

**RESPONSIBILITY AND LIABILITY
FOR UNSAFE DRINKING WATER:
WHO'S ACCOUNTABLE NOW?**

Katherine van Rensburg, Stacey Ferrara and Sarah Campbell
Gowling Lafleur Henderson LLP

**The Canadian Institute's 4th Annual Conference
on Safe Drinking Water:
Meeting your Obligations in an Era of Transition**

April 26-27, 2004

RESPONSIBILITY AND LIABILITY FOR UNSAFE DRINKING WATER:

WHO'S ACCOUNTABLE NOW?

TABLE OF CONTENTS

| | Page |
|--|-------------|
| 1 Introduction | 1 |
| 2 Statutory Regulation of Drinking Water in Ontario | 2 |
| 2.1 Ontario Regulatory Provisions – Pre-SDWA | 2 |
| 2.2 SDWA Scope and Relevant Provisions | 3 |
| 2.3 SDWA Regulations | 5 |
| 2.4 SDWA Duty and Standard of Care | 6 |
| 2.5 Meeting the SDWA Standard of Care through Due Diligence | 9 |
| 2.6 Orders and Prosecutions under the SDWA | 10 |
| 2.6.1 Orders | 10 |
| 2.6.2 Prosecutions | 11 |
| 3 Common Law Causes of Action and Civil Suits for Unsafe Drinking Water | 12 |
| 4 Criminal Liability | 15 |
| 4.1 Liability Pursuant to the <i>Criminal Code</i> | 15 |
| 4.2 Bill C-45 Amendments to the <i>Criminal Code</i> | 16 |
| 4.2.1 The New Duty of Care | 16 |
| 4.2.2 Expansion of Criminal Liability for Organizations | 17 |
| 4.3 The Implications of Bill C-45 for Environmental Offences | 19 |
| 5 Conclusion | 20 |

1. Introduction

Drinking water issues have been prevalent in Ontario and across the country since Walkerton's *Escherichia coli* bacteria outbreak which killed seven people and made more than 2,300 ill in the spring of 2000. The tragic *e-coli*-related deaths and widespread illnesses in Walkerton continue to raise questions about how the Ontario government should regulate the safety of the province's drinking water, and what role our courts play in assigning liability for injury and harm caused by unsafe drinking water. New legislation is being implemented in stages as many of the provisions of Ontario's *Safe Drinking Water Act, 2003* ("SDWA")¹ come into force with the development and promulgation of related regulations. The changes that will occur through the full implementation of the Act will not only affect the statutory regime for safe drinking water in Ontario but will also have significant implications for statutory and common law liability.

Ontario's SDWA received Royal Assent in December 2002 and provides the legislative authority for the implementation of 50 of the 93 recommendations made by the Honourable Justice D. O'Connor in Part Two of *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water* ("Walkerton Report").² Many of the provisions of the SDWA came into force in 2003 while some await the development of required accompanying regulations.³ The regulations provide the necessary detail for many of the Act's statutory requirements. Together with the *Nutrient Management Act, 2002*⁴ and the *Sustainable Water and Sewage Systems Act, 2002*⁵, the

¹ S.O. 2002, c. 32.

² The Honourable Dennis O'Connor, *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water*, 2002, online at: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/> (last modified: 23 October 2003) ("Walkerton Report").

³ Regulations promulgated at the time of writing include the following: Definitions of "Deficiency" and "Municipal Drinking-Water System", O.Reg. 172/03; Definitions of Words and Expressions Used in the Act, O.Reg. 171/03; *Drinking-Water Systems*, O.Reg. 170/03; Drinking-Water Testing Services, O.Reg. 248/03; Ontario Drinking-Water Quality Standards, O.Reg. 169/03; and Schools, Private Schools and Day Nurseries, O.Reg. 173/03.

⁴ Bill 81, the *Nutrient Management Act, 2002*, received Royal Assent on June 27, 2002.

⁵ The Ministry of the Environment website at (www.ene.gov.on.ca/envision/water/sdwa/) states that the purpose of the *Sustainable Water and Sewage Systems Act, 2002* is to help "ensure clean, safe drinking water for Ontario

SDWA and its regulations are an important part of Ontario's development of a comprehensive scheme to protect drinking water. Recognizing that providing clean drinking water requires "multiple barriers" against possible contamination, the Ministry of the Environment has recently turned its attention to the development of legislation to provide protection for water sources.⁶

The purpose of this paper is to identify and describe the key sources of liability for those involved in the supply and delivery of drinking water in the province. We will consider the current sources of statutory liability for unsafe drinking water, in the wake of Walkerton, under provincial environmental statutes and in particular, as affected by the SDWA. The impact on civil claims for damages will be considered. Finally, other potential statutory sources of liability for drinking water-related incidents will be discussed, including recent amendments to the *Criminal Code* through Bill C-45.⁷

2.0 Statutory Regulation of Drinking Water in Ontario

2.1 Ontario Regulatory Provisions – Pre-SDWA

Prior to the enactment of the SDWA, the key statutes relating to the regulation of drinking water in Ontario were the *Ontario Water Resources Act* ("OWRA")⁸ and the *Environmental Protection Act* ("EPA").⁹ Regulations specific to drinking water were introduced in 2000 and 2001 under the OWRA.¹⁰

residents by making it mandatory for municipalities to assess and cost-recover the full amount of water and sewer services". The legislation focuses on financial issues related to ensuring a safe drinking water supply.

