

# Through The Lens Of Recent Environmental Decisions & Legislation: The Ever-changing Practice Of Environmental Law

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# Overview

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- **Environmental Civil Litigation**
- **Environmental Regulatory Proceedings**
- **Environmental Legislation**
- **Looking Ahead – 2022 & Beyond**

# Environmental Civil Litigation

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- **Limitation Periods**
- **Liability**
- **Damages**
- **Standing**

# Limitation Periods

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## ***Grant Thornton LLP v New Brunswick, 2021 SCC 31***

- Standard of discoverability is “a plausible inference of liability” as opposed to “perfect certainty”
- Supreme Court of Canada (“SCC”) unanimously held
  - [47] “A plausible inference of liability is enough; it strikes the equitable balance of interests that the common law rule of discoverability seeks to achieve.”
- SCC applying *Crombie Property Holdings Ltd.* where the Court held that suspicion of potential contamination from environmental reports may trigger the duty of inquiry and discoverability of a potential claim

# Limitation Periods

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## ***Grant Thornton* followed in Ontario, BC and Alberta**

- ***Lafferty v. Co-operators General Insurance Co.*, 2021 ABCA 359**: “Plaintiffs will have sufficient knowledge when they have some support for a suspicion that their injury is attributable to the conduct of the defendant, and assuming the defendant's liability, that an action is warranted”
- ***Balmoral Holdings Inc. v. Rogers Communications Inc.*, 2021 BCSC 2330**: BCSC applied *Grant Thornton* where the SCC held that “a cause of action arises when a plaintiff has constructive knowledge of the material facts upon which a plausible inference of liability on the defendant's part can be drawn”
- ***Gordon Dunk Farms Ltd. v HFH Inc.*, 2021 ONCA 681**: “The motion judge found, based on the record, that Gordon and Floyd Dunk knew shortly after the collapse that the three respondents were responsible for these aspects of the development and delivery of the barn, and that the barn collapsed because of the failure of one or more aspects of the planning and erection of the barn. That finding is sufficient to meet the “plausible inference of liability” test for identifying the required acts or omissions of these respondents.”

# Liability

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## ***Sorbam Investments Ltd. v Litwack et al.*, 2021 ONSC 5226**

- A property owner who bought with knowledge may be liable for failing to take steps to stop the continued migration of contaminants across a property boundary
- Neighbouring property owner liable in nuisance and negligence for allowing continued interference with Sorbam’s use and enjoyment of land, and for not taking steps to stop migration of contamination
- Neighbouring property owner not liable under *Environmental Protection Act* (“EPA”), s. 99 because neither the “spiller” nor “owner of pollutant” or “person having control of pollutant” immediately before the first discharge of the pollutant

# Damages

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## ***Sorbam Investments Ltd. v Litwack et al., 2021 ONSC 5226***

- Appropriate measure of damages is diminution in value as opposed to remedial costs because Sorbam had sold the property at time of trial
- Damages in the amount of
  - \$1.2M for diminution in value
  - \$90K spent to prepare a RA and RSC in order to sell the property

# Standing

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## ***Normtek Radiation Services Ltd v Alberta Environmental Appeals Board, 2020 ABCA 456***

- Overturned the Court of Queen's Bench judicial review ruling which upheld a decision by the Environmental Appeals Board
- EAB dismissed an appeal on basis that the appellant lacked standing as it failed to show that it was 'directly affected' by the administrative decision under review
- ABCA decision potentially expands the test for standing to include parties whose economic interests may be affected even if not directly tied to an environmental impact
- Decision potentially expands scope on preliminary issue of standing; essentially requiring an analysis of the merits of appeal if connected to an appellant's position on how it may be 'directly affected' by decision being challenged



# Environmental Regulatory Proceedings

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- **Environmental Appeals Board**
- **Administrative Monetary Penalties**
- **Compliance Orders**
- **Cruel and Unusual Punishment**
- **Jail Time**
- **Alternative Measures Agreements**
- **High Fines and Creative Sentencing**
- **Greenwashing**

