Legal consequences of data reporting and public perception: pitfalls of the regulatory system in municipal wastewater treatment facilities’ pursuit of environmental advancement

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Abstract: Municipal wastewater treatment facilities undertake the challenge of furthering governmental and public policy objectives of protecting human health and minimizing negative impacts on the environment by treating wastewater gathered from municipal sewer systems. Current regulations and public opinion often fail to realize that these facilities are not polluters, but rather are treaters of pollution. Municipalities and treatment facilities are completely different creatures than for-profit industries yet broad and general application of environmental legislation often does not acknowledge their unique purpose. Required by law to engage in regular data reporting to regulators, facilities do not receive protection from civil proceedings or prosecution in exchange for this mandatory reporting. Facility operators are reasonably hesitant to volunteer any information at the risk of it later being used against them as an adversarial climate persistently shadows the relationship between facilities and regulators. Internationally recognized principles and practical realities must be considered in developing a regulatory scheme which fosters a philosophy of collaboration between every level of government and municipal wastewater treatment facilities.

Keywords: Environmental law; protection against self-incrimination; reporting

ENVIRONMENTAL LAW

Global and Canadian concerns with environmental protection are growing in importance and attracting more intervention by stakeholders. Efforts to promote environmental protection are multifaceted and require contributions to various aspects such as public education, financial investments, scientific and technological development, as well as legal regulation. In fact, the development of a legal scheme designed to promote environmentally beneficial activities and to deter detrimental acts is crucial to effective environmental protection. Environmental law affects each and every stakeholder and is a powerful tool by which to promote and implement the underlying public policy objectives surrounding the protection of the environment. This article focuses on some of the legal and policy concerns underlying environmental regulation. While some focus is put on the Canadian experience, the concepts discussed are of general application with regard to locally, nationally and internationally recognized standards.

WASTEWATER TREATMENT FACILITIES

Municipal wastewater treatment facilities [facilities] gather and treat wastewater channelled through municipal collector sewers before releasing water or by-products, such as biosolids, in the environment. From the outset, it is imperative to highlight their unique purpose.

Treaters of pollution

Every time a toilet is flushed or a sink is drained, that water and any other substance it contains, including pollutants, find their way to a facility. Thus, the facilities are not the source of these pollutants; rather the sources are each and every individual, corporation and industry that benefit from a municipal sewer system [primary sources]. These facilities do not produce pollutants but they operate a system whereby pollutants produced by others are gathered and treated prior to being discharged so that the water exits the facilities cleaner and safer than when it entered. Therefore, the facilities are “treaters of pollution”. “The primary objective of municipal wastewater treatment is to control the release of substances entering the environment with the goals of protecting human health and minimizing negative impacts on the environment.” (CWWA, 2005)
ENVIRONMENTAL PRINCIPLES

Sustainable development, pollution prevention, the ecosystem approach, and science-based decision-making are examples of environmental principles which are relevant to the policy behind environmental protection. Environmental principles underlie most, if not all, modern environmental legislation. However, broad application of environmental regulations to municipalities and other treaters of pollution often fails to meet the intent and purpose of these principles.

For example, most legislation endorses the principle that “users and producers of pollutants and wastes should bear the responsibility for their actions. Companies or people that pollute should pay the cost they impose on society.” (Environment Canada, 2004) Yet, imposing penalties on facilities, the treaters of pollution that to not control what substances that enters their operations, rather than on the primary sources of the pollution defeats the purpose and intent of the polluter pays principle.

Further, new legislation “shifts the focus away from managing pollution after it has been created to preventing pollution” (Environment Canada, 2004). While pollution prevention is a necessary objective, facilities’ role is not to prevent all pollution, but rather to treat it and control its release. As such, it is inappropriate and impossible to broadly require facilities to be “pollution preventers”.

LEGAL IMPLICATIONS

Regulation

Facilities operate within a regulated industry. Various levels of governments impose specific guidelines and conditions that provide the rules by which facilities must abide. Legislation is also the framework for the monitoring and enforcement of environmental and legal standards.

