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Thursday 12 May 2005

Standing committee on the Legislative Assembly

Environmental Enforcement Statute Law Amendment Act, 2005

Chair: Bob Delaney
Clerk: Douglas Arnott

Assemblée législative de l'Ontario

Première session, 38e législature

Journal des débats (Hansard)

Jeudi 12 mai 2005

Comité permanent de l'Assemblée législative

Loi de 2005 modifiant des lois sur l'environnement en ce qui concerne l'exécution

Président : Bob Delaney
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON THE LEGISLATIVE ASSEMBLY

COMITÉ PERMANENT DE L'ASSEMBLÉE LÉGISLATIVE

Thursday 12 May 2005

Jeudi 12 mai 2005

The committee met at 1605 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr. Bob Delaney): Good afternoon, everyone. This is the standing committee on the Legislative Assembly. We're here today to consider Bill 133, the Environmental Enforcement Statute Law Amendment Act. Our first order of business is a report of the subcommittee. Mr. Wilkinson?

Mr. John Wilkinson (Perth–Middlesex): I refer to the revised proposal, the report of the subcommittee.

Your subcommittee on committee business met to consider the method of proceeding on Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters, and recommends the following:

(1) That the committee meet for the purpose of holding public hearings on Bill 133 at Queen's Park on the following dates:

—Thursday, May 12, 2005, from 4:00 p.m. to 6:00 p.m.; and

—Monday, May 16, 2005, from 9:00 a.m. to 12:00 noon and 4:00 p.m. to 6:00 p.m., subject to the authorization of the House. Mr. Chair, I can report that the House provided that authorization today, by unanimous consent.

(2) That the clerk of the committee post notice of hearings as soon as possible on the Ontario parliamentary channel and on the Internet.

(3) That the deadline for receipt of requests to appear be 5:00 p.m. on Thursday, May 5, 2005.

(4) That the Minister of the Environment be invited to appear before the committee at 4:00 p.m. on Thursday, May 12, 2005, for 15 minutes to make a presentation and answer questions from the three parties, followed by a five-minute statement by each of the three parties.

(5) That the length of presentations for other witnesses be 15 minutes for groups and 10 minutes for individuals.

(6) That the clerk of the committee distribute a list of potential witnesses received at the deadline for requests to each of the three parties by 10:00 a.m. on Friday, May 6, 2005.

(7) That, if demand exceeds availability of time, then the following procedures apply: (i) each party is to provide to the clerk of the committee a prioritized list of witnesses based on the committee clerk's list by 2:00 p.m. on Friday, May 6, 2005; and (ii) the scheduling of witnesses is to be done, to the extent possible, in rotation and is to be done on the following basis: A (government list), B (official opposition list), and C (third party list).

(8) That if all those who request to speak can be scheduled, the committee clerk, in consultation with the Chair, be authorized to schedule all interested parties and no party lists would be required.

(9) That the research officer provide background information on Bill 133 prior to the start of committee hearings, and a summary of presentations as soon as possible prior to the start of clause-by-clause consideration of the bill.

(10) That the deadline for written submissions be 5:00 p.m. on Monday, May 16, 2005.

(11) That proposed amendments to be moved during clause-by-clause consideration of the bill should be filed with the clerk of the committee by 5:00 p.m. on Tuesday, May 17, 2005.

(12) That clause-by-clause consideration of the bill be scheduled in Toronto on Thursday, May 19, 2005.

(13) That the clerk of the committee, in consultation with the Chair, be authorized prior to the adoption of the report of the subcommittee to commence making any preliminary arrangements to facilitate the committee's proceedings.

I move adoption of the subcommittee report.

The Chair: Mr. Wilkinson has moved adoption of the subcommittee report. All those in favour? Opposed? Carried.

ENVIRONMENTAL ENFORCEMENT STATUTE LAW AMENDMENT ACT, 2005

LOI DE 2005 MODIFIANT DES LOIS SUR L'ENVIRONNEMENT EN CE QUI CONCERNE L'EXÉCUTION

Consideration of Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters / Projet de loi 133, Loi modifiant la Loi sur la protection de l'environnement et la Loi sur les ressources en eau de l'Ontario en ce qui a trait à l'exécution et à d'autres questions.

STATEMENT BY THE MINISTER AND RESPONSES

The Chair: Our first deputation comes from the Minister of the Environment, the Honourable Leona Dombrowsky. Welcome, Minister. You have 15 minutes before us today.

Hon. Leona Dombrowsky (Minister of the Environment): Thank you very much, Mr. Chair. It is a pleasure for me to be here today. I look forward to the opportunity to ensure that Bill 133 is the best it can be for the people of Ontario.

Last October, the Premier announced our intention to introduce legislation to create environmental penalties. We have delivered on that promise with Bill 133. The government has one objective in Bill 133. It is one shared by the people of Ontario and those who care about our environment: We want to reduce the number of spills in Ontario.

Our laws that require polluters to report spills, clean up spills and compensate for losses caused by spills go a long way to providing sufficient reason for many companies to take the necessary steps to prevent spills. However, given the number of spills that still occur each year, it is also clear that threat of prosecution is not sufficient to inspire all companies to take the steps needed to prevent spills. More emphasis on spill prevention is required.

Each year, the ministry receives between 35,000 and 45,000 incident reports from the public. Of these, approximately 3,900 incidents in 2004 were classified as spills. Industrial facilities accounted for 1,062 of those spills. The companies that would be affected by environmental penalties accounted for almost 40% of reported industrial spills in 2004. However, when you consider the type of spills, these companies accounted for nearly 98%, by volume, of all reported liquid industrial spills in 2004. Given these statistics, you can see why we have used a risk-based approach to determine which sectors to target to get real environmental results more efficiently and effectively.

Ladies and gentlemen, I have maps available. The first map is with regard to industrial spills in Ontario communities in 2003-04, and the second map is with regard to spills in Ontario by MISA facilities in 2003-04.

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The current system sometimes leaves provincial and municipal taxpayers footing the bill for cleaning up the impact of the spills. We can do better.

Every spill is a failure. It may be a failure of planning or a failure to take the right precautionary measures. It may be a failure to comply with our environmental laws. Not every failure leads to a major crisis, but every failure can be addressed and prevented. That is what Bill 133 is designed to do.

We intend to improve our protection against environmental and human impacts, both in terms of encouraging companies to do more to prevent spills and to ensure fast, effective cleanup when mishaps do occur.

We have heard concerns about some aspects of Bill 133, and we have listened. Some of the concerns are about the structure of the new law: How will it be administered? Who will administer it? What can those who are penalized do if they seek to appeal? Other concerns are from those who say that we've not gone far enough, that we should be doing more to prevent spills rather than penalizing those who do spill.

Many of these concerns emerged through our consultations with stakeholders. We will hear more from stakeholders at these hearings as well, and I believe that at the end, they will be satisfied that the government has listened.

I will address the concerns here today and tell you how we propose to amend Bill 133. I will be tabling a number of motions to deal with these concerns through amendments to the bill, which will be going to the Legislature for second reading.

Bill 133 would increase the tools available to us to bring companies into compliance.

Environmental penalties complement our ongoing abatement, investigation and prosecution work. These environmental penalties are a fast, effective way to ensure that when you spill, you pay. Environmental penalties will encourage companies to take action to prevent spills and to clean up a spill right away. All money collected from penalties will go to a dedicated community cleanup fund and will be used for environmental cleanup purposes only. The maximum environmental penalty for corporations will be $100,000 per day.

Environmental penalties are administrative penalties, not fines. This is why there will be absolute liability for a spill, should one occur.

Environmental penalties are not a new concept. Civil or administrative penalties are a part of the law in the United States, under federal environmental protection laws like the Clean Air Act, and under state laws, and they exist in other Canadian jurisdictions. In fact, many countries around the world use civil penalties for effective environmental compliance and enforcement.

I have a third map. It indicates the states and the Canadian provinces that use environmental penalties. They would be the coloured jurisdictions on map 3. On this map, all jurisdictions in colour have issued environmental penalties.

If Bill 133 is passed, the government intends to introduce regulations that will ensure that environmental penalties apply to the Ontario facilities covered by the municipal-industrial strategy for abatement regulations.

Presently, there are 139 MISA facilities in Ontario. If passed, Bill 133 will give the ministry and municipalities new powers to seek cleanup recovery costs from companies responsible for spills. Again, this enshrines the principle, "You spill, you pay."

Since environmental penalties are administrative, if a company decides to appeal the penalty, the onus of proof will be on it to show that the spill did not have the potential to harm the environment.

There are those who will claim that the reverse onus provision is a new principle. Clearly, it is not. One of the

most common features of environmental protection laws is that when a company experiences an environmental incident that may endanger public health or the environment, it must report it to government authorities.

This bill's proposal that reverse onus applies to an appeal of an environmental penalty is the next logical step. If there is a spill at a company plant, then the company is in the best position to ensure that the spill is contained quickly, so that it does not violate environmental protection laws. The company can put in place the appropriate monitoring and contingency responses to ensure its discharges remain within legal limits. If the company wants to challenge a penalty that the government has imposed for a spill, then the company is best positioned to demonstrate why its spill did not break the law. We contend that it is good public policy to emphasize spill prevention and expedite the cleanup of a spill, to get it done and paid for as quickly as possible.

Let me outline the motions to amend Bill 133 that I will be proposing. Again, these emerged from our consultations with stakeholders. Our objective is to raise the bar on environmental protection; to have a law that will work better, be fair and, above all, be effective.

The first area of amendments deals with the clarification of some aspects of the bill. For example, to whom will environmental penalties be issued? If there is a spill, in what circumstances will an environmental penalty not be issued? Who can issue a penalty? What if a company tried to mitigate its spill or prevent it? Would such companies get a stiff penalty? I will move amendments to clarify these points. Let me go through them.

We will ensure that only a Ministry of the Environment director can impose an environmental penalty, not a provincial officer. We will clarify that environmental penalties shall only be imposed against the company and not against company officials or employees. The objective is to promote spill prevention and to ensure fast cleanup of spills, not to penalize individuals. A company that receives an environmental penalty will not have that penalty taken as an admission of guilt in a subsequent prosecution.

