



*Environmental Consultants Do Get Prosecuted and Sued!*



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# Environmental Consultants Do Get Prosecuted and Sued!

**Richard Butler**

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SMART Remediation Seminar Series 2020



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## Outline

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1. Review the most common consultant errors that give rise to exposure to legal proceedings
2. Compare and contrast environmental regulatory liability and environmental civil liability
3. Explain legal cases against consultants and decisions of Canadian Courts
4. Outline the meaning of the statute of limitations for claims against consultants
5. Review environmental consultant insurance requirements
6. The legal meaning of 'reliance'



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# PART 1

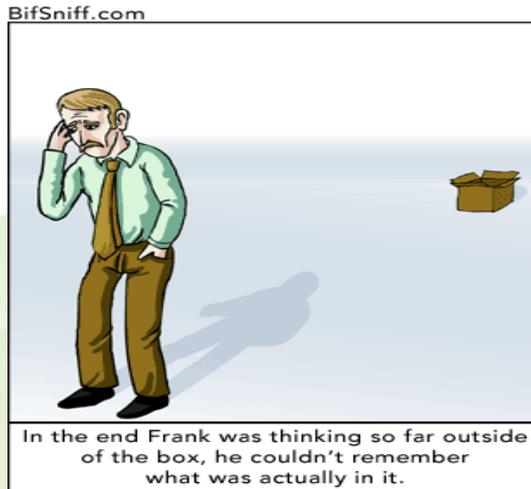
## CONSULTANT'S PROFESSIONAL ERRORS

## Most Common Errors

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1. **Consultant Misunderstands the Scope of the Consultant's Retainer**
2. **Consultant Gives an Opinion Outside of Consultant's Area of Expertise**
3. **Consultant Shares Findings with Regulators (often without client's consent)**
4. **Consultant Performs Below the Standard of Care, including Missing Contamination**
  - a) Consultant Fails to Communicate
  - b) Consultant Misses Deadlines
  - c) Consultant Underestimates Time and Resources Needed
  - d) Consultant Damages Property and/or Exacerbates Existing Contamination

## Blunder: Misunderstanding the Scope of the Retainer



## Blunder: Gives an Opinion Outside of Area of Expertise



## Blunder: Shares Findings with Regulators



## Blunder: Performs Below the Standard of Care



# PART 2

## REGULATORY LIABILITY VS CIVIL LIABILITY FOR CONSULTANTS

## Sources of Environmental Liability

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- **Civil Liability**
  - negligence, nuisance, trespass, strict liability, breach of statute, breach of contract
  - contamination migrating off-site
  - results in damage and claims for damages
- **Regulatory Liability**
  - regulator can issue orders
  - regulator can prosecute for offences under environmental statutes

## Personal Environmental Liability

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- **Personal environmental regulatory liability**

- individuals may be ordered and/or prosecuted
- statutory liability for Directors and Officers (*Rocha; McQuiston*)

- **Personal environmental civil liability**

- individuals may be sued
- precedent from the Ontario Court of Appeal (*Midwest*) for piercing the corporate veil in an environmental lawsuit

## PART 3 LEGAL CASES AGAINST CONSULTANTS

## Regulatory Liability

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- A prosecution may arise where there is a contravention of statute, regulation, or Order
- Legislation provides for a range of punishment – fines, imprisonment
- Crown must prove the offence beyond a reasonable doubt
- Defences include due diligence to prove on a balance of probabilities

## Regulatory Prosecutions

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- ***R v Gemtec Ltd (NBQB 2007)***
  - Gemtec retained by City of Moncton to conduct Closure Report for landfill site
  - Gemtec recommended closure option
    - deposit of leachate into adjacent creek
    - degrade water quality and potentially affect aquatic life
  - City followed recommendation and retained Gemtec to implement the closure option
  - Company and project director convicted and fined \$25,000 and \$3,000, respectively

## Regulatory Prosecutions

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- ***R v Sinclair (OCJ 2011)***
  - wells were constructed and abandoned on client's property by an unlicensed well technician
  - false or misleading information was given to MOE
  - consultant, company, and client received fines totalling \$201,500 plus 25% VFS

## Regulatory Prosecutions

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- ***R v Bruce A Brown Associates Ltd (OCJ 2015)***
  - consultant constructed wells without
    - retaining licensed well technician
    - providing well records
    - properly abandoning wells
  - consultant and consultant's company convicted and fined \$45,500 plus VFS

