

GREENMAIL

NEWSLETTER

*A Report On Developments  
in Environmental  
Regulation*

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## **OBSTRUCTING JUSTICE? THE DUTY TO PROVIDE INFORMATION WHEN REPORTING A SPILL UNDER THE ENVIRONMENTAL PROTECTION ACT**

This bulletin discusses the obligation to provide information to the Ministry of the Environment (the "MOE") in connection with a spill.

The Ontario *Environmental Protection Act* ("EPA") requires anyone who spills a pollutant to notify the MOE of the spill, the related circumstances and the actions being taken. The EPA contains several other provisions enabling the MOE to obtain further information relating to a spill. If a person hinders or obstructs an environmental officer in performing his or her duties under the EPA, or refuses to provide information required under the EPA, he or she may be charged with obstruction of justice.

A recent decision of the Ontario Court of Appeal sheds light on the duty to respond to requests made by environmental officers after a spill has been reported. While the EPA provides officers with broad powers to collect information, the duty to provide further information only arises where the request is properly authorized under the EPA.

### *The Facts in R. v. Crompton*

Crompton Co./CIE, a chemical manufacturer, notified the MOE that it had accidentally spilled 400 litres of cooling tower water into a nearby creek. A few days later, an environmental officer telephoned Crompton to request a written report detailing the quantity and quality of the spilled substance and an explanation of what actions Crompton was taking to prevent a recurrence. Crompton refused, unless required to do so by a written demand issued by a Director of the MOE pursuant to s. 92(3) of the EPA. Although Crompton later provided the requested information, the MOE charged Crompton under s. 184(1) of the EPA with "hindering or obstructing" an environmental officer for refusing to provide the information when initially requested.

At trial, Crompton was convicted and fined a total of \$5,000.00. Crompton successfully appealed and was acquitted. The MOE then appealed to the Ontario Court of Appeal. In October, 2005 the Appeal Court upheld the acquittal and, in doing so, clarified the MOE's powers to compel further information regarding a spill.

### *The Decision*

The Appeal Court began by reviewing the various provisions of the EPA that permit the MOE to compel information and to lay obstruction charges. The Court ultimately concluded that the environmental officer did not have legal authority to compel information by means of a telephone request and, as a result, dismissed the obstruction charge against Crompton.

First of all, the Court found that ss. 92(1) of the EPA (the section requiring persons to notify the MOE of a spill, its circumstances, and the actions being taken with respect to the spill) does not *impliedly* empower an environmental officer to request further information. According to the Court, ss. 92(3) of the EPA (which provides that a "Director" may require the production of additional information) makes it clear that if further information is to be obtained, it is only the "Director" who has the authority to demand such information.

Second, the Court reviewed the inspection powers given to environmental officers under s. 156 of the EPA, and concluded that such powers may only be exercised during a physical inspection. In the Court's words a "physical inspection, by definition, cannot be conducted over the telephone". Given that the environmental officer made a telephone request for information, the Court held that he was not conducting an "inspection" under s. 156 of the EPA and he did not have the power to request the information he sought.

The Court went on to note, however, that this does not mean the MOE was precluded from demanding the information it sought. Indeed, the Court identified three different ways that the MOE could have done so:

- 1 a Director could have issued a request for further information under ss. 92(3) of the EPA;
- 2 an environmental officer could have requested further information in the course of a physical (on-site) inspection under s. 156 of the EPA; and
- 3 a third mechanism, based upon the self-reporting nature of ss. 92(1) of the EPA.

With respect to the third mechanism, the court noted that ss. 92(1) of the EPA requires a person to notify the MOE not only of the spill but also "of the circumstances thereof" and "the action the person has taken or intends to take" regarding the spill. The Court then referred to ss. 184(4) of the EPA, which states that "no person shall refuse to furnish... information required for the purpose of this Act".

Although the issue was not squarely before it in the *Crompton* case, the Court observed that if Crompton's initial spill notification had failed to provide all of the information required by ss. 92(1), an offence under ss. 184(4) of the EPA might be made out.

### *What the Decision Means*

The decision in *Crompton* provides some clarification of the reporting duties relating to spills under the EPA. When a spill is initially reported under ss. 92(1), the company must provide adequate information relating to the circumstances of the spill and what is being done with respect to the spill. The MOE may then request further information regarding the spill in one of two ways: (i) by a Director in accordance with ss. 92(3); or (ii) by an environmental officer in the course of an on-site physical inspection under ss. 156(2). The duty to provide additional information only arises when the request is properly authorized under the EPA.

While *Crompton* provides some guidance in reporting information related to spills, any refusal to provide information should be exercised with caution. The facts in *Crompton* failed to satisfy the elements of a ss. 184(1) offence, however, the Court's decision acknowledges that a failure to comply with a proper request for additional information could amount to obstruction of justice.

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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