

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

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Overview

- **Environmental Civil Litigation**
- **Environmental Regulatory Litigation**
- **Environmental Legislation**
- **Looking Ahead**

Environmental Civil Litigation

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

Limitation Periods

Grant Thornton LLP v New Brunswick, 2021 SCC 31

- Degree of knowledge for the 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

***Gordon Dunk Farms Ltd. v HFH Inc.*, 2021 ONCA 681**

- Ontario Court of Appeal (“ONCA”) applied the SCC’s decision in *Grant Thornton*

[38] “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.”

- ONCA upheld the motion judge’s decision that dismissed Gordon Dunk Farms’ claim as statute-barred

Limitation Periods

***Albert Bloom Ltd. v LTC et al.*, 2021 ONCA 74 (“#1”)**

- Third Party Claim clock presumptively starts to run on the date of service of a claim but can be rebutted by discoverability principles
- Actual knowledge acquired through environmental reports identify former owners as the alleged contaminant source

[25] “...LTC first knew that the injury or loss occurred and was caused or contributed by an act or omission on April 30, 2013, when it was provided with the issued notice of action and the statement of claim. According to the motion judge, the day the LTC first knew that Eaton caused the loss or damage was February 3, 2012, when it was provided with environmental reports identifying the automotive manufacturing operations carried on by Eaton as a possible source of contaminant.”

- ONCA upheld the motion’s judge decision dismissing LTC’s Third Party Claim against Eaton (former owner of the LTC property) as statute-barred

Limitation Periods

***Albert Bloom Ltd. v LTC et al.*, 2021 ONSC 6674 (“#2”)**

- Limitations clock begins to run when a potential tortfeasor is identified as a possible contributing source of the contaminant
- A claimant may have actual or presumed knowledge of a potential claim based on information from environmental reports, public records (i.e., title search) and/or advice from an environmental consultant

Liability

George W. Drummond Limited v. 595831 Ontario Inc., (2022 ONSC)

- Drummond sued 595831 for unpaid soil remediation work
- Drummond agreed to remove UST at a fixed price, remainder of excavating and backfilling work on a unit rate basis
- Drummond advise to take instructions from Geotechnical Engineer, Paterson Group
- 595831 argued that contract was not enforceable, or in the alternative, Drummond's work was inadequate
- Court looked to the conduct of the parties, emails exchanged, and witness testimony to find a valid contract, and ordered 595831 to pay \$327,123.62 to Drummond for unpaid invoices
- Court was critical of expert testimony of 595831, Expert "appears to be reaching to find fault" with Paterson, and Expert's opinion was contradicted by evidence presented at trial
- Paterson not negligent in work completed nor in instructing Drummond

Liability

***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 *EPA*, s. 99 because not the "spiller" nor "owner of pollutant" or "person having control of pollutant" immediately before the first discharge of the pollutant

Damages

***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 and \$90K spent to prepare a RA and RSC in order to sell the property

Liability

MTD v. 1361821 & Sandal, 2022 ONSC 2995

- 136 Ontario and Mr. Sandal knowingly bought contaminated property and took no action as contaminants migrated off-site for decades
- Liability found in nuisance, negligence and trespass
- Liability joint and several
 - Court pierced the corporate veil
 - Mr. Sandal`s actions were “nothing short of egregious”

Remedies & Damages

MTD v. 1361821 & Sandal, 2022 ONSC 2995

- Damages in the amount of \$1.8M
- Declaration that 136 Ontario and Mr. Sandal are bound by law to indemnify MTD for
 - environmental legal, investigation and remediation costs
 - environmental regulatory liability and environmental civil liability
- Order for 136 Ontario and Mr. Sandal to remediate and file a Record of Site Condition within 6 years
- Order for additional \$2.8M in damages if remedial Order not complied with
- Declaration that the judgment can be registered on title and binds successors in title, lessees and mortgages

Environmental Regulatory Litigation

- **Cruel and Unusual Punishment**
- **Case Law Update**
 - Large Fines
 - Unique Sentencing
 - Alternative Measures Agreements
 - Greenwashing

Cruel and Unusual Punishment

***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

Case Law Update – Biggest Fine – Emissions

R v Volkswagen Aktiengesellschaft (OCJ 2020)

- Volkswagen AG imported vehicles into Canada that did not meet emission standards
- Volkswagen AG pleaded guilty to 60 charges under *Canadian Environmental Protection Act*
- Volkswagen AG fined \$196.5 million
 - largest environmental fine in Canadian history
 - fine directed to Environmental Damages Fund

Case Law Update – Appeal of Jail Time

R v Collingwood Primes 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.”

Case Law Update – Waste Rock Leachate

R v Teck Coal Ltd. (BCPC 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*

Case Law Update – Effluent

R v Husky Oil Operations Ltd (SKPC 2019)

- Between July 20 and 21, 2016, about 90,000 litres of crude oil leaked from Defendant company's pipeline and entered North Saskatchewan River
- Oil was found to be deleterious to fish and birds
- Defendant fined total of \$3.82 million
 - \$2.5 million for violating *Fisheries Act*
 - \$200,000 for violating *Migratory Birds Convention Act, 1994*
 - \$800,000 for violating Saskatchewan *Environmental Management and Protection Act* plus 40% VIS of \$320,000

Case Law Update – Effluent

R v Husky Oil Operations Ltd (SKPC 2022)

