Court of Queen's Bench of Alberta

Citation: Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP, 2011 ABQB 630

Date:
Docket: 1001 01977
Registry: Calgary

Between:

Scott & Associates Engineering Ltd.

Plaintiff

- and -

Ghost Pine Windfarm, LP, Fortuna GP, Inc.,
Fortuna Limited Partner Holding, ULC,
Nextera Energy Canada, ULC
and Nextera Energy Resources, LLC

Defendants

Reasons for Judgment
of
Chief Justice Neil Wittmann

Introduction

[1] This case involves an application by a party served out of the jurisdiction pursuant to the old Alberta Rules of Court ("Old ARC"). The entity served has moved to set aside two Orders for Service Ex-Juris ("the ex-juris orders") by way of an application filed before, but made after, the new Alberta Rules of Court ("New ARC") came into force November 1, 2010.

Details of the Claim

[2] Scott & Associates Engineering Ltd. ("SAEL") sued Ghost Pine Windfarm, LP, a limited partnership ("GPLP"), Fortuna GP, Inc., the general partner ("Fortuna"), Fortuna Limited Partner Holding, ULC ("Fortuna LP"), NextEra Energy Canada, ULC ("NextEra Canada") and

Nextera Energy Resources, LLC ("NextEra USA"). NextEra USA is a Delaware Limited Liability Corporation.

[3] The claim as presented in the Amended Statement of Claim alleges that in December 2006, Petrofund Alternative Energy Ltd. ("PAEL") decided to sell a 50% of its joint venture interest in a 150 megawatt wind farm at Three Hills, Alberta consisting of two 75 megawatt phases, Ghost Pine, being Phase I (the Ghost Pine Assets) and Lone Pine, being Phase II.

[4] PAEL engaged a consultant, Phoenix Engineering Inc. ("PEI") to request expressions of interest from firms qualified to see the project through to completion. SAEL received an Information Memorandum from PEI related to the conditions of the sale of PAEL's assets resulting in SAEL signing a Confidentiality Agreement with PAEL on December 14, 2006 and PAEL giving SAEL confidential data concerning the project.

[5] SAEL thereafter bid for the Ghost Pine Assets later acquired by Penn West Petroleum Ltd. ("PW"). In the early part of 2007, SAEL discovered that PAEL's joint venture partner, Spirit Pine Energy Corp. ("SPEC") was in fact attempting to buy the Ghost Pine Assets.

[6] Finavera Renewables Inc. ("FVR"), a public company engaged in the development of wind energy projects was introduced to SAEL as a potential Seed Investor in the project. FVR desired the confidential information belonging to SAEL and FVR signed a Mutual Confidentiality Agreement resulting in FVR obtaining the confidential information in February 2007.

[7] FVR and SAEL had discussions and correspondence resulting in FVR sending SAEL a letter offering to cooperate with SAEL concerning SAEL's proposed acquisition of the Ghost Pine Assets from PW on February 12, 2007 but no enforceable agreement between SAEL and FVR was reached.

[8] The Amended Statement of Claim alleges FVR unlawfully used the confidential information belonging to SAEL to purchase the Ghost Pine Assets for itself.

[9] In a separate action in this Court, SAEL sued FVR in August 2007 for a declaration that FVR held SAEL's interest in the project as a constructive trustee and asked for an order that FVR transfer its interest in the project to SAEL. That lawsuit remains outstanding.

[10] GPLP and FVR made an Asset Purchase Agreement in August 2008, whereby GPLP through its General Partner Fortuna, purchased the Ghost Pine Assets from FVR.

[11] FVR announced in December 2008 that it had sold its interest in the project to GPLP and that the Partnership consisted of the defendant, Fortuna as the general partner, Fortuna LP as the limited partner and that the Partnership was controlled by Fortuna and also by Fortuna LP, NextEra Canada and NextEra USA. It is claimed that all of the defendants including Fortuna, the Partnership, Fortuna LP, NextEra Canada and NextEra USA knowingly received the Ghost Pine Assets with actual or constructive knowledge of SAEL's claim that FVR held its interest in

Phase I and in the confidential information pertaining to Phase I of the project in breach of trust as a constructive trustee for SAEL.

