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RESPONSIBILITIES OF MANAGERS AND OFFICIALS

An Address to the Special Seminar on Water Quality Communications

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I. INTRODUCTION AND BACKGROUND

I have been asked to talk about the moral and legal responsibilities of the purveyors of drinking water. However, I will confine my remarks to the legal issues as the moral responsibilities would appear to be self-evident. I will start with some introductory remarks about CELA and the historical concerns about the quality of drinking water. I will then discuss the legal regime applicable to drinking water and the responsibilities of managers of water works.

CELA, founded in 1970, is a public interest environmental law group. Our casework during the past decade has been focussed in the area of toxic chemicals, hazardous wastes and pesticides. In the early 1980's CELA represented Pollution Probe and Operation Clean-Niagara and obtained friend of the court status for these two groups in relation to the Hooker Chemical Hyde Park landfill case. This landfill, located in the Niagara area in New York state contains 80,000 tons of hazardous waste including the world's largest deposit of dioxin (2000 pounds). Unfortunately, this landfill continues to leach into the Niagara River - one can see seepages on the Niagara Gorge face - and continues to threaten the drinking water of people living around Lake Ontario.

It was largely the discovery of the Love Canal and the other dumps

perched on the edge of the Niagara River that led to the initial public concerns about the quality of our drinking water. This concern has not gone away and nor have the sources of these contaminants. Concerns about drinking water are province-wide as more recently a number of pesticides have been showing up in both raw and treated water.

In 1981 Pollution Probe published Toxics on Tap its first report on drinking water.[1] This was followed in 1983 by a second report entitled Drinking Water - Make it Safe.[2] That report made a number of key findings and recommendations:

- Toronto drinking water contains more that 50 hazardous contaminants, 16 of which are carcinogens;
- Chlorination of drinking water significantly increases mutagenicity;
- concern was raised over the setting of maximum acceptable contaminant levels in drinking water in Canada and the lack of attention paid to the cumulative and synergistic effects of these contaminants;
- it was found that many toxic contaminants present in the raw water supply pass through Ontario's water treatment plants and remain present in the "treated" water;
- the report found that concern over drinking water had driven many residents to seek alternative treatments or water supplies.[3]

The City of Toronto, Department of Public Health followed in 1984 with its report entitled Toronto's Drinking Water - A Chemical Assessment in which 83 inorganic and organic chemicals were identified in Toronto's drinking water, 30 of which are either known human carcinogens or cause cancer in laboratory animals. It made a series of recommendations for improvements to our drinking water supply.[4] Toronto's Environmental Protection Office will be releasing another report on drinking water quality in the new year.

From a legal perspective, in 1982, CELA published an article jointly with Pollution Probe entitled Water Fit to Drink? The Need for a Safe Drinking Water Act.[5] In this article, we identified a number of communities across Canada where concerns had been raised about the quality of drinking water. We pointed out that although legislation has been enacted to control water pollution at the source, the legislation has not always been effective in preventing the continued degradation of our waterways. Furthermore, there has been no legislation enacted that would regulate the quality of drinking water at the point of consumption. Our recommendation was that a Safe Drinking Water Act be passed in order to safeguard public health and to set limits of exposure to chemical contaminants in drinking water. One of the purposes of such an Act would be to promote research into improved methods of water treatment that would eliminate organic chemicals in the treatment process. The major features of our proposed legislation would be regulations setting legally enforceable standards for health-related parameters in all public and private

drinking water supplies and a public notification procedure that would go into effect when a regulation is violated.

Unfortunately, while a number of Safe Drinking Water Acts have been introduced over the past few years as Private Members Bills, governments have not passed such legislation.[6] The last federal Throne Speech included the governments intention to introduce new legislation to improve water quality. Our understanding is that the bill will be very limited and deal with (1) products in trade and commerce - i.e., point of use treatment devices, and construction materials in drinking water systems and (2) providing drinking water standards for federal lands and other areas of federal jurisdiction.[7]

In 1985, a report done for the inquiry on federal water policy on municipal waterworks and wastewater systems noted that persistent pollutants, especially toxic compounds, threaten some of the 2500 municipal water supplies in Canada and efforts must be made to protect these supplies including the provision of treatment or improved treatment where necessary.[8]

In summary, it is fair to say that concerns continue to exist about the quality of our drinking water and that one spotlight will continue to be on the purveyors of drinking water.

II. THE REGULATORY FRAMEWORK

I will now turn to a discussion of the regulatory framework governing municipal drinking water and the potential for legal action to be taken against managers and officials of water treatment plants.

