



Fifteen Key Legal Developments for Oil & Gas Companies

March 03, 2017

W. Chipman Johnston, Alexandra R. Low

We have summarized key developments in Canadian law from the fourth quarter of 2016, relevant to the oil and gas industry. The fourth quarter brought a number of developments in the legal landscape, particularly in the regulation of public M&A, the approval of two key pipelines, and the emergence of guidance relating to private company governance.

Public Markets M&A

1. In [InterOil](#), the Yukon Court of Appeal prevented ExxonMobil from acquiring InterOil by arrangement, despite the fact that the transaction had been approved by InterOil's shareholders, based on the objections of InterOil's former CEO. The analysis in the judgment suggests that issuers should seek a fairness opinion that offers detail regarding the economic analysis supporting the fairness conclusion in order to reduce activist leverage. It also tends to support the view that the payment for a fairness opinion should not be made on a success basis, and that targets should bring evidence supporting the deal to the court hearing meant to approve the transaction

Energy Regulatory

2. The Prime Minister [announced](#) the approval of the proposed expansion of Kinder Morgan's Trans Mountain Pipeline (from a total capacity of 300,000 to 890,000 barrels per day) and the replacement of Enbridge's Line 3 (increasing capacity from 390,000 to 760,000 barrels per day). BC gave its environmental approval of Trans Mountain in January. This helps the industry, but these projects will take a long time to show up in prices. Others that are badly needed may never be built.
3. The federal government [proposed regulations](#) setting out the no-fault absolute liability limits for pipeline operators. The draft rules would impose a limit of \$1 billion on the liability of pipeline companies transporting at least 250,000 barrels per day.

Private Companies

4. In [Mennillo](#), the Supreme Court of Canada declined to assist a disgruntled former shareholder of a business that had become very valuable after the shareholder decided to

- sell his shares to his partner. The unhappy seller acted as though he was a seller, but failed to document that transaction. Completing a few entries on a share register would have avoided years of litigation. The case suggests that it can be very expensive (although technically feasible) to use the Supreme Court as a transfer agent.
5. In *Behr*, an Ontario trial court found that an oral agreement between a corporation and one of its consultants could be relied upon to give the consultant a valuable equity interest in the corporation. The consultant's work had greatly improved the corporation's circumstances. This teaches the eternal lesson that although the courts can help draft, they are an unimaginably expensive way to determine what is "fair".
 6. In *Chriss*, the Federal Court of Appeal found that the CRA could attack a director's assets for payroll and other unpaid withholdings because the director failed to formalize his resignation. The failure to comply with technicalities is not often a defence against the interests of the state.

Capital Markets

7. The [TSX adopted new DRIP rules](#) which require that plans must be pre-cleared with the exchange at least five days before becoming effective (unless the plan provides for the payment of dividends or distributions only with securities purchased in the market). DRIPs must also permit all security holders to participate in the plan, other than holders outside of Canada.
8. The CSA began to grant the first exemption orders permitting international dealers to trade Canadian issuers' bonds in the secondary market (pursuant to [CSA Staff Notice 31-346](#)). The exemption is available if either the bonds are denominated in a currency other than Canadian dollars, or they are denominated in Canadian dollars and were originally offered primarily outside Canada without a prospectus filing in Canada.

Litigation

9. In *Mask*, the Ontario Court of Appeal affirmed recent case law and allowed an issuer to prevent the certification of a class action based on an evidentiary record which supported its position that there was no basis for the claim.

Activism

10. In *Koh*, an Ontario trial court refused to order a shareholder meeting on the basis that the requisitioning shareholder had engaged in a long personal dispute with the board that was not concerned with corporate policy. A shareholder is not permitted to requisition a meeting if the request is based primarily on a personal grievance.

Governance

11. Glass Lewis released its [2017 voting guidelines](#). The firm will now recommend a withhold vote on a director if the director sits on more than five public boards (or two if the director is also an executive officer of a public company). Glass Lewis also recommends that RSU and performance share plans should be capped at 5% of share capital.
12. [ISS' 2017 voting guidelines](#) provide that it will generally recommend a withhold vote on a director if the director sits on more than four public boards (or two if the director is also an executive officer of a public company) and the director has attended less than 75% of her applicable board and committee meetings in the last year (without a valid excuse).

13. The CSA [released](#) a study of board gender diversity, reporting that the number of female directors increased by 1% between 2015 and 2016 and that 45% of issuers did not have a female director.
14. The federal government [proposed changes](#) to the *Canada Business Corporations Act* which would, amongst other changes, eliminate slate voting and require majority voting for the election of directors.

Investment Controls

15. The federal government [released guidelines](#) to clarify how investments are reviewed to ascertain threats to national security. Amongst other factors the government will consider the potential of the investment to enable foreign espionage or adversely affect the security of Canada's critical infrastructure.

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at [.www.stikeman.com/legal-notice](http://www.stikeman.com/legal-notice)