We will also draft regulations that will ensure that a company's actions to prevent, minimize or clean up a spill will be taken into account when a penalty is considered. While officials will not be penalized, corporate directors and officers still have the responsibility to ensure their corporations comply with the province's environmental protection laws. We will be introducing a motion that will require directors and officers to ensure that corporations satisfy their duty to notify the ministry of spills and to clean up after the spill.

I will also move to amend Bill 133 so it states clearly that a court shall consider the payment of an environmental penalty in determining the amount of a fine. In response to stakeholder comments, we plan to introduce a motion that will require those industries specified in regulations to prepare spill contingency prevention plans.

I hope that, in the time this committee meets, we will hear more constructive ideas from members and deputants. Together we will make Bill 133 a better law, providing better environmental protection for Ontarians. Ladies and gentlemen, spills do happen. If passed, Bill 133 will become law in Ontario, and it will be clear: You spill, you pay.

The Chair: We now have our opening statements from each of the parties.

Mr. Toby Barrett (Haldimand-Norfolk-Brant): Thank you, Minister, for that presentation to kick off the hearings. I appreciate hearing the direction you're putting forward with respect to a number of amendments to this piece of legislation. We have all had a considerable amount of time to work on that, I was saying to Mr. Marchese. You introduced the legislation last October 27, so we've had more than enough time to speak with people about this and about the concept of administrative or environmental penalties.

Also, in spite of the amendments you've described—you make mention of including a requirement for prevention plans; certainly I've heard that request in the Legislature—my concern remains to what extent this bill is useful, or I should say not useful, in the sense that it's only useful after the fact, after the spill has occurred. By taking your spill-and-bill approach, I'm concerned that, even with the amendments, the approach is limited in its effectiveness, because it remains virtually a stand-alone method of deterrence.

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I raise questions: Where is the coordinated, proactive approach to the prevention of such spills in the first place, the same kind of coordinated, proactive approach that was called for in your government's own IPAT report, the industrial pollution action team report, led by Dr. Heathcote?

You responded to that report in August last year. You indicated, "We will be developing an action plan on industrial pollution that will be like nothing my ministry has ever developed before." To date, the approach to Bill 133 seems to be pretty much same old, same old. We're going down the same road. Granted, there are some changes: higher, more immediate administrative penalties. I do consider this still a reactive, adversarial approach. I regret that. I feel it's heavy-handed. It seems to be stuck in the old school: the command-and-control approach to environmental issues.

Your news release on the IPAT report went on to say, "The Ontario government will act on the recommendations in the final report of the industrial pollution action team."

The Chair: Just to advise, you have about one minute left.

Mr. Barrett: We've had a chance to look at these recommendations. I've gone through the IPAT report. Certainly, very quickly, one can read the executive summary. The executive summary of that report does not mention environmental penalties. I am concerned. We know there are some lines further in the report calling for more effective penalties. I'm concerned this legislation ignores the vast majority of your own report, a report

calling for a much more comprehensive, cohesive, preventive approach—something beyond subtracting money, if you will, from the private sector.

I'm concerned that there does seem to be a disconnect. We had a report that called for a multi-pronged approach, contingency plans. It called for economic and other incentives to go beyond compliance. It called for a resolution of jurisdictional confusion. None of that's in the bill.

Mr. Rosario Marchese (Trinity–Spadina): Just for the interest of the committee and the members and the public, I'm not Marilyn Churley. It is obvious, isn't it? She's the critic; I'm not the critic for this. I'm filling in today. So to the rest of you, if I don't have a statement that might be as coherent as you would like, you'll understand why.

I only want to speak to the procedural elements of this that are a bit odd. Normally, we have second reading debate in the Legislature. It gives the critic and others an opportunity to speak to the bill: both its strengths and weaknesses. Then we come and listen to the various participants who are in favour of the bill or opposed to it. On the basis of that, we make amendments—the opposition and the government—and we move forward on the basis of what we hear.

The strangeness of this procedure is that the minister comes here and indicates that there will be a number of amendments in some areas—of course, we don't have a clue to what it is that we're responding to—and I find that particularly odd. I'm assuming that others in the public do, too. We don't have the amendments. We don't know what they are. We haven't heard from the deputants about their views to this bill and to the possible amendments that may be coming.

I just want to say for the record, I find it odd. I'm assuming the public finds it equally strange. Why the government has pursued this course versus the normal course is beyond my comprehension.

I put that for the record, eager to listen to the deputants.

The Chair: Thank you. Mr. Wilkinson.

Mr. Wilkinson: I might add that I understand where Mr. Marchese is coming from. Of course this is unique—

Mr. Marchese: Mr. Chair, sorry. For the record, isn't it the minister who takes the time of the official party? What are we doing?

Mr. Wilkinson: Not according to the subcommittee.

The Chair: She pretty much used her entire time. You've made your opening statement, as has Mr. Barrett, and it's Mr. Wilkinson's opening statement.

Mr. Marchese: I thought the minister normally speaks for the caucus. OK, that's fine.

Mr. Wilkinson: I know we're going to go with the subcommittee report, which all three parties agreed to, as to what we would be doing, which is why we started with that, Rosario.

What I find interesting and unique for me, as someone who did not know much about the environment prior to coming to this place, is the fascinating belief we have that we need to hear people. We have a forward-thinking piece of legislation that many people will argue—I'll actually bring this up as to what's happening with our neighbours to the south and with some of the other provinces that have been using environmental penalties and civil administrative penalties for many years now with, I believe, some great results.

What I find interesting about this process is that we have a government that's willing to listen to stakeholders. We introduced the bill last October. I say to the member for Trinity–Spadina that what has been happening over the last number of months is that there are many stakeholders, as we will learn over the next few days, and they have all come to the Ministry of the Environment. I've been pleased to take some of the meetings myself on behalf of the minister, so that we actually get a response from people.

They've come to us, and I think they've made many fine points, but we are here today because we don't have a closed-door system on this bill. Other people are coming here today to put on the record their concerns about the bill, about how to strengthen the bill, and their concerns about whether the bill is something they're opposed to. In a democracy we have to do that.

It reminds me of Bill 8 where we were transforming health care, where again we went out before second reading debate. It is an accepted parliamentary tradition and I think it's one where the government shows that it is willing to listen to people. I remember there were previous governments that always thought they had everything right and would come in and ram a bill through and use time allocation. Our government is different in what we're doing here.

I say to Mr. Barrett, my friend from Haldimand–Norfolk–Brant, that the coordination of spills prevention, the requirement that all of the MISA industry companies have spills prevention—I can't see what's wrong with that. As someone who lives in a community with his family, I think that industry should, let alone have a plan to mitigate it if there is a spill, which happens regrettably from time to time, have a plan to prevent it in the first place. Surely it is better to prevent the spill. This bill will say that, yes, it's a requirement now that if you want to be in this jurisdiction, we expect you to have a plan to prevent it.

I don't think it's the same old, same old, and I don't think we have taken an adversarial approach. If we had taken an adversarial approach, we wouldn't be sitting here today after six months of consultation, and now looking forward to a number of more days of consultation and going through the clause-by-clause process as proposed by the minister, and also other amendments that I'm sure the opposition parties and the government will want to bring forward. It's a nice, open, transparent system about changing and protecting our communities right here in the province of Ontario.

The Chair: Thank you, and thank you, Minister, for coming.

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ASSOCIATION OF POWER PRODUCERS OF ONTARIO

The Chair: Our first deputation this afternoon is the Association of Power Producers of Ontario, Mr. David Butters.

Please make yourself comfortable. Would you begin by stating your name for the purposes of Hansard. You have 15 minutes before us this afternoon. Any time you have left after your presentation will be divided equally among the three parties to ask you questions. The floor is yours. Please begin.

Mr. David Butters: My name is Dave Butters. I'm the president of the Association of Power Producers of Ontario. We appreciate the opportunity to appear today before this committee.

With me today is Elizabeth DeMarco of McLeod Dixon LLP. Lisa was a former prosecutor of environmental offences for the MOE legal services branch and is generally recognized as a Canadian expert on emissions trading. She represents a range of energy marketing and electricity generation clients, including cogeneration and green power companies, on power projects and emission matters and proceedings in Ontario and Canada. She has been our counsel in this matter.

This afternoon we'd like to discuss some aspects of Bill 133 that we believe may prove problematic in terms of Ontario's environmental and energy policy objectives. We've distributed copies of our speaking notes for your consideration.

First, a little bit about APPrO: APPrO is the collective voice of generators in Ontario, a non-profit organization representing more than 100 companies involved in the generation of electricity in Ontario. APPrO members produce power from cogeneration, hydroelectric, gas, coal, nuclear, wind energy, waste wood and other sources. Our members currently produce over 95% of the electricity made in Ontario, and include both investor and publicly owned generators.

Our mission is, "To promote the interests of electricity generators within a truly open and competitive power industry in Ontario."

APPrO members have a related long-standing commitment to both sustainable energy and environmental policy objectives. We are therefore concerned that, as written, the current provisions of Bill 133 may be counterproductive in realizing the government's energy and environmental policy objectives. This position is supported by an examination of a number of things: the energy policy context; the environmental policy context; the energy implications of increased director or officer liability; the environmental implications of catch-all absolute liability offences; and finally, simply, practical implications for electricity generators.

First, the energy policy context: Electricity is the very lifeblood of Ontario's economy. Without adequate, reliable and affordable supplies of electricity, the prosperity and quality of life we enjoy in this province would not be possible.

While Ontario currently has about 30,500 megawatts of generation capacity, between now and 2020, factoring in the growth of our economy, approximately 25,000 megawatts of electricity capacity is due for retirement or refurbishment. This includes the phase-out of all coal-fired generation by 2007.

This means that we have to mobilize very large amounts of capital from the private sector to replace this generation capacity to ensure Ontario's energy future. The government has kick-started this process over the past year through a series of RFPs for renewable and clean power as well as bilateral negotiations with Bruce Power, and our members have been very engaged in this.