First of all, municipalities in Ontario are empowered to establish and operate waterworks by virtue of section 2 of the Public Utilities Act.[9] Although that power is permissive, section 33(1) of the Ontario Water Resources Act allows a director appointed under that act to order a municipality to establish, improve or extend a waterworks when the Director feels such action is necessary for the public interest.[10] However, such orders are rarely necessary as most municipalities voluntarily assume the responsibility for providing safe drinking water.

The OWRA is the most important statute governing water quality and regulating the operation of water works. Under this Act, the Minister of the Environment is given supervision of all surface and groundwaters in the province.[11] He may examine all waters from time to time to determine whether a polluted condition exists and the causes of that condition. Under section 44(1)(h) the Minister may make regulations specifying standards of quality for potable and other water supplies, sewage and industrial effluents, receiving streams and water courses. However, no enforceable regulations have ever been promulgated. While the US has had safe drinking water legislation since 1974, only Quebec has enforceable regulations.[12]

In Ontario, non-enforceable objectives are laid out in the 1983 publication entitled the Ontario Drinking Water Objectives (the Green Book).[13] This publication has been revised 4 times since it was first introduced in 1964 and a new revision is expected by the end of 1989. These objectives set out suggested limits for 59 contaminants under the headings of "Maximum Acceptable Concentrations" (MACs), "Interim MACs" and "Maximum Desirable Concentrations" (MDCs). The Ontario Drinking Water Objectives (ODWO) are largely based on the Canadian Drinking Water Guidelines which were last revised in 1987.

The Drinking Water Objectives also describe what sampling should be done to ensure compliance with the Maximum Acceptable Concentrations. Adequate and routine sampling is the responsibility of each municipality. Many municipalities participate in the MOE's Drinking Water Surveillance Program (DWSP) which is a computerized information system.

Monthly reports of sampling analyses are sent to regional and district officials of the MOE. If a water quality guideline or objective is exceeded, an action alert can be issued to regional MOE and local public health officials.

Once an action alert is issued, it is up to the local authorities to

determine what action, if any, should be taken. It is difficult to generalize about how the action alerts are treated. Essentially, it is a function of what parameters are being exceeded, by how much, and how often.

III. LEGAL RESPONSIBILITY IN CANADA

If a water supplier supplies contaminated water what liability might it face? As stated earlier, a breach of the ODWO per se is not actionable. However, the act of supplying contaminated water may violate certain statutory provisions and prospective plaintiffs may also have recourse to certain common law courses of action.

A. Common Law Sources of Legal Responsibility

Water suppliers who produce contaminated water may be liable in common law to consumers on the basis of negligence and products liability.

There have been a few cases dealing with contaminated municipal water supplies. The leading case appears to be Munshaw Colour Service Ltd. v. City of Vancouver[14], a 1962 decision of the Supreme Court of Canada which stands for the proposition that once a local authority has undertaken to provide water to consumers it is under "an obligation to provide wholesome and pure water fit for ordinary domestic purposes." In that case, as a result of opening a hydrant

for sewer flushing purposes sediments were stirred up in the water mains and the sedimented water damaged film in the plaintiff's film processing tanks. Since there was no statutory duty upon the city to supply water of a specified quality or standard the action was brought in negligence. It failed largely because the amount of sedimentation was very small and the plaintiff was extraordinarily sensitive. The court held that the failure to remove such a small amount of sediment did not amount to negligence, nor did the failure to warn constitute negligence on the facts of the case.

In the 1920s a number of cases were brought in negligence where a variety of plaintiffs in Ontario claimed to have contacted typhoid fever from drinking impure water supplied by the municipality. In one case involving the City of Owen Sound, the court dismissed the action because the evidence was not sufficient to infer that the disease was caused by drinking the contaminated water.[15] However, in a similar case involving the Town of Kingsville sufficient evidence was found to support such an inference.[16]

These cases support the proposition that where a municipality knowingly maintains a contaminated water supply it is answerable in damages to all who suffer ill health or disease by drinking it.

In a 1958 case in Quebec, a municipality was held liable for allowing a layer of ice to form within a reservoir when it should have known that the ice would scrape off particles of tar paint and contaminate

the water supply.[17] The plaintiff, which operated a dyeing plant, suffered damages to goods. Another successful case in Quebec brought in 1980 involved a claim for damages against a municipality for supplying water containing sand particles to the plaintiffs soft drink production process.[18] The defendant was presumed responsible unless he could prove that he could not have prevented the damage by reasonable means. The court held that the water furnished by the town of Chicoutimi must be free of impurities.

