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Environmental crises: Management of risks and liabilities

September 22, 2016

Agenda

1. Welcome & Introduction
2. Environmental disasters: Environmental and social risk perspectives
3. Environmental liability: Cleanup costs are just the beginning….
4. Crisis management: Be quick with the facts and slow with the blame
5. Questions & Answers

Environmental Crisis Management:

Environmental and Social Risk Perspectives

Lloyd Torrens

Senior Affiliate,
Environmental and Social Impact Assessments, Permitting and Environmental Management

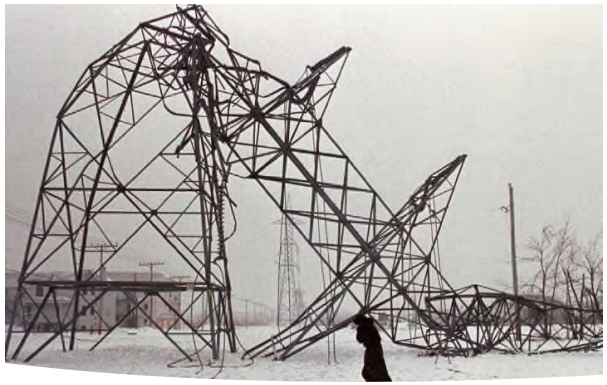
Independent Environmental Consultants

- **Independent Environmental Consultants (IEC)** is an employee-owned environmental consulting company that provides expertise in environmental science, engineering, planning and strategic advice to clients across Canada and around the world.

- Our team has worked extensively with municipalities, private sector companies, industrial associations, First Nations, public interest groups, law firms, regulatory agencies and all levels of government.

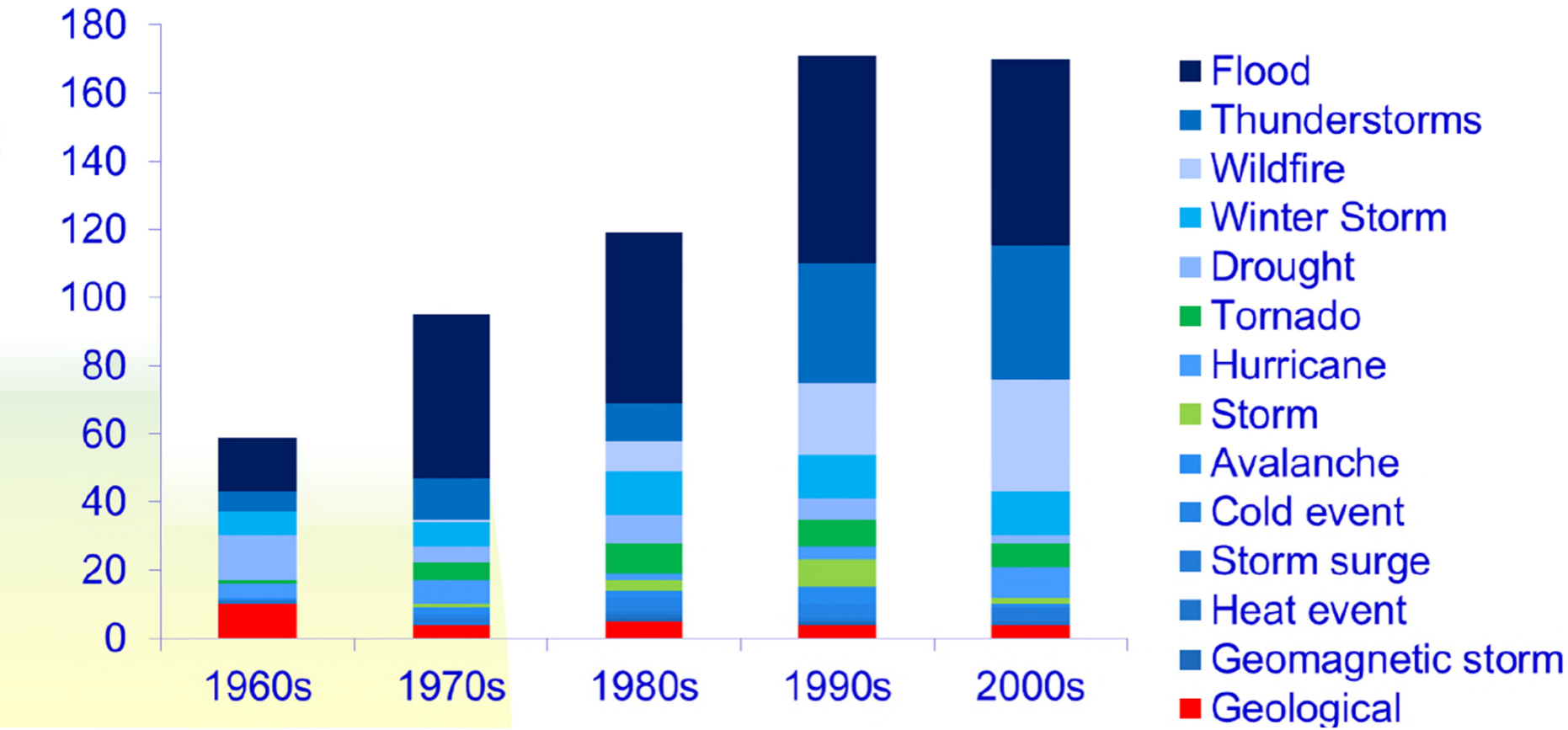
- Diverse group of senior level consultants with 25 to 45 years' of experience in consulting, government and industry.

