

GREENMAIL

NEWSLETTER

*A Report On Developments  
in Environmental  
Regulation*

November 2004

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**TAKE NO PRISONERS!  
ONTARIO'S NEW ENVIRONMENTAL LEGISLATION**

On October 27, 2004, Ontario's Minister of the Environment, Leona Dombrowsky, introduced the *Environmental Enforcement Statute Law Amendment Act, 2004* ("Bill 133") for first reading. The bill proposes significant amendments to the *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* (OWRA).

The two most radical changes of Bill 133 are the introduction of onerous "Environmental Penalties" and significant changes to the liabilities and duties of directors and officers of corporations. Bill 133 embraces the concept of absolute liability (no due diligence defence), increases fines, introduces mandatory minimum penalties, provides greater authority to the Ministry of the Environment to issue mandatory orders and even grants municipalities the authority to issue orders to pay for costs incurred to clean-up spills.

**BACKGROUND TO ENVIRONMENTAL PENALTIES**

The EPA and the OWRA had both contained provisions since 1998 that provided for administrative monetary penalties or "AMPs". AMPs were created as a sanction for environmental infractions that would be mid-way between a minor ticket offence and a full prosecution<sup>1</sup>. AMPs were intended to provide a cost efficient way to deal with non-compliance where there was no immediate environmental harm. This type of non-compliance was considered less serious and therefore did not warrant a full prosecution. AMPs could be imposed in amounts up to \$5000/day. But these 1998 provisions were the subject of much controversy amongst environmental law stakeholders and were never brought into force. The AMPs that were hotly contested with the previous government are to be replaced with new *Environmental Penalties* which are even more onerous.

Pursuant to Bill 133, the maximum amount of the penalties has increased from \$5,000/day to \$20,000/day for individuals and \$100,000/day for corporations! In addition, Environmental Penalties will be available in more circumstance than AMPs. However, the details on matters such as how Environmental Penalties are calculated and what contraventions are subject to the regime will be spelled out in regulations to be developed following adoption of the Bill.

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<sup>1</sup> A full prosecution is one where the accused is charged with an infraction, requiring a trial before a judge or justice of the peace and where the prosecutor has to satisfy a criminal burden of proof, i.e., beyond a reasonable doubt.

An order requiring the payment of an Environmental Penalty issued by a provincial officer may be amended or revoked by the provincial officer who issued the order or by the Director<sup>2</sup>. The time to request the Director, (not the Environmental Review Tribunal), to review the Environmental Penalty has been reduced from 15 days to 7 days. If the Director does not revoke, alter or confirm the order or provide notice that he needs more time to complete the review within 7 days of receiving the request for review, then the order is deemed confirmed and the recipient of the order is deemed to have been given notice, thereby starting the clock again for payment.

Under Section 182.1(9) of the existing EPA, paying an administrative penalty under the AMPs provisions would have prevented the person from being charged with an offence for the same issue. However, under the proposed Section 182.1(10) in Bill 133, there is an explicit provision providing for the charging of an offence **even when** an Environmental Penalty has been paid. Therefore, there is no downside to challenging the order to pay an Environmental Penalty and it will most likely aid any defence in a subsequent prosecution. To lawyers, a subsequent prosecution where the Environmental Penalty has been paid skates very close to the edge of violating the principles of natural justice based on double jeopardy. No doubt, this argument will be made.

Bill 133 allows any person subject to an Environmental Penalty to enter into a settlement agreement with the Director that may lead to a reduction or a cancellation of the Environmental Penalty. As part of the settlement agreement, the person will be required to comply with legally binding obligations or risk sanctions.

### **IMPLICATIONS FOR DIRECTORS AND OFFICERS**

Some of the most extreme aspects of Bill 133 concern new obligations on corporate directors and officers. Under the EPA prior to Bill 133,<sup>3</sup> directors and officers of corporations that engage in activities that may discharge contaminants are liable where they fail “*to take all reasonable care to prevent the corporation from causing or permitting*” an unlawful discharge. This is the equivalent of a due diligence obligation on directors and officers to control emissions. Under the proposed legislation, there is no requirement for a discharge. Bill 133 provides that the directors and officers have a duty to take all reasonable care to prevent the corporation from contravening the EPA, the regulations, orders, certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under the EPA, a much more stringent duty. Directors and officers could be the subject of an Environmental Penalty if the corporation fails to file a change of address form, that might be required under a Certificate of Approval, or makes an error in shipping documents for liquid wastes.

In addition, Bill 133 provides for an explicit reverse onus, by requiring directors and officers to prove that all reasonable care was taken to carry out their duty. The more onerous duty coupled with the reverse onus is potentially very serious for directors and officers of corporations. There are frequently exclusions in Directors and Officers insurance policies for environmental claims. Expanding the area in which directors and officers are exposed for environmental problems is going to make it even more challenging in the post-Enron era to find individuals willing to take on those risks.

