

Environmental Liability and Bill 133: What You Need to Know

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Absolute Liability in the Imposition of Environmental Penalties: Radical Change in Approach or Complementary Enforcement Tool?

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In the *Environmental Enforcement Statute Law Amendment Act, 2005*² (commonly known as Bill 133), the Ontario legislature has adopted a new method of seeking to promote enhanced compliance with environmental law, through the application of “environmental penalties” of up to \$100,000 per day for spills and violations of conditions contained in certificates of approval. In doing so, the Ontario legislature has provided for absolute liability to be imposed whenever environmental penalties are applied.

This paper will examine the question of whether absolute liability in the imposition of environmental penalties is sound legal policy, and will examine some of the arguments in favour of and opposed to it.

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² S.O. 2005, c. 12. Royal Assent was given on June 13, 2005.

In theory, the adoption of absolute liability in respect of contravention of environmental law potentially signals a major change in the way Ontario deals with regulatory offences.³ However, it is useful to bear in mind that the practical impact of the legislation remains to be seen. In fact, the sections dealing with environmental penalties have not yet been proclaimed in force and may never be. The government's stated intention at the time of writing is to wait for the promulgation of detailed regulations that will spell out how the environmental penalty regime will work.

The eventual impact depends on numerous factors. Some of these factors will be spelled out in regulations to be promulgated under the legislation, including (i) the amount of environmental penalties for particular contraventions, (ii) reductions in penalties to be provided for establishing a good environmental record and due diligence, and (iii) the circumstances in which the maximum environmental penalties will be imposed, among other factors. Also remaining to be seen is how broadly the environmental penalty regime will be applied, and how the Ministry will govern itself with regard to the boundaries of application of environmental penalties and prosecution for environmental offences. The Ontario government has stated that the environmental penalty regime will initially be applied only to large industries governed by the Municipal-Industrial Strategy for Abatement (MISA) regulations, but it remains open for the Ministry to change this down the road, as the legislation does not limit the extent to which environmental penalties can be applied other than to require that regulations be promulgated.

Assuming the broadest application of environmental penalties permitted by the legislation, Bill 133 could in fact have radical implications for the way environmental violations are dealt with,

³ Assuming, of course, that the legislation withstands a constitutional challenge, which issue is not directly addressed herein.

and potentially undermines the framework in which regulatory offences have been prosecuted since the landmark 1978 decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie*⁴

To understand *R. v. Sault Ste. Marie*, it is essential to understand it within the context of the development of regulatory offences in the law.

Traditional principles of criminal law required that in order for a person to be convicted of an offence, there must be not only the commission of a prohibited act (the “*actus reus*”) but also a mental element – a guilty mind (the “*mens rea*”). As Blackstone wrote in the 18th century, “to constitute a crime against human law, there must first be a vicious will, and secondly an unlawful act consequent upon such vicious will”.⁵ As Dickson J. (as he then was), described it in *R. v. Sault Ste. Marie*, “there is a generally held revulsion against punishment of the morally innocent”.⁶

This focus on the mental and moral aspect of an offence was consistent with the development of law from religious roots and is reflective of the prevailing ethical philosophy of pre-enlightenment Europe, some of which still persists today.

Since the Industrial Revolution, the preoccupation of law with morality has to a great degree waned, replaced but not entirely supplanted by more utilitarian concerns such as deterrence and regulation of activity, again consistent with prevalent philosophical trends. Following the

⁴ [1978] 2 S.C.R. 1299

⁵ 4 Comm. 21, cited in *R. v. Sault Ste. Marie*, supra.

⁶ Supra, at p. 1310.

Industrial Revolution, the nature and scope of economic activity have expanded, as has the role of the state in economic regulation.

Various regulatory regimes have been put in place, with a myriad of rules. In case of most of these regulatory rules, while it is necessary from the point of view of the smooth functioning of the state and society to ensure compliance with them, violations of the rules have little in common with the commission of traditional criminal offences to which moral disapproval has traditionally been expressed. For example, rules of the road and highway traffic offences generally are ones which for the most part do not cause concern about the character or morality of perpetrators of these offences (except perhaps in extreme cases).

