

*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<sub>5</sub>

# 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**



# What Has Changed?

## 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 \*

Other Gov't Agency Costs	\$	11,110,184
OCWA & System Remediation	\$	9,222,215
Inquiry Costs	\$	9,000,000
Household Costs	\$	6,916,949
Town Costs	\$	6,548,523
Health & Epidemiological Study Costs	\$	5,212,160
Emergency Water Provision	\$	4,167,179
Health Unit & HU Assistance	\$	3,150,000
Local Business Losses (incl. Prod)	\$	2,694,435
Long-term health	\$	2,497,932
Loss Property Values	\$	1,106,136
Legal - Private	\$	1,000,000
Samples, labs, reporting	\$	645,000
Hospital Stays & Air Trans.& Opp. Cost	\$	597,418
Coroner Costs	\$	559,824
Physician Visits	\$	99,239
	\$	64,527,194

# 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 Breachs 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 :

- **Bruce McMeeKin or Rod McLeod**

- **Miller Thomson LLP**

- Markham, Ontario 905-415-6700

- [www.millerthomson.ca](http://www.millerthomson.ca)

- Investigations & Compliance Inspections

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To Discuss How We can Assist your community call:

- **Mark McKenney**

- **EnviroChex Associates**

- Toronto, Ontario 416-483-5438

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