We've responded to the government's urgent energy supply needs by, as I said, actively participating in these initiatives; however, this is only a beginning. Ontario's ability to draw its rightful share of North American energy investment rests in large part on the conditions perceived by investors that differentiate it from opportunities in other parts of Canada, the United States or even elsewhere, including Mexico, for example.

The environmental policy context: The Ministry of the Environment and the Ontario government have launched a number of policy initiatives in order to improve air and water quality in Ontario and have demonstrated a commitment to get tough with companies responsible for spills that damage the environment and compromise the health of Ontarians, through enhanced environmental inspections and enforcement of environmental laws. While APPrO is supportive of the objectives behind Bill 133, APPrO submits that the current wording of the bill is likely to have a number of unintended impacts that may frustrate the achievement of each of the government's energy and environmental policy objectives.

The basic issue is that, if enacted, Bill 133 will unduly increase the potential environmental liabilities and associated penalties faced by officers and directors of corporations managing Ontario generation facilities. Such liability would ensue regardless of whether the officer or director was duly diligent in discharging its management duties and appropriately delegating day-to-day environmental, health and safety matters to a responsible manager.

APPrO submits that this potential for personal liability, even in instances of appropriate delegation, is, first, far more onerous than good business standards require and out of line with the standards faced elsewhere by directors and officers of corporations that are interested in developing new Ontario energy supply; second, likely to detract from the requisite management functions of officers and directors by requiring hands-on, day-to-day involvement in environmental matters; third, likely to impact the coverage and costs associated with directors' and officers' insurance.

As a result, the proposed director and officer liability provisions will constitute a new and additional systemic barrier to the development of new electricity supply that

is additional to those experienced by power developers in other jurisdictions and contrary to the government's energy policy objectives.

APPrO supports the government's intention to ensure high-level corporate responsibility for environmental matters, but strongly recommends that the government ensure that the resulting standards imposed on corporate directors and officers are consistent with good business practices and allow for the individual protections of the law through the availability of a full due diligence defence.

APPrO appreciates the issues that have given rise to the environmental penalty provisions of Bill 133. However, APPrO submits that the breadth of the proposed environmental penalty provisions in Bill 133 is likely to result in further delays and legal challenges in the event that an environmental penalty, and the associated absolute liability, is imposed on a diligent defendant for a release that poses no serious risk to public safety.

The current environmental penalty provisions of Bill 133 would allow for an absolute liability offence to be imposed, even in situations where the environmental release is minor, despite the due diligence of responsible parties, and poses no serious risk to public safety. As a result, APPrO submits that the breadth of the proposed environmental penalty provisions is likely to result in numerous and lengthy court challenges. Such challenges are likely to delay rather than expedite the administration of environmental justice, and therefore frustrate the government's underlying policy objectives. APPrO therefore recommends that the government circumscribe the proposed application of the Bill 133 environmental penalty provisions to only those spills and releases that are avoidable and pose a serious risk to public safety.

Finally, practical implications for electricity generators: Bill 133 may also result in unintended impacts on electricity generators. For example, in circumstances where the electricity supply margin is constrained, such as peak winter and summer days, the independent electricity system operator, the IESO, may require an electricity generator to enter into reliability must-run contracts and produce additional electricity and associated emissions. Such a contract permits the IESO to call upon a generation facility to increase its output in order to maintain the reliability of the IESO-controlled grid whenever sufficient resources have not been offered into the IESO-administered markets. Often this will occur in high-risk or emergency operating states as experienced prior to and during the blackout of August 14, 2003.

Under the proposed bill, an electricity generator may be subject to absolute liability through an environmental penalty if it complies with the IESO must-run contract and supplies the emergency electricity prior to receiving a timely approval from the Ministry of Environment to exceed emission limits, as was the case in the blackout. In addition, it may face penalties and additional costs under Ontario's emissions trading regulations. The diligent electricity generator would therefore find itself in the position of facing unavoidable consequences and potential prosecution under either the electricity regime or the environmental regime set out in Bill 133.

Clearly, such a situation is not consistent with both the government's energy responsibilities and environmental objectives. While we welcome the minister's comments earlier, in conclusion, we would recommend that the government make two main changes to the bill in order to achieve both its energy and environment goals: first, that it limit the application of environmental penalties to sectors other than the electricity sector, which is already subject to additional environmental requirements and consequences under the electricity and emissions cap and trade regimes; and second, restrict the scope and application of absolute liability offences to situations where there is a serious risk to public safety.

That concludes our remarks. Thank you for the opportunity.

The Chair: Thank you for coming today. We will have time for one brief question from each caucus.

Mr. Barrett: Thank you, Mr. Butters and Ms. DeMarco. You make mention of individual liability. I know there has been some discussion in the media about an employee or a worker who would end up with a $20,000 fine, perhaps in a situation where they were following the rules, following all the guidelines and they were operating equipment that did have a sound maintenance program. One of my questions is, how does this really advance environmental protection? I can see the downside of this as well. If somebody was concerned about that kind of thing, they're going to take other measures to save their own hide. How would this really work in the workplace?

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Mr. Butters: I'm not sure I can answer the question of how it would work in the workplace. I think the issue is that in going forward, investors in electricity generation projects would look at this the way it's currently construed and say, "That's a risk that I can't quantify, and I'm going to have to figure out how to build that into my project costs." Those project costs would then therefore get passed through into other costs, and ratepayers and taxpayers will wind up paying for that. I think that's the issue we want to focus on.

Mr. Marchese: Mr. Butters, do I understand correctly? What you're saying is that the electricity sector should not be subject to these penalties. Is that correct?

Mr. Butters: What we're saying is that the electricity sector is already subject to a number of environmental and emission—

Mr. Marchese: What are they again?

Ms. Butters: I'll ask Ms. DeMarco to speak to that.

Ms. Elizabeth DeMarco: A number of penalties through regulation 397/01, as well as their operating permits, certificates of approvals and their environmental assessment requirements. Fuel-specific regulations also apply to certain electricity generators; for example, the nuclear industry is extraordinarily regulated.

Mr. Marchese: What kind of penalties would you be subject to, therefore, if something went wrong?

Ms. DeMarco: They are subject to penalties pursuant to contravention of a regulation under the Environmental Protection Act, so the same penalties would apply. Let me give you an example. Under regulation 397, if an electricity generator did not comply with the obligations, if it contravened them, it would be subject to the penalties under subsection 186(3) of the Environmental Protection Act, which are quite significant under the proposed amendments. So there are a host of avenues.

Mr. Wilkinson: Thanks for coming. I appreciate that, David and Elizabeth. I'm just looking at some material provided to me by the Ministry of the Environment. My understanding is that in 2003 or 2004, looking at your members on electricity power generating who are MISA sector companies, there were no spills at Atikokan, Bruce Bulk Steam, Bruce Nuclear Power Development and Thunder Bay, but there were spills at Bruce A and B, Darlington, Lakeview, Lennox, Nanticoke, Lambton and Pickering.

Of those companies, some of them, particularly the nuclear facilities, are required to have spill contingency plans, and I can understand that. Some of them also have spill prevention plans. One of the things we're talking about in this bill, of course, is having spill prevention plans and, obviously, spill contingency plans for everybody. Some of them are required because of their certificate of approval from the MOE, and some of them are voluntary. I guess my question, as a business person, is, why would we not want to have—for example, in your sector—just a raising of the bar for everybody? Because some of the companies don't seem to have to have spill prevention plans; some do; some have spill contingency; some don't; some have to do it; some don't.

It strikes me that, for the good of the environment, it costs us money when there's a spill. It may reduce your costs, but it costs the community money. This kind of patchwork is the thing that strikes me.

The Chair: A brief answer, please.

Ms. DeMarco: There's a large distinction between the obligation to have a spill prevention plan and the application of an environmental penalty. Certainly, in no way, shape or form, should you take APPrO's comments as not supporting the environmental objectives of having a spill prevention plan. It's certainly a strong objective and a good portion of the bill. But the contrast is, in the application of environmental penalties, subsection 182.1(13) allows for certain sectors to be named or certain entities to be named. It's our submission that certainly the electricity sector should be named as not having the environmental penalties applicable to it.

The Chair: Thank you for appearing before us with your submission today.

COALITION FOR A SUSTAINABLE ENVIRONMENT

The Chair: The Coalition for a Sustainable Environment: the Honourable Perrin Beatty.

Mr. Beatty, thank you for appearing before us today. I'm sure you're familiar with the process, but let's go through it one more time. You have 15 minutes to make your submission. If you leave any time remaining, it'll be divided among the parties for questions. Before you start, please identify yourself and anyone else who will be speaking for the purposes of Hansard. Go ahead.

Mr. David Surplis: Thanks, Mr. Chairman. My name is David Surplis. I'm the past president of the Council of Ontario Construction Associations. As Mr. Arnott well knows, I've been here many dozens of times over the years. I realize the Leg Assembly doesn't give out frequent deputant flying points or miles, but maybe we can talk about that another time.

I'm actually here to tell you that, probably because of all that experience, I was chosen as chairman of this ad hoc coalition to examine Bill 133 and its implications.

I'm happy to introduce my good friend the Honourable Perrin Beatty, who has had more than 30 years of offering his services, his expertise, his knowledge in the service of Ontarians and Canadians, most recently as president of the Canadian Manufacturers and Exporters. He took a very keen interest in the ramifications and perhaps unintended consequences of Bill 133, and has come to our assistance and is going to take you through our submission, we hope.

Hon. Perrin Beatty: Thank you very much, Mr. Chairman and members of the committee. Could I start by expressing my appreciation to all parties in the Legislature for the all-party decision to refer this matter to committee prior to second reading, which allows us to have full public discussions of the provisions in the bill and to make improvements to the bill before it proceeds further. Also, may I express my appreciation to the committee for seeing us today.

We're here representing more than 40 associations of Ontario's major employers. These associations, in turn, represent tens of thousands of companies and more than a million workers.

