

EMA LEGAL UPDATE 2023

# Case Law Update

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1. Remediation of contaminated sites
2. Environmental prosecution and due diligence
3. Competing Policy Objectives: Limitation Periods and Environmental Liability
4. Bears





# Remediation of Contaminated Sites

# Niagara Regional Housing v. Trustees of Carleton United Church et al., 2022 ONSC 3413 (June 7, 2022)

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## Summary

- Carleton United Church (“Carleton”) hired LEX Scientific Inc. (“LEX”) to undertake a Phase I Environmental Site Assessment in 2016
- Carleton sold property to Niagara Regional Housing (“NRH”) in late 2016, and provided them with a copy of the report (without the consent of LEX)
- NRH later discovered contamination, and sued Carleton and LEX for negligent misrepresentation





# ***Niagara Regional Housing v. Trustees of Carleton United Church et al.*, 2022 ONSC 3413 (June 7, 2022)**

## **Analysis**

- LEX argued that:
  - report was prepared for Carleton's exclusive use;
  - no duty of care was owed to NRH; and
  - limitation of liability disclaimer in the report protected LEX from claims by third parties.
- The Court found that NRH was unable to establish that LEX owed duty of care and that such duty was not limited or waived by disclaimer
- The Court concluded that LEX was not liable to NRH, and that Carleton's cross-claim for contribution and indemnity against LEX also failed

# ***Niagara Regional Housing v. Trustees of Carleton United Church et al., 2022 ONSC 3413 (June 7, 2022)***

## **Significance**

- Limitation of liability and disclaimer clauses in Phase I reports will be strictly upheld by courts
- Rely on environmental reports commissioned by a third party without authorization from the consultant at your own peril



## Summary

- In 2013, an underground oil tank on a property was rendered inert
- Plaintiffs purchased the property in 2014
- Construction on the property occurred in 2014
- In early 2016, contaminated soil was discovered, but the oil tank was missing



## ***Tran v. Bola*, 2022 BCSC 377 (March 9, 2022)**

### **Analysis**

- The plaintiffs brought a claim for breach of contract, negligent misrepresentation, negligence and breaches of the *Environmental Management Act* (“*EMA*”)
- The Court was unable to conclude what happened to the oil tank
- The claim that the defendant was responsible for remediation under the *EMA* was dismissed because there was no evidence he transported or disposed of furnace oil and because he had no knowledge or reason to believe the site was contaminated
- The defendant was not liable for negligent misrepresentation; he would have needed to be “prescient verging on clairvoyant” to know there was contamination



# *Tran v. Bola, 2022 BCSC 377 (March 9, 2022)*

## Significance

- The defendant was able to proceed on the basis of the 2013 permit, which the Court observed would not have been issued if contamination had been observed; as such, the Court found the defendant had no knowledge or reason to believe there was contamination
- Conflicting evidence undercuts the court's ability to make findings of fact and to determine liability



# Seaspan ULC v. North Vancouver (District), 2022 BCCA 433 (December 21, 2022)

## Summary

- Seaspan shipyard in North Vancouver – long term contamination
- Remediation Order issued in 2010 to Seaspan as a responsible person
- Ongoing remediation efforts; costs of more that \$50M
- Seaspan appealed property assessments from 2013 – 2019 to the Property Assessment Board and then to the BCSC
- Seaspan appealed BCSC decision to the Court of Appeal



# ***Seaspan ULC v. North Vancouver***

## **Analysis**

- Parties agreed that the contamination negatively impacted property value, but disagreed about what the effect of the Remediation Order was
- Board held that the Order did not impact the actual value of the land, and the entire anticipated cost of remediation plus 10% should be deducted from the value of the land to determine its actual value
- BCSC held that the Board erred and that the remediation order augmented the value of the land by offsetting the effect of contamination
  - Doesn't only attach to Seaspan's interest

# Seaspan ULC v. North Vancouver

## Analysis

- Court of Appeal upheld the BCSC decision and dismissed the appeal
- *It is clear that the legal rights and obligations imposed by environmental legislation can attach to the fee simple interest in land and run with it, thereby affecting the market value of that interest. The parties and the Board accepted that the cost of remediating contamination reduced the market value of the fee simple interest because a purchaser may be liable to pay the costs of remediation. The Board erred in not appreciating that the benefit of a remediation order requiring third parties to pay the cost of that remediation also affects the value of the fee simple interest in a hypothetical market transaction, by imposing that cost on parties other than a hypothetical purchaser*

# ***Seaspan ULC v. North Vancouver***

## **Significance**

- Not only a charge or encumbrance that flows with the land will impact land value
- Must consider hypothetical and objective buyer and purchaser, and what would happen in those negotiations
- Courts will consider more than just that a property is contaminated in dealing with issue of value and the impact of contamination