Reporting. Legislators have imposed regular reporting obligations on facilities to continuously provide information concerning their regular operations to the government so to permit regulators to monitor the facilities’ activities. Most data is then compiled into a database and made publicly available. For example, ss.46-53 of the Canadian Environmental Protection Act (CEPA) enables the government to require that qualifying Canadian facilities regularly report to the National Pollutant Release Inventory (NPRI), information available to the public. Also, s.38(4) of the Fisheries Act requires mandatory reporting if there is deposit of deleterious substances in water frequented by fish. Reporting obligations are discussed in more detail below.

Inspections. Environmental legislation permits inspections by regulatory officials of premises related to the facilities’ operations (CEPA, s.218, Fisheries Act, ss.38, 49). Inspections may be undertaken in order to identify pollution, verify compliance with regulations, examine options to reduce pollution, attempt to resolve community pollution complaints, evaluate proposed construction plans, etc. (Benedickson, 2002 at 125). These inspections are deemed important to the administration of the environmental regulation scheme and are also used as a monitoring and compliance tool. Facility operators have a duty to assist inspectors, and failing to do so may constitute an offence (CEPA, ss.218(14), 273; Fisheries Act, s.49(1.2)).

Investigations. Investigations serve a different purpose than inspections: “An inspection is characterized by a visit to determine whether there is compliance with a given statute. The basic intent is not to uncover a breach of the Act; the purpose is rather to protect the public. On the other hand, if the inspector enters the establishment because he has reasonable grounds to believe that there has been a breach of the Act, this is no longer an inspection but a search, as the intent is then essentially to see if those reasonable grounds are justified and to seize anything which may serve as proof of the offence.” (Comité Paritaire, SCC 1994)

Facility operators cannot obstruct investigations, but their duty to cooperate differs from when searches are inspections. Courts have held that if reasonable and probable grounds that an offence has been committed exist prior to the search, a warrantless investigation is presumptively unreasonable (Benedickson, 2002 at 153; Inco, ONCA. 2004; CEPA, s.220). Consequently, “[i]n order to prevent the wolf masquerading as a sheep, the investigating officer would be required to obtain a warrant to proceed.” (Benedickson, 2002 at 153)
Accordingly, facility operators should be prudent and ask why a visit to their facility is being undertaken. This is very important, as inspections and investigations may be carried on by the same officials.

**Prosecutions and offences.** Offences under CEPA are set out in s.272 of the act. Penalties for such offences are a maximum of $1,000,000 fine and three years imprisonment. Relevant offences under the Fisheries Act are set out in ss.36(3) and 78 of the act. Penalties under that statute are a maximum of $500,000 fine and two years imprisonment.

**Due diligence.** Regulatory offences are often described as “strict liability” offences, meaning that prosecutors must first prove that an offence was committed, and then the onus shifts to the accused to prove due diligence (CEPA, s.283; Fisheries Act, s.78.6). “The defence of due diligence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or the omission innocent, or if he took all reasonable steps to avoid the particular event.” (Sault Ste Marie, SCC 1978). Proving due diligence is complicated and requires an analysis of the nature and gravity of the adverse effect, the foreseeability of the effect, the efforts undertaken to remedy the problem, matters beyond the control of the accused, scientific and technological limitations, skill level, economic consideration, etc. (Benedickson, 2002 at 30-31).

**Prosecutorial actions by private citizens**

Private citizens, often environmental activists, may seek to compel government to undertake enforcement or prosecution action. Under sections 17 to 22 of CEPA, if the minister does not investigate and report an alleged offence, or responds unreasonably to an investigation, a private citizen can launch an environmental protection action. The publishing of reported data augments the probability of it being used to launch such actions.

**Liability of individuals**

Directors of a corporate entity can be liable to a corporate offence on the basis that they aided or abetted in the commission of the offence. In fact, under s.280 of CEPA: “Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted and convicted.” (Similarly, see: Fisheries Act, s.78.2).

Section 280.1 of CEPA further requires that every director and officer of a corporation take all reasonable care to ensure compliance with regulations. As such, the law imposes on corporate officials a standard of reasonable care and failing to meet it may result in personal liability.

