

# The Good, the Bad and the Ugly! Managing Environmental Risks & Liabilities – Civil Liability

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This presentation provides general information and is not intended to provide legal advice. Audience members should seek legal advice for specific situations.

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# CIVIL LIABILITY

# Civil Liability – Elements

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- **Liability for environmental harm and corresponding loss**
  - plaintiffs and defendants can be governments, individuals and companies, or class action plaintiffs
  - plaintiff must prove liability and damages to succeed in any lawsuit
- **Liability is typically pleaded in**
  - nuisance, negligence, strict liability, trespass, breach of contract, breach of statutory cause of action (EPA, s. 99(2)), and request for injunctive relief
- **Courts may order injunctions, damages (direct or indirect), punitive damages, and personal liability**

# Civil Liability – Limitations

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- **A limitation period is the time limit to commence civil actions**
  - most provincial Limitations Acts require a claim to be commenced two (2) years from the date of
    - discovery, or
    - from the date when the plaintiff ought to have discovered (i.e., exercise diligence to discover the claim)
- **Each province may have other limitations periods relating to environmental contamination**
  - Alberta's Environmental Protection and Enhancement Act s. 218 creates an exception to the ultimate 10 year limitation period
  - Ontario's Limitations Act defines “environmental claim” for which there is no ultimate limitations period

# Civil Liability – Limitations

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## ***Brookfield v Imperial Oil (ABCA 2019)***

- Alberta's *LA* – ultimate limitation period of 10 years
- What about historic contamination?
- Alberta's *EPEA*, s. 218 allows for plaintiffs to seek extension of the ultimate limitation period for environmental claims
- Plaintiff cannot wait for trial and must ask the Court for extension in a separate proceeding before trial
- Age of historic contamination and passage of time are factors indicating prejudice to a defendant that may result in no extension under *EPEA*, s. 218

# Civil Liability – Limitations

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## ***United Inc. v CN Railway (ABQB 2020)***

- United bought land formerly owned by CN
- United discovered historical contamination on the land
- United asked the court for an extension to the limitation period to seek recovery for remediation expenses, alleging negligence, nuisance and strict liability
- Extension granted as long as United can prove the contamination was from 1991 or later

# Civil Liability – Limitations

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## ***Soleimani v Rolland Levesque* (ONSC 2019)**

- Plaintiff discovered contamination in 2010 and then:
  - put Defendants on notice of potential civil claim, and
  - engaged regulator to assist
- Plaintiff commenced civil litigation in 2014
- Defendants argued that the claim is time barred due to *Limitations Act, 2002*
- Plaintiff responded that because the MOE was involved, the limitation period did not start to run
- Court held that MOE intervention is not an alternative process capable of displacing the LA
- Plaintiff action dismissed

# Civil Liability – Nuisance

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- **Nuisance**
- **Noise, vibration, odour and dust causing**
  - loss of enjoyment of land
  - material discomfort (including health or environmental effects)
- **Private or public nuisance**
- **Must originate somewhere other than on the plaintiff's land**



# Civil Liability – Strict Liability

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## Strict Liability in *Rylands v Fletcher*

- Automatic liability when something that is likely to cause mischief if it were to escape, and does escape from the defendant's land onto the plaintiff's land, causing damage to the plaintiff

# Civil Liability – Trespass to Land

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- **Direct intentional act of entering upon someone's land without a lawful excuse or permission**



# Civil Liability – Negligence

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- **Failure to take due care in one's acts or omissions, not to harm "neighbour", where damage and damages result**
- **Elements to prove**
  - 1) A duty of care was owed
  - 2) The standard of care was breached
  - 3) The breach caused damages
  - 4) The damages suffered were not too remote

# Civil Liability – Breach of Contract

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- **Sources of contractual liability include**
  - Asset and Share Purchase
  - Real Estate Agreements - Purchase and Sale, Leases
  - Management, Operation & Maintenance Agreements
  - Consulting Terms & Conditions
- **Types of contractual liability**
  - Due Diligence, Buyer Beware
  - Definitions (Environmental Laws, Hazardous Substances)
  - Representations, Warranties, Covenants – compliance with all laws, no use of hazardous substances, remediation obligations
  - Indemnities – from whom, amount, length of time

# Civil Liability – BC *EMA* s. 45, 46 & 47

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- **s. 45 of the *EMA* provides a list of persons responsible for remediation of contaminated sites, including**
  - (a) a current owner or operator
  - (b) a previous owner or operator
- **s. 46 sets out exceptions to the persons listed in s. 45**
- **s. 47 states that a person who is responsible for remediation is liable to any person or government body for reasonably incurred costs of remediation of the contaminated site**

# Civil Liability – ON *EPA* s. 99(2)

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- **The *EPA* provides a right to compensation for pollutant spills – Legislative right to sue**
  - s. 99(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
    - (a) for loss or damage incurred as a direct result of,
      - (i) the spill of a pollutant that causes or is likely to cause an adverse effect

...from the owner of the pollutant and the person having control of the pollutant.

