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904 Doing Business in Ontario: Environmental Management is Key

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An Overview of Environmental Protection Law In Ontario

I INTRODUCTION

This is a brief overview of the main elements of environmental protection law in Ontario. It is, given the circumstances, necessarily summary in nature. The main objective is to identify the principal structural elements of that law, in order to provide counsel advising companies doing business in Ontario, or planning to do business in Ontario, a basic understanding of that law. It is also intended to allow my US colleagues on this panel to compare and contrast the structural elements of environmental protection law in Ontario with the law in the United States. Doing so may help to facilitate business planning and allow the compliance mechanisms used by companies in the United States to be more easily adapted for use in Ontario.

I will begin with a brief overview of the division of responsibilities, for the protection of the environment, between the federal and provincial governments, under the Canadian constitution. I will

then examine Ontario law, using one statute, the Environmental Protection Act ("EPA"), as the principal text.

II CONSTITUTIONAL FRAMEWORK

Under Canada's constitution, responsibility for the protection of the environment is divided between the federal and provincial governments. The federal government has a relatively limited role. The most important powers, in this area, are exercised by the provinces. The third level of government, that of the municipalities, has a very limited role in the protection of the environment. Municipalities can, for example, pass by-laws prohibiting the use of pesticides within their jurisdiction and regulating discharges into sewage systems.

III THE FEDERAL GOVERNMENT

The role of the federal government in the protection of the environment is limited principally to the protection of the oceans and inland waterways, the protection of fisheries, and the control

of the importing and exporting of hazardous productions. The federal government also regulates the transportation of dangerous goods between provinces and between Canada and other countries.

There are four main federal statutes dealing with the protection of the environment. They are the *Canada Shipping Act*, which deals principally with controlling the discharge of pollutants from shipping vessels, the *Fisheries Act*, which addresses the protection of fisheries habitats in both oceans and inland waterways, the *Transportation of Dangerous Goods Act*, and the *Canadian Environmental Protection Act, 1999 ("CEPA")*.

CEPA has particular significance for companies moving products between Canada and the United States. CEPA contains provisions which control the import and export of hazardous materials. Substances are classified as being on the Domestic Substances List, for which there are no import limits, or on the Non-Domestic Substances List for which there are import limits. It should be noted that CEPA contains a full range of investigative and enforcement powers, including the power to impose administrative orders. Finally, it should be noted that CEPA places an obligation on officers and directors to take all

reasonable measures to ensure compliance with its provisions.

IV THE PROVINCE OF ONTARIO

There are a number of Ontario statutes which, directly or indirectly, deal with the protection of the environment. These include the *Ontario Water Resources Act*, the *Clean Water Act*, the *Safe Drinking Water Act*, the *Nutrient Management Act*, the *Environmental Bill of Rights*, and the EPA. For purposes of this discussion, I will focus on the most comprehensive of the statutes, the EPA.

It should be noted that there are obligations, with respect to environmental compliance and disclosure, which arise indirectly from other statutes. For example, the Ontario Securities Commission requires issuers under its jurisdiction to make disclosure with respect to the following matters:

- Financial liabilities related to the environment;
- Asset retirement obligations;
- Financial and operational effects of environment protection requirements;
- Environmental policies fundamental to operations; and
- Environmental risks.

The following are the main structural elements of the EPA:

- (a) Prohibitions;
- (b) Licensing requirements;
- (c) The use of codes and standards;
- (d) Enforcement mechanisms, including administrative orders and prosecutions;
- (e) Investigative protocols;
- (f) Fines and penalties;
- (g) Officers' and directors' liability;
- (h) Particular provisions dealing with spills, brownfields developments, and the handling of waste.

The EPA defines a contaminant very broadly, to include any solid, liquid, gas, odour, heat, sound, vibration, and combination thereof, resulting directly or indirectly from human activities that cause an adverse effect.

The basic prohibition in the EPA is that prohibiting the discharge of a contaminant into the natural environment in an amount, concentration or level in excess of that prescribed by regulation. One key building block of the regulatory system in Ontario is that the allowable concentrations of contaminants of most substances are prescribed by regulation. What concentrations are allowed is tied to land use. The allowable concentrations depend, for example, on whether the use is residential, institutional or commercial/industrial. In the case of air emissions,

the allowable concentrations depend on the closest receptor.

