

URBAN, PLANNING AND
ENVIRONMENTAL
LAW REPORT

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In this issue we begin the first of a two-part feature on the recently enacted *Air Pollution Control (Amendment) Ordinance* which is expected to come into operation later this year. The amendments, which were digested in the last issue, introduce some major changes to the subject matter of air pollution regulation in Hong Kong, the power to order abatement and the penalties for air pollution offenses.

The last two months have been particularly busy for amendments and additions to Hong Kong's environmental regulation as well as the appointment of various effective dates for environmental legislation. These appear in the *Digest of Legislation* and *Diary* respectively.

The International section features a report on the potential environmental liability of secured creditors in the United States of America.

The July-August issue will appear in September after the summer recess. May we take this opportunity to wish our readers a pleasant summer and happy holidays.

The Editors

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Air Pollution Control (Amendment) Ordinance 1993

EXACTLY one decade ago, Hong Kong enacted the *Air Pollution Control Ordinance* (APCO) which was the third part of a package of environmental legislation designed to deal systematically with the Territory's declining environment. Despite its pretensions to modernity, APCO was in itself little, if any, improvement on the existing law.

Even Hong Kong's administration has recognised that it has not been able to achieve its often modest air quality objectives through APCO. In its 1992 report, the EPD revealed that concentrations of Total Suspended

Particulates and Respirable Suspended Particulates exceeded the annual Air Quality Objectives at five monitoring stations in 1991. Moreover, nitrogen dioxide levels remained high in many districts and exceeded daily Air Quality Objectives in Mongkok.

An overhaul of APCO was conducted and in February 1993 the *Air Pollution Control (Amendment) Ordinance 1993* was enacted. It introduces amendments to APCO in five major respects. It is expected to come into force later this year.

The most important change to APCO is the addition of Parts 8 and 9 (ss. 51 to 80) which create a regime for the control and

abatement of asbestos in premises throughout Hong Kong. Part 8 may be described as administrative. It establishes the machinery for administering a register of asbestos consultants, contractors, supervisors and laboratories.

It gives an administration committee the authority to advise the authority who qualifies for registration, to make recommendations on the discipline of registered persons, including their removal from the register, after a disciplinary hearing. There is no appeal from disciplinary proceedings but neither is there any attempt to exclude the right to judicial review.

Part 9 contains the central provisions on asbestos regulation. S.69 establishes duties on the owners of certain premises which contain or may reasonably be suspected of containing asbestos to engage a registered asbestos consultant to carry out an investigation, to report on the existence of asbestos and, if any is found, to plan its management and/or abatement.

The asbestos investigation report is essentially a statement of the methods used to investigate the premises, what was discovered, an assessment of the hazards and the impact on people and their activities in the immediate vicinity. The management plan consists of an 'operation and maintenance plan' and an 'abatement plan'. The former explains why the asbestos material should not be removed and how it will be maintained so as to mitigate its impact. The latter sets out a programme for the safe removal and disposal of the asbestos material.

It is EPD policy to commence enforcement in hospitals and schools. Some premises will be exempt, where the Secretary of Planning Environment and Lands ('the Secretary') so classifies them by notice in the Gazette. These are likely to include the owners of most residential and commercial premises for the time being.

Whilst APCO failed to confront air pollution caused by odour and dust as well as the micro-scale air pollution problem, the Amendment Ordinance has tackled these issues by redefining air pollution and setting out the factors which the authority may take into account in determining what is air pollution.

The officer's discretion is defined so broadly, ... it is hard to conceive of a situation where an unsafe or reasonably objectionable emission cannot be called air pollution and its abatement ordered.

The definition of 'air pollutant' is expanded to include 'objectionable odour'. 'Air pollutant nuisance' has been redefined into 'air pollution' and 'nuisance' respectively. The old definition did not extend liability to abate a micro-scale air pollution problem because it was limited to a 'nuisance to the inhabitants of the neighbourhood' (emphasis supplied). The italicised words have been deleted by the Amendment Ordinance so that even where the air pollution is merely a nuisance between neighbours the discharger will be liable to abate it.

'Nuisance' has been given a legislative definition which includes 'an event which is obnoxious and results in any of the effects set out in s.10(2)(h), which is discussed below.

