SUBMISSIONS TO THE STANDING COMMITTEE ON RESOURCE DEVELOPMENT REGARDING BILL 24, AN ACT TO AMEND THE ENVIRONMENTAL PROTECTION ACT

on behalf of

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

August, 1979.

We would like to thank the Committee for this opportunity to speak to this important piece of legislation. We would also like to commend the Minister and his staff on their openness and on the manner in which they have received and responded to the concerns raised both by industry and by conservationists.

The Canadian Environmental Law Association is a non-profit, independant public-interest group which was established in 1971. As a Legal Aid Clinic, we have often represented the victims of pollution. In addition, CELA has conducted research and taken part in public processes aimed at providing better legal protection for the environment.

On the basis of this experience, we strongly support Bill 24. Although we have suggested a number of amendments, we consider it to be much needed and highly progressive legislation.

This support is given despite two general concerns. First, the Bill does not deal with emissions or continuing discharges. It will be important for the government to introduce future legislation to give the public greater protection from ongoing pollution. Secondly, although we believe that the present provisions for clean-up and restoration will solve many problems, we are less certain that the provisions for compensation will be sufficient.

Members of the public who have attempted to use the common law to obtain compensation have been confronted by a number of barriers. The barriers to success include: the need to establish a causal link between the pollution and the specific injury; the slowness of civil court procedures; the cost of lawyers and scientific evidence; the need to prove in some cases fault and in other cases strict liability; and problems with the existing 6-year limitations period.

Absolute liability will remove some of these barriers by changing the basis on which liability is imposed. Many of these barriers will remain and problems of achieving compensation may persist. However, rather than trying to remove all of these barriers, we believe that the absolute liability provisions should be given a chance so that we will be in a better position to evaluate whether they are sufficient to ensure adequate compensation. But, if we are to accomplish any meaningful reform in regard to the victim's legal position, these absolute liability provisions must be retained.

A number of the points raised by industry have merit and we will be supporting these as we deal with specific amendments. However, industry has not substantiated a number of very alarming claims. We need to closely examine the arguments that have been put forth in opposition to absolute liability and to the essential principles of this bill. In general, absolute liability and other aspects of the bill have been criticized because of:

1) economic impact
2) the availability of insurance
3) the negligence argument
4) discrimination
5) the general welfare argument

We believe that each of these arguments is open to serious criticism.

1. Economic Impact

You have been told that this legislation is unnecessary because industry already takes all reasonable steps to clean-up spills and to settle all claims for which it is liable. On the other hand, industry has strongly implied that any further liability would have disasterous economic consequences. Where is the evidence? One would expect industry to bring before the Committee evidence of the number and size of spills in which it is involved, the number and size of claims made against it each year, the amount it currently pays out and the

effects on its economic health of current payments. This data could then be compared with the 1,000 spills reported each year. The companies involved are the only ones who have this kind of information. Industry has had many months to collect this data and to present any evidence of the alleged economic harm that will be caused by this bill. Instead, industry has chosen to emphasize extreme and improbable situations as a substitute for facts and economic analysis. We urge this Committee not to panic in the face of tales of potential gloom and doom that are not substantiated by any facts.

If industry is prepared to substantiate these claims then let it do so. If any industry can objectively demonstrate before a full public hearing that it cannot afford to comply with this legislation, then it would be appropriate for the government to consider alternative ways of reducing the impact for this particular industry or specific company. But we should not begin by surrendering the remedial effects of this legislation on the basis of unsupported claims.

2. The Availability of Insurance

Once again, industry representatives have offered no objective evidence that insurance will not be available. It is our understanding that the insurance industry does not yet know the extent to which insurance will be available. However, it is clear that some insurance will be available. Historically, the insurance industry has responded to new needs for insurance as they arise. The question is whether deductibles will be high and whether maximum limits on coverage will be adequate. Whether premiums and coverage will rise or fall will depend upon actual experience. If this Act serves its purpose by creating an incentive for industry to take steps to prevent spills, greater coverage at lower premiums should be become available.

In any event, to make liability dependent on insurance would be a radical, unprecedented departure from the common law. The courts have determined liability for centuries without any reference to insurance. Therefore it is important to bear in mind that liability for torts under our present law does not depend in any way upon the availability of insurance.

