I. Introduction

Chapter 12 provides a general introduction to environmental law in the business context. It is not intended to (nor does it) constitute legal advice. Environmental law is a complex area of the law that is constantly evolving. This chapter is designed to provide a general overview of environmental law to assist lawyers in identifying issues and to provide a starting point from which to consider matters involving environmental law. Lawyers not experienced in dealing with environmental issues are encouraged to consult an expert in the area.

There is no widely accepted definition of "environmental law". For the purposes of this chapter, "environmental law" is defined broadly to mean the common law, statutes, regulations, policies, and guidelines that govern pollution or contamination and protect human health and the environment against environmental risks and hazards. Only those laws applicable in British Columbia are addressed.

Environmental liabilities may arise in any number of business circumstances and apply to a variety of corporate and individual actors. For example, under federal and provincial statutory provisions, corporations may attract civil or criminal liability in respect of their operations, and individuals may be found similarly liable for breaches of environmental statutes in their capacity as directors, officers, or shareholders of a corporation. Of particular importance in the commercial context is the potential for environmental liabilities to have an impact on asset, share, lending, real estate, and other commercial transactions. This chapter provides a brief discussion of the jurisdiction of regulators over the environment and an overview of the principal federal and B.C. environmental statutes. The chapter then outlines the potential sources of environmental liability and addresses more specifically environmental issues and concerns that may bear on certain types of commercial transactions.

In preparing this chapter we have relied on the works cited in the text as well as generally on those listed in Schedule A at §12.113.

II. Federal and Provincial Legislation

A. General

Although jurisdiction over certain types of natural resources was assigned to either the federal government (for example, seacoast and inland fisheries) or the provincial governments (for example, forestry resources on provincial lands) by the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, general responsibility for the "environment" has not been granted to either level of government. Jurisdiction over the environment is best described as crossing numerous areas of both federal and provincial constitutional responsibility. For further information concerning the complex issue of environmental jurisdiction see Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3; P.W. Hogg, Constitutional Law

The reality of overlapping or concurrent jurisdiction over the environment creates a certain amount of federal and provincial regulatory duplication. Both levels of government have made some efforts to minimize the potential confusion and coordinate environmental management efforts. For example, the Ministers of the Environment for the federal, provincial, and territorial governments comprise the Canadian Council of Ministers of the Environment (the "CCME"). The CCME's activities include initiatives aimed at harmonizing Canadian environmental legislation, policies, procedures, and programs. In 1998, the CCME (with the exception of Québec) signed the Canada-wide Accord on Environmental Harmonization, which provides a framework for the CCME's efforts. Another mechanism that can be employed to avoid regulatory duplication involves the entering into of "equivalency agreements" by the federal government and individual provinces under the Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33 (the "CEPA"). If a province has regulatory standards equivalent to those under the CEPA and similar citizen investigation provisions, the federal government may agree that certain CEPA regulations do not apply in the province. Currently there is only one such agreement in place, this being the 1994 Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta.

Given the potential need for businesses to comply with both federal and provincial environmental laws, lawyers must always be aware when providing advice on a specific environmental issue that federal as well as provincial requirements may be relevant and applicable. In addition, municipal requirements should be considered, as municipal governments are increasingly involved with respect to environmental issues.

1. Provincial Governments

Notwithstanding overlapping or concurrent jurisdiction over the environment, the provincial governments (rather than the federal government) have traditionally enacted the majority of environmental legislation. The principal environmental statutes in British Columbia are the Environmental Management Act, S.B.C. 2003, c. 53 (the "EMA") and the Environmental Assessment Act, S.B.C. 2002, c. 43 (the "BCEAA"). The EMA regulates the introduction of waste into the environment and contains provisions governing the management of "hazardous wastes" and hazardous waste facilities, municipal waste, and contaminated sites. The EMA also includes "clean air provisions", which address air pollution. The BCEAA prohibits the undertaking or carrying on of any development that is defined as a "reviewable project" without (in most cases) first obtaining an environmental assessment certificate. This Act is discussed in further detail in §12.46.

It is necessary when advising clients not only to consider the EMA and BCEAA, but to thoroughly canvass other enactments as there are a number of other statutes touching on environmental matters that may apply in a given situation. The main B.C. statutes to consider when providing environmental advice are identified and summarized in Part 1 of Schedule B to this chapter. Care should be exercised when relying on the Schedule however, as there may be other applicable provincial statutes. It should be kept in mind that the environmental legislation of other
provinces or other jurisdictions will be relevant when providing advice to corporations that conduct business or own property outside British Columbia.

