



Environmental Case Law Update
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Overview

1. Environmental Legislation and Common Law Actions
2. Case Law Update
3. Statutory Reporting Requirements

Environmental Legislation

- BC Environmental Management Act
 - Contaminated Sites Regulation
 - Spill Reporting Regulation
- BC Environmental Assessment Act
- Fisheries Act
- Canadian Environmental Assessment Act
- Canadian Environmental Protection Act

Common Law Claims

- Breach of Contract or Tort
- Negligence/Intentional Misrepresentation
- Trespass
- Nuisance
- *Rylands v. Fletcher* – strict liability - nature of the action vs. intention

"the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape"

The Beginning... *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639

- First decision of BCSC to impose liability on “responsible persons” pursuant to *Environmental Management Act*, S.B.C. 2003, c. 53 [EMA].
- A "cost recovery" and "cost allocation" lawsuit.
- Plaintiff owned real property and claimed against multiple defendants for remediation expenses incurred after the property they purchased in 1992 was determined to be a contaminated site in 2004.
- Property operated as a gas station from 1940-1978.

Gehring v. Chevron Canada Ltd., 2006 BCSC 1639

- “Responsible persons” under s. 45 of the *EMA*:
 - Current and Previous Owners
 - Current and Previous Operators
 - Producers
 - Transporters
- Responsible Persons = **Joint and separately** liable for costs incurred.
- Minor contributor status

Gehring v. Chevron Canada Ltd., 2006 BCSC 1639

- Allocation of liability:
 - Section 47 of the *EMA* and s. 35 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96.
 - No precise formula for allocating responsibility amongst “responsible persons”.
 - *“The primary factors for allocating responsibility here are the degree of involvement in the conduct which contributed to the Property becoming contaminated, and the relative due diligence of the responsible persons, bearing in mind the increasing public awareness of environmental concerns over time.”*

Case Law Update: Beyond *Gehring*



Threshold Question: Is it a Contaminated Site?

- *Simpson & Yan v. Chapman & Drummond*, 2009 BCPC 28
 - Remediation cost recovery action brought against vendor of residential property by purchaser.
 - Plaintiff unable to demonstrate it was a “contaminated site”.
 - Method used to test the soil was not a Ministry approved analytical tool.
 - There was therefore no documented and readily available evidence of soil contamination exceeding Ministry standards.

Delineation is required

- *Aldred v. Colbeck*, 2010 BCSC 57
 - Claim by purchasers of *residential* property against sellers relating to hydrocarbon contamination from an oil tank.
 - Court held there was sufficient evidence to demonstrate a contaminated site.
 - However, the contaminated area of land must be determinable and delineated and is not determined by property boundaries.
 - Visual inspection insufficient to determine extent of contamination.

Limitation on powers of the Regulator

- *455161 B.C. Ltd. v. British Columbia (Ministry of Environment)*, [2011] B.C.E.A. No. 11 (Environmental Appeal Board)
 - A person aggrieved by a decision of a director or a district director may appeal the decision to the Board
 - Appellant sought to order the Director to issue a COC without any requirement to remediate the neighboring properties
 - Director's powers under the EMA when issuing a Certificate of Compliance ("COC")

Continued ...

- The Director cannot force investigation/remediation by refusing to issue COC.
- The Board sends the matter back to the Director with directions to issue a COC for the Property once the Appellant provides the notices required under the Regulation (potential migrating of contamination from the Property to neighboring properties)
- Other options available to the Director to address concerns including:
 - Discretion to issue a site investigation to determine contamination (s. 41)
 - The power to issue a remediation order (s. 44)
 - If the Property became re-contaminated from off-site migration, but a COC had been issued for Property as part of a site, the Director retains the right to exercise any power or function under Part 4 of the Act if “certain information becomes available or activities occur on a site that may change its condition or use” (s. 60)

Liability of Regulator

- *Berendsen v. Ontario*, 2009 ONCA 845
 - Appeal from a successful action for damages resulting from serious water quality problems on the plaintiffs' farm.
 - Province deposited asphalt and concrete waste on the farm in the 1960's, causing health issues for the cows residing on the farm.
 - Held: Province was not negligent.
 - There was no evidence that the Province acted contrary to any standards (regulatory or common practice) of the 1960s and then those of the 1980s, and therefore they were not in breach of any duty of care owed.