# CASE LAW REVIEW

# Civil Liability – Case Law Review

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## ***Floate v Gas Plus Inc. (ABQB 2015)***

- Gas Plus had a spill of 7000 to 9000 liters of gasoline in 2010 which contaminated the Plaintiff's lands
- Plaintiff argued that this spill released residual hydrocarbons in the soil that were there from a previous spill when Shell owned the property
- Shell had not had any involvement with the property for 10 years
- Court held that there was not sufficient evidence advanced by Plaintiff to link Shell to the spill
- Claim against Shell dismissed



# Civil Liability – Case Law Review

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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

# Civil Liability – Case Law Review

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## ***Crombie v McColl-Frontenac* (ONSC 2015)**

- Law of continuing nuisance applies to environmental claims but only where there is actual evidence of additional damage during the 2-year limitation period immediately preceding the claim
- A mere inference about possible ongoing migration in the context of soil and groundwater contamination may not be enough
- This may not be the same in all provinces – principle of *stare decisis* – other provincial judges' decisions are not binding, only persuasive

# Civil Liability – Case Law Review

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## ***Blatz v Impact Energy Inc. (ABQB 2009)***

- The Blatz family leased out a part of their land to Impact Energy to drill a sour gas well
- Shortly after they noticed a change in their water, which is supplied by a well on the property
- Plaintiffs allege material and soil stored in open pits on the lease site contaminated water well and related aquifers, causing physical ailments and financial losses to various family members. Plaintiffs claim nuisance, negligence and the rule in *Rylands v Fletcher*
- Defendants liable for the chemical changes and bacteria problem that resulted in the families well (but not the aquifer)
- Damages awarded
  - \$30,000 to refinish the current well or drill a new one
  - \$1,000 to each of the seven plaintiffs for personal injury
  - \$4,000 loss of income to 1 family member

# Civil Liability – Case Law Review

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

- Imperial Oil ran two pipelines through the Plaintiff's field
- Imperial Oil suspected a leak and excavated areas in the field to inspect the pipeline
  - A leak was found and Imperial Oil removed discoloured soil from around the pipeline and dumped water from the excavation on the ground
  - Plaintiff found the fence around the excavation down and saw her cattle grazing freely around the site
  - next calving season Plaintiff noticed severe deterioration in the cattle
- Plaintiff sued Imperial Oil for negligence, nuisance and trespass
- Plaintiff was awarded \$65,600.12 in damages
- Trial judge and CA found Imperial Oil negligent and created a nuisance

# Civil Liability – Case Law Review

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## ***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 was found liable under strict liability (*Rylands v Fletcher*), nuisance, negligence and trespass
- Trespass argued on basis that free product was the personal property of Huron Concrete and they had refused to remove it from Canadian Tire property
- Canadian Tire was awarded \$3.6 million to remediate its own property plus \$1.1 million for costs

# Civil Liability – Case Law Review

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## **1234389 Alberta Ltd. V 606935 Alberta Ltd. (ABQB 2020)**

- Seller sold land that she knew was contaminated – intentionally concealing environmental report re contamination from PHCs and \$500K cost to remediate
- Realtors acting for both Seller and Purchaser and did not properly advise
- Seller and seller corporation held liable for fraudulent misrepresentation and failure to disclose in the transaction
- Realtors held liable in contract and in tort for breach of duty of care
- \$1,100,000.00 in damages awarded
  - Sellers and Realtors held jointly and severally liable
    - 75% Seller
    - 25% Realtors

# Civil Liability – Case Law Review

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## ***Livco Developments v Dworschak (BCPC 2019)***