2. Federal Government

The principal federal environmental statutes are the Fisheries Act, R.S.C. 1985, c. F-14 and the CEPA. The Fisheries Act affects businesses that release substances (intentionally or otherwise) in or near fish-bearing waters or undertake work that could affect "fish habitat". Both the Fisheries Act and CEPA are discussed in further detail below.

Lawyers should be aware of the Transportation of Dangerous Goods Act, 1992, S.C. 1992, c. 34 (the "TDGA") and the Canadian Environmental Assessment Act, S.C. 1992, c. 37 (the "CEAA"), as these statutes also have a broad application. The TDGA applies to those businesses that have operations involving the movement of "dangerous goods", a term that includes many types of substances (for example, transportation of substances to a purchaser following their manufacture or to a treatment or disposal facility following their use in an industrial process). The CEAA, as discussed in further detail below, requires an environmental impact assessment for certain projects or activities when the federal government is involved.

The principal federal statutes that should be considered when advising clients are identified and summarized in Part 2 of Schedule B to this chapter. Care should be exercised when relying on the Schedule as there may be other unlisted federal statutes that might apply in a particular situation.

3. Local Governments

Cities, towns, and villages are creations of provincial governments and, accordingly, their involvement in environmental regulation is determined by provincial legislation. Although the role of local governments in environmental regulation has historically been quite limited, the role of municipalities with respect to environmental matters is expanding. For example, British Columbia's relatively new Community Charter, S.B.C. 2003, c. 26 provides specific power to local governments to pass (with some restrictions) bylaws for the protection of human health or the environment. In addition, the EMA provides the Greater Vancouver Regional District with the authority to control the introduction of air contaminants in Greater Vancouver (see Air Quality Management Bylaw No. 937, 1999).

Canadian courts have confirmed that municipalities may pass bylaws regulating the environment, provided provincial law delegates to them sufficient powers. See, for example, 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Ville), 2001 SCC 40 and Croplife Canada v. Toronto (City) (2005), 254 D.L.R. (4th) 40 (Ont. C.A.), leave to appeal dismissed [2005] S.C.C.A. No. 329 (QL), in which the courts upheld municipal bylaws regulating the use of pesticides.

III. Sources and Types of Liability

A. Introduction
Lawyers are often called upon to advise clients about potential sources and types of environmental liability. Liability with respect to environmental matters arises in numerous ways. For example, there are:

(1) statutory provisions that create environmental offences (for example, regulatory offences);

(2) statutory provisions that create administrative remedies (for example, remediation orders);

(3) statutory provisions that create civil liability (for example, claims for remediation costs);

(4) common-law causes of action (for example, negligence and nuisance); and

(5) contractual provisions that give rise to liability (for example, covenants to comply with environmental laws and indemnities).

These types of environmental liabilities might arise in any number of circumstances. Moreover, as described in further detail below, in addition to the entity directly involved in the polluting activity, other persons (such as corporate shareholders or individuals in their capacity as directors, officers, or shareholders of a corporation) may be faced with environmental liability.

B. Regulatory Offences

1. Absolute and Strict Liability Offences

An environmental or regulatory offence may be either an "absolute" or a "strict" liability offence. An absolute liability offence is one for which there is no requirement for fault and, accordingly, the offence is not contingent upon the defendant intending to break the law or being reckless with respect to breaking the law. A person commits an absolute liability offence simply by performing the prohibited act. A strict liability offence requires that the prohibited act be performed, but makes available the defence of "due diligence". As articulated by Dickson J. in R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299 at 1326, strict liability offences are:

Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

Accordingly, in prosecuting a strict liability offence, the Crown has only to prove beyond a reasonable doubt that the defendant performed the prohibited act. To successfully defend a prosecution, the accused must establish that they acted diligently in performing to the expected standard of care in the circumstances (i.e., were duly diligent) or that they were honestly and reasonably mistaken as to certain
facts and these mistaken facts, if true, would entitle them to an acquittal. Defendants bear the onus of establishing the defence of due diligence on a balance of probabilities.

