

Shared Authority, Shared Risk

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Dianne Saxe, Ph.D. in Law
Saxe Law Office
envirolaw.com



Outline

- **Shared Authority:**
 - **Prov. v. munic.: bylaws**
 - **Fed. v. prov: insolvency**
 - **Fed. v prov: EA**
- **Shared risk**
 - *Enviro West v. Copper Mountain*

Shared authority: by-laws

- If fed / prov allows something, when can municipality say no?
- Creatures of the province
- No constitutional status

Spraytech v Hudson

- Landmark decision, 2001
- Town banned cosmetic uses of pesticides
- Federal and provincial permits
- General “health and welfare” power

So what else can munic do?

- Keep hog manure away from municipal wells? *Peacock*
- Make greenhouses use cleaner fuel? *Darvonda v. GRVD*
- Close licenced landfill? *Northland Material v. Parkland*
- Stop fracking? Sludge spreading?

Province sets ground rules

- Provincial statutes can block bylaws:
 - e.g. *Peacock*: NMA: No bylaws on same subject matter
- Or empower them
 - e.g. *Northland* – landfill needed all other permits
 - *Darvonda* – air permits on terms

If province is vague or silent?

- Do the bylaws “frustrate or displace” a senior gov’t regulatory scheme?
 - “pith and substance”
- Regulation is safer than prohibition
- Must be tied to specific local impacts

More by-laws soon?

- E.g. By-law on fracking?
- Probably can't ban outright
- Probably can limit toxic substances, esp near vulnerable aquifers
- Air pollution?

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Key conflicts

- Can contamination be abandoned through CCAA / BIA?
- When is the MOE just a creditor?
- Is a cleanup order a “claim”?
- Can MOE force cleanup by:
 - Successors?
 - Officers & directors?
 - Related companies?

	Environmental Protection	Bankruptcy / insolvency
Jurisdiction	Provincial	Federal
Goal	<ul style="list-style-type: none"> • Environmental protection • Cleanup of spill, contamination, waste etc. 	<ul style="list-style-type: none"> • Preserve debtor assets for the benefit of the creditors. • Forgive unpaid debt • Ensure bankruptcies / insolvencies are administered fairly.
Subject to Orders	<ul style="list-style-type: none"> • Past / present “care, management and control”. • Responsible parties, directors & officers, related companies, innocent owners. 	<ul style="list-style-type: none"> • Debtor (Bankrupt / insolvent) • Creditor

BIA / CCAA special priority

- Environmental regulator has first claim on polluting site and adjacent land
- For other assets, unsecured creditor
- BIA 14.06; CCAA 11.8

Three active cases

- *Re Northstar Aerospace*
- *Re Nortel Networks Corporation (CA)*
- *Nfld. & Labrador v. AbitibiBowater (SCC)*

Example: *Northstar*

- 25 years of plating plus big chromic acid spill
- Spent \$20M, went into CCAA
- Now bust
- TCE (carcinogen) in 152 homes
- Urgent health risk w/o controls

Northstar

- Cambridge plant abandoned
 - Escheat?
- Other assets to secured creditors
- MOE tried to block the sale, or to hold \$14M for cleanup
- Taxpayers now paying

SCC: *Nfld. v. AbitibiBowater*

- AbitibiBowater >100 years in Nfld:
 - Mining;
 - Pulp and paper;
 - Shipping; and
 - Logging camps
- Head office in Quebec

2008...

- Abitibi announces closure of its last Nfld plant.
- Nfld *Abitibi-Consolidated Rights and Assets Act* expropriates lands and assets, without compensation.
- Some are contaminated.

2009...

- Abitibi applies to restructure remaining assets under *Companies' Creditors Arrangement Act* (CCAA)
- Quebec Court issues Claims Procedure (CP) Order
- All creditors to file proofs of claim by claims bar date. If not, claims are “forever” barred.

What's a "claim"?

- [A]ny right or claim of any Person .. in connection with any indebtedness, liability or obligation of any kind whatsoever... including.. .any breach of duty (legal, statutory.. .or otherwise) ... which existed on the Canadian Filing Date

EPA Orders

- Then Nfld EPA issues 5 orders requiring:
 - Remediation plan for Abitibi's contaminated sites; and
 - Remediation of these sites.
- *Are they a "claim"?*

EPA Orders

- S. 99 of Nfld. EPA
- MOE can issue orders against a “person responsible” to remediate contamination.
 - Includes past and present owners of pollutants and those who had management or control of the pollutant.

Can Nfld enforce the orders?

- Nfld asked for a ruling that the EPA Orders could be enforced against the new Abitibi, despite the CP Order.
 - Argued that a statutory duty to remediate contaminated lands ≠ “claim”

CCAA Court: No

- EPA Orders compelled Abitibi to expend money to remediate property with little to no value to the company.
- EPA Orders were financial in nature and should be treated as “claims”.
- Province can’t jump the queue over other creditors.

Supreme Court of Canada

- Quebec CA: no leave to appeal
- SCC: Granted Nfld leave to appeal.
- Appeal argued in November 2011.
- Still under reserve.

Provinces say:

- CCAA Court cannot relieve Abitibi, permanently, of its regulatory obligations.
 - Shifts costs of cleaning up Abitibi's contamination to the Province.
 - Unconstitutional interference in provincial law.

