

# In the Court of Appeal of Alberta

**Citation: JL Energy Transportation Inc v Alliance Pipeline Limited Partnership, 2025 ABCA 26**

**Date:** 20250128  
**Docket:** 2401-0050AC  
**Registry:** Calgary

**Between:**

**JL Energy Transportation Inc**

Appellant

- and -

**Alliance Pipeline Limited Partnership, Alliance Pipeline Ltd, Alliance Pipeline LP, Alliance Pipeline Inc, Aux Sable Liquid Products LP (formerly known as Alliance Pipeline NGL, LP), and Aux Sable Liquid Products Inc (formerly known as Alliance Pipeline NGL Inc)**

Respondents

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**The Court:**

**The Honourable Justice Frans Slatter  
The Honourable Justice Dawn Pentelchuk  
The Honourable Justice William T. de Wit  
The Honourable Justice Alice Woolley  
The Honourable Justice Kevin Feth**

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## Reasons for Decision

Appeal from the Decision by  
The Honourable Justice K.M. Horner  
Dated and Filed the 8th day of February, 2024  
(2024 ABKB 72, Docket: 1601 06322)

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## Reasons for Decision

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### The Court:

[1] The appellant owns intellectual property relating to the use of natural gas mixtures to improve the hydraulic efficiency of high pressure gas pipelines and storage and extraction facilities. It granted the respondents certain licences to use that technology in some pipelines and facilities they operate. The appellant commenced an action alleging breach of the licence terms and infringement of its patent rights on the basis that the respondents were using the technology beyond the scope of their licences. That action was summarily dismissed by the case management judge on the basis that it had been commenced outside the two year limitation period found in the *Limitations Act*, RSA 2000, c. L-12: *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2024 ABKB 72. The primary issue is whether the appellant's claim is subject to the two year limitation period in the provincial *Limitations Act*, or the six year limitation period in s. 55.01 of the federal *Patent Act*, RSC, 1985, c. P-4.

### Background

[2] The reasons of the case management judge outline details of the appellant's patented technology, particulars of the various pipelines in issue, the relationships between the parties, and the scope of the licences granted to the respondents.

[3] In summary, the respondent Alliance Pipeline carries liquid rich natural gas from northeastern British Columbia to Channahon, Illinois. The appellant granted it a licence to use its technology for that purpose. However, the respondents also transport liquid rich natural gas in a number of lateral pipelines that feed into the main pipeline. The appellant takes the position that the respondents are using its technology in those lateral pipelines without permission.

[4] The reasons of the case management judge outline in detail the inquiries of the appellant into possible misuse of its technology, from theoretical potential use as early as 2008, to suspicion, to projections based on modelling, and finally to knowledge based on real data from the operation of the lateral pipelines. The case management judge concluded that the appellant had sufficient knowledge of its claim to warrant a proceeding no later than November 27, 2013: reasons at para. 91. The appellant does not challenge this finding of fact.

[5] The statement of claim was issued on May 11, 2016. If the claim for patent infringement was subject to the two year limitation period in the *Limitations Act* it was out of time. However, if the claim was subject to the six year limitation period in s. 55.01 of the *Patent Act* it would be in time.

### The Limitations Regime

[6] Section 3(1) of the provincial *Limitations Act* provides that a defendant is entitled to immunity from a claim unless a proceeding claiming a remedial order is commenced within:

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose.

As noted, the case management judge concluded that the appellant had sufficient knowledge of its claim no later than November 27, 2013, more than two years before the statement of claim was issued. The appellant concedes that any claim arising from breaches of the licence agreements is governed by the provincial statute, and that it cannot claim a remedy for any breaches that occurred more than two years before the statement of claim was issued. However, it argues that breaches of the licence agreements engage a rolling limitation period that re-commences with each individual breach.

[7] The appellant asserts, however, that its claim for infringement of its patents is actually covered by s. 55.01 of the *Patent Act*:

55.01 No remedy may be awarded for an act of infringement committed more than six years before the commencement of the action for infringement.

