EMA ANNUAL LEGAL UPDATE

Case Law Update

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West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2019 BCCA 110

Will a commercial insurer be required to defend an insured in an action for spill-related damages?

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2019 BCCA 110

Background

- Contamination from a drycleaner migrated and entered the soils and groundwater of an adjacent lot.
- Owner of the adjacent lot sued the drycleaner.
- Insurance policies covered property damage occurring during the policy period, but excluded coverage for damage arising from pollutants.
- Insurers refused to defend the drycleaner on basis of exclusion clauses.
- Drycleaner sought a judicial declaration that the insurers are obligated to defend the drycleaner in the lawsuit.

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2019 BCCA 110

Supreme Court of BC's Findings (2017 BCSC 2397)

- Chambers judge held that the insurers had to defend the claim.
- The **duty to defend**:
  - Insurers are required to defend a claim where facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim.
  - The duty to defend could only be ousted by a "clearly and unambiguously" worded exclusion clause.
  - Exclusion clause in this case was silent as tow whether the drycleaner would be covered for damages arising from a previous owner's pollutants. The Court held that this silence resulted in ambiguity and the possibility that the insurers would cover the loss.

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2019 BCCA 110

Court of Appeal's Findings

- Allowed insurer's appeal.
- Insurer did not have a duty to defend.
  - This case does not deal with a claim arising from pollution caused by a previous owner.
  - Even if there was such a claim, the policies were clearly intended to cover only claims for damage arising *during* the policy period.
- Exclusion clause applied.
  - Exclusion clause clearly applied where pollution has migrated to a neighbouring property.
  - The exclusion, which refers to claims "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants," captures the migration of pollutants.

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2019 BCCA 110

Take-away

- The pleadings in the underlying action are crucial when determining whether or not an insurer owes a duty to defend.
- This remains a case to watch (drycleaner applied for leave to appeal to the Supreme Court of Canada on July 4, 2019).

Tanex Industries Ltd. v. Greater Vancouver Water District, 2019 BCSC 74

Can an expropriating authority deduct anticipated remediation costs of environmental contamination in respect of expropriated property?

Tanex Industries Ltd. v. Greater Vancouver Water District, 2019 BCSC 74

Background

- GVWD sought to expropriate land owned by Tanex.
- Tanex was required to compensate GVWD under the *Expropriation Act*, R.S.B.C. 1996, c. 125
- Compensation under the *Act* must be equal to the market value of the land, which can be measured 2 ways:
  - Market value based on the land's current use; or
  - If the market value is based on a use of the land other than its use at the time of expropriation, compensation is the greater of (a) the market value based on its current use, and (b) the highest and best of the property as at the expropriation date.

Tanex Industries Ltd. v. Greater Vancouver Water District, 2019 BCSC 74

Background

- Tanex paid market value *less* ~$500,000 for anticipated remediation costs.
- GVWD brought application to determine whether defendant has the authority to deduct remediation costs from compensation.
- GVWD argued that remediation costs should never be taken into account, whereas Tanex argued that they should always be.
- GVWD also raised fairness concerns stemming from the *Environmental Management Act*.

Tanex Industries Ltd. v. Greater Vancouver Water District, 2019 BCSC 74

Court's Findings

- Held that remediation costs can be deducted where appropriate.
- "Market value"
  - "The amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer."
  - Depends on the "highest and best use" of the property.
- Circumstances in which remediation costs should be deducted
  - If the property's highest and best use *not* the use at the time of expropriation, then remediation costs can be taken into account.
- The Court was not convinced by GVWD's fairness arguments regarding the *Environmental Management Act.*

Tanex Industries Ltd. v. Greater Vancouver Water District, 2019 BCSC 74

Take-away

- Remediation costs may be considered when evaluating highest and best use of property for compensation under the *Expropriation Act.*

Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254

Is a municipality required to obtain the Minister of Environment's approval to enact a bylaw prohibiting businesses from providing or selling plastic bags?

Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254

Background

- The City of Victoria enacted a a bylaw in January 2018 that prohibited business from providing or selling plastic bags to customers. The Bylaw also required fees to be charged for paper or other reusable bags.
- The Canadian Plastic Bag Association filed a petition for judicial review of the Bylaw in the Supreme Court of British Columbia in January 2018.
- The Association applied for an order quashing the Bylaw.

Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254

Supreme Court of BC's Findings (2018 BCSC 1007)

- The Association argued that the City lacked jurisdiction. It argued that under the *Community Charter*, the City was required to obtain approval from the Minister of Environment (but failed to do so).
- The City argued that the Bylaw was within its power to regulate "business" under the *Community Charter*.
- Chambers judge held that the Bylaw was within the City's jurisdiction since it was "properly characterized as a business regulation, rather than a bylaw for the protection of the environment."

Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254

Court of Appeal's Findings

- The Association argued that the Bylaw was, in essence, a law in relation to public health and the protection of the natural environment requiring the Minister's approval under the *Environmental Management Act*.
- The City argues that the Bylaw was a valid regulation in relation to business.
- Court of Appeal allowed the appeal. The Court quashed the Bylaw and indicated that the City should proceed with seeking the Minister's approval.
- The Court held that the purpose and effect of the Bylaw was to reduce plastic waste, and that businesses were only *incidentally* affected.
- This remains a case to watch (the City applied for leave to appeal to the Supreme Court of Canada on September 27, 2019).

Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254

Take-away

- The Court of Appeal affirms that the Minister of Environment's approval is required for municipal bylaws related to protection of the environment.

