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## ENVIRONOTES!

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*Environmental Solutions  
for Business*

### **NEW CRIMINAL CODE LEGISLATION POTENTIALLY COMPOUNDS ENVIRONMENTAL LIABILITY**



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On March 31, 2004, Bill C-45 was proclaimed into force amending the *Criminal Code*.

The centerpiece of Bill C-45 is the creation of a new legal duty operating in the Canadian workplace:

Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person or any other person, arising from that work or task.

The new legislation redefines the word "everyone" to include not only individual and corporate entities, but also unincorporated associations, such as, partnerships.

The amendment relies on the existing definition of "bodily harm" within the *Criminal Code*; namely, any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

A breach of the workplace duty constitutes criminal negligence which, in the event it causes death or bodily harm, can be prosecuted as breaches of sections 220 and 221 of the *Criminal Code*.

There is nothing in the new legislation to suggest that the new duty applies to only "conventional" workplace accidents. Employers who expose their employees to health risks arising from, for example, pollution could find themselves being prosecuted where there is a direct link between the polluted work environment and bodily harm suffered by one or more employees.

Nor is the duty limited to preventing bodily harm to employees. The duty speaks to bodily harm to any person, which would appear to include non-employees who have suffered bodily harm, a result of, for example, pollution caused by the employer.

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The new duty requires the employer to take reasonable steps to prevent bodily harm. At a minimum, this reinforces the existing law that employers should take all reasonable care to ensure that their workplaces comply with provincial and/or federal environmental legislation governing the employer's operations.

The responsibility for ensuring compliance falls squarely on the shoulders of the one or more senior officers who are responsible for that aspect of the employer's activities in which a risk of non-compliance leading to bodily harm may exist. If the senior officers depart markedly from the standard of care that, in the circumstances, could reasonably be expected of them, then the senior officers and the employer can be liable if shoddy environmental practices cause bodily harm or, worse, death to an employee or any other person.

The offences of criminal negligence causing bodily harm and criminal negligence causing death are "indictable" according to the *Criminal Code*. In the case of a corporation, this means that if it is successfully prosecuted for either of these offences, there is a potential for unlimited fines. The *Criminal Code* also makes provision for corporate offenders being placed on probation and being subject to restitution orders.

Individual offenders face the possibility of not only fines and probation, but also very lengthy prison sentences: in the case of criminal negligence causing bodily harm, ten years; and, in the case of criminal negligence causing death, life.

## **WHITE PAPER ON WATERSHED BASED SOURCE PROTECTION PLANNING: AN ANALYSIS**

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The Ontario Government released its *White Paper on Watershed Based Source Protection Planning* ("White Paper") in February 2004. The White Paper explores initiatives being contemplated in light of the 121 recommendations made by Commissioner O'Connor in *The Report on the Walkerton Inquiry*. The initiatives include a legislative regime for watershed source protection as well as amendments to the current legislation relating to "permits to take water" ("PTTW").

### **Source Water Protection**

A "watershed" is an area of land that drains downward to lower elevations. The drainage pathways typically merge at rivers or lakes which increase in size as the water moves further downstream through the watershed. Currently, there is no legislative scheme in place for watershed protection.

The purpose of the proposed legislation is to protect drinking water sources through the development of mandatory watershed-based source water protection plans. The MOE is in the process of working with Conservation Ontario to organize watersheds into regions.

Source Protection Planning Boards ("SPPB") would be established in each watershed region to coordinate and review key functions. In watersheds where there are conservation authorities, the SPPB will be the board of directors of the conservation authority. Proposed amendments to the *Conservation Authorities Act* will require all municipalities in the planning area to participate as members of SPPBs. Additionally, each watershed region will have a multi stakeholder Source Protection Planning Committee ("SPPC"), which will be reviewed by the SPPB. The SPPC will be charged with coordinating the development of a Source Protection Plan ("SPP") for its region and ensure that the plans conform to source water protection legislation, regulations and associated guidelines.

