

# Licensed Engineering Practitioners' Liability Under the New EASR

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# Outline

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- **New Environmental Approvals Process – Environmental Activity and Sector Registry**
- **Consultant Liability**
- **Consultant's Insurance Requirements**

# MOVING TO THE ENVIRONMENTAL ACTIVITY AND SECTOR REGISTRY (EASR)

# EASR

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- **All but high risk sectors and activities register on EASR**
- **ESDM, AAR and other reports are no longer submitted to the MOECC for review by approvals engineers**

# EASR

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- **Requires reports to be prepared by a “licenced engineering practitioner”**
  - an engineer or scientist , and
  - holds a licence, limited licence or temporary licence under the *Professional Engineers Act*
- **Engineer must stamp and ‘sign off’ on**
  - technical reports (ESDM, AAR, NAAP)
  - addendums certifying no significant changes

# EASR

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## Concerns?

- **Engineers may be responsible if**
  - inaccuracies in application
  - facility fails to meet air or noise standards
  - mitigation measures are ineffective
- **Engineers rely on information provided by the client or others**
- **Exposure to potential liability**

# CONSULTANT LIABILITY



# Consultant Liability

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## Three types:

- **Professional Licensing Liability (PEO Disciplinary proceedings)**
- **Regulatory (Orders and Prosecutions)**
- **Civil Claims (Lawsuits)**



# PROFESSIONAL LICENSING LIABILITY (PEO DISCIPLINARY PROCEEDINGS)

# Professional Licensing Liability

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- **Professional Engineers Ontario licences engineers and qualified parties to practice in Ontario**
- **Full Licence:**
  - undergraduate degree from accredited university
  - 48 months of engineering experience under a Canadian P.Eng
  - complete the Professional Practice Examination
- **Limited Licence:**
  - 3 year degree or diploma in engineering, technology or science
  - at least 8 years of specialized experience (with at least 4 years under a Canadian P.Eng.)
  - limited to providing the services set out in the limited licence
  - complete the Professional Practice Examination

# Professional Licensing Liability

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- ***Professional Engineers Act***
  - ensure the public is protected and engineers are held of to code of professional ethics and conduct
  - powers to:
    - licence
    - discipline (professional misconduct)
    - investigate complaints (unprofessional, inadequate or incompetent services)
    - conduct dispute resolution hearings
    - create performance standards

# Professional Licensing Liability

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- **Discipline can include:**
  - revoke licence
  - suspension up to 24 months and fine up to \$5,000
  - limits on professional work
  - require technical exams
  - publish disciplinary proceedings
- **Usually involves a full hearing**
- **Standard of Proof is balance of probabilities**

# Professional Licensing Liability

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- **Who can make a complaint / initiate a disciplinary process?**
  - PEO
  - Clients
  - Engineers
  - Members of the public
  - MOECC
  - Courts, Boards and Tribunals

# Professional Licensing Liability

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- **Regulation 941 – Code of Ethics**

- it is the duty of a practitioner to the public, to the practitioner's employer, to the practitioner's clients, to other licensed engineers of the practitioner's profession, and to the practitioner to act at all times with,
  - fairness and loyalty to the practitioner's associates, employers, clients, subordinates and employees;
  - fidelity to public needs;
  - devotion to high ideals of personal honour and professional integrity;
  - knowledge of developments in the area of professional engineering relevant to any services that are undertaken; and
  - competence in the performance of any professional engineering services that are undertaken.

# PEO Disciplinary Proceedings

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## Case #1

- **Engineer and engineering firm faced numerous allegations:**
  - incompetence, professional misconduct, negligence, breaching the code of ethics, acting in a way that was disgraceful, dishonourable or unprofessional, permitting a person to who is not licenced to engage in engineering
- **Firm retained to review existing environmental reports for a new property owner**
- **Peer review of environmental reports and assessment of the environmental condition was signed by the head of planning (not a professional engineer)**
- **Discipline Committee held the engineer and the firm guilty of professional misconduct**

# Prosecutions

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## Case #2

- **Samples taken on site indicated levels of PCBs**
- **Consultant told the MOECC that all PCB results were non-detect**
- **Convicted of providing false and misleading information to MOECC Provincial Officers**
- **Consultant, company fined \$45,000, President personally fined \$9,000 and one year probation on working in the business of environmental consulting**



