

EMA ANNUAL LEGAL UPDATE

# Case Law Update

Presented By

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# Agenda

- Update on GFL Environmental compost facility appeal
- Federal legislation for minimum national standards on carbon pricing
- Environmental remediation costs
- Fines in environmental prosecutions



# *GFL Environmental Inc. and British Columbia (District Director, Environmental Management Act), Re, 2018-EMA-G02*

## Final Decision in Lengthy Environmental Appeal Board Hearing

- GFL operates a composting facility in Delta
- A new, fully-enclosed composting facility was completed in September 2020
- Hundreds of complaints from nearby residents about odour in summer of 2021
- Appeals relate to Metro Vancouver's issuance of air quality management permit in August 2018



Photo Credit: Delta Optimist

# *GFL Environmental Inc. and British Columbia (District Director, Environmental Management Act), Re, 2018-EMA-G02*

- GFL appealed various terms and conditions in the Permit
- GFL argued the terms were not advisable for the protection of the environment, were unduly restrictive, and exceeded the District Director's authority
- Concerned neighbours also appealed
- Appeals were heard together
- “Hybrid” hearing

# *GFL Environmental Inc. and British Columbia (District Director, Environmental Management Act), Re, 2018-EMA-G02*

- Panel's findings:
  - District Director's "failure to provide reasons for the Permit's requirements, in the circumstances, created significant fairness concerns": at para. 319
  - Use of odour units as a compliance mechanism is not advisable for the protection of the environment: at paras. 443–444
  - The "sniff test" provisions are also not advisable for the protection of the environment: at para. 481
  - Effective period of the Permit increased to 2026
  - Some Permit terms were "unduly prescriptive" and designed to regulate composting itself: at para. 598
  - Neighbours failed to tender evidence about actual health impacts: at para. 684

# Federal Carbon Pricing Legislation

## *References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11*

- The GGPPA establishes minimum national standards for carbon pricing
- Part 1 establishes a fuel charge
- Part 2 provides for output-based limits on large industrial emitters
- Provinces and territories can establish their own pricing policies for greenhouse gas emissions
- The GGPPA applies as a “backstop” if the provincial or territorial scheme is inadequate



# Federal Carbon Pricing Legislation

## *References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11*

- Supreme Court of Canada majority upheld the Act as a valid exercise of the “POGG” Power
- GGPPA about establishing minimum national standards of greenhouse gas price stringency to reduce emissions
- This matter satisfies the POGG test:
  - It is of sufficient concern to the country as a whole
  - It has a singleness, distinctiveness, and indivisibility
  - It has a scale of impact that is reconcilable with the division of powers

# Federal Carbon Pricing Legislation

## *Manitoba v. Canada (Attorney General)*, 2021 FC 1115

- The Governor in Council added Manitoba to Schedule 1 of the GGPPA
- This had the effect of applying the GGPPA's fuel charge scheme and output-based pricing system to Manitoba
- Manitoba challenged this decision





# Federal Carbon Pricing Legislation

## *Manitoba v. Canada (Attorney General), 2021 FC 1115*

- Manitoba had previously proposed a carbon pricing scheme
- This scheme did not meet the federal benchmark set out in the GGPPA
- Manitoba withdrew its scheme in 2018 following comments by the Canadian Minister of Environment and Climate Change

# Federal Carbon Pricing Legislation

## *Manitoba v. Canada (Attorney General), 2021 FC 1115*

- The Court dismissed Manitoba's challenge
- The Governor in Council's decision was not inconsistent with the GGPPA's statutory purpose
- Manitoba had no plan in place to assess – the Governor in Council's decision was reasonable
- The decision did not run constitutionally afoul of the POGG power

# Federal Carbon Pricing Legislation

- Takeaways:
  - There will be a federal mandated pricing floor for GHG emissions, with future incremental increases in carbon pricing
  - Overlapping federal and provincial jurisdiction, subject to a minimum national standard
  - Provincial inability to address pollutants and other environmental issues may lead to increased federal regulation in this area
  - Court's reasons clearly recognize the threat of climate change and emphasize the importance of curtailing emissions from individual provinces and other sources

# Environmental Remediation

## *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd., 2021 BCCA 129*

- A former gas station owned by Victory Motors created contamination
- The contamination affected a neighbouring property owned by Jansen Industries
- Both Victory Motors and Jansen sought to recover their remediation costs