The SPPCs will establish working groups to develop effective SPPs. The development of an SPP will involve five steps: technical assessment, the implementation of interim management strategies, threat assessment and development of management strategies, development of the plan and final approval.

The SPP will identify measures to be taken to address immediate threats to drinking water sources and will describe how the plan will be implemented to manage the identified source protection issues. It will delineate management actions to be undertaken and will include procedures for ongoing monitoring and assessment.

Once a SPP has been approved and implemented, SPPBs will be expected to provide regular progress reports to the Ministry of Environment ("MOE") and the public.

### **Permits to Take Water**

At present, water takings are governed by the *Ontario Water Resources Act* ("OWRA") and the Water Taking Transfer Regulation (O.Reg. 285/99). The OWRA states that a permit must be obtained for any daily taking exceeding 50,000 litres of water. There is also a discretionary authority to require a permit for water takings of less than 50,000 litres per day.

On December 18, 2003, the Ontario Government implemented a one-year moratorium on new and expanded water taking permits for products such as bottled water. The moratorium will remain in effect until December 31, 2004 and ensures that permits to take water are not issued for new and expanding water bottling operations, as well as specifically identified commercial undertakings, until new rules are developed.

Improvements being considered by the MOE include enabling interested parties to receive early and regular notification from the ministry when applications are made, as well as increasing the responsibility of permit applicants to address public concerns. Additionally, methods to calculate water budgets and stream flows at the watershed level are being contemplated to assist with the assessment of the impact of specific water takings.

On the same day that the moratorium was announced, the Ontario government announced its intent to apply charges to water takings for commercial purposes. Water taking charges would be implemented in conjunction with the proposed improvements to the PTTW program discussed earlier.

Water taking charges could be either fixed or graduated, depending on factors specific to the taking, its purpose, or the conditions of the watershed. Charges could apply to the permitted volume of the taking or to the actual amount of water taken. Alternatively, charges could be based on "consumptive use" which refers to the portion of surface or groundwater withdrawal that is not returned to the water source from which it was taken. The consumptive use model is particularly relevant for companies that incorporate a significant amount of water into their end product.

The source of the water being taken is another factor that will be considered when determining water taking charges. Different charges could be applied to surface water than to groundwater sources. Additionally, once a water budget is established for a given watershed, charges could vary according to the budget.

It is important to note that in jurisdictions where water charges are currently in place, takings for drinking water, fire protection, mineral processing, agriculture and conservation are exempt from water taking charges. It is expected that similar exemptions will apply in Ontario.

Another issue to be considered with regard to water taking charges is the frequency of the charge. Water users could pay a one-time charge on the issuance or renewal of their permit or regular charges could be applied to new and existing permitted users.

Following consultations with the public and stake holders, the Government proposes to introduce a framework for water taking charges by the spring of 2004.

The impact of the White Paper's approach to watershed based source water protection will be most keenly felt by local municipalities which will be required to participate in the development of an SPP. Of particular concern is how the proposed watershed-based source protection approach will be funded, and how it will be enforced.

The proposed changes to Ontario's PTTW regime and the implementation of water taking charges will have a dramatic impact on entities that utilize significant quantities of water in their operation. To-date no information has been made available regarding the quantum of potential charges and therefore it is imperative that interested parties participate in the consultation process to ensure that the cost of water taking in the future does not become prohibitive.

## **THE SUPREME COURT OF CANADA RENDERS ITS DECISION ON THE TORT OF ABUSE OF PUBLIC OFFICE**

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An article appeared in the April 21, 2003 issue of EnviroNotes! concerning the Ontario Court of Appeal decision in *Odhavji Estate v. Toronto (Metropolitan) Police Force* (2000), 194 D.L.R. (4th) 577 which involved the tort of abuse of public office - the rare intentional tort. The Supreme Court of Canada heard the appeal on February 17, 2003 and released its decision on December 5, 2003. The unanimous judgement of all nine justices of the Supreme Court clarifies the law of the tort of abuse of public office in Canada (*Odhavji Estate v. Woodhouse* (2003), 233 D.L.R. (4th) 193).

