

# Recommendations For Improvement Of The Enforcement Provisions Of The British Columbia Waste Management Act



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## INTRODUCTION

The B.C. Waste Management Act, SBC 1982, c. 41, as amended, (WMA), is the primary pollution control statute in British Columbia. It prohibits pollution generally, except pursuant to permits or other authorizations issued under the Act. Non-compliance with pollution standards under the Act has been a serious problem in B.C. In early 1989, the B.C. Government launched a major initiative to strengthen enforcement of the Act. In the Summer of 1989, the government passed the Waste Management Amendment Act, 1989, SBC 1989, c.62, which substantially increased the penalties provided in the Act. However, there are a variety of practical improvements to the enforcement provisions of the Act which would substantially strengthen the Act's enforcement provisions.

## 1. ABROGATION OF DEALS

As the province moves toward a strict enforcement approach to environmental standards, a key problem is that the government's practices in the past have in many instances left a `paper trail' that could be used by an accused person to support an argument that an environmental prosecution should not be allowed to continue because the government previously entered into an agreement not to prosecute if certain conditions were met. Whether such an argument is valid in any particular case is a matter for the courts to determine. But it is the responsibility of the Legislature to determine the fate of any existing deals and whether it intends that similar deals should be allowed to be made in the future.

Mechanisms are in place under the Waste Management Act through which a manager may amend a permit or approval to discharge waste [(1) -- 1. . Waste Management Act, s.11], and the Minister may issue a variance order to provide "temporary relief from the requirements of an order, permit, approval, licence, or waste management plan". [(2) -- 2. . Ibid., s. 13]

Where a manager takes such action, an appeal lies pursuant to the Act [(3) -- 3. . Ibid., Part 5]. Where the Minister takes such action any recourse lies in the political realm.

It is our view that these mechanisms -- one at the bureaucratic level and the other at the political level -- provide a comprehensive system for reviewing and granting relief against environmental standards in particular situations. There is no valid reason for arrangements or deals to exist outside these statutory mechanisms. Indeed, the legal validity of such deals may be questionable.

Recommendation 1. The Canadian Bar Association B.C. Branch recommends that the Government of B.C. adopt legislation that would provide that:

(1) as of the date this provision is in force any existing or future agreement, deal, or arrangement by the government to tolerate non-compliance with a lawful environmental standard or condition which arrangement is not in a form expressly authorized by law is for all purposes null and void; and

(2) no compensation is payable as a result of the nullification of any arrangements under this provision.

## 2. INSPECTION

There are two problems regarding inspection powers under the WMA. The first is that WMA s. 21 allows officers authority to investigate only "on presentation of proof of his identity". This is a problem because there may not be anyone present to receive proof of identity. Thus, conservation officers must spend valuable time searching for a person to whom to present proof of identity before beginning an inspection under the WMA. It is arguable that an officer does not have authority to continue with an inspection if he or she cannot find a person to whom to present proof of the officer's identity.

The second problem is that the WMA forces conservation officers acting under the WMA to rely on the Offence Act to obtain warrants to search and seize articles in relation to offences under the WMA. The problem here is that the Offence Act s. 19 requires that things seized under such a warrant be released within three months unless charges have been laid. However, waste management investigations are often complex and may take more than three months to complete. Search and seizure warrants under the Wildlife Act are not subject to this constraint.

Recommendation 2. The CBA recommends that the Waste Management Act be amended to:

(1) delete in WMA s. 21(1) the phrase "and on presentation of proof of his identity"; and

(2) add to the WMA a provision comparable to Wildlife Act s. 94, e.g.:

On information in the prescribed form and on oath that there are reasonable grounds to believe that any thing or things that may provide evidence as to a violation of this Act or the regulations is concealed in or on a building or premises a justice may by a warrant authorize and direct a conservation officer or constable to enter and search the building or premises and to seize and remove the thing or things found.