A CHRONOLOGICAL HISTORY OF ENVIRONMENTAL CRISES



- **TWO TYPES:**
  - **Natural Disasters - Climate Change Influenced**
  - **Industrial Disasters - Infrastructure Focused**

NATURAL ENVIRONMENT EVENTS



10+killed / 100 evacuated / community assistance required / historically significant / community unable to recover on its own
(Canadian Disasters Database)

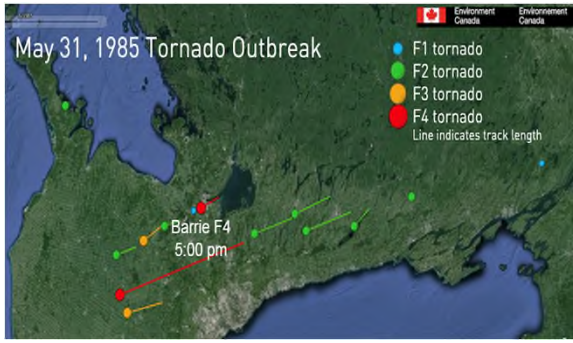
ENVIRONMENTAL CRISES: NATURAL EVENTS

HURRICANE HAZEL, October 15-16, 1954

- 225 mm rain over 36-40 hour period **(Category 4 – Extra tropical Category 1)**
- 81 deaths, and 1,868 homeless in Toronto, 3,000 homeless in Holland Marsh, 20 major bridges destroyed
- Humber River & Etobicoke Creek (Woodbridge, Weston, Long Branch), Don River and Highland Creek, and Holland Marsh
- **Estimated Costs:** economic disruption, the cost of lost property, and recovery costs, as being **$137,552,400 (2009: $1,126,947,163)** (Department of Public Safety and Emergency Preparedness Canada)

SOUTHERN ONTARIO TORNADOES OUTBREAK, May 31, 1985

- 14 Tornadoes affecting Wellington, Dufferin, Grey, Simcoe, and Hastings Counties and York and Durham Regions: killed 12, injured 281 injured, 606 homes damage, 400 farm buildings and and businesses damaged
- Barrie Tornado F4 10 km path 600 m wide, killed 8 and injured 155,300 homes destroyed
- Grand Valley - Mt. Albert F4 100 km path 200m+ wide (longest Canadian tornado path on record)
- **Estimated Costs: $393 million**



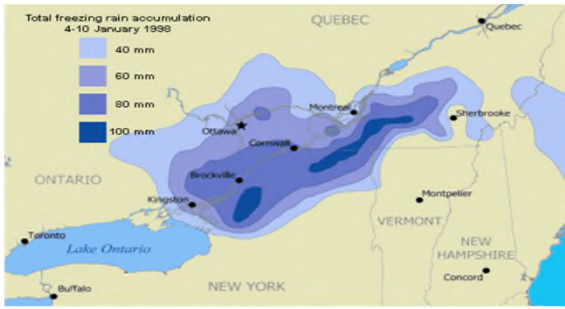
WINNIPEG FLOOD, April 22 to May 14, 1997

