MUNICIPAL ISSUES IN ENVIRONMENTAL LAW

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I don't need to tell this group that environmental issues have grown in significance and breadth exponentially over the last decade. When I switched my practice to environmental law in 1988, few people realized or appreciated the issues that we were about to face. They are many; the issues associated with them are complex; and the solutions are not always clear.

A. A REFRESHER COURSE IN BASIC SOURCES OF LIABILITY

You need to know that there are three major kinds of liability that would concern an municipality. The first type is liability that arises at **"common law"**; that is under the heads of liability that have developed in our jurisprudence over the centuries. I'll mention some of the categories in a minute. The second type is **civil** liability that arises under legislative **statute,** whether federal, provincial or municipal. I'll give some examples of this type too shortly. And the third type is **criminal or quasi-criminal** liability that arises under legislative statute - for which the Crown prosecutes the alleged offender in criminal Court or in Provincial Offences Court. I'll explain why this type of liability is of concern too.

I. COMMON LAW LIABILITY

The first type that I mentioned, Common Law liability includes many categories that you are very familiar with. They include:

> **Negligence** - Where someone had a duty to take care so as to avoid causing harm to another, and failed to take that care, they may become liable for damages caused, under the head of negligence. Thus, if a dangerous substance is brought onto someone's property, or used in an operation, and through negligence it causes harm to anyone, then there will possibly be liability on the part of the landowner, the occupant, the person bringing the substance onto the land, other handlers of the substance, and in some circumstances, the distributor and manufacturers of the substance or of components of the substance. The exact liability issues would depend on the particular case, but you can see that the net may be cast very widely. Outcomes would depend on whether the various parties were found to have a duty to the party who was ultimately harmed, whether causation could be proven,

whether the various parties had discharged their obligations to take due care, and whether the harm caused was "reasonably foreseeable".

Examples of liability in negligence include a chemical manufacturer from whose operation toxic chemicals escaped into the surrounding soil and groundwater, ultimately contaminating the municipal drinking aquifer and neighbour's lands; a government body who knew that soil was contaminated with radioactive substances in a residential neighbourhood, but did not advise anyone that it was unsafe to build in the area, and a party whose disposal of pesticide waste resulted in personal injuries to neighbouring residents.

Nuisance - Where someone unreasonably interferes with another's use and enjoyment of property, liability in nuisance may be established. Nuisance does not require proof of personal injury, and it is not a defence to say the offending operation was in place before the complainant established their own use. (Because of this, many provinces including Ontario have special legislation applicable to farm operations.) Recent legislative amendment under the Ontario Bill of Rights has expanded the circumstances in which action may be taken for nuisance, to include a private right of action even where the nuisance is broadly suffered by the public. Examples of nuisance include operation of an industrial facility that interferes with neighbours due to smell, noise, or emission of substances that make the neighbours nauseous. Other types of nuisance include allowing chemicals onto the neighbour's property, above or below ground, or interfering with the stability of the soil and geologic structures in the area, for example by changing a water table.

Trespass - This category has been used, for example, in cases of spraying someone else's property, and in cases of water pollution. It is not necessary to prove actual harm in order to sustain a claim in trespass.

Rylands v. Fletcher - or Escape of Dangerous Substances - This liability is named after the very old case which first established the proposition that someone who brings something onto their land which, if it escaped, would be dangerous, is responsible to ensure that it does not escape, and if it does escape is liable for the damages caused in consequence. An example of this is the one I argued in a recent case involving the constitutional validity of the federal Nuclear Liability Act. Although the point did not have to be determined for the case, I argued that nuclear power, as a "non-natural" use of the land, with its associated unique hazards, would fit into the 17th century description of liability on this ground, as being an escape of dangerous substances which would attract liability regardless of whether or not the operator was negligent. In other words, even if the operator took all of the care that they could possibly imagine, an escape of radioactive substances that harmed the public would result in liability under the common law. (The provisions of the Nuclear Liability Act are another story, and are the reason that no policy that you ever see or sell covers nuclear liability.) There have been thousands of cases under this category, including escape of chemicals, harm caused by animals, harm caused by escape of gas or water, and many others.
Recent British case law indicates that a requirement of "reasonable foreseeability" may be

imposed on Rylands claims. However, this is not yet the law in Canada.