[12] It is further claimed that the Defendants were withholding from FVR $1,000,000 of their purchase price until the constructive trust claim is settled and that this conduct amounts to a fraudulent injustice and dishonesty, or an inequity to SAEL.

[13] The claim SAEL asserts against GPLP, Fortuna, Fortuna LP, NextEra Canada and NextEra USA is a constructive trust over their interest in the Ghost Pine Assets and in the confidential information pertaining to the Ghost Pine Assets and all assets related to the interest of those entities with respect to Phase I of the project.

The Application and Evidence

[14] The ex-juris orders made in March 2010, are based on two affidavits of Bryan Scott ("Scott"), the sole voting shareholder of SAEL. What is asserted in these affidavits is that NextEra USA is a Delaware Limited Liability Corporation, that the Defendants are all inter-related and that Scott believes he has a reasonable cause of action against the NextEra USA to declare and enforce a constructive trust or damages in relation to land and property located in Alberta on the basis NextEra USA was knowingly in receipt of an interest in land and property impressed with a constructive trust and further, that NextEra USA committed a breach of an equitable duty in Alberta.

[15] The application to set aside the ex-juris orders was first made by NextEra USA returnable on April 21, 2010. Scott filed a third affidavit in Support of the ex-juris orders on May 3rd, 2010 and a fourth affidavit in August 2010.

[16] The details of the third Scott affidavit include:

a. That Fortuna had an interest in the lands that formed part of the Ghost Pine Assets secured by a caveat and that the address of the caveator is 700 Universe Boulevard, Juno Beach, Florida.

b. A Form 10-K filed with the United States Securities and Exchange Commission states that NextEra USA is part of the FPL Group Inc. and that NextEra USA managed or participated in the management of approximately 97% of its projects and that NextEra USA has facilities located in the United States and Canada.

c. There is a letter with a logo on it that contains the term "Nextera Energy Resources" with a circle and an ellipse;

d. An article from the Globe and Mail newspaper indicates that Nextera Energy Resources Renewable Energy has projects in Canada, including Alberta.

[17] The fourth Scott affidavit relates to the allegation that the NextEra USA was the mind, management and control of the Canadian Entities on the basis that:

a. In an e-mail between a GPLP representative and a person at the Alberta Utilities Commission, a corporate relationship between the Canadian Entities and the Company was described, including the fact that NextEra Canada is an indirect wholly owned subsidiary of NextEra USA, a Delaware Limited Liability Corporation;

b. The FPL Group Inc. website indicates that John Ketchum is the Vice-President, General Counsel and Secretary of NextEra USA and works in Juno Beach, Florida;

c. F. Mitchell Davidson is the President and Chief Executive Officer of NextEra USA at the FPL Group Inc. address;

d. In Scott's "opinion",after reviewing the document disclosure received from the Canadian Defendants, there was a lack of certain types of documents that Scott "believed" should exist when the purchase of the Ghost Pine Assets occurred and "this lack of evidence indicates the Defendants are part of a group being one concern under the supreme control" of NextEra USA.

[18] A fifth Scott affidavit was filed in October, 2010 in support of the contention that the "mind, management and control" of the Canadian Entities lay with NextEra USA on the basis that:

a. In the profile of Jason Bak, the CEO of Finavera, it was stated that he led the asset sale of a portion of Finavera's wind development portfolio to Florida Power and Light ("Nextera");

b. That the client name on a drawing prepared by Genivar for the Ghost Pine Wind Power Project submitted to the Alberta Utilities Commission ("the AUC") was "FPL Energy";

c. A boundary map for the Ghost Pine Wind Power Project had the name "FPL Energy" on it;

d. That on January 7, 2009, FPL Energy was renamed Nextera Energy Resources LLC;

