

## Environmental Liability and Due Diligence for Directors Pursuant to the Environmental Protection Act and the Ontario Water Resources Act.

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### *Liability*

#### (i) Environmental Protection Act

Generally a director or officer is guilty of an offence under the Environmental Protection Act if he or she failed to prevent the corporation or failed to take all reasonable care to prevent the corporation from causing or permitting the discharge of a contaminant, fails to notify the Minister of the discharge of a contaminant in contravention of the Act, contravening ss. 27 (Certificates of Approval), 40 or 41 in respect of hauled liquid industrial waste or hazardous waste, contravening ss 93 (restoration) or 184 (compliance with investigations), failing to install, maintain, operate, replace or alter any equipment or other thing in contravention of certificate of approval; otherwise contravening an order under the Act [ss. 194(1) and (2)]

#### (ii) Ontario Water Resources Act

Generally a director or officer is guilty of an offence under the Ontario Water Resources Act if he or she failed to prevent the corporation from causing or permitting the discharge of any material in contravention of this Act, or license, permit or approval under this Act, failing to notify the Minister of the discharge of any material in contravention of this Act, or license or permit, contravening s. 98 (obstruction), contravening an order, direction, notice or report under this Act.

### *Defence*

The defence available to directors and officers has generally been described as a defence of due diligence and is as follows:

“Directors and officers will not be held to be in breach of the duty of care...if they act prudently and on a reasonably informed basis. The decision they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.”

### *Establishing Due Diligence Generally*

In *R. v. Bata Industries Ltd.* the court stated the general proposition that the defence of due diligence requires proof that the directors *established a proper system to prevent commission of the offence and took all reasonable steps to ensure the effective*

*operation of the system.* More specifically, the court held that in order to establish “due diligence”, directors will be required as a minimum standard:

1. To ensure that a pollution prevention “system” is in place, including regular supervision or inspection and improvement in business methods.
2. To ensure that corporate officers have been instructed:
  - (a) to set up a system sufficient within the terms and practices of the industry to ensure compliance with environmental laws;
  - (b) to report back regularly to the board of directors on the operation of the system; and
  - (c) to report any substantial non-compliance to the board in a timely manner.
3. To review the environmental reports provided by officers (directors may place *reasonable* reliance on reports provided by corporate officers, consultants, legal counsel and other informed parties).
4. To follow up and substantiate that officers are addressing properly environmental concerns brought to their attention by government agencies or other concerned parties, including employees and co-op members.
5. To be aware of the standards for the warehouse industry and other industries that deal with similar environmental pollutants and risks.
6. To react immediately and personally when they have notice that the system has failed.

#### *Establishing Due Diligence Specifically*

We would be pleased to assist in establishing specific checklists for specific potentially environmentally hazardous aspects of your business and to assist in setting up a system specific to such identified potentially environmentally hazardous activities.