

# Managing Environmental Risk & Liabilities: Legal Perspective

**Jacquelyn Stevens**

*Partner, Certified Specialist in Environmental Law by the Law Society of Ontario*

**Anand Srivastava**

*Associate*

**ESAA Webinar  
May 26, 2020**

**Willms  
& Shier**  **Environment  
Indigenous  
Energy Law**

# Overview

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- **Environmental Risks & Liabilities**
- **Civil Liability**
- **Regulatory Liability**
- **Managing Environmental Liabilities**

# Environmental Risks & Liabilities

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- **Questions to consider...**
  - What is the environmental condition of the property?
  - Is there an Environmental Management System?
  - Is there a spills prevention and contingency plan?
  - Do you have all requisite approvals?
  - What are the contaminants/emissions from facility?
  - Has there been a spill/leak/discharge?
  - Is there exceedance of regulatory standards?
  - Is there contamination impacting off-site?

# Environmental Liabilities

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- **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

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- **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

# CIVIL LIABILITY

# Civil Liability - Elements

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- **Liability for environmental harm and corresponding loss**
  - plaintiffs and defendants can be governments, individuals and companies, or class action plaintiffs
  - plaintiff must prove liability and damages to succeed in any lawsuit
- **Liability is typically pleaded in**
  - nuisance, negligence, strict liability, trespass, breach of contract, breach of statutory cause of action (*EPA*, s. 99(2)), and request for injunctive relief
- **Courts may order injunctions, damages (direct or indirect), punitive damages, and personal liability**

# Civil Liability – Limitations

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- **A limitation period is the time limit to commence civil actions**
  - most provincial *Limitations Acts* require a claim to be commenced two (2) years from the date of
    - discovery, or
    - from the date when the plaintiff ought to have discovered (i.e., exercise diligence to discover the claim)
- **Each province may have other limitations periods relating to environmental contamination**
  - Alberta's *Environmental Enhancement and Protection Act* s. 218 creates an exception to the ultimate 10 year limitation period
  - Ontario's *Limitations Act* defines “environmental claim” for which there is no ultimate limitations period



# Civil Liability – Limitations

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## ***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

# COVID-19 – Federal – Limitation Periods

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- **Federal Court of Appeal Notice to the Parties and the Profession & Federal Court Practice Direction and Order**
- Suspension Period in effect from March 16, 2020 to May 29, 2020 for the purpose of calculating time under the Federal Court Rules, specified statutes and other Rules, and any direction or court order
- Deadlines for appeals and applications under the *Federal Courts Act*, ss. 27 and 28 and for commencing actions, appeals and application under other federal statutes continue to apply
- Parties may seek extension were cannot comply

# COVID-19 – Alberta – Limitation Periods

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- **Ministerial Order 27/2020 suspends:**
  - Limitation periods in the Acts listed in Appendix A of the Order, and
  - Periods of time within which any step must be taken in a proceeding or intended proceeding, subject to the discretion of the court, tribunal, or other decision maker
- **Suspension in force from March 17 - June 1, 2020**
- **Suspension does not apply to limitation periods for, among others,**
  - the *Environmental Protection and Enhancement Act*
  - the *Provincial Offences Procedure Act*

# COVID-19 – Ontario – Limitation Periods

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- **Emergency Order pursuant to the *Emergency Management and Civil Protection Act*, s. 7.1(2), Retroactive to March 16, 2020 for duration of Order**
- **Order suspends:**
  - Limitation periods
  - Periods of time for taking steps in a proceeding
- **Certain exceptions under:**
  - *Niagara Escarpment Planning and Development Act*,
  - *Construction Act*,
  - *Planning Act*
  - *City of Toronto Act, 2006*

# Civil Liability – Case Law Review

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## ***TMS Lighting Ltd. v KJS Transport Inc.*** **(ONCA 2014)**

- **Dust from KJS Transport property caused substantial and unreasonable interference with use and enjoyment of TMS lands (retail lighting manufacturer)**
- **Four factors considered to establish nuisance**



1. severity of interferences
2. character of neighbourhood
3. utility of defendant's conduct
4. sensitivity of plaintiff

# Civil Liability – Case Law Review

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## ***Midwest v Thordarson* (ONCA 2015)**

- **EPA s. 99 – statutory private right of action for restitution**
- **Negligence and nuisance claims successful**
- **Thordarson could not avoid personal liability by relying on “corporate veil” argument that liability should stop with Thorco**
- **Damages \$1.328M for restoration**
- **Punitive Damages awarded**
  - “wanton disregard for its environmental obligations”.
  - \$50,000 from each of Thorco and Thordarson
- **Leave to appeal to SCC refused**

