

EMA ANNUAL LEGAL UPDATE

Case Law Update

Presented By

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- GFL Environmental compost facility appeals
- Climate change and justiciability
- Challenges to Provincial Environmental Legislation



Photo Credit: Courts of Nova Scotia

Lengthy Environmental Appeal Board hearing continues

- Appeals relate to GFL's composting facility in Ladner
- Residents have been bothered by the odours emitted from the open-air facility
- GFL committed to building new, enclosed facility to address problem
- Construction of new facility has been delayed due to pandemic, weather and design changes

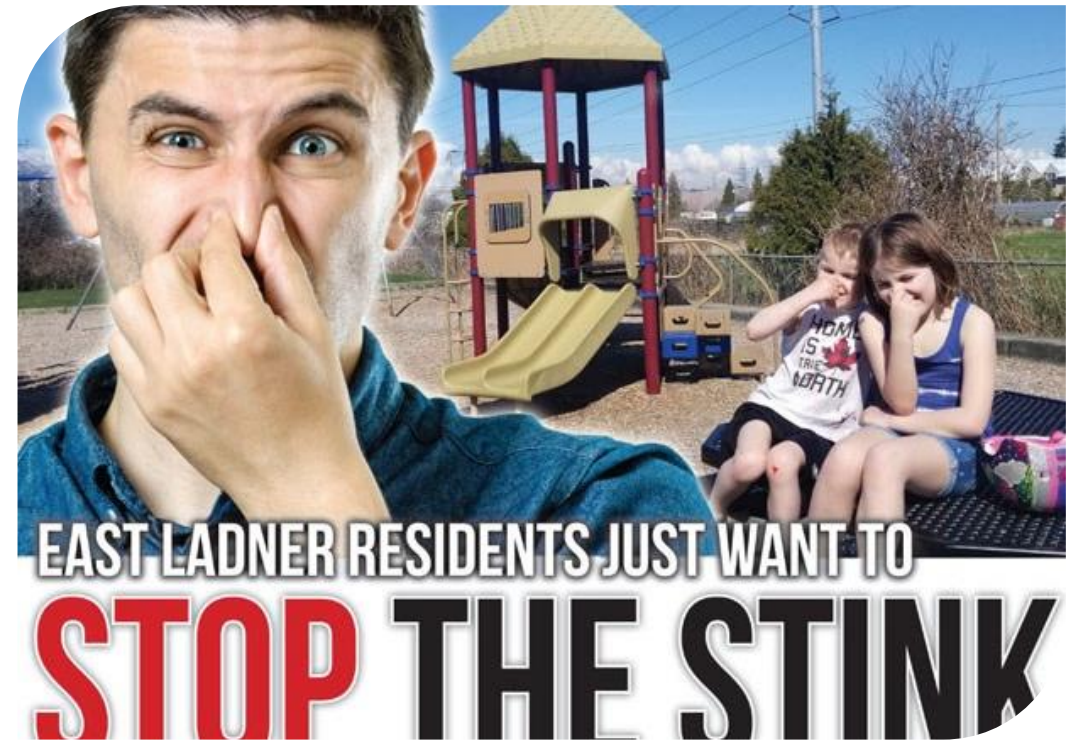


Photo Credit: Delta Optimist

GFL Environmental Inc and British Columbia (District Director, Environmental Management Act), Re, 2018-EMA-021(d)-(h)

- Metro Vancouver issued air quality management permit issued to GFL on August 1, 2018
- GFL appealed various terms and conditions in the permit
- Group of concerned citizens also appealed the permit, but for different reasons
- Appeals of GFL Environmental and concerned citizens being heard together
- City of Delta third party in all appeals

GFL Environmental Inc and British Columbia (District Director, Environmental Management Act), Re, 2018-EMA-021(d)-(h)

- Original deadline was for enclosed facility to be in place by March 1, 2020
- January 15: EAB granted GFL's application for an extension to May 1
- April 23: EAB granted a second extension to allow GFL until July 1 to finish its new facility
- June 25: EAB granted a third application to further extend deadlines varied in the first and second decisions
- GFL cited the COVID-19 pandemic and associated delays and disruptions in support of its interim relief applications

GFL Environmental Inc and British Columbia (District Director, Environmental Management Act), Re, 2018-EMA-021(d)-(h)

- The hearing, originally set for 15 days starting June 3, 2019, has gone on for 44 days
- Most recently, Metro Vancouver brought a motion to have the Panel Chair and Panel Member Michaluk recuse themselves
- On October 7, 2020, the Board denied the recusal motion
- Decision on the appeals expected in early 2021

Climate Change and Justiciability

La Rose v Canada, 2020 FC 1008

- Plaintiffs brought claim against Canada relating to climate change
- Plaintiffs claimed Canada infringed their *Charter Rights* and sought various orders
- Canada brought motion to strike Plaintiffs' claim



Photo Credit: Pacific Centre for Environmental Law and Litigation

Climate Change and Justiciability

La Rose v Canada, 2020 FC 1008

- Court found the *Charter* claims were not justiciable
- Test for Justiciability:
 - [27] Justiciability is concerned with the Court's proper role within Canada's constitutional framework and the 'time-honoured' demarcation of powers between the Courts and the other branches of government. It relates to the subject matter of a dispute and whether the issue is appropriate for the Court to decide.

