POLLUTION

and the

LAW

NEW PLAYERS, NEW RULES - NEW BALL-GAME

". . . we will be striving for the virtual elimination of persistent toxic substances from the environment."

The Honourable James Bradley,
Ontario Minister of the Environment,
November 29, 1985.

"MISA is a province-wide program of abatement of discharges into our lakes and rivers based on rigorous monitoring and standard setting . . . pollution reductions will be required from virtually every major toxic polluter of Ontario waterways . . . in addition to reducing pollution from direct dischargers, MISA will also cut contamination from the 11,700 other industries that discharge waste water into Ontario's 00 municipal sewer systems."

The Honourable James Bradley,
Ontario Minister of the Environment,
June 24, 1986.

*". . . the legislation (the federal **Environmental Protection Act**) will be backed up by sanctions that include one-million dollar-a-day fines . . . Through stiff jail sentences that the courts will be encouraged to enforce, corporate leaders will be held legally accountable for their acts . . . "*

The Honourable Thomas McMillian,
Minister of Environment,
November 19, 1986.

"Prison, stiffer fines set for polluters in new Ontario bill"

Toronto Globe & Mail,
December 4, 1986

Virtually every industry in Ontario is affected by current and proposed changes to federal and provincial environmental legislation. This one-day conference will provide complete and up to date information on what these new regulations mean for industry.

Thursday, February 26, 1987 Toronto

CANADIAN ENVIRONMENTAL LAW RESEA...

Canadian Environmental Law Research Foundation

La Fondation canadienne de recherche du droit de l'environnement

February 26, 1987

Dear Colleague:

Welcome to the Canadian Environmental Law Research Conference Pollution and the Law.

We are confident that today's discussion will be a positive contribution to the process all of us - government, industry, environmental organizations and the general public - are engaged in, which is a comprehensive overhaul of pollution regulations in such a way as to better protect the environment without placing intolerable burdens on industry.

In this binder you will find copies of all addresses except for those of Mr. Bishop and Mr. Neff. A transcript will be made of those and they will be mailed to you as soon as possible after the conference. An agenda for the conference, biographical notes on speakers, information on the Research Foundation and blank paper for note taking are also provided.

Karen Hamilton and I are the two Foundation staff who will be with you throughout the day. Please do not hesitate to approach either of us if there is anything you need.

Best wishes.

Yours truly,

Doug Macdonald
Executive Director

DM:kh

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Canadian Environmental Law Research Foundation

La Fondation canadienne de recherche du droit de l'environnement

AGENDA

Pollution and the Law

Thursday, February 26, 1987

Toronto, Ontario

Note: Time allocated to each speaker will allow at least ten minutes for questions from the floor.

9:00 - 9:30	<u>Spills Bill and TDGA liabilities</u> David Estrin, Barrister and Solicitor
9:30 - 10:00	<u>The Environmental Compensation Corporation</u> Marjory Loveys, Chairman, Environmental Compensation Corporation
10:00 - 10:30	<u>Enforcement of Ontario Law</u> Rod McLeod, Deputy Minister of the Environment, Ontario
10:30 - 11:00	COFFEE

243 Queen Street West, 4th Floor, Toronto, Ontario, M5V 1Z4 (416) 977-2410

11:00 - 11:30	<u>Environmental Enforcement Powers</u> Robert Fishlock, Barrister and Solicitor, Blake, Cassels and Graydon
11:30 - 12:00	<u>Enforcement and Industry Practice</u> Roger Cotton, Barrister and Solicitor, McCarthy and McCarthy
12:00 - 12:30	CASH BAR
12:30 - 1:30	LUNCH
1:30 - 2:00	<u>The Federal Environmental Protection Act</u>, Peter Higgins, Director General, Environment Canada
2:00 - 2:30	<u>MISA - The Government Perspective</u> Jim Bishop, Director, Water Resources Branch, Ministry of the Environment
2:30 - 3:00	<u>MISA - The Industry Perspective</u> Bill Neff, Vice-President, Technical Affairs, Canadian Chemical Producers Association
3:00 - 3:30	COFFEE
3:30 - 4:00	<u>Changes to Regulation 308 - The Government Perspective</u> Chester Duncan, Emission Technology and Regulation Section, Air Resources Branch, Ministry of the Environment
4:00 - 4:30	<u>Changes to Regulation 308 - The Industry Perspective</u> Al Schuldt, Assistant Manager, Environmental Control, Stelco
4:30	Adjournment

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BIOGRAPHICAL INFORMATION ON SPEAKERS

David Estrin: Mr. Estrin is a founding director and was appointed first General Counsel, in 1971, of the Canadian Environmental Law Association. He has carried out a private practice restricted to Environmental and Municipal Law matters since 1976. Since 1975 he has also served as Associate Professor in the Faculty of Environmental Studies, University of Waterloo (part time) and is on the faculty of the Banff Centre School of Management Program "How to Prepare and Present and Environmental Case".

Marjory Loveys: A graduate of the University of Waterloo, 1975, with a degree in Public Engineering, Ms. Loveys' environmental policy career has included service with Pollution Probe, the Honourable Marc Lalonde, Minister of Energy and Public Affairs International. She is currently associated with Energy Pathways and is Chairman of the Environmental Compensation Corporation.

Roderick McLeod: Mr. McLeod is a graduate of Queen's University and the University of Toronto and was called to the Bar in 1969. He has served as a crown prosecutor and in 1983 was appointed Deputy Minister, Ministry of the Solicitor General. Since 1985 he has served in his current capacity as Deputy Minister, Ministry of the Environment.

Robert Fishlock: Mr. Fishlock holds degrees from Trent University and Queen's University. He has worked with Mr. David Estrin and in 1985 joined the firm of Blake, Cassels and Graydon where he does civil litigation with an emphasis upon environmental matters.

Roger Cotton: Mr. Cotton is an associate of the firm McCarthy and McCarthy and pracitices exclusively in the areas of environmental, municipal and land use planning law. He is National Chairman of the Environmental Law Section of the Canadian Bar Association, a member of the executive of the Environmental Law Section of the Canadian Bar Association - Ontario, and has authored a number of articles in environmental law.

Peter Higgins: Mr. Higgins holds engineering degrees from the University of Toronto and the University of Cincinnati. He has served with the Ontario Water Resources Commission and with Environment Canada since its creation. He is currently Director of Environmental Protection, Conservation and Protection, Environment Canada and has overall responsibility for ensuring delivery of a new Environmental Protection Act.

Jim Bishop: Mr. Bishop holds a B.Sc. from the University of Alberta. He joined the ontario Water Resources Commission in 1966 and was appointed Assistant-Director, Applied Research, Ministry of the Environment in 1983. Mr. Bishop was appointed to his current position, Director, Water Resources Branch, MOE, in 1984.

Bill Neff: Mr. Neff graduated from the University of Saskatchewan in 1959 with a degree in Chemical Engineering. Since then, his career has included service in both industry and government, air and water quality regulation. He joined the Canadian Chemical Producers' Association in 1977 and is currently responsible for the Association's environmental and occupational health programs.

Chester Duncan: Mr. Duncan graduated with an Honours degree in chemistry from Queens University in 1953. After extensive industrial experience, in 1968 he joined the Provincial government as a member of the Air Pollution Control Service. In 1974 he was made Manager, Industrial Abatement Section, West Central Region, MOE and in May 1980 became co-ordinator of the Hazardous Contaminants Office. In 1983 he became Senior Policy Advisor for the Air Resources Branch and in June 1984 was appointed Manager of the Emission Technology and Regulation Section.

Al Schuldt: Mr. Schuldt was born in Germany and completed his education in Saskatchewan, graduating with a degree in Chemical Engineering degree from the University of Saskatchewan, Saskatoon. He joined Stelco Inc. in 1960, where he has held various positions in the Utilities Department at the Hilton Works plant in Hamilton. His major responsibility was in the environmental control field. He is now Assistant Manager, Environmental Control, for the Company.

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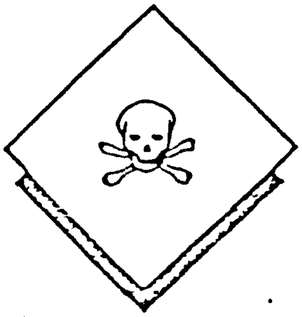
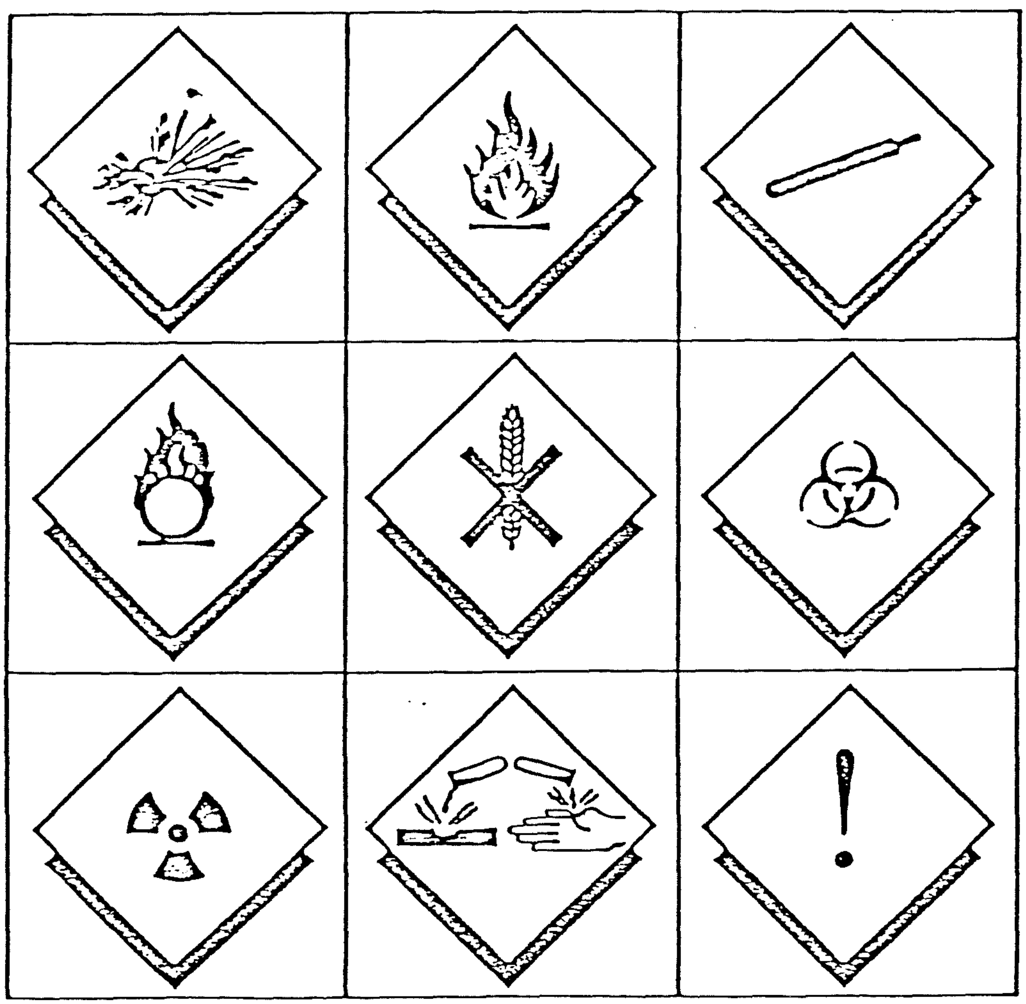
Excerpts from



HANDLE WITH CAUTION

LIABILITY IN THE PRODUCTION, TRANSPORTATION AND DISPOSAL OF DANGEROUS SUBSTANCES.



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1

Overview of the New Regulatory Regimes

1. INTRODUCTION

An increasing public awareness of potential dangers associated with the transportation of dangerous goods, exemplified by the 1979 Mississauga train derailment, which forced the six-day evacuation of over 220,000 people, and the 1985 spill of PCB's, which closed the Trans-Canada Highway near Kenora, has been reflected in recent legislative initiatives. After a gestation period lasting approximately five years, the federal and Ontario governments brought into force in 1985 three pieces of legislation that had been passed by them about the time of the Mississauga event but that had remained unproclaimed because of technical or political considerations. Additionally, in 1985, substantial amendments were made by the Ontario Ministry of Environment to waste management regulations made pursuant to the Ontario Environmental Protection Act. Generally, the new laws introduced important legal duties and liabilities on not only persons directly involved with transportation of dangerous goods and those handling waste, but on a broad spectrum of both private persons and public authorities.

2. THE TRANSPORTATION OF DANGEROUS GOODS ACT (CANADA)[1]

This federal legislation was proclaimed in force, to a limited extent, as of November 1, 1980, but it had no significant effect until July 1st, 1985, at which time comprehensive regulations, the Transportation of Dangerous Goods Regulations,[2] took effect.

The legislation potentially applies to all stages of handling and transportation of dangerous goods, including waste, from the original point where goods are manufactured or packaged for shipment (or wastes produced) to the final point where they are unloaded for use (or disposal).

To achieve its primary objective—the promotion of public safety in the movement of dangerous goods—it establishes comprehensive duties on a broad range of persons to properly register, classify, label, package and document dangerous goods, train staff, report unusual events and take emergency and remedial measures in the event of dangerous occurrences.

The Act was passed in a form that would allow all modes of transportation to be subject to it, whether or not for hire or reward.[3] However, the Act itself exempts certain transportation modes from its provisions and the regulations exempt, or have the potential for exempting, many others, under specified conditions.[4] Moreover, the Act does not directly apply to modes of transport that are provincially regulated, most importantly, intra-provincial trucking, unless a further proclamation is issued.[5] More precisely, it does not apply, in the absence of a further proclamation, to any mode of transport not described in paragraphs 4(*a*)–(*e*) of the National Transportation Act, R.S.C. 1970, c. N-17, which modes are as follows:

(*a*) transport by railways to which the *Railway Act* applies;

(*b*) transport by air to which the *Aeronautics Act* applies;

(*c*) transport by water to which the *Transport Act* applies and all other transport by water to which the legislative authority of the Parliament of Canada extends;

(*d*) transport by a commodity pipeline connecting a province with any other or others of the provinces or extending beyond the limits of a province; and

1 S.C. 1980, c. 36 [am. 1980-81-82-83, c. 165, s. 43; 1983-84, c. 40, s. 73].
2 SOR/85-77 [am. SOR/85-314; 85-585; 85-609].
3 S.C. 1980, c. 36, s. 3(1).
4 See Chapter 2.
5 S.C. 1980, c. 36, s. 32(1).

(*e*) transport for hire or reward by a motor vehicle undertaking connecting a province with any other or others of the provinces or extending beyond the limits of a province.

The Act contemplates negotiations between the federal and provincial governments with respect to how the Act will be implemented and enforced in the various provinces, and that upon agreements between the two levels of government, further proclamations would issue bringing the federal law into force in a particular province. However, if no agreement after at least twelve months of negotiations has been reached, the Act may nevertheless be proclaimed applicable to intra-provincial transportation.[6]

In addition to maximum fines of $50,000 for a first offence and $100,000 for a subsequent offence (as well as imprisonment for up to two years for individuals) for breach of the major safety requirements,[7] the federal legislation subjects certain persons to new forms of civil liability in two major ways. First, it provides that in the event of an accident involving dangerous goods, any persons who, through their fault or negligence or that of others for whom they are by law responsible, caused or contributed to the event are liable for the federal government's costs and expenses to rectify and remedy the situation.[8] Second, where a person has been convicted of any offence under the Act, any property seized by a federal inspector under the Act or in relation to which the offence was committed may, in addition to any punishment imposed on conviction, be forfeited to Her Majesty in right of Canada by order of the convicting court.[9] While provision is made for an application by a person claiming an interest in the property to be forfeited to claim compensation for or protection of his property, he must satisfy the Court that he is innocent of any conduct or complicity in any conduct that caused the property to be subject to destruction or disposition or forfeiture and of any collusion in relation to any such conduct and also that he exercised all reasonable care in respect of the persons permitted to obtain possession and use of the property to satisfy himself that it was not likely to be used contrary to the provisions of the Act and regulations.[10] The federal Act and regulations are binding on Her Majesty in right of Canada or on a province or any agent thereof.[11]

6 *Ibid.*, s. 32(2)–(4).
7 *Ibid.*, s. 6(1).
8 *Ibid.*, s. 18.
9 *Ibid.*, s. 15.
10 *Ibid.*, s. 16(1)–(4). These provisions are discussed more fully in Chapter 6.
11 S.C. 1980, c. 36, s. 3(7).

Act.[30] The Acts referred to are the Boilers and Pressure Vessels Act, the Gasoline Handling Act, the Highway Traffic Act, the Energy Act and the Pesticides Act. The reference to such Acts is deemed to include all regulations, rules or orders made under such Acts[31].

30 S.O. 1981, c. 69, s. 13(1).
31 *Ibid.*, s. 13(2).

2

Exemptions from the Duties Imposed by the Federal and Provincial Legislation

1. INTRODUCTION: CAUTION FOR READERS

In Chapter 3, the duties on various persons under the four new regulatory schemes are set out. To assist those who may be concerned as to whether they have such duties, this chapter details the persons and goods that are wholly or partially exempt. The reader, however, is cautioned that, as most exemptions are created by regulations, new exemptions may be created or present exemptions may be modified or annulled in the same way and that a continuous updating of the regulations is required in order to determine whether an exemption is in effect. The reader is also advised, as is discussed below, that even if an exemption does not presently exist, the federal Act, and the provincial Acts at least to some degree, contemplate applications for exemptions being made in individual instances. Concerned persons who are not clearly exempt may wish to consider the possibility of making a specific exemption application.

2. THE FEDERAL TRANSPORTATION OF DANGEROUS GOODS ACT: ITS SCOPE AND THE SCOPE OF EXEMPTIONS FROM IT

The potential scope of the federal Transportation of Dangerous Goods Act is virtually without parallel. It applies not only to the actual transporting of dangerous goods but also to the offering for transport and to the handling of such goods, by any means of transport, whether for hire or reward and whether the goods originate from or are destined for any place or places in Canada. It also applies to all transporting of dangerous goods by ships, vessels and aircraft registered in Canada, whether in or outside Canada.[1] However, it does not automatically apply to intra-provincial activities.[2] "Handling" is broadly defined to include virtually all activities from the original point where goods are manufactured or packaged for shipment to the final point where they are unloaded for use or disposal. The Act specifically defines "handling" as meaning:

> loading, packing or placing, unloading, unpacking or removing or reloading, repacking or replacing dangerous goods in or from any container, packaging or means of transport or at any facility for the purposes of, in the course of or following transportation and includes storing dangerous goods in the course of transportation.[3]

"Means of transport" is defined as any road or railway vehicle, aircraft, water-borne craft, pipeline or any other contrivance that is or may be used to carry persons or goods, whether the goods are in packaging or containers.[4]

The scope of the term "dangerous goods" is also exceedingly broad. It is defined to mean "any product, substance or organism included *by its nature* or by the regulations in any of the classes listed in the schedule,"[5] which schedule is found following s. 23 of the Act. Accordingly, "dangerous goods" are not limited to those specific products, substances or organisms specified in the regulations (over 3,000 of which have been specified) but include *any* product, substance or organism that "by its nature" is included within the nine classes listed in the Act's schedule. In two of those classes (Class 7 and Class 9), only materials and substances prescribed by regulations either under this Act or under

1 S.C. 1980, c. 36, s. 3(1), (2).
2 See Chapter 1, at p. x.
3 S.C. 1980, c. 36, s. 2.
4 *Ibid.*
5 *Ibid.* Emphasis added.

the Atomic Energy Control Act are within the meaning of the term "dangerous goods" for the purposes of this Act. However, with regard to seven other classes (Classes 1–6 and Class 8), judgments must be made as to whether a product or substance is within the schedule's description, and therefore within the scope of this Act, regardless of the specific substances specified in the regulations.

The nine classes set out in the schedule to the Act are as follows:

SCHEDULE

Class 1	Explosives, including explosives within the meaning of the *Explosives Act*
Class 2	Gases: compressed, deeply refrigerated, liquefied or dissolved under pressure
Class 3	Flammable and combustible liquids
Class 4	Flammable solids; substances liable to spontaneous combustion; substances that on contact with water emit flammable gases
Class 5	Oxidizing substances; organic peroxides
Class 6	Poisonous (toxic) and infectious substances
Class 7	Radioactive materials and prescribed substances within the meaning of the *Atomic Energy Control Act*
Class 8	Corrosives
Class 9	Miscellaneous products, substances or organisms considered by the Governor in Council to be dangerous to life, health, property or the environment when handled, offered for transport or transported and prescribed to be included in this class

(a) Exemptions Created Within the Act Itself

(i) *Goods under the Direction or Control of the Armed Forces*

The Act does not apply to any handling, offering for transport or transporting of dangerous goods under the sole direction or control of the Minister of National Defence or deemed under the regulations to be under his sole direction or control.[6] The regulations define dangerous goods under the sole direction or control of the Minister of National Defence to mean those goods that are in or on a means of transport owned and operated by the Department of National Defence or operated

6 *Ibid.*, s. 3(3)(*b*).

on behalf of the Department of National Defence by an employee of the Department or by an officer or man of the Canadian forces or by civilian personnel where the means of transport is accompanied at all times by and is under the direct responsibility of an employee of the Department of National Defence or an officer or man of the Canadian forces; the exemption also applies if the dangerous goods are on a means of transport owned and operated by the military establishment of a member country of NATO or operated on behalf of that establishment by military or civilian personnel of that organization or by civilian personnel if the means of tranport is accompanied at all times by and is under the direct responsibility of military or civilian personnel of that country's military establishment. Further, the exemption applies to dangerous goods that are in or on a means of transport owned by another country and operated by it in Canada pursuant to an agreement with the Department of National Defence, or operated on behalf of that other country pursuant to such agreement, by the military or civilian personnel of the military establishment of that other country or civilian personnel who are not employed by the military of that country if the means of transport is accompanied at all times by and is under the direct responsibility of military or civilian personnel of the military establishment of that country.[7]

(ii) *Oil and Gas Pipelines*

The Act does not apply to any handling, offering for transport or transporting of oil or gas by a pipeline that is governed by the law of a province or by the National Energy Board Act[8] or the Oil and Gas Production and Conservation Act.[9]

(iii) *Bulk Shipment by Vessel*

The Act is generally inapplicable to any handling, offering for transport or transporting of dangerous goods in bulk in vessels within the meaning of the Canada Shipping Act. "In bulk" means for this purpose, confined only by the permanent structures of a ship or vessel, without

7 Transportation of Dangerous Goods Regulations, SOR/85–77 as amended, s. 2.2.
8 R.S.C. 1970, c. N-6.
9 R.S.C. 1970, c. O-4. See the Transportation of Dangerous Goods Act, S.C. 1980, c. 36, s. 3(4). See also p. xx, following, for further exemptions re dangerous goods carried by pipeline.

intermediate containment or packaging.[10] The only part of the Act that may be applicable to such a mode of transportation is a Minister's directive pursuant to s. 28 of the Act.

(iv) *Permits for Exception*

The Act contemplates that the Minister of Transport or a person designated by him may issue a permit in accordance with regulations excepting the application of the Act to any handling, offering for transport or transporting of dangerous goods.[11] Regulations provide that in the ordinary course a written application must be made for a permit for exception using Part I of Form 2 set out in Schedule X to the regulations. Where it is necessary for the protection of life or property, the Minister or a designated person may, however, issue a permit for exception on the basis of an oral application. Such a permit exempts the holder from specified provisions of the Act and of the regulations for a specified period of time, although the application form contemplates a "continuing" permit for exception. There are no pre-requisites stated in the regulations as to when such a permit may be issued and there are no appeal provisions should the Minister or the designated person decline to issue such a permit.[12]

(v) *Permits for Equivalent Levels of Safety*

The Act contemplates that the Minister or a person designated by him may, in accordance with the regulations, issue a permit, subject to any terms and conditions specified in it, authorizing the handling, offering for transport or transporting of dangerous goods in a manner that does not comply with the Act and the regulations where he is satisfied that such manner of handling, offering for transport or transporting provides a level of safety at least equivalent to that provided by compliance with the Act and the regulations. Compliance with a permit issued pursuant to this provision is deemed to be compliance with the Act and the regulations.[13] An application for such a permit is to be made by completing Part I of Form 1 set out in Schedule X to the regulations. An application for review or an appeal of a decision refusing such a permit for equivalent level of safety is made available by the regulations provided

10 S.C. 1980, c. 36, s. 3(5), (6).
11 *Ibid.*, s. 3(3)(*c*).
12 SOR/85–77, ss. 11.10–11.13.
13 S.C. 1980, c. 36, s. 27.

it is launched within thirty days of the refusal of the permit. The appeal or review is dealt with on the basis of documentary evidence submitted by the appellant or applicant supported by a declaration that sets out the reasons for which and the grounds on which the appeal or application is founded and the relief sought. After consideration of the documentary evidence submitted, the Minister or the designated person, as the case may be, may rescind any decision previously made.[14]

(b) Exemptions by Regulation

The Act authorizes the Governor-in-Council to make regulations, *inter alia*, exempting from the application of the Act and the regulations or any provision thereof the handling, offering for transport or transporting of dangerous goods in such quantities and concentrations, in such circumstances and such places, premises or facilities, for such purposes or in such containers, packaging or means of transport as are specified in the regulations.[15] Part II of the regulations currently in force, as well as miscellaneous sections contained in other parts of the regulations, provide numerous exemptions, which are discussed in detail below. However, any new regulations must be first published in draft in the *Canada Gazette* "and a reasonable opportunity shall be afforded to interested persons to make representations to the minister with respect thereto."[16] Accordingly, persons who may take comfort from current provisions of the regulations discussed below should have regard on a regular basis to the relevant part of the *Canada Gazette* that publishes draft regulations so that they may be in a position to make representations as to future proposals. The Act requires that only one publication is required of a draft regulation, whether or not it is altered or amended after such publication as a result of representations made by interested persons.

Part II of the regulations is headed "Application", but it would be more accurate if titled "Exemptions". Essentially, Part II is a lengthy catalogue of many different goods that are exempted from the application of the Act either absolutely or under certain specified conditions. Additional exemptions are provided in the 102 provisions of Schedule III to the regulations. However, in order to understand whether one of these Schedule III exemptions applies, a dangerous good must first be classified

14 SOR/85-77, ss. 11.1–11.9. The complete provisions of these sections should be reviewed in the event that an application for such a permit or an appeal of a refusal is contemplated.

15 S.C. 1980, c. 36, s. 21(*e*).

16 *Ibid.*, s. 22(1). See also s. 22(2).

to determine if it is listed in Schedule II so that a reference to the further exemptions of Schedule III can be established.

Exemptions provided by regulation are usually qualified in some respects. The qualifications will normally exempt a particular good from the application of certain parts of the regulations while providing that other parts of the regulations are nevertheless applicable. In order to more quickly appreciate the exemptions that are referenced by parts of the regulations, the various parts of the federal Transportation of Dangerous Goods Regulations are listed.

PARTS OF THE FEDERAL TRANSPORTATION OF DANGEROUS GOODS REGULATIONS

Part I	Interpretations (or Definitions)
Part II	Application (or Exceptions)
Part III	Classification
Part IV	Documentation
Part V	Safety Marks
Part VI	Safety Standards
Part VII	Safety Requirements for the Handling or Offering for Transport of Dangerous Goods
Part VIII	Safety Requirements for the Transportation of Dangerous Goods
Part IX	Safety Requirements for the Training of Persons and for Reporting
Part X	Ministerial Directions (pursuant to s. 28 of the Act)
Part XI	Permits for Equivalent Level of Safety and for Exceptions
Part XII	Appointment of Agents
Part XIII	Inspectors

(i) *Exemptions in Relation to Any Means of Transport*

Exemptions for miscellaneous chemicals, solutions, metals, charcoal and like materials. The regulations do not apply to the handling, offering for transport or transporting by any means of transport of the following products or substances if the product or substance is not used to form mixtures or solutions with dangerous goods other than with dangerous goods for which it is expressly permitted by these provisions of the regulations for the product or substance:

p- Bromobenzyl cyanide;

2. REGISTRATION

(a) Registration Required by the Transportation of Dangerous Goods Act (Canada)

Subject to the exceptions specified below, every Canadian manufacturer of dangerous goods (including non-exempted wastes) that offers dangerous goods for transport and every importer in Canada of dangerous goods that are in bulk, or are in quantities exceeding 500 kg., shall register with the Director-General of the Transport of Dangerous Goods Directorate, Department of Transport, Ottawa, by providing the Director-General with the information required in Form 1 set out in Schedule IX of the federal regulations.[1] This duty does not apply in the case of dangerous goods that are included in Class 1 (explosives) if the manufacturer or the importer holds a licence issued pursuant to the Explosives Act; or if they are included in Class 7 (radioactive materials and prescribed substances) if the manufacturer or the importer holds a licence issued pursuant to the Atomic Energy Control Act; or in regard to pesticides, if the manufacturer or importer has registered them pursuant to the Pest Control Products Act.[2] There is a further duty on every Canadian manufacturer or importer who is required to make an initial registration to provide to the Director-General the same information specified once every five years after the first registration or once in every calendar year in which there is a change in the information previously submitted, whichever occurs first.[3]

(b) Registration Requirements Regarding Generators of Hazardous or Liquid Industrial Waste Pursuant to the Ontario Environmental Protection Act

Initial registration. Prior to September 17, 1986, every generator of liquid industrial or hazardous waste as defined by Ontario Regulation 309 under the Environmental Protection Act (hereafter referred to as the Waste Management Regulations) is required to register with the Director of the Waste Management Branch of the Ministry of the Environment any waste generation facility at which such waste is generated as well as each "subject waste" (meaning a liquid industrial waste or hazardous

1 Transportation of Dangerous Goods Regulations, SOR/85-77 [am. SOR/85-314, SOR/85-585, SOR/85-609], s. 9.8(1).
2 *Ibid.*, s. 9.8(2).
3 *Ibid.*, s. 9.9.

waste not exempted by the regulations)[4] that he produces, collects, handles or stores or that he is likely to produce, collect, handle or store.[5]

A generator, meaning the operator of a waste generation facility, (any facility, equipment or operation involved in the production, collection, handling or storage of liquid industrial waste or hazardous waste not otherwise exempted at a particular site) must submit an initial generator registration report (GRR) in Form 2 of the regulations, which describes the name and address of the generator, its site location, the standard industrial classification codes for site locations identified, the total number of wastes to be registered, as well as a description of the waste, a description of the water generation process, the primary characteristics of such waste, analytical data if applicable, the classification of the waste, its secondary characteristics and the principal intended receiver as well as the principal intended carrier. The generator must complete, for each site, Form 2, Part 1, and as many of Form 2, Part 2 as there are wastes generated at that site.

Following the receipt of an appropriate GRR the Director will issue a generator registration document with a generator registration number and the applicable waste numbers accepted by the Director.[6]

Registration for certain solid wastes producing leachate. In addition to the requirement that generators of hazardous or liquid industrial wastes obtain a generator registration number both for themselves and for such waste generated by them, the Waste Management Regulations require the registration of solid wastes that, when subjected to prescribed leachate extraction procedures, generate leachate contaminant levels between 10 and 100 times the level specified in Schedule 4 of the regulations, with the exception of such waste produced in any month in an amount less than 25 kg. or accumulated in an amount less than 25 kg.[7] The Ministry has stated that it will not issue generator registration numbers for these wastes; however, generators must still register them with the Ministry by and after September 17, 1986 in order to comply with the new regulatory requirements.

Registration of out-of-province generators. Out-of-province generators who transport hazardous or liquid industrial wastes for disposal in Ontario must also register themselves and these wastes with the Ministry. No carrier or receiver will be permitted to accept these wastes from out-of-province generators who have not obtained generator registration

4 See further in text for detailed discussion of these terms.
5 R.R.O. 1980, Reg. 309 [am. O.Regs. 175/83, 574/84, 322/85, 464/85], s. 15(1).
6 *Ibid.*, s. 15(3).
7 *Ibid.*, s. 15(15)(*h*).

For reactive wastes the small quantity exemption is 5 kg. per month. Generation of more then that mass in a one-month period or accumulation of more than that amount on a site over any period requires registration. Empty containers or liners are deemed not hazardous.[36]

Radioactive waste. The term "radioactive waste" is not defined by these regulations.

Pathological waste. Pathological waste is defined as:

1. any part of the human body, including tissues and bodily fluids, but excluding fluids, extracted teeth, hair, nail clippings and the like, that are not infectious;
2. any part of the carcass of an animal infected with a communicable disease or suspected by a licensed veterinary practitioner to be infected with a communicable disease; or
3. non-anatomical waste infected with a communicable disease.[37]

The Ministry advises that where there is doubt as to whether or not the waste is pathological waste, consultation should be had with a licensed medical practitioner or veterinary doctor.

Because of the concern with pathological waste there is no small quantity exemption. Empty containers and liners are also deemed hazardous although the Ministry expresses the view that if they have been incinerated, autoclaved or otherwise sterilized to make them non-infectious, they will not then be deemed hazardous.[38]

Leachate toxic waste. Leachate toxic waste is defined as a waste producing leachate containing any of the contaminants listed in Schedule 4 to Regulation 309 at a concentration in excess of 100 times that specified in the Schedule using the leachate extraction procedure or an equivalent test method approved by the Director of the Waste Management Branch.[39] This definition applies to both liquid and solid waste. The leachate extraction procedure, included as part of Regulation 309, is used to make this determination.

For leachate toxic waste the small quantity exemption is 5 kg. of wastes per month. Generation of more than that amount in a one-month period or accumulation of more than 5 kg. on a site over any period requires registration. Empty containers and liners are deemed not hazardous.[40]

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36 "Registration Guidance Manual," p. 16.
37 R.R.O. 1980, Reg. 309, s. 1.48.
38 "Registration Guidance Manual," p. 10.
39 R.R.O. 1980, Reg. 309, s. 1.37.
40 "Registration Guidance Manual," p. 17.

PCB waste. PCB waste, as defined in Ontario Regulation 11/82, is deemed to be "hazardous waste" for the purpose of the Waste Management Regulation. See Chapter 2 for a description of those wastes that are exempted from that definition. Machinery, equipment or liquids that come within the definition of PCB wastes under Ontario Regulation 11/82 and that are stored on a site, whether authorized by any other regulation, must be registered.[41]

3. THE DUTY TO CLASSIFY DANGEROUS GOODS AND WASTES

(a) The Duty to Classify Dangerous Goods Imposed by the Federal Transportation of Dangerous Goods Act

(i) *Introduction*

The major duties imposed under the federal Transportation of Dangerous Goods Act compel proper packaging, labelling and other precautions to prevent dangerous situations from arising. As well, ancillary duties to train staff, report unusual events and take emergency or remedial measures are imposed.

Classification of dangerous goods is the key to understanding and complying with the obligations imposed by the Act. It is only by properly engaging in classification that the full legal implications of the term "dangerous goods" can be understood and the requirements of the Act be complied with. This is so because the term "dangerous goods" is defined to mean "any product, substance or organism included by its nature or by the regulations in any of the classes listed in the schedule [to the Act]."

SCHEDULE[42]

Class 1 Explosives, including explosives within the meaning of the *Explosives Act*

Class 2 Gases: compressed, deeply refrigerated, liquefied or dissolved under pressure

Class 3 Flammable and combustible liquids

Class 4 Flammable solids; substances liable to spontaneous combustion; substances that on contact with water emit flammable gases

Class 5 Oxidizing substances; organic peroxides

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41 *Ibid.*, p. 11.
42 To the Transportation of Dangerous Goods Act, S.C. 1980, c. 36.

Class 6 Poisonous (toxic) and infectious substances

Class 7 Radioactive materials and prescribed substances within the meaning of the *Atomic Energy Control Act*

Class 8 Corrosives

Class 9 Miscellaneous products, substances or organisms considered by the Governor in Council to be dangerous to life, health, property or the environment when handled, offered for transport or transported and prescribed to be included in this class

While over 3,000 dangerous goods other than explosives have been specified in the regulations, the definition of "dangerous goods" as meaning any product, substance or organism included by its nature or by the regulations in any of these classes listed in the schedule does not restrict the application of the Act to those specifically mentioned in the regulations, but includes *any* product, substance or organism which "by its nature" is included within the classes listed in the schedule. In two of those classes (Class 7 and Class 9) only materials and substances prescribed by regulation, either under this Act or under the Atomic Energy Control Act, are within the meaning of the term "dangerous goods". However, with regard to seven other classes (Classes 1 to 6 and 8), the description allows for judgments to be made as to whether a product or substance is within that definition and therefore within the duties imposed by the Act.

Accordingly, as classification is the key to compliance with the Act and its many regulations, any person who may potentially be involved with the manufacture, distribution or shipment of dangerous goods within the context of the schedule must either ascertain that he or the potential dangerous goods are exempted from the requirements of the Act by having regard to the exemption provisions (discussed in Chapter 2) or, alternatively, determine exactly which classification properly describes his dangerous goods in order to understand the legal duties imposed on him.

The consignor's duty to classify. The classification duties of a consignor are as follows:

1. to determine that the goods are exempt pursuant to Part II of the regulations;
2. if they are not exempt, to classify the dangerous goods in accordance with those criteria set out in Part III of the regulations which accurately describe the dangerous goods;
3. to ascertain the division or divisions, if any, of the class or classes in accordance with the criteria set out in Part III of the regulations; and
4. to ascertain the packing group or groups, if any, applicable to the dangerous goods of the class or classes ascertained.[43]

Manufacturers, formulators and importers deemed "consignors". For the purposes of the classification requirements, a "consignor" is defined as any person

(*a*) who manufactures the dangerous goods or formulates products containing the dangerous goods, including the preparation or alteration of mixtures and solutions containing the dangerous goods; or

(*b*) on whose behalf an international consignment or a transborder consignment of dangerous goods is brought into Canada.[44]

Notwithstanding the duty to classify dangerous goods imposed on a consignor, it is not required and it is indeed illegal for a person to classify a product or substance to be included in Class 1 unless the product or substance is classified by or under the Explosives Act. It is also not required and is illegal for a person to classify a not fully specified product or substance as a product or substance included in Class 7 (radioactive materials and prescribed substances) unless the product or substance is classified by or under the Atomic Energy Control Act. Further, no person shall classify a not fully specified product or substance as a product or substance included in Class 9.[45]

Duty to classify diluted dangerous goods. There is also an obligation to classify diluted dangerous goods. Where dangerous goods have a primary classification of Class 2 to Class 6.1 or Class 8 but are so diluted that they do not meet the criteria for the primary classification or the packing group related to it and have a subsidiary classification of 9.2 (hazardous to the environment), the shipping name of the dangerous goods shall be "environmentally hazardous substance" followed by the shipping name of the product or substance corresponding to the primary

43 Transportation of Dangerous Goods Regulations, SOR/85–77, s. 3.6(1).

44 *Ibid*., s. 3.1(1) [am. SOR/85–609, s. 26]. An "international consignment" means a consignment that is transported between Canada and another country by aircraft or by ship on any voyage other than a home trade voyage Class II; a "transborder consignment" means "a consignment that is transported between Canada and the United States by road or rail": SOR/85–77, s. 1.2 [am. SOR/85–585, s. 1]. A "consignor," in addition to the definition given above in the text, is generally defined as "a person who offers a consignment for transport." See the definitions contained in the federal regulation, SOR/85–77, as amended.

45 SOR/85–77, s. 3.7.

classification in parentheses, and the product identification number then does not apply.[46]

(ii) *Guidelines for Classification*

The classification of dangerous goods under the federal regulations should proceed as follows. A consignor has the responsibility to determine whether or not his goods are found in Classes 2 to 6.1 or 8 of the regulations. List II of Schedule II of the regulations contains a comprehensive list of dangerous goods (except explosives). Commodities that are "specified dangerous goods" are set out in lower case letters in column I of List II. These are chemicals, dangerous articles or substances that are shipped in their pure form or are blends with well-defined concentration ranges. They have unique physical and chemical properties. A consignor of a commodity listed as "specified dangerous goods" in Schedule II, List II of the regulations will not need to go through the various testing procedures for classifying the product. The shipping name, product indentification number (PIN), classification and conditions under which it is to be transported are defined in that schedule.[47]

Commodities that are "not fully specified" dangerous goods are set out in upper case letters in column I of List II. These generic groups of dangerous goods include a vast number of different products, blends, solutions and mixtures. Nevertheless, there may be an applicable shipping name specified in List II of Schedule II in respect of particular "not fully specified" dangerous goods. If a "shipping name" is specified then, again, the consignor will not need to go through the process of classifying the product. On the other hand, if the goods include a vast number of different products, blends, solutions and mixtures, the shipper or manufacturer is required to define a class, division, packing ground and thus shipping name, from the criteria in the regulations. To classify a product accurately, the shipper or manufacturer needs to be familiar with its major constituents, its correct chemical name and its physical and chemical properties. However, as indicated above, products or substances in Classes 1 (explosives), 7 (radioactive substances) and 9 (miscellaneous products or substances) cannot be classified by the consignor.[48] For explosives, List I of Schedule II classifies products or substances under the

46 *Ibid.*, s. 3.28. There is no definition of the term "so diluted that they do not meet the criteria."

47 "Dangerous Goods—A Simple Guide to Dangerous Goods Classification," Transport Canada publication TP5945.