Furthermore, we do not agree that the need for insurance will give an unfair competitive advantage to companies based in other jurisdictions. This law will apply to any spill in Ontario whether caused by a resident or a non-resident company. A foreign company which owns or controls a pollutant which spills in Ontario will have to clean-up, restore the environment and compensate the victims just like an Ontario company. Therefore, it would be prudent for any company which intends to do business in Ontario to carry insurance and they can be required to do so by law. If insurance is not required in a less progressive jurisdiction, Ontario companies, like other companies, will not be required to carry insurance while doing business in that jurisdiction.

If we place arbitrary limits on an industry's liability we are also placing arbitary limits on the victim's compensation. It would be more appropriate to retain absolute liability and to recognize that liability is in fact unlimited.

3. The Negligence Argument

The impression may have been created that in order to obtain compensation a victim of pollution must always prove negligence. This is not the case. Under our present law, liability for spills frequently does not depend upon fault or negligence. The common law developed by the courts over centuries imposes liability for pollution on the basis of trespass, riparian rights, nuisance, negligence and strict liability. Of these "causes of action" only negligence is based upon fault.

In our experience, most pollution cases proceed on the basis of nuisance, strict liability or riparian rights. The victim need not establish negligence in any of these cases. If you were to require proof of fault or negligence you would actually be decreasing the victim's current legal right to compensation in most cases. If you were to impose strict liability rather than absolute liability, you would not be enhancing the current status of most victims. It is important to realize that most pollution cases do not require proof of negligence and that many are already based on strict liability. If reform is to be accomplished it will be accomplished by establishing absolute liability. This reform will not remove all of the barriers to compensation, but it will enhance the victim's legal status.

4. Discrimination

It has been argued that if a carrier; such as, a railway, spills a pollutant without negligence, then the railway is just as innocent as the victim who was injured. It is then asserted that to impose liability on the railroad is to discriminate against one party who is equally blameless.

It has been suggested to you that the Law Reform Commission of Canada said that it would be unfair to impose liability on someone who is not at fault. In fact, the report was commenting on criminal liability and said exactly the opposite about civil liability. In this regard, the Law Reform Commission said:

> " law of tort, which deals with compensation for injuries, has long accepted strict liability and no one seems to regard it as unjust... The law quite reasonable takes the view that where one of two innocent people had to suffer, the one to suffer is the one who, however innocent, caused the harm."

This argument concerning discrimination between equally innocent parties is without foundation. They may be innocent in the sense that neither is negligent. But the victim's position is certainly not equal to that of the manufacturer or the carrier. They are in a position to prevent the spill. The victim is not. It is

the manufacturer and the handler who are in a position to design containers, packaging, and vehicles; to determining the timing, mode, and route of transportation; to use less dangerous ingredients in the manufacturing processes. Furthermore, industry is in a far better position than the victim to shift or spread the cost of spills to others.

If the Committee were to accept this argument, it would place the loss on the victim who is in no position to prevent the spill in the first place.

5. General Welfare Argument

We do not accept the proposition that everyone in society benefits from industry and that therefore either the victim should bear the loss or that we should all share it. If a victim wants to share the costs of spills, he will buy the products involved and pay for the spill in the cost of the product. He should not have to expose his assets and health to risk in order to support an industry. It is the consumer of a product who benefits from that product, not the public in general. To say that all industry is good for the economy and therefore we should all subsidize its pollution, is tantamount to saying that we should all support pornography because it contributes to the flow of money.

This argument could only have application when dealt with in specifics, not in generalties. If a particular industry can demonstrate that it is essential to the well-being of the public, that it cannot reduce its spills, that it cannot afford to operate under this legislation, we would support a consideration of that industry's arguments on its merits. In the absence of such evidence, this "general welfare" argument is not a valid reason for rejecting absolute liability.

Before turning to a discussion of specific amendments, we would like to emphasize that absolute liability is one of the cornerstones of this legislation. We do not believe that valid or substantiated counter arguments have been forthcoming. We urge the Committee to support the new Minister of the Environment in the passage of this bill and in the retention of absolute liability.

