Quarterly Energy Review

December, 2019

LAWSON LUNDELL LLP

Our Lawyers

Corporate

Khaled Abdel-Barr
Sean Adair
David Allard
Crispin Arthur
Angela Austman
Holly Barker
Stuart Breen
Danielle Broadfoot
Steven Catania
Irene Chen
Kayli Clark
Brendan Craig
Mandeep Dhaliwal
Carson Falk
Jamie Gagner
Amaan Gangji
Zander Grant
Aubrey Guild-Young
Kevin Hill
Greg Hollingsworth
Chip Johnston
Andrew Kemp
Irv Laskin
Michael Li
Michael Low
Karen MacMillan
Valerie Mann
Kellan McKeen
Daniel Mowat-Rose
Gillian Muirhead
Chat Ortved
Andrew Robertson
Max Rudakov
Kyla Schwartz
Jeffrey Scobie
James Scott
Jagdeep Shergill
Lana Shipley
Carolyn Simpson
John Smith
Tim Syer
Jisoo Vis
Max Walker
Jacqueline Wilmott
Julia Winters
Rachelle Wong
Suzanne Woolley
Christopher Yan
Jack Yong

Real Estate

Maxwell Carroll
Brendan Craig
Carson Falk
James Fraser
Lisa Frey
Bryan Gibbons
Aubrey Guild-Young
Devin Itterman
Timothy Law
Andrew Mildenhall
Michael Morgan
Daniel Mowat-Rose
Jennifer Nyland
Shaun Partridge, QC
Devlin Steers
Peter Tolensky
Chad Travis
Jisoo Vis
Edward Wilson
Julia Winters
Stephanie Wong
Yumeng Zhu

Banking

Scott Anderson
Mandeep Dhaliwal
Irv Laskin
Brenda Lightbody
Michael Low
Daniel Mowat-Rose
Nabila Pirani
Jyotika Reddy
James Scott
Devlin Steers
Mona Ying

Dispute Resolution

Scott Andersen
Brad Armstrong, QC
Keith Bergner
Laura Bevan
Kinji Bourchier
Thomas Boyd
Gordon Brandt
Camille Chisholm
Jeff Christian
Tamela Coates, FCIArb.
Lauren Cook
Shailaz Dhalla
Michael Donaldson
Laura Duke
Mark Fancourt-Smith
Clara Ferguson
Craig Ferris, QC, FCIArb.
James Fraser
Kyle Gardiner
Ricki-Lee Gerbrandt
Bryan Gibbons
Kelly Hannan
Shannon Hayes
Jeffrey Hernaez
Alyssa Holland
Michelle Jones
Grace Kang
Christine Kowbel
Toby Kruger
Scott Lucyk
Sheila MacPherson
Blair McRadu
Michael Morgan
Amy Nathanson
Kai Niu
Jennifer Nyland
Anna Paczkowski
Garth Paulson
Lisa Peters, QC
Clifford Proudfoot
William Roberts
Peter Roberts, QC
Kimberley Robertson
Daphne Rodzinyak
Joel Schachter
Jonathan Selnes
Will Shaw
Alixandra Stoicheff
Marika Strobl
Cory Sully
Marko Vesely
Grant Vogeli, QC
Ian Webb
Catherine Whitehead
Shannon Wray

Regulatory

Brad Armstrong, QC
Keith Bergner
Michelle Casey
Lauren Cook
Shailaz Dhalla
Laura Duke
Clara Ferguson
Michelle Jones
Grace Kang
Christine Kowbel
Toby Kruger
Lewis Manning
Alastair Mackinnon
Kai Niu
Jennifer Nyland
John Olynyk
Clifford Proudfoot
Daphne Rodzinyak
Alixandra Stoicheff
Shannon Wray

Employment

Katy Allen
Ryan Berger
Deborah Cushing
Sandra MacKenzie
Ritu Mahil
Robert Sider
Nicole Skuggedal
Cory Sully

Pensions

Kenneth Burns
Murray Campbell
Lisa Chamzuk
Megan Kaneen
Meghan Popp

Oil & Gas

Randy Madsen
Paul Negenman
Jason Paton
Jeffrey Scobie
Bernadita Tamura-O'Connor

Tax

Kayli Clark
Leonard Glass
Reinhold Krahn
Max Walker
Gareth Williams

Research

Meg Gaily
Ricki-Lee Gerbrandt
Gareth Paulson
Lisa Peters, QC
Catherine Whitehead

Insolvency

Scott Andersen
Bryan Gibbons
Blair McRadu
Michael Morgan
William Roberts
Peter Roberts, QC
Kimberley Robertson

Technology

Ryan Berger
Mark Fancourt-Smith
Michael Macaulay
Valerie Mann
Paul Matthews, P.Eng.
Carolyn Walters

Dear Colleagues:

Welcome to the inaugural issue of the Lawson Quarterly Energy Review.

We joined Lawson Calgary's office in the spring of 2019 with the objective of establishing a new kind of energy corporate law practice in Canada, one that aims to reduce costs and improve quality for our customers and our people. We knew that process would be difficult and that it would be necessary to try new ideas along the way. The Review represents another step in that process.

The Canadian energy business is facing serious challenges, both to its sources of finance and to its legitimacy as a core part of our economy. In response, we think all of us have to first do better with less. That is part of the process of creative destruction, and it's how we've built in the past. We believe nothing improves unless we change.

We also think we have to be better at being proud of the good things we've already done. All the ways in which energy enriches every life on this planet. Proud of the fact that together, we produce the world's cleanest and safest hydrocarbon, and that the expanded use of those products will be essential to helping the world achieve its environmental goals. We have to show that energy can stand at the front of the room, not hide at the back, or in the basement.

So, this publication reflects not just some of our legal ideas, but us as people. For us, this material is not just information. Just like energy is not just a business. It is a deeply personal story. An attempt to be part of answering the challenges we face together.

We look forward to continuing that journey with you in future issues.

Jamie Gagner Chip Johnston Carolyn Simpson

About Lawson Lundell

Lawson Lundell was founded in Victoria, British Columbia in 1886. The Vancouver office opened in 1910, followed by Calgary (1997), Yellowknife (2002), and Kelowna (2017). We employ approximately 160 lawyers in Alberta, British Columbia and the Northwest Territories.

We are a full-service business law firm, known for our practical, strategic approach to legal and business problems. Our clients include some of Alberta and British Columbia's leading companies and investors. The firm has played an integral role in the development of Western Canada's resource, industrial, commercial real estate and financial sectors. It is one of only two major firms in Western Canada that are also headquartered in the West.

Lawson established its Calgary office in 1997. For many years, the firm operated a successful small regulatory practice. In 2012, we added a team of five lawyers with deep experience in Canadian oil & gas asset M&A and operations. In 2018 and 2019, we were able to enter a new phase of our development by welcoming teams of real estate, commercial litigation and corporate lawyers, bringing our total complement in the city to 36 lawyers.

Our objective is to provide high-quality, effective legal services on a basis that is clearly differentiated from our competitors.

Contact Us

We would be very pleased to hear your thoughts and feedback on this publication. Please feel free to contact any of the editors in this regard.

For additional copies of this publication, materials from our checklist and toolkit collection, or should you no longer wish to receive these updates, please contact us at kequinn@lawsonlundell.com.

Limitation on Advice

This document is a general overview created for informational purposes only and does not constitute legal advice. Certain concepts have been simplified in the interests of brevity. If you or your business have questions about specific legal issues, legal counsel qualified in the appropriate jurisdiction should always be consulted. The distribution of this document to any person does not create, continue or revive a lawyer-client relationship between Lawson Lundell and that person.

Transaction Summaries

M&A Summary

Deals declined in number (67 in 2018 against 74 in 2017) and in value ($25.9 billion in 2018 against $54.5 billion in 2017), with the same year-over-year bias towards upstream activity, which comprised 65% by number and 31% by value.

Whereas 2017 was the year of the exit *from* Canadian energy assets, 2018 was the year of consolidation within Canada. Firms got their balance sheets and operational plans in better order and, to some degree, returned to Canadian assets.

Two of the largest deals in the upstream sector in 2018 involved Canadian-based companies expanding their Canadian production base; Baytex bought Raging River's Viking oil and gas assets in the Dodsland area of Saskatchewan and Vermillion bought Spartan's Southeast Saskatchewan assets. IPC's acquisition of BlackPearl represented the lone deal for public oil sands assets, eliminating one of the few remaining independent oil sands producers in the Canadian market.

Midstream activity dominated by deal size. Enbridge internalized the Enbridge Income Fund for $4.6 billion in stock along with selling its western Canadian gas gathering and processing system to Brookfield for $4.3 billion in cash. The Government of Canada paid $4.5 billion for Kinder Morgan Canada's TransMountain system, its unbuilt expansion and related political entanglements.