48 SOR/85–77, s. 3.7.

Explosives Act and the consignor of that product must use List I to determine quantity restrictions or prohibitions for the various transportation modes. Those radioactive materials included in Class 7 must contain a product or substance with activity greater than 74 kBq/kg.[49] As for those products or substances included in Class 9, only those that are assigned to Class 9 in List II of Schedule II can be legitimately included in Class 9.[50]

It is possible that more than one classification and packing group could be applicable to specific goods. The regulations set out a formula for the determination of the primary classification, subsidiary classifications and packing group and require that the consignor ascertain the primary classification and packing group in accordance with that formula.[51] Where not fully specified dangerous goods have a classification of Class 7 (radioactive), the primary classification of the dangerous goods must be Class 7. Class 2 (gases) are also given priority. Where not fully specified dangerous goods have a classification as a gas, whether they have a classification under another class, other than Class 7, the primary classification of the dangerous goods is to be Class 2[52] and where not fully specified dangerous goods have a classification of Division 2 of Class 6 (*i.e.* they are infectious organisms or organisms reasonably believed to be infectious to humans or to animals and the toxins of such organisms) their primary classification is to be Division 2 of Class 6, *i.e.* infectious substances.[53]

The following are the nine classes of dangerous goods and their divisions where applicable and a brief description of their characteristics as provided by the Dangerous Goods Directorate of Transport Canada.

CLASSES AND DIVISIONS OF DANGEROUS GOODS[54]

CLASS 1 — Explosives

1.1 — A substance or article with a mass explosion hazard

49 *Ibid.*, s. 3.24.

50 *Ibid.*, s. 3.27.

51 *Ibid.*, ss. 3.6(2) and 3.8.

52 *Ibid.*, s. 3.8(3).

53 *Ibid.*, s. 3.8(6). This is qualified, however, to the extent that the goods are a gas, in which case they should apparently be classified as Class 2: see the exact wording of s. 3.8(6), which commences "subject to subsection (3). . . . "

54 From Transport Canada publication TP5945. See note 47, above.

alty does not apply unless the Court is satisfied that the person was notified, before entering his plea, that a penalty would be sought under these provisions.[59]

There are also other duties on manufacturers and generators imposed by the Ontario Waste Management Regulation in respect of hazardous and liquid industrial wastes, and these are discussed later in this chapter. These duties include filling out manifests, keeping records, training employees, using proper labelling and signs, etc. The same penalties just described would apply to a breach of these provisions. Unless a generator or manufacturer who may be subject to these duties and therefore to these penalties takes the requisite amount of care to determine the proper classification of his waste and therefore to comply where necessary with the provisions of the Waste Management Regulations, he will needlessly expose himself to the penalties specified. Accordingly, while no direct legal duty to classify hazardous and liquid industrial waste is imposed under the Ontario Waste Management Regulation, as a matter of interpretation and practice there is indeed a very heavy onus on generators and manufacturers to engage in the proper classification of their activities and waste.

(ii) *Persons Who Must Classify Wastes*

In summary, the duty to classify wastes is on any generator of a waste that could be within the definition of a hazardous waste, a liquid industrial waste, or such other wastes as require registration pursuant to the Waste Management Regulation. See headings **2(b)** and **2(c)(i)**, as well as Figures 1 and 2.

4. DOCUMENTATION DUTIES

(a) Documentation and Manifest Requirements under the Transportation of Dangerous Goods Act

A major objective of the federal legislation is to ensure that specific safety information about goods being handled is available for and appropriate safety precautions taken by those who may have to deal with any dangerous occurrence or accident involving the dangerous goods.

59 Environmental Protection Act, R.S.O. 1980, c. 141, s. 147 [en. S.O. 1981, c. 49, s. 4].

Accordingly, extensive provisions are made in the regulations requiring proper documentation of material being moved.

The regulations use the term "shipping document" for dangerous goods that are not waste and the term "waste manifest" for movements of waste materials.

Generally, it is the responsibility of the consignor to ensure the shipping document or waste manifest contains all the specified information, is signed, is accommpanied by any other required documents or certificates and is given to the initial carrier. Generally, it is also the responsibility of the carrier to ensure the relevant documents accompany the consignment of dangerous goods, are kept in a location prescribed by the regulations and are passed with the goods to the subsequent carrier or the consignee.

A consignment of dangerous goods must always be accompanied by all required documents, properly completed and located. Each time the consignment is transferred in whole or in part, from one to another person in charge, management or control, a copy of all properly completed documents must be transferred with the consignment, and eventually to the receiver. If the consignment is divided during its journey it is the responsibility of the person who has the charge, management or control of the consignment to amend the shipping documents as prescribed by the regulations. A unique shipping document identification number must be used for each consignment of dangerous goods except in those situations allowed for in the regulations. If the consignment is a mix of dangerous and non-dangerous goods, a single shipping document may be used, provided it is completed in the manner prescribed by the regulations.

The shipping document may be any form of document except for shipments by air or shipments of hazardous waste where specified documents must be used.

(i) *Specific Requirements in Regard to a "Shipping Document"*

The regulations require that before dangerous goods, other than waste, are transported, the consignor of the dangerous goods ("consignor" for the purposes of these requirements has the more limited definition of "a person who offers a consignment for transport")[60] shall

(*a*) prepare and date a shipping document that has legibly and indelibly printed on it a shipping document identification number and the name of the consignor for each consignment of the dangerous goods offered by him for transport;

60 SOR/85-77, s. 1.2.

ers, *i.e.* the waste disposal sites and waste management systems, to which a carrier may transfer "subject waste". In the ordinary course of events, a carrier may transfer subject waste in Ontario only to the following receivers:

1. to a waste disposal site operating under a Certificate of Approval or Provisional Certificate of Approval authorizing acceptance of the waste;
2. with the consent of the owner of the sewage works, to a sewage works for which an approval under the Ontario Water Resources Act has been issued and that is not in contravention of the approval; or
3. to a waste-derived fuel site having a combustion unit operating under a certificate of approval issued under s. 8 of the Environmental Protection Act authorizing acceptance and combustion of the waste.[131]

Where it is necessary in the opinion of a regional Director of the Ministry to alleviate a dangerous situation, a Director may give approval to a carrier to transfer subject waste to another vehicle of the same waste transportation system, to a waste transportation system operated under a Certificate of Approval or a Provisional Certificate of Approval or to a specified receiving facility of the categories mentioned in the paragraph above.[132]

Where waste is transferred out of Ontario, the obligation is put on the carrier not to take such waste to an intended receiver unless the carrier has reason to believe the intended receiver is willing to complete section C (receiver) of the applicable manifest completed for that load of waste.[133]

Where it is intended by a carrier to transfer subject waste into Ontario, it may only be transferred by a carrier to the same three categories of facilities to which subject waste may be transferred by a carrier in the normal course of events when that waste originates from Ontario.[134]

Where a transfer of subject waste takes place, the receiver must ensure that the load being received is the same as that declared by the generator on the manifest and that the waste type is consistent with the receiver's certificate of approval or other authorization received by the Ministry for the acceptance of such waste. Upon the transfer of subject waste, the receiver must obtain from the carrier the remaining four parts of the manifest completed for that load and shall

131 *Ibid.*, s. 20(3) [en. O. Reg. 322/85, s. 9].
132 *Ibid.*, s. 20(3)(*a*) [en. O. Reg. 322/85, s. 9].
133 *Ibid.*, s. 21(5) [en. O. Reg. 322/85, s. 9].
134 *Ibid.*, s. 22(5) [en. O. Reg. 322/85, s. 9].

1. at the time of the transfer complete section C (receiver) of the remaining four parts of the manifest;
2. remove copy 3 (yellow) of the manifest and return it to the Director within three working days after the transfer;
3. remove copy 4 (pink) of the manifest and return it to the carrier at the time of the transfer;
4. retain copy 5 (blue) of the manifest for two years; and
5. remove copy 6 (brown) of the manifest and return it to the generator shown on the manifest within three working days after the transfer.[135]

A receiver is entitled to refuse a load of waste and indeed must do so where a Certificate of Approval does not permit it to accept what is described in the manifest. In such a case, the receiver must prepare a refusal report indicating the manifest number, the generator registration number, the carrier number and the reasons for refusal and return it to the Director within three working days after the refusal.[136]

(vi) *PCBs—Documentation Duties on Waste Disposal Site Operators*

The operator of any waste disposal site must keep records of all PCB waste held by him.[137]

Such records are to include

1. the methods and times at which the PCB waste is received and delivered to and from the site;
2. where PCB waste is transported to and from the site, the location from or to which it is transported and the person by whom it is transported;
3. a description of the nature and quantities of PCB waste;
4. the location of the waste disposal site; and
5. the methods of storage of the PCB waste.[138]

5. DUTIES RE SAFETY MARKS, LABELS, SIGNS AND PLACARDS

(a) The Federal Transportation of Dangerous Goods Act—Requirements Regarding Safety Marks

135 *Ibid.*, s. 20(5) [en. O. Reg. 322/85, s. 9].
136 *Ibid.*, s. 24(1) [en. O. Reg. 322/85, s. 9].
137 O. Reg. 11/82, s. 4(1).
138 *Ibid.*, s. 4(2). See the provisions of this regulation for some further more detailed requirements with regard to documentation and notification on operators of sites taking PCBs.

(i) *Safety Marks*

Safety marks are used to indicate the presence of dangerous goods (including wastes) and to identify their class or classes. They also can identify the primary and subsidiary risks of the dangerous goods, the handling and storage requirements, the type of packaging, container or vehicle being used and the owner of a tank or vehicle or the reconditioner of a package or container.

There is a duty on any person handling, offering for transport or transporting dangerous goods to ensure that the safety marks prescribed by Part V of the regulations are complied with (subject to exceptions from the scope of the regulations set out in Chapter 2) unless there are contrary or other provisions in Schedule III to the regulations and with the exception that there may be different or other requirements with regard to transborder consignments between the United States and Canada and in regard to radioactive materials (Class 7).[139]

In the case of certain transborder consignments, the safety marks must be in compliance with Part V of the regulations, or alternative specific requirements that incorporate the United States Title 49 Code of Federal Regulations requirements.[140]

In the case of Class 7 (radioactive materials), the safety marks must be in compliance with the requirements set out in the Transport Packaging of Radioactive Materials Regulations. Further, the requirements of those regulations that are applicable to the transport container shall also be applicable to a means of transport.[141]

There are four groups of safety marks: labels, placards, signs and other safety marks.

Labels and placards. Labels are used on packages, cylinders and small containers. Placards are used on large containers and on vehicles and both are of a standard square-on-point shape (diamond-like) and must be manufactured in accordance with the regulations.

There are prescribed colours, symbols and sometimes words for each of the nine classes and their divisions of dangerous goods.

There are a few special labels and placards for use in certain situations such as "magnetized material", polychlorinated biphenyls", "cargo aircraft only" and "empty" labels and the "empty" and "mixed load" placards.

Signs. There are two signs that must be used under certain cir-

139 SOR/85-77, s. 5.1.
140 *Ibid.*, ss. 5.2, 5.2.1, 5.3.
141 *Ibid.*, s. 5.4(1), (2).

cumstances for certain products to identify a specific hazard or risk. Proper precautions may then be taken by those handling or transporting these products. These signs are for fumigation and oxygen depletion.

Other safety marks. Other safety marks are not necessarily symbols but are additional information which may be required on packages, containers, cylinders, tanks or means of transport. For instance, the shipping name of the dangerous goods and the product identification number must appear on the container or package of dangerous goods. Depending on certain circumstances, other information may also be required on the package, cylinder, container, tank or means of transport. This could include such information as control and emergency temperatures, the flashpoint of the substance or the package orientation ("this side up").

(ii) *Duties on Consignors with Regard to Labels and Signs—Large Container or Transport Unit*

There is a duty on the consignor, before dangerous goods are loaded in a large container or a transport unit (a "large container" is defined as a container with a water capacity greter than 454 L.; a "transport unit" is defined as a freight container, a road vehicle, a railway vehicle, a portable tank, a freight container carried on a road vehicle, a freight container carried on a railway vehicle, a portable tank carried on a road vehicle, or a portable tank carried on a railway vehicle)[142] to display each label and each sign required to be displayed pursuant to Part V of the regulations and to deliver or cause to be delivered to the initial carrier to whom he offers the dangerous goods for transport, each placard, each orange panel that indicates a product identification number (PIN) and each sign that the person in charge of the large container or transport unit is required to display in respect of the dangerous goods.[143]

The labels, placards and orange panels that indicate a PIN and required signs must be clearly visible and legible, be on a contrasting background apart from any other marking with which it might be confused, be sufficiently durable and weather resistant to withstand, without substantial alteration or detachment, the conditions to which they will be exposed during transport, meet certain technical specifications for fading and colour and not show the manufacturer's name or logo unless it is outside the border, located near the edge, and is in 10 point type size or smaller.[144]

142 *Ibid.*, s. 1.2; some of these terms are themselves further specifically defined in s. 1.2.
143 *Ibid.*, s. 5.5(1).
144 *Ibid.*, s. 5.6.

However, notwithstanding the adoption by the Ontario legislation of Parts III to IX of the federal regulations, those regulations do not apply in Ontario to prohibit the transportation of dangerous goods

1. in a service truck carrying the goods in quantities that do not exceed the quantities normally required for emergency response or repair; or
2. in a vehicle used in the constructing, repairing, painting or marking of a road surface.[180]

(ii) *Requirements Imposed by the Waste Management Provisions of the Environmental Protection Act Regarding Liquid Industrial and Hazardous Wastes*

Basically the Ontario Dangerous Transportation Goods Act, 1981, by adopting the federal Transportation of Dangerous Goods Act's requirements with regard to matters discussed in this section as obligation for the carriage of dangerous goods on Ontario highways, provides the basic duties on any person or carrier in regard to such matters. However, the Waste Management Regulations under the Ontario Environmental Protection Act makes some further cross-references to the federal requirements with regard to hazardous waste and liquid industrial waste. In particular, any waste transportation vehicle used for transporting liquid industrial waste or hazardous waste must be constructed, maintained, operated, marked or placarded in accordance with the applicable requirements of the Transportation of Dangerous Goods Act.[181] Further, no generator is legally allowed to transfer "subject waste" to a waste transportation system in Ontario unless the subject waste is so packaged or marked that it meets the transport requirements of the Transportation of Dangerous Goods Act.[182]

In addition, any waste transportation vehicle used for transporting liquid industrial waste or hazardous waste must be clearly marked with the name and number appearing on the Certificate of Approval or Provisional Certificate of Approval that authorizes the transportation.[183]

Asbestos waste. The Waste Management Regulation prescribes specific safety marks for vehicles and containers containing asbestos waste.

180 *Ibid.*, s. 7.
181 R.R.O. 1980, Reg. 309, s. 13.8.
182 *Ibid.*, s. 16(2).
183 *Ibid.*, s. 13.6.

6. SAFETY REQUIREMENTS RELATED TO THE HANDLING OR OFFERING FOR TRANSPORT OF DANGEROUS GOODS

Obligations as to safety requirements set out in this section are, of course, in addition to other obligations such as classification, documentation and use of appropriate safety marks discussed in the preceding sections of this chapter.

(a) Duties Imposed by the Federal Transportation of Dangerous Goods Act

(i) *General*

It is an offence for any person to handle or offer for transport dangerous goods unless the safety requirements for the handling or offering for transport prescribed in Part VII are complied with, subject to provisions to the contrary in Schedule III or exemptions in Part II.[184]

Packaging limits—limited quantities of dangerous goods and consumer commodities. Where limited quantities of dangerous goods or consumer commodities are to be transported,[185] the consignor must package the dangerous goods in a quantity not exceeding the quantity specified in Schedule VIII for the inner packaging to be contained in the applicable outer packagings for the dangerous goods.[186]

Storage restrictions on a ship—consumers commodities. Where more than 2,000 kg. of any one class of consumer commodities are to be transported in a transport unit and that unit is to be transported by ship, no other dangerous goods shall be stored under or over the consumer commodities and in or over any part of the space within one meter of the consumer commodities.[187]

Duty to prevent incompatible packaging. It is an offence for any person to handle or offer for transport two or more dangerous goods that are contained in the same packaging if a mixture of the dangerous goods would result in an evolution of heat or gas or produce a corrosive that would endanger the packaging.[188]

184 Transportation of Dangerous Goods Regulations, SOR/85-77, s. 7.1.
185 Within the limits for inner packagings set out in Schedule VIII.
186 SOR/85-77, s. 7.2.
187 *Ibid.*, s. 7.3.
188 *Ibid.*, s. 7.4.

ture of the aircraft, a written notice that sets out the presence of the dangerous goods in the aircraft and the air waybill number, shipping name and PIN, the primary and subsidiary classifications, including the compatibility group if the dangerous goods are explosives, the packing group, if any, in respect of dangerous goods other than radioactive material, the number of packages, the net quantity and the exact location at which the dangerous goods are placed in the aircraft. Further, in respect of radioactive materials, the number of packages, the category of each package, the transport index of each package and the exact location of each package in the aircraft shall be set out. Also to be indicated are whether the goods shall be carried on a cargo aircraft only, the place where the goods are to be unloaded, confirmation that there is no evidence that damaged or leaking packages have been loaded on the aircraft and, where applicable, an indication that the dangerous goods are being transported pursuant to a permit for equivalent level of safety issued pursuant to s. 27(1) of the Act.[203]

G. *International or transborder consignments of wastes.—Duty to provide information to Dangerous Goods Directorate.* It is illegal for any person to offer for transport an international or transborder consignment or series of consignments of waste for the purpose of disposal outside Canada or import into Canada an international or transborder consignment or series of consignments of waste for the purpose of disposal in Canada unless he provides, at least 60 days before the proposed consignment is to be exported or imported, a notice in writing to the Director General of the Transport of Dangerous Goods Directorate, Department of Transport, setting out the following information:

1. the name and address of the consignor;
2. the name, address and telephone number of the consignee;
3. the name and address of the carrier;
4. the means of transport to be used;
5. the description, and the method of packing of the waste;
6. the approximate date of the transportation of each consignment of waste for a period terminating not later than December 31 of the year of the notification;
7. the name of each province and foreign country through which each consignment of waste is to be transported;
8. the customs office of entry into or exit from Canada and the customs office of entry into or exit from each country in which the consignment of waste is to be transported; and
9. a statement confirming that arrangements have been made to receive and dispose of the consignment of waste.[204]

203 *Ibid.*, s. 7.13.

—*Further notice re PCB waste.* Where a consignor has given notification with respect to a series of consignments of waste referred to in the preceding paragraph that contain PCB's with PIN 2315, he shall notify the Director General at least seven days before each consignment, other than the first consignment, is to be exported or imported.[205]

—*Duplicate information to Environment Canada.* Every person who provides notification to the Director General pursuant to the above provisions is under an obligation to provide a copy of the notification to the Director of the Waste Management Branch, Environmental Protection Program Directorate, Environmental Protection Program Directorate, Environmental Protection Service, Environment Canada, Ottawa, Ontario, K1A 1C8.[206]

(iii) *Miscellaneous Duties Imposed by the Federal Transportation of Dangerous Goods Act*

Requirement to appoint agents. The regulations require that any person who is not a resident in Canada or who has his chief place of business or head office outside Canada must, prior to handling, offering for transport or transporting dangerous goods destined for Canada or for any place outside Canada through Canada by any means of transport, file with the Minister of Transport a notice setting out the name and address of a person in Canada having his or its chief place of business or head office in Canada that is willing to act as that person's agent together with proof of such willingness.[207]

Categories of dangerous goods for which the appointment of an agent is required. An agent must be appointed pursuant to the provisions discussed above in respect of the transportation by any means of transport of,

(*a*) fissile materials of Class 7,
(*b*) waste goods of Class 7, or

204 *Ibid.*, s. 7.14(1).
205 *Ibid.*, s. 7.14(2).
206 *Ibid.*, s. 7.14(3).
207 *Ibid.*, s. 12.1.

—*Limitations on transfers of liquid industrial and hazardous waste.* A carrier may legally transfer liquid industrial and hazardous waste only as follows in the normal course of events:

1. to a waste disposal site operating under a Certificate of Approval or Provisional Certificate of Approval authorizing acceptance of the waste;
2. with the consent of the owner of the sewage works, to a sewage works for which an approval under the *Ontario Water Resources Act* has been issued and that is not in contravention of the approval; or
3. to a waste-derived fuel site having a combustion unit operating under a Certificate of Approval issued under section 8 of the Environmental Protection Act authorizing acceptance and combustion of the waste.[227]

—*Transfers of liquid industrial or hazardous waste must have generator, receiver or vehicle driver present.* Whenever liquid industrial waste or hazardous waste is being transferred to or from a waste transportation vehicle, the driver of the vehicle must be present unless the generator or receiver is present.[228]

—*Driver training.* The driver of a waste transportation vehicle used for the transportation of liquid industrial waste or hazardous waste must be trained as specified in the regulations.[229]

—*Packaging and safety marking requirements: federal standards adopted.* No generator shall transfer subject waste to a waste transportation system unless the subject waste is so packaged or marked that it meets the transport requirements of the Transportation of Dangerous Goods Act.[230]

—*Duties on generators of hazardous or liquid industrial waste ceasing to control subject waste.* No generator shall permit liquid industrial or hazardous waste to pass from his control or to leave the waste generation facility except

1. by transfer of the subject waste to a waste transportation system operating under a Certificate of Approval or Provisional Certificate of Approval and where the generator has completed the manifest in

227 *Ibid.*, s. 20(3).
228 *Ibid.*, s. 13.5.
229 See text, below, for a summary of training requirements on drivers of these and other vehicles and persons involved in the transportation or handling of dangerous goods.
230 R.R.O. 1980, Reg. 309, s. 16(2) [en. O. Reg. 322/85, s.9].

respect to the waste in accordance with the Ontario Waste Management Regulations;[231]

2. by direct discharge to a sewage works subject to the Ontario Water Resources Act or established before August 3rd, 1957; or
3. to a sewage system as defined in Part VII of the Environmental Protection Act.[232]

—*Exception—dangerous situations.* However, where it is necessary to alleviate a dangerous situation, a carrier may transfer subject waste, with the approval of the Regional Director of the Ministry of the Environment or an alternate named by him, to another vehicle of the same waste transportation system, to a waste transportation system operating under a Certificate of Approval or Provisional Certificate of Approval or to a specified receiving facility as mentioned in clauses 1, 2 or 3 in the paragraph above.[233]

—*Refusals—requirements regarding the refusal of the acceptance of liquid industrial or hazardous waste.* Where a receiver refuses to accept a transfer of liquid industrial or hazardous waste, the carrier, before attempting to make a different transfer, must consult and obtain the instructions of the generator, unless written instructions have been provided by the generator in advance, in which case the carrier may transfer the waste to a receiving facility indicated in the instructions. However, if waste is refused by the intended receiver and if the carrier cannot conveniently make the different transfer in accordance with the requirements of the regulations, the carrier must then return the unadulterated waste to the generator's waste generation facility and there is a duty on every generator to accept a transfer of unadulterated waste in these circumstances.[234] A waste generation facility is exempt from the requirement of obtaining a waste disposal site Certificate of Approval under s. 27 of the Act in respect of an acceptance of waste in such circumstances.[235]

7. DUTIES TO TRAIN PERSONS HANDLING DANGEROUS GOODS

(a) Training Requirements—Federal Transportation of Dangerous Goods Act and Regulations

231 *Ibid.*, s. 16(1).
232 *Ibid.*, s. 16(2).
233 *Ibid.*, s. 20(3)(*a*).
234 *Ibid.*, s. 24(1)–(4).
235 *Ibid.*, s. 24(7).

It is illegal for any person to handle, offer for transport or transport dangerous goods of any description unless the person engaged in any one of these activities is a trained person, or is performing those activities under the direct supervision of a trained person.[236]

The legal necessity to be a trained person if engaged in handling, offering for transport or transporting dangerous goods of any description is a duty of potentially vast application. The reader is advised to refer to heading 2 of Chapter 2 for a discussion of the broad scope of the terms "handling" and "dangerous goods", and for those goods, persons and means of transport that may yet be exempt.

Further, this duty to be trained is required of persons transporting dangerous goods in vehicles on Ontario highways, even in the absence of a proclamation under s. 32(2)–(4) of the federal Act making its provisions directly applicable to Ontario. See heading **7(b)** below.

A person is defined as a "trained person"

> (*a*) when his employer
>
> (i) is satisfied that the person has received adequate training in the aspects of the handling, offering for transport or transporting of dangerous goods related to the duties that he proposes to assign to the person, and
>
> (ii) issues to the person a Certificate of Training that indicates
>
> (A) the date the person completed an initial training in the handling, offering for transport or transporting of dangerous goods,
>
> (B) the date the person completed each subsequent training in the handling, offering for transport or transporting of dangerous goods, if any, and
>
> (C) the aspects of the handling, offering for transport or transporting of dangerous goods for which the person was trained;
>
> (*b*) when the person is the holder of a certificate, licence or authorization recognized under
>
> (i) the *Ships' Deck Watch Regulations*,
>
> (ii) *The Pest Control Products Act*,
>
> (iii) *the Regulations No. 0-8, Uniform Code of Operating Rules*, or
>
> (iv) *Atomic Energy Control Act*,
>
> and the certificate, licence or authorization relates, at least in part, to the aspects of handling, offering for transport or transporting of dangerous goods that are applicable to his assigned duties; or
>
> (*c*) when the person is the driver of a road vehicle and is transporting dangerous goods between Canada and the United States and the person has been trained in accordance with the training requirements of [Title 49 of the U.S. Code of Federal Regulations].[237]

The training required of employees by an employer must be directly related to the dangerous goods that the person is expected to handle, offer for transport or transport during the performance of his proposed duties and shall include, as applicable, one or more of the following topics:

1. the classification, nature and characteristics of those dangerous goods;
2. the packaging requirements;
3. the safety marking requirements;
4. the documentation requirements;
5. the applicable special precautions for the handling or transporting prescribed by the manufacturer or the regulations;
6. the reporting requirements pursuant to Part IX of the regulations;
7. the applicable emergency action in case of a dangerous occurrence referred to in s. 17(1) and (2) of the Act;
8. the nature and proper utilization of equipment available for the handling or transporting of those dangerous goods; and
9. the conditions, circumstances and manner in which safety equipment made available to the person should be used.[238]

With two exceptions, a Certificate of Training issued by an employer is valid for a period of 36 months after the person has completed initial dangerous goods training or subsequent dangerous goods training. However, in the case of a person who is a member of an air crew or a member of the personnel who handle luggage or freight at an aerodrome, the certificate is valid for a period of 12 months after initial or subsequent training.[239]

There is a duty on a trained person, at the request of an inspector, to produce a Certificate of Training or a certificate, licence or authorization issued under the Acts and regulations previously referred to. In addition, every employer who issues a Certificate of Training to a trained person shall retain a copy of the Certificate of Training for a period of two years from the date of the expiration of the certificate.[240]

(b) Training Requirements Imposed by Ontario Legislation

(i) *Dangerous Goods Transportation Act, 1981:—Adoption of Federal Transportation of Dangerous Goods Act Training Requirements*

236 Transportation of Dangerous Goods Regulations, SOR/85-77, s. 9.2.

237 *Ibid.*, s. 9.3. [am. SOR/85-585, s. 9]. An "employer" includes a person who "(*a*) employs one or more individuals, or (*b*) provides the services of one or more individuals": s. 9.1 [am. SOR/85-609, s. 80].

238 SOR/85-77, s. 9.7.

239 *Ibid.*, s. 9.4(1), (2).

240 *Ibid.*, s. 9.5 and s. 9.6 [am. SOR/85-609, s. 81].

for vehicles travelling on Ontario highways, it can be concluded that the federal requirements are adopted as Ontario law for dangerous goods being transported on highways in Ontario.

(ii) *Waste Management Regulation Provisions*

There are two instances where an emergency management procedure for hazardous wastes are directly discussed in the Ontario Waste Management Regulations.

1. Hazardous and Liquid Industrial Wastes:

The driver of a waste transportation vehicle used for the transportation of liquid industrial waste or hazardous must be trained in "emergency management procedures for the waste to be handled."[257] However, unless such a requirement is made a term and condition of a Certificate of Approval for a waste management system, it does not appear that such a standard forms part of an enforceable legal obligation and is rather intended by the Ministry as a prerequisite for the issuance of a Certificate of Approval.[258]

2. Asbestos Waste:

The Waste Management Regulation's provisions for the management of asbestos waste stipulate that such waste shall be transported only in vehicles equipped with emergency spill clean-up equipment, including certain items as specifically set out in the regulations.[259] However, as with the requirement that drivers of other hazardous and liquid industrial waste vehicles be trained in emergency procedures, it is not clear that such a provision regarding asbestos waste is itself a legal duty unless the asbestos management provisions of the regulations are made a term of the Certificate of Approval for a vehicle or waste management system transporting asbestos.[260]

9. NOTIFICATION DUTIES RE DANGEROUS OCCURRENCES AND SPILLS

(a) Notification Duties—Federal Transportation of Dangerous Goods Act

257 R.R.O. 1980, Reg. 309, s. 19.9.v [en. O. Reg. 322/85, s. 8].
258 See Estrin, *Environmental Law* (Toronto: The Carswell Co. Ltd., 1984), para. 268.
259 R.R.O. 1980, Reg. 309, s. 14(1).6.vii.
260 See note 258.

Immediate reporting requirements related to dangerous occurrences. The regulations require immediate notification of certain government officials and other persons in respect of a "dangerous occurrence" involving certain amounts and categories of dangerous goods.

A "dangerous occurrence" means:

1. where dangerous goods are in a class and division set out in column I of Table I to Part IX of the regulations, a discharge, emission or escape from any container, packaging or other means of transport containing dangerous goods, which discharge, emission or escape is in a quantity or at a level set out in column II of that table and which discharge, emission or escape represents a danger to health, life, property or the environment;
2. a transportation accident in which any means of bulk containment that contains dangerous goods is damaged;
3. a transportation accident involving dangerous goods included in Class 7 (radioactive material);
4. an unintentional explosion or fire involving dangerous goods.[261]

TABLE I TO PART IX OF THE TRANSPORTATION OF DANGEROUS GOODS REGULATIONS[262]

Quantities or Levels for Immediate Reporting		
Item	Column I Class and Division	Column II Quantities or levels
1.	1	All
2.	2.1	At least 100 L*
3.	2.2	At least 100 L*
4.	2.3	All
5.	2.4	All
6.	3	At least 200 L
7.	4	At least 25 kg

261 SOR/85-77, s. 9(1) [am. SOR/85-609, s. 80].
262 SOR/85-77, *Canada Gazette*, Part II, Vol. 119, p. 472.

8.	5.1	At least 50 kg or 50 L
9.	5.2	At least 1 kg or 1 L
10.	6.1	At least 5 kg or 5 L
11.	6.2	All
12.	7	Any discharge or a radiation level exceeding 10 mSv/h at the package surface and 200 µSv/h at 1 m from the package surface.
13.	8	At least 5 kg or 5 L
14.	9.1	At least 50 kg
15.	9.2	At least 1 kg
16.	9.3	At least 5 kg or 5 L

* container capacity

Persons required to give notice and to be notified re a dangerous occurrence. The duty of notification is on any person who has the charge, management or control of the dangerous goods at the time he discovers or is advised of the dangerous occurrence. That person must immediately notify or cause the following persons to be notified:

(*a*) the appropriate authority of the province in which the goods are located by calling the authority or the telephone number specified for that province in Column II of Table II to Part IX.[263]
(*b*) where a railway vehicle is involved, the Canadian Transport Commission;
(*c*) where a ship is involved,
(i) the nearest Canadian Coast Guard Ship Safety Office, and
(ii) the regulatory authority of the nearest port, harbour, wharf or place;
(*d*) where an airport is involved or the occurrence takes place at an airport, the Canadian Air Transportation Administration of the Department of Transport;
(*e*) his employer;
(*f*) where a road vehicle is involved, the owner, lessee or charterer of the road vehicle; and
(*g*) the owner or the consignor of the consignment of dangerous goods.[264]

263 *Ibid.*, p. 3012. In all provinces, the "local authority" is the local police; in Manitoba it is the local police or fire brigade, as appropriate; in the Yukon Territory and the Northwest Territories the authority is not named but a telephone number is given.

264 SOR/85-77, s. 9.13(1) [am. SOR/85-314, s. 1; SOR/85-609, s. 85].

TABLE II TO PART IX OF THE
TRANSPORTATION OF DANGEROUS GOODS REGULATIONS
RE DANGEROUS OCCURRENCES

Notification to Provinces

Item	Column I Province	Column II Emergency Authority or Telephone Number
1.	Alberta	Local police
2.	British Columbia	Local police or (604) 387-5956
3.	Manitoba	Local police or fire brigade, as appropriate, or (204) 944-4888
4.	New Brunswick	Local police or Zenith 49000*
5.	Newfoundland	Local police or (709) 772-2083
6.	Northwest Territories	(403) 873-7554
7.	Nova Scotia	Local police or Zenith 49000* or (902) 426-6030
8.	Ontario	Local police
9.	Prince Edward Island	Local police or Zenith 49000*
10.	Quebec	Local police
11.	Saskatchewan	Local police or 1-800-667-3503**
12.	Yukon Territory	(403) 667-7244

* This telephone number is not accessible from outside the provinces of New Brunswick, Nova Scotia or Prince Edward Island

** This telephone number is not accessible from outside Saskatchewan"

Aircraft-in-flight emergency reporting. Where an in-flight emergency occurs on board an aircraft that is transporting dangerous goods, the pilot-in-command shall, to the extent possible, notify an air traffic control unit or a flight service station that dangerous goods are on board indicating, in respect of the dangerous goods,
1. the product identification number;
2. the shipping name;

Environmental Protection Act. Pursuant to s.14 of the Environmental Protection Act, persons who deposit, add, emit or discharge a contaminant into the natural environment or who permit the same out of the normal course of events that

(*a*) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it;
(*b*) causes or is likely to cause injury or damage to property or to plant or animal life;
(*c*) causes or is likely to cause harm or material discomfort to any person;
(*d*) adversely affects or is likely to adversely affect the health of any person;
(*e*) impairs or is likely to impair the safety of any person; or
(*f*) renders or is likely to render any property or plant or animal life unfit for use by man,[295]

is under a duty to forthwith notify the Ministry.

The duty to notify the Ministry pursuant to s. 14 of the Environmental Protection Act does not, however, apply to animal wastes disposed of in accordance with normal farming practices.[296]

The duties to notify described above obviously overlap in certain factual situations. For example, if a pesticide is spilled into the environment in Ontario that might result in the contamination of water, the duties under the Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act all require the incident to be reported to the Ministry. As a matter of practice, one phone call to the local Ministry office or after-hours answering service would satisfy all three requirements.[297]

The Ministry of Environment intends to have in place in the near future a central province-wide telephone number to which all spills and other environmental incidents may be reported. This, in addition to enabling people who observe spills to be sure of obtaining an informed response at the other end of the line, 24 hours a day, will simplify spill reporting procedures for industry. When this system is in place and problems with it worked out, reporting requirements under the federal Transportation of Dangerous Goods Regulations may be made to coincide with this system.

Further, although it was contemplated that when Part IX of the EPA was brought into effect the duty to notify under that Part would replace duties to give such notice under other provincial environmental statutes

295 R.S.O. 1980, c. 141, s. 14(1).
296 *Ibid.*, s. 14(2).
297 Jackson, p. 3.

and these other provisions could be repealed, nevertheless, the Ministry is now of the view that these other provisions apply in some cases where Part IX does not apply and accordingly it is no longer proposed that these provisions be repealed. Rather, the Ministry has indicated that they will be made inapplicable, by regulation, where notice is given under Part IX.[298]

(iv) *Duties to Notify under Miscellaneous Provincial Statutes*

Energy Act.[299] This Act is administered by the Ministry of Consumer and Commercial Relations and regulates the use of any hydrocarbon, including fuel oil for use and distribution, gas and oil pipeline transmissions and propane gas storage.

Subject to the regulations, a hydrocarbon handler must notify forthwith a Ministry inspector where it appears that carbon monoxide poisoning, asphyxiation, explosion or fire has occurred because of the use or handling of a hydrocarbon. Failure to do so constitutes an offence.[300]

Gasoline Handling Act.[301] The Ministry of Consumer and Commercial Relations also administers the Gasoline Handling Act. The Act governs the wholesaling, transportation and retailing of gasoline and generally requires that responsible persons be licensed under the Act.[302]

In the event of a spill or other loss of gasoline during the filling, emptying or operation of a tank vehicle, the operator must immediately take corrective action and shall notify the nearest Ministry inspector forthwith or at least within 24 hours after the spill.[303]

10. DUTIES TO TAKE EMERGENCY AND REMEDIAL ACTIONS REGARDING DANGEROUS GOODS AND SPILLS

(a) Federal laws

(i) *Transportation of Dangerous Goods Act*

Every person required to make a report regarding a discharge, emission or escape of dangerous goods or an emission of ionizing radiation

298 *Ibid.*, p. 8.
299 R.S.O. 1980, c. 139.
300 *Ibid.*, ss. 9 and 27.
301 R.S.O. 1980, c. 185.
302 *Ibid.*, s. 6. See the definition of "gasoline" in s. 1(*g*).
303 R.R.O. 1980, Reg. 439, s. 5(67).

exceeding levels or quantities prescribed pursuant to the Atomic Energy Control Act (*i.e.* any person who at the time has the charge, management or control of the dangerous goods) has a duty, as soon as possible in the circumstances, to take all reasonable emergency measures consistent with public safety to repair or remedy any dangerous condition or reduce or mitigate any danger to life, health, property or the environment that results or may reasonably and probably be expected to result from their discharge, emission or escape.[304]

The Act and regulations give authority to an inspector to require various persons to take reasonable emergency measures in certain circumstances.[305] In the absence of such an order from an inspector there is no duty to undertake remedial action beyond that specified in the preceding paragraph.

Any person authorized to take reasonable emergency measures may enter and have access to any place or property and may do all reasonable things in order to comply with the provisions of the Act.[306]

(ii) *Fisheries Act*

Where, out of the normal course of events,

1. a deposit of a deleterious substance occurs in water frequented by fish, or
2. there is a serious and imminent danger of such deposit by reason of any condition and where any damage or danger to fish habitat or fish or the use by man of fish results or may reasonably be expected to result therefrom,

there is a duty on persons who own or control or who cause or contribute to the deposit or danger, as soon as possible in the circumstances, to take all reasonable measures consistent with safety and with the conservation of fish and fish habitat to prevent any such occurrence, or to counteract, mitigate or remedy any adverse effects that may result or may reasonably be expected to result therefrom.[307]

The penalty for failing to take any reasonable measures required to be taken or to take such measures in the required manner is a maximum fine of $25,000 for a first offence and a maximum fine of $50,000 for each subsequent offence.[308]

(b) Ontario Laws

(ii) *Dangerous Goods Transportation Act, 1981: Adoption of Federal Emergency and Remedial Measures re Highway Transportation*

The Dangerous Goods Transportation Act, 1981, requires any person transporting dangerous goods in a vehicle on an Ontario highway to comply, *inter alia*, with safety requirements prescribed under the federal Transportation of Dangerous Goods Regulations.[309] Accordingly, to the extent that the federal regulations require the taking of emergency and remedial measures, these are also duties for highway transporters in Ontario.

(ii) *The "Spills Bill"—Part IX Environmental Protection Act*

Introduction. Although the federal Transportation of Dangerous Goods Act imposes a duty, in some circumstances, to take emergency measures to remedy a dangerous condition or to reduce or mitigate resulting dangers, the "Spills Bill"—now Part IX of the Ontario Environmental Protection Act—imposes a much broader and complete duty to clean up spills and to restore the natural environment. A duty to clean up is placed jointly on the owner of the pollutant and the person having control of the pollutant immediately before it was first spilled. The duties to restore the natural environment and ameliorate adverse effects have been said to be the key to Part IX. While these duties have been said to appear absolute and onerous, it has also been suggested that a key word, "practicable", modifies what are undoubtedly heavy duties.[310]

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304 S.C. 1980, c. 36, s. 17(2). The regulations pertaining to the reporting of dangerous occurrences under this Act do not require a report to be made in respect of all amounts of dangerous goods or all categories of dangerous goods. To the extent that the regulations limit the duty to report, the duty to take reasonable emergency measures pursuant to s. 17(2) of the Act is also limited.

305 These are discussed in Chapter 4 dealing with the powers of government officials to order and take remedial measures.

306 S.C. 1980, c. 36, s. 17(4).

307 R.S.C. 1970, c. F-14, s. 33.2(5) [en. c. 17 (1st Supp.), s. 3(2); am. 1976–77, c. 35, s. 9].

308 *Ibid.*, s. 33.4(1)(*i*) [en. c. 17 (1st Supp.), s. 3(2); am. 1976–77, c. 35, s. 10]. Section 33(6), (7) and (9) applies in respect of this offence: s. 33.4(2).