# Alberta Environmental Appeals Board

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## ***West Fraser Mills Ltd. v Director, Upper Athabasca Region, Alberta Environment and Parks (Alberta, 2021)***

- Pertains to the renewal of an Approval with modifications to operate pulp and paper mill
- West Fraser appealed several of the new conditions, and sought and was granted a stay pending the appeal
- Following mediation and agreement on several issues, EAB recommended variation of the approval on agreed issues to Minister

# Alberta Environmental Appeals Board

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## ***Edey et al. v Director, Alberta Environment and Parks,*** **2021 ABEAB 33**

- Appellants requested a stay of an Approval issued to the Town of High River to build a berm under the *Water Act*, while they appealed the Approval
- Approval authorized the construction of a berm they alleged would permanently alter flow and water levels in Highwood River
- On request for the stay, EAB determined
  - appellants were directly affected
  - however, failed to demonstrate irreparable harm, or harm that could not be compensated monetarily, and
  - balance of convenience and public interest favoured denying the stay

# Alberta Environmental Appeals Board

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## ***Thorlakson Nature's Call Inc. v Director, Alberta Environment and Parks, 2020 ABEAB 30***

- An appeal of an AMP for \$1,486,861.49 issued under the *Environmental Protection and Enhancement Act* (“EPEA”) and the *Code of Practice for Compost Facilities*. Penalty consisted of base penalty of \$17,000 plus an economic benefits assessment of \$1,469,861.49
- Appellant accepted more waste at their composting facility than was authorized
- EAB accepted a negotiated arrangement between Thorlakson and the Director, and reduced economic benefits portion of penalty to \$0

# Administrative Monetary Penalties

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**Teck Coal Ltd.** – \$120,000 for failing to comply with its permit by failing, on three occasions, to comply with toxicity limits (\$40,000 per occasion)

**Harbour Environmental Group Ltd., operating the Calgary Waste Management Facility** – \$47,780.65 for violating approval by

- failing to report contraventions and monitor
- storing waste directly on ground, and
- disposing of excess produced water to the surrounding environment

# Administrative Monetary Penalties

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**1506928 Alberta Ltd. operating in Cypress County –**  
\$16,000 for failing to immediately orally report the size and location of a spill greater than 2 m<sup>3</sup> on site

**Trans Mountain Pipeline ULC – Canada Energy Regulator**  
issued

- AMP-001-2022 in the amount of \$88,000 for “Inadequately implementing management system requirements for establishing and implementing processes, as required by sections 6.5(1)(k) and (q) of the Onshore Pipeline Regulations.”
- AMP-002-2022 in the amount of \$100,000 for failing to “submit an application for decommissioning as prescribed by section 45.1 of the Onshore Pipeline Regulations.”

# Compliance Orders under Alberta's *Emissions Management and Climate Resilience Act*

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## **Alberta's *Carbon Competitiveness Incentive Regulation***

- Replaced the Specified Gas Emitters Regulation on January 1, 2018
- Applies to any facility that had emitted 100,000 tonnes or more of carbon dioxide in 2003 or any subsequent year
- Benchmarking methodology: product benchmarks apply to all regulated facilities producing a given product; a facility specific benchmark applies only to one facility
- Compliance flexibility: accounts for flexibility for compliance, including on-site reductions and generation of emissions performance credits, use of credits or offsets, and payment to a climate fund

# Compliance Orders under Alberta's *Emissions Management and Climate Resilience Act*

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## **Connacher Oil and Gas Limited**

- Output based allocation was 107,014 tonnes, expressed on a CO<sub>2e</sub> basis, for 2019
- AEP records show no fund credits used to calculate Site's net emissions, therefore net emissions were 212,011 tonnes, 104,997 tonnes over output based allocation
- Compliance Order issued requiring payment of \$3,149,910.00 into the Technology Innovation and Emissions Reduction Fund
- Payment amount based on the cost for Connacher to purchase 104,997 fund credits to be in compliance



# Cruel and Unusual Punishment

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## ***R v Boudreault*, 2018 SCC 58**

[36] “... the mandatory victim surcharge constitutes punishment, engaging s. 12 of the Charter. I conclude that the imposition and enforcement of the surcharge on the poorest individuals among us result in cruel and unusual punishment.”