# REGULATORY LIABILITY: ORDERS, APPROVALS & PROSECUTIONS

# COVID-19 – Federal – Environmental Compliance

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- **Environment and Climate Change Canada’s (“ECCC”) laws remain in effect**
- Deadline for submitting greenhouse gas reports under the Greenhouse Gas Reporting Program for the 2019 calendar year is postponed from June 1, 2020 to July 31, 2020
- Deadline for submitting reports to the National Pollutant Release Inventory for the 2019 reporting year extended from June 1, 2020 to July 31, 2020



# COVID-19 – Federal – Environmental Compliance

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- **Permitting under the *Species at Risk Act* continue to be processed**
- **Department of Fisheries and Oceans (“DFO”) confirmed all critical functions remain operational, including licencing, catch certification, monitoring, and enforcement**

# COVID-19 – Alberta – Environmental Compliance

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- **Ministerial Orders provide relief from certain reporting obligations**
  - MO 15/2020 – extends deadline from March 31, 2020 to June 30, 2020 under the *Technology Innovation and Emission Reduction Regulation* for submitting compliance reports and emissions reduction plan reports for 2019
  - MO 16/2020 – extends deadline from March 31, 2020 to June 30, 2020 for submission of fuel supplier, approved contributor and renewal fuel provider compliance reports required by the *Renewable Fuels Standard Regulation*

# COVID-19 – Alberta – Environmental Compliance

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- **Ministerial Orders provide relief from certain reporting obligations**
  - MO 17/2020 – suspends reporting requirements contained in approvals, registrations, licences and land dispositions (except in the case of drinking water facilities) under the EPEA, *Water Act*, and *Public Lands Act*
  - MO 219/2020 – suspends some reporting requirements under the *Coal Conservation Act*, the *Oil and Gas Conservation Act*, and the *Oil Sands Conservation Act* related to annual reports, exploration reports, reservoir pressure surveys, well logs and summary reports, and annual geotechnical reports, etc.

# COVID-19 – Alberta – Environmental Compliance

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- **Alberta Energy Regulator Decisions - May 20, 2020**
  - Temporary suspension of some monitoring requirements for operators under the *Oil and Gas Conservation Act* and certain In Situ oil sands projects with *EPEA*, *Water Act*, and *Public Lands Act* approvals, permits, licences
  - Soil and groundwater monitoring under EPEA approvals suspended unless monitoring is necessary for protection of human health and ecological receptors
  - VOC and RSC monitoring, fugitive emissions LDAR programs carried out by 3<sup>rd</sup> party, surface water quality testing (other than releases), lab testing for water releases (field measurements must be used), QAP Audits and Verifications, wildlife monitoring

