



*Current Environmental / Legal Intersections To Be  
Aware Of*



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## Current Environmental / Legal Intersections

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## Topic 1 - PFAS Contamination Issues

- In 2006 PFAS and related substances added to list of toxic substances in Schedule 1 of the *Canadian Environmental Protection Act* (CEPA) of 1999.
- Perfluorooctane Sulfonate (PFOS) and its Salts and Certain Other Compound Regulations published at the same time.
- In 2009 PFOS added to the virtual elimination list under section 65(2) of CEPA.
- PFOS currently regulated under the prohibition of certain toxic substances, regulations and amendments which came into effect on December 23, 2016.
- Wide use in a number of products. Most significant for contamination issues is fire-fighting foam.
- Under normal conditions PFCAs and PFSAs cannot break down any further and are highly persistent in the environment.
- PFCAs and PFSAs are bio accumulative in organisms and do not undergo significant degradation or biotransformation once accumulated.



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## PFAS Contamination Issues (cont'd)

- Result is concerned with ingestion of food, water, soil or sediment in which these mediums are present.
- Very little scientific study done to substantiate the few guidelines that do exist on “permissible” levels of PFOA and PFOS.
- Health Canada has established drinking water screening values for only nine PFOS related substances.
- Hundreds to potentially thousands of other PFAS compounds could be potentially present from aqueous film forming foams (FFF) but have no guidelines and are therefore not included in the standard suite of analysis from commercial laboratories.
- Consequently still an enormous data and knowledge gap in the toxicity and treatment of PFAS.



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## Issues Presented by PFAS for Environmental Claims

- Substances are highly persistent and do not breakdown in the environment.
- Remediation difficult to impossible to affect.
- Effects of different levels of PFAS uncertain.
- Remediation technology is not well known.
- Greater difficulty in evaluating property damage from PFAS results in difficulty in assessing property values (stigma) on PFAS affected properties.
- Much more knowledge in US. Subject has had more treatment there than in Canada.



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## Outstanding Known Issues

- Two major cases have been well known and are reported in the press:
  - Mississippi Mills - National Research Council of Canada
  - North Bay - DND
- Old versus new fire-fighting foam controversy.
- Widespread use of foams a useful fire-fighting tool.
- Recent small scale incident in Smith Falls.
- Five fire departments respond.
- Debate over which vintage of foam used.
- Impacts on surrounding properties.
- Insurance proceeds exhausted.



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## Legal Difficulties in Dealing with PFAS Contamination

- Uncertainty as to remediation technologies.
- Uncertainty as to remediation possibilities.
- Uncertainty as to remediation costs, measurement of damage, loss to properties impacted by PFAS.



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## Topic 2 - Sue or Call the MOECP or Both, for Contamination Damages?

- The suitability of either alternative and the consequences of relying on one or the other.
- Choice of remedy crucial to proper recovery of losses experienced.
- Important considerations need to be verified carefully before choosing only MOECP route.
- Key case is *Soleimani v. Rolland Levesque*, 2019 ONSC 619 which the author argued in 2019.
- No problem in doing both; perfectly permissible.



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## Factual Background

- The Plaintiff discovers PHC contamination on her property in 2010.
- The Plaintiff alleges that contamination came from adjacent property owned by the Defendant.
- In late 2010 the Plaintiff notifies the MOECP of the contamination on her land.
- The Plaintiff notifies the Defendant of the fact that she is holding him responsible and intends to issue a claim.
- The Defendant denies liability.
- The Plaintiff notifies the MOECP on a continual basis, with over hundreds of contacts, that she wants her property remediated and somehow expects the MOECP to obtain that result.
- Constant contacts with MOECP from 2012 through to and including 2018.
- After denial of liability in 2010 the Plaintiff does not contact the Defendant, Levesque at all until 2014.
- 2014 Notice of Claim made against Defendant, Levesque.
- The Plaintiff told she is out of time by virtue of the *Limitations Act*.



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## Factual Background (cont'd)

- MOECP had contact and input and obtained certain results including:
  - 2012 Phase II Assessment on Defendant's property;
  - 2013 Request for further delineation over and above Phase II;
  - 2015 Order for further delineation;
  - 2016 Sampling and further delineation carried out;
  - 2017 UST tank removed from Defendants land and a small portion of adjacent Plaintiff's land remediated.