Negligence

- *Enviro West Inc. v. Copper Mountain Mining Corp.*, 2010 BCSC 1443 (** note appeal re contributory negligence)
 - The plaintiff was hired to drain waste oil from a transformer, which the plaintiff did not know contained high levels of PCB.
 - Plaintiff then mixed the PCB contaminated oil with waste oil in its tanker truck and then deposited the mix into a storage tank at its holding facility.

Continued...

- *Enviro West Inc. v. Copper Mountain Mining Corp.*, 2010 BCSC 1443
 - The plaintiff then had to have the contaminated waste oil removed and transported to a hazardous waste facility at an alleged cost of \$895,000.
 - Plaintiff sued in negligence for each defendants' failure to warn of the PCB.
 - Negligence was assessed against legislative standards and requirements (*EMA, Hazardous Waste Regulation, and the Canadian Environmental Protection Act*).
 - Negligence was established: A breach of a statute **is evidence** of negligence (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.)).

Class Actions

- *Smith v. Inco Limited*, 2011 ONCA 628
 - Class action by property owners neighboring Inco nickel refinery (\$36M awarded at trial).
 - Nuisance action succeeded at trial but overturned on appeal.
 - *Rylands v. Fletcher* action also overturned on appeal.
 - Requires the defendant to have made a non-natural use of the land and Inco operated a refinery in an industrial area, which cannot be said to be a non-natural use of the land.

Criminal & Quasi-criminal Liability: consultant liability

- *R. v. Gemtec Ltd.*, 2007 NBQB 199
 - Gemtec was retained by the City of Moncton to implement a plan to drain leachate via pipe into Jonathan Creek, from a landfill.
 - Gemtec and its project director convicted of violations of section 36(3) of the *Fisheries Act*.
 - Defenses of officially induced error and due diligence not accepted.
 - Result: Gemtec fined \$25,000, project director \$3,000.

Director Liability

- *Currie v. Ontario (Director, Ministry of the Environment)*, 2011 Carswell Ont 5580 (Ont. Env. Rev. Tribunal)
 - Directors of a **former corporate owner** of a contaminated site were ordered to remediate the site, notwithstanding that a new party had subsequently purchased the property.
 - Decision reminds us of liability extended to corporate directors whose company has in the past exercised ownership or control over a contaminated site.

Continued...

- *Currie v. Ontario (Director, Ministry of the Environment)*, 2011 Carswell Ont 5580 (Ont. Env. Rev. Tribunal)
 - The Tribunal found that for corporate directors to avoid liability, they must present a “very convincing case” to rebut the presumption created by “registered documents” that they had management and control.

Riparian Areas Regulation and Yanke v. Salmon Arm (City), 2011 BCCA 309

- A Municipality does not require the approval of the DFO before authorizing development in proximity to a regulated riparian zone except if HADD.
- A restrictive covenant registered against a property may not conclusively delineate the boundaries for a streamside protection and enhancement area.
- A restrictive covenant will not oust the applicable regulatory scheme governing a municipality's duties and powers governing riparian protection.

MEETING STATUTORY REPORTING OBLIGATIONS

- Usually required when there has been an incident engaging public safety; for example, a discharge or spill causing pollution or an employee injury in the workplace
- Usually must be made quickly after the incident incorporating adjectives/adverbs such as “forthwith” or within a set time frame (24 hours)
- The regulated entity is required to have in place a system ensuring it complies with a reporting requirement

Reporting

- Many companies have very specific written policies directing supervisors and managers as to when and to who reports must be made
- Most companies fall down – not on the reporting policy – but on the content of the information conveyed to the regulator
- Reports have to be conveyed on the assumption that, after the initial response by the regulator to address and assist in the abatement of the public safety issue, it is likely that there will be an investigation

Reporting

- This is how many investigations originate
- Statutory reports can be admissible to support a prosecution; to “prove” that the wrongful act occurred
- Need to style reports so that they are neutral in language; few if no adjectives and adverbs; no conclusion to cause
- Golden rule: factual information sufficient to meet the reporting requirements, avoiding opinions, avoiding conclusions

Additional Resources

- Sarah Hansen J.D., L.L.M, “Environmental Liability in Canada” in Todd L. Archibald & Randall Scott Echlin. *Annual Review of Civil Litigation 2011* (Ont.: Carswell, 2011).
- LinkedIn Profile – articles/slides
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