R. v MacMillan Bloedel Ltd., 2002 BCCA 510 contains a useful discussion on the differences between the two types of due diligence defence and the role foreseeability plays in each. Speaking first about the "reasonable mistake of fact" aspect of the defence, Smith J.A. stated at para. 47:

[T]here are two alternative branches of the due-diligence defence. The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event".


2. Defence of Due Diligence

a. Defence of Reasonable Care


In R. v. Bata, three directors were charged under Ontario environmental legislation for failing to take reasonable care to prevent an unlawful discharge of chemical waste. In order to assess their defence of due diligence, Ormston J. considered the following questions (at 287–288):

(a) Did the board of directors establish a pollution prevention "system" ... i.e., was there supervision or inspection? Was there improvement in business methods? Did [the directors] exhort those [they] controlled or influenced [to an accepted standard of behaviour]?

(b) Did each director ensure that the corporate officers have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substantial non-compliance to the board in a timely manner?
Ormston J. continued, reminding himself that:

(c) The directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation, but are justified in placing reasonable [emphasis in original] reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.
(d) The directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties, including shareholders.
(e) The directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks.
(f) The directors should immediately and personally react when they have notice the system has failed.

Finally, the judge stated:

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.

These questions and statements establish a profile for assessing whether directors have been diligent. The profile also assists in determining the factors that would be considered in assessing whether a company has been duly diligent. Directors should keep contemporary written records of activities in order to be able to establish due diligence in the event it becomes necessary to do so.

For a recent application of the test set out in R. v. Bata, see R. v. Weyerhaeuser Canada Ltd., 2000 BCPC 227, which involved charges under the Fisheries Act. The corporation was found not guilty on all counts because it had established an environmental management system to prevent the commission of the offences and had taken reasonable steps to ensure that the system was operating effectively. In other words, the corporation had acted in a diligent fashion.

b. Defence of Mistake of Fact

For an example of a case in which the defence of a "reasonable mistake of fact" was successful, see R. v. MacMillan Bloedel, 2002 BCCA 510. The defendant in that case had been charged under the Fisheries Act for unlawfully depositing a deleterious substance in waters frequented by fish. Fuel had leaked from pipes at one of the defendant's facilities. When alerted to the possibility of a leak, the defendant uncovered the pipes and inspected them, concluding that there was no leak. The defendant believed the pipes to be in good condition. Although a leak had in fact occurred, it was not caused by ordinary corrosion of the pipes. Rather, it had been caused by microbiological corrosion. The majority of the Court of Appeal concluded that, given the cause, the leak was not reasonably foreseeable. Accordingly, the defendant was honestly and reasonably mistaken as to certain facts (i.e., the pipes were in good condition) and these mistaken facts, if true, would entitle it to an
acquittal. Accordingly, the court held that the defendant had been properly acquitted.

3. **Sentencing**


In R. v. Alpha, the trial judge imposed a sentence of 21 days' imprisonment for the principal of a company that had introduced refuse outside the area of its landfill permit and into the environmentally sensitive Burns Bog in Delta, British Columbia. The company was fined $250,000 and was ordered to pay $390,000 in profits gained from the commission of the offence. The principal (the "directing mind" of the corporation) was personally fined $75,000. On appeal, the fines were upheld but the prison sentence was struck down as excessive in the circumstances. The court reasoned that although the principal's conduct was deliberate, her moral culpability was not sufficiently egregious.

For a discussion of sentencing principles, see the decision of the Alberta Court of Appeal in R. v. Terroco Industries Ltd., 2005 ABCA 141. The court in this case identified the following principles as relevant to sentencing for environmental offences:

1. **Culpability.** The dominant factor in sentencing is culpability. Consideration will be given to whether the act constituting the offence was intentional or unintentional. In circumstances where the act was unintentional, consideration will be given to the degree of due diligence exhibited by the offender and whether that person was reckless or careless. Due diligence will be assessed on a sliding scale. The more diligent the offender, the lower the possible sentence; the less diligent the offender, the higher the possible sentence. Aggravating factors include the failure to take inexpensive steps to avoid environmental harm.

2. **Prior record.** A prior record or evidence of prior warnings by the authorities may be an aggravating factor as these can be indicative of the offender's preference for profits over regulatory compliance.

3. **Responsibility and remorse.** Acceptance of responsibility and remorse for the offence are significant considerations, but are accorded less weight if the offender has a prior record. Voluntary payment of damages to injured parties is an example of a mitigating factor.
(4) Damage and harm. The existence, potential, duration, and degree of harm or damage caused by the offence are relevant factors for sentencing. For example, the cost of repairing the damage resulting from an offence (such as remediating contaminated soil) is a factor in determining the extent of the harm caused to the environment by the offender.

