



SMART Remediation Selected Topics in Environmental Law

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Smith v. Inco.

- Background
 - Former nickel refinery located in Port Colborne
 - Airborne Nickel deposited on adjacent residential and commercial properties
 - Nickel concentrations well in excess of applicable MOE Standards
 - Soil remediation of residential properties to below Risk-Based Standards
- Leave to Appeal to SCC denied (April, 2012)

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Smith v. Inco. (cont'd)

- Court of Appeal Decision
 - Dismissed property owners' claim
 - Reversed award of damages (found properties were not devalued due to nickel contamination)

Altered the tort of private nuisance:

- For liability in nuisance due to environmental contamination, require more than "mere chemical alteration in the content of soil"
- A change in chemical composition must have a detrimental affect on the land and the rights associated with land
- Perceived risk of negative health effects is insufficient

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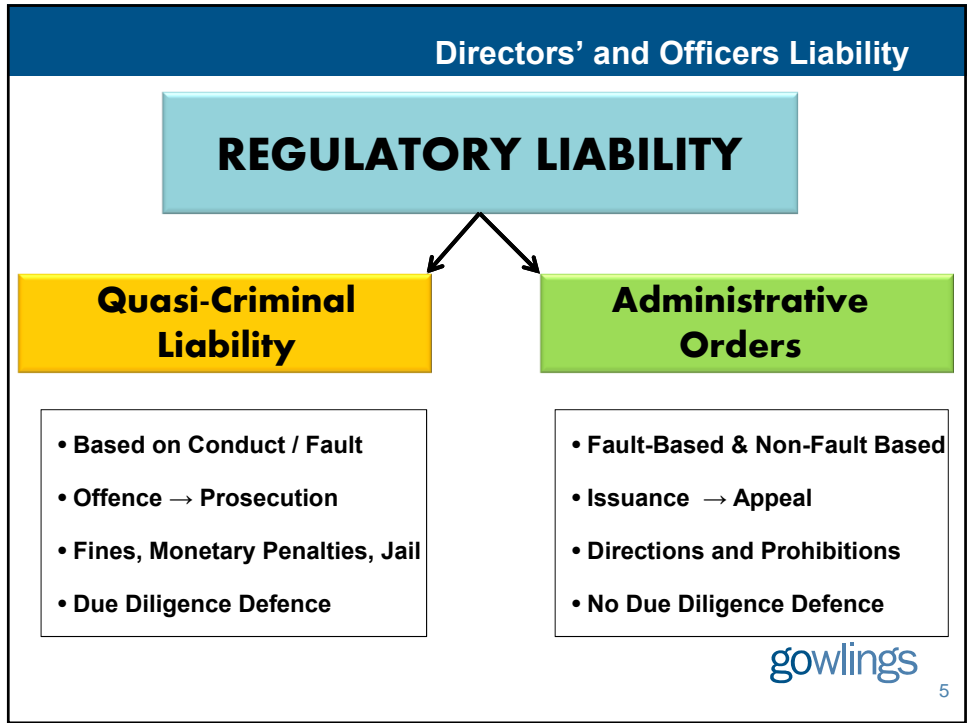
Smith v. Inco. (cont'd)

Strict liability:

- does not apply to emissions into the natural environment that are the intended consequence of an approved undertaking
- Strict liability, in the environmental context, is limited to "mishaps" resulting from an unnatural or unusual activity
- Strict liability requires an unusual use having regard to the dangerousness of the activity. Compliance with applicable environmental and planning legislation is an important consideration
- Emphasis increasing on importance of regulatory standards and approvals in the private law of liability for environmental contamination

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Fault Based Orders

“A provincial officer may issue an order to any person that the provincial officer reasonably believes is **contravening or has contravened....**” the Act, Regulations or Permit Conditions.

-EPA, s. 157

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Duty of Officers and Directors

“Every director or officer of a corporation has a duty to **take all reasonable care to prevent the corporation from...”**

-EPA, s. 194

- Discharging a contaminant in contravention of the Act, Regulations or an Approval
- Failing to notify the Ministry of a discharge
- Contravening certain provisions or contravening an order issued under the Act

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No-Fault Orders

“The Director... by a written order may require a person who owns or owned or who **has or had management or control of an undertaking or property to do any one or more of the following...”**

-EPA, s. 18

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Management and Control

"Control" does **not only** encompass the formal legal control available to officers and directors, but also de facto control by others in a position to **significantly influence the management of the undertaking**. It can incorporate control of the purse-strings through means other than direct or daily participation in the corporation or its business.

Similarly, "management" of the undertaking **is not restricted to management of the operations creating the risk of pollution**.