⁶ See MOE's *White Paper on Watershed-based Source Protection Planning* released in February 2004, which includes updates on the work of two expert source water protection committees and the government's plans to roll out new source protection legislation.

⁷ An overview of the implications of all of the changes to Ontario's regulation of drinking-water quality that are imposed by the SDWA and its regulations is beyond the scope of this paper. For an overview and detailed analysis of Parts I through XIV of the SDWA, see Lindgren, R., *Overview of the Safe Drinking Water Act: What's in, What's Out*, March, 2003, online at: www.cela.ca/water/439sdwaoverview.pdf (date accessed: 30 March 2004).

⁸ R.S.O. 1990, c. O.40.

⁹ R.S.O. 1990, c. E.19.

¹⁰ Drinking Water Protection - Larger Water Works, O.Reg. 459/00 and Drinking Water Protection - Smaller Water Works Servicing Designated Facilities, O.Reg. 505/01.

The OWRA addresses the operation and management of drinking-water systems in terms that are not as specific and directive as the SDWA. There is a general requirement for Ministry approval of the establishment and modification of water works.¹¹ Specific operational requirements can be included in the terms and conditions of the relevant certificate of approval, pursuant to the Director's authority under subsection 52(4) of the Act, and contraventions of such terms can result in prosecution.

In addition, the OWRA also contains a general prohibition against the discharge, into or near water, of a material that may impair the quality of water,¹² and provides for the issuance of a Director's Order requiring measures to be taken by a person who owns, manages or has control of sewage works, water works or any other facility which may discharge material into a water or watercourse that may impair the quality of the water.¹³ The EPA contains a general prohibition against the discharge of a contaminant into the natural environment, that causes or is likely to cause an adverse effect,¹⁴ and provides for the issuance of Directors' Orders in certain circumstances where preventive or remedial action is required.

The number of prosecutions and orders under the OWRA and the EPA in relation to water treatment and facilities were low in the years prior to the Walkerton tragedy. However, post-Walkerton, enforcement activity under these statutes increased significantly, with charges and fines against Ontario municipal water treatment facilities having more than tripled between April 1, 2000 and March 2003.¹⁵

2.2 SDWA Scope and Relevant Provisions

While the relevant provisions of the OWRA and the EPA remain in effect today,

¹¹ "No person shall establish, alter, extend or replace new or existing water works except under and in accordance with an approval granted by a Director", s. 52(1).

¹² OWRA, ss. 30(1).

¹³ OWRA, s. 32.

¹⁴ EPA, s. 14.

¹⁵ See more in the charts in Appendix 1 assembled from statistics from the Ontario Ministry of the Environment regarding charges against municipal water treatment facilities April 1, 2000-March 31, 2003.

statutory authority for the approvals process for certain municipal and non-municipal water works, now called drinking-water systems, has shifted to the SDWA and its associated regulations. Section 52 of the OWRA therefore currently applies only to water works that do not meet the SDWA's definition of "drinking-water system" which is broadly defined as:

a system of works, excluding plumbing, that is established for the purpose of providing users of the system with drinking water and that includes,

- (a) any thing used for the collection, production, treatment, storage, supply or distribution of water,
- (b) any thing related to the management of residue from the treatment process or the management of the discharge of a substance into the natural environment from the treatment system, and
- (c) a well or intake that serves as the source or entry point of raw water supply for the system.¹⁶

While the provisions relating to inspections, compliance and enforcement and penalties in the SDWA are similar to the OWRA provisions, there are several new provisions in the SDWA that indicate a bold departure from the former OWRA/EPA regime, and are intended to provide greater accountability and responsibility (and therefore may attract greater liability) for those who own and operate drinking-water systems. These provisions include a list of specific duties for owners and operators of drinking-water systems (s. 11 and O. Reg. 170/03), the creation of a duty to report adverse test results (s. 18) and the prohibition against allowing anything to enter a drinking-water system that could result in a drinking water health hazard, a contravention of a prescribed standard or interference with the normal operation of the system (s. 20).

