

MANAGING ENVIRONMENTAL LIABILITIES: PRINCIPLES OF LEGAL LIABILITY FOR CONTAMINATED SITES AND CASE LAW UPDATE



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Snapshot of Today's Discussion

- Basic principles of contaminated site liability
 - including overview of statutory liability in BC, Alberta & Ontario
 - Spotlight on Directors' & Officers' (D&O) environmental liability
 - Regulatory tools for managing contaminated sites
 - Overview of provincial contaminated site standards
 - Risk management strategies and tools
 - Case law update – recent cases of interest
 - Q&A
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Basic Principles of Contaminated Site Liability



Sources of Potential Liability for Contaminated Sites

- Statutory Liability
 - BC – *Environmental Management Act (EMA); Contaminated Sites Regulation*
 - Alberta – *Environmental Protection and Enhancement Act (EPEA); Water Act*
 - Ontario – *Environmental Protection Act, Records of Site Condition (O. Reg. 153/04)*
 - Federal – *Canadian Environmental Protection Act, 1999*
- Common Law Liability
- Contractual Liability
- Other sources of environmental liability: class actions, natural resource damages, financial reporting of environmental liabilities, cross-border liability, administrative monetary penalties.

BC – Overview of Statutory Liability

- Section 45(2) EMA – “**responsible persons**” broadly defined to include **current and previous owner/operators** of a site.
- An “**owner**” is defined to include an owner who (a) is in **possession**, (b) has the **right of control**, or (c) **occupies** or **controls** the use of real property, and includes...a person who has an estate or interest, legal or equitable, in the real property.
- An “**operator**” defined as “a person who is or was in **control** or **responsible** for any operation located at a contaminated site”.
- Section 47(1) EMA – a person who is “responsible for remediation” of a contaminated site is **absolutely, retroactively** and **jointly** and **separately liable** to any person or government body for **reasonably incurred costs of remediation** of the contaminated site, whether incurred on or off the contaminated site.

BC – Scope of Statutory Liability

- Section 48(1) EMA – a director may issue a **remediation order** to any responsible person.
- Section 83(2) – remediation may also be required under a **pollution abatement order**.
- Section 48(2) EMA – a remediation order may require a responsible person to:
 - **undertake** remediation
 - **contribute** (in cash or in kind) towards the costs of another person who has reasonably incurred costs of remediation;
 - give **security** (which may include real and personal property) in the amount and form the director specifies.
- Section 48(3) – sets out **factors** that must be considered by a director when deciding whether to require a person to undertake remediation.

Legal Issues Arising from Updates to BC Contaminated Sites Regime

- Keep in mind there are different definitions of “responsible person” within the context of contaminated sites vs. spill reporting.

EMA – Section 45(1)

A “**responsible person**” for a contaminated site includes:

- a **current owner or operator** of a site;
- a **previous owner or operator** of a site;
- a **producer or transporter** of a substance that caused contamination; and
- any of the above if a site was contaminated by a substance **migrating** from an adjacent site.

EMA – Section 91.1

A “**responsible person**” (a.k.a. the “**spiller**”) means a person who has **possession, charge or control of a substance or thing** when a spill of the substance or thing occurs or is at imminent risk of occurring.

N.B. Actions required by the responsible person are set out in Section 91.2 of EMA – i.e. **reporting** the spill in accordance with the *Spill Reporting Regulation* and ensure all **actions** to address a threat/hazard caused by the spill are taken.

Alberta – Overview of Statutory Liability

- Section 107(1) EPEA: A “**person responsible for the contaminated site**” means (i) a person **responsible** for the substance that is in, on or under the contaminated site, (ii) any other person who **caused** or **contributed** to the release of the substance into the environment, (iii) **owner** of the contaminated site, (iv) any **previous owner** of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site, (v) a successor, assignee, administrator, receiver or trustee of a person referred to in (ii) to (iv), and (vi) a person who acts as the **principal** or **agent** referred to in (ii) to (v).
- Under Part 5, Division 1 of EPEA, a person who releases, or causes or permits the release of, a substance into the environment that may cause, is causing or has caused an adverse effect has certain remediation obligations.

Alberta EPEA – Scope of Potential Liability

- Section 112(1) EPEA – where a substance that may cause, is causing or has caused an **adverse effect** is released into the environment, the **person responsible** for the substance shall, as soon as that person becomes aware of or ought to have become aware of the release:
 - (a) take all reasonable measures to: **repair, remedy** and **confine** the effects of the substance; and (ii) **remediate, manage, remove** or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect; and
 - (b) **restore** the environment to a condition satisfactory to the Director.
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Ontario – Overview of Statutory Liability

- Potential environmental liability for spills is retained by **persons having control of a pollutant** that is spilled and **persons who spill or causes or permits a spill** of a pollutant.
- Under EPA, a “**person having control of a pollutant**” means the person and the person’s employee or agent, if any, having the **charge, management or control** of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs.
- The “**owner of the pollutant**” refers to the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs.