The central issue in this appeal is whether the federal or the provincial limitations regime applies to claims of patent infringement. This Court has previously held that the provincial limitation regime applies: *Canadian Energy Services Inc v Secure Energy Services Inc*, 2022 ABCA 200, 54 Alta LR (7th) 93. However, the appellant was given permission to reargue the point: *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2024 ABCA 175.

[8] *Secure Energy* concerned competing claims over the ownership of a patent, claims of misappropriation of confidential information, and related claims of patent infringement. The majority in that decision concluded at para. 19 that provincial courts have concurrent jurisdiction

with the Federal Court to hear disputes over patent infringement. Where the plaintiff elected to sue in the Alberta courts, *Secure Energy* held s. 12 of the *Limitations Act* was engaged:

#### Conflict of Laws

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

(2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.

Having commenced the claim in Alberta, Secure Energy's claim for a remedial order was subject to the two year limitation period. The majority dealt with s. 55.01 as follows:

20 Secure's argument that, regardless, even if a limitation provision applies, the six-year limitation period in s 55.01 of the *Patent Act* would apply rather than either the two or ten-year limitation period in the Alberta *Limitations Act* is without merit. Secure provides no authority for that proposition except to argue federal paramountcy generally. This argument completely ignores the Alberta [court's] concurrent jurisdiction in infringement cases as explained above.

It appears that the applicability of s. 55.01 had not been raised before the chambers judge and was a new issue on appeal: see *Canadian Energy Services Inc v Secure Energy Services Inc*, 2020 ABQB 473.

[9] The third member of the panel in *Secure Energy* concluded that the dispute should have been decided in the Federal Court, and did not discuss the limitations issue: see the subsequent litigation at *Secure Energy (Drilling Services) Inc v Canadian Energy Services LP*, 2023 FC 906, 203 CPR (4th) 388. The Alberta *Secure Energy* litigation was focused on the concurrent jurisdiction of the provincial and federal courts and the ownership of the patent in question, not the limitations issue.

[10] The analysis in this appeal can be broken down into the following issues:

- (a) the proper interpretation of the *Limitations Act*,
- (b) the effect of the constitutional overlay, given that the *Patent Act* is federal legislation, and
- (c) whether the alleged breaches are "rolling" breaches for limitations purposes.

The Proper Interpretation of the *Limitations Act*

[11] *Secure Energy* relied on a literal interpretation of s. 12 of the *Limitations Act*:

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

The majority reasoned that since the *Secure Energy* litigation was “a proceeding commenced in Alberta” the Alberta *Limitations Act* applied without exception.

[12] Section 12(1) must be read alongside s. 2(3), which confirms that the *Limitations Act* is generally intended to provide a universal limitations regime:

2(3) Except as provided in subsection (4), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

(a) the remedial order is sought in a proceeding before a court created by the Province, or

(b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.

(4) This Act does not apply where a claimant seeks a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

As s. 2(4) confirms, however, the general universal regime in the *Limitations Act* is not intended to override other specific limitation provisions in Alberta enactments. This confirms the principle of statutory interpretation that where a statute deals with a specific topic the legislative intention is presumed to be that its provisions would prevail over statutes of general application: *Canada North Group Inc (Re)*, 2019 ABCA 314 at para. 55, 93 Alta LR (6th) 29; *Geophysical Service Incorporated v EnCana Corporation*, 2017 ABCA 125 at para. 103. This presumption of legislative intention, however, is not applicable here because the two statutes in issue were enacted by different levels of government.

[13] A better formulation of the question is whether the reference to “limitations law of Alberta” includes federal law applicable in Alberta, and if so whether the reference to claims “to which this Act can apply” excludes claims for which the Parliament of Canada has provided a discrete limitation period.

[14] The *Limitations Act* resulted from several detailed reports by the Alberta Law Reform Institute: *Report No. 55: Limitations* (1989), which followed an earlier *Report for Discussion No. 4: Limitations* (1986). Those reports explain the intentions behind s. 2(3) and s. 12.