SUGGESTED AMENDMENTS TO BILL 24

Although we strongly support Bill 24, we believe that a number of specific amendments would be appropriate.

1. Definition of pollutants

Under s 68a(1)(f) "pollutant" means a contaminant other than heat, sound, vibration or radiation, and includes any substance from which a pollutant is derived;

We suggest that this section should be amended to read as follows;

S 68a(1)(f) "pollutant" means a contaminant other than sound or vibration and includes any substance from which a pollutant is derived;

Consequently, heat and radiation would not be exempted from the definition of "pollutants".

We have suggested that heat be included as a pollutant for two reasons. First, there may be situations where heat itself is discharged and causes injury. For example, a paving contractor places his equipment for heating asphalt directly under the crown of a tree for several days and as a result the tree dies. In this situation a farmer or other landowner might lose valuable property. In this case, heat is the pollutant that is spilled and we believe that Bill 24 should provide protection. Secondly, a spill of a flammable substance may result in combustion of the substance and the generation of heat. This generated heat might then cause the specific damages. However, Bill 24 specifically states that heat is not a pollutant and that only "direct" injury. Therefore, the person responsible might argue that injury did not

result directly from the spill, but indirectly from heat, which is not a pollutant. On this basis, the victim of the injury or loss might be denied compensation. This situation may or may not be covered under the Bill as it has been drafted. However, this proposed amendment would remove all doubt.

Although "atomic energy" is within exclusive federal jurisdiction, "radiation" is not. In the Atomic Energy Control Act of 1946, the federal government declared the development, application and use of atomic energy to be solely within federal jurisdiction. Section 2 of that Act defines "atomic energy" as all energy of whatever type derived from or created by the transmutation of atoms. Therefore, radiation is withing exclusive federal jurisdiction only when it is produced by atomic energy and the transmutation of atoms.

It is our understanding that microwaves do not involve the "transmutation" of atoms. (Transmutation is a physical chemistry term meaning the change of one atom into another atom of a different element. Apparently, microwaves involve displacement of electrons but no change in the nucleus of the atom.) In addition, it is also questionable whether x-rays involve a "transmutation" of atoms. According to a standard text, Elements of Physical Chemistry, by Samuel Glasstone and David Lewis, the term gamma ray is applied to rays of nuclear origin, whereas x-rays arise from energy changes involving only electrons. This suggests to us that x-rays do not involve a transmutation and are therefore within provincial jurisdiction. Consequently, we believe that there is provincial jurisdiction over radiation from non-atomic energy sources and that this includes jurisdiction over x-rays and microwaves.

Even with respect to radiation produced by atomic energy, there may be a residual

provincial role in controlling spills and in regulating for compensation. It is clear that the federal government and the provinces have concurrent jurisdiction over environmental matters and that the provinces may regulate unless the field has been occupied by federal legislation. It is also clear that the provinces have jurisdiction over property and civil rights within the province and the administration of justice within the province. Consequently, although the federal government has exclusive jurisdiction over the development, application and use of atomic energy, the province may have legislative authority to compensate victims who are injured by radiation "spills" even if atomic energy is the source of the radiation.

In most circumstances, radiation which causes injury does not do so as a result of a "spill". However, when the radiation is intended to be contained within a closed system and escapes as a result of faulty design, maintenance or operation, this may in many cases be described as a "spill". Examples would be faulty x-ray machines and microwave ovens. These spills can cause serious injury. Since there appears to be scope for provincial legislation in regard to radiation spills, we believe that radiation should be included under Bill 24 as a pollutant.

2. Definition of Spills

Under S 68a(1) (i) "spill" when used as a verb with reference to a pollutant, means discharge into the natural environment in a quantity or in a quality abnormal at the location where the discharge occurs, and when used as a noun has a corresponding meaning:

We believe that this section should be ammended to read as follows:

"Spill" when used as a verb with reference to a pollutant, means discharge into the natural environment in a quantity or with a quality abnormal at

the location where the discharge occurs or at the location where the loss or damage occurs, and when used as a noun has a corresponding meaning;
In some situations a discharge might not be "abnormal" at the site but by leaching, accumulation or chemical reaction it might well produce an abnormal level of the pollutant at another site where the damage is acutally suffered. By adding the phrase "or at the location where the loss or damage occurs" Bill 24 would apply to these situations.

