BEST 2022

Environmental Law: Case Law Update

Presented By

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Agenda

1. Remediation of contaminated sites
2. Indigenous law: Importance of Permit Compliance
3. Environmental prosecution and due diligence
4. Overlapping areas of jurisdiction
5. Judicial Review

Remediation of Contaminated Sites

0694841 B.C. Ltd. v. Alara Environmental Health and Safety Limited, 2022 BCCA 67 (February 17, 2022)

Summary

- Purchaser hired Alara Environmental to prepare a Phase II Report
- The report contained a disclaimer that it was prepared solely for Purchaser's use
- ITC, a related company, relied on the report
- ITC later discovered contamination
- ITC alleged Alara was negligent in preparing the Phase II report

0694841 B.C. Ltd. v. Alara Environmental Health and Safety Limited, 2022 BCCA 67 (February 17, 2022)

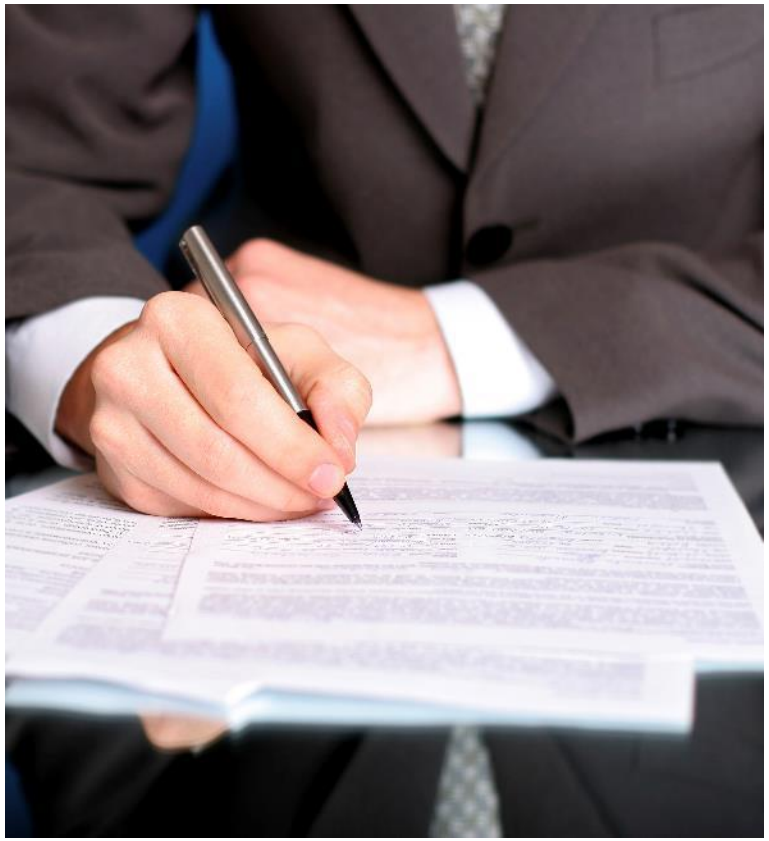
Analysis

- At trial judge found Alara not liable. ITC did not reasonably rely on the report in the face of the disclaimer
- The Court found no error in the judge's conclusion that ITC could have protected itself by:
  - (1) asking Alara to consent to ITC's use; or
  - (2) conducting its own due diligence
- Disagreed with ITC's argument that the judge ignored critical factors.
- Appeal dismissed. Alara was entitled to enforce the disclaimer, extinguishing any liability

0694841 B.C. Ltd. v. Alara Environmental Health and Safety Limited, 2022 BCCA 67 (February 17, 2022)

Significance

- Even though the Purchaser and ITC were closely related, and ITC in fact paid for the two reports, the disclaimer was still enforced
- Take away - avoid relying on reports prepared for someone else – conduct your own due diligence or seek consent to use the report.