· Re 724597 Ontario Inc. (aka "Appletex")

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Management and Control – con't

- **Presumption by Ministry of control based on legal indicia**
- **Much broader than piercing corporate veil in private law**
- **Derived from treatment of control in other public regulatory contexts**
- **Extends well beyond actual operational control**

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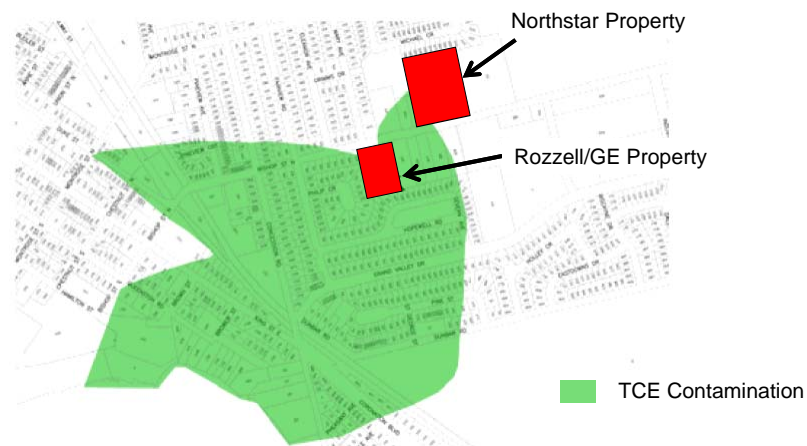
Ministry Compliance Policy

- **Ministry will not relieve a person unless it can be shown environmental protection purpose will be furthered**
- **Ministry will generally not apportion liability unless agreed to by all parties**
- **Specific Circumstances**
 - Innocent Prior Owners
 - Victimized Current Owners
 - Financial Hardship

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Baker v. Ministry of the Environment



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Baker v. MOE – con't

- **Ministry issued order to:**
 - Northstar Aerospace (Canada) Inc.
 - Northstar Aerospace Inc.
 - 13 former directors and officers
- **Based on both fault and no-fault provisions of the EPA**
- **12 of 13 former directors and officers appealed**
- **Motion for stay unsuccessful**

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Baker v. MOE – con't

“In relying on s.18 of the EPA, I am not alleging any fault on the part of the directors and officers. The directors and officers are being named because of their status as persons in management and control...”

I also relied on section 17 of the EPA as authority for issuing the Order. This section allows me to issue an order to any person who causes or permits the discharge of a contaminant. To be clear, I am not alleging that the directors and officers in any way caused the discharge of the TCE and chromium.

They did not set aside any amount of funds. They thus failed to take the necessary steps to prevent the discharge of contaminants in the long-term, which I understand falls under the definition of “permit”.”

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Baker v. MOE – con't

- **Settlement Agreement accepted (conditionally) by the ERT on October 28, 2013**
 - On December 2, 2013, the ERT accepted the Agreement
- **The directors and officers agreed to pay \$4,750,000**
 - Money is to be used for the environmental assessment and remediation of the site and neighbouring properties.
- **Director's Order amended to remove all the appellants as named persons**
- **Appeals dismissed without costs**

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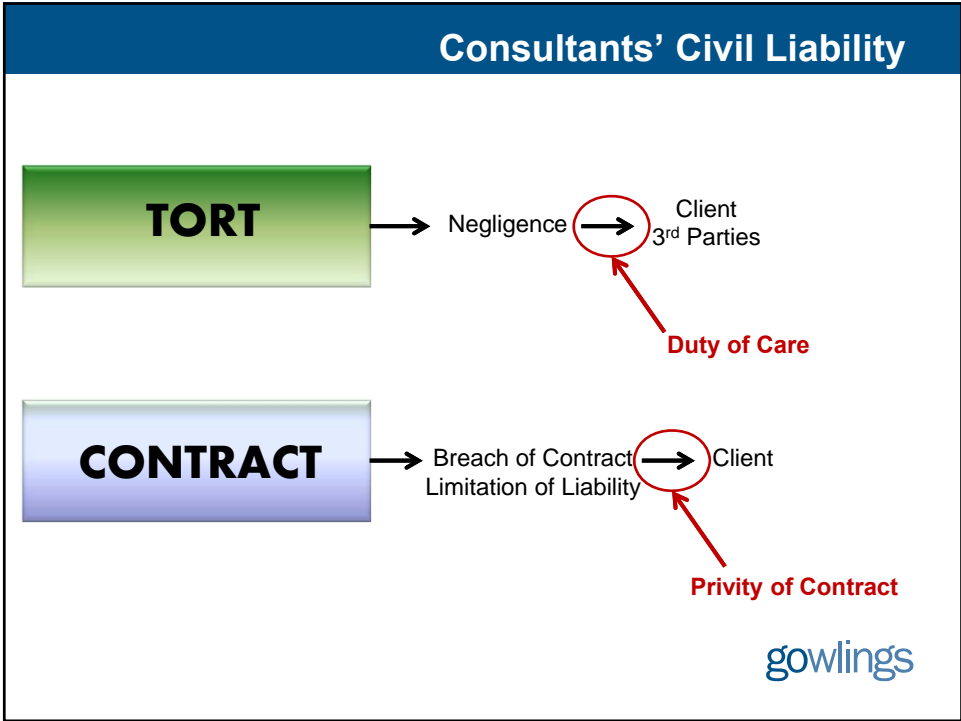
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Take Home Message

