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BILL 89: INTERVENTION STRATEGIES REFINEMENT AND REINFORCEMENT FOR THE PROTECTION OF THE ENVIRONMENT

BY OUR ENVIRONMENTAL LAW GROUP

November 2011 — On October 5, 2011, Bill 89 entitled “*An Act to Amend the Environment Quality Act in order to Reinforce Compliance*” (the “**Bill**”) was sanctioned, reinforcing compliance with the *Environment Quality Act* (“**EQA**”). The EQA is a statute of public order that aims to protect the health and well-being of the population as well as of the environment, by monitoring industrial and commercial operations.

Bill 89 establishes three main measures to reinforce the EQA: i) the reinforcement of certain penal provisions, including regarding directors and officers; ii) the reinforcement of the powers of the Minister of Sustainable Development, Environment and Parks (“**Minister**”); and iii) the establishment of an administrative penalty system. Several sections of this Bill came into force on November 4, 2011.

PENAL SANCTIONS: HEAVIER FINES AND IMPRISONMENT AS OF NOVEMBER 4, 2011

Amount of the fines: As of November 4, 2011, the fines that could be imposed by Courts on persons convicted of an offence have been substantially increased. The fines will vary depending on the nature of the breach and the amount will vary between \$1,000 and \$1,000,000 per day for an individual, and between \$3,000 and \$6,000,000 per day for a company. For example, a business that failed, before November 4, 2011, to comply with the standards pertaining to the discharge of contaminants committed an offence and was liable to a fine of up to \$250,000 per day for a first offence. Since November 4, 2011, such

breach of the EQA may result in a fine of \$30,000 to \$6,000,000 per day for the said business. Similarly, operating a facility without required authorization constitutes an offence and renders the offender liable to a fine of \$15,000 to \$3,000,000 per day, while the amount of the fine for the same offence varied between \$1,800 and \$120,000 in the case of a first offence prior to November 4, 2011.

In the case of subsequent offences, the fines are now much harsher than they were prior to November 4, 2011. The amount of the fines is doubled for the first subsequent offence and tripled for any other subsequent offence.

New tools for judges: Since November 4, 2011, judges may take into account aggravating factors determined by the Bill to impose heavier penalty on offenders if circumstances warrant it. Such aggravating factors include the seriousness of the harm to human health, the intentional nature of the offence, the toxic nature of the substances involved in the offence, etc. Since the guidelines are more precise, the Courts are likely to be more inclined to impose harsher penalties.

Moreover, judges:

- are granted ordinance powers in regard to convicted offenders. For example, a judge may henceforth order that an offender establish a pollution prevention plan or an environmental emergency plan, carry out follow-up studies on the environmental impact of the activities carried on by the offender or pay a sum of money to a person or body designated by the judge to carry out such studies, provide security or consign a sum of money to guarantee performance of those obligations; and
- can, upon application by the prosecutor, which is attached to the statement of offence, levy against the offender, in addition to any other penalty, an additional fine in an amount equal to the amount of the monetary benefit derived by or accrued to the person as a result of the commission of the offence, notwithstanding any maximum fine imposed upon him.

Imprisonment: In addition to the fines, imprisonment for a period of up to three (3) years for a first offence could be required depending on the nature of the offense, compared with the maximum prison sentence of 18 months applicable prior to November 4, 2011. The maximum prison sentence is increased to five (5) years less one (1) day for any subsequent offence.

Director and officer: Prior to November 4, 2011, a director or officer of a business that caused the discharge of a contaminant into the environment committed an offence and was liable to a fine of no less than \$2,000 per day and no more than \$20,000 per day in the event of a first offence and/or to imprisonment for a maximum term of one (1) year. Since November 4, 2011, the directors and officers of a business could be liable to twice the fines set out for an individual for the same offence. Returning to our example of a director causing a business to discharge a contaminant into the environment, said director is now liable to a fine of up to \$2,000,000 per day and/or to imprisonment for a maximum term of three (3) years. For an offence such as non-compliance with a certificate of authorization, the maximum penalty for directors and officers is \$500,000 per day.

A director or officer of a business that commits an offence pursuant to the EQA shall henceforth be deemed to have committed the offence personally unless the

director and/or officer establishes that he/she exercised due diligence and took all necessary precautions to prevent such an offence. One cannot help but to anticipate that proceedings against directors and officers shall be increasingly frequent. Directors and officers shall also ensure that such an effective environmental management system allowing to monitor compliance with environmental standards is in place for the company they run if they want to be able to demonstrate that they have shown due diligence.

Similarly, whoever does or omits to do something in order to assist a person or a municipality to commit an offence under the EQA, or advises, encourages or incites a person or a municipality to commit such an offence, is considered to have committed the offence.

Prescription: Let us recall that prescription is a means, among others, by which one can be released from the performance of a duty or an obligation by the passage of time. Since November 4, 2011, the prescription of penal sanctions applicable the breach of a provision of the EQA is of five (5) years from the date of the offence. However, this delay will be longer in some cases, since it will be calculated from the date of the actual knowledge of the offence by the authorities instead of the date of the offense. The prescription delay will be of two (2) years from the date in which the inspection or investigation that led to the discovery of the offence was begun in the case of i) false representations, ii) an offence related to hazardous materials, and iii) an offence related to the discharge of contaminants into the environment. The increase of the limitation period should lead businesses as well as their directors and officers to review their internal document retention policy to ensure that they will have access to all the necessary information in order to provide a full defense in response to potential recourses under the EQA.