e. The Affidavits of Records of GPLP, Fortuna and Fortuna Limited were sworn in Juno Beach, Florida;

f. In an e-mail sent by GPLP to the AUC, the representative of GPLP, Laura Cantave, lists contact details as a telephone number in Florida and a physical address of 700 Universe Boulevard, Juno Beach, Florida;

g. In a 2008 document, F. Mitchell Davidson, as identified as the President of Fortuna, and on a printout of a website dated September 20, 2010, Mitch Davidson is identified as being the President of NextEra USA;

h. Scott "believes" that FPL Energy is making the annual lease payments to certain land owners of the land;

i. In the litigation between SAEL and Finavera, which is a completely different action and does not involve any of the Defendants, a statement was made by counsel for Finavera that the owner of the Ghost Pine Windfarm is a variety of Defendants that go by Nextera or Florida Power;

j. Material posted on a public website of CANWEA suggests that FPL Energy is associated with various wind farm projects in Canada;

k. A corporate search of Fortuna indicates that the directors of Fortuna have addresses at 700 Universe Boulevard, Juno Beach, Florida;

l. Scott "believes" that the decision making of Fortuna is controlled by the NextEra USA due to an overlap between directors and officers of Fortuna and the NextEra USA;

m. Scott "believes" that the mind, management and control of Nextera Canada lies with Nancy Cowan, the Executive Director of Nextera Canada, who is described in a Mississauga Board of Trade pamphlet as being responsible for Nextera Energy's Canadian and U.S. Northeast Business Development.

Issues

[19] Scott was questioned on the first to fifth affidavits, as was Laura Cantave, the deponent of GPLP and Fortuna Affidavits of Records in November 2010.

[20] The applicant NextEra USA has framed the issues as falling into three categories:

1. Which Rules of Court are applicable to the within application?

2. Should portions of the affidavits sworn in support of the ex-juris orders be struck or disregarded?

3. Should the ex-juris orders be set aside for failure to comply with the requirements for obtaining such orders?

The Position of the Applicant, NextEra USA

[21] The applicant NextEra USA spent a great deal of time, both in its written brief and at the oral hearing, submitting the Old ARC, rather than the New ARC, should apply to the instant case. At the heart of the applicant's concern is whether the requirement for a "good arguable case", identified in the case law under the Old ARC, in order to support an ex-juris order, is also a requirement under the New ARC.

[22] The applicant has asserted that the provisions under the Old ARC and the New ARC are substantively identical, but in the event this Court should find there is no requirement for a good arguable case under the New ARC, it would be unjust and prejudicial to use or apply the New ARC in this application. In addition, the applicant has argued a number of the provisions of the subsequent Scott affidavits, ie. the third to fifth affidavits, contain impermissible hearsay, arguments, opinions, conclusions and belief, as well as incorrect information.

The Position of the Respondent, SAEL

[23] The respondent SAEL's position is that the New ARC apply and that there is no requirement for a "good arguable case" as that phrase has been interpreted under the Old ARC. The respondent argues that under the New ARC 11.25(2)(a), a real and substantial connection is sufficient to ground service outside of Canada and that it need only establish that the claims relate to land in Alberta, are governed by the law of Alberta, relate to a tort committed to Alberta and that NextEra USA, although outside of Alberta, is a necessary and proper party to the action, or that the action relates to the breach of an equitable duty in Alberta. Also, central to each party's position is a discussion of piercing the corporate veil.

New ARC Transition Rule

[24] This Court is well aware of the transition provisions in New ARC 15. Although the New ARC 15.2 indicates that the New ARC apply to existing proceedings, with some exceptions, including New ARC 15.6, the Court is keenly aware of its obligation to prevent difficulty or injustice to either the applicant or respondent in this case, or any other case, stemming from transition. But if the application of the New ARC would benefit one party to the detriment of another, the "difficulty, injustice" referred to in New ARC 15.6 must be resolved. On the other hand, if the requirement of a "good arguable case", as developed in the case law pursuant to the Old ARC continues and persists under the New ARC, it is not necessary to decide whether the New ARC or the Old ARC apply to this case in terms of Old ARC rules 30 and 31 and New ARC 11.25 and 11.31.