## Regulatory Prosecutions

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- ***R v Carter (ONCA 2008)***
  - samples taken on site indicated levels of PCBs
  - consultant told the MECP that all PCB results were non-detect
  - convicted of providing false and misleading information to MECP Provincial Officers
  - consultant, company fined \$45,000, President personally fined \$9,000 and one year probation on working in the business of environmental consulting

## Regulatory Prosecutions

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- ***R v Peermohamed (OCJ 2011)***
  - property owner was ordered by the MECP to retain a qualified consultant to prepare and complete a clean up report for waste illegally deposited at the property
  - consultant provided a false document to the MECP indicating that the consulting firm was retained pursuant to the Order
  - consultant pled guilty and was fined \$7,500 plus 25% victim fine surcharge

## Regulatory Prosecutions

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- ***R v Arkell (OCJ 2018)***

- Environmental Activity and Sector Registry registration required before certain activities
- consultant falsely identified himself as a licenced engineer on EASR for multiple companies
- consultant convicted for 3 registrations, fined \$22,500 plus VFS and 18 month Probation Order

## Regulatory Prosecutions

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- ***R v Soil Engineers Ltd (OCJ 2018)***

- developer notified Regulator of concerns with their Record of Site Condition (“RSC”) submissions
- consulting company and project manager found guilty of *Environmental Protection Act* violations relating to providing false information on RSCs
- consulting company fined \$35,000 plus VFS
- project manager fined \$15,000 plus VFS

## Regulatory Prosecutions

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- ***R v Ginger Ada Rogers (ABPC 2018)***

- consultant contracted to complete soil sampling to allow release of wastewater if met parameters
- consultant falsely submitted lab results for wastewater from previous year, current results did not meet parameters
- consultant fined \$28,750 plus VFS, prohibited from submitting documents/reports for 3 years to Alberta Environment and Parks

## Civil Liability

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- **Dispute between private parties**

- negligent acts that cause harm to others
- breach of contract
- negligent misrepresentation
- reliance by unknown third party

- **Plaintiff must prove its claim on a balance of probabilities**

- **Insurance is all important for defence costs first and damages if worst case**

## Lawsuits – Contract

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- **Consultant breaches contractual requirements**
- **Remedies**
- **Avoid by**
  - understanding and defining obligations
  - avoiding oral agreements
  - documenting expectations and instructions

## Lawsuits – Contract

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- ***North Fraser Harbour v Hardy BBT Ltd***  
**(BCSC 1994)**
  - consultants sued for failing to identify the extent of contaminated soil
  - consultant claims over against the laboratory which did the analytical work
  - court left open if the laboratory should be responsible or if the consultant should be responsible for any errors made by the laboratory

## Lawsuits – Negligence

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- **Relationship exists between consultant and claimant (typically the consultant's client)**
- **Consultant owed client a duty of care**
- **Consultant breached the requisite standard of care**
- **Damage was suffered as a result of a breach**
- **Damage was foreseeable**
- **Consultant's act or omission is the basis of liability for awarding damages**

## Examples of Negligence

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- **Improperly prepared proposals, designs, work plans (tasks, timing and costs) and specifications**
- **Inadequate identification of areas of potential environmental contamination (APECs) in Phase 1 Environment Site Assessment reports**
- **Inadequate scoping of the Phase 2 Environmental Site Assessment necessary to obtain the technical inputs to provide proper advice**
- **Failed supervision and/or inspection of the work**
- **Missed contamination during Phase 2 Environmental Site Assessment**
- **Improper understanding and/or interpretation of technical laboratory test results**
- **Failure to incorporate all critical test data results into report findings**

## Lawsuits – Negligence

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- ***Ontario v CH2M Gore & Storrie Ltd (ONSC 2002)***

- CH2M reported that the property was not contaminated
- Ministry of Transportation Ontario purchased the property for fair market value
- MTO excavated and discovered contamination
- MTO sued CH2M for the cost to clean and to retain a new consultant to complete the remediation
- low contract price is no defence to professional negligence
- MTO entitled to clean up costs to complete remediation

## Lawsuits – Negligence

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- ***Doug Boehner Trucking & Excavating Ltd v United Gulf Developments Ltd (NSCA 2014)***

