

The Good, the Bad and the Ugly! Managing Environmental Risks & Liabilities – Regulatory 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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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **Environmental, Indigenous, and Energy law**
- **19 lawyers**
 - eight lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
 - offices in Calgary, Toronto, Ottawa, and Yellowknife

Overview

- **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

- **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

- **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

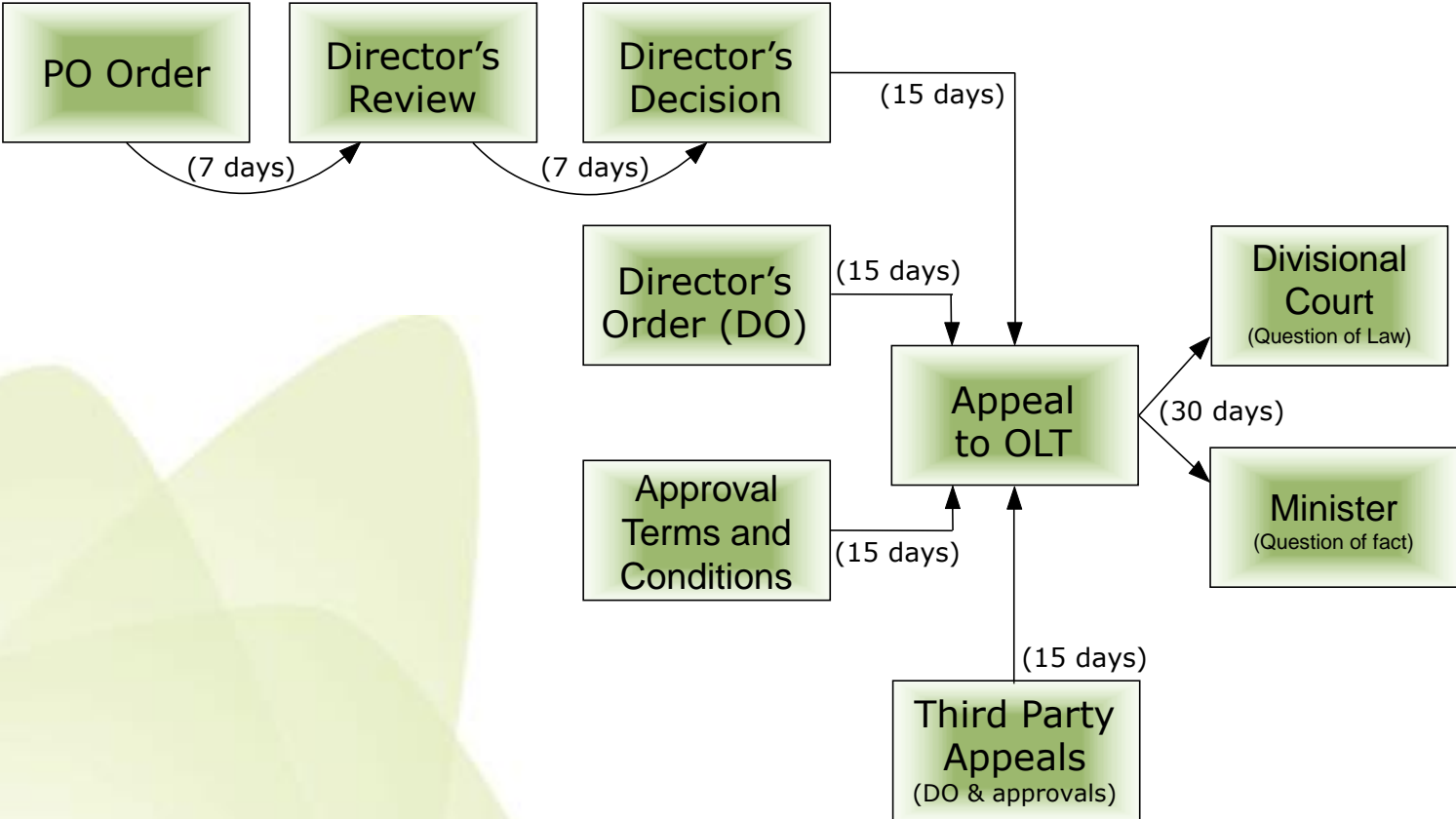
Environmental Orders

- **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)

