

Directors' and Officers' Environmental Liability

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About Willms & Shier

- **Focused on environmental, Aboriginal and energy law**
- **Established over 40 years ago**
 - just after Ontario's first environmental legislation enacted
- **15 lawyers**
 - six are certified by Ontario's Law Society as Environmental law specialists
 - others called to the Bar in each of the Territories, BC, Albert and New Brunswick

Outline

- **Directors' and Officers' Liability**
- **Recent Cases**
- **Northern Statutes and D & O Liability**
- **Conclusions**

DIRECTORS' AND OFFICERS' ENVIRONMENTAL LIABILITY

What are Directors' and Officers' Potential Environmental Liabilities?

- **Civil liability**
 - lawsuits naming D&Os personally
- **Regulatory liability**
 - statutory duties
 - prosecutions
 - Orders

Duties under Environmental Statutes

- *Environmental Protection Act (EPA)*
- **s.194 – D&O duty to take all reasonable care to prevent corporation from**
 - discharging contaminants above standards
 - failing to report a discharge
 - failing to comply with approvals, permits or Orders

Duties under Environmental Statutes

- *Ontario Water Resources Act (OWRA)*
- **s.116 – D&O duty to take all reasonable care to prevent corporation from**
 - discharging contaminants into or near water that may impair water quality (above standards)
 - failing to report discharge
 - failing to comply with approvals, permits or Orders

Duties under Environmental statutes

- *Canadian Environmental Protection Act* (CEPA)
- S. 280.1 – D & O duty to take reasonable care to ensure corporation complies with Act, Regulations and orders

Orders

- **Primary authority for issuing orders in Ontario to a corporate Director is s. 18, EPA**
- **Turns on whether person exercised “charge, management, or control”**
- **Fault or innocence is irrelevant**
- **Order based on need to serve environmental protection objective of legislation**

Prosecutions

- **Offences under EPA and OWRA**
 - contravention of the Act or its regulations
 - failure to comply with an Order
- **Convictions can lead to fines and/or imprisonment**
- **Fine Ranges— on first conviction, not more than \$50,000; on each subsequent conviction not more than \$100,000**

Regulator's Perspective

- **Directors liable when a corporation has failed to set aside sufficient funds to address future environmental remediation**
- **Avoids externalization of remediation costs to third parties and tax payers**
- **Emphasizes “polluter pays” principle**

Court/tribunal's perspectives

- Court has found that a company cannot indemnify directors for fines under OWRA (R v Bata)
- Environmental Review Tribunal (ERT) has coined “environmental fairness” to weigh against fairness
- Due diligence defence is key to prosecution and fines

RECENT CASES

Prosecution

R v Sinclair (2013)

- Company Director purchased property contaminated with PCBs to develop into residential property
- knew the land was contaminated and knew that disturbing the land could cause PCB migration
- Dug trenches against MOECC orders and allowed PCBs to migrate off-site

Prosecution

R v Sinclair (2013)

- Convicted on two counts under OWRA, s. 116 for failing to take reasonable care to prevent corporation from discharging PCB
- Court rejected due diligence
- \$35,000 in fines and 4 months' jail time

Appeal of Orders

Baker v Director, MOE (2013)

- Aerospace company owned contaminated property in Cambridge
- TCE contaminated groundwater
- Company worked with MOE to remediate at property and neighbouring properties
- Company filed for bankruptcy, assets sold (ex Cambridge property), no funds to remediate
- MOE issued Order against 13 former D&Os

Appeal of Orders

Baker v Director, MOE (cont'd)

- Former D&Os appealed Order
- Order not stayed pending appeal
- Former D&Os spent approximately \$800K to comply with Order pending appeal
- Settled with MOE before the appeal was heard by ERT for \$4.75M (not including costs already spent to comply)

Mount Polley BC Tailings Breach



Mount Polley BC Tailings Breach

Mine Expert Panel report (January 2015)

- “The Panel concluded that the dominant contribution to the failure resides in the design [of the embankment, which] did not take into account the complexity of the sub-glacial and pre-glacial geological environment associated with the perimeter embankment foundation.”

Mount Polley BC Tailings Breach

- Ongoing MOE investigation into potential charges
- Search warrants at Mine and head office of Imperial Metals
- The purpose of an investigation is to lay charges

Personal Liability in BC

Environmental Management Act

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.

NORTHERN STATUTES AND D&O ENVIRONMENTAL LIABILITY

Duties

- **Federal- *Fisheries Act***
- **Section 38**
- **Those with charge management or control, or cause or contribute to an occurrence that results or in danger of resulting in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery or to fish that support that fishery**

Duties

- **Duty to notify without delay; and**
- **As soon as feasible, must take all reasonable measures consistent with public safety and with the conservation and protection of fish and fish habitat to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from**

Orders

- Yukon- *Environment Act* (s. 111, 115(1), 136)
Minister may issue order to
 - “responsible party” with possession, charge or control over contaminant
 - person with possession, charge or control over a spill
- NWT/Nunavut – *Environmental Protection Act* (ss 4 (2) and 6)
 - inspector may issue order to persons with charge, management or control over contaminant

Prosecutions

- Yukon - s. 179 *Environment Act* and NWT/Nunavut – s 14.1 *Environmental Protection Act* , s 41 *Mine Health and Safety Act*
 - any officer or director of a corporation who knowingly directed, authorized assented to, acquiesced or participated in committing the offence is a party to and guilty of the offence

Prosecutions

- Similar federal statutory offences do not include the word knowingly (s. 280 *CEPA*; s 39 *TDGA* s. 78.2 *Fisheries Act*)
- Directors liable for offences of corporation whether or not corporation is convicted

Prosecutions

- Federal *CEPA* fines up to \$1M for first offence, up to \$2 M for any subsequent offence, and imprisonment ; *Fisheries Act* fines up to \$1M for first offence, up to \$2M for any subsequent offence and imprisonment
- Yukon *EA* fines up to \$200K per offence and imprisonment
- NWT/Nunavut *EPA* fines up to \$300K per offence and imprisonment

Conclusions

- Know the risks
- Ontario EPA and CEPA impose “reasonable care” duty on D&Os
- Territorial statutes provide broad powers to issue orders and prosecute against current and former D&Os
- Ignorance is no defence
- Best defence for D&Os is a robust environmental management system

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