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

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 plaintiff 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

Indigenous Law: Importance of Permit Compliance

Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc., 2022 BCSC 15 (January 7, 2022)

Summary

- The First Nations sued Rio Tinto Alcan ("RTA"), initially without also naming the Crown, for damages to their aboriginal rights resulting from impacts to the Nechako River arising from the development and operation of the Kenney Dam for hydro-electric development

Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc., 2022 BCSC 15 (January 7, 2022)

Analysis

- The Court concluded that a private entity could be liable, under a claim of nuisance, for damage to aboriginal rights, that the First Nations have various aboriginal rights, and the Kenney Dam had caused damage to those rights
- However, RTA was entitled to rely on the defence of statutory authority, in that the harm caused was a direct result of what they were specifically authorized to do
- The First Nations did secure an order that the Crown must take measures to protect their aboriginal rights

Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc., 2022 BCSC 15 (January 7, 2022)

Significance

- Private entities may have personal liability if they infringe aboriginal rights without (or beyond the scope of) crown authorization
- First Nations can use such an action as the forum to prove their aboriginal rights, so long as they also name the Crown as defendants
- The courts are clearly wrestling with how to craft appropriate remedies, in the context of claims based on historic developments that were authorized by the Crown before First Nations had their claims recognized through (prior) litigation or treaty
- Appeal pending

Environmental Prosecution and Due Diligence

R. v. Cermaq Canada Ltd., 2021 BCPC 283 (November 30, 2021)

Summary

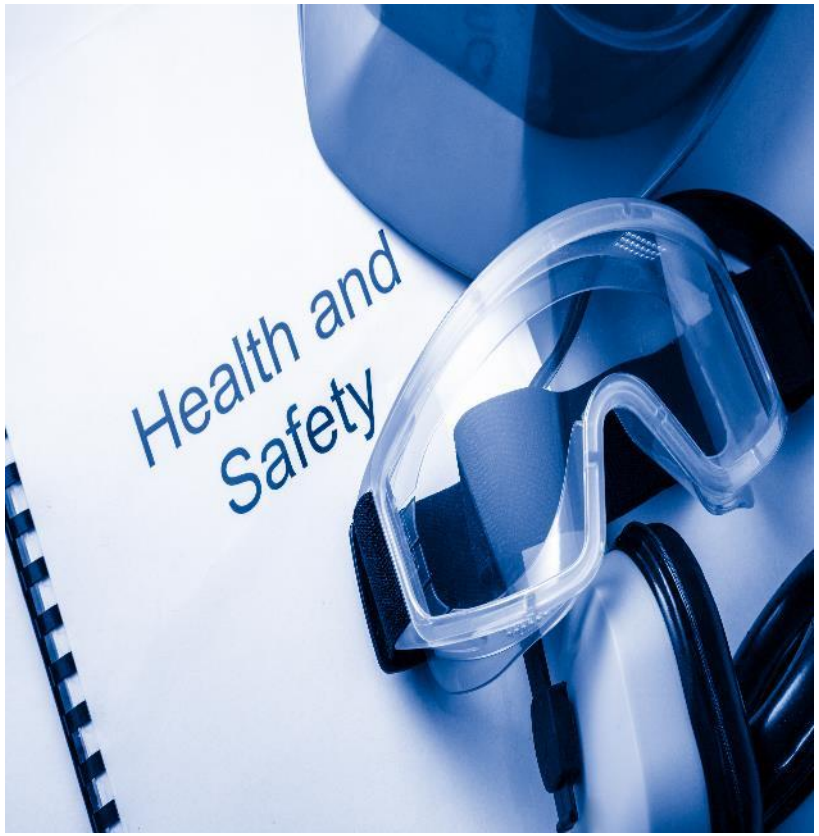
- Spill at a Cermaq run fish farm
- Employees must transfer fuel
- An employee caused a fuel spill after tying open the fuel pump
- Cermaq pleaded guilty to allowing diesel fuel to escape into the ocean

Photo Credit: Cermaq Canada Ltd.

R. v. Cermaq Canada Ltd., 2021 BCPC 283 (November 30, 2021)

Summary: Clean Up Efforts

- 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
- After the spill, Cermaq took many steps to improve
- Cermaq cooperated fully with the investigation and covered all costs ($885,000)
- Cermaq pleaded guilty early and posted an apology to its website



R. v. Cermaq Canada Ltd., 2021 BCPC 283 (November 30, 2021)

Analysis

- 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
- Ultimately, little harm to the environment
- Cermaq fined $500,000
- Cermaq ordered to publish the decision on its website for 90 days

R. v. Cermaq Canada Ltd., 2021 BCPC 283 (November 30, 2021)

Significance

- Even if you respond promptly and appropriately to violations of environmental legislation, high fines may still be imposed
- Proactively review operations to consider gaps in environmental safety procedures