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## The Issue

- Is the limitation period tolled or affected due to claimant contacting MOECP?
- Statutory Provisions: Section 5(1) of the *Limitations Act* states as follows:
- 5 (1) A claim is discovered on the earlier of,
  - (a) the day on which the person with the claim first knew,
    - ...
    - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
  - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
- Key is objective assessment of when the Plaintiff ought to know that an action is suitable remedy.



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## Key Findings of Motion Judge

- What can be obtained by contacting MOECP?
- The motion judge made the following key findings in granting summary judgment to the Defendant and dismissing the Plaintiffs' claim as statute-barred:
  - (a) on the authorities, for the two year limitation to be tolled by some form of alternate administrative process, the end or conclusion date must be reasonably ascertainable;
  - (b) the provisions of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 do not provide a dispute resolution process or mechanism;
  - (c) the steps the MOECP chooses to take are in its discretion;
  - (d) the MOECP has no power to award damages or compensation to the Plaintiffs;



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## Key Findings of Motion Judge (cont'd)

- (e) neither the provisions of the EPA nor the facts of this case allow the court to say with any certainty when the MOECP's involvement would come to an end so as to determine when the limitation period might commence;
- (f) the MOECP intervention cannot result in a declaration of responsibility for the contamination nor can it award damages for stigma nor the full recovery of legal, engineering and other costs and expenses nor damages for other economic losses, all as claimed in the Plaintiffs' statement of claim and are a significant component of the relief sought in this action;
- (g) the MOECP's powers are outside of the land owners' control and are discretionary in nature;



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## Key Findings of Motion Judge (cont'd)

(h) the Plaintiffs' decision to leave the contamination issue in the hands of the MOECP was a tactical decision to avoid costs and litigation risks; and

(i) the Plaintiffs discovered their claim, including that a court proceeding was an appropriate means to seek redress, in November of 2010 by which time they had received an environmental report identifying the contamination and offering an opinion that the source was likely Defendant's property and the Plaintiff had put the Defendant on notice of possible legal action in 2010.



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## Purpose of the *Environmental Protection Act*

- The overall purpose of the EPA is "to provide for the protection and conservation of the natural environment."
- To bring effect to this purpose, the EPA empowers the MOECP to appoint Provincial Officers and Directors who are granted authority under various sections of the EPA to make preventative measures orders against current or former property owners and those in management and control of a property or remediation orders against those who have caused a pollutant to be discharged.
- Where such orders are not complied with, the EPA provides for the issuance of non-compliance orders. Non-compliance orders are prosecuted under the *Provincial Offences Act*, R.S.O. 1990, c. P.33.
- In this manner, the EPA contains a complete regulatory regime to bring effect to its purpose.
- Although remedial in nature, this regulatory regime is not intended to be a substitute for a civil action and does not provide for civil remedies.



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## Remedies Available Under Common Law / Section 99 of the *Environmental Protection Act (EPA)*

- All costs including consulting fees, studies and investigations.
- Damages for loss of use or enjoyment of the Plaintiff's property.
- Increased costs of developing the Plaintiff's property.
- Damages for mortgage financing and difficulty.
- Declaratory Relief as to responsibility for the contamination.
- A mandatory order requiring the Defendants to take appropriate measures to remediate their own lands or the Plaintiffs lands.
- Stigma, Damages for Diminution in Property Value. Post Remediation.
- Damages for all investigation and reasonable remediation costs.



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## Appeal to the Court of Appeal

- The Plaintiffs' former lawyer (Intervenor) appealed the Motion ruling to the Court of Appeal.
- Claim advanced that the MOECP provides a suitable mechanism for settlement of contamination claims and until the Plaintiff decides to stop dealing with MOECP no limitation issue arises.
- Appeal opposed by the Defendant . Plaintiff abandons appeal two weeks prior to hearing.
- Motion Judge's ruling stands.



