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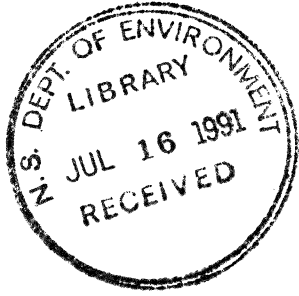
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BAKER & MCKENZIE
TORONTO, CANADA

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1.0 INTRODUCTION

Increasing public concern with the preservation and protection of the global environment and the resulting tendency of governments to legislate stricter environmental controls, regulations and guidelines have made environmental liabilities a major issue in the private sector and pose a new challenge both to the private and public sectors. Good environmental managers recognize today that "what you don't know or what you ignore can eventually cost you financially or otherwise." Environmental audits have emerged as a response to this situation. In Canada, the emphasis to date has been on environmental audits as they relate to private sector industrial activity. Environmental auditing of publicly operated facilities, where it is being carried out, has not received much public attention. Audits are generally conducted to assess the potential adverse impacts on the environment of materials and processes which in turn pose liability or risk related to property or business. They should be viewed positively as an important component of an overall risk management program of any entity which has activities that might result in an impact on the natural environment be it a private sector company or federal, provincial, municipal, territorial government departments, agencies or Crown corporations.

1.1 Objectives of the Document

The purpose of this document is to discuss the potential liability of corporations, directors, officers, employees, municipalities and governments for environmental wrongs; the importance of environmental audits in ensuring compliance with laws and regulations and, as an aspect of due diligence and other legal issues related to audits such as disclosure of information, confidentiality and solicitor-client privilege.

Two comprehensive manuals and two supporting documents are presented in order to assist government agencies and candidate companies of any size to understand the practice of environmental auditing and to help them develop specific programs, procedures, and protocols tailored to their operations in Canada. Management is encouraged to invest the time required to understand the content of these manuals, in order that they can implement an effective environmental management system. This proactive strategy for improved environmental performance will result in more efficient facility operations overall. The manuals are:

1. Principles of Effective Environmental Auditing (Volume 1)
2. Environmental Audit Protocol (Volume 2)
 - Environmental Auditing Legal Issues (Appendix Document A)
 - Bibliography of Environmental Auditing References (Appendix Document B)

The first volume is divided into two parts, one which provides an introduction to environmental auditing and the second which describes the auditing program as a means of providing the organizational and communicative framework which gives auditing its applicability. The second volume is comprised of the general environmental audit protocol with detailed instructions on how to tailor the document to a site and to specific environmental goals and objectives. The protocol and associated detail guidelines on how to conduct an effective environmental audit become the tools for a successive environmental auditing program.

Two supplementary documents are also available as part of the Environment Canada auditing series. Appendix Document A gives a detailed discussion related to environmental auditing, on legal issues which may have a bearing on industry and government departments and agencies across Canada. A summarized version of this document appears in Volume 1, "Principles of Effective Environmental Auditing". Appendix Document B is a bibliography of environmental auditing related material to reference for further information.

This series on environmental auditing was prepared by ALTECH Environmental Consulting Ltd. of Toronto, Ontario on behalf of Environment Canada Industrial Programs Branch, Hull, Quebec, except for Appendix Document A, which was prepared by Baker & McKenzie, Barristers and Solicitors, also of Toronto. The summarized version of Appendix A was prepared by ALTECH using the Baker & McKenzie manuscript as reference, and appears as Section 7 of Part 1 in the "Principles of Effective Environmental Auditing" volume. References for Section 7 are given in Appendix Document A.

1.2 Environmental Liability

Environmental liability can arise in any number of ways depending upon the nature of the environmental problem and the forum in which such a problem arises. Only a brief summary of the manner in which liability generally occurs and the persons who may be liable can be addressed in this section of the manual.

1.2.1 Types of Liabilities

Liability for environmental offenses or harm generally arises in the context of one or more of the following:

- (a) Prosecutions for Provincial Statutory Offenses
or Federal Statutory Offenses

There are numerous statutes in Canada that create liabilities for environmental offenses including the Environmental Protection Act ("EPA")¹, the Loi Sur la Qualité de l'Environnement ("EQA")², the Waste Management Act ("WMA")³, the Canadian Environmental Protection Act ("CEPA")⁴, the Transportation of Dangerous Goods Act ("TDGA")⁵ and the Fisheries Act ("FA")⁶ to mention just a few. Recent enforcement activities at the provincial level particularly in Ontario, severe fines and other penalties in the CEPA and other statutes make prosecutions a significant area of potential liability. Prosecutions may arise for any number of offenses including, incidences of actual pollution and failure to prevent pollution, failure to notify environment officials of spills or other reportable incidents, to name just a few. With the growing concern in Canada about the adequacy and consistency of enforcement of environmental laws, it is clear that the risk of prosecution heads the list as a source of concern for corporate and personal liability.

