

January 7, 2005

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Dear Mr. Bahaviolos:

RE: EBR Registry Number: AA04E0003, Environmental Enforcement Statute Law Amendment Act, 2004

Thank you for the opportunity to comment on Bill 133, the Environmental Enforcement Statute Law Amendment Act, 2004.

We have heard numerous concerns from our member companies about the bill, perhaps more than any on other environmental issue. First, let me state that CME believes in the "Polluter Pay" principle and that our members, many of which could be adversely affected by the proposals, are among the most environmentally responsible companies in the world. However, this legislation has raised serious misgivings and we hear repeatedly from members that, should the bill as written come into force, it would have a significant negative impact on investment in general in Ontario. We are also deeply concerned that Bill 133 overrides fundamental legal rights to due process, fundamental justice and fairness and replaces them with arbitrary authority by MOE officials. As a consequence, despite the common goal we share of protecting and enhancing Ontario's environment, this legislation is badly flawed and cannot be supported as currently written.

Bill 133 proposes to establish a new test in the Environmental Protection Act for regulated discharges to the environment, discharges that "may" cause an adverse effect. This new test lacks certainty and therefore has the potential to be applied in an arbitrary fashion. The proposed changes to key sections of the Environmental Protection Act, including Section 14 (the prohibition provision), Section 15 (the notification provision), Part X (the spills provisions) and the order provisions from "causes or is likely to cause an adverse effect" to "may cause an adverse effect" significantly upset the balance in the current environmental protection regime in Ontario. While it is reasonable to prohibit and require notification and remediation of discharges of contaminants that cause or are likely to cause an adverse effect on the environment, it is not as clear that

discharges that “may cause an adverse impact” should be regulated the same way. Since all human activities have an impact upon the natural environment, virtually any industrial discharge, including those permitted under existing certificates of approval, “may” cause an adverse impact. The imprecise wording of this provision will inevitably create great uncertainty about what discharges are permitted in Ontario and will undermine investment and innovation in Ontario.

The environmental penalties and absolute liability offences proposed in Bill 133 raise very serious issues concerning fairness, the right to due process and recourse to the courts, the right to fundamental justice and the potential for double jeopardy. The sweeping provisions in this Bill are both precedent setting and highly punitive, as environmental penalties would apply even where a person has taken all reasonable steps to prevent the contravention and would therefore be innocent in the event of a prosecution for the same contravention.

The concept of due diligence was initially introduced by the judiciary to provide fairness in the area of regulatory offences. Due diligence also provides an incentive to implement effective environmental management systems to ensure compliance with environmental laws. For example, over 600 companies in Ontario are ISO 14000 certified. Far from improving environmental performance, an "absolute liability" regime would undermine the incentive for companies to implement good stewardship practices, which are often quite expensive, since companies and individuals would be unfairly penalized despite having taken every reasonable measure under the circumstances that existed at the time. The proposed absolute liability regime would also be inconsistent with the policy of encouraging companies that follow responsible environmental policies and procedures.

The potential fines for individuals, including directors, officers, and employees of an organization, are up to \$20,000 per day. These monetary penalties, which are uncapped in the proposed legislation and apply to all contraventions of the Act, OWRA and Regulations, orders and approvals, may also be sufficient to create the stigma for an innocent individual that would attract the protection of Section 7 of the Charter dealing with security of the person.

If it were to become law, the legislation would be likely to create perverse consequences for both Ontario's environment and its economy. Because the environmental penalties proposed in this bill may increase the potential for a prosecution for the same offence and raise the potential for double jeopardy while excluding the basic right to a defence of due diligence, individuals may be unwilling to take on environmental obligations within a company.

Such penalties are also likely to create an adversarial relationship between the Ministry of the Environment and the regulated community. One of the strengths of Ontario's current environmental regime is the effective working relationship

that the MOE enjoys with the regulated community. A more adversarial relationship will undermine this important collaboration and encourage a more adversarial approach to environmental matters to the detriment of effective, timely environmental actions. Finally, the suggestion that the government wishes to limit the application to larger industrial organizations raises serious concerns about equity. All organizations should be treated equally under the law with respect to contraventions of legal requirements.

In summary, while CME and its members strongly support measures to protect Ontario's environment, even the most environmentally responsible companies are disturbed by this legislation primarily for these reasons:

1. The uncertainty of the new test in the Environmental Protection Act for prohibited discharges to the environment being that "may cause an adverse effect";
2. The expansion of the application of the Ontario Water Resources Act to discharges that "may" enter water;
3. The new environmental penalties which eliminate due diligence as a defence and are absolute liability offences;
4. The reverse onus in respect of discharges for appeals to the Tribunal; and,
5. The lack of clarity around the elements of the offence to be proved by the Crown for director and officer liability given the potential for fines for individuals of up to \$4,000,000 per day and jail terms of up to five years.

CME understands and supports the need to protect both Ontario's environment and its economy. We are interested in working with the MOE to develop legislation that will achieve both of these objectives.

Yours truly,

Nancy Coulas
Director, Environmental Policy

cc: The Hon. Minister Dombrowsky
The Hon. Minister Cordiano
The Hon. Minister Sorbara