

Expanded Environmental Duties for Directors and Officers in Ontario

By Barry M. Weintraub

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In June 2005, the Ontario legislature passed new legislation¹ that expands the duties of directors and officers of corporations, including several new duties to take reasonable care to prevent environmental contraventions.

The new and expanded duties are consistent with a general trend in the regulation of corporate activity in North America to impose upon directors and officers personal liability for violations of law carried out by the corporations with which they are involved, and to hold them accountable for the failures of their corporations even if they did not personally and actively contravene a legislative requirement or authorize the contravention.²

At the same time, in expanding and creating specific new environmental duties for directors and officers, Ontario is breaking new ground in Canada. It remains to be seen whether other provinces will follow suit.

¹ Environmental Enforcement Statute Law Amendment Act, 2005, Statutes of Ontario 2005, c.12, amending s. 194 of the *Environmental Protection Act* (Ontario) and s. 116 of the *Ontario Water Resources Act*

² See, for example, the *Sarbanes-Oxley Act* in the United States and recent amendments to the *Securities Act* (Ontario) to create new fraud and public market manipulation offences in respect of misrepresentations and failures to disclose material information. Similar to the new environmental legislation, the Bill 198 amendments to the *Securities Act* (Ontario) similarly expand enforcement tools and include imposition of liability for regulatory offences and to civil lawsuits for directors and officers, as a means of ensuring that corporations make fair disclosure to markets of material information.

Concept of Environmental Duties

The concept of a specific environmental duty of directors and officers was in effect in Ontario even before the recent legislation. Prior to the new legislation, directors and officers of corporations in Ontario had a statutory duty under Ontario environmental legislation to take all reasonable care to prevent a corporation from causing or permitting an unlawful discharge of contaminants. This applied to every officer and director of a corporation that engaged in an activity that may result in the discharge of a contaminant into the natural environment contrary to the legislation.³

New Duties of Directors and Officers in Ontario

Ontario's new legislation goes further down the same road, adding to the *Environmental Protection Act*⁴ several new distinct environmental duties on the part of directors and officers to take all reasonable care to prevent the corporation from:

1. discharging or permitting a discharge in contravention of a certificate of approval, license or permit.
2. failing to notify the Ministry of the discharge of a contaminant in contravention of the Act or a certificate of approval, license or permit.
3. failing to comply with Sections 27, 40 and 41 of the *Environmental Protection Act* (Ontario) in respect of hauled liquid waste or hazardous waste. These sections prohibit the operation of waste disposal sites and waste management

³ Section 194(1) previously provided: "Every director or officer of a corporation that engages in an activity that may result in the 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 discharge."

⁴ Some similar changes were made to the *Ontario Water Resources Act* but this paper will focus on the changes to the *Environmental Protection Act* (Ontario).

- systems except under a certificate of approval and in accordance with conditions in such a certificate.
4. contravening Section 93 of the EPA. This section applies in the case of a spill to require an owner and person having control of a pollutant that is spilled to immediately do everything practicable to prevent, eliminate and ameliorate any adverse effect and to restore the natural environment.
 5. contravening Section 184. This section prohibits obstructing a provincial officer in the performance of duties under the Act, and prohibits providing false or misleading information to the Ministry.
 6. failing to operate, install, maintain, replace or alter equipment in contravention of a certificate of approval, license or permit.
 7. contravening an order under the Act.

These changes require directors and officers to take an active role in ensuring the environmental compliance of a corporation.

Director and Officer Liability in Other Canadian Provinces

Other provinces in Canada do impose liability on directors and officers for their involvement in contraventions of environmental legislation, but none include positive duties to the same degree as the Ontario legislation.

Two provisions of the *Environment Quality Act* (Quebec) are relevant. Subsection 109(2) makes it an offence to do or omit to do something in order to assist in the commission of an offence, and also makes it an offence to counsel, encourage or incite an offence. Subsection 109(3) provides that it is an offence for a director and officer of a corporation to lead a corporation (by means of giving an order, authorization, advice or

encouragement) to refuse or neglect to comply with an order under the Act. The Quebec legislation also provides that it is an offence if director or an officer leads a corporation to emit, deposit, release or discharge a contaminant into the environment in contravention of the Act. While these sections can result in prosecutions for omissions, and impose duties on directors and officers to refrain from taking the prohibited acts, the Quebec legislation does not require active steps by directors and officers to prevent such contraventions, and does not result in the personal prosecution of directors and officers for failing to take such active preventive steps.

It is noteworthy that both the Ontario and Quebec legislation single out for special attention discharges into the environment and the contravention of provincial orders. None of the other provinces single out particular contraventions in the prosecution of directors and officers, instead holding them responsible for all contraventions of applicable legislation provided a test is met regarding the level of their personal involvement.

The relevant legislation in Alberta, Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island and Newfoundland provide for liability for a director, officer or agent of a corporation who directs, authorizes, assents to, acquiesces in or participates in a contravention of the legislation.⁵ The British Columbia legislation is similar, making it

⁵ *Environmental Protection and Enhancement Act* (Alberta), s. 232; *Environmental Management and Protection Act*, 2002 (Saskatchewan), s. 74(3); *Environment Act* (Manitoba), s. 35; *Environment Act* (Nova Scotia), s. 164; *Environmental Protection Act* (P.E.I.), s. 32(5); *Environmental Protection Act* (Newfoundland), s. 117.

an offence for employees, directors, officers or agents of a corporation to authorize, permit or acquiesce in the commission of an offence by a corporation.⁶

In comparing the legislation among the provinces, it would seem that on their face, Quebec's legislation is the least strict. Some active step in respect of a corporate offence, such as an order, authorization, advice, encouragement or incitement, is required in order for a director or officer to face conviction in Quebec, and this applies only to certain offences (discharges and violation of the order). In the other six provinces mentioned, a director or officer can be convicted if he or she merely acquiesces in a corporate offence. Unlike Ontario, this applies to all offences, but the legislation in these provinces contains no duty to prevent a contravention as there is in Ontario.

