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Environmental Law
The Life Cycle of a Spill: From the Hot Call to Putting the Genie Back in the Bottle and Everything in Between

After the Spill: Issues to Consider in Dealing with the Long Term Implications and Liabilities of a Spill

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AFTER THE SPILL

Issues to consider in dealing with the long term implications and liabilities of a spill.

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After the frenetic rush of activity that inevitably accompanies a spill of almost any size, comes what appears to be a period of relative calm. It is however, during the time after the initial response is over that many of the much harder and long-term issues will have to be dealt with. Regulators will still require information. Neighbours may be consulting their lawyers. Investigators may be considering sanctions in the form of penalties or charges. Internal investigations may result in recommendations to change company procedures. A myriad of decisions, some minute, some requiring the attention of senior management, will need to be taken and the implications of those decisions can have far-reaching effects.

This paper will touch on some of the issues that a company must face after the initial spill response is over. While, for the sake of clarity, issues will be dealt with in discrete topics, real life is rarely so neatly organized. Decisions on one topic will inevitably touch on other areas and overall coordination by management is crucial to ensure a consistent approach.

So you are a Polluter. Now what?

Whether a company accepts the label or not, the first step in dealing with the aftermath of a spill may be as simple as accepting the harsh reality that in the eyes of the Regulators, neighbours and the general public, the company is now a "polluter". The almost moral judgment that the term implies can be difficult to accept, especially if this is the company's first significant incident. However understanding that the company's actions will be viewed and judged in the context of

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such a value-laden label is essential if an appropriate response to the event is to be fashioned that ultimately satisfies those outside the company that the matter may be put to rest.

Any spill, no matter how small, will result in some initial loss of goodwill and trust. A prompt and candid response to concerns expressed by regulators, neighbours and members of the public will be vital to try to rebuild any lost confidence.

Ongoing Communications with the Regulator

The first post-response decisions will likely concern the regulator. During the spill response, regulators will likely have visited the facility, met some employees and management and formed an initial view of what happened. Once the immediate aftermath is over, regulators may start asking more probing questions and investigating deeper into the causes of the incident.

It is important to understand the different purposes regulators have for collecting information. They will certainly be seeking information to see if the incident can be prevented from happening again. They will likely want to figure out if this incident could have been prevented in the first place. This may lead them to ask questions to help them assess whether sanctions are required. They may even be looking at the incident to assess if there are gaps in the regulatory regime. It may not always be clear to the company (or sometimes even the regulator) which is the predominant purpose for which information is being sought.

A responsible company will have had a spill response plan, a spill response team and designated people to communicate with the regulators during the response. Those same people will often continue to be the main point of contact with the regulators after the incident. One of their first tasks will be to assemble a list of all commitments that were made to regulators during the spill response and make sure there is prompt and comprehensive follow-up. In some cases this may require looking back at company records and providing proof of employee training and certification.

As information is gathered, it may become apparent that some of the information given to the regulator during the spill response was inaccurate. This is not unusual. Often, in the heat of a response, people are working with an incomplete set of facts and will communicate

"preliminary" information. It is important to revisit that information and correct any inaccuracies promptly to avoid any perception of impropriety.

Outside consultants may need to be engaged to prepare reports on the causes of the incident. Often such reports are thought to carry greater credibility than ones generated internally. Unfortunately, the very fact they are created by a third party also leads to the possibility that internal procedures may not be properly understood and inaccurate conclusions might be drawn. Care will have to be taken with such reports to make sure the company corrects any such inaccuracies by discussing them with the regulator or the report writer, and if need be, seek a corrected report.

Should information be provided voluntarily?