(5) Deterrence. Sentences should have the effect of deterring the offender (i.e., specific deterrence) and deterring others in the business community (i.e., general deterrence). Fines, for example, should be not so low as to be regarded by industry participants or the offender as a licensing fee for illegal activity or the cost of doing business, but should not in the majority of cases result in the individual offender being rendered economically unviable.

It should be noted that the court in R. v. Terroco emphasized that there is no fixed formula for determining appropriate sentences.

Lawyers should be aware that, in addition to traditional penalties and fines, environmental statutes include a number of "creative sentencing" provisions. Subsection 127(1)(e) of the EMA, for example, allows a court to direct a person convicted of an offence to pay an amount of money to the Habitat Conservation Trust Fund, see R. v. Snowline Enterprises Ltd., 2004 BCPC 244. In addition, some creative sentencing provisions, such as s.79.2(c) of the Fisheries Act and s. 127(1)(h) of the EMA, allow a court to order a person convicted of an environmental offence to publicize the facts relating to the commission of that offence.

C. Administrative Orders

Several environmental statutes include provisions that grant regulators the authority to issue administrative orders to corporations or individuals. These orders may require a person to take action to prevent or control pollution or to remedy the effects of contamination. For example, s. 38(6) of the Fisheries Act authorizes a fisheries inspector to issue directions to persons who cause or contribute to the release of certain pollutants. Remediation orders issued under s. 48 of the EMA are another example. Generally, there is no due diligence defence available in respect of administrative orders.

Administrative monetary penalties ("AMPs") are a type of administrative order designed to avoid the often complex, costly, and lengthy environmental prosecution process, especially in respect of less serious offences. AMPs are included in the EMA. Pursuant to s. 115 of the EMA, a director designated under the Act may require a person to pay an AMP if satisfied, on a balance of probabilities, that the person has contravened a prescribed provision of the EMA (or its regulations) or has failed to comply with an order, permit, or approval issued or given under the Act. This is a lower standard of proof than the Crown must meet in the case of a charge under the EMA (i.e., beyond a reasonable doubt). Regulations setting out the details of the AMP scheme under the EMA have yet to be enacted. These regulations will specify whether the defence of due diligence will be available to avoid an AMP.

D. Civil Liability

1. Statutory Causes of Action
a. **General**

Environmental statutes often contain provisions that allow those who have suffered damage as a result of an environmental incident to sue the party responsible for the incident. These statutes often also include provisions that authorize regulators to remedy environmental impacts and recover the costs of this remedial work from those who are responsible.

b. **Federal Statutory Causes of Action**

Subsection 42(3) of the Fisheries Act, for example, includes a statutory right of action allowing commercial fishers to recover any income lost as a result of an unauthorized deposit of a deleterious substance in water frequented by fish. In addition, under s. 42(1), the federal government is entitled to recover any clean-up costs it incurs in respect of the deposit of a deleterious substance in water frequented by fish. Persons who may be liable under these sections of the Fisheries Act are those who own or who had charge, management, or control of the substance, or those who caused or contributed to its deposit. The CEPA also provides several statutory causes of action; see, for example, s. 98.

c. **Provincial Statutory Causes of Action**

The EMA provides several statutory causes of action. For example, s. 80 of the Act allows the provincial government to carry out actions necessary to address spills and to recover the costs of carrying out these "spill response actions" from those who had possession, charge, or control of the substance that was released. Similarly, s. 88 of EMA allows the government to respond to environmental emergencies and recover the associated costs from any person whose act or omission caused (or any person who authorized) the events that resulted in the emergency.

One of the most significant statutory causes of action in provincial environmental legislation in terms of its impact on commercial transactions is found in s. 47 of the EMA, commonly referred to as the "cost recovery action". This provision allows any person (including a government body) who incurs costs in carrying out remediation at a contaminated site to pursue in court the recovery of these costs from those who are defined by the EMA as responsible persons for the contamination. A more detailed discussion of contaminated site issues is provided in §12.52ff. It is important for lawyers to recognize that liability for remediation of contaminated sites may arise many years after the sale of a property or the expiry of a lease. Liability can also arise notwithstanding that the introduction of the contaminating substances into the environment was not prohibited by law or was authorized by a permit or approval. For examples of decisions involving cost recovery actions see Workshop Holdings Ltd. v. CAE Machinery Ltd., 2005 BCSC 631, and Canadian National Railway Co. v. A.B.C. Recycling Ltd., 2005 BCSC 647.