- Assiniboine, Red and Winnipeg Rivers
- Over 7000 military personnel were employed for 36 days to assist in preventing flood damage and in relocating the 25,447 evacuees; 17 communities affected included Emerson, Rosenort, St. Jean Baptiste, Morris, St. Adolphe, Nutimik, Portage la Prairie, Ste. Agathe, St. Norbert, Letellier, Dominion City, Scanterbury, Halbstadt, Brunkhild, Domain, LaSalle, Sanford and Winnipeg
- **Estimated Costs: $498.5 million** (Fed DFFA $193.8 million, Prov DFFA $48.4 million, Municipal $23.6 million, Insurance Payments $232.6 million)

ENVIRONMENTAL CRISES: NATURAL EVENTS

ICE STORM EASTERN ONTARIO/QUEBEC, January 6 -10, 1998

- Freezing rain (50 to > 100 mm) fell in a corridor extending from Kingston-to Ottawa-to Montreal and on into New Brunswick, caused massive power outages
- More than **200 Quebec communities** declared a disaster; **1,291,500 residences (affecting 3,228,750 people)** were without power; **57 Ontario communities** declared a disaster; **250,000 customers (1,500,000 people)** were without power in Eastern Ontario. (28 Fatalities, 945 Injured; 17,800 people Evacuated)
- **Total Cost: $4.635 billion** (Fed DFFA $665.4 million, Prov $ 2.184 billion, OGD/NGO $179 million, and Insurance Payments $1.712 billion)



POWER FAILURE – ONTARIO, MIDWEST AND NORTHEAST U.S., August 14, 2003

- Hot summer, high power demand – power failure with loss of 61,800 MW serving 50 million people (9 million in Ontario)
- Power restored in 48 hours, but parts of Ontario without power for a week
- **Canada – US Task Force** formed to determine cause and it made 46 Recommendations
- **U.S. Economic Costs: between $4.5 and $8.2 billion** ($4.2 billion lost wages, $15-100 million gov't overtime & emergency costs, $1-2 billion affected utilities, $380-940 million lost or spoiled commodities. **Canada - August GDP down 7%, Canadian manufacturing shipments down $2.3 billion, 18 million work hours lost.**

THUNDER STORMS, TORNADOES & TORONTO FLOOD, August 19, 2005

- Severe thunderstorms tracked eastward across southern Ontario from Kitchener to Oshawa spawning two F2 Tornados north of Kitchener/Guelph
- Within one hour, torrential rains dumped 103 mm in North York, 100 mm in Downsview, 175 mm in Thornhill, and 140 mm in Scarborough leading to flash flooding
- 15,000 insurance claims for structural and non-structural damages caused by torrential rains and high winds
- Over 4,200 basements flooded & registered with City
- **Total Costs: $500 million (insurance payments)**

ENVIRONMENTAL CRISES: NATURAL EVENTS

SLAVE LAKE WILDFIRE, May 1-May 21, 2011

- Towns of Slave Lake, High Prairie, Little Buffalo, Lesser Slave Lake, Municipal Districts of Lesser Slave River, Red Earth Creek, and Loon Lake Whitefish Atikameg, and Woodland Cree First Nations AB
- 49 wildfires prompted a forced evacuation of Penn West Petroleum, Exall Energy Corp., and Canadian Natural Resources Ltd.
- Over 12,000 evacuated from region and CN Rail halted their services in the region. **Estimated Costs: $700 million**

TORONTO FLOOD, July 8, 2013

- A thunderstorm that produced 126 mm in precipitation caused flash-flooding in the Greater Toronto area
- The flooding closed multiple transportation corridors, caused wide-spread property damage, and disrupted power to approximately 300,000 residents
- The Insurance Bureau of Canada estimated that the flooding caused **$940 million in insured property damage**

SOUTHERN ALBERTA FLOOD, June 19-28, 2013

- Heavy rainfall caused flash flooding in Southern Alberta (Canmore, Calgary, High River & 9 other municipalities). Four people were killed and significant disruptions were experienced across to power, telecommunications, clean water supply, and transportation corridors
- Temporary evacuations of approximately 100,000 people
- **Total Estimated Damage - $6 Billion** with Interim DFFA Payments of $500 million and Insurance payments estimated at **$1.9 billion**
- This disaster is estimated to have reduced **GDP in Southern Alberta by $550 million**

ENVIRONMENTAL CRISES: NATURAL EVENTS

SOUTHERN ONTARIO – GREATER TORONTO AREA WINTER ICE STORM, DECEMBER 21, 2013 – January 1, 2014

- A severe storm brought freezing rain and damaging ice accumulation
- The epicenter of the freezing rain was in southern Ontario along the north shore of Lake Ontario, including the Greater Toronto Area, where ice accumulation reached up to 30 mm. The impact was further exacerbated by freezing temperatures
- **Estimated Costs: $164.2 million**

