Comments on Bill 40, the *Environment Management Amendment Act, 1998*

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The *Environment Management Amendment Act, 1998,* (Bill 40) introduces a number of potentially very significant changes to British Columbia's environmental management regime. In particular, it allows government to, by regulation, delegate the

a. administration and management of "stewardship programs"
b. "authorities of government" under such programs

to "stewardship agencies". Although regulations and ministerial directives may elaborate on the mandate of an agency, there are few fetters, other than the requirement to exercise their powers in the public interest. Stewardship agencies can sub-delegate their powers and responsibilities to corporations or societies.

Implications are Far-Reaching

While there are advantages to delegation allowed by Bill 40, the potential loss of public control and reduction of direct ministerial responsibility are important from the perspective of our democratic institutions. Care should be taken in giving the government carte blanche to delegate.

The potential implications of Bill 40 are far-reaching. Delegation of administrative and possibly regulatory powers to relatively independent stakeholder agencies has a number of advantages:

- stakeholders are potentially forced to grapple constructively with environmental problems rather than simply criticizing government action or adopting entrenched positions;
- stewardship agencies may have more stable sources of funding than available to government; and
- stewardship agencies may be more transparent than government.

On the other hand, delegation involves a loss of public control and direct ministerial accountability that need to be fully considered as they cut to the core of our democratic institutions.

Bill 40 appears to be well intended and that the Bill could yield positive consequences. However, in its current form there is also potential for the Bill having far reaching negative implications.

Recommendation:
Care should be taken in allowing delegation of functions that are central to government's purpose. Amendments are necessary to guard against unintended impacts.

Lack of Consultation

The lack of consultation regarding Bill 40 makes may cause unnecessary suspicions.

We are disappointed by the lack of consultation in relation to such an important piece of legislation. Although, apparently some groups were aware of the legislation through the Beverage Container Board, we are unaware of any consultation beyond the recycling beverage container product stewardship (even though the Bill could allow delegation of government functions ranging from waste management to Park management). We have not had an opportunity to thoroughly review the Act or consult with our clients. This lack of consultation engenders a spirit of distrust with environmental groups even in the context of well-intended changes. Government's introduction of Bill 40 without very limited consultation follows on the heals of the government's disdainful attitude to consultation regarding changes to the *Forest Practices Code* and regulations, the *Mining Rights Amendment Act*, and changes to Vancouver's planned light rapid transit system. Consultation is currently often reserved for relatively small amendments to regulations. Initiatives that are much more important are being developed in a black box with little or no chance for meaningful comment.

Recommendation:
The government should commit to improving consultation regarding legislative and regulatory amendments.

Clarification of What Stewardship Programs Can Be Delegated

As written, Bill 40 could allow a huge range of government functions – regulation of waste emissions, park management, wildlife management, forest management etc. – to be delegated to private sector entities. However, Bill 40 appears primarily designed to delegate the relatively

simple function of product stewardship. The Bill should be amended to only allow delegation of designated types of programs (for now limited to product stewardship) so that legislative debate can occur before delegation of other programs occurs.

Stewardship program is defined by Bill 40 as a "stewardship program established under an enactment for the enhancement, management and protection of the environment." Under this circular definition, a stewardship program could include any program under a regulation or statute that has an environmental purpose.

On the other hand, the addition of paragraph 57(2)(w) of the *Waste Management Act* included in section 6 of Bill 40 provides an explicit power to establish stewardship programs. Given the context of paragraph (w), stewardship programs in paragraph (w) are apparently not limited to product stewardship programs such as the those established under the *Post Consumer Paint Stewardship Program Regulation,* the *Post Consumer Residual Stewardship Regulation* or the *Beverage Container Stewardship Regulation.* Under the *Waste Management Act* stewardship programs might include "stewardship" of special waste or "stewardship" of emissions into a watershed or airshed.

Nor does Bill 40 limit delegation of programs to programs under the *Waste Management Act*. The fact that Bill 40 gives an explicit power to establish stewardship programs is only in the context of the *Waste Management Act* does not limit Bill 40 to delegation of *Waste Management Act* programs. Prior to Bill 40, stewardship programs were established under the *Waste Management Act* with no regulation making power that referred to stewardship. There is no reason to believe that programs under the *Wildlife Act*, the *Forest Practices Code*, the *BC Environmental Assessment Act* or the *Park Act* could not be called "stewardship programs" and have their administration delegated.