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## Result of Levesque Case / Consequences for Dealing with Environmental Claims

- The MOECP is unable to provide any meaningful damages or compensation to an aggrieved party.
- While in certain circumstances dealing with MOECP might be appropriate, an action is mandatory within two years of the discovery of the contamination.
- Dealing with MOECP is irrelevant to limitation period.
- *Limitations Act* contains special provision providing that no limitation period starts to run until contamination is discovered.
- Pursuit of MOECP and an action are not mutually exclusive and may be followed in tandem where dealing with MOECP might be appropriate.



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## Topic 3 - Liability of Landlord/Tenant for Offsite Contamination

- Issue: Who is liable and under what circumstances and for what damages.
- Where Tenant causes contamination usually no issue on its liability.
- Real issue is whether Landlord can be held liable.
- Ontario Court of Appeal has now dealt with this issue on at least two (2) occasions:
  - *Durling v. Sunrise Propane Energy Group Inc.*, 2013 ONSC 5830
  - *Sorbam Investments Ltd. v. Litwack*, 2017 ONCA 850



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## Liability of Landlord

- Where liability of Landlord more certain:
- Where business activity undertaken by the Tenant has inherently a risk of danger/contamination.
- Where the Landlord is aware of the Tenant's activities.
- Where Landlord willfully ignores obvious dangers that could exist on an objective basis.
- Where Landlord is aware of contamination caused by the Tenant and does nothing to deal with it.
- Where the site is close to sensitive uses requiring special treatment.
- Can the Landlord rely on an engineering report, regardless of the correctness of the opinions in the report?
- To what extent is the Landlord stuck with liability even where his consultants say there is none (to be determined).



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## Liability of Landlord (cont'd)

### Where liability of Landlord is not clear:

- Where liability of Landlord will not attach to Tenant's contaminating activities.
- Key is that the activity undertaken by the Tenant is not, on an objective basis inherently dangerous.
- Issue of Landlord knowing about activities of Tenant on an objective basis is relevant.
- Where are activities of Tenant normal and regular such that the Landlord does not have to inquire as to whether the Tenant is emitting contaminants?
- Where are such inquiries necessary to avoid Landlord liability?



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## Liability of Landlord (cont'd)

- Issue of foreseeability used in analysis of motions judge in *Sorbam Investments Ltd. v. Litwack* and also by the Court of Appeal (Supreme Court has refused leave on an Application to have foreseeability included as a part of nuisance).
- Foreseeability required for nuisance in the United Kingdom but not in Canada.
- Did any conduct of the Landlord result in authorizing the Tenants to conduct contaminating activities?
- Foreseeability of spills by a dry cleaner by itself is not inherently dangerous.
- Use of contaminants of concern in the ongoing operation of the Tenant is not enough.
- Must prove that the risk of escape of contaminants is real and serious.
- Room to create different views on these issues.



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## Consequences for Landlord/Tenant in Assessment of Liability

- Possibility of both Landlord and Tenant being liable for contaminating activities.
- Need to weigh all factors carefully.
- Distinction between inherently dangerous activities and not inherently dangerous activities is difficult in practice.
- May be difficult to ascertain liability in different fact scenarios.
- Reality of the fact that there may be no recovery if only source of liability is the tenant.
- May be practical necessity to bring in an owner for disclosure/knowledge of activities of Tenant and arrangements undertaken with Tenant.



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## Consequences of Divided Liability for Landlord/Tenant

- Landlords will need to take care to bring themselves within the class of facts that do not attract liability.
- Ignorance of Tenant's activities or willful failure to evaluate ongoing activities on the site will not assist the Landlord.
- Proper handling of Landlord/Tenant relationship and governance of Tenant's activities mandatory to avoid Landlord liability.
- Unless activities are inherently dangerous by their nature or the Landlord has knowledge or has reason to have knowledge of Tenant's contaminating activities, liability will be difficult.



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## Topic 4 - Entitlement to Compensation Under Section 99 of Ontario's *Environmental Protection Act*

- Statutory Remedy under section 99(2) of the EPA:

### **Right to compensation**

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

- (i) the spill of a pollutant that causes or is likely to cause an adverse effect;
- (ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part; or
- (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part.

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant. R.S.O. 1990, c. E.19, s. 99 (2).