Further, the definition of 'air pollution' has been expanded to include an emission which 'is determined to be air pollution under a technical memorandum'; that is, a set of standards established by law which restrict emissions with reference to objective criteria. The importance of the introduction of technical memoranda into air pollution control will be discussed in the next issue.

In tandem with the redefinition of air pollution and nuisance, s.10 has been replaced with a new provision on the abatement of air pollution which clearly enumerates the information or effects the enforcement officer may take into account in deciding whether an emission constitutes air pollution. The officer's discretion is defined so broadly, in fact, it is hard to conceive of a situation where an unsafe or reasonably objectionable emission cannot be called air pollution and its abatement ordered.

In particular, the officer may take into account 'research material results or publications which indicate that the type of emission may have adverse health effects', the advice of a medical practitioner', and, in s.10(2)(h) any of a broad range of effects from dust deposits, odour, staining, irritation and any other effect which it is 'unreasonable for a member of the public to suffer.' (*To be continued in the next issue.*)

Digest of LEGISLATION

(This digests Legal Supplements to the Gazette Nos. 16/24 April to 24/18 June 1993.)

NOISE POLLUTION

Noise Control (Amendment) Bill 1993 (L.S. No. 3 to GAZETTE No. 17/April 1993 p.C553) Miscellaneous amendments to the Noise Control Ordinance which provide, *inter alia*, construction noise permits are only required in 'designated areas'; construction in domestic premises conducted by occupiers themselves is exempt from prohibition; technical memoranda may be issued for designated areas.

OZONE PROTECTION

Ozone Layer Protection (Amendment) Ordinance 1993 (No. 26 of 1993 in L.S. No. 1 to GAZETTE No. 17/April 1993 p. A388) Housekeeping amendments to ss.10 & 12 with respect to the powers of search and investigation of suspected offenses and s.16 on regulations, as well as extending the long title to the conservation of resources.

Ozone Layer Protection (Controlled Refrigerants) Regulation L.N. 158 of 1993 (L.S. No. 2 to GAZETTE No. 20/May 1993 p.B636) Requires the conservation of controlled refrigerants in large scale installations and in motor vehicles by means of recovery and recycling.

Ozone Layer Protection (Products Containing Scheduled Substances) (Import Banning) Regulation L.N. 159 of 1993 (L.S. No. 2 to GAZETTE No. 20/May 1993 p.B644) Prohibits

the import into Hong Kong of certain products, such as air conditioning equipment, aerosols, fire extinguishers and pre-polymers, from countries which are not party to the *Montreal Protocol on Substances that Deplete the Ozone Layer 1987*.

WASTE DISPOSAL

Waste Disposal Ordinance (Cap.354) (Application) Notice 1993 (L.S. No. 2 to GAZETTE No. 17/April 1993 p.B587)

Waste Disposal (Chemical Waste) (General) Regulation (L.N. 20 of 1992) (Application of Section 4 and Parts III, IV, V, and VI) Notice 1993 (L.S. No. 2 to GAZETTE No. 17/April 1993 p.B590)

Appoints 3 May as the day which ss.11, 16 & 17 of the Ordinance and s. 4 of the Regulation shall apply to chemical waste specified variously in Parts A and B of the Schedule.

WATER POLLUTION

(The following Legal Notices appeared in L.S. No. 2 to GAZETTE No. 21/May 1993 at pp. B699-727)

Water Pollution Control (Eastern Buffer Water Control Zone) Order L.N. 169 of 1993

Water Pollution Control (Eastern Buffer Water Control Zone) (Appointed Days) Order L.N. 170 of 1993

Statement of Water Quality Objectives (Eastern Buffer Water Control Zone) L.N. 171 of 1993

Water Pollution Control (Western Buffer Water Control Zone) Order L.N. 172 of 1993

Water Pollution Control (Wes-

tern Buffer Water Control Zone) (Appointed Days) Order L.N. 173 of 1993

Statement of Water Quality Objectives (Western Buffer Water Quality Zone) L.N. 174 of 1993

Water Pollution Control (Southern Supplementary Water Control Zone) Order L.N. 175 of 1993

Water Pollution Control (Southern Supplementary Water Control Zone) (Appointed Days) Order L.N. 176 of 1993

Statement of Water Quality Objectives (Southern Supplementary Water Control Zone) L.N. 177 of 1993

Water Pollution Control (Tolo Harbour Supplementary Water Control Zone) Order L.N. 178 of 1993

Water Pollution Control (Tolo Harbour Supplementary Water Control Zone) (Appointed Days) Order L.N. 179 of 1993

Statement of Water Quality Objectives (Tolo Harbour Supplementary Water Control Zone) L.N. 180 of 1993

These various orders create four new water control zones along with their respective water quality objectives as well as first and second appointed days under s.7(2) & (3) of WPCO by which time existing discharges must be licensed.

