

Legal Potpourri – Update on Key Environmental Cases

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This presentation provides general information and is not intended to provide legal advice.
Audience members should seek legal advice for specific situations.

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Overview

- **Spoliation in environmental civil litigation**
- **Climate change litigation - *Mathur v. Ontario***
- **PFAS environmental civil and regulatory litigation**
- **Federal Plastics Regulations**
- **Regulatory enforcement for spills and releases**

SPOILIATION LITIGATION

Environmental Civil Litigation – Spoliation

Trillium Power Wind Corp v Ontario (2023 ONCA 412)

- Trillium made significant investments to obtain authorization to operate offshore wind farm
- Without prior notice, Ontario halted consideration of offshore wind farm projects
- Trillium claimed for: (i) misfeasance due to timing of moratorium, and (ii) spoliation after learning that Ontario destroyed evidence relating to internal government communications that lead to moratorium
- Evidence did not support claim that Ontario deliberately timed announcement to undermine Trillium’s financing
- Court held circumstances of Ontario’s spoliation of evidence was an abuse of process

CLIMATE LITIGATION

Environmental Civil Litigation – Climate Change

Mathur et al. v His Majesty in Right of Ontario

- 7 youth challenging Ontario government to
 - set stronger climate targets, and
 - recognize that safe climate and healthy environment are integral to Charter right to life, liberty, and security of the person
- On April 14, 2023, Ontario Superior Court dismissed lawsuit; however, court found
 - constitutional challenge brought in this case is justiciable
 - Ontario’s target “falls severely short” of what scientific consensus requires, and this increases risk to Ontarians’ life and health
 - Ontario’s target is not contrary to “principles of fundamental justice”

Environmental Civil Litigation – Climate Change

Mathur et al. v His Majesty in Right of Ontario

- On October 17, 2024, Ontario Court of Appeal remitted case back to application judge for redetermination; court found:
 - Ontario voluntarily assumed positive statutory obligation to combat climate change
 - applicants can amend their application to incorporate intervenor arguments and produce additional evidence
- On December 16, 2024, the Ontario Government filed an application for leave to appeal the *Mathur* decision to the Supreme Court of Canada
- On January 27, 2025, legal counsel for *Mathur* filed a cross-appeal for the matter to be heard quickly

PFAS LITIGATION & LEGISLATION

Environmental Civil Litigation – PFAS Class Actions

His Majesty the King in the Right of the Province of British Columbia v 3M Company et al. (British Columbia 2024)

- Province of British Columbia on behalf of all Canadian provincial and territorial governments
- against manufacturers of PFAS for negligently designing defective products, negligently failing to warn of the risks associated with products, breaches of the *Competition Act* and civil conspiracy, and seeks to recover costs for investigating, monitoring and remediating “forever chemicals” from drinking water, wastewater, stormwater and biosolids

Environmental Civil Litigation – PFAS Class Actions

Isabelle Giard c 3M Company et al. (Quebec 2024)

- alleges that the defendants' products have contaminated drinking water sources in Quebec and endangered both public health and the environment, and the defendants knowingly developed and marketed PFAS for decades while concealing the known health and environmental risks.

Mark Mead v 3M Company et al (Ontario August 2024)

Muskoday First Nation v 3M Company et al (Manitoba August 2024)

Kyle Lynch v 3M Company et al (British Columbia Sept 2024)

Environmental Civil Litigation – PFAS Class Actions

E. Sheerr and S. Sheerr v Attorney General of Canada **(Nfld & Labrador November 2024)**

- Class action against the Federal Government on behalf of all owners and residents in a subdivision in Torbay, Newfoundland and Labrador
- relating to PFAS contaminated groundwater impacting water wells alleged to be caused by the use of AFFF in firefighting training at the St. John's International Airport.
- Transport Canada having failed to take adequate steps in past attempts to remediate

Environmental Prosecutions – PFAS

Canada v. Groupe Marcelle Inc. (QCCQ 2024)

- Canadian manufacturer of branded products in beauty industry
- ECCC officers conducted audits and inspections and identified marketing of cosmetic products (eye and lip pencils) containing Perfluorononyl Dimethicone
- Contravention of s. 81(4) of) of the *Canadian Environmental Protection Act, 1999* (CEPA) for failing to provide required regulatory information about marketing of Perfluorononyl Dimethicone, a new activity that may pose risk to the environment
- Groupe Marcelle fined \$500,000, and products withdrawn from the distribution chain
- Company added to Environmental Offenders Registry

Environmental Legislation – PFAS

In 2024, the Updated Draft State of Per- and Polyfluoroalkyl Substances (PFAS) Report concluded that the defined class of PFAS may cause harm to human health and the environment

On July 27, 2024, the Government of Canada released a Notice pursuant to s. 71 of CEPA requiring some manufacturers, importers, and users of 312 specific PFAS, to begin reporting

- deadline for reporting was January 29, 2025
- information will be used to establish baseline commercial use data
- failure to meet the deadline could result in fines of up to \$500,000 for the first offence and \$1,000,000 for subsequent offences

The Notice applies broadly to any person that manufactured, imported or used the 312 PFAS listed in Schedule 1

Federal Proposal to Add PFAS to the Toxic Substances List

On March 5, 2025, the Government of Canada announced it was publishing a PFAS report concluding that the class of PFAS, excluding fluoropolymers, is harmful to human health and the environment. The Government of Canada is proposing to add the class of PFAS to Part 2 of Schedule 1 of CEPA.