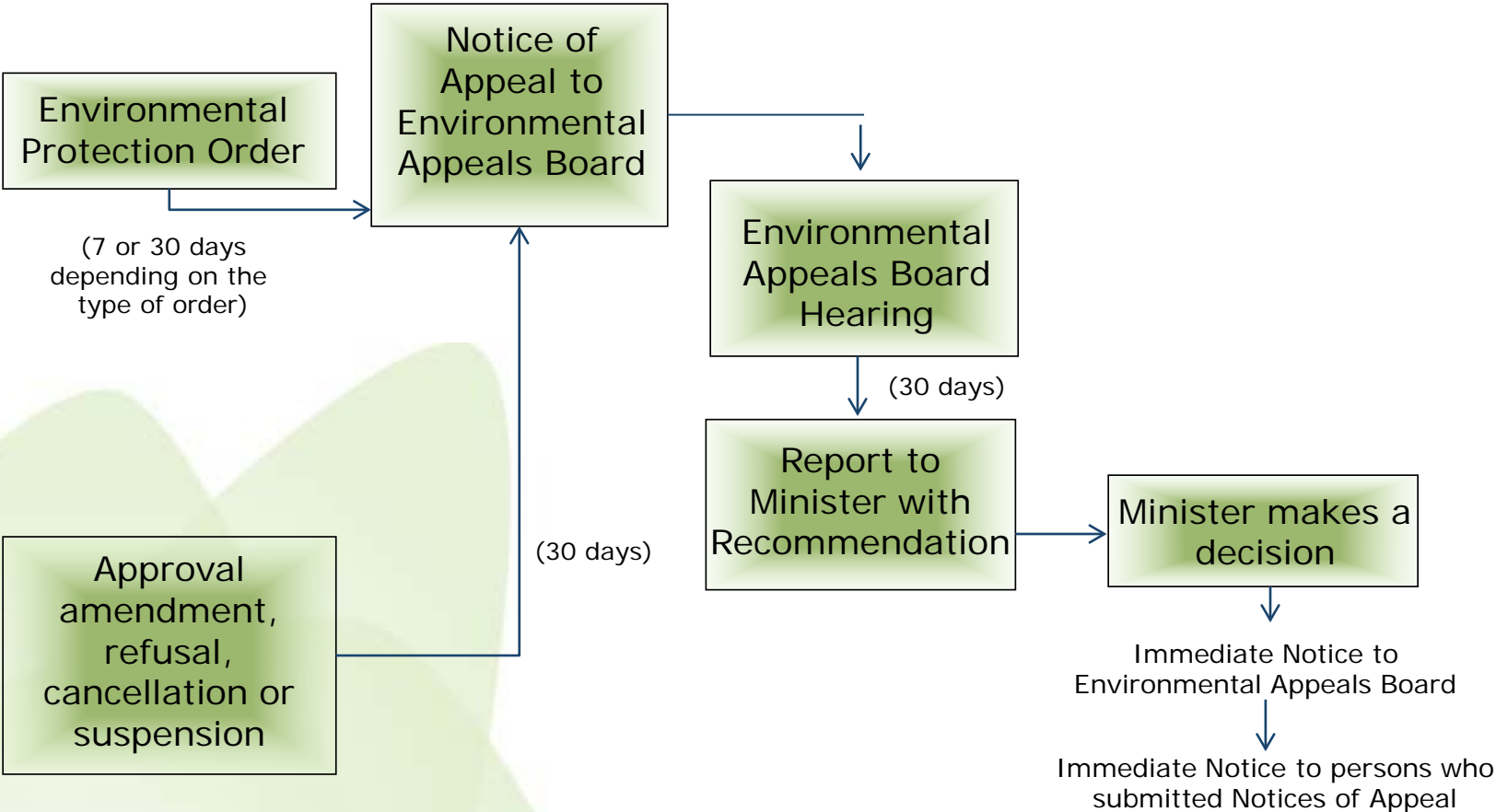
# COVID-19 – Ontario – Environmental Compliance