SOUTHERN MANITOBA FLOOD, June 25 – July 14, 2014

- Following a quiet spring flood season, heavy rainfall in Western Manitoba and Saskatchewan led to record flows and flooding along the Assiniboine, Qu'Appelle and Souris Rivers. Up to 200 mm of rain fell
- The Portage Diversion was opened near Portage la Prairie to direct flows from the Assiniboine river into Lake Manitoba.
- Over 920,000 acres of farm land went unseeded for the 2014 season, representing 25% of arable acres in Manitoba with an **estimated cost of over $1 billion**

FORT MCMURRAY WILDFIRE, May 4 – June 10, 2016

- Wildfire that forced more than 90,000 people from their homes and about 2,400 homes and buildings burned
- Restoration and rebuilding exercise present multi-faceted and unique challenges for the government services, environmental cleanups, re-construction planning, insurers, and the affected population and businesses
- **Preliminary Costs: Insurance Bureau of Canada estimated $3.6 billion** with 27,000 Personal Property Insurance claims (averaging $81,000) + 250,000 Commercial Property Claims (averaging $250,000), and 12,000 auto claims(averaging $15,000)

KEY CONCLUSIONS FROM THE TD ECONOMICS GROUP SPECIAL REPORT: *NATURAL CATASTROPHES: A CANADIAN ECONOMIC PERSPECTIVE (APRIL 2014)*

- Globally, there has been an **increase in the number of natural catastrophes over the past three decades**.

- Where severe weather that used to occur **once every forty years is now occurring once every six** in some regions of the country.

- Report referenced by the National Round Table on the Environment and Economy, *Paying the Price: The economic impacts of climate change for Canada (2011)*:
  - If no efforts are made to upgrade infrastructure to withstand harsh conditions, natural catastrophes could cost Canadians an **estimated $5 billion/year in 2020** and **$21-$43 billion by 2050**, in infrastructure damages, healthcare costs, reduced performance of Canadian industry, and lost labour hours.
  - Some costs can be mitigated by upgrading infrastructure to be prepared for these events. Some estimates claim that **every dollar invested in adaptation now, will yield anywhere from $9-$38 worth of avoided damages** in the future.

ENVIRONMENTAL CRISES: INDUSTRIAL EVENTS

MISSISSAUGA TRAIN DERAILMENT November 10-16, 1979.

- A CPR train of 106 cars carrying many dangerous chemicals derailed near Mavis Road in Mississauga and burst into flames, creating a gigantic explosion
- The proximity of tank cars containing chlorine to propane tank cars that may have exploded, and released a toxic cloud of chlorine, forced the evacuation of 225,000 people
- **Costs not documented**

TIMMINS TRAIN FUEL SPILL - March 31, 1986

- Between 4,500-5,000 people evacuated from homes;
- a railway tank car off-loading to Imperial Oil storage depot leaked 21,000 of litres of gasoline into storm sewers and sanitary sewers prompting an evacuation
- The gas fumes resulted in several explosions and the destruction of two homes
- Sewer system ventilated and flushed over 24-48 hours
- **Costs not documented**

SUNRISE PROPANE TORONTO ON, August 10, 2008

- A series of explosions at North York's Sunrise Propane Industrial Gases plant forced 12,000 people living inside a 1.6 km radius to leave the area
- A 25-year veteran of the Toronto fire service was killed while on duty in the aftermath of the explosions
- A **$23 million cleanup settlement** was arrived at – with approximately **$7.9 million** distributed equally to 6,000 affected residents, the City of Toronto, and insurance companies.

ENVIRONMENTAL CRISES: NATURAL EVENTS

LAC-MÉGANTIC - QUEBEC, July 6, 2013

- A 74-car freight train carrying crude oil derailed and exploded causing forty-two deaths and the evacuation of 2,000
- The explosion destroyed more than thirty buildings and caused extensive damage to the centre of the town
- Over 5,560,000 litres of crude oil was released into the environment and an estimated 100,000 litres spilled into the nearby Chaudière river. The spill travelled down the river and reached the town of Saint-Georges 80 km to the northeast.
- Estimated **total costs of the cleanup and reconstruction will be more than $400 million**.

