

Review of Significant Environmental Litigation in 2007: Continuing Trend To Restrict Damages and Liability in Civil Cases?

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This is a review of several significant 2007 decisions in civil cases dealing with environmental law (i.e., exclusive of decisions in class actions, regulatory matters or prosecutions).

Each of the decisions focused on is significant in advancing environmental law, whether by clarifying previously unresolved issues or by giving further guidance in an increasingly better defined caselaw. The decisions come from across the country, and seem to have general application regardless of forum.

The environment has taken centre stage in public consciousness in recent times, and we are coincidentally seeing an increase in civil litigation regarding environmental issues. Given all the recent judicial attention to the environment, discerning a trend from selected cases covering such a short period of time is a mug's game: both easy and unreliable. With all the judicial activity, one may well be able to compile cases to support a hypothesis for all sorts of trends, including contradictory and conflicting ones. It is important to keep in mind that what may appear today as a trend may turn out tomorrow to have been merely a blip on the jurisprudential landscape.

With that important caveat in mind, however, certain trends do seem to be apparent from the significant decisions of 2007. These trends are neither revolutionary nor unexpected, but reflect a judicial conservatism in respect of civil damages and liability in environmental matters.

This seeming trend, to the extent it is real, may reflect a common sense, pragmatic reaction to the fact that the environment is now a highly regulated sphere. If regulators can be relied upon to address and prevent serious environmental effects, then there is less work to be done by private litigants and the courts. It may also reflect a retrenchment inspired by a perception that there are many plaintiffs aggressively seeking windfalls in the form of damages in environmental matters.

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Wainwright (Town of) v. G-M Pearson Environmental Management Ltd.²

Wainwright v. G-M Pearson Environmental Management Ltd., an Alberta Court of Queen's Bench decision, can be used as authority in addressing two important questions in environmental cases: whether reliance on a qualified professional satisfies a duty of care in relation to environmental matters, and whether following orders can be a valid defence in these cases.

In *Wainwright*, a fire broke out at an incineration facility owned by the plaintiff and managed by the defendant, a one-person management company. The principal of the company had managed the facility for many years but otherwise had no special qualifications. The fire was caused by the incineration of highly flammable furniture waste, lacquer dust, that had been imported to Alberta by waste brokers who had contracted to arrange for its disposal on behalf of a U.S.-based furniture company. The U.S. manufacturer and its U.S. waste broker appropriately labelled several of the drums of waste as flammable and hazardous and forwarded it on to an Ontario waste broker. The Ontario waste broker delivered the waste to an Alberta waste broker for disposal at an appropriate facility in Alberta. In doing so, the Ontario waste broker failed to pass on information from the U.S. manufacturer warning of the flammable nature of the lacquer dust and instead labelled it as non-hazardous, and failed to provide samples requested by the Alberta broker. The Alberta waste broker transferred the waste from drums into a bulk format, which was illegal, and provided the waste to the incinerator operator without checking the labeling on the drums of waste and without insisting that the Ontario broker provide samples and adequate information.

The Court held that the two Canadian waste brokers were jointly and severally liable for the damages arising from the fire, allocating 70 percent of the responsibility to the Ontario broker. The Ontario broker was held to be negligent based on its failure to notify all subsequent handlers that some of the furniture waste was highly flammable. The Court suggested that it may have in fact suppressed information about the waste's flammability. The Alberta waste broker was held to be negligent based on its failure to inspect the waste, its failure to insist on being supplied with information about the waste before its ultimate transfer to the incineration facility, and its decision to illegally mix the waste.

What makes the case interesting is that the U.S. manufacturer was held not to be liable because it had appropriately labelled the goods when it shipped them and had reasonably relied on the Ontario waste broker which held itself out to be knowledgeable and competent. In addition, the incinerator operator, G-M Pearson, was held not to be liable, on the basis that it had reasonably relied on the Alberta waste broker and that it had followed detailed procedures that were set out by the plaintiff, a waste authority run by several municipalities around and including Wainwright.

² 2007 Carswell Alta 1304, 2007 ABQB 576, [2007] A.W.L.D. 3976, [2007] A.W.L.D. 3986, [2007] A.W.L.D. 3987, [2007] A.W.L.D. 3988, 32 C.E.L.R. (3d) 234 (Alta. Q.B., Sep 28, 2007)

The case makes clear that it is reasonable and does discharge a duty of care to rely on “experts”, and that those holding themselves out as experts will be held to a higher standard – in particular, the Court’s holding means that it was not reasonable for the Alberta waste broker to rely on the Ontario waste broker.

The exoneration of the incinerator operator is also very interesting. The Court pointed out repeatedly that the authority knew that the operator did not have expert qualifications (as if operating the incinerator for many years did not qualify him), and places considerable weight on the fact that he was following the detailed instructions of the waste authority. This suggests that the standard of care of a non-expert is significantly lower than the standard of care of an independent expert, and that simply following instructions can be a defence if you lack expertise.

