

Managing Environmental Liabilities: Legal Perspective

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Overview

- **Environmental Liabilities**
- **Case Law Update**
- **Managing Environmental Liabilities**



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Environmental Liabilities

- **Regulatory Liability**

- regulator can issue orders and prosecute under environmental statutes
- “person responsible”
- concept of “adverse effect”

- **Civil Liability**

- contamination on-site (soil, groundwater, indoor air)
- contaminant migration and impact off-site (groundwater, air emissions)
- concept of “flow through” property
- causes of action and damages

Personal Environmental Liabilities

- **Personal environmental regulatory liability**

- individuals may be ordered and/or prosecuted
- statutory liability for Directors and Officers

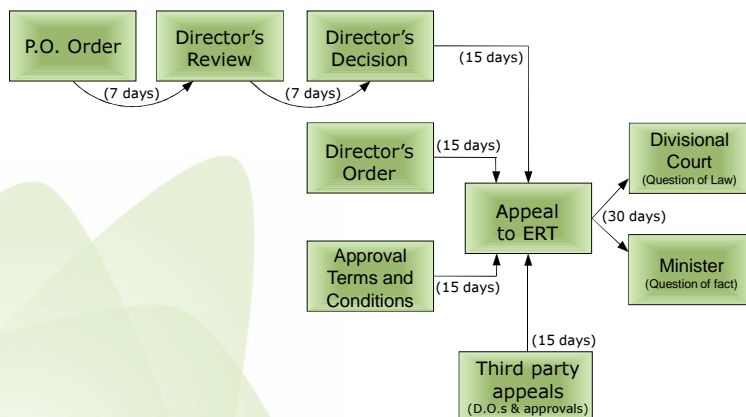
- **Personal environmental civil liability**

- individuals may be sued
- precedent from the Ontario Court of Appeal (*Midwest*) for piercing corporate veil in an environmental lawsuit

REGULATORY ORDERS

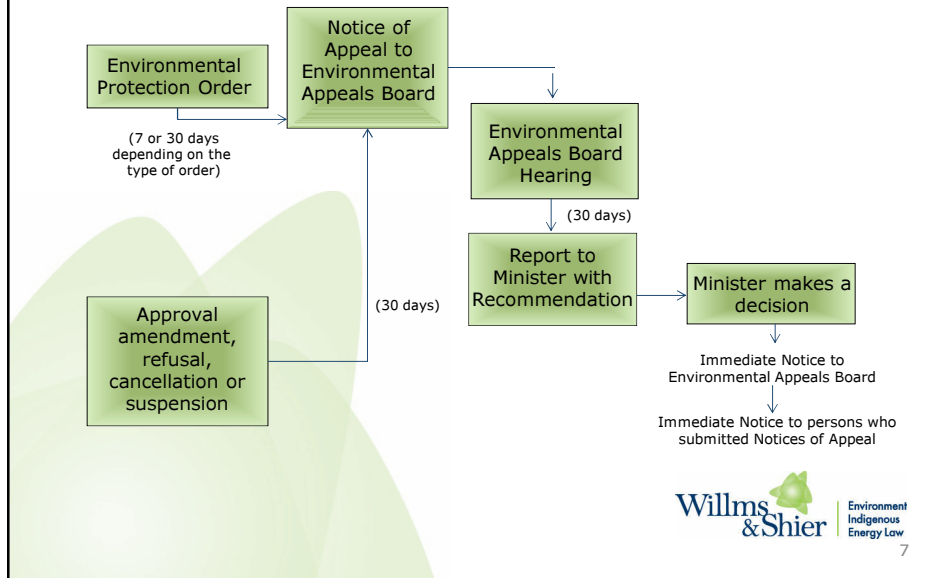
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Ontario Deadlines to Appeal Regulatory Orders and Approvals



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Alberta Deadlines to Appeal Regulatory Orders and Approvals



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Regulatory Orders

- ***Kawartha Lakes (City), MOE (2013)***
- ***Baker, MOE (2013)***
- ***Rocha, MOECC (2014)***
- ***McQuiston, MOECC (2015)***
- ***Rubin, MOECC (2016)***

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Regulatory Orders

Domtar v AEP (2018)

- Historic Domtar wood processing operations
 - PHCs, PAHs, VOCs, dioxins/furans discharged to soil, groundwater and surface water resulting in off-site migration onto adjacent properties with residential uses
- AEP issued multiple Orders requiring Domtar to delineate, remediate, and control contamination
- Domtar appealed Orders – Board issued stay because

“excavating and removing the contaminated material may not be the best way to deal with the materials and the status quo is to remain until a full hearing is held and the Minister makes a decision on the appeals”
- May 18, 2018, AEP Director cancelled Orders because of new 2018 orders issued
- March 14, 2019, Minister reversed new 2018 Orders, issued new EPO to Domtar