In services, Tervita and Newalta finally combined their environmental services businesses (long after Tervita's failed hostile bid for Newalta in 2001), in an effort to build a better balance sheet and achieve operational efficiencies. Ensign reached for consolidation through its hostile bid for Trinidad, edging out Precision in a similar attempt to benefit from scale.

	2018 Deal Value (CAD Millions)	**2018 Deal Count**	**Three Year Average Deal Value (CAD Millions)**	**Three Year Average Deal Count**
Upstream				
Public Boards	4,482	13	4,435	12
Private Targets & Assets	3,423	31	16,949	43
Midstream				
Public Targets	4,600	1	4,633	1
Private Targets & Assets	11,220	11	6,279	9
Downstream				
Public Targets	-	-	23	1
Private Targets & Assets	260	1	620	1
Oilfield Services				
Public Targets	1,203	4	783	4
Private Targets & Assets	352	6	355	7
Total	**25,900**	**67**	**34,077**	**78**

Finance Summary

A hopeful equity rally in the Spring of 2018 was followed by a harrowing Fall in which the differential on heavy oil increased substantially, leaving certain blends of Canadian crude the cheapest in the world and forcing Alberta's government to impose production curtailments of approximately 9% of daily production to prevent widespread crisis.

This pricing and production quagmire was most acutely reflected in the capital markets where capital raising effectively ground to a halt. In terms of general activity across the sector, the prevailing theme was fewer and smaller with 55 deals in 2018 (126 in 2017) for proceeds of $7.7 billion ($40.3 billion in 2017). The asset sale became the preferred means of protecting the balance sheet in the place of capital from the dilution markets.

2017 was the year of acquisition finance, with the number of major deals anticipated to get even bigger in 2018 in the wake of Canadian exits. As it turned out, 2018 was largely the year of doing nothing. Upstream finance led the contraction. There were only five public offerings by upstream issuers in all of 2018, for proceeds of $294 million, down from 16 offerings in 2017 for proceeds of $4.3 billion and 42 offerings in 2016 for proceeds of $8.6 billion.

Montney liquids and Duvernay oil drove the very limited upstream equity headlines. NuVista completed the largest equity financings in both the public and private markets in order to support its acquisition of Cenovus' Alberta Montney assets. Hammerhead and Artis both secured private equity commitments for oil development in the Montney and Duvernay formations. Pipestone (Monteny liquids) and Arrow (Colombian oil) both used reverse takeovers to go-public. There were no initial public offerings.

	2018 Deal Value (CAD Millions)	**2018 Deal Count**	**Three Year Average Deal Value (CAD Millions)**	**Three Year Average Deal Count**
Upstream				
Equity (Prospectus)	294	5	4,444	21
Equity (Private Placement)	1,186	20	1,349	28
Debt	2,411	15	6,529	20
Midstream				
Equity (Prospectus)	200	1	5,962	8
Equity (Private Placement)	-	-	682	1
Debt	1,597	3	4,810	8
Downstream				
Equity (Private Placement)	-	-	223	1
Debt	954	2	485	1
Oilfield Services				
Equity (Prospectus)	106	2	451	7
Equity (Private Placement)	26	3	158	4
Debt	922	4	1,234	5
Total	**7,696**	**55**	**26,327**	**104**

Legal Strategy Lessons

Our view is that decisions of courts and regulators are not just sources of new legal rules or theories. Because they are about things that went wrong for one of the parties to the dispute, they also teach important lessons about how to use legal techniques to prevent costly disputes, or if a dispute arises for it to be resolved more efficiently. The decisions can also change the value of assets and the means by which transactions are completed.

Seen in the right light, recent cases offer guidance about how to shape deals to avoid unexpected results and costly legal expenditures. We have applied this analysis to the key energy law and corporate decisions of 2018 to help inform your legal strategy and risk management plan. The following is a summary of the key facts in each of these decisions and the key lessons we feel they teach.

Energy

An investor took a royalty in producing oil and gas assets. The producer became insolvent. The receiver took the position that a royalty was not an "interest in land" and was subject to the claims of the secured lenders, with the result that the investor would lose its royalty. The receiver lost. (*Re Manitok Energy Inc.,* Court of Queen's Bench of Alberta, June 22, 2018)

> If you buy esoteric oil and gas interests, you must take steps in the contract to ensure that those rights are characterized as "interests in land" (and not mere "contractual rights"). Otherwise you may lose those interests to secured lenders or face an expensive fight to resolve that uncertainty.

A landowner agreed to a very long and very low fixed-rate contract for the sale of electricity in exchange for the developer taking all of the risk of project cost escalation. The price of electricity increased dramatically. The landowner sued the developer on the basis that the deal was unfair. The landowner lost. (*Churchill Falls* (*Labrador*) *Corp. v Hydro-Quebec*, Supreme Court of Canada, November 2, 2018)

> Markets are extremely unpredictable. Use market pricing as much as possible to avoid unintended outcomes. Also know that fixed-price contracts can be an extremely expensive form of finance. Moreover, it is very expensive and sometimes impossible to use litigation to fix bad deals. Lastly, if you mean it, say it.

A company thought it had acquired all of a bankrupt's pipeline-related assets from its receiver, however some of those assets had been purportedly contributed to a partnership well before the insolvency. Purchaser's diligence had failed to identify what was rightfully left over in the bankrupt's estate that it could acquire. (*Quicksilver Resources Canada Inc.* (Re), Alberta Court of Queen's Bench, September 11, 2018)

> Title and facility due diligence matters. The more precise the schedules to your asset sale agreement, the better. Consider "white map" plats for schedules (but be sure to exclude unwanted liabilities).

A receiver attempted to sell "good" assets to a purchaser in an insolvency (for the benefit of the secured lenders) while leaving the "bad" assets to be cleaned-up by the provincial regulator. The regulator objected and won. (*Orphan Well Association v Grant Thornton Limited,* (*Redwater*), Supreme Court of Canada, January 31, 2019)

> Secured lenders will enhance liability management reporting requirements and scrutiny of liability ratios. They may require minimum spending to retire abandoned wells. Non-producing wells with liabilities will count against the borrowing base in reserve-based loans. Purchases out of bankruptcy will yield lower prices because unproductive wells must be retained by a bankrupt's estate.

Capital Markets

A small cannabis producer tried to buy another producer in an attempt to avoid being purchased by a much larger producer. The larger bidder went hostile and tried to shorten the bid period to prevent the other deal. (*In the Matter of Aurora Cannabis Inc. and Cannimed Therapeutics Inc.,* Ontario Securities Commission and Financial and Consumer Affairs Authority of Saskatchewan, March 15, 2018)

> Management can't ignore the wishes of large shareholders. If you make a hostile bid, assume the bid must be open for 105 days, even if a shorter bid period would benefit the bidder by preventing the target from making a blocking transaction. If you are defending against a hostile bid, you can't use a rights plans to hinder the bid. However, you can use the 105 day bid period to try to generate a higher offer.

Promissory notes secured by a valuable toy collection met the test in the Ontario Securities Act that specifies "a bond, debenture, note or other evidence of indebtedness" is a "security" and were subject to a cease trade order then in force. (*Ontario Securities Commission v Tiffin, 2018*, Ontario Superior Court of Justice May 15, 2018)

> Early-stage and small businesses should be aware that any debt or equity they issue may be subject to securities law rules which regulate the distribution of securities. If in doubt, assume you are issuing a security and comply. Most investors will be exempt from complex disclosure obligations so compliance will usually not be onerous.

A lawyer tipped his friend about a pending M&A deal. That friend tipped many other people until the information came to two traders who relied on the information to buy stock in the target. They made a lot of money. The OSC came after them and won. (*Finkelstein v Ontario Securities Commission*, Court of Appeal of Ontario, January 25, 2018)

> The lure of profits from undisclosed information is extraordinary and often overcomes the scruples of many normal, law-abiding people. Remember, you can be guilty of insider trading on a tip, even if you don't know where the tip came from.

Corporate

A major multinational cosmetics company made a minority investment in an early-stage cosmetics company. The early-stage company's founder suffered a nervous breakdown. He took over his company's social media platform and website and launched a variety of personal attacks on employees and competitors through hundreds of posts and videos. The investor sought an injunction, and won. (*Estée Lauder Cosmetics Limited v Deciem Beauty Group Inc.,* Ontario Supreme Court of Justice, October 15, 2018)

> Passwords for corporate social media accounts should be treated as critical corporate assets and should be known to all board members. Directors and officers in closely-held private companies should be subject to a contractual obligation to not make defamatory statements regarding the corporation.

Commercial

A husband, his common law wife and the husband's company all signed an agreement to purchase a motorhome. The wife was not really interested in the motorhome and made payments out of the company of the (now) deceased husband and his estate. The administrator of the deceased husband's estate wanted the wife to be liable for her share of the purchase. The administrator won. (*Wade Estate v Duck,* British Columbia Court of Appeal, May 8, 2018)

Don't add unnecessary parties to a contact. You will have trouble changing contractual obligations by conduct after making a contract. Be specific about your obligations if they are important to you.