Regulators have broad powers under their governing statutes. The breadth of powers granted under s.156 of the *Environmental Protection Act* for example, is quite impressive. The regulator may request an opportunity to interview employees. At times, a delicate balance needs to be struck between the need to co-operate with such requests and concerns about self-incrimination. In this area, more than any other, it is important to get a good understanding of the purpose of the request. Concern may be raised as to whether such interviews might be part of an investigation that could lead to sanctions. Often the company will require legal advice to assist in considering how to deal with such requests. A company may not have the full protection of the *Charter*, but if the regulator has reasonable and probable grounds to believe that an offence has been committed by an individual, then that individual must be afforded their right to counsel and allowed to exercise their right to silence.

The decision of the Ontario Divisional Court in *Branch v. Ontario*,[2] is a good illustration of the complexities involved. Prior to that decision, the Court of Appeal in *R. v Inco*[3] in 2001, had held that under the EPA, once reasonable and probable grounds existed, the broad inspection powers under s. 156 of the EPA could no longer be used.

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[2] *Branch v Ontario (Minister of the Environment)* (2009), 93 O.R. (3d) 665; 306 D.L.R. (4th) 565

[3] *R. v. Inco Ltd*. (2001), 155 C.C.C. (3d) 386

The Court in *Inco*, however, also stated that a new (at that time) section of the EPA (S.163.1(2) - a section that was not directly before it as it came into effect after the facts that gave rise to *Inco*) would allow for the techniques to be used if application was made to the Court for an order to that effect. These orders became know as "Inco Orders".

In *Branch v Ontario* however, the Divisional Court ruled that "Inco Orders" are not permitted by the EPA and that the Court has no jurisdiction to compel a witness such as an employee of a company under investigation to be interrogated and answer questions or produce documents once "reasonable and probable grounds are found to exist". The ruling was not based on *Charter* grounds but on an interpretation of the words of the statute.

The decision highlights the importance of making sure all employees are aware of their legal rights and obligations. There is, of course, nothing stopping any investigator from asking questions of anyone even after reasonable and probable grounds are formed. The decision to refuse to answer questions is often exercised reluctantly by companies or employees who feel that exercising that right might appear to be an admission of guilt. But where reasonable and probable grounds that an offence has been committed have already been formed, such considerations must be weighed against the potential serious prejudice that may result from a voluntarily-given, and possibly incriminating, statement. Such a statement made by an employee is admissible in Court against both the employee and the employer without the need for them to testify or to be subject to cross examination[4]. Trying to qualify the statement in any way after the fact may be awkward at best and impossible at worst.

Determining the cause of the spill – and whether changes should be made as a result

The regulator, as well as the company, will be interested in determining the cause of the spill. A root cause investigation will often be undertaken. This can be a very useful exercise as it can help shed light on gaps in systems that ought to be rectified to prevent the incident from happening again. The essence of due diligence involves learning from an incident and improving systems as a result. The limitations of such investigations must also be appreciated. Some

[4] *R. v. Strand Electric*, [1969] 1 O.R. 190 (O.C.A.)

failures will have multiple causes. Others may not have a readily-determinable cause. It is obviously much harder (though not impossible) to establish a due diligence defence when cause cannot be determined[5]. Similarly, it will be difficult to decide what changes need to be made to the systems unless there is a clear idea of what caused the incident in the first place.

Once the investigation into cause has concluded, the next logical step will be to determine what changes need to be implemented to prevent the incident from happening again. At this stage, a concern might be raised that making improvements could be seen as an admission of a previously deficient system – in effect, an act that could be taken as an admission of guilt in a prosecution or of civil liability in subsequent litigation.

But failing to make changes is probably even more fraught with danger. Having determined what led to an incident, there is no longer even the possibility of arguing lack of forseeability should the incident recur - unless one wanted to try a "lightning-should-not-have-struck-twice" type of defence!

Ultimately, any liability, whether quasi-criminal or civil, will be determined based on the test of reasonable forseeability. Regardless of whether the first incident was foreseeable, it is beyond doubt that a repeat incident will be treated as much more likely to have been foreseeable.

