

Environmental Case Law Update

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**“Law Firm of the Year” for Environmental Law in
*The Best Lawyers in Canada, 2017 Edition***

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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **16 lawyers**
 - six 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, and Nunavut

Overview

- **Environmental Liabilities**
 - Regulatory Liability
 - Civil Liability
- **Case Law Updates**
- **Managing Environmental Liabilities**

CASE LAW UPDATE: REGULATORY LIABILITY



Regulatory Liability

- **Regulator can**
 - issue orders and/or
 - prosecute under environmental statutes
- **Concept of responsible person and adverse effect**
- **Personal environmental regulatory liability**
 - individuals may be ordered and/or prosecuted
 - statutory liability for Directors, Officers and agents

Regulatory Liability – Orders

- ***Kawartha Lakes (City), MOE (2013)***
- ***Baker, MOE (2013)***
- ***Rocha, MOECC (2014)***
- ***McQuiston, MOECC (2015)***
- ***Rubin, MOECC (2016)***

Regulatory Liability – Orders

Domtar (AEP, 2018)

- **Historic Domtar wood processing operations**
- **PHCs, PAHs, VOCs, dioxins/furans discharged to soil, groundwater and surface water**
 - off-site migration
 - adjacent residential uses
- **Multiple Orders require delineation and remediation/control**

Regulatory Liability – Orders

Sears Canada (AEP, 2018)

- **Sears operated a retail fuel outlet until 1995**
- **Property sold to Concord in 2015**
- **Unknown extent of contamination off-site**
- **Sears and Concord ordered to**
 - recommence sampling and monitoring
 - fully delineate plume
 - remediate all off-site properties

Regulatory Liability – Orders

Hamilton Beach v Director, MOECC (ON ERT 2017)

- **VOC contamination migrated to neighbouring residential, commercial and institutional properties**
 - significant concern about vapour intrusion into nearby buildings
- **ERT confirmed that the MOECC has jurisdiction to require off-site investigation in an EPA, s. 18 order**
 - s. 18 requires a person who owns or owned, or has or had management or control of a contaminated undertaking or property to investigate contamination
- **Appealed to Divisional Court**

Regulatory Liability – Bankruptcy and Insolvency

Redwater (AER, 2017)

- **Redwater became insolvent**
- **Grant Thornton appointed receiver and trustee**
- **Grant Thornton disclaimed wells that had onerous environmental abandonment costs**
- **AER ordered Grant Thornton to remediate disclaimed wells before distributing to creditors**

Regulatory Liability – Bankruptcy and Insolvency

Redwater (AEP, 2017)

- **Court of Queen's Bench**
 - AER's authority to order Grant Thornton frustrates purpose of bankruptcy proceedings
- **Court of Appeal**
 - upheld lower decision
 - AER's order subject to bankruptcy proceedings
- **Supreme Court of Canada**
 - heard on February 15, 2018

CASE LAW UPDATE: CIVIL LIABILITY



Civil Liability

- **Can arise where contaminant impact on-site and/or migration off-site (soil, groundwater, indoor air)**
- **Typical causes of action: nuisance, negligence, strict liability, trespass, breach of contract, breach of statutory cause of action (EPA, s. 99(2))**
- **Causes of action and damages must both be proved on a balance of probabilities for plaintiff to succeed**
- **Personal environmental civil liability**
 - individuals may be sued
 - precedent from the Ontario Court of Appeal (*Midwest*) for piercing corporate veil in an environmental lawsuit

Civil Liability

- **Courts may Order**
 - injunctions – requiring defendant to do something or stop doing something
 - damages – compensation for injury/damage
 - punitive damages – where a defendant's behaviour is found to be egregious
 - personal liability – where closely held company

Civil Liability – Corporate Veil

- ***Midwest v Thordarson* (ONCA 2015)**
 - negligence and nuisance claims successful
 - 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
 - damages of \$1,328,000 for restoration costs

Civil Liability – Historic Spills

Huang v Fraser Hillary's Ltd (ONSC 2017)

- **EPA, s. 99, passed in 1985**
 - 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
- **Remediation Damages \$1.63M + \$201K incurred**
- **OCA heard appeal May 2018**

Civil Liability – “Innocent” Landlord

Sorbam Investments Ltd v Litwack (OCA 2017)

- **Ontario Court of Appeal**
 - Motion Judge’s decision was affirmed on appeal
 - leasing property to a dry-cleaning business does not standing alone trigger a duty of care to a neighbouring land owner to inspect or supervise the tenant or tenant’s operations

Civil Liability – Limitations

- **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 of diligence to discover the claim)
 - Alberta has a 10 year ultimate limitation period
 - Alberta's *Environmental Enhancement and Protection Act* s. 218 creates an exception to the ultimate 10 year limitation period

Civil Liability – Limitations

- ***Lakeview Village v Suncor* (ABQB 2016) and *Brookfield v Imperial Oil* (ABQB 2017)**
 - Alberta's *Limitations Act* – ultimate limitation period of 10 years
 - what about historic contamination?
 - Alberta's *Environmental Protection and Enhancement Act*, s 218 allows for plaintiffs to seek extension of the ultimate limitation period for environmental claims
 - age of historic contamination is a factor

MANAGING ENVIRONMENTAL LIABILITIES



Managing Environmental Liabilities

- **Understand environmental issues and risks**
 - What is the environmental condition of the property?
 - Do you have all requisite approvals?
 - What are the contaminants or emissions from facility?
 - Exceedance of regulatory standards?
 - Contamination impacting off-site?

Managing Environmental Liabilities

- **Exercise Due Diligence**

- took all reasonable care to avoid the offence
R v Sault Ste. Marie (City)
- “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

Managing Environmental Liabilities

- **Environmental Liability Protection**

- allocating liability during transactions
- regulatory liability protection
- environmental insurance

Managing Environmental Liabilities

- **Understand environmental condition of property**
- **Exercise due diligence**
- **Consider exposure to environmental liability (civil and regulatory)**
- **Ensure environmental liabilities are within risk tolerance**
- **Consider environmental liability protection**

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