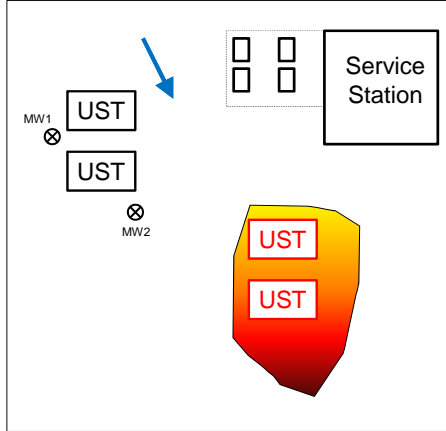
- **Fault vs. No-Fault Liability**
- **Documentation of due diligence is still key**
- **Insurance which specifically includes coverage for administrative orders**
- **Extent of Ministry's jurisdiction to issue orders under the banner of "management and control" still undecided**

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Ontario (MTO) v. CH2M



Purpose was to determine:

- Presence and extent of PHC contamination
- Presence and location of UST

Methods:

- Relied on map from former operator
- Completed soil vapour survey
- Two boreholes and soil/groundwater sampling

Breaches of Standard:

- Failed to consult Fire Insurance Plans
- Borehole locations not based on vapour survey
- Failure to perform proper QA/QC

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Contract



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Simons v. Diagnostic Engineering

Facts

- Oral contract to determine if house had mould problem
- Engineer requested client to sign "Service Agreement" prior to testing
- Engineer erroneously told client that there was a mould problem
- Actual results showed no problem
- Client spent large sum of money needlessly remediating

Findings of Court

- Consultant fell below standards required under contract and was therefore in breach of the contract



"total liability, in the aggregate... shall not exceed the project costs, as invoiced to the client.."



Not Enforceable:

- Sufficient notice of limitation not given
- Not clear if specific breach was covered by exclusion

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The Red Hand Rule

Some clauses which I have seen would need to be printed in **red ink** on the face of the document with a **red hand** pointing to it before the notice could be held to be sufficient.

-Lord Denning (*J Spurling Ltd v Bradshaw*)



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Take Home Message

1. Always ensure expectations are well defined prior to commencing work
2. Provide a written rationale and disclosure of risks for any deviation from standard practice
3. Draw specific and documented attention to the exclusion clause
4. Exclusion clauses should be drafted to cover specific types of negligence or breach of contract – Do Not rely on boiler plate

4. EXCLUSION OF LIABILITY



- a. The club will not be damage to the property visitors, whether caused
- b. We can remove the club not been paid for. You club reception for up to not be responsible for a

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“Fairness” Before the ERT

- **Polluter Pays Principle**
 - EPA’s Order Powers
- **MOE Compliance Policy**
 - The Law Pre-*Kawartha Lakes*
- **Appletex & “Fairness Factors”**
 - The Law Post-*Kawartha Lakes*
- **What’s left of fairness?**
 - Implications for Clients

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Polluter Pays Principle

- **Polluter Pays Principle**
 - The cost of remedying environmental damage should be borne by the polluter
- **Why does this matter?**
 - When costs are borne by others, or “externalized”, the polluter has no incentive to reduce or avoid pollution
- **MOE’s Statement of Environmental Values**
 - MOE “endeavours to have the perpetrator of pollution pay for the cost of clean-up”
- **SEV must be applied when decisions are made and when instruments are issued**

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Administrative Order Powers

- **Ontario’s *Environmental Protection Act* provides the power to issue administrative orders**
 - Most are rooted in the Polluter Pays Principle
- **For example:**
 - Remedial Orders (s. 17)
“where any person causes or permits the discharge of a contaminant into the natural environment...”
 - Contravention Orders (s. 157.(1))
“may issue an order to any person that the provincial officer reasonably believes is contravening or has contravened....”
- **BUT a handful of order powers are not**
 - Based instead on connection to land

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“No Fault” Order Powers

- **These are “no fault” order powers**
 - Preventative Measures Order (s. 18, s.157.1)
“Director...may require a **person who owns** or owned or who has or had management or control of an undertaking or **property**...”
- **May be used even if contamination was caused by others / has migrated from adjacent land**
 - Can require a person to address contamination that they did not cause, and could not have prevented
- **Justified on the basis of urgency and the need to prevent further harm**

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Who Pays the Bill?