Ontario – Scope of Potential Liability

- Section 17 EPA – **Remedial Orders** – where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is (or is likely to be) injured, damaged or endangered, the Director may order the person to repair/prevent the injury or damage.
- Section 93(1) EPA – **Duty to Mitigate and Restore** – the **owner of a pollutant** and the **person having control of a pollutant** that is spilled and that causes or is likely to cause an adverse effect is required to do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

Regulatory Tools for Managing Contaminated Sites

Jurisdiction	Regulatory Tool
BC	<ul style="list-style-type: none">▪ Remediation orders▪ Minor contributors provision▪ Voluntary remediation agreements▪ Cost recovery mechanisms▪ Certificates of compliance
Alberta	<ul style="list-style-type: none">▪ Environmental protection orders re: contaminated sites▪ Remedial action plans and agreements▪ Remediation certificates
Ontario	<ul style="list-style-type: none">▪ Stop orders, control orders, remedial orders or preventive orders▪ Records of Site Condition; Certificate of Property Use

Common Law Liability

- **Nuisance** – plaintiff must establish a substantial interference with the use and enjoyment of property that would not be endured by an ordinary occupier.
- **Trespass** – consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object on the land without the legal right to do so.
- **Negligence** – plaintiff must establish that (1) a duty of care existed between the parties, (2) the defendant breached the standard of care; and (3) the breach of the duty caused the plaintiff damage or loss that was not too remote a consequence of the breach.
- **Rule in *Rylands v. Fletcher*** – common law cause of action for strict liability as articulated in *Rylands v. Fletcher*: “...the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

Contractual Liability

- In addition to statutory and common law liability, liability for contaminated sites and other environmental matters can attract potential liability in the form of contractual obligations.
- Private agreements seek to allocate risk between the parties and can provide greater recourse or a broader range of remedies than under statute or common law.



Spotlight: D&O Environmental Liability

- D&O liability is a key instrument used by policy makers to promote good corporate governance.
- D&O must: (i) act **honestly**, in **good faith** and in the **best interests** of the company, and (ii) exercise the **care, diligence** and **skill** that a **reasonably prudent** person would in **comparable circumstances**.
- Personal liability “is the most effective method of ensuring that persons with the power to shape corporate policy are deterred from either active or passive acquiescence in the development of corporate policies precipitating violations” [Chief Justice Stewart, *R. v. United Keno Hill Mines Ltd.* (1980)].

Sources of D&O Environmental Liability

- Express statutory liability for D&O under federal and provincial environmental regimes (e.g. BC *Environmental Management Act* and *Canadian Environmental Protection Act, 1999*).
- Corporate officials have long been liable to prosecution for corporate offences as parties who aided/abetted the commission of wrongful acts.
- Other sources of environmental liability for D&O: civil actions, financial reporting of environmental liabilities.

D&O Liability under Environmental Statutes

- Many Canadian environmental statutes hold directors and officers personally liable for pollution and environmental offences that occur “on their watch”. For example, under the EMA:

121 (1) If a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted.

D&O Environmental Liability – A Question of Influence and Control

- Generally, the words “*directed, authorized, assented to or acquiesced or participated in*” in a statutory environmental context have been held to connote, in addition to knowledge of the relevant facts, a degree of influence or control.
- Ontario ERT decisions have held that the power to issue an EPO extends to all corporate directors, both current and previous, provided they have the requisite degree of management or control (*Currie v Director (MOE)* (Ont. ERT, June 7, 2011)).

Northstar Aerospace Case – Expanding D&O Environmental Liability?