The Old ARC

[25] The relevant excerpts from the Old ARC 30 and 31 are set out below:

30 Service outside of Alberta of any document by which any proceeding is commenced, or of notice thereof, may be allowed by the Court whenever:
(a) the whole subject matter is land situated within Alberta (with or without rents or profits) or the perpetuation of testimony relating to lands so situated;
(b) any act, deed, will, contract, obligation or liability affecting land situated within Alberta is sought to be construed, rectified, set aside or enforced;
...
(f) the proceeding is to enforce, rescind, resolve, annul or otherwise affect a contract or to recover damages or obtain any other relief in respect of the breach of a contract, being (in any case) a contract
(i) made within Alberta, or
(ii) made by or through an agent trading or residing within Alberta on behalf of a principal trading or residing out of Alberta,
...
(g) the action is in respect of a breach committed within Alberta of a contract made within or out of Alberta, and irrespective of the fact, if that is the case, that the breach was preceded or accompanied by a breach committed out of Alberta that rendered impossible the performance of so much of the contract as ought to have been performed within Alberta;
...
(j) a person out of Alberta is a necessary or proper party to an action properly brought against another person served within Alberta;
...
(q) the proceeding relates to the breach of an equitable duty within Alberta.

31 Every application for leave to serve any document, or to give notice thereof, out of Alberta shall be supported by affidavit or other evidence,
(a) stating that in the belief of the deponent the applicant has a reasonable cause of action,
(b) showing in what place or country the person to be served is, or probably may be found, and
(c) giving the grounds upon which the application is made;

and every order allowing such service shall limit the time within which the proceedings may be answered or opposed, and in limiting the time regard shall be had to the place where service is to be effected.

The New ARC

[26] Excerpts from the New ARC with respect to service of documents outside of Canada are as follows:

11.25(2) A commencement document may be served outside Canada only if

(a) a real and substantial connection exists between Alberta and the facts on which a claim in an action is based and the commencement document is accompanied with a document that sets out the grounds for service of the document outside Canada, or

(b) the Court, on application supported by an affidavit satisfactory to the Court, permits service outside Canada.

(3) Without limiting the circumstances in which a real and substantial connection may exist between Alberta and the facts on which a claim in an action is based, in the following circumstances a real and substantial connection is presumed to exist:

(a) the claim relates to land in Alberta;

(b) the claim relates to a contract or alleged contract made, performed or breached in Alberta;

(c) the claim is governed by the law of Alberta;

(d) the claim relates to a tort committed in Alberta;

(e) the claim relates to the enforcement of a security against property other than land by the sale, possession or recovery of the property in Alberta;

...

(i) the defendant, although outside Alberta, is a necessary or proper party to the action brought against another person who was served in Alberta;

...

(k) the action relates to a breach of an equitable duty in Alberta.

[27] Excerpts from the New ARC, Rule 15.1, 15.2 and 15.6:

15.1 In this Part,

(a) "existing proceeding" means a court proceeding commenced but not concluded under the former rules;

(b) "former rules" means the Alberta Rules of Court (AR 390/68) in effect immediately before these rules come into force.

15.2(1) Except as otherwise provided in an enactment, by this Part or by an order under rule 15.6, these rules apply to every existing proceeding.

(2) Every order or judgment made under the former rules and everything done in the course of an existing proceeding is to be considered to have been done under these rules and has the same effect under these rules as it had under the former rules.

15.6 If there is doubt about the application or operation of these rules to an existing proceeding or if any difficulty, injustice or impossibility arises as a result of this Part, a party may apply to the Court for directions or an order, or the Court may make an order, with respect to any matter it considers appropriate in the circumstances, including:

> (a) suspending the operation of any rule and substituting one or more former rules, with or without modification, for particular purposes or proceedings or any aspect of them;
> (b) modifying the application or operation of these rules in particular circumstances or for particular purposes.