2. **Common-law Causes of Action**

Environmental damage to real property (for example, contamination) can result in liability under common-law causes of action. The common-law causes of action most often relied on are listed below, together with case law examples. For a description of the elements of each cause of action, see D.R. Cameron's Environmental Concerns in Business Transactions: Avoiding the Risks (Butterworths, 1993) at pp. 50–53.


Common-law causes of action continue to be relevant in the context of environmental contamination claims notwithstanding the introduction of the cost recovery action under s. 47 of the EMA, because s. 47 only permits recovery of reasonably incurred remediation costs and does not address issues such as diminution in value. Damages other than remediation costs must still be recovered based on the common-law causes of action.

It is worth noting that there is currently no legislation in British Columbia that provides for the recovery of monetary compensation for damage to the intrinsic or aesthetic (i.e., non-commercial) value of the environment. However, in British Columbia v. Canadian Forest Products Ltd., 2004 SCC 38, the Supreme Court of Canada indicated that there is nothing preventing the common law from developing in this direction. The court ultimately recognized the possibility of this type of compensation, but held that it must proceed cautiously and that the pleadings and evidence in Canadian Forest Products did not support such a claim.

3. Liability under Contractual Provisions

Contracts often include provisions that give rise to environmental liabilities. For example, many leases include environmental requirements that the tenant must comply with. These requirements will often be more stringent than the requirements that would apply under environmental laws (for example, remediation may be required to a higher standard than under applicable laws). Such leases will often include an environmental indemnity from the tenant to the landlord with respect to environmental issues created by the tenant and that indemnity will generally survive the termination of the lease. Another example of contractual provisions that may give rise to liabilities of an environmental nature are indemnities in transaction agreements. A vendor of real property or a business may agree to indemnify the purchaser in the event that the purchaser becomes liable to a third party for environmental problems that were in existence prior to the transfer of the property or business.
It is important to review applicable contracts when advising a client on potential exposure to environmental liability. It is also important in virtually any transaction to consider environmental exposure under existing contracts. For example, in an asset transaction where the purchaser is taking an assignment of a lease, the purchaser's counsel should consider whether the lease will require the tenant (i.e., the purchaser) to remediate all contamination from the commencement of the term. If so, purchaser's counsel should consider that requirement in light of the scope and time limits on the vendor's environmental indemnity in the transaction agreement.

Contractual provisions are discussed in further detail at §12.63ff.

IV. Director and Officer Liability

A. Introduction

Directors and officers may incur the following types of personal liability for environmental damage:

(1) prosecution for offences under federal and provincial statutes;

(2) liability under administrative orders (for example, orders issued under the EMA to remediate contaminated property); and

(3) civil liability (for example, pursuant to statutory or common-law causes of action).

B. Liability for Environmental Offences

There are three ways in which a director or officer may become liable for an environmental offence:

1. Liability as Principal

Like any person, including a corporation, a director, or an officer may be found to have committed the offence (i.e., as "principal"). The courts have generally held that in order for a director or officer to be convicted as principal, he or she must have been directly involved in the activity that constitutes the offence. For a discussion of this type of liability see chapter 7 (Environmental Liability) in M.P. Richardson (ed.), Directors' and Officers' Duties and Liabilities in Canada (Butterworths, 1997) at p. 129. See also R. v. Varnicolor Chemical Ltd. (1992), 9 C.E.L.R. (N.S.) 176 (Ont. Prov. Div.). In this case a director of a corporation was convicted of a pollution offence based, in large part, on the fact that the director was involved in the daily operations of the corporation and was its sole "directing mind".

2. Liability as a Party to the Offence

Under s. 85 of the Offence Act, R.S.B.C. 1996, c. 338 and s. 21 of the Criminal Code, R.S.C. 1985, c. C-45, a director or officer who aids or abets the commission of an offence may be charged as a party to that offence.