[15] Section 2(3) was inserted to ensure that there were no gaps in the regime, or uncertainties about the application of the *Limitations Act* to claims arising from federal law. As stated in *Report No. 55* at p. 56:

*Federal law.* Any claim which arose under substantive federal law and which is brought before an Alberta court is, by express reference, subject to the Act to the extent that the Act can be made applicable to it. The result is that no limitations hiatus can exist because Alberta has failed to assert a legislative power over a claim which is not in fact subject to limitation provisions under federal law. (Some areas of law are subject to exclusive federal jurisdiction. Although Parliament can subject claims in these areas to applicable provincial limitations law, the extent to which it has done this is sometimes uncertain. In other areas of law there may be dual legislative jurisdiction, with federal jurisdiction paramount. Federal legislation on a subject would preempt that subject area. However, the extent to which federal legislation on a subject actually occupies an entire subject area, and hence preempts provincial legislation, is sometimes uncertain.) (Emphasis added)

This carried forward the recommendation in *Report for Discussion No. 4* at pp. 174-176. The intention was that provincial limitation periods would apply to federal claims where there was a potential hiatus because the federal statute did not have its own limitation period. Thus, the Institute assumed that the paramountcy doctrine would apply in the case of conflicts between provincial and federal limitation periods. The wording in s. 2(3) that the *Limitations Act* only operates with respect to federal law claims “to which this Act can apply” recognizes provincial jurisdictional boundaries, while avoiding any gaps in the limitations regime.

[16] Likewise, the provisions of s. 12 were not intended to override federal jurisdiction. This provision, as originally recommended by the Institute, and as included in the statute when it was first enacted as *Limitations Act*, SA 1996, c. L-15.1, read:

#### Conflict of Laws

12. The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

The Institute explained in *Report No. 55* at p. 98:

S. 12 provides for the application of Alberta limitations law where a claim brought in Alberta (the forum jurisdiction) will be adjudicated under the substantive law of another jurisdiction (the foreign jurisdiction) in accordance with the applicable principles of private international law (conflict of law rules).

The recommendation embraced a “legal philosophy” that Albertan principles of fairness should be applied in Alberta.

[17] The original wording of s. 12 made it clear that it was a choice of law clause, intended to override the previous rule that limitation periods were a matter of substantive law so that the limitations law of the situs of the cause of action would prevail: see *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022 at pp. 1071-73.<sup>1</sup> The “conflict of law rules” deal with choice of law between different territorial jurisdictions (usually two provinces), not conflicts arising where provincial and federal legislation apply in the same province: *ITO - International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at p. 777.

[18] In 2007 s. 12 was amended to its present wording:

#### Conflict of Laws

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

(2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.

See *Limitation Statutes Amendment Act, 2007*, SA 2007, c. 22, s. 1(4). The effect of this amendment was to reverse the apparent effect of the original wording of s. 12, and restore the outcome of the *Tolofson* decision, as explained in *Castillo v Castillo*, 2005 SCC 83, [2005] 3 SCR 870. This was likely done as a matter of comity, and because of insurance underwriting implications.

[19] It follows that the shortcoming of the reasoning in *Secure Energy* was a failure to interpret s. 12(1) and (2) as a whole, and in context. When properly interpreted, it was a choice of law

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<sup>1</sup> The comments in *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at para. 38, [2010] 1 SCR 649 were apparently based on this original version of the statute.

provision that was never intended to address the situation where there were competing federal and provincial limitation periods.

### The Constitutional Overlay

[20] The second aspect of the limitations issue is that the *Patent Act* is federal legislation, while the *Limitations Act* is provincial legislation. If there is a conflict, which statute should prevail? This is a question of statutory interpretation with a constitutional flavour. It is axiomatic that a province cannot displace federal jurisdiction by enacting a “choice of law” clause like s. 12 of the *Limitations Act*. Further, if possible, the provincial *Limitations Act* should be given an interpretation that keeps it within the appropriate constitutional boundaries.

