



# **RemTech 2012 Contaminated Sites Overview and Update**

Presented by Corbin Devlin

McLennan Ross LLP

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## Distinct Regulatory and Civil Liability Issues

- Regulatory (*Environmental Protection and Enhancement Act*)
- Civil liability (Tort Law)



## ***Environmental Protection and Enhancement Act***

- Environmental Protection Orders
- Contaminated site designations
- Enforcement Orders
- Reporting obligations
- Remediation and Reclamation Certificates

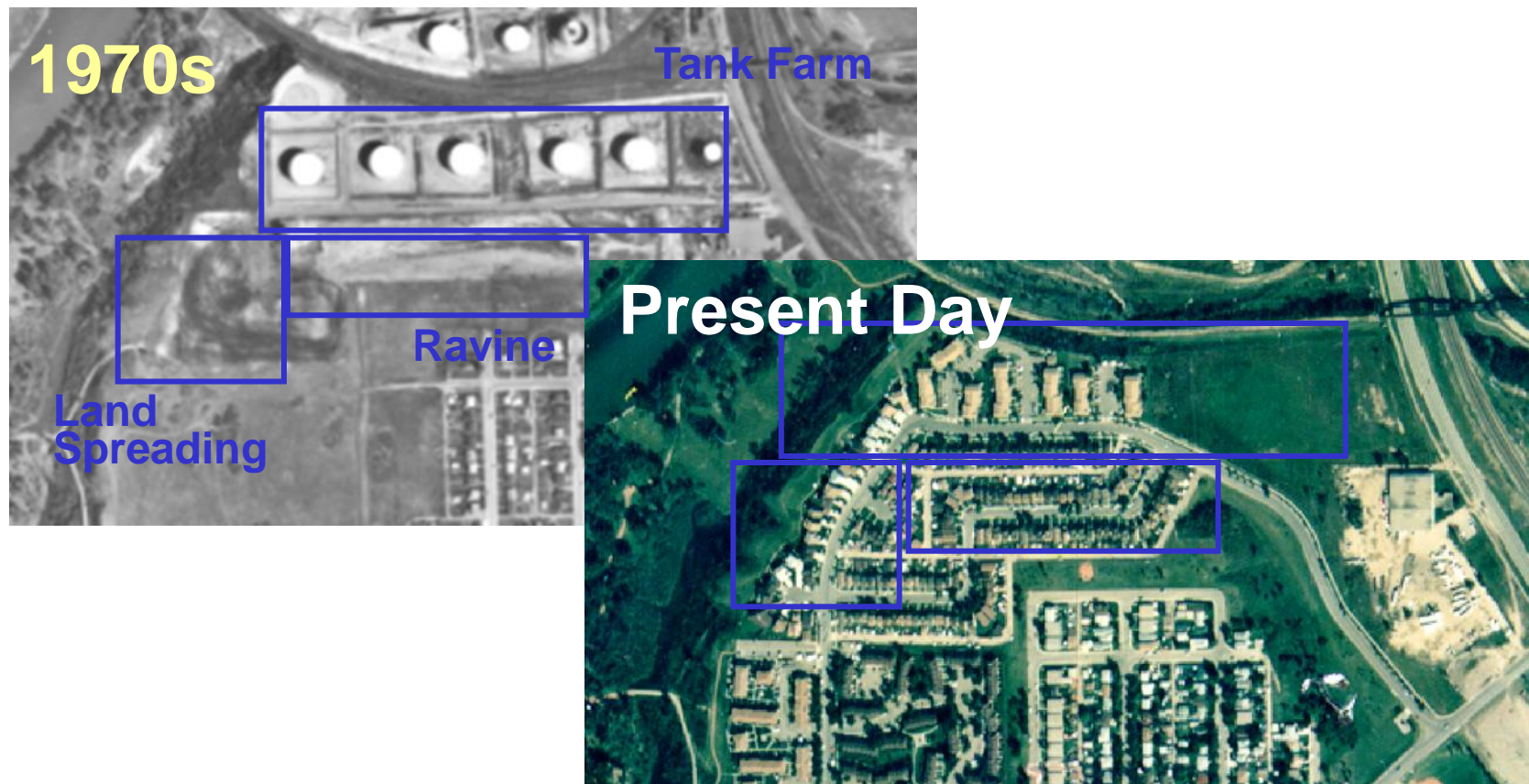


## Environmental Protection Orders

- Substance release
- Adverse effect or potential adverse effect
- Persons responsible (change, management and control)
- Potential persons responsible
- Appeal process