3. Director and Officer Provisions
There are a number of statutory provisions that impose liability on directors and officers for their involvement in the commission of an environmental offence by a corporation. These provisions usually provide that where a corporation commits an offence, any director or officer who "authorizes, acquiesces, permits or otherwise participates" in the offence is also guilty of the offence. Examples of these types of provisions include s. 78.2 of the Fisheries Act, s. 280 of the CEPA, and s. 121(1) of the EMA. For an example of a decision in which this type of provision was considered see R. v. Alpha Manufacturing Inc., 2005 BCSC 773. In this case, a landfill operator and its sole director appealed their convictions for introducing waste into the environment. The director had been convicted and sentenced on the basis that she had authorized, permitted, or acquiesced in the commission of the offence.

Although provisions with wording similar to the "authorizes, acquiesces, permits or otherwise participates" language have been interpreted to apply to both active and passive involvement, it is likely that a prerequisite to a conviction is that the director or officer be aware of the contravention: Directors' and Officers' Duties and Liabilities, supra, at p. 133. For example, in R. v. Rogo Forming Ltd. (1980), 56 C.C.C. (2d) 31 (Ont. Prov. Ct.), the court addressed the issue of an officer or director's knowledge under an offence provision in the Income Tax Act, R.S.C. 1952, c. 148 containing the phrase "directed, authorized, assented to, acquiesced in or participated in". The court concluded that even passive participation requires proof that the accused knew of the offence and then stood aside and allowed the offence to occur without attempting to prevent it.

Some statutory provisions such as s. 280.1 of the CEPA go beyond the "authorizes, acquiesces, permits or otherwise participates" language and impose a positive obligation on directors and officers to take all reasonable efforts to ensure that the corporation complies with the legislation. Under these types of provisions a director or officer can be charged regardless of whether another section of the Act has been breached or an offence committed.

C. Due Diligence Defence


D. Administrative Orders

As outlined in §12.15, environmental regulators may issue administrative orders to corporations or individuals ordering them to take action to prevent, control, or remediate contamination or pollution. Such orders may, in some cases, be issued to the directors or officers of a corporation. For example, under s. 38(6) of the Fisheries Act, an inspector may direct certain persons to take measures to counteract, mitigate, or remedy the adverse effects of a deposit of a deleterious substance in water frequented by fish. The persons who can be named in a direction under this section are those who own or have charge, management, or control of the deleterious substance or who cause or contribute to the deposit. In certain cases, this could include the directors or officers of a corporation.
At the provincial level, under the EMA, remediation orders in respect of a contaminated site may be issued to those who are defined by the EMA as responsible persons for the contamination, including current and former owners and operators of the site. The terms "owner" and "operator" are defined to include persons who controlled or had the right to control the contaminated site and persons who controlled or were responsible for any operation located at the site. Directors and officers are included in the definition of "person". While not common, remediation orders have been issued against directors. See for example the British Columbia Environmental Appeal Board's (the "EAB") decision in Lawson v. British Columbia (Ministry of Water Land and Air Protection), [2001] B.C.E.A. No. 35 (QL) (E.A.B.).

In Lawson, Mr. Lawson appealed his being named as a person responsible for contamination in a remediation order issued under the Waste Management Act, R.S.B.C. 1996, c. 482 (the "WMA"), predecessor to the EMA. The remediation order applied in respect of contamination on and adjacent to property that had been used by various companies. Mr. Lawson had served as director and officer of one of these companies, Globe West Products Inc. Mr. Lawson argued that he could not be a responsible person under the Act because there was no evidence that he caused any contaminants to be mishandled or any person to fail to exercise due diligence with respect to the property. The EAB rejected Mr. Lawson's argument. The EAB was satisfied that the Act was clear that directors and officers could be held responsible for remediation. And, with respect to causation, the EAB stated that there does not need to be a causal link between contamination at a site and the directors or officers in order for those persons to be responsible for remediation. It should be noted that this finding was not necessary to the EAB's decision, because the Board had come to the conclusion that the site had in fact been contaminated during Globe West's tenure.

E. Civil Liability

Directors and officers can potentially have civil liability arising under common law or statutory causes of action in relation to environmental matters. With respect to common-law causes of action (that is, those based on negligence, nuisance, trespass, or strict liability), the courts have generally been unwilling to find a director or officer liable unless that person ordered or participated in the complained-of activity in a knowing, deliberate, and wilful manner; see Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1994), 15 B.L.R. (2d) 160 (Ont. Gen. Div.), varied (1995), 129 D.L.R. (4th) 711 (Ont. C.A.). With respect to statutory causes of action, as discussed above, environmental statutes often include provisions that allow persons who have suffered damage to sue the party responsible and provisions that authorize government regulators to address environmental damage and charge the costs of this remedial work to the persons responsible. Depending on the wording of the relevant provision, this might in some cases include directors or officers.