So while evidence of post-incident changes might be admissible in subsequent litigation as being of some relevance to the issue of liability, it would still appear to be the height of folly to refuse to implement practical changes to deal with gaps revealed by a post-spill investigation out of fear that this might be seen as an admission of liability.

Directors and Officers

Depending on the size of the company and the severity of the spill, consideration should be given to the level of involvement in the post-spill activities that would be appropriate for directors and officers. Risk management for directors and officers will be less concerned with protecting them from liability for the current spill – since any risk management measures for that spill should

[5] See for instance *R. v. Petro-Canada* (2003), C.E.L.R. (3d) 167 (O.C.A.)

have already been in place – but rather with taking steps to minimize exposure in the event of a similar incident happening again by making sure there is appropriate analysis of the lessons learned from the current incident and proper implementation of the recommended remedial measures.

Directors and officers can have a very important role to play in the post-spill response. They may be called upon to decide on significant capital expenditures. Large scale, systemic changes to organizational structure, spending priorities, reporting requirements and re-allocation of responsibilities may well only be possible with their direction and approval.

Directors and officers actively involved in major decisions related to post-spill activities should be able to demonstrate what decisions were taken and what direction they gave to ensure that all reasonable measures have been put in place to prevent a repetition of the events that gave rise to the incident.

Responding to Regulatory Orders

Part of the aftermath of the spill will involve ensuring that any regulatory orders issued during the spill incident response are properly complied with. Any new orders will need to be carefully reviewed. Sometimes orders are presented in draft form, to allow for an informal opportunity to comment. This is a sensible regulatory practice as it is in everyone’s interest that any obvious problems with an order be dealt with expeditiously and efficiently. Once an order is issued, appeal periods may be quite tight and a company may be forced to launch a protracted appeal rather than try to negotiate a change in the short time before an appeal period expires.

One of the first tasks when presented with an order is to carefully review it and make sure that it is capable of being complied with. An order to make investigations off site for instance, must allow for the fact that consent of third parties will be required. It is not unheard of for an inexperienced investigator, interested in making sure there is proper off-site delineation of a potential plume, to inadvertently order a company to trespass on a neighbour's property.

Any deadlines in the order must be reviewed to ensure they can be met. This is especially important where meeting the deadline may require actions of third parties such as consultants, consent of neighbours or municipal permits.

Consideration should be given to breaking down one comprehensive order into a number of separate orders. Sometimes it is easier to comply with a series of discrete orders issued over a longer period of time than with one comprehensive order. This may often have the effect of deferring controversial terms of a proposed order to a later date and thus avoid forcing the company to appeal the order in its entirety at the outset.

Penalties

Though relatively few penalties have been issued since regulations 223/07 and 222/07 came into effect, 2009 appears to have been a year when penalties became more common[6]. If the company is one of those to whom the penalties regime applies, consideration needs to be given to the increasing likelihood that a penalty will be issued.

A company faced with the possibility of a penalty, should become familiar with the information that may assist the regulator in formulating the penalty. Guidance documents are available from the MOE website. They explain the rather mechanical way in which the penalty amount is arrived at, based on a number of factors, such as the seriousness of the harm, the duration of the event and reductions that might be available if certain systems and procedures were in place prior to the spill.

The penalty may be issued up to one year after the incident. However, the regulation also entitles the recipient of the penalty to be provided with a Notice of Intention to issue a penalty and a 15 day period in which to respond to the Notice[7]. In effect this means the Ministry has 15 days less than one year in which to issue the Notice, if there is to be compliance with the regulatory deadlines.

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[6] By the end of 2009 almost 50 Penalties had been issued across the Province.

[7] O. Reg. 222/07, s. 6; O. Reg. 223/07, s. 6.

Responding to the EP notice also appears to be a rather mechanical task. There are no defences to a penalty, absent a jurisdictional argument or a denial of identity. The only response in most cases will be to highlight other mitigating factors which the regulator should take into account in reducing the penalty further.

