

## **\$5.3M in Fines Against Sunrise Propane and Directors for Fiery Propane Explosion**

By [Donna S.K. Shier](#), Partner and Certified Environmental Law Specialist, and [Giselle Davidian](#), Associate. © Willms & Shier Environmental Lawyers LLP.

February 8, 2016

*On January 25, 2016, the Ontario Court of Justice (OCJ) imposed \$5.3 million in fines plus victim fine surcharges (VFS) on Sunrise Propane Energy Group Inc., 1367229 Ontario Inc. (collectively, Sunrise Propane) and its two directors. The fines were for, among other things, discharging contaminants into the natural environment and failing to comply with a Provincial Officer's Order. The discharge resulted from an explosion and subsequent fire that occurred at Sunrise Propane's storage facility.*

The Sunrise Propane incident, its unfortunate consequences and the magnitude of fines demonstrate that:

- ♦ the definition of a discharge and what constitutes an “adverse effect” under the *Environmental Protection Act* (EPA) continues to expand,
- ♦ preventative systems and emergency response plans are important to satisfy environmental, health and safety obligations,
- ♦ industries involved in activities that may be hazardous for workers and/or the environment need to ensure regular communication among corporate directing minds, employees, external contractors and relevant regulators, and
- ♦ directors and officers can be personally liable where their company fails to comply with a ministerial Order and their company does not use the appeal mechanisms available.

### **Facts- the Explosion**

Prior to the explosion, Sunrise Propane's Downsview facility in Toronto often engaged in on-site truck-to-truck transfers of propane. In truck-to-truck transfers, big non-metered trucks pump propane into a metered truck. This has the legal effect of unlicensed on-site propane storage.

In 2006, the Technical Standards and Safety Authority (TSSA) issued a Director's Public Safety Order prohibiting truck-to-truck transfers of propane, unless the facility was licensed as a bulk plant. To obtain a license as a bulk plant and continue its business at the same level, Sunrise Propane required an expanded licensed fixed tank storage capacity.

After a number of delays, Sunrise Propane's contractor began installing a larger capacity tank in June 2008. During the installation, Sunrise Propane's facility continued to conduct truck-to-truck transfers.

On August 10, 2008, a series of explosions occurred at Sunrise Propane's facility during a truck-to-truck transfer of propane, causing contaminant discharge from fuel tanks.

On August 13, 2008, the Ministry of the Environment (MOE, now Ministry of the Environment and Climate Change, MOECC) issued a Provincial Officer's Order specifying control and remediation requirements following the blast. Sunrise Propane never appealed the Order to the Environmental Review Tribunal.

TSSA shut down all three Sunrise Propane facilities shortly after the incident.

### **The Ontario Court of Justice Decision**

In June 2013, the OCJ convicted Sunrise Propane and its two directors of nine offences under the EPA and the *Occupational Health and Safety Act* (OHSA).<sup>1</sup>

The defence alleged, among other things, that although they were using truck-to-truck transfers:

- ◆ TSSA had sanctioned the practice as a temporary measure to prevent shutting down Sunrise Propane's business,
- ◆ Sunrise Propane had reason to believe that they were licensed as a bulk plant according to a TSSA letter citing the license number, and
- ◆ in any case, Sunrise Propane was working to be in compliance with new legislation, but it was not feasible to do so more quickly.

The Court found that the defendants discharged a contaminant that caused adverse effects and contravened a Provincial Officer's Order, contrary to the EPA.

### **The Discharge and "Adverse Effect" under the EPA**

In *Sunrise Propane*, the defendants were convicted of discharging contaminants contrary to section 14 of the EPA. The contaminants included "heat, vibration, sound, gas vapour, smoke, and solids such as asbestos, dust, metal fragments, and other debris" as far as one kilometre from the plant.<sup>2</sup>

The Court found that the discharge of contaminants caused adverse effects. The adverse effects included death of an employee, personal injuries to neighbours in nearby homes and damage to neighbouring homes, schools and businesses. In some cases, homes were rendered uninhabitable for over a year. A neighbouring car dealership business was completely destroyed.