Certain additional provisions, not yet in force, will provide for the codification of a statutory standard of care (s. 19), the requirement that drinking-water systems are run by accredited operating authorities (ss. 13 and 14) who are required to submit operational plans for municipal drinking-water systems (ss. 15 and 16), the establishment of accreditation bodies with authority to audit accredited operating authorities (s. 22), the requirement that drinking-water testing is performed by authorized facilities (s. 63) and the establishment of accreditation bodies to accredit laboratories (s. 64).

¹⁶ SDWA, s. 2(1) "drinking-water system."

2.3 SDWA Regulations

Any review of the obligations and responsibilities that are imposed under the new SDWA regime must include consideration of the regulations, which provide important details for the requirements imposed by the Act. For example, the Ontario Drinking-Water Quality Standards Regulation (O.Reg. 169/03) provides limits on the amount of microbiological, chemical and radiological parameters allowable in drinking water. Exceedences are required to be reported immediately to the medical officer of health, followed by the execution of any directions provided by that party, and addressed through appropriate corrective action.

The new Drinking-Water Systems Regulation (O. Reg. 170/03) replaces the two post-Walkerton regulations under the OWRA¹⁷ and categorizes drinking-water systems according to their size, consumer and owner type and frequency of use. Drinking-water systems may be large or small, residential or non-residential, municipal or non-municipal and year-round or seasonal. The corresponding requirements for operations, treatment, operational checks, sampling and testing regimes, report submission and maintenance, retention of records and chemical testing parameters for each type of system are prescribed by this regulation.

The Drinking-Water Testing Services Regulation (O.Reg. 248/03) deals with the licensing of those conducting tests and provides for certain exemptions from the licensing requirement. Drinking-water licences may be valid for up to five years from the date of issue, renewal or amendment and are subject to prescribed conditions (in addition to those statutorily defined) regarding the conspicuous display of certificates, the records required for subcontracting drinking-water testing services, the requirement to develop and maintain written policies and procedures for sample handling, conducting drinking-water tests and reporting, and cooperation with the Director during performance evaluation. Proper procedures for sample submission and handling are also detailed, as well as testing methods, reporting and record keeping.

¹⁷ Drinking Water Protection - Larger Water Works, O.Reg. 459/00 and Drinking Water Protection - Smaller Water Works Servicing Designated Facilities, O.Reg. 505/01.

2.4 SDWA Duty and Standard of Care

An important new provision introduced in the SDWA (which is not yet in force) is the codification of a statutory duty and standard of care for those with ownership and oversight of municipal drinking-water systems. Section 19 of the Act provides:

19. (1) Each of the persons listed in subsection (2) shall,
 - (a) exercise the level of care, diligence and skill in respect of a municipal drinking-water system that a reasonably prudent person would be expected to exercise in a similar situation; and
 - (b) act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the municipal drinking-water system.
- (2) The following are the persons listed for the purposes of subsection (1):
 1. The owner of the municipal drinking-water system.
 2. If the municipal drinking-water system is owned by a corporation other than a municipality, every officer and director of the corporation.
 3. If the system is owned by a municipality, every person who, on behalf of the municipality, oversees the accredited operating authority of the system or exercises decision-making authority over the system.
- (3) Every person under a duty described in subsection (1) who fails to carry out that duty is guilty of an offence.
- (4) A person may be convicted of an offence under this section in respect of a municipal drinking-water system whether or not the owner of the system is prosecuted or convicted.

Section 19 resulted from Recommendation 45 of Part II of the Walkerton Report. Justice O'Connor explained the recommendation as follows:

...in light of municipal ownership of water systems, municipal councils are responsible for ensuring the effective management and operation of their water systems. In some cases, councillors will assume this oversight responsibility directly; in others, they may delegate aspects of the oversight function. Given the importance of drinking water for public health, *those responsible for the discharging of the oversight function of the municipality (e.g. the council or a committee of council) should be held to a statutory standard of care that recognizes and formalizes their responsibilities.* These individuals should be required under the *Safe Drinking Water Act* to act honestly and in good faith with a view to the protection of the safety of the consumer, and to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. This standard of care is similar to the standard of care for directors of corporations under the various corporations statutes.¹⁸ (emphasis added)

¹⁸ Walkerton Report, at p. 296.

Subsection 194(1) of the EPA provides that every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant contrary to the Act or regulations, has a duty to “take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge”. A similar provision is contained in the OWRA with respect to activities that may discharge material into waters that may impair the quality of water.¹⁹ The explicit duty of care for officers and directors has been part of Ontario law since 1988, and has resulted in numerous prosecutions of responsible individuals for acts and omissions of their corporations, both under these sections and as parties to offences by the corporations.

The section 19 standard of care will apply to a range of parties that are involved in the supply and management of drinking-water within the province beginning with the owners of municipal drinking-water systems. For corporate, non-municipal owners, the duty will extend to their directors and officers. For municipally-owned drinking-water systems, the duty will attach to every person who, on behalf of the municipality, oversees the accredited operating authority of the system or exercises decision-making authority over the system. The standard of care that applies to each of these parties is twofold – to exercise the level of care, diligence and skill that a reasonably prudent person would be expected to exercise in a similar situation, and to act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the municipal drinking-water system.