Riparian Water Rights - Riparian water rights protect the flow of water through or by one's land in its natural state. This principle protects water quantity and quality. These rights include use for ordinary purposes, but not for "extraordinary purposes such as off-site diversion or removal.

Deceit and Misrepresentation - Latent Defects - Where there is a hazard associated with real property, and the owner knows, should know, or suspects that the hazard is present, that owner must disclose the hazard to any potential purchaser. Otherwise, the principle of caveat emptor (buyer beware) does not apply, and the purchaser can sue the vendor for damages when the hazard becomes known. This area is of great concern to insurers, because many older policies are called on to provide coverage for something that was done a long time ago, before the risks were completely understood. So, for example, in the case of a long-gone manufacturing operation, in which some of its product or waste was stored or buried and forgotten, that operation's insurer may be called upon many years later to respond to a claim arising from the harm caused by those substances. Of course the risk underwriting did not include this type of harm, which no one would have then appreciated, and especially did not include the quantum of damages which be payable to clean up a difficult contamination problem.

Restitution - Restitution may found a claim where it would be otherwise unjust for a person to retain the money or benefit in question. Someone (including a municipality) who cleans up a property for someone else's benefit may thus be able to make a successful claim for repayment.

Claims in Contract - Many agreements now, for example to buy a business, farm or other real property, include contractual provisions as to responsibility in the event of discovery of contamination on the property. Any claim should always be evaluated as to whether any such contractual provisions exist.

II. STATUTORY LIABILITY

The second type of liability that I mentioned is that of civil liability established by statute.

There are many specific examples which abound particularly in the transportation industry, nationally and internationally. Another example is the part of the Ontario Environmental Protection Act known as the "Spills Bill", which prescribes civil liability to clean up and compensate in the event of a spill.

In such cases, the duty, the responsible parties, the extent of the liability, any time limits and the potential claimants must be ascertained by reference to the particular statute.

Every municipality that has any potential for environmental damages should have a good review of their potential liability carried out, in order to ensure that they are minimizing the risks, and that they are aware of their obligations. Some industries, such as the insurance and the financial industries, are beginning to require such reviews and assessments as a condition of providing both insurance and financing. As these tools are developed, the scrutiny offered by environmental management system reviews will also benefit municipalities who are considering what types of businesses to permit in their boundaries, and what types of controls and safeguards to implement in the planning process. This is a matter of self interest because municipalities may be prevented from taking action on properties for tax arrears where there are significant environmental contamination issues, due to the fear that they will assume those liabilities. I will discuss this further in a few minutes.

Other statutory compensation programs or liabilities to note include:

- Environmental Bill of Rights (which among other things has expanded the availability of nuisance actions)
- Farm Practices Protection Act
- Environmental Compensation Corporation (for spills)
- Pesticide Residue Compensation Act (federal)
- Waste Well Disposal Security Fund (for potable water replacement)
- EPA Board of Negotiation (for damage to livestock or vegetation caused by a contaminant)
- Worker's Compensation Act
- Fisheries Loans Act
- Restitution orders following conviction under statutes or Criminal Code

There are many other examples under provincial and federal statutes.

III. CRIMINAL AND ADMINISTRATIVE LIABILITY

The third type of liability that I earlier alluded to was that of criminal or quasi-criminal and administrative liabilities. There are many, many such statutes, including Ontario's Environmental Protection Act, Ontario's Water Resources Protection Act, and their federal equivalents, and many other more specific pieces of legislation that may refer to a particular activity or industry.

These liabilities are of great concern, because in addition to liability on the part of a corporate actor, they may place liability on officers and directors; on present and prior "owners"; may authorize very, very large fines, and may authorize imprisonment of officers and directors.

Many of these statutes also authorize their responsible agencies to order activities to stop, installation of protective equipment, and clean up requirements. All of these things may be extremely expensive. The concern for a municipality is whether it could be responsible under one of these types of liabilities.