(b) Prosecutions for Breaches of Municipal By-laws

Municipalities, as creatures of provincial statutes are entitled to legislate in the environmental sphere to the extent provided for in their governing statute. To this end, by-laws are passed setting out specific offenses and the penalties for their contravention. While the penalties that may be imposed in the event of successful prosecution are small compared to, for example, CEPA penalties, some municipal acts contains provisions allowing municipalities to utilize court orders and sanctions, including contempt proceedings to enforce compliance with by-laws. In two Toronto by-law cases for example, Regina v. B.E.S.T. Plating Shoppe Ltd. and Sam Siapas,⁷ and Regina v. Jetco Manufacturing Limited and Keith Alexander,⁸ the court found both the companies and their presidents to be in criminal contempt of court for breach of an environmental protection order directed against their corporations. The companies had continued to pollute in violation of Metropolitan Toronto's sewer-use by-law, despite a court order prohibiting the companies from doing so. While the appeals in these cases were ultimately successful on the basis of procedural defects with respect to the individual accused, the principle that individuals who are the directing minds of corporate accused can be held liable for contempt in these circumstances appears not to have been questioned by the Court of Appeal. The cases demonstrate the serious consequences that can flow from on-going breach of municipal by-laws.

c) Civil Liability Imposed by Statute

The risk of civil suits, particularly following a successful prosecution, is an area of growing concern both for the private and public sectors. Civil liability for loss or damage as a result of the spill or discharge of a pollutant or contaminant into the natural environment and for conduct contrary to statutes or the regulations has been given statutory recognition in some form in most provincial environmental protection acts and in s.136 of CEPA.

Factors making civil suits against companies, individuals and governments more likely in the future include:

- (a) the willingness of courts to treat breaches of statutes as evidence of negligence;
- (b) the expected liberalization of class proceedings in provinces such as Ontario to permit an individual representative plaintiff to bring an action for damages on behalf of himself or herself and an unspecified number of individuals with similar grievances;
- (c) increased use of contingency fee arrangements. Contingency fees are an arrangement between a client and his/her lawyer under which a lawyer receives no fees if a civil suit fails but is entitled to a percentage of the total financial recovery of damages if successful. Such arrangements are currently permitted in all provinces except Ontario. Approximately a year and a half ago, Ontario appeared on the verge of adopting such a system however, the Law Society of Upper Canada appears to have put this plan on ice, believing that the moment is not right to start such a system. The Society will report to the attorney general on the subject if the government decides to proceed with

- (d) the trend toward liberalization of the law of standing. Standing is concerned with who is permitted to institute a court action.⁹ Currently a person may bring a proceeding only if:
- (i) he/she has some personal, proprietary or pecuniary interest in a proceeding; or
 - (ii) has suffered or may suffer injury or harm of the same kind or degree as others.

The lack of standing has been a major obstacle to individuals and public interest groups bringing environmental actions.

(d) Common Law or Civil Causes of Action

In addition to the liability imposed by various environmental statutes, liability may also arise even where no statute is breached as a result of common or civil law causes of action. Such actions allows individuals or entities whose rights have been violated to sue third parties in civil actions for remedies such as compensation and restitution. The actions include the following:

- (i) private or public nuisance;
- (ii) the doctrine of Rylands v. Fletcher (a defendant is strictly liable for harm or damage resulting from the discharge or escape of inherently dangerous substances or things from his/her property);
- (iii) negligence;
- (iv) trespass to property;
- (v) riparian rights (the owner of land bordering on a waterway has the right to the continued flow of the water in its natural quantity or quality subject to the ordinary, reasonable use thereof by the owner at the upper end of the waterway; and,
- (vi) fraud and misrepresentation.

While these causes of action have existed for a long time and been used to redress environmental harm before there was any legislation on the subject, the limits of liability in some of these areas is just beginning to be explored by the courts. The decisions that are being made by courts are becoming benchmarks which promise to significantly affect the way corporations, individuals and governments do business.

1.2.2 Persons Who May Be Liable

CORPORATIONS, OFFICERS, DIRECTORS, EMPLOYEES

The law recognizes the possibility of convicting both corporations and individuals within those corporations who contribute to or commit an environmental offence. For example, under section 147a of the EPA, directors and officers of corporations that engage in an activity that may result in the unlawful deposit, addition, emission, or discharge of a contaminant into the natural environment have a duty to take all reasonable care to prevent the corporation from causing or permitting the same. Personal liability may attach to those who fail to carry out this duty.

CEPA takes a different approach from the Ontario act concerning director and officer liability. Section 122 of CEPA imposes personal liability on directors, officers or agents of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence by the corporation. This is similar to the liability provision in British Columbia's WMA and in Quebec's EQA. Whether all directors and officers would be liable or only those more directly involved at an operations level will be determined on the particular facts of each case.

A further group of individuals who need to be especially aware of liability are those with direct environmental supervisory responsibility. The trend in court cases is toward prosecution of such individuals with or without the concurrent prosecution of the corporation. As such, any officers, boards of directors or others who set up a framework where the day to day activities and events which could cause pollution are carefully monitored should be shielded from liability. The goal of a fully developed compliance/environmental management program, of which an environmental audit is a feature, is key.

1.2.3 Municipalities

Municipalities are corporations and have officers as designated by statute such as the mayor of a city or town, the treasurer, municipal solicitor, the reeve of a village or township. Department heads and deputy department heads, or in some cities, commissioners and deputy commissioners are also statutory officers. In their departments or offices they must take all reasonable care to prevent the municipal corporation and its representatives from causing or permitting unlawful contamination of the natural environment. If they become aware of potential or actual violations of environmental laws they must take care to ensure the event is stopped and prevented from recurring and ensuring that funds are available or made available to deal with problems as quickly as possible. In one case in Ontario, the Township of Charlottenberg was fined, in November 1986, \$12,000 for grossly mismanaging its landfill site over a period of years, in defiance of the Ministry of the Environment. The result was rodents, filth, smoke and fumes. The fine, upheld on appeals, was then the largest environmental fine imposed on a municipality. In another case, the Town of Collingwood was fined \$25,000 on two guilty pleas of emitting smoke from uncontrolled burning of refuse kept in the vicinity of an incinerator. The incinerator was being used at three times its approved capacity. Legal disposal of the additional waste would have been very expensive.¹⁰ These cases demonstrate that municipalities are equally subject to prosecution for environmental offenses. Municipal officers and councillors can minimize their potential environmental liability and the liability of the municipal corporation by having environmental audits of environmentally related activities within their jurisdiction undertaken.

