

Legal Aspects of Nuisance: Odour, Dust and Noise

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**“Law Firm of the Year” for Environmental Law in
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Willms
& Shier  Environment
Aboriginal
Energy Law

Willms & Shier Environmental Lawyers

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

Overview

- **What is Nuisance?**
- **Environmental Nuisance Liabilities**
- **Case Law Updates**
- **Managing Environmental Nuisance Liabilities**
- **Checklist**

What is “Nuisance”?



What is “Nuisance”?

- **Noise, vibration, odour, heat, smoke, dust**
- **That causes**
 - adverse effect
 - loss of enjoyment
 - material discomfort
- **May cause health or environmental effects**



ENVIRONMENTAL NUISANCE LIABILITIES



Environmental Nuisance Liabilities

- **Regulatory Liability**

- regulator can issue orders
- regulator can prosecute for offences under environmental statutes
- concept of “adverse effect”

- **Civil Liability**

- contamination on-site (soil, groundwater, indoor air)
- contaminant migration and impact off-site (groundwater, air emissions)
- concept of “flow through” property
- causes of action and damages

Environmental Nuisance Liabilities

- **Personal liability (civil and regulatory)**
- **Individuals may be sued, prosecuted and/or ordered**
- **Corporate officers and directors may be charged separately with failing to exercise all reasonable care**

Environmental Nuisance Liabilities

- **Notwithstanding “compliance”**
 - trigger for complaints
 - abatement orders to address complaints
 - prosecution for “adverse effects”
 - contravention of municipal by-laws
 - lawsuits for private or public nuisance