# Environmental Prosecution and Due Diligence

# *Mount Polley Mining Corporation v. Environmental Appeal Board, 2022 BCSC 1483 (August 25, 2022)*

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## Summary

- Mount Polley has operated open-pit copper and gold mine since 1997
- 2014 – tailings dam failure
- Director amended permit, imposing requirements for design and testing of waste water treatment systems
- Failure to comply with requirements led to \$9,000 administrative penalty, upheld on appeal
- Mount Polley petitioned for judicial review



# ***Mount Polley Mining Corporation v. Environmental Appeal Board, 2022 BCSC 1483 (August 25, 2022)***

## **Analysis**

- Applicable standard of review: reasonableness
- *Administrative Penalties (Environmental Management Act) Regulation* allows Director to impose administrative penalty even where due diligence is exercised
- Court ruled that defence of impossibility analogous to defence of due diligence in the circumstances, and that neither applied under the EMA
- Court concluded that Board undertook detailed analysis, decision was reasonable
- Petition dismissed

# *Mount Polley Mining Corporation v. Environmental Appeal Board, 2022 BCSC 1483 (August 25, 2022)*

## Significance

- Impossibility defences are not available under the administrative monetary penalty regime set out in the *EMA*
- While the defences of impossibility and due diligence apply in the penal context, they do not apply under the *EMA*





# *R v. Teck Metals*; Sentencing Decision, January 2023

## Summary

- 2019 release of 2.5 million litres of low pH effluent into the Columbia River by Teck Metals Inc
- Spill reported and investigated by Province and Federal Authorities and charges laid under the *Fisheries Act* and the EMA
- Appears to be guilty plea and was a joint submission on sentencing
- Fine of \$2.5 million





# ***R v. Teck Metals*; Sentencing Decision**

## **Significance**

- Teck a repeat offender and therefore escalating fines
- Fines for environmental offences continue to increase
- Commitment to deterrence by Provincial and Federal Government

# Limitation Periods and Environmental Liability



# *Paramount Resources Ltd v Grey Owl Engineering Ltd, 2022 ABQB 333 (May 9, 2022)*

## Summary

- Grey Owl Engineering was involved with updating pipeline owned by Paramount in 2004, pipeline used without issue until 2015
- Use of pipeline discontinued between 2015-2017, then resumed
- In 2018, two environmental leaks found, Paramount required to remediate (~\$20 million to date)
- Paramount alleged negligence on part of Grey Owl for failing to bury pipeline deep enough



# ***Paramount Resources Ltd v Grey Owl Engineering Ltd, 2022 ABQB 333 (May 9, 2022)***

## **Analysis**

[24] Absent clear legislative language or appellate guidance, I believe it would be an unwarranted expansion of equitable indemnity to allow it in this case. The policy concerns raised in Addison are also relevant here. I am greatly concerned about exposing contractors and subcontractors to limitless liability simply because their work carries environmental risk. Exceptions to limitation periods are few, and they should not be expanded lightly.

[...]

[29] The 10-year time limit in section 3(1)(b) of the Limitations Act favours finality. It is important that potential liabilities are eventually put to rest so that people can move forward without having to keep reserves in case an ancient claim rears its head. It is also a recognition of the practical problems that arise from lost records and faded memories, which only add to the difficulties associated with proof at trial: Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited, 2019 ABCA at para 12.

# *Paramount Resources Ltd v Grey Owl Engineering Ltd, 2022 ABQB 333 (May 9, 2022)*

## Significance

- Policy considerations under the *Alberta Limitations Act* militate against extension of limitation periods under the *EPEA*, particularly in the context of contractors and subcontractors
- What constitutes an “act or omission” for the purposes of determining the ultimate limitation period in a cost recovery claim under the *EMA* in BC remains unsettled.







# Bears

# *R. v. Stevikova*, 2022 BCSC 2094 (December 1, 2022)

## Summary

- Defendant plead guilty to offences under the *Wildlife Act* related to feeding bears
- Feeding bears on property in Whistler over several seasons; conservation officers called and found bears on property
- Bears had to be put down and charges laid
- Plead guilty and joint submission on sentencing made



# ***R. v. Stevikova*, 2022 BCSC 2094**

## **Analysis**

- Joint sentencing submission rejected by Judge at first hearing and much higher fine of \$60,000
- Held that accepting joint submission would lead people to believe proper functioning of justice system had broken down; feeding a bear was akin to killing a bear
- Crown and defendant appealed and BCSC overturned decision of sentencing judge and imposed sentence recommended in joint submission

***R. v. Stevikova, 2022 BCSC 2094***

**Significance**

**DON'T FEED THE BEARS!**



Questions?



# Thank You

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