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2014 Environmental Case Law Year in Review

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Canadian environmental case law during the past 18 months gave environmental lawyers much to talk about. Personal liability of directors and officers is more uncertain than ever following the Baker v Director (MOE) *decision. Nuisance case law deviated from the path set out by* Smith v Inco. *Class action plaintiffs in contaminated land cases faced obstacles in 2014. The following summaries provide a snapshot of notable recent environmental law cases across Canada.*

Nuisance and Other Causes of Action

- ***Antrim Truck Centre Ltd. v Ontario (Transportation)*** **(**2013 SCC 13**)—**The Supreme Court of Canada (SCC) held that, to establish a claim in nuisance, the interference with the beneficial use of the property must be both substantial and unreasonable.

- ***TMS Lighting Ltd. v KJS Transport Inc.*** **(**2014 ONCA 1**)—**The Ontario Court of Appeal found that dust from KJS Transport Inc.'s property caused substantial and unreasonable interference with the use and enjoyment of TMS lands. In finding nuisance, the Court considered the severity of the interferences, the character of the neighbourhood, the utility of the defendant's conduct and the sensitivity of the plaintiff.

- ***Smith v Inco*** **(**2013 ONCA 724 **and** 2011 ONCA 628**) –** The Ontario Court of Appeal dismissed the defendant's appeal of Justice Henderson's cost award. In the 2011 Ontario Court of Appeal decision, the Court outlined two distinct branches of nuisance. The first involves material physical damage to property. The second is interference with the beneficial use of the property. The Court held that, to constitute nuisance, physical damage must be material, actual and readily ascertainable. The other key issue related to strict liability (as articulated in *Rylands v Fletcher*). The Court concluded that Inco did not present an "abnormal risk" to its neighbours and the refinery did not constitute a "non natural" use of Inco's property. The SCC recently denied a second leave to appeal for reconsideration.

- ***Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd.*** **(**2014 ONSC 288**)—**Ontario Superior Court of Justice awarded millions for historic offsite gasoline contamination that migrated from a neighbouring property. Justice Leitch accepted plaintiff's counsel's summary of current environmental causes of action.

- ***Windsor v Canadian Pacific Railway Ltd.*** **(**2014 ABCA 108**)—**The Alberta Court of Appeal struck out the claims in *Rylands v Fletcher* for all class members of a trichloroethylene class action and nuisance for homes without sub-slab depressurization systems, finding that the class of claimants had only shown nominal or trivial damages. The Court found that there was no error in allowing the claim by the owners of properties with sub-slab depressurization

systems to proceed to trial, because the respondents had demonstrated a genuine issue requiring a trial to determine damage to that category of lands.

- ***Canada (Attorney General) v MacQueen*** **(**2013 NSCA 143**)—**The Nova Scotia Court of Appeal struck out a class action about contamination from the Sydney Tar Ponds and associated steel and coke plants. The Court dismissed claims for trespass, *Rylands v Fletcher* and battery, leaving only negligence, nuisance and breach of fiduciary duty. Plaintiffs can individually pursue claims on the three remaining causes of action.

Directors' and Officers' Liability

- ***Baker v Director (MOE)*** **(2013 CarswellOnt 9913; [2013] OERTD No 21; 2013 ONSC 4142)** and ***Northstar Aerospace Inc. (Re)*** **(**2013 ONCA 600**)—**The Ontario Divisional Court and Ontario's Environmental Review Tribunal (ERT) upheld the Ontario Ministry of the Environment and Climate Change's (MOECC) Order to corporate directors of an insolvent company to clean up the property with the directors' personal funds. The directors and officers were named because of their status as persons having management and control. In the settlement, 10 former corporate directors paid $4.75 million to be released from the MOECC clean up order.
- ***Kawartha Lakes (City) v Ontario (Environment)*** **(**2013 ONCA 310**)—**The Ontario Court of Appeal held that innocent landowners can be subject to remediation orders. "Fairness" is now a much narrower ground of appeal of an order where the environmental protection objective of the *Environmental Protection Act* is met.
- ***Rocha v Director, Ministry of Environment*** **(2014 CarswellOnt 13113)—**Ontario's ERT found that, where groundwater contamination is present and spreading, the balance of convenience favours requiring the mortgagee and advisor to pay for remediation before hearing his appeal. The ERT's decision of Mr. Rocha's appeal of the Director's Order is imminent.