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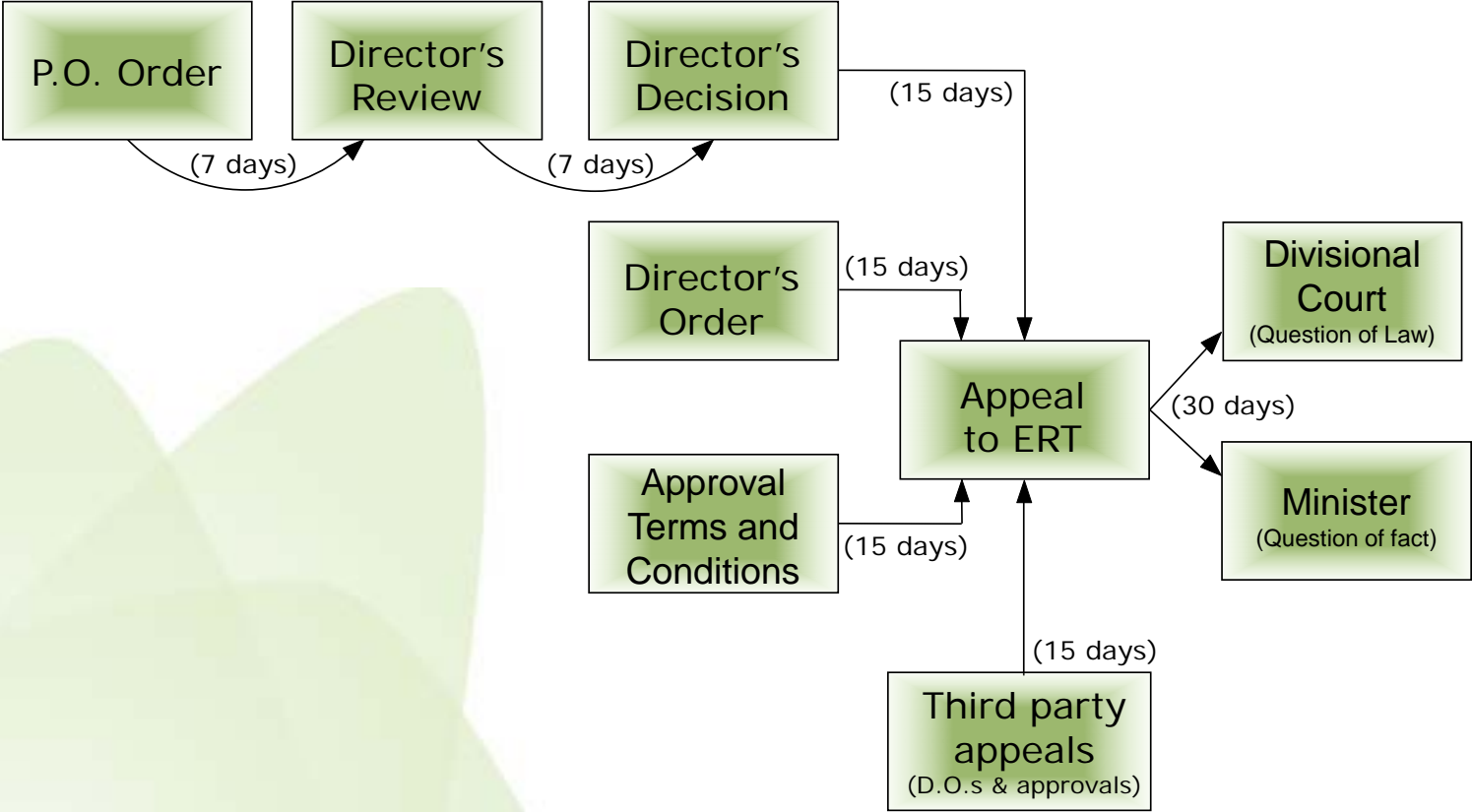
- **Ministry of Environment, Conservation and Parks**
  - no directives, orders, or guidelines providing relief from regulatory requirements
- **Ministry of Natural Resources and Forestry**
  - interpreted the emergency Orders to suspend regulated timelines under the *Aggregate Resources Act*
- **O. Reg. 115/20 exempts all proposals for Acts, policies, regulations, and instruments from Part II of the *Environmental Bill of Rights, 1993***

# REGULATORY ORDERS & APPROVALS

# Alberta Deadlines to Appeal Regulatory Orders and Approvals



# Ontario Deadlines to Appeal Regulatory Orders and Approvals





# Regulatory Orders

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- ***Kawartha Lakes (City), MOE (2013)***
- ***Baker, MOE (2013)***
- ***Rocha, MOECC (2014)***
- ***McQuiston, MOECC (2015)***
- ***Rubin, MOECC (2016)***
- ***Sears, AEP (2018)***
- ***Domtar, AEP (2018)***

# Regulatory Orders

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## ***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

# Regulatory Orders

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## ***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

# Regulatory Orders

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## ***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

# REGULATORY PROSECUTIONS

# Regulatory Prosecutions

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- **By Whom?**

- federal, provincial or municipal governments or individuals

- **Against Whom?**

- individuals, partnerships, corporations
- corporate directors and officers have a duty to take all reasonable care to prevent environmental contraventions
- regulators have been known to prosecute directors and officers and/or their companies to extract a conviction against the company

# Regulatory Prosecutions

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- **Why?**
  - for contravening environmental laws, regulations, permits, approvals or orders
- **Sanction?**
  - fines, court orders, imprisonment, profit-stripping, victim fine surcharge (add 25% to any fine)

# Regulatory Prosecutions – Potential Defences

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- **Failure of the Crown to Prove the Constituent Elements of the Offence**
- **Compliance with Order, Permit, Approval**
- **Abuse of Process**
- **Act of God**
- **Sabotage**
- **Officially Induced Error**
- **Necessity**
- **Mistake of Fact**
- **Due Diligence**



# Regulatory Prosecutions – Potential Defences – Due Diligence

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- **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)*

# Due Diligence – Key Elements

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- **Adequate environmental management system, properly implemented**
- **Compliance with reasonable industry standards**
- **Contravention not reasonably foreseeable**
- **No feasible alternative to prevent the contravention**
- **Activity conducted by competent trained personnel**
- **Employees, agents, contractors properly supervised**
- **Coincidence in time between failure to exercise due diligence and alleged unlawful act**

# Due Diligence – *Zellstoff Celgar LP*

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## ***R v Zellstoff Celgar Limited Partnership*** **(BCPC 2012)**

- 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 because procedure not followed