We are aware that under the "Project Viability" initiative, proposals were made to allow delegation of responsibility over aspects of park management to separate corporations with cabinet appointed boards. These provisions were eventually withdrawn after criticism that they were ill-conceived. Bill 40 should not be a back door means of allowing such delegation.

Moreover, while Bill 40 allows delegation of park management, waste management and forest management, the details of the Act are not well suited to delegation of anything beyond product stewardship. (The only program specific powers of agencies in subsection 21(2) relate to product stewardship.) West Coast Environmental Law has no fundamental objections to delegation of product stewardship programs, but delegation of control over waste management, parks, forest practices, or environmental assessment are either unacceptable or need to be fully considered and done under legislation designed for the appropriate purpose.

Recommendation:
Redefine stewardship program as

> **"a program established under an enactment for the enhancement, management and protection of the environment and of a type listed in Schedule 1"**

and by adding a Schedule 1 which would be limited to

> **"programs under which the manufacturers, distributors, vendors or providers of a class of products take responsibility for managing waste associated with that product's provision, delivery or disposal."**

Amendments to Annex 1 should only be possible through legislative amendment.

Defining "Authorities of Government" which may be delegated

Without defining what is meant, section 18(1) allows delegation to a stewardship agency of "authorities of government". This could be interpreted as allowing delegation of regulation-making powers.

Under section 18(1) the Lieutenant Governor in Council may, by regulation, delegate to a stewardship agency "the authorities of the government under a stewardship program". A statute based stewardship program could include the Lieutenant Governor in Council's regulation making powers. Thus, regulation-making powers could potentially be delegated.

For the purposes of product stewardship programs, all necessary rule making powers are included in section 21. There is no need to allow general delegation of regulation making authority.

Recommendation:
Add a subsection 18(10) stating "Regulations delegating government authority under subsection (1) may not delegate any regulation making authority".

Public Oversight

Current provisions for ensuring democratic, public oversight of agencies do not give the Minister a clear power to direct stewardship agencies.

Section 23 allows the Minister to issue written directions that specify "factors, criteria and guidelines that the stewardship agency must use" and "setting objectives and targets". The agency must comply with such directives.

Although the section 23 refers to mandatory compliance with directions, the section is ambiguous. "Factors, criteria and guidelines" all suggest matters that must be considered but which provide flexibility. Most of the time this will be appropriate, but in some circumstances it may be necessary to direct that boards follow an explicit process or policy. Similarly, targets and objectives connote non-mandatory goals. If a target is set under section 23(2) (for instance, 90% return rate for a used product) it is not clear if the agency is simply required to make some efforts to meet the target or whether they must meet that target, not just make some meager attempt. It is essential to have clear mandatory targets by which an agency's success or failure can be measure. It should be noted that making targets and objectives mandatory will not make agencies or directors liable if they fail to meet those targets.

Recommendation:
Amend section 23 to state:

1. **....**

    a. **specifying factors, criteria, guidelines, <u>procedures and policies</u> that the stewardship agency must use..."**
    b. **setting objectives and targets <u>that the stewardship agency must meet</u> ....**

Balanced Representation

Balanced representation of different interests on the boards of stewardship agencies is key to the acceptability of the system. Predefining constituents of different boards is impossible without knowing the stewardship program, but basic principles of multistakeholder representation should be set out in legislation.

Under section 19(4) "the Lieutenant Governor in Council must appoint persons to the board ... that the Lieutenant Governor in Council considers are representative of the various stakeholders who have an interest in the stewardship program for which the stewardship agency has responsibility." While this provision enshrines the concept of multistakeholder representation, operationalizing such representation is dependent on the whim of cabinet. Although we do not believe that is the government's intention, under Bill 40 cabinet could interpret "interest" as being a pecuniary interest, excluding environmental groups or consumers. To ensure balanced representation in agency boards, basic principles of multistakeholder representation should be set out in legislation.

