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Consultants' Liability:

Staying Clean in the Remediation Business

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Consultants' Liability: Staying Clean in the Remediation Business

Today's Session

Introduction to:

- Civil Liability
- Criminal Liability
- Regulatory Liability
- Professional Liability

Other Concepts:

- Vicarious Liability v. Personal Liability
- Insurance and Indemnity

Case Studies

Q & A

Civil Liability

- Lawsuit between private parties
- Often seeks monetary compensation “damages”
- For example, a tort claim in “negligence”
 - Duty owed
 - Breach of duty
 - Damages suffered
 - Failure to meet reasonable standard expected of a like professional in like circumstances
 - Does not require perfection

Standard of Care

Typically, the claimant must establish that the professional failed to exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard of the time

Other Concepts

Vicarious Liability

“... an employer may be vicariously liable (1) for acts of an employee which are authorized by the employer, or (2) for unauthorized acts which are so closely connected with authorized acts that they may be regarded as modes of doing an authorized act.”

- *S.G.H. v. Gorsline*, 2004 ABCA 186

Personal Liability

In addition to your company or firm being held liable, you may also be liable as an individual.

Personal liability is not precluded by principle of vicarious liability

May apply in civil, regulatory, criminal or professional contexts

Criminal Liability

Criminal Code

Criminal negligence

219(1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Regulatory Liability

Regulatory liability refers to those liabilities which do not exist at common law, but have been imposed by Parliament or our Legislature in the form of:

- Legislation,
- Regulations,
- Codes of Practice
- etc.

Occupational Health and Safety Act

Section 2

- (2) Every worker shall, while engaged in an occupation,
- (a) take reasonable care to protect the health and safety of the worker and of other workers present while the worker is working, and
 - (b) co-operate with the worker's employer for the purposes of protecting the health and safety of
 - (i) the worker,
 - (ii) other workers engaged in the work of the employer, and
 - (iii) other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.

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Environmental Protection and Enhancement Act

Offences

227 A person who

- (a) knowingly provides false or misleading information pursuant to a requirement under this Act to provide information,
- (b) provides false or misleading information pursuant to a requirement under this Act to provide information,
- (c) fails to provide information as required under this Act, except under [section 110\(3\)](#),
- (d) knowingly contravenes a term or condition of an approval, a code of practice, a certificate of variance, a reclamation certificate, a remediation certificate or a certificate of qualification,
- (e) contravenes a term or condition of an approval, a code of practice, a certificate of variance, a reclamation certificate, a remediation certificate or a certificate of qualification,
- (f) knowingly contravenes an enforcement order,
- (g) contravenes an enforcement order,
- (h) knowingly contravenes an environmental protection order,
- (i) contravenes an environmental protection order, or
- (j) contravenes [section 60](#), [61](#), [67](#), [75](#), [76](#), [79](#), [87](#), [88](#), [108](#), [109](#), [110\(1\)](#) or [\(2\)](#), [111](#), [112](#), [137](#), [148](#), [149](#), [155](#), [157](#), [163](#), [169](#), [170](#), [173](#), [176](#), [178](#), [179](#), [180](#), [181](#), [182](#), [188](#), [191](#), [192](#), [209](#) or [251](#)

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Environmental Protection and Enhancement Act

Penalties

- 228(1)** A person who commits an offence referred to in [section 60](#), [87](#), [108\(1\)](#), [109\(1\)](#) or [227](#)(a), (d), (f) or (h) is liable
- (a) in the case of an individual, to a fine of not more than \$100 000 or to imprisonment for a period of not more than 2 years or to both fine and imprisonment, or
 - (b) in the case of a corporation, to a fine of not more than \$1 000 000.
- (2) A person who commits an offence referred to in [section 61](#), [67](#), [75](#), [76](#), [79](#), [88](#), [108\(2\)](#), [109\(2\)](#), [110\(1\)](#) or [\(2\)](#), [111](#), [112](#), [137](#), [148](#), [149](#), [155](#), [157](#), [163](#), [169](#), [170](#), [173](#), [176](#), [188](#), [191](#), [192](#), [209](#), [227](#)(b), (c), (e), (g) or (i) or [251](#) is liable
- (a) in the case of an individual, to a fine of not more than \$50 000, or
 - (b) in the case of a corporation, to a fine of not more than \$500 000.
- (3) A person who commits an offence referred to in [section 178](#), [179](#), [180](#), [181](#) or [182](#) is liable
- (a) in the case of an individual, to a fine of not more than \$250, or
 - (b) in the case of a corporation, to a fine of not more than \$1000.

Regulatory Defences

There are defences available if you are charged with a statutory offence.
For example:

- **Due diligence:**

 - **Due diligence defence**

 - **229**

 - No person shall be convicted of an offence under [section 61](#), [67](#), [75](#), [76](#), [79](#), [88](#), [108\(2\)](#), [109\(2\)](#), [110\(1\)](#) or [\(2\)](#), [111](#), [112](#), [137](#), [148](#), [149](#), [155](#), [157](#), [163](#), [169](#), [170](#), [173](#), [176](#), [188](#), [191](#), [192](#), [209](#), [227](#)(b), (c), (e), (g) or (i) or [251](#) if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission

- **Statutory Immunity**

 - See for example, s. 220 of *EPEA*

- **“Officially induced error”**

 - See for example: *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, [2013] 3 SCR 756, 2013 SCC 63

Environmental Protection and Enhancement Act

Joint and several liability

215 Where an enforcement order is issued to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so, including any costs incurred by the Director under [section 214\(2\)](#).