- Plaintiff bought land from Defendant in 2017 after Defendant removed oil tank
- Plaintiff tried to sell the land in 2018 but testing revealed contamination and the purchase fell through
- Plaintiff seeks to hold the Defendant accountable for remediation costs and loss of profit pursuant to agreement for sale and statutory obligations
- Court held that no common law liability arose in tort or contract
- Defendant however responsible for remediation under section 45 of the BC *Environmental Management Act*
- Remediation costs split 50-50 between Plaintiff and Defendant

# Civil Liability – Case Law Review

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

- 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 *EPA*, s. 99
- Appeal to ONCA



# Civil Liability – Case Law Review

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## ***Midwest v Thordarson (ONCA 2015)***

- *EPA*, s.99 creates a private right of action designed to “overcome the inherent limitations in the common law in order to provide an effective process for restitution to parties whose property has been contaminated.”
- Damages of \$1,328,000 for restoration costs
- 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
- Leave to appeal to SCC refused

# Civil Liability – Case Law Review

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## ***Huang v Fraser Hillary's Ltd (ONCA 2018)***

- *EPA*, s. 99, passed in 1985 but applies to historical spills prior to 1985 (intent to protect public, not punish for prior spills)
- Nuisance, interference was
  - substantial and serious – contamination ongoing, exceeded standards, potential to contaminate adjacent properties, unable to redevelop properties
  - unreasonable – contamination likely to prevent obtaining Risk Assessment, non-compliance MOECC Order
- Remediation damages \$1.63M + \$201K incurred
- Findings of trial judge upheld
- Leave to appeal to SCC refused

# Civil Liability – Case Law Review

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## ***Tridan Developments Ltd. v Shell Canada Products Ltd. (ONCA 2002)***

- Shell operated a service station next to Tridan
- In September 1990, 9,000 litres of gasoline leaked from an underground fuel line on Shells property
  - This led to contamination of Tridan's property
- Trial judge found that Tridan was entitled to have the property remediated to pristine condition and awarded remediation costs and stigma damages
- On appeal, the court held that clean-up to pristine condition is warranted, but there is no stigma loss at the pristine cleanup level
  - The award was reduced by \$350,000 to correct this
- Application for leave to appeal to SCC dismissed

# Civil Liability – Case Law Review

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## ***61836 Alberta Ltd. v Canadian Turbo (ABQB 2004)***

- In 1993 or 1994 Plaintiff's lands were contaminated by a gas leak from a neighboring property, formerly owned by Canadian Turbo, now owned by Shell
- Shell agreed to pay the full costs of remediation
- Plaintiff claims damages for losses that arose from the contamination
- Court awards damages for diminution of property value, loss of profit, and partial legal costs up to September 3, 2003
  - Plaintiff has an obligation to mitigate its damages, they had an opportunity to sell September 2003 and it was unreasonable to refuse this offer and not mitigate their damages

# Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **Environmental, Indigenous, and Energy law**
- **17 lawyers**
  - eight lawyers 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, Nunavut and Yukon
  - offices in Calgary, Toronto, Ottawa, and Yellowknife

# Contact Information

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# The Good, the Bad and the Ugly! Managing Environmental Risks & Liabilities – Regulatory Liability

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# Overview

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- **Overview of Environmental Liabilities**
- **Environmental Orders**
  - Who can be Ordered?
  - Timing to Appeal
- **Environmental Prosecutions**
  - Potential Legal Defences
  - Sentencing Factors
  - Case Law Update

# ENVIRONMENTAL LIABILITIES

# Environmental Liabilities

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- **Regulatory Liability**

- regulator can issue orders
- regulator can prosecute under environmental statutes
- “person responsible”, “contaminant”, “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

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- **Personal Environmental Regulatory Liability**
  - individuals may be ordered and/or prosecuted
  - statutory liability for Directors, Officers and agents
- **Personal Environmental Civil Liability**
  - individuals may be sued
  - precedent from the Ontario Court of Appeal (*Midwest*) for piercing corporate veil in an environmental lawsuit

# ENVIRONMENTAL ORDERS

# Environmental Orders

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- **Regulators may make Orders**

- preventive action
- stop work
- change equipment or processes
- study, monitor, and report
- clean up and restore the environment
- pay costs