The issue of who is a "person responsible" and thus potentially liable to orders under legislation such as the Environmental Protection Act is itself the subject of much litigation. The Ontario definition is that "person responsible" means

- the owner
- the person in occupation
- the person having the charge, management or control of a source of contamination.

Among the legal tests to make this determination is whether the person has the "ability to influence" the outcome. On this test, the definition is very broad, and "control" can be established based on legal relationship, financial relationship, executive or supervisory relationship, or contractual relationship, and is not necessarily in accordance with the parties' expectations. Thus, investors who had never been directors, officers, or employees were held liable in one case after they began to make some of the key decisions about the property.

It is prudent to assume that municipalities who take action against property for example, for tax arrears, could be considered to be the "person in control" under the Ontario statute. This does not mean that you would never want to take action, but rather that you would seek specific advice and assistance before you take action, so as to proceed prudently. For example, a municipality might be able to persuade a Court to provide limited protection for inspection activity, in order to facilitate a possible remediation opportunity. Clearly it is in the public interest to provide ways for reasonable action to be taken to return abandoned properties to productive use. The municipality can explore these opportunities by obtaining protection for sufficient investigation to determine the scope of the problem, and then by attempting to market the property to investors who will take it on an "as is" basis. In some circumstances, the municipality may even decide to take on the remediation if it has assessed the cost as being reasonable for that property. I stress that this is a risk assessment exercise, and there should be no foregone conclusions that a property should remain "untouched" just because it has some sort of "environmental problem". Such problems can run the gamut from simple and inexpensive, to complex and very costly, and an informed decision must be made for each case.

Other options that may be available include the possibility that there is an insurance policy to respond to the problem; that there are guarantors of corporate liabilities; that there are other responsible parties who can be included in an action plan, or who can be required to take responsibility for clean up costs. Each situation requires its own enquiry and evaluation in this regard.

B. DEFENCES

In the event that a municipality finds itself responding to an environmental claim or action, whether due to its own properties or actions, or due to its assumption of other properties, there are various defences that may apply to specific claims. The following is a partial list of some defences that may apply.

- **Due Diligence**
  A very important topic in the area of environmental liability and defence of a quasi-criminal prosecution is that of "due diligence". These prosecutions do not need to establish that the company or its directors and officers (including municipal officers) knew of the harm that was being caused. Rather, most of these sections only require proof of the activity, and then liability is "strict". The only defence that is available, then, is to persuade the Court that the Defendant municipality has carried out due diligence. The requirements to establish due diligence are strict indeed, as interpreted by the Courts in recent years, and are imposed at the highest executive levels of small and large companies. It is necessary to establish that a "system" has been put into place to prevent the harm; that

its effectiveness has been regularly assessed; that senior management has taken personal responsibility for assurance of environmental compliance by rigorous management.

As a result of these requirements, many industries have become interested in Environmental Management reviews, where with appropriately qualified legal or consulting advice, they set up a system to ensure that these issues are properly dealt with. Since a failure to do so can, and in some cases has, resulted in personal fines and even imprisonment of senior management, the seriousness of this endeavour cannot be understated.

One difficulty that has arisen in this regard is that of assessing the quality of the system established, and this is currently about to be met in the form of the ISO 14,000 series standard of environmental management systems, and associated auditing. However, the important point is to ensure that the review of potential liabilities and appropriate protective measures has been thorough and pertinent to the operation, and that it is well-managed to ensure its effectiveness and ongoing improvement. Some insurance companies and financial institutions are indicating that this standard will be required of their more risky policies as a prerequisite to coverage.

Other defences that may be available in any particular action against a municipality include:

- **Express Statutory Provisions**
- **Expiry of a Time Limitation**
- **No Proof of Causation**
- **No Foreseeability** (for example, in negligence, contract, and now, maybe in Rylands claims)
- **"Reasonableness"** (for example, in nuisance, negligence and some statutory compensation claims)
- **Due diligence** (as discussed above, for example regarding strict liability offences, and for some aspects of civil claims, to help disprove negligence, or to help prove "reasonableness")
- **No Proof of Loss**
- **"Public Utility"** (for example, for some nuisance claims)
- **Statutory Authority** (which is usually narrowly construed, but covers an authority which is required to be exercised in a particular manner)
- **Consent** (for example, if the Plaintiff contractually agreed to the risk, or if the plaintiff has otherwise accepted the risk)
- **Intervening Acts** (where they eliminate liability for the original act)
- **Emergency** (for example is a defence to some statutory compensation schemes)
- **Acts of God** (may be defences to some claims in negligence, nuisance or Rylands)

Other issues to consider in defending an environmental claim as a municipality include:

- Is there a **claim over** for contribution or indemnity from another party?
- Is there **contributory negligence** by another person?
- Has a nuisance been "**adopted**"?

