

# Managing Environmental Liabilities: Brownfields Case Law Update

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# Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **16 lawyers**
  - seven are certified by the Law Society of Upper Canada as Environmental Law Specialists
  - lawyers called to the Bar in Ontario, British Columbia, Alberta, Northwest Territories, Nunavut and New Brunswick

# Overview

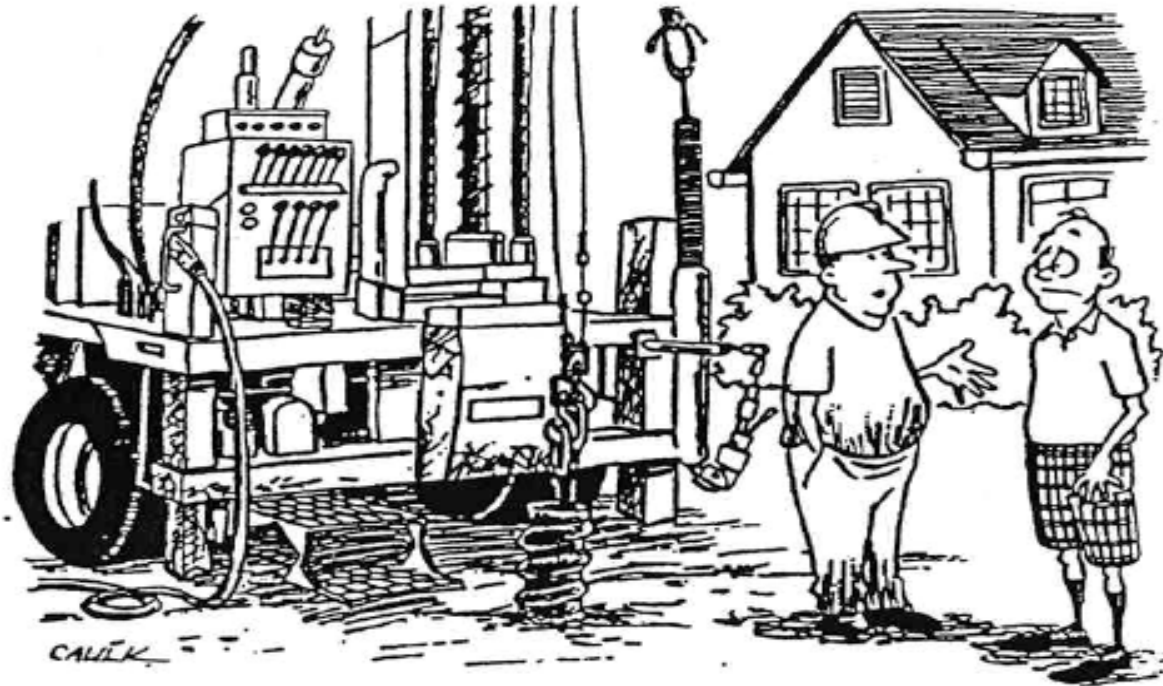
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- **Managing Environmental Liabilities**
- **Case Law Updates**
- **Contaminated Sites Checklist**



# Managing Environmental Liabilities

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*"The good news is we found oil on your property. The bad news is it's in drums."*

# Environmental Liabilities

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- **Regulatory Liability**

- Regulator can issue orders
- Regulator can prosecute for offences under environmental statutes

- **Civil Liability**

- contamination migrating off-site
- “flow through” property

# Managing Environmental Liabilities

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- **Understand the environmental condition of the property**
  - What contaminants are present?
  - Do the contaminants exceed regulatory standards?
  - Is the contamination delineated?
  - Is the contamination migrating off-site?