Overlapping Areas of Jurisdiction

O.K. Industries Ltd. v. District of Highlands, 2022 BCCA 12 (January 13, 2022)

Summary

- O.K. Industries ("OKI") obtained a provincial quarry permit to operate a rock quarry in the District of Highlands
- The District then informed OKI it had to comply with District bylaws
- When OKI removed trees without a tree-cutting permit, a compliance officer issued a cease work order for non-compliance with the bylaws

O.K. Industries Ltd. v. District of Highlands, 2022 BCCA 12 (January 13, 2022)

Analysis

- The Court concluded that a municipal government cannot regulate “mines”, including quarries, under its zoning powers
- Additionally, provincial legislation evinces an intention for the Province to reserve authority over mines and mining activities
- This does not usurp all municipal power to, e.g., regulate soil, but prevents bylaws that have a prohibitory effect on an aggregate mining operation or mining activity regulated under a mines permit

O.K. Industries Ltd. v. District of Highlands, 2022 BCCA 12 (January 13, 2022)

Significance

- Municipal bylaws can still apply to mining operations, but they cannot have a prohibitory effect
- Overlapping provincial and municipal jurisdiction can increase the requirements that an operation must comply with

British Columbia (Environmental Management Act) v. Canadian National Railway Company, 2022 BCSC 135 (January 28, 2022)

Summary

- The Province enacted spill contingency planning provisions that required "regulated persons", including railway or highway transporters of defined substances, to have spill contingency plans and to provide designated information to the Director
- Three interprovincial railways were caught by the new provisions and challenged the constitutionality of the provisions

British Columbia (Environmental Management Act) v. Canadian National Railway Company, 2022 BCSC 135 (January 28, 2022)

Analysis

- The Court determined that the pith and substance of the scheme was to regulate the spill planning, preparedness and response of regulated persons and the listed substances
- Though the scheme applies to interprovincial railways, the Court held the scheme did not “target” the railways
- The Court considered that the Province had jurisdiction to enact such a scheme through its authority over property and civil rights or its authority over municipal institutions

British Columbia (Environmental Management Act) v. Canadian National Railway Company, 2022 BCSC 135 (January 28, 2022)

Significance

- Shared provincial and federal jurisdiction over the environment can result in overlapping regulatory requirements
- The courts are struggling to define the boundaries of provincial versus federal jurisdiction over the environment

Reference re Impact Assessment Act, 2022 ABCA 165 (May 10, 2022)

Summary

- The Alberta Court of Appeal heard a reference on the constitutionality of the *Impact Assessment Act*, S.C. 2019, c. 28, and the *Physical Activities Regulations*, S.O.R./2019-285
- Focus was on constitutionality validity of IAA as it applied to intra-provincial activities designated as "designated projects"

Reference re Impact Assessment Act, 2022 ABCA 165 (May 10, 2022)

Analysis

- The majority was concerned the scheme provides the federal government with an effective veto over intra-provincial projects
- The majority also flagged practical effects, including delay and uncertainty
- The dissent found the scheme was constitutional because, even though it applied to intra-provincial projects, it targeted adverse environmental effects in federal jurisdiction

Reference re Impact Assessment Act, 2022 ABCA 165 (May 10, 2022)

Significance

- The decision, if upheld, will likely lead to a more limited application of federal impact assessments to certain projects that do not clearly touch on federal matters
- However, the federal government has already announced its intention to appeal to the Supreme Court of Canada
- The decision is a “reference”, so it is expected the IAA will remain in force and effect until and unless the Supreme Court of Canada upholds the decision

Judicial Review

Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard), 2022 FC 588 (April 22, 2022)

Summary

- In December 2020, the Minister announced her intention to end fish farming in the Discovery Islands
- The decision came as a surprise to industry
- Four fish farms sought judicial review of the decision

Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard), 2022 FC 588 (April 22, 2022)

Analysis

- The decision was a licensing decision, not a policy decision
- The decision was procedurally unfair because:
  - The process did not meet the applicants' legitimate expectations for consultation;
  - There was no notice of the pending decision, no opportunities to make submissions, and no opportunities to respond; and
  - There were no reasons for the decision.
- The decision was also unreasonable because of the lack of reasons

Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard), 2022 FC 588 (April 22, 2022)

Significance

- The decision was set aside
- The Minister has not yet responded to the decision
- Case demonstrates a need for reasons and consultation when making major decisions

Questions?

Thank You

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