THE VULNERABILITY OF PUBLIC OFFICIALS
aka
WHEN BAD THINGS HAPPEN TO GOOD PEOPLE

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INTRODUCTION

When Alberta Environment Investigator Lorie Paulovich and I spoke to the 2009 Annual Operator Seminar (AOS) of the Alberta Water & Wastewater Operators Association (AWWOA) about the great unpleasantness of being prosecuted, one of points we were trying to make is that public officials are potentially on the hook as well. While this is old news for us, it sent shock waves through the audience and several public officials asked for a copy of our presentation. I couldn't and won't put together a power point presentation if my life depended on it but I did promise to put together a discussion paper.

I then circulated that paper to investigators and inspectors from across the Province asking for their input so the end result is a combination of my thoughts and their observations. This is not a statement of policy, a definitive statement of law or even legal advice. This paper is presented for educational purposes and to encourage further dialogue.

MY MOTIVATION

I've been a prosecutor now for over 31 years, the last 20 exclusively dealing with environmental files. But before that I prosecuted 'real crime': murder, sexual assaults, bank robberies and the like. A prosecutor can do nothing about the causes of violent crime, such as addiction, unemployment, mental illness and poverty, but when I began to handle environment files it dawned on me that virtually every offence I prosecuted was committed by otherwise fine upstanding citizens and that the offences were COMPLETELY preventable.

That made me sad. So for every file I have ever worked in the last 20 years I have done a root cause analysis to try to identify the real reason the offence occurred in the first place. You would be really surprised: there are three or four common denominators that repeat themselves over and over again. These become the "lessons learned" for industry and I share this information by lecturing at the universities, industry and not for profit organizations.

The other motivation is that a friend of mine was just elected to a Village Council and they have a water problem and considering she is a para-legal in my old office she was worried about her personal culpability.

SO WHAT ARE THESE COMMON DENOMINATORS THAT LEAD TO OFFENCES?

Based on my experience I fear that municipalities fail to invest time and effort (not so much money) into the systems that deliver potable water and release waste water to the environment because they do not assign the appropriate level of importance to those services. Why? I think that there are myths, misconceptions, and false beliefs that lead municipalities to believe they don't have to. And while this is a topic that could fill volumes, here is the 'Coles notes' version.

MYTH "A" -- Municipalities don't understand that criminal law applies to them

Municipalities and councillors believe and expect that they will be sued so they invest time and effort to develop strategies that limit their civil liability, but they never imagine that they could end up in a criminal court room.

But under the *Criminal Code*, if a person (and that includes a corporation like a municipality) has there is a duty to act, one must do so competently and negligent acts or omissions are subject to criminal charges like public endangerment and criminal negligence causing death. Conviction for these types of offences does not require proof of intent to cause harm.

Even when there is no express duty, if a corporation or an individual assumes responsibility for an activity they are on the hook. In THE leading case on regulatory prosecutions R v. Sault Ste. Marie (1978) 40 C.C.C. (2d) 353, the City argued that it had no "duty" to act and therefore should not be held liable for the actions of its contractor. The Supreme Court of Canada disagreed, stating at page 376 that… "[t]he law is replete with instances where a person has no duty to act but where he is subject to certain duties if he does act."

While it is extremely rare for municipalities to commit criminal offences, there is a plethora of other legislation dealing with public health and safety and the environment. While this legislation is described pleasantly as regulatory or quasi criminal, the reality is that offences under these Acts and Regulations are prosecuted in criminal court before criminal judges and the all of the adverse publicity and shame that is associated with criminal proceedings applies. And once you are standing in a criminal courtroom the objective of the exercise is punishment, not making things better.

So what is the point of all of this?

Well it means that the criminal system is COMPLETELY different from the civil system and there are different rules. The one that catches most corporations off guard is the fact that you cannot contract your way out of criminal liability. So forget about all those fancy terms in a contract talking about indemnification or transfer of risk, they are MEANINGLESS in the context of a criminal or quasi-criminal proceeding.