Environmental Nuisance Liabilities

- **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

Environmental Nuisance Liabilities

- **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



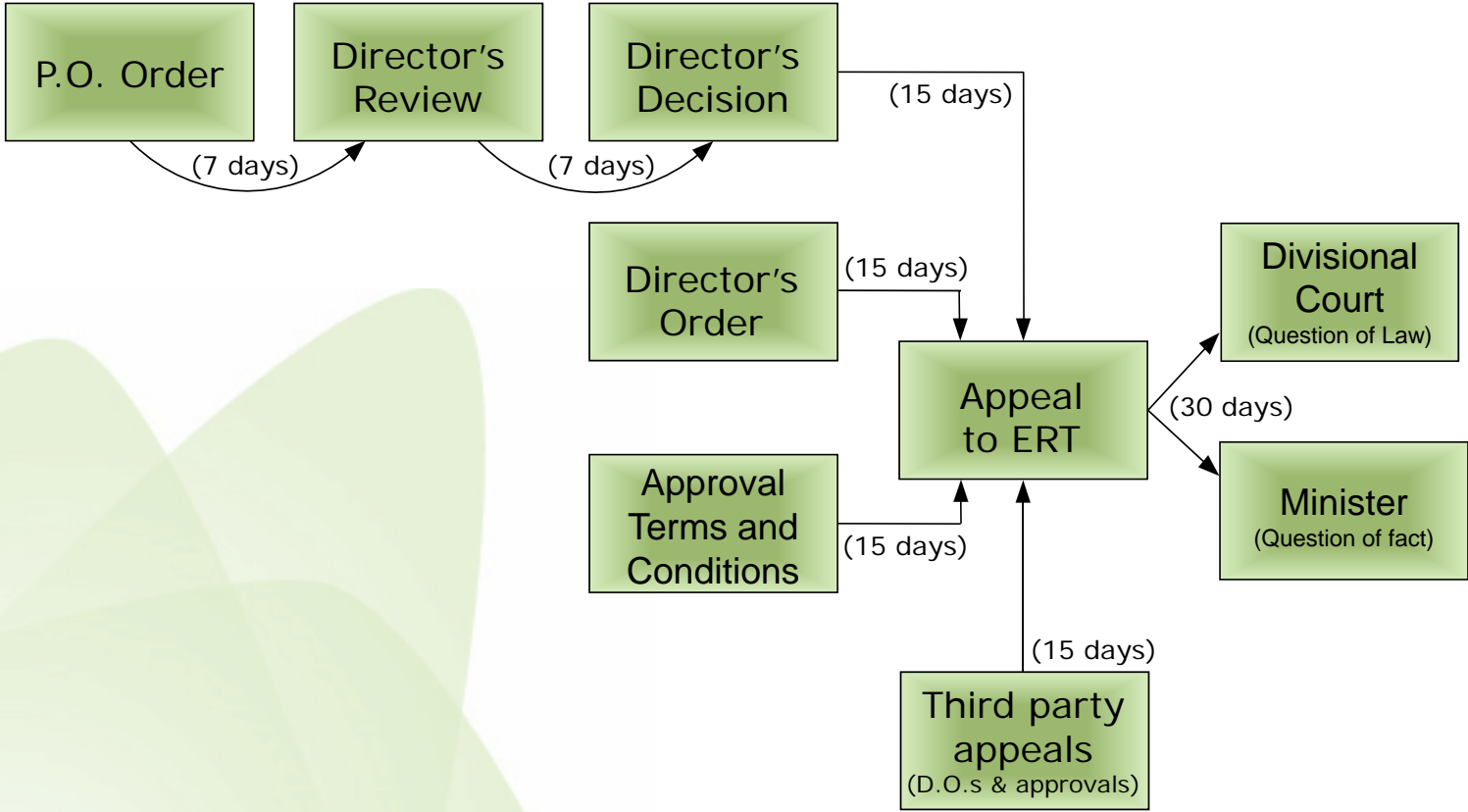
Sources of Regulatory Authority

- ***Environmental Protection Act***
- **Environmental Noise Guideline – NPC 300**
- **Air Pollution – O Reg 419/05**
- **Land Use Planning Guidelines**
- ***Municipal Act, 2001***
- **Municipal By-Laws**
- **Provincial Policy Statement**

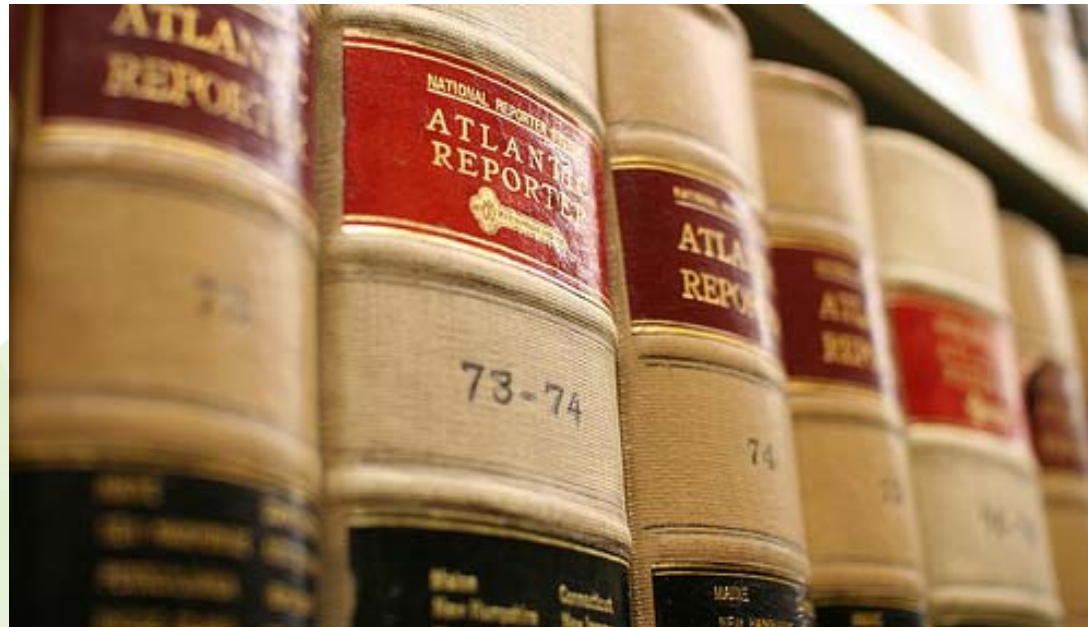
Regulatory Instruments

- **Request for voluntary abatement**
- **Orders**
- **Environmental Compliance Approval**
- **Permits**
- **Licences**

Deadlines to Appeal MOECC Orders and Approvals



CASE LAW UPDATE



ORDERS AND PROSECUTIONS



Case Law Update – Orders and Personal Liability

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

Case Law Update – Prosecutions

Heat, Smoke, Vibration, and Dust

- ***R v Sunrise Propane (2016)***
 - a series of explosions at Sunrise Propane’s 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 – company fined \$4,820,000 plus 25% VFS for EPA violation – Also fined \$280,000 for OHSA violations
 - conviction – directors fined \$100,000 plus 25% VFS