## 3. PROTECTION OF OFFICERS

The protection provided by WMA s. 34(4.1) to conservation officers against persons who would resist or obstruct an officer is limited to situations where the officer is acting under WMA s. 21.1. The Wildlife Act s. 98 provides such protection to officers acting under **any** section of that Act. There is no reason why the protection for officers acting under the WMA should be any weaker than the protection afforded officers acting under the Wildlife Act. The Wildlife Act also specifies that an officer is, for the purposes of the Act, a peace officer. This means that officers acting under the Wildlife Act are protected by the "assaulting an officer" provisions of the Criminal Code.

Recommendation 3. The CBA recommends that the Waste Management Act be amended to:

(1) replace the phrase "under section 21.1" in WMA s. 34(4.1) with the phrase "under this Act."; and

(2) add a new subsection specifying that, "An officer is, for the purposes of this Act, a peace officer."

## 4. LIMITATION PERIOD

The limitation period for laying charges under the WMA is one year "from the time of the happening of the offence". Environmental offences are often serious and complex, and a one-year limitation period is unduly restrictive. Moreover, there may be some time delay before the offence comes to the attention of the authorities. For this reason, the limitation period should begin to run at the time the Ministry becomes aware of the offence.

Recommendation 4. The CBA recommends:

(1) that the WM Amendment Act be amended to provide that the limitation period in WMA s. 34(14) be increased to two years from one year; and

(2) that the limitation period begin to run at the time the Ministry becomes aware of the offence.

## 5. MINIMUM PENALTIES FOR SUBSEQUENT OFFENCES

The WM Amendment Act, 1989 did substantially increase the fines provided for in the WMA. However, the WM Amendment Act did not introduce **minimum** penalties for subsequent similar offences, such as are set out in the Pesticide Control Act, R.S.B.C. 1979, c.322. Pesticide Control Act s. 22 provides a maximum penalty of \$2,000 (or six months imprisonment), and it imposes a minimum fine of \$1,000 for conviction of a subsequent similar offence.

Recommendation 5. The CBA recommends that the Waste Management Act be amended to add the following provision:

Section 34.2 Where a person is convicted of a subsequent similar offence under this Act or Regulations the minimum fine which the Court shall impose is \$1,000.

## 6. SUSPENSION OR CANCELLATION OF PERMITS OR APPROVALS

The WMA authorizes the Minister of the Environment to suspend or cancel a permit or approval where the holder of the permit or approval fails to carry out a variety of obligations under the Act, or Regulations, permits or approvals under the Act. These would include the payment of a fine. This power would be an effective way of ensuring that a fine imposed under the WMA is actually paid.

However, the power is exercisable only by the Minister of Environment, which requires a cumbersome bureaucratic procedure to implement. Many other powers under the WMA are exercisable by a manager, which allows for much more effective use of these powers. The manager's decision is appealable to the Director of Waste Management and/or to the Environmental Appeal Board.

Recommendation 6. The CBA recommends that the Waste Management Act s. 23(1) be amended by replacing the word "minister" with the word "manager".

## 7. SPILL PREVENTION AND REPORTING

The WMA s. 10 sets out provisions for prevention and reporting of spills of "polluting substances". However, WMA s. 10(1), in defining a "polluting substance" states that:

Section 10(1). In this section "polluting substance" means any substance, whether gaseous, liquid or solid that could, **in the opinion of the Minister**, substantially impair the usefulness of land, water or air if it were to escape into the air, or were spilled on or were to escape onto any land or into any body of water. (Emphasis added.)

The inclusion of the phrase "in the opinion of the Minister" has undermined the usefulness of this section, because the Minister's opinion has never been set out in an Order-in-Council or other form.

Moreover, WMA s. 10(5), which requires reporting of a spill "in accordance with the regulations", has been rendered useless because no such regulations have been passed. Thus, it is only where reporting of a spill is required as a term of a permit or approval that a person is required to report a spill under the WMA.

Recommendation 7. The CBA recommends that:

(1) the Minister of the Environment take steps to define the polluting substances that are to be subject to the requirements of WMA s. 10; and

(2) the Lieutenant Governor in Council adopt regulations setting out the reporting requirements imposed by WMA s. 10(5).