While generally it will not be difficult to identify the owners of municipal drinking-water systems, and the officers and directors of corporate, non-municipal owners, in practice it may be more problematic to identify those individuals who oversee the accredited operating authority and have decision-making authority over the system. In many cases, it will be municipal councillors who will assume this oversight responsibility directly, although the oversight function may be delegated to others (e.g. to a committee of council). This is a new area of

¹⁹ EPA, ss. 194(1) and OWRA, ss. 116(1).

accountability and potential liability for municipal councillors that is a cause for concern.²⁰

As in the case of officers and directors, it is expected that operational responsibilities will be discharged by other employees of the organization. Justice O'Connor suggested in the Walkerton Report that oversight responsibilities can include activities such as adopting an overall policy for the system, hiring senior management or contracting with an external operating agency.²¹ Where a municipality has contracted with an external operating agency to run the water system, the municipal council will still be responsible for ensuring effective oversight, including regular audits and evaluation of the outside agency's performance.²²

In discharging their responsibilities under s. 19, those with oversight responsibility for drinking-water systems must keep in mind the specific obligations that are imposed elsewhere in the SDWA and regulations on other parties, and in particular, the responsibilities placed on "owners" and "operating authorities" under ss. 11(1). That subsection requires owners and operating authorities to *ensure* that water provided by the system to the point where the system is connected to a user's plumbing system meets the requirements of the prescribed drinking-water quality standards, that the drinking-water system is operated in accordance with the Act, is maintained in a proper state of repair, is operated by those with proper training or expertise, that all sampling, testing and monitoring requirements are complied with, that personnel at the drinking-water system are under the supervision of persons having the required qualifications, and that persons who carry out functions in relation to the drinking-water system comply with the reporting requirements that are prescribed or required by the conditions in the license or approval granted for the system.

The new Drinking-Water System Regulation (O.Reg. 170/03) also plays an important

²⁰ The MPP for Ottawa Centre during the Parliamentary debates in respect of Bill 195, the federal *Safe Drinking Water Act, 2002* stated: "there are also widespread concerns about the 'standard of care' provisions in the *Safe Drinking Water Act*, which suggest municipal councillors have a duty to take all reasonable steps to prevent any users of the system from being exposed to unreasonable health risks. This is the one where councillors are getting a little bit nervous about the liabilities they have as councillors when most of them, as you well know, do this job part-time and for less than \$7,000 or \$8,000 a year"; Bill 195, *Safe Drinking Water Act, 2002*, 3d Sess., 37th Parl., 2003 (assented to 13 December 2002).

²¹ Walkerton Report, at p. 296.

²² Walkerton Report, at p. 297.

role in providing detailed requirements for treatment, the operation and maintenance of the equipment, sampling and testing of drinking-water, the reporting of adverse test results, follow-up corrective action and the content and public availability of various types of required reports.

2.5 Meeting the SDWA Standard of Care through Due Diligence

As a strict liability standard, the new duty of care will be subject to a defence of “due diligence”. How does a municipal councillor or other person who is subject to the new statutory duty of care meet that standard? The standard of care is not a standard of perfection, but is one that demands honesty and integrity and a level of competence that would be expected of a similarly situated person.

The leading case dealing with the standard of care and due diligence for directors and officers in environmental matters (*R. v. Bata Industries*²³) recognizes that those with oversight responsibility can discharge their duty of care in a number of ways, including through the adoption of appropriate systems, with proper supervision and inspection, by requiring periodic reports as well as reports of any incidents of non-compliance, by delegating to responsible persons who have appropriate training and experience, by keeping aware of the standards of the industry and by acting immediately and personally if they have notice that the system has failed.²⁴

In situations where those responsible lack confidence in their expertise in a particular area, external advice and assistance should be obtained. In fact, s. 19 recognizes that those who own and are responsible for drinking-water systems will look to other professionals for direction, and contains an exception from liability where a person “relies in good faith on a report of an engineer, lawyer, accountant or other person whose professional qualifications lend credibility to the report” (s. 19(5)). This follows a recommendation in the Walkerton Report that the process of obtaining and following proper expert advice should be encouraged and should satisfy the statutory standard of care. The risk of liability under the Act related to the statutory standard of care may therefore be managed by seeking expert advice when necessary.

²³ (1992), 70 C.C.C. (3d) 394.

²⁴ Walkerton Report, at p. 429.