## ***Quebec (AG) v 9147-0732 Quebec Inc*, 2020 SCC 32**

SCC held that the *Charter*, s. 12 does not apply to corporations; corporations cannot rely on *R v Boudreault*

## ***R v Envirogun Ltd.*, 2019 SKQB 89, 2021 SKCA 144**

Nothing in *R v Boudreault* purported to strike down legislative provisions imposing mandatory surcharges in addition to fines for provincial (non-Criminal Code) offences

# Jail Time Removed

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## ***R v Collingwood Prime Realty Holdings, 2021 ONCA 665***

- Sentencing judge fined company and its director \$420,000 and 45-day jail term for director
- Appeal judge reduced fine to \$150,000 (company) and \$170,000 (director)
- ONCA restored original fines of \$420,000 but upheld the removal of incarceration
  - [11] “We agree with the appellate judge that there was an error in principle in comparing the case to *Sinclair* where there were deliberate actions to harm the environment which are not analogous to the situation here. Having found otherwise, the sentencing judge erred in principle and the appellate judge did not owe the decision deference. We agree that incarceration of El-Hinn is not proportional and should be eliminated.”

# Jail Time and Lifetime Ban

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## ***R v Steer, 2021 BCSC 2404***

- Commercial fisherman convicted of five offences under the *Fisheries Act* relating to the landing of fish without validation, not maintaining harvest logs, and offering fish for sale caught without a licence
- Defendant had multiple prior convictions and other aggravating factors
- Sentenced to 6 months in jail, followed by a 3-year Probation Order; for the first 12 months of the Order, the defendant must obey a curfew
- Court further granted
  - order for forfeiture of the vessel and fishing gear
  - a lifetime fishing prohibition
  - a lifetime prohibition from being on any fishing vessel
  - a five-year prohibition from being involved in the purchase or sale of fish or fishing vessels

# Alternative Measures Agreement

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## ***R v Drewlo Holdings Inc. (Ontario, 2021)***

- Drewlo Holdings Inc. was charged under the *Fisheries Act* for depositing hydrocarbons into Schneider Creek near Kitchener/Waterloo
- On June 24, 2021, Drewlo entered into an alternative measures agreement with the Crown requiring Drewlo to
  - pay \$300,000 to the Government of Canada's Environmental Damages Fund, and
  - retain a qualified environmental consultant to review the company's current environmental practices, procedures
- On November 10, 2021, charges dismissed after AMA requirements completed

# Regulatory Inspection

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## ***R v Land Petroleum International Inc. (Alberta, 2021)***

- Corporate defendant found guilty of contravening the *Oil and Gas Conservation Act*
- Failing to permit or assist in an inspection by the Alberta Energy Regulator (AER)
- After gaining access to the facility, AER inspectors found 22 non-compliances
- Land Petroleum International ordered to pay \$92,000 fine

# Pesticides

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## ***R v Canadian National Railway Company (BC, 2021)***

- CNR sprayed pesticides along a rail corridor close to the Skeena River and nearby, tributaries and wetlands between Terrace and Prince Rupert, BC
- ECCC led investigation in collaboration with the British Columbia Conservation Officer Service
- Pesticides were deleterious to fish
- CNR convicted and fined \$2,500,000 for violating section 36(3) of the *Fisheries Act*

# Waste Rock Leachate

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## ***R v Teck Coal Ltd. (BC, 2021)***

- Teck Coal deposited coal mine waste rock leachate into the upper Fording River in southeastern BC
- Teck Coal entered a guilty plea on two counts of unlawfully depositing a deleterious substance into water frequented by fish contrary to s. 36(3) of the *Fisheries Act*
- \$60 million (fine and monetary court orders) in addition to pollution reduction measures
- Highest fine ever imposed by a Canadian court for a violation of the *Fisheries Act*

# Effluent

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## ***R v Valoris (Quebec, 2020)***