- **MOE can and should act to prevent imminent harm**
 - *Not* a choice between environmental protection and fairness
- **The issue is *who should pay*:**
the polluter, the MOE, the province, an innocent party?
- **MOE can order polluter(s) to respond**
- **Can have work done and recover costs from polluter**
 - Is a hierarchy imposed by the SEV? PPP first?
 - What if PPP fails? Who should be next in line?
- **Assumption is that costs are recoverable**
 - Should it matter if they are not?

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MOE Compliance Policy (2007)

- **Innocent PRIOR owners / occupants will not be named (if property sold *prior* to contamination)**

“Including such an entirely innocent and uninvolved person in a control document would tend to bring the administration of the EPA into disrepute, thereby encouraging the parties and the public to flout it...”

- **Innocent CURRENT owners / occupants WILL be named in control orders**

“Generally, a current owner, occupant and those in charge, management and control of a contaminated site should not be relieved by a statutory decision-maker from liability (or taken off a control document) on the grounds that the circumstances leading to the contamination were beyond the control of that person.”

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The Law Pre-Kawartha Lakes

- ***Appletex***

“when the law allows the imposition of substantial liabilities on individuals **regardless of fault**, this raises questions about when it is fair to do so...” (Appletex, para. 104-105)

- ***Karge***

“...anyone exercising the kind of broad discretion that the Director has to impose **unlimited financial liability regardless of fault** must exercise that discretion in a consistent, fair and principled fashion...” (Karge, para. 106)

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The Law Pre-Kawartha Lakes

- **Montague**

“...Where neither the Ministry nor the Director have put their mind to the **principles of fairness, efficiency and effectiveness** to guide the exercise of discretion, the Board may attempt to enunciate and apply such principles.” (Montague, para. 26)

- **Prior to *Kawartha Lakes*, appellant could seek relief from liability with reference to fairness factors**

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The Law Pre-Kawartha Lakes

- **Fairness Factors**

- **Fault or responsibility for the contamination**
 - Did the appellant have any influence over the creation of the risk?
- **Unjust enrichment**
 - Contribution of others not before the Tribunal
- **Polluter Pays Principle**
 - Benefit to the polluter from the polluting activity
- **Due diligence**
 - Was the risk of harm foreseeable? Were preventative steps taken?
 - The applicable standard of care & appellant's skill & knowledge
 - Was due diligence exercised?
- **The Risk to the Environment**
 - Likelihood & seriousness of harm
 - Available alternatives
- **Financial hardship** – inability to pay

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Kawartha Lakes Appeal

- **Leak from a residential fuel oil tank**
 - Reported within a day but not contained for 12 days
- **Migrated offsite *after* MOE / TSSA were notified**
 - Allowed to migrate into sewers, across road, into lake
- **Complex and costly clean-up resulted**
 - Order issued to homeowner, insurer responded
 - However, offsite clean-up ceased when policy limit was reached – before off-site clean-up was complete
- **On-site clean-up continued until property was remediated and new home was built**
 - In parallel, MOE ordered City to take over off-site work

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Kawartha Lakes Appeal

- **City appealed to ERT**
 - Sought to bring evidence that others were responsible for the spill and had not been ordered to respond
- **ERT refused to admit evidence**
 - City is innocent, but s. 157.1 does not require “fault”
 - Evidence re: fault of polluters is irrelevant
 - Environment must be protected – what’s your solution?
- **Appeal to Divisional Court, then Court of Appeal**
 - MOE ignored Polluter Pays Principle
 - Must consider all order powers - s. 157.1 is a choice
 - Evidence re: fault of polluters needed to present a solution (polluters must be ordered to respond *first*)

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What's Left of Fairness?

- **City lost its appeal**
 - **If unfairness exists, it is in the statute**
 - Presumably the solution is legislative reform
 - **Environmental protection trumps fairness**
 - Some fairness factors may still be relevant - a polluter that is impecunious can still ask for relief
- = Fairness is irrelevant to an appeal brought by an innocent party, yet available to a polluter?**

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Implications for Clients

- **Municipalities should be preparing**
 - Need to be involved in spill supervision from the outset
 - Need clear notification protocol with MOE (spill may not be reported to the municipality as required)
 - Need to consider how such orders are to be funded
 - May wish to seek provincial funding to cover costs (may be many years before costs can be recovered – if they are in fact recoverable at all)
- **Clients buying or selling contaminated land will need to consider the risk of orders very carefully**
 - Restricted grounds of appeal
 - May wish additional assurance if clean-up promised

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Thank You



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