

Managing Environmental Liabilities: Eight Common Professional Blunders

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Environmental Liability



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

Environmental Liability

- **Regulatory Liability**
 - regulator issues orders
 - regulator prosecutes offences under environmental statutes
- **Civil Liability**
 - professional negligence, breach of contract, breach of statute
- **Professional Licensing Liability**
 - disciplinary proceedings

Communications between Legal Counsel and Expert

***Moore v Getahun* (ONCA 2015)**

- **Communications have the protection of litigation privilege unless reasonable grounds to suspect that counsel communicated in a way likely to interfere with the expert's duties of independence and objectivity**
- **Only “the foundational information” that supports and underpins expert opinion must be disclosed to be relied on at trial**
- **Leave to appeal to SCC refused**

Communications between Legal Counsel and Expert

British Columbia

- Supreme Court Civil Rules, 11-6(8)
 - party who serves expert report must disclose communications and information on which expert opinion is based (i.e., data, statements of facts, results of tests, record of observations)

Alberta

- *Chernetz v Eagle Copters Ltd* (ABQB 2005) communications between expert and instructing counsel are initially covered by litigation privilege
 - if expert testifies, privilege lost for all documents used in forming opinion “whether the expert relied on, rejected or disregarded the information.”

Managing Environmental Liability

- **Know the environmental condition of property**
- **Allocate Risk in transactions involving Contaminated Property**
- **Regulatory Liability Protection**
- **Environmental Insurance**
- **Risk Tolerance**

Common Blunders

- 1. Failing to Communicate**
- 2. Opining Outside of Area of Expertise**
- 3. Sharing Findings with Regulators**
- 4. Performing Below the Standard of Care**
- 5. Missing Deadlines, Underestimating Time, Resources**
- 6. Damaging Property / Exacerbating Existing Contamination**
- 7. Extending Reliance**
- 8. Negotiating Liability Limits**

Blunder #1: Failing to Communicate



Blunder #2: Opining Outside Area of Expertise

BifSniff.com



In the end Frank was thinking so far outside of the box, he couldn't remember what was actually in it.

Blunder #3: Sharing Findings with Regulators



Blunder #4: Performing Below Standard



Blunder #4: Performing Below Standard

Providing False Information to Regulator about Retainer (OCJ, 2011)

- **Property owner ordered to retain consultant**
- **Consultant provided fraudulent document to regulator about retainer**
- **Consultant no longer employed by firm**
- **Consultant convicted and fined \$7,500, plus 25% VFS**

Blunder #4: Performing Below Standard

Failing to Follow Regulation & Providing False Information to Regulator (OCJ, 2015)

- **Consultant constructed wells without**
 - retaining licensed well technician
 - providing well records
 - properly abandoning wells
- **Consultant and Consultant's company convicted and fined \$45,500 plus VFS**

Blunder #4: Performing Below Standard

Providing False Information to Regulator about Sample Results (ONCA, 2008)

- **PCBs in two of consultant's samples**
- **Consultant told Regulator there was no PCB in samples**
- **Consultant convicted and fined for providing false or misleading information**
- **Consultant also prosecuted before Professional Engineers Ontario Discipline Committee**

Blunder #4: Performing Below Standard

Erroneous Identification of Mould (ABPC, 2010)

- **Consultant advised there was serious mould contamination in daughter's room**
- **Clients moved out and undertook remediation**
- **Consultant ignored limitations of sampling and failed to properly interpret data**
- **Consultant failed to bring limitations of mould sampling to the client's attention**
- **Damages of \$14,894 awarded**

Blunder #4: Performs Below Standard

Free Contaminated Fill Offered For Development (NSCA, 2014)

- **Excavator offered soil that smelled of hydrocarbons as free fill**
- **Soil used as backfill in subdivision**
- **Excavator should have tested soil when appearance made it clear it may be contaminated**
- **Excavator ordered to pay \$487,295 for remediation**

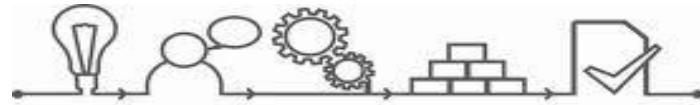
Blunder #4: Performs Below Standard

Providing False & Misleading Information to Regulator about Sample Results (ABPC, 2018)

- **Consultant contracted to complete soil sampling to allow release of wastewater if met parameters**
- **Consultant falsely submitted lab results for wastewater from previous year, current results did not meet parameters**
- **Consultant fined \$28,750 plus VFS, prohibited from submitting documents/reports for 3 years to Alberta Environment and Parks**

Blunder #5: Missing Deadlines/ Underestimating Time & Resources

DON'T MISS
THE DEADLINE!



**PROJECT
MANAGEMENT
LIFECYCLE**



Blunder #6: Damaging Property



**PLEASE
KEEP
OUR
PROPERTY
CLEAN**

Blunder #6: Damaging Property

Failure to Recommend Preventative Measures (NBQB, 2007)

- **Consultant recommended no options to prevent deposit of toxic leachate into creek in Landfill Closure Report**
- **Leachate, a deleterious substance, was deposited into Creek**
- **Consulting firm and project leader convicted and fined \$28,000 under *Fisheries Act***

Blunder #7: Extending Reliance



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Report Failed to Mention Extent of Contamination & Violations of Laws (ONCA, 1995)

- Environmental audit and assessment report contained third party disclaimer
- Third party purchaser relied on report to close
- Areas of contamination found and violations of environmental laws
- Court found no privity of contract
- Consultant did not owe duty to third party where no reliance extended

Blunder #7: Extending Reliance

Appraiser Overstates Value (NSCA, 1996)

- **Appraiser report disclaimer that not liable for damages incurred by third parties**
- **Appraiser negligently overstated property value**
- **Bank relied on report to approve financing**
- **Default and foreclosure resulted in loss to Bank**
- **Court found Bank should have requested unqualified report or sought reliance and that Bank assumed risk of relying on report**

Blunder #7: Extending Reliance

Reliance on Phase I ESA (NLCA, 2018)

- **APS required Vendor to provide Phase I ESA to Purchaser**
- **Consultant Project Agreement contained third party disclaimer**
- **PHC contamination discovered after deal closed**
- **Purchaser sued Vendor and Consultant**
- **Court found if Purchaser wanted reliance should have initiated discussion with Consultant**
- **Consultant had turned mind to third party with disclaimer in agreement**

Blunder #8: Negotiating Liability Limits



6 Takeaways to consider...

- **Understand client needs**
- **Confirm instructions**
- **Do excellent work**
- **Stick to your area of expertise**
- **Your words, spoken or written, matter**
- **Have appropriate insurance**

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 Bar across Canada

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