Environmental Case Law Update: The Year in Review

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Environmental Case Law Update
Outline

1. Recent environmental class action proceedings post *Inco*
2. Cases of general interest
3. Recent cost recovery actions
4. Insolvency issues post *Abitibibowater*
5. Recent Environmental Appeal Board decisions

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Class Actions Recap: *Smith v. Inco*, 2011 ONCA 628, leave to SCC ref'd.

- Canada's first class action proceeding from a common law province
- Nickel particle emissions in Port Colborne, Ontario over a period of 66 years [!]
- Trial judge awarded surrounding landowners $36 million in damages, after a 45-day trial
- Overturned by Ontario Court of Appeal - Leave to Supreme Court of Canada refused.
- No private nuisance: plaintiffs failed to establish a material injury to property (harm to human health, etc…)
- No *Rylands v. Fletcher*: industrialized part of City; Inco authorized to carry out activities
- In any event, no damages: trial judge committed errors in comparing real estate values between Port Colborne and neighbouring town of Welland.

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Windsor v. Canadian Pacific Railway Ltd., 2014 ABCA 108

- CP operated locomotive repair facility in Calgary;
- Contaminants leaked into groundwater beneath facility and migrated onto surrounding properties
- TCE - toxic substance
- CP installed sub-slab pressurization systems on some (but not all) properties to reduce contaminant concentrations to below Health Canada thresholds

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Windsor v. Canadian Pacific Railway Ltd., 2014 ABCA 108

- Class action proceeding by landowners for diminution in property value and loss of rental income caused by contaminants in groundwater
- Action based on negligence, nuisance, trespass, and *Rylands v. Fletcher* doctrine
- CP applied to summarily dismiss nuisance and *Rylands v. Fletcher* claims.
- Wants to proceed to trial on negligence and trespass only.

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Windsor v. Canadian Pacific Railway Ltd., 2014 ABCA 108

- Case Management Judge:
  - Dismissed nuisance claim, but only by class members without sub-slab pressurization systems in place (i.e. those whose lands did not exceed Health Canada threshold).
  - Declined to dismiss any other claims.

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Windsor v. Canadian Pacific Railway Ltd., 2014 ABCA 108

- Court of Appeal:
  - Allowed CP's appeal regarding *Rylands v. Fletcher* claim.
  - Test for liability under *Rylands v. Fletcher* doctrine not met by landowners
    - Nothing “special” or “extra-hazardous” about CP's use of lands
    - Contaminants used in accordance with best practices and discontinued when risk was understood
    - Migration was not an “escape” or “accident”
  - Dismissed CP's appeal regarding nuisance claim by class members with sub-slab pressurization systems in place – allowed to proceed.

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Canada (AG) v. MacQueen, 2013 NSCA 143

- NSCA decertified a class action in relation to the "Sydney Tar Ponds Litigation"
- Closure of steel-making industry in Cape Breton
- Airborne emissions from coke ovens and steel plant over 33 years (1967 until 2000).
- Hundreds of thousands of tonnes of contaminants, including heavy metals, hydrocarbons, dangerous particulates.

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Canada (AG) v. MacQueen, 2013 NSCA 143

- Court of Appeal:
  - Set aside class certification order
  - The authorized release of contaminants by industry not an “escape” in *Rylands v. Fletcher* rule
  - Release of substances in ordinary course of manufacturing is an intentional and continuous escape
  - Claim for trespass decertified; no direct interference with use of property.
  - Claim for battery decertified; directness is required, but not pleaded
  - Claim in nuisance allowed, but class should not have been certified on this issue alone. Individual nature of nuisance requires claimants to pursue their own claims, not as class proceeding

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Smith v. Inco Ltd., 2013 ONCA 724