2.6 Orders and Prosecutions under the SDWA

2.6.1 Orders

Parts IX and XI of the SDWA deal with compliance, enforcement and penalties for breaches of the Act and regulations. The Act provides for the issuance of provincial officers' orders against anyone the provincial officer reasonably believes is contravening or has contravened the Act, regulations, an order thereunder or a condition in an approval or licence (s. 105), to require compliance with the law and any directions of the officer. The Act also provides for the issuance of provincial officers' orders against any person who owns, manages or has control of a municipal or regulated non-municipal drinking-water system that can require such parties to take a range of actions in relation to the drinking-water system, including the direction to engage contractors or consultants to carry out work required by the order (s. 106).²⁵

Where there is an imminent drinking-water health hazard, a Director can issue orders against the owner or the operating authority for the system, requiring compliance with directions that can include the requirements to immediately cease or restrict the operation of the system, and to provide the users of the system with an alternative supply of drinking water (s. 109). An order can also be made by the Minister, that can include the suspension of a license under the Act for a period not exceeding 90 days, as well as any order that a Director could make (s. 108).

The Act also provides for the issuance by a Director of a notice of emergency response to the owner, operating authority, the Ontario Clean Water Agency or another person, the chief medical officer of health and the medical officer of health, the local municipality and the Minister, that directs the Agency or person to assume control over the drinking-water system to which the notice of emergency response relates (s. 110). Where such a notice has been issued, the Agency or person, its employees and agents are provided with limited immunity from liability in respect of the condition of the drinking-water system immediately before the notice of emergency response was issued (s. 110(11)), and the Crown is immune from legal action in

²⁵ As is the case with provincial officers' orders under the OWRA and the EPA, these orders can be reviewed by a regional Director of the Ministry of the Environment, and, if affirmed, appealed to the Environmental Review Tribunal ("ERT"). All of the Directors' and Minister's orders discussed in this section can be appealed to the ERT, following the procedure, including time limits for commencing appeals, set out in the Act.

respect of acts, neglect and any tort committed by any person acting under the authority of a notice of emergency response (s. 110(12)).

A range of other orders can be made by a Director, including an order requiring a municipality to provide service from a municipal drinking-water system to residents in a major residential development or to oversee the establishment or alteration of one or more non-municipal drinking-water systems to serve those residents. Municipalities may comply with such orders in some cases by assuming responsibility for a regulated non-municipal drinking-water system or a privately-owned municipal drinking-water system, or can extend the existing system, or establish a new system to meet the needs of the development (s. 114). The Director may also order the appointment of an interim operating authority (s. 113).

2.6.2 Prosecutions

Contravention of the SDWA, a regulation, an order, or the term of a license or approval can result in prosecution. On conviction, an individual is liable to a maximum fine of \$20,000 per day (first conviction), and on each subsequent conviction to a maximum fine of \$50,000 per day, and imprisonment for up to a year, or both a fine and imprisonment. Corporations are liable to fines of \$100,000 per day for a first offence and \$200,000 per day for subsequent offences.

Where the conviction is in respect of an offence that could have resulted in a drinking water health hazard or for obstruction, failure to furnish information, furnishing false information or for the breach of an order or condition of an approval or license, the maximum penalties are increased to \$50,000 per day (first offence) and \$100,000 per day (subsequent offences) for individuals, and \$250,000 per day (first offence) and \$500,000 per day (subsequent offences) for corporations.

Where the offence involves a violation of the duty to report adverse test results, is a contravention of the owner's obligations under s. 11 that involves failure to satisfy the requirements of a water treatment standard for a drinking-water system, or where the offence results in a drinking-water health hazard, the maximum penalty is increased to \$4,000,000 per day (first offence) and \$7,000,000 per day (subsequent offences) for individuals and/or imprisonment for up to five years, and \$6,000,000 per day (first offence) and \$10,000,000 per

day (subsequent offences) for corporations.

Other penalties can be imposed on conviction for offences under the Act, including an increase in the fine as a result of any monetary benefit acquired by the accused (s. 145), an order to prevent damage, including providing an alternative drinking-water supply (s. 146) and a restitution order (s. 148).

3. Common Law Causes of Action and Civil Suits for Unsafe Drinking Water

One recommendation that was made to Justice O'Connor in the Walkerton Inquiry, that he did not adopt, was the creation of a statutory cause of action. This would have gone beyond the creation of statutory duties and standards of care, and would have permitted private parties to sue directly for compensation for damages incurred as a result of a breach of the statute, without having to prove negligence.

Under Ontario environmental law, there is one important precedent for a statutory cause of action, in the case of “spills”. Under Part X of the EPA, in addition to requiring reporting and response to spills, there is an express right for the Crown and any other person to compensation for loss or damage occurred as a result of a spill, against the owner of the pollutant and the person having control of the pollutant. Spills liability does not depend on fault or negligence, but on the occurrence of a spill contrary to the Act.

