The Expense of Being an Innocent Victim of an Environmental Spill

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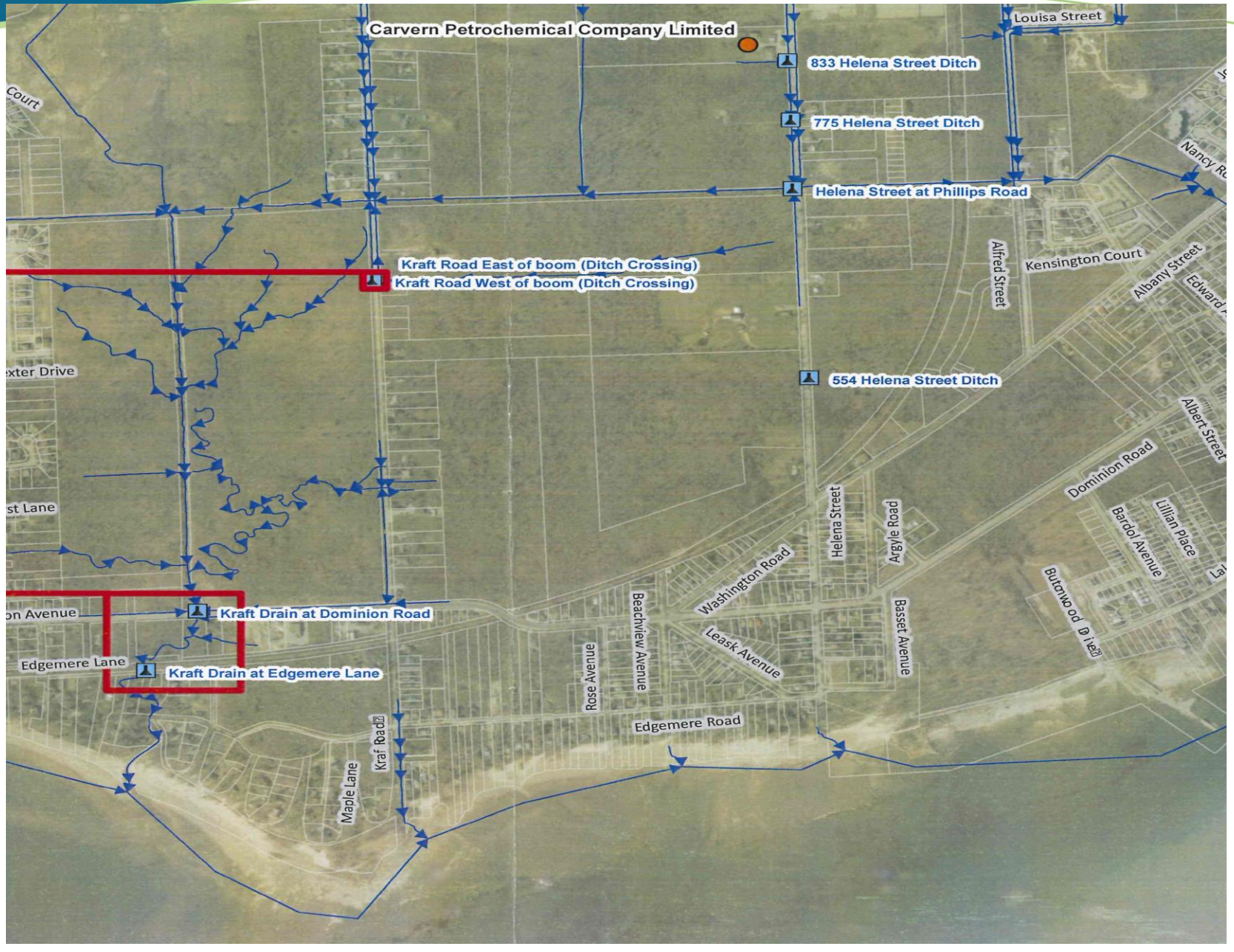
And so it begins…..

March 9, 2015

- Town of Fort Erie advises Niagara Region of what appears to be a chemical spill coming from an adjacent neighbouring property (833 Helena Street, FE) into a Niagara Region's road allowance storm water ditch
- Spill was traversing storm water ditch to Kraft drain with potential entry into Lake Erie near the Rosehill Water Treatment Plant


Carvern Petrochemical Company Limited
833 Helena Street Ditch
775 Helena Street Ditch
Helena Street at Phillips Road
Kraft Road East of boom (Ditch Crossing)
Kraft Road West of boom (Ditch Crossing)
554 Helena Street Ditch
Kraft Drain at Dominion Road
Kraft Drain at Edgemere Lane
Louisa Street
Kensington Court
Albany Street
Alfred Street
Dominion Road
Albert Street
Helena Street
Argyle Road
Washington Road
Leask Avenue
Basset Avenue
Beachview Avenue
Rose Avenue
Edgemere Road
Edgemere Lane
Maple Lane
Bardol Avenue
Lillian Place