1.2.4 Provincial and Federal Governments

The liability of governments (the "Crown") their servants and agents depends upon a complex set of rules, presumptions, privileges and immunities. According to long standing legal tradition, there is a presumption that no statute binds the Crown unless the Crown is expressly named therein. The federal Interpretation Act and similar acts in each Canadian province commonly codify this presumption. In most jurisdictions a legislative draftsman must deliberately bind the Crown where that is desired. In British Columbia and Prince Edward Island however, the reverse is the case; the legislative draftsman must specifically exempt

the Crown from the applicability of a statute. Express provisions binding the Crown are not routinely included in environmental legislation. Where the provision is included, such as in Ontario's EPA, an argument can be made that the act binds only the Crown in right of the province and not the Crown in right of Canada. Courts have generally ruled that the activities of the federal government are exempt from provincial pollution laws except where the federal Crown can be said to have sought the benefit of the provincial legislation.

Servants and agents of the Crown acting in the course of and for the purposes of their statutory duty enjoy almost the same immunity as the Crown. However, if they act outside the lawful scope of their statutory duties they might be found liable.¹¹

CEPA on the other hand binds the Crown in the right of Canada or a province. Part IV of CEPA is potentially very broad, relating to federal departments, agencies, crown corporations, works, undertakings and lands. Federal lands include all northern lands not yet made into provinces. Federal works and undertakings include airports, inter-provincial railroads and canals, works or undertakings declared to be for the general advantage of Canada as well as atomic energy facilities. Whenever these federally-regulated areas lack specific environmental regulations under other legislation, the federal government under CEPA may make such regulations (s.54(1)). No regulations have yet been adopted. However, in its Regulatory Plan for 1990, the government has indicated its intention to introduce regulations on hazardous waste management for federal facilities and non-hazardous solid waste incinerators at federal incinerators. Once adopted, breach of these regulations could be a source of potential liability.

The Law Reform Commission of Canada has recommended that the federal government, its agents and servants should no longer claim immunity, except where such immunity is necessary for the public business of government. In addition, in a recently published report,¹² the Ontario Law Reform Commission has recommended that the Crown be, for the most part, subject to the same laws as any ordinary person. If these recommendations are any indication of the "trend of the times", governments and their employees who, to date, have enjoyed certain privileges and immunities in respect of civil liabilities not enjoyed by private persons, have reason to be concerned since some of their departments are involved in the provision of goods and services which might result in environmental harm or contamination.

Public interest groups are making "in-roads" in challenging governments to adhere to environmental legislation. Courts are responding to these groups and to the public's concern for the environment generally, by granting third parties the status or standing in court to sue government and government agencies for alleged contraventions of environmental laws. Previously, such groups could not sue governments unless they could demonstrate that they were directly affected by a particular matter in issue or had a genuine interest as a citizen in the validity of legislation. In Energy Probe et al. v. Attorney General of Canada; Ontario Hydro et al.,¹³ the Ontario Court of Appeal allowed Energy Probe to commence a lawsuit which will determine the validity of a federal statute which seeks to limit the liability of nuclear energy producers in the event of nuclear accidents. Energy Probe had no apparent special personal interest in the case.

In addition, public interest groups are forcing governments to follow their own environmental rules. The Canadian Wildlife Federation was recently successful at the Federal Court of Canada level in obliging the federal government to follow its own environmental assessment guidelines in regards the Rafferty-Alameda dam project in Saskatchewan. The Federal Minister of the Environment was required to assess the project for environmental implications before granting the required licence to build.

In a similar case, the Federal Court recently ruled that the Federal Transport and Fisheries departments had been negligent in not conducting environmental assessments on the partly-completed Oldman River dam in Alberta and ordered them to do so.

These cases indicate a growing trend by courts to relax technical rules and to allow public interest groups to challenge the government where there is clearly a matter of public concern. In addition, individual plaintiffs are having some success in obtaining damages in suits against governments for negligence. In Heighington et al. v. The Queen in Right of Ontario et al.,¹⁴ the Province was found negligent in not taking steps to ensure that a housing subdivision built on land contaminated with radioactive waste was safe for housing. This was in breach of the Public Health Act which imposed a duty on the Department of Health to take measures necessary to abate conditions injurious or dangerous to health. The Province through its employees knew that activities involving radioactive material were being conducted at the site. Provincial officials were negligent in not making sufficient inquiries and in not ensuring the clean-up of the radioactive material and contaminated soil. In Schenk v. The Queen,¹⁵ a nuisance and negligence case, a plaintiff was successful in claiming damages from the Ontario government for harm done to fruit orchards by road salt applied during the government's maintenance program. The government was unable to prove that the nuisance suffered by the plaintiff was the inevitable consequence of the government carrying out its duties authorized by the statute in question. The statutory authority did not exempt unreasonable acts of the Crown or its employees from liability for damage to private property. In Sevidal et al. v. Chora et al.,¹⁶ a case dealing with latent defect, radioactivity of soil in a residential purchase and sale transaction, the Atomic Energy Control Board was found liable for negligent misrepresentation. The AECB assumed responsibility for disseminating information about radioactivity in the McClure Crescent area. They were negligent in that they told the purchaser there was no contaminated soil at the property intended to be purchased, that it was safe. They failed to tell the prospective purchaser radioactive testing was not complete and that AECB only disclosed information to registered owners and that the prospective purchaser should continue to check with AECB and the vendors for more information. The AECB employee knew the information given was being relied on. The purchasers learned of the contamination of their property after the closing. They subsequently sold the house at a loss.