## Lynnview Ridge



## Lynnview Ridge

- EPO issued against Imperial Oil and Devon Estates (IOL to provide delineation, remedial plan and communications plan)
- Appeal to EAB: Retroactivity, other persons responsible, reasonableness of EPO Requirements

**Imperial Oil**





## Lynnview Ridge EAB Decision

- EPOs can be issued in respect of historical releases
- Broad discretion regarding persons responsible
- EAB can modify EPO requirements



## Lynnview Ridge EAB Decision (cont'd)

- EAB makes a recommendation to Minister
- The Minister upheld the EPO but rejected the EAB's changes





## Judicial Review



- The Minister's (EAB) decision upheld
- The Minister must provide reasons for rejecting the EAB's recommendations

## Environmental Protection Orders

- Appeals process is...unique
- Indefinite liability
- Liability resulting from changing standards, science



## Environmental Protection Orders (cont'd)

- Broad discretion as to persons responsible (polluters pay, but not necessarily just polluters)
- Front end investment of resources is worth it



## Remediation Certificates



- Remediation and (off-site) risk management agreement
- Regulatory closure...?
- Notwithstanding clauses
- Civil liability unaffected
- Incomplete but best available protection

## Civil Liability

- Neighbours
- Subsequent owners and occupiers
- Landlords and tenants



## Civil Liability

- Nuisance
- Trespass
- Strict Liability
- Negligence
- Duty to disclose
- Contract obligations



## Tridan v. Shell





## Tridan v. Shell

- Liability admitted
- Law suit for remediation costs and “stigma”
- Damages awarded for remediation to “pristine” standard
- “Stigma” damages overturned on appeal

## Civil Liability

- Civil liability concurrent with regulatory liability
- Regulatory standards do not determine remediation standard (damages) for civil purposes



## ***Pearson v. Inco***



## Pearson v. Inco

- No issues with regulatory compliance
- Class action law suit for loss of property value
- Inco held liable at trial



## Court of Appeal

- No damage to land because no interference with use?
- No strict liability because nickel refinery was natural use (no accident or mishap)?
- No nuisance because not ongoing?



## Civil Liability Cases Hard to Reconcile

- Law is still undeveloped
- Liability based on fault...not as clear as it sounds
- Difficult questions of proof
- Limitations periods are not absolute



## Distinct Regulatory and Civil Liability Issues

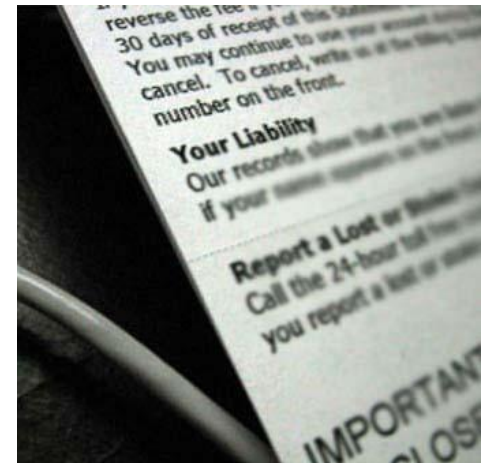
- Compliance with regulatory or industry standards is not determinative in civil context
- Different grounds for liability
- Different remedies/consequences





## Distinct Regulatory and Civil Liability Issues (cont'd)

- Different parties to consider (future occupants/owners/neighbours)
- Remediation Certificates do not preclude civil claims



**QUESTIONS?**