- *Baker et al. v. Director, Ministry of the Environment* (Ontario Environmental Review Tribunal (ERT) 2013)
 - A number of former directors and officers of Northstar Aerospace, Inc. found themselves personally liable for the remediation of a contaminated site, even though they had no involvement in activities that resulted in the contamination.
 - The former directors and officers appealed the ERT decision but settled prior to the appeal being heard.
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Northstar Aerospace Case – A Cautionary Tale

- Since settlement was reached before the appeal could be heard, it is uncertain whether the facts would have supported MOE's position.
 - *Northstar* case shows that Ontario MOE is willing to pursue D&O even in the absence of fault, prior to any adjudication of responsibility, and for historical contamination caused before the tenure of D&O.
 - If MOE had been successful, this would have expanded scope of D&O liability established in ERT's June 2011 ruling in *Currie*.
 - Too early to tell whether other provincial regulators will follow MOE's approach, but *Northstar* serves as a cautionary tale.
 - Under BC's EMA, Director must consider certain factors before deciding which parties will be named in a remediation order.
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D&O Liability for Environmental Offences in BC

- 44(1) of EMA: Director may determine whether a site is contaminated and if so, the boundaries of such site.
- 45(1) of EMA: Sets out broad definition of “persons responsible” for remediation of contaminated sites.
 - Note: a “person” includes a director and officer.
- 46(1) of EMA: Sets out list of “persons not responsible” for remediation of contaminated sites.
- 47 of EMA: Cost recovery mechanism.
- 48(1) & 48(2) of EMA: Director may issue a remediation order to any responsible person for the contaminated site, requiring them to undertake remediation, contribute to costs of remediation, or give security.

Remediation Orders – Identifying the Parties

- 48(4)(b) of EMA: For the purpose of deciding who will be ordered to undertake or contribute to remediation, the director must name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account such factors as
 - i. the **degree of involvement** by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and
 - ii. the **diligence exercised** by persons with respect to the contamination.

D&O Liability for Environmental Offences – Due Diligence Defence

- Environmental offences are generally strict liability offences, meaning the defence of due diligence is available (reasonable mistake of fact may also be available as a defence).
- Required standard of care is one of “reasonable care”.
- Per Ormston J. in *R. v. Bata Industries Ltd.* (1992):
“Within this general profile and dependent upon the nature and structure of the corporate activity, one would hope to find remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a proactive environmental policy.”

Risk Management Tools (including due diligence)

Legal Issues to Consider at Acquisition

- Due diligence can help to mitigate exposure to unknown, but potentially significant, environmental risks and liability.
 - Due diligence activities may include:
 - Reviewing historical site information (e.g. historical activities on site, previous site assessments, public registry searches).
 - Undertaking a site investigation.
 - Further site investigation (e.g. Phase II site assessment) if the initial review reveals any potential concerns.
 - Compliance review.
 - Financial due diligence to assess counterparty's ability to meet environmental obligations.
 - Consider allocation of responsibility for remediation obligations.
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Ongoing Risk Mitigation Strategies

- Review environmental policies and practices, as well as insurance policies to assess coverage.
- Regularly consult with environmental managers to address any issues of concern and ensuring that issues are reported to senior management in a timely way.
- Ensure that employees, contractors and agents are aware of their responsibilities to comply with requirements under environmental legislation (e.g. spill reporting obligations).
- Ensure that remedial and preventative measures are in place to respond to environmental incidents.
- Ensure that environmental audits are carried out at regular intervals.
- Regularly review industry standards with regard to controlling comparable environmental risks.

Other Risk Management Tools

- Environmental insurance
- Contractual terms
 - Representations and warranties
 - Environmental indemnities
- Statutory instruments (e.g. Certificate of Compliance in BC, Remediation Certificate in Alberta, Record of Site Condition in Ontario)

Contaminated Sites – Case Law Update



Case Law Update – Recent Cases of Interest in BC & Alberta

- *Ban v. Keleher*, 2017 BCSC 1132
 - *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited*, 2017 ABQB 218
 - *Domovitch v Willows*, 2016 BCSC 1068
 - *Jl Properties Inc v PPG Architectural Coatings Canada Ltd.*, 2015 BCCA 472
 - *Dolinsky v Wingfield*, 2015 BCSC 238
 - *Halme's Auto Service Ltd v British Columbia (Regional Waste Manager)*, 2014 CarswellBC811 (BC Env Appeal Board)
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Case Law Update – Recent Cases of Interest in Ontario

- *Hamilton Beach Brands Canada Inc. et al. v The Director (Ministry of Environment and Climate Change)*, 17-025 HBBC Inc. v Ontario (MOECC) (ON ERT)
- *2280577 Ontario Inc. v Ontario (Environment and Climate Change)*, 2017 (uncited)
- *Sorban Investments Ltd. v Litwack*, 2017 ONSC 706
- *Crombie Property Holdings Limited v McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 15
- *Huang v. Fraser Hillary's Limited*, 2017 ONSC 1500
- *Rubin v Ontario (Environment and Climate Change)*, 2016 CanLII 24523 (ON ERT)
- *Midwest Properties Ltd. v Thordarson*, 2015 ONCA 819

Thank you for your attention. Questions?

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**“This place has a reputation
as a biodiversity hot spot.”**