



*Managing Environmental Liabilities: Case Law Update
and Case Studies*



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Managing Environmental Liability, Case Law Update and Consultant Blunders

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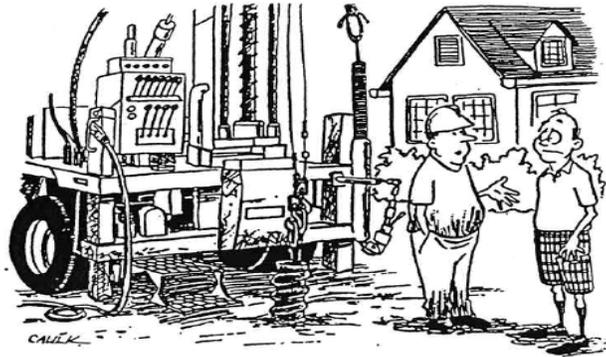
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MANAGING ENVIRONMENTAL LIABILITY



Managing Environmental Liability



"The good news is we found oil on your property. The bad news is it's in drums."

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Managing Environmental Liability

- **Regulatory Liability**

- regulator can issue orders
- regulator can prosecute for offences under environmental statutes

- **Civil Liability**

- negligence, nuisance, breach of contract, breach of statute, strict liability, trespass
- contamination migrating off-site
- "flow through" property
- results in damage and damages

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Managing Environmental Liability

- **Know the environmental condition of property**
- **Allocate Risk when Purchasing Contaminated Property**
- **Regulatory Liability Protection**
- **Environmental Insurance**
- **Risk Tolerance**



CASE LAW UPDATE



Case Law Update - Nuisance

Antrim Truck Centre Ltd. v Ontario (Ministry of Transportation) (SCC 2013)

- **Private nuisance claimants must show that interference with the use of the property is both substantial and unreasonable.**
 - a **substantial** injury “is one that amounts to more than a slight annoyance or trifling interference.”
 - courts must balance the gravity of the harm against the utility of the defendant’s conduct to establish whether the interference was **unreasonable**



Case Law Update - Nuisance

French v Chrysler (ONCA 2015)

- **Nuisance has “certain defined, long-standing characteristics, which courts have considered to be essential to the tort. In particular, the alleged nuisance must originate somewhere other than on the plaintiff’s land.”**



Case Law Update - Nuisance

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

Case Law Update - Nuisance

Steadman v Lambton County (ONSC 2015)

- **County applied road salt to abutting roadway**
- **Contaminated approximately 15% of property**
- **Salt caused soya bean crop losses and diminished value of property**
- **Court found County liable in nuisance**
- **Steadman awarded \$106,000**

Case Law Update - Continuing Nuisance

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
- The decision has been appealed



Case Law Update

Canadian Tire v Huron Concrete (ONSC 2014)

- Claim for PHC contaminant migration
- Nuisance, negligence (breach of EPA), strict liability and trespass
- Liable for the damage caused from escape and migration of gasoline
- Court awarded \$3.6M to remediate and \$1.1M for out-of-pocket expenses (legal/professional costs)



Case Law Update - Experts & Counsel

Moore v Getahun (ONCA 2015)

- **Communications between counsel and expert will have the protection of litigation privilege unless there are reasonable grounds to suspect that counsel communicated with the expert in a way that is likely to interfere with the expert's duties of independence and objectivity**
- **Only “the foundational information” that supports and underpins the opinion must be disclosed with the expert's report to be relied on at trial**



Case Law Update - D & Os

Currie v Director, MOE (ERT 2011)

- Order upheld against a director who had very limited involvement in the day to day operations

Rosenfeld v Director, MOE (ERT 2011)

- former corporate director removed from an Order because established he had no “management or control”

Baker v Director, MOE (ERT 2013)

- “failed to carry out their duty and exercise their authority as a director/officer to make adequate provision to ensure implementation of the remediation strategy...”
- D&Os appealed, Order not stayed, spent ~ \$800K to comply
- Settled with MOECC for \$4.75 Million



Case Law Update - D & Os

Rocha v Director, MOECC (ERT 2014)

- **MOE issued two Director's Orders against advisor and mortgagee**
- **Property was the source of a groundwater plume of TCE and VC**
- **Appealed Orders based on not exercising management or control**
- **Applied for a stay pending appeal - denied**
- **Orders were upheld**



Case Law Update - D & Os

McQuiston v Ontario, MOECC (ERT 2015)

