

FillmoreRiley

Environmental Issues for Municipalities

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About Fillmore Riley

- **Large, full-service law firm – 56 Lawyers**
- **Based in Winnipeg, Manitoba**
- **More than 20 practice areas – from A for Administrative to W for Wills, and everything in between (corporate, litigation, real estate, environmental, family, construction, etc.)**
- **Preferred defence counsel for the Municipal Liability Program**
 - Act for Manitoba municipalities, councillors, and municipal employees on all insurance defence matters unless conflicted
- **Six-person municipal law group:**
 - Expropriations
 - Municipal decision-making
 - Bylaw modernization
 - Regulatory advice
 - Litigation

Fillmore Riley's Municipal Law Group



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About Sven Hombach

- **J.D. (University of Toronto) – 2005**
- **M.Sc. (University of Manitoba) – 2002**
- **Member of the environmental, municipal, and litigation practice groups at Fillmore Riley**
- **Services for municipalities include:**
 - Litigation of municipal liability issues
 - Contaminated site advice
 - Regulatory permit negotiation and guidance
 - Bylaw modernization (sewer, land drainage, pesticides, etc.)
 - Due diligence training and risk management advice
 - Defence of provincial or federal prosecutions
 - Bylaw prosecutions
 - Public Utilities Board hearings

Overview

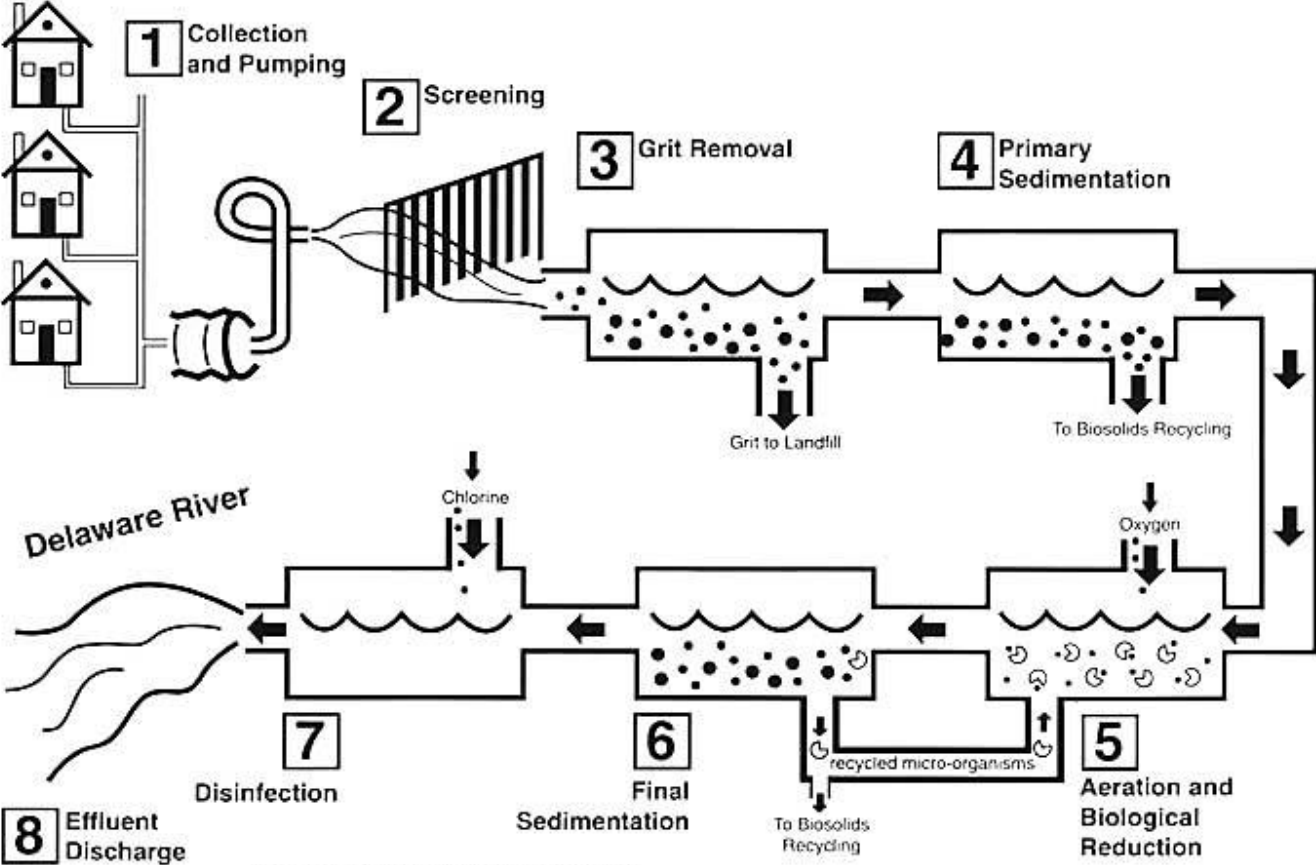
Six Environmental Issues:

