

# Managing Air Emissions Environmental Risks and Liabilities

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**Willms  
& Shier**  **Environment  
Indigenous  
Energy Law**

# Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **17 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

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- **Environmental Liabilities**
- **Case Law Update**
- **Managing Environmental Liabilities**

\*The information and comments herein are for the general information of the attendee only and do not constitute legal advice or opinion. The attendee should seek specific legal advice for particular applications of the law to specific situations.

# Environmental Liabilities

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- **Regulatory Liability**

- regulator can issue orders
- regulator can prosecute under environmental statutes
- “person responsible”
- concept of “adverse effect”

- **Civil Liability**

- contamination on-site (soil, groundwater, indoor air)
- contaminant migration and impact off-site (groundwater, air emissions)
- 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 and Officers
- **Personal environmental civil liability**
  - individuals may be sued
  - precedent from the Ontario Court of Appeal (*Midwest*) for piercing corporate veil in an environmental lawsuit

# CASE LAW UPDATE

# CIVIL LAWSUITS

# Common Law Nuisance

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- **Public nuisance**

- unreasonable interference with the public's right to use and enjoy public aspects of air, land and water
- anyone who creates a public nuisance may be held responsible
- compliance is not a defence





# Common Law Nuisance

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- **Private nuisance**

- unreasonable interference with use and enjoyment of land
- substantial injury – “one that amounts to more than a slight annoyance or trifling interference.”
- involves balance of competing interests
- occurs where individual or corporation created, authorised, permitted or permitted others to cause interference
- alleged nuisance must originate somewhere other than on the plaintiff’s land
- compliance is not a defence

# Civil Lawsuits – Private Nuisance

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## Odour and Smoke

- ***Powell v Dowsley (ONSC 2016)***

- smoke and odour from outdoor wood burning furnace
- nuisance claim failed
- court held no substantial and unreasonable interference with use and enjoyment of land that would not be tolerated by the ordinary occupier
- court found neighbours had vulnerabilities and sensitivities from pre-existing respiratory issues



# Civil Lawsuits – Public Nuisance

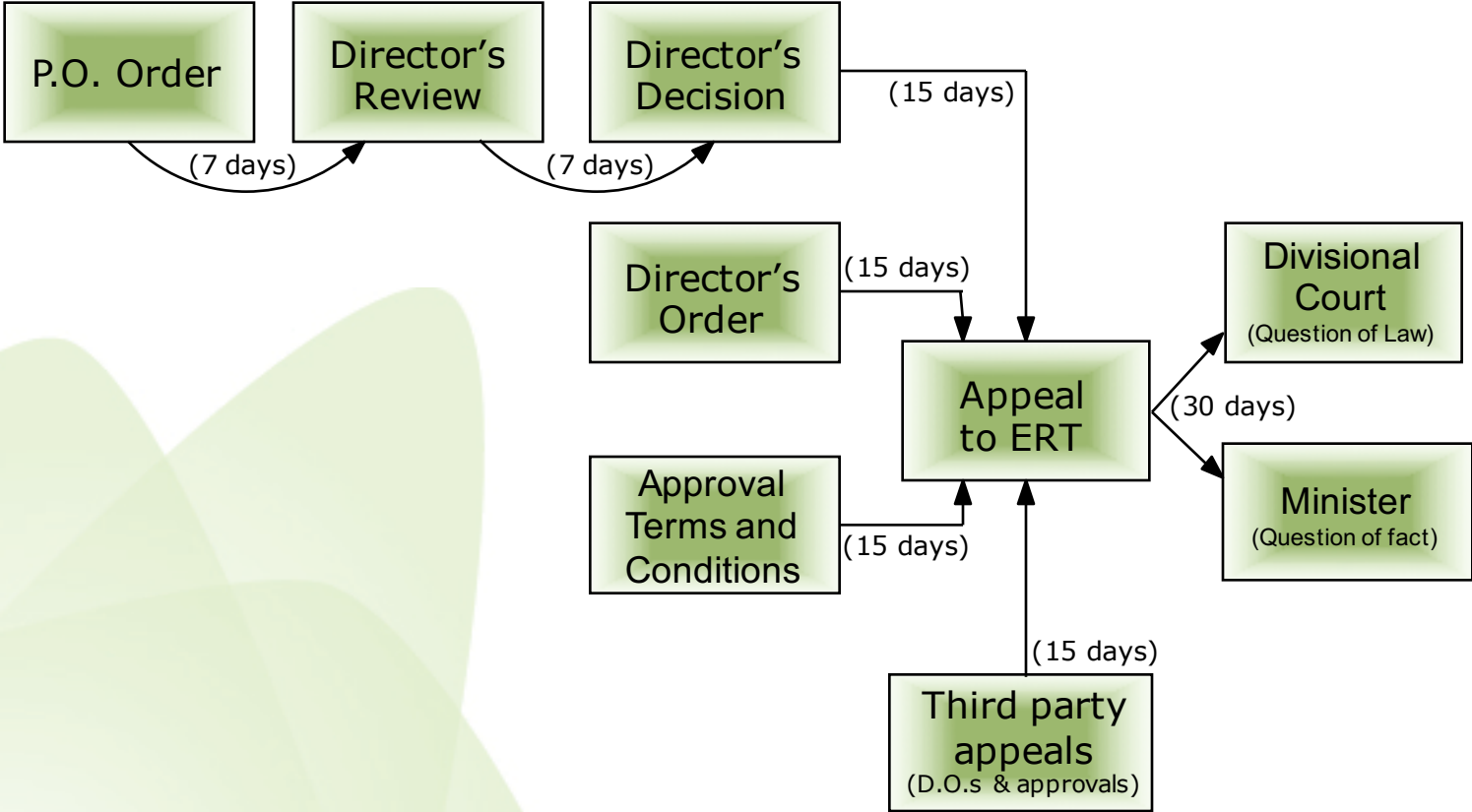
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## Odour