- **MOECC issued investigation and cleanup order to:**
 - former tenant, its D&Os and site manager
 - current property owner - British resident who inherited the company
 - accountant who accepted a power of attorney to sell the property
 - listing broker
- **Ongoing before the ERT**



Case Law Update - Negligence

Thornhill v Highland Fuels (ONSC 2014)

- Fuel oil leak through broken valve on tank contaminating property
- Claim in negligence against Highland Fuels
- Court held no breach of standard of care, Highland Fuels not liable, no causal connection and acted in accordance with law and industry standard
- Obiter – “for the sake of completeness”
 - remediation to non-detect (but for test)
 - consultant costs unreasonable
 - insurer partially responsible for unreasonable costs



Case Law Update

Midwest v Thordarson (ONSC 2013)

- Purchaser 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 s. 99 EPA



Case Law Update - EPA s. 99

Midwest v Thordarson (ONCA 2015)

- s.99 EPA 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.”
- No concern for double recovery under s.99
- Damages of \$1,328,000 for restoration costs



Case Law Update – Negligence & Punitive Damages

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



COMMON CONSULTANT BLUNDERS



Common Consultant Blunders

- 1. Consultant Failure to Communicate**
- 2. Consultant Opinion Outside of Consultant's Area of Expertise**
- 3. Consultant Shares Findings with Regulators**
- 4. Consultant Performs Below the Standard of Care**
- 5. Consultant Misses Deadlines / Underestimates Time, Resources**
- 6. Consultant Damages Property / Exacerbates Existing Contamination**
- 7. Consultant Reliance**
- 8. Consultant Negotiates Unreasonable Liability Limits**



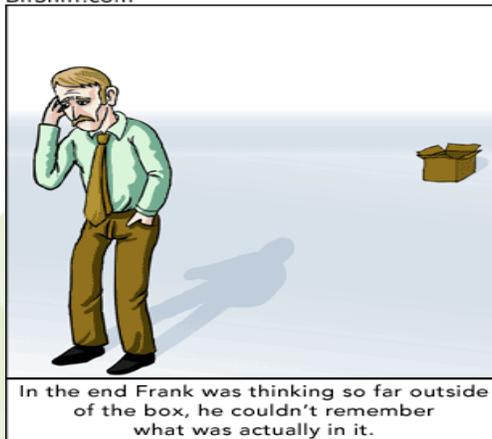
Blunder: Failure to Communicate



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Blunder: Gives an Opinion Outside of Area of Expertise

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Blunder: Shares Findings with Regulators



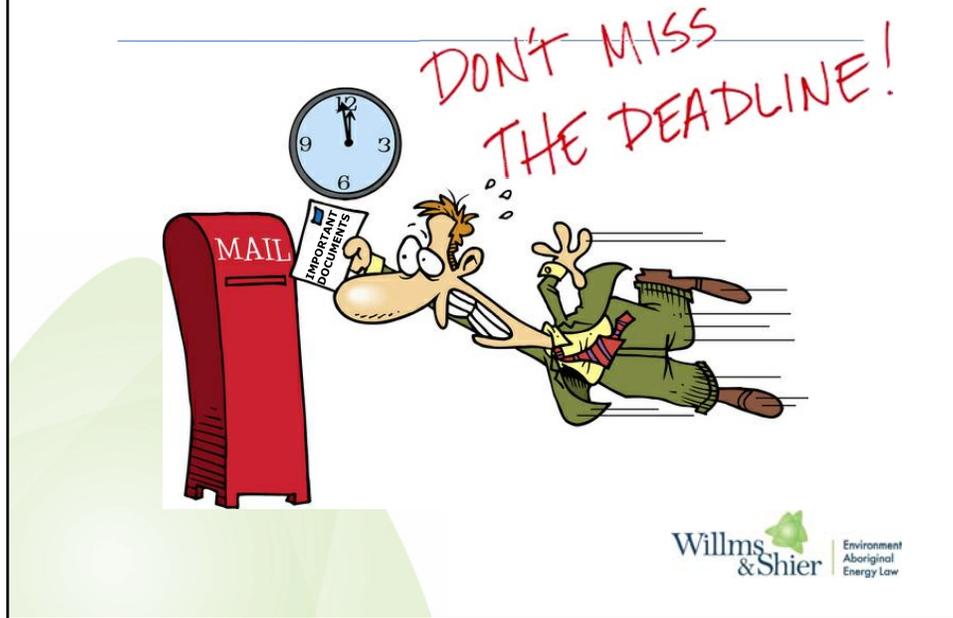
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Blunder: Performs Below Standard



