

# There's Been a Spill, Now What? Legal Requirements for Responding to a Spill

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This presentation provides general information and is not intended to provide legal advice.  
Audience members should seek legal advice for specific situations.

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# Overview

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- **Spill Reporting**
  - Trigger to Report
  - When
  - Who and to Whom
  - What
- **Prosecution Caselaw Update**



# SPILL REPORTING

# Environmental Legislation Requires Reporting Spill or Emergency

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- ***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?

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## **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

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- **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

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- **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

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- **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
  - danger to the environment on which life depends, human life and/or health
- **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

# Is there an Adverse Effect?

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- **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?

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- **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**

# When to Report

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- **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
  - when in doubt, report!

# When to Report (Ontario)

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## ***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%)

# When to Report (Alberta)

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## ***R v Shell Canada Ltd. (Alberta, 2000)***

- Bioassay test report showing failure of toxicity of the discharge was mailed to Shell and employee responsible for receipt of test filed the report without reading
- 2 weeks later, Shell employee read the test results while writing the monthly report and reported the discharge to Alberta Environment
- failing to report 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**”
- Until Shell employee had knowledge of test results showing an adverse effect, no actual knowledge of the adverse effect.
- 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

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## ***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, but not Ministry of the Environment
- Subcontractor convicted for failing to report the discharge to Ministry of the Environment and fined \$25,000
- The Court held “when in doubt, report”

# Who Must Report? & To Whom?

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- **Who must 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

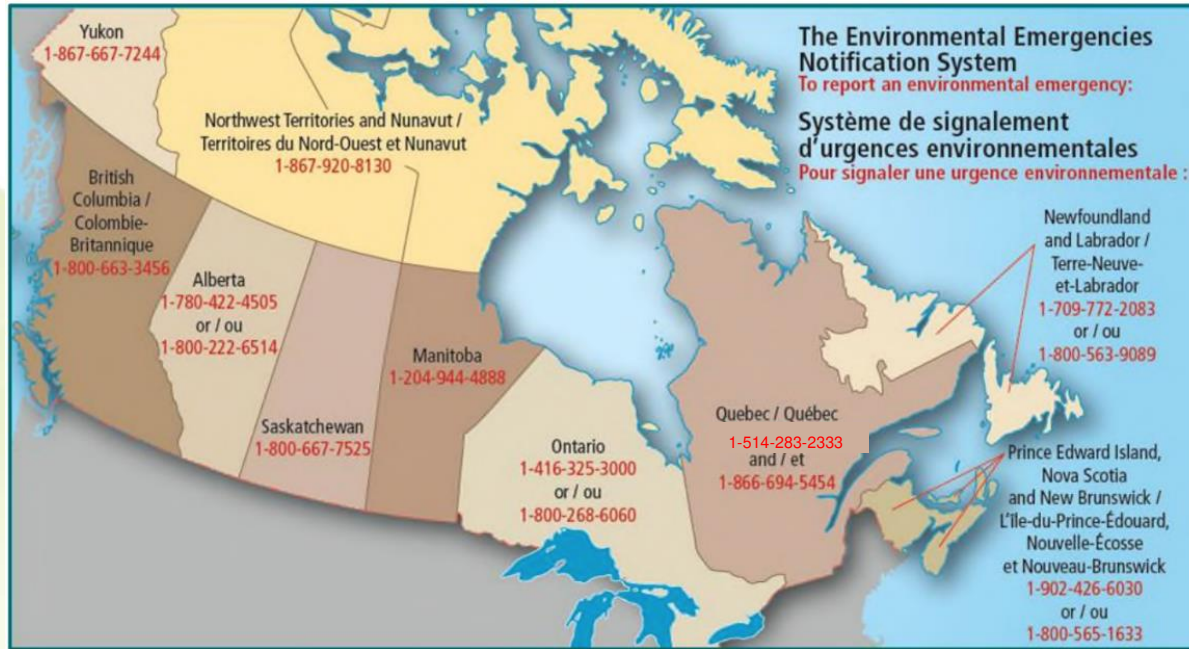
- **To whom**

- 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**



# What to Report

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- **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

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- **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

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- **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

# PROSECUTION CASELAW UPDATE

# Environmental Prosecution – Waste Rock Leachate

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## ***R v Teck Coal Ltd. (British Columbia, 2021)***