Provincial, federal and municipal government actions can expect to be increasingly scrutinized more closely, particularly in the developing area of environmental liability. The development of effective environmental assurance programs which would include environmental audits of government departments and facilities makes sense. It would alert governments to those practices that could expose the government or its employees and agents to liability or to public criticism. The adoption and promotion by the Federal government of environmental auditing would, in the words of the Green Plan,¹⁷ send a message to Canadians that the government intends to lead by example. In addition, it would be a reflection of a policy of environmental conscientiousness that the public is demanding both of the private and public sectors.

1.3 Importance of Audits in Ensuring Compliance With Environmental Laws and Regulations

The purposes of undertaking an environmental audit fall into three general categories of which one or all three may be addressed in any particular audit:

- (a) to determine the compliance status of the facility or department with applicable legislation, regulations, standards or policies;

- (b) to identify potential liability risks or hazardous conditions; and,
- (c) to verify the existence and effectiveness of environmental management and control systems.

Environmental auditing for compliance is generally the driving force behind most audits. It is fuelled in large measure by private sector concern for increased risk of enforcement actions by investigation and enforcement branches of environment ministries and the risk of corporate and personal liability of directors and officers for pollution offenses. Companies and government agencies are expected to comply with the laws applicable to them one hundred percent of the time. Failure to so comply involves, at least for companies, some risk of prosecution. However, determining whether a facility is in absolute compliance at any one particular point in time is frequently difficult in light of the volume of provincial, federal, municipal laws and regulations that may be of concern. In addition, there are numerous guidelines, standards and policies, which, while not having the force of law, dictate the manner in which a facility is to operate. The trend in Canadian and provincial laws is clearly toward a more specific and standards-oriented approach similar to that found in the United States. In that jurisdiction, there has been greater opportunity for a numerical determination of compliance.¹⁸ To the extent that a compliance can be clearly ascertained, environmental auditing is an important function in determining past and present compliance with legal requirements. A lawyer can be helpful in this regard by providing advice on legal requirements including, regulatory interpretations and reviewing the protocol and audit reports.

1.3.1 CEPA and Enforcement and Compliance Policy

The importance of compliance with environmental laws and regulations cannot be overstated. The penalties associated with contravention of environmental legislation have become tremendously important. Fines in most jurisdictions are no longer negligible and equally importantly, the imprisonment of officers and directors of corporations for breaches of the laws is a distinct possibility (maximum penalty in CEPA is \$1,000,000 and or imprisonment for five years).

The federal government has stated that CEPA will be enforced with vigour. To this end, an Enforcement and Compliance Policy for CEPA was published in 1987. Environment Canada has stated it will ensure compliance with environmental laws through measures that will promote compliance, including communication and publication of information, public consultation, technical assistance and technology development. Vigorous enforcement will be ensured by means of a planned program of inspection and monitoring, complemented by spot checks. In cases of a violation, environment officials will, in appropriate circumstances, adopt measures to compel compliance without resorting to court action (for example, warnings, direction by inspectors, ticketing, compliance guarantees). In other circumstances, depending upon the nature of the violation, compliance will be compelled through court action.

The Enforcement and Compliance Policy requires enforcement officials through Canada, federal, provincial and territorial to apply CEPA in a manner that is fair, predictable and consistent. Further developments in regards this policy may arise as a result of the Federal government's Green Plan. One of the issues raised is "Whether the Government should emphasize compliance (for example, advising firms on how to meet requirements) or enforcement (for example, inspecting and initiating legal action as required)". A federal-provincial co-operative national training program for enforcement officers is being considered.

1.3.2 Investigation and Enforcement

At the provincial level, the establishment in a number of provinces of a separate investigation and enforcement branch of the Ministry of the Environment has resulted in an increase in the number of investigations and prosecutions. In Quebec for example, there were five investigators in 1987. In 1988 there were a total of sixty-four inspectors, investigators and support staff (staff accounting for approximately eleven positions). In light of the Quebec budget's recent allocation of some \$15,000,000 to the environment ministry, one can reasonably expect a further increase in staff and prosecutions.

In Alberta, An Action Plan for Environmental Law Enforcement¹⁹ was presented to the government in 1988 by a review panel. The report contains two themes: that there should be an increase in public involvement in standard setting and in the licensing processes and that enforcement of environmental laws should be undertaken in a consistent manner, pursuant to clear department policy. While the report was never formally endorsed by the environment minister, many of the recommendations are being implemented by Alberta environment, including the restructuring of the pollution control division to include separate investigation and compliance branches.

At the federal level, as at the end of April, 1990 an additional sixteen persons were to be hired in enforcement and compliance. This number is expected to double in the current fiscal year. The government is also working on a Fisheries Act Enforcement Policy similar to the one under CEPA.

All of this would appear to point to a greater emphasis on investigation and enforcement. Consistent and uniform enforcement programs of governments coupled with greatly increased penalties and the potential for imprisonment for conviction of pollution offenses by individuals and corporations has made the prospect of non-compliance with the laws that much more formidable. This has resulted in a degree of tension in the relationships between environment ministries and industry which will have to be "worked out".

Environmental audits are accordingly a critical means of gathering sufficient information to determine, from a regulatory and risk management standpoint, compliance with laws and in the event of non-compliance, the steps to be taken to minimize or avoid liability. They also are becoming a key component in prudent business planning.

