



ENFORCING ENVIRONMENTAL LAW

OJEN Summer Law Institute 2009

Isabelle O'Connor
Crown Counsel
Legal Services Branch
Ministry of the Environment

August 26, 2009

BACKGROUND

- Environmental Law is a relatively new area of law in Ontario. Issues relating to the natural environment were previously covered off primarily by municipal planning law, property law, and torts
- Both the federal government and the Province of Ontario set up departments and ministries with responsibility for environmental matters in the early 1970's
- Environmental Law deals generally with issues relating to pollution – emissions to air, land and water – conservation, sustainable development and more recently biodiversity and ecosystems
- Environmental enforcement largely deals with the prevention and punishment of pollution

BACKGROUND

- In Canada both the federal government and the provinces may regulate in the area of the environment. By contrast only the federal government can make laws relating to criminal matters.
- In Ontario, pollution is regulated through standards which are set out in legislation, regulations and guidelines, and through licences, permits and approvals which are granted at the discretion of a Director within the Ministry of the Environment (“MOE”)

BACKGROUND

- In addition to these specific requirements there is a general prohibition in Ontario against the discharge to the natural environment of a contaminant that may cause an adverse effect.
- Adverse effect includes things such as: impairment of the quality of the natural environment, loss of enjoyment of the normal use of property, harm or material discomfort to any person, injury to property, plant or animal life etc
- The principle Ministry of the Environment statutes are the *Environmental Protection Act*, the *Ontario Water Resources Act*, the *Pesticides Act*, the *Safe Drinking Water Act*, and the *Nutrient Management Act*

ENFORCEMENT

- The MOE finds out about suspected offences in a number of ways:
 - Citizens might observe something and contact the MOE
 - Inspectors who carry out routine inspections may come across suspected violations
 - MOE might decide to target a particular industry and conduct a blitz on those companies
 - Inspectors from other areas of government such as health or labour might refer a matter to the MOE
 - Employees (whistleblowers) might bring something to the MOE's attention
 - In certain circumstances there is a requirement on the polluter to notify the MOE of a suspected violation – eg spill or discharge to natural environment



INSPECTIONS & INVESTIGATIONS

- The MOE has two types of staff who are primarily involved in compliance and enforcement. They are Inspectors, called Abatement Officers, and Investigators

INSPECTIONS & INVESTIGATIONS

- Abatement Officers have broad powers under environmental statutes to enter property, take samples, seize things, demand documents and ask questions. They can do all of these things without a search warrant. These are significant powers and are often referred to as “superpowers”.
- The Regulated party must allow the inspectors to enter the facility and do their work and the Regulated Party must cooperate by answering questions etc. It is an offence to hinder or obstruct an inspector or other agent of the MOE in the performance of his or her duties.
- The Abatement Officer’s role is to assess compliance and to assist parties in adhering to government rules and regulations. Where the Abatement Officer finds non-compliance he or she may refer the matter to the Investigations and Enforcement Branch (“IEB”) for further investigation or take other abatement measures including issuing orders

INSPECTIONS & INVESTIGATIONS

- Investigators have much more limited powers as their role is to try and find evidence of whether an offence has occurred.
- Because the Investigators are looking for evidence they must be careful not to violate a person's *Charter Rights*. In particular s. 8 of the *Charter* gives the right to be secure against unreasonable search and seizure. Evidence obtained in violation of this right is likely to be excluded from the evidence presented at trial. Therefore where a suspected violator does not wish to cooperate (and at this stage they are not required to) the Investigator will have to obtain a search warrant to go on the property and search for evidence
- Similarly where an Investigator wants to question a suspected violator he or she must inform that person that they have the right to remain silent and that if they wish to provide a statement they have the right to have counsel present during the questioning. If an investigator does not inform the person of these rights a statement obtained from him or her may be excluded from the evidence at trial as having been obtained in violation of the person's s. 7 & 10 *Charter* rights

INSPECTIONS & INVESTIGATIONS

- There are three types of mandatory compliance tools that are available in Ontario:
 - Orders
 - Prosecutions
 - Environmental Penalties
- These approaches are not mutually exclusive and it is possible that all three can be employed in the appropriate circumstances

ORDERS

- Stop Orders require the ordered party to stop the discharge of a contaminant into the natural environment and to immediately comply with the specified legislative provisions.
- These orders are issued rarely and only when the MOE is satisfied that the discharge is occurring in such a way that it constitutes an immediate danger to life, health or property