The adoption of a no-fault statutory cause of action in the case of municipal drinking-water systems was advocated to Justice O'Connor, particularly in order to support claims against the government for failure to ensure safe drinking water. Justice O'Connor dismissed the recommendation as follows:

Certain parties have urged that I create a new statutory cause of action for safe drinking water. The cause of action would enable a member of the public to take the government to court for breaches of a right to safe drinking water. I have considered this issue very carefully and decided against the creation of a right...I am satisfied that the existing causes of action, such as negligence, nuisance, and breach of statutory duty, provide sufficient access to the courts to compensate those who suffer damages from consuming unsafe drinking water.²⁶

²⁶ Walkerton Report, at pp. 405-406. Another recommendation that was rejected by Justice O'Connor was the inclusion of a “citizen’s suit” mechanism that would permit members of the public to enforce drinking water requirements in civil court, by stepping into the shoes of the Ministry of the Environment and the Attorney General

Although the SDWA did not create a statutory cause of action, it can be expected that the detailed and prescriptive provisions of the Act and its regulations will assist future plaintiffs who may have claims for damages as a result of unsafe drinking water.

Civil environmental claims in general are based on the torts (or causes of action) of nuisance, strict liability (*Rylands v. Fletcher*), trespass and negligence. In the absence of a specific statutory cause of action, these common law doctrines remain the foundation for any civil claim for environmental harm. In the case of unsafe drinking water, the primary cause of action is negligence.

The Walkerton class action provides a good example of the types of claims that can be asserted in respect of unsafe drinking water. The Statement of Claim, issued on June 14, 2000 claimed damages on behalf of Walkerton residents and their families, and sought certification as a class action under the *Class Proceedings Act, 1992*.²⁷ The defendants were The Corporation of the Municipality of Brockton (the “Municipality”), The Bruce-Grey-Owen Sound Health Unit, Stan Koebel, The Walkerton Public Utilities Commission (“Walkerton PUC”) and the Crown.

In the Walkerton proceedings, the Statement of Claim alleged that the Municipality, as owner of the water system, was vicariously liable for the acts and omissions of the Walkerton PUC, which had the duty to operate the Walkerton water works, and that the Walkerton PUC, in turn was liable for the negligence of its employees, including Stan Koebel. The Statement of Claim pleaded that each of the defendants owed each class member a duty of care to ensure that each class member received only potable water and did not receive contaminated water. The Statement of Claim alleged that each of the defendants was negligent, and in particular that the Municipality failed to manage, maintain and inspect its system, that it failed to adequately test the water, and that it failed to take appropriate actions when it knew or ought to have known of the contamination.

to enforce the regulatory framework. Justice O’Connor was of the view that the enforcement of the law should primarily be the responsibility of the government and that actions commenced by the public would divert time and money from the operation of the system (at p. 453).

²⁷ *Smith et al. v. The Corporation of the Municipality of Brockton, The Bruce-Grey-Owen Sound Health Unit, Stan Koebel, The Walkerton Public Utilities Commission and Her Majesty the Queen in right of Ontario*, Court File no. 00-CV-192173CP.

Claims for negligence require proof that the defendant in question owed the plaintiff (or the class of plaintiffs) a duty of care, that there was a breach of the duty, in the sense that the defendant failed to meet the required standard of care, and that the breach caused the plaintiff's damages. Since the Walkerton litigation was settled at an early stage²⁸, before any evidence had been adduced through oral and documentary discovery and even before the defendants had filed Statements of Defence, we will never know whether and to what extent the plaintiffs would have succeeded in their specific allegations against the defendants, and in particular whether a court would have concluded that each of the defendants owed the plaintiffs a duty of care and were in breach of that duty.

Establishing the duty and standard of care can often be difficult, and in asserting a claim for negligence, statutory standards can be extremely helpful. While the case law is clear that breach of a statute does not in itself give rise to a right to compensation²⁹, breach of a statute or regulation can be good evidence of negligence.

The detailed provisions of the SDWA setting out specific responsibilities for parties involved in the supply of drinking water may well facilitate civil claims for damages. Section 19, in particular, in identifying a duty and standard of care, and in relating that standard to the need to ensure the protection and safety of users of the drinking-water system, is likely to expand the range of potential targets of civil claims to include all of the parties covered by s. 19. Further, it can be expected that the inclusion of detailed requirements for the owners, operators, inspectors and others dealing with municipal water works, will have an effect on the standard of care that would be expected of such persons in the context of civil claims.

²⁸ *Walkerton Compensation Plan* ("Plan") also known as the Walkerton Class Action Settlement, is the result of out-of-court negotiations culminating in the Plan which provides a compensation offer of \$2,000 to each class member upon proof of qualifications (and in some cases further compensation where proof of loss is established). A full copy of the compensation plan can be found in the *Walkerton Compensation Plan* report which has a plan Administrator who has posted the details of the settlement in the Plan report which can be found at: www.walkertonclassaction.com/walk.pdf.