**Civil liability**

Where private citizens suffer damage, they have recourse to the courts in order to remedy the damage. Claims in nuisance, negligence and trespass often have environmental elements to them. Citizens may bring such actions if they have suffered damage caused by operations of facilities, or risk suffering the same. Class actions suits may also be instituted if the damage is caused on a large scale. Further, with regards to the distribution of biosolids, products liability claims are also possible if facilities do not provide a safe and high quality product. If a facility were found liable under such actions, courts can grant as a remedy a monetary damage award or order injunctive relief, which either forces the facility to do or to abstain from doing something.

**REPORTING OBLIGATIONS**

Facilities are required under various laws to submit reports to regulators related to the substances they discharge into the environment. There are also legislative provisions and governmental initiatives which permit and encourage voluntary reporting of data. Failing to comply with mandatory reporting is a punishable offence (s.272 CEPA). Therefore, there are significant legal consequences associated with non-reporting of data which the government legislatively mandates.
Practical risks
Facilities do not receive protection from prosecution or from civil proceedings in exchange for their mandatory reporting of data. In other words, they effectively receive no protection for compelled “confessions”. While full disclosure of data, above and beyond what is required by law, is paramount to the advancement of environmental science, facility operators have reason to hesitate to provide any information beyond what is legally required at the risk of incriminating themselves.

At the blink of an eye regulators can change roles from collaborators to investigators and prosecutors. This makes it difficult, if not impossible, for facilities to rely on a relationship of trust through full disclosure, as the adversarial nature of their relationship is always latent. As such, facilities fear that what they report may be used against them and therefore report only what is minimally necessary. Rare are the instances where facilities dare to embark on voluntary reporting.

Consequently, while regulators seek to obtain full disclosure, the scheme by which they impose the same has the opposite result since facilities and their operators must protect themselves from corporate and personal liability before they can consider volunteering information to feed environmental databanks.

PRINCIPLE AGAINST SELF-INCrimINATION
The possibility that information required to be provided by a facility to regulators would be subsequently used against the facility seems to offend the principle against self-incrimination and therefore violate principles of fundamental justice. In Canada, these rights are protected by s.7 of the Charter. In fact, the Supreme Court of Canada has stated that “[a]ny state action that coerces an individual to furnish evidence against him- or herself in a proceeding which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.” (Jones, SCC 1994 at 249)

Judicial treatment in the regulatory sphere: R. v. Fitzpatrick
The SCC has however also upheld the mandatory reporting requirements in where the reports had subsequent prosecutorial use. In Fitzpatrick (SCC, 1996), a fisherman was charged under the Fisheries Act with catching and retaining fish in excess of a fixed quota. The only evidence presented by the prosecution was reports the accused had been required to provide to regulators. The court ruled that the principle against self-incrimination was not offended by the prosecutorial use of the compelled reports and that the reports were admissible.

The court held that individuals do not enjoy absolute protection against self-incrimination and that the fact that evidence is brought into existence by state compulsion is less important than the purpose for which it is compelled. The availability of the protection also depends on the context in which the claim for protection arises and whether the rationale for the protection is threatened.

The context in which the claim arises considers that persons accused of regulatory offences are afforded less protection than those accused of criminal offences, whether or not an adversarial relationship existed with the state at the time the information was compelled, and whether the accused freely chose to enter the regulated industry. The purpose for the protection considers the need to protect against unreliable confessions and abuse of power by the state.

Adversarial relationship. The facts in Fitzpatrick can be distinguished from those which would arise with regards to facilities. Fitzpatrick was involved in a commercial fishery operation. The court held that he was not in an adversarial relationship with regulators at the time he furnished the reports, stating at paragraph 37: “(1) individuals like [Fitzpatrick] who are compelled to furnish hail reports and fishing logs are not in an adversarial or even inquisitorial relationship with the state at the time they provide this information. Indeed, far from being adversaries, the individual and the state are in fact partners, joined together in the need (1) to protect fishery as a valuable resource through conservation measures and (2) to fairly allocate the fish that do exist between all those who seek to have access to them.” Clearly the purpose of the fishing quotas is distinguishable from regulators’ monitoring of facilities’ discharge. Where regulators may at any time charge facilities with environmental offences due to such discharge, it cannot practically be said that facilities and
the government are “partners” in their day-to-day activities under the current regulatory scheme. At the very least, it can be said that the governmental role in monitoring discharge reports is inquisitorial.