A generous lottery winner lent money to a friend so that the friend could buy a home. The friend had trouble paying and the winner was generous with extensions to pay. The friend tried to get out of paying by arguing that the extensions were not amendments. The lender won. (*Rosas v Toca*, Court of Appeal of British Columbia, May 18, 2018)

Agreements should provide that they cannot be amended or waived except in writing, signed by the parties. Also, the amendment should refer to the provision being amended. Lastly, business teams should avoid making gratuitous promises regarding contractual performance that may be seen, with the benefit of hindsight, as an amendment made without consideration.

A caveat was ordered discharged as the interest claimed, and the caveator's capacity through which such interest was claimed, was unclear and failed to satisfy the requirements of s. 131(1) of the *Land Titles Act*, which provides that a "[caveat must state] the nature of the interest claimed and the grounds on which the claim is founded". *(Sewak Gill Enterprises Inc.* v. *Bedaux Real Estate Inc.*, Court of Queen's Bench of Alberta, September 25, 2018)

A caveat protecting an interest in land must clearly describe the interest and the grounds for the claim otherwise the interest may be lost, or litigation may be required to enforce the claim.

Employment

An employee was terminated and gave a general release of all claims against the employer related to the employment. She later sued the employer for damages resulting from workplace harassment. The employer argued that the release prohibited the claim. The employee won. (*Watson v Governing Council of the Salvation Army of Canada*, Ontario Superior Court, February 26, 2018)

Employers cannot use releases to protect themselves against claims for damages arising from sexual harassment. Employers should establish mechanisms to deal with sexual harassment and other workplace harassment in order to prevent such claims.

Termination clauses in employment contracts are frequently litigated, often because contracts fail to exclude common law entitlements and specify a formula for determining compensation on termination. The *Employment Standards Act* in Alberta, in addition to "statutory minimums", provides that the employee is also entitled to whatever additional amount of compensation for termination that may be awarded under common law. The common law provides for a greater entitlement to severance than the ESA. (*Holm v AGAT Laboratories*, Court of Appeal of Alberta, January 18, 2018)

To restrict an employee's right to compensation on termination without cause to the "statutory minimum" the contract must contain a provision which specifies the formula for the determination of that amount and expressly exclude the right to common law severance (which is provided for in the ESA). Contracts should not import obligations specified by statute and formulas for determining payments under a contract should not rely on variables outside the contract.

Executive Employment Agreement Checklist (Private Enterprise)

This checklist is designed for use by Canadian energy companies and their executives in preparing executive employment agreements. It does not address all of the elements to be considered when drafting an employment agreement, nor is it our view that every agreement must address all of these issues. In general terms, this checklist is biased towards the issues that arise for early-stage and mid-market private enterprise employers. Large employers (and their executives) and public enterprises will have different priorities. A long-form version of this checklist is available on request.

For Employers

Duties

- Employee will not engage in any conduct which creates a conflict of interest.
- Employee will comply with all of Employer's policies.
- Termination of employment does not terminate the agreement, only the obligation to provide the employment service.
- Employer may make bonus payments at its discretion.
- Termination of employment does not relieve Employee of fiduciary duties owed to Employer.

Termination

- For cause termination is permitted if Employee commits a material violation of the agreement (or Employer's policies) (unless the violation can be cured within 7 days).
- In a termination without cause, if the term of employment has been shorter than six months, Employee gets no severance.
- Employee will provide a release to Employer in a form specified in the agreement before receiving any severance payment.
- There is no termination or payment on a change of control; requires a change of control and "good reason".
- On termination, Employee will resign as a director or employee of any affiliate.
- After termination, Employee may not make any disparaging comments about Employer.

Business Protections

- Employee will not disclose (or make use of) any confidential information of Employer or its affiliates, except in the course of Employee's duties.
- All documents or records obtained or created in the course of employment are the property of Employer and will be returned to Employer within 7 days of termination.
- Employee will not directly or indirectly engage in the business of Employer from the commencement of employment until 24 months after termination.
- The definition of "business of Employer" for purposes of the non-competition obligation, includes any business conducted by Employer after the agreement was entered into, and any business prospect being developed at the time of termination.
- All intellectual property created by Employee during the term of employment is the property of Employer.

Other Terms

- All disputes are resolved by arbitration.
- Employee has obtained independent legal advice regarding the agreement before signing, or acknowledge that Employee understands all of his or her obligations because Employee understands complex legal agreements.
- The agreement does not operate to limit any of Employer's rights against Employee under statute or common law, including fiduciary duties owed by Employee.

For Employees

Termination

- A long-form employment agreement should be used to clarify and enhance common law severance obligations.
- For cause termination is allowed in common law circumstances of cause only.
- Employer should be required to consider Employer's duty to accommodate Employee when determining whether a disability exists.
- In a termination without cause, Employee gets 20% of salary in compensation for lost benefits and an amount equal to the average of the best two annual bonus payments pro-rated for the number of months served in the year in which termination occurs.
- There should be no "time of service" hurdle to the payment of severance.
- Employee is not required to mitigate any claim to severance by seeking other employment.
- The release given by Employee should include a reciprocal release by Employer of Employee from any liability to Employer, absent fraud.

Business Protection

- Confidentiality obligation ends when the non-competition period ends.
- Confidential information does not include any information in the possession of Employee at the time of hire or information developed by Employee without the use of Employer's confidential information and outside the scope of Employee's duties.
- Employee should be able to disclose confidential information in the Employee's possession in the proper discharge of Employee duties.
- The restricted period for the purposes of a non-competition covenant should be no more than the number of months of the severance period.
- Employee owns any intellectual property created by Employee outside the employment duties that does not rely on Employer's confidential information.

Other Terms

- Disputes are resolved by court proceedings.
- The agreement governs in the event of a conflict between a contractual fiduciary duty and the obligations under the agreement.

Deal Lists

2018 M&A Transactions

Value (CAD)	Date	Transaction
		Upstream
Public Targets		
$1.9B	June 18	Acquisition of Raging River by Baytex by arrangement
$1.2B	April 16	Acquisition of Spartan by Vermillion by arrangement
$622M	October 10	Acquisition of BlackPearl by International Petroleum (related party) by arrangement
$320M	September 5	Acquisition of Mount Bastion by Surge by arrangement
$211M	October 30	Acquisition of Pipestone by Blackbird by arrangement (reverse takeover of Blackbird)
$133M	May 22	Acquisition of Iron Bridge by Velvet by takeover bid
$94M	June 4	Acquisition of Arrow by Front Range by arrangement (reverse takeover of Front Range)
$94M	August 24	Acquisition of Ikkuma by Pieridae by arrangement (spin-out of exploreco)
$91M	January 15	Acquisition of southeast Saskatchewan producer by Vermillion by arrangement
$84M	March 7	Acquisition of Cona by Waterous Energy Fund (insider) by arrangement
$47M	July 26	Acquisition of Laricina by CNRL by takeover bid
$30M	July 23	Acquisition of Steppe by Gear by arrangement
$16M	September 13	Acquisition of Marquee by Prairie Provident by arrangement
Not disclosed	March 28	Acquisition of Bashaw Oil by Clearview Resources (related party) by amalgamation
Private Targets & Assets		
$920M	February 12	Acquisition of interest in Syncrude from Mocal Energy by Suncor
$625M	August 9	Acquisition of Pipestone assets from Cenovus by NuVista
$340M	June 14	Acquisition of Kakwa assets from Paramount by Strath Resources
$280M	June 21	Acquisition of Williston basin assets from Crescent Point by an undisclosed purchaser
$232M	May 8	Acquisition of Southeast Saskatchewan assets from an undisclosed vendor by TORC
$225M	August 31	Acquisition of Total's interest in the Joslyn oil sands from Total by CNRL
$154M	April 12	Acquisition of Montney assets from an undisclosed vendor by ConocoPhillips
$130M	November 8	Acquisition of Redwater assets from ARC by an undisclosed purchaser
$88M	August 8	Acquisition of Villanova 4 by TORC
$72M	February 28	Acquisition of assets from Tourmaline by an undisclosed purchaser
$50M	July 31	Acquisition of Montney assets from Canbriam by an undisclosed purchaser
$39M	November 14	Acquisition of Montney assets from an undisclosed vendor by Birchcliff
$32M	November 13	Acquisition of Alabama and Mississippi assets from Gulf Pine by Standard Exploration
$28M	May 15	Acquisition of Sparky assets from an undisclosed vendor by Surge
$24M	March 7	Acquisition of Weyburn and Mitsue Gilwood assets from an undisclosed vendor by Freehold Royalties
$20M	February 14	Acquisition of Peace River High Triassic assets from an undisclosed vendor by Tourmaline
$20M	October 29	Acquisition of royalty interests and seismic assets from an undisclosed vendor by PrairieSky
$17M	September 13	Acquisition of West Pembina assets from InPlay by an undisclosed purchaser