309 S.O. 1981, c. 69, s. 3 and O. Reg. 363/85, s. 2.

310 Jackson (Chapter 1, note 16), p. 6.

Duty to prevent and ameliorate adverse effects and to restore the natural environment. There is a duty on the owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause adverse effects to forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effects and to restore the natural environment.[311]

"Restore the natural environment", when used with reference to a spill of a pollutant, means restore all forms of life, physical conditions, the natural environment and things existing immediately before the spill of the pollutant that are affected or that may reasonably be expected to be affected by the pollutant, and "restoration of the natural environment", when used with reference to a spill of a pollutant, has a corresponding meaning.[312]

There is an exception for the disposal of animal wastes in accordance with normal farming practices.[313]

This duty takes effect in respect of each of the owner of the pollutant and the person having control of the pollutant immediately the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause adverse effects.[314]

Definition of "practicable". For the purposes of these provisions, "practicable" is defined as meaning capable of being effected or accomplished.[315] Further, in determining what is practicable for the purposes of these provisions, regard must be had to the technical, physical and financial resources that are or can reasonably be made available.[316] This last mentioned provision has been described as importing a "reasonable standard." [317]

Definition of "restore the natural environment". The term "restore the natural environment" used in connection with the duty being described means to restore all forms of life, physical conditions, the natural environment and things existing immediately before the spill of the pollutant that are affected or that may reasonably be expected to be affected by the pollutant and "restoration of the natural environment", when used with reference to the spill of a pollutant, has a corresponding meaning.[318]

311 R.S.O. 1980, c. 141, s. 81(1).
312 *Ibid.*, s. 79(1)(*i*).
313 *Ibid.*, s. 79(4).
314 *Ibid.*, s. 81(2).
315 *Ibid.*, s. 71(1)(*g*).
316 *Ibid.*, s. 79(3).
317 Jackson, p. 6. To what extent will insurance or some collateral funding available to a person under a duty to restore the natural environment be taken into account in the phrase "financial resources that are or can reasonably be made available"? Is a person who regularly involves himself with the manufacture, handling or transport of dangerous goods obligated to make all possible efforts to obtain the greatest amount of insurance available so as to be in a position to take such actions in the event of a spill?

Duties to act—Minister's orders. There are detailed provisions in the Act whereby the Minister may order the owner of a pollutant, or the person having control of the pollutant, or persons owning or having charge, management or control of real or personal property that is affected or that may reasonably be expected to be affected by the pollutant as well as municipalities and public authorities and any other person whose assistance is necessary or who may be adversely affected to do everything practicable or to take such actions as may be specified in respect of the prevention, elimination and amelioration of the adverse effects and the restoration of the natural environment. These and other Ministry powers to issue orders as well as the authority of the Ministry of the Environment itself to engage in clean-up activities, are discussed in Chapter 4.

Powers to enter and remove pollutants. For the purpose of carrying out a duty imposed, or order or direction made or given under Part IX of the Environmental Protection Act, any person subject to this duty or to whom the order or direction is made or given and his employees and agents, may enter and have access through or over various types of buildings, structures, vehicles, machinery, materials and equipment and have the authority to remove therefrom the pollutant or any matter, thing, plant or animal, or any part of the natural environment that is affected or that may reasonably be expected to be affected by the pollutant. Such rights may be enforced by application without notice to a judge of the Supreme Court of Ontario, or a local judge of the High Court, by a person, employee or agent who has a duty to act.[319]

Obligations re disposal of pollutants. Any person carrying out a duty imposed under Part IX shall only dispose of or use any pollutant, or any matter, thing, plant or animal or any part of the natural environment that is affected or that may reasonably be expected to be affected by the pollutant in accordance with an order of or direction by the Minister or his officials; such directions or orders may be amended.[320]

Immunity from conviction. A person who in good faith and in a reasonable manner, in carrying out or attempting to carry out a duty imposed

318 R.S.O. 1980, c. 141, s. 79(1)(*i*).
319 *Ibid.*, s. 83.
320 *Ibid.*, s. 84.

The Minister may exercise that authority by sending a written notice by registered mail requesting disclosure. Every person who receives such a notice is under a duty to disclose to the Minister, within the time and in the manner specified in the notice, any information that is requested and in the possession of that person.[1]

Certain information provided to the Minister pursuant to his power to require disclosure, information of a similar nature obtained by an inspector (pursuant to his powers to take samples, examine and make copies of books, records and other information[2]) and similar information obtained pursuant to an Inquiry[3] under this Act is given a qualified privilege.

Generally, such information is privileged and, notwithstanding any other Act or law, no person shall be required, in connection with any legal proceedings other than legal proceedings relating to the administration or enforcement of this Act, to produce any statement or other writing containing any such information or to give evidence relating to such information.[4]

However, the privilege does not apply to such information,

(*a*) to the extent that it relates only to the dangerous properties of any product, substance or organism without revealing the formula, composition or chemical ingredients thereof; or
(*b*) to the extent that it is required to be disclosed or communicated for the purposes of an emergency involving the health or safety of any person or the public.[5]

It is an offence for any person to whom any privileged information has been provided to knowingly, without the consent in writing of the person by whom the information was provided, communicate or allow to be communicated to any person or allow any other person to inspect or have access to any such information except for the purposes of the administration or enforcement of the Act.[6]

Where information is provided under any other federal legislation regarding the formula, composition or chemical ingredients of any product, substance or organism, such information may, notwithstanding anything in that other Act, be disclosed to the Minister of Transport or person designated by him for the purposes of the administration or enforcement of the federal Transportation of Dangerous Goods Act, with the consent in writing of the person by whom the information was provided.[7]

1 Transportation of Dangerous Goods Act, S.C. 1980, c. 36, s. 23(1), (2).
2 See heading **5(a)**(ii) following.
3 See heading **5(a)**(iv) following.
4 S.C. 1980, c. 36, s. 23(3).
5 *Ibid.*, s. 23(4).
6 *Ibid.*, s. 23(5).

One of the major federal Acts under which disclosure of such information can be ordered is the Environmental Contaminants Act.[8]

(b) Ontario Laws

There are no comparable specific provisions in either the Dangerous Goods Transportation Act, 1981 or the "Spills Bill" that specifically give an Ontario Ministry the right to require disclosure of information about the ingredients of dangerous goods or wastes. One pre-existing section of the Environmental Protection Act establishes a duty on "every person responsible for a source of contaminant" to furnish such information as a provincial officer requires for the purposes of the Act and regulations.[9]

Another section authorizes a Ministry Director, where illegal emission of a contaminant has occurred, to order the person responsible to report as to fuels, materials and methods of production used and intended to be used, and the wastes that will or are likely to be generated.[10]

3. FINANCIAL RESPONSIBILITY—GOVERNMENTAL POWERS TO COMPEL INSURANCE OR BONDS

(a) Federal Law—Transportation of Dangerous Goods Act

The federal Minister of Transport may require any person who engages or proposes to engage in handling, offering for transport or transporting dangerous goods or any class thereof to provide evidence of financial responsibility in the form of insurance or an indemnity bond satisfactory to the Minister or in any other form satisfactory to him.[11]

(b) Ontario Legislation—Environmental Protection Act

The Environmental Protection Act contemplates that an applicant for a Certificate of Approval for a waste disposal site or waste management system may be required to deposit a sum of money, furnish a surety

7 *Ibid.*, s. 23(6).
8 S.C. 1974–75, c. 72.
9 Environmental Protection Act, R.S.O. 1980, c. 141, s. 127(3).
10 *Ibid.*, s. 113(*h*).
11 S.C. 1980, c. 36, s. 19(1).

bond or furnish personal sureties to assure satisfactory maintenance of the waste management system or the waste disposal site or the removal of waste from a site if a Director of a Ministry considers such removal necessary. The payment of such money or the furnishing of such security would be a condition precedent to the issuance of a Certificate of Approval to an applicant other than a municipality if regulations were made setting out the amount and the conditions for such security. Until and unless such regulations are made, however, this specific governmental authority remains unexercised.[12]

4. POWERS TO PROHIBIT AND REGULATE THE HANDLING, USE AND TRANSPORTATION OF DANGEROUS GOODS AND WASTES

(a) Federal Law—Transportation of Dangerous Goods Act

(i) *"Protective Directions"—Prohibitions and Restrictions by Ministerial Order*

Powers to issue protective directions. Where the Minister of Transport or person designated by the Minister considers it necessary for the protection of public safety, property or the environment, in any case not provided for by the Act or the regulations, he may, subject to any regulations requiring the notification of persons directed to do anything and appeals in respect thereto, direct any person engaged in handling, offering for transport or transporting dangerous goods to cease any such activity or to carry it on in the manner directed.[13]

Notification requirements with respect to protective directions. Part X of the federal Transportation of Dangerous Goods Regulations requires that the Minister or a person designated by him shall notify any person directed to do anything pursuant to a direction and that where such a person is notified other than in writing, such a direction shall be confirmed in writing within seven days. Unless otherwise specified, a direction

12 R.S.O. c. 141, s. 34. Nevertheless, in many Certificates of Approval, at least in regard to waste disposal sites, terms and conditions have been imposed by the Director requiring the establishment of a security or bonding fund based on his authority to impose terms and conditions where he considers, upon probable grounds, that the use, establishment, operation, alteration, enlargement or extension of a waste management system or a waste disposal site may create a nuisance, is not in the public interest or may result in a hazard to the health or safety of any person: s. 38(2).

13 S.C. 1980, c. 36, s. 28.

takes effect immediately upon notification and a direction is valid for such period as is mentioned therein.[14]

Appeal and review respecting protective directions. Within 30 days after being notified of a direction, a person may apply to the Minister or the designated person, as the case may be, for a review of the direction or may make an appeal to the Minister from a direction issued by a designated person.[15]

An application for review or appeal shall be commenced by serving the Minister or the designated person in writing with a notice of appeal or an application for review which contains the information specified in the regulations, including the matter appealed against or submitted for review, the grounds for appeal or for the application and any material in support thereof and the relief sought.[16]

An applicant for review is required to send to the Director General a copy of his application for review on the same day that he serves his application for review on the Minister or the designated person. An appellant shall send to the designated person and to the Director General a copy of the notice of appeal on the same day that he serves the notice of appeal on the Minister.[17]

Within 15 days after service of a notice of appeal or of an application for review, an appellant or applicant must submit to the Minister, or if applicable, to the designated person, complete documentary evidence supported by a declaration that sets out the reasons for which and the grounds on which the appeal or application for review is founded and the relief sought. A copy of the documentary evidence and the declaration shall also be sent to the Director General on the same day that the documentary evidence and the declaration are submitted to the Minister or the designated person.[18]

The Minister, after considering the documentary evidence submitted to him with respect to an appeal or an application for review, may rescind, alter or vary any direction made by him or by a designated person that is the subject of the appeal or review.[19]

A designated person may, after considering the documentary evidence, rescind, alter or vary any direction made by him that is the subject of the review.[20]

14 SOR/85-77, ss. 10.1–10.4.
15 *Ibid.*, ss. 10.5–10.7.
16 *Ibid.*, s. 10.6(1).
17 *Ibid.*, s. 10.6(2), (3).
18 *Ibid.*, s. 10.7.
19 *Ibid.*, s. 10.8.
20 *Ibid.*, s. 10.9.

The Minister or the designated person shall communicate, in writing, his decision respecting an appeal or an application for review together with his reasons therefor.[21]

Protective direction regarding PCBs. The first protective direction was issued by the Minister April 22, 1985 with regard to the road or railway vehicle transportation of polycholorinated biphenyls (PCBs). The direction is to any person engaged in offering for transport or transporting PCBs and directs any such person to refrain from offering PCBs for transport by road or railway vehicle and from transporting PCBs on such vehicles unless the PCBs or any article containing the PCBs is enclosed in a rigid, leak-proof container, and requiring any large article containing PCBs that cannot be so enclosed to be drained and provided with a weather protected, leak-proof device to prevent the release of any residual PCBs from that large article. Further, such persons shall not transport a leak-proof container or a large article containing PCBs unless that container or article is secured in or on the road or railway vehicle. The direction is for a duration of one year.[22]

Application of protective directions to vehicles on Ontario highways. Regulations under the Ontario Dangerous Goods Transportation Act, 1981, make it an offence for any person to transport dangerous goods in or on a vehicle on a highway where a direction has been given under the federal Transportation of Dangerous Goods Regulations in respect of that transportation except in accordance with the direction.[23]

(ii) *Prohibitions and Restrictions by Regulation*

The federal cabinet is given the power to make regulations prescribing products, substances and organisms to be included in the classes listed in the schedule to the Act; prescribing circumstances in which the handling, offering for transport or transporting of dangerous goods is prohibited; and specifying dangerous goods that shall not be handled, offered for transport or transported in any circumstances.[24]

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21 *Ibid.*, s. 10.10.

22 Protective Direction No. 1. On October 12, 1985, proposed amendments to the regulations were published in the *Canada Gazette*, Part I, which would basically add the prohibitions contained in Protective Direction No. 1 to the regulations by amending ss. 7.10 and 8.6, but which would also provide some further exceptions for PCB mixtures by amending s. 2.19. See Dangerous Goods Special Bulletin, October, 1985, TP2711E.

23 O. Reg. 363/85, s. 5.

24 S.C. 1980, c.36, s. 21.

Any proposed regulation must be published in the Canada Gazette and a reasonable opportunity afforded to interested persons to make representations to the Minister with respect thereto. However, no proposed regulation need be published more than once, even if it is altered or amended after such publication as a result of representations made by interested persons.[25]

(b) Ontario Legislation

(i) *Environmental Protection Act*

There is no direct authority in the Ontario Environmental Protection Act authorizing a ban on production or manufacture of materials or goods merely because they are dangerous. However, there is broad regulatory scope to prohibit the discharge of any type or level of contaminant into the natural environment, and to the extent that production or manufacture cannot take place without the addition or emission of contaminants into the natural environment, the Act may be used to indirectly effect such a ban. However, that is not the obvious intent of the Environmental Protection Act.[26]

(ii) *Dangerous Goods Transportation Act, 1981*

Under this Act, the provincial cabinet may, by regulation, prohibit the transporting of such dangerous goods as are prescribed by regulations, or prohibit the transporting of dangerous goods under such circumstances as are prescribed by regulations.[27] The wording of this power would not limit any prohibition to transporting of dangerous goods in a vehicle on an Ontario highway but could extend to any means of transportation within the jurisdiction of the government of Ontario.[28] However, at the present time, the only regulations made under the Ontario legislation prohibit that which is prohibited under the federal Transportation of Dangerous Goods Regulations.[29]

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25 *Ibid.*, s. 22.

26 See R.S.O. 1980, c. 141, ss. 5–8, 38(2), 39, 40, and the regulation-making power under s. 136.

27 S.O. 1981, c. 69, s. 11(1) (*n*), (*m*).

28 Subject, however, to constitutional law principles that may make invalid provincial regulatory schemes that merely duplicate federal schemes.

29 See O. Reg. 363/85.

whichever occurs first, unless before that time proceedings are instituted in respect of an offence under the Act or the regulations in relation to the property seized, in which case it may be detained until the proceedings are finally concluded unless the prosecutor agrees otherwise.[43]

(iii) *Recovery of Costs and Expenses by the Federal Government*

Her Majesty in right of Canada may recover costs and expenses related to the exercise of certain of its discretionary powers under the Act, particularly by an inspector dealing with goods originating outside Canada where there is a failure to comply with the Act, the taking of appropriate action where dangerous goods appear to have been abandoned or to have deteriorated and the taking of immediate action to carry out reasonable emergency measures. The circumstances under which such cost recovery can be made and provisions to assist recovery of compensation are discussed in Chapter 6.

(iv) *Inquiries*

The Minister of Transport has the authority to direct a public inquiry where a discharge, emission or escape of dangerous goods or ionizing radiation described in s. 15(1)(*a*) of the Act in the course of their handling or transporting has resulted in death or injury to any person, danger to the health or safety of the public or damage or danger to property. The public inquiry shall be made in the manner directed by the Minister, who may authorize any person or persons he deems qualified to conduct the inquiry. Following the inquiry a report must be submitted to the Minister with recommendations and all evidence and other material that was before the inquiry and such a report shall be published by the Minister within thirty days after he has received it.[44] The Minister, however, may not direct an inquiry in regard to the contributing factors and causes of any discharge, emission or escape that constitutes an aviation occurrence that is being or has been investigated under the Canadian Aviation Safety Board Act.[45]

6. PROVINCIAL AND MUNICIPAL GOVERNMENT POWERS

In Chapter 3, the duties cast upon persons involved in the transpor-

43 *Ibid.*, s. 15(3).
44 *Ibid.*, s. 20.
45 *Ibid.*, s. 20(2).

tation of dangerous goods to take emergency remedial action and restoration measures are set out. This section will discuss the scope of provincial governmental powers to order clean-ups and remedial action and the authority of provincial and municipal governments to take such actions themselves.

(i) *Environmental Protection Act*[46] (Spills Bill changes)

Definitions of terms; exemptions re animal wastes. The following terms all have specific meanings pursuant to the Environmental Protection Act: "owner of a pollutant", "person having control of a pollutant", "spill", "adverse effects", "practicable", "pollutant", "natural environment", "restore the natural environment". None of the provisions discussed below apply to the disposal of animal wastes in accordance with normal farming practices.[47]

Duty on an owner or person having control of a pollutant to take remedial action. Regardless of whether any order or direction discussed below has been or is made, there is a duty on the owner of a pollutant and the person having control of a pollutant that has spilled and that causes or is likely to cause adverse effects to forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effects and to restore the natural environment.[48]

Ministerial directions to Ministry employees and agents to effect remedial action.—Powers of Minister to issue directions. Where a pollutant is spilled and the Minister of the Environment is of the opinion that there are or are likely to be adverse effects as a result of the spill, the Minister may, in the circumstances set out below, give direction to his employees and agents to do everything practicable or to take such action as may be specified in the direction in respect of the prevention, elimination and amelioration of the adverse effects and the restoration of the natural environment. Any such directions may be amended or revoked by further direction. The Minister need not hold or afford to any person an opportunity for a hearing before giving directions under this provision.[49]

46 For the purposes of the EPA duties and powers discussed in this section, a reference to an owner of a pollutant includes a successor, assignee, executor or administrator of the owner of the pollutant or the person having control of the pollutant: R.S.O. 1980, c. 141, s. 79(5).
47 R.S.O. 1980, c. 141, s. 79(4). And see Chapter 3, heading **9(c)(ii)B** for definitions of the above terms.
48 *Ibid.*, s. 81. See Chapter 3, heading **10(b)**(ii), for an elaboration on this duty, which takes effect immediately the owner or a person knows or ought to know that the pollutant is spilled and is causing or is likely to cause adverse effects: s. 81(2).
49 *Ibid.*, s. 82(1), (3), (4) and (6).

5. GOVERNMENTAL POWERS TO INSPECT AND TO TAKE AND REQUIRE THE TAKING OF EMERGENCY, PREVENTATIVE AND REMEDIAL MEASURES.

(a) Federal Law—Transportation of Dangerous Goods Act

(i) *Introduction*

The duty on persons who are involved in the transportation of dangerous goods to take reasonable emergency measures and to mitigate dangers to life, health, property or the environment in respect of the discharge, emission or escape of dangerous goods has been described in Chapter 3 under heading 10.[30] Similarly, the duty to notify relevant governmental authorities in respect of dangerous occurrences has been described in Chapter 3 under heading 9.[31] What is described in the following pages are the discretionary powers given to federal authorities with respect to potential violation of the Act and regulations and the potential duties and liabilities that may be incurred by persons in respect of such powers.

(ii) *Inspectors and Their Powers*

Appointment and certification. The Minister of Transport has the power, in accordance with the regulations, to designate any person whom he deems qualified to be an inspector for the purposes of the Act or any provision thereof.[32] The Act contemplates that an inspector will receive a certificate of designation showing the purposes, classes of dangerous goods, means of transport and the buildings or places for which he has been designated. An inspector must, on entering or inspecting any building, place, container, packaging or means of transport, if so required, produce the certificate to the person in charge thereof.[33]

Any person may apply for a certificate of designation as an inspector. However, no certificate can issue unless the applicant has a combination of education and related experience sufficient to enable him to carry out his duties in the field or fields related to the area of inspection to which a certificate relates.[34]

30 See Transportation of Dangerous Goods Act, S.C. 1980, c. 36, s. 17.
31 See SOR/85-77, s. 9.13(1) [am. SOR/85-314, s. 1(1); SOR/85-609, s. 85].
32 S.C. 1980, c. 36, s. 13(1).
33 *Ibid.*, s. 13(2).
34 SOR/85-77, ss. 13.2, 13.3.

Inspectors' powers to enter buildings and places and request the opening and inspection of containers, packaging or means of transport. For the purposes of ensuring compliance with the Act and regulations, an inspector may, at any time, enter and inspect any building or place for which he is designated where he believes on reasonable and probable grounds that dangerous goods are being handled, offered for transport or transported, and request the opening and inspection of or open and inspect any container, packaging or means of transport for which he is designated whereby he believes on reasonable and probable grounds that dangerous goods are being handled, offered for transport or transported.[35]

Inspectors' powers to take samples for analysis, examine and make copies and extracts of records. On inspecting any building, place, container, packaging or means of transport pursuant to his powers to enter and inspect, an inspector may,

> (*a*) for the purposes of analysis, take samples of anything found therein that he believes on reasonable and probable grounds to be dangerous goods; and
>
> (*b*) . . . examine and make copies and extracts of any books, records, shipping documents or other documents or papers that he believes on reasonable and probable grounds contain any information relevant to the administration or enforcement of the Act and the regulations.[36]

Inspectors' remedial powers regarding non-compliance with safety measures: refusing entry and turning back of shipments. Where an inspector is satisfied on reasonable and probable grounds that any dangerous goods are being handled, offered for transport or transported otherwise than in compliance with the applicable prescribed safety marks, safety requirements, safety standards and shipping documents, he shall, wherever possible, request the taking of or take any measures necessary to remedy the failure to comply; and, where the transportation of dangerous goods originating from any place or places outside Canada is involved and such remedial measures are not, in his opinion, possible or desirable, he may refuse entry into Canada of the goods and any containers, packaging or means of transport therefor or take measures to turn them back to the place or places of origin.[37]

The duties to assist and not to mislead or hinder inspectors. There is a duty on the owner or person who has the charge, management or control of any building, place, container, packaging or means of transport inspected

35 S.C. 1980, c. 36, s. 14(1).
36 *Ibid.*, s. 14(2).
37 *Ibid.*, s. 14(3).

Duty to assist and not mislead inspectors. The owner or person who has the charge, management or control of any container, packaging or vehicle inspected by an inspector shall give the inspector all reasonable assistance in his power to enable the inspector to carry out his duties and functions under the Act.[85] Further, no person shall, while an inspector is exercising his powers or carrying out his duties and functions under the Act,

(*a*) fail to comply with any reasonable request of the inspector;

(*b*) knowingly make any false or misleading statement either verbally or in writing to the inspector;

(*c*) except with the authority of the inspector, remove, alter or interfere in any way with anything removed by the inspector; or

(*d*) otherwise obstruct or hinder the inspector.[86]

85 *Ibid.*, s. 10(3).
86 *Ibid.*, s. 10(4).

5

Enforcement of Statutory Duties and Powers: Penalties, Defences and Evidentiary Issues

1. ENFORCEMENT OF GENERAL DUTIES AND OFFENCES UNDER THE FEDERAL TRANSPORTATION OF DANGEROUS GOODS ACT

(a) Priority of the Act

In the event of any inconsistency between the regulations made pursuant to this Act and any orders, rules or regulations made pursuant to any other Act of Parliament, the regulations made pursuant to this Act prevail to the extent of the inconsistency.[1]

(b) Duties

Utilizing prescribed safety requirements, safety standards and safety marks. Any person handling, offering for transport or transporting any dangerous goods has the duty to ensure:

1 Transportation of Dangerous Goods Act, S.C. 1980, c. 36, s. 31.

—*Circumstances in which the Minister may give directions to Ministry employees for remedial action.* The Minister may give directions for his employees or agents to take remedial action where he is of the opinion that it is in the best interest of the public to do so and,

1. he is of the opinion that neither the person having control of the pollutant nor the owner of the pollutant will carry out promptly the duty imposed upon them to take appropriate remedial action; or
2. he is of the opinion that the person having control of the pollutant or the owner of the pollutant cannot be readily identified or located and that as a result the duty imposed on such persons will not be carried out promptly; or
3. the person having control of the pollutant or the owner of the pollutant requests the assistance of the Minister in order to carry out the duty imposed upon them to take remedial action.[50]

—*Directions take precedence over provincial Acts, regulations, orders, permits, approvals and municipal by-laws.* No Act, regulation, by-law, order, permit, approval or licence bars the employees and agents of the Ministry from acting in accordance with directions given by the Minister under these provisions.[51]

Ministerial orders requiring any person or municipality to take action or give assistance with regard to a spill.—Power to issue Ministerial orders. Where a pollutant is spilled and the Minister of the Environment is of the opinion that there are or are likely to be adverse effects and that it is in the best interest of the public for an order to be made by him requiring the doing of everything practicable or the taking of such action as may be specified in the order in respect of the prevention, elimination and amelioration of the adverse effects and the restoration of the natural environment within such period or periods of time as may be specified, then he may do so by order directed to one or more of the following persons:

1. The owner of the pollutant.
2. The person having control of the pollutant.
3. The owner or the person having the charge, management or control of any real property or personal property that is affected or that may reasonably be expected to be affected by the pollutant.

50 *Ibid.*, s. 82(2).
51 *Ibid.*, s. 82(5).

4. The municipality or regional municipality, or both of them, within whose boundaries the spill occurred.
5. Any municipality or regional municipality contiguous to the municipality or regional municipality within whose boundaries the spill occurred.
6. Any municipality or regional municipality that is affected or that may reasonably be expected to be affected by the spill of the pollutant.
7. Any public authority.
8. Any person who is or may be adversely affected by the pollutant or whose assistance is necessary, in the opinion of the Minister, to prevent, eliminate or ameliorate the adverse effects or to restore the natural environment.[52]

—*Contents of a Ministerial order.* In an order made under these provisions the Minister may require the doing of everything practicable or the taking of such action as may be specified in the order in respect of the prevention, elimination and amelioration of the adverse effects and the restoration of the natural environment within such period or periods of time as may be specified in the order. He may also require the doing of everything practicable or the taking of such action as may be specified in the order in respect of the use or disposal of,

(*a*) the pollutant; or

(*b*) any matter, thing, plant or animal or any part of the natural environment affected or that may reasonably be expected to be affected by the pollutant

within such period or periods of time as may be specified in the order.[53]

—*Procedure and priority with regard to Ministerial orders.* Any order made by the Minister may be amended or revoked by a further order. A ministerial order is effective notwithstanding any Act, regulation, by-law, permit, approval or licence. The Minister need not hold or afford to any person an opportunity for a hearing before making an order.[54]

—*Notice and service of Ministerial orders.* A ministerial order is not effective unless it is set out in writing or is set out in a written notice of order. However, the Minister may direct, orally or in writing, a representative of the Ministry to give a written notice setting out an order of the Minister made orally or in writing and an order of the Minister set out in a notice is for all purposes an order of the Minister.[55]

52 *Ibid.*, s. 85(1).
53 *Ibid.*, s. 85(2), (3).
54 *Ibid.*, s 85(4), (5), (6).
55 *Ibid.*, s 85(7), (8), (10).

(a) all applicable prescribed safety requirements are complied with ["prescribed" means prescribed by regulations under this Act]; and
(b) all containers, packaging and means of transport comply with all applicable prescribed safety standards and display all applicable prescribed safety marks.[2]

Duty to not mark containers, packaging or means of transport unless prescribed safety standards are complied with. There is a duty on every person to refrain from placing any prescribed safety mark on any container, packaging or means of transport used or intended for use in handling or transporting dangerous goods unless the container, packaging or means of transport complies with all applicable prescribed safety standards.[3]

Duty to refrain from selling, delivering or distributing containers, packaging or means of transport except where in compliance with applicable safety standards. There is a duty on every person to refrain from selling, offering for sale, delivering or distributing any container, packaging or means of transport used or intended for use in handling or transporting dangerous goods, on which any prescribed safety mark is displayed, unless the container, packaging or means of transport complies with all applicable prescribed safety standards.[4]

(c) Penalties

Penalties for breach of general duties or failing to obey a protective direction. Any person who contravenes or fails to comply with the duties described in the preceding paragraphs or with a Protective Direction under s. 28 of the Act, of which he has been notified in accordance with the regulations, is guilty of an offence and is liable:

(a) on summary conviction to, a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence; or
(b) on conviction on indictment, to imprisonment for a term not exceeding two years.[5]

Penalties for breach of other provisions of the Act and regulations. The penalty for contravening provisions of the Act and regulations, other than ss. 4, 5 and 28, is a fine not exceeding $10,000 on summary conviction; or on conviction by indictment, to imprisonment for a term not exceeding one year.[6]

2 *Ibid.*, s. 4.
3 *Ibid.*, s. 5(*a*).
4 *Ibid.*, s. 5(*b*).
5 *Ibid.*, s. 6(1).
6 *Ibid.*, s. 6(2).

Forfeiture of seized property upon conviction. Where a person has been convicted of an offence under the Act, any property seized by an inspector by means of or in relation to which the offence was committed may, in addition to any punishment imposed on conviction, be forfeited to Her Majesty in right of Canada by order of the convicting court (whether or not it has been returned after an initial detention) and on the making of such order the property shall be forfeited and may be disposed of as the Minister of Transport directs.[7]

(d) Prosecution

Limitation period for instituting prosecutions. There is a two-year limit on commencing a prosecution by way of summary conviction under the Act from the day the offence was committed. There is no time limit on offences that are prosecuted by indictment.[8]

"Ticket Offences" and service of summons by inspectors. The Cabinet may by regulation designate any offence under the Act as a "ticket offence", in which instance an inspector may both initiate the charge and issue and serve a summons to an accused by completing a ticket and delivering it to the person alleged to have committed the offence. However, no such procedure can be used until regulations have been made setting out the procedure and for allowing the entering of a guilty plea and paying a prescribed fine in regard to such a plea. The maximum fine that may be levied in regard to offences initiated through a "ticket" is $1,000.[9]

Place of trial. A complaint or information in respect of an offence under the Act may be heard, tried or determined by any competent court of criminal jurisdiction in and for a province if the accused is resident or carrying on business in the territorial jurisdiction of that court, although the matter of the complaint or information did not arise in that territorial jurisdiction.[10]

Offence by employees or agents. In any prosecution for an offence under this Act, it is sufficient proof of the offence to prove that it was committed by an employee or agent of the accused, whether the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge

7 *Ibid.*, s. 15(5).
8 *Ibid.*, s. 6(3).
9 *Ibid.*, s. 7.
10 *Ibid.*, s. 9.

or consent and that he took all reasonable measures to prevent its commission.[11]

Liability of officers, directors or agents of a corporation. Any officer, director or agent of a corporation who directed, authorized, consented to, acquiesced in or participated in the commission of an offence is a party to and guilty of the offence and is liable upon conviction to the punishment provided for the offence, whether the corporation has been prosecuted or convicted.[12]

Evidence provided by a certificate or report from an inspector or analyst. A certificate or report appearing to have been signed by an inspector or analyst stating that he has made an inspection or analyzed or examined the product, substance or organism and stating the results of the inspection, analysis or examination is, with certain exceptions and under certain conditions, admissible in evidence in any prosecution for an offence under the Act without proof of the signature or official character of the person appearing to have signed the certificate or report and, in the absence of any evidence to the contrary, is proof of the statements contained in the certificate or report.[13]

(e) The Defence of "All Reasonable Measures"

No person is guilty of an offence under the Act (or the regulations) if he establishes that he took all reasonable measures to comply with the Act and the regulations.[14]

2. ENFORCEMENT OF GENERAL DUTIES AND POWERS UNDER ONTARIO LAW

(a) Environmental Protection Act

11 *Ibid.*, s. 10.

12 *Ibid.*, s. 11.

13 *Ibid.*, s. 12(1)–(4).

14 *Ibid.*, s. 8. This statutory provision indicates that Parliament has determined that a defence seemingly similar to that defence of "all reasonable care" for public welfare offences first enunciated by the Supreme Court of Canada in the case of *R. v. The City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 21 N.R. 295, 7 C.E.L.R. 53, 85 D.L.R. (3d) 161 is available and that none of the offences created by the Act will be considered offences of "absolute liability" but rather offences of "strict liability". For discussion of how Canadian courts have interpreted the term "all reasonable care" with respect to defending environmental offences, see Estrin, *Environmental Law* (Toronto: The Carswell Co. Ltd., 1984), paras. 118 to 132.

(i) *Penalties*

Penalties for spills. Part IX of the Environmental Protection Act does not make spilling of a pollutant an offence and no penalty provisions apply, under Part IX, to the spill itself. However, such a spill may well be an offence under other provisions of the Environmental Protection Act as well as an offence under other provincial and federal statutes.[15]

Penalties for failure to carry out a duty, order or direction under Part IX. The failure to carry out a duty imposed by Part IX arising out of a spill as well as the failure to carry out a ministerial order or direction or a Director's direction under Part IX is an offence to which the Environmental Protection Act general penalty provision applies. That general penalty provision provides that every person, whether as principal or agent, or an employee of either of them, who contravenes any provision of the Act or the regulations or fails to comply with an order or any term or condition of a Certificate of Approval or a licence made or issued under the Act is guilty of an offence and on convicton is liable on a first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000 for every day or part thereof upon which such offence occurs or continues.[16]

Penalty for offences created by the Environmental Protection Act, Part V, and Waste Management Regulations. Subject to the following paragraph, the maximum fine for an offence contrary to Part V of the Act (Waste Management), including failure to comply with a waste management or waste disposal site Certificate of Approval or the Waste Management Regulations, is $2,000 for every day or part thereof upon which such offence occurs or continues.[17]

Increased fines where hauled liquid waste or hazardous waste involved. With the exception of offences created by Part IX, where a person is convicted of an offence under the Environmental Protection Act or its regulations in respect of hauled liquid industrial waste or hazardous waste as designated in regulations made pursuant to Part V and the action or failure to act for which the person is convicted results or may result in certain specified impacts to the natural environment or to persons, prop-

15 See Estrin, *Environmental Law*, for an elaboration of all provincial and federal statutes applicable to pollution offences in Ontario as well as the penalties and sentencing considerations arising thereunder.

16 R.S.O. 1980, c. 141, s. 146(1). However, a person to whom an order of the Minister or the Director is directed who complies fully therewith shall not be prosecuted for or convicted of an offence, in respect of the matter dealt with in the order, that occurs during the period within which the order is applicable: s. 146(2).

17 R.S.O. 1980, c. 141, s. 147.

3. THE ONTARIO DANGEROUS GOODS TRANSPORTATION ACT, 1981[12]

As a result of negotiations leading up to an expected agreement for the implementation of the federal Act within Ontario, the province passed the Dangerous Goods Transportation Act, 1981. It was brought into force on July 1, 1985, the same date as the federal Act and regulation took full effect.[13] The provincial Act is focussed on regulating the transportation of dangerous goods while they are on Ontario highways. Basically, it authorizes regulations which prescribe that the requirements of the federal Transportation of Dangerous Goods Regulations must be followed in regard to the transportation of dangerous goods in a vehicle on Ontario highways. The regulations that have been made under the Ontario Act[14] provide that the basic safety requirements, safety standards and safety marks set out in the federal regulations must be complied with and make it illegal for any person to transport dangerous goods on a highway under circumstances where such transportation is prohibited under most provisions of the federal regulations.[15]

It appears that even in the absence of a proclamation having issued under the federal Act with respect to the direct application of the federal regulations to intra-provincial modes of transportation, the fact that Ontario has both enacted and proclaimed the Dangerous Goods Transportation Act, 1981 and made regulations effective July 1, 1985 adopting the major requirements of the federal regulations effectively means that dangerous goods on Ontario highways are comprehensively regulated. One major difference between the two Acts is that the Ontario legislation lacks emergency clean-up provisions as contained in the federal Act; however, these were likely omitted because of the more comprehensive remedial provisions of the "Spills Bill" (see heading 4 below). The other major difference is that the federal Act applies from the preparation for transport of dangerous goods to their delivery and unloading while the provincial Act only regulates the transport of dangerous goods while they are on a highway. However, insofar as the provincial Act adopts the federal regulations' requirements with regard to safety standards, labelling and documentation etc., the incidental effect is created of forcing shippers, as well as the truckers, to comply with the packaging, labelling, loading and documentation requirements of the federal regulations.[16]

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12 S.O. 1981, c. 69.

13 Ontario Gazette, June 22, 1985, p. 2659.

14 O. Reg. 363/85, effective July 1, 1985.

15 O. Reg. 363/85, ss. 2–5.

16 M.B. Jackson, "Transportation of Dangerous Goods Act, Dangerous Goods Trans-

The Ontario dangerous goods legislation is binding on the provincial Crown.[17] Penalties of the same maximum monetary amount as described above for the federal legislation are provided under the Ontario Act.[18]

4. THE "SPILLS BILL"–ONTARIO ENVIRONMENTAL PROTECTION ACT, PART IX

Part IX of the Environmental Protection Act, commonly referred to as the "Spills Bill", makes major changes in the civil liability of persons involved with pollutants spilled into the natural environment. It further imposes major duties on a wide range of persons connected with such pollutants, as well as on municipalities, to take prompt and comprehensive remedial action with regard to spills.[19] The Spills Bill has been proclaimed effective November 29, 1985.[20]

Because of the scope of explicit as well as potential duties imposed by the Spills Bill, virtually any person could be affected by its provisions. As under the federal Transportation of Dangerous Goods Act, government officials are given power to direct any person to take appropriate action in an emergency situation. Generally, such persons must act immediately or within specified times. The persons potentially affected by such orders are not restricted to those directly or even indirectly responsible for the pollutant. Not only can such orders be issued to the owner or the person having control of the pollutant but they may be issued to the municipality within whose boundaries the spill occurred, adjoining municipalities or those that may reasonably expected to be affected, any public authority and to any person who is or who may be adversely affected or whose assistance is necessary to prevent, eliminate or ameliorate the adverse effects or to restore the natural environment.[21]

A duty to notify the Ministry of Environment in the event of a spill is placed not only on the person having charge of the pollutant at the

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portation Act, 1981, Environmental Protection Act, Part IX Spills," a paper delivered to the Canadian Bar Association–Ontario, Continuing Legal Education Programme "Too Hot to Handle–Transportation of Dangerous Goods and the Spills Act," September 12, 1985, p. 3.

17 S.O.1981, c. 69, s. 2(5).

18 *Ibid.*, s. 4(1).

19 The legislation was initially introduced as a bill in the Ontario Legislature in 1978. It was re-introduced in 1979 with amendments arising from debates in 1978 and was further amended in committee before it was finally passed in 1979 as S.O. 1979, c. 91. It is now incorporated as Part IX to the Environmental Protection Act, R.S.O. 1980, c. 141. Part IX is headed "Spills".

20 Ontario Gazette, August 17, 1985, p. 3539.

21 These powers are discussed in Chapter 3.

time but upon every person who spills or causes or permits a spill having certain specified effects.[22] Both the owner of the pollutant and the person having control of it are under a duty, without receiving any government order, to do everything practicable to prevent, eliminate and ameliorate the adverse effects of a spill and to restore the natural environment.[23]

Municipalities are given powers as well. Where a spill occurs, which has caused or is likely to cause adverse effects, a municipality may do everything practicable to prevent, eliminate and ameliorate the adverse effects and to restore the natural environment, and a municipality has the right to compensation from the owner of the pollutant and the persons having control of the pollutant for all reasonable costs and expenses incurred in taking such action.[24]

Under the provisions of the Spills Bill, new forms of civil liability are created. Owners, as well as those having control of the pollutant when it is spilled, are persons who may be legally responsible for the direct and indirect costs and expenses related both to the damage of the spill as well as the costs of cleaning it up.[25] Loss or damage for which a legal remedy is given includes not only personal injury or loss of life, but loss of use or enjoyment of property and pecuniary loss, including loss of income. The right to compensation in regard to loss of income and other forms of pecuniary loss are not generally available under the present common law tort system. The owner of the pollutant or the persons having control of the pollutant are liable for such loss or damage not only to Her Majesty in right of Ontario or Her Majesty in right of Canada but to any person under conditions specified in the legislation and discussed in Chapter 6. Provision is made under specified conditions for certain persons to recover compensation for reasonable costs and expense from Her Majesty in right of Ontario or from a new corporation established under the legislation, the Environmental Compensation Corporation.[26]

5. WASTE MANAGEMENT REGULATIONS–THE ONTARIO ENVIRONMENTAL PROTECTION ACT

The Waste Management Regulations under Ontario's Environmental Protection Act were substantially revised with particular application to liquid industrial and hazardous waste effective September 17, 1985.[27] These regulations require that generators, carriers and receivers of hazardous and liquid industrial waste (as specifically defined by the regulations) must register with or obtain an approval from the Ontario Ministry of the Environment, require that generators provide information as to facilities to be used for transportation and disposal, require that drivers transporting such materials receive proper training, and require the use of prescribed forms so that such materials can be tracked from the point of generation to the point of disposal. (Insofar as the federal Transportation of Dangerous Goods Regulations require the keeping of records for shipments of such materials, the Ontario regulations attempt to avoid the duplication of effort.) The Waste Management Regulations apply to waste that originates in Ontario for disposal in Ontario, to waste that is transported through Ontario and to waste imported into Ontario for disposal.