Secondly, it's not enough good enough just to comply with the Acts and Regulations. Those same Acts and Regulations ALSO require compliance with standards and codes adopted by the legislation. So it comes as shock to many municipalities that an approval or a Code of Practice is not just helpful advice, they create legal obligations and failure to comply is an offence.

Third, it means that the decision whether or not to proceed with charges is made by a prosecutor using the same tests that applies in every criminal case which means that the decision is made in on the basis of the evidence, not on a cost benefit analysis.

MYTH "B" -- Municipalities like many other corporations don't understand that criminal responsibility extends beyond the person who did the dirty deed

Almost every corporation I have ever prosecuted believes that if an employee or agent made a mistake that is the person who will be dragged into court. Not so fast. There are a whole bunch of ways in which the employer (read municipality) and the Directors (read councillors) are potential accused as well. In my world it's called "parties to the offence" and this is how it works:

Liability based on the Criminal Code

The Criminal Code extends liability to other folks (aka parties to the offence), in this way:

> 21(1) Every one is a party to an offence who
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of **aiding** any person to commit it; or
> (c) **abets** any person in committing it.
>
> 22(1) Where a person **counsels** another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counseled is a party to that offence, notwithstanding the offence was committed in a way different from that which was counseled.

The *Criminal Code* specifically allows for convictions of the party even where the principal could not be convicted. (Section 23.1)

Now what does "abetting" mean? Well the Manitoba Court of Appeal had this to say in the context of regulatory prosecutions:

> …the failure of the accused to make any effort to stop or prevent the commission of the offence, when he was in a position to do so and when he had the authority to do so, was equivalent to encouragement on his part.

The great thing about parties to an offence for the Crown is that it matters not whether that liability is framed in terms of the actions of a principal or of a party. That was the whole point in R v. Thatcher. Some of you may remember when the former premier of Saskatchewan was convicted of murdering his wife. The Crown couldn't prove whether he had actually pulled the trigger himself or whether he had paid someone else to do the deed but the neither the jury nor the Court cared when they convicted Mr. Thatcher.

Liability based on Statute Law

Quite apart from the provisions in the *Criminal Code* talking about parties (which incidentally applies to all provincial legislation) there are specific provisions in the provincial legislation that widens the net of persons who might be held responsible.

Under section 232 of the *Environmental Protection & Enhancement Act*, the directors and officers of a corporation (which would include a municipality) are on the hook if the corporation committed an offence if they "directed, authorized, assented to, acquiesced or participated in the commission of the offence."

In the same Act under the heading "Liability of public officials" Section 233(1) provides:

> Where a person who is acting under the direction of
> **c)** A member of a council of a local authority…commits an offence under this Act, the…member of council…is also guilty of the offence…if the member of council **knew or ought reasonably** to have known of the circumstances that constituted the offence and **had the influence or control to prevent its commission…**

There are almost identical provisions in the *Water Act.*

Have we charged a councillor personally? No, but only because there we didn't have the evidence, not because we can't.

Liability based on the duty to supervise

This is usually the biggest surprise for the corporate accused. Employers are responsible for the actions of their employees and agents because there is a residual duty to supervise and because human error is inevitable, the employer MUST set up systems that anticipate mistakes. Because a failure to understand this is the reason for SO many convictions, I'm going to give you a number of quotes so that you understand that this is not my idea. The leading author on regulatory prosecutions John Swaigen had this to say:

> …**the employer or principal is punished not for the errors of its employees or agents, but for its own negligence in failing to set up an appropriate system to prevent such errors.**

The Supreme Court of Canada in talking about what it would take to establish a due diligence defence, had this to say:

> [A] superior company may not avoid its duty of due diligence by simply contracting out, but can escape a finding of guilt if it is able to establish as a fact that it put in place a proper system for supervising its servants and its contractors.

And finally, this is what the Walkerton Commission had to say about municipalities in particular:

> In light of municipal ownership of water systems, municipal councils are responsible for ensuring the effective management and operation of their water systems. In some cases, councillors will assume this oversight responsibility directly, in others, they may delegate aspects of the oversight function. Given the importance of drinking water for public health, those responsible for discharging the oversight function of the municipality (e.g., the council or a committee of the council) should be held to a statutory standard of care that recognizes and formalizes their responsibilities.