- Spill reported to MOECC's Spill Action Centre by Town of FE
- MOECC attempts to contact owners of 833 Helena Street
- When Helena St. owners cannot be reached, MOECC directs Niagara Region to address impacts of spill as Niagara Region is now controller of material in ditch (No Order issued)
- Niagara Region and MOECC find contaminants including toluene, xylene and acetone in ditch

March 19, 2015

- MOECC makes order under ss. 17, 18, 196 of *Environmental Protection Act* against:
  - Land owner (limited company and its officer and director personally)
  - Power of Attorney for land owner
  - Business operator who operated until 2014 (limited company and its officers and directors personally)
  - Real Estate Broker who had care and control of site since 2014 (limited company and its officers and directors personally)

Order directs the following *(inter alia)*:

- Retention of expert in spill response to take all reasonable actions to prevent discharge and to remove and dispose of off-site surface and ground water
- Create and retain records of collection, storage and removal of surface and ground water
- Retention of expert to develop and implement a written plan to restore the natural environment

3 Months Later

- Niagara Region continued to pump and dispose of contaminated waste for 3 straight months
- The land owner eventually was able to contain the waste to its own property without further contamination of Niagara Region's ditch
- Niagara Region drove much of the effort to plug leaks into our land

Cost of Being Innocent Victim

- Within 1 month of spill Niagara Region had spent ~$1M and incurring ~$50K per day for pumping, disposing and monitoring
- Mid April – levels of contaminants in our ditches were within acceptable levels*
- June 9 – Niagara Region vacated site after 1 month of stable monitored levels

TOTAL COSTS SPENT IN 3 MONTHS: $3.6M

Allegations against Town of FE

- Town of FE – served with Notice of Allegations in ERT matter by land owners
- Land owners have 2 theories of municipal liability
  - Town of FE sold property under a tax sale in 1999 (15 years before spill)
  - Town of FE through its predecessor Economic Development Committee encouraged industrial property development in 1960 (paint and petrochemical companies located in the industrial park)
- This is not yet litigated before ERT but could be a big issue for municipalities if the results are unfavourable for FE
- Town of FE also received FOI for all documents related to the property back to 1896, which was denied. Town now in an IPC Appeal

Status of MOECC Order

Environmental Review Tribunal

- Appeals of MOECC Order by most parties in April/May 2015
- Niagara Region added as a participant
- Fort Erie added as a party
- Others added as parties
- Owner (limited company) represents that work under interim Order should be complete by end of September
- Preliminary Hearing adjourned to October 15, 2015

Environmental Protection Act

Prohibition, discharge of contaminant

14. (1) Subject to subsection (2) but despite any other provision of this Act or the regulations, a **person** shall not **discharge** a **contaminant** or cause or permit the discharge of a contaminant into the natural environment, if the discharge causes or may cause an **adverse effect**.

Environmental Protection Act

Remedial orders

17. Where any **person** causes or permits the **discharge** of a **contaminant** into the natural environment, so that **land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered**, the Director may order the person to,

(a) repair the injury or damage;

(b) prevent the injury or damage; or

(c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies.

Environmental Protection Act

- "**person responsible**" means the owner, or the person in occupation or having the charge, management or control of a source of contaminant;
- "**contaminant**" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect;
- "**discharge**", when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak;

Environmental Protection Act

"**adverse effect**" means one or more of,

(a) impairment of the quality of the natural environment for any use that can be made of it,

(b) **injury or damage to property or to plant or animal life,**

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(e) impairment of the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,

(g) loss of enjoyment of normal use of property, and

(h) interference with the normal conduct of business;

Order by Director re preventive measures

18. (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.
3. To implement procedures specified in the order.
4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.
5. To monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director.
6. To study and to report to the Director on,
   i. the presence or discharge of a contaminant specified in the order,
   ii. the effects of the presence or discharge of a contaminant specified in the order,
   iii. measures to control the presence or discharge of a contaminant specified in the order,
   iv. the natural environment into which a contaminant specified in the order may be discharged.
7. To develop and implement plans to,
   i. reduce the amount of a contaminant that is discharged into the natural environment,
   ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or
   iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,
      A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and
      B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.
8. To amend a plan developed under paragraph 7 or section 91.1 in the manner specified in the order.