ORDERS

- Control Orders require the ordered party to implement measures to control the illegal discharge of a contaminant into the natural environment
- It is a precondition of any control order that a prohibited contaminant has been discharged into the natural environment or that the discharge has occurred in such a way as to violate the EPA or its regulations
- These types of orders often include obligations to monitor discharges, to install or replace equipment and to adopt certain operational practices

ORDERS

- Preventive Orders are issued to prevent or minimize anticipated environmental damage
- Under these types of orders the MOE may require the ordered party to monitor and report, to install or modify equipment, to adopt operational practices and to study and develop plans to reduce the amount of the contaminant entering into the natural environment

ORDERS

- Remedial Orders require the clean-up and restoration of the natural environment
- In most circumstances Orders issued by the MOE are a combination of the above types
- For example where there is an ongoing discharge that is causing an adverse effect to the environment, the party in control of the discharge may be issued an order that requires it to stop or control the discharge and to remediate the contaminated land

ORDERS

- All orders carry with them the right by the ordered party to appeal the order to the Environmental Review Tribunal (“ERT”). The ERT is a quasi-judicial body that has the power to uphold, revoke or vary the MOE’s order
- Decisions of the ERT may be appealed on matters of law to the Divisional Court and on other matters (i.e. policy) to the Minister of the Environment

ORDERS

- Appeals are usually heard by panels of 1-3 members of the ERT. Many of the ERT members have legal training but they are not required to have it
- The MOE is automatically a party to such hearings along with the person or company that appealed the order
- Members of the public may request to become parties to these hearings. They will have to demonstrate that they have a genuine and direct interest in the outcome of the proceedings and that they will make a relevant contribution to the ERT's understanding of the issues in the proceeding

ORDERS

- Other ways of participating in a hearing, other than as a party, are as a Participant or Presenter
- A participant is entitled to receive copies of documents at the hearing, to give evidence and to make submissions at the hearing
- A presenter may be a witness at the hearing and may make written submissions
- Participants and Presenters may not examine or cross-examine witnesses

PROSECUTIONS

- When it comes to the attention of the MOE that a potential violation of MOE legislation has occurred the matter is forwarded to the IEB for investigation
- The IEB was created in 1985 with the specific role of investigating environmental offences. The investigators are often former police officers from the RCMP, OPP or municipal forces. Many of them have a scientific or technical background
- The investigator's job is to determine what caused the offence, who is responsible for it and whether there are any defences to a potential prosecution

PROSECUTIONS

- Once an investigation is completed and if the Investigator is satisfied that there are reasonable and probable grounds that an offence has been committed he or she completes a Crown Brief and sends it to the Legal Services Branch of the MOE for review.
- The Crown brief usually consists of witness statements, photographs, company documents, complaint logs, lab results and experts reports

PROSECUTIONS

- In the Legal Services Branch Crown Briefs are reviewed by the Prosecutions Team Leader
- He or she reviews the brief and makes a determination of whether there is a reasonable prospect of conviction and whether it is in the public interest to prosecute.
- If the Team Leader is satisfied that these criteria are met, charges are laid by the Investigator and the matter proceeds in the Provincial Offences Court. Most matters are heard by a Justice of the Peace but where the matter involves complex legal or *Charter* issues the Crown may elect to have it tried before a Judge.
- Justices of the Peace are not required to be lawyers or have legal training whereas Judges must have practised law for a minimum of 10 years before applying to be a judge

PROSECUTIONS

- Environmental offences are a type of regulatory offence. Regulatory offences differ from criminal offences
- To be guilty of a criminal offence the defendant must have both done the act and intended to do it. The Crown must put evidence before the court proving, beyond a reasonable doubt, both the physical component of the act (the "*actus reus*") and the mental component ("*mens rea*")
- For a regulatory offence the Crown must prove the *actus reus* beyond a reasonable doubt but then the onus shifts to the defendant who may defend itself by providing evidence on the balance of probabilities that it took all reasonable care to prevent the offence from occurring. This is called the "due diligence" defence

PROSECUTIONS

- Some indications of due diligence
 - appropriate employee training and retraining directed at the possible environmental hazards
 - adequate staffing
 - appropriate pollution control equipment with necessary alarms, warning systems and security devices
 - maintenance program
 - emergency planning and spill response