We'd like to make it clear that the coalition fully supports measures to improve the environment. All of our members are fully committed to sustainable environmental management and firmly support the highest standard of care to protect our environment. Our members know that benefits flow to all of society when we practise principled stewardship of our resources. All of our members strongly agree that those who damage the environment should bear the costs of response, abatement and remediation. A great many of our member companies are ISO-registered, and that designation is only awarded and renewed to those who demonstrate fair, ethical and sound business practices including, of course, principles of stewardship.

Turning to the bill itself, we welcome the minister's statement that the government will propose amendments. Because we have not had an opportunity to study the wording of the amendments, our comments will refer to the bill as it is currently drafted. We would, however, hope that the minister would make available to the public and to the members of the committee, at the earliest

opportunity, the specific wording of the amendments and that we would be given the opportunity to study those amendments, to look at their implications and to make further written submissions to the committee in response to those proposals.

It's instructive to note that when the bill was posted under the Environmental Bill of Rights process for comment, there were 164 responses, of which 157 expressed significant concerns about various parts of the bill, including civil liberties issues, and mentioned the complete lack of meaningful prior consultation. As a group, we petitioned the government for a hearing on the points where we felt that improvements could be made. While we recognize that elements of the bill are embodied in other legislation, this combining of these elements into one act has not been fully understood or adequately explained to the people of Ontario.

In the first place, our major complaint was that there has been little explanation of the real intent of the legislation that is so broad in scope. It has been said that its aim, through regulation, is to force MISA-regulated facilities to pay up, and quickly, whenever there is a spill. But if that is the intent of the bill, we wondered why its provisions are so sweeping and potentially include everyone in Ontario, including private citizens. Why were the powers under existing legislation not chosen for enhancement and enforcement?

We want to talk today about potential amendments, but we also want to ask first why a single class of facilities—MISA facilities—is being singled out when other entities have equal or greater capacity to cause damage to the environment. The targeting of MISA facilities, which are already heavily regulated, is of grave concern when other entities are to be exempt. We are left to wonder as to how this approach will improve the protection of the environment from all potential incidents. It would appear that very different standards are being expected from the private sector than from the public sector, without relevance to the ability to pollute.

In addition, it should be noted that Bill 133, were it in place, would not have addressed the recent incident that affected drinking water in Stratford, and it certainly would not have had any effect in Walkerton. Surely we all believe in the principle of equal application of the law.

Finally—and this is of particular importance to me—we would stress that, as currently worded, the bill gives the government the ability to include or exclude whole classes of citizens and organizations at the stroke of a pen. We believe that the Legislature of Ontario has a clear responsibility to defend the rights of Ontarians to be free of arbitrary and capricious actions, by limiting the regulation-making authority contained in the bill to those purposes that the government has explained and justified at the time that the bill is passed.

1650

One publicly stated reason for creating environmental penalties is the relative slowness of court action. There's a need, we're told, to be swift afoot. Apart from the obvious question—why not address the slowness of the court process?—we accept, although we're disappointed, that the government has decided that EPs are the answer, so we have a number of suggestions to improve their administration.

Given that the bill, as written, would allow EPs to be calculated using direct spill costs as well as punitive charges, it's important that the government official applying an EP take into account due diligence considerations and remove the reverse onus provision as it currently applies to EPs. It would be a miscarriage of justice if a company were forced to pay a substantial EP only to be found not guilty in a court of law on the grounds that the company took all reasonable measures to prevent a spill and, in fact, may not even have been guilty of the spill at all.

The government official must have the ability to take into account the incident-specific factors before taking the very serious action of levying an EP. If an EP is to be levied in a spill incident, we believe that only someone at the director level or higher should be authorized to issue EPs, to ensure that considerations for due diligence and evidence of guilt can be taken into account. Such a provision would supply senior government oversight to a critical decision and would avoid the situation in which field staff would act as police, prosecutor and judge, a situation we believe would seriously undermine cooperative interaction with ministry staff.

We're also concerned that EPs are to be levied on employees and officers of a company. This proposal is patently unfair to employees when it is the company that has the full responsibility for its assets and actions. We believe that the possibility of serving directors, employees and contractors with EPs should be removed by amendment.

We're also very concerned that punitive EPs would place a company in double jeopardy. Under the bill's proposals, a company could sustain EPs far in excess of the costs of response, abatement and remediation, and then face equally huge penalties via charges filed under the Environmental Protection Act or the Ontario Water Resources Act. Under that provision, a company would be penalized twice for the same infraction. Such a provision is completely unfair and unwarranted. We suggest that if EPs are to be the chosen vehicle, then they should follow the New Jersey model and allow subsequent fines, if any, to be offset by EPs previously paid in full.

There's a widespread concern regarding the loss of due diligence as a defence. Mr. Chairman, you'll be well aware that due diligence is a guiding principle for companies that want to succeed. There's also a long-standing history of it being recognized in case law throughout Canada, including in Ontario. For example, this fundamental principle underlies all safety programs at the Workplace Safety and Insurance Board. Everyone wins when due diligence is applied. It must be both recognized and encouraged. An amendment that would allow the amount spent by a company on response, abatement and remediation to be recognized as an offset to either an imposed EP or to a fine in the event that a company is prosecuted or fined would encourage companies to

continue practising due diligence. A company that does all that it could and should be doing deserves recognition for its efforts.

Let me turn to the issue of "likely" versus "may." With regard to modifying the threshold definition of "environmental consequence," we're concerned that the extremely important and drastic proposed change in wording from "likely to cause" to "may cause" might escape attention. That provision, however, is probably of greater consequence than any other aspect of the bill. "May" could be used to apply to virtually any set of circumstances, and it could be used pre-emptively.

Most importantly, the change from "likely" to "may" calls into question the very basis for measurement of both offences and compliance. The Ministry of the Environment issues certificates of approval on the basis of scientific measurement. Charges are laid under various acts on the basis of scientific measurement. The use of the word "may" is subjective, without the ability to use measurement associated with its application. That fact undermines virtually all provisions of existing legislation by overriding the use of science and its principle of measurement as the basis for legislation. How could any conscientious company maintain compliance? What would "compliance" mean? We would therefore recommend an amendment that would give the very necessary precision to the words used in the act.

In the bill as introduced, there's a provision for a community fund, and that causes serious concern for our members. The lack of definition of the fund implies that it could be used for purposes other than to address the immediate spill. We ask why funds from EPs could be utilized for projects far removed from the circumstances of a spill. In that vein, EPs would then be truly punitive and could be levied without necessarily allowing recourse to the judicial system with all its checks and balances. An amendment clarifying that point, and ensuring that EPs could be used only to deal with circumstances relevant to why they were being levied in the first place, would be most welcome.

Members of the coalition are very concerned about the provisions for reverse onus and absolute liability written into the bill, for they're the very antithesis of due process and civil rights that we as Ontario citizens are guaranteed. We still find these provisions to be offensive to democratic principles, even if they apply only to EPs. If it is understood that the imposition of EPs will fully take into account both the severity of the damage and the cost of action taken by the company, as in New Jersey, then their application would be less troublesome to us.

Let me conclude this way: To summarize, CASE members are still concerned about Bill 133 and about its wide, sweeping scope, and we state again that it would have been a better and more sustainable piece of legislation had the time been taken to consult before its introduction. But we do again underscore the fact that we appreciate the initiative taken by the Legislature and by this committee to invite us in at this stage. This is an important and, I think, a very positive step that has been taken by the government and by all parties to invite this public input, and we're grateful for that opportunity.

Given the realities of how the bill was drafted, we believe it would be substantially improved by amendments saying:

(1) There will be a more specific definition of "spill" for the imposition of EPs.

(2) There will be no exposure of directors, employees, contractors and/or agents to EPs.

(3) EPs will be issued only at the director or higher level.

(4) There is a narrowing of the regulations' powers to limit regulation-making authority to the purposes that have been explained and justified to the Legislature at the time the bill is passed. If the government has the intention to apply the bill only to certain classes of citizens and organizations, the bill should be limited to those groups with the requirement that the government seek authorization of the Legislature if it decides to broaden the bill's application.

The Chair: You have about a minute left.

Hon. Mr. Beatty: Let me digress simply to make this plea as a former parliamentarian myself. It is an essential part of the responsibility of every elected representative to ensure that when granting regulation-making authority to the executive, the grant of that authority is confined to the area that has been justified to the Legislature or to Parliament at the time the legislation is adopted. I urge you strongly to consider that principle.

(5) Preventive actions and the costs of response, abatement and remediation absorbed by a company will be taken into account regarding EPs, and that payment of an EP is not to be considered an admission of guilt; if proven innocent, an EP is reversed.

(6) The community fund will only be used to cover the actual costs of response, abatement and remediation for each spill event.

(7) Due diligence is restored and recognized.

(8) The huge difference between "may" and "likely" will be clarified and "may" will not be available for pre-emptive action.

If it's the ultimate opinion of the committee that the provisions for EPs are unavoidable, we ask that consideration of due diligence be allowed and that the government official applying the EP be satisfied there is sufficient evidence of liability before an EP is issued.

Mr. Chairman, thank you for hearing us and for your efforts to examine and remedy the flaws in the current draft of Bill 133. We welcome this opportunity to express our concerns and we renew our commitment to work with all stakeholders to enhance Ontario's environment and to strengthen its economy.

The Chair: Thank you, and your timing is impeccable. That's your 15 minutes. We thank you very much for your time and your efforts in preparing your statement and your deputation before us today.

1700

Mr. Barrett: On a point of order, Mr. Chair: Just following on this presentation where we've had an

indication of eight amendments, previously the minister made an indication of a number of amendments. I am having difficulty squaring to what extent the last two presentations' amendments coincide with the government's amendments. I would ask if the government could give us the amendments. We can look it up in Hansard, but it's an awful lot of—

The Chair: Mr. Barrett, you would be out of order, because at this point our job is to hear the deputations prior to drafting any amendments.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

The Chair: The Canadian Environmental Law Association: Paul Muldoon. Before you get started, you have 15 minutes to present to us. Please begin by identifying yourself for the purposes of Hansard and proceed.