### **OTHER AMENDMENTS**

In addition to the Environmental Penalties and the changes to the duties of directors and officers highlights of Bill 133 include the following:

- **General Contraventions** - Increased maximum fines from \$20,000/day for a first conviction and \$50,000/day for a subsequent conviction to \$50,000/day for a first conviction and \$100,000/day for a subsequent conviction. For corporations, maximum fines increase from \$100,000/day on a first conviction and \$200,000/day on a subsequent conviction to \$250,000/day on a first conviction and \$500,000 a day on a subsequent conviction.

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<sup>2</sup> The “Director” is a senior MOE officer appointed for the purpose of certain sections of the EPA or the OWRA and is generally the head of a regional office or a major Branch such as the Environmental Assessment and Approvals Branch.

<sup>3</sup> Subsection 182.1(1)(d)

- **Serious Offences** – For individuals a minimum fine of \$5,000/day and a maximum fine of \$4,000,000/day on a first conviction, a minimum fine of \$10,000 a day and a maximum fine of \$6,000,000/day on a second conviction, and a minimum fine of \$20,000 a day and a maximum fine of \$6,000,000/day on a subsequent conviction. For corporations, these offences carry a minimum fine of \$25,000 and a maximum fine of \$6,000,000 on a first conviction, a minimum fine of \$50,000 and a maximum fine of \$10,000,000 on a second conviction, and a minimum fine of \$100,000 and a maximum fine of \$10,000,000 on a subsequent conviction. Imprisonment for up to five years is also available in certain circumstances.
- **Aggravating Factors** - require certain circumstances to be considered as aggravating factors when determining the sentence to be imposed. If the court decides that an aggravating factor does not warrant a more severe penalty, the court is required to give reasons for that decision. The court shall not consider compliance with an order issued in response to the offence to be a mitigating factor.
- **Discharges** - Section 14 of the EPA, the general prohibition against discharging a contaminant, is changed by removing the phrase “*that causes or is likely to cause an adverse effect*” thereby making the act of the discharge of the contaminant prohibited regardless of whether or not its impact or its potential impact has the potential for any adverse consequences. The same phrase has also been removed from Section 15 which requires reporting of discharges “out of the normal course of events”. This amendment is bizarre. It applies on its face to any discharge “out of the normal course of events”. Arguably, if you let your car idle in the driveway for an extra 15 minutes, you are discharging a contaminant from the exhaust in contravention of the law and will have to report to the MOE!
- **Lower Thresholds** - Bill 133 provides for a number of amendments throughout the EPA whereby the threshold changes from “likely” to cause a problem or an adverse effect or “expected” to do so, to “may”. This lowers the threshold from “likely” which would connote a probability of occurrence of 50% or greater to “may” which could conceivably be interpreted as any probability greater than 0%.
- **Director’s Orders** - The Director, under the proposed changes, is provided the ability to make an order for costs requiring the owner of the pollutant or the person having control of the pollutant to pay to the Minister of Finance any reasonable costs or expense incurred by the Province: (i) to prevent, eliminate or ameliorate any adverse effects; or, (ii) to prevent or reduce the risks of future discharges into the natural environment of any pollutant owned by or under the charge, management or control of the person to whom the order is made.
- **Municipal Orders** - Municipalities will be granted the ability to issue orders requiring the owner or the person having control of the pollutant to pay to the municipality “*any reasonable costs or expenses incurred....to prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.*” Amounts owing pursuant to such orders are given priority lien status.
- **Deemed Impairment** - In the OWRA, there is a new definition of “*deemed impairment*”. The provision deals with both the material discharged and its derivatives and basically uses a threshold of “may cause injury to any living organism” which is considerably more stringent than the current law. It also provides that the material may enter the water “directly or indirectly”.
- **Environmental Clean Up Fund** - Environmental penalties are to be paid into a “separate account in the Consolidated Revenue Fund”. Bill 133 provides the Minister of the Environment the authority to direct the money to compensate persons or bodies who incurred costs or expenses suffered as a result of a spill or to those who undertake environmental remediation projects or other purposes prescribed by regulation but does not guarantee the money will be spent for these purposes.
- **Shifting the Onus** - In several circumstances, the onus of proving compliance is placed on the person whose conduct is challenged rather than on the Ministry of the Environment.

## CONCLUSION

The amendments in Bill 133 represent a significant change in the manner of dealing with environmental compliance and will be sure to generate passionate debate. Although the public will support the concept of polluter pays, the concept of guilty unless you can prove you are innocent will be a much tougher sell. In addition, by raising the stakes with significantly increased penalties the government has ensured that any person charged will most certainly take all necessary steps to fully defend its position. Finally, the new onus on corporate directors and officers will be an additional deterrent to prospective candidates for Ontario's boardrooms.

Bill 133 was introduced with almost no advance notice and is out for public comment under the EBR process until November 27<sup>th</sup>. It is expected that there will be substantial input from interested parties and how the government deals with that input will be an interesting test.

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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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