IMPERIAL METALS MOUNT POLLEY MINE B.C. TAILINGS DAM FAILURE - August 4th 2014

- A breach of the Imperial Metals-owned Mount Polley copper and gold mine tailings pond, releasing its water and slurry with years worth of mining waste into Polley Lake
- The spill flooded Polley Lake, its outflow Hazeltine Creek, and continued into nearby Quesnel Lake and Cariboo River
- **Cleanup costs estimated at $67.4 million** (with taxpayers are subsidizing cleanup costs to the tune of $23.6 million)

HUSKY ENERGY PIPELINE LEAK – MAIDSTONE SASKATCHEWAN, July 21, 2016

- 200,000 and 250,000 litres of crude oil and other material.
- Alternative water supply issues for Prince Albert, and North Battleford.
- **Cleanup costs not yet determined**

ENVIRONMENTAL AND SOCIAL ISSUES	RANGE OF ACTIONS
INFRASTRUCTURE RISK AND VULNERABILITY ASSESSMENTS	• Hydro Systems and Networks • Flood Risk – Updates • Riverine Flood Plain Mapping • Storm Drainage Systems Assessments (overland/ neighborhood flooding) • Telecommunication Systems and Networks • Environmental Event Forecasting and Warnings • Design and Permit Approvals
ON-GOING CLIMATE CHANGE STUDIES	• Government Sponsored Research • Climate Change Action Plans • University Research • Climate Research Consortiums • Exchange of research Information through federal and provincial agencies, NGOs, Federation of Canadian Municipalities • Biodiversity – Habitat Adaptation
ENVIRONMENTAL MANAGEMENT SYSTEMS	• Effective On-going Maintenance and Monitoring Environmental Monitoring, and Inspections • Application of Best Management Practices (BMPs) • Co-ordinated Emergency Response Protocols, Plans, and Training Programs • Community Awareness and Education Programs

ENVIRONMENTAL AND SOCIAL ISSUES	RANGE OF ACTIONS
PLANNING AND FUNCTIONAL GUIDANCE DOCUMENTS	• Revised Design Criteria • Updated Building Standards and Codes • Operational Procedures/Management Plans • Planning Guidelines & Land Use Planning Tools • Adaptation Handbooks • Environmental Best Management Practices o Mitigation Plans o Adaptation Measures o Property Landscaping and Drainage Guidelines • Climate Change Adaptation and Resiliency Plans o Provincial Level o Municipal Level
FEDERAL, PROVINCIAL, AND MUNICIPAL FINANCIAL ASSISTANCE PROGRAMS	• Conservation Improvements • Infrastructure Improvements
LIABILITY ISSUES	• Insurance Claims and Settlements • Due Diligence Government Authorities • Environmental Audits • Emergency and Crisis Management Planning
FINANCIAL INVESTMENTS	• Asset Management • Funding Sources for Both Public and Private Investments • Disaster Risk Modelling

Key Considerations for Moving Forward

- **Prudent for businesses and policy-makers to start thinking of the long term implications**, and place a larger emphasis on natural or human catastrophes when making investment decisions.

- **Businesses need to identify how these events may impact them** and adjust long- term financial plans accordingly (frequency and magnitude of events).

- **Governments need to take a close look at their inventory of infrastructure to identify vulnerabilities** and areas where proactive adaptation can prevent future damages, loss of life, or economic disruptions.

- **Awareness and preparation** is the first step toward ensuring the safety of people, property, and prosperity for Canada's economy.

Environmental liability following an environmental crisis

Cleanup costs are just the beginning….

Meredith James
Dentons Canada LLP

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Take-away messages

Legal liability for environmental crises can result in enormous costs

- Legally required cleanup costs can be in the $Millions
- Fines for non-compliance with environmental laws can easily exceed $100K
- D&O can be held personally liable
- Impacted neighbours can sue for $Millions in damages
- The business may be unable to continue

Environmental liability

Sunrise propane case study

- Environmental orders
- Prosecutions
- Personal liability of D&O
- Civil claims

Photo credit: Public Domain

Sunrise propane explosions

August 10, 2008

- 3 am – truck to truck transfer of liquid propane
- Explosion #1 – propane vapour cloud explosion
- Explosion #2 – boiling liquid expanding vapour explosion
- Nearby residences:
  - Personal injuries - cuts, bruises, burns
  - Damage to buildings – shattered windows, blown in doors, structural damage
- 12,000 people evacuated
- 1 employee died, another injured