Lionhead Investments Inc. v. Petro-Canada³

In September 2007, the Court of Appeal for Ontario dismissed the appeal from the trial decision⁴ (which had been rendered in June and July 2006), in the process clarifying the basis on which the action was properly dismissed.

In *Lionhead*, the plaintiff bought contaminated property from a third party for a price of \$1.162 million, reduced from market value as a result of contamination stigma. As a condition of sale, Lionhead obtained an indemnity agreement from Petro-Canada (which had caused the contamination) to cover all liabilities and losses arising from the contamination. There was no specific completion date contained in the agreement. Ten years later, Lionhead sold the property for \$3.8 million. It then sued Petro-Canada for the contamination stigma attached to the property, which had forced it to issue to the purchaser a take-back mortgage and a guarantee that it would re-buy the property if the clean-up was not completed by 2009.

The trial judge’s decision in 2006 held that the specific language of the indemnity agreement did not cover the plaintiff’s “lost profits”; instead, it required that Petro-Canada reimburse Lionhead for any “loss or expense that has been incurred or suffered, rather than compensation for gains not realized or profits not achieved”.⁵ The trial judge also noted that there was no loss per se, as the plaintiff had made a profit, albeit one not as high as it might have been had the property not been contaminated.

The Court of Appeal for Ontario dismissed the appeal, noting that the plaintiff had benefited from a lower purchase price at the time of its original purchase, and that Petro-Canada had already been sued by the original vendor for the diminution of the purchase

³ 2007 Carswell Ont 5450, 31 C.E.L.R. (3d) 1, 30 B.L.R. (4th) 191, 2007 ONCA 592 (Ont.C.A., Sep 04, 2007)

⁴ 2006 CarswellOnt 3624, 22 C.E.L.R. (3d) 307, 20 B.L.R. (4th) 82 (Ont.S.C.J. Jun 15, 2006), additional reasons at 2006 Carswell Ont 4128 (Ont.S.C.J. Jul 05, 2006)

⁵ At paragraph 28 of the trial judge’s decision, reported at 2006 CarswellOnt 3624, 22 C.E.L.R. (3d) 307, 20 B.L.R. (4th) 82.

price. In doing so, the Court rejected the submission that the indemnity agreement amounted to the assignment of the vendor's cause of action against Petro-Canada.

Cousins v. McColl-Frontenac Inc.⁶

In October 2007, the New Brunswick Court of Appeal dismissed an appeal from a two-phase trial in *Cousins v. McCall-Frontenac Inc.*⁷

The plaintiff bought land in 1986 from McColl-Frontenac Inc. (then known as Texaco Canada Ltd.), knowing that there had been a leaking storage tank underground. The plaintiff subsequently bought adjacent properties from third parties with the intention of developing the land as a convenience store or repair shop. Approximately seven years later, the plaintiff entered into negotiations to construct a donut shop; it was at that time that he discovered that the land was unusable due to environmental contamination. He later then bought a neighboring road allowance, knowing it to be contaminated to an extent that would prevent development.

There were two phases to the trial, the first dealing with the former Texaco property and the second dealing with the subsequently acquired adjacent property. In the first phase of the trial, the trial judge held that Texaco should not be liable. The agreement of purchase and sale between the plaintiff and Texaco specifically stated that Cousins was to accept the land "as is" and that Texaco was not making any representation or warranty regarding future use. Limitation periods were in issue in the first trial, as well as changing standards. The action was commenced thirteen years after the property was purchased, but within the six year limitation period following discovery of the contamination in 1993. The Court held that the action was not barred by the limitation period, saying that the failure to have a modern environmental assessment done in 1986 did not start the limitation period running then. In doing so, he rejected the notion of "creeping requirements", that modern standards should be applied to the plaintiff's conduct in 1986 (just as it should not be applied to the defendant's conduct in 1986).

In the second phase of the trial, Texaco was deemed liable for the contamination of one piece of the adjoining property which had been contaminated from the former Texaco property when Texaco owned it. Even though contamination continued to migrate from the former Texaco site after the plaintiff purchased it, the Court did not make an allowance reducing damages for that period, which it called "overkill". In determining damages, the trial judge held that it would be unreasonable to award Cousins damages based on speculative remediation costs or theoretical assumptions about the loss of future profits, nor would it be fair to base compensation for the plaintiff's collapsed dreams on the present value of uncontaminated land. Instead, he held that damages should be calculated based on the plaintiff's net investment and carrying charges for the

⁶ 2007 CarswellNB 549, 2007 CarswellNB 550, 2007 NBCA 83 (N.B. C.A., Oct 18, 2007)

⁷ 300 N.B.R. (2d) 188, 2006 CarswellNB 403, 782 A.P.R. 188, 2006 NBQB 255 (N.B. Q.B. Jul 21, 2006), additional reasons at 307 N.B.R. (2d) 95, 2006 CarswellNB 652, 795 A.P.R. 95, 2006 NBQB 406 (N.B. Q.B. Nov 29, 2006)

contaminated portion of the entire property over the years, with an allowance for interest.⁸ This came to an amount higher than the value of the contaminated land.