Provinces say:

- Statutory duty to clean contamination is not like a commercial debt.
 - Province enforcing its laws ≠ creditor seeking payment of debt.
 - *Panamericana*

Abitibi says:

- No regulation of its ongoing operations
 - Abitibi not operating in Nfld anymore

Abitibi says:

- The EPA Orders are designed to jump the queue over other creditors.
 - Essentially financial
 - Therefore a “claim”

Abitibi says:

- Allowing orders to spend money would frustrate the “pith and substance” of the federal insolvency power
 - Avoid social and economic costs of liquidation

Abitibi says:

- Environmental obligations are just one of many.
- Share the pain, balancing all claims

Decision when?

- The SCC is still thinking

Implications

- Can companies shed environmental obligations through CCAA / BIA?
- How much can be shifted to the Crown?
 - Insolvency?
 - Escheat?
- How much already has?

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CEAA 2012

- Dramatic cuts to federal EA
 - Fewer
 - Faster
 - Narrower

Fewer projects

- Shift from “triggers” to limited “project list”.
- The old Comprehensive Study list
- *Regulations Designating Physical Activities* (RDPA) designated activities that may require assessment.

Even fewer

- Even those projects may not need federal EA
- Provincial “equivalency”

Faster

- Short deadlines
- Exclude many opponents
 - “direct interest” only
- Narrower scope
- Screenings instead of comprehensive studies?

Quick Deadlines

- Screening = 45 days
- Minister's decision whether to refer to a Panel = 60 days
- EA by the CEA Agency = 365 days
- EA by a Panel = 24 months
 - Minister will set project specific timelines for each phase of the Panel review.
- CNSC and NEB have their own timelines.

Assessment or screening?

- Must complete a “screening” if regulated by the CEA Agency.
- Agency has broad discretion.
- Applies to most projects in the RDPA.

Few mandatory assessments

- *Must* complete an EA assessment only for largest projects:
 - Regulated by the CBSC, NEB or a federal authority; or
 - Designated by Minister.
- 7 of 39 activities in RPDA, like nuclear plants and major pipelines

Narrower

- Fewer environmental effects:
 - Change to fish and fish habitat, aquatic species, migratory birds;
 - Change to federal lands, another province, or outside Canada;
 - Changes to aboriginal health, socio-economic conditions, heritage, or current use of lands / resources.

Fisheries Act also slashed

- Protects fewer species
- Less habitat
- Ignores cumulative effects

But federal lands / permits?

- What is filling the gap where federal EA used to be?
- Will provinces do more?
- Federal departments
 - EIA?
- Back to First Nations / the courts?

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Shared Risk

Enviro West Inc. v. Copper Mountain Mining

- The generator: Copper Mountain Mining
- The middle men: Canyon Electric and Boundary Electric
- The hauler / receiver: Enviro West

Facts: The job

- Copper Mountain hires Canyon Electric to redo electric system
- Canyon Electric hires Boundary Electric to dispose of transformer
- Boundary Electric sub-contracts transformer job to Enviro West
- Enviro West sends driver to empty the transformer

Facts: What oil?

- Askarel
- Almost pure PCBs
- Copper and Canyon know there are high PCBs
- Boundary and Enviro West assume <50 ppb
- Enviro West not in PCB business

Facts: Label, what label?

- Driver ignores warning signs and Askarel label
- Pumps the PCBs into waste oil tanker truck and storage tank
- Contaminates 91,000 litres of waste oil plus equipment

Facts: Cleanup cost

- Cleanup cost = \$895,000
- Enviro West sues Boundary Electric, Canyon Electric and Copper Mountain

At Trial: Round 1

- Each defendant liable to Enviro West
- Enviro West not negligent - can't expect too much of driver
- Awarded \$655,337 (plus costs)

Waste generator: 60%

- Copper Mountain failed to communicate the nature of the oil and its risks, and to ensure that Canyon did so too.
- Enviro West or Boundary Electric would not have accepted the waste if properly warned

Middlemen: 20% each

- Canyon Electric failed to advise Boundary Electric that it:
 - Knew this was almost pure PCB-laden oil; or
 - Did not know the PCB content of transformer oil.

Middlemen: 20% each

- Boundary Electric failed to advise Enviro West that:
 - The transformer oil contained PCBs in excess of 50 ppm;
 - A PCB Report was available; and
 - Boundary Electric had not verified the PCB level in transformer oil.

Appeal: Round 2

- Wasn't Enviro West also negligent?
- BC Court of Appeal ordered trial judge to reconsider

Reconsideration: Round 3

- Enviro West was also negligent:
 - Failed to ask for test results;
 - Failed to train drivers about PCBs, warnings and labels;
 - No policies to ensure employees and middlemen knew their obligations

Everyone's liable:

“Enviro West's primary failure concerned its failure to properly train and educate its staff. The resulting ignorance of its employees allowed both the driver and his supervising manager here to erroneously assume, without verification and with no proper regard for the warning signs, that since Boundary Electric was the middleman, the PCB level of the transformer oil would be within regulatory limits.

Shared liability

In my view, given its much superior information and its ability and duty to properly manage the hazardous waste in its control, Copper Mountain is equally blameworthy.”

Shared liability:

- Enviro West = 37.5%
- Copper Mountain = 37.5%
- Boundary Electric = 12.5%
- Canyon Electric = 12.5%

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Questions?

Saxe Law Office

720 Bathurst Street, Suite 204

Toronto, Ontario M5S 2R4

Tel: 416 962 5009 / 416 962 5882

Fax: 416 962 8817

admin@envirolaw.com

envirolaw.com