

# 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 a Plaintiff to seek extension of the ultimate limitation period for environmental claims
- A 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)**

- Soleimani discovered contamination in 2010 and then:
  - put Rolland on notice of potential civil claim, and
  - engaged regulator to assist
- Soleimani commenced civil litigation in 2014
- Rolland argued that the claim is time barred due to *Limitations Act, 2002*
- Soleimani 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*
- Soleimani 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, & 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. 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 7,000 to 9,000 liters of gasoline in 2010 which contaminated Floate's lands
- Floate argued that 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 Floate 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)***

- Blatz leased part of land to Impact Energy to drill a sour gas well
- Noticed a change in water, supplied by a well on the property
- Blatz alleges 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. Blatz claims nuisance, negligence and the rule in *Rylands v Fletcher*
- Impact Energy liable for the chemical changes and bacteria problem in the families well but not the aquifer
- Damages awarded
  - \$30,000 to refinish the current well or drill a new one
  - \$4,000 loss of income to 1 family member
  - \$1,000 to each of 7 plaintiffs for personal injury

# Civil Liability – Case Law Review

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

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

# 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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## ***Sorbam Investments Ltd. v Litwack (ONSC 2021)***

- 1129892 Ontario Inc. (owner of the neighbouring property) purchased with knowledge of the presence of contamination
- 112 was not the “spiller” of contaminants but did nothing to prevent migration once aware contaminants were on-site, and migrating off-site onto Sorbam’s property
- 112 liable in nuisance and negligence for allowing continued interference with Sorbam’s use and enjoyment of land, and for not taking steps to stop contamination from continuing to migrate
- 112 not liable under s. 99 of the *EPA* because 112 was not the “spiller” nor “owner of pollutant” or “person having control of pollutant”
- Damages awarded \$1.2M to Sorbam for diminution in value and \$90K expended to prepare a RA and RSC to sell the property

# Civil Liability – Case Law Review

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

- Seller sold land that 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
- \$1.1M 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)***

- Livco bought land from Dworschak in 2017 after Dworschak removed oil tank
- Livco tried to sell the land in 2018 but testing revealed contamination and the purchase fell through
- Livco seeks to hold the Dworschak 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
- Dworschak however responsible for remediation under section 45 of the BC *Environmental Management Act*
- Remediation costs split 50-50 between Livco and Dworschak



# Civil Liability – Case Law Review

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

- Purchaser Midwest 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 awarded to Midwest 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)
- Fraser liable in 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**
- **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

# Contact Information

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