1.4 Environmental Audits, an Element of Due Diligence Defence

Since the 1978 Supreme Court of Canada decision in R. v. City of Sault Ste. Marie,²⁰ environmental legislation has been characterized as public welfare legislation. Based on that characterization, unless a statute expressly provides otherwise, the type of defence available for alleged non-compliance with environmental legislation is a defence of "due diligence"; that is, an accused may avoid liability by proving, on a balance of probabilities, that he took all reasonable care to avoid the particular event giving rise to the prosecution. If the accused is

a corporation, the availability of the defence will depend on whether those who are the "directing mind and will of the corporation that is, directors and officers, who are in law responsible for the acts of the corporation, took all due care.²¹ What the standard of care is in any particular circumstance depends upon the special fact situation and the nature of the industry. However, courts have considered the following critical circumstances with which to assess the actions of an accused:

- (a) the gravity of the potential harm;
- (b) the alternatives available to the corporation;
- (c) the likelihood of harm;
- (d) the degree of knowledge or skill expected of the accused; and,
- (e) the extent to which the underlying causes of the offence are beyond the control of the accused.

It is in the context of the ability to rely on a defence of due diligence that a "compliance program" becomes important. The establishment of a comprehensive and up-to-date program to ensure at a minimum, compliance with laws to deal with the problems and directives of relevant legislation and, once in place, the proper maintenance and updating of such a program, so as to provide on-going evidence of reasonable preventative care, will go a long way towards establishment of a due diligence defence. The environmental audit is one management tool that can be used to ensure that all existing or potential non-compliance with environmental laws and regulations and environmental concerns are identified and acted upon. Failure, without proper justification, to act on audit recommendations can provide devastating evidence of the shortcomings of a facility. This can be fatal to the establishment of a due diligence defence.

The audit itself is, however, but one element of a responsible environmental management compliance program. It is not the whole answer. A management or compliance program ideally would include such elements as:

- (a) the development and implementation of written policy statements endorsing compliance with laws;
- (b) appointment of, and education of, environmental managers/coordinators with the duties and requirements of environmental legislation;
- (c) on-going training of staff in effective performance of functions required by legislation, in particular with statutory requirements to notify environment ministries in respect of a spill and timely, adequate responses to environmental problems;
- (d) ensuring the adequacy and accessibility of equipment and facilities to enable compliance;
- (e) establishment and updating of operating manuals and procedures and emergency/contingency plans;
- (f) implementation of environmental protection programs and regular and continuous monitoring and maintenance thereof;

-
- (g) timely communication with employees, including information updates, notices and reminders;
 - (h) planned and orderly recordkeeping, documenting systems and events; and,
 - (i) studies and programs directed to air, water, waste, spills and impact on land.²²

While an environmental management/assurance program cannot guarantee that present or future liabilities will be eliminated, the implementation of such a program will undoubtedly reduce the overall liabilities of an organization and the individuals responsible. Equally as important, audits are not merely exercises in self interest, they are good business practice for management. Compliance activity will continue to evolve, the challenge to public and private sectors will be to keep pace with the rapid development.

1.4.1 Due Diligence

Section 125 of CEPA specifically codifies the defence of due diligence.

No person shall be found guilty of an offence under this Act, other than an offence under section 114 or section 115.... (the sections dealing with providing false and misleading information and damage to the environment and death or harm to persons).... if the person established that he exercised all due diligence to prevent its commission.

Most provincial environmental statutes also codify the due diligence defence but imposes a positive duty on directors or officers of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to the Act or regulations, to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge. Failure to carry out the duty is itself an offence.

1.5 Other Legal Issues Related to Environmental Audits

In addition to liability, there are other legal issues to be considered in the context of environmental audits. These include, an analysis of the type of information usually generated in audits, the sensitivity of some of that information, the manner in which it may be disclosed to governments or to the public, the legislative protection afforded to confidential information and the use of solicitor-client privilege to protect sensitive audit information.

1.5.1 Audit Information²³

While environmental audits are an excellent management instrument, the information generated from them is generally viewed by the private sector as a potentially threatening government tool in situations of non-compliance with laws. The audit may provide evidence

against a company and its officials and negate the availability of a defence of due diligence. Accordingly, care should be taken in identifying the information that may be generated by the audit and in assessing whether some or all of the information generated should be protected from disclosure. Most information falls into one of the following four categories:

- (a) reports or other information required to be provided to government (for example, monthly activity or annual reports on compliance);
- (b) information required to be kept by an operator on-site and which is available upon request, to inspectors;
- (c) corporate policies, procedures, environmental operating plans, emergency spills response plans;
- (d) internal memoranda, trade secrets, reports, minutes of meetings or other documents relating to non-compliance or to potential problem areas or harmful practices.

Information in categories (a) and (b) is confidential in that it is only disclosed to government departments requiring it. While the public may access category (a) information by means of freedom of information legislation it is not generally "public" information (see however, section Statutory Rights of Access and/or Disclosure regarding access in Quebec).

Disclosure of category (c) information is not generally of concern as it is likely to be more beneficial than not and to evidence some care and foresight for protection of the environment.

It is the disclosure of information in category (d) which is more problematic.

Disclosure of audit information may be of interest not only to government regulators, but also to other outside parties such as business competitors; private plaintiffs initiating lawsuits for personal injury, property or environmental damages; stockholders of corporations; unions concerned about employee health and safety; environmental rights groups and government lawyers investigating administrative or civil cases and companies targeted for take-over or acquiring companies that might be concerned about environmental weaknesses. The disclosure of category (d) type of information to these persons could be harmful to the interests of a company, a government or government agency conducting an environmental audit of its operations. To the extent that it is desirable or possible, information of a confidential nature should be protected from disclosure and treated as confidential.