- Are there **contractual warranties** and other contractual rights against another party?
- Has there been **professional negligence** of engineers, building inspectors, real estate appraisers, lawyers, etc. for **third party claims**?

C. SHOULD THE MUNICIPALITY GET INVOLVED WHEN THERE IS A SPILL OR OTHER EMERGENCY?

Factors that would affect your decision as to whether to "get involved" in a particular situation include the following:

- Is this problem within your jurisdiction and do you have a duty to act - and if so, to what extent? (If you are owner, occupier, or person in control of the substance, you must act.)
- Would your involvement decrease your exposure?
- Could your involvement increase your exposure?
- **Beware** becoming a **"person in control"** under the applicable statute, and thus possibly liable to clean up orders and other statutory liabilities beyond your pre-existing responsibility, i.e. if you are not the owner or "person in control" already.
- Is your financial exposure limited or open ended?
- Are there third parties who are not yet harmed, but who may be harmed if the response is inadequate, and if so, will your intervention avoid your own further exposure?
- What is your insurance company's view? Will your action void your policy, or will failure to act breach a condition of your policy?

The risks and benefits of this decision can be considerable, and are fact specific. Get appropriate advice on a case by case situation before making a decision as to whether to "get involved" or not. Get as much information as you quickly can obtain in order to make an informed decision.

D. WHAT IS YOUR INSURANCE COVERAGE?

- Is the subject of the claim defined in the policy? Have you evaluated your policy from the perspective of possible environmental exposures?
- Is the subject expressly excluded? Is it not included in the scope of the definitions?
- Watch your definitions. Case law has held terms in insurance policies to have different meanings than their meanings within environmental statutes.
- Is there ambiguity, for example within the terms of the policy, or even due to apparently contradictory coverages chosen?

In terms of deciding what coverages to seek, you, of course, (and your insurer) have many choices. The types of risk that you may seek coverage for include:

- third party liability, as to either or both personal injury and property loss
- municipality's own property
- municipal employees' own personal injury
- "sudden & accidental" damage

- a latent or long term problem newly discovered
- resulting from the municipality's own actions or business activities
- resulting from another person's actions or business activities (e.g. a neighbour)
- claims made in the policy period
- problems discovered in the policy period
- loss occurring or commencing in the policy period
- "bodily injury" versus "personal injury"
- tangible property loss or damage
- economic loss, like loss of profit
- loss of use of property
- clean up costs
- reconstruction and restoration costs
- remediation and treatment costs
- Director's and officers or senior staff coverages
- protection for provincial offences fines
- products liability

The point of this list is not to say what you should or should not obtain. Rather, it is to illustrate the range of coverages that could be offered for appropriate premiums, and the necessity of clear communication with your insurer, along with review by environmental counsel as to what is and is not covered if you obtain a "pollution" endorsement or other environmental coverage.

E. INSURANCE POLICY LIMITATIONS OF RISK

Aside from limitations of risk contained in the defined insurance policy coverages and exceptions, there are other limitations to be aware of:

- Are there **time** limitations that clearly apply to a particular endorsement?
- Are there **dollar** limitations that apply either to the whole policy or to particular endorsements?
- Are there **persons excluded** from the coverage? Is it clear?
- Are there **types of conduct** (e.g. *mala fides* such as fraud) that is excluded? Of which persons? Is this clear?
- Are there certain states of **knowledge** that are excluded? Are they clearly defined? Whose knowledge?
- Are there types of **activity** that are intended to be included or excluded? For example, if an activity is to be covered, has there been an adequate definition of what the activity is, and is it updated regularly for renewal purposes?

