

## NEW ENFORCEMENT LEGISLATION IN ONTARIO

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On October 27, 2004, Ontario Minister of the Environment Dombrowsky tabled Bill 133: "An Act to Amend the *Environmental Protection Act* and the *Ontario Water Resources Act* in Respect of Enforcement and Other Matters". The introduction of this legislation follows Premier McGuinty's October 8 announcement that the Government would introduce new legislation to follow through on a number of recommendations made by the Industrial Pollution Action Team established by the Minister of the Environment in the summer of 2004 to review the application and enforcement of provincial environmental legislation.

The Bill is shockingly aggressive in its content. The proposed amendments include:

- a rewording of the substantive pollution offence (Section 14 of the *Environmental Protection Act* ("EPA")) in a manner that creates an offence to discharge anything that *may* cause an adverse effect, as opposed to the current wording which prohibits discharges that *cause or are likely to cause* an adverse effect;
- the same rewording will dramatically increase the number of reportable discharges to the Ministry;
- widening the order making power of provincial officers and the list of requirements that can be included in orders; and
- changing the directors' and officers' provisions in both the EPA and the *Ontario Water Resources Act* ("OWRA") to, despite the constitutionally enshrined presumption of innocence, place the onus of directors and officers in a prosecution to prove that they took all reasonable care to ensure that the corporation would not offend the statutes or their regulations.

This latter amendment is so wide that it effectively means that directors and officers are *presumed* to be in breach of Ontario's environmental statutes the moment they agree to a corporate appointment.

Perhaps the most aggressive amendments go to the establishment of the Environmental Penalties ("EPs") regime. Under the Conservative Government, plans had been made to introduce a comparable regime entitled "Administrative Monetary Penalties" or "AMPs". Although legislation was introduced in 1999 to bring AMPs into play, the legislation was never proclaimed into force.

The EPs regime is roughly comparable to AMPs in that it will empower provincial officers to issue "on the spot" notices to corporations requiring the payment of penalties if an inspection or investigation reveals a contravention of the EPA or OWRA. Regulations (not yet available in draft) will likely set out the formula the officer must follow in setting out the size of the penalty. The legislation will provide for a right of initial appeal to the Officer's superior within the Ministry as well as a further appeal to the Environmental Review Tribunal. Parties can appeal the decisions from the Environmental Review Tribunal, on a question of law, to the Ontario Superior Court. On questions of fact, they can appeal to the Minister.

There are some major differences between the AMPs regime and the proposed EPs. First, Bill 133 specifically includes a provision that does not permit individuals and corporations assessed with penalties to defend themselves before the Environmental Review Tribunal on the basis that they took all reasonable care to prevent the commission of the contravention. Essentially, offenders will be in the position of being caught by something akin to "photo radar" in that their only defence will be that they did not commit the alleged wrongful act or omission. The proposed legislation, however, does not stop there. In the case of a breach of Section 14, for example, it will be up to the offender to prove that the substance discharged was not a contaminant. Moreover, even though an offender has been penalized by an EP, the Ministry can still commence a court-based prosecution as a result of the very same alleged breach. The potential size of EPs will also be much greater: maximums of \$20,000.00 for individuals and \$100,000.00 for companies for

each day the contravention continues or occurs.

The Bill includes other proposed amendments: for example, introducing the concept of "deemed impairment" to circumscribe difficulty the Ministry was encountering in prosecuting contraventions of section 30, the OWRA's substantive pollution offence. It also increases the potential exposure to imprisonment of officers and directors convicted of a breach of Section 14 (EPA) or Section 30 (OWRA) and other specific offences to five years (less a day) in both the EPA and the OWRA.

Copies of the Bill can be found at [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/Session1/b133.pdf](http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b133.pdf). The Bill will now move to the Committee phase. We will keep you advised on its progress.