1.5.2 Means of Disclosing Audit Information

Information generated through an environmental audit may be disclosed in a number of ways, including:

VOLUNTARY DISCLOSURE

A company or government department or agency may choose to disclose audit information to another party voluntarily, among other reasons, because the information is not sensitive or is unlikely to lead to liability exposure; because disclosure will be of greater net

benefit than non-disclosure or because it is necessary in a particular transaction. In the private sector in particular, non-disclosure agreements are sometimes considered to protect confidential information although statutory rights of access by way of freedom of information legislation may override such agreements. Environmental hazard disclosure has become a major issue within the context of corporate and real estate transactions. Buyers and sellers are frequently unsure whether pollution problems either need to be disclosed or the extent of such disclosure. Courts have affirmed the general rule that, subject to several important limitations, the doctrine of caveat emptor "buyer beware" applies. However, where there has been fraud, mistake or fraudulent misrepresentation on the part of a vendor, caveat emptor no longer operates. In those circumstances, disclosure is necessary.

DISCLOSURE AS A RESULT OF LITIGATION

Audit information, including audit reports may be required to be produced by court order in the course of civil or criminal proceedings. Once produced, the party seeking protection from disclosure may advance arguments in respect of solicitor-client privilege, confidentiality, trade secrets, etc. A judge will then determine the issue on its merits on a case by case basis. One can accordingly not assume that a claim for confidentiality or privilege will succeed.

STATUTORY RIGHTS OF ACCESS AND/OR DISCLOSURE

As a result of provisions within legislation and regulations requiring disclosure of certain information (for example, spills and other occurrences reporting, performance and other reports pursuant to facility certificates of approval or permits), and as result of the broad inspection and search and seizure powers of designated officers contained in legislation such as Ontario's EPA, Quebec's EQA and the federal CEPA, disclosure of environmental audit information may, subject to certain statutory duties of secrecy imposed on officers (discussed in the Statutory Protection and Access to Information Legislation section), result. For example, environmental statutes often provide that provincial inspectors, investigators may, from time to time, and upon production of a designation, enter at any reasonable time any building, structure, machine or vehicle and make or require to be made surveys, examinations, investigations, tests or inquiries, including examination of books, records, and documents, as is considered necessary. The books or documents may include audit reports. In addition, there are often provisions imposing a duty on a person responsible for a source of contamination to furnish such information as a provincial officer requires for the purposes of the act or regulations. Failure to do so, or to hinder or obstruct an officer in the lawful performance of his duties is an offence.

In Quebec, articles 198.4 and 198.5 of the EQA requires the ministry of the environment to maintain certain registers of information to which the public has access. By enacting these provisions, the government has provide the public with a right of access to environmental information greater than that available to the public in other jurisdictions by means of access to information legislation.

CEPA provides for disclosure, inspection, search and seizure. However, Environment Canada has stated in its Enforcement and Compliance Policy²⁴ released at the time of CEPA's enactment that environmental audits will not routinely be requested to verify compliance with CEPA during routine inspection.

If environmental audit information is legally required to be disclosed or is seized by authorized officers, arguments could be made concerning confidentiality, privilege or trade secrets to prevent its disclosure. These aspects are discussed in section 1.5.4 of this paper.

In addition, information contained in records held by a department or agency of government may be disclosed to third parties by means of access to information legislation. Federally, the Access to Information Act²⁵ creates a broad right of access to Canadian citizens and permanent residents to records under the control of federal government institutions. An applicant can only be denied access to such a record if a record is subject to a particular exemption set out in the legislation. A person denied access to a particular record is entitled to have the matter reviewed by the Access to Information Commissioner and the Federal Court.

A number of provinces have passed freedom of information legislation similar to the federal act whereby members of the public may seek access to records in the custody or control of a government institution, subject to certain exemptions. Quebec and Ontario have such legislation. In British Columbia a member's bill of freedom of information received first reading in 1989 but died on the order paper when the legislature was adjourned.

While the general principle embodied in freedom of information legislation is to provide public rights of access to government records, there are protection against disclosure provisions built in to legislation, for example, for trade secrets and information subject to solicitor-client privilege.

1.5.3 Confidentiality of Information

Commissioning an environmental audit that examines in a systematic and professional manner a corporation's or department's record of compliance, its systems of internal management and control and that attempts to identify possible future problem areas is a productive, responsible and valuable exercise. However, its greatest drawback is its potential for not being a privileged or confidential document. If an audit report, for example, recommended certain changes in procedures and those changes were not implemented and an environmental accident occurred, the audit report in the hands of a prosecutor would be damaging evidence. It could be the factor that prevents an accused from establishing a defence of due diligence. In addition, from the private sector point of view, it could open the door to increased government inspection, regulation, prosecution and even civil liability. From the public sector point of view, it could result in civil proceedings, embarrassing disclosures, increased public scrutiny and criticism. How then can one keep an audit confidential?

The best way of maintaining confidentiality is not to compile unnecessary audit documents, that is, keep the documents created to the minimum necessary. Secondly, maintain an attitude of confidentiality by an emphasis on non-disclosure throughout the process and subsequent to the audit with employees, consultants or others brought into the audit on a need-to-know basis. Thirdly, ensure that documents which are considered confidential are clearly marked confidential. Fourthly, ensure that confidential documents do not lose their confidential nature by wide distribution thereof. Notwithstanding the adoption of the foregoing four measures, there is no guarantee that sensitive information will not be disclosed. However, the measures are a recommended practice in any environmental audit both for the private and public sector.