F. EVALUATION OF RISKS

Evaluating the level of your risk depends on your risk assessment procedures, just as in any other area of loss prevention for your municipality. The importance in this area is elevated, however, because of the potential for large claims in the event that a municipality is determined to be responsible for one of the foregoing reasons.

A brief listing of some considerations would include:

- Decide what types of business activities to consider for special planning by-laws or other municipal requirements.
- Evaluate the business activities presently occurring in your municipality - are you protected from possible liability? Even if you don't end up "owning" the property due to tax action, could you be responsible to your residents for alternate provision of water supplies or other services due to the activities of one of the businesses in your municipality?
- Develop a check list for your purposes but **note** that an appropriate checklist should be specifically tailored to your concerns and to your municipality's geographic and business environment.
- Consider the option of obtaining real property audits before issuing land use permits (paid for by the applicant)
- Consider the option of requiring operations environmental audits, and/or insist on environmental management system certification such as that provided by the I.S.O. for businesses that you identify as particularly risky, with recertification or reevaluation requirements included, prior to issuing other municipal permits or approvals.
- Consider obtaining personal indemnifications to the municipality from business or land owners prior to issuance of approvals for risky operations. Include express warranties regarding applicants' (e.g. "no environmental concerns"), in inclusive language.
- Visit the site, or have a qualified professional visit the site and evaluate it, where appropriate. (Do this mainly to watch for "red flags" that would cause you to turn down the application; but for assurance of compliance you should rely on professional review.)

G. RISK MANAGEMENT

There are many things that you can do to assist in managing your outstanding risk. A few examples include:

- Have an environmental law and management review of your existing situation and your controls and approvals processes.
- Have spot audits of your approvals in order to obtain advice about your procedures and possible liability concerns.
- If you do have evaluation requirements, require periodic updates and NOTE CHANGES on renewal applications or annual checklists
- Get express warranties from the land owners and business operators where approvals are being renewed, regarding their knowledge, broadly and inclusively worded, and get such warranties from any new applicants.
- If you required environmental audits or formal environmental management certification in order to issue and approval or permit, then ensure that the permit or approval is conditional upon being updated annually or as appropriate, and provided to you. The frequency of update may depend on the activity in question and your level of risk as municipality.
- Train your staff especially in this area and emphasize items of particular concern (for example, not to make rash representations re: environmental suitability or acceptability in response to enquiries); have a protocol as to who is authorized to respond to any enquiries

about environmental matters, and as to how those enquiries may be answered.

I. FINANCING ISSUES

In many ways, financial institutions have very similar concerns and perspectives to municipalities, as outlined above. The main message to convey for today's purposes is that any particular situation must be properly evaluated and decisions as to whether to act or not must be made based on reliable information, and not based on speculation. Therefore, where both a municipality and a financial institution share interest in a property, specific professional advice should be sought as to the best method of obtaining necessary information while avoiding assumption of any further liabilities.

J. ENVIRONMENTAL ISSUES IN PROVISION OF SERVICES

a) Water: As already mentioned, a reason for significant concern in many municipalities in recent years has resulted from actual or threatened drinking water contamination. A municipality can find itself incurring great expense in participating in legal proceedings, as well as in clean up activities to protect its drinking water sources.

All municipalities should be alert to the potential for such threats. I have already mentioned opportunities to increase vigilance before any such activities become established. Where there are existing situations which may cause concern, municipalities should seek advice as to whether they have any options to assist with prevention in advance of actual contamination occurring. Municipalities should monitor, or have monitored, the Environmental Bill of Rights Registry as to applications for certificates of approval that may cause them concern. Municipalities should not assume that they will always receive notice of such applications; if no municipal approvals are required, then they may well not be notified of an activity prior to its inception.