Livco Developments v. Dworschak, 2019 BCPC 45

Can a current landowner recover remediation costs and loss of profit on resale of property from a previous landowner?

Livco Developments v. Dworschak, 2019 BCPC 45

Background

- Plaintiff purchased Saanich property from Defendant.
- Agreement included a provision that “[i]f [oil] tank found the seller will remove along with any environmental issues as per municipal standards before completion.”
- Defendant found and removed an oil tank on the property. Unbeknownst to either party, contamination remained.
- Plaintiff tried to then sell the property to another buyer, at which point the contamination was discovered.
- Plaintiff paid to remediate the property.
- Plaintiff sued the defendant, seeking remediation costs and lost profit.

Livco Developments v. Dworschak, 2019 BCPC 45

Legal Principles

- Common law liability
  - *Caveat emptor* (“buyer beware”) relieves defendant from liability.
  - Exceptions if (1) breach of contract, (2) fraud, or (3) non-innocent misrepresentation.
- Statutory liability
  - *Environmental Management Act*: a former owner of a parcel of contaminated land is a person responsible for its remediation and is liable for reasonably incurred remediation costs.
  - Apportionment may be available under the *Contaminated Sites Regulation*.

Livco Developments v. Dworschak, 2019 BCPC 45

Court's Findings Regarding Remediation Costs

- Defendant *is not* liable at common law
  - No evidence of fraud or misrepresentation.
  - No breach of contract: ""[i]f [oil] tank found the seller will remove along with any environmental issues as per municipal standards before completion."
  - *Caveat emptor* ("buyer beware") applies.
- Defendant *is* liable under the EMA
  - Defendant was clearly a "responsible person" under the *EMA* and is therefore obliged to contribute to remediation costs.
  - No evidentiary basis for apportionment under the *EMA*, so Court defers to maxim of "equality is equity" and splits the costs equally between Plaintiff and Defendant.

Livco Developments v. Dworschak, 2019 BCPC 45

Court's Findings Regarding Lost Profits

- Lost profits are not a "remediation cost" as defined in the *EMA* and are therefore not recoverable under the *EMA*.

Livco Developments v. Dworschak, 2019 BCPC 45

Take-away

- Shows how the maxim of “equality is equity” may be used to apportion remediation costs between a former and current owner of contaminated property.

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

Can the Province require a permit for the transportation of "heavy oil" in British Columbia?

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

Background

- Province passed amendments to the *Environmental Management Act* regarding transportation of dangerous substances.
- Amendments specifically targeted heavy oil transported through pipelines and gave broad discretion to the Minister of Environment regarding permits.
- Province asked the Court for a reference decision regarding the constitutionality of amendments.

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

Division of Powers

- *Constitution Act, 1867* sets out the areas over which the federal government and the provincial governments can regulate ("heads of power")
- Both levels of government have jurisdiction over aspects of the environment
  - Federal: interprovincial projects; navigation and shipping
  - Provincial: property and civil rights; management of provincial public lands; matters of a local or private nature

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

Judicial Review

- Identify the dominant characteristic (or “pith and substance”) of the challenged law.
  - Purpose and effects
- Assign to a head of power.

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

Court's Findings

- Amendments were *not* constitutional.
- Dominant characteristic:
  - Court found that the matter was regulation of an interprovincial pipeline/railway.
- Head of power:
  - Interprovincial project (federal undertaking)
- Province did not have legislative authority to make the proposed amendments, which crossed the line from environmental law of general application to the regulation of federal undertakings.

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

Take-away

- This decision provides much needed legal clarity on the regulatory jurisdiction of interprovincial projects at a time of uncertainty in the energy industry.
- Notice of Appeal was filed in June 2019.
- But, as it stands, this decision affirms that federal undertakings are not immune from provincial environmental laws. Therefore, this decision may have future implications for provincial environmental laws of general application, such as environmental assessments – particularly, the applicability of all or parts of provincial environmental assessments to federally regulated interprovincial undertakings.

R. v. MV Marathassa, 2019 BCPC 13

Has an accused charged with environmental offences established the requirements for a defence of due diligence?

R. v. MV Marathassa, 2019 BCPC 13

Background

- In April 2015, the vessel M/V Marathassa discharged an unknown quantity of intermediate fuel oil into the English Bay.
- Charges were laid against the vessel owner and the vessel itself.
- Vessel owner was acquitted entirely; Marathassa was acquitted of some of the charges against.
- Trial proceeded on the remaining charges against Marathassa.

R. v. MV Marathassa, 2019 BCPC 13

Legal Principles

- Strict liability offences
  - Crown needs only to prove, beyond a reasonable doubt, the acts which are the subject of the offences.
  - Accused can then raise the defence of due diligence.
- Due diligence defence
  - Defendant must prove either that it was mistaken as to facts, or it took all reasonable steps to prevent the commission of the offence.

R. v. MV Marathassa, 2019 BCPC 13

Court's Findings

- Strict liability offences proven
  - Crown proved, beyond a reasonable doubt, that the Marathassa discharged fuel oil in English Bay.
- Due diligence defence established
  - Marathassa had extensive pollution prevention systems in place and had conducted comprehensive crew selection, training, and inspections.
  - Marathassa had a mistaken, honest, and reasonable belief that the vessel was seaworthy to the highest international standards
- Court acquitted Marathassa of all charges.

R. v. MV Marathassa, 2019 BCPC 13

Take-away

- The decision serves as a useful summary of some of the steps necessary to establish a due diligence defence in the maritime pollution context, and the proper elements of “reasonable care” with regards to pollution prevention.

Questions?

Thank You

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