Given that many regulatory offences did not really involve any degree of moral turpitude, to require proof of evil intent for contraventions seemed pointless. Furthermore, it would place a tremendous burden on the state, making prosecutions expensive and difficult in most cases, particularly given the nature of the offences.

Thus, absolute liability offences evolved. In absolute liability offences, a person can be convicted of an offence on proof merely that the prohibited act constituting the *actus reus* of the offence was committed, with no mental element being required. In an absolute liability offence, it is no defence that the accused may have been entirely without fault. A person can be “morally innocent in every sense yet he is branded as a malefactor” and punished as such”.⁷ As an efficient and effective way of ensuring compliance with regulatory legislation, courts did away with the requirement of *mens rea* for very minor offences.

⁷ R. v. Sault Ste. Marie, supra, at p. 1310.

However, when sought to be applied to a serious environmental offences, such as a large chemical spill (as was the situation in *R. v. Sault Ste. Marie*), absolute liability could result in the punishment of someone who was morally innocent of any wrongdoing, in the sense that the person or company had done everything possible to prevent the discharge. This would have violated the “generally held revulsion against the punishment of the morally innocent.”

With regard to this generally held revulsion toward punishment of the morally innocent, absolute liability has been sought to be justified on the basis that regulatory offences are not crimes and that there should be no stigma attached to conviction. But, it is fair to question how realistic that is, particularly in the case of serious environmental offences. A significant portion of the general public does regard the contamination of the natural environment as being a moral wrong, and the deterrent value of convictions seems generally accepted. As John Swaigen has written:

“It is likely that every prosecution has a ripple effect throughout the industry and that a single prosecution has a much greater deterrent effect on other potential offenders than administrative remedies.”⁸

⁸ John Z. Swaigen, “A Case for Strict Enforcement of Environmental Statutes”, in L. Duncan, ed., *Environmental Enforcement* (Edmonton: Environmental Law Centre, 1985), as cited in E. Hughes et al, *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Limited, 1998), 337 at 339-40. See also Dianne Saxe, “The Impact of Prosecution of Corporations and their Officers and Directors upon Regulatory Compliance by Corporations”, (1990, vol. 1, no. 1, *Journal of Environmental Law and Practice* 91, cited in Hughes, *supra*, at p. 341).

In addition to the argument that absolute liability makes prosecution more efficient, another justification for absolute liability that has been put forward is that it provides an incentive to maintain high standards of care and attention in order to avoid liability, prompting precautionary measures beyond what otherwise might be taken to avoid non-compliance.

These arguments in favour of absolute liability were addressed head on, and rejected, by the Supreme Court of Canada in *R. v. Sault Ste. Marie*. Dickson J. wrote that

“There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it, the opprobrium of conviction.”⁹

Thus, the Supreme Court of Canada in *R. v. Sault Ste. Marie* rejected the arguments in favour of absolute liability and instead changed the law to put in place a regime of “strict liability” for regulatory offences, whereby if the Crown proves the occurrence of a prohibited event (such as a discharge), a conviction will be entered unless the accused person establishes the defence of due diligence.

⁹ Supra, at pages 1311-1312

The decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie* did not come out of an historical vacuum. The issue had been long considered for numerous years in various countries. In fact, the Supreme Court of Canada noted recommendations made by the Law Reform Commission of Canada with regard to regulatory offences, which recommended that negligence be the minimum standard of liability in regulatory offences. This was because the purpose of such offences was to promote higher standards in respect of various objectives, including protection of the environment. As a result, the “moral wrong” in regulatory offences was considered to be carelessness. Given that the wrong being addressed was negligence, the Supreme Court of Canada agreed that a person accused of a regulatory offence should not be convicted if he or she establishes that due care and attention was in fact given. (i.e., the absence of negligence). According to the Supreme Court of Canada, liability for environmental contraventions should be based on an accused person having had the power, authority and opportunity to prevent the contravention but having failed to do so.