- **Who can be Ordered?**

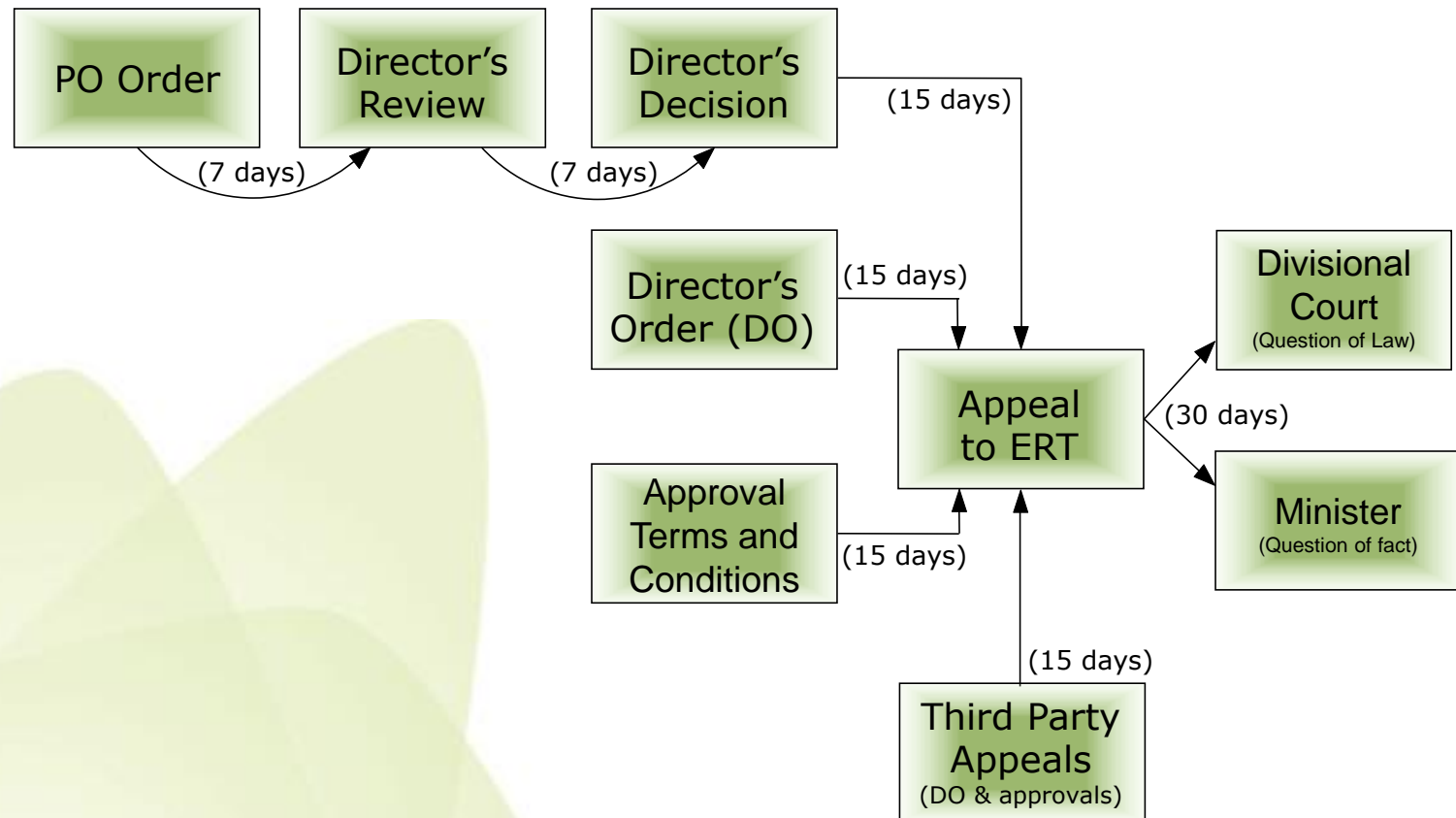
- companies
- corporate directors, officers, owners
- controllers – persons with charge, management or control of a contaminant or property (individuals)