One complication that arises in responding to a penalty is caused by the fact that the MOE has two years from the date of the spill to commence a prosecution under the OWRA and the EPA. So any information provided to the MOE in the penalty review process could conceivably become part of an investigator's file and could be used in making a decision to prosecute.

Here again, a judgment is going to have to be made. Will the information about due diligence be persuasive such as to make a prosecution less likely? Or, will the information simply spur the investigator to build an even stronger case for the prosecution?

Prosecution

It is expected that in cases where a penalty is available and has been issued, the MOE will likely not proceed to a prosecution other than in an unusual case. But where penalties are not available or have not been used, the possibility of a prosecution remains as real as ever.

In the aftermath of the spill, a company must be aware of the possibility of a prosecution and take steps to preserve any information that might be useful in a defence. While investigators will use their broad powers to collect information needed for the prosecution, they may not collect all the information needed to establish a due diligence defence. Key persons may need to be interviewed early on in order to preserve their recollections of events while they are still fresh. With a two year deadline for initiating a prosecution and a Provincial Court system ill-equipped to handle multi-day trials, it is not unusual for a prosecution case to get to trial 3 or 4 years after the event.

Preserving memories and evidence for the possibility of a defence or even a meaningful plea arrangement should be a main priority in the time following a spill, if prosecution is considered to be a possibility. The defence of due diligence requires a multitude of facts and witnesses to

establish successfully. Witnesses may move or change employment, documents may be lost and physical evidence destroyed if care is not taken at an early stage.

Civil Liability for Offsite Impacts

The aftermath of a spill will also involve considerations of potential civil liability. Neighbours may have been affected by the short-term effects of a spill. There may have been disruptions caused by the spill response. An evacuation may have been necessary. Concerns may arise about potential health effects. Properties may have been affected. Invariably questions will be asked about potential liability and compensation.

Communication is often crucial in the early days. Much of the anxiety of neighbours stems from a legitimate fear of the "unknown". They may not be familiar with the company or its personnel. A crisis is a difficult time for a company to win trust from affected neighbours, especially when the same people involved were "on watch" before the spill happened. Enlisting the support of third parties, whether from the regulator or in the form of an outside expert, can, in some circumstances, help assure neighbours that matters are in the right hands.

Immediate compensation for day-to-day disruptions should be considered. If neighbours had to be relocated, accommodation costs should be reimbursed immediately. Incidentally, while it is appropriate to ask for a receipt for any such payments, this would not be a good time to request a heavy-handed "full and final release".

Not every spill will merit the dedicated toll-free hotline with a knowledgeable person available to answer questions that large companies engaged in a large-scale spill response will often establish. But anyone involved in a spill that has attracted some attention in the neighbourhood should consider using easily available, web-based tools for communicating up-to-the minute information. While there is still value in some cases to more personal contacts such as knocking on doors and having face-to-face conversations with affected people, there is no reason for a business of any size not to consider the web and social media sites as a way of rapidly communicating up-to-the-minute information to an interested audience.

If entry on off-site properties is needed as part of the investigation, personal contact is a must. Local businesses and home owners should be consulted about expected entries onto their properties and given details about what is to be expected. It will be important to make sure there is appropriate evidence of the consent to the entry. Many future problems can be avoided if all promises made about such mundane things as time of entry, repairs to be made and information to be exchanged, are well documented and honoured. If there is some flexibility as to timing of a proposed entry, then a great deal of goodwill can be had by accommodating any concerns the property owner may have in order to minimize the disruption caused.

Managing expectations at the early stages of contact with an affected neighbour will go a long way towards minimizing the potential for acrimony later. Persons having direct contact with neighbours need to be well trained in adopting the approach that will be most effective. Unnecessary speculation should be avoided. A well-organized communication strategy will include a list of expected questions and frank, simple answers that provide factual information or candidly admit where no answers are yet available.

