

Managing Environmental Liabilities: Legal Updates

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Willms & Shier  Environment
Indigenous
Energy Law

Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **17 lawyers**
 - six 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

Overview

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

Environmental Liabilities

- **Regulatory Liability**

- regulator can issue orders
- regulator can 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

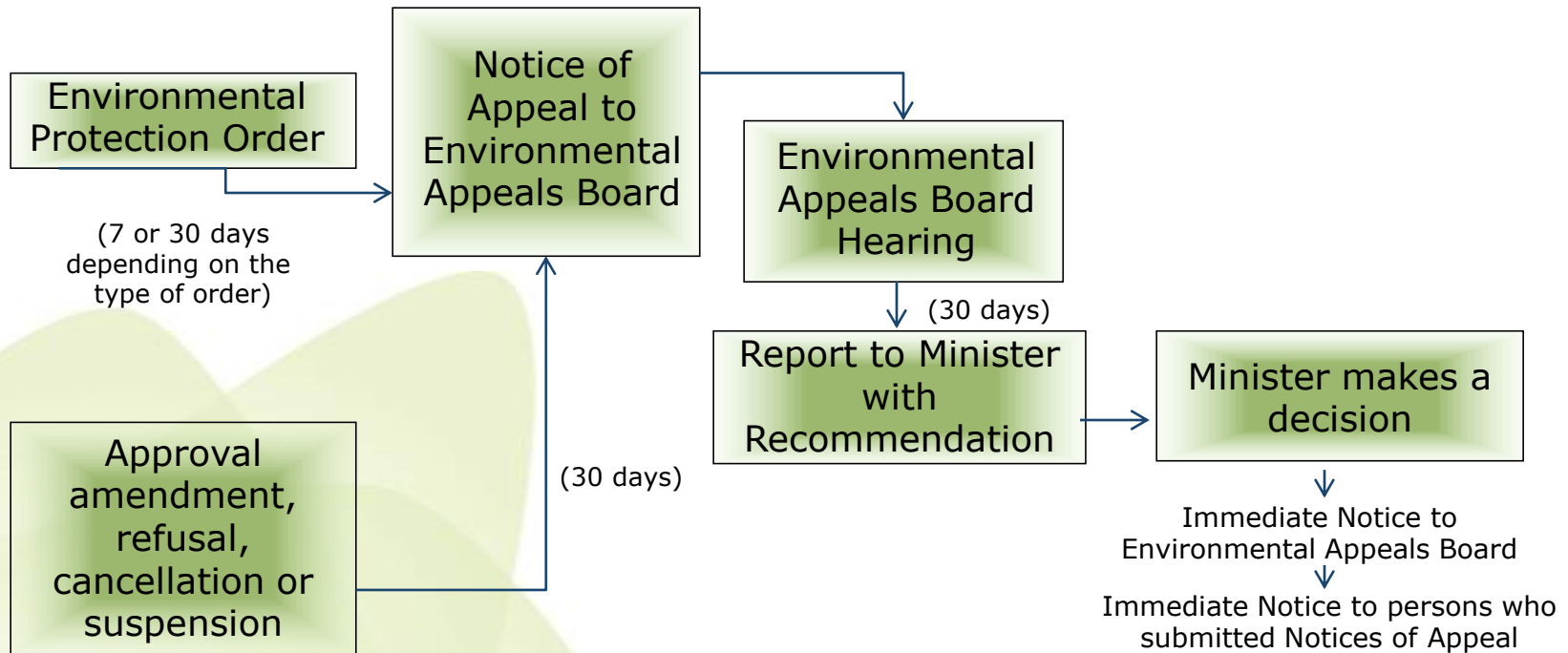
Personal Environmental Liabilities

- **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

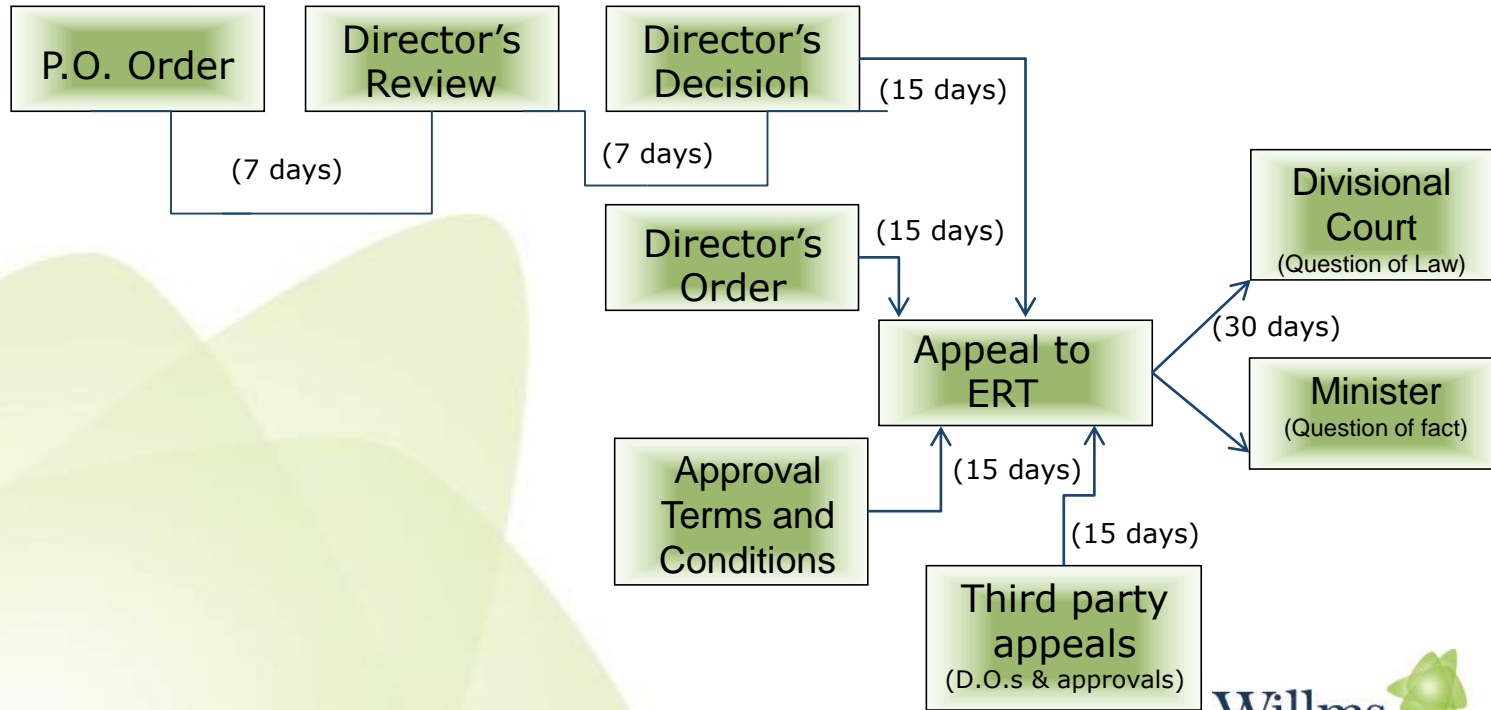
CASE LAW UPDATE

REGULATORY ORDERS

Alberta Deadlines to Appeal Regulatory Orders



Ontario Deadlines to Appeal Regulatory Orders and Approvals



Regulatory Orders

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

Regulatory Orders

- ***Domtar (AEP, 2018)***
 - historic Domtar wood processing operations
 - PHCs, PAHs, VOCs, dioxins/furans discharged to soil, groundwater and surface water
 - off-site migration
 - adjacent residential uses
 - multiple Orders require delineation and remediation/control

Regulatory Orders

- ***Domtar (AEP, 2018)***
 - 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”
 - hearing was held on August 27 to 31 and September 12 to 14, 2018

Regulatory Orders

- ***Sears Canada (AEP, 2018)***
 - Sears operated a retail fuel outlet until 1995
 - property sold to Concord in 2015
 - unknown extent of contamination off-site
 - Sears and Concord ordered to
 - recommence sampling and monitoring
 - fully delineate plume
 - remediate all off-site properties
 - in March 2018, Sears and Concord filed Notices of Appeal
 - mediation in September 2018

Regulatory Orders

- ***Hamilton Beach v MOECC (ERT 2017)***
 - VOC contamination migrated to neighbouring residential, commercial, and institutional properties