- Cost reduction upheld becomes of novelty of case
- At trial, plaintiff class awarded $36 million in damages
- Court of Appeal reversed trial decision: claimants failed to establish Inco's liability under private nuisance or *Rylands v. Fletcher* rule, and failed to establish any damages.
- Leave to appeal to SCC refused
- Issue of costs came up before Court of Appeal; remitted back to trial judge
- Inco claims $5,340,563.00 in legal costs – double costs following settlement offer
- Trial judge only awards Inco $1,766,000 –shortfall of $3.6 million

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Smith v. Inco Ltd., 2013 ONCA 724

- Trial judge:
  - Ordered costs of $1,766,000.00; a substantial reduction from Inco's claimed costs
  - Reduction of costs was because the case raised novel points of law
  - The case was Canada's first environmental action certified as a class proceeding and first such action to proceed to trial
- Court of Appeal:
  - Upheld trial decision regarding reduction of costs based on novelty of case

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Ernst v. EnCana Corp, 2013 ABQB 537

- Ernst brought action against EnCana, the Energy Resources Conservation Board ("ERCB"), and Province of Alberta for alleged contamination from hydraulic fracturing operations
- Claimed personal damages against ERCB under the *Charter* for violating free speech rights.
- Sought damages of $33 million
- ERCB brought application for summary judgment

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Ernst v. EnCana Corp, 2014 ABCA 285

- ABQB:
  - Granted summary judgment
  - ERCB did not owe Ernst a private law duty of care
  - Relationship of proximity necessary to found a private duty of care did not exist; only public duties owed
  - Regulator had no direct authority over the member of the public
  - Claim against ERCB statute barred by s. 43 of *Energy Resources Conservation Act*
- Court of Appeal:
  - Upheld trial decision; No private law duty of care to landowners

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Western Forest Products Inc. v. New Westminster (City), 2013 BCSC 1001

- Remediation “in a timely fashion” does not mean “as quickly as possible”
- Vendor plaintiff sued City for breach of contract regarding the sale of a contaminated former sawmill property

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Western Forest Products Inc. v. New Westminster (City), 2013 BCSC 1001

- Contract permitted City to withhold portion of purchase price to cover remediation costs; once remediation complete, City required to remit balance of purchase price, minus remediation costs
- 10 years later [!] remediation was only partially complete
- Vendor claimed City had not made reasonable efforts to complete remediation in timely fashion and was in breach of contract

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Western Forest Products Inc. v. New Westminster *(City)*, 2013 BCSC 1001

- Supreme Court:
  - City should have taken some steps more quickly, but contract did not require City to proceed with remediation as quickly as possible
  - Contract did not specify that remediation had to occur within a specific time period
  - No breach of contract

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Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment), 2013 ONCA 310

- "Owner pay" principle trumps "polluter pay" principle
- MoE Director issued remediation order for oil that leaked from a private property into City storm drains and created risk of contamination to nearby lake
- Landowners and City ordered to remediate damage; City appealed to Ontario Environmental Review Tribunal
- City argued before Tribunal that it was innocent property owner, should not have to pay, payment violated "polluter pay" principle

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Kawartha Lakes (City) v. Ontario (Director Ministry of the Environment), 2013 ONCA 310

- Tribunal:
  - Director exercised his discretion per fundamental purpose of legislation
  - No other party could have remediated or prevented further contamination
  - Statutory regime contemplates making innocent owners pay for initial clean up and to prevent further contamination
- Divisional Court:
  - Upheld Tribunal's decision stating that statute is that owner pays, not polluter pays; “polluter pays” principle trumped by legislation
  - Upheld by Court of Appeal

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J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., 2014 BCSC 1619

- Reclusive billionaire – Craig McCaw
- James Island, a private gulf island in B.C. with a 5,000 sq. ft. home, trout pond, Jack-Nicklaus designed golf course, and a mock-western town
- Purchased island for $26 million in 1994
- Now selling it for $75 million
- Former site of munitions factory
- $5.23 million in remediation costs

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J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., 2014 BCSC 1619

- PPG (formerly ICI) manufactures explosives on the site from 1913-1988.
- In 1988, ICI decommissions munitions factory and voluntarily remediates various contaminants (TNT, DNT, lead and mercury).
- No contaminated sites regime in 1980s.
- Received a “letter of comfort” from MoE confirming that the remediation was acceptable
- Restrictive covenant advising of contamination and restricted use of land.