[28] Excerpts from the New ARC Rule 1.4:

> 1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.
>
> (2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:
>
> (a) grant, refuse or dismiss an application or proceeding;
> (b) set aside any process exercised or purportedly exercised under these rules that is
>
> (i) contrary to law,
> (ii) an abuse of process, or
> (iii) for an improper purpose

[29] Excerpts from the New ARC Rule 1.7:

> 1.7(1) The meaning of these rules is to be ascertained from their text, in light of the purpose and intention of these rules, and in the context in which a particular rule appears.
>
> (2) These rules may be applied by analogy to any matter arising that is not dealt with in these rules.
>
> (3) Headings in these rules may be considered in ascertaining the meaning of these rules.

Requirement of a "Good Arguable Case"

[30] The position of SAEL is that there is no requirement for a "good arguable case" under the New ARC and that therefore, it need not establish a good arguable case in order to successfully resist an application to set aside the ex-juris orders, because the New ARC apply.

[31] Under the Old ARC, a good arguable case was required: *Nova, An Alberta Corporation v. Grove Estate*, 1982 ABCA 279. In delivering his judgment, dissenting in part on other issues, Laycraft J.A., stated as follows:

> [10] In many cases a plaintiff will have difficulty in meeting the requirements of Rule 31. The need for service ex juris arises, of necessity, before pleading is complete and before there has been production of documents or oral

examinations. The plaintiff at that stage will often find it a problem to prove many facts which would be easily proven at a later stage of the action. For example, a plaintiff who is not certain which of two defendants injured him or whether his claim is in contract or in tort is entitled to plead alternative causes of action (Rule 111) or may plead against defendants in the alternative (Rule 36). He is nevertheless required to support an application for service ex juris by an affidavit in which the deponent swears his belief that the plaintiff "has a reasonable cause of action". On the test stated by Lord Simonds in *Vikpovice Horni a Hunti Tezirstro v. Korner*, [1951] A.C. 869, and adopted by the Supreme Court of Canada in *Composers, Authors and Publishers Assoc. of Canada Ltd. v. International Good Music Inc.*, [1963] S.C.R. 136, at 142 he must show "a good arguable case" to be entitled to the order. This test does not, in my opinion, require a plaintiff to prove his case as he would at trial and does not take from him the right granted by the rules to plead in the alternative.

[11] In *Vikpovice Horni* (supra) Lord Simonds at page 878 quoted Lord Davey in *Chemische Fabrik Vormals Sanoz v. Badische Anilin and Soda Fabriks* (1904), 90 L.T. 733, at 735 where he said:

> "This does not of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand the court is not on application for leave to serve out of the jurisdiction ... called upon to try the action or express a premature opinion on its merits."

[12] Lord Simonds then said at page 879:

> "... a plaintiff can make it sufficiently appear that the case is a proper one for service out of the jurisdiction while falling short of the standard of proof which must be attained at the trial. If it were not so, it would become the duty of the court to do just what Lord Davey said was not its duty, viz., to try the action upon the preliminary application."

[32] I apprehend the position adopted in Alberta, taken from *Vikpovice*, is that the standard of proof to be attained to support service *ex-juris*, in terms of establishing that a plaintiff "has a reasonable cause of action" as set forth in Old ARC 31(a) is somewhat elusive. Recognizing the difficulty of a plaintiff in attaining the same standard of proof as would be necessary in a trial, the standard is less. That standard is simply an assessment of the particular facts of the case in terms of whether it is good and arguable.

[33] But what does that mean? Some assistance is gained from *Vikpovice* itself in the judgment of Lord Simonds, where he said at [1951] 2 All E.R. 334 at 338:

> "It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one. I do not wholly like the expression a 'prima facie case', for where leave to serve has been given ex parte under Ord. 11 and application is then made under Ord. 12 to set the proceedings aside, a conflict may arise in which the question is not so much whether a prima facie case has been made out as whether upon all the materials then before him, the judge is of opinion that the case -- I can find no better word -- is a proper one to be heard in our courts. The description 'a good arguable case' has been suggested and I do not quarrel with it."