CASELAW Update

Canterbury City Council v Colley and Another (House of Lords, Times Law Report 26 January 1993) *Assumption in assessing compensation for revocation of planning permission - s.164(4) of the Town & Country Planning Act 1971 - mandatory nature of the assumption of planning permission.*

The appellants were owners property for which the respondent council had granted outline planning permission in November 1961 for 'the demolition of house and erection of new dwelling.' The house was duly demolished in 1963 but no new dwelling had ever been erected. The appellants bought the site in 1986 and after a lengthy dispute the council agreed that the 1961 permission was still valid. However, in November 1987, the council revoked the 1961 permission and after a public inquiry the revocation was confirmed by the Secretary of State.

The appellants then applied for compensation under s.164 of the 1971 Act and this was referred to the Lands Tribunal.

The issue before the House was whether the Lands Tribunal was correct in assessing the depreciation of the property at £106,750, a figure arrived at by simply subtracting the value of the land without the 1961 permission from its value with that permission and disregarding s.164(4) which provides that 'In calculating ... the amount of any loss ... it shall be assumed that planning permission would be granted for development of the land of any class specified in

Schedule 8.' Schedule 8 includes the cost of rebuilding the dwelling that was demolished.

By taking account of this assumption the amount of depreciation would be reduced to £45,000. The Court of Appeal had allowed an appeal by the council on a case stated by the Lands Tribunal and found the Lands Tribunal had erred in not taking account of the assumption in s.164(4). The appeal from that judgment by the appellants was dismissed by the House of Lords.

The judgment was delivered by Lord Oliver, with whom Lords Templeman, Ackner, Mustill and Woolf agreed. *Held:* In assessing compensation payable on the revocation of planning permission to demolish and rebuild a house, the valuer had no choice but to apply s.164(4) of the 1971 Act and assume that permission to rebuild the house would be granted, even in circumstances where such a permission was in substance the subject matter of the revocation order.

His Lordship disagreed with the opinion expressed by the Lands Tribunal that the legislature could not have intended to deprive claimants of compensation by taking into account a notional permission which had no possibility of implementation. The legislature may not have actually foreseen circumstances where the permission revoked and the notional permission overlapped, and this was a sound reason for hoping that this 'anachronistic relic' be looked at by Parliament.

Certainly the result of applying s.164(4) may sometimes be

anomalous, but as they stand the terms of that section were clear and mandatory and had to be applied in all cases. Moreover, by examining the legislative history of s.164(4) of the 1971 Act, His Lordship concluded that the intention of the legislature was in fact to limit the amount of compensation that could be claimed by setting a base value for land by reference to Schedule 8 development.

Diary

(See *DIGEST OF LEGISLATION* for details.)

23 April 1993: ss.2(b) and 3 of the Forests and Countryside (Amendment) Ordinance came into operation.

3 May 1993: various provisions on the disposal of chemical waste came into operation.

1 June 1993: first appointed date under s.7(2) WPCO for the four new water control zones at which time existing discharges must be reported.

11 June 1993: the remaining sections of the Forest and Countryside (Amendment) Ordinance came into operation.

15 July 1993: the Factories and Industrial Undertakings (Noise at Work) Regulation comes into operation.

1 December 1993: second appointed date under s.7(3) WPCO for the four new water control zones by which time all existing discharges must be licensed.