1. Sewage
2. Contaminated Sites
3. Noxious Weeds
4. Dutch Elm Disease
5. Municipal Pesticide Bans
6. Bylaw Enforcement



Overarching theme: Management of these issues relies on bylaws that are (a) clear, (b) sufficiently detailed and (c) enforceable.

Sewage – Treatment Process Overview



Source: Philadelphia Water Department

Sewage – A Few Key Truths

Truth #1: Sewage treatment plant design is based on hydraulic retention time (tank volume divided by flow).

- **Case Study: Manitoba treatment plant for community of 300**
 - Design flow in North America is 400 litres/person/day (Metcalf & Eddy)
 - Normal BOD₅ (measure of sewage strength) is 200 mg/litre
 - Spring flow measured at 1,200 litres/person/day
 - BOD₅ only 40 mg/litre
 - Why? Sump pumps!
- **Lesson: Make sure bylaws require connected to land drainage only, and make sure this is enforced.**

Sewage – A Few Key Truths

Truth #2: Sewage treatment is a biological process.

- **Case Study: Packaged treatment plant for police detachment & jail**
 - Normal aerobic bacterial treatment process.
 - One day, bacterial floc has died without warning. Water remains untreated.
 - Why? Jail cell used as drunk tank. Hosed down overnight with one full gallon of bleach.
 - Enough to disinfect entire treatment plant.
- **Lesson: Watch the input. Smaller systems are more susceptible to shocks.**

Sewage – A Few Key Truths

Truth #3: Output = Input – Treatment

- **Case Study: Packaged treatment plant for busy Ontario truck stop with attached restaurant**
 - Certificate of Approval had unrealistic total phosphorus (TP) effluent limit
 - Plant well-designed but could never meet TP limit
 - Province prosecuted for almost half a year of TP exceedances (more than a dozen counts)
 - Plea bargain ultimately struck for \$110,000
- **Lesson: Must account for inability to treat in one of two ways:**
 - Negotiate higher effluent limits (or discharge into lagoon)
 - Set (and enforce) sewer influent limits by bylaw to meet output requirements

Contaminated Sites – What are they?

- **The business definition:**
 - A site that requires clean-up
 - A site that may attract liability and-clean-up orders
 - A site that cannot be sold
- **The legal definition:**
 - A site designated as a “contaminated site” by Manitoba Conservation pursuant to s. 7(1) of the *Contaminated Sites Remediation Act*
 - Designation will be registered on title (s. 7(1)(a))
 - Municipality will receive notice of designation (s. 7(1)(b)(ii))



A container used to treat wood with chemicals by saturation.

Contaminated Sites – Consequences

- **Province can issue order requiring site investigation to “one or more owners or occupiers of the site” (s. 4(1))**
- **Province can issue clean-up orders to “persons responsible” (s. 9(1)):**
 - Current owner/occupier or past owner/occupier who owned site after contamination occurred
 - Person with possession, charge or control of a contaminant on site
 - Directors or officers who “by an act, omission, direction or authorization occurring after the coming into force of this section, contaminated the site.
- **Municipalities that become owner by virtue of a tax sale are not persons responsible (s. 9(2))**
- **However, can still be liable for investigation as “owner or occupier”**

Contaminated Sites – Best Practices

- **When contemplating a tax sale for a commercial property:**
 - Check registry for contaminated site designation
 - Check municipal records for notice from Manitoba Conservation
 - Ask environmental people about site history
 - Common “red flags” include abandoned gas stations, vehicle service facilities, dry cleaners, etc.
- **If “red flags” are triggered:**
 - Speak to Manitoba Conservation about potential for issuing investigation order to current or past owner/occupier
 - Discuss possibility of Province doing the work and going after owner/occupier
- **Where land is sold for taxes after remediation is started, taxes still take priority over provincial lien (s. 38)**

Dutch Elm Disease – What is it?