Source: Toronto Star

Warning signs from TSSA

- TSSA order prohibiting truck to truck transfer
- TSSA inspection report:
  - Non-compliance with order
  - Lack of employee training
  - Order to cease and desist truck to truck transfer

Immediate aftermath: Chaotic and fast moving

- August 10 – “chaotic” site
  - Various agencies – Fire, Police, TSSA, TPH, Ministry of Labour, MOECC,
  - Environmental consultant: Hazco
  - Debris in 1 km radius
- August 11 – Hazco identified asbestos contamination in surrounding area
- August 12 – Hazco unable to confirm contract with Sunrise
- August 13 – MOECC issued cleanup order against Sunrise

Administrative orders

MOECC's order powers

- Ministry has extensive order powers
  - Preventative orders (EPA, s. 17)
  - Remedial orders (EPA, s. 18)
  - Spills (EPA, s. 97)
- Such orders can be issued against those who:
  - Own
  - Control
  - Manage

Not necessarily fault based

- Orders can be appealed to the Environmental Review Tribunal but…
  - No automatic stay
  - ERT cannot grant a stay if there is a risk of harm to human health, environment, property (EPA, s. 143(3))

Sunrise propane
Cleanup order

- Very short timelines
- Broad scope
- Cost
- Limited / No Site Access

Sunrise propane

Failed to comply with the Order

- Did not request extension of deadlines
- Did not appeal to the ERT
- City of Toronto took over the cleanup
  - 10 days
  - $2.8 million

Environmental prosecutions

Prosecution of sunrise propane

- Discharge of a contaminant causing an adverse effect
- Failure to comply with the Order
- Failure of Directors to prevent the company from failing to comply with the Order

Environmental prosecutions

In serious cases, fines can be very high

	First offence	Subsequent offences
Less “serious” offences	Min fine = none Max fine = $250K	Min fine = none Max fine = $500K
“Serious” offences (ex. EPA s. 14, s. 15, s. 92)	Min fine = $25K Max fine = $6M	Min fine = $50K (Second offence) Min fine = $100K (subsequent offences) Max fine = $10M

For each day on which the contravention occurred or continued.

Plus 25% Victim Fine Surcharge.

Sunrise propane
Court rejected attempted defences

- Defence of impossibility – rejected
  - Sunrise failed to show it was not physically or morally possible to comply.
- Due diligence defence - rejected
  - Sunrise failed to show it had an adequate “preventative system” given its “inherently dangerous” propane business.

Environmental prosecution

Sunrise propane – substantial fines

Count	Fine
Causing or permitting the discharge of a contaminant (1 count)	$4M
Failing to comply with an environmental order (4 counts)	$820K
Total	**$4.82 M**

Directors and officers liability

Under the EPA

- Administrative orders
  - D&O are presumed to have "management and control"
- Prosecution
  - Principal to the offence
  - Failure to fulfill duties of D&O under the EPA (s. 194)

D&O have duty to prevent corporation from:

- Discharging a contaminant
- Failing to notify the MOECC of a discharge
- Failing to cleanup a spill
- Obstructing an investigation
- Operating equipment in contravention of approval
- Contravening an environmental order
- Contravening certain waste rules

Directors and officers liability

Sunrise Propane

- Two directors convicted of failing to take all reasonable care to prevent the corporation from contravening the environmental order
- Each fined $100K

(Note: Insurance coverage for such liability is uncertain)

Civil action

The “Toxic Torts”

- Nuisance
- Negligence
- Trespass
- Strict liability (*Rylands v. Fletcher*)
- Statutory cause of action under the *EPA* (s. 99)

Sunrise propane class action

Durling v Sunrise Propane Energy Group Inc.

- Class action against 15 defendants including
  - Sunrise Propane (and related companies) and its directors
  - Propane trucking company
  - Landlord
  - TSSA
  - Employee who completed the truck to truck transfer
  - Various equipment manufacturers
- Certified against all defendants
  - Personal injury and property damage

Sunrise propane class action

Settlement

- $7,909,500 plus interest - fund for class members
- $7,909,500 plus interest - fund for insurance companies
- $6,961,000 plus interest - counsel fees
- $565,000 plus interest - counsel administrative fees

TOTAL: $23,345,000 (plus interest)

Beyond environmental liabilities

Far reaching impacts of environmental crises

- Other legal liabilities
  - Prosecution for health and safety violations
  - Order/claim by municipality to recover cleanup costs
- Business impacts
  - Inability to operate during cleanup and repair
  - Other sites may be shut down
  - Loss in property value
  - Reputation losses
- Administrative, legal and expert costs

