

DIRECTORS' AND OFFICERS' ENVIRONMENTAL LIABILITY

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Heightened awareness of environmental protection has focused legislative attention on corporate accountability. In keeping with the trend to improve corporate governance, a growing number of environmental statutory provisions have imposed environmental due diligence duties on directors and officers. Unwitting directors and officers can find themselves facing steep fines and even imprisonment for their corporation's environmental transgressions.

There are two potential sources of environmental liability for officers and directors. First, many environmental statutes make directors and officers liable for participating in, or acquiescing to, conduct that contravenes environmental laws, regardless of whether or not the corporation is charged or convicted. Second, directors and officers may be liable under laws that impose statutory duties to ensure that directors and officers take all reasonable steps to *prevent* environmental contraventions. One of the best ways for companies to protect their directors and officers from this latter form of liability is by ensuring that the company has a properly functioning environmental management system ("EMS") to (1) reduce the likelihood of environmental offences occurring in the first place; (2) ensure that senior management is kept informed of environmental issues impacting upon the company, has timely information, and the opportunity to act; and (3) provide a means to document due diligence decisions and actions.

Individual Liability for Environmental Offences

Environmental offences are generally quasi-criminal in nature, and as such, are strict liability offences. Defendants can avoid conviction by proving that they acted with due diligence to avoid the commission of the offence.⁴

Culpability for an offence – such as a spill, or operating outside of a regulatory standard – often falls on the corporation. In large corporations, individuals rarely face primary liability for an offence, because environmental harm generally isn't the result of one person's conduct, but rather of systemic problems within the corporation. Furthermore, regulatory authorities rarely pursue charges against low-level employees who are simply performing their duties.

Parliament and provincial legislatures have gradually amended environmental protection statutes to extend liability to those in a position to control potential environmental harm. These provisions usually provide that any officer, director, or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence can be liable for the offence. Such wording can be found in the federal *Fisheries Act*,⁵ Alberta's *Water Act*,⁶ *Environmental Protection and Enhancement Act*⁷ and *Forest and Prairie Protection Act*,⁸ British Columbia's *Environmental Management Act*⁹ and *Drinking Water Protection Act*,¹⁰ and Quebec's *Environment Quality Act*.¹¹

Director and Officer Due Diligence Duty

Statutory duties for directors and officers to prevent contraventions have been enacted in a number of Canadian laws, including federal statutes, such as the *Canadian Environmental Protection Act, 1999*,¹² and provincial statutes, such as Ontario's *Oak Ridges Moraine Conservation Act*¹³ and *Pesticides Act*,¹⁴ and Newfoundland and Labrador's *Endangered Species Act*.¹⁵ A recent and important *Criminal Code* amendment imposes a legal duty on those who supervise work to prevent harm to workers and the public.¹⁶ Another important example is found in the recent amendments to Ontario's *Environmental Protection Act* ("EPA")¹⁷ and the *Ontario Water Resources Act* ("OWRA")¹⁸ (commonly known as Bill 133 amendments).¹⁹

Like the other statutes mentioned above, Ontario's EPA and OWRA now impose a duty on directors and officers of corporations to require that reasonable care be taken to prevent the corporation from committing a wide range of environmental contraventions.²⁰ They also impose a statutory reverse onus provision – meaning that a director or officer who is charged has the burden of proving that he or she took reasonable care to prevent the infraction.²¹ Until the recent amendments, directors and officers had a limited duty – to prevent actual pollution offences resulting from spills or discharges. Bill 133 expanded the scope of the due diligence duty to a wide range of environmental contraventions including:

- discharging, causing, or permitting the unlawful discharge of a contaminant;
- failing to notify the Ontario Ministry of the Environment of an unlawful discharge of a contaminant;
- unlawfully managing or depositing certain wastes;
- improperly responding to a spill;
- contravening an approval, certificate of property use, licence, or permit;
- contravening an order under the EPA or OWRA; and
- obstructing a Provincial Officer.