Mr. Paul Muldoon: Good afternoon. My name is Paul Muldoon. I'm the executive director of the Canadian Environmental Law Association. The association is a non-profit organization founded in 1970 for the purpose of improving environmental law in the province. Funded as a legal aid clinic specializing in environmental law, we represent individuals and groups before trial and appellate courts and administrative tribunals on a variety of environmental issues. We also undertake public education, community organization and law reform efforts. For your convenience, I've handed out copies of my remarks.

Where I want to start my submission is at the nature of the problem. Environmental spills continue to be a major threat to our environment and public health. In a recent report, it was noted that those facilities caught by this bill, the MISA facilities, accounted for some 84% of reported spills in 2003 and over 97% in 2004. Available data indicate a six-fold increase in the number of water treatment plant intake closures across the province due to spills from MISA facilities from 2003 to 2004. Spills from MISA facilities increased from 2003 to 2004 by some 13%, with an increase in the average volume of liquid spills from approximately 15,000 litres to 55,000 litres.

Members of the committee, spills are a major environmental problem. I've been quoted as stating that this is a crisis. This bill is not academic; it's not responding to a phantom concern. It's a real concern to the people of Ontario, and action is needed. The Canadian Environmental Law Association strongly supports this bill, and we urge you to forward it through the legislative process as quickly as possible and get it into law to protect the environment and the people of Ontario.

What I'd like to do is talk about two aspects of the bill. One aspect deals with environmental penalties, and the other deals with environmental prosecutions.

With respect to environmental penalties, this tool has been used effectively in other jurisdictions such as British Columbia and New Jersey. It seems to us it's appropriate that the Ministry of the Environment have the enhanced powers to deal with this urgent and long-standing problem. Why would we handcuff our environmental officials to deal with such an urgent problem? Let's give them the necessary tools and legislative power to act, to act preventively, and to act on an urgent matter. The intent of the legislation is clear, it's needed and we should push ahead with it.

Despite our clear, strong and unequivocal support for the bill, we see some areas within the regime of environmental penalties that could actually be strengthened. I'd like to talk about three of them this afternoon.

The first one is that within the bill, environmental officials can impose a penalty upon those facilities. Subsequent to the penalty, they can negotiate a settlement agreement; in effect, reduce the fine or other measures.

That settlement agreement deals with the reality of the situation. It's a worthwhile endeavour. However, our amendment suggests that the settlement agreements ought to be made public. Think of the downstream interests, those community members who had to forgo their water supply or have other consequences. Certainly they have the right to know what happened after the issuance of the environmental penalty. We're simply saying it should be made public, and we're suggesting those settlement agreements should trigger information notices under the Environmental Bill of Rights registry. In this way, they would be public and transparent, and all parties, both government and private industry, would be accountable.

The second issue I'd like to raise in terms of improving the bill—it seems to me the minister has pointed out possible amendments in this area—is mandatory spill prevention plans. Certainly this is a needed effort. Our view, though, is that these provisions may even want to go further. Not only should the provisions deal with spill prevention, but should also deal with pollution prevention. It seems we are at an interesting time and opportunity to attempt to engage industry to look at the facilities and not only plan to reduce spills but pollution generally. In our view, they should be mandatory on facilities and expanded to ensure that these are made available so that the government has an idea of what's going on and takes action, as appropriate.

The previous deputant noted that the bill only applies to MISA facilities. I presented data this afternoon that suggests there's good reason for that, that they are a significant contributor to the problem. But we also recognize that there may be other sectors that also may be part of the problem. Our solution to this is to urge you, as legislators, to pass Bill 133. Let's get it in place, let's see how it works, and then, over time, phase in other sectors on an as-needed basis when we see a constituency where spills are becoming a problem. Let's phase in this legislation and broaden this application. Once we've learned some lessons, we understand how it can be implemented. That way, that concern can be dealt with by expanding the scope in an appropriate way.

That deals with the environmental penalties. I would like to talk for a moment about environmental prosecutions. The use of environmental penalties should not be

considered a replacement for environmental prosecutions, but as a supplementary tool to a wide range of measures designed to ensure compliance with environmental laws. As commentator John Swaigen noted, "It is likely that every prosecution has a ripple effect throughout the industry and that a single prosecution has a much greater deterrent effect on other potential offenders than administrative remedies." In other words, we are suggesting that the provisions in this bill which deal with environmental penalties are certainly valid, but the environmental prosecution side should also be beefed up to ensure that both of those regimes are robust.

As such, the Canadian Environmental Law Association strongly supports the amendments which would reduce the threshold for prosecutions under the Environmental Protection Act. These amendments lower the threshold by changing the requirement that an activity is "likely to cause" an adverse effect to "may cause" an adverse effect. This wording already exists in the Ontario Water Resources Act and, in our view, is long overdue and would even out the tools so the tools are made available and accessible.

The other aspect that deals with prosecution is the provisions dealing with deemed impairment. Deemed impairment is a proposed provision of the Ontario Water Resources Act. This provision outlines the criteria used in determining when something may cause an adverse effect for the purposes of the prosecution. In other words, at the present time, due to a court case, the prosecutor must establish actual impairment of water before a prosecution. The bill proposes language that would allow deemed impairment, or those circumstances where a definition of what kind of impairment would suffice for the purposes of prosecution. Our view is that it rectifies the situation we now have, which deters prosecution, and clarifies that decision in a very appropriate way.

The last suggestion we have to improve the bill is that the Ministry of the Environment should provide detailed annual reports to the public to assess the use of environmental penalties and to reveal and outline the investigation and prosecution record in the environmental realm. Reports on compliance were undertaken for many years, through the late 1980s and 1990s, and then they were stopped. So the public of Ontario does not have a good view of the state of compliance. It does not have a good view of what the prosecution record is. We think that's essential and important, but we also think it should be important to have a record of what the use of environmental penalties is. In this way, groups like mine can praise or suggest more rigorous enforcement, depending on what the data states.

In conclusion, the Canadian Environmental Law Association welcomes the overall direction taken by this legislation and supports Bill 133. We've offered, hopefully, some constructive amendments to improve and enhance the bill, but in the meantime we strongly urge that the Legislature push ahead with the bill and see its timely passage into law for the benefit of the environment and public health for the people of Ontario.

1710

The Chair: Thank you. We should have time for about a minute each for questions, beginning with Mr. Marchese.

Mr. Marchese: I have two quick questions of Mr. Muldoon. Obviously, the minister came here and indicated there would be amendments. It is unusual for us not to have the wording. By the way, we will only know toward the end of the proceedings. Then they're introduced, dealt with in one day, we'll get back to third reading probably for one day, and we're done. So you're not going to get much of an opportunity to see those amendments. Does that concern you?

Mr. Muldoon: If it's a choice between our amendments and no bill, we'd rather take the bill. But we do think that our suggestions are constructive for improving the bill.

Mr. Marchese: I understand. We're going to try to do that as well. It appears to me that the use of environmental penalties is often presented as a kind of panacea for reducing pollution in the environment. You probably agree, and that is why you're talking about including provisions aimed at reducing the use of pollutants. Is that right?

Mr. Muldoon: That's exactly right. There are two things. One, we'd like the bill to get through the Legislature. It's needed; it's required. But there are other environmental priorities which we, as an association, would really like to further. Pollution prevention is one of them. Let's get through this bill and move on to that. This bill can contribute to that by mandating pollution prevention plans to reduce pollution, so it could perhaps look toward that goal also.

Mr. Wilkinson: Thank you for coming in, Paul. I must admit, today is a day when we have some high-powered people in Ontario who have a great deal of experience coming to advise us. We really appreciate somebody like you and, obviously, Perrin Beatty coming today. It's wonderful.

I just have a couple of questions about the transparency of settlement agreements. Really, it goes to a question of accountability. I'm just worrying about the cost of doing that. That should be somehow factored in so that the government can get these things put on a Web site or an annual report. How do you see that working?

Mr. Muldoon: Right now, there is the Environmental Bill of Rights registry, which is a very effective, very well-used mechanism for the public to access—

Mr. Wilkinson: It's posted there.

Mr. Muldoon: Exactly. This law itself is posted there. Perhaps there are other options, but that could be a vehicle to posting settlement agreements, so that downstream interests who are affected by this bill could say, "Why did the government reduce the penalty?" or, "Why did the government increase the penalty?" just to add that kind of clarity. The benefit of this bill is often for those affected by the spill. The bill right now does not allow for that disclosure, and I think it's kind of unfair, because those affected should have the right to know what went on.

Mr. Barrett: Thank you, Mr. Muldoon, on behalf of CELA. In reading the legislation, I see no mention of spills prevention or planning. In the government's IPAT report, Dr. Isobel Heathcote's report, they address that lack in our society. They call for an introduction of regulatory requirements not only for pollution prevention plans but also spill prevention plans, including multiple barriers and spill contingency plans.

You made brief mention of an amendment. Are you looking at those three areas in your amendment?

Mr. Muldoon: Yes. I think that the spill prevention plan is very important and it would be a very positive and constructive amendment to the bill.

The Chair: Thank you very much for coming in today. Thank you for your deputation as well.

LAKE ONTARIO WATERKEEPER

The Chair: Lake Ontario Waterkeeper: Mark Mattson. Just begin by stating your name for the purposes of Hansard. You have 15 minutes for your deputation. If you leave any time, it'll be divided among the parties for questions. Please begin.

Mr. Mark Mattson: Thank you. I'm Mark Mattson and I'm president of Lake Ontario Waterkeeper. Lake Ontario Waterkeeper is part of the Waterkeeper Alliance. There are 130 different Waterkeeper groups in North America. Our president is Robert Kennedy Jr. We have nine keeper programs in Canada, and I'm the board member for those keeper programs. We're a charity. Our role, really, is to help enforce environmental laws and regulations, as well as to try to win back some of our rights to swim, fish and drink in our rivers, lakes and watersheds. We've been involved in Bill 133 from the beginning. Our comments are on the record already as part of the EBR registry, which went forward a number of months ago. Thank you very much for the opportunity to come here today.

