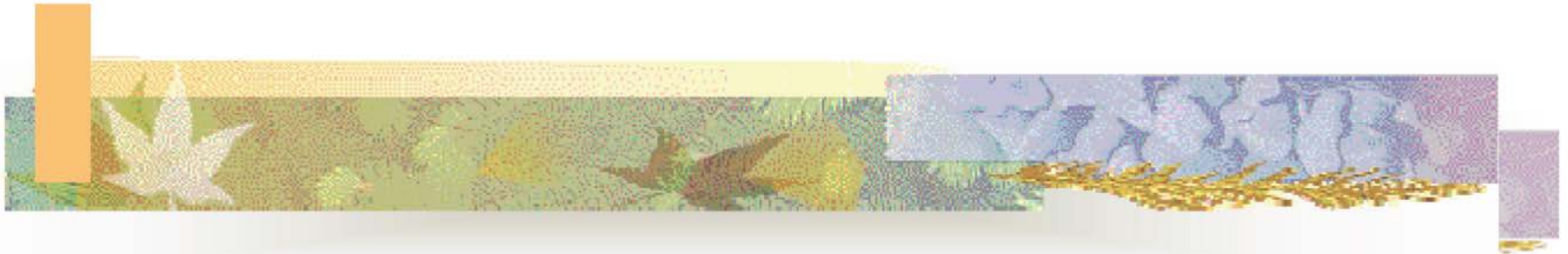


WSER - Legal Perspectives



CWWA - Window On Ottawa

Dianne Saxe, Ph.D.





Overview

- **New liabilities & protections**
- *Fisheries Act* enforcement trends
- Prosecution for what you can't prevent?
- Private prosecutions under the *Fisheries Act*
- Meaning of the RIAS
- Municipal by-laws



Authorizations

- Authorization to Deposit
 - IF 1) not “acutely lethal” AND meet other criteria of s. 6(1)
- Transitional Authorization
- Temporary Authorization NH3



Deleterious substances

- s. 5(1) - in effect immediately
- carbonaceous biochemical oxygen demanding matter;
- suspended solids;
- total residual chlorine; and
- un-ionized ammonia.



Liability?

- Deleterious substances
- Transition periods
- Missing authorizations



CCME?

Canada-wide Strategy for the Management of Municipal Wastewater Effluent

- **Minimum National Performance Standards**
 - Carbonaceous Biochemical Oxygen Demand (CBOD5) – 25 mg/L;
 - Total Suspended Solids (TSS) – 25 mg/L
 - Total Residual Chlorine (TRC) – 0.02 mg/L.
- **Site-specific Effluent Discharge Objectives**
 - Pathogens, nutrients, metal



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Fisheries Act Enforcement

- Environment Canada enforces pollution prevention provisions, e.g. s.36 (3) of the FA
- On summary conviction
 - 1st offence: fine up to \$300,000
 - subsequent: fine up to \$300,000 and/or 6 months in prison
- Indictable offence
 - 1st offence: fine up to \$1 million
 - Subsequent offences: fine up to \$1 million and/or 3 years in prison



Fisheries Act Enforcement

■ EC Legal activities reports 2004 - 2009

Region	Investigations	Range of Fines ²	Penalty (total) range ²
Atlantic	14	\$2,000 - \$7,000	\$10,000 - \$37,000
Quebec ³	2	\$5,000 - \$30,000	\$5,000 - \$75,000
Ontario	11	\$2,500 - \$25,000	\$10,000 - \$70,000
Prairies	20	\$1,000 - \$10,000	\$4,000 - \$100,000
Pacific	2	\$500 and \$2,000	\$45,500 and \$100,000

² For corporations (not individuals)

³ 2 prosecutions on several counts resulted in penalties totalling \$750,000 (Tembec) & \$80,000 (Cascades)



Fisheries Act Enforcement

- EC Legal activities reports 2004 - 2009
- 2 municipalities prosecuted:
 - Town of Beaverlodge (Alberta) - FA s. 36(3)
 - Guilty plea under s. 36(3) of FA for discharging wastewater from sewage lagoon that was acutely lethal to fish; discharge turned water brilliant green colour
 - Total penalty: \$20,000
 - Fine: \$2,000
 - Other: \$18,000 to the EDF. Other orders included a presentation to the Alberta Water and Wastewater Operator's Association at the annual seminar, Lagoon Aeration, Aeration Verification Study and Monitoring Prior to Discharge



Fisheries Act Enforcement

■ Moose Jaw (Sask)

- Guilty plea under s. 36(3) of FA for releasing 431,000 L untreated sewage into Moose Jaw River (due to power failure)
- Total penalty: \$55,000
- Fine: \$5,000
- Other: \$50,000 to EDF at rate of \$10,000 per year - will support programs that promote management and control of fisheries and fish habitat or conservation and protection of fish/fish habitat in area



