Comprehensive Environmental Legislation:

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In this first of two parts, Mr. McCague provides an overview of certain aspects of environmental law, with particular emphasis on the *Environmental Protection Act* and the role of the Ontario Ministry of Environment.

Introduction

As little as 20 years ago, there was no comprehensive legislation in force in Ontario. Pollution control was largely regulated by Municipal By-Laws and Local Boards of Health. None of the law schools in the Province offered courses in environmental law, and had they done so, it would have been difficult to develop a curriculum which would have lasted more than a few weeks.

Today, we have comprehensive environmental legislation in force at both the Provincial level, with the *Environmental Protection Act*, and at the Federal level, with the *Canadian Environmental Protection Act*. In addition, there are a number of related statutes containing important environmental provisions, such as the *Ontario Water Resources Act*, the *Ontario Pesticides Act*, the *Canada Fisheries Act*, and the *Transportation of Dangerous Goods Act*.

In recent years, major amendments have frequently been introduced to the legislation, governing the environment. Virtually every law school in the Province now offers courses in environmental law. Environmental concerns top most public opinion polls, and have occupied a central place in recent election campaigns. The desire for environmental protection has become a major goal of law and public policy, which appears to be founded on a broad social and political consensus.

Jurisdiction

The *Constitution Act* does not explicitly state whether Federal or Provincial Governments have responsibly for environmental matters. Historically, Sections 91 and 92 of the Act have been interpreted to mean that pollution which is confined within Provincial boundaries, remains a Provincial Legislative concern.

However, on June 28, 1988, the *Canadian Environmental Protection Act* received Royal assent. This Act ostensibly marked the entry of the Federal Department of the Environment into the fields of Environmental Regulation and Protection in a comprehensive way. In reality, the Act largely consolidated the provisions of various pieces of Federal Environmental Legislation into one statue. This Legislation included the *Clean Air Act*, the *Environmental Contaminants Act*, the *Ocean Dumping Control Act*, and provisions of the *Canada Water Act*.

The new *Canadian Environmental Protection Act* broadens the pre-existing legislation and contains broad language which permits the Federal Government to impose "cradle to grave" regulation of "toxic substances," and considerably enhances the fine and penalty structure for Federal environmental offenses. For example, the Act provides for fines of up to $1 million or imprisonment for up to 3 years for indictable offenses, and fines of up to $200,000 and imprisonment for 6 months for summary conviction offenses.

There are some real constitutional questions concerning the ultimate enforceability of various provisions of this Act. A review of these questions is beyond the scope of this paper.

However, the general scheme of the legislation is that where the Federal and Provincial Government agree in writing that there are in force Provincial provisions equivalent to the regulations enacted by the Federal Government, with respect to toxic substances, and with respect to investigation of alleged environmental offenses, the Federal Government will exempt that Province from the application of the Federal regulations.

As a result, in Provinces with established and active environmental ministries, such as Ontario, it is anticipated that Federal regulation of intra-Provincial pollution caused by regulated toxic substances will be of little impact.

Powers of the Ontario Ministry of the Environment

Accordingly, while the Federal Government is expanding its presence in the environmental field, the real power lies at the Provincial level.

Jurisdictionally, Provincial authorities have a strong legislative basis from which to operate, They are able to set emission standards, regulate environmental activity, and prosecute environmental infractions. In the Canadian setting, Ontario's Ministry of the Environment is at the forefront concerning the enforcement of environmental legislative mandates.

The Scope of These Mandates

The Ontario Ministry obtains its authority over environmental matters from the *Environmental Protection Act* and the *Ontario Water Resources Act*. However, neither Act adequately

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differentiates between the owner of the product and the person who has control over the product

For example, Section 16 of the *Ontario Water Resources Act* stipulates that no person who causes or permits the discharge of any pollutant into any water is committing an offense.

Similarly, Section 12 of the *Environmental Protection Act* stipulates that every person who discharges pollution into the natural environment shall forthwith notify the Ministry. Section 13 prohibits any person from discharging a contaminant into the natural environment.

As you can see, these provisions direct their thrust at the persons who cause or permit the discharge. The Acts thereby arguably limit their applicability to the entity that is actively polluting. However, the *Environmental Protection Act* more broadly states that the purpose of the Act is to provide for the protection and conservation of the natural environment. The Act sets out the powers and duties of the Ministry which include the authority to investigate problems of:

- pollution;
- waste management;
- waste disposal;
- litter management and litter disposal.