# Environmental Remediation

## *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129

- Both recovered their costs for retaining engineering firm in order to obtain Certificates of Compliance
- However, they also sought their legal fees associated with arranging for remediation
- The *Environmental Management Act* allows recovery of “all costs of remediation”, which includes:
  - Costs of preparing a site disclosure statement
  - Costs of carrying out a site investigation and preparing a report
  - Legal and consultant costs associated with seeking contributions from other responsible persons
  - Fees imposed by a director, municipality, approving officer or the commission

# Environmental Remediation

## *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd., 2021 BCCA 129*

- The Court of Appeal held that remediation legal costs can be recovered as remediation costs:

*[99] Similar to the examples of remediation legal costs I described generally above, this subset of remediation legal costs would include those for legal services engaged in the investigation of other responsible persons, negotiations with those persons, and drafting and preparing agreements for joint remediation and cost sharing. Again, this is not an exhaustive list.*

*[100] Section 47(3)(c) legal costs must be of the sort I have described, because if they were to be characterized only as litigation legal costs between responsible persons, the section would be redundant of the Supreme Court Civil Rules costs rules.*

- Takeaways:
  - Allowing recovery of remediation legal costs encourages early involvement of lawyers
  - Responsible persons will be liable to pay more to cover remediation legal costs
  - Defendants will need to scrutinize claimed remediation legal costs
  - Lawyers should keep track of legal costs relating to remediation versus litigation costs and maintain separate files and bills
  - Issues of waiver of privilege when proving remediation legal costs

# Fines in Environmental Prosecutions

## *R. v. Teck Coal Limited*, 2021 BCPC 118

- In 2012, waste rock from two of Teck's mines discharged selenium and calcite into a nearby river and settling pond
- Westslope Cutthroat trout live in the river
- Teck pleaded guilty to contaminating waterways





# Fines in Environmental Prosecutions

## *R. v. Teck Coal Limited*, 2021 BCPC 118

- Testing showed unsafe levels of selenium in the water and the trout
- Teck admitted it did not exercise all due diligence to prevent, or have a comprehensive plan in place to address, the deposit of deleterious substances in the waters
- The contamination had a community impact on the Ktunaxa Nation

# Fines in Environmental Prosecutions

## *R. v. Teck Coal Limited*, 2021 BCPC 118

- Teck took significant steps after the fact, including:
  - Creating an independent expert panel to advise and assist for producing a strategic plan for management of selenium
  - Creating the Elk Valley Water Quality Plan
  - Agreeing to design and operate active water treatment facilities
  - Increasing its efforts to address water quality
  - Commissioning and contributing to selenium research
  - Commissioning a multi-year study of the trout population
- Between 2011 and 2020, Teck paid \$1 billion to bring selenium levels under control

# Fines in Environmental Prosecutions

## *R. v. Teck Coal Limited*, 2021 BCPC 118

- Maximum financial penalty available was \$1 million
- But, each day the offence was committed counts as a separate offence
- Teck paid \$60 million, equating to \$80,000 per day of 2012
- This is the highest total penalty to date under the *Fisheries Act*

# Fines in Environmental Prosecutions

## *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

- Cermaq runs salmon fish farms
- Employees must transfer fuel
- An employee caused a fuel spill after trying to open the fuel pump
- Cermaq pleaded guilty to allowing diesel fuel to escape into the ocean



Photo Credit: Cermaq Canada Ltd.

# Fines in Environmental Prosecutions

## *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

- Employees took immediate steps to clean up spill
- Cermaq hired a firm to lead clean-up efforts
- Vast majority of diesel recovered in four days

# Fines in Environmental Prosecutions

## *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

- After the spill, Cermaq took many steps to improve, including:
  - Reconfiguring its fuelling system to eliminate fuel transfers
  - Adding spill kills and booms
  - Hiring consultants to help review its fuel handling policies and practices
- Cermaq cooperated fully with the investigation and covered all costs (\$885,000)
- Cermaq pleaded guilty early and posted an apology to its website

# Fines in Environmental Prosecutions

## *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

- Cermaq argued this was a “near miss” of due diligence
- The Crown argued culpability was “middling”
- Cermaq’s culpability was low, but it should have made changes earlier

# Fines in Environmental Prosecutions

## *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

- The potential for harm was minor
- Expert evidence on harm was inconclusive
- There were no dead fish observed
- Nearby organisms were safe for consumption
- Salmon in the fish farm unaffected long term



# Fines in Environmental Prosecutions

## *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

- Cermaq fined \$500,000
- Cermaq ordered to publish the decision on its website for 90 days

# Fines in Environmental Prosecutions

- Takeaways:
  - Even if a company responds promptly and appropriately to violations of environmental legislation, high penalties may still be imposed
  - Proactively review operations to consider gaps in environmental safety procedures



Questions?

# Thank You

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