F. Measures to Reduce Risk

To minimize the risk of being prosecuted for an environmental offence, becoming the subject of an administrative order, or being found civilly liable pursuant to a statutory or common-law cause of action, directors and officers should (to the extent possible) avoid becoming involved in the day-to-day operations of the corporation. For example, directors and officers should (if able to) avoid making direct decisions with respect to specific environmental issues.
In addition, directors and officers should, taking into account the corporation's nature and scale, consider implementing an "environmental management system" ("EMS"). As indicated in R. v. Bata Industries Ltd. (1992), 9 O.R. (3d) 329 (Prov. Div.), sentence varied on appeal (1993), 14 O.R. (3d) 354 (Gen. Div.), varied (1995), 25 O.R. (3d) 321 (C.A.), a key element of a successful due diligence defence is the implementation of an EMS. Having such a system in place will reduce the risk of non-compliance with environmental statutes and, if an incident does occur, the system will help the corporation and its directors and officers to establish a due diligence defence in the event of a prosecution. Further, an EMS may supply a defence to civil liability by, for example, establishing that the directors have not been negligent. For a useful discussion on the development of an EMS and the steps that directors and officers may take to ensure they exercise reasonable care while performing their duties, see Directors' and Officers' Duties and Liabilities, supra, at pp. 150–152. It is critical for directors and officers to ensure follow-up on environmental problems that are identified and to verify that the EMS is working properly (for example, through regular audits).

G. Indemnities and Insurance

1. Indemnities

The corporate statutes of most jurisdictions have codified the common-law principle that permits corporations to indemnify directors and officers. Taken together, ss. 160 and 163 of the Business Corporations Act, S.B.C. 2002, c. 57 (the "BCA") provide that a corporation that is incorporated under the laws of British Columbia may indemnify a director or officer against certain penalties or legal expenses. Directors and officers can only be indemnified if they acted honestly and in good faith with a view to the best interests of the company and, in the case of a criminal or administrative action or proceeding, the director or officer had reasonable grounds for believing that his or her conduct was lawful. It is no longer necessary for a corporation to obtain court approval before indemnifying a director or officer, unless it was that corporation (or one of its affiliates) that brought the legal proceeding against the director or officer. See the BCA, ss. 164(a) and (b) and 163(2) for details.

The jurisdiction of a court to prevent a corporation from indemnifying a director or officer as an aspect of a sentence was considered in R. v. Bata Industries Ltd. (1995), 25 O.R. (3d) 321 (C.A.). As discussed in §12.12, charges were brought against a corporation and three of its directors under Ontario environmental legislation in respect of an unlawful discharge of chemical waste. In addition to imposing fines, the trial judge made it a term of the corporation's probation order that it was prohibited from indemnifying the two directors that were also convicted. The Ontario Court of Appeal ultimately struck this term from the probation order. The term was aimed at the directors in an attempt to ensure that they were punished. According to the Court of Appeal, this was inappropriate as it was the corporation, not the directors, that was subject to the probation order and to be punished by it. The court noted that it is the Ontario Business Corporations Act that governs the extent to which a company is prohibited from indemnifying its directors, and the trial judge should have consulted this statute.

In light of some of the limitations on the scope of director and officer indemnities in the corporate legislation and to increase the financial support for the indemnity,
some directors and officers will seek a broad indemnity from a shareholder in addition to the indemnity provided by the corporation of which they are a director or officer.

2. **Insurance**

Most corporate statutes in Canada permit corporations to obtain insurance for the benefit of directors and officers. For B.C. corporations, the relevant provision is s. 165 of the Business Corporations Act. It is usually not a condition of coverage that the director or officer act in good faith with a view to the best interests of the corporation, although most insurance contracts will not cover losses that are incurred through the dishonesty of the insured.

There are two types of insurance coverage in this area:

1. coverage for the directors and officers in respect of acts which may give rise to personal liability and for which the corporation chooses not to or is unable to provide an indemnity; and

2. coverage for the corporation to cover its expenses and losses in connection with the corporation's indemnification of directors or officers: see Directors' and Officers' Duties and Liabilities, supra, at p. 302.

