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Trends and Developments

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Lawson Lundell LLP is a leading, full-service business law firm based in western Canada, with over 160 lawyers located in offices in Vancouver, Kelowna, Calgary and Yellowknife. Its litigation team members have acted at all levels of court in the west and north of Canada and at the Supreme Court of Canada, as well as before a wide range of administrative and regulatory panels and tribunals, and in national and international arbitrations. The firm's litigation group provides expertise to clients in an array of industries and practice areas, including: aboriginal, administrative, constitutional and public law, alternative dispute resolution, appellate advocacy, class action, climate change, commercial, competition and antitrust issues, construction and engineering, corporate governance and shareholder rights, creditors' remedies and collections, defamation and media, environmental, healthcare, insolvency and restructuring, insurance, natural resources, pensions, benefits and trust issues, privacy and freedom of information, product liability, public utility and regulatory, real estate, research and opinions, securities, taxation, technology, and transportation.

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Overview

In the past year in Canada, and in British Columbia specifically, recent legal developments have further altered the status quo, in an effort to address reconciliation with indigenous peoples over the use of the country's natural resources, and to increase access to justice outside the traditional courtroom setting. In the recent federal election, the incumbent Liberal government under Prime Minister Justin Trudeau retained a minority, which may affect its ability to bring about legislative changes to further its mandate.

The provinces and territories in Canada (other than Québec) are common law jurisdictions, with a hierarchical court system, made up of both provincially and federally constituted courts. The federal parliament appoints judges to the provinces' superior courts, for example, the British Columbia Supreme Court (BCSC) and Court of Appeal (BCCA), as well as to the federal courts (both trial and appellate levels).

The Canadian constitution dictates the subject-matter jurisdiction of the country's courts (as well as of provincial and federal regulatory tribunals). The jurisdiction of the federal courts is restricted to those matters governed by federal statutes, which expressly confer jurisdiction on these courts.

Focusing on British Columbia (BC), the BCSC is a superior court of inherent jurisdiction. The majority of commercial litigation cases in the province are determined in the BCSC and, if appealed, by the BCCA. The decisions of the provinces' appellate courts and the Federal Court of Appeal (FCA) are ultimately subject to review by the Supreme Court of Canada (SCC), which sits in the national capital, Ottawa. As part of its continued commitment to increasing access to justice, in late September 2019, for the first time in its history, the SCC sat in Winnipeg, Manitoba to hear two appeals and meet with members of the public.

The BC Provincial Court, whose judges are appointed by the provincial government, hears civil claims valued between CAD5,001 and CAD35,000 (as well as criminal, family and youth, and traffic matters). In BC, the Civil Resolution Tribunal (CRT), Canada's first online administrative tribunal, has jurisdiction to resolve civil disputes up to CAD5,000 (among other things).

Canada is a country rich in natural resources. In the 21st century, the Canadian government has made efforts to attempt to address reconciliation with the country's indigenous peoples. Tensions have long existed between the commercial interest in utilising the country's natural resources, and environmental concerns about doing so. Indigenous rights and claims over lands where the resources are located also form part of this delicate balance. In 2019, the Canadian government overhauled the federal environmental assessment regime for major projects. Among the stated objectives underlying this overhaul is reconciliation with indigenous peoples. A number of recent prominent court cases involving the expansion of the highly publicised Trans Mountain oil pipeline illustrate the complexity of resolving disputes in this area of law.

In 2014, the SCC confirmed the existence of an "overarching organizing principle of good faith" in contract law, namely, that parties to a contract must perform their contractual obligations honestly and reasonably and not capriciously or arbitrarily. In July 2019, the SCC granted leave to appeal in two cases to be heard together, one from the BCCA, the other from the Ontario Court of Appeal, in which the appellate courts considered how far the principle of good faith in contract performance could be extended. Later in this article, we discuss the BCCA's decision in Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd, 2019 BCCA 66 (Wastech).

Canada has a robust regulatory culture and disputes are resolved by provincial and federal administrative tribunals. The BC government established the CRT in 2012 as a way to increase access to justice, and it came into operation in 2016. Parties using the CRT are generally required to represent themselves. The CRT was initially given jurisdiction over civil claims to a value of CAD5,000 (with the value expected to increase in future), as well as strata-related disputes (ie, condominiums) of any value. In 2019, the BC government expanded the CRT's jurisdiction to include the resolution of motor vehicle injury claims up to CAD50,000, as well as disputes involving societies and co-operative associations of any value.

In this article we highlight some notable cases and developments in Canada over the past year in the fields of environmental, regulatory, aboriginal and contract law.