 - significant concern about vapour intrusion into nearby buildings
 - ERT confirmed that the MOECC (now MECP) has jurisdiction to require off-site investigation in an EPA, s. 18 order
 - 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
 - Upheld by Divisional Court on September 4, 2018

Regulatory Orders

- ***Redwater (AER, 2017)***
 - Redwater became insolvent
 - Grant Thornton appointed receiver and trustee
 - Grant Thornton disclaimed wells that had onerous environmental abandonment costs
 - AER ordered Grant Thornton to remediate disclaimed wells before distributing to creditors

Regulatory Orders

- ***Redwater (AER, 2017)***
 - Court of Queen's Bench
 - AER's authority to order Grant Thornton frustrates purpose of bankruptcy proceedings
 - Court of Appeal
 - upheld lower decision
 - AER's order subject to bankruptcy proceedings
 - Supreme Court of Canada
 - heard on February 15, 2018

PROSECUTIONS

Prosecutions

PCBs

- ***R v 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 and Court sentenced
 - Company and Director to pay \$420,000 penalty, and
 - Director to 45-day jail term (to be served on weekends)

Prosecutions

Spills

- ***R v Clark Builders (Alta. Prov. Ct., 2012)***
 - defendant was construction manager for the project
 - subcontractor hit a water main when excavating for foundation pilings
 - defendant failed to obtain underground location of 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

Prosecutions

Spills

- ***R v Montreal, Maine and Atlantic Canada Co. (Lac-Mégantic) (Quebec 2018)***
 - train carrying 7.7 million litres of crude oil derailed in Lac-Mégantic, Quebec 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 Mégantic Lake and the Chaudière River, waters frequented by fish
 - Company fined \$1,000,000 under the *Fisheries Act*, of which \$400,000 is to be directed to federal Environmental Damages Fund (to support projects focused on impacted lake and river)