Lake Ontario Waterkeeper has been on the water, visiting communities, taking samples, and investigating polluters since 2001. In that time, we've seen an epidemic of spills in Ontario. In Toronto, the Don River turns red and the Humber River bright blue, and both rivers are sometimes covered with mountains of foam. The TRCA recently reported that there were 6,936 reported spills in the region between 1988 and 2000.

We've been active in Sarnia, where the community invited us recently to come help after a rash of chemical spills in 2003-04. The Canadians and Americans living on the St. Clair River have suffered from the effects of more than 800 spills in the last 20 years.

Just last month, I'm sure you've all heard about the 77,000 litres of Voltesso 35 spilled at the Bruce nuclear plant on Lake Huron. The oil is used as an insulator in transformers. As a result of this spill, aerial, boat and land-based monitoring programs had to be instituted, clean-up experts had to be brought in, drinking water wells had to be put under constant surveillance, and distressed animals had to be rescued. The public was urged to stay away from the spill for fear of respiratory irritation. In other words, there are real casualties in this epidemic: the people, who can no longer safely swim, drink, or fish in local waterways, and the aquatic life and birds that rely on clean water for survival.

Lake Ontario Waterkeeper believes that Bill 133 is about protecting communities, not about punishing polluters. It is the best possible remedy for the epidemic of spills. Pure and simple, the bill is a code of conduct for business in Ontario. It is not criminal or quasi-criminal sanctions, which remain in the realm of the courts. This code of conduct ensures that companies that have been granted the privilege of using public waterways in their industrial processes can be disciplined for infractions by the professional regulating body; that is, the Ministry of the Environment. The Bill 133 regime is akin to the codes of conduct that apply to professional groups such as doctors, lawyers, accountants, engineers and even hockey players. These professionals are accountable to both their codes of conduct and the general laws of the land. Bill 133 provides a level of certainty and fairness that is currently missing in Ontario. Businesses and communities will all understand what the rules are and what the repercussions of a spill will be.

We understand that the business community is worried about Bill 133. Detractors say that it will not provide a deterrent. It does not need to provide a deterrent. That is what the other provisions in the Ontario Water Resources Act, the Environmental Protection Act and the Fisheries Act are for. Bill 133 needs to help the casualties of the spills.

Detractors say that Bill 133 will encourage cover-ups, that employees will be afraid to report spills. This implies that employees are currently reporting spills out of the goodness of their own hearts. This is not true. Reporting is required by law, and if it does not happen, charges can and will be laid. That does not change with Bill 133.

Detractors say that Bill 133 is a cash grab. That is not true. The real cash grab is polluters robbing communities of environmental rights and forcing taxpayers to clean up every time a company spills into a public waterway. Bill 133 remedies this.

Detractors say that Bill 133 discriminates against business. This is not true. Businesses in Ontario have unique access to some of the world's most valued fresh water. This code of conduct simply ensures that this privilege is respected.

Once you get past the spin, it is clear that Ontarians need Bill 133. This is not punishment for industry. This has nothing to do with industry. Bill 133 provides security for communities affected by spills, period.

We have made a number of recommendations. They're part of our EBR comment. I can say that we would agree wholeheartedly with Mr. Paul Muldoon of the Canadian Environmental Law Association and his recommendations. Second, we believe that the tax loophole that allows companies to write off environmental penalties currently should be continued to be of concern to the Ontario government, as I know it is, and it should be closed. Third, a clear enforcement policy for

the proposed legislation should be committed to, with the necessary resources necessary to implement it effectively.

As Mr. Muldoon indicated, an annual report for the public should be published. This report should include information such as the number of spills reported, the number of investigations conducted, the number of penalties awarded and the number of penalties collected.

Finally, I think we all know the importance of trying to prevent spills and working proactively. That is the role of the Ministry of the Environment and the abatement staff in Ontario. They consume 80% to 90% of the resources at the Ministry of the Environment. The enforcement wing of the Ministry of the Environment is minuscule in comparison.

This bill certainly helps put some of the stick—not as a punishment, but certainly as a way to compensate the victims—back into our laws. I think it balances some of the carrot-and-stick approaches that are necessary to protect our waters.

Those are my comments, and I'm open to questions.

1720

The Chair: Thank you very much. We'll have just a little over two minutes per party, beginning with Mr. Wilkinson.

Mr. Wilkinson: Great, Mark. Thank you so much for coming. On a personal note, I had the pleasure of hearing Robert F. Kennedy Jr. the last time he was in Toronto over at the U of T. It was a remarkable night; he had lost his voice and he was still one of the finest orators I have ever heard. He is so passionate on this issue.

I just want to follow up on the whole issue here about the taxpayer and communities. It seems to strike me that right now there are spills happening and the burden of cleaning it up is falling upon the community—so, really, on the victim. They didn't spill. Ultimately, it falls on the taxpayer, because the taxpayer—I give the example of Stratford, where we had an accident happen. There was a car wash and some soap and stuff got into our water supply. Of course, there was an excellent response to that, but our whole community came to a stop. Our community had to spend hundreds and hundreds of thousands of dollars. I know it doesn't apply here, but I now have a sense of how it is that it falls upon someone who is innocent to pick up the cost of these spills.

I wonder if you could just elaborate about the need to really restore some justice to the fact that if you spill, you pay, and that it isn't anybody else in the chain—no victim, no taxpayer—who ends up having to pick up that tab.

The Chair: And succinctly.

Mr. Mattson: That, I believe, is the basis of Bill 133. I really believe the bill is trying to bring about fairness for the victims of spills. It is trying to address those concerns, not through the criminal courts, not leaving it to whether or not it was a criminal act; it could have been incompetence. No matter how you look at it, industry needs to take into account those costs and deal with what may not be a criminal fault, but is still their own doing. They are the ones given the privilege of the certificate of approval. They're the ones the Ministry of the Environment licenses to do their industrial processes and make their profit. They need to consider what happens when things go wrong. That's what this bill is really focused on correcting.

Mr. Barrett: Thank you, Mr. Mattson, for your presentation on behalf of Lake Ontario Waterkeeper. You make, I think I count, three recommendations; for example, close the tax loophole to write off penalties. You indicated that the government is concerned about that. I don't know whether I heard the minister include that today in her recommended amendments. We have confusion in this committee because we don't know what we're dealing with now. You make mention of a clear enforcement policy and also publishing the annual report. I don't think the minister mentioned that today. I may be mistaken. We're all hampered by a lack of information.

In the IPAT report, there is quite a call for improved spills notification and communications systems. When you talk about the annual report, I assume you're talking about something a bit more than just a list of penalties and spills. What would you like to see as far as keeping everybody in the loop and, in particular, those native communities that may be affected? How do we keep them in the loop?

Mr. Mattson: Thank you, Mr. Barrett. I know that in the past you've been quite helpful to many of the environmental issues, so I know that your questions are genuine.

I indicate that we have put our recommendations in a response as part of the Environmental Bill of Rights registry. We have put those recommendations into that process, and at some point the government needs to respond to those questions. They weren't mentioned today by the minister; you're correct. I would hope that, supplementing the EBR registry comments with this parliamentary session, the government will address those issues and bring them to the fore.

In terms of a public notification process, as Mr. Muldoon spoke of, there was, in the past—I think five years ago it was discontinued—a published report that listed all the complaints, where they went to, where the fines were and they were available to all communities across Ontario, not only on-line but also published. You could get them at your local library. They were quite widely distributed. I think it's very important for the community to know what's going on, to hold the ministry accountable, and also to know what's happening in their community as it relates to spills. I'm supportive of increased process. I'm supportive of taking into consideration the recommendations from the EBR and those made today. I hope that's helpful.

Mr. Marchese: Mr. Mattson, three questions, if I can fit them in. First, you are asking that they develop a clear enforcement policy for the proposed legislation and commit the resources necessary to implement it. The Ministry of the Environment, in the recent budget, has been flatlined. Does that concern you vis-à-vis the recommendation you're making?

Mr. Mattson: I only had an opportunity to review the budget briefly yesterday. Certainly, it wasn't going in the same direction it had been going for a number of years. In fact, it may even have increased slightly. But yes, I think that there is not provision in the current budget for enforcing Bill 133 yet.

Mr. Marchese: Do you have any fears that this bill's provision for the EPs will displace the MOE's appetite for prosecuting polluters?

Mr. Mattson: I would hope not. That fear has always been there. We made comments when the original administrative monetary penalties—the AMPs, as they were called—came forward a number of years ago, where they were going to replace the quasi-criminal environmental protections with administrative penalties. We were opposed to that.

We don't see this as replacing the criminal sanctions. They need to remain and they must remain. This is really dealing, as I said—like the law society, it would take away your licence. You would still face criminal sanctions if you committed a criminal act, just like Bertuzzi. He lost 25 games and half a million dollars, and he still went to court and faced criminal sanctions in the court. I think it's the same. This is about a privilege. These companies are given the privilege, through their C of A, to make their livelihood. The regulating agency, which is the Ministry of the Environment, has the right, I think, to penalize infractions.

Mr. Marchese: A quick last question: The Association of Power Producers of Ontario recommends that the government limit the application of environmental penalties to sectors other than the electricity sector. Do you agree with that?

Mr. Mattson: No, I think this really echoes the concerns. When Mr. Kennedy came up here and commented on this bill, he said that this was the end of the race to the bottom in North America. What the Association of Major Power Consumers are asking for, really, is to put that race back on where the lower the standards are, the more competitive the electricity generation system would be. That is certainly not a good idea. We should stop that race to the bottom, and I think this bill adequately does that and lives up to our commitments in North America not to lower our standards to try to bring investment.

The Chair: Thank you for having come in today.

CANADIAN PETROLEUM PRODUCTS INSTITUTE

The Chair: The Canadian Petroleum Products Institute.

Mr. Wilkinson: Just a point of information for my fellow committee members while we're getting set up here: My understanding is that the deductibility would be eliminated at the federal level and thus, by default, at the provincial level, if the current federal budget before the House of Commons passes. Of course, if it doesn't, then that change would not happen. That's just so we know where we are on that whole tax loophole question.