[21] As noted, the Institute was alive to the issue of federal jurisdiction over certain areas of law. This helps interpret the reference to “limitations law of Alberta” in s. 12(1) and the reference in s. 2(3) to claims “to which this Act can apply”.

[22] The starting point is s. 91(22) of the *Constitution Act, 1867*, which gives the federal government jurisdiction over Patents of Invention and Discovery. There is no doubt that the *Patent Act* is valid federal legislation. Section 55.01 was added to that statute in 1993, along with s. 55 which confirmed the cause of action for patent infringement:

55(1) A person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement. . . .

55.01 No remedy may be awarded for an act of infringement committed more than six years before the commencement of the action for infringement.

Where rights are created within the pith and substance of federal law the federal government has the jurisdiction to establish discrete limitation periods with respect to those claims: *Whitbread v Walley*, [1990] 3 SCR 1273 at pp. 1288-89.

[23] The meaning of the reference in s. 2(3) to claims “to which this Act can apply” can best be illustrated by the decision in *Clark v Canadian National Railway Co.*, [1988] 2 SCR 680. In that case a toddler had been injured when he wandered onto the right of way and was hit by a train. The defendant argued that the claim was barred by the two year limitation period in s. 342(1) of the *Railway Act*, RSC 1970, c. R.-2. The provincial *Limitation of Actions Act* would have allowed the claim if it was commenced within six years of when the toddler attained the age of majority. The Supreme Court concluded that the provincial limitation period applied. While the *Railway Act* was valid federal legislation, the claim asserted by the toddler was a claim in tort created under provincial law which meant that it was subject to the provincial limitations regime.

[24] The Court framed the issue at p. 695:

Rights of action for damages for personal injury and the procedure relating thereto is a matter which, for constitutional purposes, falls within exclusive provincial legislative competence in relation to “Property and Civil Rights” (*Constitution Act, 1867*, s. 92(13)) and “Procedure in Civil Matters” (s. 92(14)). Parliament has exclusive legislative jurisdiction in relation to railways and works declared to be for the general advantage of Canada (ss. 91(29), 92(10)). Under which head of power does the prescription of the respondent’s action fall? . . .

The Court concluded that, from a constitutional point of view, the general laws of the province applied to the operations of railways. Federal law only applied to matters that were an “integral element” of railway operations.

It is clear from the authorities just discussed that undertakings which fall under federal legislative competence by virtue of s. 92(10) are not thereby removed from the ambit of provincial legislative competence, and equally, that they are not entirely embraced by the legislative authority of Parliament. While section 342(1) of the *Railway Act* is plainly legislation in relation to railways, a limitation provision relating to an action for personal injury caused by a railway cannot be said to be an integral part of federal jurisdiction. The core federal responsibility regarding railways is to plan, establish, supervise and maintain the construction and operation of rail lines, railroad companies, and related operations. The establishment of general limitation periods which affect those injured by the negligence of the railway is not, to our mind, part of that core federal responsibility or of any penumbra sufficiently proximate to satisfy the test articulated in the cases just referred to. . . . (at p. 708)

Since the toddler’s claim was a common law tort claim it was created under provincial law, not federal law, and was subject to provincial limitation periods.

[25] *Clark* confirmed at p. 709 that the federal limitation period would apply to “breaches of statutory causes of action validly created under the *Railway Act*”. That is the significant point as far as this appeal is concerned. The claim for infringement of a patent is a statutory cause of action validly created under s. 55 of the *Patent Act*: *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 at para. 12, [2008] 3 SCR 265. It follows that the federal limitation period in s. 55.01 applies. On the other hand, as the appellant concedes, the provincial limitation period applies to its claims for breaches of the licence agreements, a matter governed by provincial law. This interpretation of *Clark* was confirmed in *Whitbread v Walley* at pp. 1288-89 and is consistent with *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58, [2019] 4 SCR 228.