The EPA grants the Ministry of Environment ("MOE") broad powers to issue a variety of administrative orders to deal with the discharge of contaminants causing adverse effect. Those powers include the following:

- (a) The power to issue control orders, orders which may limit or control the rate of the discharge of a contaminant into the natural environments/or require that the discharge be stopped all together. Control orders may also require the person to whom they are directed to study and report to the MOE on measures required to control the discharge of a contaminant in the future;
- (b) The power to issue stop orders. These orders may require the person to whom they are directed to immediately stop or cause the source of the contaminant to stop discharging it into the natural environment, either permanently or for a specific period of time. Stop orders may require a person to effectively cease the operation of the business;
- (c) The power to issue remedial orders which may require a person to take steps to clean up a contaminant and to restore the natural environment; and

(d) The power to issue orders to take preventative measures.

An important feature of these administrative orders is the range of persons to whom they may be issued. They may be issued to the following:

- (a) An owner or previous owner of the source of the contaminant;
- (b) A person who is or was in occupation of the source of the contaminant;
- (c) A person who has or had the charge, management or control of the source of a contaminant.

The breadth of the potential objects of an administrative order has important implications for the structuring of commercial transactions for the purchase, sale or financing of land or business. These implications are discussed, below, in the context of a review of the "brownfields" provisions of the EPA.

The EPA also creates a form of licensing system. A Certificate of Approval ("C of A") is required to construct, alter, extend or replace a new plant, structure, equipment, apparatus, mechanism or thing that may discharge a contaminant into the natural environment. A C of A is also required to alter a

process or rate of production that may result in the contaminant being discharged. If a C of A is required, there is a prohibition against operating without it.

The EPA, and the regulations under it, contain detailed provisions dealing with the management of waste. A C of A is required to use, operate, establish, alter, enlarge or expand a waste management system or waste disposal site. A waste management system is broadly defined to include any facility or equipment used in, or operations, management system. The elements of an environmental management system are now prescribed by the Canadian Standards Association in guidelines which have been adopted by the regulations under the EPA. The same regulations adopt the standards established by third parties for the auditing of environmental management systems.

One relatively new feature of the EPA is the attempt to bring a measure of certainty to commercial transactions involving the purchase, sale and financing of contaminated land. The so-called "brownfields" provisions of the EPA establish a system under which, if a qualified third party certifies that any contamination on a property is below the

The EPA contains provisions dealing with the spills of contaminants. A spill is defined as a discharge into the natural environment that is abnormal in quality or quantity. There is a duty imposed on a person having control of the contaminant that has spilled and every person who causes or permits a spill to notify the MOE and the affected municipality. In addition, there is a duty to take steps to prevent, eliminate and ameliorate the adverse effect of the spill and to restore the natural environment.

The EPA allows appeals to a body called the Environmental Review Tribunal ("ERT") in a number of circumstances, including those where a C of A has been refused or where an administrative order has been issued. As a general rule, the appeal does not act as a stay of the administrative order. The ERT may issue a stay, except where there is a danger of health or safety or the risk of serious impairment to the environment, if certain tests are met.

Where a person refuses to comply with an order or will not carry out the order competently, the MOE may itself do the work. Thereafter the MOE may order the person to whom the order was originally issued to pay for the work which the MOE does.

The EPA grants a broad

array of powers of inspection and investigation to so-called provincial officers.

In addition to administrative orders, the MOE may prosecute for a breach of the Act, including a breach of the terms of a C of A. The size of the fines imposed on conviction depends on the nature of the offence, and whether it is a first or subsequent offence. For serious offences a jail term may be imposed.

The EPA contains a list of circumstances which a court may consider in determining the nature and size of a penalty imposed for a conviction. Those circumstances include, for example, whether the offence caused an adverse effect, whether the defendant committed the offence intentionally or recklessly and whether, after the commission of the offence, the defendant failed to cooperate with the MOE or other public authorities, failed to take prompt action to mitigate the effects of the events, and failed to take prompt action to reduce the risk of similar offences being committed in the future. This last circumstance is particularly relevant to the use of an environmental management system.