- Teck Coal deposited coal mine waste rock leachate into the upper Fording River in southeastern BC
- Teck Coal entered a guilty plea on two counts of unlawfully depositing a deleterious substance into water frequented by fish contrary to s. 36(3) of the *Fisheries Act*
- \$60 million (fine and monetary court orders) in addition to pollution reduction measures
- Highest fine ever imposed by a Canadian court for a violation of the *Fisheries Act*

# Environmental Prosecution – Drilling Fluid

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## ***R v Michels Canada Co. (British Columbia, 2022)***

- In August 2017, Michels carried out horizontal directional boring operations in Coquitlam, BC
  - release of drilling fluid and sediment-laden water to storm sewer system into Cape Horn Creek
  - 20 dead fish in creek following release
- In September 2017, Michaels carried out horizontal directional boring operations in Surrey, BC
  - release of drilling fluid and sediment-laden water to storm sewer system into Quibble Creek
  - 533 dead fish in creek following release
- Michels plead guilty to charges under *Fisheries Act*, s. 36(3) and fined \$2.8 million directed to Environmental Damages Fund

# Environmental Prosecution – Chlorinated Water

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## ***R v Gibson Energy ULC & GEP ULC (Alberta, 2021)***

- Fire suppression system leak caused millions of litres of chlorinated water to escape a retention pond, enter a creek, and flow into the North Saskatchewan River
- Foreseeable that water from a line break or valve failure in a system without sufficient internal shut off mechanisms could overflow the retention pond
- Convicted under *Fisheries Act*
- Fined \$1.5 million, to be directed to EDF
- Also ordered to make a presentation to industry in Strathcona County about the danger of chlorinated water



# Environmental Prosecution – Air Emission (Creative Sentencing)

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## ***R v Suncor Energy Products Partnership Produits Suncor Energie (Alberta, 2021)***

- Defendant pleaded guilty to one count of breaching a condition of its Approval under Alberta's EPEA through the release of unauthorized air effluent streams
- Defendant admitted that a valve was not properly closed, resulting in the release of hydrogen sulphide gas; five nearby employees were sent to the hospital for treatment
- Creative Sentencing Order: \$99,000 will be allocated to the Strathcona Community Hospital Foundation to purchase respiratory support medical equipment

# Environmental Prosecution – Process Water

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## ***R v Husky Oil Operations Ltd (Saskatchewan, 2022)***

- A 2018 release of approximately 2.8 million litres of process water, a by-product of oil and gas production and high in salt content, from the rupture of the Westhazel pipeline
- The process water travelled 450 metres over land resulting in dead vegetation, and then entered the Englishman River
- Process water was determined to be deleterious or harmful to fish under *Fisheries Act*
- \$600,000 fine to Environmental Damages Fund
- Company added to Environmental Offenders Registry

# Environmental Prosecution – Toxic Substance

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## ***R v ArcelorMittal Canada Inc. and 7623704 Canada Inc. (Quebec, 2022)***

- ArcelorMittal Canada Inc. and 7623704 Canada Inc. partners in mining company that operates Mont-Wright mining complex in Fermont, Quebec
- Between May 2011 and May 2013, 33 (unauthorized) deposits of toxic substances in water frequented by fish
- ArcelorMittal guilty of 93 charges and 7623704 guilty of 5 charges for violating the *Fisheries Act* and *Metal Mining Effluent Regulations*
- Fine of \$15 million to be paid to Environmental Damages Fund
  - ArcelorMittal fined \$14,400,000
  - 7623704 fined \$600,000

# Environmental Prosecution – Acidic Water

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## ***R v Rio Tinto Alcan Inc. (Quebec, 2023)***

- Rio Tinto discharged acidic water into the Saguenay River used to cool equipment for repair work after boiler failure
- Acidic water (pH level between 4.6 and 5.5) was a deleterious substance deposited into water frequented by fish (cod, smelt and sturgeon) contrary to s. 36(3) *Fisheries Act*
- Fine of \$500,000 to be paid to Environmental Damages Fund

# KEY TAKEAWAYS

# Key Takeaways

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- **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
- **Understand reporting obligations in the event of the spill, Federal, Provincial, Municipal**
- **Regulatory enforcement action and fines on the rise!**

# Willms & Shier Environmental Lawyers

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- **Established nearly 50 years ago**
- **Environmental, Indigenous, and Energy law**
- **18 lawyers**
  - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
  - offices in Calgary, Ottawa, Toronto, and Yellowknife

# Contact Information

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