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*Environmental Liability Viewed through the Lens of Recent
Environmental Law Decisions*



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Willms & Shier Environmental Lawyers

Virtual SMART Remediation Seminar
February 3, 2022

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Environmental Liability Viewed Through the Lens of Recent Environmental Law Decisions

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Audience members should seek legal advice for specific situations.

SMART Remediation Seminar Series
Virtual Session
February 3, 2022



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Outline

- Contaminated land litigation
- Corporate directors/officers exposure to liability
- Environmental indemnity in an agreement
- Environmental obligations and bankruptcy
- Canada's regulation of climate
- Greenwashing



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Contaminated Land – Limitation Periods

***Albert Bloom Ltd. v LTC et al.*, 2021 ONCA 74 (“Albert Bloom #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 that 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 that dismissed the LTC's Third Party Claim against Eaton (former owner of the LTC property) as statute barred

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Contaminated Land – Limitation Periods

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

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Contaminated Land – 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

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Contaminated Land – 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

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D & O – Cruel & Unusual Punishments

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

- Mandatory victim surcharges related to environmental and criminal offences do not violate the *Charter*, section 12
- Saskatchewan Court of Queen’s Bench held
 - [109] “I do not see the decisions in *Boudreault* as being applicable in the circumstances. Nothing in *Boudreault*, as I read it, purported to strike down legislative provisions imposing mandatory surcharges imposed in addition to fines for provincial, non-*Criminal Code* offences.”
- Saskatchewan Court of Appeal dismissed Envirogun’s application

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D & O – 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.”

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D & O – Appeal of MECP Orders

Alizadeh v Ontario (MECP), (2019, ERT)

- Leachate was discharging to groundwater and surface water from a wood waste landfill site
- 2013 Ministry Order - Company & Director prosecuted and ordered to complete the work required in 2013 Ministry Order
- 2018 Ministry Order - Company & Director to prevent migration of contaminants
- Appeal of 2018 Ministry Order, ERT held
 - directors and officers presumed to have management & control
 - financial hardship will not relieve a director or officer of obligations under an Order

Environmental Indemnity in an Agreement

Resolute FP Canada Inc. v Ontario (AG) 2019 SCC 60

- **ONCA held** - 1985 Indemnity obliged the Province to indemnify for the actions ordered
- 1985 Indemnity would only cover the actions ordered if Resolute and Weyerhaeuser had the benefit of the indemnity
 - Resolute was not entitled to indemnification, as Bowater fully assigned the benefit to Weyerhaeuser in 1998
 - Weyerhaeuser's entitlement was remitted to the ONSC
- **SCC held** - 1985 Indemnity did not cover the actions ordered
 - 1985 Indemnity applied to third party claims only
 - "broader context and factual matrix"

Environmental Obligations & Bankruptcy

Yukon v Yukon Zinc Corporation (2020 YKSC)

- Yukon Zinc Corporation (“YZC”) owned the Wolverine Mine and ceased operations
- Yukon Government held \$10.5M in security to fund clean-up
- Yukon Government sought additional \$25M in security due to deteriorating conditions
- YZC went bankrupt
- YKSC held Yukon Government did not have claim provable in bankruptcy for additional \$25M...yet!
- YKCA agreed in part - Yukon Government has sought leave to appeal to the SCC re super-priority claim against mineral claims

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Environmental Obligations & Bankruptcy

PwC v Perpetual Energy Inc., 2021 ABCA

- Perpetual Energy Inc. sold mature natural gas assets with significant future Abandonment and Reclamation Obligations (“AROs”) to Perpetual/Sequoia for \$1
- Perpetual/Sequoia operated the assets for 18 months and then assigned itself into bankruptcy
- ABCA confirmed *Redwater* decision that AROs are not claims provable in bankruptcy and not subject to the debtor/creditor scheme in the *BIA*
- AROs are real liabilities or obligations and the oppression remedy claim could be advanced on behalf of the creditors who were owed money at the time of the sale of the natural gas assets

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Canada's Regulation of Climate

Reference re Greenhouse Gas Pollution Pricing Act (SCC 2021)

- GGPPA attempts to reduce GHG emissions through its federal framework
- 6-3 majority upheld the GGPPA as constitutional under the federal governments peace, order and good government powers (s.91)
- This ruling allows the federal government to establish a minimum national standard of GHG price stringency to reduce GHG emissions across the country
- Carbon pricing, as a means to reduce GHG emissions, was recognized as a matter of national concern

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Canada's Regulation of Climate

- **Climate change corporate disclosure obligations**
- **Liability could arise for failing to consider ESG in investing**
- **Climate Change financial materiality**
- **International: Task Force on Climate-related Financial Disclosure (TCFD) – released June 2017**
- **Ontario: Capital Markets Modernization Taskforce – released January 22, 2021**
- **Large Employer Emergency Financing Facility**
- **Boards of Directors assessment of climate change related best practices**

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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, and
 - publish corrective notice on various platforms

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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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