HONG KONG Briefing

ENVIRONMENT AND PUBLIC HEALTH

GREEN GROUPS in Hong Kong have joined forces to present a united stance on environmental policy and to coordinate activities. Green Power, Friends of the Earth, the Conservancy Association and the World Wide Fund for Nature have formed the Green Groups United Front and their first joint action is to produce a statement on environmental policy for the review being made by the Planning, Environment and Lands Branch which is due in June 1993. (SCMP 19 & 22 April 1993)

THE EPD has spent \$380 million on employing consultancies to carry out investigations, and to do design and monitoring work. (SCMP 6 May 1993)

MAI PO MARSHES are expected to be listed under the Ramsar Convention on Wetlands of International Importance, which would give the area international recognition. A further 90 hectares of shrimp ponds has been given over to the WWF to manage as part of the Mai Po nature reserve, costing the government around \$17million in compensation to the affected farmers. (SCMP 6 May & 11 June 1993)

THE SEWAGE treatment master plans have been revised and show savings of at least \$500 million. Under these new plans, which need \$17.8billion, sewage will be piped underground to just two large partial treatment

plants at Stonecutters' Island and Mount Davis before it is pumped out to sea via a 35-kilometre pipeline. The SAR will still be responsible for building this pipeline. Meanwhile, proposals for the sewage fee scheme to provide \$3.4billion from public and industrial levies have been delayed. (SCMP 20 & 28 April, 21 May 1993)

TIGHTER emissions standards, heavier penalties and a cleaner diesel fuel have been proposed by the EPD as ways to reduce air pollution. The department also plans to revive a scheme to switch taxis and light goods vehicles from diesel to petrol. (SCMP 20 April & 27 May 1993)

EPCOM has agreed to a reduced proposal to dredge the East Lamma channel for 15million cubic metres of sand to use in landfills for Container Terminal Nine. Its members recorded their fears of the effects it could have on some beaches, particularly at Repulse and Deepwater Bays as well as on the coral and fishing. (SCMP 11 May 1993)

A FAMOUS Yuen Long cakeshop became the first defendant to be given the maximum fine of \$20,000 for air pollution. This was the company's sixth offence of emitting heavy black smoke. (SCMP 16 June 1993)

AIR POLLUTION levels were within health safety standards in April, as compared with last year when the same month showed health standards to be exceeded by 50%. This however is more a sign of differences in

weather conditions, rather than real improvements in air pollution which, when reviewed over a year, appears to be getting steadily worse. (SCMP 13 May 1993)

CIGARETTES not carrying a health warning and confiscated by Hong Kong customs officers to enforce the territory's anti-smoking policy are being auctioned to China, ship stores and others to produce over \$1million a year in Government revenue. (SCMP 11 May 1993)

HONGKONG'S first treatment plant for hazardous chemical waste was officially opened at Tsing Yi Island on June 2nd amid protests from local residents about potential hazards to health from the fumes produced by the plant. The plant has been operational since April and will treat waste which although hazardous to health has previously been dumped in the harbour and EPD maintain there are no off-site risks. The proposal to charge a levy on industries to recover the \$200-\$300million operating costs should go to ExCo by the end of June. (SCMP 14 May, 3 & 8 June 1993)

LANDFILL fees to be levied on polluters have been proposed at a moderate level so as to avoid dumping of waste on road sides. Legislators have objected on grounds that the fees are too lenient and will not encourage recycling and reduction of waste. Charges ranging from \$75 to \$150 will take effect next July and should cover 25% of operating costs. There are plans to extend the scheme to householders. (SCMP 16 April 1993)

TUNNEL pollution is to be studied by the EPD to draw up guidelines which take into account the level of nitrogen oxides produced by diesel fuels. Current air quality standards use carbon monoxide, produced by petrol, as the indicator of pollution. (SCMP 14 April 1993)

DEVELOPERS may be required under the new Environmental Impact Assessment Ordinance presently being drafted to pay for measures to reduce noise and other pollution when they build residential developments in polluted areas. Such a provision would raise a number of practical problems, such as how to avoid passing the costs on to the consumer and how to effectively include environmental requirements into the planning process. (SCMP 14 May 1993)

PLANNING AND LAND USE

LAI CHI KOK Amusement Park may become the site of a revamped Sung Dynasty Theme Park under a proposal made by the Far East Hotels & Entertainment Company. The site is presently zoned as a 'comprehensive development area' and the Housing Authority has already indicated its interest in the site for the development of a public housing project. (SCMP 7 April & 7 June 1993)

DEMOLITION of the Walled City should be completed four months ahead of schedule and the site will be used as a park featuring relics from the Walled City. (SCMP 8 June 1993)