[26] As noted, general limitation periods are within provincial jurisdiction as matters of property and civil rights. While the federal government can establish limitation periods for federal claims, where Parliament has not done so provincial limitation periods still apply: *Wesley v Alberta*, 2024 ABCA 276 at paras. 33-34. Where there is an operational conflict between valid provincial and

valid federal legislation, the doctrine of paramountcy dictates that the federal legislation prevails: *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras. 71-73, [2007] 2 SCR 3. From one perspective there is an operational conflict here because the *Patent Act* says that during a four year window the appellant has an enforceable right, while the provincial *Limitations Act* says the opposite. This engages the paramountcy doctrine because as stated in *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para. 60, [2015] 3 SCR 327 “. . . the laws at issue give inconsistent answers to the question whether there is an enforceable obligation: one law says yes and the other says no”.

[27] The respondents argue that there is no inconsistency because the two statutes can operate together. They argue that the *Limitations Act* specifies when an action must be started, and then the *Patent Act* caps the damages for the previous six years. However, it was never intended that the two statutes would operate together, if only because (as discussed *supra*, para. 15) it was not intended that the provincial statute would apply when there is an operative federal limitation period. This interpretation is inconsistent with the structure of s. 2(3) of the *Limitations Act* and s. 39(1) of the *Federal Courts Act*, RSC 1985, c. F-7:

39(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in the province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

The federal legislation defaults to the provincial law unless there is a specific federal limitation period. The wording of both statutes is inconsistent with tandem operation.

[28] The respondents note that s. 55.01 of the *Patents Act* is very similar to the equivalent language in 35 *US Code* § 286. Section 55.01 counts back from the date that the action was commenced, and bars any remedy for earlier breaches. The *Limitations Act* on the other hand, provides the defendant with “immunity from the claim” if the claim is not advanced within two years of discoverability. Despite these differences in approach, the effect is the same. Claims arise, such as the appellant’s, where the *Limitations Act* precludes a claim that the *Patent Act* would not. This express contradiction generates the fundamentally inconsistent answers as identified in *Moloney* at paras. 22, 60, and *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961 at para. 17.

[29] The majority in *Secure Energy* concluded at para. 20 that the concurrent jurisdiction of the federal and provincial courts over patent infringement claims displaced paramountcy. However, the test for non-operation of a provincial statute in the face of conflicting federal legislation does not depend on the jurisdiction of the court deciding the issue.

[30] As noted, patent infringement claims can be brought either in the Federal Court or the provincial superior courts, and an interpretation that would apply different limitation periods depending on where the action was started would be both undesirable and contrary to legislative

intent: *Massie & Renwick, Ltd v Underwriters' Survey Bureau Ltd*, [1937] SCR 265 at p. 270. A patent infringement claim brought in the Federal Court would engage s. 39(1) of the *Federal Courts Act*, which applies provincial limitations “Except as expressly provided by any other Act”. Section 55.01 of the *Patent Act* is a limitation “expressly provided” in another statute, and so would apply to infringement claims commenced in the Federal Court. The interpretation in *Secure Energy* results in a different limitation period applying to equivalent actions commenced in the provincial superior courts, which is a further indication that *Secure Energy* should no longer be followed.

[31] Under the doctrine of paramountcy, the federal legislation would prevail. However, it is not necessary to resort to the paramountcy doctrine here, because as previously discussed the provincial *Limitations Act* was not intended to apply to rights created under federal legislation which are subject to specific federal limitation periods. This interpretation of the provincial legislation is consistent with the principle that, if possible, legislation should be interpreted in a way that keeps it within constitutional boundaries.

#### Summary on Limitations Issue

[32] In summary, on a proper interpretation the provincial *Limitations Act* does not purport to apply to causes of action created by federal statutes which are subject to a discrete limitation period, because they are not claims “to which [that] Act can apply”. That interpretation is consistent with the constitutional division of powers. It follows that the appellant’s claim for patent infringement is subject to the limitation period in s. 55.01 of the *Patent Act* and was commenced in time. The reasoning in *Secure Energy* on the limitations issue should no longer be followed, and the appeal on the limitations issue should be allowed.