STATUTORY PROTECTION AND ACCESS TO INFORMATION LEGISLATION

Confidentiality and disclosure of information is specifically dealt within a number of provincial statutes. For example, in Ontario's EPA, except as to information in respect of the deposit, addition, emission, or discharge of a contaminant into the natural environment, provincial officers are required to preserve secrecy in respect of all matters that come to their attention in the course of any survey, examination, test or enquiry under the statute and its regulation unless:

- (a) disclosure is required in connection with the administration of the Act or regulations, for example, during hearings, prosecutions;
- (b) the matter is being disclosed to their counsel;
- (c) the person to whom the information relates, consents, (s. 130(1) EPA).

It is apparent that the excluded information in respect of deposit, addition, emission or discharge of a contaminant into the natural environment along with any other information obtained by the Ministry other than by a provincial officer in connection with a survey, examination, test or inquiry is subject to the provisions of freedom of information legislation and may, therefore, ultimately find its way into the hands of the public as the result of an access to information request under the act. Confidentiality is accordingly not entirely assured.

Where there is Freedom of Information legislation the statute must be verified to determine whether it overrides the confidentiality provisions of other statutes in that jurisdiction.

At the federal level, the Access to Information Act generally contemplates the release of information such as that required to be provided under the CEPA. However, CEPA is a more recent statute and contains provisions relating to protection of confidential information.

If information is confidential business information (for example, trade secrets; financial, commercial, scientific or technical information consistently treated as confidential by a supplier; information which, if disclosed, would interfere with contracts or negotiations for contracts; information whose disclosure: result in material financial loss to suppliers; result in material financial gain to a third party or prejudice the competitive position of the supplier), it is required to be disclosed to the Minister but may not be publicly exposed. There are, however, certain exceptions provided for in section 20 (4) of CEPA. Confidential business information may be disclosed:

- (a) with the written consent of the person who provided it;
- (b) as may be necessary for the purposes of CEPA;
- (c) to another federal Minister, a provincial government or a government of a foreign country if those receiving the information undertake to keep the information confidential.

Item (c) accordingly raises a concern about disclosure through provincial access to information legislation although for example in Ontario, the Freedom of Information Act protects information revealed in confidence from another government.

In addition, CEPA contains a public interest override to the exemption from disclosure of confidential business information. Except for trade secrets, the Minister may disclose any information where the disclosure is in the interest of public health, public safety or the protection of the environment and where the public interest in the disclosure clearly outweighs in importance any material financial loss or prejudice to the competitive position of the person who provided the information. Since there have been no court cases as yet interpreting these provisions, it is difficult to predict the extent to which the confidentiality of information provisions will be undermined by a liberal interpretation of the exemption provision.

1.5.4 Solicitor-Client Privilege

In addition to endeavouring to protect audit information by arguments of confidentiality or trade secret, another means to attempt to prevent disclosure of such information is to claim solicitor-client privilege. There is no guarantee that such a claim will automatically result in the denial of disclosure of audit information. However, if well structured, and if a court is so persuaded, solicitor-client privilege is a means of protecting sensitive audit information. While solicitor-client privilege is applicable both to the public and private sectors, it is more likely to be invoked by the private sector since governments have, to date, tended to rely more on confidentiality arguments to protect sensitive information. There is no reason however, that governments might not, in proper circumstances consider using this privilege. Governments are, after all, as entitled to seek legal advice from counsel as a private sector person and to expect such communications as inviolate.

Solicitor-client privilege is concerned with communications between a solicitor and client in connection with legal advice and with such communications in connection with pending or contemplate litigation.

LEGAL ADVICE

All communications given in confidence between a solicitor and client for the purpose of obtaining legal advice except communication for the purpose of perpetrating a crime or fraud, are privileged and may not be disclosed. The right to communicate in confidence with one's legal advisor is viewed as a fundamental civil and legal right founded upon the unique relationship between a lawyer and client. In order to successfully argue legal advice privilege in the context of an audit the following elements must be present before the audit is carried out:

- (a) The solicitor must be retained to provide legal advice on the request of the client;
- (b) The matter must be confidential (for example, a wide distribution of the communication beyond the client could defeat the privilege);
- (c) Voluntary disclosure of the communication amounts to a waiver of confidentiality;
- (d) Only the actual communications are privileged (for example, the environmental audit documents, not the underlying facts on which it is based);

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- (e) The communications must go directly between the solicitor and client (not through third parties such as consultants).

PENDING OR CONTEMPLATED LITIGATION

The scope of privilege as it relates to communications in connection with pending or contemplated litigation is not quite as clear. It would appear that the communications would be privileged only if the dominant purpose of the communication is in connection with pending or contemplated litigation.

Solicitor-client privilege may offer a viable means of preventing disclosure of sensitive audit information. However, care must be taken not to overly rely on the prospect that the audit report will be privileged. Privilege is easily lost if the audit is not kept confidential and is released or communicated to third parties. There is a further risk that while the audit report itself is privileged, internal memoranda and similar documents prepared as a consequence of the audit may not be. The latter may be equally or more damaging if disclosed or if recommendations are not acted upon. Admittedly, solicitor-client privilege greatly inhibits the utility of an environmental audit as an effective management tool. For this reason, such legal protection is frequently not sought. Whether this is wise depends on the circumstance. However, lawyers are increasingly recommending to their clients that audits should not be conducted without the protection of solicitor-client privilege.