Overhaul of the Federal Environmental Assessment Process

In Canada, projects such as the creation or expansion of oil pipelines are subject to federal regulation. In August 2019, the new federal Impact Assessment Act (IAA), came into force, replacing the former Canadian Environmental Assessment Act, 2012. In the preamble to the IAA, the government of Canada recognised the "importance of public participation in the impact assessment process" and committed, in the course of exercising its powers and performing its duties in relation to assessing regional and strategic impacts, to "ensuring respect for the rights of the Indigenous peoples of Canada" and to "fostering reconciliation and working in partnership with them".

At the same time as the IAA came into force, the Canadian Energy Regulator Act (CERA) replaced the National Energy Board Act, and the existing federal regulator, the National Energy Board (NEB), transitioned to become the Canadian Energy Regulator (CER).

One of the most significant changes in the overhaul of environmental assessment of resource projects is the inclusion of the concept of indigenous consent into the impact review process. The stated goal of the Canadian government is to secure free, prior and informed consent from indigenous groups through a process based on mutual respect and dialogue. In addition, under the new IAA process, the CER will be required to treat Indigenous Traditional Knowledge with equal weight as it affords to scientific evidence and other information in assessing the potential impacts of a project.

Litigation Contesting the Expansion of the Trans Mountain Oil Pipeline

An example supporting the Canadian government's rationale for overhauling the federal environmental assessment process can be seen in the litigation involving the expansion of the Trans Mountain pipeline (TMX). The TMX is a proposed twinning of an existing oil pipeline system, which will add approximately 987 km of new pipeline segments from the province of Alberta to BC, to provide additional capacity to transport crude oil to Asian markets. This will also result in an increase in the number of oil tankers in the coastal waters near the pipeline's terminus in Burnaby, BC (near Vancouver), on the Pacific.

Trans Mountain applied to the NEB in December 2013 for permission to construct and operate the TMX. As part of its approval of the proposed route of the TMX, the NEB required Trans Mountain to conduct field studies on Burnaby Mountain, which involved clearing vegetation and cutting down trees, in violation of several of Burnaby's municipal by-laws. Burnaby is opposed to the TMX. Trans Mountain obtained a ruling from the NEB in 2014 authorising it to go onto Burnaby's land without the municipality's consent. Burnaby sought injunctions in the BC courts to prevent Trans Mountain from violating its by-laws, arguing that the federal NEB did not have jurisdiction to limit Burnaby's ability to enforce its by-laws. The litigation proceeded through the BC courts for several years. The BCCA dismissed Burnaby's appeal in 2017 (Burnaby (City) v Trans Mountain Pipeline ULC, 2017 BCCA 132) and upheld the lower court's determination that the NEB had the jurisdiction to resolve the conflict.

In May 2016, following the process under the previous environmental assessment regime, the CER (formerly the NEB) issued its report to the federal cabinet recommending approval of the TMX. On 29 November 2016, the federal cabinet accepted the CER's recommendation and issued an Order in Council approving the TMX and directing the CER to issue a certificate approving the construction and operation of the TMX.

A number of First Nations (indigenous peoples), in particular the Tsleil-Waututh Nation whose traditional territory includes the Burnaby terminus of the TMX, environmental groups, and two municipalities (including the City of Burnaby) challenged the approval of the TMX. They filed several petitions in the federal courts, which were heard together.

In August 2018, in Tsleil-Waututh Nation v Canada (Attorney General), 2018 FCA 153 (Tsleil-Waututh), the FCA quashed the approval of the TMX, identifying a deficiency in the CER's determination that the TMX was not likely to cause significant environmental effects, and criticising the adequacy of Canada's consultation process with indigenous groups. The effect of the Tsleil-Waututh decision was that the CER had to reconsider its approval of the TMX, specifically taking into account the effect of project-related shipping on the southern resident killer whale (orca) population. At the same time, the FCA ordered Canada to re-do its consultation with affected First Nations.

The CER issued its Reconsideration Report on 22 February 2019, again recommending approval of the TMX. Subsequently, for the second time, the federal cabinet approved the TMX in an Order in Council issued 18 June 2019. Since then, the FCA has received 12 requests for permission to challenge the second approval of the TMX. On 4 September 2019, the FCA granted six of those requests, but limited the challenges to the narrow issue of the adequacy of Canada's further consultation with indigenous peoples and First Nations between 30 August 2018 (the date of the FCA's Tsleil-Waututh decision) and 18 June 2019 (the federal cabinet's approval), and related issues. These parties may now start legal challenges to the approval of the project in the federal court.