A responsive company will deal quickly with any information about compensable losses. If a fair request for compensation is made, there is no reason not to honour it.

When is a release necessary?

This is a vexing question that has often resulted in small problems growing into unnecessarily large ones. Every company wants finality. It is only natural that in making a payment for compensation, the company will want to know that there will be no further demands. But asking for a release too early often backfires. Few people are unsophisticated enough not to react negatively to an overly-broad release presented too early. Why should a neighbour sign off all rights to litigation in exchange for being compensated for a night’s hotel accommodation? On the other hand, how fair is it for a company to withhold such a payment until the neighbour is willing to sign a full release?

An approach more likely to be successful is to simply obtain receipts for all payments made in the early days. This fosters great goodwill while ensuring that even if there is a later demand for larger compensation all payments previously made can easily be accounted for.

Litigation

Even the best-managed responses will sometimes result in litigation. In Ontario, the *Limitations Act* allows a claim to be commenced within two years from the time the plaintiff knew or ought to have known about the loss. In the case of a well-publicized spill, one would expect that the presumption and reverse onus in s. 5(2) of the Act will likely operate to make sure most plaintiffs bring their claims within two years after the event.[8]

In advising a client that might be a defendant as a result of a spill, care must be taken to remind them of s. 17 of the *Limitations Act* which says that "There is no limitation period in respect of an environmental claim that has not been discovered". This section removes the application of the 15 year ultimate limitation period in s. 15 of the Act. Section 17 has yet to receive the considered judicial interpretation that will answer the many questions it gives rise to. A detailed discussion is beyond the scope of this overview. Suffice to say that while the policy of most limitations legislation is to give potential defendants finality, Ontario has chosen to say that where polluters are involved, there is no finality until two years after a potential plaintiff has acquired actual or constructive knowledge of the facts that give rise to a claim, and that two-year period can start to run even decades after the spill in question.

As a result, preservation of evidence that may be needed in such litigation becomes even more important than ever. Since environmental litigation has no ultimate limitation period, document retention and destruction policies may need to be revised in the case of documents relating to a spill. Problems of prejudice to defendants with missing or deceased witnesses will have to be balanced against the unfairness of not compensating a legitimate plaintiff. It may not be an earth-shattering prediction to suggest that the equities in such a case will likely favour the plaintiff, especially if the prejudice results from an inadequate policy for the retention of vital information.

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[8] See *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B ss. 4, 5(1) and 5 (2)

Typical claims for environmental harm range from simple claims for out-of-pocket expenses, to ones for business interruption losses, commercial losses, property devaluation and short- and long-term health effects. A significant spill can also result in a class action, though difficulties remain, in Ontario, in establishing a practical regime for dealing with a class action for an environmental claim.

For a large number of environmental claims, especially ones arising directly out of a spill, liability is often not in issue. The fundamental problem instead becomes one of assessing and agreeing upon damages. The problem stems in no small part because of the uniqueness of environmental claims. Unlike a typical tort claim, which results in a measurable, easily-identifiable loss, environmental claims involve "stuff" that is often unseen, difficult to quantify, and with effects that may be short term, long term and perhaps even matters of hot scientific debate. Compare an environmental claim to a simple car accident that results in a loss of a limb: In the car accident, the actual loss will not be in dispute. Evidence is relatively easy to obtain as to the effects of that loss and what monetary compensation should be available. In contrast, a spill onto a neighbouring business will pose a number of problems that make measuring ensuing damages very difficult. Determining how much was spilled, where it is and what it might cost to remediate, is only part of the problem. If a commercial property has suffered no business interruption and can still be used for all its intended purposes, is there always a "loss", even if the site is contaminated? If so, how is it to be measured? If a property can't be returned to a "pristine" state, what is an appropriate level of remediation? How does one properly arrive at a value for "stigma"? What is the extent of the defendant's duty to act reasonably to mitigate their damages? Unfortunately, there have been very few cases that have looked in detail at the calculation of damages in environmental cases.

