

EMA OF BC – ANNUAL LEGAL
UPDATE

The Year in Environmental Case Law

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Agenda

1. Scope of “responsible persons”
2. Development in riparian areas
3. Environmental due diligence
4. Mineral claims and UNDRIP
5. Environmental offences



Scope of “Responsible Persons”

I4PG Hastings Street Inc. v. Burnaby Dry Cleaners Ltd., 2023 BCSC 242 (February 17, 2023)

Summary

- Plaintiff property owner alleged property was contaminated by dry-cleaning chemicals
- Plaintiff brought cost recovery claim under the *Environmental Management Act*
- In 2022, dry cleaner sold its property to numbered co. and they entered into an indemnity agreement
- Numbered co. tried to avoid being added as a defendant to the action based on the indemnity agreement



I4PG Hastings Street Inc. v. Burnaby Dry Cleaners Ltd., 2023 BCSC 242 (February 17, 2023)

Analysis

- Master dismissed application to add numbered co., finding it unlikely that numbered co. would be a “responsible person”
- On appeal, the Court disagreed with the Master’s conclusion that numbered co. was not a “responsible person”
- No exclusions were available to the numbered co.
- Indemnity agreement confirmed that numbered co. was aware of the action

I4PG Hastings Street Inc. v. Burnaby Dry Cleaners Ltd., 2023 BCSC 242 (February 17, 2023)

Significance

- “Responsible persons” under *EMA* is defined broadly
- Indemnity agreements between two “responsible persons” do not preclude a plaintiff from claiming against both directly
- Highlights the importance of allocating legal costs in indemnity agreements



Development in Riparian Areas

Background

- CVRD's Official Community Plan sets out Streamside Protection Areas, and a Policy set out in the OCP Bylaw prohibited any development to occur within a SPEA
- The Wilsons applied for a development permit to construct a single family home on Cowichan Lake within the SPEA
- Application was supported by a report from a Qualified Environmental Professional that the construction of the home would not result in harmful alteration, disruption, or destruction of fish habitat
- CVRD refused to issue DP pursuant to the prohibition

Cowichan Valley Regional District v Wilson, 2023

BCCA 25

Chambers Decision

- The Wilsons sought a judicial review of the CVRD's refusal and argued that the CVRD did not have the authority to prohibit development in a SPEA
- Argued that the Riparian Areas Regulation, which created the SPEA, did not grant authority to a local government to prohibit development where a QEP reported that there would be no HADD to fish habitat
- Therefore the Bylaw and Policy were outside the authority of the CVRD and could not be enforced, resulting in the DP having to be approved

Cowichan Valley Regional District v Wilson, 2023

BCCA 25

Chambers Decision

- Chambers judge held that the CVRD had the power under the LGA to regulate but not wholly prohibit development in a SPEA
- Could not enact and follow a policy that ignored the system set out in the RAR whereby a QEP evaluates the impact of a development on the SPEA
- Concluded that the Policy in the OCP Bylaw was invalid and that the decision to deny the Wilson's DP application was unreasonable
- Ordered that the CVRD must issue the DP

Cowichan Valley Regional District v Wilson, 2023

BCCA 25

Court of Appeal

- CVRD appealed to the Court of Appeal
- The Court of Appeal upheld the chambers judge's decision quashing the Bylaw
- The local government does not have legislative authority to prohibit any development in a SPEA where a qualified environmental professional had deemed that no harm to fish habitat would result.
- But overturned the order requiring the DP to be issued because the QEP report did not meet the prescribed form and did not follow the required methodology

Environmental Due Diligence

Andrade v. Collins; 2023 ONSC 6011

Background

- Dispute arising out of the purchase of a motel, restaurant and gas bar in Frenchman's Bay, Ontario
- Shortly after sale closed the Plaintiffs became aware of issues with an underground fuel tank resulting in extensive contamination
- The purchasers commenced an action against the vendors for fraudulent and negligent misrepresentation against the vendors and for negligence against their own solicitor
- Prior to the purchase an order had been issued by the Ontario Safety Authority due to the fuel system failing tests which required the system to be repaired