Regulatory Orders

Hamilton Beach v MOECC (ERT 2017, ONSC 2018, ONCA 2018)

- VOC contamination migrated to neighbouring residential, commercial, and institutional properties – Significant concern for vapour intrusion in nearby buildings
- MOECC issued order requiring former and current property owners to submit a workplan to investigate and delineate off-site contamination.
- ERT confirmed that the MOECC has jurisdiction to require off-site investigation pursuant to section 18 of the EPA
 - s. 18 requires a person who owns or owned, or has or had management or control of a contaminated undertaking or property to investigate contamination
 - No association with polluting activity or property at time of contamination
- Decision upheld by ONSC Div. Ct.
- ONCA denied leave to appeal

Regulatory Orders

Redwater and Orphan Well Association (AER 2017)

- Redwater became insolvent – Grant Thornton (GTL) appointed receiver and trustee
- GTL disclaimed wells with onerous environmental abandonment costs under federal bankruptcy law
- Alberta Energy Regulator issued abandonment orders for the disclaimed wells
- GTL argued that provincial requirement to remediate oil wells conflicted with the ability to disclaim set out in federal bankruptcy law

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Regulatory Orders

Redwater and Orphan Well Association (AER 2017)

- **Alberta Court of Queen's Bench**
 - AER's authority to order Grant Thornton to remediate disclaimed wells frustrates purpose of bankruptcy
- **Alberta Court of Appeal – upheld ABQB decision**
 - AER's order subject to bankruptcy proceeding
- **Supreme Court of Canada granted leave to appeal**
 - reconsider whether trustees and receivers in bankruptcy must remediate wells in priority to claims of secured creditors

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Regulatory Orders

Redwater and Orphan Well Association (SCC 2019)

- Reversed ABCA & ABQB
- AER's order not subject to bankruptcy proceedings
- AER's authority does not conflict with bankruptcy legislation – federal and provincial regimes operate harmoniously
- End of Life Obligations under OGCA not claims provable in bankruptcy
- SCC found that GTL (as trustee) could not be held personally liable for abandonment requirements, but no restriction on GTL using estate's assets to fulfill provincial end of life obligations for oil and gas wells

PROSECUTIONS

Case Law Update – Tailings Waste

Syncrude Canada Ltd (ABPC 2019)

- Syncrude abandoned tailings pond containing bitumen without completing remediation
- Contractor for Syncrude found 30 decomposing Great Blue Herons in pond and one live heron covered in oil
- Syncrude convicted under Alberta's *EPEA* and federal *Migratory Birds Act*
- Syncrude fined \$2.75 million
 - \$25,000 fine plus VFS to court for *EPEA* charges
 - \$950,000 held in trust by AER to fund wildlife, biodiversity projects (RFP process)
 - \$1.8 million directed to EDF

Case Law Update – Effluent

Irving Pulp and Paper Limited (NBPC 2018)

- Defendant company discharged improperly treated effluent into St. John River between June 2014 and August 2016
- In 2018, defendant convicted under *Fisheries Act*
- Defendant fined \$3,500,000, of which \$2,340,000 was directed to EDF and \$1,160,000 directed towards UNB Canadian Rivers Institute
- Company also directed to commission new effluent treatment system

Case Law Update – PCBs

Collingwood Prime (OCJ 2018)

- Electrical equipment exceeded regulated PCB levels and was not sent for destruction to authorized facility
- Company and its director charged with
 - 10 counts of contravening *PCB Regulations* under *CEPA*
 - 1 count of failing to comply with an EPCO
- Defendants pleaded guilty
 - company and director fined \$420,000, and
 - 45-day jail term for director (to be served on weekends)

Case Law Update – Crude Oil

Montreal, Maine and Atlantic Canada Co. (QCCP 2018)

- Train carrying 7.7 million litres of crude oil derailed in Lac-Mégantic in July 2013
- Resulting fire destroyed town's downtown, 47 people died, 2,000 people forced out of homes
- 6 million litres of crude oil spilled, including into Lac-Mégantic and the Chaudière River
- Defendant company fined \$1,000,000 under *Fisheries Act*, of which \$400,000 is to be directed to EDF

Case Law Update – Logging

Gwaii Wood Products Ltd. (BCPC 2017)

- Defendants' logging and road construction caused extensive damage to over 2.5 km of streams, stream banks, riparian vegetation, and wetlands
- Defendants convicted under *Fisheries Act*
- Defendants ordered to collectively pay \$2,200,000, of which \$400,000 was directed to Fisheries and Oceans Canada to promote fisheries management activities
- 2 defendants also prohibited from conducting logging operations

