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ENVIRONMENTAL & ENERGY LAW

Propane Company and its Directors Found Guilty of Nine Health and Safety and Environmental Offences Relating to the 2008 Explosions in Toronto

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The tragic events in the early morning hours of August 10, 2008 culminating in the death of an employee, the destruction of property, the disruption of schools and business and the temporary evacuation of 12,000 Toronto residents were the subject of a 135 page judgment of the Ontario Court of Justice on June 27 , 2013 in *Ontario (Ministry of Labour and Ministry of the Environment) v. Sunrise Propane Energy Group Inc. et al., 2013 ONCJ 358*. While the exact cause of the explosion was never conclusively determined, it was fairly clear following the trial, that the large propane vapour cloud explosion followed by a series of smaller explosions as the heat from the first explosion ignited other stored tanks at the site, was triggered by a truck- to- truck transfer of approximately 4000 U.S. Water Gallons (USWG) or a little less than 20,000 litres of liquid propane.

Justice Chapin found Sunrise Propane guilty under *Ontario's Occupational Health and Safety Act* of both failing as an employer to provide information, instruction and supervision to a worker to protect the health or safety of the deceased worker at a workplace and of failing to take every precaution reasonable in the circumstances for the protection of the worker. While the company's records were destroyed in the blast, completed exams for propane training, including emergency response, were, as a matter of course, sent to the Ontario Propane Association. There was no record with the Association of the deceased employee having been trained. None of the contractors who provided training could recall giving training to the deceased worker. ....Continued on page 2

No Section 7 Rights for Municipalities

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On July 12, 2013, the Environmental Review Tribunal ("ERT") released a decision in which it confirmed that section 7 of the *Canadian Charter of Rights and Freedoms* ("Charter") does not apply to Municipal Corporations.

Section 7 of the Charter guarantees "everyone" the right to "life, liberty and security of the person".

In *Municipality of North Middlesex v. Director, Ministry of the Environment*, ERT Case No.: 13-045, the appellant Municipality challenged the constitutionality of sections 47.5 and 142.1 of the *Environmental Protection Act* ("EPA"). Section 47.5 of the EPA permits the issuance of a renewable energy approval ("REA") for a renewable energy project if it is in the public interest to do so. Section 142.1 of the EPA permits any resident of Ontario to appeal an REA on grounds of serious harm to human health or serious and irreversible harm to plant life, animal life, or the natural environment. The Appellant Municipality requested an order from the ERT declaring sections 47.5 and 142.1 of the EPA inoperative to the extent that they allow for a violation of the Municipality's rights under section 7 of the Charter. ...Continued on page 3

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The deceased employee's response to the event was to run towards the blast and this supported a lack of information and proper training. With respect to the charge of failing to take every precaution, two tanks containing propane had been moved 35-40 feet to make room for a bulk 30,000 USWG tank which was to be installed. While the disconnecting and connecting of electrical lines and piping associated with this movement wasn't linked to the explosion, this modification required the approval of the Technical Safety Standards Authority (T.S.S.A.) and no such approval had been given. The installation of the new 30,000 USWG tank would facilitate compliance with a general order of the T.S.S.A. director and its subsequent adoption in the Propane Code posted on the T.S.S.A. website, that truck- to -truck transfers were not to be carried out unless the operation was at a bulk plant. The defence, relying on *R. v. Bata Industries Ltd. [1992] O.J.No.236 (Ont. Ct. Justice),* argued that they could not be faulted for what happened as they were relying on trusted professionals. The Court rejected this argument, relying on the Ontario Court of Appeal's decision in *R. v Wyssen (1992),10 O.R. (3d)193,* which had decided that the employer's responsibility for safety in the workplace was non-delegable and could not be evaded by contracting out the performance of the work to independent contractors.

The defendants were also convicted of numerous offences under the *Environmental Protection Act (E.P.A.),* including unlawfully discharging sound, vibration, heat, gas vapour and solids into the natural environment that caused an adverse effect. The numbered company was found to be in control of the site by virtue of being the holder of the lease, the insurance policy and the T.S.S.A. licence. The duty upon the defendants was captured in the following statement in the reasons for judgment at par. 548:

> "In an inherently dangerous industry the defendants were required to take steps to ensure that their truck drivers were knowledgeable about the risks of handling propane and how to avoid them."