In contrast to provisions that impose liability for authorizing or acquiescing to the conduct, the EPA/OWRA standard requires active steps be taken to *prevent* the commission of the offence *before* it happens. Moreover, most statutes make it clear that it is not necessary for the corporation to be prosecuted for the offence in order for the director or officer to be liable for breaching his or her due diligence duty.

The growing importance of preventative measures in Canada also has an impact on the investigative stage of a prosecution. The Supreme Court of Canada has affirmed that environmental investigators acting under judicial authorization have the power to search for and seize evidence relating to a potential due diligence defence.²² This reinforces the importance of documenting due diligence efforts and also flags the importance of segregating solicitor–client privileged information from non-privileged information. Segregating this information enables corporate counsel to identify solicitor–client privileged information to investigators, and to ensure that proper procedures are taken to seal and protect such information from disclosure to prosecutors.

Demonstrating Due Diligence

What must directors and officers do to show they took reasonable care to prevent the commission of an offence? The case law describes the due diligence defence as the duty to take “all reasonable care” to prevent the commission of the offence.

One of the most effective and important ways to demonstrate “all reasonable care” is to establish an EMS, which is a comprehensive system to ensure environmental compliance and to prevent the commission of environmental offences. While some companies design and implement their own unique EMS, there are EMS systems that are internationally recognized, that include auditing and third-party certification.²³ An essential part of any EMS is an environmental committee of the board of directors that includes senior environmental officers. An effective EMS should include steps to monitor, inspect, and improve the effectiveness of the operation of the system.

In assessing due diligence, courts will not only look at the general conduct taken, but at the person’s conduct in relation to the “particular event”. Therefore, it is not adequate for a company to simply have a general due diligence program in place; it must also consider its operations and the potential for environmental impacts in the context of the relevant legislation. Courts will also consider surrounding circumstances such as the nature and gravity of the adverse effect, the foreseeability of the environmental impact, industry standards, the timeliness of the responsive action taken, the state and age of the facility, and matters beyond the control of the accused, including technological limitations.²⁴

The importance to legislators of the existence of a sound EMS is illustrated by the upcoming Environmental Penalty (“EP”) regime in Ontario. When the EP regulations take effect, they will specifically provide that the implementation and maintenance of an EMS will be a mitigating factor in determining the amount of the penalty imposed on the company.²⁵

Particular actions that board members can take to demonstrate due diligence include:

- instructing appropriate officers to establish an EMS to ensure compliance with environmental laws, anticipate, prevent and respond to environmental events, and that will meet or exceed industry standards and practices;
- ensuring that officers have sufficient authority and resources to establish and maintain all elements of the EMS, including training and documentation (although companies should beware of documenting environmental problems and recommendations, then failing to follow them, as this will result in the failure of due diligence and may provide the Crown with evidence to help prove its case!);
- requiring officers to report regularly to the board on the operation of the system, and that any substantial non-compliance is reported to the board in a timely manner;
- carefully considering the recommendations of the environment committee, and actively responding to them;
- critically assessing whether the board is justified in placing reliance on reports provided by corporate officers, consultants, counsel, or other parties;
- ensuring that environmental concerns of government agencies or other concerned parties, including shareholders, are considered and addressed;
- ensuring that there is active supervision, inspection, and training of employees; and
- ensuring corrective action is taken immediately when the system fails.

Many of these elements were first enunciated in the seminal decision of *R. v. Bata Industries Ltd.*,²⁶ which provides a prime example of the standard of due diligence expected of corporate directors charged with an environmental offence. In this case, environmental inspectors discovered leaking drums of liquid industrial waste casually stored at the back of an industrial plant. The Crown brought charges against not only the company, but also against several local directors, and against the company’s founder, CEO, and chairman of the board, Thomas Bata. The directors were charged under Ontario’s EPA and OWRA provisions for failing to take all reasonable care to prevent a discharge.