Andrade v. Collins; 2023 ONSC 6011

Plaintiffs' Arguments

- Vendor/defendants had not informed the Plaintiffs of the order and had stated that the fuel system was in good working order
- Plaintiffs claimed this was a misrepresentation and sought the cost to remove the existing system, install a new one, and remediation costs
- Also claimed their lawyer was negligent due to failing to properly advise of the risks of the acquisition and to include terms in the contract to protect the purchasers from the risk
- Lawyer was unfamiliar with risks associated with gas stations, the contract did not contain remedies if the fuel system was not in working order, and failed to search the records of the Safety Authority

Andrade v. Collins; 2023 ONSC 6011

Decision

- Court held that the vendors made both negligent and fraudulent misrepresentations to induce the vendors into purchasing the property, including deliberately failing to disclose the existence of the outstanding order
- On the basis of expert evidence provided by a lawyer experienced in similar real estate transactions, court held that the vendors' lawyer had breached the standard of care owed to the Plaintiffs, and that the Plaintiffs had relied on her expertise when deciding to proceed with the purchase

Andrade v. Collins; 2023 ONSC 6011

Significance

- Underscores the importance of ensuring that experienced counsel (or consultants) with relevant expertise is retained when proceeding with transactions or actions with environmental risks
- Do not forego proper due diligence or properly advising your clients for the sake of not “blowing up the deal”



Mineral Claims and UNDRIP

Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680

Background

- BC's mineral tenure system dates back to 1859, now regulated under the *Mineral Tenure Act*
- Free miners can register a “mineral claim” over unclaimed Crown land
- No consultation when a claim is staked
- Province only consults First Nations when a recorded holder applies permits

Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680

Petitioners' Arguments

- The Gitxaala Nation and Ehattesaht First Nation argued that the mineral tenure system breached their s. 35 rights
- Duty to consult – *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
- Argued that the duty to consult was triggered at the mineral claim stage
- Argued that the *Mineral Tenures Act* was inconsistent with *UNDRIP*

Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680

Duty to Consult

- Whether the duty to consult is triggered at the mineral claim stage
- Third element of the *Haida* test – whether the granting of mineral claims adversely affects or impacts a claim or right of the petitioners
- Court held that granting of mineral claims triggers a duty to consult
- Impacts of mineral claims on claims of Aboriginal rights and title
- Impacts must also be viewed from an Indigenous perspective

Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680

UNDRIP

- Interpretation of *Mineral Tenures Act* in manner consistent with *UNDRIP*
- In light of *UNDRIP*, the Court held that the *Mineral Tenures Act* was valid, since it provided authority for pre-registration consultation process
- However, the Court held that British Columbia did not implement *UNDRIP* into domestic law
- Section 3 of the *Declaration on the Rights of Indigenous Peoples Act* did not create justiciable rights

Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680

Remedy

- Declaration: CGC's online system for registration of mineral claims, without consultation, breached the obligations of the Crown
- The declaration included mineral claims throughout the province
- 18-month deferral of declaration to allow for design and implementation of consultation program
- No finding or order on the validity of existing mineral claims – all mineral claims registered under the existing system are valid

Environmental Offences

R. v. Keller Foundations Ltd. (Unreported, BCPC North Vancouver File NO. 68610-1, March 17, 2023)

Summary

- Sentencing decision of construction and geotechnical engineering company
- Charge brought under s. 36 of *Fisheries Act*
- Water going from stockpile to underground culvert, and into Larson Creek = 85 dead trout



R. v. Keller Foundations Ltd. (Unreported, BCPC North Vancouver File No. 68610-1, March 17, 2023)

Analysis

- Early guilty plea entered
- Agreement between Keller and Crown that \$1M fine appropriate
- Sentencing judge agreed with \$1M fine, after considering relevant sentencing factors:
 - ***Moral culpability***
 - ***Harm***
 - ***Prioritizing profits (aka prior record)***
 - ***Guilty plea***
 - ***Post-offence conduct***

***R. v. Keller Foundations Ltd.* (Unreported, BCPC North Vancouver File No. 68610-1, March 17, 2023)**

Significance

- Reinforces importance of exercising due diligence and addressing problems as they are identified
- Emphasizes value of entering an early guilty plea and seeking joint submission on sentencing where no defences are available



Questions?