²⁹ *Bhaduria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181, see also *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205

4. Criminal Liability

4.1 Liability Pursuant to the *Criminal Code*

In addition to the civil claims and statutory sources of liability at the provincial level discussed above, the contamination of drinking-water systems in Ontario may also attract criminal liability under the *Criminal Code*. The primary vehicle for prosecuting environmental offences is under provincial legislation, however, in certain cases the conduct in question can be characterized as criminal, and charges can be laid under the *Criminal Code*. Recent amendments to the *Criminal Code*, under Bill C-45, may substantially increase the risk of criminal charges, where there is a potential for harm to the public.

The *Criminal Code* imposes potential criminal liability for a nuisance that has the effect of either endangering the lives, safety or health of the public, or causing physical injury to a person. The public endangerment provision was used in 1994 to lay criminal charges against Goodyear Tire & Rubber Co. of Canada for the alleged burial of toxic drums in Ameliasburg, Ontario.³⁰ This is also the provision under which the Koebel brothers were charged, as a result of their role in the contamination of the drinking water supply in Walkerton, Ontario.³¹

Another section of the *Criminal Code* creates an offence for the introduction of an offensive volatile substance, into or near any place that causes (or may cause) any person alarm, inconvenience, discommode or discomfort or causes (or may cause) damage to property.³² The application of this provision has yet to be discussed by the courts and ‘offensive volatile substance’ is not a defined term in the *Criminal Code* yet there appears to be considerable potential for the application of this provision to address a situation where harmful substances are

³⁰ These charges were dismissed as a result of procedural errors: *R. v. Goodyear Tire & Rubber Co. of Canada*, (1996) 21 C.E.L.R. (N.S.) 176 (Ont. C.J. (Prov. Div.)).

³¹ Both Stan and Frank Koebel were charged with public endangerment for (a) operating Well 7 without a chlorinator, (b) failing to monitor, sample and test the well water supplying the Town of Walkerton while Stan Koebel was also charged with public endangerment for (a) failing to notify the Ministry of the Environment of the adverse sample results as reported to him by a lab and (b) failing to notify the Medical Officer of Health and the Public Utilities Commission of the adverse sample results reported to him by a lab. Both Stan and Frank Koebel were also criminally charged with forgery, knowingly using a forged document, and breach of trust. Ontario Provincial Police Press Release, “OPP Law Charges in Walkerton Water Contamination” (23 April 2003).

³² *Criminal Code*, s. 178.

introduced into drinking-water systems.

Section 219 of the *Criminal Code* criminalizes negligent activity that involves wanton or reckless disregard for the lives or safety of others while doing anything or failing to do anything that is required by a statutory duty.³³ This offence requires proof of both the statutory duty and that the accused failed to meet the duty in a manner demonstrating “wanton or reckless disregard for the lives or safety of others”.

The specific duties applicable to owners and operators of drinking-water systems found under the SDWA, and in particular under sections 11 and 19, may increase the potential for criminal negligence charges against a wider range of targets in the event of a Walkerton-type disaster, where the failure to meet the statutory duty involves wanton or reckless disregard for the lives or safety of others.

4.2 Bill C-45 Amendments to the *Criminal Code*

4.2.1 The New Duty of Care

Bill C-45³⁴ came into force on March 31, 2004. Bill C-45’s amendments were a response to Nova Scotia’s Westray mine disaster which involved a methane explosion in a mine that killed 26 workers in 1992. The employees of the mine were working in unsafe conditions that were known to the corporation, yet criminal proceedings against the corporation and the mine’s managers were unsuccessful. Charges against the corporation were dropped due to procedural problems related to the laying of the charges and the Crown stayed the criminal negligence charges against the mine managers with the explanation that there was not enough evidence to ensure a conviction.

Bill C-45 introduces two important changes to the *Criminal Code*. It introduces a new duty of care for all persons directing the work or tasks of other individuals, and it establishes the rules for attributing criminal liability to organizations (including specifically corporations and

³³ *Criminal Code*, s. 219.

³⁴ Bill C-45, *An Act to amend the Criminal Code (criminal liability of organizations)*, 2d. Sess., 37th Parl., 2003, (assented to 7 November 2003, S.C. 2003, c. 21).

municipalities³⁵) for the acts of their representatives.

The new duty of care for anyone who directs how another person performs work is contained in s. 217.1 of the *Criminal Code* which provides:

217.1. Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

During Bill C-45's Second Reading in the House of Commons, Mr. Paul Harold Macklin, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, explained this provision as follows:

The importance of having such a duty in the *Criminal Code* is that if there is a breach of that duty, wanton and reckless disregard for the life or safety of people, and injury or death results from that breach, a person can be convicted of criminal negligence causing death which is punishable by up to life imprisonment, or criminal negligence causing bodily harm which is punishable by up to 10 years imprisonment.³⁶

In creating a new statutory duty, it is expected that this provision will work with the criminal negligence provisions of the *Criminal Code*, to permit criminal charges to be brought against a person who has supervised or directed work (including senior management), showing wanton and reckless disregard for the life or safety of others, where injury or death has resulted.