A recent amendment to the EPA allows the MOE to impose administrative monetary

penalties. These are penalties for breaches of the Act that do not depend on a conviction and which are typically applied for each day that the breach continues. An important aspect of the administrative monetary penalties scheme is that the defence of due diligence, which is discussed in detail below, is not available where an administrative monetary penalty is imposed. However, the regulations under the Act provide that a person is entitled to receive notice of an intention to issue an administrative monetary penalty, and is entitled to make submissions requesting that, for example, the amount of the administrative monetary penalty be reduced. One significant feature of this regulation is that it allows the MOE to reduce the administrative monetary penalty if, at the time of the contravention, a person had in place an environmental management system for the plant that was audited in the three years before the contravention, and if the audit confirmed that the environmental management system had met the specified standards. The contents of an environmental management system, and of the procedures used to audit its operation, are now codified.

The EPA imposes, on the officers and directors of a corporation, a duty to take all

reasonable care to prevent the corporation from the following:

(a) Discharging or causing or permitting the discharge of a contaminant in contravention to EPA, the regulations under it, or a certificate of approval;

(b) Failing to notify the MOE of the discharge of the contaminant;

(c) Failing to do everything practicable to prevent, eliminate and ameliorate the adverse effect of a spill and to restore the natural environment;

(d) Hindering or obstructing any provincial officer in the performance of his or her duties under the EPA, or orally, in writing or electronically giving or submitting false or misleading information to the MOE;

(e) Failing to install, maintain, operate, replace or alter any equipment or other thing in contravention of a certificate of approval; and

(f) Contravening any order made under the Act.

A significant feature of the duty which is imposed on officers and directors is that, if they are charged with a breach of that duty, they bear the onus, at the trial of the offence of proving that they carried out the duty. A

breach of the duty imposed on an officer or director can lead to a fine, or, in particularly serious circumstances, a jail term.

As a practical matter, corporations doing business in Ontario should understand that it is the practice of the MOE, in most if not all cases, to issue administrative orders, or to prosecute, the officers and directors of a corporation.

It is the Ministry's position that issuing orders against officers and directors, or prosecuting them, is the most efficient way to ensure that a corporation complies with the EPA in the future.

For most offences under the Act, the defence of due diligence is available. To succeed in that defence, the defendant must establish either that the act which is the basis for the charge did not occur or that, if it did occur, the person charged took all reasonable care to prevent the commission of the offence. In the case of charges against officers and directors, the courts have ruled that, to succeed in the defence of due diligence, the following matters will be considered:

(a) Did the Board of Directors establish a system for the prevention of the event and was there supervision or inspection of the system;

(b) Did each director ensure

that the corporate officers are instructed to set up a system sufficient to meet the industry practices of ensuring compliance with the environmental laws, that the officers report back periodically to the Board on the operation of the system, and that the officers are instructed to report any substantial non-compliance to the Board in a timely manner;

(c) Directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation and may be justified in placing reasonable reliance on reports provided to them by corporate officers or consultants, counsel or other informed parties;

(d) Directors should be satisfied that the officers are promptly addressing environmental concerns brought to their attention by the others;

(e) Directors should be aware of the applicable environmental laws and the standards of their industry; and

(f) Directors should immediately and personally react when they have notice of the system has failed.

Establishing the defence of due diligence requires, for all intents and purposes, that a corporation have an environmental

management system. The elements of an environmental management system are now prescribed by the Canadian Standards Association in guidelines which have been adopted by the regulations under the EPA. The same regulations adopt the standards established by third parties for the auditing of environmental management systems.

One relatively new feature of the EPA is the attempt to bring a measure of certainty to commercial transactions involving the purchase, sale and financing of contaminated land. The so-called "brownfields" provisions of the EPA establish a system under which, if a qualified third party certifies that any contamination on a property is below the applicable level of concentration,

then a "Record of Site Condition" is issued which precludes the MOE from, for example, issuing administrative orders in respect of the property. It is now common practice, in all transactions involving the purchase, sale or financing of commercial and industrial property, that a Record of Site Condition is required.

V THE COMMON LAW

While much of the focus of environmental protection law is on the operation statutes, like the EPA, it is important to remember that there are provisions of the common law which deal with the protection of the environment. For example, a person may seek civil damages against a party where that that party's actions on its land have contaminated their land. In addition, a person

may seek an injunction to stop another person from carrying on an activity which is causing environmental harm to himself or his property. While compliance measures, such as the use of an environmental management system, are important to prevent the imposition of orders or penalties under statutes like the EPA, they are also important in both avoiding the circumstances that might give rise to a civil claim for damages under the common law, and to providing a defence if such a claim should arise.