

Canadian Manufacturers & Exporters
Presentation to the Committee on the Legislative Assembly of Ontario
May 16, 2005
On
Bill 133, Environmental Enforcement Statute Law Amendment Act

Canadian Manufacturers & Exporters is Canada's largest trade and industry association. Its mandate is to promote the competitiveness of Canadian manufacturers and enable the success of Canadian goods and services exporters in markets around the world.

CME's membership is drawn from all sectors of Canada's manufacturing and exporting community and from all provinces across the country. The association represents Canada's leading global enterprises and more than 85% of CME's members are small- and medium-sized enterprises. Together, CME's membership accounts for an estimated 75% of total manufacturing production and 90% of Canada's exports. Ontario accounts for 51% of Canada's total manufacturing output.

CME members are responsible corporate citizens that contribute to the well-being of the communities in which they are located. CME is committed to the principle that if you pollute, you should pay the costs of response and restoration of the environment. CME

members respect and comply with the laws of Ontario and of Canada and as employers, workers and residents of the communities in which they are located, strongly support good environmental stewardship

Bill 133 was introduced with very limited consultation and, perhaps in part as a result, raises a number of very serious concerns:

- The legislation as drafted applies to everyone, with the environmental penalty provisions applying to persons engaged in business activities described in the regulations and persons holding an environmental approval and their directors, officers, employees and agents. It has been said that the intent is to apply to MISA regulated companies. If this is the intent, it would perhaps be more appropriate to amend the regulations currently governing MISA regulated companies. The legislation as drafted should be clearly consistent with the intended scope.
- The legislation as worded ignores long-established principles of good governance and denies citizens the type of fair treatment they have a right to expect in a democracy.
- The bill as currently worded may have the inadvertent consequences of:
 - encouraging companies to move jobs and investment from Ontario into other jurisdictions where there is greater certainty as to the legislative requirements; and
 - undermining the effective working relationship between regulators and industry and encouraging industry to focus more on protecting

themselves from legal liability than on good environmental stewardship practices.

CME members will continue to be good corporate citizens. However, the current drafting of Bill 133 is so unclear in terms of the requirements that it will be extremely difficult for any company, even with the best of intentions, to be sure that it is in compliance. Without major improvements, this law will therefore be a major barrier to new investment by manufacturers in Ontario and will negatively impact fragile, existing investments.

For these reasons, the Committee must support amendments to Bill 133 to promote certainty, fairness and robust compliance to Ontario's environmental laws that address the following concerns:

Director and Officer Provisions - The potential scope of liability for directors and officers is greatly expanded in Bill 133. The reverse onus placed on directors and officers to prove they have complied as compared to the current regime is unreasonable and unfair and will serve as a barrier for Ontario companies to obtaining the most qualified officers and directors for their board of directors. Further, from a practical perspective, it is unclear what directors and officers should do differently. To create greater certainty and to improve environmental protection, including addressing the concern that companies do not have adequate spill plans in place, CME recommends that the director and officer provisions focus on requiring directors and officers ensure that

the organization establish environmental policies and programs, including where applicable, a spills response plan.

Threshold Change of "May" vs. "Likely". The proposed new threshold in Bill 133, the absolute prohibition applicable to every person, despite any other provision in the Act or regulations, against any discharge of a contaminant is subjective, unattainable (i.e. both individuals and companies carrying out currently legal activities such as burning logs in a fireplace or operating in accordance with the terms of an approval may be out of compliance), and unfair in that quasi-criminal proceedings should not be taken against an organization or individuals where there "may" be an environmental impact. Quasi-criminal proceedings are very serious proceedings for both individuals and organizations and should not be used unless there is at least the likelihood of an adverse environmental impact. Environmental legislation that abandons the use of science and measurement and instead proposes to substitute with subjective judgments creates a regulatory regime with an unreasonable level of uncertainty and unpredictability as to what is and what is not an offense.

As applied to spill and emissions reporting, the reduced threshold will significantly increase the number of reportable incidents by including incidents that "may" or may not have an adverse environmental impact, an unnecessary burden on industry and the government. Both industry and government resources, should be clearly focused on spills that have or are likely to have an adverse environmental impact. This issue cannot

be fixed in regulations and therefore, must be dealt with by this Committee as an amendment to Bill 133.