6. RELATIONSHIP OF THE NEW REGIME TO PRE-EXISTING LAWS–INCONSISTENT PROVISIONS

Prior to the enactment of the new regulatory regimes described above, there existed in various federal and provincial statutes requirements providing for the notification of government agencies in the event of certain types of spills, provisions that may allow for the recovery of compensation for pollution spills under specified circumstances through statutory mechanisms, as well as extensive regulatory schemes governing many contaminants and modes of transport.[28] The new federal and provincial dangerous goods Acts specify that their provisions are, in general, to receive priority in the event of inconsistency with many of the pre-existing laws. Specifically, the federal Act provides that its regulations prevail, to the extent that there is inconsistency, over orders, rules or regulations made pursuant to other federal Acts.[29] The Ontario Dangerous Goods Transportation Act provides that with respect to five named Ontario statutes, insofar as such statutes purport to require or authorize anything that is a contravention of the new Ontario Act, the Dangerous Goods Transportation Act applies and prevails unless it is specifically provided that the contrary provision is to apply notwithstanding the new

22 R.S.O. 1980, c. 141, s. 80.

23 *Ibid.*, s. 81.

24 *Ibid.*, s. 88. It should be noted that many of the terms used in the text have specific definitions under the "Spills Bill" and that the definitions of these terms are found in Chapter 6.

25 See Chapter 6 in regard to the detailed compensation provisions of the Spills Bill.

26 See Chapter 6 for a detailed discussion of these provisions.

27 O. Regs. 322/85 and 464/85, substantially amending R.R.O. 1980, Reg. 309.

28 See D. Estrin, *Environmental Law* (Toronto: The Carswell Co. Ltd., 1984), for a complete description of existing federal and provincial environmental regulatory schemes applicable in Ontario.

29 S.C. 1980, c. 36, s. 31.

COMPENSATION FOR SPILLS
THE ENVIRONMENTAL COMPENSATION CORPORATION

Marjory Loveys

Introduction

This paper will cover compensation for spills and the role of the Environmental Compensation Corporation.

First, I will cover the structure and mandate of the ECC and give you a rough overview of how we operate.

I will then deal with "spills" and the criteria that an incident must meet in order to be a spill for the purposes of the ECC.

I will then discuss the two groups of "victims" that can apply to the ECC. I will focus on eligibility requirements and the types of loss of damage that can be claimed.

Finally, I will review the impact that Part IX has had on compensation for spills and touch on some of the gray areas that we have uncovered in the course of our operation.

Who are we?

The ECC is a Schedule I, Crown Corporation. It consists of a three member Board of Directors and a small staff.

While the ECC has a close relationship with the Ministry of the Environment, compensation decisions are made autonomously. Also, our legislation permits the hiring of independent technical help.

The ECC's mandate is to receive and assess applications for compensation from victims who have been unable to obtain compensation from insurance companies or those liable for a spill.

What is a spill?

The ECC has jurisdiction to deal with a "spill". You may feel that you know intuitively what a spill is; however, "spill" is a legal definition under Part IX, and one that requires careful attention.

A spill, as defined, is a discharge of a pollutant into the natural environment from or out of a structure, vehicle, or other container that is abnormal in quality or quantity in light of all the circumstances of the discharge.

What does all this mean?

There must be a discharge, which includes deposits, emissions or leaks. It is not enough, for example, that barrels of toxic waste are stored near your property if they are not leaking.

The substance must be a pollutant, which is a very broad term. For example, sand has been considered as a pollutant. By definition, however, heat, sound, vibration or radiation are not pollutants.

The spill must occur into the natural environment, also a defined term. As buildings are not part of the natural environment, a discharge into a building is not a spill. For example, where vandals break into a factory and upset the fuel oil tank so that oil is discharged on the floor, there is no spill. However, if the fuel oil collects in the sump and is pumped onto the land around the building, that would constitute a spill.

There is one exception where a discharge into a building is a spill. Where an air-borne contaminant moves between two buildings via a structure such as a sewer pipe, the situation is deemed a spill. For example, where gasoline is flushed from a building directly into a sewer and resurfaces in houses connected to the same sewer, this is a spill even though there was no discharge into the natural environment.

A spill must occur from or out of a structure, vehicle or other container. Obviously, this will include, vehicles, storage tanks and pipelines. It may include a tailings pond that has been built to contain materials. It probably does not include a slag heap.

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Finally, a spill must be abnormal in quality or quantity in light of all of the circumstances of the discharge. Although this may sound somewhat nebulous, common sense should dictate where the line is drawn. Diesel fumes from a bus, or the drip from the oil pan of a car would probably be considered normal; however, either one could become abnormal by, for example, an increase in quantity.

As you can see, it is not always easy to classify incidents into rigid definitions.

How do we operate?

Our program is governed by a complex Act and Regulation. We do want to make the program accessible, though. In doing so, the ECC must maintain a careful balance between the legal requirements specified in the legislation, and the intent that ECC compensation be available to the public.

The onus is on the victim to contact the ECC; however, the ECC has been monitoring spill activity and will take measures to make our program accessible where there have been significant spills.

We encourage victims to contact us. If possible, we will assist them in dealing with the process.

Who can contact the ECC?

The Regulation sets out classes of persons that can apply to the ECC. There are two groups. The first, called "Spill Creditors", are third-party victims who had no involvement with the pollutant other than the fact that it was spilled on them. The second, which I will call "Owners and Controllers", are those who had to pay compensation to third parties even though they were not liable at common law.

Both of these groups may be eligible for compensation.

Applications by spill creditors

Spill creditors must meet certain conditions in order to be eligible for compensation.

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They must notify the ECC in writing within 30 days of the spill or of the date when they knew or ought to have known they suffered loss or damage as a result of the spill. This requirement is waived where the ECC concludes that its ability to assess damages has not been impaired.

For example, the limitation might apply where a farmer approaches the ECC after harvest, claiming that the crop was damaged. If the evidence had been ploughed under, the ECC would have no way of assessing the damages. On the other hand, if evidence such as photos or videotapes, or reports from the Ministry of Agriculture are available, the ECC may waive the 30-day requirement.

In all cases, spill creditors must first claim from their own insurers and those liable for the spill before they apply to the ECC. They must prove that they have made such claims.

Also, spill creditors must not have settled their claims unless the ECC has given prior written consent to such settlement.

The onus is on the applicant to demonstrate evidence of a loss (for example, with invoices, receipts, photos or video tapes). Of course, the applicant must show that the incident which caused the loss was a spill, and that the loss was a direct result of the spill.

When the ECC receives the application form, and assuming that these requirements have been met, the ECC will make an assessment of the quantum of damages.

The ECC may compensate for loss or damage including:

bodily injury;
clean-up costs;
property damages; and
pecuniary loss, including loss of wages.

The ECC will deduct any amount that a spill creditor has received from any other source as well as a $500 deductible for property damage and clean-up costs.

In addition, the ECC may deduct any loss that was a result of the victim's failure to mitigate damages, or failure to comply with orders and reasonable recommendations by all public officers.

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<u>Application by Owners and Controllers</u>

Owners and persons having charge, management or control of a pollutant (or "controllers") may also be victims and may apply for compensation if they are without fault for the spill.

Owners or controllers must meet the following eligibility requirements in order to be able to apply to the ECC.

They must have been liable under Part IX; however, they cannot have been liable at common law for the spill. This can be shown by a judgment to that affect.

They must have resolved all spill creditor claims arising as a result of the spill.

They must have taken legal action against those responsible for the spill and attempted to enforce any judgment obtained.

Owners and controllers may apply to the ECC for damages paid out to others. That is, amounts paid to spill creditors for bodily injury, property damage or pecuniary loss. In addition, they may apply for any costs incurred in cleaning up the property of others. Owners and controllers may <u>not</u> apply to the ECC for loss or damage to their own property.

Applications from owners and controllers are subject to a specified deductible as set out in the Regulation. The amount of this deductible is: $500,000 for a farmer; $1,000,000 for an individual or for a municipality; and $1,000,000 plus 10% of the corporate assets for a corporation.

These provisions make it clear that owners or controllers are responsible for insuring themselves against liability up to the amount of the specified deductible.

Payments to owners and controllers will also be reduced by the amount of loss that could have been avoided by mitigating damages or by complying with orders or recommendations by all public officers.

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What impact has Part IX and the ECC had on the payment of compensation for spills?

The proclamation in force of Part IX represents a decision by society as expressed through the Government that the victims of a spill should be compensated.

Historically, some spill victims were unable to obtain redress. Part IX has improved the position of these individuals by strengthening their ability to collect. It has put the weight of the Crown behind a claim for compensation. In addition, the legislation provides a last resort when a spill victim has been unable to collect from any other source.

Since its creation, the ECC has had a steady stream of contacts, which is increasing as people learn of us. The majority of those that notify us initially are compensated by others before they reach the application stage. One could reasonably expect that the presence of the ECC in the background may facilitate the normal claims procedure. For example, our presence may result in insurers decreasing the waiting period that claimants are sometimes subject to.

We expect that our applicants will fall into one of two groups. The first are those that have been unable to make a claim because, for example, the spiller was unidentified. The second are those that have made a claim to those responsible but are dissatisfied with the results.

The ECC has not yet processed a large number of applications; however, we must be prepared to deal with large numbers, as would be expected with a major spill where there was no responsible owner or controller overseeing the compensation process.

What problems has the ECC encountered?

As with any new law, there are gray areas in Part IX. Can we compensate for pure economic loss? Probably. Can we compensate municipalities for costs and expense they incur in cleaning up a spill? Partially. Can we compensate for inconvenience and mental anguish? Probably not.

The ECC has been approached about loss or damage caused by fires. The legislation is about spills, not fires. The ECC has no involvement with fires unless they are associated with a spill or the fire is larger than that normally associated with more than ten residential properties.

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We have also run into questions from municipalities that incur costs in response to spills. It is clear that municipal property is covered, as is the property of anyone else. It is not clear to what extent the ECC can compensate for action taken by a municipality on behalf of others.

Undoubtedly, these or other questions will reach the Courts at some point and will then be clarified.

Summary

Insurance companies and those legally responsible for a spill have the primary duty to pay for damages. The ECC is a back-up for people whose legitimate claims for damages go unsatisfied.

We hope that the legal profession can help us assist the public to take advantage of these new rights. This is especially important with respect to the 30-day limitation period, and the preparation of appropriate claims documentation.

More complete details about compensation are found in our two information brochures which will be distributed.

If you would like to know more about the ECC or have questions about specific claims or procedures, contact us at:

The Environmental Compensation Corporation
1 St. Clair Avenue West
5th Floor
Toronto, Ontario
M4V 1K6

Telephone: (416) 323-4826

NOTES FOR REMARKS BY
RODERICK M. McLEOD, Q.C.
DEPUTY MINISTER OF ENVIRONMENT ONTARIO

AT POLLUTION AND THE LAW CONFERENCE
CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION

FEBRUARY 26, 1987
(CHECK AGAINST DELIVERY)

INTRODUCTION

I was invited here to discuss the new tougher enforcement of Ontario's environmental legislation - What we are doing, how we are doing it and why.

The why was summed up very neatly by Environment Minister Jim Bradley when he introduced the latest amendments to Bill 112 in the Legislature December 3, 1986:

> "Not all pollution offences cause dramatic fish kills or ruin, for years to come, a drinking water supply. More often, environmental degradation is like suffering death by a thousand cuts. The only way to prevent that end is by taking each cut seriously, and deterring it from recurring."

The how is the process of legislative reform which you have seen over the past two years.

LEGISLATION

The key to effective legislation is that it:

1) Answers a need
2) Deals with that need in a practical and realistic way
3) Applies with justice and fairness to all, which means

    a) All parties are equal before the law

    b) Responsibilities of each party must be well defined

    c) Effective communications to ensure understanding

    d) Penalties appropriate to and commensurate with offences

    e) Consistent performance monitoring and enforcement

With these ingredients in mind, let us review some of the Ministry of the Environment's legislative reforms.

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ENVIRONMENTAL ASSESSMENT ACT

- Applied to municipal sector under the same ground rules as for Provincial undertakings

- One review committee hears and recommends on exeption requests

- Ontario Waste Management Corporation exemption was revoked

PART IX SPILLS LEGISLATION

- Well-defined reporting requirements

- Containment and cleanup responsibility fixed on owner and carrier without prejudice in terms of liability

- Spills Action Centre Provides central co-ordinating role

BILL 112 INTRODUCTION

- Now known as Environmental Enforcement Statute Law Amendment Act

- Extensive public review and comment went into this Bill

- Emphasis is on clear delineation of responsibility and accountability for offences under Ontario's environmental legislation

BILL 112 PRE-CONVICTION CHANGES

- Corporations are responsible for the acts of their employees

- Crown immunity removed

- Corporate officers and directors have a new positive and personal duty to prevent polllution offences. Failure in this duty is, in itself, an offence.

- Posting financial security, frequently required in waste management area, can now be required as a part of virtually any control order or approval

- Appeal process is provided both to the security posting requirement and prior to any forfeiture

BILL 112 PENALTY STRUCTURE

New fines and other penalties reflect both the seriousness of the offence and the impact on the resources of the offender.

A jail term of up to one year may be imposed:

- For a serious pollution discharge both on the discharger and any officer of a company responsible for ordering or requiring the discharge.

- For agents or officers responsible for serious offences involving liquid industrial or hazardous wastes.

Corporate fines may be levied:

- Up to $25,000 for a first offence

- Up to $50,000 for a second offence

- Up to $100,000 for a second offence involving actual pollution or violation of a stop order

- Up to $500,000 for the most serious offences involving liquid industrial waste and hazardous waste

Fines for individuals remain unchanged at $5,000, for a first offence and $10,000 for subsequent offences.

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However, Bill 112 goes beyond establishing a penalty structure with innovative provisions which give a court scope to:

- Require cleanup of pollution discharges

- Set out required measures to prevent future recurrence of pollution

- Impose additional penalties designed to strip away any ill-gotten gains resulting from an offence.

INVESTIGATIONS AND ENFORCEMENT

- The 65-member Investigations and Enforcement Branch is set aside from the normal process of inspection, abatement and negotiation on control programs and orders to concentrate on the two areas specified in the name

- Their varied backgrounds have combined engineering and scientific expertise with police investigation skills and training

- They work to a detailed enforcement prosecution policy which is set out for public scrutiny in the Ministry's policy manual

- But the law requires that the investigator, with legal advice, makes the decision to lay a charge

The Ministry has also been active in the area of new regulations.

INDUSTRIAL WASTE REGULATIONS

The Ministry's control program for liquid industrial and hazardous wastes emphasizes prevention with:

- Registration of all generators of these wastes
- Classification of wastes in terms of handling, treatment and disposal requirements
- A manifest system which documents the movement, shipment, treatment and ultimate disposal of these wastes
- Computer monitoring to track those that go astray and to generate documentation and statistics on quantities

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COUNTDOWN ACID RAIN

Ontario's targets for acid rain reduction within our boundaries are embodied in firm regulations aimed at three companies and a provincial utility.

These regulations:

- Set specific staged targets for reductions

- Require early and consistent progress reports to anticipate any roadblocks so they can be dealt with

- Are based on extensive consultation and negotiations with the parties governed by the regulations

- Rely on corporate decisions as to what is economically and technically feasible and government review of these decisions

- Provide for public funding if their analysis and our review reveals an unacceptable corporate financial commitment.

The result is an unprecedented level of pollution control, with the full co-operation of the companies affected and strong support from the public, which leaves Ontario in a strong position to face the polluters outside our boundaries and governments who have a responsibility to regulate those polluters.

MISA PROGRAM

The Ministry's new Municipal Industrial Strategy for Abatement will develop similar specific, progressive and achievable water pollution control programs for:

- The 300 industries which discharge directly into Ontario waters

- The 11,700 industries that discharge into the Province's 400 municipal sewer systems

It is a four-stage program:

1) Pre-regulation consultation with eight industrial sectors and the municipal sector to determine monitoring regulations

2) Monitoring and consultation with the nine sectors to establish achievable compliance regulations

3) Compliance regulations and consultation on possible control orders required for specific companies or municipalities.

4) Control orders issued where necessary and enforced

Throughout these four stages, continuous consultation will be provided through technical committees for each sector and an advisory committee with strong input from environment and public interest groups and involvement of the sector affected.

WHAT NEXT

As MISA develops, you will see continuing consultation on Regulation 308 as part of a thrust to extend our initiatives to serve the best interests of air quality.

You will also see continuing co-operative efforts between our Ministry and the federal government to ensure that the best legislation from both levels is applied to serve the interests of the Ontario environment.

I hope to be able to say more on this in future, when some of the newly announced federal initiatives take a more concrete form.

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IN CONCLUSION

All of these initiatives and legislative reforms are directed to one end as set out in the Ministry of the Environment goal statement:

- To achieve and maintain a quality of the environment, including air, land and water, that will protect both human health and the natural environment and will contribute to the well-being of the people of Ontario.

This is the ultimate measure of our efforts.

Thank you

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<u>ENVIRONMENTAL LAW ENFORCEMENT POWERS</u>

Robert M. Fishlock
February, 1987

ENVIRONMENTAL LAW ENFORCEMENT POWERS

CONTENTS

I. Introduction

The proliferation of new environmental laws and regulations during the recent years has been dramatic to say the least. Dangerous or hazardous substances have become a central concern of environmental protection authorities and the emerging regulatory regime will effect most aspects of their manufacture, import and export, storage, transportaion, handling by employees and ultimate disposal. In order to insure compliance with this growing body of environmental law as well as respond to public concerns that past obligations were not being taken seriously enough, law enforcement officials will be deployed in increasing numbers throughout industry to conduct inspections and investigations.

This paper will discuss the investigatory powers of Ontario environmental officials acting under the Environmental Protection Act (the "provincial Act")[1] and, to a lesser extent, the powers of their federal counterparts acting under the Environmental Contaminants Act (the "federal Act")[2] which remain much the same under the proposed Canada Environmental Protection Act (see Appendix A).

In light of the high penal consequences of failing to comply with environmental laws, it is all the more important that industry be prepared to cooperate with environmental officials, while at the same time, be in a position to exercise its own rights, particularly when the officials operate at the edge of their statutory and constitutional powers. The manner in which government officials are dealt with at the initial stage of an environmental problem can be determinative of whether or not a company is allowed to deal with a situation itself or finds itself subject to extensive government intervention in the form of clean up or control orders and ultimately, criminal prosecution.

Throughout this discussion some practical measures will be identified which can be taken by industry in light of its rights and obligations.

II. Routine Inspection Powers

(a) Power to Enter and Examine Without a Warrant

A provincial officer and a federal inspector may enter business premises at any "reasonable time" to ensure that the relevant statute is complied with. The officers must possess written evidence certifying their authority or designation and if unable to produce such a certificate, they will be unauthorized to conduct a search of the premises without the owner's consent.

What will constitute a "reasonable time" may vary from situation to situation. A routine inspection should probably be required during normal business hours, while a true "search" based upon a suspicion of an offence having been committed, may be reasonable at other times of the day, but as will be suggested below, such a "criminal" search should be made pursuant to a court order or warrant in which the timing of the search is set out.

Accordingly, a provincial officer or federal inspector should be required to produce evidence of his or her designation before being permitted access to the premises. Furthermore, he or she should be asked to explain the reasons for, and the nature of, the intended inspection. The officer or inspector should be accompanied by a responsible employee, preferrably someone at a management level familiar with environmental matters, who can both assist the officer during the inspection and take notes of what was seen, who was spoken to and what was said. Such notes will be invaluable in future dealings with the environmental authority if further action is to be taken as a result of the inspection. If an employee makes a statement which is incriminating for both him or herself or for the company, it is important that the company be in a position to clarify what was said and the statement's context. It is critical that management keep on top of what transpires between its employees and environmental officials. Although management should not prevent what an employee wishes to communicate to a provincial officer or federal inspector, there is no excuse for being unaware of what was said and thereby, not being in a position to clarify what may or may not have actually happened. Furthermore, there is nothing more deadly in the preparation of a company's due diligence defence to an environmental charge than to have a particular situation of non-compliance noted during one particular inspection, and then to be found still occurring on a subsequent inspection.

Given the sweeping scope of section 13 of the provincial Act with its general prohibition of almost any imaginable form of pollution, a provincial officer can apparently inspect every industrial, commercial or residential premises in the province "for the purpose of the administration of the Act and regulations". Under subsection 127(1) of the Act he or she may enter any building, structure, machine, vehicle, land, water or air to conduct an inspection. Notwithstanding this rather unlimited power of entry, it is suggested that the officer or inspector must explain the objective of the inspection and the explanation must be consistent with a provision of the statute. Since the Act's basic thrust is to prohibit or control the discharge or emission of contaminants into the natural environment, the provincial officer should identify a particular discharge or specific provision in the Act or regulations which he feels may not have been complied with.

Although one will not be in a good position to argue with a provincial officer or federal inspector regarding the merits of his or her inspection, the basis of the inspection will be useful after the fact if property or other evidence is seized. An unauthorized inspection or search and seizure will provide legal counsel with a strong basis for obtaining a release of the property seized.

In the recent Ontario District Court decision of R v. Texaco[3] an inspection under the provincial Act was found to have been made outside the authority of subsection 127 (1) because the search extended beyond the actual business premises where compliance with the Act was required and was used to seize evidence on other premises.

The federal Act, as it presently exists, is more limited in scope than the provincial Act. It applies only to the manufacture and importation of substances or contaminants which have been identified by the Minister of the Environment and may be the subject of study pursuant to sections 3 and 4 of the Act or prohibited from release into the environment, etc., pursuant to sections 7, 8 and the schedule to the Act. Under section 10 of the Act, federal inspectors are only authorized to enter any place, "other than a private dwelling place ... in which he believes on reasonable grounds there is a substance or class of substance that has been added to the schedule pursuant to section 7". The only substances regulated by the present federal Act are:

(1) polychlorinated biphenyls (PCBs);

(2) chlorofluor carbons (CFCs);

(3) mirex;

(4) polybrominated biphenyls; and

(5) polychlorinated terphenyls.

In order to conduct searches under the federal Act in other places, where there may be "anything" which will afford evidence respecting an offence, a warrant pursuant to section 10.1(2) must be obtained.

Although one is encouraged to obtain as much information as possible from the provincial officer or federal inspector before the inspection, one should not enter into a protracted argument respecting the merits of the inspection. Undoubtedly it is an important principle of our law that one not be subject to arbitrary or unreasonable search and seizure, but one is cautioned from making a capital case of the principle at a time when it is more likely to give rise to suspicion than persuasion.

It is no less important to keep in mind that one cannot do anything that would "hinder or obstruct" the officer or inspector, as this constitutes an offence under section 10.3 of the federal Act and section 129 of the provincial Act. The statutes go even further in positively obligating a person to furnish information required for the purposes of the statutes and in the case of the federal Act, require a person to provide "all reasonable assistance in his power to enable the inspector to carry out his duties and functions" under the Act. Some of the legal ramifications of this duty are explored below at page 23.

Depending upon the objectives of the environmental officer's inspection, the timing of his or her appearance at the premises may not be convenient for company personnel best acquainted with the officer's particular concerns. It is suggested that the officer be requested to conduct his or her inspection at a subsequent time when qualified employees can assist the inspector. If at all possible, any inquiries raised by the officer should be answered by way of written letter, since more than one person can then contribute to the answer.

(b) <u>Right to Legal Counsel</u>

Most large industrial operations today are well equipped to deal with environmental authorities and have established sizable environmental affairs departments within their corporate structure. The staff members of these departments are often better prepared to deal with environmental authorities than lawyers who lack the experience of day to day human interactions. However, there will be occasions when the advice of legal counsel is desired, particularly when the reasonableness of when the environmental officers requests are in doubt or the inspection is less routine and more likely a part of a criminal investigation. There is certainly nothing unreasonable in demanding that the inspection be delayed in order to allow the company time to consult its lawyer and it is highly unlikely that such a demand would constitute an obstruction.

Under section 10 of the <u>Charter of Rights</u> a person is entitled on arrest or detention:

(a) to be informed promptly of the reason for the arrest or detention and

(b) to retain and instruct counsel without delay and to be informed of that right.

In the Supreme Court of Canada decision of R. v. Therens[4], Justice LeDain established a very broad test for determining when a "detention" arises. He indicated that the protection of section 10 of the Charter is "directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel that might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee". He went further to state that detention would also arise "when a police officer or other agent of the state assumed control over the movement of a person by demand or direction which may have significant legal consequences and which prevents or impedes access to counsel".[5]

However, in the subsequent Ontario Court of Appeal decision in R. v. Esposito, it was held that the right to be informed of the right to retain and instruct counsel without delay did not arise during police questioning in the home of an accused where there was no evidence of circumstances that would lead an accused to reasonably believe that his freedom had been restrained or that he was subject to a demand or direction he was required to comply with.[6]

It would appear unlikely that a corporation can be "detained" during an environmental inspection. The word detention has generally been used by the courts in terms of an infringement of the liberty of an individual. Perhaps at some point in the inspection process the corporation is detained, particularly when property is seized or detained.

In any event, when employees are questioned and are warned that a failure to provide answers will constitute an offence, the right to counsel should arise. When the employee indicates he or she wishes to retain counsel all questioning should cease until an opportunity to do so has been afforded.[7] Even when an employee requests on behalf of the corporation, an explanation of the reasons for the inspection and the opportunity to consult legal counsel, it is arguable that a refusal to do so constitutes an unreasonable search, contrary to section 8 of the Charter of Rights.

(c) Incidental Powers to Seize without a Warrant

Under both section 10 of the federal Act and subsection 127(1) of the provincial Act an inspector or officer may make various examinations, including the examination of books and other documents and remove copies or abstracts at the time of an inspection. There is also a power under the provincial Act to conduct "tests" and remove "samples".

Under subsection 127(1a) of the provincial Act, a provincial officer may specifically "detain anything at the place where he finds it or may remove a thing or cause it to be removed to another place" until he has completed his examinations, etc. The onus is then on the owner or "the person who had the charge, management or control of the thing detained" to apply under subsection 127(1b) to a Justice of the Peace who may make an order for the release of the thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of the administration of the act and regulations.

In contrast to the provincial detention powers, section 11 of the federal Act provides for detention and seizure of "any substance or product" <u>only</u> where the inspector "believes on reasonable grounds" that any provision of the Act has been contravened and he may only seize and detain substances "by means of or in relation to which he reasonably believes the contravention occurred or will afford evidence of such contravention". A further limitation of the power is that the inspector must be of the opinion that "such seizure is <u>necessary in the public interest</u>", except to the extent that the substance is required as evidence or for purpose of analysis.

Where a federal inspector has seized and detained a substance he shall, "as soon as practicable", advise the person in whose possession it was at the time of seizure of the provision of the Act that he believes has been contravened. An owner of the seized substance or product may then apply to the federal inspector or Minister for its release, but not to an independent court officer. Upon such application the federal officials must be satisfied that "it is not necessary in the public interest to continue to detain such substance or product", except to the extent that it is required as evidence or for purpose of analysis.

If after the expliration of 60 days, proceedings have not been instituted in respect of the contravention or notice of an application for an order extending the time during which the substance may be detained has not been received by the owner, the seized substance must be returned.

III. Constitutional Search and Seizure

Throughout the preceding discussion there has been a deliberate attempt to characterize the inspection as routine in nature. However, section 127 of the provincial Act and section 10 of the federal Act are not limited in wording to such an interpretation and can and are in fact used whenever convenient "for the purpose of the administration of the Act" or "for any purpose relating to the enforcement of the Act". Such warrantless invasions of private property are coming under increasing judicial scrutiny to ensure that they do not contravene the protection against unreasonable search or seizure contained in section 8 of the Charter of Rights. Although both the federal and provincial Acts provide for search and seizure pursuant to a warrant or judicial order, there is very little, if any, guidance provided as to when a search and seizure should be made with or without a warrant.[8]

A warrant under subsection 10.1(2) of the federal Act would permit an inspector to conduct a search in "any place" as opposed to only a non-dwelling house, although even this limitation can be waived where there are "exigent circumstances" as defined in section 10.1(4) and (5). A warrant under subsection 127(2) of the provincial Act provides no greater power to the provincial officer than that already possesed directly under subsection 127(1) of the Act. Clearly, if warrantless searches can be made of business premises in any or most instances, they provide environmental law enforcement officials with a powerfull weapon in their fight against actual or suspected pollution.

Although there is some case law to the contrary, it it submitted that the existence of both warrantless and warranted search and seizure powers in the provincial and federal Acts demonstrates a legislative intent to limit warrantless searches. This division of search powers recognizes that both statutes establish an environmental protection system that combines administrative and criminal law provisions. The dual purposes are all the more evident given the recent flurry of amendments increasing the maximum fines available against offenders. Less recently it was the administrative aspect of environmental regulation which was most often employed, utilizing a vast array of administrative tools such as control orders, program approvals, waste management and waste site approvals and clean up orders.

Warrantless inspections are more consistent with the administrative aspects of environmental legislation. Once the penal consequences of the law are engaged then the traditional protections of criminal procedure must be brought into play. Since the landmark decision of the Supreme Court of Canada in Hunter vs. Southam Inc.[9], any search and seizure conducted without prior judicial authorization prima facie constitutes an unreasonable search and seizure and is contrary to section 8 of the Charter of Rights. In Southam Inc. the Court stated that the right to be secure against unreasonable search and seizure incorporated a fundamental right of the citizen to privacy which could be expressed as an entitlement to a "reasonable expectation of privacy"[10].

The search in the Southam Inc. case was part of a government inquiry into the state of the newspaper industry in Edmonton under the Combines Investigations Act. At the time of the search the company was not informed of the specific objective of the inquiry, let alone of the search, nor was it informed of an alleged offence. The search was made pursuant to a warrant, which purported to authorize the Combines Investigation officers to search the company's premises in Edmonton and "elsewhere in Canada". Unlike the warrantless environmental search and seizure powers described above, the Combines Investigation Act provision required that the officer obtain a certificate from a member of the Restrictive Trade Practices Commission, authorizing the exercise of such power.[11]

In the course of its decision, the Supreme Court of Canada made some very general pronouncements on the meaning of section 8 of the Charter of Rights and what would constitute a reasonable search and seizure. Notwithstanding the relatively administrative nature of the Combines Investigation inquiry, the Court did not hesitate to hold that prior authorization, "where feasible", is a precondition for a valid search and seizure and where so authorized, the authorization must by an impartial person acting judicially. The Court specifically required that the authorization be based, at a minimum, on a belief, given under oath, that an offence has been committed and that evidence is to be found at the place to be searched.

Since the decision of Southam Inc. a number of important federal search and seizure powers have been declared as contrary to section 8 of the Charter of Rights. The power to seize without a warrant during an income tax audit was found to be unconstitutional in R. v. Dzagic;[12] the power to search with a warrant under s. 231 (4) of the Income Tax Act, where no standard or conditions precedent are present with which to determine whether or not to grant approval, was found unconstitutional in Re Print Three Inc.;[13] the power to search a dwelling place pursuant to a writ of assistance under s. 10 1(a) of the Narcotic Control Act was found to be in effect warrantless and unconstitutional in R. v. Noble;[14] the power to search a non-dwelling house pursuant to a writ of assistance under s. 10(1)(a) of Narcotic Control Act, where no exceptional circumstances, found unconstitutional in R. v. Rao.[15]

Notwithstanding the requirements for a valid search and seizure set out in Southam Inc., many provincial Courts of Appeal have upheld the power of provincial officers to search and seize without warrants. The Courts appear very hesitant to burden government officials in the carrying out of their regulatory duties; however, they have emphasized an important distinction between "administrative inspections" and "criminal investigations".

The Ontario Court of Appeal in Re Belgoma Transportation held that Employment Standards Act officers can reasonably search or inspect business premises and require production of various records for inspection and copying without a warrant, where the search and seizure "is not aimed at detecting criminal activity".[16] In the subsequent decision of R v. Quesnel, the Court approved the power of a Farm Products Marketing Act inspector to inspect a farm without a warrant to confirm whether it was carrying on a regulated activity, i.e., raising chickens. The Court of Appeal again emphasized the distinction between criminal investigations and inspections or audits under regulatory statutes.[17]

As indicated earlier, in R v. Texaco[18] the Ontario District Court found that subsection 127(1) of the provincial Environmental Protection Act did not authorize provincial officers to inspect records kept at offices not located at the regulated premises and that for such a search, a warrant was required.

The British Columbia Court of Appeal has also followed the reasoning of the Ontario decisions and held that a municipal bylaw inspector could conduct a routine inspection of a dwelling place without obtaining a warrant. In R. v. Bichel[19] the British Columbia Court emphasized the distinction between administrative and criminal investigations and refused to follow American case law[20] to the contrary.

In R v. Sheppard[21] the Newfoundland Court of Appeal found that a warrantless search of a dwelling house by a wildlife officer was contrary to section 8 of the Charter of Rights. On the other hand, in Chabot v. Manitoba Horse Racing Commission[22] the Manitoba Court of Appeal upheld a warrantless search by a race track officer as constitutional, and in Bertram S. Miller Ltd. v. the Queen,[24] a warrantless seizure and destruction of goods by Plant Quarantine Act inspectors was approved.

Obviously the law regarding the necessity for search warrants when conducting administrative inspections is unsettled and the best advice to businesses subject to such a search is that one must insist upon receiving the reasons and objectives of the search or inspection and a copy of any warrant or court order. If the search is requested because of a suspicion that an offence has been committed, then one has grounds for objecting to a warrantless search and should insist on consulting legal counsel.

If anything is seized during the inspection and legal counsel is satisfied that there are grounds to believe the search was only aimed at obtaining evidence of an environmental offence and not intended to ensure general compliance with the relevant statute, an application could be made to the courts to impound any documents in order to deprive the investigating officers of access pending determination of whether the search was made in contravention of section 8 of the Charter of Rights.[24]

In one U.S. Supreme Court decision there is a strong suggestion that a company must take steps to demonstrate the "expectation of privacy" referred to in the Southam Inc. decision. In Dow Chemical Co. v. United States[25] the Court held that the taking of aerial photographs of an industrial complex by the U.S. Environmental Protection Agency was not contrary to the Fourth Amendment protection against unreasonable search and seizure, as it did not constitute at "search".

In upholding the validity of the Agency's inspection the Court found that the company did not have a reasonable expectation of privacy in the industrial complex subject to photography. The Court noted that the company had made elaborate provisions for security against ground surveillance but had done nothing to avoid aerial surveillance. However, the decision did recognize certain limits to such technologically enhanced inspections, and stated:

> "It may be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment."[25a]

IV. Duty to Furnish Information and Self-Incrimination

Both the federal and provincial Acts require that persons furnish information to an officer or inspector. Subsection 127 (3) of the provincial Act states that:

> "every person responsible for a source of contaminant shall furnish such information as a provincial officer requires for the purposes of this Act or the regulations".

Section 129 of the Act reinforces this obligation, stating that:

> "No person shall ... furnish a provincial officer with false information or refuse to furnish him with information required for the pruposes of this Act and the regulations."

Section 10.2 of the federal Act similarly requires the owner, person in charge and every person found in a place entered by an inspector to "furnish him with such information with respect to the administration of this Act and the regulations as he may reasonably require.

Whether or not an inspection is being conducted, where a discharge or spill of a contaminant occurs the company is generally required under the provincial Act to report the event to the Ministry "forthwith".[26]

This statutory duty to provide information flies directly in face of what was recognized by the Ontario Court of Appeal in R v. Esposito[27] as a "deeply rooted" right to remain silent when questioned by investigative officers. Unfortunately, this right has not been regarded by Canadian courts as being free from statutory encroachment and to date, has not been found to be protected by the Charter of Rights.

In the recent decision in Thompson Newspapers v. Director of Investigation and Research, Combines Investigation Act, the Ontario Court of Appeal noted that there are many instances where persons can be compelled to testify and provide incriminating evidence and therefore, there was no modern tradition in Canada recognizing a right of a witness not to incriminate him or herself. The issue before the Court was whether the very general protection of section 7 of the Charter of Rights respecting "life, liberty and security of the person" prevented the Director of Combines Investigation from compelling examinations upon oath and the production of documents. The Court held section 7 of the Charter did not provide any protection against a person being required to give such information to the Combines authorities. The Court stated that:

> ".... the only rights against self incrimination now known to our law are those found in subsection 11 (C) and 13 of the Charter, namely: the right of a person charged with an offense not to be compelled to be a witness in those proceedings and the right of a witness not to have incriminating evidence and the right of a witness not to have incriminating evidence by him used against him is subsequent proceedings."[28]

The Ontario Court of Appeal in effect circumscribed its earlier statement in R. v. Esposito where an accused was questioned at home by police respecting fraud and forgery offenses. In that decision the Court recognized a right to remain silent in the face of police questioning, stating that "the right operates both a the investigative stage of the criminal process and at the trial stage".[29] In response to this earlier statement, the Court in Thompson Newspapers simply stated that any such right to remain silent "must be restricted to police enquiries and the like and the trial proceedings themselves".[30]

The above-noted limitation of the right to remain silent or not to incriminate oneself finds strong support from the decisions of the British Columbia Court of Appeal in Haywood Securities Inc. v. Inter-Tech Resource Group Inc.;[31] and Tranpacific Tours Ltd. et al v. Director of Investigation and Research, Combines

Investigation Act[32] and pre-Charter Supreme Court of Canada decisions in Marcoux and Solomon v. The Queen,[33] and Curr v. The Queen.[34]

In R. v. Vandervoet,[35] an Ontario Provincial Court decision, the sections of the Ontario Environmental Protection Act requiring that persons provide information to provincial officers were upheld as constitutionally valid. In that decision the Court found that the object and scope of the provincial Act was of such "great public concern" and the duty of providing information of so little inconvenience, that the statutory requirement was not a contravention of the right to "life, liberty and security of the person" "guaranteed by section 7 of the Charter of Rights.

In United States v. Ward,[36] the U.S. Supreme Court affirmed a Federal Court of Appeal decision which upheld the constitutional validity of requiring persons responsible for oil spills or discharges to report the discharges to government authorities pursuant to the Federal Water Pollution Control Act. The lower court held that the administrative assessment of a fine or penalty against the person who was both responsible for and reported the pollution, did not offend the privilege against self-incrimination protected by the Fifth Amendment of the U.S. Constitution, provided that the evidence used to establish liability for the discharge was derived from a source independent of the compelled disclosure. Otherwise, under American law the privilege against self-incrimination should be liberally construed and the fine or penalty declared invalid.

In a footnote to the decision of the Federal Court of Appeal in United States v. Ward, the Court noted that its holding, which was in respect to the right against self-incrimination of an individual, did not preclude the use of the discharge or spill report in a proceeding for assessment of a penalty where a corporation was involved.[36a] The question of whether a corporation can be incriminated through statements by its employees, including management employees, has also been dealt with by Canadian courts. In a recent Ontario High Court decision it was held that a corporation is not a person that could be a witness and therefore, was not capable of benefiting from the protection against being compelled to be a witness in penal proceedings against oneself, contained in section 11(c) of the Charter of Rights.[36b]

Accordingly, even if there exists a right to remain silent in Canada, such right may only be effective in excluding evidence at trial and only at the trial of the prosecution of an individual and not a corporation. The requirement to make a report or answer the questions of an inspector is most likely valid.

V. Admissability of Incriminating Statements at Trial

A number of legal consequences arise out of the duty to provide information which relate to the admissibility of incriminating statements made by employees of a company at a trial of the individulas or the corporation. At common law the incriminating statements of an accused made to a person in authority are admissible only when it is proved that they were made voluntarily in the sense that they were not induced by threats, promises or other inducements.[37] Therefore, it is important that all the circumstances surrounding the giving of statements by employees to an environmental inspector be recorded. Knowledge of the legal duty to provide information on the part of employees may be one factor which will indicate that the statements were not made voluntarily. However, it appears unlikely that knowledge of the legal duty alone will provide a basis for rejecting their admission at trial.

Ontario's Highway Traffic Act, which also sets out a duty to provide information to provincial officers, has been considered by the Supreme Court of Canada and found not in and of itself to render incriminating statements inadmissible in criminal proceedings against the person making them.[38]

A popular practice of provincial environmental officers when conducting questioning of employees of corporations or other persons responsible for sources of contaminants, is to write out a narrative of the employee's answers and ask that the employee sign this narrative as his or her own statement. There is nothing in the provincial or federal Acts which requires that any person sign such a statement. Whether a refusal to sign a statement could constitute hindering or obstructing an officer or inspector is difficult to say at this point in time. If the person has answered those questions put to him or her, it is suggested that the environmental officer has obtained sufficient cooperation to perform his or her duty and therefore, cannot be hindered or obstructed.

