Exercising Due Diligence – in Municipal Water Systems

Presented by:
Miller Thomson LLP
& EnviroChex Associates
Walkerton Changed The Rules
A Series of Events – That Could Happen Elsewhere

• Walkerton - 4,800 population. Public Utilities Commission operated water system for the municipality.

• In May 2000, outbreak of gastroenteritis, >2000 sick, 7 fatalities linked to contaminated water

• Consequences:
  – world-wide media attention (Time Magazine - Events of Year 2000),
  – Walkerton Inquiry, civil suits, insurance claims / court actions, financial exposure of the municipality to large rehabilitation costs and other financial liabilities
  – OPP criminal investigations, MOE investigations,
  – increased oversight by the Province of Ontario of all water systems
  – Reg. 459/00 Drinking Water Protection Regulation
Our Involvement with Walkerton

- **Miller Thomson LLP**, law firm representing Municipality, Mayor, Councilors, Municipal staff, engineering advisors, in all responses to the incident, remediation efforts, regulatory initiatives, investigations, litigation and Public Inquiry

- **EnviroChex Associates**, retained by Miller Thomson LLP, to assist in all aspects of Walkerton assignment (research, investigations, Public Inquiry)
Water System in Walkerton

- Is similar to MANY small communities in Canada
  - Owned by Town – operated by Public Utilities Commission (PUC)
  - Wells #5, #6, #7 operated on demand with 2 Standpipes
  - 41 km. of Watermains
  - System controls – manual and a automated SCADA system
  - Operators many years of “on-the-job” training
  - Operator licenses “grandfathered” by Province
Walkerton

What is now known (Source: Report – Part 1, Walkerton Inquiry)

• Operator did not keep municipality in-the-loop about Ministry of Environment (MOE) reports or deficiencies

• At the Inquiry - PUC operator admitted falsifying records, improper sampling, knowingly operating the system without a chlorinator running, poor understanding of requirements, using unlicensed staff

• Contamination caused when shallow well became contaminated from drainage from adjacent agricultural land-use

• Concerns over Well 5, when constructed in 1978
Walkerton

What is now Known (Source: Report – Part 1, Walkerton Inquiry)

- Gov’t inspections every few years – reports sent to PUC, and Health Unit
- PUC did not act upon recommendations of MOE Inspection Reports
- MOE did not follow-up, did not issue Orders / did not amend C. of A’s to force issues
- Health Unit relied on MOE to call them with info about Adverse Sample Results
- Health Unit did not follow up on MOE Inspection reports showing deficiencies
- PUC Commissioners not fully informed of problems by operator – Town not aware of deficiencies
Walkerton

What is now Known (Source: Report – Part 1, Walkerton Inquiry)

- Contamination came from run-off & groundwater contamination in vicinity of Well # 5 – associated with low residual chlorination
- Bacteria E. Coli 0157:H7 and campylobacter caused disease of citizens – most serious E. Coli. waterborne outbreak recorded in North America
- Bacteria in Well #5 – linked to cattle in nearby barnyard by DNA testing
- OCWA running water system since May 25/00 – PUC disbanded Jan8/01
- Boil Water Order lasted from May – December 2000
Walkerton
Remediation efforts

- **5,000 water tests** - Well #5 abandoned
- #6 & #7 continue to operate - new source being sought – Expensive ultra-filtration
- Septic tanks pumped, sewage sludge removed & disposed of, all cisterns sealed, all cross connections eliminated
- Water mains flushed, standpipes cleaned, swabbing of lines, elimination of dead-ends, building-by-building disinfection (>1800 buildings)
- Over 5 km. of water mains replaced
More Rules than Ever before – More Expected of Municipalities

- New Drinking Water Protection Regulation (Reg. 459/00)
- New Reg. 505/01 – Small Facilities (health care, schools etc)
- New Private Communal Water Systems regulation in consultation – will likely proceed in 2002
- Engineer’s Reports – modifications to Cert. of Approvals – tighter scrutiny – citizen expectations
- Field Orders are now “the normal procedure”
- MOE / Public Health stricter than ever before
- Class Action civil suits concluded
- Police criminal investigations still on-going
## Cost of a Crisis - $64.5 Million