Environmental Penalties. Environmental Penalties give the Ministry of the Environment the authority to directly and quickly impose penalties on violators. While CME supports rapid and effective environmental enforcement, CME has several concerns in respect of the Environmental Penalties section of Bill 133 and believes that the Committee should support amendments to the Bill's Environmental Penalties provisions. CME's concerns include the following:

- The intent with respect to the scope and implementation of Environmental Penalties is not clear from the legislation. CME believes that the government should use regulation only in instances that have been clearly envisaged by the legislature and that these regulations should be drafted and seen by the public prior to the passage of Bill 133. To create certainty and facilitate robust compliance, the scope needs to be clarified to be specific to spills into water which "cause or are likely to cause" an adverse effect.
- CME is adamantly opposed to the requirement that Environmental Penalties be absolute liability offences. The Supreme Court of Canada in *R. v. Sault Ste. Marie (City)* established "strict liability" offences on the basis that:

"If a person is already taking every reasonable precautionary measure, is he likely to take additional measures,

knowing that however much care he takes, it will not serve as a defence in the event of a breach?"

The defence of due diligence rewards and encourages companies to put in place responsible environmental practices. The proposal to eliminate due diligence as a defence is based on American law which is far more prescriptive than Canadian law in its nature and ignores the Canadian legal heritage of cases such as the Sault Ste. Marie case. Due Diligence as a defence is well established in case law in all Canadian jurisdictions, including Ontario. There would not appear to be any evidence that the American way is the more effective way.

- As written in Bill 133, an MOE “officer” (i.e. field staff) has the power to issue an Environmental Penalty of up to 100,000 dollars per day for corporations. To ensure that such significant penalties are imposed after appropriate review for consistency and to maintain effective working relationships with the local abatement officer, CME strongly supports an amendment to the Bill that would ensure that an Environmental Penalty would be issued only by at least Director-level or higher MOE staff.
- Environmental Penalties should not be levied on employees, officers, contractors nor agents of a company, but only on the company itself. Placing a penalty on an employee, would be extremely punitive as there are extremely limited appeal rights for such penalties to a court, potentially violating the fundamental rights to due process enjoyed by all Ontarians. These penalties may only be appealed to a court with respect to question of law. Further, this would have a significant impact on the ability to hire engineers and environmental managers in Ontario.

Environmental engineers will not wish to accept work under conditions where they risk having a fine imposed that could destroy their families' finances. CME supports making an amendment to the Bill which would ensure that company officials or employees would not be subject to Environmental Penalties.

- CME supports a cap on the maximum Environmental Penalty payable by companies, such as \$20,000 and there should not be Environmental Penalties for individuals. Where the offence is more serious, a prosecution is the appropriate enforcement tool, not an environmental penalty. In addition, there should be a one-year limitation period for the application of Penalties.

CME supports sustainable, effective environmental laws and effective enforcement of those laws. CME supports the creation of a Community Clean Up Fund provided that the funds are used specifically to deal with community spill response and cleanup costs. The administrative costs for the fund need to be minimized, funds must be delivered in a timely fashion, and the scope of the fund (how it is spent) must be clearly outlined. With respect to *Cost Recovery Orders*, more detail is required as to who would get compensation. We would need to ensure that liability is not unlimited and that MOE cannot charge a company under both Cost Recovery Orders and Environmental Penalties (S. 99.1, S. 100.1). CME recommends that the regulation that appears to be intended to govern what is compensable be released for public comment prior to the passage of Bill 133.

In the time available, we have only been able to touch upon our key concerns with respect to the bill as it is currently worded. There are many other improvements that must also be made if the bill is to proceed, and we urge the committee to ensure that the Bill is amended in ways that will make it both more effective and more fair. We have heard in remarks made by the Minister of the Environment on May 12th, 2005 that she intends to table amendments to Bill 133 prior to second reading. We urge the Government of Ontario to table these amendments immediately for public consideration prior to this Committee completing its work on Bill 133.

All Ontarians, both as individuals and as members of organizations, have a responsibility to preserve and enhance Ontario's environment for future generations. Ontario's manufacturers pledge ourselves to working with all partners, including government, to encourage good stewardship of our air, lands and water. In turn, we ask this Committee and the Legislature of Ontario to ensure that Bill 133 reflects the respect for basic rights and sound public policy that every Ontarian has a right to expect of our government.

We are pleased to have this opportunity to provide our input to the Committee, and hope that our input will be reflected in timely amendments to the legislation.