# Managing Environmental Liabilities

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- **Allocate Risk when Purchasing Contaminated Property**
  - obtain full and timely disclosure
  - right of access and inspection
  - ensure access to property, records, employees
  - seek full warranties for environmental condition
  - indemnities, security, releases
  - specify proposed future use of property

# Managing Environmental Liabilities

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- **Regulatory Liability Protection**
  - Remediation Certificate, RSC
  - protection from regulatory orders
  - no protection from civil liability



# Managing Environmental Liabilities

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- **Environmental Insurance**

- Commercial General Liability typically has pollution exclusion
- Director & Officer Liability policies typically exclude environmental matters
- Insurers offer Environmental Impairment Liability policies

# Managing Environmental Liabilities

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- **Risk Tolerance**

- determine environmental risks and liabilities
- develop plan for managing environmental risks and liabilities
- ensure potential environmental risks and liabilities are within your risk tolerance

# CASE LAW UPDATES



# Case Law Update

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## ***Antrim Truck Centre Ltd. v Ontario (Ministry of Transportation) (SCC 2013)***

- **private nuisance claimants must show that interference with the use of the property is both substantial and unreasonable.**
  - a **substantial** injury “is one that amounts to more than a slight annoyance or trifling interference.”
  - courts must balance the gravity of the harm against the utility of the defendant’s conduct to establish whether the interference was **unreasonable**

# Case Law Update

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## ***French v Chrysler* (ONSC 2014) ONCA 2015**

- **Nuisance has “certain defined, long-standing characteristics, which courts have considered to be essential to the tort. In particular, the alleged nuisance must originate somewhere other than on the plaintiff’s land.”**

# Case Law Update

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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

# Case Law Update

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## ***Steadman v Lambton County (2015, ONSC)***

- **County applied road salt to abutting roadway**
- **Contaminated approximately 15% of property**
- **Salt caused soya bean crop losses and diminished value of property**
- **Court found County liable in nuisance**
- **Steadman awarded \$106,000**

# Case Law Update

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## ***Midwest v Thordarson* (2013 ONSC)**

- **Purchaser claims against neighbour**
- **Not enough to show migration can or has occurred or exceedance of Standards to establish “loss or damage”**
- **Purchaser must show contamination increased during ownership due to neighbour's actions**
- **No “double recovery” under s. 99 EPA**



# Case Law Update

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## ***Canadian Tire v Huron Concrete* (2014 ONSC)**

- **Claim for PHC contaminant migration**
- **Nuisance, negligence (breach of EPA), strict liability and trespass**
- **Liable for the damage caused from escape and migration of gasoline**
- **Court awarded \$3.6M to remediate and \$1.1M for out-of-pocket expenses (legal and professional costs)**

# Case Law Update

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## ***Windsor v CPR (2014 ABCA)***

- **Claims struck for class members without sub-slab systems**
- **Class had only shown nominal or trivial damages**
- **Allowed claim by owners with sub-slab depressurization systems to proceed to trial**

# Case Law Update

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## ***Ball v Imperial Oil (2010 ABCA)***

- **Imperial Oil had two pipelines running through Ball's cattle ranch**
- **Pipelines leaked, Imperial failed to fully remediate, cows died**
- **Liable in nuisance and negligence (Court did not address trespass)**
- **Special damages for vet bills, lost production and general damages for inconvenience**

# Case Law Update

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## ***Smed v Priddis Greens GCC (2011 ABQB)***

- **Golf course discharged effluent from waste water ponds, migrated to Smed's land**
- **Golf course liable only in nuisance (Smed's loss of use and enjoyment of land)**
- **No trespass because waste water did not directly intrude on Smed's land**

# Case Law Update – D&Os

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## ***Rocha v Director, MOECC (2014)***

- **MOE issued two Director's Orders against advisor and mortgagee**
- **Property was the source of a groundwater plume of TCE and VC**
- **Appealed Orders and denied exercising management or control**
- **Applied for a stay pending appeal**
- **ERT denied application for a stay**
- **Hearing – Orders upheld**

# Case Law Update – D&Os

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## ***McQuiston v Ontario, MOECC (2015 ERT)***

- **MOECC issued investigation and cleanup order to:**
  - former tenant, its D&Os and site manager
  - current property owner - British resident who inherited the company
  - accountant who accepted a power of attorney to sell the property
  - listing broker

# Contaminated Sites Checklist

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- **Understand property's environmental condition**
- **Know your environmental risks and liabilities**
- **Allocate risks and liabilities during transaction**
- **Consider regulatory liability protection**
- **Environmental insurance**
- **Ensure potential environmental risks and liabilities are within your risk tolerance**

# Contact Information

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