- Fungal disease spread by elm bark beetle
- First identified in 1921 in the Netherlands
- Spread to Manitoba in 1975
- In Toronto, 80% of elm trees have died
- Manitoba still faring better
- Regulated in Manitoba through the Dutch Elm Disease Act



The *Dutch Elm Disease Act* - Highlights

- **Manitoba Conservation can require municipalities to implement management programs for Dutch elm disease (s. 10(1)):**
 - Municipality must fund; but
 - Funding agreements with Province available
- **Municipalities can issue orders to private individuals requiring:**
 - Destruction of tree
 - Disposal of wood
 - Deadline for doing so
- **Order must be based on “reasonable grounds” belief by inspector that tree/wood is infected**
- **Failure to comply punishable with fine up to \$5,000**
- **Prohibition on transport of affected wood, except for disposal**

Noxious Weeds – The *Noxious Weeds Act*

- **Straightforward statute – 10 pages, 42 sections**
- **12 pages of designated noxious weed species**
- **General duty to destroy weeds:**

“Each occupant of land, or, if the land is unoccupied, the owner thereof, or the agent of the owner, and each person, firm or corporation who or which is in control of, or in possession of, in in charge of, land, shall destroy all noxious weeds and noxious weed seeds growing or located on the land as often as may be necessary to prevent the growth, ripening and scattering of weeds or weed seeds.”

Noxious Weeds - Municipal Core Duties

- **Appoint (and fund) Inspectors (ss. 11, 25)**
- **Alternatively, set up Weed Control Board (s. 31)**
- **Declare (and act on) weed infested areas (s. 10)**
- **Review and collect expenditures (ss. 26, 27)**
- **Administer recovery of expenses (ss. 28, 29, 30)**



Noxious Weeds - Compliance Option No. 1

- **Appoint “Municipal Noxious Weed Inspector” (s. 11)**
 - March 1 deadline for any year (s. 11(1))
 - Twelve-month appointment unless removed by council (s. 11(2))
 - Notice of appointment must be sent to Province (Director, Soils & Crops Branch, MAFRI) within one week
 - Appoint sub-inspectors if necessary (s. 13)
 - Council resolution must fix (s. 12):
 - Salary
 - Geographic limit of jurisdiction



Noxious Weeds - Compliance Option No. 2

- **Form Weed Control Board (s. 31):**
 - Individual Weed Control District(s. 31(1)(a))
 - Joint District with other municipalities (s. 21(1)(b))
 - Municipalities represented by board members (s. 31(2))
 - Bylaw creating Board must:
 - Authorize appointment of weed supervisor (s. 31(5))
 - Authorize delegation of authority to weed supervisor (s. 31(5))
 - Authorize board to determine compensation
 - Board must appoint, and fix salary for, secretary treasurer (s. 31(7))
 - Currently 32 such districts (Source: MWSA)

Noxious Weeds - Financial Tools

- **Council has positive obligation to provide inspectors with:**
 - Salary (s. 12)
 - Expenses, including salary for “men employed under his direction” (s. 25)
- **Weed Control Board financed through grants from general funds**
- **No ability to recoup salary of inspector / weed supervisors - must fund through general revenue stream**
- **Expenses can be recouped by:**
 - Addition to property tax (s. 27)
 - Limit of \$500 per parcel or ¼ section per year, unless Minister approves higher limit
 - Special levy for declared noxious weed infestation zones (s. 28)
 - Limit of \$10 per acre
 - Notice requirements