- Valoris released effluent containing ammonia nitrogen, which is lethal to rainbow trout, into a nearby stream between March 13, 2014 and October 12, 2016
- Pleaded guilty to one count contrary to the *Fisheries Act*, s. 36(3)
- Fined \$500,000 to be paid to EDF and requirement to ensure monitoring of the water-treatment system



# Chlorinated Water

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## ***R v Gibson Energy ULC & GEP ULC (Alberta, 2021)***

- Fire suppression system leak caused millions of litres of chlorinated water to escape a retention pond, enter a creek, and flow into the North Saskatchewan River
- Foreseeable that water from a line break or valve failure in a system without sufficient internal shut off mechanisms could overflow the retention pond
- Convicted under *Fisheries Act*
- Fined \$1.5 million, to be directed to EDF
- Also ordered to make a presentation to industry in Strathcona County about the danger of chlorinated water

# Migratory Birds

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## ***R v EllisDon Construction Services Inc. (Alberta, 2021)***

- An Environment and Climate Change Canada inspector discovered seven bird boxes had been taken down from fence posts and later reattached
- Bird boxes were being used by Tree Swallows
- Defendant pleaded guilty to one count under the *Migratory Birds Regulations* pursuant to the *Migratory Birds Convention Act, 1994* for disturbing migratory bird nests without a permit
- Ordered to pay a \$100,000 fine and develop educational material on migratory birds for staff and subcontractors to review on-site during orientation

# Creative Sentencing Order

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## ***R v Suncor Energy Products Partnership Produits Suncor Energie (Alberta, 2021)***

- Defendant pleaded guilty to one count of breaching a condition of its Approval under Alberta's EPEA through the release of unauthorized air effluent streams
- Defendant admitted that a valve was not properly closed, resulting in the release of hydrogen sulphide gas; five nearby employees were sent to the hospital for treatment
- Creative Sentencing Order: \$99,000 will be allocated to the Strathcona Community Hospital Foundation to purchase respiratory support medical equipment

# Greenwashing

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## ***R v Keurig Canada Inc. (Quebec, 2021)***

- Competition Bureau found that Keurig Canada’s claim regarding the “recyclability” of their single-use K-Cups were false and misleading contrary to the *Competition Act*
- Keurig Canada ordered to
  - pay \$3 million penalty and \$85,000 in costs
  - donate \$800,000 to environmentally focused charity, and
  - publish corrective notice on various platforms

# Environmental Legislation

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- **Excess Soil across Canada**
- **Extension of Expiry of EPEA Regulations**
- **Activity Designation Regulation**
- **Extended Producer Responsibility**
- **Air Quality Monitoring Guideline**
- **Oil & Gas Liability Management**
- **AER Updated Guidance Documents**
- **Alberta Hydrogen Road Map**
- **Geothermal Resource Development**

# Excess Soil Across Canada

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- **Ontario:** *On-site and Excess Soil Management Regulation* (O. Reg. 406/19) and related laws
- **British Columbia:** contaminated soil governed by *Contaminated Sites Regulation* under the *Environmental Management Act*
- **Quebec:** *Regulation respecting traceability of excavated contaminated soils* came into force on November 1, 2021 and will be implemented in phases

# Extension of Expiry of EPEA Regulations

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- **Expiry of several EPEA regulations extended for 5 years to allow for review, including**
  - Beverage Container Recycling Regulation
  - Designated Material Recycling and Management Regulation
  - Electronics Designation Regulation
  - Lubricating Oil Material Designation Regulation
  - Paint and Paint Container Designation Regulation
  - Tire Designation Regulation, and
  - Release Reporting Regulation

# Activities Designation Regulation

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- **Amendments to the Activities Designation Regulation, AR 276/2003 pursuant to Alberta's EPEA**
  - AR 262/2021: effective December 16, 2021, added “hydrovac facility” and “hydrovac waste”, the construction, operation or reclamation of a hydrovac facility, and the *Code of Practice for Hydrovac Facilities*
  - AR 257/2021: effective January 1, 2022, added “heating plant” and “geothermal heating operation”