The Chair: Ms. Goodman, you have 15 minutes before us today. If you leave any time, it will be divided among the three parties for questions. Please begin by stating your name for the purposes of Hansard, and then continue.

Ms. Faith Goodman: My name is Faith Goodman. I'm the vice-president of the Canadian Petroleum Products Institute for Ontario.

On behalf of our members, I would first of all like to thank you for the opportunity to speak to Bill 133 and to outline some of the concerns we have with the legislation as it is currently drafted. As an aside, I would also like to thank Minister Dombrowsky for her presence here earlier today, and for meeting with us in the past to listen to our concerns first-hand. In addition, we welcome the minister's statements today. However, we'd like the opportunity to review the proposals in detail and possibly to make additional written comments. We support the minister's stated objective of a safer, cleaner Ontario.

The Canadian Petroleum Products Institute includes all the petroleum refiners and major petroleum product distributors operating in Ontario. Every day in this province, our members process millions of litres of crude oil into fuels that keep Ontario's private and public transportation systems moving and heat Ontario's homes, offices and schools. As well, we provide feedstock to several other value-added industries and produce state-of-the-art lubricants that are found in everything from your car to cosmetics and even to gummy bears.

We serve the people of Ontario 24 hours a day, seven days a week, with over 2,200 service stations across Ontario. In times of crisis, our members are there to provide the fuels needed to keep emergency services operating and power the generators at countless hospitals and seniors' homes. In short, we employ over 80,000 people and are involved in virtually every aspect of the Ontario economy. As CPPI, we work with governments at all levels to create responsible and responsive standards, laws and regulations to safeguard communities, our workers and the environment. That is why I am here today.

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The members of CPPI share the interest of the government of Ontario and the people of Ontario in protecting and enhancing the quality of the province's environment. We are committed to continuously lowering the environmental footprint arising from both our operations and the use of our products.

Earlier today, you heard from the Honourable Perrin Beatty, the spokesperson for the Coalition for a Sustainable Environment. We strongly support the coalition's entire position.

Bill 133 ignores long-established principles of good governance and effectively denies citizens the type of fair treatment they have a right to expect in a democracy. The bill, as currently worded, may in addition have unintended consequences, including undermining the effective relationship between regulators and industry, encouraging industry to focus more on protecting themselves from legal liability than on good environmental steward-

ship practices, and may act as a deterrent to the type of future economic investment the government is working hard to attract.

Our members strongly agree that those who cause damage to the environment should bear the costs of response, abatement and remediation. A great many of our members are ISO-certified and ISO-registered. As you know, these designations are only awarded and renewed to those who demonstrate fair, ethical and sound business practices, including, of course, principles of stewardship. As a result, we agree with the principle of "polluters pay."

We believe the underlying root cause, however, for the majority of concerns with Bill 133 is the fact that there was no meaningful consultation before its introduction. We believe the bill is flawed and will not achieve the results the government seeks. In our original submission to the minister, we recommended the bill's withdrawal and that we start again with the help of experts from all sectors. As this appears not possible, we are here to point out the deficiencies and our suggestions for improvement.

It is instructive to note that when the bill was posted under the Environmental Bill of Rights process for comment, there were approximately 166 responses with over 95% expressing significant concerns with respect to the bill, including civil liberties issues. As an association and as part of CASE, we petitioned the government for a hearing on the points where we thought improvements could be made. While we recognize that elements of the bill are embodied in other legislation, this combining of these elements into one act has not been fully understood nor adequately explained to the people of Ontario.

With respect to the intent of the legislation, our major concern was that there has been little explanation of the real intent of the legislation that is so broad in scope. It has been said that its aim, through regulation, is to force MISA-regulated facilities to pay up, and pay up quickly, whenever there is a spill. But if that is the intent of the bill, we wondered why its provisions are so sweeping and potentially include everyone in Ontario, including private citizens. Why were the powers under the existing legislation not chosen for enhancement and enforcement?

We are here to talk about potential amendments, but we must first ask why a single class of facility is being singled out when other entities have equal or greater capacity to cause damage to the environment? The targeting of MISA facilities, which are already heavily regulated, is of grave concern when other entities are to be exempt. We are left to wonder how this will improve the protection of the environment from all potential incidents. It would appear that very different standards are being expected from the private sector than from the public sector without relevance to ability to pollute. In addition, it should be noted that Bill 133, were it in place, would not have addressed the recent incident that affected drinking water in Stratford, and it clearly would not have had any effect in Walkerton. What happened to the principle of equal application of the law? Is this the kind of Ontario we want to create?

Finally, we would stress that, as currently worded, the bill gives the government the ability to include or exclude whole classes of citizens and organizations at the stroke of a pen. We believe the Legislature of Ontario has a clear responsibility to defend the rights of Ontarians to be free of arbitrary and capricious actions by limiting the regulation-making authority contained in the bill to those purposes that the government has explained and justified at the time the bill is passed.

On the subject of environmental penalties, one publicly stated reason for creating EPs is the relative slowness of court action. It appears that the government wants municipalities to be reimbursed as soon after a spill as possible, without waiting for decisions of a court. There is a need, we are told, to be swift afoot. Apart from the obvious question—why not address the slowness of the court process?—we are disappointed that the government has decided that EPs are the solution. However, if EPs are the chosen vehicle, we have a number of suggestions to improve their administration.

Given that EPs can be based not only on direct spill costs but can also include punitive charges, it is important that the government official applying an EP take into account due diligence considerations and remove the reverse onus provision as it currently applies to EPs. It would be a miscarriage of justice if the company were forced to pay a substantial EP only to be found not guilty in a court of law on the grounds that the company took all reasonable measure to prevent a spill and, in fact, may not have even been guilty of a spill at all.

The government official must have the ability to take into account the incident-specific factors before taking the very serious action of levying an EP. If an EP is to be levied in a spill incident, we believe that only someone at the director level or higher should be authorized to issue EPs to ensure that considerations for due diligence and evidence of guilt can be taken into account. Not only would this apply the needed level of sufficient senior government management oversight to a critical decision point, but it also avoids having field staff act as police, prosecutor and judge in a situation we believe would seriously undermine co-operative interaction with ministry staff.

As written, EPs can be levied on employees and officers of a company. This proposal is patently unfair to employees, when it is the company that has the full responsibility for its assets and its actions. We believe that the possibility of serving directors, employees and contractors with EPs should be removed by amendment.

We are also very concerned that punitive EPs would place a company in double jeopardy. Under the bill's proposals, a company could sustain EPs far in excess of the costs of response, abatement and remediation, and then face equally huge penalties via charges filed under the EPA and the OWRA. Under that provision, a company would be penalized twice for the same infraction, and we assert that such a provision is completely unfair and unwarranted. We suggest that if EPs are part of Bill 133, they should follow the New Jersey model and allow

subsequent fines, if any, to be offset by EPs previously paid in full.

There's widespread concern regarding the loss of due diligence as a defence. Due diligence is a guiding principle for companies that want to succeed, and there is also a long-standing history of it being recognized in case law throughout Canada and Ontario. For example, this fundamental principle is the rationale for all safety programs at the WSIB. Everyone wins when due diligence is applied, so it must be both recognized and encouraged.

An amendment that would allow the amount spent by a company on response, abatement and remediation to be recognized as an offset to either an imposed EP or to a fine in the event that a company is prosecuted and fined would encourage companies to continue practising due diligence. A company that does all that it could and should be doing deserves recognition for its efforts.

With regard to modifying the threshold definition of an environmental consequence, we are concerned that the extremely important and drastic proposed change in the wording from "likely to cause" to "may cause" was simply being buried. This provision, however, is probably of greater consequence than any other aspect of the bill. "May" could be used to apply to virtually any set of circumstances, and it could be used pre-emptively. More importantly, the change from "likely" to "may" calls into question the very basis for measurement of both offences and compliance.

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The Ministry of the Environment issues certificates of approval on the basis of scientific measurement. Charges are laid under various acts on the basis of scientific measurement. The use of the word "may" is subjective without the ability to use "measurement" associated with its application. That fact undermines virtually all provisions of existing legislation by overriding the use of science and its principle of measurement as the basis for legislation. How could any conscientious company maintain compliance? What, in fact, would compliance mean? We would therefore recommend an amendment that would give the very necessary precision to the words used in the act.

In the bill as introduced, there is provision for a community fund that causes serious concern for our members. The lack of definition of the fund implies that it could be used for purposes other than to address an immediate spill. We asked why funds from EPs could be utilized for projects far removed from the circumstances of the spill. In that vein, EPs would then be truly punitive and could be levied without necessarily allowing recourse to the judicial system, with all of its checks and balances. An amendment clarifying that point and ensuring that EPs could only be used to deal with circumstances relevant to why they were levied in the first place would be very welcome.

Members of CPPI are very concerned about the provisions for reverse onus and absolute liability written into the bill, for they are the antithesis of the due process and civil rights that we as Ontario citizens are guaranteed. We still find these provisions to be offensive to democratic principles, even if they apply only to EPs. And, if it is understood that the imposition of EPs will fully take into account both the severity of the damage and the cost of action taken by the company, à la the New Jersey model, then their application would be less offensive.

In conclusion, CPPI and its members are still concerned about Bill 133 and its wide, sweeping scope, and state again that it could have been a better and more sustainable piece of legislation had the time been taken to consult before its introduction.

Given the realities of how the bill was drafted, we believe it would be substantially improved by amendments that say that:

(1) There will be a more scientific definition of "spill" for the imposition of EPs.

(2) There will be no exposure of directors, employees, contractors and/or agents to EPs.

(3) EPs will only be issued by at the director—or higher—level.

(4) There is a narrowing of the regulation powers to limit regulation-making authority to the purposes that have been explained and justified to the Legislature at the time the bill is passed. If the government has the intention to apply the bill only to certain classes of citizens and organizations, the bill should be limited to those groups, with the requirement that the government seek the authorization of the Legislature if it decides to broaden the bill's application.

(5) Preventive actions and the costs of response, abatement and remediation absorbed by a company will be taken into account regarding EPs, and payment of an EP is not to be considered an admission of guilt. If proven innocent, an EP is reversed.