Lawyers should be aware that most insurance policies exclude coverage for fines and penalties. Each insurance policy should be reviewed carefully to determine the precise nature of the coverage.

V. **Shareholder Liability**

A. **Introduction**

Shareholders of a corporation may be liable in the following ways for environmental damage caused by a corporation:

1. prosecution for offences under federal and provincial statutes;

2. liability under administrative orders (for example, orders to remediate contamination under federal and provincial environmental legislation); and

3. civil liability (for example, pursuant to statutory or common-law causes of action).

B. **Offence Provisions**

Shareholders are potentially vulnerable to the environmental offence provisions contained in federal and provincial statutes in the same manner as directors and officers. However, a court would not likely impose liability on shareholders unless circumstances existed which would allow the court to pierce the corporate veil at common law (which is relatively rare) or where the shareholder was directly involved in the activities that constituted the offence.
C. Administrative Orders

As is the case with directors and officers, administrative orders may be issued to shareholders. For a discussion of the level of control over an activity necessary to trigger shareholder liability see the Ontario Environmental Appeal Board’s decision in 724597 Ontario Inc. v. Ontario (Minister of Environment and Energy), [1994] O.E.A.B. No. 17 (QL). See also Beazer East, Inc. v. British Columbia (Environmental Appeal Board), 2000 BCSC 1698, which confirmed that although a parent corporation will not be found liable for a site contaminated by a subsidiary solely on the basis of its share ownership, it may be found liable on the basis that it exercises (or exercised) a degree of control over the subsidiary's operations at the site.

Beazer concerned a remediation order issued under the WMA by the Ministry of Environment in respect of property located along the Fraser River in Burnaby, British Columbia (the "Site"). The parties identified as responsible under the order included CN Rail (as prior owner of the Site) and Beazer East, Inc. (as a prior owner and operator of the Site). The Site was contaminated as a result of a wood treatment operation carried on at the location from 1931 to 1982. Throughout this period, the Site was owned by CN Rail and was leased to the operator of the wood treatment business (the "Principal Operator"). From 1969 to 1988 Beazer was the parent company of the Principal Operator.

The B.C. Supreme Court overruled the EAB's decision that Beazer was a "previous owner" of the Site, reasoning that notwithstanding the fact that a parent corporation may have de facto control over the use of a subsidiary's assets (i.e., through effecting a change in directors), it does not have the legal right to control the use of such assets. (It is important to emphasize that the court was considering only one aspect of the definition of "owner" under the WMA, not the entire definition.)

The court, however, upheld the EAB's conclusion that Beazer was a "previous operator" of the Site on the basis that a person who makes decisions with respect to an operation is in control of the operation, and a person who has the authority to make decisions with respect to an operation is responsible for the operation. The evidence relied on by the EAB to conclude that Beazer was in control of an operation at the Site included:

1. its extensive financial control over the Principal Operator (for example, the budget of the Principal Operator required Beazer's approval);
2. the organizational and decision-making structures in place (for example, a Beazer executive played an active role in managing the operations of the Principal Operator and Beazer regarded the subsidiary as a "division");
3. the control of Beazer over the lease of the Site (Beazer's approval was required for the Principal Operator to enter into new leases with CN Rail); and
4. the involvement of Beazer in the environmental affairs of the Principal Operator (for example, a member of Beazer’s law department played an active role in monitoring the conduct of environmental charges laid against the Principal Operator).
D. Civil Liability

Shareholders are potentially vulnerable to civil liabilities arising under statutory or common-law causes of action. Liability would, however, likely arise only where the shareholder participated directly in the damaging activity or could be said to have exercised charge, management, or control over the polluting substance.

E. Measures to Reduce Risk

Shareholders should (to the extent possible) avoid becoming involved in the day-to-day operations of the corporation. Subsidiaries should operate as independently as possible from parent corporations. The risk of shareholder liability will be reduced by avoiding total duplication of directors and officers at the parent and subsidiary levels. Corporate forms and requirements applicable to the subsidiary should be observed (for example, separate directors' meetings). Decisions regarding the subsidiary should be made at meetings of the directors of the subsidiary and documented separately. Separate financial arrangements should be maintained. Parent company personnel who become involved in the subsidiary's business operations (for example, corporate environmental managers) should, to the extent possible, do so as advisors or consultants to the subsidiary or in some other similar capacity rather than as employees of the parent corporation.