



# MILLER THOMSON LLP

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## ENVIRONOTES!

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*Environmental Solutions  
for Business*

### CONTROVERSIAL BILL 133 PASSED BY LEGISLATURE



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Bill 133 received Third Reading on June 9. Portions of the Bill became law on Royal Assent on June 13, amending the *Environmental Protection Act* (the "EPA") and the *Ontario Water Resources Act* (the "OWRA"). Other portions, particularly those dealing with environmental penalties, will come into force once enabling regulations have been promulgated by Cabinet.

In our last EnviroNotes, dated May 2005, we reported that the Bill was on an unusual route through the legislature and had been referred to the Standing Committee of the Legislative Assembly prior to Second Reading. The referral to the Standing Committee resulted in a number of amendments to the enacted Bill, which can be summarized as follows:

#### **Environmental Penalties**

The Bill, as originally introduced, amended the EPA and the OWRA to provide the MOE with a very significant new enforcement tool. If a Ministry inspection identifies any one of a number of potential contraventions, the MOE will be authorized to issue an Order to the inspected party requiring it to pay a penalty of up to \$100,000 for each day the contravention continued or occurred. Regulations will be promulgated setting out the factors to be considered in determining quantum. The penalized party can appeal to the Environmental Review Tribunal on both the Order's merits and quantum, with a further right of appeal to the Superior Court of Justice on questions of law and to the Minister on questions of fact. Payment of a penalty by a party will not be a bar to the MOE commencing a prosecution against the party for the same contravention, although payment will not be admissible in the prosecution as an admission. Failure to pay the penalty could result in the suspension of approvals or the MOE's refusal to issue an approval. The unpaid penalty may also be enforced as civil judgment in the Superior Court.

A number of amendments were made to the Bill prior to its enactment which have the potential to limit the application of environmental penalties. Ordinary provincial officers will not be authorized to issue Orders. Rather, only MOE Directors will have the authority to issue, meaning that the Directors will be in a position to avert unmerited Orders. The MOE will not be authorized to issue Orders to individuals, unless the individual holds an approval or permit and the individual is within a class of persons ("regulated persons") defined by regulation. In a parallel website posting, the MOE advised on June 9 that only industrial sector MISA ("Municipal/Industrial

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Strategy for Abatement") dischargers would be liable for penalties. Although this may be the initial intent, nothing prevents the MOE from expanding the class in the future to include other regulated persons.

The legislation also provides for the striking of agreements between the MOE and Ordered parties that can result in Orders being cancelled or the quantum reduced if the MOE is satisfied the party has completed the steps in the agreement to, presumably, remedy the situation that led to the Order's issue.

On the appeal of Orders issued to deal with breaches of the substantial pollution provision in the EPA (section 14) and the obligation to remediate spills (section 93), the onus of proof will be reversed on some issues. For example, for section 14 contraventions, it will be incumbent on the party to disprove what was discharged was not a "contaminant".

One issue left untouched by the legislature prior to the Bill's enactment is the relevance of the defence of all reasonable care. The legislation provides that it will not be a defence to the merits of an Order, although one would think that it will be considered a mitigating factor on quantum by the issuing Director or a factor that may contribute to entering into an agreement with the MOE to cancel payment or reduce the penalty's size. At a minimum, the legislation provides that if the party has in place an environmental management system "specified in the regulations" at "the time of the contravention to which the penalty relates occurred", the regulations must provide for a reduction in the amount of the penalty.

The environmental penalty provisions will not come into force until regulations are ready that formally identify the class of regulated persons and the factors to be considered in calculating the size of the penalty imposed.

Although the amendments to the Bill adopted by the legislature are welcome, no doubt the unavailability of reasonable care/due diligence as a defence will be aggressively litigated before the Environmental Review Tribunal and, subsequently, the courts.

### **Section 14/EPA Amended**

The legislature also amended section 14 of the EPA to prohibit discharges that may cause an adverse effect. This compares to the prior wording which dealt with situations where there was at least the likelihood, as opposed to the possibility, of an adverse effect resulting from a discharge. The duties to report pollution, however, remain fixed to situations when there is at least the likelihood of an adverse effect. In addition, the MOE will be authorized to issue Control Orders only where there is, at the least, the likelihood of an adverse effect. Before an Order issues requiring payment of an environmental penalty for an alleged breach of section 14, the MOE will have to be satisfied that the discharge created the likelihood of an adverse effect.