In respect of the duties enumerated in the legislation, the Ontario regime goes the furthest in requiring preventive action by directors and officers. In imposing liability, the Ontario legislation does not even require actual knowledge or awareness of an imminent contravention in order for there to be liability to prosecution.

Reverse Onus in Ontario

In the event a contravention does occur, Ontario's new legislation also makes it easier to obtain convictions of directors and officers by putting in place a reverse onus, whereby an officer or director charged with an offence must prove that he or she fulfilled his or

⁶ *Environmental Management Act* (British Columbia), s. 121.

her duty. As a result, the Crown need only prove that the corporation committed a contravention of the legislation and that the accused person is a director or officer of the corporation. If that is proved, there is effectively a presumption that the person failed to take all reasonable steps (and that he or she knew and participated in, ordered, directed, authorized, permitted, acquiesced in) any contravention, leaving it to the accused to demonstrate that he or she carried out the duty to take all reasonable care to prevent the contravention.⁷

With regard to what directors and senior officers of a corporation can do to prevent liability, following are some steps that they can and should take to fulfill their duties and avoid liability under the new legislation:

1. Corporations with any sort of environmental issues should establish a detailed, written environmental policy. This policy should not just set out the corporation's objective to comply with all environmental laws and regulations, but more specifically should also delineate particular responsibilities for oversight of environmentally sensitive activities and for the prevention of the prescribed types of violations.
2. Consideration should be given to the establishment of an environmental committee within a corporation in appropriate circumstances. This sort of delegation to knowledgeable individuals may be seen as a reasonable step to prevent the contravention of the legislation.
3. The establishment of an officer responsible for environmental affairs, or if one already exists, the enhancement of that person's authority and status within the corporation, would seem to be a reasonable step to take.
4. Ensuring that the environmental officer of a corporation is competent to carry out his or her functions and regular oversight and supervision of that person's

⁷ The reverse onus provision will likely face a constitutional challenge as it is arguably inconsistent with an individual's right to be presumed innocent and the right not to be compelled to testify in one's own defence. The legislation contemplates convictions of individuals for the actions of a corporation even if the individual had no knowledge of or involvement in the incident or activity that gave rise to the charges.

- performance by senior officers would likely be important aspects of establishing that all reasonable steps were taken to prevent a contravention.
5. Regular reports should be required from employees in charge of environmentally sensitive activities to the board of directors and senior officers of a corporation on steps being taken to ensure compliance with environmental laws. Directors and officers should read these reports and ask questions where appropriate.
 6. Adequate training should be in place for all employees with respect to the avoidance of environmental non-compliance.
 7. Resources for environmental compliance programmes must be made available. This should explicitly be made part of the function of the financial officers of a corporation.
 8. It would be prudent for a corporation to seek to obtain insurance for liability of its directors and officers. Whether corporations are permitted to ensure against such liability or indemnify their directors and officers for liability is the subject of general corporations legislation. For example, the *Business Corporations Act* (Ontario) establishes a statutory scheme of general application governing the indemnification of directors and officers, which permits the indemnification of a director or officer of a corporation provided that he or she acts honestly and in good faith with a view to the best interests of the corporation and, in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that his or her conduct was lawful.

The Impact of Ontario's New Environmental Duties

If the reverse onus provisions survive a constitutional challenge, it will be interesting to see whether the new legislation has the desired effect of causing corporations to take greater care to prevent contraventions of the legislation.

The new legislation requires directors and officers of corporations with environmental issues to be very concerned to ensure that the corporation does whatever it can to ensure compliance with the law and, more pertinently, the conditions of any certificate of

approval, permit or license under which it operates. Whether this will have the effect of increasing compliance remains to be seen, as it is entirely possible that a certain level of contravention of legislation will occur notwithstanding best efforts to comply, simply as a result of the nature of environmental legislation which prohibits acts which are not always preventable, and due to imperfect management systems and control mechanisms. However, it seems likely that the legislation will have some positive impact on compliance and will help to instill a better culture of compliance in Ontario corporations.

The imposition of economic disincentives to environmental non-compliance underlies Ontario's new directors and officers' duties, as well as other aspects of the Ontario legislation.⁸ To impose economic disincentives to environmental non-compliance seems to be good public policy, particularly in the governance of economic activity by corporations in regulated businesses.

At the same time, however, one cannot help but wonder whether the legislation is unfair to individual directors and officers. The threat of individual prosecution for an environmental offence will certainly light a fire of motivation under most directors and officers to ensure that their corporation complies with all legal requirements. However, where directors and officers are not directly responsible for non-compliance with environmental law, or where they lack knowledge of environmental risks or affairs, it seems a little harsh to convict them for offences they cannot prevent.

⁸ For example, important provisions of the recent Ontario legislation establish absolute liability "environmental penalties" imposed by administrative order in the event of a contravention, without permitting a defence of due diligence on the part of the corporation. This aspect of the Ontario legislation is not yet in effect, but is expected to be proclaimed shortly, once regulations governing the specific environmental penalties to be imposed in respect of particular incidents are promulgated.

Of course, the new Ontario legislation in requiring directors and officers to “take all reasonable care” will have to be interpreted in a manner consistent with the context of the situation and the particular director or officer involved. A vice president of sales, for example, will likely be required to take less care than a director of environmental affairs of a corporation in an environmentally sensitive industry.

However, the Ontario legislation potentially opens the door to prosecution and potential conviction of innocent people, particularly if enforcement activity in respect of environmental offences, spurred by political expediency, becomes overzealous.