

WeirFoulds Subrogation & Recovery Group Successfully Upholds \$24.3 Million Trial Award for Oil Pipeline Leaks

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By Raj Datt, Marie-Pier Nadeau

In 2019, Justice Marriott of the Alberta Court of Queen's Bench awarded our client, ISH Energy Ltd. ("ISH") damages in excess of \$24 million against its pipeline contract operator, Weber Contract Services Inc. ("Weber")^[1], for breach of contract and negligence in the maintenance and operation of an oil field. In a 2-1 decision, the majority for the Alberta Court of Appeal very recently upheld this decision.^[2] Raj Datt was lead counsel for ISH at trial, and Raj Datt and Marie-Pier Nadeau responded to the appeal.

ISH was the owner of the Desan oil field located in British Columbia, which had been in operation since the mid 1990's. Between 2000 and 2007, ISH contracted out the pipeline operation and maintenance to Weber. Among other things, Weber was contractually required to pig the lines and to apply anti-corrosion chemicals. In July and August 2007, leaks were discovered at five locations in the Desan oil field, which required significant clean up and extensive repair to the pipelines. ISH sued Weber and alleged that the leaks were the result of internal pipeline corrosion combined with a buildup of high pressure within the pipeline system, which were both caused by Weber's negligence in failing to properly maintain and operate the oil field.

At trial, Weber chose not to call its own expert, and argued instead that there were weaknesses in the expert evidence called by ISH. While Weber contended that ISH should be held mostly, if not entirely liable for the loss, Weber did not adduce sufficient evidence establishing any contributory negligence on ISH's part. At the end of three weeks of trial, Justice Marriott found Weber solely liable for the leaks. She held that the pigging was done but not as frequently as required by the contract. She further held that Weber did not sufficiently treat the pipelines with corrosion inhibitor. Lastly, she accepted that a high-pressure event occurred when a Weber employee negligently closed an inlet valve, increasing the pressure in the pipeline system. As the pipeline was weakened by corrosion as a result of negligent maintenance by Weber, this high-pressure event caused the various leaks to occur. Justice Marriott outlined her reasons in a detailed and lengthy 41-page decision.

Weber appealed, without success. The majority, Justices Strekaf and Khullar, dismissed the appeal, deeming that the case called out for appellate restraint. Weber contended that Justice Marriott made mostly factual errors, which attract a high standard of review: an appellate court will not intervene on factual issues unless the trial judge made a palpable and overriding error. The concept of "palpable and overriding error" has been compared to an obvious error that goes to the very core of the outcome of the case or simply put, to a beam in the eye. The majority was not persuaded that Justice Marriott made any palpable and overriding error. Her reasons were thorough, demonstrated a reasonable assessment of the voluminous evidence and provided sufficient support for her various factual findings. Deference was owed to her factual findings and to her application of the law to the facts as she found them.

The dissenting judge, Justice O'Ferrall, would have ordered further evidence and/or argument on various issues which were never raised at trial or on appeal. This was yet another reason why the majority called for appellate restraint. The majority reminded that the litigation system is adversarial. The parties are the ones who frame the issues to be determined at trial and on appeal. Courts can only decide the case based on what was before them. The majority concluded:

"We have to be mindful of this record, and how this appeal was argued. Our colleague [Justice O'Ferral] addresses issues beyond the scope of this appeal, issues that might best be left for another record and another day."^[3]

The majority's decision is yet another reminder of how difficult it can be to appeal defensible findings of fact, especially when the trial judge's reasons are thorough and properly supported by the evidence.

^[1] *ISH Energy Ltd v Weber Contract Services Inc.*, 2019 ABQB 221.

(<https://www.weirfoulds.com/weirfoulds-secures-one-of-canadas-largest-subrogation-trial-judgments>)

^[2] *ISH Energy Ltd v Weber Contract Services Inc.*, 2021 ABCA 281.

^[3] 2021 ABCA 281 at paras 11, 16.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Raj Datt

Toronto
416.947.5038

Email:
rdatt@weirfoulds.com

Raj Datt is a Partner and the Chair of the firm's Subrogation & Recovery practice. His practice is focused on prosecuting large commercial and residential property losses arising from fires, floods, product liability, oil & gas operations, water/sewer main failures, construction projects, and many other complex loss scenarios.



Marie-Pier Nadeau

Toronto
416.947.5055

Email:
mnadeau@weirfoulds.com

Marie-Pier Nadeau is a partner in the Subrogation & Recovery Practice Group at WeirFoulds LLP. Marie-Pier has a thorough understanding of the insurance industry and regularly provides her clients with clear and practical advice.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035