2018 M&A Transactions

Value (CAD)	Date	Transaction
		Upstream
Private Targets & Assets		
$16M	June 4	Acquisition of St. Lawrence Lowlands assets from an undisclosed vendor by Questerre Energy
$14M	July 20	Acquisition of Twining assets from Eagle Energy by Barnwell
$13M	October 4	Acquisition of Ferrier assets from Grafton Energy by Bellatrix
$12M	June 23	Acquisition of Cortona by Toscana (related party)
$10M	May 10	Acquisition of Lloydminster assets from Crew by an undisclosed purchaser
$10M	May 14	Acquisition of eastern Alberta assets from Perpetual Energy by an undisclosed purchaser
$10M	November 26	Acquisition of Ferrier area assets from an undisclosed vendor by Bellatrix
$8M	February 12	Acquisition of High Point by Bird River Resources by share purchase agreement
$8M	March 8	Acquisition of Pembina Cardium assets from Freehold Royalties by an undisclosed purchaser
$8M	June 14	Acquisition of gas assets from Toscana by an undisclosed purchaser
$7M	February 28	Acquisition of Duvernay assets from an undisclosed vendor by Freehold Royalties
$6M	March 21	Acquisition of Cardium assets in Willesden Green from undisclosed vendor by InPlay
$5M	February 6	Acquisition of West Central Alberta assets from Toscana Energy by an undisclosed purchaser
Not disclosed	January 3	Acquisition of an additional interest in Fort Hills project from Total by Suncor and Teck
Not disclosed	January 31	Acquisition of assets from Obsidian by an undisclosed purchaser for the assumption of abandonment liabilities
Not disclosed	March 23	Acquisition of northeast British Columbia assets from Suncor by Canbriam
Not disclosed	April 24	Acquisition of Flaxcombe assets from an undisclosed vendor by Saturn Oil & Gas
Not disclosed	April 19	Acquisition of northeastern British Columbia assets from Cequence by an undisclosed purchaser
		Midsteam
Public Targets		
$4.6B	May 18	Acquisition of Enbridge Income Fund by Enbridge (insider) by arrangement
Private Targets & Assets		
$4.5B	May 29	Acquisition of Trans Mountain Pipeline system from Kinder Morgan by the Government of Canada
$4.3B	July 4	Acquisition of the Canadian gas gather and processing business from Enbridge by Brookfield
$1.5B	February 8	Acquisition of Access Pipeline and Stonefell Terminal assets from MEG Energy by Wolf Midstream
$265M	December 10	Acquisition of Leismer pipeline and Cheecham storage terminal from Athabasca Oil by Enbridge
$230M	September 26	Acquisition of Aitken Creek assets from Black Swan by AltaGas
$159M	April 2	Acquisition of Pipestone assets from Encana by Keyera
$105M	September 10	Acquisition of power and midstream assets and shares of Tidewater from Alta Gas by Birch Hill

2018 M&A Transactions

Value (CAD)	Date	Transaction
		Midstream
Private Targets & Assets		
$90M	December 17	Acquisition of pipeline assets from Tidewater by TransAlta
$31M	September 20	Acquisition of Kisbey and Coleville gas plants from SaskEnergy by Steel Reef
$30M	May 15	Acquisition of non-core midstream assets from Ikumma by an undisclosed purchaser
$10M	March 21	Acquisition of natural gas facility from InPlay by an undisclosed purchaser
		Downstream
Private Targets & Assets		
$260M	December 10	Acquisition of 4Refuel by Finning
Public Targets		
$478M	March 1	Acquisition of Newalta by Tervita by arrangement
$450M	August 14	Acquisition of Trinidad by Ensign by takeover bid (hostile)
$198M	June 5	Acquisition of Xtreme by Akita by arrangement
up to $77M	April 16	Acquisition of Aveda by Daseke by arrangement
Private Targets & Assets		
$186M	December 13	Acquisition of Onstream by Mistras
$125M	March 19	Acquisition of US energy services assets from Gibson Energy by an undisclosed purchaser
$14M	January 8	Acquisition of Moose Haven Lodge from Chipewyan Prairie First Nations by Horizon North
$12M	July 13	Acquisition of Three Star Trucking by Vertex
$9M	August 20	Acquisition of Powerstroke by High Artic
$6M	May 10	Acquisition of drilling assets from Red Dog by MATTRIIX

2018 Finance Transactions

Value (CAD)	Date	Transaction
		Upstream
Equity (Prospectus)		
$170M	August 9	NuVista – Bought deal offering of subscription receipts led by CIBC, Peters and RBC
$60M	February 8	Valeura Energy – Bought deal offering of common shares led by GMP FirstEnergy
$40M	July 12	PetroShale – Bought deal offering of subscription receipts led by Haywood
$15M	February 22	Crown Point – Rights offering of common shares
$9M	June 27	Cequence – Rights offering of common shares
Equity (Private Placement)		
$249M	August 9	NuVista – Placement of subscription receipts and flow-through shares led by CIBC, Peters and RBC
$58M	April 25	Africa Energy – Placement of common shares managed by Pareto Securities
$23M	September 17	Arrow – Placement of subscription receipts
$20M	November 13	Standard Exploration – Placement of common shares
$12M	September 14	Blackbird – Placement of flow-through shares
$11M	February 14	Renaissance Oil – Placement of common shares and warrants led by Haywood
$10M	October 17	Cuda Oil – Placement of common shares led by KES 7 Capital
$8M	March 1	Relentless Resources – Placement of common shares and warrants
$8M	December 13	Pieridae Energy – Placement of common shares and warrants
$6M	October 15	Pulse Oil – Placement of common shares and warrants
$6M	November 20	Oronova – Placement of common shares and warrants
$5M	February 13	Sunshine Oilsands – Placement of common shares
$5M	October 16	Alvopetro – Placement of common shares and warrants led by Aspenwood
$5M	June 13	Saturn Oil & Gas - Placement of common shares and flow-through shares co-led by Canaccord Genuity and Gravitas Securities.
Equity (Private Placement to Sponsors)		
$300M	September 14	Hammerhead – Equity commitment led by Riverstone
$180M	May 29	Artis – Placement of common shares to Warburg Pincus
$111M	October 30	Pipestone – Placement of subscription receipts to CNOR and GMT Capital
$94M	January 2	First Reserve – Placement of preferred shares to a subsidiary of PetroShale to First Reserve
$65M	August 21	Perisson Petroleum – Placement of common shares and put-options to Lan-cheng
$10M	July 12	PetroShale – Placement of subscription receipts to Chernoff and First Reserve
Debt (Private Placement)		
$509M	April 24	Harvest – Offering of 5-year notes co-led by SMBC Nikko and Merrill Lynch
$466M	June 20	Frontera – Offering of 5-year notes
$412M	April 26	Canacol – Placement of 7-year notes
$319M	June 19	ShaMaran Petroleum – Placement of 5-year notes led by Pareto
$220M	February 27	NuVista – Placement of 5-year notes co-led by CIBC and RBC
$200M	July 24	Vesta – Placement of 5-year notes co-led by RBC and BMO

2018 Finance Transactions

Value (CAD)	Date	Transaction
		Upstream
Debt (Private Placement)		
$100M	January 2	Peyto – Placement of 10-year notes
$20M	February 13	Perisson Petroleum – Placement of 2-year convertible debentures
$15M	November 1	Delphi Energy – Placement of 3-year notes
Debt (Private Placement to Sponsors)		
$40M	July 26	Bellatrix – Offering of 5-year notes to funds advised by FS/EIG and FS/KKR
$26M	September 14	Saturn Oil & Gas – Placement of 4-year notes with warrants to Prudential
$30M	November 5	Strategic Oil & Gas – Placement of notes to GMT Capital
$22M	January 22	Journey – Placement of 4-year notes and warrants to AimCo
$19M	July 13	Pine Cliff – Placement of 4-year notes with warrants to AimCo
$13M	August 30	Petro-Victory – Placement of 3-year notes with warrants to PPF
		Midstream
Equity (Prospectus)		
$200M	November 7	Inter Pipeline – Offering of common shares led by TD Securities and BMO Capital
Debt (Prospectus)		
$700M	March 22	Pembina Pipeline - Offering of 10-year and 30-year notes through a syndicate of dealers
$497M	February 2	Rockpoint Gas Storage – Offering of 5-year notes of common shares co-led by BMO, CIBC, and RBC
$400M	June 19	Keyera – Offering of 10-year notes through a syndicate of dealers
		Downstream
Debt (Private Placement)		
$654M	March 16	Parkland Fuel – Placement of 8-year notes
$300M	November 8	Parkland Fuel – Placement of 9-year notes led by National Bank, CIBC and Scotia
		Oilfield Services
Equity (Prospectus)		
$56M	March 16	STEP Energy Services – Bought deal offering of subscription receipts co-led by CIBC and Peters
$50M	June 5	Horizon North – Bought deal offering of common shares led by National Bank
Equity (Private Placement)		
$10M	July 17	Claim Post – Placement of common shares
$6M	September 13	Wolverine Energy and Infrastructure – Placement of common shares
Equity (Private Placement to Sponsors)		
$10M	February 20	NXT Energy – Placement of common shares and warrants to Alberta Green Ventures
Debt (Private Placement)		
$835M	May 15	Calfrac – Placement of 8-year notes
$50M	May 24	Source Energy – Placement of 3-year notes co-led by BMO and Scotiabank