#### “Rolling” Limitation Periods

[33] The other issue raised by the appellant is whether the breaches it alleges are continuing breaches, engaging a “rolling” limitation period, or whether the initial breach is a discrete event which commences the running of the limitation period for all subsequent infringing acts. The appellant argues that each day that the respondents infringe its patents or breach the licence agreements creates a fresh cause of action, starting a fresh limitation period. The respondents reply that the case management judge was entitled to conclude that in this case there was only one breach at the commencement of any alleged infringement or breach, which started the running of the limitation period even though the damages arising from that single breach may have continued to accrue.

[34] The case management judge concluded that this case did not engage a rolling limitation period:

107 I find that the Defendants’ alleged continuing use of the Licensed Technology outside the scope of the License Agreements did not give rise to separate and

continuing injuries. JL had knowledge of the alleged injury it suffered (i.e., breach of License Agreements and infringement of Patents) as of November 27, 2013. It had two years to pursue compensation for this injury. It failed to do so. To decide otherwise would allow owners of Intellectual Property to discover an unlawful use of their property, sit on their hands until the unlawful business built around the use of that property grew to a sufficient size, and then launch a lawsuit after the defendant's work reliant on the property became sufficiently ripe to make damages worthwhile. This is a mischief to be avoided, and specifically addressed by limitations periods. Intellectual Property rights are rights created and bestowed upon the owner by law. The owner is therefore bound by limitation rights set out in law in enforcing these rights.

In coming to this conclusion, the case management judge followed *Secure Energy* at para. 30, which held “the continued use of property, including intellectual property, does not constitute an ongoing tort. To find otherwise would render limitation periods meaningless”. The respondents argue that whether there is a rolling limitation period is a mixed question of fact and law, depending on the particular circumstances, but the case management judge appears to have decided the issue as a question of law, not based on findings of fact on this record.

[35] The appellant argues that this conclusion is contrary to authority, citing *AstraZeneca Canada Inc v Apotex Inc*, 2017 FCA 9 at para. 112; *Wall v Horn Abbot Ltd*, 2007 NSSC 197 at para. 455, 256 NSR (2d) 34; *Aram Systems Ltd. v Novatel Inc.*, 2007 ABCA 100 at para. 29, 74 Alta LR (4th) 37; *Hazelquist v Guchi Mochie Tackle Co., Inc.*, 437 F.3d 1178 (2006); *Petrella v Metro–Goldwyn–Mayer, Inc.*, 134 S.Ct. 1962, 1969, 188 L.Ed.2d 979 (2014); and *SCA Hygiene Products Aktiebolag v First Quality Baby Products, LLC*, 137 S.Ct. 954, 197 L.Ed. 2d 292 (2017). It argues the issue in *Secure Energy* was the “one time” misappropriation of the patent, not strictly continuing infringement. It argues that there is no universal rule, and the application of the limitation period to continuing infringement or breach must be determined on a case-by-case basis. Further, it argues a rolling limitation period does not render the limitation period meaningless, because it still has the effect of granting the defendant immunity for all breaches that occurred prior to the limitations window.

[36] The respondents support the conclusion of *Secure Energy* on this point, citing the several *Geophysical Service* decisions, including *Geophysical Service Incorporated v Encana Corporation*, 2018 ABCA 384 at paras. 31-32, 78 Alta LR (6th) 82; *Champagne v Sidorsky*, 2018 ABCA 394 at para. 12, 78 Alta LR (6th) 1; *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras. 89-90, [2017] 1 WWR 685; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras. 134-35, [2002] 4 SCR 245; *Brookfield Residential (Alberta) LP v Imperial Oil Ltd*, 2019 ABCA 35 at para. 6, 81 Alta LR (6th) 285; *Bowes v Edmonton (City of)*, 2007 ABCA 347 at paras. 172-74, 86 Alta LR (4th) 47; *RVB Management v Rocky Mountain House*, 2015 ABCA 188 at paras. 18-19, 19 Alta LR (6th) 195; *Weatherford Canada Partnership v Artemis Kautschuk und Kunststoff-Technik GmbH*, 2017 ABCA 110 at para. 26; and *Husky*