Statutory Interpretation

- ***Castonguay Blasting Ltd. v Ontario (Environment)*** **(**2013 SCC 52**)—**The SCC found that the eight adverse effects set out in Ontario's *Environmental Protection Act* definition of "adverse effects" were independent of each other and were each individually sufficient to trigger the reporting requirement in section 15(1) of the Ontario *Environmental Protection Act*. The SCC found that a broad approach to the reporting requirement was consistent with the "precautionary principle". The decision sends a clear signal that courts should interpret the *Environmental Protection Act* in a manner consistent with the overarching goal of protecting the environment.
- ***Thornhill v Highland Fuels*** **(**2014 ONSC 3018**)—**The Ontario Superior Court of Justice determined that the requisite standard of care for the installation of a fuel oil tank is established by reference to the Technical Standards and Safety Authority, Ontario Regulation 213/01 and the *Installation Code for Oil-Burning Equipment* (CAN/CSA B139). The case reinforces the need for tank installers and fuel suppliers to follow statutory requirements set out in the *Fuel Oil Code*. An appeal is expected.
- ***Western Canada Wilderness Committee v British Columbia (Oil and Gas Commission)*** **(**2014 BCSC 1919**)—**The British Columbia Supreme Court clarified the interpretation of section 8 of the British Columbia *Water Act* and upheld recurrent short-term water use approvals.
- ***J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.*** **(**2014 BCSC 1619**)—**The British Columbia Supreme Court reinforced the "polluter pays" principle in applying sections 45 and 47 of British Columbia's *Environmental Management Act*. The provisions of

the *Environmental Management Act* allow persons incurring remediation costs to recover from responsible persons, including both current and previous owners of a contaminated site. The Court ordered a former landowner (the historic polluter) to compensate the current owner in the amount of $4.75 million for reasonable reclamation costs incurred to remove contaminants caused by the former owner's industrial activities.

Endangered Species

- ***Ostrander Point GP Inc. v Prince Edward County Field Naturalists*** **(**2014 ONSC 974**)—**The Ontario Divisional Court found the ERT's prior decision to be "unreasonable" on the basis of several errors of law which, both individually and collectively, were fatal to the ERT's conclusions. The Divisional Court provided detailed guidance about how the ERT should apply the test of serious and irreversible harm to endangered species, what evidence on endangered species is needed, its jurisdiction to impose measures to mitigate any harm and the process to be followed before the ERT grants an appeal that terminates a project. The ERT and Divisional Court found that the Alliance to Protect Prince Edward County's expert evidence did not meet the standard of a peer-review or was not otherwise independently verified. Prince Edward Country Field Naturalists appealed the Divisional Court decision to the Ontario Court of Appeal on December 8, 2014. The Court of Appeal's decision is pending.
- ***Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*** **([2014] FCJ No 151)—**The Federal Court found the Minister of Fisheries and Oceans' and the Minister of the Environment's delay in the preparation of recovery strategies under the *Species at Risk Act* unlawful.
- ***Lewis v Director, Ministry of the Environment*** **(ERT Case No 13-044)—**Ontario's ERT found that to prove a wind energy project will cause serious and irreversible environmental harm, an applicant will need an expert and a scientifically solid case. The ERT also concluded that direct bald eagle mortality, or that of other birds or bats, is not likely based on the evidence provided.

Contract

The following two SCC contract law decisions may apply in the environmental law context, for example in agreements of purchase and sale, limitations of liability and contracts of service.

- ***Bhasin v Hrynew*** **(**2014 SCC 71**)—**The SCC recognized a new duty on parties to act honestly in the performance of contractual obligations.
- ***Sattva Capital Corp. v Creston Moly Corp.*** **(**2014 SCC 53**)—**The SCC confirmed that contract interpretation should include the examination of the "factual matrix". Evidence of surrounding circumstances can deepen the decision-makers understanding of words used in the contract.
- ***Community Mental Health Initiative Inc. v Summit Lounge Ltd.*** **(**2014 NLTD(G) 130**) –** The Supreme Court of Newfoundland and Labrador held that a vendor's consultant has no privity of contract with the purchaser and owes no duty of care to the purchaser.