Reflective of this thinking is the comment of Lord Justice Devlin in *Reynolds v. Austin and Sons Limited*¹⁰, cited by the Supreme Court of Canada in its reasons for judgment, that:

“A man may be responsible for the acts of servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions, citizens are induced to keep themselves and their organizations up to the mark....

If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged not in

¹⁰ [1951] 2 K.B. 135 at 139

punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim.”

Since the decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, the “strict liability” outlined by the Court has been the accepted norm in regulatory offences. The Crown must prove the prohibited act, and if it does so the accused person will be convicted unless he or she can establish the due diligence defence. It is based on the very simple notion that a person or corporation should not be punished if it does everything that can reasonably be expected to prevent a contravention of the legislation and one nevertheless occurs.

Environmental penalties can be seen as a rejection of the approach imposed by the Supreme Court of Canada, and more than 30 years of experience with it. If the environmental penalty regime is put in place, the Court will be faced with deciding whether it is within the power of the Ontario legislature to override the *Sault Ste. Marie* decision.

Is absolute liability fundamentally unjust and unfair? How can the state justify the imposition of penalties in the absence of any kind of fault on the part of the person charged with paying the penalty?

The Ontario Government’s stated rationale for the move to absolute liability has been that environmental penalties are but an additional enforcement tool, complementary to prosecution for environmental offences, and that they should not be regarded as being the same as fines imposed on conviction of environmental offences (in respect of which the strict liability due diligence defence would still apply).

Given the magnitude of the environmental penalties that can be imposed under the new legislation, however, one can legitimately question whether that is a valid distinction. In fact, given the obvious administrative ease and advantages to proceeding with environmental penalties, they could, if fully implemented to the extent the legislation allows, almost entirely supplant environmental prosecutions as a primary enforcement tool.

The argument that liability for environmental penalties is not the same as liability to pay a fine for an offence seems weak. The Supreme Court of Canada has established that rights under Section 11 of the Charter of Rights and Freedoms are available to persons prosecuted for provincial regulatory offences involving “punitive sanctions”. In *R. v. Wigglesworth*¹¹, the Supreme Court of Canada set out two tests for determining whether proceedings are in respect to a penal matter, (i) the “nature of the proceeding” test and (ii) whether there are true penal consequences. With regard to the nature of the proceeding test, the Court held that:

“If a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within Section 11. It falls within this section because of the kind of matter it is. This is to be distinguished from private, domestic, or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity.”

With regard to the second test, whether there are true penal consequences, the Court held that a true penal consequence is “imprisonment or a fine which by its magnitude would appear to be

¹¹ [1987] 2 S.C.R. 541

imposed for the purpose of redressing the wrong done to society at large, rather than to the maintenance of internal discipline within the limited sphere of activity”.

Under both these tests enunciated by the Supreme Court of Canada in *R. v. Wigglesworth*, it seems likely that the environmental penalties provided for in Bill 133 would be regarded as satisfying the test and being penal. The nature of the matter is certainly of a public nature and within a public sphere of activity. In addition, the fines imposed by the legislation are so large that it would be difficult to argue that they were not imposed for the purpose of redressing the wrong done to society at large, although it is important to note that once regulations are promulgated, this conclusion may not apply, or may apply only in respect of high penalty situations.

In fact, the speech made by the Minister of the Environment in support of the legislation make clear that the environmental penalty legislation is intended to address a social problem, that being that recent growth in the number and volume of reported spills in Ontario.¹²

It does seem possible, however, to justify imposition of financial disincentives to spills regardless of whether the person or company whose activities generated the spill was duly diligent or not. If the activity or enterprise in which a business is engaging gives rise to such spills, then additional costs imposed on the enterprise commensurate with the incidence of spills would provide an economic disincentive to the activity that generates the spills, resulting in less of the activity and hence fewer spills. Just as gasoline taxes can be justified as a tax on the

¹² Legislative Assembly of Ontario, 1st Session, 38th Parliament, Official Report of Debates (Hansard), Thursday, June 2, 2005 at pages 7418-7420.

activity of driving automobiles in order to cover the social costs of providing the infrastructure of automobiles, as a rough proxy for those costs, so too could environmental levies be sought to be justified as a form of taxation. To the extent that additional costs are imposed on certain events, a rational response by an efficient business would be to invest additional resources in ensuring that those events did not take place.

