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Court of Appeal confirms settlements must be 'immediately' disclosed, and consequences for non-disclosure are severe – an environmental perspective

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In cases involving contaminated sites, there are often multiple parties pointing fingers at one another. This can include the original polluter from decades past (who formerly owned the site), the current site owner, current and former owners of 'victim' properties to which the contamination migrated, and environmental consultants who allegedly failed to warn their clients about the presence of the contamination. At the same time, one or more parties may wish to take remedial steps designed to address the contamination, or abate its migration; and parties may enter into 'tolling agreements' to preserve their respective litigation rights while these remedial steps are undertaken.

Untangling such a web of claims, cross-claims, counter-claims, third party claims, and remedial actions to determine the proper apportionment of liability can be quite complex, both from a legal perspective and scientific perspective. Consequently, parties in contaminated sites cases often will seek to settle one aspect of the dispute (e.g., as between the original polluter and the current site owner) while leaving other aspects of the dispute (e.g., as between the original polluter and the owners of 'victim' properties) for adjudication by the courts.

It can be tempting, in such instances, for the settling parties (who may wish to cooperate to defeat the other parties in litigation) to wait some amount of time before disclosing their settlement. That would be a mistake. As the Court of Appeal for Ontario recently confirmed in its decisions in *Waxman v. Waxman* and in *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.* (leave to appeal to the Supreme Court of Canada denied),[1] "any agreement which changes the landscape of the litigation by altering the adversarial position of the litigants must be disclosed immediately". This obligation of disclosure is "clear and unequivocal" – and "immediate", in the true sense of that word – regardless of whether any party is actually prejudiced by the delay in disclosure. And the remedy for non-disclosure is severe: the non-disclosing party's claim or defence can be stayed as an abuse of process – in other words, thrown out of court. As the Court of Appeal has explained:

Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit the litigation to proceed without disclosure of agreements [that alter the adversarial position of the litigants] such as the one in issue renders the process a sham and amounts to a failure of justice.[2]

This caution should be borne in mind by any party that seeks to partially settle a multi-party environmental dispute (or any multi-party dispute for that matter).

For questions regarding these trends or any inquiries relating to environmental dispute resolution and litigation, please contact the members of Osler's Environmental Disputes, Investigations and Enforcement Group.

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[1] 2022 ONCA 311, leave to appeal ref'd 2022 CanLII 96459; 2022 ONCA 66, leave to appeal ref'd 2022 CanLII 96460.

[2] *Waxman*, citing 2010 ONCA 898 at para. 16.