An action for products liability may usually be brought either under contract or tort depending on the relationship between the plaintiff and the defendant. At first glance, both options would appear to be available to the injured consumer of contaminated drinking water. Since water rates are charged for the provision of water in most municipalities, a relationship of buyer and seller exists between the prospective plaintiff and defendant. However, in Ontario, the courts have held that there is no contractual relationship between the municipality supplying the drinking water and the receiving inhabitants because the city is bound by law to supply water to any resident requesting it.[19] This would seem to leave the consumer with only a remedy in tort.

In a claim for products liability five elements must be established:

- legal duty of care;
- defective product;
- negligent defendant;

- that the defect caused the plaintiff's injuries; and
- that the plaintiff suffered damage as a result of the defendant's negligence.[20]

The general rule is that a manufacturer of products who knows that, in the absence of reasonable care in preparation, his products may result in injury owes a duty to the consumer to take such reasonable care. It seems clear that such a duty is owed by the municipality to the residents consuming drinking water. The class of prospective plaintiffs is also very broad and would appear to include not only the purchasers of the water and their families, but all who drink the water. The Alberta Court of Appeal has stated that the manufacturer's duty extends to all "potential users" of the item in question.[21]

Of course, it is necessary to prove that on the balance of probabilities, the defendant was negligent. However, in regard to certain products the Canadian courts have established very high standards of care. An example is the food industry--arguably a very close analogy to supply of drinking water.

The United States Safe Drinking Water Act preserves the right of any person to seek common law relief due to the presence of contaminants in drinking water. One such leading case is Moody v. City of Galveston.[22] This is a 1975 Texas case in which a water utility was held strictly liable for injuries resulting from the ignition of gas

carried in drinking water. The court found that the water supplied by the city was a defective product insofar as it contained pockets of natural gas. The court found that the city was negligent in allowing the situation to occur and held the city strictly liable for the damages caused by the explosion. While in Canada negligence must usually be shown in cases involving products liability, the case illustrates that common law remedies are available where damage has been shown to occur as the result of contaminated water.

In such common law actions the defendant will usually be a municipal corporation. It is unlikely that municipal directors and officers will be personally liable under common law actions for the provision of contaminated drinking water. Municipal officers are not generally responsible in law for acts done on behalf of the municipality in the exercise of their powers, provided they act within the realm of their authority.[23]

Furthermore, the Public Authorities Protection Act provides that all civil proceedings against a statutory officer exercising municipal powers and acting within the apparent scope of his duties must be commenced within 6 months of the act complained of.[24] This is a comparatively short limitation period and should serve to further extend the protection from personal liability enjoyed by municipal officers and directors.

B. Statutory Remedies

Section 23 of the OWRA governs the operation of water works and section 23(1) requires that the Director of Approvals for the MOE approve the establishment, alteration, extension or replacement of a water works. Section 23(4) provides that the Director can either refuse or grant an approval. If an approval is granted it can contain terms and conditions and these can be altered by the Director. Pursuant to section 61 where a Certificate of Approval is refused or where terms and conditions are imposed in the granting of an approval, there is a 15 day period to appeal to the Environmental Appeal Board. Grounds of appeal must be specified in the notice of appeal.

The Ministry presently requires as a condition of approval that all water works comply with the ODWO.[25] They must also have acceptable source protection and treatment processes and adequate sampling and monitoring programs to ensure that the ODWO will be met. Consequently, a breach of the Ontario Drinking Water Objectives would constitute a breach of the Certificate of Approval and a violation of section 23(8) of the OWRA.

In 1986, the Environment Enforcement Statute Law Amendment Act (Bill 112) was passed.[26] It amended the OWRA, the EPA and the Pesticides Act. The first item of note is that the 1986 amendments eliminated the immunity from prosecution for municipalities from section 23 of the OWRA. This section had previously made municipalities immune

from Director's directions or from prosecution for breaches of terms and conditions of a Certificate of Approval. These sections have been rewritten and municipalities are no longer immune from prosecution.

The 1986 amendments also significantly increased the fines for environmental offences under the OWRA and EPA. Previously a violation of s. 23 (failure to operate a waterworks in accordance with a Certificate of Approval) would subject an individual to a maximum daily fine of $500, but municipalities were exempt from the provisions of that section. The 1986 amendments have changed both the issue of liability and the level of fines.

The relevant sections begin with section 66(1) of the OWRA which provides that every person that contravenes the Act or regulations is guilty of an offence. "Person" is defined in section 1(oa) of the Act as including a municipality. Section 66(3) provides that every person that contravenes a term or condition of a licence, permit, approval or report made under the Act is guilty of an offence. Thus operators of water works are liable for prosecution if they breach the terms and conditions of their Certificates of Approval. Under section 67 every <u>person</u> convicted of an offence under the Act is liable on conviction for each day or part of a day on which the offence occurs to a maximum fine of $5000 for a first offence and up to $25,000 on each subsequent conviction. Where a corporation is

convicted the maximum fines go up to $25,000 and $50,000 respectively.