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J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., 2014 BCSC 1619

- ICI sells island to a third party, Parkland Properties Inc. 1988
- Parkland Properties sells the island to JI Properties (aka McCaw) in 1994.
- JI Properties reviews old environmental reports, is aware of restrictive covenant on title (and remaining contamination) at the time of purchase
- Law changes in 1997
- JI Properties carries out additional remediation and obtains a CoC for residential and parkland use.

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J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., 2014 BCSC 1619

- Remediation occurred between 2004 and 2006.
- Action commenced in 2009.
- PPG argues outside two-year limitation period (under old *Limitation Act*)
- Court dismisses this argument: applicable limitation period is six years (under old Act)
- Court also holds that time limit begins to run when remediation is completed, not when it begins.

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J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., 2014 BCSC 1619

- PPG also claimed it was not a responsible person under s.46(1)(m), which states that a person is not responsible if the Ministry issues a CoC for a site.
- PPG argues that letter of comfort = CoC.
- Court dismisses this argument: Legislation could have grandfathered "comfort letters" but did not do so.

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J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., 2014 BCSC 1619

- Lastly, PPG argues that remediation costs incurred by JIP were unreasonable.
- Also: remediation to residential/parkland standard was not reasonable because residential development was unlikely.
- Court (largely) dismisses these arguments as well: JIP followed advice of a qualified environmental consultant, and residential and outdoor recreation uses of property were reasonable.
- Awards JIP $4.75 million in remediation costs.

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Atlantic Waste Systems Ltd. v. Canada, 2014 BCSC 490 310

- Plaintiff (tenant) sued Federal Government (lessor) after lease over landfill on First Nations reserve terminated
- Federal Government counterclaimed for damages for breach of lease (presence of untreated leachate)
- Sought to add as defendant:
  - director/officer, based on *Fisheries Act* (s. 42) and EMA (s. 35(4) of CSR).
  - environmental consultant, as operator (s. 45(1)(a) of EMA).
- A low threshold for adding a party:
  - a possible cause of action against the proposed defendant
  - just and convenient to add the party

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Atlantic Waste Systems Ltd. v. Canada, 2014 BCSC 490

- Court concluded director/officer and environmental consultant can be held liable under *Fisheries Act* and EMA, and should be added as defendants
- EMA, provincial legislation, applied to First Nations reserve lands, notwithstanding that those lands federally regulated (i.e. interjurisdictional immunity defence did not apply), although legal question left for another day

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Nortel Networks Corp. (Re), 2013 ONCA 599
Northstar Aerospace Inc. (Re), 2013 ONCA 600

- In *Nortel* and *Northstar*, Ontario Court of Appeal:
  - Applied test from *Newfoundland and Labrador v. AbitibiBowater Inc* (SCC) to determine whether environmental remediation orders are subject to claims process (and stayed) or something else (and not stayed)
  - Key criteria: possible to attach a monetary value to the remediation obligation?
  - occurs where remediation work complete (reimbursement) or where it is "sufficiently certain" that the province will do the work and then seek reimbursement

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Nortel Networks Corp. (Re), 2013 ONCA 599
Northstar Aerospace Inc. (Re), 2013 ONCA 600

- In *Nortel*:
  - It was clear that the province would remediate one site, and therefore order for that site a monetary claim and stayed
  - For other sites, multiple owners faced remediation orders so it was possible the province would not end up paying for the remediation, such that orders not stayed

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Nortel Networks Corp. (Re), 2013 ONCA 599
Northstar Aerospace Inc. (Re), 2013 ONCA 600

- In *Northstar*:
  - No subsequent purchaser whom province could order to undertake the remediation
  - No realistic alternative but to remediate the property and in fact, province was already performing remediation
  - Remediation order was a monetary claim and stayed

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Morguard Real Estate v Director, Env. Management Act, 2013 CarswellBC 2195

- Morguard applied for certificates of compliance ("CoCs") for its property and a portion of the neighbouring property following remediation of PCE
- The Director issued draft CoCs, but before finalizing, isolated contamination discovered in neighboring area beyond area covered by CoCs and brought to the attention of Director by neighbour.
- The Director then rejected Morguard's CoC application, required re-submission.

