

Environmental Law

February 1, 2005

Proposed Amendments to the *Environmental Protection Act* and the *Ontario Water Resources Act*

The Province of Ontario has introduced Bill 133 which will amend the *Environmental Protection Act* and the *Ontario Water Resources Act*. The most significant provisions of the Bill:

- remove the due diligence defence currently available to corporations, officers and directors in certain circumstances; and
- expand the potential liability of directors and officers.

The amendments will primarily apply to:

- specific “business activities” to be prescribed in a yet unavailable regulation; and
- business activities which operate under a Certificate of Approval or other licence or permit.

Leona Dombrowsky, the Minister of the Environment suggested in a recent speech that the prescribed “business activities” would be restricted to the industrial sectors within the MISA program (Municipal/Industrial Strategy for Abatement). These sectors include: petroleum, pulp and paper, metal mining, industrial metals, metal casting,

organic chemical manufacturing, inorganic chemical, iron and steel, and electrical power generation.

Bill 133 received first reading in the legislature on October 7th, 2004. According to the Ministry of the Environment’s Legal Department, the second reading of the Bill, with only a few revisions, is expected to occur sometime in the spring of 2005.

New “Environmental Penalties” - How Wide has the Province Cast its Net?

The draft legislation introduces the concept of “Environmental Penalties” which can be imposed upon corporations or its officers and directors for contravention of the *Environmental Protection Act* or *Ontario Water Resources Act*.

According to Minister Dombrowsky, in a speech delivered on December 8th, 2004:

“Bill 133 is a framework that sets out our public policy intention. While Environmental Penalties are a tool that can be used broadly, their application will be controlled through regulations.

The regulations will apply Environmental Penalties to the approximately 178 companies that are currently covered by the MISA regulations.”

The Minister goes on to say:

“We are focusing on major polluters and the law will not be applied broadly.”

Although the Minister suggests that it is the government’s intention that the affected parties would be limited to the MISA sectors, the wording of the draft legislation casts a much broader net. Any business activities which require a Certificate of Approval, license or permit under existing environ-

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mental legislation will be subject to Environmental Penalties.

The Environmental Penalties can be as high as \$20,000 a day for individuals and up to \$100,000 a day for corporations.

New “Environmental Penalties”- Absolute Liability

The draft legislation removes the due diligence defence in instances where an Environmental Penalty is imposed. Bill 133 permits the imposition of Environmental Penalties on a polluter even if that person (corporation, officer or director) took all reasonable steps to prevent the contravention and even if, at the time of the contravention, that person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent.

Potentially Increased Standards to be Met:

Under the current *Environmental Protection Act* and *Ontario Water Resources Act* in order for a prosecution to take place or an order to be issued, many provisions require that the government demonstrate that harm to the environment had occurred or was likely to occur as a result of a discharge. Bill 133 amends many of these provisions so that it is sufficient prerequisite that harm “may occur”.

For example, remedial orders may be issued under the current *Environmental Protection Act* when the natural environment is injured, damaged or endangered or “likely to be injured, damaged or endangered.” Bill 133 substitutes the phrase “or may be injured” for the phrase “or is likely to be injured”.

Onus on Officers and Directors - Innocent until Proven Guilty Will No Longer Apply:

Bill 133 places the onus on the corporation, officer or director appealing an Environmental Penalty to prove that they did not contravene the applicable provisions of the legislation.

Further, Bill 133 proposes that, in the event an officer or a director is prosecuted for an offence under the current *Environmental Protection Act*, the officer or director has the onus of proving that he or she carried out the duty to take all reasonable care to prevent the corporation from causing or permitting an unlawful discharge.

Offence In Addition to Environmental Penalties:

Bill 133 provides that the imposition of an Environmental Penalty does not prevent a prosecution under other provisions of the current legislation for an offence in respect of the same contravention.

For further information, please contact a member of Goodmans’ Environmental Group listed below.

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