# Environmental Orders

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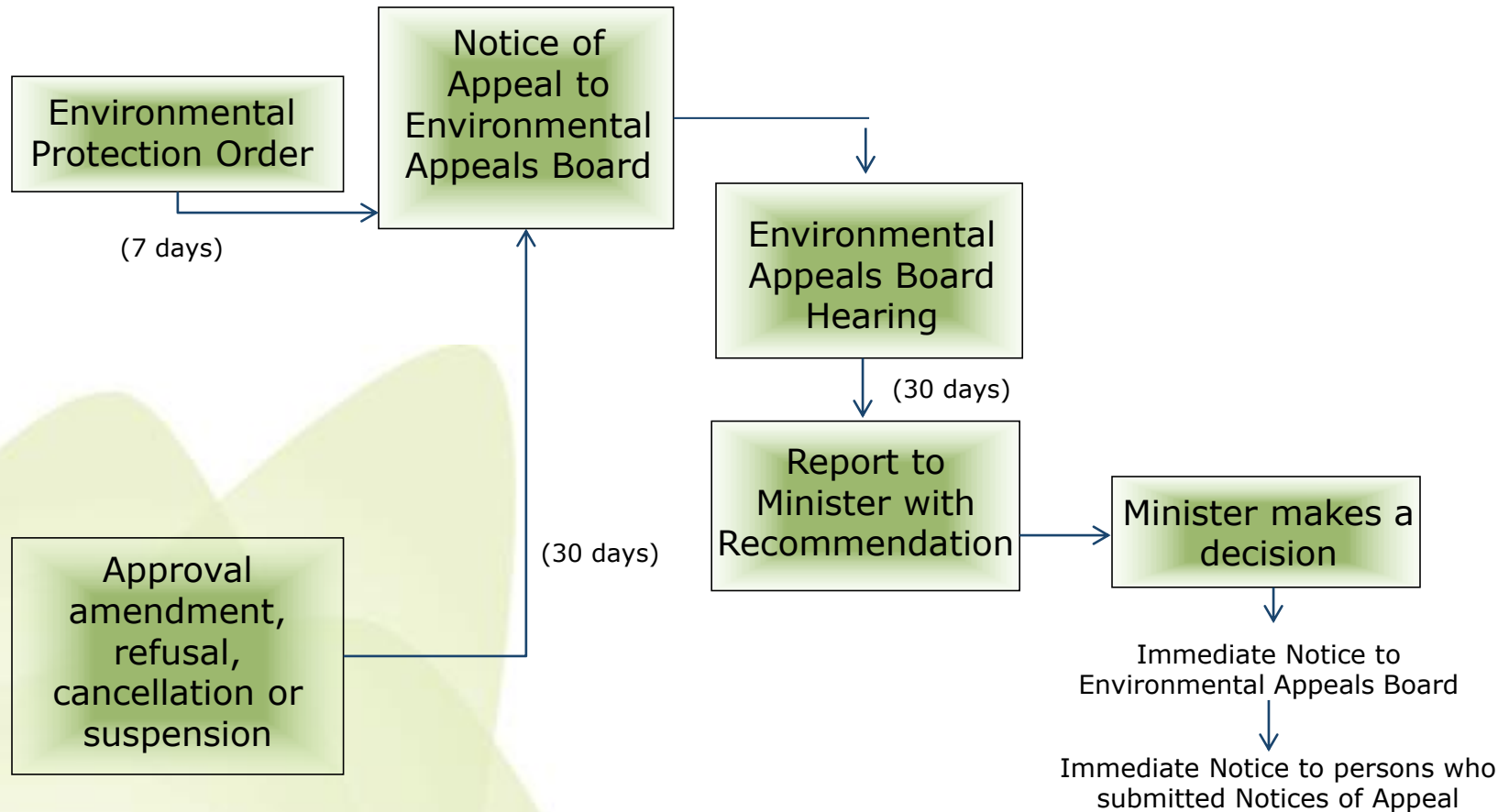
- **Orders must be complied with or appealed**
  - Time frames for review/appeal are short
  - Regulatory authorities often look to name those with 'deep pockets' and often multiple parties in an Order
  - During appeal, order must be obeyed unless stay is granted

# Ontario Deadlines to Appeal Environmental Orders





# Alberta Deadlines to Appeal Environmental Orders



# ENVIRONMENTAL PROSECUTIONS

# POTENTIAL LEGAL DEFENCES TO PROSECUTIONS

# Potential Legal Defences

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- ***De Minimus* Principle**
- **Defence of Officially Induced Error**
- **Defence of Necessity**
- ***Charter* Applications - Gathering of Evidence**

# Potential Legal Defences

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## Defence of Due Diligence (*R v Sault Ste Marie (City)*)

- Took all reasonable care to avoid the offence
  - “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*
- Reasonable belief in a mistaken set of facts
  - “the defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent” – *R v Sault Ste Marie (City)*

# Potential Legal Defences

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## Defence of Due Diligence

- Environmental Management Systems (EMS)
  - 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)

# Case Law – Due Diligence Defence

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## ***R v Zellstoff Celgar Limited Partnership*** **(BCPC 2012)**