Case Law Update – Chlorinated Water

Clark Builders (ABPC 2012)

- Defendant was construction manager for the project
- Subcontractor hit a water main when excavating for foundation pilings
- Defendant failed to obtain locates for water main prior to construction
- Approx. 12 million litres of chlorinated water entered the North Saskatchewan River
- Defendant pleaded guilty to offence under the *Fisheries Act* and fined \$285,000

CIVIL LAWSUITS

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Civil Liability – Limitations

Brookfield v Imperial Oil (ABCA 2019)

- Alberta's *LA* – ultimate limitation period of 10 years
- What about historic contamination?
- Alberta's *EPEA*, s. 218 allows for plaintiffs to seek extension of the ultimate limitation period for environmental claims
- Plaintiff cannot wait for trial and must ask the Court for extension in a separate proceeding before trial
- Age of historic contamination and passage of time are factors indicating prejudice to a defendant that may result in no extension under *EPEA*, s. 218

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Civil Lawsuits

Huang v Fraser Hillary's Limited (ONCA 2018)

- Commercial property contaminated by adjacent long-standing dry cleaner
- Dry-cleaner spilled contaminants outside its premises between 1960 and 1974
- Commercial property owner discovers contamination and sues
- Dry-cleaner liable under EPA, s. 99 and in nuisance
 - damages of \$1.6 million for the cost to remediate
- Leave to appeal to SCC denied

MANAGING ENVIRONMENTAL LIABILITIES

Managing Environmental Liabilities – Understand Environmental Risks

- **Understand environmental issues and risks**

- What is the environmental condition of the property?
- What are the contaminants present at the property?
- Exceedance of regulatory standards?
- Has there been a spill/leak/discharge?
- Contamination impacting off-site?
- Do you have an Environmental Management System?

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Managing Environmental Liabilities – Environmental Management Systems

- **Develop and implement an Environmental Management System**

- reasonable and realistic corporate policy
- identify environmental impacts and legal requirements
- implement SOPs and training
- adequate commitment of resources
- continuous improvement (management review, audits, updates)

- **Can be indicia of due diligence in regulatory context**

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Managing Environmental Liabilities – Due Diligence

- **Took all reasonable care to avoid the offence**
 - “reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing action”
– *R v Courtaulds Fibres*
- **Reasonable belief in a mistaken set of facts**
 - “the defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent”
– *R v Sault Ste Marie (City)*

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Managing Environmental Liabilities – Due Diligence

- ***R v Zellstoff Celgar Limited Partnership (2012 BCPC)***
 - defendant found guilty of discharging effluent into the Columbia River
 - defendant had ISO procedures to prevent the discharge
 - “... had [the defendant] followed the ISO procedures, it should have prevented the spill ...”
 - defence of due diligence rejected

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Managing Environmental Liabilities – Due Diligence

- ***R v ControlChem (OCJ 2016)***

- employee deliberately discharged liquids from four large totes into a storm drain which turned the creek white
- 5 EPA and OWRA charges were brought against both the company and employee
- employee pled guilty and convicted on one OWRA charge
- due diligence (took all reasonable care) was made out during the company's trial in Fall 2015
- company mantra – “nothing leaves the building”
- ControlChem acquitted of all 5 charges

Managing Environmental Liabilities – Due Diligence

- ***R v MV Marathassa (BCPC 2019)***

- ship leaked fuel oil into English Bay in Vancouver
- charged under *Canada Shipping Act* for discharging pollutant and failing to implement pollution emergency plan
- due diligence defence made out at trial
 - defendant reasonably believed ship was designed, built, and certified to internationally recognized environmental and safety standards (ECO standard) (belief in mistaken set of facts)
 - pollution prevention systems included comprehensive crew selection and training program aimed at pollution prevention
 - met and exceeded regulatory requirements and industry standards
- MV Marathassa acquitted of all charges.

Managing Environmental Liabilities – Environmental Liability Protection

- **Allocating Liability During Transactions**
 - BUT you cannot contract out of regulatory liability
- **Regulatory Liability Protection (RSCs, Remediation Certificates)**
 - liability protection from certain regulatory orders; regulator retains emergency order powers
 - no protection from civil liability; not absolute, can be re-opened
- **Environmental Insurance**

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Managing Environmental Liabilities – Checklist

- **Know your environmental risks – create your environmental team – technical and legal**
- **Understand potential liabilities – regulatory & civil – personal & corporate**
- **Create and implement Environmental Management System**
- **Build due diligence into corporate culture**
- **Consider and obtain environmental liability protection, where available/applicable**

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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **19 lawyers**
 - seven are certified by the Law Society of Ontario as Environmental Law Specialists
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, and Nunavut
 - offices in Calgary, Ottawa, Toronto and Yellowknife



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