However, it is unclear whether a municipality will be considered to be a person or a corporation for the purposes of sentencing. As was just mentioned, person is defined so as to include municipality. The intention of those who drafted the amendments was to include municipalities with the corporations. However, at that time there was concern that the anti-discriminatory provision of the Charter of Rights - S.15 could be interpreted so as to make higher fines for corporations a discriminatory practice. If this interpretation came to pass then those sections of the Act establishing separate and higher fines for corporation could be struck from the Act as discriminatory. In order to cover this eventuality the drafters of the amendments defined person as including a "municipality" thus ensuring that municipalities would be caught under one category or the other.[27]

The result is that a municipality convicted of an offence under the OWRA may have a strong argument for receiving personal rather than corporate levels of fines.

It should be noted that section 54 of the OWRA provides that charges must be laid within two years from the date on which the offence was alleged to have been committed.

In addition to the government laying charges under the OWRA, private citizens have a common law right to launch private prosecutions of any statutory offence. In Ontario, there have been a number of private prosecutions launched for breaches of the EPA, OWRA and federal Fisheries Act.

(i) Corporate Liability

The 1986 amendments also make it clear that corporations will be responsible for any activities of employees within the scope of their employment. Section 73 of the amended OWRA provides that:

> "For the purposes of this Act and the regulations, an act or thing done or omitted to be done by an officer, official, employee or agent of a corporation in the course of his or her employment or in the exercise of his or her powers or the performance of his or her duties shall be deemed to be also an act or thing done or omitted to be done by the corporation."

The intention of this section is to prevent corporations from shifting responsibility for their actions onto their employees. However, whether a municipality is a person or a corporation under the OWRA may again be an issue. Section 73 will not apply to municipalities unless they can be considered to be corporations.

(ii) The Duty of Care of Officers and Directors

The 1986 amendments to the OWRA clearly lay out the duties and

responsibilities of directors and officers. Who are the directors and officers?

As municipalities are corporations their officers are officials so designated by statute. Part VI of the Municipal Act states that for example, the mayor of a city and the reeve of a township are the Chief Executive Officers of their respective corporations.[28] Officials such as the treasurer, tax collector and the heads of various departments may be considered as officers.[29] A municipal officer, generally, is one who holds a permanent position of responsibility with definite rights and duties; usually prescribed by statute or bylaw.[30] An officer will usually be required to exercise some discretionary authority and not merely be under a duty to obey orders.

Whether or not a municipal corporation has directors is an open question. Possibly the CEO is a director. It is possible that elected municipal councillors may be directors since the position are analogous in some respect to that of corporate directors. However, there is no jurisprudence to support this.

What is the duty

The duty is laid out in s.75 of the OWRA:

> "75(1) Every director or officer of a corporation that engages in an activity that may result in the discharge of any material into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters contrary to this ACt or the regulations has a duty to take all reasonable care to

> prevent the corporation from causing or permitting such unlawful discharge.
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted."

The 1986 amendments lay out clearly, for the first time, duties and responsibilities of directors and officers. The duty is spelled out in general terms so that the court may react flexibly to determine the level of fault in each situation. The basic principle behind the amendment is that each officer and director has a duty of care commensurate with the expertise and understanding that a person in that position is expected to have to avoid foreseeable injuries to others.

However, this expanded duty may have a limited effect on those municipal officers responsible for drinking water quality. Firstly, there is the already discussed problem as to whether the municipality is a person or corporation and if it is a person whether s.75 even applies.

Secondly, if s.75 does apply then it appears to be directed specifically towards pollution offences by corporations whose activities present a significant environmental risk. Arguably a municipal water works is not engaged "in an activity that may result in the discharge of any material into or in any waters or on any

shore or bank thereof..." as is required by s.75. The wording of s.75 is taken directly from the anti-pollution provision s.16(1). Section 75 does not appear designed to impose its expanded duty of care upon corporations that are not engaged in traditional polluting activities.

The intent of the 1986 amendments was to complete the circle of corporate responsibility for actions that affect the environment. Liability was to attach not only to the artificial shell of the corporation and to the employees who actually commit the offence, but also to those senior officials responsible for the corporate policies that have resulted in the environmental problem.

However, the full impact of those amendments on the legal responsibilities of municipal drinking water suppliers is unclear. The main reason for this would appear to be confusion about the status of a municipality under the OWRA (is it a person or a corporation) and, with regard to s.75 the fact that that section is directed towards standard pollution offences.