**Coercion.** In Fitzpatrick, the court ruled there was no coercion, stating at paragraph 29 that: “No one is compelled to participate in the groundfish fishery; they do so purely as the result of their own free decision.” It then followed at paragraph 43: “[T]he individual is furnishing information that is meant to benefit him… through proper and fair distribution of scarce fishing resources… The state required certain information to be provided, and the individual voluntarily assumed the obligation to do so in deciding to become a fisher in the first place.” Evidently, municipalities do not choose to treat wastewater. This is not a self-motivated commercial decision, but rather a public service obligation. Further, it is an obligation with a clear governmental purpose. The rationale of “free choice” as outline in Fitzpatrick should not apply with regards to facilities’ responsibilities.

**Protection against unreliable confessions.** The reporting scheme may not motivate facilities to falsify their reports, as this is an offence in and of itself (CEPA, s.273). However, it does have the negative impact by seriously limiting the information provided. It has certainly curtailed, if not halted, all voluntary provisions of information when requests for surveys or studies are made.

**Important contextual differences.** While Fitzpatrick has been quite rigorously followed by inferior courts, the inherently different purpose of municipalities and other facilities should colour a court’s analysis when faced with such circumstances. The realities that municipalities are completely different creatures than for-profit industries, that environmental protection is their ultimate goal and not a condition to their operations, and that their existence is attributable to the effectively delegated implementation of governmental objectives cannot be denied.

**Availability to corporations**

Where corporations are charged with offences, the availability of Charter protections may come in question. Courts are very reluctant to avail corporations of the same Charter protection as is available to individuals. It is also unclear whether an individual may invoke a right against self-incrimination where the evidence was compelled from the corporation and not the individual (Wholesale Travel, ONCA 1989; Bata, ONCA 1992). Recall that prosecutors may also charge individuals, who are entitled to Charter protection. It should also be noted that, with regards to environmental offences, the information provided by the facilities is the same evidence relied upon to lay charges against individuals. As such, on a practical level, individuals are subject to adversarial state action and thus there is a strong argument that they should be entitled to Charter protection. It is beyond the scope of this article to further discuss the legal niceties of Charter application; however its underlying principles of fundamental justice are relevant and used to illustrate fairness concerns with the existing regulatory scheme.

**Spirit of collaboration requires voluntary change**

Indeed, municipal facilities may argue that compelled reports are inadmissible in prosecutions. While legal challenges may bear some weight, voluntary changes to the reporting scheme are more appropriate to promote collaboration between the government and facilities. In Fitzpatrick, the court discussed that absent the self-reporting information, regulators would have little information available to them to enforce the law. While this may be a real risk in the commercial context, it is not necessarily true with regards to municipal facilities since they have the exact same objective as do governments: reaching the greater good of waste clean-up and environmental protection.

**QUALITY ASSESSMENT**

Reporting to the NPRI is intended “for the purpose of conducting research, creating an inventory of data, formulating objectives and codes of practice, issuing guidelines or assessing or reporting on the state of the environment” (CEPA, s.46). Fundamentally, this is a form of quality assessment with relation to pollutants which are discharged into the environment.
Governments maintain that the aim of environmental legislation is the protection of the environment and of human health. The human health and the environmental objectives are closely intertwined, one being as important to public protection as the other. Accordingly, the health and environmental industries are good comparators with respect to quality assessment regulation.

**Quality assessment in the health industry: A comparator**

Health care providers are also subject to quality assessment monitoring with respect to care provided to the public. In fact, the regional health authorities and colleges of physicians and surgeons often review physicians’ work and have the authority to suspend or discipline those who do not meet the requisite standards. While quality assessment for municipalities relates to the discharge of pollutants, quality assessment in the health industry relates to the care provided to the public. During such reviews, information may be exchanged between physicians and medical regulators. However, unlike in environmental reporting schemes, the purposes for which such reported information may be used have been legislatively restricted.

