

# Newton's Pendulum: The Swinging Spheres of Environmental Law

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This presentation provides general information and is not intended to provide legal advice.  
Audience members should seek legal advice for specific situations.

**RemTech East**  
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# Overview

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- **Environmental Civil Litigation Cases**
- **Environmental Regulatory Cases**
- **Environmental Legislation Update**
- **Looking Ahead in 2023**

# ENVIRONMENTAL CIVIL LITIGATION CASES

# Environmental Civil Litigation – Breach of Contract

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

- Drummond sued 595831 Ontario Inc. 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 advised to take instructions from 595 Ontario's Geotechnical Engineer
- 595 Ontario 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 the Owner to pay \$327,123.62
- Court did not accept 595 Ontario's Expert and found Expert's opinion was contradicted by evidence presented at trial
- Geotechnical Engineer not negligent in work completed

# Environmental Civil Litigation – Nuisance

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## ***Rintoul v Drummond* (2022 ONSC)**

- Neighbours in rural Ontario
- Defendants installed and used an outdoor wood-fired boiler (“OWB”)
- Plaintiffs allege that OWB resulted in the release, discharge, emission and migration of contaminants, which substantially and unreasonably interfered with their use and enjoyment of their property
- Trial judge accepted that plaintiffs suffered a serious and persistent interference with the use and enjoyment of their property
- Permanent injunction, \$40,000 in damages
- \$90,000 in legal costs – offers to settle

# Environmental Civil Litigation – Negligence, Nuisance and Trespass

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## ***MTD v 1361821 & Sandal (2022 ONSC)***

- Defendants bought property with knowledge that property was contaminated with chlorinated solvents
- Defendants committed to City of Kitchener to remediate contamination at Defendants' property
- Plaintiff owns multiple properties that border Defendants' property on three sides, in the shape of a horseshoe
- Defendant self-represented, did not respond to Request to Admit and did not lead any evidence at trial
- At time of trial, Defendants had not remediated contamination
- Court accepted Plaintiff's environmental expert evidence

# Environmental Civil Litigation – Negligence, Nuisance and Trespass

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## ***MTD v 1361821 & Sandal (2022 ONSC)***

- Court found that chlorinated solvents had migrated and continued to migrate to Plaintiff's properties from Defendants' property for over 20 years with full knowledge of the Defendants
- Defendants liable in negligence, nuisance and trespass to land
- Contaminant allowed to escape from Defendants' property and migrate to Plaintiff's properties
- 11<sup>th</sup> hour limitations defence rejected because Court found contamination continued to flow
- Personal liability for director of Defendant numbered company

# Environmental Civil Litigation – Damages

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## ***MTD v 1361821 & Sandal (2022 ONSC)***

- Damages
  - \$1.8M for nuisance, negligence and trespass
  - \$2.8M if Defendants do not comply with Court-ordered schedule to remediate Defendants' property and file Record of Site Condition on the Environmental Site Registry
- Defendants to remediate its property in accordance with Court-imposed schedule
- Corporate director and corporation jointly and severally liable for damages



# Environmental Civil Litigation – Negligence, Nuisance and EPA, s. 99

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## ***Sorbam Investments Ltd. v Litwack (2022 ONCA)***

- Appellant (1129292 Ontario Limited) and the respondent (Sorbam) owned neighbouring properties
- Central issues at trial were
  - whether contaminants had migrated from the appellant's property to the respondent's property, and
  - when the appellant received notice of the contaminant migration issue
- Trial judge found appellant liable for negligence and nuisance, even though not polluter because purchased with knowledge and took no steps to stop migration in a reasonable amount of time
- Appellant not liable under EPA, s. 99 because no control over pollutant before discharge
- Trial decision upheld by Ontario Court of Appeal

# Environmental Civil Litigation – Reliance

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## ***Niagara Regional Housing v Trustees of Carleton United Church et al. (2022 ONSC)***

- Motion for summary judgment by LEX Scientific Inc. to dismiss NRH's claim
- NRH entered APS with Church to purchase property in St. Catharines, ON
- LEX's proposal contained Disclaimer Clause that stated LEX Report was prepared for sole benefit of Church and limited third parties' reliance
- Without LEX's knowledge or consent, Church gave a copy of LEX Report to NRH during sale transaction
- Court dismissed claim against LEX
- LEX's Disclaimer Clause excluded imposition of duty of care by LEX to NRH
- Disclaimer Clause can extinguish any duty of care and defeat a claim in negligence, even where there is actual negligence

# Environmental Civil Litigation – Reliance

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## ***0694841 B.C. Ltd. v Alara Environmental Health and Safety Limited*** **(2022 BCCA)**

- Holding Co. (used to make offers to purchase real estate) retained consultant to undertake Phase I & Phase II ESAs for pre-purchase due diligence
- Consultant did not find contamination and Consultant’s report contained disclaimer that only “client” could rely on report
- Holding Co. assigned its rights under the APS to a Related Co.
- Six years after purchasing property, Related Co. found contamination and sued Consultant for negligent misrepresentation
- Chambers judge held Related Co. cannot rely on environmental assessment prepared for Holding Co., due to consultant disclaimer re liability to third parties
- Appeal to BCCA dismissed

# ENVIRONMENTAL REGULATORY CASES

# Environmental Regulatory Cases – Approvals

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## ***Darling International Canada Inc v Ontario (2022 OLT)***

- Appeal of ECA with an Odour Performance Limit
- OLT may issue an order approving a settlement where all statutory requirements and the public interest are satisfied
  - OLT Rules of Practice and Procedure, Rule 12.1
- OLT held that conversion of binding Odour Performance Limit to an Odour Objective will “ensure environmental protection and consistency with the EPA’s purpose and provisions.”