3. Directions by the Minister

It is suggested that S 68d (2) should be replaced in its entirety by the following section;

68d(2) The Minister shall give directions in accordance with subsection 3 where

(a) neither the person having control of the pollutant nor the owner of the pollutant will carry out promptly the duty imposed by section 68c; or

(b) the person having control of the pollutant or the owner of the pollutant cannot be readily identified or located and that as a result the duty imposed by section 68c will not be carried out promptly.

68d(2A) The Minister may give directions in accordance with subseqtion (3) where the person having control of the pollutant or the owner of the pollutant requests the assistance of the Minister in order to carry out the duty imposed by section 68c.

When it is apparent that if the polluter will not or cannot carry out his duty or cannot be found, the Ministry should have a duty to act. Otherwise, the victims of pollution will be left in a state of uncertainty. The situation may deteriorate while the Ministry decides whether to exercise its discretion. In many cases the victims of pollution may be left with the responsiblity of

cleaning up and restoring the environment themselves. Consequently, while the Ministry should make every effort to locate the responsible party and to have that party conduct a clean-up, it is important to stipulate that in the absence of these developments, the Ministry shall issue the appropriate directions to effect a clean-up.

4. Disposal of Pollutants

It is suggested that S68f(1) should be amended by adding the following subsection;

S 68f(1) (e) No hazardous waste or hauled liquid industrial waste shall be disposed of in a waste disposal site without first obtaining directions from the director unless that waste is specifically referred to in the certificate or provisional certificate of approval for that site.

"Hazardous waste" is defined in section 1 of Regulation 824 made under the Environmental Protection Act as "waste that requires special precautions in its storage, collection, transportation, treatment or disposal, to prevent damage to persons or property and includes explosive, flammable, volatile, radioactive, toxic and pathological waste".

"Hauled liquid industrial waste" is defined as "liquid waste, other than hauled sewage, that results from industrial processes or manufacturing or commercial operations and that is transported in a tank or other container for treatment or disposal, and includes sewage residue from sewage works that are subject to the provisions of the Ontario Water Resources Act".

S 68f(1) (d) does not provide sufficient protection in regard to these toxic

wastes. It only stipulates that the person must obey the conditions in the certificate and any direction issued by the Director if they exist.

The certificates of approval governing the operation of many waste disposal sites are silent on whether liquid wastes or hazardous wastes are allowed. This is particularly true of some of the older certificates which were not drafted with current experience in mind. The Ministry has told the Canadian Environmental Law Association that it interprets certificates to mean that unless the certificate states specifically that something is prohibited, it is allowed. As a result, unless Bill 24 is amended , toxic substances may be disposed of in inappropriate landfill sites where they could create a danger.

Similarly, with regard to directions issued by the Director, subsection d only provides protection if the Minister has in fact issued such directions. But what if the Director has not set his mind to this question? This suggested amendment merely assures that either the Director or the person disposing of the toxic waste will have to set his mind to whether any conditions are necessary in cases where the certificates are silent or ambiguous.

5. Right to Compensation: Item 1

S 68i(1) provides that; in this section, "loss or damage" includes personal injury, loss of life and pecuniary loss.

It is recommended that this section should be amended to read as follows:

S 68i(1) In this section, "loss or damage" includes personal injury, loss of life, loss of use and enjoyment of property, and pecuniary loss including loss of income.

Loss of use and enjoyment of property and loss of income may or may not be covered by the existing section. This kind of loss so frequently attends pollution incidents and is of such importance that the Bill should be more explicit.

Loss of use and enjoyment of property is a recognized basis for obtaining compensation in nuisance cases. There may be little direct injury to health or financial loss from many spills. But people may be deprived of the use and enjoyment of their property for months, disrupting their lifestyle, and generally causing great suffering. Perhaps the classic example of this was the spill of 1,200 gallons of fuel oil from a truck on Ellis Park Road in Toronto on January 23rd of this year. One family abandoned their home after two months of living with the fumes. Another family that chose to remain was unable to use the basement where the husband had a workshop and the wife prepared her teaching aids. After three months they were still subjected to odours and disruption while waiting for action from an insurance company.