Fisheries Act Enforcement

- EC Legal activities reports 2004 - 2009
- 2 municipalities prosecuted:
 - City of North Battleford (Sask) -
 - Guilty plea under s. 36(3) of FA for 3 sewage spills and effluent samples seized and found to be deleterious to fish
 - Total penalty: \$80,000
 - Fine: \$10,000
 - Other: \$50,000 to the EDF; \$20,000 to Receiver General (Canada) to cover expert witness costs. Court Order to complete construction of new wastewater treatment plan. (In the event of non-compliance, further penalty of \$25,000 to EDF for every 30 days beyond deadline)



Fisheries Act Enforcement

- *R. v. City of Dawson* (2003, Y. Terr. Ct.)
- City pleaded guilty to depositing deleterious substance into Yukon River
- Discharged a billion litres of sewage a year over 20 yr period following primary treatment
 - Its licence required effluent to be non-toxic to fish - yet failed bioassay 18/20 times during 1st licence
 - Felt secondary treatment plant unjustified expense
- Fine: \$5000 + must construct secondary sewage treatment plant; if fail to meet deadline - additional \$5000 per month



Fisheries Act Enforcement

- *R. v. Iqaluit (City)* (2002, Nu.C.J.)
- During labour dispute, City lacked staff to maintain sewage pumping facilities & respond to emergencies
- Result: 5 raw sewage spills of up to 830,000 L into inlet adjacent to City
 - City made no plans to deal with foreseeable result of labour dispute
 - Cooperated w investigators, no prior convictions
- Penalty: \$90,000
 - \$10,000 fine + \$65,000 to Minister of Environment + \$25,000 for manuals, training



Provincial Enforcement - Ontario Water/wastewater prosecutions

■ *Drinking water*

- *R. v. Ottawa* - June 2011 - guilty plea
 - CofA breach - failed to incorporate change to backwash procedure into operations manual before change took effect (Fine: \$6000 + VFS)
- *R. v. Nipigon* - Dec 2010 - guilty pleas - 3 counts - total fine \$10,000 + VFS
 - Failed to maintain system in repair - disinfection pump had broken (\$2000)
 - CofA breach - had not completed assessment & capacity review of gravity filters and submitted results to MOE (\$4000)
 - No CofA - modified residual management system without authorization (\$4000)
- *R. v. Pickle Lake* - November 2010 - guilty plea
 - Failed to check and calibrate monitoring equipment as required - accuracy of meter not confirmed (\$6,000 + VFS)



Provincial Enforcement - Ontario Water/wastewater prosecutions

■ *Drinking water*

- *R. v. Waterloo* - Jan 2009 - guilty plea
 - Failed to comply with Provincial Officer Order to identify and document all pipe connections that could allow untreated water to bypass primary disinfection, at its water treatment facilities (Fine: \$10,000 + VFS)
- *R. v. Parry Sound* - Feb 2008 - guilty plea
 - Failed to report adverse water quality results to MOE and MOH on 9 separate occasions (\$5000 + VFS)



Provincial Enforcement - Ontario Water/wastewater prosecutions

■ *Wastewater*

- *R. v. North Glengarry* - Oct 2008 - guilty pleas - 2 counts - total fine \$28,000 + VFS
 - Failed to immediately notify MOE of sewage discharge; before making urgent request to MOE to conduct fall discharge from sewage laggons, Township discharged >36,000 cu. m. effluent into river, did not notify MOE for 5 months (\$25,000)
 - No CofA - installed new water service and watermain without authorization (\$3000)
- *R. v. Ottawa* - Oct 2008 - guilty plea - 2 counts - total fine \$450,000 + VFS
 - Discharged 764 million L sewage to Ottawa River; during planned overflow, regulator gate jammed open (\$360,000 + VFS)
 - Failed to notify MOE (for nearly 8 months) (\$90,000 + VFS)



Provincial Enforcement - Ontario Water/wastewater prosecutions

■ *Wastewater*

■ *R. v. Toronto - 2007 - guilty plea*

- Failed to report adverse sewage spill; once City realized sewer main had broken, 63,000 L of raw sewage escaped; post-amalgamation, different teams wrongly believed the other had reported the spill (\$25,000 + VFS)

■ *R. v. Perth - June 2007 - guilty plea*

- Failed to notify MOE of spill 3 years earlier; MOE became aware of earlier incident when Town reported pumping station in Town's sewage system malfunctioned, discharging sewage into swamp (Fine: \$10,000 + VFS)



Provincial Enforcement - Ontario Water/wastewater prosecutions

■ *Discharge - water*

- *R. v. Lambton Shores - Oct 2010 - guilty plea*
 - Municipality hired company to clean and inspect drinking water standpipe
 - Company piped 2000 gallons of red water/solids from pipe (which had not been cleaned for 12 years) into a spillway flowing into municipal drain
 - City fined \$20,000 + VFS for discharging water contaminated with iron and aluminum into water
 - Company fined \$30,000 (+VFS) on guilty plea for same offence - *Court considered that municipality is small and its lesser role in the offence*