Where contamination has already occurred, it is vital that a municipality have its own technical and legal advice. The studies and advice offered to a landowner or by the Ministry of Environment and Energy is not necessarily offered from the perspective of the municipality's concerns and issues. Independent peer review is becoming essential in an era of senior government cut backs, where you cannot rely on provincial or federal review to protect your interests.

b) Sewer treatment services Municipalities must be vigilant to ensure that the sewage collection system remains intact and that it is not causing environmental contamination by reason of corrosion or breakage of pipes. Any indications that there may be a problem (for example due to frequent odour complaints in an area) should be thoroughly investigated, promptly. The treatment system itself must be operated, not only to ensure that the terms of its certificate of approval are met, but to ensure that there are no additional environmental contamination problems. For example, is the monitoring program adequate? Has the municipality had its operations audited or peer-reviewed by a qualified engineering firm?

c) Waste management services - This falls into two main categories - operation of existing programs sites, and location of future or new sites, along with planning to reduce waste. You are all familiar with your obligations to reduce the quantities of your waste by the year 2002. Many opportunities exist to do this, from recycling initiatives to innovative composting programs and plans like Guelph's "Wet-Dry" program. Other opportunities include per bag user fees, and many other diversion programs. With respect to planning to locate future sites, the approvals environment is in a great deal of uncertainty at present. Amendments to the Environmental Assessment Act have been introduced in Bill form, but not yet approved. If approved, they will significantly alter the environmental assessment approvals process. The approvals process for waste management is undergoing significant changes, and if your municipality is in the process of applying for approval, or is planning for future siting decisions, then you should seek specific advice for your situation. Depending on your situation, you may be best advised to complete an approval process that you are involved in , or you may be well advised to explore other options while awaiting the new system. Given the political difficulty in this area, you would not be well advised to "do nothing" if you don't have a long term site presently available.

Turning to existing landfill operations, it is important to note that the standards for appropriate operations and for environmental protection have increased tremendously over the past 10 or 15 years. Municipalities who are operating their own sites are obliged to comply with their certificates of approval, but also to comply with the Environmental Protection Act generally. This includes prevention and remediation of odour concerns, of landfill gas emissions, of dust, of vermin, birds, & litter; adequate and thorough monitoring of groundwater and surface water impacts, along with appropriate responses to reduce problems which are causing any of these impacts. The Ministry of Environment has introduced some standardized approvals terms that you should review carefully even for your existing sites.

In this area of municipal services, the regulatory requirements and concerns are many. I would be very happy to entertain any specific questions that you may have.

QUALIFICATION AND EXCLUSION OF LIABILITY:

Here is the obligatory caution that this paper is meant for discussion and illustration purposes, and should not be considered to be legal advice. Any particular situation must be evaluated in light of its specific facts and the applicable law. However, I hope that this presentation has been helpful in raising some "red flags" as to issues that you may want to consider further in your municipalities.

If there are any questions that you have after today's presentation, don't hesitate to contact me for assistance.

LIST OF SOME STATUTES WITH ENVIRONMENTAL REQUIREMENTS

Provincial:

- Environmental Assessment Act
- Planning Act
- Municipal Act
- Environmental Protection Act
- Environmental Bill of Rights
- Ontario Water Resources Act
- Dangerous Goods Transportation Act
- Gasoline Handling Act
- Aggregate Resources Act
- Conservation Authorities Act
- Ontario Heritage Act
- Drainage Act
- Tile Drainage Act and Agricultural Tile Drainage Installation Act
- Farm Practices Protection Act
- Forestry Act
- Lakes and Rivers Improvement Act
- Game and Fish Act
- Health Protection and Promotion Act
- Ontario Planning & Development act
- Livestock, Poultry & Honey Bee Protection Act
- Pesticides Act
- Weed Control Act
- Dead Animals Disposal Act
- Feeds Act
- Livestock & Livestock Products Act
- Abandoned Orchards act
- Forest Tree Pest Control Act
- Plant Diseases Act
- Fish Inspection Act
- Livestock Medicines Act
- Meat Inspection Act
- Milk Act
- Occupational Health & Safety Act
- Occupiers Liability Act
- Farm Implements Act
- Mining Act
- Agricultural Rehabilitation & Development Act
- Endangered Species Act
- Negligence Act
- Topsoil Preservation Act
- Trees act
- Conservation Land Act

- Hunter Damage Compensation Act
- Forest Fires Prevention Act
- Woodlands Improvement Act
- Settlers Pulpwood Protection Act