

There's Been a Spill, Now What? Legal Requirements for Responding to a Spill (Part 1)

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Presentation Outline

- **Reporting a Spill**
- **Remediation and Restoration**
- **Regulatory Enforcement**
- **Insurance Considerations**



Anatomy of a Spill

- **Spill Event**
- **Employee and Public Safety**
- **Spill Containment**
 - not the same as remediation (short, immediate)
- **Reporting**
- **Remediation/Restoration**
- **Regulatory Enforcement**

REPORTING SPILLS

Sources of Environmental Liability

- **Regulatory Liability**

- regulator can issue orders
- regulator can remediate and seek cost of doing so
- regulator can prosecute for offences under environmental statutes

- **Civil Liability**

- negligence, nuisance, trespass, strict liability, breach of statute, breach of contract
- contamination migrating off-site
- results in damage and claims for damages

Environmental Legislation Requires Reporting Spill or Emergency

- **Environmental legislation requires reporting spills or environmental emergencies**
 - *Canadian Environmental Protection Act, 1999* (Federal)
 - *Fisheries Act* (Federal)
 - *Transportation of Dangerous Goods Act* (Federal)
 - *Environmental Management Act* (British Columbia)
 - *Environmental Protection and Enhancement Act* (Alberta)
 - *Environmental Management and Protection Act, 2010* (Saskatchewan)
 - *Environmental Protection Act* (Ontario)
 - *Ontario Water Resources Act* (Ontario)

What Triggers the Requirement to Report?

Generally, there is a requirement to report

1. The discharge, spill, or release into the environment
2. Of a contaminant, pollutant, or substance
3. That has caused or may cause an adverse effect

Definition of Spill

- **British Columbia**

- “spill” means the introduction into the environment, other than as authorized under *Environmental Management Act* and whether intentional or unintentional, of a substance or thing that has the potential to cause adverse effects to the environment, human health or infrastructure

- **Alberta**

- “release” includes to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust

Definition of Spill

- **Saskatchewan**

- “discharge” means a discharge, drainage, deposit, release or emission into the environment

- **Ontario**

- discharge of a “pollutant”
 - contaminant but not including heat, sound, vibration, radiation
- into the natural environment
- from or out of a structure, vehicle or other container
- that is abnormal in quality or quantity in light of the circumstances

Additional Definitions

- **Depending on your jurisdiction, Contaminant/Substance/Pollutant may include**
 - solid, liquid, gas, odour, heat, sound, vibration, radiation, or combination
 - resulting directly or indirectly from human activities
 - causes or may cause an adverse effect
 - substantially alter or impair the usefulness of the environment
 - immediate or long-term harmful effect on the environment or its biological diversity
 - danger to the environment on which life depends, human life and/or health

Additional Definitions

- **Depending on your jurisdiction, Natural Environment/Environment may include**
 - air, land and water
 - external conditions or influences under which humans, animals and plants live or are developed
 - all layers of the atmosphere
 - all organic and inorganic matter and living organisms

Who Must Report?

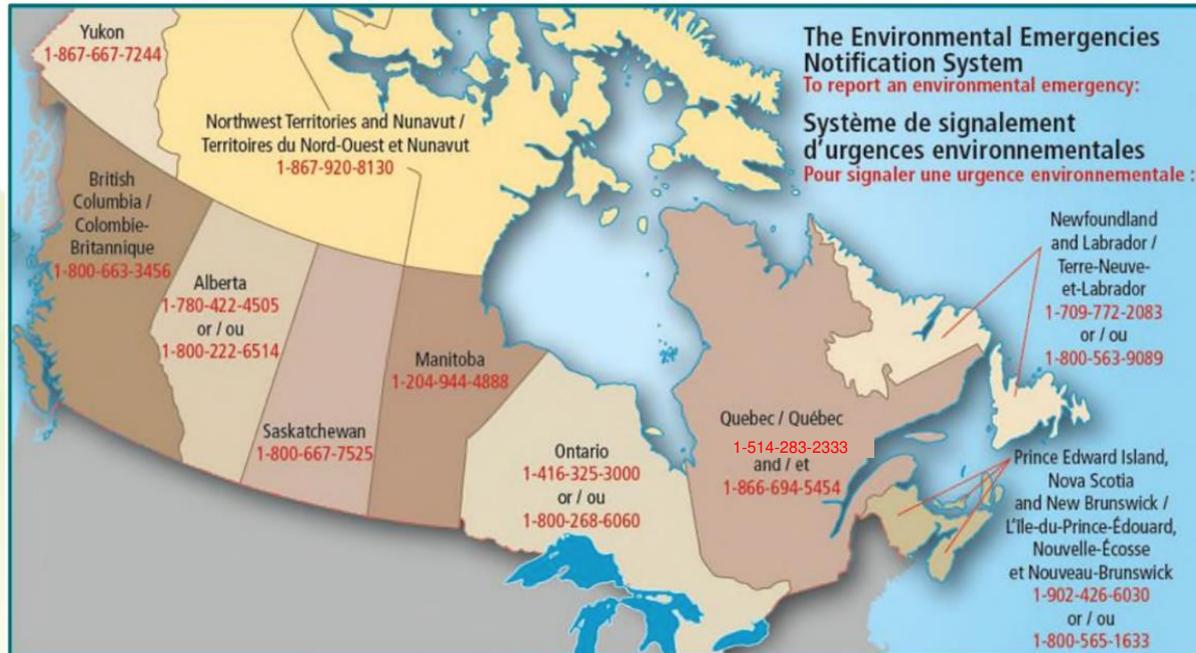
- **Depending on your jurisdiction, the following person may need to report**
 - every person who owns or has charge, management or control of the substance that is discharged, released or spilled
 - every person who spills or causes, permits, or contributes to the discharge, release or spill
 - a member of a police force, municipal employee or other public authority who is informed of or who investigates the spill