In addition, the Minister is authorized to:

- conduct research;
- convene conferences;
- publish information, and
- make loans and grants for research projects.

The Ministry of the Environment also has authority to appoint Directors, as he considers necessary. Generally, the Director is given the authority to issue certificates of approval, control orders and stop orders.

A certificate of approval is necessary when a person constructs, alters, extends or replaces anything that may emit or discharge a contaminant into the natural environment. Similarly a certificate of approval is required when one alters the process or rate of production with the results that a contaminant may be emitted into the natural environment.

The Director's certificate of approval will include approval by the Ministry for the methods or devices to be employed to control or prevent the emission or discharge of any contaminant. The Director may require the applicant for the certificate of approval to provide plans, specifications and other information to the Director. The Director has the power to refuse to issue a certificate, or may issue one on the terms and conditions he considers necessary to ensure compliance with the Act.

In addition, the Director has the power to issue control orders. When a provincial office issues a report containing a finding that a contaminant has added to, emitted, or discharged into the natural environment at a rate that exceeds the amount prescribed by the regulations, the Director may issue a control order, directing the person who is responsible.

The Director also has the authority to issue stop orders. When the Director is of the opinion that a contaminant is discharging into the natural environment constituting an immediate danger to human health, the health of any person, or property, the Director *may* issue a stop order directed to the person who is responsible.

Part IX of the *Environmental Protection Act* is popularly referred to as "The Spills Bill." This Part IX of the Act imposes significant additional liabilities on polluters, or persons that control pollutants, that would otherwise *not* exist at common law.

The Act defined the "owner" to be the owner of the pollutant immediately before the "first discharge." The person in control is defined as the person having charge, management or control of the pollutant immediately before the "first discharge."

When an act of pollution occurs, the owner and/or person in control must immediately advised the Ministry and the local Municipality. At that point, the owner and the person having control of the pollutant will face absolute liability to prevent, eliminate, or ameliorate the adverse effect of the pollutant and restore the natural environment.

These provisions direct their thrust at the persons who cause or permit the discharge.

If the owner or person in control agrees to forthwith do everything practicable to clean-up the pollution, the Ministry will observe the works to ensure that it is satisfactory.

However, if the Ministry is of the opinion that:

- it is in the best interests of the public;
- the owner or person in charge in not taking *prompt* action;
- the owner or person in charge cannot be readily identified; or
- the owner or person in charge requests the Ministry's assistance.

The Ministry will assume the responsibility to prevent, eliminate, ameliorate the adverse effects of the pollutant and restore the natural environment. When the Ministry assumes this responsibility, it can retain, direct or order any person to

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carry out the clean-up operations. The Ministry can then compensate that person for the reasonable costs and expenses incurred in the clean-up. Naturally, the owner of the pollutant and the person having control of the pollutant are excluded from this scheme. The Ministry then invoices the owner or person in control for the costs incurred. Although the amount can be disputed, the owner and the person in charge are absolutely liable to pay the Ministries' reasonable expenses.

Once the Ministries account is paid, the owner or person in control of the pollutant acquires the right of subrogation. However, the right of subrogation is only effective if the Ministry consents in writing to a settlement that discharges the right of recovery. If the owner or person in charge or its insurers take action without prior approval from the Crown, the insurer then becomes liable to the Ministry for the amount recovered as a set-off against the compensation paid by the Ministry.

In addition, the owner and person in control of the pollutant are strictly liable for any losses and damages incurred by any third party as a result of the spill. Liability will include:

- loss or damage for personal injury;
- loss of life;
- loss of uses of equipment or property, and
- pecuniary loss, including loss of income.

Although the injured third party has a common law right of action against the owner or person in control of the pollutant, the Act also establishes the Environmental Compensation Corporation. The purpose of this Corporation is to receive and assess applications by injured third parties for payments. The Corporation can then make payment to any third party who has suffered a loss or damage as a result of the spill.

After the Ministry makes payment to the injured third parties, the Ministry submits the invoice to the owner and/or person in control. The owner and/or person in control are then strictly liable to pay the account. The only exceptions to the rule of strict liability arise when the owner or person in control of the pollutant establishes that he took all reasonable steps to prevent the spill, or if he can establish that the spill was caused by an act of war, terrorism, a natural phenomenon, or an act of harm by the third person. In addition, the owner or person in control of the pollutant may dispute the amount of the invoice.

When the Ministry assumes responsibility, it can retain, direct or order any person to carry out the clean-up.