*Injection Moulding Systems Ltd v Schad*, 2016 ONSC 2297. The plethora of authority on both sides of the argument demonstrates that the distinction between repeating claims, and continuing damages from a single breach, is not always clear-cut.

[37] Given our conclusion on the applicable limitation period, as the following analysis demonstrates it is not clear to what extent the issue of “rolling limitation periods” is still of importance. To the extent that it remains a live issue, it is not one that can be summarily determined on this record, and if necessary it will have to be decided at trial.

#### *Patent Infringement*

[38] With respect to patent infringement claims, the rolling limitation period issue is to some extent a matter of statutory interpretation. There is not necessarily a universal answer to whether limitation periods are “rolling”. To what extent does the wording of the limitation period preclude a remedy? In this case the section reads:

55.01 No remedy may be awarded for an act of infringement committed more than six years before the commencement of the action for infringement.

This section provides that there shall be “no remedy” for “an act of infringement” committed beyond the statutory deadline. This wording could support the view that each “act of infringement” creates a separate right to a remedy, and it is that remedy which is foreclosed after six years pass.

[39] However, the statement of claim for patent infringement was issued on May 11, 2016. Since it is subject to a six year limitation period, it would catch all infringements after May 11, 2010 whether or not there is a rolling limitation period.<sup>2</sup> The statement of claim pleads that the infringing lateral pipelines all came into operation after that date: Septimus (in Canada) in September 2010; Tioga in September 2012; Prairie Rose in July 2011. Therefore, on this record whether an infringement of a patent creates a rolling limitation period appears to be moot, because all of the pleaded infringing activities nevertheless occurred within the window created by the limitation period.

#### *Breach of the Licences*

[40] The appellant also alleges breaches of the licence agreements, which it concedes are subject to the two year provincial limitation period. However, while the statement of claim pleads breaches of those licence agreements, in this litigation the licences appear to be more of a shield than a sword. The functional structure of the claim is as follows:

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<sup>2</sup> If the six year limitation period in s. 55.01 engages the “discoverability” principle, the limitations window could be longer: see *Google Canada Corp v Paid Search Engine Tools, LLC*, 2021 FCA 63.

- (a) the appellant has patents which it alleges are infringed,
- (b) to the extent that the respondents are using the patented technology, they could justify that use by the licences they hold, but
- (c) the appellant argues that the respondents' use of the patented technology is beyond what is authorized by the licences.

What the statement of claim pleads as “breaches of the licences” appear actually to be acknowledgements that licences have been granted, with the proviso that the rights granted by the licences are limited. The claim alleges uses of the patented technology beyond what is authorized in those licences, engaging the scope of the licences, although the pleading can also be read as alleging a positive breach of the “limited use” covenants in the licences.<sup>3</sup>

[41] To illustrate, para. 18 of the statement of claim pleads that licences were granted to the respondents but “solely for the transport of gas mixtures in the Canadian Pipeline System”, and:

21. At no time have the Defendants had a lawful right to use the Licensed Technology except as expressly permitted by the limited use Canadian Pipeline License, the limited use US Pipeline License, and the limited use US Facility License (collectively the “Limited Use Licenses”). . . .

27. At no time has JL authorized the Defendants to use the Patents or the proprietary Licensed Technology except as permitted in the Limited Use Licenses.

The appellant could have simply claimed infringements of its patents. The respondents could have filed their defences, potentially including a denial of infringement or a justification based on the fact that they held licences. The appellant could then have filed a reply alleging that the use of the technology by the defendants exceeded the scope of the licences. The appellant seems to have merely anticipated a defence in the drafting of its statement of claim, but this would not alter the substance of the claim. Of course, pleadings can be amended to clarify the claim.