# Bill 83 – EPEA – Extended Producer Responsibility

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- **Came into force on December 2, 2021**
- **Key Provisions**
  - Enables the creation of effective and efficient producer-run provincial recycling systems for single-use plastics, packaging and paper products, and hazardous and special products
  - Flexibility to set collection and recovery requirements in regulation, rather than in statute, ensuring that producer-run material collection and recovery programs can be customized while still meeting performance targets and expectations
  - Ensures that regulatory requirements are reasonable and enforceable by allowing exemptions for various elements of Extended Producer Responsibility (“EPR”) systems, such as the designated materials, types of activities, or classification of industry
  - Ensures that the necessary information can be collected to determine eligibility for these exemptions

# Air Quality Modeling Guideline

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- **Came into effect November 15, 2021**
  - Intended for regulatory applications that require an EPEA approval, that operate under a Code of Practice for emissions to the atmosphere, or as required by other regulatory agencies within Alberta
  - 3 ‘companion documents’
    - a clarification document on interpreting modeling results
    - a spreadsheet for determining modeling terrain
    - a response to stakeholder comments on the original draft guideline

# Oil and Gas – Liability Management

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- **Liability Management Framework**
  - Upholds the polluter-pay principle
  - Establishes five-year rolling spending targets for reclamation that every active site operator must meet
  - Establishes a formal opt-in mechanism for landowners to nominate sites for clean up
  - Implements a process to address legacy and post-closure sites
  - Includes the expanded role of the Orphan Well Association set out in the *Liabilities Management Statutes Amendment Act* – came into effect June 15, 2020

# AER Updated Guidance Documents – Directives

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- **Directive 006:** Licensee Liability Rating (LLR) Program
- **Directive 020:** Well Abandonment
- **Directive 056:** Energy Development Applications and Schedules
- **Directive 065:** Resources Applications for Oil and Gas Reservoirs
- **Directive 067:** Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals
- **Directive 087:** Well Integrity Management
- **Directive 088:** Licensee Life-Cycle Management

# AER Updated Guidance Documents: Manuals

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- **Manual 012 – Energy Development Applications: Procedures and Schedules**
  - procedural instructions and forms necessary to apply to construct or operate facilities, pipelines, or wells under Directive 056
- **Manual 013 – Compliance and Enforcement Program**
  - compliance and enforcement program, including education about requirements
- **Manual 021 – Contamination Management**
  - regulatory requirements and expectations for remediating contamination related to oil and gas, in situ, and pipeline activities regulated by the AER
- **Manual 023 – Licensee Life-Cycle Management**
  - supplements Directive 088: Licensee Life-Cycle Management

# Alberta Hydrogen Roadmap

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- **Opportunity to diversify to clean energy source**
- **Natural gas combined with carbon capture, utilization and storage provide way to scale hydrogen production**
- **Hydrogen markets**
  - residential and commercial heating
  - transportation
  - industrial processes
  - power generation and energy storage
  - export market

# Geothermal Resource Development

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- **AER regulation of deep geothermal projects (AEP for shallow geo-exchange projects)**
- **Economic development and enhance community resiliency**
- **Responsible resource development and protection of landowner rights**
- **Applications for geothermal leases for exploring and developing geothermal resources being accepted**
- **Information Bulletin 2022-02 outlines business requirements and best practices for geothermal resource leases**

# Looking Ahead – 2022 & Beyond

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## **Environmental Litigation**

- Fact specific assessment of limitation periods with review of actual and constructive knowledge
- Measure of damages – diminution in value vs remediation costs

## **Environmental Regulatory Proceedings**

- Continued abatement activity across sectors
- Use of alternative measures agreements
- Increased fines and creative sentencing for prosecutions

## **Environmental Legislation**

- Opportunities: hydrogen, geothermal, extended producer liability
- Amended & new legislation, regulations, guidelines



# Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **Environmental, Indigenous, and Energy law**
- **18 lawyers**
  - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
  - offices in Toronto, Ottawa, Calgary, and Yellowknife

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