PROSECUTIONS

- Other factors that the court will consider
 - seriousness of the impact
 - industry standards
 - availability of alternative solutions
 - compliance with regulatory standards
 - immediacy of response
 - matters beyond the control of the defendant
 - skill level expected of the accused

ORDERS

- Timing is critical when it comes to due diligence. The necessary steps should be taken to avoid the discharge and to minimise damage once it has occurred
- Due diligence after the event is only relevant to the sentence imposed

SENTENCING

- There are a range of penalties depending on the offence, whether it is a first or subsequent offence and whether the offender is a person or corporation
 - First Tier Offences – Individuals
 - First conviction - max fine is \$50,000 per day
 - Subsequent conviction – max fine is \$250,000 per day or imprisonment of not more than one year or both
 - First Tier Offences - Corporations
 - First conviction - max fine is \$250,000 per day
 - Subsequent conviction – max fine is \$500,000 per day

SENTENCING

- Second Tier Offences (more serious offences) – Individual
 - Fine
 - First conviction – min fine is \$5,000 per day up to a maximum of \$4,000,000
 - Second conviction – min fine is \$10,000 per day up to a maximum of \$6,000,000
 - Subsequent conviction – min fine is \$20,000 per day up to a maximum of \$6,000,000
 - imprisonment of up to 5 years less one day
 - or both

SENTENCING

- Second Tier Offences – Corporations
 - First conviction - min fine is \$25,000 per day up to a maximum of \$6,000,000
 - Second conviction – min fine is \$50,000 per day up to a maximum of \$10,000,000
 - Subsequent conviction – min fine is \$100,000 per day up to a maximum of \$10,000,000

SENTENCING

- Where exceptional circumstances exist a Justice of the Peace or Judge may give relief from imposing the minimum sentence where imposing the minimum fine would be unduly oppressive or if it is otherwise not in the interests of justice
- The main objective in sentencing is to deter others from committing the offence (general deterrence) and to deter the guilty party from repeating the offence (specific deterrence). The amount of penalty therefore must be sufficient to avoid being a cost of doing business without being unduly harsh

SENTENCING

- The factors that the court will consider in imposing sentence are taken from an early environmental case called *R. v. United Keno Hill Mines Ltd.* They are:
 - the nature of the environment affected
 - the extent of the damage inflicted
 - the deliberateness of the offence
 - the attitude of the accused
 - the size, wealth, nature of operations, and power of the corporation
 - the extent of attempts to comply
 - profits realized by the offence
 - previous convictions/evidence of good character

ENVIRONMENTAL PENALTIES

- Environmental Penalties are a means by which the MOE may directly impose monetary penalties on violators without commencing a court process. They are viewed as a means of providing enforcement in a less costly and more expeditious way than through prosecution. In addition they give the MOE greater control over the penalty assessment to advance specific policy or program goals. An environmental penalty does not result in a “record” for the violator
- This type of regime is in place in many provinces in Canada, the federal government and throughout the United States. In Ontario they apply only to a specific sector at present – primarily those industries that discharge to water. EPs are primarily if not exclusively directed at corporations and it is unlikely that an individual would be issued an EP at this point in time

ENVIRONMENTAL PENALTIES

- In the applicable circumstances the MOE will issue a notice indicating that the company has contravened a condition of an approval, permit or licence or a provision of the legislation or regulations. The notice will also set out the amount of the penalty that is required to be paid
- Although the ordered party can appeal an EP to the ERT, the tribunal cannot substitute its opinion for the Director with respect to the appropriateness of the penalty, unless it considers the penalty to be unreasonable. Unlike a prosecution, a company subject to an EP is not entitled to the defence of due diligence. Instead, the principle of absolute liability applies to EPs

ENVIRONMENTAL PENALTIES

- The EP regime includes a reverse onus provision in relation to spills or discharges into the natural environment. The provision provides that where an appeal to the ERT is related to an unlawful spill or discharge, the onus is on the appellant to prove that it did not cause or could not have caused an adverse effect. This is in contrast to the usual requirement that the Crown prove the *actus reus* of an offence beyond a reasonable doubt when a person is subject to a prosecution
- The EP regime allows for a “double jeopardy” approach such that a person who has been subject to an EP and has paid the penalty may still be prosecuted for the same contravention
- The maximum penalty that may be imposed in an EP is \$100,000