Whether or not the environmental officer indicates that he or she is about to take a statement, all employees should be cautioned that an inspector will likely take notes of any answers given and such notes can be used almost as effectively at a future trial as a signed statement. The main protection against the use of such evidence will be the rule concerning the voluntariness of the statement or the Charter of Rights. If the employee has been threatened with potential prosecution for failing to answer questions then it quite possible that any statement given, orally or written, will not be admitted in evidence at a trial of that employee. Where the employee claims the right to remain silent and to consult a lawyer, and the request is refused, it becomes even more likely that the evidence will not be admitted at trial due to a breach of the right to counsel.[39]

Where there is no question of voluntariness or breach of a Charter right, if the statement is being tendered as an incriminating statement or admission of the corporation, the Crown must prove that the employee was a directing mind of the corporation or otherwise authorized to make the statement on behalf of the company.[40]

It may also be arguable that a combination of the Canada and Ontario Evidence Acts can be used by a person being questioned to prevent his or her answers being used against them at a trial. Under the Ontario Evidence Act the protection against using answers to questions in any proceeding against a "witness" in a "subsequent proceeding", applies to all "actions", including investigations and inquiries.[41]

While it appears clear that at least during a routine environmental inspection one must answer questions relating to ongoing and potential pollution or to a federally regulated contaminant, the case becomes much less clear when environmental officers are conducting an after the fact investigation in order to obtain evidence of an offence. In the former case the government power relates to the general responsibility to prevent pollution and its affects upon people and the environment. In the latter case, where the pollution event has occurred and the full impact upon the environment has been felt, the object of an investigation is merely to find the culprit and deliver punishment. As was discussed in respect to consitutional search and siezure powers, when this becomes the sole object of the inspection or investigation, the matter is in reality a criminal investigation and should be conducted in accordance with the traditional rules of criminal procedure and evidence.

The British Columbia Court of Appeal in Haywood Securities Inc v. Inter-Tech Resource Group Inc. made the following comments:

> "I agree that if the sole aim and purpose of the proceeding was to obtain evidence to support a charge or to assist the criminal prosecution of the witness, it might be arguable that the witness ought not to be compelled to divulge information which might lead to his conviction. But, in my view, such a result would follow only if the proceedings, in which such evidence was given, were so devoid of any legitimate public purpose, and so deliberately designed to assist the prosecution of the witness that to allow them to continue would constitute an injustice. In such circumstances, the continuance of the proceedings could be said to constitute a violation of the principals of fundamental justice."[42]

Given the above discussion, it is in the Company's interest to educate all its employees of their rights and the real possibility of having their statements used against them in future prosecutions. Individual employees are equally liable to be prosecuted with the corporation and this must be brought home to all company personnel. Given the uncertainty surrounding the ability of the corporation alone to utilize various legal safeguards it is in the corporation's interest to ensure that its employees enforce their rights to counsel and resist unreasonable entries on company property and unreasonable questioning.

VI. Documents Protected by Solicitor and Client Privilege

Professional communications of a confidential nature between a solicitor and his or her client, which take place with the purpose of obtaining legal advice, are privileged. It is not necessary that the communications should be made either during or relating to an actual, or even an expected, litigation. It is sufficient if they pass as professional communications in a professional capacity, subject to one or two specific exceptions, such as communications between solicitor and client that have been made to facilitate the perpetration of a crime or fraud. Neither the solicitor nor the client can be compelled to disclose the content of such communications or to produce any documents embodying the communications.[43]

Where documents come to the solicitor from an agent employed or instructed by the client to communicate with the solicitor or the solicitor has obtained the document or information on the instructions of his client for the purposes of giving advice when litigation is contemplated, the documents are protected by the privilege.[44] When litigation of any kind is not

<u>contemplated</u> the privilege may not apply and in one Ontario High Court decision written communications passing between the client's accountants and solicitors, which were seized by Revenue Canada, were declarred not to be privileged.[45] The same Court has also come to the opposite conclusion.[46]

The protection of third party communications to a solicitor, made by an agent instructed by the client to communicate with the solicitor, is particularly important in environmental matters. Very often the specific source of a contaminant entering into the environment is unknown and expert consultants may be retained to provide advice to the company's solicitors. Accordingly, where the company wishes to conduct a review of its operations for the purpose of insuring compliance with environmental laws (an environmental audit), it is recommended that the consultants be retained by the company solicitors and that the final advice to the company be made through its solicitors. Whether any written report based on such a review will be protected by the privilege may depend upon the existence of circumstances which support an expectation that charges will be forthcoming.

The procedure for dealing with a claim of solicitor-client privilege at the time of an attempted seizure is not provided for under either the provincial or federal environmental statutes, although section 232 of the Income Tax Act has contained such a procedure for some time now. Even where a search of a solicitor's office has been attempted the courts have been hesitant to lay down any strict guidelines as to the manner of dealing with a claim of solicitor-client privilege. However, a practice has been recognized whereby the allegedly privileged documents are placed in a sealed envelope until such time as a judge has ruled upon the issue.

In Descoteaux v. Mierzwinski, a case concerning the validity of a search warrant which authorized a search of a legal aid office in Quebec, it was held that a person is entitled to raise a solicitor and client privilege at any stage in the proceeding as a ground for quashing the search warrant for lack of jurisdiction on the part of the Justice of the Peace. The Court went further to state that a Justice of the Peace faced with the information for a search warrant should consider the strength of any solicitor-client privilege claim and, where necessary, find that he has no jurisdiction to authorize the search.

The Court took the general position that the following two conditions must be satified by a Justice of the Peace before a warrant is issued whenever a search is sought to be conducted of premises occupied by an innocent third party, such as a solicitor, who is not alleged by the information to be connected in any way with the crime:

1. Whether a reasonable alternative source of obtaining the information was or was not available, and

2. if available, whether reasonable steps have been taken to obtain the information from that alternative source.

The Court went on to say that even if these conditions were met, the Justice of the Peace must set out procedures for the execution of the warrant which will reconcile the protection of solicitor-client privilege, or any other fundamental freedom or right, with the protection of those interests which the search power is seeking to promote.[47] The Court specifically referred to the procedure set out in section 232 of the Income Tax Act as suitable for dealing with a claim of solicitor-client privilege.[48]

This basic procedure is now also established for Criminal Code[48] searches and is very similar to the procedure set out in section 144 of the Ontario Provincial Offences Act.[49] Under both statutes where a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of the named client, the person shall, without examining or making copies of the document, seize the document and place it, together with any other documents seized in respect to which the same claim is made on behalf of the same client, in a package and seal and identify the package. The sealed package is then placed in the custody of the local court clerk or sheriff in which the seizure was made or in the custody of another person agreed to by the lawyer and his client. The lawyer and client must then apply to a judge for an order sustaining the privilege and for the return of the document within a certain period of time.

It is suggested that the guidelines set out by the Supreme Court of Canada in the Discoteaux case and the above-noted statutes are equally applicable to an environmental officer conducting a warrantless search. Where no attempt at all is made by the officer to accommodate a claim of solicitor-client privilege, then he or she has likely converted an originally legal search into an unreasonable search, contrary to section 8 of the Charter of Rights.

The above is only a brief discussion of solicitor-client privilege and the reader is directed to other sources for a more detailed treatment.[51]

END NOTES

1. R.S.O. 1980, c. 141

2. S.C. 1974-75-76, c.72

3. (1986), 1. C.E.L.R. (N.S.) 100; See also R v. A & A Marine & Drydock (1986), 16 W.C.B. 200 (Ont. Dist. Ct.), where a demand for information pursuant to section 48 of the Fisheries Act found invalid when it exceeded purpose of statute.

4. (1985), 18 C.C.C. (3d) 481

5. Ibid, p. 504; see also Black v. The Queen (1985), 19 C.R.R. 167 (Sas. C.B.), where accused acquitted of charge of obstructing wildlife officer when not informed of right to counsel when request to search accused's clothing.

6. (1985), 24, C.C.C. (3d) 88, leave to appeal to S.C.C. refused, 24 C.C.C. (3d) 88n, at 101.

7. Ibid, p. 97; R. v. Mannien (1983), 8 C.C.C. (3d) 193, at 198 (Ont. C.A.).

8. See Fontana, J.A., The Law of Search and Seizure in Canada (2nd Ed., 1984), for a discussion of the law pertianing to the issue and execution of search warrants.

9. [1984] 2 S.C.R. 145; 14 C.C.C. (3d) 97.

10. Ibid, p. 159; see also the leading U.S. decision, Katz v. U.S., 389 U.S. 347 (1967).

11. R.S.C. 1970, c. C-23, S. 10(n)(3).

12. (1985), 19 C.C.C. (3d) 98 (Ont. H.C.); Aff'd at 27 C.C.C. (3d)1 (Ont. C.A.).

13. (1985), 51 O.R. (2d) 322 (C.A.).

14. (1984), 48 O.R. (2d) 643 (C.A.).

15. (1984), 46 O.R. (2d) 80 (C.A.).

16. (1985), 51 O.R. (2d) 509, at p. 512.

17. (1985), 53 O.R. (2d) 338; leave to appeal to the S.C.C. refused at 55 O.R. (2d) 543; See also R v. Rao (1984), 46 O.R. (2d) 80 (C.A.) at p. 96, and Charboneau v. College of Physicians & Surgeons (1985), 20 C.R.R. 68 (Ont. H.C.).

18. (1986), 1 C.E.L.R. (N.S.) 100, at p. 104.

19. (1986), 32 M.P.L.R. 91.

20. See Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) and See v Seattle, 387 U.S. 541 (1967), where U.S. Supreme Court held that warrantless administrative searches unconstitutional.

21. (1984), 11 C.C.C. (3d) 276.

22. October 24, 1986, unreported 12 C.P.R. (3d) 97 (Ont. C.A.).

23. (1986), 28 C.C.C. (3d) 263, (Fed. C.A.). The Court stated at p. 289:

    "I would first observe that the seizure involved in this case was not "search and seizure" in a criminal law context. He was a seizure effected in the course of administering the Plant Quarantine Act. It was an administrative process. It is, I think important to have this distinction in mind. I quote from Mr. Justice Martin in R. v. Rao ..."

24. See Re Corr (1986), 56 O.R. (2d) 144 (H.C.).

25. 106 S.Ct. 1819 (1986); see also Glenn v. Delaware, 414 A2d 820, 14 ERC 1274 (Del. Sup. Ct. 1980), and Andrus v. P-Borg Coal Co., 495 F Supp 82, 14 ERC 1847 (50 Ind. 1980).

25a. Ibid, p. 1826-27; and see dissent.

26. Sections 14 and 80, R.S.O. 1980, c. 141; See also section 22 of the proposed Canada Environmental Protection Act, which includes the reporting of "imminent liklihood" of a release into the environment.

27. (1985), 53 O.R. (2nd) 356, at p. 362.

28. October 12, 1986, unreported, at p. 4.

29. 53 O.R. (2d) 250 , at p. 362.

30. Supra, at p. 5.

31. (1985), 24 D.L.R. (4th) 724.

32. (1985), 9 C.P.R. (3d) 325.

33. (1975), 24 C.C.C. (2d) 1.

34. (1972), 7 C.C.C. (2d) 181.

35. (1986), 15 W.C.B. 491.

36. 444 U.S. 939 (1980), affirming 598 F.2d 1187 (1979).

36a. 598 F.2d 1187 (1979), at p.1195; See U.S. v. Allied Towing Corporation, 578 F.2d 978 (4th Cir. 1978).

36b. Re Arrigo and The Queen (1986), 290 C.C.C. (3d) 77; See also R. v. Judge of General Sessions of Peace for County of York, Ex.p. Corning Glass Works (1970), 3 C.C.C. (2d) 204 (Ont.C.A.); and R. v. N.M. Paterson & Sons Ltd. (1080), 55 C.C.C. (2d) 289 (S.C.C.) re: compellibility of corporate officers.

37. Ibrahim v. The King [1914] A.C. 599 (P.C.); See McWilliams, Canadian Criminal Evidence (2nd Ed. 1984).

38. Marshall v. The Queen, [1986] S.C.R. 123; Walker v. The King, [1939] S.C.R. 123; Walker v. The King, [1939] S.C.R. 214.

39. See R. v. Mannien (1983), 8 C.C.C. (3d) 193 (Ont. C.A.); R. v. Morgan (1985), 22 C.R.R. 164 (B.C. Prov. Ct.).

40. R.S.O. 1980, c. 145, ss. 1(a), 2 and 9.

41. R.S.C. 1979, c. E-10, s.5; R.S.O. 1980, c. 145, s.9; and see R. v. Glen Hewitt (1984), 4 C.R.D. 875-05 (Man. Prov. Ct.).

42. (1985), 24 D.L.R. (4th) 724, at p. 748-49.

43. Re Borden & Elliot and The Queen (1975), 30 C.C.C. (2d) 337 9Ont. H.C.), affd 30 C.C.C. (2d) 337 (Ont. C.A.), at p. 340.

44. Descoteaux v. Mierzwinski (1982), 70 C.C.C. (2d) 385 (S.C.C.), at p. 402-05; Wheeler v. Le Marchant (1881), 17 Ch.D. 675.

45. Re Goodman and Carr and M.N.R., [1968] 2 O.R. 814 (H.C.).

46. Re Alcan-Colony Contracting Ltd., [1971] 2 O.R. 365 (H.C.); see also Biomedical Information Corp. v. Pearce (1985), 47 C.P.C. 113 (Ont.M.C.).

47. Descoteaux v. Mierzwinski, ibid, p. 412; See also Re Church of Scientology and The Queen No. 6) (1985), 21 C.C.C. (3d) 147 (Ont. H.C.), at p. 174-75; apprd, unreported January 30, 1987 (C.A.).

48. S.C. 1970-71-72, c. 63, as amended.

49. R.S.C. 1970, c. C-34, s. 444.1, amended S.C. 1985, c. 19, s. 72.

50. R.S.O. 1980, c. 400

51. McWilliams, Canadian Criminal Evidence (2nd Ed. 1984), P. 963; Sopinka & Lederman, The Law of Evidence in Civil Cases (1974), p. 157.

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APPENDIX A

Excerpts of:

Ontario ENVIRONMENTAL PROTECTION ACT, R.S.O. 1980, c.141, as amended

PART XII

PROVINCIAL OFFICERS

Designation of provincial officers

125. Repealed, S.O. 1986, c.68 (see amended s.4).

Survey by provincial officer

126.—(1) A provincial officer may survey from time to time anything that he has reason to believe is or may be a source of contaminant, and after completing such survey shall report his findings and his recommendations.

Report to be sent to Ministry and person responsible

(2) Repealed, S.O. 1986, c.68.

Powers of provincial officer

127.—(1) For the purpose of the administration of this Act and the regulations, a provincial officer may, from time to time and upon production of his designation, enter at any reasonable time any building, structure, machine, vehicle, land, water or air and make or require to be made such surveys, examinations, investigations, tests and inquiries, including examinations of books, records and documents, as he considers necessary, and may make, take and remove or may require to be made, taken or removed samples, copies or extracts. R.S.O. 1980, c. 141, s. 127 (1).

Detention or removal for testing

(1a) A provincial officer may detain any thing at the place where he finds it or may remove the thing or cause it to be removed to another place until the surveys, examinations, investigations, tests and inquiries in respect of the thing that the provincial officer is authorized to make or require to be made are completed.

Application for release

(1b) Upon application with notice by the owner or the person who had the charge, management or control of a thing detained by a provincial officer, a justice of the peace may make an order for the release of the thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of the administration of this Act and the regulations.

Appeal

(1c) An appeal lies from an order or refusal to make an order under subsection (1b) by a justice of the peace in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate under the *Provincial Offences Act*. 1983, c. 52, s. 20 (1).

R.S.O. 1980, c. 400

Order authorizing

(2) Where a justice of the peace is satisfied, upon an *ex parte* application by a provincial officer, that there is reasonable ground for believing that it is necessary to enter any building, structure, machine, vehicle, land, water or air or to detain or remove any thing for the administration of this Act or the regulations, the justice of the peace may issue an order authorizing a provincial officer to enter therein or thereon to detain or to remove any thing and to make or require to be made such surveys, examinations, investigations, tests and inquiries and to take the other actions mentioned in subsection (1) but every such entry, survey, examination, investigation, test, inquiry and other such action shall be made or taken between sunrise and sunset unless the justice of the peace authorizes the provincial officer, by the order, to so act at another time. R.S.O. 1980, c. 141, s. 127 (2); 1983, c. 52, s. 20 (2).

Information

(3) Every person responsible for a source of contaminant shall furnish such information as a provincial officer requires for the purposes of this Act or the regulations. R.S.O. 1980, c. 141, s. 127 (3).

Calling for assistance of member of police force

128.—(1) Whenever a provincial officer is required or empowered by this Act or the regulations to do or direct the doing of anything, such provincial officer may take such steps and employ such assistance as is necessary to accomplish what is required, and may, when obstructed in so doing, call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required and it is the duty of every member of a police force to render such assistance.

Inspection of motor vehicles

(2) A provincial officer, for the purpose of carrying out the provisions of this Act and the regulations, may require the driver of any motor vehicle to stop and may inspect the motor vehicle and require the driver of the motor vehicle to submit the motor vehicle, together with its equipment and any trailer attached thereto, to such examinations and tests at such place or places and time or times as the provincial officer considers expedient and where the provincial officer considers it necessary or expedient he may call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required and it is the duty of every member of a police force to render such assistance.

Duty of driver of motor vehicle

(3) Every driver of a motor vehicle shall stop or submit the motor vehicle, together with its equipment and any trailer attached, to such examinations and tests as may be required by a provincial officer or a member of a police force referred to in subsection (2). R.S.O. 1980, c. 141, s. 128.

Obstruction of provincial officer

129. No person shall hinder or obstruct a provincial officer in the lawful performance of his duties or furnish a provincial officer with false information or refuse to furnish him with information required for the purposes of this Act and the regulations. R.S.O. 1980, c. 141, s. 129.

Matters confidential

130.—(1) Except as to information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment, every provincial officer shall preserve secrecy in respect of all matters that come to his knowledge in the course of any survey, examination, test or inquiry under this Act or the regulations and shall not communicate any such matters to any person except,

(a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations;

(b) to his counsel; or

(c) with the consent of the person to whom the information relates.

Testimony in civil suit

(2) Except in a proceeding under this Act or the regulations, no provincial officer shall be required to give testimony, other than testimony in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment, in any civil suit or proceeding with regard to information obtained by him in the course of any survey, examination, test or inquiry under this Act or the regulations. R.S.O. 1980, c. 141, s. 130.

Canada ENVIRONMENTAL CONTAMINANTS ACT, S.C., 1974-75-76, c.72, as amended

INSPECTORS AND ANALYSTS

Inspectors and analysts

9. (1) The Minister may designate as an inspector or analyst for the purposes of this Act any person who, in his opinion, is qualified to be so designated.

Inspector to show certificate of designation

(2) An inspector shall be furnished with a certificate of his designation as an inspector and on entering any place pursuant to subsection 10(1) shall, if so required, produce the certificate to the person in charge thereof.

INSPECTION AND SEARCH

Inspection

10. An inspector may at any reasonable time enter any place, other than a private dwelling place or any part of such place that is designed to be used and is being used as a permanent or temporary private dwelling place, in which he believes on reasonable grounds there is any substance or class of substances that has been added to the schedule pursuant to section 7 and may, for any purpose relating to the enforcement of this Act,

INSPECTEURS ET ANALYSTES

Inspecteurs et analystes

9. (1) Le Ministre peut désigner pour occuper la fonction d'inspecteur ou d'analyste, aux fins de la présente loi, toute personne qu'il estime compétente pour occuper cette fonction.

L'inspecteur doit produire le certificat de nomination

(2) Un inspecteur doit être pourvu d'un certificat de nomination à cette fonction, et lorsqu'il entre dans un lieu en application du paragraphe 10(1), il doit, s'il en est requis, produire le certificat à la personne qui a la charge de ce lieu.

INSPECTION ET PERQUISITION

Perquisition

10. (1) L'inspecteur peut, à tout moment raisonnable, entrer dans un lieu, à l'exception d'une résidence particulière ou d'une partie d'un lieu qui est conçue pour être utilisée et est utilisée à titre de résidence particulière permanente ou temporaire lorsqu'il a des motifs raisonnables de croire qu'il s'y trouve un produit ou une substance ou une catégorie de substances ajoutée à l'annexe en vertu de l'article 7 au moyen ou au sujet duquel ou de laquelle il a

(*a*) examine any substance or product found therein;

(*b*) open and examine any receptacle or package found therein that he has reason to believe contains any substance or any substance of a class of substances specified in the schedule or any product containing any such substance; and

(*c*) examine any books, reports, records, shipping bills and bills of lading or other documents or papers that on reasonable grounds he believes contain any information relevant to the enforcement of this Act and make copies thereof or extracts therefrom. 1974-75-76, c. 72, s. 10; 1985, c. 26, s. 40.

été contrevenu à une disposition de là présente loi, et il peut, à quelque égard, pour l'application de la présente loi,

a) examiner toute substance ou tout produit qui s'y trouve;

b) ouvrir et examiner tout récipient ou paquet qui s'y trouve et dans lequel il a des raisons de croire qu'il y a une substance figurant à l'annexe ou une substance appartenant à une catégorie de substances qui y figure ou un produit contenant une telle substance; et

c) examiner les livres, rapport, registres, connaissement et feuilles d'expédition ou autres documents ou pièces qu'il croit, en se fondant sur des motifs raisonnables, contenir des renseignements pertinents pour l'application de la présente loi, et en prendre des copies ou des extraits. 1974-75-76, c. 72, art. 10; 1985, c. 26, art. 40.

Search

10.1 (1) An inspector with a warrant issued under subsection (2) may at any reasonable time enter and search any place in which he believes on reasonable grounds there is any substance or product by means of or in relation to which any provision of this Act has been contravened.

Authority to issue warrant

(2) Where on *ex parte* application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any place referred to in subsection (1)

(*a*) any substance or product by means of or in relation to which any provision of this Act has been contravened, or

(*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of any contravention under this Act,

he may issue a warrant under his hand authorizing the inspector named therein to enter and search that place subject to such conditions as may be specified.

Use of force

(3) In executing a warrant issued under subsection (2), the inspector named therein shall not use force unless he is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

Where warrant not necessary

(4) An inspector may exercise the powers of entry and search referred to in subsection (1) without a warrant issued under subsection (2)

Perquisition

10.1 (1) L'inspecteur muni du mandat visé au paragraphe (2) peut, à toute heure raisonnable, pénétrer dans un lieu lorsqu'il a des motifs raisonnables de croire qu'il s'y trouve une substance ou un produit qui a servi où a donné lieu à la perpétration d'une infraction à la présente loi, et peut y perquisitionner.

Pouvoir de délivrer un mandat

(2) S'il est convaincu d'après une dénonciation sous serment qu'il y a des motifs raisonnables de croire à la présence dans un lieu visé au paragraphe (1)

a) soit d'une substance ou d'un produit qui a servi ou donné lieu à la perpétration d'une infraction à la présente loi,

b) soit d'un objet dont il y a des motifs raisonnables de croire qu'il servira à prouver une infraction à la présente loi,

le juge de paix peut, sur demande *ex parte*, délivrer sous son seing un mandat autorisant l'inspecteur qui y est nommé à pénétrer dans ce lieu et à y perquisitionner, sous réserve des auditions éventuellement fixées dans le mandat.

Usage de la force

(3) L'inspecteur nommé dans le mandat prévu au paragraphe (2) ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.

Perquisition sans mandat

(4) L'inspecteur peut exercer sans mandat les pouvoirs d'entrée et de perquisition visés au paragraphe (1) lorsque l'urgence de la situation

if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

Exigent circumstances

(5) For the purposes of subsection (4), exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (2) would result in danger to human life or safety or the loss or destruction of evidence. 1985, c. 26, s. 40.

Assistance to inspectors

10.2 The owner or the person in charge of a place entered by an inspector pursuant to section 10 or 10.1 and every person found therein shall give the inspector all reasonable assistance in his power to enable the inspector to carry out his duties and functions under this Act and shall furnish him with such information with respect to the administration of this Act and the regulations as he may reasonably require. 1985, c. 26, s. 40.

Obstruction of inspectors

10.3 No person shall obstruct or hinder an inspector in the carrying out of his duties and functions under this Act. 1985, c. 26, s. 40.

SEIZURE AND DETENTION

Seizure

11. (1) Whenever an inspector believes on reasonable grounds that any provision of this Act has been contravened, he may seize and detain any substance or product by means of or in relation to which he reasonably believes the contravention occurred.

Seizure limitation

(2) Except to the extent that the substance or product, or a sample thereof, is required as evidence or for purposes of analysis, an inspector shall not seize any substance or product pursuant to subsection (1) unless in his opinion such seizure is necessary in the public interest.

Notice of contravention

(3) Where an inspector has seized and detained any substance or product pursuant to subsection (1), he shall, as soon as practicable, advise the person in whose possession the substance or product was at the time of seizure of the provision of this Act that he believes has been contravened.

Detention and release

(4) Any substance or product seized pursuant to subsection (1) shall not be detained

(*a*) after an inspector or the Minister, upon application made to him by the owner of the substance or product or by the person in whose possession the substance or product was at the time of seizure, is satisfied that it

rend pratiquement contre-indiquée l'obtention du mandat, sous réserve que les conditions de délivrance de celui-ci soient réunies.

Situation d'urgence

(5) Pour l'application du paragraphe (4), il y a notamment urgence dans les cas où le délai d'obtention du mandat risquerait de mettre en danger des personnes ou d'entraîner la perte ou la destruction d'éléments de preuve. 1985, c. 26, art. 40.

Aide à donner aux inspecteurs

10.2 Le propriétaire ou la personne ayant la charge d'un lieu où un inspecteur entre en application des articles 10 ou 10.1 et toute personne qui s'y trouve doivent fournir toute l'aide raisonnable en leur pouvoir à l'inspecteur pour lui permettre d'exercer ses fonctions en vertu de la présente loi et lui fournir, en ce qui concerne l'application de la présente loi et des règlements, les renseignements qu'il peut raisonnablement exiger.

Obstruction faite aux inspecteurs

10.3 Nul ne doit gêner ou empêcher un inspecteur dans l'exercice des fonctions que lui confère la présente loi. 1985, c. 26, art. 40.

SAISIE ET RÉTENTION

Saisie

11. (1) Chaque fois qu'un inspecteur croit, en se fondant sur des motifs raisonnables, qu'il a été contrevenu à une disposition de la présente loi, il peut saisir et retenir tout produit ou toute substance au moyen ou au sujet duquel ou de laquelle la contravention a été commise.

Restriction à la saisie

(2) Sauf dans la mesure où la substance ou le produit, ou un échantillon de ceux-ci, est nécessaire à titre de preuve ou aux fins d'analyse, un inspecteur ne doit saisir une substance ou un produit en application du paragraphe (1) que s'il estime cette saisie nécessaire dans l'intérêt public.

Avis de violation

(3) Lorsqu'un inspecteur a saisi et retenu une substance ou un produit en application du paragraphe (1), il doit, dès que cela est matériellement possible, faire connaître, à la personne qui en avait la possession au moment de la saisie, la disposition de la présente loi qu'il croit avoir été enfreinte.

Rétention et remise

(4) Une substance ou un produit saisis en application du paragraphe (1) ne doivent plus être retenus

a) dès qu'un inspecteur ou le Ministre, à la suite d'une demande que lui présente le propriétaire de la substance ou du produit ou la personne qui en avait la possession au is not necessary in the public interest to continue to detain such substance or product, except to the extent that the substance or product, or a sample thereof, is required as evidence or for purposes of analysis; or

(*b*) after the expiration of sixty days from the day of seizure, unless before that time

(i) the substance or product has been forfeited pursuant to section 13,

(ii) proceedings have been instituted in respect of the contravention in relation to which the substance or product was seized, in which event the substance or product may be detained until the proceedings are finally concluded, or

(iii) notice of an application for an order extending the time during which the substance or product may be detained has been served in accordance with section 12.

Storing of seized substance or product

(5) A substance or product seized by an inspector pursuant to subsection (1) shall be kept or stored in the building or place where it was seized except where, in the opinion of the inspector, it is not in the public interest to do so, because such substance or product or a sample thereof is required as evidence or because the person in whose possession the substance or product was at the time of seizure or the person entitled to possession of the place requests the inspector that it be removed to some other place, in which case such substance or product may be removed to and stored in any other place at the direction of or with the concurrence of an inspector and at the expense of the person who requested that it be so removed.

Interference with seized substance or product

(6) Unless authorized by an inspector, no person shall remove, alter or interfere in any way with any substance or product seized and detained by an inspector pursuant to subsection (1) but an inspector shall, at the request of the person from whom the substance or product was seized, allow that person or any person authorized by that person to examine the substance or product so seized and, where practicable, furnish a sample thereof to such person.

Application to extend period of detention

12. (1) Where proceedings have not been instituted in respect of the contravention in

moment de la saisie, est convaincu qu'il n'est pas nécessaire, dans l'intérêt public, d'en poursuivre la rétention, sauf dans la mesure où cette substance ou ce produit, ou un échantillon de ceux-ci, est nécessaire à titre de preuve ou à des fins d'analyse; ou

b) dès l'expiration d'un délai de soixante jours à partir de la date de la saisie, sauf si, avant cela,

(i) la substance ou le produit ont été confisqués en application de l'article 13,

(ii) des procédures ont été intentées relativement à la contravention ayant donné lieu à la saisie de la substance ou du produit, auquel cas la substance ou le produit, peuvent être retenus jusqu'à la fin des procédures, ou

(iii) un avis de demande d'ordonnance prolongeant le délai de rétention de la substance ou du produit a été signifié conformément à l'article 12.

Emmagasinage de la substance ou du produit saisis

(5) Une substance ou un produit saisis par un inspecteur en application du paragraphe (1) doivent être gardés ou emmagasinés dans le bâtiment ou le lieu où ils ont été saisis, sauf lorsque, de l'avis de l'inspecteur, cela n'est pas d'intérêt public, parce que cette substance ou ce produit ou un échantillon de ceux-ci sont nécessaires à titre de preuve ou parce que la personne qui avait la possession de la substance ou du produit au moment de la saisie ou la personne ayant droit à la possession du lieu en question demande à l'inspecteur de les placer ailleurs; dans ce cas, cette substance ou ce produit peuvent être déplacés et emmagasinés en tout autre lieu sur l'ordre ou avec l'accord d'un inspecteur, aux frais de la personne qui en a demandé le déplacement.

Manipulation de la substance ou du produit saisis

(6) À moins d'y être autorisé par un inspecteur, nul ne doit enlever, modifier ni manipuler de quelque façon une substance ou un produit saisis et retenus par un inspecteur en application du paragraphe (1); mais un inspecteur doit, à la demande de la personne entre les mains de laquelle la substance ou le produit ont été saisis, permettre à cette personne ou à toute personne autorisée par elle d'examiner cette substance ou ce produit et, lorsque cela est matériellement possible, lui en fournir un échantillon.

Demande de prolongation du délai de rétention

12. (1) Lorsqu'il n'a pas été intenté de procédure relativement à la contravention ayant relation to which any substance or product was seized pursuant to subsection 11(1), the Minister may, before the expiration of sixty days from the day of seizure and upon the serving of prior notice in accordance with subsection (2) on the owner of the substance or product or on the person in whose possession the substance or product was at the time of seizure, apply to a magistrate within whose territorial jurisdiction the seizure was made for an order extending the time during which the substance or product may be detained.

Notice

(2) The notice referred to in subsection (1) shall be served by personal service at least five clear days prior to the day on which the application is to be made to the magistrate or by registered mail at least seven clear days prior to that day and shall specify

(*a*) the magistrate to whom the application is to be made;

(*b*) the place where and the time when the application is to be heard, which time shall be not later than ten days after service of the notice;

(*c*) the substance or product in respect of which the application is to be made; and

(*d*) the evidence upon which the Minister intends to rely to show why the time during which the substance or product may be detained should be extended.

Order of extension granted

(3) Where, upon the hearing of an application made under subsection (1), the magistrate is satisfied that the substance or product seized should continue to be detained, he shall order that the substance or product be detained for such additional period of time and upon such conditions relating to the detention for that additional period of time as he deems proper and that upon the expiration of such period of time the substance or product be restored to the person from whom it was seized or to any other person entitled to possession thereof unless before the expiration of such period of time subparagraph 11(4)(*b*)(i) or (ii) applies.

Order of extension refused

(4) Where, upon the hearing of an application made under subsection (1), the magistrate is not satisfied that the substance or product seized should continue to be detained, he shall order that the substance or product be restored to the person from whom it was seized or to any other person entitled to possession thereof upon

donné lieu à la saisie d'une substance ou d'un produit en application du paragraphe 11(1), le Ministre peut, dans les soixante jours qui suivent la date de la saisie et sur signification d'un préavis, conformément au paragraphe (2), au propriétaire de la substance ou du produit ou à la personne qui en avait la possession au moment de la saisie, demander à un magistrat dans le ressort duquel la saisie a été effectuée une ordonnance prolongeant le délai de rétention de cette substance ou de ce produit.

Préavis

(2) Le préavis mentionné au paragraphe (1) doit être signifié à la personne, cinq jours francs au moins avant la date où la demande doit être présentée au magistrat, ou par courrier recommandé, sept jours francs au moins avant cette date, et doit spécifier

a) à quel magistrat la demande sera présentée;

b) où et quand la demande sera entendue, la date d'audition devant se situer dans les dix jours suivant la signification du préavis;

c) à quelle substance ou quel produit se rapporte la demande; et

d) quelle preuve le Ministre entend invoquer pour justifier la prolongation du délai de rétention de la substance ou du produit.

Ordonnance de prolongation

(3) Lorsque, à la suite de l'audition d'une demande présentée en vertu du paragraphe (1), le magistrat est convaincu qu'il y a lieu de ne pas mettre fin à la rétention de la substance ou du produit saisis, il doit ordonner que la substance ou le produit soient retenus pendant tel délai supplémentaire et à telles conditions relatives à la rétention qu'il juge appropriés, et qu'à l'expiration de ce délai la substance ou le produit soient restitués à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession, à moins que, avant l'expiration de ce délai, les sous-alinéas 11(4)*b*)(i) ou (ii) ne s'appliquent.

Refus de rendre une ordonnance de prolongation

(4) Lorsque, à la suite de l'audition d'une demande présentée en vertu du paragraphe (1), le magistrat n'est pas convaincu qu'il y ait lieu de ne pas mettre fin à la rétention de la substance ou du produit saisis, il doit ordonner que la substance ou le produit soient restitués à la personne entre les mains de laquelle ils ont été

the expiration of sixty days from the day of seizure unless,

(*a*) before the expiration of such period of time, subparagraph 11(4)(*b*)(i) or (ii) applies; or

(*b*) at the time of the hearing, such period of time has then expired in which event he shall order the restoration thereof forthwith to the person from whom it was seized or to any other person entitled to possession thereof.

saisis ou à toute autre personne ayant le droit d'en avoir la possession, à l'expiration d'un délai de soixante jours à partir de la date de la saisie, à moins que

a) les sous-alinéas 11(4)*b*)(i) ou (ii) ne s'appliquent avant l'expiration de ce délai; ou que

b) ce délai ne soit arrivé à son terme au moment de l'audition, auquel cas il doit en ordonner la restitution immédiate à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession.

"Magistrate" defined

(5) In this section, "magistrate" means a magistrate as defined in the *Criminal Code*.

(5) Au présent article, «magistrat» désigne le magistrat défini par le *Code criminel*.

Définition de «magistrat»

FORFEITURE

Forfeiture on consent

13. (1) Where an inspector has seized any substance or product pursuant to subsection 11(1) and the owner thereof or the person in lawful possession thereof at the time of seizure consents in writing at the request of the inspector to the forfeiture of the substance or product, such substance or product is thereupon forfeited to Her Majesty.

Forfeiture by order of court

(2) Where a person is convicted of an offence under this Act and any substance or product seized pursuant to subsection 11(1) by means of or in relation to which the offence was committed is then being detained, such substance or product

(*a*) is, upon such conviction, in addition to any punishment imposed for the offence, forfeited to Her Majesty if such forfeiture is directed by the court; or

(*b*) shall, upon the expiration of the time for taking an appeal from the conviction or upon the final conclusion of the proceedings, as the case may be, be restored to the person from whom it was seized or to any other person entitled to possession thereof upon such conditions, if any, as may be imposed by order of the court and as, in the opinion of the court, are necessary to avoid the commission of any further offence under this Act.

Articles deemed not to have been seized

(3) For the purposes of subsection (2), any substance or product released from detention pursuant to paragraph 11(4)(*a*) or (*b*) shall be deemed not to have been seized pursuant to subsection 11(1).

CONFISCATION

Confiscation par consentement

13. (1) Lorsqu'un inspecteur a saisi une substance ou un produit en application du paragraphe 11(1) et que, à la demande de l'inspecteur, la personne qui en est propriétaire ou la personne qui en avait légalement la possession au moment de la saisie consent par écrit à sa confiscation, cette substance ou ce produit est immédiatement confisqué au profit de Sa Majesté.

Confiscation par ordonnance du tribunal

(2) Lorsqu'une personne est déclarée coupable d'une infraction prévue par la présente loi et qu'une substance ou un produit saisis en application du paragraphe 11(1), au moyen ou au sujet desquels l'infraction a été commise, sont alors retenus, la substance ou le produit

a) sont, après cette déclaration de culpabilité, et en sus de toute peine imposée pour l'infraction, confisqués au profit de Sa Majesté si le tribunal l'ordonne; ou

b) doivent, à l'expiration du délai prévu pour porter la condamnation en appel, ou à la fin des procédures, selon le cas, être restitués à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession, aux conditions, s'il en est, que le tribunal peut fixer par ordonnance et qui, de l'avis de ce dernier, sont nécessaires pour éviter que soit de nouveau commise une infraction prévue par la présente loi.

Articles réputés ne pas avoir été saisis

(3) Aux fins du paragraphe (2), une substance ou un produit restitués en application des alinéas 11(4)*a*) ou *b*) sont réputés ne pas avoir été saisis en application du paragraphe 11(1).

PART V

GENERAL

Exercise of Regulation Making Power

General

40. The Governor in Council may, in the exercise of any regulation making power under this Act, in respect of a substance,

(*a*) prescribe the minimum, average or maximum quantity or concentration thereof; and

(*b*) prescribe the method of determining such a quantity or concentration.

Agreements with Provinces

Agreements

41. The Minister may, with the approval of the Governor in Council, enter into agreements with one or more provincial governments with respect to the administration of this Act.

Inspectors and Analysts

Inspectors and Analysts

42. (1) The Minister may designate as an inspector or analyst for the purposes of this Act any person who, in his opinion, is qualified to be so designated.

Inspector to show certificate of designation

(2) An inspector shall be furnished with a certificate of his designation as an inspector and on entering any place pursuant to subsection 43(1) shall, if so required, produce the certificate to the person in charge thereof.

Inspection and Search

Inspection

43. (1) An inspector may at any reasonable time enter any place, other than a private dwelling place or any part of such place that is designed to be used and is being used as a permanent or temporary private dwelling place, where he has reasonable grounds to believe

(*a*) that there can be found therein a substance or class of substances to which this Act applies or a product containing such a substance;

(*b*) that an activity is being or has been carried on therein which may result in the

PARTIE V

DISPOSITIONS GÉNÉRALES

Exercice du pouvoir réglementaire

Disposition générale

40. Dans l'exercice des pouvoirs réglementaires qui lui sont attribués par la présente loi, le gouverneur en conseil peut, en ce qui concerne une substance :

a) en fixer la quantité ou concentration moyenne, minimale ou maximale;

b) fixer la méthode de détermination de cette quantité ou concentration.

Accords avec les provinces

Conclusion

41. Le ministre peut, avec l'approbation du gouverneur en conseil, conclure avec les gouvernements des provinces ou leurs organismes des accords relatifs à la réalisation de programmes découlant de la mise en oeuvre de la présente loi.

Inspecteurs et analystes

Inspecteurs et analystes

42. (1) Le ministre peut désigner pour occuper la fonction d'inspecteur ou d'analyste, aux fins de la présente loi, toute personne qu'il estime compétente pour occuper cette fonction.

L'inspecteur doit produire le certificat de nomination

(2) L'inspecteur doit être pourvu d'un certificat de nomination à cette fonction, et lorsqu'il entre dans un lieu en application du paragraphe 43(1), il doit, s'il en est requis, produire le certificat à la personne qui a la charge de ce lieu.

Inspection et perquisition

Pénétration

43. (1) L'inspecteur peut, à toute heure convenable, pénétrer dans un lieu, à l'exception d'une résidence particulière ou d'une partie d'un lieu qui est conçue pour être utilisée et est utilisée à titre de résidence particulière permanente ou temporaire, lorsqu'il a des motifs raisonnables de croire :

a) soit qu'il s'y trouve ou bien une substance ou une substance d'une catégorie de substances visée par la présente loi, ou bien un produit contenant une telle substance;

release into the ambient air of an air contaminant;

(*c*) that a fuel to which this Act applies is being or has been produced therein or can be found therein;

(*d*) that a cleaning agent or water conditioner to which this Act applies is being or has been produced therein or can be found therein; or

(*e*) that there can be found therein any books, records, electronic data or other documents relevant to the enforcement of this Act.

Idem

(2) In carrying out an inspection of a place pursuant to subsection (1), an inspector may, for the purposes of this Act,

(*a*) examine any substance or product referred to in paragraph (1)(*a*), any material used for an activity referred to in paragraph (1)(*b*) or resulting from such an activity, any fuel referred to in paragraph (1)(*c*) or any cleaning agent or water conditioner referred to in paragraph (1)(*d*) that is found therein;

(*b*) open and examine any receptacle or package found therein that he has reason to believe contains any substance, product, air contaminant, fuel, cleaning, agent or water conditioner;

(*c*) examine any books, records, electronic data or other documents that on reasonable grounds he believes contain any information relevant to the enforcement of this Act and make copies thereof or extracts therefrom; and

(*d*) take samples of any thing referred to in paragraph (*b*).

