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ONTARIO MINISTRY OF ENVIRONMENT RISKS LIABILITY ONCE IT BECOMES INVOLVED IN REMEDIATION DECISIONS

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The Decision: On September 16, 2016 the Superior Court of Ontario in Swaita v. The Queen (Ministry of Environment) (2016) ONSC 5785 dismissed the Crown's motion to strike a statement of claim and action arising out of a spill involving the release of approximately 9000 litres of petroleum on Shell property, 100 feet from the plaintiff's property.

The Facts: The spill occurred in September 1990 but was only discovered by the plaintiff 23 years later. The plaintiff's statement of claim alleged that the Ministry of the Environment became involved in the investigation, inspection, monitoring, decision-making and approval of the remediation of the spill after becoming aware of it in 1990.

The Negligence Claim: The plaintiff claimed that the Ministry owed a duty of care to the neighbouring property owners including the plaintiff. The Ministry was negligent in: 1) failing to adequately inspect the Shell property after becoming aware of the spill; 2) failing to order the spill on the property to be remediated to the standards set out in the Environmental Protection Act (EPA); 3) failing to implement trace testing of the extent or migration of the contaminants; 4) failing to order proper measures to contain the contaminant and prevent it spreading onto neighbouring properties.

The Crown's Defence: The Crown, in its motion to strike the claim and dismiss the action, contended that the Minister was under no duty to perform any of the described actions, that they were discretionary and that there was insufficient proximity to give rise to a duty of care. Without any allegation of direct interaction with the plaintiff, the plaintiff had failed to meet the test of proximity. The test required a failure to take reasonable care which might foreseeably cause loss or harm to the plaintiff.

The Court's Reasons: The Superior Court, relying on the test of proximity set out in Taylor v Canada (Attorney General) 2012 ONCA 479 at pars. 75-80, first focussed on the legislative scheme and only then on the interaction between the plaintiff and defendant. The Court noted that subsection 180(2) of the EPA anticipated a private law duty of care or negligence and action against the Crown. Ray J. concluded "Once the defendant embarks on a course of action (whether obliged to do so under a legislative scheme, or has chosen to do so under discretionary powers) the defendant is obliged to carry out that course of conduct without negligence. There is then sufficient proximity for the basis of a


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private law duty of care." The Court rejected the Crown's "floodgates" argument that there would be no end to matters for which the government would be required to compensate if a private law duty of care were recognized in these circumstances. The Court observed that the analysis of "who is your neighbour" limited the scope of potential liability.