Agreement of Purchase and Sale

- ***1828445 Ontario Ltd. v Guerra*** **(**2014 ONSC 238**)—**The Ontario Superior Court of Justice found that a plaintiff who has waived the condition cannot use the fact that a risk has materialized as a basis for renegotiating an agreement of purchase and sale.
- ***Western Forest Products Inc. v New Westminster (City)*** **(**2013 BCSC 1001**)—**The British Columbia Supreme Court considered a clause in an agreement of purchase and sale requiring

that work be done "diligently" and in a "timely fashion". The Court held that the wording should be read in the context of the agreement as a whole and in accordance with the parties' intentions at the time they entered into the agreement.

Insurance

- ***O'Byrne v Farmers' Mutual Insurance Company (Lindsay)*** **(**2014 ONCA 543**)—**Despite a pollution exclusion clause, the Ontario Court of Appeal forced an insurer to pay for a fuel oil cleanup after a spill. The Court held that, on a plain reading of the policy, there had to be another operative exclusion before the pollution exclusion applied.
- ***Mississauga Motors Mart Inc. v. Sovereign General Insurance Company*** **(**2013 ONSC 6360**)—**The Ontario Superior Court of Justice found that a landlord's claim against its tenant arose out of the spill of a pollutant that fell within the policy's exclusion. The decision is a reminder that businesses with pollution risks need to buy insurance that provide pollution coverage that is not negated by a pollution exclusion.

Evidence

- ***Pointe Estates*** **(Ontario Municipal Board Case No PL 130890)—**In a recent Ontario Municipal Board (OMB) hearing that began on November 18, 2014, the OMB decided not to hear the testimony of a Michigan-based hydrogeologist. The Chair of the OMB ruled that the hydrogeologist lost his objectivity as an expert witness when he expressed his concerns to the Algoma Public Health and City Council. A decision on this matter is expected from the OMB in January 2015.
- ***Brimley Progress v Director (Ministry of Environment)*** **(2013 CarswellOnt 4405)—**Ontario's ERT found that, when seeking leave to appeal an Environmental Compliance Approval, the public has a limited right to access Environmental Compliance Approval documents.
- ***Bovaird v Director, Ministry of the Environment*** **(2013 CarswellOnt 18046)—**Ontario's ERT took a harder approach to assessing the qualifications of witnesses who proposed expert anti-wind energy evidence.

Fracking

- ***Pétrolia inc. c Gaspé (Ville de)*** **(**2014 QCCS 360**)—**The Quebec Superior Court found that a Gaspé municipal anti-fracking bylaw was invalid as it prevented Pétrolia from fracking authorized by the Province. The Town of Gaspé is appealing the decision.
- ***Ernst v EnCana Corporation*** **(**2014 ABCA 285 **and** 2014 ABQB 672**)—**In September 2014, the Alberta Court of Appeal upheld a ruling of the Court of Queen's Bench of Alberta that held the plaintiff could not include Alberta's energy regulator in her lawsuit. The Court held that the Alberta Energy Resource Conservation Board is immune from private civil claims and certain Charter challenges. The SCC's decision on the Plaintiff's leave to appeal is imminent.

Costs Before Tribunal

- ***Seaspan ULC v Director, Environmental Management Act*** **([2014] BCWLD 6784)—**In a rare decision, the British Columbia Environmental Appeal Board awarded costs against an appellant. The Environmental Appeal Board found that Seaspan's conduct was irresponsible and deserved reprimand. The Environmental Appeal Board considered that Seaspan's expert report was discredited in cross-examination and that the expert purposely omitted dealing with evidence contrary to his opinion. Tribunals generally view costs as punitive in nature, and not compensatory.

For further information about the impact of any of these cases, please contact Jacquelyn Stevens directly at jstevens@willmsshier.com / 416-862-4828.

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