PROCEDURES TO ENSURE COMPLIANCE WITH THE EQA: SINCE NOVEMBER 4, 2011

Since November 4, 2011, the Minister has the following powers:

- 1) the power to order a person or municipality to cease or to limit to the extent determined by the Minister for a maximum period of 30 days, any work, construction or activity that contravenes the EQA, if the Minister believes that such work, construction or

activity contravening the EQA can cause serious harm or damage or risk causing serious harm or damage to human health or the environment. The ordinance may be extended for a maximum period of 60 days;

- 2) the power to order the person or municipality that conducts the work or the construction or carries activities in contravention of the EQA to take the measures required to prevent or reduce the harm or damage or risk of harm or damage.

The Government or the Minister may refuse to issue, renew, amend, suspend or revoke any type of authorizations granted under the EQA in certain cases as determined by Bill 89. For example, the Minister could suspend an authorization certificate if:

- 1) a company has defaulted on payment of an amount due under the EQA;
- 2) if a director, officer or shareholder of a company has been convicted of i) an offence under the EQA in the last two years or ii) an offense to a fiscal law in the last five years;
- 3) if a director, officer or shareholder of a company has been the director, officer or shareholder of another company that has been convicted of i) an offence under the EQA in the last two years or ii) of an offense to a fiscal law in the last five years.

Consequently, the application for any type of authorization or for the renewal of such authorization will require additional information regarding the applying company and its directors, officers or shareholders to be transmitted to the Ministry or to the Quebec Government. Note that the term “shareholder” is defined as a natural person who directly or indirectly holds shares that carry 20% or more of the voting rights of the said company that is not a reporting issuer under the *Securities Act*. Hence, the person who files an application to obtain or renew an authorization certificate will now have to produce, as a delivery requirement, any statement or information required by the Government or the Minister and necessary for that purpose, including the penal or criminal offenses for which the company or one of its directors, officers or shareholders has been convicted.

ADMINISTRATIVE PENALTIES: AS OF FEBRUARY 1, 2012

Distinction with penal sanctions: Bill 89 sets out new rules that will henceforth allow inspectors designated by the Minister to assess administrative penalties by notice of claim against persons (legal and natural) or municipalities that fail to comply with certain provisions of the EQA. These administrative penalties will enter into force as of February 1, 2012. To that end, the Minister will develop a public general framework for applying such administrative penalties.

These penalties resemble criminal fines, but are imposed by governmental authorities as opposed to being determined by a Court following judicial proceedings. They are subject to administrative review, and, as the case may be, may be contested before the Administrative Tribunal of Quebec. The implementation of administrative penalties shall, therefore, vest inspectors with the power of immediate coercion over offenders who have received a notice of non-compliance whereas before November 4, 2011, offenders would generally get away with a warning only.

An administrative penalty cannot be notified to a person when a statement of offense has previously been delivered for the same day and based on the same facts. However, the opposite is possible.

Penalties Amounts: Penalties will vary, depending on the nature of the breach, between \$250 and \$2,000 per day for an individual, and between \$1,000 and \$10,000 per day for a business. For instance, an administrative penalty of \$2,500 per day may be given to a business that does not comply with its certificate of authorization. As well, a business that releases a contaminant into the environment in greater quantity or concentration than acceptable norms may be liable to a penalty of \$10,000 per day. It is important to note that Bill 89 provides for the possibility to request the review of any decision imposing an administrative penalty.

Directors and officers: If a business fails to pay the administrative penalty assessed against it, the Minister may claim such amount from the directors and officers of said business. These directors and officers shall be held solidarily liable for the payment unless they demonstrate that they exercised due care and diligence to prevent the failure that gave rise to the penalty.

Prescription: By introducing administrative penalties, Bill 89 has also established the prescription delay for such penalties. Therefore, the prescription of administrative penalties is of two (2) years following the date of non-compliance, subject to certain exceptions set out in the Bill, in particular in the case of i) false representations; ii) an offense related to hazardous materials; or iii) an offense related to the discharge of contaminants into the environment, in which cases the administrative penalty may be levied within two (2) years following the date of commencement of the inspection or investigation that led to the discovery of the breach.

PUBLIC NATURE OF INFORMATION

As of November 4, 2011, the Minister shall be required to keep a record of information related to administrative penalties and penal sanctions imposed on persons, both legal and natural, or on municipalities pursuant to the EQA. The information contained in this register shall be public.

The coming into force of the Bill sheds new light on the question of EQA standards compliance. Thus, any person engaged in activities subject to the EQA, including in particular directors, officers and shareholders, will have to be able to assess and ensure compliance with applicable standards. Failure to do so will result in various measures that can be implemented by authorities, including an increase in criminal penalties, administrative monetary penalties and even revocation of any environmental authorization required to maintain business operations.

The new rules thus remind us of the importance of establishing and maintaining an effective environmental management system to monitor and assess regulatory compliance and, when required, to make the necessary corrections as soon as possible.

Heenan Blaikie offices

Montreal	514 846.1212
Toronto	416 360.6336
Vancouver	604 669.0011
Québec	418 524.5131
Calgary	403 232.8223
Ottawa	613 236.1668
Sherbrooke	819 346.5058
Trois-Rivières	819 373.7000
Victoria	250 381.9321
Paris	+33 (0)1 40 69 26 50
Singapore	+65 6221 3590

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Heenan Blaikie