Prosecutions

Spills

- ***R v Mackenzie Pulp Mill Corporation***
(BC Prov. Ct. 2018)
 - Company discharged improperly treated effluent to a lake frequented by fish
 - contravention of federal *Fisheries Act*
 - conviction – company fined \$900,000 and ordered to complete audit of operations to prevent future incidents

Prosecutions

Unlawful Transfer of Petroleum Product

- ***R v Crop Production Services (Canada) Inc.***
(Sask. Prov. Ct., 2018)
 - Company transferred petroleum products into unidentified storage tank systems
 - contravention of federal *Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations*
 - conviction – company fined \$150,000

Prosecutions

Unlawful Importation of Fuel

- ***R v Canadian National Railway Company (Quebec 2018)***
 - CN imported diesel fuel that did not contain sufficient renewable fuel content and CN failed to obtain enough compliance units
 - contravention of federal *Renewable Fuels Regulations*
 - conviction – company fined \$25,000 and ordered to pay an additional \$1,101,627 to promote the protection of the environment

Prosecutions

Waste

- ***R v 1449817 Ontario Inc. and Alfred Tenny (OCJ 2016)***
 - Refinery and formerly approved waste disposal processing facility
 - Company and President ordered by MOECC to process, remove and dispose of metals and other waste
 - In 2015, company and President convicted of failing to comply with MOECC Order (5 counts) and ordered by Court to process, remove and dispose of waste
 - Company and President failed to comply with Court Order and convicted (8 counts)
 - President fined \$320,000 plus 25% VFS, Company fined \$1,200,000 plus 25% VFS

Prosecutions

Odour

- ***R v Shell Canada Limited (OCJ 2015)***
 - leak of liquid containing mercaptan caused a foul odour and flowed into ditch that emptied to on-site waste water treatment facility
 - shelter-in-place advisory was issued for City and First Nation Community
 - complaints of sore eyes and throat, headaches, nausea and vomiting
 - conviction – \$500,000 plus 25% VFS, 60 days to pay & probation order issued for \$200,000 to be paid to the impacted First Nation Community

CIVIL LAWSUITS

Civil Lawsuits

- ***Canadian Tire v Huron Concrete (ONSC 2014)***
 - Canadian Tire found 60 cm of free phase petroleum product in a monitoring well at the Canadian Tire property
 - Huron Concrete (neighbour) was found liable under strict liability (*Rylands v Fletcher*), nuisance, negligence and trespass
 - Canadian Tire was awarded \$3.6 million to remediate its own property plus \$1.1 million for costs

Civil Lawsuits

- ***Midwest v Thordarson* (ONCA 2015)**
 - negligence and nuisance claims successful
 - Thordarson could not avoid personal liability by relying on “corporate veil” argument that liability should stop with Thorco
 - punitive damages awarded
 - “wanton disregard for its environmental obligations”
 - \$50,000 from each of Thorco and Thordarson
 - damages of \$1,328,000 for restoration costs

Civil Lawsuits

- ***Lakeview Village v Suncor* (ABQB 2016) and *Brookfield v Imperial Oil* (ABQB 2017)**
 - Alberta's *Limitations Act* – ultimate limitation period of 10 years
 - what about historic contamination?
 - Alberta's *Environmental Protection and Enhancement Act*, s 218 allows for plaintiffs to seek extension of limitation period for environmental claims
 - age of historic contamination is a factor

MANAGING ENVIRONMENTAL LIABILITIES

Managing Environmental Liabilities

- **Understand Environmental Risks**
- **Exercise Due Diligence**
- **Implement Environmental Management System (EMS)**
- **Consider Environmental Liability Protection**

Managing Environmental Liabilities

- **Understand environmental issues and risks**
 - What is the environmental condition of the property?
 - Do you have all requisite approvals?
 - What are the contaminants or emissions from facility?
 - Exceedance of regulatory standards?
 - Contamination impacting off-site?

Managing Environmental Liabilities

- **Due Diligence**

- took all reasonable care to avoid the offence
R v Sault Ste. Marie (City)
- “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

Managing Environmental Liabilities

- **Environmental Management Systems (EMS)**
 - can be a proper system of due diligence
 - develop and implement EMS
 - reasonable and realistic corporate policy
 - identify environmental impacts and legal requirements
 - implement SOPs and training
 - adequate commitment of resources
 - continuous improvement (management review, audits)

Managing Environmental Liabilities

- **Environmental Liability Protection**
 - allocating liability during transactions
 - regulatory liability protection
 - environmental insurance

DUE DILIGENCE CASE LAW

Managing Environmental Liabilities

- ***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

Managing Environmental Liabilities

- ***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

Environmental Liability Management Checklist

- **Know your environmental risks and liabilities**
- **Build due diligence into corporate culture**
- **Implement environmental management program**
- **Consider environmental liability protection**

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