Case Law Update – Prosecutions

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

Case Law Update – Prosecutions

Odour

- ***R v De Simone (2016)***
 - odour complaints from 2003 to 2014 about slaughterhouse in Niagara
 - 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

Case Law Update – Prosecutions

Odour

- ***R v Shell Canada Limited (2015)***
 - leak of liquid containing mercaptan caused a foul odour and flowed into ditch leading to on-site waste water facility
 - complaints of sore eyes and throat, headaches, nausea and vomiting
 - shelter-in-place advisory was issued for City and First Nation Community
 - conviction – \$500,000 plus 25% VFS, 60 days to pay & probation order – \$125,000 to the impacted First Nation Community

Case Law Update – Prosecutions

Dust

- ***R v Essar Steel Algoma Inc. (2016)***
 - malfunction at baghouse for lime kiln at steel making facility
 - lime kiln discharged lime dust into the air
 - conviction – \$100,000 plus 25% VFS and 90 days to pay

Case Law Update – Prosecutions

Dust

- ***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

Case Law Update – Prosecutions

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

Case Law Update – Prosecutions

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

Case Law Update – Prosecutions

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

Case Law Update – Prosecutions

Fly Rock

- ***Austin Powder Ltd. (OCJ 2014)***
 - quarry blasting services at limestone quarry near Arnprior
 - fly rock discharged beyond 200 m control area - later determined should have been 500 m control area
 - rock struck worker at neighbouring business in the arm
 - scalehouse (230 m away) and two vehicles (300 m away) damaged by fly rock
 - Austin Powder failed to report incident forthwith
 - conviction – \$130,000 plus 25% VFS and 6 months to pay



CIVIL ACTIONS



Case Law Update – Civil Actions

Dust

- ***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
 - severity of interferences
 - character of neighbourhood
 - utility of defendant's conduct
 - sensitivity of plaintiff



Case Law Update – Civil Actions

Noise

- ***469238 B.C. Ltd. v Motoplex Speedway and Event Park (2016 BCSC)***
 - motorcar race track located near residential area
 - noise from race track substantially and unreasonably interfered with nearby residents and developer's use and enjoyment of land
 - injunction granted against race track
 - damages awarded – residents \$5,000 to \$7,500 each and developer \$100,000

Case Law Update – Civil Actions

Lights and Noise

- ***Robert v Assis* (2017 ONSC)**
 - neighbour claimed interference with enjoyment of property from
 - floodlights and speaker systems pointed at their property
 - verbal attacks
 - firing hockey pucks over the fence
 - court dismissed nuisance claim

Case Law Update – Civil Actions

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

MANAGING ENVIRONMENTAL NUISANCE LIABILITIES



Managing Environmental Nuisance Liabilities

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

Managing Environmental Nuisance 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 Nuisance Liabilities

- **Due Diligence**

- took all reasonable care to avoid the particular event
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 Nuisance Liabilities

- **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 Nuisance Liabilities

- **Environmental Liability Protection**

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

DUE DILIGENCE CASE LAW



Due Diligence Case Law

- ***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

Due Diligence Case Law

- ***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
 - ControlChem acquitted of all 5 charges

Due Diligence Case Law

- ***R v ControlChem* (OCJ 2016)**
 - system and procedures
 - ISO 9001 and ISO 14001 (early adopter)
 - written environmental policies
 - standard operating procedures (SOPs)
 - documented training
 - identification and remediation of deficiencies in adherence
 - periodic external audits of practices and procedures
 - company mantra – “nothing leaves the building”

Due Diligence Case Law

- ***R v ControlChem (OCJ 2016)***
 - “I am satisfied that the defendant has proven on the balance of probabilities that it took all reasonable care in the circumstances leading up to the March 29, 2012 discharge of the offending liquids.”
 - “The evidence reveals the Defendant to have had farsighted, thoughtful, methodical and well documented philosophy and standards to address environmental protection generally and specifically addressing the issue of spills avoidance/mitigation.”
 - “Management recognized the high risk of severe harm that could follow from a spill or discharge of any materials and employed robust steps were taken to minimize this risk and harm.”

Due Diligence Case Law

- ***R v Brookfield Gardens Inc. (2015); R v D.S. Ellis Inc. (2016)***
 - key elements of successful environmental due diligence defences involving fish kill after heavy rains:
 - compliance with industry standards, relevant legislation, licenses, plans, permits and product labels
 - implementation of preventative systems and training
 - internal and external audits
 - promptness in responding to the problem, mitigate and remediate

Environmental Nuisance Liability Management Checklist

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

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