Consequences of environmental crises can be devastating

Be aware of warning signs

- Generally, there are signals of environmental or health and safety issues before an environmental crises:
  - Non-compliance with regulatory standards and orders
  - Issues identified in inspections or compliance audits
  - Lack of internal compliance audits and inspections
  - Culture of accepting non-compliance
- “Good enough” is not the same as compliance, particularly in highly regulated, “inherently dangerous” industries

Crisis management:

Be quick with the facts and slow with the blame

Alex MacWilliam

Dentons Canada LLP
Leader, National Environment Practice Group

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Sources of crisis

The secret of crisis management is not good vs. bad, it's preventing bad from getting worse.

Andy Gilman

- Environmental incidents
- Financial or legal malfeasance
- Major regulatory non-compliance
- Natural disasters and weather
- Workplace violence
- Terrorism
- Product defects and recalls
- Supply chain interruptions
- Cyber attacks
- Pandemics
- Adverse rumors

Crisis frequency

- On average a large company is hit by a crisis every seven years.
- 64% of organizations have faced some type of corporate crisis in past five years:
  - Compliance-related (19%)
  - Natural disasters (16%)
  - Tort/accident, workplace (i.e., employee misconduct, harassment, violence) (11.2%)
  - Environmental crises (11.2%)

Source: 2011 poll of members of 61 Association of Corporate Counsel committees

The anatomy of a crisis: Common elements

- Loss of control
- Anxiety and panic
- Lack of reliable information
- Immediate actions will be required
- The “correct” approach may not be immediately clear
- Extensive scrutiny from and confrontation with outside forces
- Innocent conduct may be viewed with suspicion
- The facts may turn out to be different than initially thought

There cannot be a crisis next week. My schedule is already full.
Henry Kissinger

Do you have a crisis?

- Is there a good chance that this situation will, if left unattended, escalate in intensity?
- Might the situation foster unwanted attention by outsiders, such as the news media or some regulatory agency?
- Is it likely that the situation might interfere with normal business operations in some manner?
- Could it make you look bad or cause people (the public at large, social media or investors) to lose confidence?
- Is it going to affect your bottom line?

Source: Crisis Management: Planning for the Inevitable by Steven Fink

Today’s additional pressures

- Digital media has revolutionized the speed and reach of information
  - 24-hour news cycle means overblown stories reign supreme
- Lack of trust in corporations may cause innocent conduct to be viewed with more suspicion
- Economic pressures may diminish available resources to prevent, plan for and manage crises
- Increased political involvement/agendas
- More “watchdogs” at both government and NGO levels
- Global competition pushes reduction in best practices to remain competitive

Crisis management

The management and coordination of your institution's responses to an incident that threatens to harm, or has harmed, your institution's people, structures, ability to operate, valuables and/or reputation.

It includes pre-incident planning and incident response processes but also involves reacting to unanticipated situations as they arise.

Contents of a crisis management plan

- Identity of Crisis management team
- Determine who will be in charge during crisis
- Define command structure and roles
- Identify location of command centre(s)
- Set out communications plan and procedures
- Specify solution scenarios
- Redundancy/backups for everything/everyone

When a crisis occurs

- Follow the crisis management plan
  - Adapt it if necessary to deal with unexpected events
- Keep calm and carry on
- Get the facts
- Communicate early, often and honestly
- Demonstrate concern and offer help if possible
- Cooperate with authorities
- Apologize if appropriate
  - “apology” legislation provides that saying “We are sorry” does not constitute express or implied admission of fault or liability

It is estimated that less than 30% of all organizations in North America possess a crisis management plan that would actually work in the event of an incident.

Source: FEMA Readiness Reporting, 2013

Priorities when implementing a crisis management plan

- Crisis management theory sets out the following hierarchy of response objectives:
  - Preserve safety and health of responders
  - Save lives
  - Reduce suffering
  - Protect public health
  - Protect critical infrastructure
  - Protect property
  - Protect the environment
  - Reduce / mitigate economic and social losses