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
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<tbody>
<tr>
<td>Other Gov't Agency Costs</td>
<td>$11,110,184</td>
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<tr>
<td>OCWA &amp; System Remediation</td>
<td>$9,222,215</td>
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<tr>
<td>Inquiry Costs</td>
<td>$9,000,000</td>
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<td>Household Costs</td>
<td>$6,916,949</td>
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<td>Town Costs</td>
<td>$6,548,523</td>
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<td>Health &amp; Epidemiological Study Costs</td>
<td>$5,212,160</td>
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<td>Emergency Water Provision</td>
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<tr>
<td>Health Unit &amp; HU Assistance</td>
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<td>Local Business Losses (incl. Prod)</td>
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<td>Long-term health</td>
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<td>Loss Property Values</td>
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<td>Legal - Private</td>
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<td>Samples, labs, reporting</td>
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<td>Hospital Stays &amp; Air Trans.&amp; Opp. Cost</td>
<td>$597,418</td>
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<td>Coroner Costs</td>
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<td>Physician Visits</td>
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<td>$64,527,194</td>
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*The Economic Costs of the Walkerton Water Crisis - Dr. J. Livernois, for Walkerton Inquiry*
Statutory & Common Law Duties

• Statutory Duties
  – Laws like the: Ont. Water Resources Act
    • Regulation 459/00 – Drinking Water Protection (Municipal)
    • Regulation 435 – Operator Licensing
    • Regulation 505/01 – Small Facilities Protection (healthcare, schools)

• Common Law Duties
  – Negligence
  – Contract
  – Fiduciary responsibilities
  – Product liability
Sources of Statutory Liability

- These include:
  - Ministry - Certificates of Approval
  - Orders to perform work
  - AMPs (Administrative Monetary Penalties) (Expected in the near future)
  - Prosecution for Breaches of an Act or Regulations – court actions
Sources of Liability

Who in Your Municipality does the duty fall upon?

- Fall upon the following:
  - Municipality (a corporation like a Commercial Corp.)
  - Head of Council (similar to the CEO of a Corp.)
  - Councilors (i.e., Directors of Corp – ”directing mind”)
  - Senior Munic. Management (i.e., Corp. VP’s, Managers)
  - Supervisory Staff (i.e., Production / Shift managers)
  - Salaried Staff (i.e., Operators, persons operating facilities)
Concept of “Directing Mind”

- Means the person who has delegated executive authority over the operation of the water system.
- Wrongful act by the directing mind of a municipality is the wrongful act of the municipal corporation.
- Municipal corporations are primarily liable for the wrongful acts of their employees.
Meeting – the Standard of Care

- Corporate Due Diligence
  - Extends equally to a Municipal “corporation” as to a private sector corporation
  - Can establish “due diligence” by establishing a proper system to prevent commission of an offence by taking reasonable steps to ensure effective operation of your systems
  - Due diligence by the directing mind of a municipality is the due diligence expected of a corporation.
Meeting – the Standard of Care

• What is due diligence?
  • Concept of law, established by R. vs. Sault Ste. Marie case in 1978
  • Accused charged with strict liability offence may avoid liability by proving that they took all reasonable care.
  • Defence available if accused reasonably believed in a mistaken set of facts or if they took reasonable steps to avoid the event.
The “Directing Mind” Must Meet the Standard of Care

**Standard of Care**

- **Means:** the steps which can be reasonably expected to minimize the risk of breaching a statute

- **Basic understanding of Acts / Regs.**
  - Council / Management / Staff need to have sufficient knowledge to ask the proper questions to detect or prevent breaches by the water / wastewater operators

- **Implement Corp. Compliance System**
  - Council designate formal responsibility to ensuring compliance with a person ( Usually CAO or equivalent )
  - Written policy to comply with Standard of Care
  - Management structure to implement policies
  - Clear roles & responsibilities for water services
  - Training – structured, implemented, documented
The “Directing Mind” Must Meet the Standard of Care

• **Implement a Corporate Compliance System**
  – Provide necessary resources to comply with Policies
  – Compliance reviews – internal and external – documented

• **Components of a Compliance System for Water**
  – Membership in provincial / national water associations to keep technically abreast of standards within municipal water purveyor sector.
  – Meet or surpass municipal water purveyor industry standards
  – Appropriate Staffing and budget – “full cost” accounting – realistic water rates
  – Training & re-Training: minimum or surpass Regulation requirements – documented
  – Regular internal & external communication system: report water quality data to “directing mind” and to consumers, Reports to Council, Written records of compliance, Track provincial / federal infrastructure opportunities to avail municipality of infrastructure improvements
Summary - Due Diligence

- Recognize your responsibility, and your liabilities, and take action before an event occurs
- Develop a “system” to prove that you took all reasonable care
- Do it NOW – after-the-fact won’t be a viable defense.
Contact us:

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  - Investigations & Compliance Inspections
  - Defend Prosecutions
  - Compliance Systems
  - Regulatory Negotiations

To Discuss How We can Assist your community call:

• **Mark McKenney**
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    - [www.Mgm-management.com](http://www.Mgm-management.com)
  - Engineers Reports
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  - Due Diligence Systems
  - Operator Training