

# Environmental Law for Construction Lawyers



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# Overview

- **Examples**
- Who does what?
- Key obligations
- Enforcement



# Dust

- *R. v. Warren Bitulithic* (2001)
- Dust from portable gravel crusher
- Covered vehicles nearby
- Paid cleanup
- Fine: \$15,000 plus VFS



## Dust, #2

- *R. v. Hard Rock Paving* (2007)
- Reconstruction of raised track
- Strong winds, history of dust complaints
- Angry neighbours
- Owner authorized watering after MOE call
- Prosecution 2 years later
- Fine: \$5700



# Silt

*R. v. Spruce Falls Inc. (2003)*

- Faulty road-building: silt into creek
- Impact severe: altered course, changed habitat
- Fines (+VFS):
  - \$25,000 (discharge that may impair)
  - \$5000 (failure to report to MOE; had reported to MNR)
  - \$10,000 (failure to follow work plan)
- PLUS spent > \$100,000 to remediate and upgrade erosion-prevention measures



## Silt, #2

- *R. v. Barrie*
- Fisheries Act
- CA fill permit
- Is municipality liable for developers's erosion?
- City accepting dedication of roads, EPZ





# Torbear Construction

- Sewage plant upgrade affecting containment
- Subcontractor broke chemical pipe
- No extra precautions
- \$80,000 + VFS



# Nethercott Excavating

- Transported contam soil as “fill”
- Convicted of using waste management system w/o coa
- \$8,000 + VFS





# Mattamy (Half Moon Bay)

- Burned wood waste in open fire
- Establishing waste site w/o permit
- also no waste audit
- \$24,000 + VFS



# Taggart Construction

- Taking excess water w/o PTTW
- \$5,000 + VFS



# Biloski Contractors

- Hauled demolition waste to private ppty
- Depositing waste at unapproved site
- \$15,000 + VFS + cleanup



# Fraud artist

- Surplus soil dumped on illegal sites
- Mixed with illegal dumping by third parties
- Fraudulent plan by disgruntled contractor
- Charged with fraud....



# Heyes v South Coast BC

- Class action for noise/ disruption during Canada Line construction
- Successful at trial, overturned on appeal, SCC refused leave



# Overview

- Some cases
- **Who Does What?**
- Key Obligations
- Enforcement





# Who does what?

- Federal
- Provincial
- Municipal



# Federal Role

- Issues of national/international concern
  - Crossing borders (e.g., import/export of hazardous waste, transport of dangerous goods, climate change)
  - Toxic substances
  - Science/standard setting
- “Federal house”
  - Federal government/agencies
  - Areas of exclusive federal jurisdiction (harbours, railways, aviation, nuclear power, oceans, fisheries)



# Key statutes

- Environment Canada:
  - *Canadian Environmental Protection Act, 1999*
  - *Canadian Environmental Assessment Act*
- Department of Fisheries and Oceans:
  - *Fisheries Act*



# Provincial Role

- Most environmental issues
  - Air, land, and water
  - Property and civil rights
  - Natural resources
- Key provincial statutes
  - *Environmental Protection Act*
    - Regulation 347 (Waste)
  - *Ontario Water Resources Act*
  - *Clean Water Act, 2006*
  - *Toxic Substances Reduction Act*



# Municipal Role

- Steadily growing
  - Off-loading by provinces
  - More responsibilities than money
- Key statutes
  - *Municipal Act, 2001*
    - Sewer bylaws
    - Site alteration bylaws
  - *Planning Act*



# Other Agencies

- Conservation authorities
  - fill control
  - flooding
- Source water protection committees
  - Protecting sources of drinking water





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# Key obligations

- Don't pollute
- Get all the right permits
- Report, report, report
- There are lots more...



# Don't pollute

- “Normal” discharges
- Spills
- Waste



# Discharges

- e.g. EPA S. 14 - No *person* shall
  - *discharge...or cause or permit* the discharge of
  - *a contaminant*
  - *into the natural environment*, that
  - *causes or may cause*
  - *an adverse effect.*



# Who is the polluter?

- Who “causes or permits”?
- Who has “charge, management and control”?
  - Corporation
  - Officers/Directors
  - Senior management
  - Staff?



# Don't pollute

- *Ontario Water Resources Act*  
s.30 – “cause or permit” a discharge that pollutes water
  
- *Fisheries Act*  
s.35 - Carry on a “work or undertaking” that harms fish habitat (HADD)  
s. 36- Deposit deleterious substance in waters frequented by fish





# Control

- Liability rests upon control and the power/  
authority/opportunity to prevent
  - *R. v. Sault St. Marie*



# What is Pollution?

- “Contaminant”, s.1
- Anything with potential for adverse effect
  - Solid (e.g., dust, smoke, flyrock)
  - Liquid (e.g., wash water)
  - Gas
  - Vibration
  - Noise
  - Odour



# Adverse Effect

- Impairment, injury, damage, harm
- Impair quality of environment for any use
- Interference with normal use of property
- Material discomfort



# How much is too much?

- Objective benchmarks

- Regulations
- Guidelines
- Permits

- Subjective

- Adverse effect

- Trivial impacts?