MYTH "C" -- Municipalities think that they CAN'T be charged

I've heard this over and over from defense lawyers and from councillors:

> **But we are a separate branch of government, you can't charge us**

But hey, didn't you notice that the leading case in environmental prosecution is Regina v. the City of Sault Ste. Marie? Besides we even prosecute departments within our own government. Maybe the reason that these files aren't on the radar screen is that when we do proceed, the federal Crown handles the file because there is a conflict.

Why would municipalities forget about the City of Sault Ste, Marie? Well I think it's because they think they are immune and there are a number of reasons that contribute to that misunderstanding.

First, the *Municipal Government Act* can be misinterpreted to provide a false sense of security:

> Section 527.2
> Subject to this and any other enactment, a municipality is not liable for damage caused by anything done or not done by the municipality and accordance with authority of this or any other enactment unless the cause of action is negligence or any other tort.

Section 525(2) is even more comforting. It starts off helpfully with the heading "Protection of Councillors and Others" and goes on to say:

> Councillors, council committee members, municipal officers and volunteer worker are not liable for loss or damage caused by anything said or done or omitted to be done in good faith in the performance or intended performance of their functions, duties or powers under this Act or any other enactment.

But hey, take a look at what these sections are talking about: damages, loss, causes of action in negligence or tort…these are all concepts of CIVIL LIABILITY. And as I said at the start, the rules in the criminal system are TOTALLY different. And even the *Municipal Government Act* says "subject to… any other enactment".

Second, I think that councillors think of themselves like members of parliament who do have limited immunity. But guess what, they're not.

Third I think there is a myth that *in camera* deliberations are privileged. I've heard of this scenario being played out: An operator knows that repairs need to be undertaken and new equipment purchased but any expenditure more than petty cash has to be approved by Town Council. When the operator makes his pitch, Council retires to private chambers to discuss the matter and upon their return, the request is denied without explanation. Councillors believe that what they say in the privacy of their chambers will never see the light of day.

Sad to report that the only stuff that is privileged is your communication with your spouse and your lawyer and even then, there are a whole bunch of exceptions. And hiding the stuff in the lawyer's office doesn't work either because we can still get a warrant. It's more work, but it is doable.

Fourth, and this is according to the investigators and inspectors across the Province, municipalities seem to think that someone else will be responsible for safe drinking water. While Alberta Environment is a resource, they are not the responsible party and there is no guarantee that they will forgive and forget...

MYTH "D" -- Municipalities think that they WON'T be charged

This is the other thing that I hear all the time:

> **But it wouldn't be in the public interest to go after us.**

Now I get it, nobody wants to be taking money out the hands of one group of taxpayers and giving it to another. But the solution lies in how you sentence the accused, not in whether you prosecute or not. (By the way this isn't my brilliant idea; this comes from the case law too). At the sentencing stage we don't ask for money, we invest in creative sentencing projects that will benefit not only the taxpayers in that municipality, the citizens of Alberta as well.

Whether or not charges will be laid depends on the evidence, not the identity of the accused.

WHY DO THESE MYTHS LIVE ON?

I don't think that municipalities talk to each other when they get convicted so the lessons learned the hard way are not shared. At the end of this paper I've prepared a number of case summaries, not to be critical but to drive home the point that municipalities or any corporation that delivers potable water or releases treated effluent into the environment is ultimately responsible for the acts or omissions of its employees and agents. I've also included a short paper on due diligence in Appendix B, based on my experiences which includes references to cases where no charges were laid.

THE BOTTOM LINE...

While the personal consequences for the individuals who have been convicted and their employers were pretty catastrophic, that is nothing compared to the tragedy when things go really wrong. Let's never forget the Walkerton case. One man was sent to jail for a year and his brother placed under house arrest. These were good men, good fathers, good husbands and upstanding members of the community and they had no understanding of what they had done and that they and their families were in danger as well. Yet these two men must live with the knowledge that their neighbors died because of their ignorance.

Pray that lesson needs never to be taught again.