4.2.2 Expansion of Criminal Liability for Organizations

The scope of liability for a corporation or other organization for criminal offences has been broadened by Bill C-45. Prior to these amendments, corporations could be held liable for criminal acts and omissions of persons who, by reason of their relevant position or authority within the corporation, constituted a "directing mind" of the corporation. A "directing mind" has

³⁵ "Organization" means (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons; *Ibid.*, s. 1(2).

³⁶ *House of Commons Debates* (15 September 2003) at 1340 (Mr. P. H. Macklin).

been described as an individual within the corporation who is authorized to design and supervise the implementation of corporate policy rather than simply carry it out. In the past, in order for a corporation to be a party to an offence that was committed by its employee or representative, the prosecution was required to prove that one or more of the “directing minds” of the corporation had knowledge of the criminal act or omission.

Bill C-45’s amendments to the *Criminal Code* have significantly broadened the range of individuals whose conduct can trigger the criminal liability of the organizations that they represent. With respect to criminal negligence and other negligence-based criminal offences, an organization will be a party to the offence if (a) one of its representatives is party to the offence, or two or more representatives have engaged in conduct that together constitute an offence and (b) a senior officer, or senior officers collectively, who is or are responsible for the aspect of the organization’s activities that is relevant to the offence “departs markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence”.³⁷

A “representative” of the organization is broadly defined to include a director, partner, employee, member, agent or contractor³⁸ and a “senior officer” is a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.³⁹

Bill C-45 also addresses corporate responsibility for intentional criminal offences. An organization will be considered to be a party to a criminal offence that requires the prosecution to prove fault other than negligence, when a senior officer, acting with the intent at least in part to benefit the organization, (a) is a party to an offence while acting within the scope of his or her authority, (b) with the intent required for the offence, directs the work of other representatives so that they do the act or make the omission specified in the offence, or (c) knowing that a

³⁷ *Criminal Code*, s. 22.1.

³⁸ *Criminal Code*, s. 2 “representative”.

³⁹ *Criminal Code*, s. 2 “senior officer”.

representative is, or is about to be, a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.⁴⁰

4.3 The Implications of Bill C-45 for Environmental Offences

Parliament's discussions surrounding Bill C-45 during its progression through the legislative process clearly indicate that the intention behind these amendments was to improve workplace health and safety. While this may have been the intended focus, the amendments are broad enough to apply to various other contexts, including corporate and municipal responsibility for criminal charges resulting from an environmental incident.

A key feature of the new *Criminal Code* duty of care is its reference to the requirement that persons directing the work of another person take reasonable steps to prevent bodily harm to that person “or to any other person”. The section is not limited to the workplace context, and can clearly apply to activities that have an impact on the health of members of the public.

The extension of organizational responsibility will have an impact on both corporations and other organizations, including partnerships, municipalities and trade unions, where actions are taken by employees and other representatives that would attract personal criminal liability, and senior management has knowledge and fails to intervene to prevent the offence.

It is clear that these general amendments may result in municipal and/or corporate drinking-water system owners and/or operators, as an “organization”, being charged as a party to a criminal offence as a result of the criminal actions or omissions of certain representatives. Individuals associated with drinking-water systems who direct the work or tasks of another individual also have a clear legal duty to ensure that the bodily harm to the person taking direction, and all other persons, which would include drinking-water consumers, is prevented. The *Criminal Code* therefore has the potential to become an important source of liability for entities involved in the supply of drinking water.

⁴⁰ *Criminal Code*, s. 22.2.

5. Conclusion

Recent changes to Ontario's environmental laws, through the introduction of the *Safe Drinking Water Act* will certainly change the landscape for those involved in the provision of drinking water in the province. Specific statutory and regulatory duties have been imposed, containing more detailed and prescriptive provisions for operators, owners, and those with oversight functions in relation to municipal and regulated non-municipal drinking water systems.

In addition to the threat of orders and prosecution under the SDWA and other provincial statutes, those involved in the supply of drinking-water may face increased potential liability to civil claims for negligence by persons claiming damages for unsafe drinking water. The provisions of the SDWA will assist private parties in identifying a broader range of potential defendants who now have obligations under the legislation, and the appropriate standard of care can be argued with reference to the statute and regulations.

Finally, the amendments to the *Criminal Code* through Bill C-45 create an additional potential source of liability. The new duty of care for those who direct work can apply to persons who have responsibility for drinking water systems, requiring them to exercise care to prevent bodily harm to members of the public. Breach of this duty can lead to criminal negligence charges for both the individuals involved and, by application of the new rules for organizational liability, the corporations, municipalities and other entities they represent.