It is particularly important that loss of income be specifically mentioned because Bill 24 limits recovery to "direct" damage and at least one judge has held that loss of revenue is an indirect consequence of pollution. In a 1972 Newfoundland case, Hickey v. Electric Reduction Co. of Canada Ltd., the court dismissed an action by a group of commercial fishermen who claimed to have suffered loss of revenue as a result of fish

allegedly killed by the discharge of chemicals from the defendant's plant. Judge Furlong took the view that business losses were not recoverable because they were "merely consequential damage resulting from the nuisance". Although there is some evidence that Ontario law may be different, this is uncertain.

Loss of income has been a major source of injury in two of Ontario's most serious pollution cases, the contamination of the English-Wabigoon River system and Lake St. Clair; Lake Erie and the St. Clair River with mercury. In both cases fishermen lost their livelihood for several years. On the English-Wabigoon, tourist guides lost their employment as well. In the Dow case, bait dealers were also affected. In both cases, it was government agencies primarily, not the persons responsible for the contamination, that provided income substitutes through unemployment insurance, welfare, job creation programs, and forgivable loans. The same was true in the case of mercury contamination on the Saskatchewan River in Manitoba. These types of damages are often a result of pollution and it is vital that they be expressly included in the legislation.

6. Right to Compensation: Item 2

S 68i(2) Her Majesty in Right of Ontario or in Right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant.....

It is suggested that this section should be amended to read as follows:

S 68i(2) (a) For loss or damage incurred as a direct or indirect result of,

(i) the spill of a pollutant.....

Bill 209 made the owner and person in control of a pollutant responsible for "loss or damage incurred as a result of the spill..." without mentioning the words "direct" or "indirect".

We feel that it would be preferable to make the polluter explicitly responsible for both direct and indirect damages. In the alternative, a return to the wording of Bill 209 would be preferable to the present wording of Bill 24.

The courts in recent years have recognized a need to broaden the kinds of damages that may be compensated. This tendency to protect the victim should either be actively encouraged by giving the court the explicit right to compensate for indirect damage or by remaining silent on the point and allowing the court to develop the law.

Polluters have frequently sought to evade their responsibility for loss or damage by claiming that the loss was indirect rather than direct. For example, when fishermen lost income in the early 1970s as a result of mercury contamination, the allegedly responsible companies said that the loss was not directly a result of the mercury pollution, but that it was directly caused by a government ban on fishing. They said the government, not their discharge, was the direct cause of the loss.

Similarly, a number of Indian tour guides lost their livelihood on the English-Wabigoon system when the owner of the lodge where they were employed

closed his tourist camp rather than expose his guests and employees to contaminated fish. In such a situation, a limitation to "direct" results would strongly assist the person responsible for a spill. He could argue that the loss was a "direct" result of the employer's decision.

In Manitoba, the government passed the Fishermen's Assistance and Polluters' Liability Act in 1970, which removed the defence that harm was suffered because of action taken by the government to close a fishery, and a number of other such defences. At best, the Ontario government should do likewise. At worst, the government should not preclude the courts from doing so where appropriate. To limit damages to "direct" results would be retrogressive legislation.

7. Class Actions

We believe that Bill 24 should be amended by adding the following section;

S 68i(1A) One or more members of a class may sue in the court as a representative party on behalf of all provided

(1) the class is numerous:

(2) there are questions of law or fact common to the class;

(3) the claims of the representative party are typical of the claims of the class;

(4) the representative party will fairly and adequately protect the interests of the class.

This provision for class actions is taken from a model statute for consumer class actions published by Professor Neil J. Williams, formerly of Osgoode Hall Law School, in Volume 13, number 1, June 1975 Osgoode Hall Law Journal.

At present, victims of pollution suing for compensation are barred from joining together in a class action, and are left in a position of relative weakness vis a vis the defendant.

8. Regulations by the Lieutenant Governor in Council

Bill 24 S 94 (6a) provides that the Lieutenant Governor in Council may make regulations relating to Part VIII-A,

(a) designating persons....

(e) classifying spills and exempting any spill.....