- 2018 release of approximately 2.8 million L of process water from Westhazel pipeline
- Process water travelled 450 m over land (resulting in dead vegetation) and then entered Englishman River
- Process water was determined to be deleterious to fish
- \$600,000 fine to EDF for violating the *Fisheries Act*

Case Law Update – Effluent

R v Irving Pulp & Paper Limited (NBPC 2018)

- Defendant company discharged improperly treated effluent into St. John River between June 2014 and August 2016
- In 2018, defendant convicted under *Fisheries Act*
- Defendant fined \$3,500,000, of which \$2,340,000 was directed to EDF and \$1,160,000 directed towards UNB Canadian Rivers Institute
- Company also directed to commission new effluent treatment system

Case Law Update – Tailings Waste

R v Syncrude Canada Ltd (ABPC 2019)

- Syncrude abandoned tailings pond containing bitumen without completing remediation
- Contractor for Syncrude found 30 decomposing Great Blue Herons in pond and one live heron covered in oil
- Syncrude convicted under Alberta's *EPEA* and federal *Migratory Birds Convention Act, 1994*
- Syncrude fined \$2.75 million
 - \$25,000 fine plus VFS to court for *EPEA* charges
 - \$950,000 held in trust by AER to fund wildlife, biodiversity projects (RFP process)
 - \$1.8 million directed to EDF

Case Law Update – Chlorinated Water

R v Gibson Energy ULC & GEP ULC (ABPC 2021)

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

Case Law Update – Creative Sentencing Order

R v Suncor Energy Products Partnership Produits Suncor Energie (ABPC 2021)

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

Case Law Update – Alternative Measures Agreements

Drewlo Holdings Inc. (2021)

- Drewlo Holdings Inc. was charged under the *Fisheries Act* depositing hydrocarbons into Schneider Creek near Kitchener Waterloo
- On June 24, 2021, Drewlo entered into an alternative measures agreement to
 - pay \$300,000 to the Government of Canada’s Environmental Damages Fund
 - retain a qualified environmental consultant to review the company’s current practice among other things
- On November 10, 2021, charges dismissed after AMA requirements were completed

Case Law Update – Greenwashing

Keurig Canada Inc. (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 *Competitions Act*
- Keurig Canada ordered to
 - pay \$3 million penalty and \$85,000 in costs
 - donate \$800,000 to environmentally focused charity
 - publish corrective notice on various platforms

Environmental Legislation

- **Excess Soil**
- **Administrative Penalties**
- **Changes to Brownfield Regime**
- **Changes to D-Series Guideline**
- **Odour Guidance and Tools**
- **Changes to Compliance Policy**

Excess Soil

- **Ontario introduced a new framework to govern excess soil under the *On-Site and Excess Soil Management Regulation* (O. Reg. 406/19)**
- **O. Reg. 406/19 is being phased in over time**
 - January 1, 2021: reuse rules, waste designations and approvals
 - January 1, 2022: notice-filing and related planning document and formal tracking system requirements (paused to January 1, 2023)
 - January 1, 2025: restrictions on landfilling soils that meet the Excess Soil Standards
 - January 1, 2022 to January 1, 2026: grandfather provisions
- **Regulatory changes for beneficial reuse of excess soils under the *Aggregate Resources Act***

Proposed Administrative Penalties

- **Ontario has proposed to amend five environmental regulations to enable administrative penalties**
- **Key features**
 - absolute liability
 - rights of review and/or appeal to the Ontario Land Tribunal
 - quantum calculated by formula
 - money collected to be disbursed through Ontario Community Environment Fund
- **Public consultation closed on March 28, 2022**
- **Implementation timeline?**

Proposed Changes to Brownfield Regime

In January 2021, Ontario posted a proposal to

- Update the RSC Guide to include
 - changes to processes and policies, and the recent introduction of O. Reg. 406/19, and
 - improvements that support high quality RSC and Risk Assessment (“RA”) submissions
- Update the “Procedures for the Use of Risk Assessment” to include
 - alignment with the latest regulatory requirements and best practices related to brownfield RAs
- Create a Technical Guidance on Soil Vapour Intrusion Assessment document

Proposed Changes to D-Series Guideline – Land Use Compatibility

- **MECP received comments between May 2021 and August 2021**
- **On October 13, 2021, Ontario posted on the Environmental Registry of Ontario (“ERO”) that it will no longer proceed with the proposed changes**
- **Current D-Series Guidelines for land use compatibility remain in effect**

Proposed Guideline to Address Odour Mixtures

- **Proposed odour guidance to help ensure there is**
 - less regulatory uncertainty for facilities
 - better coordination with land planning decisions
 - more effective remediation of issues caused by odour mixtures
- **Odour mixtures (total odour) are not specifically addressed under the Local Air Quality Regulation (O. Reg. 419/05)**
- **Development of additional guidance and tools including technical bulletins, screening forms and odour technology benchmarking report**

Proposed Changes to Environmental Compliance Policy

- **Proposed updates to**
 - environmental compliance policy
 - referral tool
 - service standards
- **Increased focus on high-risk incidents to better hold polluters accountable**
- **Updated tools and resources for environmental officers to determine the level of intervention required**
- **Referral of low-risk cases to agencies and municipalities**

Looking Ahead

Civil Cases

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

Regulatory Cases

- increased fines
- use of alternative measures agreements and unique requirements

Legislation

- new and amended legislation
- proposed regulations under legislation

Willms & Shier Environmental Lawyers

- **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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