Our AMPs Go to Eleven: The Coming of Administrative Monetary Penalties Under the Manitoba Environment Act

Authors: John Stefaniuk, K.C. Chad Laferriere-Enns

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AMPs are upon us.

Following a reported 135 million–liter sewage spill into the Red River from a broken City of Winnipeg sewer pipe, Manitoba Environment Minister Tracy Schmidt made it known that her department was looking at amendments to *The Environment Act* (Manitoba) that would create a deterrent without the need to go to the Provincial Court by way of prosecution. That was a clear signal of her government's intention to implement a new administrative monetary penalty (AMP) regime.

Bill 37 (Bill), *The Budget Implementation and Tax Statutes Amendment Act, 2024*, received second reading in the Manitoba Legislature on October 10, 2024. The Bill is omnibus legislation that both implements the provincial budget and contains amendments to miscellaneous legislation. The government has been criticized for "burying" the amendments in a budget bill instead of using separate legislation, and more so because, unlike other legislation, budget bills in Manitoba are not subject to public comment at legislative committee hearings.

Schedule B of Bill 37 constitutes *The Environment Act Amendment Act*. The proposed amendments introduce AMPs as an enforcement tool to be used by the Manitoba Department of Environment and Climate. The amendments will take effect when that part of Bill 37 receives royal proclamation (i.e., approval by Cabinet sometime after the Bill passes).

What is an AMP and why?

While relatively new to Manitoba, AMPs are a popular enforcement and deterrence tool used by all manner of regulatory authorities at all levels of government in Canada. The **British Columbia Ministry of Environment** describes AMPs as follows:

An administrative penalty is a monetary penalty that can be imposed on individuals or companies who fail to comply with requirements of a statute or regulation, an order given by a Ministry official, or a requirement of an authorization (permit, license, approval etc.).

AMPs can be issued by regulators without initiating a formal prosecution. Although they are sometimes likened to “tickets”, the penalties under AMP regimes in Canada can be well into the thousands of dollars and sometimes even the millions. And unlike ticketed offences, which still must be proven by the Crown if challenged in court, the opportunities to challenge the issuance of an AMP are prescribed in the legislation that creates them, and those grounds are often limited in scope.

How will it work?

Under the proposed amendments, when the director appointed under *The Environment Act* (Act) is of the opinion that a person (including a corporation or other entity) has failed to comply with an “environmental protection order” issued under the Act, the director may issue a notice in writing requiring the person to pay an AMP. Again, the director only needs to hold an opinion; no strict proof, whether to a criminal or civil standard, of intent to commit an offence or of the facts constituting an offence is required.

Environmental protection orders may be issued by the director pursuant to Section 24 of the Act against a “person responsible for a pollutant” where the director believes a pollutant may be released, is being released, or has been released, and the release may cause, is causing, or has caused an adverse effect on the environment. The Act defines the person responsible for a pollutant to be the owner of the pollutant and any other person having charge, management or control of the pollutant.

Environmental protection orders can require the person responsible to take any steps that the director considers necessary to protect the environment. These steps may include investigating the situation; measuring the release; remedying the effects of the pollutant on the environment; restoration; monitoring, removal, storage, containment or destruction of the pollutant; installing equipment or works to eliminate the release of the pollutant; and reporting.

How much and by when?

Bill 37 provides that the amount payable under an AMP may be set by regulation but sets the maximum AMP for an individual at $25,000 and at $125,000 for a corporation. The minister is given the regulatory authority to provide that the penalties vary based on the nature or frequency of the failure to comply and whether the non-compliant person is an individual or a corporation. It is expected that the regulation determining the amount payable will be enacted by Cabinet at the same time as the amendments are proclaimed into force. Subject to a request for reconsideration or challenge, described below, an AMP is payable 30 days after it is issued.

It is important to note that AMPs may be issued for each separate failure to comply with an environmental protection order. In addition, each day of failure to comply constitutes a

separate failure and can result in a new AMP. For example, if the director decided that a corporation failed to comply with an environmental protection order and that failure extended for eight days, that corporation could be faced with a maximum of $1 million in AMPs. Multiply that by multiple failures to comply and, well, you get the picture.

Once issued, an AMP has the effect of a debt due to the Crown and may be enforced as such. That includes taking out a court judgment. The director is required to issue public reports of any AMPs that are issued — not exactly news that the recipient of an AMP wants to broadcast.

So, you are served with notice of an AMP…

Boy Scout or not, the best advice is to be prepared.

If you or your business has been issued a valid environmental protection order, prompt compliance is key. If there is an issue as to its validity, then steps should be taken to assert your position. (You likely need your lawyer here.)

Anyone receiving notice of an AMP has **only seven days** to file a "request for reconsideration" with the director. The grounds for reconsideration are limited to one or more of the following:

- the finding of non-compliance was incorrect;
- the amount of the penalty was not determined in accordance with the regulations; or
- the amount of the penalty is not justified in the public interest.

It should be noted that the typical grounds that would apply to defending a regulatory charge, such as due diligence, reasonable and honest mistake of fact, officially induced error, and abuse of process, are not listed and might not apply. So, "doing everything reasonably possible to comply" might not be enough to avoid an AMP. A request for reconsideration operates as a "stay" of the AMP. The stay postpones the payment requirement until the director delivers the reconsideration decision.

The director can only revoke an AMP if satisfied that new evidence has become available or has been discovered that is substantial or material to the decision, and the evidence did not exist, or was not discovered, at the time the decision to impose the AMP was made. There may be other ways to challenge the issuance of an AMP, such as a failure by the director to follow the legislation. That would require civil court action, which can be costly and lengthy. On top of that, a court challenge might not operate as a stay of the requirement to pay the AMP on time.

AMPing up

Regulators see AMPs as an efficient tool to discourage non-compliance without the formality

of a prosecution. Those who are regulated often see AMPs as lacking in fairness, sometimes arbitrary, and a burden that discourages cooperation and creative solutions. Whether the addition of AMPs in Manitoba Environment and Climate's regulatory quiver will impact its historically cooperative approach toward compliance is uncertain. Stay tuned!

For helpful resources such as events, news and more articles like this, visit the Knowledge Centre of our website at **tdslaw.com/knowledge-centre**.