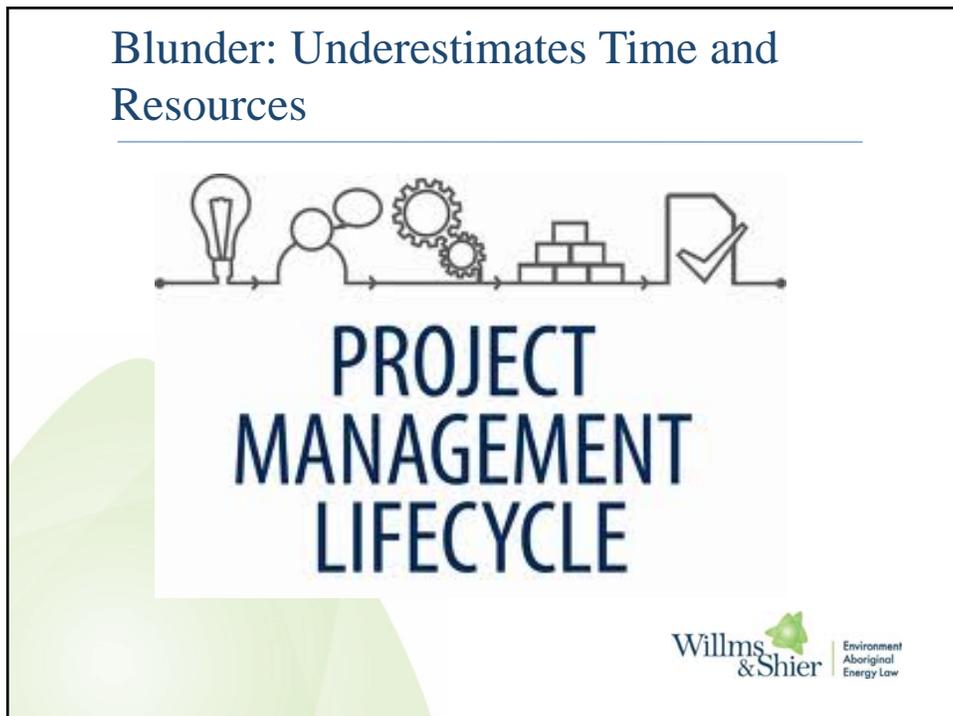
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Blunder: Misses Deadlines



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Blunder: Underestimates Time and Resources



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Blunder: Damages Property



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Blunder: Reliance



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Blunder: Negotiates Unreasonable Liability Limits

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Case Law Reviewed

- *Antrim Truck Centre Ltd. v Ontario (Transportation)*, [2013] 1 SCR 594
- *Currie v Ontario (Environment)*, [2013] O.E.R.T.D. No. 23 (ON ERT)
- *1317424 Ontario Inc. v Chrysler v. Chrysler Canada Inc.*, 2015 ONCA 104
- *Baker v Ontario (Environment)*, 2013 CarswellOnt 15791 (ON ERT)
- *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1
- *Rocha v Ontario (Environment)*, 2015 CarswellOnt 11189 (ON ERT)
- *Steadman v. Corporation of the County of Lambton*, 2015 ONSC 101
- *McQuiston v Ontario (Environment)*, 2015 CarswellOnt 11173 (ON ERT)
- *Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd.*, 2014 ONSC 288
- *Midwest Properties Ltd. v Thordarson*, 2013 ONSC 775
- *Moore v Getahun*, 2015 ONCA 443
- *Midwest Properties Ltd. v Thordarson*, 2015 ONCA 819
- *Kawartha Lakes (City) v Ontario (Environment)*, 2013 ONCA 310
- *Crombie v McColl-Frontenac*, 2015 ONSC 6560
- *Currie v Ontario (Environment)*, ERT Case Nos: 10-050/10-051/10-052 (ON ERT)
- *Thornhill v Highland*, 2014 ONSC 3018

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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **14 lawyers**
 - five are certified by the Law Society of Upper Canada as Environmental Law Specialists
 - lawyers called to the Bar in Ontario, Alberta, British Columbia, Northwest Territories, Nunavut and New Brunswick



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