[34] Under the Old ARC, what did "good arguable case" mean? In my view, it meant a case that was not fanciful or speculative but was grounded upon some evidence upon which an objective trier would say "well, on the basis of the facts presented, the case is arguable and certainly is not to be dismissed out of hand."

[35] The requirement has been articulated in subsequent cases: *Murray v. Canada*, 2003 ABQB 260; *Suncor Inc. v. Canada Wire and Cable Limited*, 114 A.R. 341; *Metera v. Financial Planning Group*, 2002 ABQB 1051.

[36] In *Murray*, Moen J. stated at paragraph 31:

> The granting of a service ex juris order allows the Alberta courts to assume jurisdiction over a nonresident. This is considered to be a sufficiently serious assertion of power that an applicant must justify the court's assumption of such jurisdiction and establish *on the evidence* before the court that there is a good arguable case ... [emphasis supplied].

She went on to state at paragraph 33 that "it is settled law that a mere statement that the deponent of an affidavit in support believes he has a good cause of action is not sufficient."

[37] In *Suncor*, Forsyth J. referenced the requirement of a good arguable case when considering whether a Defendant is a "proper or necessary party to an action properly brought against another person served within Alberta" would be satisfied where the material filed supports the causes of actions pleaded and where all of the Defendants are or may be involved in any of the causes of action. He summarized that it means that where the facts alleged establish that a Defendant exhibits a "definite connection to the case" the requirement of a good arguable case is met and that the Defendant is a proper or necessary party.

[38] The standard of proof was further considered in *Wheeler v. 1000128 Alberta Ltd.*, 2008 ABQB 70, by Rooke J., as he than was, indicating that the standard was "lax" at paragraph 24. He also cited *Alliance Pipeline Ltd. v. C.E. Franklin Ltd.*, 2005 ABCA 298 where the Court of Appeal indicated that it is the evidence that makes the case arguable and that is all that is needed at that stage of the lawsuit with respect to establishing a cause of action.

[39] For this court to do away with the good arguable case criterion and have no standard whatsoever, which is what SAEL asserts, would in my view require that under the New ARC there should be express or implied a provision that a "good arguable case" is not required to be made out to support valid service outside of Canada pursuant to Rule 11.25(2). It is common ground that there is no express exclusion of the requirement in the New ARC. Nor is anything to be implied from the New ARC which would do away with this requirement.

[40] Logic and common sense dictate some standard of proof in addition to mere allegations in a statement of claim in order to support service of an originating document outside of the jurisdiction. Were it otherwise, this Court could take jurisdiction over any person or entity outside the jurisdiction solely on the basis of unproven allegations in an originating document. That has never been the law and would give rise to a potential for much mischief should it become so. Thus, to resolve the issue in this case, namely whether the ex-juris orders ought to be set aside, I continue the requirement of a good arguable case, which requires some evidence. I will first consider whether the evidence accumulated in the five Scott affidavits rises to the threshold of a good arguable case and may thereafter consider whether I should be excluding the third to fifth Scott affidavits as urged upon me by the applicant.

Good Arguable Case

[41] In addition to the requirement for a good arguable case, under the Old ARC, the claim alleged had to fall within one of the permissible categories enumerated in Rule 30. The New ARC 11.25 (2) uses the terminology "a real and substantial connection" as its fundamental premise, the connection being between Alberta and the facts on which a claim and action is based. Both the Old ARC and the New ARC require a document that sets out the grounds for the service outside Canada, and Rule 11.25(3) enumerates presumptions for the real and substantial connection, which enumeration is closely aligned with Old ARC 30.