Civil cause of action

219 Subject to [section 220](#), where a person is convicted of an offence under this Act, any person who suffers loss or damage as a result of the conduct that constituted the offence may, in a court of competent jurisdiction, sue for and recover from the convicted person an amount equal to the loss or damage proved to have been suffered.

Professional Liability

Professional Liability typically arises where a regulated professional (often called a “member”):

- Demonstrates a lack of competence and/or
- Engages in unprofessional conduct

Professional Liability

Legislation gives Professional Regulatory Organizations the authority to ensure their members:

- meet educational and training requirements
- provide safe, ethical and competent services
- follow prescribed Codes of Conduct
- have appropriate complaint, investigative and disciplinary processes

Professional Liability

Disciplinary proceedings may be triggered by a complaint from:

- a member of the public,
- a client,
- an employer, or
- another professional

who believes that the consultant has demonstrated incompetence or other unprofessional conduct.

Professional Liability

Engineering and Geoscience Professions Act

- 44(1) Any conduct of a professional member, licensee, permit holder, certificate holder or member-in-training that in the opinion of the Discipline Committee or the Appeal Board
- (a) is detrimental to the best interests of the public,
 - (b) contravenes a code of ethics of the profession as established under the regulations,
 - (c) harms or tends to harm the standing of the profession generally,
 - (d) displays a lack of knowledge of or lack of skill or judgment in the practice of the profession, or
 - (e) displays a lack of knowledge of or lack of skill or judgment in the carrying out of any duty or obligation undertaken in the practice of the profession,

whether or not that conduct is disgraceful or dishonourable, constitutes either unskilled practice of the profession or unprofessional conduct, whichever the Discipline Committee or the Appeal Board finds.

Professional Liability

- *Agrology Profession Act*
- *Consulting Engineers of Alberta Act*
- *Engineering and Geoscience Professions Act*
- *Regulated Forestry Profession Act*
- *Land Surveyors Act*
- *Professional and Occupational Associations Registration Act*
 - governs Biologists, Chemists, Landscape Architects, etc.

Insurance and Indemnity

Insurance:

- Professional Liability Policies
- Self-insured

Indemnity Agreements:

- Especially relevant for contractors and subcontractors

Case Study #1

- You are retained by a client to prepare a Remediation Plan.
- You complete your investigation and prepare a proposal identifying various options for remediating the Site.
- You fail to include a remediation option that is both economical and appropriate, having regard to the site conditions, nature of contamination, etc.
- Your client completes the remediation at a much higher cost, and then discovers that a far more economical option exists.
- Your client sues you for failing to recommend the economical option.

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Case Study #2

- You are retained to provide remediation services at a Contaminated Site accessible only by quad.
- Prior to dispatch, your team received training on the safe operation of quads.
- However, when you arrive on Site you observe that:
 - your team is not following safety protocols re: quad use
 - the site supervisor smells like alcohol
- You make a note to discuss your concerns with your team at the end of the day.
- That afternoon the site supervisor rolls one of the quads. An employee, who was not wearing a helmet, is seriously injured.

Case Study #3

- You are retained to complete a Phase 1 Assessment of an industrial property.
- You identify numerous exceedances of the Alberta Tier 1 Soil and Groundwater Remediation Guidelines.
- You suspect, but cannot confirm, that the contamination is migrating off-Site.
- You recommend that your client report the exceedances to the Regulator and undertake further investigation to delineate the contamination.
- Your client declines to do so and is sued by their neighbour.

Case Study #4

- You are retained to remediate a retired coal-fire power generation facility.
- As part of your initial assessment you discover that a piece of equipment has a high probability of a failure, which could result in a catastrophic release of plant effluent.
- You leave the plant for a long weekend vacation you have been planning for months, without communicating your findings to anyone.
- During the weekend that same piece of equipment fails, resulting in the deposit of a deleterious substance into fish habitat.

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Case Study #5

- You are an engineer retained to provide field services.
- Your client alleges that you took too long to prepare report and was overly cautious in his approach, resulting in delay and cost over-runs.
- ***Engineering and Geoscience Professions Act***

Section 44(1)

Any conduct of a professional member, licensee, permit holder, certificate holder or member-in-training that in the opinion of the Discipline Committee or the Appeal Board

d. displays a lack of knowledge of or lack of skill or judgment in the practice of the profession...

Whether or not that conduct is disgraceful or dishonorable, constitutes either unskilled practice of the profession or unprofessional conduct, whichever the Discipline Committee or the Appeal Board finds.

- ***APEGA Code of Ethics:***

Rule of Conduct #2

Professional engineers, geologists and geophysicists shall undertake only work that they are competent to perform by virtue of their training and experience.

Questions?