# Spills

What is a spill?

- Abnormal discharge out of a structure, vehicle or other container
  - of a pollutant
  - into the natural environment
  - that causes or is likely to cause an adverse effect



# Is that a spill?

- No minimum quantity
- Need not leave property
- Odours or gas (not noise) can = spill
- Leaks
- Flyrock





# Obligations

- Stop spill
- Report
  - To MOE, Municipality, owner of pollutant, AND person in control of pollutant,
  - Plus OHSA if impact on a worker
- Contain and clean up
  - Restore natural environment to the extent practicable
- Civil liability



# “You spill, you pay”

- Environmental penalties for spills
- Absolute liability
- Administrative process
- Penalties increase with time
  - To start: only MISA sector facilities affected
  - Factors: seriousness of violation; consequences; monetary benefit gained; duration of offence; previous violations and



# Don't pollute: Waste

- Elaborate rules for all kinds of wastes
- All sites need C of A
- Cradle-to-grave control for hazardous wastes
- Special substances, e.g. Asbestos



# Moving soil

- New Part XII (Soil)
- MOE has talked about movement of “clean” soils for years
- Some argued that only “inert fill” (Table 1) could be moved
- This restrictive interpretation was rarely followed....*but is now law*
- How much more will it cost to dispose of surplus soils from construction projects?



# Better sampling

- Must sample all soil brought to RSC property
- Analyse everything “may reasonably be expected to be potentially present”
- Segregate stockpiles by suspected level of contaminant, and sample each
- RSC’s require reports documenting and quantifying all movements of soil on and off an RSC property





# Where can it go?

- Can freely transport & deposit only soils that meet Table 1
- Soils that meet Tables 2 or 3 may only be transported to already-contaminated properties
  - that were used as gas stations, garages, dry cleaners, industries, and
  - require an RSC before conversion to a more sensitive use (s. 32)





# Get all the right permits

- Air and water pollution permits
  - Certificates of approval (permits)
  - Standards get steadily tougher
- Waste management systems and disposal sites
- *Ontario's approval system is changing dramatically*



## Other permits

- Federal and provincial environmental assessment
- Renewable energy approvals
- Sewer bylaw discharge agreements
  - *changing this year in Toronto*



# Report, report, report

- Spills
- NPRI
- GHGs
- Waste diversion
- Permit conditions



# Other obligations

- Contaminated sites
  - rules changed July 1, 2011
- Endangered species
- Dangerous pests
- Chemicals Management Plan
- Protected areas
- etc.



# Overview

- Some cases
- Who Does What?
- Key Obligations
- **Enforcement**
- Due Diligence



# Enforcement

- The Players

- MOE/ DFO

- Minister, Director, Provincial Officer

- Orders

- Minister's, Director's, POO, Court/ERT Orders

- Offences

- Breach Act or regulations

- Fail to comply with Order, CofA, other permits





# Limitation period

- Two years after the *later* of the day the offence was committed and the day on which evidence re the offence first came to the attention of a Director



# Offences:

- Less serious
- More serious
  - Breach numerical limit in order, CofA
  - Discharge adverse effect (actual or likely)
  - Fail to report
  - Obstruct PO, false info



# Penalties ~ less serious offences

## ■ Individuals:

- First conviction:  $\leq \$50,000$  per day (first offence)
- Subsequent convictions:  $\leq \$100,000$  per day and/or imprisonment for  $\leq 1$  year

## ■ Corporations:

- First conviction:  $\leq \$250,000$  per day
- Subsequent convictions:  $\leq \$500,000$  per day



# Penalties - more serious

- Individuals:

- First conviction: \$5,000 to \$4 million per day
  - Second conviction: \$10,000 to \$6 million per day
  - Subsequent convictions: \$20,000 to \$6 million per day
- and/or
- imprisonment for  $\leq 5$  years



# Penalties - more serious

## ■ Corporations:

- First conviction: \$25,000 to \$6 million per day
- Second conviction: \$50,000 to \$10 million per day
- Subsequent convictions: \$100,000 to \$10 million per day





# Sentencing

- Aggravating factors (adverse effect, intentional/reckless, motivated by profit, prior convictions)
- Mitigating factors (act done in good faith, quick response...)
- Plus victim fine surcharge: 25%
- Criminal conviction?





# Officers/directors- s.194

- Duty to take all reasonable care to prevent corporation from contravening Act by
  - Discharging or causing/permitting discharge
  - Failing to notify MOE of discharge
  - Contravening an Order under the EPA
- Failure to discharge that duty - person is guilty of an offence
- A director or officer of a corporation may be convicted whether or not the corporation is prosecuted



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# Questions? Comments?

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