Environmental Protection Act

- **Orders, consequential authority**
- 196. (1) The authority to make an order under this Act includes the authority to require the person or body to whom the order is directed to take such intermediate action or such procedural steps or both as are related to the action required or prohibited by the order and as are specified in the order.
- **Same, authority to order access**
- (2) A person who has authority under this Act to order that a thing be done on or in any place also has authority to order any person who owns, occupies or has the charge, management or control of the place to permit access to the place for the purpose of doing the thing.
- **Application**
- (3) Subsection (1) applies in respect of every order made under this Act whether or not the order was made before the 1st day of January, 1984

Importance of "Spill"

Municipality's order for costs and expenses

100.1 (1) If a pollutant is **spilled**, a municipality may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the municipality any reasonable costs or expenses incurred by the municipality, or a local board of the municipality within the meaning of the *Municipal Affairs Act*, to prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.

Contents

(3) An order under subsection (1) shall include,

(a) a statement identifying the spill to which the order relates;

(b) a description of things for which the municipality or local board incurred costs or expenses for a purpose referred to in subsection (1);

(c) a detailed account of the costs and expenses incurred in doing the things; and

(d) a direction that the person to whom the order is issued pay the costs and expenses to the municipality.

Lien

(5) If a municipality issues an order under subsection (1) against a person who owns real property in the municipality and the pollutant was spilled on that property, the municipality shall have a lien on the property for the amount specified in the order and that amount shall have priority lien status, as described in section 1 of the *Municipal Act, 2001* or section 3 of the *City of Toronto Act, 2006*, as the case may be.

Appeal of Municipal Order

Appeals

(7) A person to whom an order of a municipality is directed under subsection (1) may, by written notice served on the municipality and the Tribunal within 15 days after service on the person of a copy of the order, require a hearing by the Tribunal.

Contents of notice requiring hearing

(9) A person who gives a notice under subsection (7) shall state in the notice,

(a) the portions of the order in respect of which the hearing is required; and

(b) the grounds on which the person intends to rely at the hearing.

Automatic stay on appeal

(12) The commencement of a proceeding before the Tribunal stays the operation of the order made under subsection (1).

Parties to hearing

(13) The person requiring the hearing, the municipality and any other person specified by the Tribunal are parties to the hearing.

Costs may be increased

(14) At a hearing by the Tribunal under this section, the municipality may, on reasonable notice to all parties, ask the Tribunal to amend the order by adding new costs or expenses or by increasing the amounts set out in the order.

Kawartha Lakes – Innocent Victim

- Furnace oil leaded from resident basement into municipalities storm sewer system prior to discharge into Sturgeon Lake
- MOECC order against municipality after property owner could not afford cost of clean up (because insurance limits reached)
- Municipality incurred $471K for clean up

Kawartha Lakes Cont'd

- Municipality appealed MOECC order to ERT, which found:
  - Potential unfairness to innocent owners is justifiable in order to protect the environment
  - Environmental protection objective takes precedent over "polluter pays" principle
  - MOECC did not need to be satisfied that City would be reimbursed prior to Order
- Division Court and Court of Appeal upheld ERT

Kawartha Lakes Tries to Recover Cost

1. **Section 100.1 Order** by Municipality against land owners, fuel supplier and TSSA
   - All 3 parties appealed to ERT
   - Municipality withdrew against fuel supplier and TSSA contingent on pursuing in the civil action
   - ERT adjourned for years
   - ERT now has set hearing dates in Feb 2016
2. **Civil Action** against land owners, tank manufacturer, TSSA, remediation company, MOECC, insurer and adjuster (land owner brought companion action against other parties)
   - Mediation
   - Discoveries have been concluded on both actions
   - PTC held
   - Municipality has survived several Summary Judgment Motions
   - 12 Week Trial date is being set for the 2 actions

Lessons Learned for Municipalities

- Legal Counsel needs to be engaged immediately
  - Clients may try to handle the situation relying on MOECC
  - MOECC has a vested interest in the environment and the municipality has the deepest pockets, best solvency and immediate skill to address the clean-up irrespective if there is liability
  - An exit strategy to be considered from day 1

Lessons Learned Cont'd

- Challenge the MOECC
  - Ensure that MOECC is aggressively pursuing the polluters for containment and remediation to protect the innocent victims
  - Independently fact check the acceptable levels standards provided by MOECC on contaminant levels and press MOECC when you disagree with standards set by MOECC

Lessons Learned Cont'd

- Closely manage the clean-up firms
  - The market is small
  - How do you ensure no conflict of interest
  - Sharing the firm with the polluter may seem attractive (efficient with potential cost savings); however, it is very difficult to fully segregate costs and avoid duplicate/overlapping billing

Lessons Learned Cont'd

From Kawartha Lakes:

- Issue s. 100.1 Order as soon as you can quantify costs
- Pursue ERT Appeal Timelines aggressively through completion in less than 2 years
- Commence civil action before expiration of 2 year limitation but after ERT appeals complete, if possible