The Supreme Court of Canada (SCC) recently considered the meaning of "adverse effect"<sup>3</sup> under the EPA in *Castonguay Blasting Ltd. v. Ontario (Environment)*.<sup>4</sup> In that case, the defendant was conducting blasting operations when fly rock flew from the site and damaged a house and vehicle. The defendants contended that the discharge of fly rock did not impair the natural environment and was therefore not under the jurisdiction of the MOE, pursuant to the EPA.

The defendants in *Castonguay* argued that clauses under the definition of "adverse effect" were not standalone elements, but rather had to be accompanied by an impairment of the natural environment to constitute an adverse effect under the EPA. The SCC disagreed and dismissed the appeal, holding that the clauses in the definition of adverse effect are standalone elements, and each is sufficient to constitute an adverse effect. The SCC found that there need not be lasting or substantial environmental harm to trigger the EPA.

<sup>1</sup> *Ontario (Ministry of Labour and Ministry of the Environment) v Sunrise Propane Energy Group Inc.* [*Sunrise Propane*].

<sup>2</sup> *Sunrise Propane* at para 9.

<sup>3</sup> See *Environmental Protection Act*, RSO 1990, c E 19 at s 1(1). Section 1(1) of the EPA lists and number of factors that a court will consider in determining whether there is an adverse effect resulting from a discharge.

<sup>4</sup> *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52.

The *Sunrise Propane* decision is consistent with *Castonguay*'s expansion of the scope of MOECC's jurisdiction for events that are not strictly "environmental". The expansion has meant increased MOECC scrutiny for activities that were previously primarily regulated by the Ministry of Labour and TSSA.

### **Due Diligence Defence**

Sunrise Propane and its directors were charged with strict liability offences. Accordingly, once the Crown proves the prohibited act, the burden shifts to the defence to establish due diligence.

The *Sunrise Propane* decision reaffirms the difficulty of establishing a due diligence defence for an inherently dangerous activity leading to an incident. Even if the particular incident could not have been foreseen, or had a small chance of materializing, due diligence requires companies and their directing minds to take significant steps to prevent the particular harm.

The OCJ found it "shocking that there was no system in place to ensure that the requirements of the TSSA were complied with, particularly given that this filling plant was located in a densely populated area..."<sup>5</sup> The Court found "a total lack of communication" among the corporate directors, engineers and external contactors to ensure that the propane tanks were properly installed.

### **Directors' and Officers' Liability**

Sunrise Propane's two corporate directors were convicted of failing to take all reasonable care to prevent the company from contravening the Provincial Officer's Order, contrary to section 194(1)(f) of the EPA.

### **Magnitude of Fines**

In January 2016, the OCJ fined Sunrise Propane \$4,820,000 plus VFS for its EPA breaches. The company was cleared of one count of failing to provide notification to MOECC that the company could not clean up after the blast.

Sunrise Propane was also convicted under the OHSA for failing to provide safety training and a safe working environment, leading to the death of an employee who was at the propane storage facility at the time of the explosion. Sunrise Propane was fined \$280,000 plus VFS for two OHSA violations.

Sunrise Propane's two directors were each personally fined \$100,000 plus VFS for failing to take reasonable care to prevent Sunrise Propane from contravening the EPA Order.

A separate class action that derived from the 2008 Sunrise Propane explosion settled for \$23 million in August 2014.<sup>6</sup>

---

<sup>5</sup> *Sunrise Propane* at para 376.

<sup>6</sup> See class action settlement, online:  
<<https://www.strosbergco.com/sites/default/files/documents/1199123.PDF>>.

[Donna S. K. Shier](#), is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and is certified as a Specialist in Environmental Law by The Law Society of Upper Canada. She can be reached at 416-862-4822 or by e-mail at [dshier@willmsshier.com](mailto:dshier@willmsshier.com).

[Giselle Davidian](#), is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. She can be reached at 416-646-4894 or by e-mail at [gdavidian@willmsshier.com](mailto:gdavidian@willmsshier.com).

*The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.*