ENVIRONMENTAL MANAGERS ASSOCIATION OF B.C.

LEGAL UPDATE 2013

January 17, 2013

Presented by Gord Buck

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Overview

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- Key Legislative Changes:
  - Bills C-38 and C-45 – changes to federal environmental legislation
  - New B.C. Limitation Act – coming into effect in July 2013
- Caselaw Update:
  - Review of key environmental decisions from the last year.

Bills C-38 and C-45

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- Both omnibus budget bills which include changes to various pieces of federal legislation concerning the environment.
- Bill C-38 – introduced March 2012.
- First stage of amendments came into force July 18, 2012.
- Second stage of amendments not yet in force.
- Bill C-45 received Royal Assent December 14, 2012 and is now in force.

Bill C-38

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Amendments now in force:

- Minor expansion of HADD provision by adding “activity” to the prohibition in s. 35.
- Allows for federal/provincial agreements and delegation.
- Clarifies duty to self-report HADDs
- Creates new offence for breach of an authorization condition.

Bill C-38

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- Also changes limitation periods:
  - Former provision – 2 years after Minister became aware of subject-matter
  - New provision – 5 years after the day on which the offence was committed
- Former provision had a shorter limitation period but included ‘discoverability’.
- New provision has absolute limitation period of 5 years.

Bill C-38

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Amendments Not Yet in Force:

- Some amendments ‘tweaked’ in Bill C-45.
- Significant revision of s. 35 of the Fisheries Act.
- New regulatory guidelines.
- Increased penalties including mandatory minimums.

Bill C-38

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Revision of HADD: Changing Focus

- Shift from HADD to "serious harm" to fish that are part of a commercial, recreational or Aboriginal fishery.
- "Serious harm" = death of fish or any permanent alternation to or destruction of fish habitat.
- "Fishery" = fish is actually harvested.

Bill C-38

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Increased Penalties:

- Current penalties have maximum fines of $300,000 (summary conviction) and $1-million (indictable offence).
- New penalties provide for maximum fines of up to $600,000 for individuals and $8,000,000 for corporations (summary conviction), and up to $2,000,000 for individuals and $12,000,000 for corporations (indictable offence).

Bill C-45

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- Amends the provisions of the Fisheries Act dealing with the obstruction of waters and fish passageways.
- Amends the sentencing provisions of the Fisheries Act by stipulating that all fines will be directed to the Environmental Damages Fund.
- Major revamping of Navigable Waters Protection Act.

Bill C-45

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Changes to NWPA:

- Will now be called Navigable Waters Act.
- Fewer environmental assessments (focus on major projects).
- Only fish of “commercial importance” will be protected.
- Pipelines will be exempt from the Act (and environmental assessments triggered by the Act).
- Only 3 oceans, 97 lakes and 62 rivers will be covered by new Act – less than 1% of Canada’s waterways.

New B.C. Limitation Act

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- New Limitation Act has been passed and comes into effect June 2013.
- Old Act had different limitation periods depending on type of claim and allowed postponement of ‘limitation clock’.
- New Act establishes 2-year limitation period for claims and an ‘ultimate’ 15-year limitation period.
- Brings B.C. more into line with other provinces.

New B.C. Limitation Act

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- Clock will start to run where person knew or ought to have known:
  - Of the injury, loss or damage;
  - That the injury, loss or damage was caused by an act or omission of the defendant; and,
  - That a Court proceeding would be the appropriate means to seek to remedy it.
- Remains to be seen how Court will interpret these requirements.
- Key change is “ought to have known” – suggests that if parties do not use due diligence to discover claims they may be barred.

New B.C. Limitation Act

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- 2-year ‘default’ limitation period has exceptions.
- Key one is where limitation period is set by another Act.
- New Limitation Act will amend the Environmental Management Act to remove any limitation period with respect to cost recovery actions.

New B.C. Limitation Act

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- In other words: there are no limits on when someone can sue under the EMA to recover costs of remediation.
- In theory, someone could undertake remediation, wait 20 years, then sue and their claim would not be time-barred.
- The implications of this for professionals in the environmental area are significant.

New B.C. Limitation Act

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- Cost recovery claims could arise many, many years after the remedial work was undertaken.
- If contamination is not discovered for many years, could be faced with lawsuits decades after being involved with a site!
- Could be very difficult to defend such claims since many organizations and individuals do not retain records for that long.
- Also difficult to identify other parties who might also be liable after passage of time.