2018 Deal List

Value (CAD)	Date	Transaction
		Oilfield Services
Debt (Private Placement)		
$26M	March 29	Ensign – Placement of 4-year convertible debentures
$11M	April 12	Ensign – Placement of 4-year convertible debentures

2018

Note Redemptions		
$355M	February 28	Enbridge – Offer for 2032 and 2038 Spectra Energy Capital notes
$265M	February 1	Western Energy Services – Redemption of 2019 notes
$75M	June 12	Precision Drilling – Redemption of 2021 and 2024 notes
$13M	May 2	Bellatrix – Redemption of 2020 notes for common shares
Normal Course Issuer Bids		
$400M	February 15	Encana – Normal course issuer bid for up to 3.6% of its common shares
Not disclosed	May 16	CNRL – Normal course issuer bid for up to 5% of its common shares
Other Issuer Bids		
$21M	January 22	Journey – Repurchase of 12.7 million common shares held by MIE Maple Investments
CCAA and Bankruptcy Processes		
-	April 25	Dundee Oil and Gas entered into CCAA proceedings with FTI Consulting Canada as monitor
-	April 19	Gemini placed into court-ordered receivership with FTI Consulting Canada as receiver
-	March 12	Forent Energy placed into court-ordered receivership with Grant Thornton as receiver
-	February 21	Manitok Energy placed into court-ordered receivership with Alvarez & Marsal as receiver

Terms of Reference

General

In compiling this survey, we have relied on publicly available information. We have not attempted to identify transactions which are disclosed indirectly or are otherwise not disclosed. We have used our discretion in categorizing a transaction or event, and whether or not a transaction constitutes an energy transaction. For the purposes of this publication, energy is limited to (crude) oil and (natural) gas; future publications will endeavor to include renewables. All dates listed refer to the announcement date of each transaction or event, other than in the case of CCAA or bankruptcy filings of private entities which are not publicly announced, in which case we have used the date of the first relevant CCAA or bankruptcy filing. We have reported only transactions or events where the assets, target or subject of the transaction or event is Canadian. A target or subject is Canadian if it is listed on a Canadian exchange or headquartered in Canada. Assets are Canadian if they are primarily located in Canada. All deals of less than $1 billion are rounded to the nearest million and all deals of more than $1 billion are rounded to the nearest hundred million. Transactions of less than $5 million are not included. All values are stated in Canadian dollars and converted, if necessary. Corporate names have been truncated and parent entities are used in place of subsidiaries, as applicable. Transactions that were disclosed without a value were not included in the summary of deal counts and/or values.

M&A Transactions

We have listed the equity value of the target implied by the acquisition price, as disclosed in the relevant press release, not including assumed debt. Equity interests in the target held by the buyer are not included in the value of the target. Related party, insider and other special relationships are noted where appropriate and if publicly disclosed. A target is public if it is listed, it is a reporting issuer or it is sufficiently widely-held to justify the use of an arrangement or non-exempt bid to complete the acquisition.

Finance Transactions

Finance values are reported as of the announcement date, unless significantly amended prior to closing. A placement is to a "sponsor" if the issuer has placed a substantial number of securities to a single purchaser or small group of purchasers. Only the lead dealers in financings are identified. We have not reported new or amended credit facilities.

CCAA and Bankruptcy Proceedings

Any major follow-up transactions completed under the CCAA process are included in that category. However, sales by a receiver appointed pursuant to a bankruptcy are still described in the "Acquisitions" category.

Case Summaries

Energy

Private M&A - Insolvency Priority

What's the case name?

***Manitok Energy Inc. (Re)*, 2018 ABQB 488**
(Court of Queen's Bench of Alberta, June 22, 2018)

What are the lessons for my legal team?

- If you buy esoteric oil and gas interests, you will want those assets to be characterized as "interests in land" (and not just mere "contractual rights"), in order to avoid losing those interests to secured lenders in an insolvency where the lender's security interest in the owner's assets will take priority over contractual claims against the owner.
- That outcome requires two things. First, the interest must be taken from another interest in land. Second, the contract must confirm that the interest is an interest in land. The contract should provide something like *"It is the express intention of the parties that the [Producing Royalty] is an interest in land and runs with the Royalty Lands and the Producing Royalty is itself derived entirely from an interest in land secured".*

What happened?

Manitok was a junior E&P company running short on cash. Freehold was in the business of paying up-front cash as a form of finance in exchange for a royalty interest, (a portion of production or cash resulting from the sale of production) that would be paid by Manitok to Freehold over the life of a producing well. Freehold paid $25 million to Manitok for a production royalty in Manitok's assets. Manitok, Freehold and Manitok's bank entered into an agreement confirming the bank had no security interest in the royalty. Shortly after that, the bank foreclosed and the receiver (and certain of Manitok's other lenders) took the position that the royalty was not an "interest in land" and was subject to the claims of the secured lenders, with the effect that Freehold would lose its rights to the royalty.

The receiver and secured lenders had a tough case. They tried. They argued that the royalty was not an interest in land because, amongst other things, it was in respect of a fixed quantity of daily production (and not a share of *in situ* production), it was not granted in respect of specific lands, and Freehold had no right of entry to the lands (other than on a capital commitment default by Manitok).

The Court disagreed. It found that the second part of the test from Dynex (a decision of the Supreme Court of Canada) was met because the language of the contract showed a clear intent to create an interest in Manitok's lands. The first part of the test was satisfied because the royalty had been created out of oil and gas leases owned by Manitok.

Who complained?

Freehold applied to the Court for an order declaring that the royalty was an interest in land and therefore the property of Freehold.

Who won?

Freehold. The Court granted the application.

What changed in the law?

Nothing.

Energy

Project Development - Pricing Terms

What's the case name?

***Churchill Falls (Labrador) Corp. v Hydro-Quebec,* 2018 SCC 46**
(Supreme Court of Canada, November 2, 2018)

What are the lessons for my legal team?

- Markets are extremely unpredictable. Use market pricing as much as possible unintended outcomes.
- Fixed-price contracts can be an extremely expensive form of finance.
- It is very expensive and sometimes impossible to use litigation to fix bad deals. If you mean it, say it.

What happened?

Churchill and Hydro-Quebec signed a take-or-pay power contract in 1969 after years of negotiations. Churchill owned the source of power. Hydro-Quebec had the money and expertise to develop a power project. Churchill was owned by the Province of Newfoundland, which was keen to use resource development to improve the standard of living of its citizens. Hydro-Quebec and Churchill agreed to a 65-year fixed price term (a 40-year initial term with Hydro-Quebec's option to renew for another 25 years at a slightly lower rate). In exchange, Churchill was protected against all construction cost overruns by Hydro-Quebec and obtained a cash flow that allowed it to debt finance the plant's construction. At the time, the price of electricity was stable and sometimes declining. Since 1969, the price of electricity has risen dramatically above the offtake price. As a result, Hydro-Quebec has enjoyed substantial profits and Churchill has not (much to the regret of the Province and citizens of Newfoundland).

Amongst other arguments, Churchill asked the trial court to revise the contract to provide for market pricing on the grounds of good faith, maintaining the "equilibrium" of the agreement, honoring the intention of the original negotiations or the unforeseeability of the change in market rates. Some of these doctrines exist only in Quebec civil law.

The Supreme Court rejected this approach, finding that the courts will not find an implied duty to renegotiate a contract except in limited circumstances where there is a glaring gap or omission in the contract. Although parties have a duty to act in good faith in exercising their contractual rights, that does not impose an obligation to renegotiate a contract or prevent a party from relying on the words of a contract. The doctrine of unforeseeability requires a hardship to have been suffered, but Churchill was paid exactly what it had bargained for.

Fundamentally, the original paradigm of the contract was not to allocate risk equally between the parties but to set out the specific risks each had agreed to assume. Hydro-Quebec took on the risk of the cost of the project. Churchill acquired a plant without exposure to additional risk. Each side had negotiated complex arrangements to give effect to the bargain.

Who complained?

Churchill. It failed at trial and on all subsequent appeals.

Who won?

Hydro-Quebec. Churchill's appeal was rejected.

What changed in the law?

Nothing. The courts will not assist a party who made a bad deal for itself by reapportioning benefits to deprive the party who made a good deal for itself. Good faith and other rectification doctrines will rarely be used by courts to alter transactions between large, commercial entities.