The Ontario Court of Appeal in *Tridan v Shell*[9] clearly allows for the award of "stigma" damages where a contaminated property is remediated to a less-than-pristine level. The Court however also, rather enigmatically, stated that "Of course [damages] must be reasonable" without any further elaboration as to what factors Courts are to take into account in determining reasonableness. Is it for instance "reasonable" for someone to insist on a clean-up that exceeds

[9] *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 O.R. (3d) 503 (O.C.A.)

the fair market value of their property? Would it matter if the property were a commercial property? What if it were the ancestral family cottage?

Again, it is not the intent here to provide a detailed discussion of damages in environmental cases. But the difficulty in assessing damages for any of these claims makes advising clients in the aftermath of a spill particularly problematic. Should funds be reserved to deal with possible claims? How much? Should claims be settled early or should a full investigation take place to ensure there is no over-compensation?

Advising plaintiffs is equally problematic, for if damages are hard to assess, then how does one advise the plaintiff that a certain settlement is fair and reasonable? And of course, if plaintiffs cannot receive the comfort of such advice, then what is the likelihood of a claim settling?

The recent decision in *Berendsen*[10] highlights another difficulty that arises from environmental claims being brought many years after the incident. Mr. Berendsen's dairy herd suffered ill health as a result of leachate from asphalt deposited, with a previous owner's consent, by the Ministry of Transport over 30 years before the claim was brought. At trial Mr. Berendsen was awarded damages on what appears to be the basis that the consent of the previous owner did not matter as the MTO failed to properly warn of the potential consequences of the deposit. The decision was reversed by the Court of Appeal on the grounds that there was no breach of the duty of care when MTO's as the harm complained of was not foreseeable to MTO at the time of the original deposit.

There is at the time of writing, a likelihood that leave to appeal to the Supreme Court of Canada will be sought in *Berendsen*. If granted, it will be interesting to see how the Court reconciles the traditional tort theory followed by the Ontario Court of Appeal, with the broad statements about the "Polluter Pays" concept in decisions such as *Imperial Oil v. Quebec*[11].

Berendsen also potentially causes difficulty for ongoing reliance on *Tridan* for the premise that clean up beyond criteria is required. *Tridan* of course was decided before the MOE standards acquired force of law by virtue of Ontario Regulation 153/04. In Berendsen, the Court of Appeal

[10] *Berendsen v Ontario* 2009 ONCA 845 (Dec. 1, 2009); reversing *Berendsen v. Ontario* (2008), 34 C.E.L.R. (3d) 223

[11] *Imperial Oil v Quebec (Minster of the Environment)*, [2003] 2 S.C.R. 624

stated that “Once Ontario concluded that the Berendsens' well water did not contain contaminants in excess of the existing standards, it had no duty to remove those contaminants or even their source.” How is this to be reconciled with Tridan, which required remediation (or equivalent compensation) to a pristine level?

Conclusion

Once the immediate response to a spill is over, a multitude of decisions must be made that will often have far-reaching implications. If there are any residual effects of a spill -- and there usually are -- the implications of what happened will often not be fully realized until many months, and possibly even many years, later. Some appreciation, early on, of the issues that might be faced, will help arrive at a better action plan that minimizes exposure to unnecessarily-expensive claims from regulators or third parties.

A well-thought-out plan of action for the aftermath of a spill is at least as important as a spill contingency plan. Proper responses to regulatory requests and orders require careful planning and awareness of the consequences of any contemplated action. Fair and open dealing with neighbours’ concerns can avoid expensive civil litigation that too often results in unsatisfactory results for both parties. Identification and preservation of important evidence can avoid the potentially harsh consequences of a regime with a potentially-non-existent limitation period. To say that the effects of a spill will last long after the initial incident is over, is a truism that is well worth keeping in mind as these many decisions are being made.