- ***Newmarket (Town) v Halton Recycling Ltd.***  
**(ONSC 2006)**
  - Town applied for injunction for public nuisance under Municipal Act, 2001, s. 447.1
  - odour emissions from organic waste composting
  - > 1,000 complaints in less than 2 years
  - court ordered premises closed for 9 months – stayed for 90 days for company to abate odours

# REGULATORY LIABILITY

# Ontario Deadlines to Appeal Regulatory Orders and Approvals



# PROSECUTIONS

# Regulatory Liability – Prosecutions

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## Emissions

- **Volkswagen/Audi Automotive (January 2017)**
  - Competition Bureau found companies misled consumers
  - software changed how vehicles operated during testing and reduced emissions during testing
  - class action resulted in settlement
    - \$2.1 billion settlement with Commissioner of Competition approved by courts in Ontario and Quebec
    - \$15 million went to settle diesel engine emissions issue

# Regulatory Liability – Prosecutions

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## Odour

- ***Orgaworld Canada Ltd. Waste Management (October 2017)***
  - composting facility convicted of repeatedly discharging odours (9 offences)
  - neighbours alleged discomfort and interference with business
  - company ordered to
    - pay \$900,000 fine + \$225,000 VFS, and
    - operate at 30% of design capacity



# Regulatory Liability – Prosecutions

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## Odour

- ***R v Imperial Oil Limited (2016)***
  - a frozen flare line discharged coker stabilizer thermocracked gas into the natural environment
  - odour from the gas affected some people causing burning eyes, sore throats, headaches, nausea,
  - local hospital issued a Code Grey for 45 mins, preventing external air from entering the facility
  - conviction – \$650,000 plus 25% VFS and 6 months to pay

# Regulatory Liability – Prosecutions

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## Odour

- ***R v De Simone (2016)***
  - slaughterhouse in Niagara received odour complaints from 2003 to 2014
  - MOECC Ordered the Directors to address the odour complaints
  - charged with failure to prevent the odour discharge causing an adverse effect
  - conviction – total for Directors \$12,000 plus 25% VFS and 2 years to pay

# Regulatory Liability – Prosecutions

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## Particulate, Dust and Noise