KAU SHAT WAN, an isolated bay between Discovery Bay and Silvermine Bay on Lantau

Island, inaccessible by road or hillside path, is planned to be the site for an explosives magazine to replace the store on Stonecutters' Island. The magazine will store 500,000 kilograms of explosives in caverns dug into the hillside. Islands District Board members have expressed opposition to the scheme because of its proximity to a rapidly expanding population and to ferry routes between Lantau and Peng Chau. (SCMP 7 April 1993)

PLANS FOR two chemical plants on a 20 hectare site in Tuen Mun have been opposed by District Board members because of the pollution and transport problems they would create. (SCMP 16 June 1993)

GOVERNMENT has decided to go ahead with plans for an 18 hectare landfill site in Clearwater Bay Country Park, despite objections from legislators and environmentalists, taking advantage of the exemption to Government provided by the legislation protecting country parks. (SCMP 28 May 1993)

ILLEGAL changes to land use, in the form of filling in fishponds in the New Territories are not being prosecuted according to the WWF, although it causes land degradation and flooding. Ponds are being filled with concrete often for use as container storage parks and whilst enforcement action is taken against this unauthorised use, no steps are taken to restore the land to its lawful use. (SCMP 29 April 1993)

'PADS' UPDATE

FINANCING of the project remains to be the central point of controversy as talks with China resume but continue to reach no agreement. A third financing proposal which eliminates the need for China to use part of the SAR Land Fund for the project has been produced by the British side but the details have not been published. Although the Financial Secretary has ruled out the possibility of the Government funding the entire project, it is thought that this new proposal requires a reduced financial commitment from China. (SCMP 21 & 23 April, 1, 4, 6 & 8 June 1993)

MEANWHILE the PAA is likely to be granted around \$560million to keep running until March 1994. There is a disputed item in this budget, that is an estimate of \$355million for 8 design contracts. The previous 5 design contracts, although estimated by the PAA to cost \$236million only in fact cost \$85million. These funding proposals have also raised discussion on the need to localise the PAA as over 70% of senior staff are expatriates. (SCMP 7, 9 & 11 June 1993)

LACK OF financial agreement over the airport has continued to delay the tender for the Central-Wan Chai reclamation. Contractors were asked in April to calculate several options to cover delays until July. The reclamation site is to house the airport railway terminus and the delays are threatening the planned completion date in mid-1997. (SCMP 2 April 1993)

REGIONAL AND INTERNATIONAL

UNITED STATES OF AMERICA

Secured Creditor Liability Under U.S. Environmental Laws

Potential lenders of secured loans to companies located in the U.S. should consider the potential risks as a secured creditor under U.S. and state environmental laws. Many of these laws impose on owners or operators of facilities extensive obligations, ranging from inexpensive tank closures to multi-million dollar clean-ups of hazardous waste.

The term 'owner or operator' is often defined broadly in environmental laws or construed broadly by the courts. A secured creditor who becomes involved with the management of its borrower's facility or forecloses on a collateral facility may be treated as an owner or operator of the facility for the purposes of an environmental law.

The best known environmental law imposing owner/operator liability on secured creditors is the federal *Comprehensive Environmental Response, Compensation and Liability Act* of 1980 ('CERCLA'). Under CERCLA, past and present owners or operators of a facility from which there is a release of a hazardous substance are potentially liable for the costs of cleaning up the release. This liability is strict (*i.e.* without regard to fault) and joint and several.

CERCLA includes a 'secured creditor exemption' from

owner/operator liability. A person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility will not be considered an owner or operator of the facility for the purposes of CERCLA.

When are the indicia of ownership held primarily to protect a security interest? U.S. courts have grappled with the uncertainties in the secured creditor exemption but have unfortunately reached different conclusions.

In response to secured creditors' concerns, the U.S. Environmental Protection Agency (the 'EPA') recently promulgated a lender liability rule which describes the types of actions that a secured creditor can take and still remain within the protection of the secured creditor exemption. These include:

- requiring the borrower to undertake an environmental clean-up of the facility in which the secured creditor has a security interest;
- working with troubled borrowers on financial or administrative matters;
- restructuring or 'working-out' a loan in or near default; and
- foreclosing on collateral property, provided that the property is thereafter offered for sale, as provided in the rule.