## 8. SPILL CLEAN-UP AND ENVIRONMENTAL RESTORATION

The Waste Management Act does not impose an obligation on a person responsible for a spill of a polluting substance to clean up the spill or to restore the environment, except to the extent that these may be incorporated as specific requirements of a permit, authorization, approval or any discretionary order. In contrast, in 1985 Ontario implemented Part IX of the Environmental Protection Act of Ontario [(4) -- 4. . Part IX, Environmental Protection Act, RSO 1980, c.141, as amended.], commonly known as the "Spills Bill". The "Spills Bill" provides that:

(a) the owner and the person having control of a pollutant have a statutory duty to do everything practicable to prevent, eliminate, and ameliorate the adverse effects of a spill of a pollutant, and to restore the natural environment;

(b) owners and controllers of a spilled pollutant are absolutely liable to the government and other persons for;

i. expenses incurred by these parties to prevent, eliminate or ameliorate the adverse effects of the spill and to restore the natural environment;

ii. loss or damage that is a direct result of the owner/controllers' failure to carry out a duty imposed under the Act;

(c) owners and controllers of a pollutant are strictly liable to government and to other persons who suffer loss or damage (including loss of income) incurred as a direct result of a spill;

(d) spillers have the benefit of limited [(5) -- 5. . This provision is subject to a large deductible.] provisions for partial government reimbursement for compensation paid by them to third parties and for their costs of cleaning up other persons' property, where the spiller would not have been liable under the common law.

The "Spills Bill" also establishes a fund to make expeditious compensation payments to third parties who suffer damages (up to certain monetary limits) due to a spill.

Recommendation 8. The CBA recommends that the government of British Columbia amend the Waste Management Act to:

(1) require the owner or controller of a spilled pollutant to prevent, eliminate and ameliorate the adverse effects of the spill, and restore the natural environment;

(2) impose absolute liability on the owner/controller for clean-up and restoration expenses incurred by the government or other persons;

(3) impose absolute liability on the owner/controller for loss or damage to the government or any other person suffered as a direct result of the owner/controller's failure to carry out a duty under the Act;

(4) impose strict liability on the owner/controller for loss or damage incurred by government or any other person as a direct result of a spill;

(5) set out reasonable provisions for the government to share with the owner/controller the cost of compensation to third parties where the owner/controller would not have been liable at common law; and

(6) establish a fund to make expeditious compensation payments (up to reasonable monetary limits) to third parties who suffer damages due to a spill.

## **9. PROHIBITION OF POLLUTION FROM PRESCRIBED ACTIVITIES OR OPERATIONS**

The WMA s. 3(1.2) prohibits a person from introducing into the environment waste "produced by any prescribed activity or operation". This subsection was intended to deal with prevention of pollution from non-commercial activities, such as changing motor oil, which are too small on an individual basis to allow the Crown to prove that the waste was introduced into the environment "in such a manner or quantity as to cause pollution" pursuant to WMA s. 3(2), but which are common enough to cause an overall problem for the environment. Unfortunately, no regulations have been passed prescribing these activities. Thus, authorities who find a person, for example, dumping a small quantity of changed motor oil down a sewer, have no feasible recourse under the WMA. (Charges under the Litter Act, the federal Fisheries Act or municipal sewage bylaws are possible but for a variety of reasons are not usually practical.)

Recommendation 9. The CBA recommends that the Lieutenant Governor in Council pass regulations under WMA s. 35(2)(t) prescribing activities, operations and classes of persons for the purpose of WMA s. 3(1.2).

## 10. POWERS RE: SPECIAL WASTE IN VEHICLES

WMA s. 21.1 authorizes a "police constable" to order movement of vehicles containing special (hazardous) waste. The problem is that "police constable" is not a term used in B.C. legislation. Thus, it is not clear who has the authority to exercise this power.

Recommendation 10. The CBA recommends that the WMA s. 21.1 be amended to provide that in this section "'officer' includes conservation officer, provincial constable or municipal constable", and to replace the term "police constable" in this section with "officer".

## 11. MONITORING

Many British Columbians do not have confidence that information provided by companies and government provides a complete and accurate accounting of all the pollution discharged and emitted by B.C. sources of pollution.