Report to Whom?

- **Depending on your jurisdiction, you may need to report to**
 - Provincial environmental emergencies/spills centre
 - Ministry of Environment
 - Municipality
 - Owner of the pollutant
 - Person who controls the pollutant
 - Person who may be directly affected

Report to Whom?

- Phone numbers to notify/report to regulatory authorities



Reporting Spills

- **When must notice be given?**
 - duty is to give notice “forthwith” in Ontario
 - “immediately” in BC, Alberta, Saskatchewan
 - “as soon as possible in the circumstances”, federally

Reporting Spills (Ontario EPA)

R v Dofasco (Ontario, 2020)

- Spill into Hamilton Harbour
- Company took time to investigate/remediate before reporting
- **3.5 hours was too long**
- Fined \$60,000 plus Victim Fine Surcharge (25%)

“Forthwith” (Ontario EPA)

R v Hemlo Gold Mines Inc. (Ontario, 1991)

- Unforeseeable failure in containment device
- Resulted in discharge of tailings containing cyanide into creek
 - 4:43 am – spill detected, staff took steps to neutralize effect of cyanide
 - 5:30 am – mine manager was notified at home
 - 6:30 am – mine manager arrived on site and called meeting with employees
 - 7:40 am – mine manager called MOE
- Court held report was not made forthwith
- Court found there should always be person on duty with authority to report spills
- fined \$7,000 (~\$1M spent to respond to spill and improve containment system)

Immediately upon becoming aware (Alberta)

R v Shell Canada Ltd., (ABQB, 2000)

- Three counts laid against Shell:
 - two for unlawfully applying a toxic pesticide released into water
 - one for failing to report a release
- Bioassay test report showing failure of toxicity of the discharge was mailed to Shell
 - Shell employee responsible for receiving the test results filed the report without reading it
 - two weeks later, Shell employee read the test results while writing the monthly report and reported the discharge to Alberta Environment

Immediately upon becoming aware (Alberta)

R v Shell Canada Ltd., (Con't)

- Court held that Count 3 turned on the wording of the legislation and reporting “immediately upon becoming aware” that release has caused, is causing or may cause an adverse effect
- Difference between the language “**immediately upon becoming aware**” and “**as soon as the person knows or ought to know**”
- “It is sensible to hold the person who causes the release [...] to a higher standard than the person in control of the substance”
- Until Shell employee had knowledge of test results showing an adverse effect, no actual knowledge of the adverse effect.
- Not found to have failed to report as the Crown could not prove the act of failing to report - employee was not aware of the adverse effects of the discharge until the report was read.

When In Doubt, Report

R v Castonguay Blasting Ltd (SCC, 2013)

- Subcontractor hired to do blasting operations for Ontario Ministry of Transportation highway-widening project
- Blasting operation went wrong, rock debris (fly-rock) was sent into the air and damaged a nearby home
- Subcontractor reported to contract administrator who then reported to both the Ministry of Transportation and Ministry of Labour
- Subcontractor convicted for failing to report the discharge to Ministry of the Environment and fined \$25,000
- The Court held “when in doubt, report”

Is there an Adverse Effect?