Energy

Private M&A - Asset Purchase

What's the case name?

***Quicksilver Resources Canada Inc.* (Re), 2018 ABQB 653**
(Alberta Court of Queen's Bench, September 11, 2018)

What are the lessons for my legal team?

- *Caveat Emptor* still defines the law of ownership of "tangibles".
- Title and facility due diligence should not be overlooked or disregarded.
- The more precise the schedules to your asset sale agreement, the better.
- No matter how much we try to define things like "tangibles" in a sale agreement, words can be imprecise when applied to the facts in real-world situations.
- Consider "white map" plots for schedules (but be sure to exclude unwanted liabilities).

What happened?

The nub of the matter is who bought, or didn't buy, a metering station, pig receiver and metering station license situate at the end of the Maxhamish Pipeline. Quicksilver originally owned all the assets, contributed some or all of them to a partnership in 2011, and then went bankrupt and some or all of the assets were bought by Rockyview Resources Inc. from a receiver (monitor) under a 2016 Vesting Order.

The Quicksilver contribution agreement defined "Tangibles" in part as "… used or useful in connection with the operation of the Maxhamish Pipeline…" (a phrase the court would find to be less than helpful). Rockyview failed to confirm as part of its diligence process prior to completing the asset purchase whether the disputed assets had in fact already been contributed to the partnership and no longer owned by Quicksilver.

In turn, the asset purchase agreement between Rockyview and Quicksilver defined "Tangibles" in part as those assets "… in the vicinity of the Lands…" Matters were made worse for Rockyview as it acknowledged in the agreement that this was an "as-is, where-is" sale with no representations from Quicksilver as to title to any of the assets and the Vesting Order could not be used to correct the situation and confer title to Rockyview where Quicksilver no longer held title to the disputed assets.

Who complained?

Rockyview. It brought a claim for ownership of the disputed assets.

Who won?

The receiver of Quicksilver (but narrowly).

What changed in the law?

Nothing really. Just a reminder of the importance of due diligence and proper scheduling of tangibles matters.

Energy

Insolvency - Debt Priority

What's the case name?

Orphan Well Association v Grant Thornton Limited,* 2019 SCC 5 *(Redwater)
(Supreme Court of Canada, January 31, 2019)

What are the lessons for my legal team?

- Secured lenders will enhance liability management reporting requirements and scrutiny of liability ratios.
- They may require minimum spending to retire abandoned wells.
- Non-producing wells with liabilities will count against the borrowing base in reserve-based loans.
- Purchases out of bankruptcy will yield lower prices because unproductive wells must be retained by a bankrupt's estate.

What happened?

Redwater Energy Corporation was experiencing financial difficulties and in 2015 became insolvent. In May of 2015, Grant Thornton was appointed Redwater's receiver and it decided to conduct a sale of Redwater's productive wells to realize the proceeds for Redwater's secured creditor, Alberta Treasury Branches. Relying on common insolvency practitioners' practices and the settled application of the *Bankruptcy and Insolvency Ac (Canada)*, Grant Thornton renounced Redwater's 107 unproductive wells, avoiding an obligation to abandon and reclaim them.

The AER ordered Grant Thornton to close and abandon the renounced assets and refused to approve the transfer of Redwater's well licenses to the buyer. Grant Thornton refused.

At court, Grant Thornton argued that the AER's position amounted to creating a 'super priority' for the AER over Redwater's assets. This set the stage for a conflict between the jurisdiction of the federal *Bankruptcy and Insolvency Act* and Alberta's constitutional right to legislate in relation to property and civil rights in the province. Grant Thornton raised a constitutional argument by stating that the federal *Bankruptcy and Insolvency Act* is paramount over the provincial regulatory regime.

The Supreme Court of Canada found no conflict was created in applying provincial environmental laws to a sales process governed by the federal bankruptcy law. The Supreme Court of Canada applied its earlier decision in *Newfoundland and Labrador v Abitibi Bowater Inc.* which essentially concluded that a creditor acting in its regulatory capacity, in the public interest is not a creditor and stands outside the insolvency process.

The Supreme Court of Canada affirmed the Alberta Court of Appeal's 1991 decision, *Northern Badger*, which takes the same positioning.

Who complained?

Grant Thornton. It had originally applied for an order of the Alberta Court of Queen's Bench to approve its sale process.

Who won?

Grant Thornton, at Queen's Bench and at the Alberta Court of Appeal; the Orphan Well Association and AER at the Supreme Court of Canada.

What changed in the law?

No change, but clarification of the law.

Capital Markets

Public M&A - Hostile Bids

What's the case name?

***In the Matter of Aurora Cannabis Inc. and Cannimed Therapeutics Inc.,* 2018 ONSEC 10**
(Joint decision Ontario Securities Commission and Financial and Consumer Affairs Authority of Saskatchewan, March 15, 2018)

What are the lessons for my legal team?

- Management can't ignore the wishes of large shareholders.
- If you make a hostile bid, assume the bid must be open for 105 days, even if a shorter bid period would benefit the bidder by preventing the target from making a blocking transaction.
- If you are defending against a hostile bid, you can't use a rights plans to hinder the bid. However, you can use the 105 day bid period to try to generate a higher offer.
- Make sure your engagement letter with your financial advisor provides that the advisor can't resign from your mandate and act for a party that might interfere with your deal.

What happened?

Cannimed was a Saskatchewan-based, TSX-listed medical cannabis grower and distributor. It was pursuing the acquisition of Newstrike Resources, a smaller TSXV-listed grower and distributor, despite strong and vocal opposition from two shareholders controlling 26% of Cannimed's stock who wanted Cannimed to sell to a larger producer. One of Cannimed's shareholders initiated discussions with Aurora (a BC-based TSX-listed grower and distributor) to encourage Aurora to acquire Cannimed. Aurora agreed to proceed and entered into lock-up agreements with four shareholders owning 38% of Cannimed's stock. Newstrike's financial advisor then resigned from its engagement and began to advise Aurora on its bid for Cannimed. The day before Cannimed's board was to meet to approve the Newstrike purchase, Aurora made a proposal to Cannimed to buy Cannimed.

Four days later, Cannimed's board rejected Aurora's offer and agreed to acquire Newstrike. Cannimed's deal with Newstrike (if approved) would close before Aurora's bid could be completed (but required shareholder approval by Cannimed and Newstrike). Aurora's offer was conditional on Cannimed not approving the Newstrike acquisition. Cannimed later adopted a shareholder rights plan which had the effect of preventing Aurora from acquiring or locking-up any additional shares of Cannimed. Aurora asked the Ontario and Saskatchewan securities regulators to cease trade the Cannimed rights plan (allowing Aurora's offer to proceed) and to reduce the mandatory bid period for Aurora's offer from 105 days to 35 days. Cannimed asked the regulators to prevent Aurora from buying up to 5% of Cannimed's shares during the bid and to require Aurora to make a time-consuming and expensive amendment of its bid disclosure. Cannimed's rights plan was terminated, but Aurora had to leave its bid open for 105 days. Aurora was allowed to buy shares on the market during the bid, but it had to amend its bid circular to provide certain disclosure regarding its lock-ups.

Who complained?

Aurora and Cannimed.

Who won?

Legally, it was a tie, but Aurora won the business contest. Cannimed agreed to a friendly deal with Aurora after Aurora increased its bid. Cannimed terminated the Newstrike acquisition and paid a break fee to Newstrike. Newstrike's stock tanked.

What changed in the law?

Nothing. However, this was the first time the interaction between rights plans and the 105 day bid period had been considered at length.

Capital Markets

Capital Markets - Private Placements

What's the case name?

***Ontario Securities Commission v Tiffin,* 2018 ONSC 3047**
(Ontario Superior Court of Justice, May 15, 2018)

What are the lessons for my legal team?

- Early-stage and small businesses should be aware that any debt or equity they issue may be subject to securities law rules which regulate the distribution of securities.
- If in doubt, assume you are issuing a security and comply. Most investors will be exempt from complex disclosure obligations so compliance will usually not be onerous.
- Securities regulators are keen to maintain their regulatory authority. Assume that a regulator will take jurisdiction in grey areas.

What happened?

Tiffin was a financial advisor and the owner of an investment firm. Because of other regulatory troubles, his firm was subject to a cease trade order which prevented him from issuing securities to finance its activities. Tiffin did not let that this arrangement slow him down. He continued to solicit funds from his existing clients to keep the firm afloat and he sold $700,000 in promissory notes (with a one-year term) to six people. The notes were secured by Tiffin's toy soldier collection, claimed to be worth more than $500,000.

Relying on US precedent and policy objections, the trial judge decided that the notes were "simple private loan agreements" and not "securities" within the meaning of the *Securities Act* (Ontario) and were not subject to the cease trade order.

On appeal to the Ontario Superior Court, the Court applied the test in the Act, which specifies that any "a bond, debenture, note or other evidence of indebtedness" is a "security" and allowed the appeal. It declined to follow other lines of case law which exempt certain debt instruments from regulation under Canadian securities law.