Recommendation 11. The CBA recommends that the government of B.C.:

(1) adopt an environmental monitoring program to be paid for by the companies whose activities are being monitored, that will ensure that the public of B.C. receives prompt, credible information on;

(a) the full extent of discharges of contaminants to land, air and water, including spills, upsets and other unusual incidents;

(b) audits designed to ensure the accuracy of monitoring carried out by and on behalf of regulated industries;

(c) the environmental effects of pollution from particular sources of environmental problems; and

(d) research studies to clarify the extent and nature of environmental problems and to point the way towards solutions; and

(2) where necessary to ensure the credibility of this information:

(a) utilize government personnel to obtain and analyze this information; and

(b) post government personnel on site.

## 12. EQUIVALENCE WITH THE CANADIAN ENVIRONMENTAL PROTECTION ACT

There are a variety of ways in which the WMA should be strengthened in order to make it equivalent to the Canadian Environmental Protection Act (CEPA).

Recommendation 12. The CBA recommends that the Waste Management Act be amended to make the WMA equivalent to the Canadian Environmental Protection Act [(6) -- 6.. Canadian Environmental Protection Act, SC 1988, c.22, as amended.] in the following respects:

- (1) adding to the WMA a section similar to CEPA s. 108 allowing any two adult Canadian residents to require the Minister of Environment to investigate an alleged offence;
- (2) adding to WMA s. 10 provisions requiring reporting and remedial measures by the owner in addition to "the person who had possession, charge or control" of a polluting substance;
- (3) adding to the WMA a provision comparable to CEPA s. 37 ("whistleblower protection") which would allow a person to claim and receive confidentiality regarding a voluntary report of an infraction of an environmental standard, and which would bar employers from disciplining the person for making such a report;
- (4) adding to the WMA a section similar to CEPA s. 40, which would authorize the Minister to take a wide variety of remedial actions such as requiring the recall of a product which is hazardous to the environment;
- (5) adding to the WMA a provision similar to CEPA s. 48 requiring that proposed regulations be published in the Gazette with 60 days to allow the public to comment;
- (6) adding to the WMA a provision similar to CEPA s. 102 requiring the owner or person in charge of a place, or a person present in a place, entered by an inspector to give the inspector all reasonable assistance to enable the inspector to carry out duties and functions under the Act;
- (7) adding to the WMA a section similar to CEPA s. 120 which would allow the Lieutenant Governor in Council to make regulations prescribing the manner in which the proceeds resulting from the payment of fines or the execution of orders under the Act shall be distributed (to allow a regulation such as the Penalties and Proceeds Regulations under the federal Fisheries Act, which provides that one half of any fine resulting from a private complaint may go to the private complainant);
- (8) adding to the WMA provisions comparable to CEPA sections 128 and 130, which would authorize the Court to impose a broad range of sentencing options many of which are not currently available under the WMA, such as orders to:
  - (a) prevent future offences,
  - (b) take remedial measures,
  - (c) publish the facts relating to the conviction,
  - (d) notify a person aggrieved or affected by the offender's conduct,
  - (e) post a bond to ensure compliance,
  - (f) submit a follow-up report to compensate the government for the cost of remediation,
  - (g) perform community service, or
  - (h) pay for research into the ecological use and disposal of the substance in question;
- (9) adding to the WMA a provision comparable to CEPA s. 131 which would allow the Court at the time a sentence is imposed to order the offender to pay compensation to a person aggrieved

(note that this provision follows conviction under the Act, and does not require a civil suit for damages);

(10) adding to the WMA a provision comparable to CEPA s. 135, which would allow the Court to grant an injunction on the application of the Minister requiring a person to refrain from committing or to prevent the commission of an offence under the Act;

(11) adding to the WMA a provision comparable to CEPA s. 136 which would allow a person who has suffered loss or damage as a result of a violation of the Act or Regulations to recover damages and to obtain an injunction (this provision is stronger than the common law, in that the aggrieved person would have to prove only that the defendant violated the Act or Regulations, without having to prove negligence); and

(12) adding to the WMA a section similar to CEPA s. 139 which would require a legislative review of the administration of the Act within 5 years, with a report including recommended changes to the Act or its administration to be tabled in the Legislature.

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End of Recommendations For Improvement Of The Enforcement Provisions Of The British Columbia Waste Management Act

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