1.5.5 Government Response to Audits

Environment Canada has recognized the desirability and utility of environmental audits as a management tool for companies and government agencies by including a policy statement on the promotion of audits in its Enforcement Compliance Policy for CEPA. The policy is that inspections and investigations under CEPA will be carried out in a manner that will not inhibit the practice or quality of audits. Environmental audit reports will not be requested by inspectors during routine inspections to verify compliance with the Act. However, access to an environmental audit report may be required when an inspector or investigator has reasonable grounds to believe that:

- (a) an offence has been committed;
- (b) the audit's findings will be relevant to a particular violation, necessary to an investigation and required as evidence;
- (c) the audit information being sought cannot be obtained from other sources through the inspector's or investigator's exercise of his powers.²⁶

The policy further states that a request for an audit report during investigations will, subject to exigent circumstances, be made under the authority of a search warrant. While this policy has not yet been tested in a court of law, it is a laudatory effort on the government's part. Further developments on the federal government's policy may arise following the public consultation period on the recently announced Green Plan, A Framework for Discussion on the Environment. One of the questions posed is "Should environmental audits for industry and Government be made compulsory and should the results be made available to the public?"

At the provincial level, none of the governments appear to have issued a similar formal policy, although environmental audits are encouraged. The lack of a formal policy provides less of a comfort level about audit report confidentiality at the provincial level than at the federal level.

1.6 Conclusion

Although different philosophies, scope of audits and audit techniques exist from operation to operation, there is wide recognition that notwithstanding the legal concerns with disclosure of sensitive information, environmental auditing is a desirable stewardship tool and can be a prudent business management practice. With the changing attitudes of courts toward environmental offenders the broadening scope of liability and the public's increasing intolerance of polluters (be they in the private or public sectors) corporations or operations can no longer be indifferent or wilfully blind. A demonstration of their due diligence through an environmental audit may prove a defence in the event of a prosecution for environmental offence. Provided that the legal aspects for conducting an audit are appropriately addressed, the carrying out of an audit within the context of a comprehensive environmental assurance plan is to be highly recommended.

ENDNOTES

1. Environmental Protection Act, R.S.O. 1980, c. 141 as amended.
2. Environment Quality Act, R.S.Q. 1977, c.Q-2 as amended.
3. Waste Management Act, S.B.C. 1982, c.41 as amended.
4. Canadian Environmental Protection Act, S.C. 1988, c.22as amended.
5. Transportation of Dangerous Goods Act, S.C. 1980-81-82-83, c.36 as amended.
6. Fisheries Act, R.S.C. 1970, c. F-14 as amended.
7. Regina v. B.E.S.T. Plating Shoppe Ltd. and Sam Siapas (1986), 1 C.E.L.R. (N.S.) 85 (H.C.J.).
8. Regina v. Jetco Manufacturing Limited and Keith Alexander (1986) 1 C.E.L.R. (N.S.) 9 (H.C.J.).
9. References from pp. 12, 13 of a paper entitled "Strategies to Reduce and Defend Liability" by Andrew J. Roman presented at an Insight seminar on Anticipating, Defending and Litigating Environmental Liability Claims held at Toronto, February 1990.
10. Extract from pp. 114, 118 of a paper entitled "Fines Go Up Dramatically in Environmental Cases" by Dianne Saxe, 3 C.E.L.R. (N.S.), the Carswell Company Limited, 1989.
11. Information referenced in part from "Application of Provincial Environmental Statutes to the Federal Government, Its Servants and Agents" by Dianne Saxe, 4 C.E.L.R. (N.S.) pp. 115-120, Carswell Legal Publications, January, 1990.
12. Report on the Liability of the Crown, Ontario Law Reform Commission, 1989.
13. Energy Probe et al. v. Attorney General of Canada; Ontario Hydro et al. 3 C.E.L.R. (N.S.) 262.
14. Heighington et al. v. The Queen in Right of Ontario et al. (1987), 60 O.R. (2d) 641.

ENDNOTES continued

15. Schenk v. The Queen [1981] 34 O.R. (2d) 595; (1982) 40 O.R. (2d) 410, affirmed [1987] 2 S.C.R. 289.
16. Sevidal et al. v. Chopra et al. (1988), 64 O.R., 2nd, 169.
17. A Framework For Discussion On The Environment, The Green Plan, A National Challenge, Minister of Supply and Services Canada, 1990.
18. Extract from pp. 24 and 25 of a paper by Norman S. Rankin entitled "Structuring Environmental Concerns Into Real Estate and Other Commercial Transactions" presented at an environmental law seminar "The Changing Landscape of Environmental Regulation and How to Cope With It" on May 25, 1989.
19. An Action Plan for Environmental Law Enforcement in Alberta. The Report of Review Panel on Environmental Law Enforcement (Edmonton: Alberta Environment, January, 1989) (Chair: K.R. Smith).
20. R. v. City of Sault Ste. Marie, (1978) 85 D.L.R. (3rd) 161.
21. Supra, note 20 p. 378.
22. Some of these elements, in edited form were extracted from page 15 of a paper entitled "Environmental Audits" by Janette M.F. MacDonald presented at the Canadian Bar Association Ontario Continuing Legal Education seminar on Corporate Environmental Responsibility and Liability.
23. Sections 1.5.1 to 1.5.4 of this paper were adapted, in part, from a paper initially presented at the Canadian Bar Association Continuing Legal Education Programme on Corporate Environmental Responsibility and Liability by Roger Cotton, in Toronto in May, 1987. Roger Cotton is a partner with Baker & McKenzie.
24. Canadian Environmental Protection Act Enforcement and Compliance Policy, Minister of Supply and Services, 1988.
25. Access to Information Act, R.S.C. 1985, c. A-1, as amended.
26. Supra, note 24, p.29.