This amendment greatly expands the application of section 14. Although, historically, the possibility of an adverse effect from a discharge required the discharger to obtain a Certificate of Approval, theoretical contamination, as opposed to the likelihood of contamination, was not offensive to section 14.

There are a whole host of situations where discharges may result in an adverse effect. The amendment will generate a great deal of uncertainty within industry as to whether a number of industrial operations offend section 14.

The amendments to section 14 did not become effective on Royal Assent but rather will be proclaimed into force on a date to be named by Cabinet.

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

Bill 133 has also amended the directors' and officers' liability provisions in both statutes. Historically, these provisions created a duty of care, independent of those found in common law, requiring executives to take reasonable steps to ensure that their employers' operations did not create the risk of pollution. Bill 133 has expanded this duty to include the requirement that executives take all reasonable care to ensure compliance with a number of specific regulatory provisions in both the EPA and OWRA for example, ensuring compliance with issued certificates of approval. These duties also operate independently, meaning, that the mere failure to ensure compliance attracts liability regardless of whether or not the corporation has actually contravened the provision in issue. Moreover, the amended provision now provides that in a prosecution of an executive for a breach, it is incumbent on the executive to establish meeting the applicable duty. To repeat our observation from the May 2005 edition of EnviroNotes, this "reverse onus" has the unusual effect of creating a presumption that an executive is in breach of the independent duty of care as soon as the executive has become a corporate officer or director.

### **Spills Prevention**

Bill 133 requires that every person who belongs to a class of persons prescribed by regulations develop and implement a spill prevention plan to prevent or reduce the risk of spills. In addition, the Bill requires that the same class of persons also develop and implement a spill contingency plan to prevent, eliminate or ameliorate any adverse effects that result or may result from spills, including plans to notify the MOE, other public

authorities and members of the public who may be affected and plans to ensure that appropriate equipment, material and personnel are available to respond to a spill.

**Deemed Impairment/OWRA Amended**

Bill 133 has also amended the substantial pollution offence in the OWRA, section 30, to incorporate the concept of "deemed impairment". At a minimum, in order to establish a breach of section 30, the MOE will only have to prove that the material discharged may cause injury to or interference with a living organism that comes into contact with or consumes the water or soil, or sediment in contact with the water or, that the material may cause a degradation in the appearance, taste or odour of the water. Impairment may also be established if there are peer reviewed scientific publications indicating that the material or its derivative causes injury to or interference with organisms that are dependent on aquatic ecosystems. This may include just about any imaginable living organism.

**Increased Fines**

Bill 133 has also amended the EPA's and OWRA's sentencing provisions to expand substantially the fines available on the more minor offences, incorporate minimum fines for the more serious offences, and to increase jail time for individuals. The new fines are summarized below:

	Individuals			Corporations		
General Offence	1 <sup>st</sup> Conviction	Subsequent Conviction		1 <sup>st</sup> Conviction	Subsequent Conviction	
Maximum Penalty	\$50,000 per day	\$100,000 per day and/or up to 1 year in jail		\$250,000 per day	\$500,000 per day	
Serious Offence	1 <sup>st</sup> Conviction	2 <sup>nd</sup> Conviction	Subsequent Conviction	1 <sup>st</sup> Conviction	2 <sup>nd</sup> Conviction	Subsequent Conviction
Minimum Penalty	\$5,000 per day and/or up to 5 years in jail less a day	\$10,000 per day and/or up to 5 years in jail less a day	\$20,000 per day and/or up to 5 years in jail less a day	\$25,000 per day	\$50,000 per day	\$100,000 per day
Maximum Penalty	\$4 million per day and/or up to 5 years in jail less a day	\$6 million per day and/or up to 5 years in jail less a day	\$6 million per day and/or up to 5 years in jail less a day	\$6 million per day	\$10 million per day	\$10 million per day

**Sentencing Factors**

Both statutes have also been amended to incorporate factors that the courts must consider when determining the appropriate disposition for a conviction. The factors include whether the offence caused an adverse effect, whether the defendant committed the offence intentionally or recklessly, and whether the defendant was motivated by a desire to increase revenue or decrease costs. The greater the number of aggravating factors, the greater the penalty. If the court decides that an aggravating factor does not warrant a more severe penalty, it has to give reasons. The legislation now specifically provides that compliance with an order cannot be considered a mitigating factor on sentence. Payment of an environmental penalty, however, should be considered a mitigating factor.