The company and two directors were convicted on various counts, but Thomas Bata mounted a successful due diligence defence. In acquitting Mr. Bata, the Court noted the following:

- he had little direct involvement with the subject facility (focusing instead on global operations);
- he immediately directed the appropriate resources to minimize the effect on the environment when the chemical storage problem was brought to his attention;
- he allocated appropriate funds to construct a water treatment plant for the town of Batawa (where the facility was located) when a water problem was identified;
- he demonstrated his awareness of his environmental responsibilities through his involvement in the issuance of a Technical Advisory Circular to the company's interests around the world. This circular updated previous industrial safety measures, paying particular attention to environmental concerns, and exhorted all companies to work in cooperation with local authorities to identify problems and carry out precautionary measures;
- he personally reviewed the facility when he was on-site and did not allow himself to be wilfully blind or orchestrated in his movements;
- he responded to the matters that were brought to his attention promptly and appropriately;
- he placed an experienced director on-site and was entitled in the circumstances to assume that another director was addressing the environmental concerns;
- he was entitled to assume that his on-site manager/director would bring to his attention any problem that arose; and
- he was entitled to rely upon his system unless he became aware the system was defective.

Would a court reach the same conclusions on the same facts today? Or has the rising sophistication of environmental management systems also raised the due diligence standard? With the expanded range of environmental offences for which corporate directors and officers may be held responsible, we can expect to see courts grappling with this question soon.

Notes:

¹ See *R. v. Sault Ste. Marie (City of)*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30. See also *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. J.).

² See *R. v. Sault Ste. Marie (City of)*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30. See also *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. J.).

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⁵ R.S.C. 1985, c. F-14.

⁶ R.S.A. 2000, c. W-3, s. 146.

⁷ R.S.A. 2000, c. 12 (Supp), s. 232.

⁸ R.S.A. 2000, c. F-19, s. 37.1.

⁹ S.B.C. 2003, c. 53, s. 121.

¹⁰ S.B.C. 2001, c. 9, s. 45(4), (5).

¹¹ R.S.Q., c. Q-2, s. 109.3.

¹² S.C. 1999, c. 33, s. 280.1. See also the *Migratory Birds Convention Act*, S.C. 1994, c. 22, s. 5.5, and the *Antarctic Environmental Protection Act*, S.C. 2003, c. 20, s. 51.

¹³ S.O. 2001, c. 31, s. 24 (4).

¹⁴ R.S.O. 1990, c. P.11, s. 49.

¹⁵ S.N.L. 2001, c. E-10.1, s. 42.

¹⁶ See s. 217.1 of the *Criminal Code* of Canada. These provisions were enacted as a result of the 1992 Westray mine disaster, a methane explosion in a coal mine in Plymouth, Nova Scotia that killed 26 miners.

¹⁷ R.S.O. 1990, c. E.19.

¹⁸ R.S.O. 1990, c. O.40.

¹⁹ Made by the *Environmental Enforcement Statute Law Amendment Act, 2005*, S.O. 2005, c. 12., assented to June 13, 2005.

²⁰ EPA, s. 194(1); OWRA, s. 116(1).

²¹ EPA, s. 194(2.1); OWRA, s. 166(2.1).

²² See *CanadianOxy Chemicals v. Canada (Attorney General)*, [1999] 1 S.C.R. 743.

²³ In North America the most widely accepted EMS is the International Organization for Standardization (ISO) 14001: 2004 EMS standard. The five key elements of an ISO 14001 EMS are: an environmental policy, planning, implementation and operation, checking and corrective action, management review, and continual improvement.

²⁴ *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. J.); *R. v. Courtaulds Fibres Canada* (1992), 9 C.E.L.R. (N.S.) 304 (Ont. Ct. J.).

²⁵ See EPA proposed s. 182.1 (created by S.O. 2005, c. 12).

²⁶ (1992), 9 O.R. (3d) 329 (Prov. Div.); sentence varied by (1993), 14 O.R. (3d) 354 (Gen. Div.) and (1995), 25 O.R. (3d) 321 (C.A.).