- **Ontario’s definition of “adverse effect” includes**
 - impairment of the quality of the natural environment for any use that can be made of it
 - injury or damage to property or to plant or animal life
 - harm or material discomfort to any person
 - an adverse effect on the health of any person
 - impairment of the safety of any person
 - rendering any property or plant or animal life unfit for human use
 - loss of enjoyment of normal use of property, or
 - interference with the normal conduct of business

Is there an Adverse Effect?

- **In BC, spills reporting deals with causing pollution, which encompasses the concept of adverse effect**
- **In Alberta, “adverse effect” means impairment of or damage to the environment, human health or safety or property**
- **In Saskatchewan, “adverse effect” means impairment of or damage to the environment or harm to human health, caused by any chemical, physical or biological alteration or any combination of any physical or biological alterations**

Content of Report

- **Generally, a report of a spill/incident may include**
 - your name, role, organization and contact information
 - description of incident/spill – product(s) and quantity
 - description of circumstances leading up to the release
 - date/location of incident/spill
 - duration of the incident/spill and whether continuing
 - cause or most likely cause of the incident/spill
 - when the incident/spill occurred (or was discovered)
 - details of action taken/proposed to be taken in response
 - departments/organizations informed or at the site

Additional Reporting

- **Some jurisdictions also require written reports**
 - Federal *Fisheries Act* requires written report as soon as feasible after the occurrence
 - British Columbia requires a regular “Update to Minister Report” at least every 30 days, an “End-of-Spill Report” and, in some cases, a “Lessons-Learned Report”
 - Alberta requires that a written report be made within 7 days
 - Saskatchewan requires a written report in 30 days of discharge for spills exceeding reportable limits

Reporting Exemptions

- **Depending on the jurisdiction, there may be reporting exemptions that apply, for example**
 - if the spilled substance is part of a spills prevention and contingency plan
 - if volume of spill meets a small quantities exemption
 - if there is no prospect of the spilled material entering the environment and causing an adverse effect

Federal Reporting Requirements

- ***Canadian Environmental Protection Act, 1999***
 - notify enforcement officer/designated person and provide a written report on the environmental emergency
 - make reasonable effort to notify any member of the public who may be adversely affected by the emergency
 - Environmental Emergencies Regulations have additional reporting obligations for regulated substances
- ***Fisheries Act***
 - notify inspector, fishery officer, fishery guardian or prescribed authority and provide written report
- ***Transportation of Dangerous Goods Act, 1992***
 - submit report(s) depending on mode of transport

Municipal Reporting Requirements

- **Municipalities may have additional requirements for spill reporting, for example**
 - City of Hamilton Sewer Use By-law
 - Every person having the charge, management and control of matter that is spilled and every person who spills or permits the spill of matter must immediately notify the City of Hamilton at 905-540- 5188, the owner of the premises where the spill occurred, and any other person who may be directly affected by the spill
 - City of Vancouver Sewer and Watercourse By-law
 - A person who accidentally discharges any prohibited substances (listed in Section 3.3 of the bylaw) into a public or private sewerage system, storm drainage system or watercourse must immediately report the incident to the Inspector or City Engineer

There's Been a Spill, Now What?

Legal Requirements for Responding to a Spill (Part 2)

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Recap Part 1 – Reporting a Spill

- **Spill Event**
- **Employee and Public Safety**
- **Spill Containment** - short, immediate
- **Reporting**
 - Who? – owner, charge management and control, spiller
 - To whom? – provincial, municipal, federal, neighbours
 - When?
 - “forthwith” in Ontario
 - “immediately” in BC, Alberta, Saskatchewan
 - “as soon as possible in the circumstances”, federally
 - What information? – details of spill and actions taken to respond

REMEDICATION/ RESTORATION

Restoration

- **Duty to take all reasonable steps to**
 - contain and control the spill
 - improve adverse effects
 - clean up and restore the environment
- **When to respond to a spill?**
 - respond immediately once aware of the spill

Mitigation and Restoration

- **A thorough and prompt spill response may**
 - contain a discharge, spill or release and prevent a contaminant from entering the natural environment and causing an “adverse effect”
 - be part of a due diligence defence to a prosecution
 - mitigate penalties, if convicted