Recommendation:
Add a subsection 19(4.1) stating:

"Representation under section 19(4) should include balanced representation from:

a. **registrants and others with a pecuniary stake in stewardship programs;**
b. **local governments where local governments have expressed an interest in the program;**
c. **environmental groups;**
d. **consumer groups; and**
e. **other groups that the Lieutenant Governor in Council considers to have an interest.**

Effective Representation

Effective representation will only occur where the groups represented are adequately resourced. Often environmental groups – as well as municipal government or consumers groups -- are excluded from effective multistakeholder participation by simple lack of resources.

West Coast Environmental Law supports multistakeholder dialogue, but multistakeholder processes are often made ineffective by lack of resources for some participants. WCEL, like many other environmental groups, must routinely turn down requests to participate in multistakeholder processes because of limited capacity. Effective participation can be extremely time consuming, especially where a process has a decision-making capacity over technical matters. In some processes, industry has used its overwhelming resources to slow meaningful dialogue until such time as environmental participation wanes (due to frustration and lack of time) and industry faces less resistance to its will

Even where participant assistance is available, it often only covers a fraction of the costs of having someone at the table. (For instance, in the case of WCEL, participant assistance of $175 per day offered in one process is far below the combined costs of office overhead, professional overhead and relatively low salaries that are needed to maintain competent staff). The problem of resources must be dealt with in Bill 40.

Subsection 19(7) allows boards to set remuneration for agency directors that are not public service members. While this is an important provision, there is no guarantee that board's will remunerate directors even if remuneration is essential to the effective participation of some directors. Representatives of well resourced organizations that are adverse in interest to poorly resourced groups such as environmentalists, consumer groups and municipalities have an incentive to reject remuneration simply so that they can effectively exclude opposing interests.

Recommendation:

Amend section 19(6) to state

> **"A director who is not a public service employee … must be paid reasonable remuneration where needed to allow effective participation in the board, and every director …."**

Amend section 23(1) by adding a paragraph (c):

1. **The minister may issue written directions to a stewardship agency**

> **(c) specifying guidelines for compensation to board members.**

Conflict of Interest Provisions

Potentially stewardship agency board members could manipulate stewardship programs in order to restrict competition within sectors or pursue other commercial goals. Provisions are necessary to ensure that individual directors act in pursuance of the public interest, disclose conflicts and abstain from voting on issues in some circumstances.

To some extent, conflicts of interest are inherent in a multistakeholder board. However, many of the decisions of stewardship agencies will have significant positive commercial implications for the industries represented on a board disadvantaging industries not represented on the board. For instance, levies set under paragraph 21(2) could be used to favour one company and disadvantage a competitor.

Although section 21 states that boards as a whole are required to govern and administer affairs of the stewardship agency in accordance with Part 2 of the *Environment Management Act*, regulations and ministerial directives, the direction is purely hortatory. There are no legally enforceable responsibilities imposed on individual directors to act in good faith and in the best interests of the stewardship program. Moreover, Bill 40 does not include bars to directors of stewardship agencies involving themselves in decisions in which they have a conflict of interest and standard *Company Act* provisions regarding conflict of interest are excluded by subsection 18(8)**.**

Recommendations:

Make directors subject to Company Act conflict provisions in relation to contracts or transactions of a stewardship agency in which the directors have a direct or indirect interest. (This could be done by incorporating section 120 from the *Company Act*.)

Require every director in exercising his or her powers to act in the public interest, act honestly and in good faith and in the best interests of the stewardship program. (Similar to section 118 of the *Company Act*.)

Require every director to disclose any offices he or she holds or property they possess which might create a conflict of interest. (This could be done by incorporating section 123 of the *Company Act*.)

Require that in any circumstance where a director is aware that a decision of the board may directly or indirectly financially affect a corporation or sector represented by the director the director discloses the interest of the sector or corporation. Directors with such conficts should be required to abstain from voting and exclude themselves from discussion unless either (a) a unanimous vote of the board approves their participation, or (b) an equal number of directors representing corporations with opposite interests are present. (This attempts to balance stakeholder participation against the need to guard against abuse of position.)

Conclusion

We hope the above comments will be fully considered by the members of the legislature during deliberations over Bill 40. Questions or comments regarding the above comments should be addressed to Chris Rolfe at West Coast Environmental Law Association (604.601.2512).