**Evidentiary protection – Statutory privilege.** Section 71.2(2) the Medical Act of New Brunswick, ensures that “No record of a proceeding or investigation under this Act, no report, document or thing prepared for or statement given at a proceeding or in the course of an investigation under this Act, and no order or decision made in a proceeding under this Act, is admissible as evidence in a civil proceeding other than a proceeding under this Act.”

Further, section 43.3(2)(b) of the Evidence Act of New Brunswick states that “A witness, whether a party to a legal proceeding or not, is excused from producing any document made by or for a regional health authority or a committee established by the regional health authority, prepared for the purpose of being used in the course of, or arising out of, any study, research or program the dominant purpose of which is medical education or improvement in medical or hospital care or practice.” This non-admissibility of evidence does not apply, however, to patients’ clinical records (see s.43.3(3)).

Courts have upheld the validity of these limitations on admissibility of reported documents, deeming them privileged and inadmissible where they were created for the dominant purposes contemplated by the statutes (Doyle, NBCA 1996; Comeau, NBQB 1997).

**Legislative compromise.** While the confidential setting in which the statutory privilege arises in the medical context is distinct, it is worthwhile to note that legislators have recognized that free exchange of information is essential to quality assessment in the health industry and that this cannot be assured unless some legal protection is granted. This legal and evidentiary protection deems certain reported documents inadmissible for purposes other than those for which they were created.

Certainly, there is no reason to suggest that human health is less important than the environment. Consequently, quality assessment is as important in the health industry as it is in the environmental sector. Accordingly, where evidentiary compromises have been made with regards to quality assessment in the former, they should be just as appropriate in the latter in order to ensure a greater exchange of relevant information. It is therefore not unfathomable to require that documentation reported to environmental regulators also be limited in use for the purposes they were intended.

**PUBLIC PERCEPTION**

One of the most challenging tasks which facilities face is developing a supportive public opinion of their operation. Members of the public have various opportunities to participate in the environmental management and regulatory scheme and, due to the potentially prominent legal involvement of the public, it is crucial that it be adequately informed of facilities’ positive role. Otherwise, the launch of private prosecutions or lawsuits may be motivated by a preconceived, and inaccurate, negative impression the public has with regards to facilities’ roles.

Closely intertwined with public perception is political will. Unfortunately, politicians and environmental regulators may suffer from the same lack of information that do many members of the public. Moreover,
politicians may be pressured to act by members of the public which are ill-informed of facilities’ roles. In failing to adequately inform the public, facilities risk also facing uninformed legislators who are responsible for shaping the legal scheme regulating their operations.

**A simple solution**

Problems occur when facilities take a reactive approach and embark on “damage-control” missions once a negative public image has been created. Facilities have a responsibility and a vested interest in changing the public perception. As such, it is key that facilities be proactive and plan ahead in order to condition the public through education and communication in order to highlight their invaluable positive contribution to environmental protection. The result will certainly be enhanced goodwill in public forums as well as stronger political will to collaborate with and assist facilities in bringing forward the environmental agenda as it relates to wastewater treatment.

**CONCLUSION**

Municipalities and other facilities implement a governmental objective when they undertake the responsibility of treating wastewater. The responsibility which they undertake as treaters of pollution inherently differentiates them from other corporate entities. In order to meet their objectives of protecting human health and minimizing negative impacts on the environment, it is essential that there be a collaborative relationship established with regulators which will permit full disclosure of all relevant information, above and beyond what is currently being reported.

So long as the adversarial relationship with regulators lurks in the background, facilities and their operators will continue to fear incriminating themselves and exposure to serious legal liabilities by volunteering pertinent data. Consequently, the growth of the bank of shared environmental data will be stunted and environmental protection will suffer the consequences. Simple modifications to the regulatory scheme taking into account facilities’ unique purpose would improve disclosure and reporting initiatives while at the same time promoting a spirit of collaboration with regulators.

**REFERENCES**


Benedickson, J. (2002), Environmental Law, 2nd ed. (Toronto: Irwin Law) [Benedickson].


Evidence Act, R.S.N.B. 1979, c.E-11 [Evidence Act].

Medical Act of New Brunswick [Medical Act].