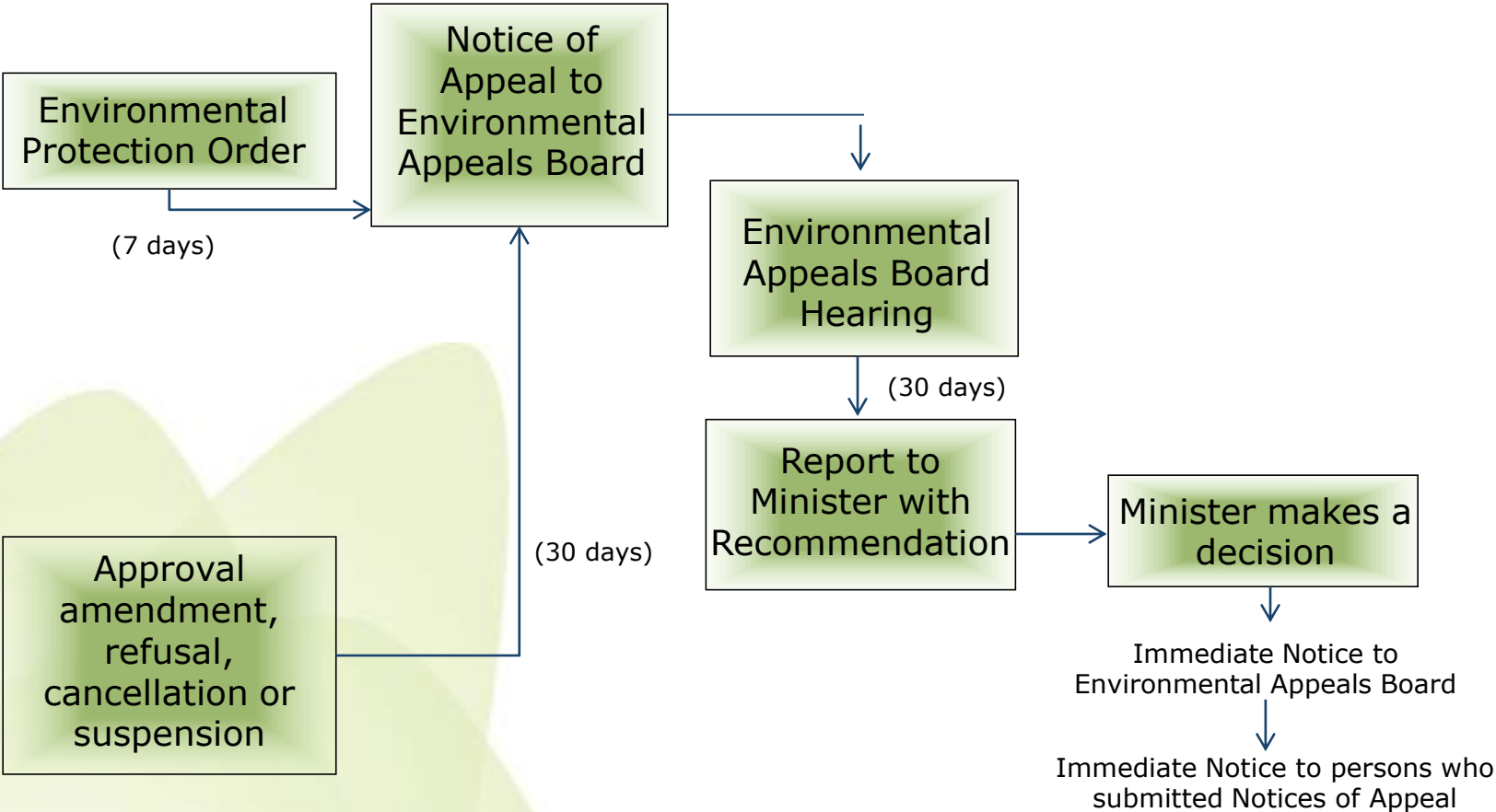
Environmental Orders

- **Orders must be complied with or appealed**
 - Time frames for review/appeal are short
 - Multiple parties jointly and severally responsible to respond to 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

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

Potential Legal Defences

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

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

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

***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

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

- **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

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

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% VFS of \$320,000

Case Law Update – Tailings Waste

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

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

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

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

Case Law Update – Pesticides

Canadian National Railway Company **(BCPC 2021)**

- CN convicted and fined \$2,500,000 for violating section 36(3) of the *Fisheries Act*
- CN sprayed pesticides along a rail corridor close to the Skeena River, tributaries and wetlands between Terrace and Prince Rupert, British Columbia
- ECCC led investigation in collaboration with the British Columbia Conservation Officer Service
- Pesticides were deleterious to fish

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