Authority to issue warrant

44. (1) Where on *ex parte* application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any place referred to in subsection (2)

(*a*) any thing by means of or in relation to which any provision of this Act has been contravened,

(*b*) any thing for which there are reasonable grounds to believe will afford evi-

b) soit qu'on s'y livre, ou qu'on s'y est livré, à une activité qui peut entraîner l'émission dans l'air ambiant d'un contaminant atmosphérique;

c) soit qu'on y produit du combustible, ou qu'il s'y trouve, du combustible visé par la présente loi;

d) soit qui on y fabrique un agent de nettoyage ou un conditionneur d'eau, ou qu'il s'y trouve tel produit importé visé par la présente loi;

e) soit qu'il s'y trouve des livres, registres, données électroniques ou autres documents relatifs à l'application de la présente loi.

Examen et échantillons

(2) L'inspecteur qui a pénétré dans un lieu ou un local en vertu du paragraphe (1) peut, pour l'application de la présente loi :

a) examiner toute substance ou tout produit visé à l'alinéa (1)*a*), toute matière utilisée pour une activité visée à l'alinéa (1)*b*), ou qui en résulte, tout combustible visé à l'alinéa (1)*c*) ou tout agent de nettoyage ou conditionneur d'eau visé à l'alinéa (1)*d*) qui s'y trouve;

b) ouvrir et examiner tout contenant ou emballage qui s'y trouve et dans lequel il a des motifs de croire qu'il s'y trouve une substance, un produit, un contaminant atmosphérique, un combustible, un agent de nettoyage ou un conditionneur d'eau;

c) examiner les livres, registres, données électroniques ou autres documents dont il a des motifs raisonnables de croire qu'ils contiennent des renseignements qui concernent l'application de la présente loi, et en prendre des copies ou extraits;

d) prélever des échantillons de toute chose visée à l'alinéa *b*).

Pouvoir de délivrer un mandat

44. (1) S'il est convaincu d'après une dénonciation sous serment qu'il y a des motifs raisonnables de croire à la présence dans un lieu visé au paragraphe (2) :

a) soit d'une chose qui a servi ou donné lieu à la perpétration d'une infraction à la présente loi,

b) soit de toute chose dont il y a des motifs raisonnables de croire qu'elle servira à prouver une infraction à la présente loi, dence with respect to the commission of any offence under this Act, or

(*c*) any books, records, electronic data or other documents for which there are reasonable grounds to believe will afford evidence with respect to the commission of any offence under this Act,

the justice of the peace may issue a warrant under his hand authorizing the inspector named therein to enter and search that place and to seize and detain any thing referred to in paragraphs (*a*) to (*c*) subject to such conditions as may be specified.

Search

(2) An inspector with a warrant issued under subsection (1) may at any reasonable time enter and search any place in which he believes on reasonable grounds there is any thing referred to in that subsection by means of or in relation to which any provision of this Act has been contravened and may seize and detain any such thing in accordance with section 47.

Where warrant not necessary

(3) An inspector may exercise the powers of entry, search, seizure and detention referred to in subsection (2) without a warrant if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

Exigent circumstances

(4) For greater certainty, exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (2) would result in danger to human life or the environment or the loss or destruction of evidence.

Operation of computer system

(5) A person who is authorized pursuant to subsection (1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output and may seize the printout or other output for examination or copying.

c) soit de livres, registres, données électroniques ou autres documents dont il y a des motifs raisonnables de croire qu'ils serviront à prouver une infraction à la présente loi,

le juge de paix peut, sur demande *ex parte*, délivrer sous son seing un mandat autorisant l'inspecteur qui y est nommé à pénétrer dans ce lieu et à y perquisitionner et y saisir et retenir les choses visées aux alinéas *a*) à *c*), sous réserve des conditions éventuellement fixées dans le mandat.

Perquisition

(2) L'inspecteur muni du mandat visé au paragraphe (1) peut, à toute heure raisonnable, pénétrer dans un lieu lorsqu'il a des motifs raisonnables de croire qu'il s'y trouve des choses visées au paragraphe (1) qui ont servi ou donné lieu à la perpétration d'une infraction à la présente loi, et peut perquisitionner et y saisir et retenir ces choses conformément à l'article 47.

Perquisition sans mandat

(3) L'inspecteur peut exercer sans mandat les pouvoirs d'entrée, de perquisition, de saisie et de rétention visés au paragraphe (2) lorsque l'urgence de la situation rend pratiquement contre-indiquée l'obtention du mandat, sous réserve que les conditions de délivrance de celui-ci soient réunies.

Situation d'urgence

(4) Il est entendu qu'il y a notamment urgence dans les cas où le délai d'obtention du mandat risquerait soit de mettre en danger des personnes ou l'environnement soit d'entraîner la perte ou la destruction d'éléments de preuve.

Usage d'un système informatique

(5) L'inspecteur qui est, en vertu du paragraphe (1), autorisé à perquisitionner un lieu pour y chercher un document peut soit utiliser ou faire utiliser tout ordinateur se trouvant dans le lieu en question dans le but de faire la recherche de données se trouvant dans l'ordinateur, ou pouvant lui être fournies, soit, à partir de ces données, reproduire ou faire reproduire le document sous forme d'imprimé ou d'une autre sortie de données intelligible, soit en outre emporter cet imprimé ou cette sortie de données pour les examiner ou en prendre copie.

Duty of person in control of computer system

(6) Every person who is in possession or control of any premises in respect of which a warrant is issued under subsection (1) shall, on presentation of the warrant, permit any person named in the warrant to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system for data from which a record that that person is authorized to search for may be produced, to obtain a physical copy thereof and to seize it.

Obligation de la personne ayant la possession d'un ordinateur

(6) La personne qui est en possession ou qui a le contrôle d'un lieu à l'égard duquel un mandat a été délivré en application du paragraphe (1) doit, sur présentation du mandat, permettre à toute personne nommée au mandat d'utiliser ou de faire utiliser l'ensemble ou une partie seulement d'un ordinateur se trouvant dans le lieu en question de sorte que toute donnée se trouvant dans l'ordinateur ou pouvant lui être fournie puisse faire l'objet d'une recherche dans le but de trouver des données à partir desquelles peut être produit un document que la personne nommée au mandat est autorisée à rechercher, de même qu'elle doit permettre à cette dernière d'en obtenir une copie physique et de l'emporter.

Definitions

(7) For the purposes of this section, "data" and "computer" have the same meaning as in subsection 301.2(2) of the *Criminal Code*.

Définitions

(7) Aux fins du présent article, «données» et «ordinateur» s'entendent au sens du paragraphe 301.2(2) du *Code criminel*.

Assistance to inspectors

45. The owner or the person in charge of a place entered by an inspector pursuant to section 43 or 44 and every person found therein shall give the inspector all reasonable assistance in his power to enable the inspector to carry out his duties and functions under this Act and shall furnish him with such information with respect to the administration of this Act and the regulations as he may reasonably require.

Aide à donner aux inspecteurs

45. Le propriétaire ou la personne ayant la charge d'un lieu où un inspecteur entre en application des articles 43 ou 44 et toute personne qui s'y trouve doivent fournir toute l'aide raisonnable en leur pouvoir à l'inspecteur pour lui permettre d'exercer ses fonctions en vertu de la présente loi et lui fournir, en ce qui concerne l'application de la présente loi et des règlements, les renseignements qu'il peut raisonnablement exiger.

Obstruction of inspectors

46. No person shall, while an inspector is exercising his powers or carrying out his duties and functions under this Act,

(*a*) knowingly make any false or misleading statement, either orally or in writing, to the inspector; or

(*b*) otherwise obstruct or hinder the inspector.

Entrave

46. Lorsque l'inspecteur agit dans l'exercice de ses fonctions, il est interdit :

a) de lui faire sciemment, oralement ou par écrit, une déclaration fausse ou trompeuse;

b) d'une façon générale, d'entraver son action.

Seizure and Detention

Saisie et rétention

Seizure

47. (1) Whenever during the course of an inspection or of a search an inspector believes on reasonable grounds that any provision of this Act has been contravened, he may seize and detain any thing by means of or in relation to which he reasonably believes the contravention occurred or will afford evidence of such contravention.

Saisie

47. (1) Chaque fois, lors d'une inspection ou d'une perquisition, qu'un inspecteur croit, en se fondant sur des motifs raisonnables, qu'il a été contrevenu à une disposition de la présente loi, il peut saisir et retenir toute chose au moyen soit au sujet duquel ou de laquelle la contravention a été commise, soit qui servira à prouver celle-ci.

Seizure limitation

(2) Except to the extent that the thing is required as evidence or for purposes of analysis, an inspector shall not seize any thing pursuant to subsection (1) unless in his opinion such seizure is necessary in the public interest.

Notice of contravention

(3) Where an inspector has seized and detained any thing pursuant to subsection (1), he shall, as soon as practicable, advise the person in whose possession it was at the time of seizure of the provision of this Act that he believes has been contravened.

Detention and release

(4) Any thing seized pursuant to subsection (1) shall not be detained

(*a*) after an inspector or the Minister, upon application made to him by the owner of the thing seized or by the person in whose possession the thing was at the time of seizure, is satisfied that it is not necessary in the public interest to continue to detain it, except to the extent that it is required as evidence or for purposes of analysis; or

(*b*) after the expiration of ninety days from the day of seizure, unless before that time

(i) the thing seized has been forfeited pursuant to section 49,

(ii) proceedings have been instituted in respect of the contravention in relation to which the thing was seized, in which event it may be detained until the proceedings are finally concluded, or

(iii) notice of an application for an order extending the time during which the thing may be detained has been served in accordance with section 48.

Storing of seized substance or product

(5) A thing seized by an inspector pursuant to subsection (1) shall be kept or stored in the building or place where it was seized except where, in the opinion of the inspector, it is not in the public interest to do so, because the thing seized is required as evidence or because the person in whose possession it was at the time of seizure or the person entitled to possession of the place requests the inspector to have it removed to some other place, in which case it may be

Restriction à la saisie

(2) Sauf dans la mesure où la chose est nécessaire à titre de preuve ou aux fins d'analyse, un inspecteur ne peut effectuer la saisie prévue par le paragraphe (1) que s'il l'estime nécessaire dans l'intérêt public.

Avis de violation

(3) L'inspecteur qui a saisi et retenu une chose en application du paragraphe (1) fait connaître dès que cela est matériellement possible, à la personne qui en avait la possession au moment de la saisie, la disposition de la présente loi qu'il croit avoir été enfreinte.

Rétention et remise

(4) Une chose saisie en application du paragraphe (1) ne peut plus être retenue :

a) dès qu'un inspecteur ou le ministre, à la suite d'une demande que lui présente le propriétaire de la chose ou la personne qui en avait la possession au moment de la saisie, est convaincu qu'il n'est pas nécessaire, dans l'intérêt public, d'en poursuivre la rétention, sauf dans la mesure où cette chose, est nécessaire à titre de preuve ou à des fins d'analyse; ou

b) après l'expiration d'un délai de quatre-vingt-dix jours à partir de la date de la saisie, sauf si, au préalable, un des événements suivants survient :

(i) la chose a été confisquée en application de l'article 49,

(ii) des poursuites ont été intentées relativement à la contravention ayant donné lieu à la saisie, auquel cas la chose peut être retenue jusqu'à la fin des poursuites,

(iii) un avis de demande d'ordonnance prolongeant le délai de rétention de la chose a été signifié conformément à l'article 48.

Emmagasinage de la chose saisie

(5) Une chose saisie par un inspecteur en application du paragraphe (1) doit être gardée ou emmagasinée dans le bâtiment ou le lieu où elle a été saisie, sauf lorsque, de l'avis de l'inspecteur, cela n'est pas d'intérêt public, parce que cette chose nécessaire à titre de preuve ou parce que la personne qui en avait la possession au moment de la saisie ou la personne ayant droit à la possession du lieu en question demande à l'inspecteur de la placer ailleurs; dans ce cas, cette chose peut

removed to and stored in any other place at the direction of or with the concurrence of an inspector and at the expense of the person who requested that it be so removed.

Interference with seized substance or product

(6) Unless authorized by an inspector, no person shall remove, alter or interfere in any way with any thing seized and detained by an inspector pursuant to subsection (1) but an inspector shall, at the request of the person from whom it was seized, allow that person or any person authorized by that person to examine it and, where practicable, furnish a sample or copy thereof to such person.

Application to extend period of detention

48. (1) Where proceedings have not been instituted in respect of the contravention in relation to which any thing was seized pursuant to subsection 47(1), the Minister may, before the expiration of ninety days from the day of seizure and upon the serving of prior notice in accordance with subsection (2) on the owner of the thing or on the person in whose possession it was at the time of seizure, apply to a provincial court judge within whose territorial jurisdiction the seizure was made for an order extending the time during which it may be detained.

Notice

(2) The notice referred to in subsection (1) shall be served by personal service at least five clear days prior to the day on which the application is to be made to the provincial judge or by registered mail at least seven clear days prior to that day and shall specify

(*a*) the provincial court judge to whom the application is to be made;

(*b*) the place where and the time when the application is to be heard, which time shall be not later than ten days after service of the notice;

(*c*) the thing seized in respect of which the application is to be made; and

(*d*) the evidence upon which the Minister intends to rely to show why the time during which the thing seized may be detained should be extended.

Order of extension granted

(3) Where, upon the hearing of an application made under subsection (1), the provincial court judge is satisfied that the thing

être déplacée et emmagasinée en tout autre lieu sur l'ordre ou avec l'accord d'un inspecteur, aux frais de la personne qui en a demandé le déplacement.

Manipulation de la chose saisie

(6) À moins d'y être autorisé par un inspecteur, nul ne peut enlever, modifier ni manipuler de quelque façon une chose saisie et retenue par un inspecteur en application du paragraphe (1); mais un inspecteur doit, à la demande de la personne entre les mains de laquelle la chose a été saisie, permettre à cette personne ou à toute personne autorisée par elle de l'examiner et, lorsque cela est matériellement possible, de lui en fournir un échantillon ou une copie.

Demande de prolongation du délai de rétention

48. (1) Lorsqu'il n'a pas été intenté de procédure relativement à la contravention ayant donné lieu à la saisie d'une chose en application du paragraphe 47(1), le ministre peut, dans les quatre-vingt-dix jours suivant la date de la saisie et sur signification du préavis prévu par le paragraphe (2) au propriétaire de la chose ou à la personne qui en avait la possession au moment de la saisie, demander à un juge de la cour provinciale dans le ressort duquel la saisie a été effectuée une ordonnance prolongeant le délai de rétention de cette chose.

Préavis

(2) Le préavis mentionné au paragraphe (1) est signifié à personne, cinq jours francs au moins avant la date de présentation de la demande au juge, ou par courrier recommandé, sept jours francs au moins avant cette date, et doit spécifier :

a) à quel juge de la cour provinciale la demande sera présentée;

b) où et quand la demande sera entendue, la date d'audition devant se situer dans les dix jours suivant la signification du préavis;

c) à quelle chose saisie se rapporte la demande;

d) quelle preuve le ministre entend invoquer pour justifier la prolongation du délai de rétention de la chose saisie.

Ordonnance de prolongation

(3) Lorsque, à la suite de l'audition d'une demande présentée en vertu du paragraphe (1), le juge est convaincu qu'il y a lieu de ne

seized should continue to be detained, he shall order that it be detained for such additional period of time and upon such conditions relating to the detention for that additional period of time as he deems proper and that upon the expiration of such period of time it be restored to the person from whom it was seized or to any other person entitled to possession thereof unless before the expiration of such period of time subparagraph 47(4)(*b*)(i) or (ii) applies.

pas mettre fin à la rétention de la chose saisie, il doit ordonner qu'elle soit retenue pendant tel délai supplémentaire et à telles conditions relatives à la rétention qu'il juge appropriés, et qu'à l'expiration de ce délai, la chose soit restituée à la personne entre les mains de laquelle elle a été saisie ou à toute autre personne ayant le droit d'en avoir la possession, sauf si, avant l'expiration de ce délai, les sous-alinéas 47(4)*b*)(i) ou (ii) ne s'appliquent.

Order of extension refused

(4) Where, upon the hearing of an application made under subsection (1), the provincial court judge is not satisfied that the thing seized should continue to be detained, he shall order it be restored to the person from whom it was seized or to any other person entitled to possession thereof upon the expiration of ninety days from the day of seizure unless,

(*a*) before the expiration of such period of time, subparagraph 47(4)(*b*)(i) or (ii) applies; or

(*b*) at the time of the hearing, such period of time has then expired in which event he shall order the restoration thereof forthwith to the person from whom it was seized or to any other person entitled to possession thereof.

Refus de rendre une ordonnance de prolongation

(4) Lorsque, à la suite de l'audition d'une demande présentée en vertu du paragraphe (1), le juge de la cour provinciale n'est pas convaincu qu'il y ait lieu de ne pas mettre fin à la rétention de la chose saisie, il doit ordonner qu'elle soit restituée à la personne entre les mains de laquelle elle a été saisie ou à toute autre personne ayant le droit d'en avoir la possession, à l'expiration d'un délai de quatre-vingt-dix jours à partir de la date de la saisie, sauf si :

a) les sous-alinéas 47(4)*b*)(i) ou (ii) ne s'appliquent avant l'expiration de ce délai;

b) ce délai ne soit expiré au moment de l'audition, auquel cas il doit en ordonner la restitution immédiate à la personne entre les mains de laquelle elle a été saisie ou à toute autre personne ayant le droit d'en avoir la possession.

Forfeiture

Forfeiture on consent

49. (1) Where an inspector has seized any thing pursuant to subsection 47(1) and the owner thereof or the person in lawful possession thereof at the time of seizure consents in writing at the request of the inspector to the forfeiture of that thing, it is thereupon forfeited to Her Majesty.

Forfeiture by order of court

(2) Where a person is convicted of an offence under this Act and any thing seized pursuant to subsection 47(1) by means of or in relation to which the offence was committed is then being detained,

(*a*) that thing is, upon such conviction, in addition to any punishment imposed for the offence, forfeited to Her Majesty and all or a part of the costs of the forfeiture

Confiscation

Confiscation par consentement

49. (1) Lorsqu'un inspecteur a saisi une chose en application du paragraphe 47(1) et que, à la demande de l'inspecteur, la personne qui en est propriétaire ou la personne qui en avait légalement la possession au moment de la saisie consent par écrit à sa confiscation, cette chose est immédiatement confisquée au profit de Sa Majesté.

Confiscation par ordonnance du tribunal

(2) Lorsqu'une personne est déclarée coupable d'une infraction prévue par la présente loi et qu'une chose saisie en application du paragraphe 47(1), au moyen ou au sujet de laquelle l'infraction a été commise, est alors retenue, la chose :

a) est, après cette déclaration de culpabilité, et en sus de toute peine imposée pour l'infraction, confisquée au profit de Sa shall be paid by the offender, if the court so directs; or

(*b*) that thing shall, upon the expiration of the time for taking an appeal from the conviction or upon the final conclusion of the proceedings, as the case may be, be restored to the person from whom it was seized or to any other person entitled to possession thereof upon such conditions, if any, as may be imposed by order of the court and as, in the opinion of the court, are necessary to avoid the commission of any further offence under this Act.

Majesté et tout ou partie des frais d'aliénation de la chose sont à la charge de la personne trouvée coupable, si le tribunal l'ordonne;

b) doit, à l'expiration du délai prévu pour porter la condamnation en appel, ou à la fin des procédures, selon le cas, être restituée à la personne entre les mains de laquelle elle a été saisie ou à toute autre personne ayant le droit d'en avoir la possession, aux conditions, s'il en est, que le tribunal peut fixer par ordonnance et qui, de l'avis de ce dernier, sont nécessaires pour éviter que soit de nouveau commise une infraction prévue par la présente loi.

Articles deemed not to have been seized

(3) For the purposes of subsection (2), any thing released from detention pursuant to paragraph 47(4)(*a*) or (*b*) shall be deemed not to have been seized pursuant to subsection 47(1).

Choses réputées ne pas avoir été saisies

(3) Pour l'application du paragraphe (2), une chose restituée en application des alinéas 47(4)*a*) ou *b*) est réputée ne pas avoir été saisie en application du paragraphe 47(1).

Offences and Punishment

Infractions et peines

Inspectors

50. Every person who

(*a*) fails to give an inspector all reasonable assistance or to provide him with information as required under section 45; or

(*b*) contravenes section 46

is guilty of an offence and is liable on summary conviction to a fine not exceeding one hundred thousand dollars.

Inspecteurs

50. Quiconque :

a) omet de fournir de l'aide ou des renseignements à l'inspecteur en application de l'article 45,

b) contrevient à l'article 46,

commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de cent mille dollars.

Information, notices and testing

51. Every person who

(*a*) fails to provide the Minister with information as required under section 7, paragraph 9(1)(*b*), subsection 15(1) or paragraph 16(2)(*c*),

(*b*) fails to notify the Minister as required under paragraph 9(1)(*a*),

(*c*) fails to conduct the tests referred to in paragraph 9(1)(*c*), or

(*d*) contravenes subsection 28.1(1),

is guilty of an offence and is liable on summary conviction, to a fine not exceeding two hundred thousand dollars.

Renseignements, avis et expérimentation

51. Quiconque :

a) omet de communiquer au ministre les renseignements prévus par l'article 7, l'alinéa 9(1)*b*), le paragraphe 15(1) ou l'alinéa 16(2)*c*),

b) omet de donner au ministre l'avis prévu par l'alinéa 9(1)*a*),

c) omet de faire les essais prévus par l'alinéa 9(1)*c*),

d) contrevient au paragraphe 28.1(1),

commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de deux cent mille dollars.

Tests, manufacture, etc.

52. Every person who

(*a*) fails to provide the Minister with information as required under section 8,

Essais, fabrication, etc.

52. Quiconque :

a) omet de communiquer au ministre les renseignements prévus par l'article 8,

THE IMPACT OF BILL 112

Environment Enforcement Statute Law Amendment Act

Higher Fines, Imprisonment, and
Liability for Directors and Officers
- What does it all mean?

POLLUTION AND THE LAW

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McCarthy & McCarthy

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THE IMPACT OF BILL 112

Environment Enforcement Statute Law Amendment Act

Higher Fines, Imprisonment, and Liability for Directors and Officers - What does it all mean?

I. INTRODUCTION

On July 3, 1986, the Minister of the Environment (the "Minister") for Ontario introduced the Environment Enforcement Statute Law Amendment Act, S. O. 1986, ch. 68 ("Bill 112"). It provides amendments to the Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act. Following a number of amendments, the Act was proclaimed on December 18, 1986. Most notably, the Act:

1. Increases the maximum fine for general pollution offences by corporations five-fold (to $25,000 per day on a first offence, to $50,000 per day on subsequent offences);

2. Creates a separate fine structure under the Environmental Protection Act for pollution offences involving hazardous waste, up to a maximum fine of $500,000 per day for subsequent offences involving actual pollution impacts;

3. Gives the Courts the option of imprisonment for a term of up to one year for certain pollution offences;

4. Deems an act carried out by an employee or agent of the corporation to be an act of the corporation;

5. Enables the Courts to increase a fine to an amount equal to the "monetary benefit" obtained by the commission of specified pollution offences;

6. Provides for financial assurances as a condition for the granting of an approval or order; and

7. Creates a personal liability in a director or officer of a corporation for pollution offences, whether or not the corporation is prosecuted or convicted.

The Act reflects provincial government policy aimed at increasing penalties for pollution offences by individuals and corporations and streamlining the introduction of evidence by the Ministry of the Environment. The Minister stated in the legislature that the Act is intended "... to protect the competitive position of ... good corporate citizens by imposing real punishment on the recalcitrant minority who cut environmental corners to make an extra buck". It remains to be seen whether the judiciary will be willing to impose these substantial fines, imprison individuals and/or confiscate the profits of offenders once the legislation becomes law.

The Act will inevitably bring substantial changes to all parties involved in environmental prosecutions. However, one caveat should be made prior to any further comment. The author has been asked to gaze into a crystal ball and foretell the future. There is one obvious danger in such presumption - that these materials will be used for years, allowing the opportunity for readers to say, probably rightly so, that "that dimwit didn't know what he was talking about". We can all, I am sure, provide scenarios, particularly political ones, which would prove the Act to be yet another piece of legislation with good intentions but no practical impact. With this escape clause aside, there are a number of impacts of the Act which we could venture to foresee, following a summary of the new provisions.

II. SUMMARY OF THE AMENDMENTS

A. SUMMARY OF <u>ENVIRONMENTAL PROTECTION ACT</u> ("EPA") AMENDMENTS

<u>Part I - Interpretation</u>

Subsection	
1(1)	Definitions of "adverse effects", "analyst" and "document" are added.

Part II - Administration

Section 4 This provision was re-enacted to widen the power of appointment to include members of classes of employees of the Ministry and other persons as Directors for the purposes of the EPA and the regulations thereto. It also specifies appointment of "analysts" and limits powers of provincial officers "in such a manner as the Minister considers necessary or adviseable".

Section 6 The existing section authorizes the Director to issue a control order following upon a report of a provincial officer making certain findings. The amendment clarifies that service on the person responsible for the source of the contaminant is required.

Part V - Waste Management

Section 47 Repealed. This was the offence section for this Part. Its repeal means that the general offence provision (section 146) would apply to offences under this Part; the maximum fine of $2,000.00 per day would be replaced by the maximums under section 146 (below).

Part VIII - Litter

Section 78 — This is the general offence section for litter offences. It is replaced with separate provisions for litter offences and packaging offences as well as separate fines for individuals and corporations. For corporations, maximum fines for the listed litter offences are increased from $100.00 to $1,000.00 on a first offence and from $1,000.00 to $2,000.00 on a subsequent offence. For packaging offences, corporations are subject to maximum fines increased from $100.00 to $3,000.00 for first offences and $1,000.00 to $6,000.00 for subsequent offences.

Part X-A - Financial Assurance

This new Part of the EPA allows the Director to impose various financial requirements as a condition of an approval or order.

Section 119a — This is the definition section of the new Part. "Approval" and "order" includes program approval, certificate of approval, permit under the Ontario Water Resources Act, control order, and other such approval, but does not include an approval under Part IX (Spills) of the EPA. "Financial assurance" includes cash, letter of credit, bonds, negotiable securities or other agreements. Other relevant terms are also defined.

Section 119b — This section allows the Director to include a requirement for financial assurance to the Crown for the performance of any action in an approval or order, the provision of alternate water supplies, and measures to prevent adverse effects for closure or cessation of an activity or facility. Staged assurances and amendments are also provided for in the section.

Section 119c — This provision provides for the revocation of an approval should financial assurance not be provided, and an order prohibiting or restraining the use of the activity or facility.

Section 119d — This section provides for the release of such a financial assurance by the Director.

Section 119e — This provision allows the Director to convert the financial assurance to cash unless renewed at least 30 days prior to the renewal date.

Section 119f — This section gives the Director the power to issue an order to use the financial assurance upon reasonable and probable ground for the specified purpose.

Part XII - Provincial Officers

Section 125 Repealed. The authority to designate provincial officers is now under section 4 of the EPA.

Subsection 126(2) Repealed. These matters are now under section 6 of the EPA.

Part XIV - Miscellaneous

Section 135 This provision deals with admission of documents in evidence in proceedings and is extensively revised. It defines "official documents" broadly, including all relevant certificates prepared to be signed by the Minister, Director, employees or analysts. Such documents shall be received into evidence in any proceeding as proof, in the absence of contrary evidence, of the facts stated therein.

Subsection 136(9) New subsection adds to the regulation-making authority of the Lieutenant Governor in Council the power to prescribe requirements for financial assurances.

Section 141 Repealed. Now covered by section 135.

Subsection
144(2)

New subsection enables a court, upon its own initiative or application by prosecuting counsel, that convicts a person of a pollution offence to make an order prohibiting the continuation or repetition of an act or omission.

Section
146

The general offence and penalty section of the EPA. These penalties apply where the offence does not have a penalty specified elsewhere in the EPA.

For corporations, maximum fines for failure to comply with an order, term or condition are increased from $5,000.00 per day for a first conviction to $25,000.00 and increased from $10,000.00 per day to $50,000.00 per day for subsequent convictions.

Section
146a

New section provides increased penalties for specific offences including section 13(1), the most frequently used charging section. Notice of this provision is required to be provided to the person charged. This section provides for, in addition to or in substitution of a fine, imprisonment of a person for a term of no more than one year.

For corporations, the maximum fine for these offences is increased from $5,000.00 to $50,000.00 for the first offence and increased from $10,000.00 to $100,000.00 for a subsequent offence. "Subsequent conviction" is defined as per section 146b.

Section 146b

"Subsequent conviction" is defined to include any convictions under this Act (other than Part VII (Sewage Systems) and Part VIII (Litter) offences), the Ontario Water Resources Act (other than some plumbing offences), or the Pesticides Act.

Section 146c

New section enables a court to increase a fine by an amount equal to the monetary benefit obtained by the commission of the offence.

This provision raises the prospect that evidence will be introduced as to profits gained as a result of activities seen as tied to a pollution offence, despite whatever maximum fines may be specified.

Section 146d

New provision enables a court which convicts a person under section 146 to make an order requiring action to be taken to prevent, eliminate or reduce the effects of the offence or the event. The order made must specify a time period and, upon application by any of the parties, changes can be made to any order made.

Section 146e — New provision where, upon application of the Director, an order may be made under the _Provincial Offences Act_ to suspend any licence (or not grant a licence applied for) of a person who is in default of payment of a fine under the EPA, the _Ontario Water Resources Act_ or _Pesticides Act_. "Licence" is defined as a certificate of approval or licence issued under the EPA or the regulations.

Section 146f — New "deeming" provision which deems an act or thing done or omitted to be done in the course of employment by an officer, official, employee or agent of a corporation to be the act or thing done or committed to be done by the corporation.

Section 147 — This section provides specific penalties for convictions involving hauled liquid industrial waste or hazardous wastes. The imprisonment option is extended to this section as in section 146a, and penalties are substantially increased for corporations. Maximum fines for first offences are $50,000.00 per day, with $100,000.00 per day the maximum for subsequent offences. However, the maximum fine is increased to $250,000.00 per day on first conviction, and to $500,000.00 per day for subsequent offences, if the offence resulted in any of the actual effects outlined in the existing section 147(1), e.g. "impairment of the quality of the natural environment for any use that can be made of it". Notice to the corporation is required that these increased penalties will be requested.

Section 147a — This new section creates personal liability in a director or officer of a corporation which engages in an activity that may result in contamination of the environment and creates a duty of "all reasonable care" to prevent such contamination. Such personal liability may follow whether or not the corporation itself has been prosecuted or convicted.

B. ONTARIO WATER RESOURCES ACT ("OWRA") AMENDMENTS

Most of the amendments to the Ontario Water Resources Act are identical or similar amendments to those made to the EPA. In brief:

Section 1 — The terms "analyst" and "document" are defined.

Section
1a On March 31, 1987, the Act will bind the Crown.

Subsection
2(2) The section assigns ministerial responsibility for sections 45 to 48 of the OWRA, relating to plumbing.

Subsections
7(4), 10(4),
16(1), (2)
and (4),
17(2), (3),
18(2), 19(2),
20(8), 23(2),
23(6) and
Section
22q These subsections and this section set out amendments and repeals which are complementary to the new enforcement provisions of subsection 56(2) and sections 66 to 72 of the OWRA.

Subsections
23(5) and
23(8) These are re-enacted to remove the exemption of municipalities and to complement the new enforcement provisions.

Subsection
24(2) This provision is repealed as complementary to the new enforcement provisions.

Subsection
24(5) This provision is re-enacted to remove the exemption of municipalities and to complement the new enforcement provisions.

Subsection
24(7) This new provision deems the approval of sewage works under construction, extension or alteration by the Crown under the Act on June 30, 1987.

Section
31 This amendment is complementary to the new enforcement provisions.

Subsection
32(2) This provision is re-enacted to remove the exemption of municipalities and to complement the new enforcement provisions.

Subsections
33(2) and
43(12) These subsections set out amendments and repeals which are complementary to the new enforcement provisions.

Subsection
44(1)(u) This subsection adds to the regulation-making powers of the Minister, subject to approval by the Lieutenant Governor in Council, a power to classify or exempt any class of materials for the public benefit, and to attach conditions if necessary.

Subsection
44(2) This provision relates to the making of regulations for plumbing. The amendment is complementary to the re-enactment of subsection 2(2) of the OWRA.

Subsection 44(4)

This amendment retains the existing fines for offences relating to plumbing.

Section 50, and Subsections 51(3), and 52(2)

These repeals are complementary to the new enforcement provisions.

Subsection 56(2)

This provision enables a court that convicts a person to make an order prohibiting the continuation or repetition of the act or omission for which the person is convicted. The subsection is similar to existing subsection 56(1) of the OWRA, but does not require the commencement of a separate proceeding.

Section 59

This section makes the giving of false information on an application or return an offence; the amendment is complementary to the new enforcement provisions.

Section 66

This is the new general offence section.

Section 67

This provision sets out the basic penalties for individuals and corporations. For individuals, the maximum fine for a first conviction is $5,000.00 per day with a $10,000.00 maximum fine for each subsequent conviction. For a municipality or corporation, the maximum fine is $25,000.00 per day on a first conviction and $50,00.00 per day on each subsequent conviction.

Section 68 This provision sets out the penalties related to specific pollution charges (under s. 16(1) or 19(2)(b)). For municipalities or corporations, the maximum fine is $50,000.00 on the first conviction and $100,000.00 on each subsequent conviction. Notice to the person responsible for the source of the contaminant is required, and the section provides for imprisonment of not more than one year for individuals in addition to or substitution for a fine.

Section 69 "Subsequent convictions" is defined to include any convictions under this Act, other than for some plumbing offences, the EPA (other than Litter and Sewage Systems) and the Pesticides Act.

Section 70 This provision enables the court to increase a fine by an amount equal to the monetary benefit obtained by the commission of the offence.

Section
71 This provision enables the court, upon application by the Minister, to order a convicted person to take specified action to protect and restore the natural environment.

Section
72 This provision deals with the suspension of a licence.

Section
73 This is the "deeming" provision which specifies that an action by an officer, employee or agent of a municipality, a corporation or other employer in the course of employment is deemed to be the action of the municipality, corporation or other employer for the purposes of the OWRA and the regulations thereto.

Section
74 This provision relates to the use of official documents as evidence in proceedings.

Section
75 This provision creates personal liability in a director or officer of a corporation which engages in an activity that may result in contamination of the environment and creates a duty of "all reasonable care" to prevent such contamination. Such personal liability may follow whether or not the corporation has been prosecuted or convicted.

C. PESTICIDES ACT ("PA") AMENDMENTS

As with the OWRA, most of the amendments to the Pesticides Act are identical or similar amendments to those of the EPA. In brief:

Subsection 1(1) — The terms "analyst" and "document" are defined.

Section 8 — This relates to the liability of an employer and is re-enacted to be consistent with similar sections set out in the EPA (section 146f) and the OWRA (section 73).

Section 34 — This is the general offence and penalty section of the PA.

Section 34a — This is a new provision which revises the basic penalties section. The maximum penalties for an individual are unchanged at \$5,000.00 per day on a first conviction and \$10,000.00 per day on each subsequent conviction. However, the maximum penalties per day for a corporation will be \$25,000.00 for a first offence and \$50,000.00 for subsequent offences.

Section 34b — This provision enables the court to increase a fine by an amount equal to the monetary benefit obtained by the commission of the offence.

Section 34c — This provision provides an additional penalty of imprisonment for not more than one year for contravention of actual pollution offences or a stop order. For a corporation, the maximum fines are increased to $50,000.00 for a first offence and $100,000.00 for a subsequent offence per day for contravention of or failure to comply with a stop order. "Subsequent convictions" are defined as with the EPA and OWRA.

Section 34d — This provision authorizes the court, upon application by the Minister, to order a person convicted of an offence under the PA to take the actions specified by the court to protect and restore the natural environment.

Section 34e — This provision deals with the suspension of a licence (see section 146e of the EPA).

Section 34f — Renumbered from section 34a.

Section 34g — This new provision creates a personal liability in officers and directors of corporations (see section 147a of the EPA).

Section 36 — This provision is replaced with a more detailed provision related to documentary proof and defines "official documents".

Subsection 37(3) — This provision enables a court that convicts a person of an offence under the PA to make an order prohibiting the continuation or repetition of the offence by the person convicted.

III. THE IMPACTS OF THE AMENDMENTS

A. INCREASED FINES AND LITIGATION

Increased fines, the spectre of imprisonment and other forms of liability will inevitably lead to higher stakes being waged in environmental prosecutions, which in turn will lead to increased litigation. Experience would seem to indicate that the issue of "guilt" or "innocence" (which are almost always relative terms in an industrial context) rarely becomes the major consideration at the outset. Most companies, as do most individuals, feel unjustly accused, often rightly so, after making substantial expenditures of pollution equipment and after attempts to train and manage employees in an environmentally sound manner - only to be prosecuted nonetheless (often for the first time in the company's history). Typically, the prosecution happens despite a history of co-operative relations with one Ministry of the Environment ("MOE") branch, the Abatement Branch. Suddenly, there is another branch, the Enforcement Branch, to contend with. Some will say that this is a rosy view of corporate responsiblity in this area, but it is certainly the one most apparent to the companies involved. That "recalcitrant minority" that the Minister speaks of are not the only ones being prosecuted. As a result, the initial reaction of such a company, again often rightly so, is to "take it to the highest court in the land".

Despite this initial response, prior to Bill 112, the majority of these cases would lead to the settlement of such charges as "plea bargains" - in return for a guilty plea on some of the charges, fines were negotiated. The reasons for these agreed-upon solutions were numerous - on the part of the MOE, perceived inadequacies in the evidence, lack of faith in the value of prosecutions, perceived judicial reluctance to impose heavy fines; on the part of the alleged pollutor, costs of litigation and public image.

When faced with the prospect of lengthy trials at substantial cost, most companies in the past made a sensible business decision - despite any resentment at having to plead guilty to an offence they could well defend, sound financial considerations told them to settle. In addition, other rewards would be to minimize any press interest and maintain a co-operative attitude with the MOE.

Today, we see a dramatic increase in the number of prosecutions, an increase in the fine structure, additional threats of imprisonment or officer and director liability. It is therefore easy to predict that these factors will lead to a more adversarial process. As well, environmental prosecutions are now often front page news, particularly in the Toronto newspapers and in one-industry towns. In fact, the MOE itself encourages, through the use of press releases, such publicity, presumably for its deterrent value.

The impact of higher fines is obviously felt most substantially by small to medium size companies, whose economic viability can be affected by such fines. However, larger companies faced with the potential of six or seven-figure fines as a result of a continuing offence (over a period of days or weeks) will also look to litigation as an economic decision which is reinforced by the natural inclinination to feel unjustly prosecuted.

Litigation lawyers (including MOE) are no doubt pleased with these developments - trials will get longer, creative procedural defences will be raised, interesting legal challenges will be presented, the Charter of Rights will get a workout, appeals will go further to higher courts, "bigger-name" lawyers will get involved. It remains to be seen whether this litigation activity will have the desired effect on judges or corporations in the province of Ontario.

In regard to the judiciary, it is interesting to note that longer trials (particularly at the Provincial Court level) do not necessarily lead to higher fines (and we have yet to see the first imprisonment). A recent 10-day trial, for example, by a colleague enabled the company to fully present in vivid detail its multi-million dollar PCB control program as an indication of its "due diligence". Although it was ultimately convicted of some of the charges, the total fine was $4,000.00.

In regard to the response of industry, these new enforcement amendments may have the desired effect, but only if mechanisms and procedures are available which allow companies to improve their pollution control activities without penalty. One of these measures is the environmental audit.

B. ENVIRONMENTAL AUDITS

One impact of these enforcement activities will be the increased use of environmental audits. The last year has seen a dramatic increase in interest and discussion of this subject, partly as a result of Bill 112.

An environmental audit is an assessment of a company's compliance with environmental laws and regulations, and an identification of environmental liability within the company's operations. While environmental auditing has probably always existed as an informal process, it has only recently become a formal process, particularly with large corporations. It is clearly related to other kinds of assessments or audits carried on within a company, such as financial audits, but has some unique characteristics.

There are many excellent reasons for carrying out an environmental audit:

(a) to identify in a comprehensive manner the environmental impacts of a company or a facility's operations, as an after-the-fact environmental assessment. The generation of this information can identify potential liabilities under existing or proposed environmental laws or regulation, and assess the vulnerability of the company to such liabilities.

(b) to the extent possible, determine "compliance" with environmental law and regulation. Unlike our American neighbours, who are more able to play a "numbers" game in respect to compliance with standards, Canadian environmental law has a more limited opportunity for a numerical determination of compliance. However, in those cases where compliance can be clearly ascertained, environmental auditing is an important review.

(c) to protect employees, officers and directors. Given the new liability provisions directed to officers and directors, a management tool is necessary to assure itself that it has canvassed all environmental potentialities.

(d) to protect the company's public reputation. An element of public responsibility can be met by a review of compliance with environmental law and regulation in order to avoid prosecutions and the resultant public exposure.

(e) to facilitate preparation for defence of prosecutions or actions. The use of the audit document in a prosecution could show "due diligence" in the company's dealing with the subject matter of the prosecution.