Noxious Weeds – Powers of Inspectors

- **If no compliance with orders issued under section 8:**
 - Issue offence notice (fine of up to \$500) plus \$100 for each day of failure to comply (ss. 19(1), 36(1))
 - Destroy weeds by way of herbicides or other means (s. 19(2))
 - Destroy without notice where landowner resides outside municipality (s. 19(4))
 - Destroy on subdivisions after posting newspaper notice (s. 20(1))
 - Cut down weeds (and crops!) in crop-growing area up to three acres (s. 21(1))
 - Cut down weeds (and crops!) in crop-growing area over three acres after (s. 21(2)):
 - Notice to landowner
 - Approval from mayor / reeve / chair of weed control board

Noxious Weeds – Powers of Council

- **Council can designate “weed infested area” (s. 10):**
 - Enter into agreement with landowner for up to five years to eradicate weeds (ss. 10(2), 10(4))
 - Cause work to be done and (s. 10(3)):
 - Enter lands and destroy weeds
 - Prohibit occupier from sowing or harvesting crops
 - Limit land use to pasture
 - Recovery of money by:
 - Retaining and selling crops (s. 10(5))
 - Adding amount to property tax (s. 10(5))



Municipal Pesticide Bans – A Brief History of Federation

- **Constitution Act, 1867, assigns heads of power to feds and provinces**
- **“Municipal Institutions” assigned to provinces:**
 - Normally, no municipal jurisdiction other than what is set out in the Municipal Act.
 - “Environment” not in Municipal Act
 - “Pesticides” not in Municipal Act
- **But: Not in Constitution Act, 1867 either:**
 - Feds regulate as “national concern” and “sea coast and inland fisheries”
 - Provinces regulate as “all matters of a merely local or private nature”
 - Municipalities regulate as “safety, health & protection of people”

Municipal Pesticide Bans – *Spraytech v. Hudson* (S.C.C.)

- **Facts:**
 - Spraytech was applying pesticides registered with the PMRA in Hudson, Quebec under valid provincial applicator licence
 - Hudson had bylaw stating that “The spreading and use of a pesticide is prohibited throughout the territory of the Town”, subject to some exceptions
 - Hudson issued fine
 - Case went to Supreme Court of Canada

Municipal Pesticide Bans – *Spraytech v. Hudson* (S.C.C.)

- **Ruling:**
 - Municipality had power to under “general welfare” power in Quebec Civil Code
 - Acted in good faith
 - Bylaw not invalid because “dual compliance” possible – simply comply with most stringent standard
- **Similar power under Manitoba’s Municipal Act s. 232(1)(a):**

232(1) A council may pass by-laws for municipal purposes respecting the following matters:

(a) the safety, health, protection and well-being of people, and the safety and protection of property

Bylaw Enforcement – Municipal Powers

- **Bylaws only as effective as their enforcement**
- ***Municipal Act, s. 236(1)(b)* provides power to include the following in municipal bylaws:**
 - create offences
 - provide for fines and penalties
 - stipulating that fines and penalties can be collected like a tax
 - seizing, removing or impounding of items related to offence
 - charging costs for doing so
 - imposing imprisonment of up to six months for offence or non-payment of fine

Bylaw Enforcement – Express Limits to Power

- ***Fees, Discounts & Penalties Regulation* limits municipal fines to \$1,000 for each day an offence continues**
- **Limit makes it difficult to recover cost of enforcement**
- **Enforcement at minimum requires:**
 - Offence notice
 - Court appearance for plea
 - (Potentially) 2nd court appearance for sentencing
 - Receipt of fine by municipality and remission of court costs to provincial court
- **However, “set fine” offences can streamline process**

Bylaw Enforcement – “Set Fine” Offences

- **Summary Convictions Act allows** bylaws to contain “set fines” for offences
- Can prescribe in bylaw in a schedule creating a list of offences
- Must include amount payable in offence notices
- **Administrative advantages:**
 - Payment of fine is “deemed guilty plea”
 - No need to appear before provincial court justice to argue fine
 - Easier to get default conviction for non-payment (set fine + \$50 default penalty)
- **Drawbacks:**
 - Loss of flexibility
 - However, can write in “discretion” to use either set fine or regular fine

Questions?



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