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Morguard Real Estate v Director, Env. Management Act, 2013 CarswellBC 2195

- EAB overturned the Director's decision, ordering a CoC be issued, based on following factors:
  - The EAB found that the evidence from consultants demonstrated that Morguard had delineated the contamination and remediated the site to the extent required by the legislation
  - The investigative standard is not one of perfection
  - The Director does not have unfettered discretion to refuse to issue a CoC

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Halme's Auto Service Ltd v BC (Regional Waste Manager), 2014 CaswellBC 811

- Remediation order issued to Halme's, Petro Canada (Suncor), and Chardale Enterprises in regards to gasoline contamination was challenged on the following basis:
  - The remediation order did not take into account private agreements respecting liability for remediation between the parties
  - The Chardale was designated as a “Minor Contributor” under the *Act*

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Halme's Auto Service Ltd v BC (Regional Waste Manager), 2014 CaswellBC 811

- The EAB found, regarding the Remediation Order that:
  - Private indemnification agreements will be taken into account in naming parties to a remediation order, but only up to the point that they will not jeopardize remediation efforts
  - In *Halme's*, Suncor benefitted from an indemnification, but was the only party with the financial means available for the necessary remediation – so it was properly named in the remediation order
- Section 27.3 (now 49 of EMA) - the "Minor Contributor" provision - was unconstitutional because it transferred powers held by superior courts at the time of Confederation to an administrative decision-maker

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Seaspan ULC v. British Columbia (Director, EMA), 2014 CarswellBC 2726

- Series of remediation orders made against Seaspan and Domtar, requiring them to address contamination on a site
- A number of appeals, in one of which Seaspan advanced, as ground, that it was not a “responsible person”
- Appeal based largely on theory that creosote contamination found on western lands did not migrate from site A
- Theory relied on expert evidence to effect that there was no continuous creosote plume from source site A to western lands – Seaspan maintained western contamination originated from storage of creosote treated timbers

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Seaspan ULC v. British Columbia (Director, EMA), 2014 CarswellBC 2726

- Significant frailties in expert evidence on cross, to extent EAB concluded it crumbled almost immediately
- Seaspan abandoned appeal on day 3 of three week hearing
- Parties to appeal sought order for costs on basis that appeal was manifestly deficient and without merit
- In respect of costs hearing, Seaspan expert's file ordered produced, providing further fodder to impugn expert report

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Seaspan ULC v. British Columbia (Director, EMA), 2014 CarswellBC 2726

- The EAB set out principles and parameters for making a costs award
- Section 95(2)(a) of EMA confers on EAB broad jurisdiction to award costs (party and party costs)
- Per EAB Procedure Manual, costs not awarded to "indemnify successful party", but rather to encourage "responsible conduct" and discourage "unreasonable and/or abusive conduct"
- Jurisdiction to award costs informed by "special costs" principles and concept that reprehensible conduct should be penalized

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Seaspan ULC v. British Columbia (Director, EMA), 2014 CarswellBC 2726

- Reprehensible conduct includes proceeding where case lacks merit (i.e. fail to acknowledge manifest deficiency)
- Costs awarded to parties to appeal:
  - Seaspan reluctant to identify its position from the outset of appeal
  - That position changed over time
  - Based largely on expert evidence tendered, Seaspan either advanced a theory that it knew lacked merit or had not undertaken a careful assessment of the strength or lack thereof of the appeal
- Whether EAB could claim its costs left for another day.

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Thank You!!!

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