In dismissing the appeal, the New Brunswick Court of Appeal agreed with the trial judge's calculation of damages.

ML Plaza Holdings Ltd. v. Imperial Oil Limited, 2006 BCCA 564⁹

In December 2006, the British Columbia Court of Appeal dismissed an appeal from the trial decision in *ML Plaza Holdings Ltd. v. Imperial Oil Limited*.¹⁰ Leave to appeal to the Supreme Court of Canada was refused in May 2007.¹¹

In *ML Plaza*, Imperial Oil decided not to renew its lease for a gas station attached to a shopping mall. In early 1992, it began taking steps to decommission the site; all underground storage tanks were removed later that year. After the tanks had been removed, Imperial Oil conducted an environmental assessment of the area. Soil testing confirmed that the land had been decontaminated. ML Plaza was informed of the contamination in 1994. Between 1993 and 1999, Imperial Oil made several offers to ML Plaza, confirming its position that it had caused the contamination and that it was willing to clean up the site. All of these offers were rebuffed.

The action was launched in 1999. ML Plaza claimed damages based on nuisance, *Rylands v. Fletcher*, and the indemnification clause under the original lease. In particular, it argued that Imperial Oil was under the obligation to restore the site to "pristine" condition, and to cover the loss of rent that ML Plaza suffered when its redevelopment plans were "thwarted" by the contamination.

The trial judge held that the plaintiff's actions in nuisance and strict liability under the doctrine of *Rylands v. Fletcher* were statute-barred under the B.C. Limitations Act. She concluded that because the source of the contamination was removed in 1992, there was no fresh or additional damage to the property after that time. While Imperial Plaza had recognized its obligation to remedy the contamination, it had never suggested to ML Plaza that it would waive the limitation period. Finally, it was held that ML Plaza could not rely on the indemnification clause in the lease because there was nothing to be reimbursed. ML Plaza had suffered no loss because it never spent any money to clean-up the site, or to deal with any loss or damage arising from the contamination.

On appeal, ML Plaza argued that Imperial Oil "confirmed the cause of action based on the indemnity clause in the lease".¹² The British Columbia Court of Appeal in December

⁸ Paragraph 16 of the trial judge's decision.

⁹ 237 B.C.A.C. 111, 2006 CarswellBC 3165, 392 W.A.C. 111, 2006 BCCA 564, [2007] B.C.W.L.D. 651, [2007] B.C.W.L.D. 653, [2007] B.C.W.L.D. 654, [2007] B.C.W.L.D. 716, [2007] B.C.W.L.D. 717, 51 R.P.R. (4th) 37, 26 C.E.L.R. (3d) 161 (B.C.C.A., Dec 07, 2006)

¹⁰ 2006 CarswellBC 520, 2006 BCSC 352, [2006] B.C.W.L.D. 2701, [2006] B.C.W.L.D. 2841, 41 R.P.R. (4th) 266 (B.C.S.C. Mar 03, 2006)

¹¹ 2007 CarswellBC 962, 2007 CarswellBC 963 (S.C.C. May 03, 2007)

¹² At paragraph 2.

2006 upheld the trial judge's finding that ML Plaza had not incurred any expenses due to the contamination. Because there was no possible claim under the indemnity clause, "consideration of the newly advanced confirmation argument [is] unnecessary".¹³

Monarch Construction Ltd. v. Axidata Inc.¹⁴

In *Monarch Construction*, the Court had to determine who was liable for the contamination of several pieces of property in the Toronto area. The contamination stemmed from the disposal of toluene waste (used in the printing of computer punch cards and the cleaning of related equipment) in an underground storage tank. Over the course of approximately twenty years, two companies – Control Data and Axidata – used the tank. The main issue before the Court was who was responsible for the contamination.

The Court held that Control Data, the original computer punch card manufacturer, installed the tank and failed to adequately monitor it. Further, given the significant decrease in the manufacture of computer punch cards between the 1970s and the 1990s, the Court found that Control Data was responsible for disposing most of the waste. It also held that the seepage of the contamination onto adjoining properties largely occurred while Control Data was operating the tank.

The Court concluded that Control Data was 90 percent responsible for the contamination and resulting damages. Control Data was deemed to have breached the indemnity clause in its agreements with Axidata and its landlord.

That part of the case is largely unremarkable -- essentially an allocation of responsibility under a contract of indemnity based upon historical use.

Where the case becomes more interesting, however, is that Control Data was also found to be negligent, on the basis that it had failed to monitor the offending tanks. Notwithstanding evidence that monitoring of tanks was not done in the 1970s, the Court simply held that the failure to monitor was negligent. There was no indication in the Court's reasons of any expert or other evidence on the standard of care at the time.

¹³ At paragraph 18.

¹⁴ 2007 CarswellOnt 1271, [2007] O.J. No. 816, 27 C.E.L.R. (3d) 258 (Ont.S.C.J., Mar 05, 2007)