[42] In summary, infringements of the appellant's patents could potentially be both an infringement actionable under s. 55 of the *Patent Act*, and a breach of the licence agreements. For example, to the extent that the respondents covenant in the licence agreements that they would not use the patented technology beyond the uses authorized, excessive use could be a breach of the licence agreements. However, those breaches would likely be concurrent with breaches that are actionable under s. 55, and more robust remedies may be available for the infringement claim. As such, since there appears to be no effective limitation period on the infringement claim in this

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<sup>3</sup> The parties did not emphasize the distinction, if any, between the “Licensed Technology” in the licences and the scope of the invention covered by the “Patents”, and the extent of overlap between the two is not clear from the record.

action, whether there is a rolling limitation period on the licence breaches may not impact the remedy.

### *Summary*

[43] The point is that the appellant's allegation is not strictly that there were a series of breaches of the licence agreements which might entitle it to a remedial order, potentially engaging a rolling limitation period. Rather, it argues that there have been infringements of its patents since about 2010. The relevance of the licences may be primarily as a defence or justification to that claim, not as a foundation for a potential series of breaches. The respondents are not necessarily seeking "immunity from a claim" based on breaches of the licences, but rather may only be facing a limitation on any defence of justification they may have based on those licences. It follows that the issue of a "rolling limitation period" cannot be fairly determined on a summary basis on this record: *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49 at para. 47, [2019] 6 WWR 567, 86 Alta LR (6th) 240.

[44] The statement of claim does contain an allegation that the defendants disclosed confidential information in breach of the licence agreements. This, however, appears to be merely a collateral argument about how the patented technology came to be used beyond the scope of the licences. To the extent that it is a separate claim, the case management judge did not deal with it. Whether it gives rise to a separate remedial order, and whether it engages a rolling limitation period, cannot fairly be determined on this record.

[45] While the reasons of the case management judge deal with a number of issues, the formal order merely states: "The action is dismissed in its entirety". Since this conclusion was based on the interpretation of the limitations legislation found in *Secure Energy* the appeal must be allowed, and the order set aside. The applications for summary dismissal are dismissed. The claim must proceed to trial, at which time the issue of a "rolling limitation period" and any independent claim of disclosure of confidential information can be explored in full to the extent necessary. There is no issue estoppel on these issues arising from dismissal of the applications for summary dismissal, as dismissal only signifies that there are genuine issues requiring a trial: *Gault Estate v Gault Estate*, 2016 ABCA 208 at para. 18, 42 Alta LR (6th) 209; *Skunk v Ketash*, 2016 ONCA 841 at paras. 33-37, 135 OR (3d) 181.

Conclusion

[46] In conclusion, the limitations aspect of the decision in *Secure Energy* should no longer be followed. The order under appeal (including the granting of costs) is set aside, and the applications for summary dismissal are dismissed. The matter is returned to the trial court for continuation of the litigation.

Appeal heard on December 3, 2024

Reasons filed at Calgary, Alberta  
this 28th of January, 2025

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Slatter J.A.

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Pentelechuk J.A.

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Authorized to sign for: de Wit J.A.

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Authorized to sign for: Woolley J.A.

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Feth J.A.

**Appearances:**

A.P. Wilson, K.C.

D.J. Marshall

C.E. Stokes

C. Huang (no appearance)  
for the Appellant

M.R. Lindsay, K.C.

A.W. Wilkinson

K. Harder (no appearance)

M. Herron (no appearance)

for the Respondents, Alliance Pipeline Limited Partnership, Alliance Pipeline Ltd, Alliance Pipeline LP and Alliance Pipeline Inc

R.F. Smith, K.C.

K. Moffet-Burima

S.J. Frazer

J. Urquhart

C. Nimmo (no appearance)

for the Respondents, Aux Sable Liquid Products LP and Aux Sable Liquid Products Inc