[42] Here, the essence of the claim against NextEra USA and the other Defendants, is that they took land situated in Alberta that was impressed with a constructive trust; they took it knowingly, and are obliged to account for any profit. Alternative remedies are also claimed: an accounting for profit and a transfer of the interest of any of the Defendants in the mis-appropriated assets, to the Plaintiff.

[43] I am therefore proceeding on the basis that there is a real and substantial connection existing between Alberta, and the facts on which a claim in an action is based, against NextEra USA. The requirement of a good arguable case is, however, subsumed in the phrase that the commencement document is "accompanied with a document that sets out the grounds for service of the document outside Canada, or ... the Court on application supported by an affidavit satisfactory to the Court, permits service outside Canada": New ARC 11.25(2)(a)(b).

[44] As stated earlier, this requirement prevents service outside of Canada being permitted simply on the basis of the facts alleged in a claim alone, that is, unproven allegations. There must be something more. What is there here?

[45] What there is, is summarized in paragraph 15 through 20 above.

[46] The sum of that evidence is that NextEra USA indirectly controls NextEra Canada and GPLP and its constituent entities. The issue becomes whether evidence establishing a parent subsidiary relationship, is sufficient to meet the threshold of a good arguable case against the parent for the allegedly unlawful acts of its subsidiary or subsidiaries where there is some evidence of common officers and directors as well as decision making relevant to the issues being contributed to by the parent. Put another way, is there enough evidence to establish a good arguable case to pierce the corporate veil?

Piercing the Corporate Veil

[47] In this regard, the Applicant, NextEra USA has cited the following authorities: *Salomon v. Salomon & Company*, [1897] A.C. 22; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Company* (1996), 28 O.R. (3d) 423 (Ont. S.C.); *Bank of Montreal v. Canadian Westgrowth Ltd.* (1990), 102 A.R. 391 (Q.B.); Kevin P. McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham, ON: LexisNexis, 2007) at paragraph 2.28; *Cunningham v. Hamilton* (1995), 29 Alta. L.R. (3d) 380 (C.A.).

[48] The Respondent SAEL, on the issue of piercing the corporate veil, relies mainly on the case of *Tirecraft Group Inc. v. High Park Holdings ULC*, 2010 ABQB 653 (QB).

[49] It is common ground that the caveats filed claiming an interest in the lands are signed by "Ghost Pine Windfarm, LP by its General Partner, Fortuna GP, Inc." There is no suggestion that NextEra USA, is claiming any legal interest in the Alberta lands.

[50] In reviewing the authorities, some care should be taken to look at the facts of the individual cases.

[51] In *Tirecraft*, there was a dispute over responding to certain questions that arose during an Examination for Discovery. The Applicant there was arguing that it required the information asked for, in order to establish a case for the Court to "pierce" the various corporate veils that the individual Respondents erected. In discussing the concept of a corporate veil, Yamauchi J. reviewed *Salomon*, and other authorities including *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2. In *Kosmopoulos*, Yamauchi J. noted at para. 14 that the Court had stated at para. 12 that there is no consistent principle but that the ... "best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interests of Revenue': L.C.B. Gower, *Modern Company Law* (4th ed., 1979) at p. 112."

[52] He also referred to the *TransAmerica* case from Ontario, which will be discussed below, and helpfully enumerated a number of circumstances when a Court may find a corporation to be a 'sham, cloak or alter ego' to pierce the corporate veil. At paragraph 21, Yamauchi J. noted a number of factors that would be significant including: where the shareholder treats itself and the corporation interchangeably; where the corporation is merely created to deflect monies from

their proper usage; where the shareholder intermingles the corporation's affairs with its own, such that the shareholder itself fails to recognize the corporation's separate identity; where the shareholder treats corporate property as though it belongs to the shareholders without regard for the interests of those dealing with the corporation.

[53] In *Transamerica*, "piercing the corporate veil" was an issue. A number of mortgage loans had been made by the Plaintiff, *Transamerica* to Canada Life Mortgage Services Limited ("C.L.M.S.") and it was sought in the action to hold Canada Life Assurance Company ("Canada Life") liable for the wrongs of C.L.M.S. on the basis of the alleged wrongs of its wholly owned subsidiary. C.L.M.S. was a wholly owned subsidiary of Canada Life.