The court noted that preventative systems were not in place and that despite employees testifying that safety was considered their priority, there were examples of daily slippage such as an unattended transfer hose and failure to obtain the T.S.S.A. authorization for moving two propane tanks. The defence unsuccessfully argued that they should be excused from having engaged in a truck-to-truck transfer before the large storage tank had been installed and operational because the T.S.S.A. inspector had expressly told them that they could continue to operate knowing full well at the time that the larger tank had yet to become operational. The Justice accepted as a fact that the inspector had conveyed this impression to the defendants in meetings at the end of 2006, but refused to accept defences of officially induced error or due diligence because by the summer of 2007 or slightly over a year before the explosions, the Propane Code Adoption Document Amendment was issued and posted on the T.S.S.A. website prohibiting truck-to-truck transfers before a bulk plant was in place. The defendants were guilty because their preventative systems and emergency response were inadequate. They were not found guilty because they couldn't install the 30,000 USWG. bulk propane tank and have it operational within two years. The Court reviewed the timelines which included approval by the City of Toronto, custom building the tank, an application for T.S.S.A. approval, unsuitably cold and wet weather and the contractors' scheduling conflicts and found that the installation had been pursued diligently (see pars. 543-546).

Perhaps the most interesting findings of guilt concerned 6 counts of contravening a provincial officer's order. The timelines for compliance were very short in light of the urgency and magnitude of the events. The order required that the Company confirm in writing that they were willing to comply within 3 days of the event. Their lawyer received the order within 15 minutes of the deadline for complying and not having instructions from his client, no written response was effected within the window provided for in the order. The defendants' lawyer had received no instructions to appeal the orders. The company was further convicted of failing to retain the services of one or more qualified persons to carry out the work, verifying in writing that such persons had been hired, and developing a written cleanup plan also all within 3 days of the event. They were further convicted of failing to immediately clean up the residential area surrounding the plant and providing written copies of sampling results to the Ministry and Toronto Public Health. Lastly, they were convicted of not developing a clean-up plan for the propane facility within 24 hours of the Ontario Fire Marshall releasing the site. ...Continued on page 3

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The defendants raised the defence of impossibility arguing that the time lines were unreasonable see *R. v. Canchem [1984] 4 C.E.L.R. (N.S.) 237*. They further argued that without having their insurers concurrence they had no money to pay for the clean-up. The Court noted at par.558 that the appropriate forum for challenging the terms of the order was the Environmental Review Tribunal and that collateral attacks on orders were generally prohibited as explained in *R. v Consolidated Maybrun Mines Ltd. [1998] 1 S.C.R 706*. The court rejected the defence of impossibility on the basis that there was evidence that reasonable legal alternatives were available to the defendants, that they had money available to them and that the clean-up plan didn't need to be complicated and could have been contained in an e-mail.

There was considerable debate about whether the defendants owed a continuing duty to provide the information in the orders following the deadline in the order. Their stark realization that the deadlines were missed had, to some degree, influenced their limited response to the orders. Had the defendants acted more expeditiously, the order contravention charges might have born a different result. While it is clear, given the gravity of the impacts, that charges would be laid and proceeded with, the number of charges and the penalty sought and obtained, will ultimately depend upon the degree to which serious efforts to comply have been demonstrated following the event .

The Court also found the operating director of the business, Shay Ben-Moshe and his co-owner and director, Valery Belahov, guilty of being directors of the propane company and failing to take all reasonable care to prevent the corporation from contravening a provincial officer's order.

The message from the Sunrise Propane experience is clear: industries involved in activities with potentially hazardous consequences to their workers and/or the environment need to ensure regular ongoing communication between their management, their employees, their outside contractors and the relevant regulators. The overall program must include a process for responding to emergent events. Management should be asking before any such event occurs:

- whether employees have been made aware of the risks and the way to manage them;
- whether equipment is in place to ensure a safe and timely shutdown of any systems that could pose or aggravate risk in such an emerging event; and
- how quickly can a recovery plan be brought in and what would such a plan involve?

It will be interesting to see the final penalties handed down.

No Section 7 Rights for Municipalities

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The ERT dismissed the Appellant Municipality's constitutional challenge on the basis that section 7 of the Charter does not apply to corporations, including municipal corporations. In other words, the Municipality had no direct standing to bring the section 7 challenge. In dismissing the challenge, the ERT rejected the Appellant Municipality's argument that section 9 of the *Municipal Act, 2001*, which grants municipalities the specific rights of a "natural person" and an increased recognition of municipalities' powers means that municipalities are akin to individual human beings for the purposes of section 7 of the Charter. Instead, the ERT confirmed that the Supreme Court of Canada's ("SCC") decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 ("*Irwin Toy*") is still good law and applicable to the ERT. In *Irwin Toy*, the SCC held that section 7 of the Charter guarantees rights that can only be enjoyed by humans and as such the term "everyone" in section 7 must be "defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings."

The ERT also found that the Appellant Municipality did not have indirect standing to bring the section 7 challenge. It was not an involuntary litigant, did not qualify for discretionary public interest standing or any other source of discretion that may apply.

What's next? - Individual constitutional challenges to the REA process. To date we know of three that have been filed. Stay tuned.