APPENDIX A – CASE STUDIES

CONVICTIONS IN ALBERTA

A large municipality in Alberta was penalized $200,000.00 for failing to comply with reporting requirements under the approval when 2300 cubic meters of untreated sewage was released from a pump station into the river. Although there was an alarm system that should have prevented the release, employees did not understand how the system worked.

A regional water Commission in Alberta that operated a potable water facility serving several municipalities was penalized $100,000.00 when the plant's senior operator dumped a corrosion inhibitor into the boiler sump unaware that the sump was connected to the plant's intake water system. Although engineering diagrams kept at the plant indicated that the sump lines were connected to the wastewater line and ponds, the operator did not review the plans. The Commission was aware that the operator was under considerable pressure at the time of the offence.

A major corporation in Alberta was penalized $250,000.00 when the operator of a potable water plant that serviced a large construction camp falsified records. Although the company knew nothing of the falsification, they had no system to supervise the operator and they knew that he was overwhelmed by his responsibilities.

A large municipality in Alberta was penalized $200,000.00 for releasing 160 kilograms of chlorine gas from a chlorine storage room at their water treatment plan. The release was caused because an inappropriate gauge had been installed and although there was a system to contain accidental releases, the procedures for activation of the system were incomplete and not understood by contractors hired by the municipality.

Two multinational corporations were penalized $175,000.00 and $225,000.00 respectively for when the operator of a wastewater treatment falsified laboratory results to conceal discharge violations. The operator was sentenced to 12 months of house arrest. Although the owner of the plant had delegated responsibility for the water treatment facility to another company, they had not investigated the whether the subcontractor was competent to manage such a facility and took no steps to supervise the subcontractor. In turn, the subcontractor relied upon the operator without properly supervising his work.

A town in Alberta was convicted under the federal Fisheries legislation when they released effluent from a waste water holding pond into a river. Although the town had compiled with the provincially issued approval, they did not understand that they were also bound by federal legislation nor did they understand the environmental impact of their effluent on the fishery.

Another town in Alberta was penalized $70,000.00 under the federal Fisheries legislation in an almost identical case when they released effluent from a waste water holding pond into a river. Although the town had compiled with the provincially issued approval, they did not understand that they were also bound by federal legislation.

The operator of a feed lot operation was penalized $150,000.00 when effluent overflowed from a waste water holding pond into a river. The company had experienced a similar problem in the previous year but had only installed a temporary structure that could not manage a large volume release.

CASES FROM OTHER JURISDICTIONS

A municipal district in Saskatchewan was convicted of building a water treatment plant without authorization from the Province. While the council had heard representations from a contractor as to the costs associated with authorization, the council decided that they couldn't afford to wait for proper authorization. While the municipality typically released the minutes of Council meetings on their web-site, they choose not to include the minutes for the meeting in which the question of authorization had been debated.

A Village in the Northwest Territories was penalized for violations under the federal *Fisheries Act* The Village argued unsuccessfully that they had been targeted unfairly and that federal legislation should not apply because a licence had been issued to the Town by the NWT.

A Village in British Columbia was convicted under the federal *Fisheries Act* when five and a half million gallons of sewage effluent was released into a river when a storage lagoon broke. The Village had not maintained the lagoon according to its design and had not established a proper system of inspection nor taken steps to ensure the safe operation of the system. Prior inspections had been conducted indicated that there was a risk of failure. The Village argued unsuccessfully that it could rely upon the fact that the province had inspected the lagoons.

A university in Nova Scotia was convicted when an underground storage tank was overfilled and 6800 gallons of fuel was spilled which eventually made its way through a storm sewer and into the ocean. The release occurred because the gauge indicating the level of product in the tank was faulty. The University was aware of the problem because of an earlier incident. The responsible Supervisor had requested that the gauge be replaced but the University did not approve that budget expenditure.

APPENDIX B – DUE DILIGENCE

What is due diligence?

Due diligence is a defence that is available for most regulatory crimes. The Supreme Court of Canada decreed that for offences where there is no requirement to prove an evil intent that:

> The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, **or if he took all reasonable steps to avoid the particular event.**

In considering what would be "**all** reasonable steps" in the context of the acts by an employee or agent, the Court had this to say:

> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the questions will be whether the act took place without the accused's direction or approval, thus negating willful evolvement of the accused **and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.**

What are the minimum requirements of a system that meets the test for due diligence?