# Due Diligence – *ControlChem*

## *R v ControlChem (OCJ 2015)*



# Due Diligence – *ControlChem*

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## ***R v ControlChem (OCJ 2015)***

- ControlChem made out due diligence defence; acquitted of all 5 *EPA* and *OWRA* charges
- 20 year employee pled guilty and was convicted on one *OWRA* charge (\$5,000 fine plus VFS) – deliberately discharged 4000 L of chemical water into storm drain
- MOECC and the City traced flow upstream through the sewer system to a catch basin at rear of the property
- Systems and procedures in place, documented training, company mantra “nothing leaves the building”
- ControlChem made out due diligence defence at trial

# Sentencing Principles – Mitigating & Aggravating Factors

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- **Adverse effect/impairment to environment or environmental quality**
- **Risk to unique, rare or important/vulnerable component**
- **Intentional/reckless acts**
- **Financial benefit (increase revenue, decrease cost)**
- **Previous warnings**
- **Previous convictions or non-compliance**
- **After the offence**
  - attempt to conceal the offence
  - failed to take prompt action to mitigate/remediate
  - failed to take prompt action to reduce risk of similar offence

# Penalties

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- **Fines dependent on**
  - Federal vs Provincial vs Municipal offence
  - Regulated person/entity
  - Individual vs Corporation
  - First or subsequent offence
  - Mandatory minimums and maximums
  - Seriousness of the impact
- **Other penalties:**
  - Jail-time (rare)
  - Creative Sentencing

# Case Law Update – Emissions

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## ***Volkswagen Aktiengesellschaft (OCJ 2020)***

- Volkswagen AG imported vehicles into Canada that did not meet emission standards
- Volkswagen AG pleaded guilty to 60 charges under *Canadian Environmental Protection Act*
- Volkswagen AG fined \$196.5 million
  - largest environmental fine in Canadian history
  - fine directed to Environmental Damages Fund



# Case Law Update – Crude Oil

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## ***Journey Energy Inc. (ABPC 2020)***

- Defendant company's pipeline leaked 9 cubic meters of crude oil into nearby creek killing fish and other wildlife
- Defendant company pleaded guilty to offence under Alberta's *Environmental Protection and Enhancement Act*
- Defendant company was fined \$125,000

# Case Law Update – Crude Oil

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## ***Husky Oil Operations Limited (SKPC 2019)***

- Between July 20 and 21, 2016, about 90,000 litres of crude oil leaked from Defendant company's pipeline and entered the North Saskatchewan River
- Oil was found to be deleterious to fish and birds
- Defendant fined total of \$3.82 million
  - \$2.5 million for violating the *Fisheries Act*
  - \$200,000 for violating the *Migratory Birds Convention Act, 1994*
  - \$800,000 for violating the Saskatchewan *Environmental Management and Protection Act* plus 40% VIS of \$320,000

# Case Law Update – PCBs

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## ***Collingwood Prime (ONSC 2020)***

- Company and Director plead guilty to 11 counts under CEPA for failure to remove PCB-containing equipment
  - Company fined \$200,000. Director fined \$220,000 and sentenced to 45-day intermittent jail term
- On appeal of the sentence, the Court
  - found sentencing judge erroneously relied on *R v Sinclair* re level of moral blameworthiness and harm
  - vacated the jail term for the Director
  - reduced the fines to \$150,000 for Company and \$170,000 for Director

# Case Law Update – Tailings Waste

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## ***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 – Chlorinated Water

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## ***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

# MANAGING ENVIRONMENTAL LIABILITIES

# Environmental Risks & Liabilities

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- **Questions to consider...**

- What is the environmental condition of the property?
- Is there an Environmental Management System?
- Is there a spills prevention and contingency plan?
- Do you have all requisite approvals?
- What are the contaminants/emissions from facility?
- Has there been a spill/leak/discharge?
- Is there exceedance of regulatory standards?
- Is there contamination impacting off-site?

# Managing Environmental Liabilities – Environmental Management Systems

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- **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**



# Managing Environmental Liabilities – Environmental Liability Protection

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

# Managing Environmental Liabilities – Checklist

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- **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**

# Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **16 lawyers**
  - eight 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

# Contact Information

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**Jacquelyn Stevens**  
jstevens@willmsshier.com  
(403) 444-6887



**Anand Srivastava**  
asrivastava@willmsshier.com  
(403) 444-6887

**Willms & Shier Environmental Lawyers LLP**

**[www.willmsshier.com](http://www.willmsshier.com)**