Key steps to effective crisis management

- **Best defense is a good offense**
  - Establish a plan and communicate it to all who need to know. Train your personnel on their roles and responsibilities.
- **Tell me now**
  - Encourage timely reporting, using established protocol, when potential issues are identified.
- **Rally the troops**
  - Assemble crisis management team quickly and implement Incident Command System (if applicable).
- **Investigate and verify the issue**
  - Send personnel to ‘go and see’ to demonstrate active response.
- **The truth is easier to remember**
  - Do not speculate or prevaricate. Likewise “no comment” is no answer anymore.
- **Appoint a champion**
  - Identify a key spokesperson for any customer, employee, press release, or other communication. One contact point.
- **Isolate, contain and fix the problem**
  - Always over-respond rather than under-respond. If you think you need one, order two.
- **Participate in lessons learned by debriefing and consider including authorities**

Communications: Advance planning is key

The speed of information release, and the number of potential sources of that information, means that effective incident response must include a media / communications strategy:

- Periodic Media training for identified “Champions” and spokespersons
- Identify and retain media and messaging consultants
- Relationship building between your public affairs group and key media
- Develop Fact Sheets
- Regular press releases emphasizing response efforts and status

A lie gets half way around the world before the truth has a chance to get its pants on.

Winston Churchill

Documents: A critical aspect of crisis response

Document production and Information Requests (IR's) are very onerous aspects of post-incident investigations by regulatory and prosecutorial bodies.

- Assume you will be investigated and will need to disclose documents and respond to overlapping Information Requests (IR's) from multiple requesters. How do you prepare?
  - Identify the location of key business documents, and the custodian(s) IN ADVANCE
  - Establish protocol that all IR's must be in writing and addressed to identified individuals only
  - Divide and conquer: Divide IR's among document custodians to prepare initial responses, then returned to legal counsel for vetting before disclosure
- Use technology:
  - Create electronic records that cannot be tampered with
  - Use secure FTP or Sharepoint sites to deliver documents to regulators

Role of legal counsel prior to a crisis

- There **is** an important role for in-house and external legal counsel both pre and post-crisis
- Starts at the planning stage
- Lawyers are trained to identify potential issues
  - Issues can become threats and crises
  - Advise on how regulatory regimes and common law can come into play during and after a crisis
  - May have existing relationships and good will with regulators that can be used to assist in development of plans and in working cooperatively when emergency situations arise

Role of legal counsel prior to a crisis

- Ensure any plans required by legislation are properly completed and filed with appropriate authorities and that corporate plans are consistent with statutory plans
- Examples:
  - Alberta Energy Regulator – ERPs under Directive 071
    - Requires site-specific and corporate level Emergency Response Plans
  - Transportation of Dangerous Goods legislation – ERAPs
    - Note recent changes in response to Lac Mégantic disaster
  - E2 plans under *CEPA Environmental Emergency Regulations*
  - Alberta *Responsible Energy Development Act* – Security Management for Critical Upstream Petroleum and Coal Infrastructure
    - Alberta Counter Terrorism Crisis Management Plan

Planning more important than plans

- Plans are of limited value if no one knows how to implement them
- Importance of regular drills, exercises and mock disasters
  - Consider inviting regulators and first responders to observe and comment
- Plans should be tested and revised over time
- Critical to have in-house and external counsel involved to define and refine roles in preparation for the real event
- Internal assessment/audit of performance can be privileged if counsel properly involved

Role of legal counsel during the crisis

- Lawyers should not be leading the response but can provide key support to incident response team
- Advice on regulatory obligations (e.g. reporting requirements)
- Analysis of material contractual rights and liabilities including notices (e.g. force majeure) to counterparties, insurers etc.
- Working within communication plan to advise on content of external and internal communications
- Assisting with document management and control
- Providing privilege protection where necessary and appropriate

Role of legal counsel after the crisis

Post-crisis:

- Lawyers trained at finding facts
  - Involvement in internal investigations and “root cause” processes
- Preparation for and representation during regulatory investigations
- Knowledge of liability “tails”
  - In respect of regulatory enforcement and civil actions
- Preserving remedies
- Litigation mitigation

Counsel’s toolkit: Resources at your fingertips

Counsel should collect and maintain some basic information in preparation for an incident:

- Company executive and responder contact lists, including home/cell numbers
- Contact lists for key regulators (ensure no reporting obligations missed)
- Identified external counsel in each jurisdiction where your organization does business
- Dealing with media guidelines; public affairs contact information
- Standard Form Agreements to mobilize resources
- Witness Briefing Instructions
- Document Hold Notices and Retention Instructions
- Guidelines for responding to subpoenas, warrants, raids
- Interview forms
- Chain of custody forms for records seized during searches

Thank you

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