Again, the insurer of the owner or person in control may acquire subrogation rights of recovery, but only if the Corporation consents in writing to a settlement or court action. If the insurer proceeds without this consent, it becomes liable to the Corporation for the amount recovered as compared with the payment made.

Essentially, these provisions establish no-fault liability wherein the owner and the person in control of the pollutant will be liable regardless of negligence or fault. However, the owner or person in control of the pollutant is then free to commence an action against those responsible for the spill.

In addition, it is important to note that none of the provisions of the Act limit any right or remedy that any person may have against another. Accordingly, common law rights of recovery are still available to those affected by a spill against the owner, the person in control of the pollutant, his employees and agents.

Apart from the spills provisions in the *Environmental Protection Act*, the provincial officers are given broad powers relating to search and seizure. The Act empowers a provincial officer to enter at any reasonable time, any building, structure, machine, vehicle, land, or water or require to be made such surveys, examinations, tests and enquiries including examination of books, records and documents he considers necessary. Under this provision, samples, copies or extracts may be made or taken.

Prior to the provincial officer entering a building, structure and so on, an *ex parte* order from a justice of the peace will be required to authorize the search. The test for authorizing the investigation is that there are reasonable grounds for believing that entry, detention, removal and examination is necessary.

Further, the provincial officer has the authority to detain "anything" at the place he finds it, or remove it until the surveys, examinations, investigations, tests and enquiries are completed. (Dillon ats Ottawa)

A justice of the peace may make an Order for the *release* of the thing detained upon application with notice to the owner or the person who had the charge, management or control of the thing. The Order can only be made if the thing detained is no longer necessary for the purposes of the Administration of the Act or its regulations.

This power of investigation extends to motor vehicles. A provincial officer may require the driver of a motor vehicle to stop and the officer may inspect the motor vehicle at such place or place and time the officer considers expedient. In all instances, the provincial officer may call for the assistance of any member of the Ontario Provincial Police force, or the police in any area, to render assistance as required.

Along with legislative developments, there has been a noticeable

shift in enforcement and prosecution policy. In the past, environmental legislation was enforced by local abatement officers who became familiar with the concerns of local industry and the feasibility of implementing environmental protection measures. Disputes over compliance with environmental legislation were generally reached by negotiation.

However, in 1985, the EPA was amended to give the Ministry strong enforcement powers for violators of environmental standards. To ensure that fines really do act as a deterrent, the maximum fine has been increased to $10,000 per day for the first offence, and up to $25,000 or imprisonment for one year for each subsequent offense. Corporations may be fined up to $250,000 on a first conviction plus $500,000 on each subsequent conviction.

Generally, the level of the fine depends on whether there has been actual harm to the environment. Each day an offense continues is considered to be a separate offense. The courts can also add to the fine the value of any benefit the defendant received by commission of the offense.

In addition, the establishment of a special investigation and enforcement branch in 1985 has resulted in an increase in the number of prosecutions. More than 20 environmental prosecutions are not launched in Ontario *each month*. Ontario defendants charged last year have already been fined and paid well in excess of $1 million with many cases yet to be completed.

While the Act is structured in such a way that allows the Ministry strong enforcement powers, it is also interesting to note that the *Environmental Protection Act* is upheld through its administrative workings. For instance under the Act, an Environmental Appeal Board has been established. This Board may be activated when a Director refuses a notice of approval, or when a permit or license is refused and the applicant challenges that decision. The Board has the power to confirm, alter or revoke the action of the Director. A further right of appeal lies with the Divisional Court on a question of law. Alternatively, an appeal lies with the Minister on matters excluding a question of law.

In Summary

The Ontario *Environmental Protection Act* is very comprehensive. It gives the minister, and the Ministry of the Environment broad powers. Those powers take different forms. On the one hand, non-compliance with the Ministry's control orders, stop orders, notices and directions may involve the imposition of provincial offenses arising under the statute. In order to ensure that the provisions of the Act will be met, the provincial officers have broad powers of search and seizure, as authorized by the judiciary in a particular instance.

A more conciliatory route for effecting the purpose of the Act is contained in the administrative structure created by the Act. While the effort to maintain the integrity of the natural environment can be achieved in good faith and in a reasonable manner, it is also important to note that the Act has strong enforcement provisions to ensure that the goal is met.

End of Part One.

In the April issue of Right of Way, *Mr. McCague will discuss how these environmental laws affect employees, corporate officers and purchasers.*

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