# Environmental Regulatory Cases – Use of Experts

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## ***Ontario (Natural Resources and Forestry) v South Bruce Peninsula (Town) (2022 ONCA)***

- Town convicted of 2 counts of damaging endangered bird's habitat
- Town appealed summary conviction decision of appeal judge dismissing Town's appeal from trial decision, arguing the Court below erred
  - in their interpretation of the word "damage" in s.10(1) of the *Endangered Species Act, 2007*, and
  - in holding that opinion evidence of MNR's biologist was admissible because MNR witness lacked necessary impartiality and independence
- Not one of rare cases where evidence of a proposed expert should be excluded because they were unwilling or incapable of carrying out duty to the court
- ONCA reiterated principles from *White Burgess*

# Environmental Regulatory Cases – Alternative Measures

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## ***R v Barclay Construction Group Inc. (OCJ 2023)***

- Barclay Construction Group Inc. was charged under *Fisheries Act* for depositing sediment-contaminated water into Lake Ontario
- In 2022, Barclay entered into alternative measures agreement (AMA) with Crown requiring Barclay to
  - pay \$175,000 to Government of Canada's EDF
  - promote effective implementation of EMS by identifying improvements made, and lessons learned, at an open house and a construction industry conference, and
  - develop and finalize a standard operating procedure on spill containment and cleanup, and train all their field employees on this procedure
- In 2023, charge stayed after completion of AMA

# Environmental Regulatory Cases – Effluent

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## ***R v ArcelorMittal Canada Inc. and 7623704 Canada Inc.*** **(2022 QCPC)**

- ArcelorMittal Canada Inc. and 7623704 Canada Inc. partners in mining company that operates Mont-Wright mining complex in Fermont, Quebec
- Between May 2011 and May 2013, 33 (unauthorized) deposits of toxic substances made in water frequented by fish
- ArcelorMittal guilty of 93 charges and 7623704 guilty of 5 charges for violating the *Fisheries Act* and *Metal Mining Effluent Regulations*
- Fine of \$15 million to be paid to Environmental Damages Fund - ArcelorMittal fined \$14,400,000 and 7623704 fined \$600,000
- Companies added to Environmental Offenders Registry



# Environmental Regulatory Cases – Drilling Fluid

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## ***R v Michels Canada Co. (2022 BCPC)***

- In August 2017, Michels carried out horizontal directional boring operations in Coquitlam, BC
  - release of drilling fluid/sediment-laden water to storm sewer and into Cape Horn Creek
  - 20 dead fish in creek following release
- In September 2017, Michaels carried out horizontal directional boring operations in Surrey, BC
  - release of drilling fluid/sediment-laden water to storm sewer and into Quibble Creek
  - 533 dead fish in creek following release
- Michels plead guilty to charges under *Fisheries Act*, s. 36(3) and fined \$2.8 million directed to Environmental Damages Fund
- Company added to Environmental Offenders Registry

# Environmental Regulatory Cases – Species at Risk

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## ***R v Canac-Marquis Grenier Ltée (2022 QCPC)***

- Between December 21, 2021, and March 23, 2022, Canac-Marquis Grenier blew snow from lumber yard into western chorus frog habitat protected by *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence -Canadian Shield Population)* in La Prairie, Québec
- Pled guilty to one count of violating the prohibitions under the *Emergency Order for the Protection of the Western Chorus Frog* and the *Species at Risk Act*
- \$40,000 fine paid to Receiver General for Canada

# ENVIRONMENTAL LEGISLATION UPDATE

# Environmental Legislation Update

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## ***Single-use Plastics Prohibition Regulations***

- Part of Canada's plan to address pollution, meet its target of zero plastic waste by 2030, and help reduce greenhouse gas emissions
- Starting December 20, 2022, prohibition on manufacture and import for sale of:
  - single-use plastic checkout bags
  - cutlery
  - foam, black plastic and “oxo-degradable” plastic takeout food containers
  - stir sticks, and
  - straws
- Prohibition on sale of items comes into force in December 2023
- Further prohibitions on manufacture, import and sale in coming 3 years

# Environmental Legislation Update

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## ***O. Reg. 406/19 On-Site and Excess Soil Management - Notice Filing Requirements***

- Starting on January 1, 2023, project leader must file notice on registry before transporting excess soil from project area unless exempt (also notice-filing requirement for reuse site receiving excess soil for final beneficial reuse, unless exempt)
- Registry operated by Resource Productivity and Recovery Authority (RPRA)
- Project leader exempt from requirement to file notice if
  - contract for excess soil management entered into before January 1, 2022
  - Schedule 2 exception applies, or
  - not required to file notice pursuant to s. 8(1.1) (this is new)

# LOOKING AHEAD IN 2023

# Looking Ahead in 2023

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## **Civil Cases**

- injunctive relief as well as monetary damages awarded
- measure of damages – diminution in value vs remediation costs
- consider consultant retainer and whether or not reliance extended

## **Regulatory Cases**

- increased fines and many fines directed to EDF
- consideration of alternative measures
- increased attention to violations of species at risk legislation

## **Legislation**

- moving forward with single-use plastics ban – staged approach for the next few years
- practical implications of excess soil regime

# Willms & Shier Environmental Lawyers

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- **Established nearly 50 years ago**
- **Environmental, Indigenous, and Energy law**
- **16 lawyers**
  - eight 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



# Contact Information

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