- excavator offered soil that smelled of hydrocarbons as free fill
- soil used as backfill in subdivision
- excavator should have tested soil when appearance made it clear it may be contaminated
- excavator ordered to pay \$487,295 for remediation

## Examples of Damages – Negligence

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- **Costs to investigate, monitor and/or clean up**
- **Costs associated with dealing with and/or responding to the regulator**
- **Loss of business income**
- **Loss of (or additional costs incurred) investment/sale/financing**
- **Diminution in property value or business including “stigma” associated with either the presence of contamination or post-remediation knowledge in the real estate market**

## Lawsuits – Negligent Misrepresentation

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- **Special relationship gives rise to a duty of care**
- **Consultant’s representation is found to be untrue, inaccurate, and misleading**
- **Negligence is attributed to the consultant in making the misrepresentation**
- **Client relies on the misrepresentation**
- **Consultant’s client suffers damages as a result**

## Lawsuits – Negligent Misrepresentation

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- ***Simons v Diagnostic Engineering Inc (ABPC 2010)***

- consultant advised the homeowners to move out
- consultant knew that the air samples were variable and failed to demonstrate care and skill
- consultant's representations about mould were negligent
- limitations on agreement were not mentioned or explained to the homeowners
- false positive testing was not mentioned by the consultant in the contract limitation clause
- homeowners awarded \$14,894 for expenses relating to testing, demolition, inconvenience and replacement of personal effects

## PART 4 LIMITATION PERIODS

## Ontario's *Limitations Act, 2002*

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- **Applies to civil claims pursued in Court**
- **Two year basic limitation period**
  - 'Discoverability' principle – time runs from the day a claim is discovered, or ought to have been discovered
- **15 year ultimate limitation period**
  - No ultimate limitation on undiscovered "environmental claims" as defined in the Act
- **Important to consider limitations expiry early on when investigating a claim against a consultant**
- **Limitations defense may be a defendant's best answer to a claim**

## PART 5 ENVIRONMENTAL CONSULTANT INSURANCE – ONTARIO REGULATION 153



## Environmental Consultant Insurance – O Reg 153

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- **Qualified Persons (QP) must have coverage at all times when that person**
  - supervises any work done
  - makes any statement required by the regulation
- **Coverage must last for two years after the QP ceases to act as the QP**

## Environmental Consultant Insurance – O Reg 153

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- **Policy must indemnify from failure to perform required tasks**
- **Minimum statutory indemnity limit of \$1,000,000 per claim and \$1,000,000 in aggregate (too low!)**
- **Provides for the continuation of coverage if the insured consultant is bankrupt, insolvent, incompetent or dies during the coverage period**

# PART 6 RELIANCE

## Reliance by Unknown Third Party

- ***Wolverine Tube (Canada) Inc v Noranda Metal Industries (ONCA 1995)***
  - environmental consultant's report set out a disclaimer providing that the consultant was not liable for damages incurred by any third party who relies on the consultant's report
  - purchaser relied on reports and sued for negligence
  - courts upheld the disclaimer in finding that the consultant did not owe any duty to a third party to whom the consultant had not extended "reliance"

## Reliance by Unknown Third Party

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- ***Royal Bank v Burgoyne (NSCA 1996)***
  - appraiser's report disclaimer stated that the appraiser owed no liability to any person other than the appraiser's client
  - third party bank relied on the appraiser's report to the bank's detriment
  - disclaimer of liability in the report protected the appraiser from the bank's claim for damages
  - bank should have requested unqualified report from the applicant or requested permission to rely on the appraiser's report

## Reliance by Unknown Third Party

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- ***Community Mental Health Initiative Inc v Summit Lounge Ltd (NLCA 2018)***
  - APS required vendor to provide Phase I ESA to purchaser
  - Consultant Project Agreement included a third party disclaimer
  - PHC contamination was discovered after the deal closed
  - purchaser sued vendor and consultant
  - court found that if purchaser wanted reliance, purchaser should have sought reliance from the vendor's consultant
  - consultant had turned its mind to third party liability by including a liability disclaimer in the Agreement which the Court upheld

# Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **Environment, Indigenous, and Energy law**
- **20 lawyers**
  - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and Yukon
  - offices in Toronto, Ottawa, Calgary and Yellowknife



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## Contact Information

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