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## Section 91(1) of the *Environmental Protection Act*

- To utilize this Section have reference to section 91(1) for:
- “owner of the pollutant” means the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and “owner of a pollutant” has a corresponding meaning;
- “person having control of a pollutant” means the person and the person’s employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and “person having control of the pollutant” has a corresponding meaning;
- “spill”, when used with reference to a pollutant, means a discharge,
  - (a) into the natural environment;
  - (b) from or out of a structure, vehicle or other container; and
  - (c) that is abnormal in quality or quantity in light of all the circumstances of the discharge.and when used as a verb has a corresponding meaning.



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## Section 99 Claim Requirements

- Clear pre-requisites for section 99 Claim:
  - (a) Loss or Damage must incur as a result of a spill;
  - (b) Spill must cause or be likely to cause an “adverse effect”; and
  - (c) Claims limited to claims against “owner of pollutant” or “person having control of pollutant”.
- Note that person having control over the pollutant can be persons other than the owner of the land in question.
- This section provides additional grounds to claim personal liability that may not be available at Common Law.
- Possibility of claims against non-owners under section 99.



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## Recovery Permitted under Section 99

- All loss or damage incurred as a direct result of the spill.
- Full range of damages available as in Common Law action.
- Limit is not on recoverability of damages but on class of Claimants/Defendants.
- Limits on recovery result in use of section 99 in conjunction with other remedies.
- Commonly combined with claims for negligence, nuisance or strict liability.
- Useful where case could be weak on one or more of the requirements for nuisance or negligence.
- Avoids technical fault arguments and concentrates on the parties and the loss.



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## Timing of Claims under Section 99

- Timing for permissible claims under section 99 subject to judicial interpretation.
- Part 10 of the EPA enacted in 1985.
- No statutory compensation scheme in force prior to 1985.
- Spills that occur before 1985 with ongoing impacts exist post-1985.
- Special provision in the *Limitations Act* regarding environmental claims: concept of time coming from discovery of contamination.
- Concept of discoverability – see my paper in *Soleimani v. Rolland Levesque*, 2019 ONSC 619.
- Analysis of problem enumerated in *Huang v. Fraser Hillary's Limited*, 2017, ONSC 1500, trial decision, paragraphs 65 - 117.



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## Court of Appeal Assessment

- In 2018 the Court of Appeal dealt with the Appeal in *Huang v. Fraser Hillary's Limited*, 2018 ONCA 527.
- "Spill", "owner of pollutant" and "person having control over the pollutant" defined in Section 91.
- Section 93 - **Duty to mitigate and restore:**
- 93 (1) The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.  
**When duty effective**
- (2) The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect. R.S.O. 1990, c. E.19, s. 93.



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## Court of Appeal Assessment (cont'd)

- Where duty ongoing, section 99 Liability is ongoing where no attempts made to remedy the effects of spill.
- Simpler more concise statement of applicable legal principles than trial decision.
- Result: unless steps taken by polluter to remedy the spill, liability will go on from time of spill, even when it occurred before 1985 when section 99 came into force.
- Liability concentrated on the lack of action to comply with statutory duties.
- Lack of action results in continuous liability regardless of when the spill occurred.



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## Application for Leave to Appeal to Supreme Court of Canada

- Application for Leave to Appeal to Supreme Court of Canada – Fraser Hillary’s Limited appeals the Court of Appeal’s finding that liability attaches to a spill occurring before section 99 came into existence.
- Fraser Hillary’s Limited argues that statute is retrospective in Court of Appeal’s analysis.
- Retrospective application of statutes not normally permissible.
- April 2019 Supreme Court of Canada dismisses Application for Leave to Appeal.
- Court of Appeal decision final and binding on the issue of liability for spills occurring before the compensation provision came into existence.



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## Conclusions

- Section 99 – useful tool for environmental claims.
- No negligence, nuisance or other technicalities to deal with.
- Disadvantages of strict requirements that must be met in order to qualify as a “spill” and a limit on the persons on whom liability is visited.
- Time of spill not normally a problem.
- No argument of “retroactivity” permitted where clear evidence of lack of action or statutory duties.



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