(f) to enable financial and business planning. Often a company has a number of capital expenditures to consider for pollution control. Without guidelines or assistance from the MOE (which is usually the case) as to the relevant urgency or importance of the expenditures, it may be difficult to prioritize without a comprehensive evaluation. It can also indicate constraints on expansion or other business decisions.

While few would argue with the benefits of such auditing programs, one major difficulty remains. Any document which appraises the company's operations with a critically honest eye is potentially self-incriminating. On one hand, we have the excellent policy reasons outlined above why such audits should be carried out. However, on the other hand, there is the real possibility that the audit document could be used in litigation as an indication that the company should be liable for a problem or procedures that it itself has identified in such an assessment.

The question arises therefore as to whether such audit documents can be protected or "privileged" information under existing law. This is clearly a debatable point in law but, in my opinion, such an audit can be privileged as between the solicitor and his corporate client, if <u>properly structured</u>.

Such a privilege is predicated upon solicitor-client privilege. Privilege in Canada has two branches. First, all communications between solicitor and client, for the purpose of securing legal advice, are privileged. The only major exception to this category of solicitor-client communications is communications for the purpose of perpetrating a crime or fraud. In this exceptional case, the solicitor's knowledge of the purpose for which the advice was secured is irrelevant.

The second branch of solicitor-client privilege is concerned with communications in connection with pending or contemplated litigation. The scope of such a privilege in Ontario is not judicially clear, however, it would appear that such communications will be subject to the privilege only if the dominant purpose of the communication is in connection with pending or contemplated litigation.

Therefore, if an environmental audit is in connection with pending or contemplated litigation, and it is properly structured, the solicitor-client privilege is relatively assured.

In situations outside of pending or contemplated litigation, the privilege must be in the nature of securing legal advice. In order to claim this privilege, a number of specific steps, commencing with proper written instructions from the client to the solicitor and concluding with controlled distribution of the audit document, must be followed if the claim of privilege is to meet these criteria. While a detailed summary of the specific actions between the company and the solicitor is outside of the ambit of this presentation, it is imperative that such must be followed for a claim of privilege to succeed.

However, the major difficulty with such a claim remains - its uncertainty. Should the Ministry request an environmental audit document, and the claim of privilege has been maintained, litigation can still ensue.

A solution would be a policy of protection for such documents by the MOE, in the interests of improving the quality of the environment by improving the information capable of being internally generated by the company. A Ministry policy, hopefully enshrined in legislation or regulation, to not demand such audit documents when knowledge of their existence comes to light, would be a useful approach (exceptions could be possible if, for example, the defendant company on a prosecution introduces such an audit document in their defence, then it could be admissible in its entirety).

Such a compromise in the United States has been achieved. An Environmental Auditing Policy Statement by the Environmental Protection Agency in July of 1986 formulated a policy which protects, to a limited extent, environmental audits. The policy states:

> "EPA believes routine Agency requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will not routinely request environmental audit reports.

> EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focussed on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defence; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required."

While this would not reduce uncertainty, it would at least provide some assurance to companies involved in environmental auditing programs.

The Ministry has yet to finalize a policy on environmental audits. In response to a query, the Minister stated:

> "At the present time, the Ministry does not propose to develop a formal policy on environmental audits. It does, however, encourage the use of audits as the best means of ensuring compliance with environmental laws, regulations and statutory instruments such as orders and approvals.
>
> The Ministry does not propose to automatically and routinely require production of audits. Audits, however, will be reviewed where they may be relevant to investigations or the development of abatement requirements or for some other purpose, where it is in the public interest to do so." (Letter from the Minister of the Environment to J. MacDonald, January 9, 1987)

More encouragment by the MOE to users of environmental audits would be of assistance.

C. FINANCIAL ASSURANCES

Part X-A entitled "Financial Assurance" is a new part of the EPA. Basically, the addition allows the Director to require a "financial assurance" such as cash, a letter of credit, bond or other instrument as a guarantee for any "approval" or "order" (program approval, certificate of approval, control order, etc.) under the EPA or OWRA (with some exceptions).

There are, of course, precedents in other areas of business law for such guarantees. In the environmental field, these financial assurances will be limited to the performance of actions specified in such an approval or order, the provision of alternate water supplies should works contaminate existing water supplies, and other measures appropriate to prevent adverse effects in the closing or cessation of the "works". In effect, most approvals now raise the possibility of such an additional requirement.

On a case-by-case basis, the impact of this financial requirement could be substantial, particularly on small to medium-size companies. In a recent case which we are aware of, a $3.6 million letter of credit was to be maintained for works required in a control order (the financial assurance, following negotiations, was dropped altogether as a requirement).

It should be noted that existing powers of the MOE to order remedial works at the expense of the owner (e.g. section 16 and 17) reinforce these additional powers.

It remains to be seen whether the Ministry intends to make widespread use of these assurances to guarantee the installation or provision of the specified works. In any event, it can be expected that such assurances will become an additional matter of negotiation with approvals or control orders. Depending upon circumstances, it may well prove another roadblock to constructive agreement.

D. OFFICER AND DIRECTOR LIABILITY

It is possible to speculate that the imposition of direct penalties on corporate directors and officers results from a perceived lack of effectiveness of fines and other sanctions imposed on corporations and a fear of directors hiding behind impecunious corporate offenders. Whether or not the perception is in accordance with reality is uncertain, but we now have personal liability for officers and directors <u>whether or not</u> the corporation is prosecuted or convicted.

Section 147a of the <u>Environmental Protection Act</u>, R.S.O. 1980, c. 141 as enacted under Bill 112 provides:

> s147a-(1) Every person or officer of a corporation that engages in an activity that may result in the deposit, addition, emission, discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful deposit, addition, emission or discharge.
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> (3) A director or officer of a corporation is liable to the conviction under this section whether or not the corporation has been prosecuted or convicted."

This provision clearly places a duty on directors and officers that may have major implications for the conduct of their activities. It is difficult to think of a corporation that is not engaged in or may be engaged in an "activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment". As you are aware, the language of the EPA has been cast in the broadest terms. For example, a "contaminant" has been defined as virtually any substance which may have an adverse affect on plants, animals or humans (EPA s. 1(1)(c)). Consequently, very few corporations can totally ignore the ramifications of the Act.

We must first determine <u>who</u> within the corporate structure is at risk of being prosecuted. At first glance, the section seems abundantly clear in stating "every director or officer". On closer examination, however, the question of who is an officer of a corporation is not at all clear. Unlike directors, the management personnel of a corporation cannot be readily categorized as officers or non-officers. The EPA provides no definition and the corporation statutes either do not give a definition [Canadian Business Corporations Act, S.C. 1974-75-76, c. 33 ("CBCA")] or fail to give a comprehensive definition [Ontario Business Corporations Act, R.S.O. 1982, c.4, s.1(1) 28 and 41 ("OBCA")].

The OBCA defines officer as including persons the board of directors specifically designates as an officer or anyone who holds the position of chairman or vice chairman of the board of directors, the president, the vice president, the secretary or assistant secretary, the treasurer or assistant treasurer or the general manager of the corporation. These would be obvious candidates in the corporate hierarchy. However, the legislation makes it clear that the category is not restricted to persons holding these titles. Rather, an officer is a person that performs functions normally performed by persons holding these traditional titles whether or not they hold that specific title (OBCA, s.1(1) 28). In addition, a person is a "senior officer" if he or she holds one of five highest paid positions in the corporation (OBCA s.1(1) 41). In a small corporation, it is conceivable that a person at a relatively low level of management or even a secretary could be a senior officer.

Regardless of the difficulties in determining the group that is specifically at risk within any corporate hierarchy, the most important task is to determine the standard of care each director and officer must meet. Section 147a simply states that the directors and officers are required to take "all reasonable care" to prevent pollution by the corporation. This wording has appeared in a number of statutes including section 169A of the federal Excise Tax Act, S.C. 1934, c.52. Cases interpreting the phrase "all reasonable care" indicate that the wording does not require that all steps be taken, only those that could be reasonably expected under the circumstances. [These are reviewed in General Motors Acceptance Corporation v. Commissioner of Excise, 16 C.R. 241 (Man. Q.B.)] In fact, the cases make no distinction between "all reasonable care" and "reasonable care". The phase "all reasonable care" was also adopted by the Supreme Court of Canada in defining the standard of due diligence required to successfully defend an absolute liability offence. [R. v. The City of Sault Ste Marie, [1978] 2 S.C.R. 1299 at 1331] There is considerable case law regarding "due diligence" and most corporations are familiar with the requirement to meet this test. Therefore, it would be logical to conclude that if the corporation is duly diligent its officers and directors will be free of prosecution.

The next question is whether each officer or director of the corporation is liable if the corporation cannot establish a due diligence defence. A director or officer may or may not be directly responsible for the activity which resulted in pollution. It would appear that whether or not a particular director or officer has taken all reasonable care depends on the character of the management structure of the corporation and his particular responsibility in the corporate hierarchy, not whether the corporation can prove due diligence.

Under corporate law, directors have the duty to manage or supervise the management of the business and affairs of the corporation "in the best interests of the corporation" (OBCA s.115(1); CBCA s.117(1)). Accordingly, it is recognized at law that the directors are primarily responsible for the operation of a corporation. However, the corporate legislation recognizes that many of these powers will be delegated to the officers (OBCA s.133; CBCA s.116), managing committee or managing director (OBCA s.127(1) restricted by s.127(3); CBCA s.110(1) restricted by s.110(3)). Since the directors may delegate powers, by inference it would appear that as long as they show due care in selecting such officers then no liability will result (OBCA s.133; CBCA s.116). Also, the directors would be absolved from liability if they rely in good faith upon financial reports or reports of lawyers, accountants, engineers, appraisers or other professionals (OBCA s.135(4); CBCA s.118(4)).

Directors in a large corporate structure generally have very little to do with the operation of the business but leave responsiblity to a group of professional managers. The role of the board of directors in most cases is therefore passive, and the directors may not be in contact with the affairs of the business on a regular basis. The sole standard applied may therefore be that the directors must take all reasonable care in selecting a competent manager to take care of the business. If this is the case, the delegation of extensive powers to govern the business of the corporation has resulted in the insulation of the directors and senior officials from liability for alleged environmental violations.

In summary, if the directors have delegated the power over an activity to an officer and have no knowledge of any circumstances which may indicate a possibility of pollution and are not deliberately ignoring facts which may result in pollution, then they have discharged their duty of care.

This may also apply to officers within a corporate hierarchy if the officers have specialized duties and responsibilities which are not at all connected with the activity resulting in the alleged pollution.

In a situation where the corporation is effectively operated by the professional managers with delegated power to manage from the board of directors, only those officers with powers and duties with regard to environmental activities will be liable to fines. Because these officers are responsible for administration of such programs, they are the obvious targets. As a result, the officers' liability will depend upon the appropriateness of such activities to meet the "due diligence" test.

If the corporation is a small, closely held corporation, where the role of officer and director are exercised by the same persons, the directors or senior officers will not be insulated. Directors and officers of small corporations will therefore be more vulnerable. Under these circumstances, the defence of directors and officers most likely depends upon the ability to establish due diligence rather than by delegation of power.

Where a defence is not available or unsuccessful, the directors or officers will be liable to pay the substantial fines outlined above. As a result, officers and directors affected will likely seek an indemnity from the corporation.

Corporate statutes allow the corporation to indemnify its directors and officers under certain circumstances. Section 136(1) of the OBCA provides that:

> A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of such corporation or body corporate, if,
>
> (a) he acted honestly and in good faith with a view to the best interests of the corporation; and

> (b) in the case of a criminal or administrative action or proceeding that is enforced by monetary penalty, he had reasonable grounds for believing that his conduct was lawful."

Therefore, as long as the director or officer exercised his duties in good faith, with the best interests of the corporation in mind, and had reasonable grounds for believing his conduct was lawful, then the corporation may indemnify. Officers and directors without such indemnification may wish to consider such guarantees in this regard from the corporation.

Finally, it should be noted that experience with other legislation of this type, requiring the officers and directors to take all reasonable care, has been for the most part ineffective. For example, the federal government has a similar provision in s.21(5) of the Defence Production Act, R.S.C. 1970, c.D2, s.20 of the Export and Import Permits Act, R.S.C. 1970, c.E17 and s.17(3) of the Aeronautics Act, R.S.C. 1970, c.A3. To date, no officer or director has been successfully prosecuted under these provisions. Whether or not the EPA provision will experience the same fate is yet to be determined.

IV CONCLUSION

The major potential impacts of the Environment Enforcement Statute Law Amendment Act - increased fines and litigation, financial assurances, environmental audits, and liability for directors and officers - remain to be seen. While these impacts would appear to be straightforward, there is one important policy element that is equally as important in this discussion; that is, the use of discretion by the Ministry which administers this Act.

To the ordinary viewer, the enforcement process associated with pollution offences would seem self-evident. First, you determine whether an individual or company has committed an offence; secondly, should such an offence be committed, then the Ministry will prosecute. We all realize that the process is much more complicated. Many violations are undetected and, if detected, may or may not be prosecuted. Instead, prosecutors and their staff often prefer less formal and severe methods of inducing compliance, such as warnings, negotiation, persuasion, and encouragement. The Ministry may not prosecute for a variety of reasons - perceived inadequacies in the evidence, apprehensions about the value of legal proceedings in relation to the offence, public policy reasons (e.g. the exemption of municipalities until these amendments), and so on.

The critical questions for both the Ministry and those who fall within its review is on what basis the Ministry is to make the decision to prosecute rather than use its established non-adversarial roles. From the perspective of the company, the overriding concern is with certainty and consistency in Ministry relations with the company - otherwise, planning at the management level becomes an uncertain and unpredictable exercise.

In addition, the company is concerned with equality of treatment between its company and others, not solely for competitive reasons, but for a sense that enforcement policies are fair and just. It should be noted that "equality before law" is embodied in paragraph 1(b) of the Canadian Bill of Rights, and section 15(1) of the Canadian Charter of Rights and Freedoms. It could well be that random or selective enforcement strategies could be challenged under these provisions.

In short, we search for a rational basis for enforcement policy. We have noted in the introduction to this discussion the Minister's statement at the announcement of these amendments. He indicated that the Act is intended "... to protect the competitive position of ... good corporate citizens by imposing real punishment on the recalcitrant minority who cut environmental corners to make an extra buck". The future will show whether this is an accurate statement of enforcement policy by the Ministry.

PROPOSALS FOR A NEW ONTARIO GENERAL AIR POLLUTION REGULATION

FOR PRESENTATION AT CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION CONFERENCE
"POLLUTION AND THE LAW"

TORONTO, ONTARIO - FEBRUARY 26, 1987

C. E. DUNCAN and J. M. HEWINGS

PROPOSALS FOR A NEW ONTARIO GENERAL AIR POLLUTION REGULATION

INTRODUCTION

Ontario's legislation governing air management has evolved over the past 30 years. During that time the responsibility for ensuring the integrity of our air resource has been passed from municipal authorities to the Provincial Government, and the programs involved have been altered and refined on a number of occasions to deal with changing needs.

The current re-evaluation of Ontario Regulation 308 - General Air Pollution - represents one part of a further stage of refinement of the whole air management program designed to ensure that current needs are being addressed. The review which began in 1983 will involve:

- An examination of the history and philosophy of the Air Management Program.

- A total review of all the legislation governing air management - O. Reg. 308 is being examined in this context.

- An examination of the Design and Approvals process for air emissions.

- The development of policies and procedures related to source testing and control.

- A review of ambient air monitoring.

- An identification of research needs.

THE CURRENT REVIEW OF O. REG.308

1. Background

Despite its generally acclaimed success as a mechanism for improving air quality in Ontario, while providing an acceptable basis for the approval of new or substantially altered sources of emissions, the present legislative framework has been found to be inadequate to deal with a number of specific situations. Among these are:

- The long range transport of air pollutants.
- The accumulation of air pollutants through deposition.
- The control of emissions of black smoke by reference to smoke density charts.
- The method of regulating emissions of pollutants such as those with "non-threshold effects levels" including genotoxic, bio-accumulative as well as persistent compounds.
- The control of fugitive and low level emissions.
- The modelling of complex plume situations.
- The appropriateness of the Air Pollution Index in its existing form.
- The use of guidelines for levels of contaminants in forage, soil, moss bags and snow.

2. Establishment of Internal MOE Working Groups

In order to address these items a technology review was initiated in November 1983 within the Ministry of the Environment. Eight working groups were established with the following specific tasks:

Working Group I - The co-ordinating group responsible for definitions and final recommendations.

Working Group II - Review of the Air Pollution Index (API) and alert procedures.

Working Group III - Responsible for a review of existing sections of Ontario Regulation 308 governing emissions to the atmosphere, examination of possible alternative methods of control or improvements to the existing framework, and the desireability of adding new objectives to deal with odours.

Working Group IV - Responsible for examining the possible inclusion of method to address long range transport of air pollution and the deposition of chemicals.

Working Group V - Responsible for phytotoxicological aspects, in particular, levels of contamination in forage, foliage, soil, moss bags and snow.

Working Group VI - Evaluation of methods for determining the opacity of emissions and use of the visible emissions chart.

Working Group VII - Co-ordination of legislation pertaining to incineration.

Working Group VIII - Finalization of Revised Regulation.

The Working Groups' reviews were completed by the middle of 1985. Recommendations of the various groups were as follows:

Working Group I - It was recommended that the definitions for the following should be deleted:

(i) Fuel burning equipment (id)
(ii) Highway (ie)
(iii) Incinerator (if)

It was found that the exemption under Seciton III for "fuel burning equipment used solely for the purpose of comfort heating" was covered in the Environmental Protection Act, and therefore redundant.

An exemption was recommended for a source of visible light radiation intended for the purpose of advertising.

Working Group II

This Working Group recommended retention of the API in its existing format. The intention of the MOE to introduce an Air Quality Index to supplement the Air Pollution Index as a means of public information on air quality was central to the Working Group's discussions.

It was noted in the discussion that the AQI:

- Is not a legal instrument.

- Was exclusively designed for public information and not control. (The API although currently used for both purposes is designed primarily as a control device.)

- Is structured with descriptive terms.

- Embraces contaminants which cannot be controlled.

Working Group III

After consideration of a number of alternative approaches to evaluation Certificates of Approval, this Group recommended adoption of an approach currently used in the case of discharges to water.

Using this approach, "best reasonable technology" would be demanded as the minimum acceptable level of control. Where circumstances, as indicated by ambient air quality modelling or the nature of the type of emissions, demand it, tighter controls to the point of minimum emission may be used. The group as part of its report recommended that the modelling provisions of the existing regulation be completely revamped, taking account of recent advances in the field, to permit total ambient modelling. In conjunction with this recommendation the Group advocated using the existing Ambient Air Quality Criteria as Ambient Air Quality Objectives. The existing half hour point of impingement standard under this system would be abolished.

Working Group IV

It became apparent that Group IV's mandate to investigate long range transport and deposition overlapped with tasks assigned to Group III. Accordingly, it was decided to merge the work of the two groups.

Working Group V

A uniform approach to the setting of guidelines in this area was evolved by the Working Group, but it was decided that these should be published following review by the Environmental Air Standard Setting Committee rather than being incorporated into O.Reg. 308 or O.Reg.296.

Working Group VI

This Group recognizing obstacles encountered in producing a Visible Emission Chart, and the cost and general impracticability of alternatives, recommended that the wording of O.Reg. 308 should be changed to include reference to "trained observers" and that other changes should be made to enable such observers to operate effectively.

Working Group VII

Working Group VII concluded that there was potential for conflict between Ontario Regulations 308 and 309 on the subject of waste incineration. However at present no problem exists.

3. Air Pollution General Regulation Workshop/Modelling Workshop

In order to subject the findings of the Working Groups to wider scrutiny and initiate further discussions, a workshop was held on November 14 and 15, 1985 at the Prince Hotel in Toronto. The workshop was attended by 60 invitees, chosen to represent the views of numerous interests including major industries, various levels of government, the academic community, non-government organizations (interest groups), consultants, equipment suppliers and environmental lawyers. A background document outlining the concerns and inadequacies of the existing regulation was mailed in advance to participants.

As a result of discussions at this workshop it was decided to hold a supplementary workshop specifically on the modelling proposals of the review. This was held on June 25 and 26, 1986 and was attended by a group familiar with the application of air quality models.

Transcripts of the first workshop have been published and mailed to people and organizations who participated or have indicated an interest in the proceedings. A summary report of the modelling workshop has been prepared and will be included as an appendix to the government's proposals when they are issued as a Green Paper.

November 1985 Workshop Conclusions

1. Use of Best Reasonable Technology and Ambient Modelling

Despite considerable support for the continued use of the existing point of impingement approach, there appeared to be a consensus that amendments or changes were indeed required to the Approvals process. Major areas of concern identified were:

- Long range transport.
- Accumulation of contaminants through wet and dry deposition.
- Emissions of genotoxic, bioaccumulative and persistent compounds.
- Multiple sources of emissions.

Given that to address these problems will entail some degree of bottom-of-the-stack control and improved modelling, the basic concept of using Best Reasonable or Best Available Technology and an enhanced modelling package did not appear to find disfavour. However, in terms of details, a number of practical problems were raised including:

- The way in which Best Reasonable or Best Available Technology would be defined.
- The phasing-in of the regulation.
- The use of worst case modelling.
- Possible disparities between Ontario and neighbouring U.S. sources.
- Different levels of control in different areas of the Province.

- Use of modelling in enforcement.
- The interpretability of the Regulation by the courts and owners of emissions sources.
- Whether the modelling should or should not be included in the regulation.

2. The Standard Setting Process

There was a clear request from a number of participants for a more accessible process for setting air quality criteria or objectives. The alternatives for greater public involvement which were discussed included better notice to the public on standard setting, more accessible documentation, and public hearings or some facility for public comment. A number of discussions identified a need for regular review of standards to ensure that they are based on most recent scientific evidence.

3. Certificates of Approval

Both the contents of Certificates of Approval and the process by which they are issued were critically reviewed by the discussion groups.

On the contents of Certificate of Approval, a wide range of opinion was expressed. Many attendees were in favour of retaining the existing format, but others were insistent that changes were required. Non-government organizations, in particular, wanted much tighter controls on fugitive emissions and specific mention of housekeeping measures on Certificates, although the methods by which these might be achieved were not specified.

In terms of the process for granting of C of As, the subject of hearings was discussed. Public hearings for "classes of C of As" and the possibility of including hearings similar to those currently allowed at the discretion of the Director for certain waste management and disposal facilities (EPA Section 32(1)) were discussed.

The possibility was also entertained that C of As should be two-part documents with a C of A to construct, and a C of A to operate, the latter to include process monitoring, compliance testing and reporting.

4. Opacity

On the question of opacity there was considerable support for the concept of using trained observers in lieu of smoke density charts, although there was some disagreement on details such as the frequency of personnel training and the possible direct involvement of the public.

The subject of whether the C of A should permit exemptions to opacity requirements under specific circumstances was raised. The use of time weighted averages, and a permitted number of violations emerged as suggested methods for addressing problem areas.

5. Air Quality Index

Many participants in the workshop expressed concerns over the Ministry's plan to retain the Air Pollution Index (API) for regulatory purposes while implementing the Air Quality Index as a public information device. The difficulty of having two parallel indices, the terminology involved, and the problems associated with the high Air Quality Index values which could not be controlled by MOE (e.g. ozone) were identified as points of possible confusion.

The general concensus was that the API should be retained in its present form as a regulatory device designed to prevent health related air pollution episodes, while the AQI should become the prime public information index. It should be noted that the API is one of the terms included in the AQI, so to a limited extent there is some overlap in the two indices.

6. Phytotoxicology Guidelines

Considerable constructive criticism of the phytotoxicology guidelines was expressed, particularly with regard to nomenclature and definitions. The concept of using the numbers was, however, generally supported and it was suggested that they might be incorporated in some way into the standard setting process.

7. Incineration, Open Burning, Wood Stoves

Support was expressed in the discussion groups for the creation of a separate guideline on incineration. Particular concern was expressed over Section 12 and its applicability to apartment incinerators, and over some of the terminology used in the regulation. Several participants advocated that destruction/removal efficiencies should be included in the regulation particularly to deal with emissions of hazardous contaminants. On the subject of open burning, municipal involvement based on a model by-law approach was favoured.

Wood stoves were identified as an item deserving of greater regulatory attention. The certification of approved designs was advocated.

June 1986 Modelling Workshop

Among the concerns addressed at the modelling workshop, were the following:

- Comparison of proposed model results with existing models for typical sources.

- Evaluation of the models in an integrated manner.

- Uncertainty in the model outputs and the way in which it will be incorporated in model application.

- Application of the proposed modelling package.

4. Proposed "Green Paper"

Since the two workshops MOE staff have been involved in the preparation of a Green Paper which outlines the Ministry's proposals. This document has been reviewed internally throughout the Ministry and by the Minister's staff. Currently, the document is being revised to accommodate comments resulting from these reviews. It is anticipated that the Green Paper will be available for circulation in the immediate future.

Following publication and distribution of the Green Paper, the sequence outlined below will be followed:

1. Comment period on the Green Paper.

2. Analysis of comments.

3. Production of Draft Regulation. Circulation to concerned parties.

4. Comment period on Draft Regulation.

5. Concurrent with the comment period on the Draft Regulation, public meetings to explain the proposals.

6. Production of Final Regulation.

COMMENTS ABOUT CHANGING

REGULATION 308

<u>AN INDUSTRY PERSPECTIVE</u>

BY

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Presented at the 1987 Symposium on Pollution and the Law organized by the Canadian Law Research Foundation

Toronto February 26, 1987

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INTRODUCTION

There is never too much clean air. We value clean air and this esteem imposes a stewardship responsibility. In Ontario it is accomplished through the Environmental Protection Act and in particular Regulation 308. The challenge is to maintain air quality or enhance it through appropriate management strategies when necessary.

How effective is the strategy we have been using? It is difficult to get a clear sense of how well we have managed the air resource. But perhaps the advertisement for the recent Canadian visit by the World Commission on the Environment and Development captures the essence. The poster states in part **"The fact that urban air in Canada is cleaner now than it was a decade ago speaks for a degree of success in meeting this challenge".** This comment is a positive indication that things are better. The notion is also supported by a study done in Hamilton by the Ontario Research Foundation in 1982. Basic approaches in use for managing air resources seem to be sound.

Nevertheless a review of regualtions, guidelines, policies, etc. is timely for the purpose of fine tuning and ensuring programs reflect remaining issues and priorities. In this regard, the Ministry's current activity regarding Regulation 308 is a welcome step.

The aim of this paper is to review what has been accomplished and list some of the concerns the steel industry has regarding Regulation 308.

INFORMATION WORTH THINKING ABOUT

In the late 1960s, the Ontario Ministry of the Environment began working closely with industry to catalogue emission sources. This led to an inventory of the amounts of pollutants discharged to the air. This information was used to develop control programs with the aim of lowering emissions over time from existing facilities and to apply state-of-the-art controls to new sources. This activity prompted the steel industry to implement an intensive review of available control technology and operating procedures, and companies began programs of testing and development work. The prime focus was on collecting suspended particulates from process sources.

Emission control was not new to the steel industry in Hamilton. Attempts were made as early as 1928. It started with the cleaning of blast furnace gas to permit the reuse of the gas as a fuel. As well, steelmaking furnaces were outfitted with emission controls as furnaces were modernized for oxygen blowing in the 1960s. These steps took place in advance of any specific regulations. The industry now controls stack emissions by using:

- High efficiency electrostatic precipitators
- High energy water scrubbers
- Large cloth air filters
- Modern combustion controls and clean burning fuels

For fugitive emission control, special programs and techniques are used. As well, outdated production equipment has been shutdown and replaced with new facilities that include the latest technology in emission control. As a result, particulate emissions from operations have shown a steady downward trend. Action taken is a testimony of a positive attitude towards environmental management.

The industry has spent millions of dollars for the best equipment available to do the required job. Now we are reaching the point of diminishing returns in terms of reductions of emissions per dollar expended. The high cost of buying additional equipment needed to remove the last few pounds of particulates, and the high costs in energy required for running the equipment, make further expenditures progressively more difficult to justify. The high costs arise because large volumes of air with low dust content would have to be cleaned. Equipment costs of $18 million for each ton of dust collected per day might be needed to satisfy stack opacity requirements. The dilemma is that the actual amounts of dust collected from stack gases might have little bearing on the ambient air quality. In order to deal realistically with these problems an alternative strategy is needed to ensure expenditures achieve measureable benefits. New regulatory flexibility ought to be created that would allow emissions approvals through an emission trading frame work. Instead of controlling stack emissions we should look at reducing fugitive emissions for greater rewards.

There are a few additional factors that should be kept in mind. The Canadian Steel Industry competes in a world market and to stay in business must remain competitive. Competition for markets is fierce as the indsutry faces a glut of steelmaking capacity on a world wide basis. Steel consumption is projected to decrease.

By the year 1990, the Western World steelmaking capacity will exceed the apparent consumption by more than 100 million tonnes. Likely this will result in fundatmental changes in how liquid iron and steel are produced during the next 20 to 30 years.

These events also have a bearing on environmental planning. Environmental regulations and strategies should reflect what our trading partners do and enforce to ensure the Canadian Steel Industry is not at a disadvantage.

COMMENTS CONCERNING REGULATION 308

Emissions to the air have been regualted since 1968. Since then, large sums of money have been spent on controls for new and existing facilities. Air quality has improved or good existing quality has been maintained. As well, elaborate monitoring and warning networks are in place. These are tangible achievements. Also there is a reasonable level of understanding of the strengths and weaknesses of the Regulation. The learning curve is perhaps complete. The Act and Regulations had a positive influence and most have learned to live with it.

For instance, the Act and Regulation 308 guided the development of a new industrial complex around the hamlet of Nanticoke. The development is recognized as one of the largest undertaken in Canada to date. Extensive monitoring confirmed that the local ambient air quality, while showing evidence of variability, continues to be satisfactory. Local industry in general has had little impact on air quality even though steam plumes and tall stacks are now part of the landscape. The good results are due to preventive steps taken during plant design stages.

Thus it may shown that by applying Regulation 308, the impact of stack emissions has been reduced significantly in existing plants, and the Regulation does deal adequately with new installations. Therefore little change is needed.

Nevertheless there are areas of concern with respect to Regulation 308. At the beginning, stack emissions were evaluated and approved on the basis of single stack dispersion calculations. Each individual stack had to satisfy the prescribed standard for maximum ground level concentration. Later on this approach was changed and made more stringent. Now the sum of all stack emissions from a plant, the aggregitate, is not to exceed the same standards. As a result, multi stack plants have greater difficulties to comply. It is also conceivable that, due to plant siting and the number of stacks involved, standards would not be met even when highly efficient cleaning devices are in place.

Granted the regulations were changed to further limit emissions and improve the ambient air quality. But do the regulations focus on the important emission sources, and do they promote an effective use of economic resources?

Consider the situation in Hamilton. The suspended particulate level in Hamilton has fallen as a result of controls added by industry. But the overall level has fallen by a smaller proportion than industrial emissions.

Moreover, the Ontario Research Foundation concluded in their 1982 Study Report that the largest contribution of particulate matter came from traffic related sources while industrial point source emissions were minor. The relative contributions are:

Traffic Related	40%
Background Influx	35%
Industrial	6%
Others	19%

This study seems to suggest that further reduction in emissions from stack sources will not likely achieve significant improvements in ambient air quality. The observations point to the need to shift the emphasis from a stack control strategy to one where a variety of other non-traditional sources are controlled that are present in the urban environment.

But there are other factors that could have bearing on any new strategy initiative. For instance we should examine if the current ambient air quality criteria for suspended particulates is set at a realistic level. In Ontario the level is 60 ug/m^3 whereas U.S. jurisdictions use 75 ug/m^3. The U.S. experience and changes they intend to make should also be considered to ensure compatibility and avoid disadvantages. Also, there are grounds for improving the accuracy of the air monitoring system. Sampling stations near highways and busy roadways do not always give representative ambient air quality information.

Finally the issue of controlling visible emissions or stack opacity deserves a comment. Occasionally, opacity requirements are more difficult to meet than standards set for stack particulate emissions. In the present form, the opacity rule could be applied to any source at the point where the emisison occurs. In general terms this means emissions are judged close-up where smoke is the heaviest. The rule does not take into consideration the nature of an operation nor if there is a real environmental impact caused by short puffs of smoke.

While the rule seems to be arbitrary, it is a useful and inexpensive tool for monitoring operations. It helps to ensure control equipment and processes are operating properly. Further, emissions are limited so that they do not interfere with, for instance, road traffic. Opacity has a place when it comes to continuous and steady state operations or when used for monitoring purposes. However the situation changes when the rule is used for enforcement.

Situations concerning batch operation, start-up and shut-down of equipment require a different approach. The vagaries of cyclical operations and the nature of some facilities make it impossible to comply totally with the rule as written. For example automobile emissions during start-up, particularly during cold weather, are more visible than when cruising at 40 mph with a warm engine. Charging of furnaces is another example when momentarily doors are open and emissions escape. What is the alternative? It seems these special cases could be covered adequately through an approval step which takes into consideration the nature of the operaion, operating procedures, environmental impact, etc. Allowed visible emissions could be specified on a permit or certificate of approval. A simple amendment would achieve a realistic approach for controlling visible emissions.

VIEWS WORTH CONSIDERING

Many of the expected changes will be highly technical ones namely those that deal with atmospheric dispersion of contaminants and new standards. As well policy changes are expected that will focus on air management issues such as air shed management, long range transport emission restrictions, application of Best Practicable Available Technology, etc. Within the next few months we should learn more about the focus and priorities of proposed concepts through the expected policy document on ammendments of Regulation 308.

Here are some ideas for consideration.

1. Opacity requirements governing visible emissions should be amended. In this regard guidelines for judging opacity should be developed.

2. State-of-the-art dispersion models should be developed as guidelines for general planning purposes. Comprehensive modelling should not be a requirement for small emission sources wherever emission approal is being sought.

3. Ambient Air Quality Criteria should be updated.

4. Policies should be developed for approving new sources or when retrofitting existing emission sources in situations where the ambient air quality is not completely satisfactory.

5. Protocols for ambient air monitoring ought to be developed to achieve a uniform approach for site selection and network design.

6. The concept of using "best reasonable technology" for emission control should be developed as guidelines through Government sponsored industry specific task forces.

7. Proposed stack emission testing program requires a balanced approach to avoid unnecessary costs.

8. The basic principles of Regualtion 308 should be retained but refined and new concepts introduced slowly.

9. Impact of change should be examined closely to avoid creating disadvantages and dislocation.

SUMMARY

A review of Regulation 308 is a timely undertaking to ensure goals and control strategies are compatible with environmental issues. Fine tuning of the Regulation seems desirable, while major changes in regard to using new dispersion models for enforcement is premature. Impact of new modelling techniques should be assessed to ensure disadvantages are not created, and to get a greater sense of the benefits, utility and practicality of new strategies. Because it is difficult to predict the consequences of change it is prudent to proceed cautiously.

ADDRESS BY MR. WILLIAM NEFF,
CANADIAN CHEMICAL PRODUCERS' ASSOCIATION
TO THE "POLLUTION AND THE LAW" CONFERENCE
FEBRUARY 26, 1987

The Canadian Environmental
Law Research Foundation

March, 1987.

First, because some of you may not be familiar with the Canadian Chemical Producers, I would like to just say a few words in introduction. Our association, the Canadian Chemical Producers' Association, represents some seventy-three manufacturing companies which account for about ninety per cent of Canada's total output of manufactured chemicals. The annual production is in the order of $18 billion a year and the industry directly employs about 28,000 people and about one-third of production (basis sales) are exported to various countries, about two-thirds to the U.S.

The industrial chemical industry ranks fifth in value of shipments behind petroleum refineries, pulp and paper, motor vehicles and meat and poultry industries. We are larger than iron and steel. In terms of value added, our industry ranks second only to pulp and apper as far as upgrading raw resources, raw materials. Our products are essential raw materials for Canada's manufacturing sector. We are a key industry, a strategic industry in terms of employment in Canada's present and future well being. We are alos, we believe, a responsible industry and in 1983 our member companies took an initiative, an innovative first step in formalizing an active program to the responsible management of chemicals through their entire life cycle; i.e. introduction, development, manufacture, transpportation, storage, handling, distribution and ultimate disposal, in order to minimize the adverse effects that could occur.

In this initiative, the chief executive officers of all our member companies formally committed themselves "to taking every practical precaution towards ensuring that their operations do not represent an unacceptable level of risk to employees, customers, the public or the environment. They did this by signing CCPA's statement of responsible care. There is a signature and seal for every one of our member companies and it is a formal endoresement of this policy. Endorsement is now a formal condition of membership to our association.

I would just like to briefly review the principles that have been signed onto because I think they are relevant when we are talking about effluent discharge, pollution and the law. Eachcompany will:

° ensure its operations do not represent an unacceptable level of risk to employees, customers, the public or the environment;

° provide relevant information on the hazards of chemicals to its customers, urging them to use and dispose of products in a safe manner and make such information available to the public;

° make responsible care an early and integral part of the planning process leading to new products, processes and plants;

° increase the emphasis on understanding existing products and their uses and ensure a high level of understanding of new products and their potential hazards prior and throughout commercial development;

° comply with all legal requirements which affect their operations and products;

° be responsive and sensitive to legitimate community comcerns; and

° work actively with and assist government and selected organizations to foster and encourage equitable and attainable standards.

We recognise as an industry that a degree of government regulation in combination with self-initiated actions are required to ensure a sufficiently comprehensive, timely and orderly advance towards our mutual goal of protecting health and the environment.

I have been asked this afternoon to speak to you on pollution and law as it relates to MISA, and we just heard what that is. As some of you are aware, our association has publicly stated our support for the objectives of MISA. We are currently actively involved in consultation with government to develop specific regulations that will achieve these objectives in a practical and timely manner for the organic chemical sector. I do not propose to deal with the specifics of these ongoing discussions today. Like Mr. Reisman, I do not believe that public ventilation of <u>any</u> of the participants views at this time would enhance the consultative process.

However, I would like to present to you some views on the nature of the problem we are trying to solve from our perspective and the approach we feel is necessary if we are going to arrive at the equitable and attainable standards that I think we all want to have.

So let's look first at the state of the North American environment. Some of you will react to this. I am not questioning that, but this is our perspective and I think it has some bearing.

In order to address the question of pollution and the law, we think it is appropriate to look at what is the state of the environment to the best of our present knowledge? I guess you have to say that since the early 1970s our ability to detect many trace contaminants has progressed faster than our ability to understand the answers that we get. We now can analyze to parts per quadrillion level, a million-fold increase in sensitivity in less than fifteen years. As our analytical capability improves, we are beginning to find that everything is contaminated with an ever so small amount of everything else. Substances once considered pure are now found to be contaminated and obscure chemicals which used to appear only in scientific literature are now being detected in the environment. It is little wonder the public believes our environment is still deteriorating. We do not know, however, whether these contaminants have been recently dispersed in the environment or whether they have been there for a long time because we lacked the means of detecting them.

We are also unsure about their possible effects. A valuable perspective on this was given by William Ruckle-house when he returned to the post of minister of the U.S. EPA in 1983 and I am quoting something he said:

> There is little question that the environment is in better shape than it was when I first had this job thirteen years ago. Many major sources of gross and obvious pollution have been controlled, the number of days of unhealthy air in major cities has declined virtually without break since 1974. Despite growth in the economy and population, we have seen no decline in water quality over the past years and important rivers have made remarkable comebacks. We are starting to see game fish in places that have not been inhabited for a generation. In short, we have attained many of our goals that were set a decade ago. Yet if I had to sum up the present environmental situation in a phrase, I would say we are doing better and feeling worse.

He said that, he was responsible for the U.S. I can't say that that is exactly the same thing for Canada, but I think there are certain similarities in our economy. I am not saying there is no problem. I am agreeing there is an issue. People are concerned and we have to deal with their concern. I am however questioning the nature of the problem that we are trying to deal with. We believe this statement reflects and points out the need to go beyond simply technical solutions or considerations when searching out solutions to society's concerns which are real and have to be dealt with.

It also points out the futility of any one sector of society attempting to "solve" the problem unilaterally. It won't work. Canada is a multi-goal society. While giving high priority to environment and health issues, we also have some other objectives. Some of them are economic. Some of them are otherwise. So in searching for solutions we must ensure that the wide range of viewpoints are brought to the same table and that the best knowledge and expertise available from society as a whole is utilized. Only then can we hope to achieve, I think, what Canadian society's dual objectives are, environmental protection and economic development.

As part of the chemical industry, we believe we have a contribution to make. Our industry knows a lot about chemicals, their properties and possible effects. The vast majority of all testing done by our industry and the expertise available in interpreting the results, is legion. CCPA believes the best way to achieve solutions acceptable to society, not only for industry but for society as a whole, is to get all the stake holders that are involved and affected by the issue in the same room, lock the door and don't let them out until they come up with mutually agreed to solution. That is the way I feel about it.

We welcome the input from environmental groups and other non-government organizations. If the points we are trying to make don't hold up under tough scrutiny, maybe we need to change them. These people know what they are talking about. They raise concerns that society shares and we as industry need to deal with them or we are going to be continuing to read about ourselves on the front pages of the newspaper.

So this viewpoint, I would just like to point out, is not theoretical or utopian, but is based on recent Canadian experience insolving other social problems through the consultative approach.