Climate Change and Justiciability

Misdzi Yikh v Canada, 2020 FC 1059

- Plaintiffs argued that Canada's policy objectives for the reduction of GHG emissions by 2030 were insufficient
- Plaintiffs sought wide-ranging remedies



Photo Credit: Toronto Star

Climate Change and Justiciability

Misdzi Yikh v Canada, 2020 FC 1059

- Court granted Canada's motion to strike Plaintiffs' claim
- Insufficient legal elements in Plaintiffs' claims for them to be justiciable
- The Court stated:

[77] The issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government.

Climate Change and Justiciability

- Takeaways:
 - Not the role of the courts to dictate climate change policy
 - When policy is translated into law or state action, the resulting law or state action must not infringe constitutional rights
 - The court can address a definable law or state action in issue

Challenges to Provincial Environmental Legislation

- *Reference re: Environmental Management Act (British Columbia), 2020 SCC 1*
 - Proposed amendment to the *Environmental Management Act* challenged
 - Would require any person in control of “heavy oil” to obtain permit from Province
 - In effect, would only apply to Trans Mountain Pipeline Expansion Project



Photo Credit: National Observer

Challenges to Provincial Environmental Legislation

- *Reference re: Environmental Management Act (British Columbia), 2020 SCC 1*
 - Canada and other interested parties argued proposed legislation was beyond the legislative authority of the Province
 - Province argued purpose of proposed amendment was to regulate release of hazardous substances into environment

Challenges to Provincial Environmental Legislation

- *Reference re: Environmental Management Act (British Columbia)*, 2020 SCC 1
- BC Court of Appeal:
 - Federal undertakings not immune from provincial environmental laws
 - Both levels of government enjoy jurisdiction over aspects of the environment
 - Proposed amendment unduly encroached upon regulation of federal undertakings
 - *Ultra vires* provincial jurisdiction

Challenges to Provincial Environmental Legislation

- *Reference re: Environmental Management Act (British Columbia), 2020 SCC 1*
- Supreme Court of Canada:
 - Dismissed appeal for the unanimous reasons of the BC Court of Appeal



Challenges to Provincial Environmental Legislation

- *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*, 2018-EMA-043(c); 2018-EMA-044(c); 2018-EMA-045(c)
 - Appeals related to orders made under the *Environmental Management Act*
 - Orders required appellants to provide route and volume information regarding shipments of crude oil
 - Ministry planned to publish reports on crude oil transport in BC

Challenges to Provincial Environmental Legislation

- *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*, 2018-EMA-043(c); 2018-EMA-044(c); 2018-EMA-045(c)
 - Orders made pursuant to section 91.11(5)(b) of the *EMA*
 - “regulated person” includes a person who transports 10,000 litres or more of crude oil

Challenges to Provincial Environmental Legislation

- *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*, 2018-EMA-043(c); 2018-EMA-044(c); 2018-EMA-045(c)
 - Appellants argued legislation not within Province's constitutional jurisdiction
 - Legislation and Orders regulated interprovincial railways, which are exclusively under federal jurisdiction
 - Constitutional law doctrines raised

Challenges to Provincial Environmental Legislation

- *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*, 2018-EMA-043(c); 2018-EMA-044(c); 2018-EMA-045(c)
 - Province argued that:
 - the orders would allow a better understanding of movement of crude oil by rail through BC
 - the orders would allow the Province to assess spill response preparedness plans
 - the legislation and orders were aimed at environmental protection

Challenges to Provincial Environmental Legislation

- *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re, 2018-EMA-043(c); 2018-EMA-044(c); 2018-EMA-045(c)*
 - Environmental Appeal Board reversed orders and allowed appeals

[143] While section 91.11 may, in other instances, be characterized as an environmental law of general application, the very specific nature of the definition of “regulated person” in section 2(1)(b)(i) of the Regulation appears to target interprovincial railway operations.

Challenges to Provincial Environmental Legislation

- Takeaways:
 - Both levels of government can act in relation to the environment
 - Targeted provincial legislation that affects federal undertakings more than incidentally will be found to be inoperative



Questions?

Thank You

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