(6) The community fund will only be used to cover the actual costs of response, abatement and remediation for each spill event.

The Chair: Just to advise you: You have about one minute.

Ms. Goodman: OK.

(7) Reverse onus is removed and due diligence is restored and recognized.

(8) The huge difference between "may" and "likely" is clarified, and references to "may" are entirely removed.

If the ultimate opinion of the committee is that the provisions for EPs are unavoidable, we ask that consideration of due diligence be allowed and that the government official applying the EP is satisfied that there is sufficient evidence of liability before an EP is issued.

Thank you for hearing us and for your efforts to examine and remedy the flaws of the current bill. We welcome this opportunity to express our concerns but, most importantly, to renew our commitment to work with stakeholders to enhance, as we have been working, Ontario's environment and to strengthen its economy.

The Chair: That concludes the time you have been allotted. Thank you very much for your deputation.

GREAT LAKES UNITED

The Chair: Great Lakes United.

Welcome. You have the last word this afternoon. Please begin by stating your name for the purposes of Hansard. You have 15 minutes for your deputation. In the event you don't use the 15 minutes, the remainder will be divided among the parties for questions. Please proceed.

Ms. Jessica Ginsburg: Thank you very much. My name is Jessica Ginsburg. I am here today as agent for Great Lakes United. Great Lakes United is a coalition of organizations that includes environmental groups, labour groups and community groups across Canada and the United States. Great Lakes United was founded in 1982 and is dedicated to the promotion of clean water and air and the protection of human and environmental health.

Great Lakes United strongly supports the direction taken by this bill and, in particular the new threshold provisions which make it easier for the ministry to prosecute for harmful discharges into the water, air and ground. Great Lakes United also supports the environmental penalty provisions and feels that they assist ministry officials in sending a swift and decisive message to polluting companies.

What I'd like to do during my time before you is go back to first principles and examine what the bill does on a very practical level. I'll discuss the provisions dealing with prosecutions and specifically the new thresholds used to establish a contravention under both the Ontario Water Resources Act and the Environmental Protection Act.

Let's begin by acknowledging the fact that a problem currently exists in the province of Ontario. A recent report by the Ministry of the Environment SWAT team on environmental compliance in the Sarnia area found that almost 100% of facilities were in non-compliance with legislative or regulatory requirements and nearly 23% of facilities lacked a spill prevention plan or spill contingency plan. This is unacceptable. It suggests quite clearly that our pollution prevention and control regime is faulty and in dire need of repair.

We are also being suffocated by our poor air quality, which is a result, at least in part, of our inability to hold accountable the major air polluters. This week, CTV reported that an estimated 6,000 to 8,000 people die prematurely each year from air pollution. Toronto Public Health has published statistics showing that 1,700 people in Toronto alone die prematurely and another 6,000 are hospitalized each year for health problems related to poor air quality. These health effects can range from heart problems, asthma, bronchitis, reduced lung function, eye, nose and throat irritation, and even, possibly, increased risks of lung cancer. This too is unacceptable. There are too many contaminants being discharged into our air and, contrary to popular opinion, the pollution problem is getting worse and not better. Little is being done or can be done to prosecute those responsible. Bill 133 goes at least part of the way toward mending the problem by making it easier to prosecute hazardous releases into air and water, thereby creating a stronger deterrent effect for polluting companies.

Let's turn now to the Ontario Water Resources Act. As you've been told today, Bill 133 includes a "deemed impairment" provision which amends section 1 of this act. The deemed impairment provision will allow the crown to prosecute when a discharge has the potential to cause harm. Without it, the crown needs evidence of actual harm, such as dead fish remains washing up on shore, before moving forward with a case.

Before delving into more detail about the impact of this provision, let me outline a common scenario for you. Suppose there is a plant in rural Ontario which discharges an effluent into a waterway. This effluent may not be toxic by its very nature, but it is released in such a large quantity, over such a short period of time, that it causes serious injury to the water quality and to organisms living in that water. The Ministry of the Environment becomes aware of the spill and initiates an investigation. However, as we all know, the province of Ontario is a pretty vast place and it could take ministry inspectors many hours or even days to respond. By the time they arrive to gather evidence and take samples, the inevitable has occurred: the discharge has become diluted. This presents a problem for inspectors and could ultimately be fatal to any attempted prosecution. Why? Because of a court case in 2001 called R. v. Inco.

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Prior to the Inco case, ministry officials had interpreted and used the Ontario Water Resources Act as a zero-tolerance piece of legislation. In other words, it was believed that a contravention could be made out if inspectors could show that a spill had the potential to impair the quality of any body of water. This is how the legislation was intended to be used.

However, the court, in Inco, created a sizeable loophole by holding that impairment depended on "the nature and circumstances of the discharge of that material, including its quantity and concentration, as well as the time frame over which the discharge took place." Thus, where the substance is not inherently toxic, inspectors need evidence that the spill occurred in such a concentration and over such a period of time as to meet the Inco test for impairment.

As you can imagine, this sort of evidence is very difficult to gather in circumstances such as those described above, where much of the necessary evidence may have washed away by the time inspectors arrive. Ask yourself this: If a spill occurs in a remote area and no one is there to gather samples, does it still create a harm? The answer is obviously yes.

Thus we arrive back at the deemed impairment provision of Bill 133. This provision does not represent new law, for it mimics other provisions that already exist within the Fisheries Act. In effect, it will allow the situation to revert back to that which existed prior to the Inco decision.

The main point to remember is this: The deemed impairment provision does not accomplish anything new,

nor does it attempt to; it simply fixes a problem that was created four years ago by the courts. Without this amendment, the prosecution of water spills will remain an unduly difficult task for the crown and the original intent of the Ontario Water Resources Act will have been defeated.

I want to now deal with the changes to the Environmental Protection Act as a result of Bill 133. The changed threshold in the EPA attempts to address a somewhat different issue in a somewhat different manner.

Currently, in order to establish a contravention, the act requires proof that a discharge is likely to cause an adverse effect. This is equivalent to saying that there is more than a 50% chance that an adverse effect will result for any given discharge. Bill 133 proposes to change this threshold to "may cause an adverse effect." In other words, a discharge would need to have the potential to cause an adverse effect. There is a very simple rationale for this change: to allow the same protection against air and ground pollution as is currently available for water pollution.

The Ontario Water Resources Act, even prior to the changes proposed in Bill 133, already creates an offence of discharging any material which may impair the quality of water. Two previous speakers here today have called the change "drastic." It's true, it is a change, but it's not an unprecedented one that would launch us into a period of unscientific or random prosecutions. Given the statistics I quoted earlier about smog pollution, there is clearly a pressing need to prevent releases into air as well as water.

At a practical level, the crown faces similar challenges when attempting to prosecute air offences. As difficult as it is to convict a company of an offence under the Ontario Water Resources Act, it is even more difficult under the Environmental Protection Act. Realistically speaking, only the most blatant infractions are now prosecuted under environmental legislation.

For instance, if there is a massive release into the air of a highly potent chemical and community residents become ill, the ministry may have the evidence to prosecute. However, most examples of air pollution are not this blatant. The poor air quality we experience today is the result of death by 1,000 cuts, and it is these thousand cuts that Bill 133 attempts to address.

In closing, I'd like to tie these threshold provisions back to the penalty provisions, which comprise the bulk of Bill 133. The penalty and prosecution regimes directly impact one another, and an appropriate balance must be struck between the two. Bill 133 goes a long way toward strengthening the utility of penalties, but we must be cautious not to neglect prosecutions. Prosecutions can achieve a deterrence effect beyond that which results from the use of penalties alone. There is a stigma associated with being prosecuted and convicted of an offence—and rightly so. Such proceedings are open to public scrutiny and thus a company's public image is at stake. There is also little danger of Bill 133 opening the floodgates to crown prosecutions. The fact exists that the ministry has never relied heavily on prosecutions, and only a very small fraction of offenders is ever brought to justice in this manner. Bill 133 is unlikely to change this reality. What the bill will achieve is to make it easier for the ministry to prosecute those companies that have shown a blatant disregard for environmental laws in this province. For this reason, Great Lakes United wishes to express its support for the overall direction taken by this bill and urges you to maintain its necessary and long-overdue measures. Thank you very much.

The Chair: Thank you. We will have time for just one brief question, and, Mr. Barrett, it's yours.

Mr. Barrett: Thanks, Great Lakes United and Ms. Ginsburg. You indicate in your paper that Bill 133 helps fix problems by making it easier for the ministry to prosecute the worst offenders. I certainly agree with that. Some companies are laggards and some are leaders in environmental protection. I think of the Esso refinery just down from my farm. It's a very large refinery and relatively new. They do have spills. I consulted there. I've been in and out a number of times. They seem to be doing a tremendous amount to prevent these kinds of spills. I know you are pushing prosecutions, and much of this bill is about environmental penalties. It's not so much about spills; it's more about penalties. I'm concerned. Does that approach penalize those companies that do everything they can to prevent it? Their employees do everything they can. They have the training and the preventive measures in place. But with these environmental penalties, where there is no process to fight it or show due diligence, does that just put them on the same playing field as, say, another company I can think of in my riding that is less diligent? For a good company that is totally compliant and does its best, how is this going to make them even more compliant by getting these penalties?

Ms. Ginsburg: I don't think that it does create the situation that you are alluding to. From the penalties side, obviously they can still try to appeal a penalty. There are still appeal rights to the Environmental Review Tribunal. They can still attempt to show that they are not guilty of what they have been accused of. If they did not create the spill, if they did not cause the harm, they still have that opportunity available to them. Due diligence is still a defence in terms of the prosecution side of things.

Mr. Barrett: But not the penalties.

Ms. Ginsburg: There are still a number of factors that will be taken into account when determining how severe the penalty will be on the penalty side. So it's not my impression that they will be penalized without any regard to their attempts or to their past performance.

The Chair: Thank you for your deputation and to everyone for their time in coming today.

These hearings stand adjourned.

The committee adjourned at 1800.

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