- ***R v Essroc Canada (2015)***
  - discharge of particulate from cement plant causing brownish gray dust, haze, fog, smoke or smog
  - notified Spills Action Centre of opacity exceedances
  - noise complaint from noise generated by heat exchanger fans in excess of applicable sound limits
  - conviction – \$350,000 plus 25% VFS and 90 days to pay

# Regulatory Liability – Prosecutions

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## Dust and Noise

- ***R v ML Ready Mix Concrete Inc. (2016)***
  - dust and noise complaints from a concrete batching plant since 2011
  - independent Acoustic Audit found sound in excess of noise standards in 2014
  - conviction – companies fined \$130,000 plus 25% VFS with 120 days to pay
  - conviction – Director fined \$30,000 plus 25% VFS and 120 days to pay

# Regulatory Liability – Prosecutions

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## Dust and Smoke

- ***R v SEJJ Environmental Solutions (2015)***
  - non-hazardous waste transfer and processing facility
  - smoke from burner for woodwaste and other waste
  - dust emissions from haulers/improperly stored waste
  - dust and smoke caused discomfort to public
  - conviction – companies fined \$60,000 plus 25% VFS and 1 year to pay
  - conviction – Director and officer fined \$15,500 plus 25% VFS and 1 year to pay

# Regulatory Liability – Prosecutions

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## Smoke

- ***R v McAsphalt Industries (2015)***
  - fire inside large warehouse at asphalt facility
  - fire marshall confirmed cause to be improperly installed and maintained metal halide lights
  - evacuation ordered due to unknown effects of smoke
  - conviction – \$80,000 plus 25% VFS and 90 days to pay

# Regulatory Liability – Prosecutions

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## Heat, Smoke, Vibration, Dust

- ***R v Sunrise Propane (2016, appeal 2017)***
  - a series of explosions at facility during a truck-to-truck transfer of propane
  - contaminants included heat, vibration, sound, gas vapour, smoke and solids (asbestos, dust)
  - death, personal injuries, damage to buildings/property
  - conviction – companies fined a total of \$4,820,000 plus 25% VFS for EPA violation – Also fined \$280,000 for OHS violations
  - conviction – directors fined \$100,000 plus 25% VFS
  - conviction and sentence were appealed - appeal dismissed in 2017

# Regulatory Liability – Prosecutions

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## Odour

- ***R v Shell Canada Limited (OCJ 2015)***
  - leak of liquid containing mercaptan caused a foul odour and flowed into ditch that emptied to on-site waste water treatment facility
  - shelter-in-place advisory was issued for City and First Nation Community
  - complaints of sore eyes and throat, headaches, nausea and vomiting
  - conviction – \$500,000 plus 25% VFS, 60 days to pay & probation order issued for \$200,000 to be paid to the impacted First Nation Community



# Regulatory Liability – Prosecutions

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## Fly Rock

- ***R v Castonguay Blasting Ltd (2013)***
  - blasting operations for highway-widening project
  - rock debris “fly-rock” propelled approximately 90 metres into the air by explosion
  - damaged to home and car considered adverse effect
  - conviction – \$25,000 plus 25% VFS



# MANAGING ENVIRONMENTAL LIABILITIES

# Managing Environmental Liabilities

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- **Understand Environmental Risks**
- **Exercise Due Diligence**
- **Implement Environmental Management System (EMS)**
- **Consider Environmental Liability Protection**

# Managing Environmental Liabilities

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

# Managing Environmental Liabilities

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- **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

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- **Due Diligence**

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

- 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

# Managing Environmental Liabilities

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- **Due Diligence**

- *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 one 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 5 charges

# Managing Environmental Liabilities

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- **Environmental Management Systems (EMS)**
  - can be a proper system of due diligence
  - 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)



# Managing Environmental Liabilities

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- **Environmental Liability Protection**
  - allocating liability during transactions
  - regulatory liability protection
  - environmental insurance

# Environmental Liability Management Checklist

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- **Know your environmental risks and liabilities**
- **Build due diligence into corporate culture**
- **Implement environmental management program**
- **Consider environmental liability protection**

# Contact Information

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