- 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

# Case Law – Due Diligence Defence

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## ***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 1 *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 charges



# Case Law – Due Diligence Defence

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## ***R v MV Marathassa* (BCPC 2019)**

- Ship leaked fuel oil into English Bay in Vancouver
- Charged under *Canada Shipping Act* for discharging pollutant, failing to implement pollution emergency plan
- Due diligence defence made out at trial
  - defendant reasonably believed ship was designed, built, and certified to internationally recognized environmental and safety standards (ECO standard) (belief in mistaken set of facts)
  - pollution prevention systems included comprehensive crew selection and training program aimed at pollution prevention
  - met and exceeded regulatory requirements and industry standards
- MV Marathassa acquitted of all charges

# SENTENCING FACTORS IN ENVIRONMENTAL PROSECUTIONS

# Sentencing Factors

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- **Court weighs several sentencing factors when assessing a fine amount**
  - statutory sentencing factors
    - adverse effect, intentional or reckless. prior warning, prior convictions, actions after offence
  - common law sentencing factors – *R v Bata Industries Ltd*
    - nature of environment affected, extent of damage, deliberateness, attitude, size, wealth and power of corporation, duration of non-compliance, profits, prior offences, evidence of character

# ENVIRONMENTAL PROSECUTIONS – CASE LAW UPDATE

# Case Law Update – Emissions

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## ***Volkswagen Aktiengesellschaft (OCJ 2020)***

- Volkswagen AG imported vehicles into Canada that did not meet emission standards
- Volkswagen AG pleaded guilty to 60 charges under *Canadian Environmental Protection Act*
- Volkswagen AG fined \$196.5 million
  - largest environmental fine in Canadian history
  - fine directed to Environmental Damages Fund

# Case Law Update – Spill

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## ***Husky Oil Operations Limited (SKPC 2019)***

- Between July 20 and 21, 2016, about 90,000 litres of crude oil leaked from Defendant company's pipeline and entered the North Saskatchewan River
- Oil was found to be deleterious to fish and birds
- Defendant fined total of \$3.82 million
  - \$2.5 million for violating the *Fisheries Act*
  - \$200,000 for violating the *Migratory Birds Convention Act, 1994*
  - \$800,000 for violating the Saskatchewan *Environmental Management and Protection Act* plus 40% VIS of \$320,000

# Case Law Update – Tailings Waste

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## ***Syncrude Canada Ltd (ABPC 2019)***

- Syncrude abandoned tailings pond containing bitumen without completing remediation
- Contractor for Syncrude found 30 decomposing Great Blue Herons in pond and one live heron covered in oil
- Syncrude convicted under Alberta's *EPEA* and federal *Migratory Birds Convention Act, 1994*
- Syncrude fined \$2.75 million
  - \$25,000 fine plus VFS to court under *EPEA*
  - \$1.8 million directed to EDF
  - \$950,000 held in trust by AER to fund wildlife biodiversity projects (RFP process)

# Case Law Update – Chlorinated Water

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## ***Gibson Energy ULC & GEP ULC (ABPC 2021)***

- A fire suppression system leak caused millions of litres of chlorinated water to escape a retention pond, enter a creek, and flow into the North Saskatchewan River
- Foreseeable that water from a line break or valve failure in a system without sufficient internal shut off mechanisms could overflow the retention pond
- Gibson convicted under *Fisheries Act*
- Gibson fined \$1.5 million, to be directed to EDF
- Gibson also ordered to make a presentation to industry in Strathcona County about the danger of chlorinated water



# Case Law Update – Effluent

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## ***Drever Agencies Inc. (ABPC 2020)***

- Defendant company convicted under the *Fisheries Act* for depositing a deleterious substance (Petrosol solvent) into water frequented by fish (a creek that flows into the Battle River)
- Solvent spill resulted in dead fish when solvent leaked from a tank and entered the creek
- Defendant company fined \$1,250,000 to be directed to the Government of Canada's Environmental Damages Fund
- Defendant company to be added to the Environmental Offenders Registry

# Case Law Update – Failing To Assist An Investigation

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## ***Land Petroleum International Inc. (ABPC 2021)***

- Corporate defendant found guilty of contravening the *Oil and Gas Conservation Act* by failing to permit or assist an inspection by the Alberta Energy Regulator (AER)
- After gaining access to the facility AER inspectors found 22 non-compliances
- Land Petroleum International ordered to pay \$92,000 fine

# Contact Information

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