- Phase 1 (starting in 2025) will address PFAS in firefighting foams
- Phase 2 will focus on limiting exposure to PFAS in products not necessary for protecting human health, safety, or the environment (e.g., cosmetics, food packaging materials, and textiles)

The federal government will also require manufacturing/other facilities to report the use of PFAS to the National Pollutant Release Inventory.

- Public commentary on the Risk Management Approach and Proposed Order to add the class of PFAS is until May 7, 2025

FEDERAL PLASTICS LITIGATION AND LEGISLATION

Environmental Regulatory Litigation – Plastics

Responsible Plastic Use Coalition v Canada (ECCC) **(FC 2023)**

- Coalition of companies with petrochemical operations applied for judicial review of Federal Cabinet Order to list all Plastic Manufactured Items (PMIs) in Schedule 1 of CEPA
 - Judicial review based on both constitutional and administrative law grounds
- Court held that labelling all PMIs as toxic was both unconstitutional and unreasonable
 - Order not properly supported under criminal law power
 - Order threatened balance of federalism
 - Cabinet determination of PMIs as toxic was overly broad for what CEPA permits

Environmental Regulatory Litigation – Plastics

Responsible Plastic Use Coalition v Canada (ECCC) **(FCA 18 2024)**

- Canada appealed Federal Court's decision
- Canada sought stay of Federal Court's decision until after outcome of appeal
- Stay was granted and *Single-use Regulations* remain in effect pending outcome of the appeal
- Appeal was heard June 26, 2024
- Decision has not been released

Environmental Legislation – Plastics Reporting

In 2024, the Government of Canada established a Federal Plastics Registry to be phased in over 3 years

- Requires companies to report annually on the quantity and types of plastics manufactured, imported and placed on the market. The first deadline for reporting is September 29, 2025, via an online portal
- Product reporting includes resins (PET, ABS, PVC, and nylon resins), fossil-based, bio-based and recycled resins, rigid and flexible plastic packaging, other plastic products

Environmental Legislation – Plastics Reporting

Reporting requirements apply to entities including

- manufacturers, importers and market placers of plastic resins and resin sources
- producers of plastic products and plastic packaging
- generators of packaging and plastic product waste
- Service providers for management of plastics or plastic products

Reporting obligations do not apply to entities that

- manufacture/import less than 1,000 kg of plastic products per calendar year
- generate less than 1,000 kg of packaging and plastic product waste at their industrial, commercial or institutional facilities per year
- manage less than 1,000 kg of plastics via the plastics management services per year

ENVIRONMENTAL PROSECUTIONS

Environmental Prosecution – Effluent

R v Rio Tinto Fer et Titane inc. (QCCQ 2025)

- Discharge points from mine subject to *Metal and Diamond Mining Effluent Regulations*, impacting the Lac Petit Pas
- Convictions related to
 - excess nickel, a deleterious substance, caused by accidental severing of electrical cables which interrupted the pumping and treatment of effluent
 - untreated low pH effluent which is harmful to fish at final discharge points
 - failure to take a sample following an unauthorized deposit of a deleterious substance
- Ordered to pay \$2M to Canada's EDF
- Company added to Environmental Offenders Registry

Environmental Prosecution – Crude Oil

R v Canadian National Railway (OCJ 2024)

- Canadian National Railway (CNR) experienced 2 derailments in 2015 in northern Ontario
- 3.66 million litres of crude oil spilled into natural environment
- July 2024, CNR entered guilty plea on two counts of unlawfully depositing deleterious substance into water frequented by fish contrary to s. 36(3) of *Fisheries Act*
- CNR fined \$8M to be paid to Canada's EDF
- Company added to Environmental Offenders Registry

Environmental Prosecution – Crude Oil

R v Husky Oil Operations Limited (NLPC 2024)

- Husky Oil released 250,000 litres of crude oil into environment after flow line failure at an offshore floating production facility
- Husky Oil pled guilty to contravening:
 - Sec. 38(6) of *Fisheries Act*
 - Sec. 5.1(1) of *Migratory Birds Convention Act*
 - Sec. 194.1 (a) of *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*
- Husky Oil ordered to pay \$2.5M fine – \$2.4M was directed to Canada’s EDF, and \$100K to Receiver General of Canada
- Company added to Environmental Offenders Registry

Environmental Prosecution – Effluent

R v Canadian Kraft Paper Industries (MBPC 2023)

- Pulp and paper mill pipe leak resulted in 181M litres of acutely lethal effluent released into Saskatchewan River
- Canadian Kraft Paper pled guilty to contravening subsection 36(3) of *Fisheries Act*
- Ordered to pay \$1M for *Fisheries Act* violation paid to Canada's EDF
- Required to conduct independent audit to review operations and provide best practices to prevent deposit of deleterious substances in future
- Company added to Environmental Offenders Registry

Environmental Prosecutions – Inspections

R v ArcelorMittal Canada (QCCQ 2024)

- During inspection, enforcement officer requested documents from ArcelorMittal to verify compliance with the *Metal and Diamond Mining Effluent Regulations* and *Fisheries Act*
- Enforcement officers have broad powers to conduct inspections and gather necessary information to assess compliance with applicable Act and regulations
- Companies and individuals can be charged for failing to comply with requests during inspections. Note, if it is an investigation, *Charter* rights become engaged.
- ArcelorMittal refused to comply with requests for information during the inspection
- Ordered to pay \$100,000 for obstructing enforcement officers and to submit documents it refused to provide

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