In such a regime, discussions of “morality”, “vicious will”, “intent”, “fault” and “carelessness”, and the use of terms such as “offences” and/or “penalties”, would be inappropriate. While there may be a “generally held revulsion against punishment of the morally innocent”, taxation and financial disincentive to the engaging particular activities do not tend to give rise to the same revulsion (however unwelcome they may be to those required to pay them).

Looked at in that light, absolute liability is not necessarily a bad thing. However, neither is it a particularly effective tool in achieving the objective of there being fewer spills. The Industrial Pollution Action Team formed by the Ontario government, in its report in August 2004, called for proactive measures and a multi-pronged approach, including:

- Introduction of regulatory requirements for pollution prevention plans, spill prevention plans, including multiple barriers, and spill contingency plans;
- a legislative framework that incorporates economic or other incentives to go beyond compliance;
- regulatory requirements for operator training; and

- improved spills notification and routine communication systems including resolution of jurisdictional confusion.”¹³

These recommendations of the Industrial Pollution Action Team for required pollution, spill and prevention plans, training and routine communication systems would likely be more effective than administrative levies in encouraging better environmental protection (although the two can co-exist).

However, neither proactive measures nor morally-neutral administrative levies form the basis of Bill 133. Instead, the Ontario government chose the term “environmental penalties” and set them at levels that make them virtually indistinguishable from fines for environmental offences. Furthermore, they were expressly put forth as a response to high-profile (and politically charged) circumstances, including in particular a series of spills in the St. Clair River. In addition to drawing considerable local attention, the incidents drew international attention from some American federal legislators from Michigan who wrote to United States Secretary of State Colin Powell calling for swift action to head off future spills.¹⁴

It is indisputable that there are real practical problems with the strict liability/due diligence regime. From the Crown perspective, prosecutions have become very expensive, and many of them have been unsuccessful, making it appear to an impatient and demanding public that there is no effective sanction for harming the environment. For accused persons or corporations, in many situations, the cost of establishing that there has been due diligence and defending a prosecution will often exceed the fines that are imposed by the Courts, which can lead to guilty

¹³ Hansard, supra, at page 7428

¹⁴ Hansard, supra, at pages 7430 ff.

pleas simply in order to avoid the costs of defending the charges. This is particularly the case in respect of minor infractions where large fines are not likely to be imposed in any event. In those circumstances, simply as a practical pragmatic response, some form of administrative monetary levy with absolute liability makes good common sense. For example, an absolute liability penalty in respect of non-compliance with a condition in a certificate of approval requiring the filing of reports by a particular date, or failures to monitor as required, or a discharge slightly in excess of a level permitted in a certificate of approval but which does not cause an adverse effect (or similar technical contraventions) would seem ideal candidates for absolute liability. As matters stood prior to Bill 133, this sort of contravention often escaped sanction altogether, since it was not considered serious enough to warrant the investment of public resources that a formal prosecution represents.

In respect of minor offences, for these pragmatic “affordability” reasons, an absolute liability regime would be a positive step. In that respect, it is ironic that the Ontario government has determined to apply environmental penalties to the MISA sector, which is less susceptible to this sort of financial pressure than are smaller businesses and individuals. While there are good practical reasons for doing so as a first step in a phased-in approach, universal application of an appropriately scaled-down version of absolute liability environmental levies should be implemented as soon as possible.

A distinction can and should be drawn between violations of regulatory requirements that are purely administrative, on the one hand, and those actions which deservedly attract moral

disapproval and stigma, on the other hand. In the former case, absolute liability should be the norm. In the latter case, formal prosecutions should be the rule.

To the extent that society in fact views pollution events as worthy of moral disapproval, then an absolute liability environmental penalty regime such as is enacted under Bill 133 simply confuses the issue. The problem with absolute liability environmental penalties is that they appear to be too much like prosecution of environmental offences, but without affording basic legal protections to the accused including, fundamentally, the ability to establish that the accused is not “at fault” and has done nothing wrong.