# PEO Disciplinary Proceedings

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## Case #2

- **Following prosecution, case brought before PEO Discipline Committee**
- **Engineer and engineering firm guilty of professional misconduct**
- **Engineer was the person responsible for reviewing all environmental reports**
  - did not perform site work, author or sign report
  - report had been issued without his review or knowledge

# PEO Disciplinary Proceedings

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## Case #2

- Professional misconduct was made out against the firm based on the finding of guilt under the *EPA*
- Engineer was not charged by MOECC, but was found guilty of professional misconduct – failed to exercise appropriate supervision or direction

# REGULATORY LIABILITY



# Regulatory Liability

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- **Arises where contravention of legislation or regulation**
- **Legislation provides for a range of punishment – fines, imprisonment**
- **Crown must prove the offence beyond a reasonable doubt**
- **Defenses include due diligence to prove on a balance of probabilities**
- **There have been a handful of prosecution against consultants**

# Prosecutions

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## Case A

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

# Prosecutions

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## Case B

- **Wells were constructed and abandoned on client's property by an unlicensed well technician**
- **False or misleading information was given to MOECC**
- **Consultant, company, and client received fines totaling approximately \$200,000 plus 25% VFS**
  - Consulting company and its Director fined a total of \$161,000 plus 25% VFS

# Prosecutions

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## Case B

- **Consultant company and Director appealed 2011 convictions and \$161,000 (plus VFS) in fines**
- **Following new trial, engineer and firm found guilty of three offences under OWRA for providing false or misleading information to MOECC**
- **Engineer and firm fined a total of \$45,500 plus 25% VFS**

# Prosecutions

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## Case C

- **Property owner was ordered by the MOECC 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 MOECC indicating that the consulting firm was retained pursuant to the Order**
- **Consultant pleaded guilty and was fined \$7,500 plus 25% VFS**



# CIVIL CLAIMS (LAWSUITS)



# Civil Liability

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- **Dispute between private parties**
  - breach of contract
  - negligent acts that cause harm to others
  - negligent misrepresentation
- **Plaintiff must prove its claim on a balance of probabilities**
- **Insurance is critical (defence costs and damages)**

# Lawsuits - Contract

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- **Consultant breaches contractual requirements**
- **Remedies**
- **Avoid by**
  - understanding the scope of work
  - having written agreements
  - documenting expectations and instructions

# Lawsuits - Contract

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## Case D

- **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"**

# Lawsuits – Contract

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## Case E

- **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**

# Lawsuits – Contract

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- **In deciding whether to give effect to a limitation/exclusion clause, court considers:**
  1. Whether the parties intended at the time of contract that the exclusion clause would apply in these circumstances
  2. Whether the clause was unconscionable at the time the contract was made
  3. Whether an overriding public policy would preclude its enforcement

# 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 work plans (tasks, timing and costs) designs, and reports**
- **Inadequate review of information or preparation of analysis**
- **Failed supervision and/or inspection of the work**
- **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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## Case F

- **Consultant reported that the property was not contaminated**
- **MTO purchased the property for fair market value**
- **MTO excavated and discovered contamination**
- **MTO sued consultant 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 was entitled to clean up costs to complete the 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**

# *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**
- **Important to consider early on when investigating a claim against a consultant**
- **Limitations defense may be the best answer to a claim**

# INSURANCE



# Insurance – *Professional Engineers Act*

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- **Requires holders of certificates of authorization to hold professional liability insurance**
- **Minimum coverage of \$250,000 per claim and \$500,000 per year aggregate**
- **Maximum deductible of \$5,000 or 5% of annual fees billed in the previous 12 months**
- **Coverage for errors, omissions and negligent acts**

# 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**

# Insurance – O. Reg. 153

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

# Insurance – Reg. 903

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- **Well contractors must maintain insurance**
- **Minimum of \$2,000,000 each for**
  - property damage, per incident
  - death or bodily injury, per individual



# Insurance - EASR

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- **There are no requirements under O. Reg. 1/17 to obtain insurance**
- **Engineers will require insurance under *Professional Engineers Act***

# Practice Tips

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- **Ensure you understand your role and duties at the outset**
- **Consider relevant facts and do not go beyond expertise**
- **Communicate information gaps that must be filled to form an opinion**
- **Do not act as an advocate**
- **Ensure that any information you rely on is from a reputable and reliable source**

# Contact Information

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