We believe that this particular section should be amended as follows:

S 94 (6a) the Lieutenant Governor in Council may make regulations relating to Part VIII-A, after a copy of each regulation has been published in the Ontario Gazette, and no such regulation should take effect until after 60 days following such publication and any person may make submissions in writing to the Minister of the Environment during this 60 day period.

The provisions of this Act affect the health, well-being and property of the people of Ontario. In particular, they establish a right to compensation for damage from spills. If this right is to be taken away in certain cases, or if spills are not to be cleaned up in certain cases, it is important that the public be given an opportunity to comment. Presumably any exemptions from this legislation would be made at the request of industry. Before acceding to these requests, the Ministry should hear from their potential victims as to how an exemption might affect their interests. Public participation would ensure that the Ministry would not be unduly influenced by one point of view in the absence of others.

Moreover, there is legislative precedent. The right to comment on environmental standards and regulatory actions is well established in the Untied States and is becoming established in other jurisdictions in Canada. The Canadian federal Clean Air Act, 1971, provides sixty days for comments on specific air emissions standards. The Environmental Contaminants Act, 1974-75-76, provides for publication in the Canada Gazette of orders designating a substance as a contaminant. It also provides for comment. The Quebec Environment Quality Act of 1972 gives the public 60 days to send the Minister of the Environment written objections to proposed regulations.

In fact, under several U.S. state and federal statutes, public hearings must be held before rules and regulations are adopted or amended.

9. Commencement of the Act

At page 15, S 5 of Bill 24 provides that:

this Act comesinto force on a day to be named by proclamation of the Lieutenant Governor.

We believe that this provision should be replaced by the following amendment

S 5. This act comes into force upon receiving royal assent.

The major provisions of this Act are not dependent upon regulations, so we can see no reason to delay proclamation. CELA has been concerned in the past when environmental legislation such as the Endangered Species Act and the Environmental Assessment Act has not been promptly proclaimed or implemented. We believe that Bill 24 contains interdependent provisions which should come into force simultaneously and at the earliest possible moment.

When legislation is passed without proclamation, it unduly confuses the public by creating uncertainty.

10. Limitations

Under s.68 i(11) "no person is liable to an action for compensation under this section unless the action is commenced within 2 years from,

(a)....the date when the person knew or ought to have known of the loss or damage";

It is recommended that this section should be amended as follows;

s.68 i(11) "No person is liable to an action for compensation under this section unless the action is commenced within 6 years from,

(a)....the date when the person actually knew of the loss or damage."

In Bill 209, the limitation period was 6 years. This has been changed to 2 years in Bill 24.

This reduction in the limitations period is not consistent with either the recommendations of various law reform commissions and committees, or with the relevent legislation in many jurisdictions including Ontario, Manitoba, British Columbia., England, Scotland, New South Wales and South Australia. The British Columbia Law Reform Commission Report on Limitations, 1974, specifically recommends that actions which are based on the rule in Rylands v. Fletcher (as is the current situation with many pollution cases) should retain a six year limitation period and not just a two year period.

In all of the jurisdictions cited, the Law Reform Commissions and Committees recommend that the general limitations period should be reduced to two or three years. But in every case, including Ontario, these law reform commissions also recommend that procedures for an extension of the time period should be enacted

to provide the court with judicial discretion to permit actions where the 2 or 3 year general limitations period has already expired. These extension procedures have in fact been enacted in all of these jurisdictions except Ontario where the limitation period has not been reduced by general legislation. Bill 24 would effectively reduce the limitations period for one type of action without providing the safeguards recommended by the Ontario Law Reform Commission and enacted in other jurisdictions.

The need for this type of safeguard was made apparent by the English experience. In 1949 the Tucker Committee recommended both a reduction in the general limitations period and the enactment of extension procedures. Unfortunately the government acted on the first recommendation without acting on the second. The inevitable case arose in Cartledge v. E. Jopling and Sons Limited .

The victim suffered lung damage through silicosis but the damage did not become manifest until 6 years after the cause of action arose. The plaintiff was accordingly held to be out of time and his action was dismissed. As a direct result of this case, the government of England passed legislation to provide for extension procedures. On the basis of this experience, the jurisdictions cited have enacted similar extension procedures. In this regard the Ontario Law Reform Commission Report on Limitation of Actions, 1969, stated that, "it would be necessary to have a well worked out extension procedure similar to that in the 1963 statute". It would be tragic for Ontario to reenact the English experience of the Cartledge case. This is a very real and particular danger in pollution cases.