[54] Sharpe J.A., in delivering a judgment of the Court, referred to *Transamerica's* argument that *Kosmopoulos* stood for the proposition that the corporate veil could be pierced when it is "just and equitable" to do so. He indicated that this was neither the intent nor the result in *Kosmopoulos*. In doing so at para. 25, he quoted Laskin J.A. in *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 at page 536:

> Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

He went on to find, in the case before him, that the relationship between *Canada Life and C.L.M.S.* was a typical parent and subsidiary relationship, where Canada Life wholly owned C.L.M.S. and its Board of Directors was comprised of Canada Life executives. C.L.M.S. did have independent management and conducted a business separate and distinct from that of its parent. He held, there was not sufficient evidence to give rise to a triable issue, namely that C.L.M.S. "is the mere puppet of Canada Life": paragraph 27.

[55] In *Bank of Montreal v. Canadian Westgrowth Ltd.* (Calgary Queen's Bench No. 8401-17707), the Bank claimed against a number of defendants, including *Canadian Westgrowth Ltd. ("Ltd.") and Westgrowth Petroleums Inc. ("Inc.")*.

[56] The facts were that *Inc.* was a wholly owned subsidiary of *Ltd.*; the officers and directors of the two Companies were identical; the meetings of their two Boards were held concurrently; Inc. was funded entirely by Ltd. and that Inc.'s assets were purchased with monies loaned by Ltd., interest free, with no terms for repayment; the audits on both companies were done in Calgary by the same auditor; each company had the same year-end; most of the dealings and correspondence with respect to the contract in question were between personnel in Ltd.'s Calgary office; Ltd. provided management services to Inc. without cost.

[57] However, everyone was aware that the contract in issue was with Inc., not with Ltd.. Brennan J., after reviewing the authorities, including *Salomon*, found that piercing of the corporate veil was not justified. He said at paragraph 25:

> With respect to both grounds argued by the Plaintiff, it is my view that the facts relied upon by the Plaintiff in support thereof, are nothing more than one would expect to find in the operation of two associated companies, and in particular where, as here, Ltd. provided management services for Inc.

[58] In *Cunningham*, a Chambers Judge decided to strike the Order for Service Ex-Juris against the Broken Hill Propriety Company Ltd. (Broken Hill), the parent corporation of BHP Holdings (USA Inc.) (BHP). The argument made was that BHP was at the time of the merger between it and Hamilton Oil Corporation (HOC), the alter ego of Broken Hill, or vice versa, and that the corporate veil should be lifted and the Court should treat Broken Hill as a true successor corporation to HOC.

[59] In dismissing the appeal, Fraser, C.J.A. for the majority, indicated that although Broken Hill operated a number of its worldwide companies as an integrated economic unit, that did not mean that for legal purposes, separate legal entities would be ignored, unless there was some compelling reason for lifting the corporate veil. In making this statement, she quoted Goff, L.J. in *Bank of Tokyo Ltd. v. Karoon,* (Note) [1987] A.C. 45, where he said:

> [Counsel] suggested ... that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are not concerned with economics but with the law. The distinction between the two is, in law, fundamental and cannot here be bridged [at 538].

[60] Applying the authorities to the evidence, I am driven to the conclusion here, that there is not sufficient evidence presented by SAEL, even considering all five of the affidavits, to meet the threshold for a good arguable case as against NextEra USA. It necessarily follows, that on this record, the ex-juris orders are set aside. The Applicant will have costs of this application, pursuant to Schedule C of the New ARC, Column 5, payable forthwith.

Heard on the 4th day of May, 2011.
Dated at the City of Calgary, Alberta this 12th day of October, 2011.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

J.E. Fletcher
for the Plaintiff

R.V. Reichelt
S.C.J. Louw
for the Defendants