Practical Implications

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- Environmental Section of the BCCBA is lobbying for amendments to the legislation.
- Assuming these changes go through unamended, will effectively be no limitation period for cost recovery actions.
- Many organizations currently have 7- or 10-year document retention policies.

Practical Implications

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- Stakeholders need to be aware that cost recovery actions could arise at any time in the future and no limitation defences will be available.
- Environmental managers will likely need to increase record-keeping requirements to carefully document environmental issues in case of future lawsuits.
- Retention policies will have to be changed to provide that documents relating to environmental issues are never destroyed.

New and Recent Cases

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ING Insurance v. Mohawk, 2011 ONCA 321

- Gas station was sued for leakage onto neighbouring property.
- Insurer refused to defend on the basis of pollution exclusion clause in policy.
- Ontario Court of Appeal rejected trial judge's finding that the clause only applied to "active" industrial polluters.

New and Recent Cases

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- Court of Appeal held that the exclusion clearly extended to activities such as storing gasoline in the ground for resale that carry a “known risk of pollution or environmental harm”.
- Will be very difficult for a party sued for contamination to trigger insurance coverage under typical commercial general insurance policy.

New and Recent Cases

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Smith v. Inco Limited, 2011 ONCA 628

- $36-million class action brought by residents of Port Colborne, ON for contamination of their properties by airborne metals.
- Trial court awarded damages based on loss of value of properties as a result of the contamination.

New and Recent Cases

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- Court of Appeal dismissed the lawsuit on the basis that there was no evidence of actual physical harm to the properties.
- Also no evidence that nay of the class members had experienced an interference with use and enjoyment of property.
- Limits scope of claim based on *Rylands v. Fletcher*. Normally strict liability based on the escape of pollution.

New and Recent Cases

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- Court of Appeal found that claim under *Rylands v. Fletcher* required damages to arise from "unintended consequence" of "non-natural use" of the land.
- Nickel omissions from the refinery accrued over 66 years and were natural and ordinary consequence of such operation, which was regulated by government.
- Risks no different than any other industrial operation.

New and Recent Cases

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Re: AbitibiBowater Inc., 2011 SCC 67

- Newfoundland tried to order Abitibi to clean up environmental contamination at former mill sites (estimated cost of $100-million).
- Abitibi sought protection under the Companies Creditors Arrangement Act and claimed that the protection trumped the Province's claims.
- SCC dismissed the Province's appeal, finding that to allow the Province's claims would put them in a better position than other creditors.

New and Recent Cases

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Terrim Properties Ltd. v. Soprop Holdings Ltd. – 2012 BCSC 985

- Cost recovery action dismissed because the Court found the Plaintiff had not fully complied with the statutory requirements in the EMA.
- In particular, the Plaintiff failed to provide the required Notice of Independent Remediation to the Director.

New and Recent Cases

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Enviro West Inc. v. Copper Mountain Mining Corp., 2012 BCCA 23

- Plaintiff had been hired to remove waste oil which was later discovered to be contaminated with PCBs.
- Issue on the appeal was whether the Plaintiff was contributorily negligent – i.e. was the Plaintiff partly at fault for failing to detect the contamination.

New and Recent Cases

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- Trial judge found no contributory negligence on the part of the Plaintiff.
- Trial judge found that the driver's behaviour was reasonable in the circumstances and no 'red flags' would have been apparent to the driver.
- BC Court of Appeal found the trial judge had erred by focusing on the driver's behaviour, and failed to address corporate behaviour.

New and Recent Cases

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- Case was remitted to the trial court to consider evidence of possible corporate negligence:
  - Managing office did not ensure that drivers were trained about the implications of transporting PCBs or PCB labelling.
  - Lack of guidelines or company policies on statutory obligations of persons transporting PCBs
  - The Plaintiff's founder and CEO had advocated for testing all loads for possible PCBs.

New and Recent Cases

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- Upshot of this case is that the Court will look at corporate policies and behaviour in considering claims of contributory negligence.
- Even if a particular employee might have acted reasonably given his or her training or knowledge, if that training or knowledge was inadequate the corporation may still be held contributorily negligent.

Conclusion

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- Questions?
- Comments?
- Concerns?

Thank you for attending!

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