IV. CONCLUSION

I would now like to briefly recap the main points.

1) Common law actions have been rare to date, but those that have proceeded have been based on the doctrine of negligence. However, a possible cause of action may also lie in the theory of products liability in tort.

2) The most likely avenue for a statutory proceeding against a municipal water supplier would be s.23(8) of the OWRA for a breach of the terms and conditions of a Certificate of Approval (for example, exceeding the ODWO).

3) The Environment Enforcement Statute Law Amendment Act of 1986 may not have a strong impact on the level of municipal fines and the liability of municipal offices. This is because of the ambiguity surrounding the definition of municipality in the OWRA and the restrictive wording of s.75 of the OWRA.

In conclusion, it should be noted that while the existing legal regime makes it somewhat difficult for statutory prosecutions and common law actions to succeed against municipal water suppliers this situation may well change. Public concern over the quality of drinking water will probably increase in the future. The political response to this concern could result in the creation of more legal mechanisms designed to safeguard the safety of our drinking water. In any event, greater attention is likely to focus on the legal responsibilities of the purveyors of drinking water.

V. ENDNOTES

1. Pollution Probe, Toxics on Tap, (Toronto: Probe, 1981).

2. Pollution Probe, Drinking Water - Make it Safe, (Toronto: Probe, 1983).

3. Ibid., summary.

4. Katherine Davies, Joan Campbell, with Agnes Bleiwas, Toronto's Drinking Water: A Chemical Assessment, (Toronto: City of Toronto, Department of Public Health, April 1984).

5. Toby Vigod, CELA and Anne Wordsworth, Pollution Probe "Water Fit to Drink? The Need for a Safe Drinking Water Act" (1982), 11 C.E.L.R. 80.

6. See, for example 38 Elizabeth II, 1989, Bill 25 "An Act to Protect and Enhance the Quality of Drinking Water in Ontario", 1st Reading May 18th, 1989.

7. Conversation with Dr. Stan Winthrop, Health and Welfare, by Kathy Cooper, CELA, (May 23, 1989).

8. J.W. MacLaren, Municipal Waterworks and Wastewater Systems on Federal Water Policy, Research Paper #3 for the Inquiry on Federal Water Policy, (Toronto: Inquiry on Federal Water Policy, January 1985).

9. Public Utilities Act, R.S.O. 1980, c.423, s.2.

10. Ontario Water Resources Act, R.S.O. 1980, c.361 s.33(1).

11. Ibid., s.15.

12. Quebec Drinking Water Regulation, O.C. 1158-84, May 1984. Made pursuant to Environment Quality Act, R.S.Q. 1980, Q-2 s.46.

13. Ontario Ministry of the Environment, Ontario Drinking Water Objectives, (Toronto: MOE, 1984).

14. Munshaw Colour Services Ltd. v. City of Vancouver, [1962] S.C.R. 433.

15. McQueen v. City of Owen Sound (1927), 32 O.W.N. 383 (C.A.).

16. Campbell v. Town of Kingsville (1929), 37 O.W.N. 51.

17. Pinatel Piece Dye Works Ltd. v. Joliette, [1958] R.L. 257 (Que S.C).

18. Liquueurs Saquenoy Ltee. v. Ville de Chicoutimi (1980), 14 M.P.L.R. 233.

19. Scottish Ontario and Manitoba Land Co. v. City of Toronto (1899), 26 O.A.R. 345.

20. See Linden, Allan, Canadian Tort Law 3rd ed., (Toronto: Butterworths, 1982) at 575.

21. See Ostash v. Sonnenberg (1968), 67 D.L.R. (2d) 311 (Alta. C.A.) at 207.

22. Moody v. City of Galveston, 524 S.W. 2d 583.

23. Scott v. Hamilton Hyro Electric Commission (1915), 7 O.W.W. 385.

24. Public Authorities Protection Act, R.S.O. 1980, c.406, s.11.

25. MOE Policy 15-06, November 12, 1986.

26. Environment Enforcement Statute Law Amendment Act, S.O. 1986, c.68.

27. Personal Communication, John Swaigen, Metro Toronto Legal Services, Oct. 10, 1989.

28. Municipal Act, R.S.O. 1980, c.302, s.210(1).

29. McLeod Q.C., Roderick M., "Environmental Protection Legislation: Personal Liability of Officers' and Directors'" in Liabilities for Environmental Contamination, L.S.U.C. Seminar, June 13, 1989, at D-22.

30. Rogers Q.C., Ian M., The Law of Canadian Municipal Corporations (1959) at p.281, s.54.