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May 16, 2014

ENVIRONMENTAL & ENERGY LAW

UNDER THE FISHERIES ACT, OWNERS AND THOSE IN CONTROL OF DELETERIOUS SUBSTANCES INCLUDING CONSULTANTS, COULD BE LIABLE WITHOUT REGARD TO FAULT TO GOVERNMENTS FOR PREVENTATIVE OR REMEDIAL MEASURES

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It is well established in the precedents of the Ontario Environmental Review Tribunal that liability for preventative and remedial work ordered by the Ministry of the Environment doesn't depend upon the fault of owners or those in management and control (*see Kawartha Lakes (City) v. Ontario (Director Ministry of the Environment) (2010) 52 C.E.L.R.(3d) 273 at pars. 39-41 and more recently Fogler, Rubinoff LLP's Environmental & Energy Law Newsletters regarding Northstar Directors' settlement, dated October 18 and November 1, 2013).*

It may not be as well known however, that similar but not identical results follow under the federal *Fisheries Act*. Section 42(1)a of the *Fisheries Act* provides that where a deposit of a deleterious substance in water frequented by fish or a serious and imminent danger thereof presents itself, the persons who at any material time own the deleterious substance or have the charge, management or control thereof, are jointly and severally liable for all expenses reasonably incurred by the governments of Canada or a province to prevent, mitigate or remedy any adverse effects that may reasonably be expected. Their liability is stated in subsection 42 (4) to be "*absolute and does not depend on proof of fault or negligence."*.

For persons other than the owners or those with the charge, management or control of deleterious substances, their liability for the expenses just described, depends upon their respective degrees of fault or negligence for causing or contributing to the causation of the deposit or danger thereof. (s.42(1) b.

Recently, in *Atlantic Waste Systems Ltd. v. Canada (Attorney General) 2014 BCSC 490*, the British Columbia Supreme Court allowed the Canadian Government, the landlord of a landfill, to add as parties to its counterclaim for breach of contract against their tenant, the manager, director and officer of the tenant company who had day-to-day responsibility for the oversight of the tenant's environmental policies and practices. The Court further added as a party the company retained by the tenant as its environmental consultant. The consultant was responsible for monitoring and reporting annually on the environmental conditions of the premises, sampling and analyzing surface water, groundwater and leachate formed in the operation of the landfill; and ensuring that the leachate formed and collected on the premises was of such quality that it could be released to the environment. The consultant argued that it had no access to the site without the tenant's permission, no discretion to do the work on its own and no control of either the landfill operations or any of the contaminants. The Government successfully argued that even if the consultant wasn't an owner or in management or control, it contributed to the release of leachate into fish bearing waters and negligence didn't need to be pleaded. It should be observed that the threshold for adding parties is low and the case has yet to be finally determined.

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