In tandem with the federal environmental assessment process, British Columbia is obliged under its provincial environmental legislation to review projects like the TMX. As a result of the federal cabinet's approval of the TMX in 2016, the BC Ministers of Environment and Natural Gas Development had issued environmental assessment certificates for the TMX, with conditions imposed by the NEB. After the FCA's decision in Tsleil-Waututh in 2018, the Squamish First Nation and its chief challenged the BC ministers' decisions issuing the BC certificates in the BC courts. In September 2019 in Squamish Nation v British Columbia (Environment), 2019 BCCA 321, the BCCA allowed the Squamish Nation's appeal in part and remitted the conditions in the BC certificates back to the ministers for reconsideration in light of the changes to the original report of the NEB, now the CER, set out in its 2019 reconsideration report.

Treaty 8 Boundary Dispute

In most of Canada between 1871 and 1921, the indigenous peoples entered into several treaties with the federal government, which were numbered from one to 11, from east to west. Entered into in 1899, Treaty 8 surrendered to the federal government, the "Crown", 840,000 square km of what is now northern Alberta, north-eastern British Columbia, north-western Saskatchewan and the southern portion of the Northwest Territories. In exchange, the Crown promised

in the treaty to award First Nations land reserves and other benefits, including traditional rights of hunting, trapping and fishing.

Treaty 8's western boundary has been debated for over 100 years. The West Moberly First Nation, together with four other First Nations, whose ancestors adhered to Treaty 8, dispute the western boundary, arguing it runs along the Arctic-Pacific Divide. The federal government agreed with the West Moberly group about the location of the boundary. Thus, the signatories to Treaty 8 agreed on its boundary. The provincial government of BC argued that the western boundary runs along the Rocky Mountains and several First Nations (who are not signatories to Treaty 8) agreed.

In 2017, in West Moberly First Nations v British Columbia, 2017 BCSC 1700, the BCSC ruled that the location of the western boundary of Treaty 8 runs along the Arctic-Pacific Divide. The BCSC extensively canvassed the state of geographical understanding in the late 19th century, reviewing maps, government documents, correspondence and reports made before and soon after Treaty 8's formation. The court also considered the language of other treaties, and took into account the historical evidence of members of various indigenous groups.

Ultimately, the BCSC's decision about the location of the western boundary of Treaty 8 resulted in an overlap between Treaty 8 lands and the traditional title lands of First Nations who were not signatories to Treaty 8.

In October 2017, the province of BC appealed the decision to the BCCA. The BCCA granted intervener status to four First Nations whose traditional title lands have been affected by the decision. The BCCA heard the appeal in March 2019, but its decision has not yet been released.

The West Moberly First Nation's reserve covers 2,000 ha; however, the West Moberly First Nation asserts its traditional territory encompasses over 12 million ha in which it exercises its treaty rights. The West Moberly First Nation has opposed industrial projects proposed within what it claims is its traditional territory, including the Site C hydroelectric dam and associated infrastructure currently under construction along the Peace River in British Columbia. In 2018, the BCSC refused West Moberly's application for an injunction to halt further construction of the Site C Dam.

The Duty of Good Faith Performance in Contract

In the area of contract law, in the case of Bhasin v Hrynew, 2014 SCC 71, the Supreme Court of Canada confirmed the existence of an "overarching organizing principle" at law, namely, that parties must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. Unfortunately, Canadian courts have since struggled to clarify what this "good faith obligation" requires of contracting parties.

The scope of the duty of good faith performance recently came under scrutiny in a case involving a dispute over a 20-year contract to provide waste disposal services: Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd, 2018 BCSC 605 (Wastech). A contractor hired to remove and haul solid wastes (Wastech) alleged that the Vancouver Sewerage and Drainage District (Metro) had reallocated wastes between long-haul and short-haul destinations in bad faith (2011 Reallocation) and thus increased Wastech's costs by millions of dollars. Specifically, Wastech could no longer meet its Target Operating Ratio (OR) as per their contractual terms. The agreement provided for adjustments to the OR, but only with a deviation of 3%. The 2011 Reallocation went beyond this. Wastech took its claim to arbitration, arguing that an implied term or a duty of good faith should apply to compensate it for the "lost opportunity" to meet the OR and to receive operating profits.