Who complained?

The OSC, on appeal to the Superior Court.

Who won?

The OSC. But the Ontario Superior Court allowed Tiffin's appeal. That matter is expected to be heard in 2019.

Who changed in the law?

As it stands, nothing. The Court of Appeal of Ontario may reach a different conclusion.

What's the case name?

***Finkelstein v Ontario Securities Commission,* 2018 ONCA 61**
(Court of Appeal of Ontario, January 25, 2018)

What are the lessons for my legal team?

- The lure of profits from undisclosed information is extraordinary and often overcomes the scruples of many normal, law-abiding people. Copies of this decision should be distributed to everyone who receives non-public information about a transformational M&A deal.
- You can be guilty of insider trading on a tip, even if you don't know where the tip came from.

What happened?

Michael Finkelstein was a lawyer whose firm was acting on the proposed all-cash buy-out of Masonite, a TSX-listed company. He conveyed information about the potential deal to a friend, who passed it on to a friend. The news of the potential bid eventually came to the attention of Mr. Miller, a broker at TD Securities, who then passed it on to Mr. Cheng (also at TD). Both Miller and Cheng bought (for themselves or accounts managed by them) substantial amounts of stock of Masonite. They profited from the eventual buy-out of Masonite.

Ontario securities law prohibits people who are in a "special relationship" with a public company from buying or selling securities of a listed company while they are in possession of material non-public information regarding the listed company. The only issue in dispute was whether Miller or Cheng were in a "special relationship" with Masonite. Because they weren't insiders of Masonite (and didn't know that the tip they received came from an insider), the only way that they could have been in a "special relationship" was if they "ought reasonably to have known" that the person providing the information was in a "special relationship" with Masonite.

The OSC panel outlined a wide range of factors that should be employed to determine whether someone "ought reasonably to have known" that they are receiving information from someone in a special relationship, but to some degree they boil down to whether a reasonable person would think that the information was too good to be true or whether it appears that they recipient acted as though the information was too good to be true. The case established a multi-factor test for making this determination.

The Court's decision turned mainly on whether the OSC had taken an appropriate approach. Miller argued that the consideration of such factors effectively ignores the recipient's state of knowledge regarding the individual providing the information and places far too much weight on an analysis of the nature of the information itself.

The Court of Appeal rejected this argument and upheld the OSC's approach.

Who complained?

The OSC brought changes against all those who had received information originally derived from Finkelstein, other than one individual located outside of Canada. It succeeded against all of them. The defendants appealed to the divisional court. It ruled in favor only of Cheng Miller appealed again and the OSC appealed the decision on Cheng.

Who won?

The OSC. Cheng's conviction was re-instated. Miller's appeal was again denied.

What changed in the law?

The scope of persons who can be convicted if insider trading has been expanded.

Corporate

Private Investment - Termination of Directors

What's the case name?

***Estée Lauder Cosmetics Limited v Deciem Beauty Group Inc.,* 2018 ONSC 6079**
(Ontario Supreme Court of Justice, October 15, 2018)

What are the lessons for my legal team?

- Passwords for corporate social media accounts should be treated as critical corporate assets and should be known to all board members.
- Directors and officers in closely-held private companies should be subject to a contractual obligation to not make defamatory statements regarding the corporation.
- Substantial minority investors in founder-controlled businesses should have the right to require the removal of any officer or director that violates the "business protection" provisions of employment agreements.

What happened?

Founded in 2013, Deciem was a popular Toronto-based skincare and cosmetics developer and retailer with 33 stores worldwide and a large online sales presence. Estée Lauder owned one-third of Deciem's shares and Deciem's founder Truaxe and his partner owned two-thirds of Deciem. Starting in early 2018, Truaxe (an IT professional) took over Deciem's social media platform and website from which he launched a variety of personal attacks on competitors, employees, directors, customers and suppliers through hundreds of posts and videos. Estee Lauder's efforts to halt these actions were not successful. Eventually, Truaxe released a video announcing that Deciem was ceasing operations. Most employees did not show up for work the next day.

Estée Lauder brought an urgent motion under an oppression application for injunctive relief to remove Truaxe as a director and to stop his continuing interference with Deciem's operations. Truaxe's actions violated Deciem's unanimous shareholder agreement and so additional orders were sought to require that Truaxe comply with its terms.

Who complained?

Estée Lauder.

Who won?

Estée Lauder.

What changed in the law?

Nothing. This is a frank reminder to minority investors in founder-controlled businesses to implement measures to counter-act unauthorized online activities that could damage an organization's reputation.

Commercial

Private Contract - Post-Contractual Conduct

What's the case name?

***Wade Estate v Duck,* 2018 BCCA 176**
(British Columbia Court of Appeal, May 8, 2018)

What are the lessons for my legal team?

- Don't add unnecessary parties to a contact.
- You will have trouble changing contractual obligations by conduct after making a contract.
- Be specific about your obligations if they are important to you.

What happened?

Mr. Wade and Ms. Duck were common-law partners who signed a conditional sales contract to finance the purchase a motorhome. The contract listed Wade as "Buyer" of the motorhome and both Duck and Spring Cove, (a company owned by Wade), as "Second Buyer". "Buyer" and "Second Buyer" were jointly and severally liable under the contract.

Before Wade passed away, all motorhome payments were made from Spring Cove's accounts. Duck became the administrator of Wade's estate and continued making payments from Spring Cove's accounts until the accounts ran dry. After that, she made the payments from Wade's estate. Duck made no payments of her own. Eventually Duck gave the motorhome away to a family friend.

Wade's daughter had Duck removed as administrator of Wade's estate. As replacement administrator, Wade's daughter brought an application against Duck alleging that Duck was jointly liable for the loan for the motorhome and that she owed Wade's estate for a portion of the loan.

At trial, Duck argued that all the payments had come from Spring Cove's accounts, Duck had not owned the motorhome and that it had been used primarily in support of Spring Cove's business. The trial court concluded the debt was intended to be Wade's, Duck was not liable for the loan and it was appropriate for Duck to have made payments from Wade's estate.

The Court of Appeal, however, concluded that the chambers judge erred by interpreting the contract using the parties' post-contractual conduct. Post-contractual conduct can only be considered as evidence if the contract contained an ambiguity. The contract contained no ambiguity and clearly stated that Duck was to be jointly and severally liable for the loan.

Duck was ordered to reimburse Wade's estate for half of the loan amount paid.

Who complained?

Wade's Estate.

Who won?

Wade's Estate.

What changed in the law?

Nothing. This decision confirms that courts will only consider post-contractual conduct when interpreting a contract that contains ambiguity.

Commercial

Commercial Agreements - Amendment

What's the case name?

***Rosas v Toca,* 2018 BCCA 191**
(Court of Appeal of British Columbia, May 18, 2018)

What are the lessons for my legal team?

- Agreements should provide that they cannot be amended or waived expect in writing, signed by the parties. The amendment should refer to the provision being amended or waived. An amendment or waiver should not be attempted orally or by email. Ideally the amending document should refer to the consideration provided by both parties (however trivial) by virtue of their mutual decision to amend the agreement.
- Business teams should avoid making gratuitous promises regarding contractual performance that may be seen, with the benefit of hindsight, as an amendment made without consideration.

What happened?

Rosas won $4.2 million in the lotto. She agreed to loan $600,000 to her friend, Toca, so that Toca could buy a home. The loan was to be repaid without interest in one year. After one year, Rosas wanted to collect her money. Toca asked for more time. After two years, Rosas wanted to collect. Toca asked for more time. After three years… you get the picture. After seven years, Rosas went to court to collect.

The trial judge said that there was no consideration for each 'voluntary extension', there was no seven year term and Rosa was out of time, and way past the limitation period to make a claim on her one year loan.

Rosas, on appeal, argued on several grounds. Most were easily dismissed. The Court of Appeal found one compelling. It was unhappy with the strict application of the requirements for fresh consideration to make a contractual variation enforceable, and cited several academic commentators including the eponymous contractual experts, Fridman and Waddams. There was no suggestion that any variations to the repayment was procured under duress, was unconscionable or otherwise invalid on the basis of public policy.

The Court concluded that when parties agree to vary terms of a contract and show an intent to be bound without fresh consideration, the variation is enforceable, absent duress, unconscionability, or other public policy concerns.

Who complained?

Rosas.

Who won?

Rosas. She got a judgment for the $600,000 she had loaned to Toca.

What changed in the law?

A lot. Fresh consideration is no longer needed for an amendment, at least in BC law governed agreements. There is some doubt about how other courts will apply these principals in other cases. But measures can be taken to avoid the uncertainty that may arise in managing amendments.

What's the case name?

***Sewak Gill Enterprises Inc. v. Bedaux Real Estate Inc.,* 2018 ABQB 823**
(Court of Queen's Bench of Alberta, September 25, 2018)

What are the lessons for my legal team?