I will just say a couple of words on that. I think we have been, as an association, in the forefront of multi-partite consultation aimed at developing workable and practical solutions on complex social issues related to the management of chemicals. We believe this experience is unique in the world, I might say, and will cite specific recent examples to illustrate the utility of the process. We believe this experience is relevant in solving issues relating to MISA and in developing regulations that will flow from this initiative.

The first example is Environment Canada's consultation development process, in which we participated. The Ontario government and federal government, non-government organizations and labour all got together in Niagara on the Lake and agreed that there was a need to develop solutions to environmental issues that have broad-based support. A few years ago Environment Canada initiated this initiative, brought people together who were throwing grenades at each other, and asked, isn't there a better way? We sat around there and said yes, we believed there was. I think such developments are useful because they represent a broach consensus from business, labour, environmental groups and the two principal levels of government, environmental professionals, scientists, academics and others as to the best way to approach solving these problems.

Now, two significant milestones have evolved out of this. The first was a joint so-called manifesto. Everybody cringed, but that is what it got known as, a joint statement on the environment, economy and consultation. This was a common statement that recognised the mutual advantages of working together as opposed to against each other to improve both the environment and the conomy. A number of principles were identified and these are available, but I think the quote that is worthwhile hearing is, the task force said:

A watershed opportunity exists to protect and stren-

> gthen both the environment and the economy by fresh approaches based on multi-stakeholder consultation. The challenge is to create new mechanisms of active focused cooperation among government, environmental organizations, labour, industry and other key stakeholders, leading to an effective mix of positive, predictable regulatory approaches and voluntary action.

The key here is on the stress of cooperative approaches as opposed to adversarial approaches. It is more efficient and it will help the environment sooner and better.

The second milestone were principles and protocols of meaningful consultation, so-called consultation etiquette. How do you approach consultation? The task for report is in the public record. It sets forth the principles and protocols which should be adhered to by all participants in the consultation if it is to be meaningful and effective with respect to environmental issues, especially where there are important linkages to the economy. They are proposed as a guide for participants.

Now for the definition of stakeholders. What do we mean by stakeholders. These are groups that have a vital interest in the issue, will be directly affected by the outcome and/or can make an important contribution to the resolution. We believe we are a stakeholder in developing solutions for MISA for the chemical industry. We also believe environmental groups are and there may be others. Specific stakeholders may change depending on the issue being resolved, but in the case of MISA, I have indicated who we think would be there.

In the views of the task force meaningful consultation is an ongoing dialogue among affected stakeholders, including government, aimed at obtaining all the relevant information, evaluating the available options and the related consequences and providing an objectively balanced perspective to each stakeholder's decision making. The prime objective is to obtain consensus at each stage of the process. Again we may not get there, but you will sure narrow the differences under that system.

"Meaningful consultation" is not a simple matter of bringing diverse groups of interested parties together and expecting them to immediately and automatically develop solutions to complex issues. There has to be time for the participants to get to know each other, to listen and understand their respective points of view and to develop respect, which Heaven forbid, can develop into trust in that particular environment. Finding the common ground of consensus and building on that commonality to reach the solution requires time, not too much time, but some time and that is another prerequisite. What is being advocated is a new approach, a shedding of the stereotyped roles in order to find a balance between self-interest and the interest of multo-objective Canadian society. Earlier role-playing has now evolved into diverse groups playing legitimate roles in developing public policy and through the resulting by-in that occurs when you go through this in accelerating and improving the implementation of whatever is decided. You might say that sounds very, very nice, but does it really work? So let's look at some real practical examples. I can assure you I have been inthe bear pit on a lot of these projects and I can tell you they do work.

The first one I would like to say is the workplace hazardous material information system, affectionately known to people involved as WHMIS. That is a national labelling and information on chemical programs that will replace a gap that presently exists in Canadian legislation on all chemicals, whether manufactured or imported on a standard basis. It is a quantum improvement onthe available relevant information on chemicals in our society. This project was an unprecedented tripartite consultation on very complex issues. We were asked to recommend a process that would work; the most difficult problem was the balancing of the worker's right to know with the industry's right to protect intellectual property. We had two rights and they appeared to be diametrically opposed. How could we ever come out with a resolution of that? It was also the first time that our association was ever involved with any of this kind of consultation and I have to admit we entered it with a lot of caution. We didn't know how it would go. I am pleased to be able to say that after a lot of acrimonious and tough discussion we did reach a hard and balanced compromise agreement and consensus that hopefully, and I think will in the next month, be transposed into federal legislation, and mirrored in provincial regulations.

We say balanced becase of the fact that the consensus has held for over three years despite all kinds of issues and questions being raised. It has been vocally advocated by organized labour which gives us some comfort that there must be something in it that is right. We can also live with it. We are not going to go down the tubes. It is going to cost a lot of money but we will do it and it is an advancement. So we support this development since it represents a consistent legal base which will result in a very significant increase of information on chemicals to workers and the communities generally.

The last exercise I have been involved in, and the ink is still not dry, is amendments to the Environmental Contaminants Act, which is now being talked about in the Environmental Protection Act. I guess I just want to say that after eight months, which is a very short period of really tough discussion, we have consensus here involving the notification, testing, assessment of new chemicals, modifications to the Environmental Protection Act, export notification of chemicals that all parties have bought into. It is common ground.

I can tell you this consensus is alive and well and we will be pushing very hard for the federal government to implement it. So what do we summarize and what does this mean then? We believe that the consultative approach involving all aspects of society is essential if we are going to come up with meaningful solutions that are going to last. This is a new approach. There has been a change in the type of issues that we are asked to face. If any one group, industry, government, law people try to advocate a unilateral solution, I don't believe it is going to work. We really have a choice. We can continue to throw grenades at each other. You know, we can get very proficient at that sort of thing. But if the objective we share is to clean up the environment, we just don't think that makes a whole lot of sense. The truth is that when you get people into that kind of a situation with the kind of process that will allow these things to develop, our experience has been that most people want to get a workable, practical solution implemented. We believe that this can happen. We believe that if this happens, we can meet the Minister's objectives for MISA. We can meet his timetable and we will get off the front page of the papers.

Thank you very much. We are going to support this goal and we are optimistic. Somebody once said, "I guess you have to be optimistic if you work for the chemical industry of Canada." That is right. I am optimistic and I think we are going to end up with something that is really workable here and we are committed to giving it our best shot.

Speaking Notes

for

P.M. Higgins
Director General
Environmental Protection
Conservation and Protection
Environment Canada

to the

Pollution and the Law Conference
Canadian Environmental Law Research Foundation
120 Adelaide Street West, 10th Floor
Toronto, Ontario

February 26, 1987

Thank you. I am pleased to have the opportunity to speak to you about the federal government's draft Environmental Protection Act, the proposed legislation which will strengthen the country's capacity to fight pollution, especially to control the introduction of new toxic chemicals which could adversely impact our air, water and soil.

Certainly, the Canadian public wants government to provide leadership in this vital area. A crop-focus poll found that worries about toxic chemicals rank with unemployment and threats to world peace as the three issues of greatest concern. Nearly 40 per cent of Canadians believe that the government should assume primary responsibility for ensuring an acceptably safe society for the future. What I am here today to share with you is one initiative of the federal government which will contribute to the desired level of risk protection.

On December 18, the Honourable Tom McMillan, Minister of the Environment and the Minister of National Health and Welfare, the Honourable Jake Epp, tabled in Parliament for discussions a major piece of environmental legislation, the Environmental Protection Act. A series of public information and consultation meetings are now being held across the country to seek views on how the Act can be improved. After public comments have been analyzed and incorporated into the Environmental Protection Act, the government of Canada will introduce the Act in Parliament for debate.

It is intended that the Act be tabled for first reading prior to this summer's parliamentary recess.

The preamble to the proposed Environmental Protection Act indicates clearly the direction the federal government intends to take on environmental quality in Canada and sets out fully the policy framework for the Act.

The preamble recognizes the fact that pollution can jeopardize the life and health of the people of Canada and the environment on which human life depends. It acknowledges the right of Canadians to a healthy environment and commits the federal government to cooperate with provincial and territorial governments, in consultation with all Canadians, to protect and enhance the environment.

The preamble also stipulates that the federal government will take a leadership role in the establishment of national codes and guidelines of environmental quality, and in the promoting of "A Social and Economic Climate" in which environmental concerns will have a fundamental place in economic decision-making.

The proposed Act has six major components:

1) A new and comprehensive approach to control all aspects of the lifecycle of toxic chemicals;

2) The establishment of rules which will aid the federal government in carrying out its own activities in an environmentally sensitive way to protect federal lands and waters;

3) The establishment of a basic authority which other federal ministers can use in exercising their responsibility by establishing environmental requirements for federal regulated businesses and undertakings;

4) The establishment of national environmental guidelines and objectives related to desirable levels of environmental quality and to environmentally-sound commercial or industrial practices;

5) Control of sources of atmospheric pollution in Canada that are likely to affect another country or violate international agreements; and

6) Control of nutrients, such as phosphates, in cleaning or water-conditioning products, which accelerate the growth of aquatic vegetation and thus disturb the balance of nature.

The Act as proposed would repeal the Environmental Contaminants Act and the Clean Air Act, as well as Part III of the Canada Water Act and a part of the Department of the Environmental Act. The proposed legislation will be proactive in making available, information to the Canadian public on the state of the Canadian environment, while at the same time recognizing the need for safeguards for confidential business information and proprietary information.

The Environmental Protection Act would also contain new provisions for dealing with federal lands, waters, works and undertakings. Section 6(2) of the Department of the Environment Act, dealing with environmental protection by federal departments, agencies and corporations, would be transferred to the new Act. As well, there would be a new provision, empowering the government to establish regulations for the environmental protection of those federal lands, waters and undertakings under federal jurisdiction.

The authority of the minister to develop regulations and national environmental quality guidelines would be upgraded under the new Act. The Clean Air Act, within limits, allows the government to set national environmental guidelines and objectives for ambient air quality and for the emission of chemicals into the air. The new Act would allow for similar control of discharges to water, land and any part of the environment. These guidelines and objectives would be developed in cooperation with provincial and territorial governments, as a basis for regulation by each level of government.

The following provisions related to toxic chemicals in the new Act represent major changes from the Environmental Contaminants Act and as such, will directly affect the operations of all those subject to the Act.

1) CHEMICALS NEW TO CANADA

   The Act would provide that anyone introducing a chemical into Canada would be required to so notify the Minister. This notice would have to be filed before, not after, the chemical is imported or manufactured.

2) "REASON TO BELIEVE"

   The "Reason to Believe" limitation on authority to require testing by manufacturers or importers will be removed.

The wording in the new Act would be changed to a "Reason to Suspect", allowing the ministers to compel manufacturers and importers to provide sufficient data to assess the potential hazard and, if necessary, control the chemical.

3) POWERS OF INSPECTORS

The Environmental Contaminants Act provides for the appointment and training of environmental inspectors. The new Act would provide these inspectors with powers to take samples and measurements during an inspection of any facility in order to ensure compliance with the Act. The government would be empowered to take corrective measures after an investigation.

4) RECALL POWER

The new Act would give the Minister of the Environment the power to order recalls of chemicals or products distributed in contravention of the Act. A recall could be ordered, for example, if a manufacturer failed to notify the government prior to the introduction of a chemical into Canada. The provision would include the power to require the offender to publicize the recall order, and to repurchase or replace the chemical or product.

5) CLEAN-UP

Under the Environmental Contaminants Act, there are no powers to compel polluters to clean up controlled chemicals released into the environment. The new legislation would provide the Minister with this authority. If the polluter fails to comply with such an order, the government will have authority to take remedial action and recover costs from the polluter.

6) EXPORT NOTIFICATION

A new provision would require anyone exporting, for the first time, a substance that is banned or severely restricted in Canada, to notify a national authority in the country of destination. A copy of the notification would be sent to the Canadian government and may be published in the Canada Gazette. The notice would identify the chemical, the name of the exporter and the country to which it is going. The purpose of this notice is to assist foreign governments in regulating substances being imported into their countries.

This provision would allow Canada to meet its obligations as a member of the United Nations Environment Program and the Organization for Economic Cooperation and Development. Canada will benefit from equivalent notificaion from other participating nations, giving the government advance warning when potentially dangerous chemicals are entering Canada.

7) OFFENCES

In addition to a number of offences set out in the Environmental Contaminants Act, the new legislation introduces the following: failure to provide the Minister with requested or required information; failure to notify the Minister when a chemical, previously considered harmless, is found to be dangerous; failure to perform tests or take measurements; fraudulent testing; and fraudulent reporting on testing.

8) PENALTIES

The Environmental Contaminants Act provides fines of up to $100,000 and two years' imprisonment while the Clean Air Act provides a maximum fine of $200,000. The new maximum penalty would be set at $1,000,000 and five year's imprisonment. Each day a prohibited activity continues could be considered a separate offence.

That, in brief, is a general outline of the major components of the draft Environmental Protection Act. The bill reflects a careful consensus forged in a two-year consultative process, involving representatives of the two senior levels of government, industry, labour, environmental groups and consumers.

The new Act is an important effort on the part of the Minister of the Environment to consolidate his authority and to use it as a framework in conjunction with the laws and regulations of other federal departments and other levels of government. It focuses on managing toxic chemicals through their full lifecycle, from manufacture, to transport, to use, to storage through to ultimate disposal as waste.

The Act will be administered to emphasize prevention, rather than after-the-fact remedies and punishment. As a result, the Minister of the Environment, in conjunction with his provincial colleagues, will be able to take direct action at any stage of the lifecycle of a chemical substance, should that need arise.

In the past, the onus has been on government to demonstrate, after a chemical has been marketed, that it is harmful to human health or to the environment. This onus has had the effect of extending to chemicals a presumption of innocence totally inappropriate for compounds that may be harmful to the environment and to people. In future, the onus will be reversed: manufacturers will be required to satisfy government that a chemical can be controlled within acceptable risks so that it can be introduced, used and disposed of as waste without significant harm to the environment. This new approach marks a sharp departure from past practices.

The Honourable Tom McMillan, Minister of the Environment, has stated quite unequivocably his intention to get tough with those who either by design or through carelessness, pollute the environment. So, it is proposed that the new legislation be backed up by sanctions that include fines of one million dollars a day and, in addition, those who make the decisions that dictate corporate behaviour will be personally accountable under the law. Those who knowingly or fraudulently violate the law could face still jail sentences that the courts will be encouraged to impose. Corporate leaders will be held legally accountable for their acts and for the acts of their agents.

To the extent that legal structures for controlling chemicals have existed, they have been fragmented and incomplete. Responsibility has been diffuse. In many cases, industry itself has never been sure what laws and whose jurisdiction apply to it in particular cases.

As in other areas of public policy, whether tax law, banking regulations or combines legislation, business tends to accept rules -- provided they are rational, fair and consistently enforced. Those qualities, I believe, are characterized in the new Environmental Protection Act in both intent and specifics.

With this in mind, the federal government is currently developing a comprehensive policy on compliance and enforcement. A draft of that policy will be released when the Environmental Protection Act receives first reading in Parliament. The enforcement and compliance policy will outline for the administrators of the Environmental Protection Act, for those to whom the legislation applies, and the public precisely how the provisions of the Act will be implemented. The policy will clearly state what constitutes compliance and the enforcement responses to non-compliance. The policy will apply nationally and will be fair, predictable, consistent, effective and efficient. The rules, sanctions, processes and actions of regulatory authorities will be securely founded in law, in keeping with the Charter of Rights and Freedoms and in conformity with the federal government's policies on regulatory fairness.

Agreement will be undertaken with the provinces which will demystify and delayer the roles of the two senior governments - put more positively, to conjoin the federal and provincial effort.

The Environmental Protection Act is the legislation which will see us into the next century. It is based on a broad consultative process. The Act itself is now being reviewed through extensive consultation. A spirit of geunine cooperation and a mutual desire to secure the best possible legislation has infused this lengthy process. The expertise of organizations such as the Canadian Environmental Law Research Foundation has proven invaluable to us.

I personally want to thank all of you who have contributed and will be contributing time and effort to this process.

On March 23-24, Environment Canada will be hosting a National Consultation Meeting on the Environmental Protection Act in Ottawa. I hope that many of you will be able to join us there and to work with us to ensure that the Environmental Protection Act provides the protection framework that Canadians are demanding of us all.

Thank you

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Speaking Notes

for

Mr. Jim Bishop
Ontario Ministry of the Environment

to the

Pollution and the Law Conference
Canadian Environmental Law Research Foundation
120 Adelaide Street West, 10th Floor
Toronto, Ontario

February 26, 1987

<u>Municipal-Industrial Strategy for Abatement</u>
(MISA)

MISA is an acronym for the Ministry's new program initiative entitled "Municipal-Industrial Strategy for Abatement". The objective of this program is to develop a comprehensive abatement strategy to control hazardous and conventional liquid discharges from both municipal and industrial sources. In simple terms, the goal of MISA is the virtual elimination of toxics discharged to our natural water environment.

MISA will provide control over liquid effluent waste stream from industries and from municipalities that are discharged to natural receivers, whether they be lakes or streams. MISA is not intended to look after air emissions or waste management practices since they will be addressed through amendments being contemplated to Regulation 308, and 309 respectively.

In many cases industries collect and segregate their polluted waste streams and direct them to industrial wastewater treatment facilities. These facilities remove contaminants from the effluents prior to their release to the natural environment. Liquid wastes from commercial establishments, residential areas and some industries, are also discharged to municipal sanitary sewers for ultimate treatment at municipal sewage treatment plants. These sewage treatment plants discharge their wastes to natural receiving waterbodies. MISA will attempt to control the effluent discharges from both the industrial and municipal sectors.

As a first effort, MISA will require each discharger to monitor it's waste and submit a complete report on the quantity and quality of their effluents to the Ministry of the Environment. MISA will also establish minimum performance requirements for each of the dischargers in order that toxics are ultimately eliminated from the final liquid effluent discharges. At the same time, MISA will make use of the water quality impact approach to ensure that the treated effluent even after it meets minimum performance requirements, does not cause any damage to the natural environment. By developing new regulations under the MISA program, abatement and enforcement processes are strengthened since control programs will now have to meet regulatory requirements rather than the policy statements, objectives or guidelines being used at the present time.

Under the technology requirement, effluent dischargers will be requested to provide a minimum level of treatment regardless of the receiver consistent with best available technology economically achievable (BATEA). The Ministry of the Environment in consultation with the industries will identify the technology that might be applied across the sector to provide a uniform degree of treatment. Once the treatment technology is established and the degree of treatment ascertained, it will be possible to characterize the quality of the treated effluent. Through this process, it will be further possible to establish maximum loading requirements for each type of treatment, and it is these loading requirements that will be put into a regulatory framework. By imposing requirements across the sector independant of the receiving body of water, it will be possible to cap the toxics released to the natural environment.

Once the discharger has complied with the BATA requirements, additional studies on the receiver will be carried out to determine whether that treated effluent has any impact on the receiving body of water. If it is determined that this effluent, even though it meets the BAT requirements, still causes pollution problems as identified by site specific studies further controls will be requested of the discharger. Essentially, by carrying out water quality impact studies site specific requirements can be imposed upon the discharger beyond the BAT levels to ensure adequate protection of the environment. These additional controls beyond BATA can be imposed on the discharger through the use of control orders or through Certificates of Approval.

At the present time, the Ministry is carrying out negotiations with four of the eight industrial sectors (petroleum industries, organic chemical industries, pulp and paper industries and mines) to encourage each of these sectors to carry out a cooperative and voluntary pre-regulation monitoring program. The purpose of this pre-regulation monitoring program is to provide the Ministry with preliminary information that might be used to develop a monitoring regulation. This monitoring regulation will require each of the industries in a particular industrial sector to carry out a comprehensive assessment and analysis of their particular effluent dischargers to identify the contaminants released to the natural environment. These regulations will be enforced for a period of one year during which time effluent quality data will be compiled to form the basis for developing the ultimate compliance regulation. The compliance regulation will be based on best available technology for that sector and will include effluent criteria defined in numerical fashion. This compliance regulation will set effluent limits and will indicate the violation responses.

Once the BATA effluent limit regulation is promulgated, the original monitoring regulation will be folded into the compliance regulation and hence, at the end of the two year period, each sector will have one regulation defining the type and the nature of effluent that can be released from its operation.

At the present time, the Ministry is intending to deal with eight industrial sectors and the municipal sector and, therefore, at the end of 1989, it is proposed that there will be 9 BATA regulations specifying minimum treatment requirements for each of the nine sectors.

In summary, the Ministry is proposing to develop a monitoring regulation for each of the industrial sectors that will require the discharger to monitor his waste for a period of one year. Data accumulated from the monitoring program will be used to develop a compliance or BATA regulation setting out effluent limits for each of the sectors at which time the monitoring regulation will be rolled into the compliance regulation. If water quality assessments indicate that the quality of the effluent, even though it meets BATA requirements, still causes difficulty in the receiving stream, then the discharger will be required to provide controls beyond that specified by BATA to ensure that the receiving body is adequately protected. These additional controls will be developed on a case basis and will be imposed on the discharger through the use of control orders or through Certificates of Approval.

In developing the MISA program, the Minister has struck a MISA Public Advisory Committee made up of representatives from industry, the academia, consulting firm and public groups to review the final draft of the regulation from a public perspective. The draft regulations for each of the sectors will be developed by technical committees set up for each sector taking their representation from the industry, the Industrial Association, Ministry of the Environment, and Environment Canada. These technicial committees through negotiations with the industry will prepare the regulation which will be forwarded to the Minister for his final review. A similar technical committee taking its representation from the Ministry of the Environment, Environment Canada, Municipal Engineers Association has been established to deal with the technical regulation for the municipal sector. Again, this regulation will be reviewed by the MISA Advisory Committee prior to that regulation being put forward to the Minister for his final review.

It is anticipated that the first monitoring regulation for the first industrial sector (Petroleum Sector) will be presented to the Minister in final draft form in May, 1987.

This regulation will be closely followed by a monitoring regulation for the Organic Chemical Sector approximately one month later. Between May, 1987 and the middle of 1988, industrial monitoring regulations will be provided for each of the eight industrial sectors.

After a one year monitoring period by the petroleum sector, the first industrial effluent regulation is expected to be completed in the early part of 1988. From 1988 to about the mid 1989, the other sectors will be brought on line. It is, therefore, expected that the final effluent regulations will be completed by mid 1989.

In conclusion, the MISA program as envisaged will develop a comprehensive abatement strategy for Ontario's water resources. It will provide a technical approach to each of the industrial sectors and will impose minimum requirements across the sector independant of the receiving body. This will place a cap on the toxics being discharged to our natural watercourses. At the same time, MISA will permit a systematic review and assessment of the receiving watercourses to ensure that the effluent requirements imposed by BATA are sufficient to provide adequate protection. If this is not the case, the discharger will be required to provide further controls to protect the natural receivers. The MISA program will provide a greater degree of environmental protection and will satisfy public expectations. It will provide a consistent and effective control of toxics to the natural environment.

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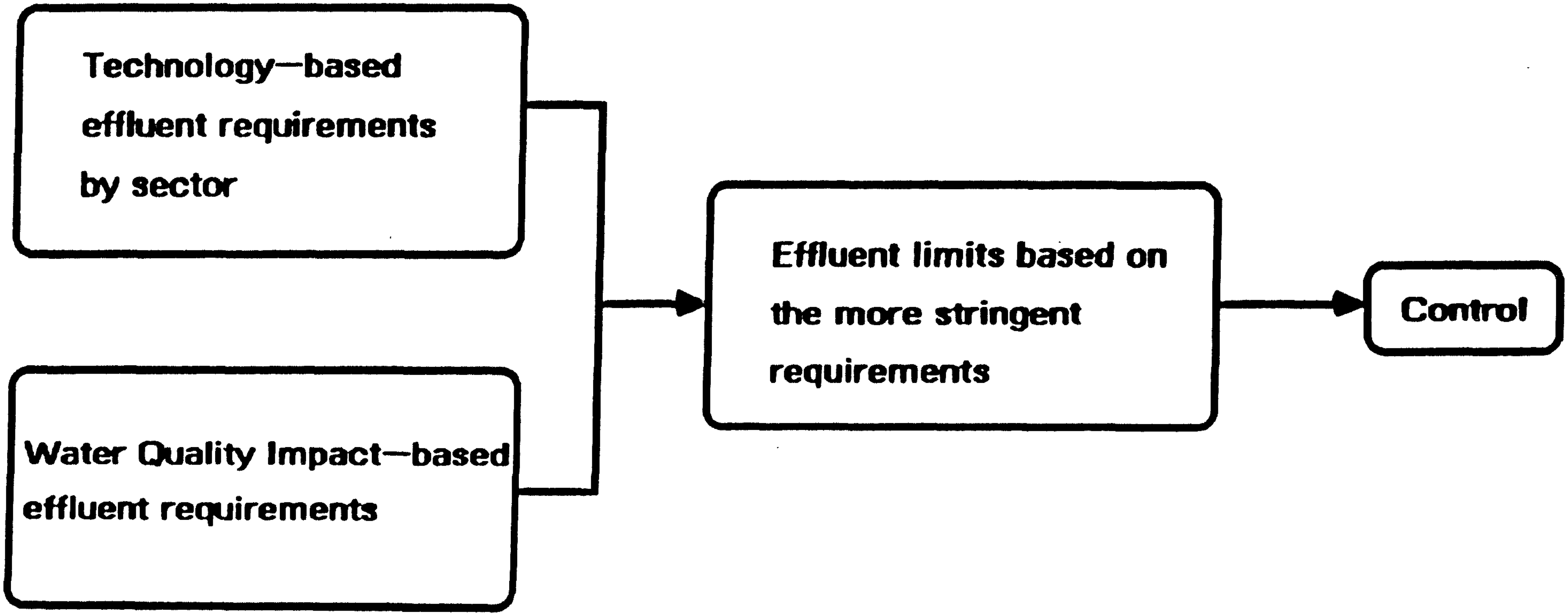
MUNICIPAL – INDUSTRIAL STRATEGY FOR ABATEMENT

MISA


Technology—based effluent requirements by sector
Water Quality Impact—based effluent requirements
Effluent limits based on the more stringent requirements
Control

OBJECTIVE

- To provide a uniform and systematic way of integrating MOE water management activities leading to a comprehensive abatement strategy to control hazardous as well as conventional discharges from municipal and industrial sources

TECHNOLOGY–BASED EFFLUENT REQUIREMENTS

- Requires a minimum level of treatment regardless of location of discharge
- Considers the best available technology economically achievable by sector
- Imposes contaminant load limits per unit of production and maximum discharge concentrations
- Leads to specific control and abatement requirements imposed by Control Order

WATER QUALITY IMPACT–BASED EFFLUENT REQUIREMENTS

- Requires a water–quality based assessment be made
- Effluent requirements based on aquatic and human health effects
- Considers both concentration and loading effects
- Leads to specific control and abatement requirements imposed by Control Order

PROGRAM SEQUENCE

- Pre–Regulation cooperative monitoring
  - —by industrial and municipal sectors
  - —includes effluent characterization, variability and routine monitoring

leading to:

- <u>MONITORING REGULATION</u>
  - —sampling and analytical protocols
  - —reporting and disclosure

leading to:

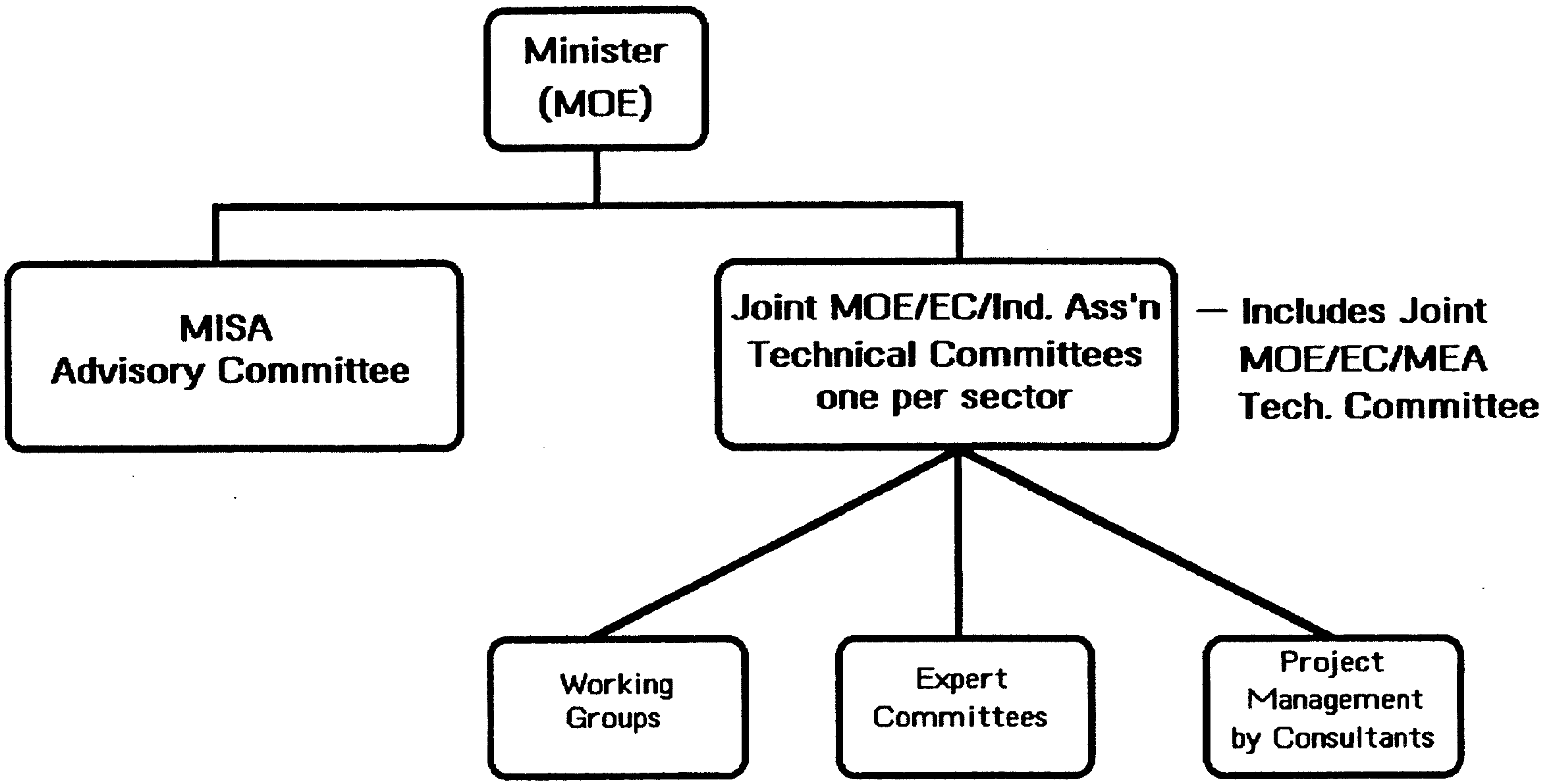
- <u>COMPLIANCE REGULATION</u>
  - —effluent limits
  - —violation responses

leading to:

- <u>CONTROL ORDERS FOR ABATEMENT</u>
  - —specific to each discharger
  - —time schedule for compliance

PRE–REGULATION MONITORING PROGRAM

COMMITTEE STRUCTURE



LEGEND:

MOE — Ministry of the Environment (Ontario)

Ind. — Industry

AMO — Association of Municipalities of Ontario

EC — Environment Canada

MEA — Municipal Engineers' Association (of Ontario)

MISA:

- introduces dischargers' self monitoring and reporting
- introduces minimum performance requirements for toxic control (BAT based)
- retains water—quality impact approach to set effluent limits for environmental protection
- adds a regulatory thrust to strengthen enforcement
- sectoral approach
- covers direct and indirect discharges
- shared responsibilities: Government (Provincial/Federal)
Industry
Publics

MISA WORKING GROUPS

Working Group 1 — Regulation Development

Working Group 2 — Industrial Sector Characterization & Standards

Working Group 3 — Municipal Sector Characterization & Standards

Working Group 4 — Toxicity and Biomonitoring

Working Group 5 — Pilot Sites & Modelling

Working Group 6 — Data Systems Development

Working Group 7 — Sampling & Analytical Protocols

Working Group 8 — Communications

8 Major Industrial Sectors

- Petroleum Refining
- Organic Chemicals
- Pulp and Paper
- Metal Mining and Refining
- Iron and Steel
- Industrial Minerals
- Inorganic Chemicals
- Electric Power Generation

Municipal Sector

- Sewage Treatment Works

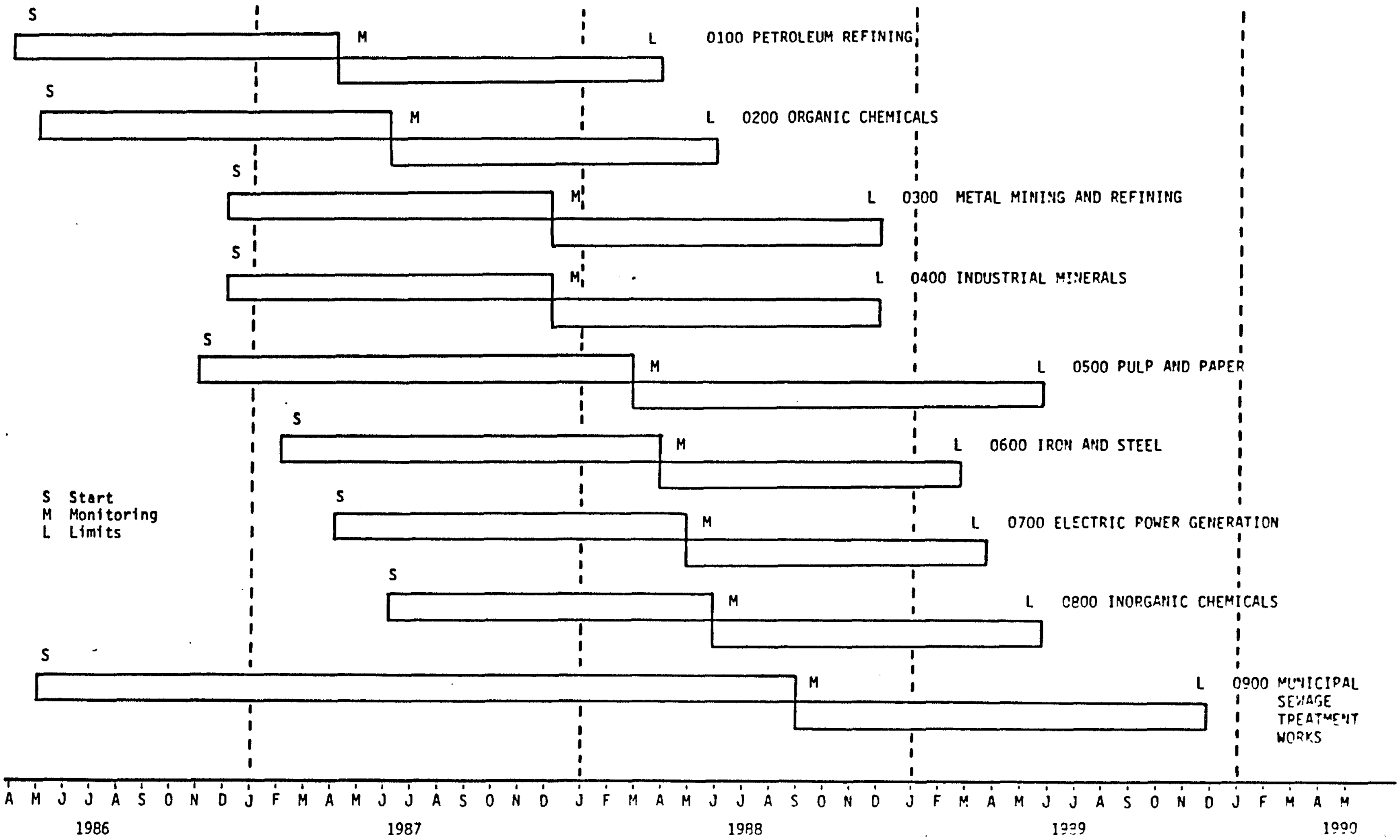
INDUSTRIAL POLLUTION CONTROL IN ONTARIO

Legislation	Provisions
Ontario Water Resources Act and Ontario Environmental Protection Act	* Prohibit pollution * Control through Orders * Approval of Sewage Works * Regulatory Powers
Canada Fisheries Act	* Regulations and Guidelines

INDUSTRIAL DISCHARGERS IN ONTARIO

DIRECT	INDIRECT
* 147 monitored	* 12,000 (approximately)
*75 to 100 additional not monitored (mostly mines)	* Dischargers are industrial and commercial
* Discharge to lakes and rivers	* Discharge to municipal sewers
* Control by Provincial and Federal Legislation	* Control by municipal by-laws

MISA SECTORS SCHEDULE



The MISA Timetable

SECTOR	START	REGULATION	
		MONITORING	LIMITS
0100 Petroleum Refining	APR 86	APR 87	APR 88
0200 Organic Chemicals	MAY 86	JUN 87	JUN 88
0300 Metal Mining and Refining	DEC 86	DEC 87	DEC 88
0400 Industrial Minerals	DEC 86	DEC 87	DEC 88
0500 Pulp and Paper	NOV 86	MAR 88	JUN 89
0600 Iron and Steel	FEB 87	APR 88	MAR 89
0700 Electric Power Generation	APR 87	MAY 88	APR 89
0800 Inorganic Chemicals	JUN 87	JUN 88	JUN 89
0900 Municipal Sewage Treatment Works	MAY 86	SEPT 88	DEC 89

TABLE 1

MISA SECTORAL STATUS

PETROLEUM REFINING SECTOR : CHARACTERISTICS

* 7 refineries— all similar
* Oil separation, biological treatment
* Low levels of toxics
  - benzene
  - toluene
  - xylenes
  - PAH's
* Stormwater control may need upgrading
* Close to BAT
* Effluent characterization/ industry
* Draft regulation— public review— March 1987

PETROLEUM REFINING SECTOR

(7 Dischargers)

* Wastewater segregation for organic and inorganic pollutants
* Oil separation
* Equalization and pH control
* Activated sludge
* Temperature control
* Clarifying and settling
* Sour water stripping
* Stormwater treatment to remove oil and contaminants
* Meet MISA requirements to control toxics
* Reuse of process waters
* Process water cooling before discharge
* Sand/anthracite filtration

ORGANIC CHEMICAL SECTOR: CHARACTERISTICS

* 20 manufacturing sites with direct discharges
* Variety of chemicals manufactured and discharged
* Contributor of priority pollutants
* Unique nature of processes, discharges and treatment levels requires site—specific assessment, monitoring and effluent limits
* Effluent characterization underway
* Draft regulation expected for review, Spring 1987
* Capital expenditure needed to meet BAT requirements

ORGANIC CHEMICALS SECTOR

(23 Dischargers)

* Steam stripping for volatile organics
* Primary sedimentation and separation
* Biological treatment

PULP AND PAPER: CHARACTERISTICS

* 28 mills— several types:
  - kraft pulp
  - sulphite pulp
  - chemical, mechanical and thermo—mechanical pulp
  - paper mills
* Largest contributors of organics (BOD) and suspended solids loadings
* Kraft pulp mills use chlorine for bleaching— creates chlorinated compounds of concern
* Resin and fatty acids
* All mills have minimum of primary treatment (solids removal)
* Very few have biological treatment
* Very few meet toxicity requirements
* Capital expenditures will be needed to meet anticipated BAT requirements
* Effluent characterization program under negotiation

PULP AND PAPER SECTOR

(28 Dischargers)

* In—mill fibre recovery (saleable)
* In—mill recovery of suspended solids, which are landfilled
* In—mill recycling of wood furnish
* In—mill closure (no wastewater dis—charge)
* Steam stripping of odorous/organic condensates
* Suspended solids removal via clarifiers and settling ponds
* Biological treatment (aerobic, in aeration lagoons)
* Activated sludge
* Pure oxygen high rate systems

METAL MINING AND REFINING SECTOR: CHARACTERISTICS

* 53 active major mines
* Difficulties defining sector with frequent opening and closing of mines
* Metal mining effluent control typically consists of tailings sedimentation, recycling, and neutralization
* Gold mining— cyanide removal technology is new— not all sites use it
* Organic reagents, flotation agents require characterization
* Nuclear fuel mining and refining requires negotiation with AECB to achieve MISA requirements
* Effluent characterization program under negotiation

METAL MINING AND REFINING SECTOR

(35 Dischargers)

* Tailings sedimentation
* Leachate neutralization
* Cyanide removal or natural degradation

SEWER–USE CONTROL CHARACTERISTICS

- 11,700 indirect discharges
- discharge to Municipal STPs
- STPs controlled by municipalities
- concern whether conventional STPs can remove persistent hazardous contaminants
- insufficient data base (therefore, 40 STP Survey)

SEWER—USE CONTROL ACTIVITIES

- 40 plant survey
- interim sewer—use by—law
- sewer—use control program

PUBLIC PARTICIPATION

- 60—day White Paper public review and comment
- Advisory Committee (including public interest groups) reviews draft regulations and makes recommendations
- Formal period for public review of draft regulations
- Complete access to contaminants discharge data, compliance status and abatement progress

TABLE 2

MISA REGULATIONS