The issue before the Supreme Court of Canada was whether the defining element of the tort is the unlawful exercise of a statutory or prerogative power as opposed to the unlawful exercise of a statutory duty.

The Supreme Court of Canada found that the tort is not so narrowly construed, but applies more broadly to unlawful conduct in the exercise of public functions generally. The Court affirmed that this has been the law since *Roncarelli v. Duplessis*, [1959] S.C.R. 121, when the Premier of Quebec was found liable for unlawfully exercising a statutory power. Without any statutory power to do so, Premier Duplessis directed the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. The Supreme Court also relied on jurisprudence from Australia, New Zealand and the United Kingdom in concluding that the tort is not limited to the unlawful exercise of a statutory or prerogative power actually held.

The tort's purpose is "to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."

The two common elements of the tort are defined by the Court:

1. The public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer; and

2. The public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

The first element goes to the conduct of the public officer. The conduct must be deliberate; it cannot result from inadvertence or negligence because the tort is directed at a public officer who has wilfully chosen not to discharge his or her public obligations despite his or her ability to do so. The conduct must be either an unlawful act or omission, such as breaching the relevant statutory provisions or acting in excess of the powers granted or for an improper purpose.

The second element goes to the awareness of the public officer. The public officer must have been aware that his or her conduct was unlawful and that it was likely to harm the plaintiff. The requirement that the defendant must have been aware of these two elements is a result of the fact that misfeasance in a public office is an intentional tort; it requires an element of "bad faith" or "dishonesty".

Iacobucci J., writing for the Court, concluded:

To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: i) deliberate unlawful conduct in the exercise of public functions; and ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

## MOE ORDERS

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In 1998, Ontario's environmental statutes were amended to empower every Provincial Officer to issue Orders in circumstances of non-compliance or where necessary to prevent the discharge of contaminants. As predicted by most observers, the Provincial Officer Order has now become the primary control instrument for the Ontario Ministry of the Environment (MOE). Combined with a strong trend away from voluntary abatement and towards compulsory control, there is a very different regulatory climate in Ontario in 2004 than there was even five years ago.

There are a number of important issues to keep in mind when faced with a Provincial Officer Order:

- An Order has the force of law. If you choose to ignore it, investigation and prosecution is highly probable.
- There is a two-level appeal mechanism associated with Provincial Officer Orders. The first level is a prerequisite for the second.
- Within 7 days of *receiving* an Order, you are entitled to request a review by the Director. For administrative purposes, the MOE has designated every District Manager as the Director for this purpose. A request for review needs to be in writing, but it is often an excellent idea to seek the opportunity to make oral submissions.
- The decision of the Director on the review is an Order appealable within 15 days to the Environmental Review Tribunal (ERT). A Provincial Officer Order may *not* be appealed to the ERT. It is necessary to go through the review stage.
- If the Director does not decide within 7 days of receiving the request for review, he or she is deemed to have confirmed the Order. That deemed decision is appealable

to the ERT.

- A Provincial Officer Order is effective upon issuance. It is possible to request the Director to stay the Order, although such a request will rarely be successful. The ERT can, and frequently does, stay orders pending a determination on the merits of the appeal. An ERT cannot be sought until the appeal is filed.
- On occasion, it is difficult to negotiate a resolution with the Director within the 7 day review period. As there is a further 15 day window in which to file an appeal with the ERT, it is often advisable to stretch negotiations well into that period.
- Provincial Officer Orders are not posted on the Environmental Registry. However, ERT appeals will result in Notices of Hearing being mailed to adjacent landowners and published in local newspapers.

For further assistance with Provincial Officer Orders, contact John Tidball (905.415.6710), Bruce McMeekin (905.415.6791), Bryan Buttigieg (416.595.8178), Tammy Farber (416.595.8520), David Whitten (905.415.6752) or Michelle Fernando (905.415.6716).

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