- When drafting a caveat for registration with Land Titles, the description of the interest claimed must adequately describe the interest and the grounds for the claim.
- In the event of a challenge to a caveat pursuant to the provisions of the *Land Titles Act* (Alberta), a caveat that does not adequately and correctly describe the interest claimed may be ordered discharged from title, resulting in a loss of priority of the interest claimed by the caveat, although such interest in the lands claimed in the caveat would not be extinguished solely as a result of the discharge of caveat.

What happened?

1325573 Alberta, the land owner, brought an application for summary judgment seeking the discharge of a billboard sign lease caveat registered against title to its lands. The caveat had been registered by Bedaux Real Estate to give notice of Bedaux's interest in receiving monthly rents from billboards placed on the lands pursuant to display structure agreements between Bedaux and Pattison Group. Bedaux had previously had an interest in the lands as purchaser under a purchase agreement and in connection with the assignment of that purchase agreement had reserved to itself the right to receive for 25 years the monthly rental payments for the billboards.

The decision turned on whether the interest claimed in the caveat was drafted to satisfy the requirements of s. 131(1) of the *Land Titles Act*, which provides: "[a caveat must state] the nature of the interest claimed and the grounds on which the claim is founded". The Court found that these requirements were not satisfied and ordered the caveat discharged. More specifically, the Court found that the caveat was not clear about the capacity in which Bedaux claimed its interest, as Bedaux was described as a "tenant" when the reservation of rights to receive billboard rents made it more akin to a "landlord" or "sublandlord". The wording of the caveat also appeared to reference a standard land lease between the owner of the lands and Bedaux, which was inconsistent with Bedaux receiving rental payments from the display structure agreements.

Who complained?

1325573 Alberta.

Who won?

1325573 Alberta won on appeal in the Court of Queen's Bench who ordered the caveat at issue discharged from the Land Titles Registry.

What changed in the law?

Nothing.

Employment

Employment Law - Sexual Harassment Releases

What's the case name?

***Watson v Governing Council of the Salvation Army of Canada*, 2018 ONSC 1066**
(Ontario Superior Court, February 26, 2018)

What are the lessons for my legal team?

- Employers cannot use releases to protect themselves against claims for damages arising from sexual harassment.
- Employers should establish mechanisms to deal with sexual harassment and other workplace harassment in order to prevent such claims.

What happened?

Ms. Watson managed a Salvation Army thrift store. When her employment was terminated, she signed a standard form full and final release and received severance of $10,000. Later, she brought a claim seeking damages for negligence, intentional infliction of emotional harm and breach of fiduciary duty against both her manager and the Salvation Army relating to sexual harassment during the course of her employment. Her manager attempted to have the claim dismissed arguing that Ms. Watson's claim was barred as she had signed the following release:

> *"In accordance with the terms of settlement outlined in the attached letter dated August 8, 2011, I, Emma Oliveira Watson, agree to release any and all claims I have or may have against The Salvation Army, past, present or future, known or unknown, which arise out of or which are in any way related to or connected with my employment or the ending of my employment."*

The Court found that the words "... *arise out of ... my employment"* limited the scope of the release to the employment relationship. The Salvation army acknowledged that sexual harassment does not arise from an employment relationship. The court reasoned that while the harassment occurred at the place of employment during Ms. Watson's term of employment, the harassment she endured was not connected to her employment. Further, the settlement she received pertained only to her severance and that her claim for damages was not barred by her signing of the release.

Who complained?

Watson.

Who won?

Watson.

What changed in the law?

This decision clarifies the law. Workplace sexual harassment is a separate matter, unconnected to an individual's employment and employers cannot be released from instances of sexual misconduct, no matter the language of the release.

Employment

Employment Law - Vacation Pay and Holiday Pay

What's the case name?

***RG Bissett Professional Corp v Kusick,* 2018 ABQB 406**
(Alberta Court of Queen's Bench, May 22, 2018)

What are the lessons for my legal team?

- Employers must provide monthly statements to employees, setting out separately each component of the earnings for each pay period.
- "Vacation pay" is an obligation to …, "holiday pay" is an obligation to …are separate concepts under the Alberta Employment Standards Code. A reference to vacation pay in an employment contract will not be deemed to include holiday pay and vice versa.
- Employers and employees cannot contract out of the Code.

What happened?

Kusick began working at Stringam LLP in 2005 and the parties later signed an Association Agreement, providing that Kusick's pay would be "inclusive of vacation pay entitlement". In 2015 Kusick terminated his employment and filed a complaint with Alberta Employment Standards to claim vacation pay and holiday pay for the two years prior to his termination. Kusick was awarded amounts for both vacation pay and general holiday pay by an Order of Officer, a decision which was upheld by a Provincial Court Umpire.

Stringam argued that the term "vacation pay", as used in the Agreement was a generic term that included holiday pay and that this was understood by both parties. The Umpire rejected this argument, holding that the Code distinguishes between vacation pay (a percentage of wages an employee is entitled to dependent on vacation entitlement) and general holiday pay (pay for statutory holidays). The Agreement only addressed vacation pay, not holiday pay. As the Agreement was unambiguous, the Umpire could not consider any additional evidence as to the parties' intentions. Kusick was awarded an amount for unpaid holiday pay.

The Code requires employers to keep up-to-date records of information for each employee showing separately each component of the earnings for each pay period. Employers must provide a written statement showing the breakdown of those earnings to employees for each pay period. The Umpire found that the clause in the Agreement stating that Kusick's pay would be "inclusive of vacation pay entitlement," was inconsistent with Stringam's record keeping obligations and that Stringam had not met its obligations under the Code. It had failed to provide Kusick with pay statements showing vacation pay and holiday pay as separate components. Stringam could not prove on its records that it had paid Kusick his vacation pay entitlement due to lumping vacation pay in with other pay and so Kusick was awarded his unpaid vacation pay.

Who complained?

RG Bissett Professional Corporation and Stephen C Mogdan Professional Corporation, operating as Stringam LLP.

Who won?

Kusick. On appeal, the Court of Queen's Bench found the Umpire's decision to be reasonable.

What changed in the law?

No change to the law. The courts confirmed that vacation pay and holiday pay are separate concepts under the Code and that employers must record each component separately.

Employment

Employment Law - Termination Obligations

What's the case name?

***Holm v AGAT Laboratories,* 2018 ABCA 23**
(Court of Appeal of Alberta, January 18, 2018)

What are the lessons for my legal team?

- To restrict an employee's right to compensation on termination without cause to the "statutory minimum" the contract must contain a provision which specifies the formula for the determination of that amount and expressly exclude the right to common law severance (which is provided for in the ESA).
- Contracts should not import obligations specified by statute and formulas for determining payments under a contract should not rely on variables outside the contract.
- The clause should read something like *"The amount payable by the Employer in the event of termination without cause will be an amount of salary equal to one week for each year of employment less than two years and two weeks for each year of employment more than two years. The Employee agrees that the Employee is not entitled to any other compensation for termination under common law, statute or any other right of any kind and that this amount settles all obligations of the Employer to the Employee".*

What happened?

Holm had an employment contract with AGAT which provided that if he was terminated without cause:

> "… [AGAT] will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment."

His agreement contained three clauses which solemnly confirmed that this was the only compensation to which he was entitled.

[(the "ESA")] provides that if an employee is terminated without cause the employee is entitled to be paid the equivalent of one week's pay, if the employee has worked for between three months and two years. But the ESA also provides that the employee is also entitled to whatever additional amount of compensation for termination that may be awarded under common law. The common law provides for a greater entitlement to severance than the ESA. AGAT intended that this would limit its payment to Holm to the lesser amount, which is often referred to as the "statutory minimum". But the contract did not exclude the common law entitlement and it did not specify a formula for determining compensation on termination.

Who complained?

Holm complained AGAT had constructively dismissed him. AGAT appealed the decision and the Court considered the issue of quantum of compensation or termination.

Who won?

Holm.

What changed in the law?

Nothing. This issue has been litigated with some frequency.

Contributors

Holly Barker practices corporate commercial law.

Shailaz Dhalla practices regulatory law with a focus on energy, environmental, public utility and indigenous law matters.

Jamie Gagner advises on a broad range of securities, corporate and commercial law matters.

Aubrey Guild-Young practices in all areas of commercial real estate.

Chip Johnston focuses on public and private acquisitions and equity financing.

Daniel Mowat-Rose practices real estate and banking law.

Paul Negenman advises on a broad range of transactions for oil and gas clients.

John Olynyk practices indigenous, environmental, and project development law.

Karen Quinn is a paralegal working in mergers and acquisition, capital markets and commercial transactions.

Carolyn Simpson focuses on commercial transactions and business law.

Madison Fulton was a summer student in 2019.

Nicolas Lindal was a summer student in 2019.

For more information, please contact inquiries@lawsonlundell.com.

lawsonlundell.com