Restoration

- **The Ministry of the Environment may issue an order requiring one or more of the following to take steps to mitigate or restore the environment**
 - owner(s) of the pollutant, including a corporation
 - person(s) in control of the pollutant, including a corporation, its corporate directors and officers, and its employees
 - government agencies
 - municipalities
 - others

REGULATORY ENFORCEMENT

Regulatory Orders

- **Regulators May Make Orders**

- preventive action
- stop work
- change equipment or processes
- study, monitor, and report
- clean up and restore the environment
- pay costs

- **Who Can be Ordered?**

- companies
- corporate directors, officers, owners
- Controllers/individuals – persons with charge, management or control of a contaminant or property

Regulatory Orders

- **Orders may be appealed and must be obeyed**
 - time frames for review/appeal are short
 - Regulator often names multiple parties in an Order
 - during appeal, order must be obeyed unless stay is granted

Regulatory Prosecutions

- **Federal and provincial prosecution for**
 - pollution offences
 - causing or likely to cause an adverse effect
 - impairment of water quality
 - serious harm to fish or fish habitat
 - exceeding regulatory standards
 - failure to report - at all or in time

Regulatory Prosecutions – Defences

- **Failure of Crown to Prove Constituent Elements of the Offence** – each element must be proved beyond a reasonable doubt
- **Charter Application** – actions of regulator during inspection/ investigation
- **Abuse of Process** – may justify a stay where there is oppression, prejudice, harassment or manifest hardship on the accused to a significant degree
- ***DeMinimus* Principle** – trivial or minimal impairment
- **Act of God** – an extraordinary event of nature that could not be foreseen and could not be guarded against by taking reasonable steps
- **Officially Induced Error** – official gave advice that was reasonable but erroneous
- **Sabotage** – deliberate failure of employees to follow a system
- **Necessity** – to respond to an emergency to the extent necessary to avoid the potential harm

Regulatory Prosecutions – Due Diligence

R v Sault Ste Marie (City) & R v Courtaulds Fibres

- Took all reasonable care to avoid the offence
- Superhuman efforts not required
- Reasonable belief in a mistaken set of facts
- Environmental Management Systems (EMS) are important elements

Regulatory Prosecutions – Due Diligence

Environmental Management Systems (EMS)

- reasonable and realistic corporate policy
- identify environmental impacts and legal requirements
- implement SOPs and training
- adequate commitment of resources
- continuous improvement (management review, audits)

Regulatory Prosecutions – Due Diligence

R v ControlChem (OCJ 2016)

- Employee deliberately discharged liquids from four large totes into a storm drain which turned the creek white
- 5 *EPA* and *OWRA* charges were brought against both the company and employee
- Employee pled guilty and convicted on 1 *OWRA* charge
- Due diligence (took all reasonable care) was made out during the company's trial in Fall 2015
- Company mantra – “nothing leaves the building”
- ControlChem acquitted of all charges

Sentencing Principles – Mitigating & Aggravating Factors

- **Adverse effect/impairment to environment or environmental quality**
- **Risk to unique, rare or important/vulnerable component**
- **Intentional/reckless acts**
- **Financial benefit (increase revenue, decrease cost)**
- **Previous warnings**
- **Previous convictions or non-compliance**
- **After the offence**
 - attempt to conceal the offence
 - failed to take prompt action to mitigate/remediate
 - failed to take prompt action to reduce risk of similar offence

Penalties

- **Fines dependent on**
 - Federal vs Provincial vs Municipal offence
 - Regulated person/entity
 - Individual vs Corporation
 - First or subsequent offence
 - Mandatory minimums and maximums
 - Seriousness of the impact
- **Other penalties**
 - Jail-time (rare)
 - Creative Sentencing

INSURANCE COVERAGE

Insurance Coverage

- **Contact your Broker**
- **Review your insurance policy line by line**
 - what is the extent of your coverage?
 - do you have “emergency coverage” under your insurance policy?
 - do you have excess insurance?
- **When should you notify your insurer/insurers?**
- **Will your insurance cover compliance costs?**
- **Will your insurance cover defence costs?**

KEY TAKEAWAYS

Key Takeaways

- **PLAN AHEAD!**
- **Prepare and implement spill prevention and contingency plans to**
 - prevent or reduce risk of spills
 - eliminate or ameliorate adverse effects of a spill
 - demonstrate capacity to effectively respond to a spill
 - set out reporting obligations in the event of a spill
- **Create and implementing procedures that may prevent spills**
- **Report, remediate and restore**

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 - offices in Calgary, Ottawa, Toronto, and Yellowknife

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