The various cases have said that:

The system must anticipate human error.

- There must be adequate communication between the company, its' employees and agents.
- There must be periodic reviews and inspections to determine whether the system is operating as it was intended

What due diligence isn't

The case law is also clear that:

- It is no defense to rely exclusively on an expert
- It is not defense to "download" responsibility to employees or agents

My experience

These are the questions that I ask myself in assessing whether a due diligence defence would be successful:

- What did the accused do **before the offence**? (To be crude, due diligence is like birth control, not an abortion. Actions taken after the fact are for the most part, irrelevant.)
- Did the accused have a **system** in place?
- Did that **system** deal specifically with the circumstances that lead to this offence?
- Is the **system** formal in the sense that it was reduced to writing?
- Is the **system** rigorous in the sense that it has the following components?
    - Identified environmental risks;
    - Established objects and targets;
    - Monitoring mechanism;
    - Ability to modify the system based on the results of the monitoring.

While many companies have implemented the first two components of an environmental management system, virtually none of them policed themselves or made improvements based on those findings.

I also think the court in Regina v. Midland Transport provides a good measuring stick for what a good due diligence system looks like:

> These included a training program, handbooks, written instructions, posters, video, regular meetings, spot checks and an adequate budget to fund the program.

It may occur to you that it is very difficult for a company to establish due diligence. In fact, that has been my experience. In recent cases the courts have gone so far as to say that there can be no due diligence without a formal environmental management system in place and that a failure to do HAZOP or Risk Analysis prior to undertaking a significant project or change precludes the defense of due diligence.

What would evidence of a lack of due diligence look like?

In my experience the best evidence to undermine a claim of due diligence is found in the historical files. Corporations including municipalities typically "know" about an environmental risk but the lesson is forgotten so it is question of looking for evidence such as:

- previous incidents where no changes were implemented
- warnings from regulators that went unheeded
- internal policies that were not followed
- a failure to comply with well-known standards
- a failure to act upon publically available information such as the recommendations from the Walkerton inquiry
- minutes of meetings, e-mails, correspondence in which the risk was discussed or considered and no action taken
-

Perhaps the most powerful evidence that I have exploited is where lower level employees have complained about a problem and employer has ignored the "man on the factory floor."

What might evidence of due diligence look like?

I have to be careful because these are files were no charges were laid so it would be completely unfair to give information that would identity the subject but I can give some details.

Dealing specifically with municipalities, the operator of a water treatment and distribution system plant was sentenced to house arrest when he falsified laboratory results for potable water. The offence was discovered by an Alberta Environment inspector and Boil Water Advisory was issued for the Village and surrounding community. The Village was not charged because the operator held the appropriate level of qualification, he was experienced and the alteration of the records was sophisticated enough to mislead an auditor.

In another municipal file, the operator of waste water treatment plant was incarcerated when he falsified laboratory results and untreated effluent was released into a river. The Town was not charged because they had a system for supervising the operator through quarterly audits. The only failing in the audit system was that the operator was notified in advance as to when the auditors would be arriving so he was able to alter the computer records in advance.

In the case of major industrial plant, a catastrophic failure of the wastewater containment system sent millions of gallons of effluent into a nearby river. However, a plant wide audit identified this very problem the day before the release and the company had taken immediate steps to try to remedy the problem.

In another case, when a company was experimenting with a new disposal procedure, there was a release of mercaptan in a residential area resulting in hundreds of emergency calls which overwhelmed the 911 system. However the company had anticipated problems had contacted Alberta Environment in advance. The regulator was on site and providing assistance when the release occurred.

ABOUT THE AUTHOR

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Ms. McRory has been involved in prosecutions against several large multi-national and Canadian corporations as well as municipalities including the City of Edmonton, the City of Calgary and several smaller Alberta municipalities. Ms. McRory previously served as Chief Crown Prosecutor for the Judicial District of Vegreville and a prosecutor with General Prosecutions in Edmonton.

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