Provincial Enforcement - Ontario Water/wastewater prosecutions

■ *Discharge - water*

■ *R. v. Barrie* - June 2002 - guilty plea

- Typically developers own sewer works until they are completed; City assumes responsibility on completion
- City sent in applications in name of developer; on this occasion, the MOE asked the City to sign the application itself, which it did
- City fined \$45,000 (+VFS) for discharge of raw sewage into creek. Also ordered to pay \$15,000 to local dam removal project.
- Court found City responsible for the sanitary sewers, even though developer still owned them.
- City had failed to exercise due diligence - prior to the discharge, alarms and pumps found to be malfunctioning, and City did not address these problems adequately.



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- Private prosecutions under the *Fisheries Act*
- Meaning of the RIAS
- Municipal by-laws



Prosecution for what you can't prevent?

- Strict Liability Offences - control
- Due Diligence Defence = all reasonable care in the circumstances
 - *Fisheries Act*, s. 78.6(a)
 - *R. v. Sault Ste. Marie (City)*
 - *R. v. Pioneer Timber Co.*



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Private Prosecutions

Process

- Laying of the Information
- AG may intervene
 - Assume conduct (proceed/enter stay of proceedings)
 - Return for further proceedings
- Proceeds as would if Crown were prosecutor
- Penalty/proceeds of sale forfeited article split between person who laid the information and the Crown



Fletcher v. Kingston (City)

- City operated a landfill. Fletcher and MOE took samples of leachate - tested for “acute lethality”. Showed high levels of ammonia.
- Issue: Leachate = deleterious substance?



Fletcher v. Kingston (City)

- Trial - convicted on 4 counts in private prosecution and 3/4 counts in Crown prosecution
 - Fine = \$120,000 (privately laid counts) + \$30,000 (counts laid by Crown)
- Court of Appeal:
 - Ministry samples diluted to test toxicity of leachate at several concentrations -> deleterious BRD
 - Fletcher's samples only tested at 100% concentration -> reasonable doubt if deleterious



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Regulatory Impact Analysis Statement (RIAS)

- Since 1986, both federal draft regulations + RIAS (unless exempted) must be published in Canada Gazette
- Government declaration published with regulations to advise public of the purpose of the regulations and the mischief they address
 - Describes how the regulation will impact our environment, health, safety, security, social & economic well-being
 - Provides opportunity to comment on draft regulations
 - Final regulation published in Canada Gazette Part II, with RIAS, which may be modified to reflect comments received
- As of April 1, 2008, new RIAS required for all new regulatory proposals
 - New RIAS reflects 2007 Cabinet Directive on Streamlining Regulation
 - Includes performance measurement, enhanced risk assessment, quantitative cost-benefit analysis
 - Accountability (for costs/benefits, service standards, performance measurement)
 - Consistent approach by regulators, e.g., transparency in decision-making



The RIAS

■ Courts refer to RIAS

- as sources of information regarding the purpose of regulations
- is an extrinsic aid; legislative history material - used to complement interpretation (*not* the only source of information used)
- to assist in interpreting regulation
- to support/confirm interpretation court gives a regulation

■ Court has discretion to give RIAS weight

- If meaning of regulation plain - RIAS has little weight



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Role of Municipal By-laws

■ Responsibilities

- Provinces off-load responsibility...
- Duty of care under tort law - applies to municipalities (as to corporations)
- Comply with environmental statutes
 - prevent, report, clean up spills
 - ensure discharges comply (e.g., no exceedences)



Role of Municipal By-laws

- How can municipalities ensure this?
 - General powers to make by-laws in several broad spheres, e.g., sewer & water services
 - Can regulate or prohibit, provide for licence/permit system, impose conditions for obtaining licences, approvals



Role of Municipal By-laws

- *R. v. Sault Ste Marie* - 1978, SCC
 - Can't slough off responsibility by contracting work
 - Can control and supervise companies it hires by contract
 - Power of by-law
 - “*It fails to do so at its peril.*”



Role of Municipal By-laws

- What's going too far?
 - Certain by-laws may be outside powers conferred to municipalities
 - *Ferme l'Evasion v. Elgin*[Que] - municipality tried to ban use of sewage and de-inking sludge on farms; by-law effectively banned use of *all* sludge, even that which is permitted by law



Role of Municipal By-laws

■ What's OK?

■ Other by-laws survive scrutiny by Courts

- *Wallot v. Quebec* [Que] - municipality required owners of lakefront property to put in buffer zones composed of trees and other plants - the Court found the City had the power to adopt the by-law and had reasonably exercised its discretion

Questions?

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