Conversely, some actions may cost a secured creditor the protection of the secured creditor exemption, including:

- exercising decision-making control over the borrower's hazardous substance handling or disposal practices;
- exercising control, at a level comparable to that of manager, such that the secured creditor has assumed responsibility for the overall management of either the day-to-day decision-making regarding the borrower's environmental compliance matters or substantially all of the borrower's enterprise other than environmental compliance matters;
- outbidding, rejecting, or failing to act upon an offer of fair consideration for the facility.

The EPA rule is a welcome step but it does not provide full protection from CERCLA liability or from liability under other environmental laws. Owners and operators are not the only persons affected by liability under CERCLA and the lender liability rule does not affect liability under the other two categories of persons liable for CERCLA clean-up costs: those who arrange for the disposal or treatment of a hazardous substance at a facility from which there is a release of a hazardous substance and those who transport a hazardous substance to a facility from which there is a release of a hazardous substance.

Further, it is not clear that the EPA rule is binding on third parties, such as state agencies which enforce state environmental laws and other parties who may also be responsible for CERCLA clean-up costs. Because of the limitations in the EPA rule, secured creditors still

**Comparative Table of Environmental Convictions:
March and April 1993**

	Number	First Offence	Second Offence	Third+ Offence	Maximum Fine
Air	29	15	9	5	\$18,000
	18	9	6	3	\$13,000
Dumping at Sea	3	2	1	-	\$ 7,500
	1	-	-	1	\$ 5,000
Noise	21	18	1	2 (4th)	\$80,000
	17	13	3	1	\$25,000
Waste	1	1	-	-	\$ 3,500
	-	-	-	-	-
Water	16	11	2	3	\$30,000
	11	8	3	-	\$80,000
Total	70	47	13	10	
	47	30	12	5	

ABBREVIATIONS

- AFD Agriculture & Fisheries Department
- APCO Air Pollution Control Ordinance
- CFCs Chlorofluorocarbons
- EC European Community
- EPCOM Environmental Pollution Advisory Committee
- EPD Environmental Protection Department
- EXCO Executive Council
- FEER Far Eastern Economic Review
- JLG Joint Liaison Group
- LDC Land Development Corporation
- LEGCO Legislative Council
- LS Legal Supplement
- NCO Noise Control Ordinance
- NT New Territories
- PAA Provisional Airport Authority
- PADS Port and Airport Development Strategy
- SCMP South China Morning Post
- SMP Sunday Morning Post
- WDO Waste Disposal Ordinance
- WPCO Water Pollution Control Ordinance

March figures appear above April figures.

Source: EPD, Anti-Pollution Prosecution Figures (20 April & 18 May 1993).

risk liability under provisions of CERCLA that are not affected by the rule and under other environmental laws. Consequently, creditors must carefully consider potential environmental liabilities at every

step in a lending transaction.

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This report does not constitute advice of a legal nature. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors or omissions. Further information, inquiries and advice in respect of this report should be directed to:

HONG KONG

CANADA

UNITED KINGDOM

FRED KAN & CO. *Solicitors & Notaries*

Smith, Lyons, Torrance, Stevenson & Mayer
Barristers & Solicitors

IRWIN MITCHELL
SOLICITORS

Suite 1218, 2 Pacific Place
Queensway, Hong Kong
Telephone: (852) 868 0870
Facsimile: (852) 523 6707

Suite 6200, Scotia Plaza
40 King Street West
Toronto, Canada M5H 3Z7
Telephone: (416) 369 7200
Facsimile: (416) 369 7250

St. Peter's House
Hartshead
Sheffield S1 2EL
United Kingdom
Telephone: (742) 767 777
Facsimile: (742) 753306

Suite 1506-8
Chinachem Golden Plaza
77 Mody Road
Tsim Sha Tsui East,
Kowloon
Telephone: (852) 301 1700
Facsimile: (852) 311 3224

World Trade Centre
Suite 550-999 Canada Place
Vancouver, Canada V6C 3C8
Telephone: (604) 662 8082
Facsimile: (604) 685 8542

190 Corporation Street
Birmingham B4 6QD
Telephone: (21) 212 1828
Facsimile: (21) 212 2265