Managing Environmental Liabilities:
Brownfields Case Law Update

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Willms & Shier Environmental Lawyers

- Established over 40 years ago
- 16 lawyers
  - seven are certified by the Law Society of Upper Canada as Environmental Law Specialists
  - lawyers called to the Bar in Ontario, British Columbia, Alberta, Northwest Territories, Nunavut and New Brunswick
Overview

• Managing Environmental Liabilities
• Case Law Updates
• Contaminated Sites Checklist
Managing Environmental Liabilities

"The good news is we found oil on your property. The bad news is it's in drums."
Environmental Liabilities

- **Regulatory Liability**
  - Regulator can issue orders
  - Regulator can prosecute for offences under environmental statutes

- **Civil Liability**
  - Contamination migrating off-site
  - “Flow through” property
Managing Environmental Liabilities

• Understand the environmental condition of the property
  • What contaminants are present?
  • Do the contaminants exceed regulatory standards?
  • Is the contamination delineated?
  • Is the contamination migrating off-site?
Managing Environmental Liabilities

• **Allocate Risk when Purchasing Contaminated Property**
  - obtain full and timely disclosure
  - right of access and inspection
  - ensure access to property, records, employees
  - seek full warranties for environmental condition
  - indemnities, security, releases
  - specify proposed future use of property
Managing Environmental Liabilities

- **Regulatory Liability Protection**
  - Remediation Certificate, RSC
  - protection from regulatory orders
  - no protection from civil liability
Managing Environmental Liabilities

- **Environmental Insurance**
  - Commercial General Liability typically has pollution exclusion
  - Director & Officer Liability policies typically exclude environmental matters
  - Insurers offer Environmental Impairment Liability policies
Managing Environmental Liabilities

• **Risk Tolerance**
  - determine environmental risks and liabilities
  - develop plan for managing environmental risks and liabilities
  - ensure potential environmental risks and liabilities are within your risk tolerance
Case Law Update

*Antrim Truck Centre Ltd. v Ontario (Ministry of Transportation) (SCC 2013)*

- private nuisance claimants must show that interference with the use of the property is both substantial and unreasonable.
  - a *substantial* injury “is one that amounts to more than a slight annoyance or trifling interference.”
  - courts must balance the gravity of the harm against the utility of the defendant’s conduct to establish whether the interference was *unreasonable*
Case Law Update

*French v Chrysler* (ONSC 2014) ONCA 2015

- Nuisance has “certain defined, long-standing characteristics, which courts have considered to be essential to the tort. In particular, the alleged nuisance must originate somewhere other than on the plaintiff’s land.”
Case Law Update

**TMS Lighting Ltd. v KJS Transport Inc. (ONCA 2014)**

- Dust from KJS Transport property caused substantial and unreasonable interference with use and enjoyment of TMS lands (retail lighting manufacturer)
- **Four factors considered to establish nuisance**
  1. severity of interferences
  2. character of neighbourhood
  3. utility of defendant’s conduct
  4. sensitivity of plaintiff
Case Law Update

Steadman v Lambton County (2015, ONSC)

- County applied road salt to abutting roadway
- Contaminated approximately 15% of property
- Salt caused soya bean crop losses and diminished value of property
- Court found County liable in nuisance
- Steadman awarded $106,000
Case Law Update

*Midwest v Thordarson (2013 ONSC)*

- Purchaser claims against neighbour
- Not enough to show migration can or has occurred or exceedance of Standards to establish “loss or damage”
- Purchaser must show contamination increased during ownership due to neighbour's actions
- No “double recovery” under s. 99 EPA
Case Law Update

**Canadian Tire v Huron Concrete** (2014 ONSC)

- Claim for PHC contaminant migration
- Nuisance, negligence (breach of EPA), strict liability and trespass
- Liable for the damage caused from escape and migration of gasoline
- Court awarded $3.6M to remediate and $1.1M for out-of-pocket expenses (legal and professional costs)
Case Law Update

*Windsor v CPR (2014 ABCA)*

- Claims struck for class members without sub-slab systems
- Class had only shown nominal or trivial damages
- Allowed claim by owners with sub-slab depressurization systems to proceed to trial
Imperial Oil had two pipelines running through Ball’s cattle ranch. Pipelines leaked, Imperial failed to fully remediate, cows died. Liable in nuisance and negligence (Court did not address trespass). Special damages for vet bills, lost production and general damages for inconvenience.
Case Law Update

*Smed v Priddis Greens GCC (2011 ABQB)*

- Golf course discharged effluent from waste water ponds, migrated to Smed’s land
- Golf course liable only in nuisance (Smed’s loss of use and enjoyment of land)
- No trespass because waste water did not directly intrude on Smed’s land
Case Law Update – D&Os

*Rocha v Director, MOECC (2014)*

- MOE issued two Director’s Orders against advisor and mortgagee
- Property was the source of a groundwater plume of TCE and VC
- Appealed Orders and denied exercising management or control
- Applied for a stay pending appeal
- ERT denied application for a stay
- Hearing – Orders upheld
Case Law Update – D&Os

_McQuiston v Ontario, MOECC (2015 ERT)_

- MOECC issued investigation and cleanup order to:
  - former tenant, its D&Os and site manager
  - current property owner - British resident who inherited the company
  - accountant who accepted a power of attorney to sell the property
  - listing broker
Contaminated Sites Checklist

- Understand property’s environmental condition
- Know your environmental risks and liabilities
- Allocate risks and liabilities during transaction
- Consider regulatory liability protection
- Environmental insurance
- Ensure potential environmental risks and liabilities are within your risk tolerance
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