The arbitrator declined to imply a term, given the parties' deliberate choice not to include such an adjustment, but decided that although Metro's conduct had been honest and reasonable from its own point of view, Metro failed to give "appropriate regard" to Wastech's interests or expectations. According to the arbitrator, this constituted "dishonesty" for the purposes of the duty of good faith performance. Metro appealed to the BCSC, which allowed the appeal, ruling that the arbitrator had erred in finding that Metro's conduct was "dishonest" and thus in breach of the duty of good faith performance simply by being "at odds" with Wastech's expectations.

In 2019, the BCCA dismissed Wastech's appeal (2019 BCCA 66), agreeing with the BCSC that the arbitrator erred in his extension of the contractual duty of good faith performance in the circumstances of the case. In particular, the BCCA declared that the Supreme Court of Canada in Bhasin v Hrynew never intended to suggest that the duty of good faith performance would be breached whenever a party exercising a contractual discretion failed to have "appropriate regard" for the other party's (contractual) interests. In other words, there is no standalone civil wrong of "disregard of contractual interests".

On the question of "bad faith", the arbitrator had decided that no additional form of dishonesty was required to be shown, just that it was wholly at odds with the legitimate contractual expectations of the other party. According to the BCCA, this was incorrect as, in articulating the duty of good faith performance, the Supreme Court of Canada in Bhasin v Hrynew was concerned substantially with conduct having a subjective element of improper motive or dishonesty. Bad faith connotes malice, untruthfulness, ulterior motive, or even intentional conduct equivalent to fraud. This

includes reckless conduct where "absence of good faith can be deduced and bad faith presumed".

In July 2019, the Supreme Court of Canada granted leave to Wastech to further appeal the decision, and the case will be heard together with a decision of the Ontario Court of Appeal similarly exploring the limits of the good faith performance principle: CM Callow Inc v Zollinger, 2018 ONCA 896. In this case, a party to a contract for winter maintenance services for condominium corporations knew it would be terminating the contract, but waited to advise the counterparty until the performance of the parties' contract for summer maintenance had ended. The Ontario Court of Appeal found that the duty of honest performance requires parties to be honest with each other concerning matters directly linked to the performance of the contract, but does not limit the parties' freedom concerning future contracts not yet negotiated or entered into.

Expansion of the Jurisdiction of the BC Civil Resolution Tribunal

A trend in Canadian law is access to justice for self-represented litigants. The BC Civil Resolution Tribunal is an online tribunal with statutory jurisdiction to resolve certain categories of civil disputes. When it was established, the CRT dealt solely with strata property (ie, condominium) disputes of any value, as well as civil disputes up to CAD5,000 in value. The BC provincial government recently amended the CRT's governing statute, expanding the CRT's jurisdiction to include claims for injuries sustained in motor vehicle accidents up to CAD50,000 in value, as well as disputes involving societies and housing and community service co-operatives. The stated goal of the amendments is to significantly reduce "the costs, complexity and delay associated with the resolution of vehicle accident cases".

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The general rule remains that parties will represent themselves in most cases, but lawyers will be allowed to represent parties in accident claims. In respect of motor vehicle accidents, the CRT is now able to determine the following: whether an injury is a "minor injury" (with the consequence that non-pecuniary compensation is capped at CAD5,500 under the legislation); and whether a claimant is entitled to benefits paid or payable under the Insurance (Vehicle) Act.

Some concerns have been raised over the expansion of the CRT's jurisdiction, including whether the CRT has the necessary resources or expertise, and whether an unfair onus is being placed on claimants to establish the nature of their injuries. Further, lawyers in BC have also expressed concern that the changes will "unduly restrict access to the courts".

At the same time as it expanded the CRT's jurisdiction to include motor vehicle accidents below CAD50,000, the BC government amended the rules of civil procedure of the BCSC (Rules) in an effort to limit the number of expert witness reports allowed to be submitted in evidence at motor vehicle claim trials before the BCSC. The BC Trial Lawyers' Association challenged the amended Rules on the grounds that they interfered with the court's ability to hear and determine the cases before it. In late October 2019, the chief justice of the BCSC declared that the amended Rules were of no force or effect and set them aside in Crowder v British Columbia (Attorney General), 2019 BCSC 1824. Among other things, Chief Justice Hinkson determined that the amended Rule, "instead of leaving it to the litigants to meet their burden of proof by adducing the necessary evidence", placed a duty on the court to ensure that the court has sufficient expert evidence before it determines a proceeding on its merits, which "compromises and dilutes the role of the court, and encroaches upon a core area of the court's jurisdiction to control its process".

Conclusion

As illustrated in this article, the areas of environmental law, resource development and aboriginal law dominate the legal landscape in Canada as courts address the tensions and competing interests in these fields. In addition, efforts to increase access to justice continue, but not without growing pains.