If limitation periods are to be reduced, they should be reduced by means of general legislation and not on a piecemeal basis. And they should certainly not be reduced without the inclusion of adequate extension procedures.

11. Definition of Owner

Under S68a(1) (d) "owner of the pollutant" means the owner of the pollutant immediately before the first discharge of the pollutant...
S68i(2) then imposes liability upon "the owner" and "the person having control of a pollutant".

Many of the representatives of industry and of the farm community have pointed out that it is often difficult to identify the "owner". Furthermore, they have pointed out that in contractual relationships more powerful parties may be able to transfer potential liability to weaker parties. We share these concerns - particularly insofar as they may leave the victim without an effective remedy.

For example, if a large manufacturer sells chemicals to a small retailer, he

may ship the goods via a small trucking firm and so structure the sale that the retailer would become the "owner" as soon as the chemical left the factory door. If a spill occurs in transit, both the carrier and the retailer are liable. The court may apportion damages as between them. But if the carrier has no assets the retailer will bear the entire burden. If neither the carrier nor the retailer has sufficient assets, the victim will bear the loss. A fund may help to alleviate this inequity for the victim, but not for the retailer. Despite the fact that the manufacturer is clearly involved and profits from the entire transaction, he may structure his affairs so as to avoid responsibility.

This very real danger arises because the word "owner" is not a precise legal term. In identifying the owner the court would look primarily to the Sale of Goods Act to determine who had title at the time of the spill. Unfortunately, section 18 of the act establishes that property (and ownership) can be passed purely by the terms of the contract. Furthermore, even if a large manufacturer does not use the contract to expressly divest himself of title and responsibility at the earliest possible moment, the issue of ownership would be determined by the complex rules contained in the act. In this regard, the Law Reform Commission Report on the Sale of Goods Act, 1979, notes that, "the rules... to determine transfer of title are so complex and frequently turn on such highly subjective factors, that accurate prediction of the outcome of a litigated issue is well nigh impossible, and incongruous results may well occur."

In order to meet these difficulties, consideration should be given to providing a more precise definition to the word "owner". Alternatively, the Act could be amended to specifically empowering the court to look beyond questions of "title" and the Sale of Goods Act to ensure that a wider interpretation may be applied in situations of inequity.

In this regard, one possible approach would be to amend the Act to provide that:

1) where the first discharge of a pollutant is the discharge of a finished consumer product, and the discharge occurs before the product has actually been delivered to the consumer, the last manufacturer of the product is the owner of the pollutant.
2) "Finished consumer product" means a product which does not require any further manufacturing, refining or processing prior to its sale to a consumer; except for packaging, labelling, weighing or measuring.
3) "Last manufacturer" means the person who is the final manufacturer, processor, or refiner of a finished consumer product.

In our specific example, these provisions would relieve the retailer or the carrier of liability unless he is "the person having control of the pollutant" at the time of the spill. Furthermore, they would ensure that the injured party would be able to recover damages from the manufacturer even if the retailer and/or carrier did not have sufficient assets. If, in a specific situation, the manufacturer were relatively "innocent" in comparison to the retailer or carrier, S 68i(6) enables the court to apportion damages as between them. By allowing the injured party to recover from the manufacturer, the injured party would be provided with a stronger guarantee of compensation. This appears to be a just approach since the danger of environmental pollution is an incidental risk to the manufacture of specific products and this risk should be borne by the party with substantial assets who benefits from the production of the product even when he has structured his affairs to avoid liability.

This particular approach is not without difficulty, but we believe that it should be considered. We understand that a number of alternative approaches will be suggested to the Committee by other groups. We urge the Ministry to carefully examine these alternatives and to introduce amendments which will alleviate the problem of identifying the owner in a just and equitable manner.

12. Contribution Liability

The Canadian Manufacturers Association and others have pointed out a related problem. Even if the owner and the person having control of a pollutant are

equitably identified, the stronger of the two parties may require the weaker party to indemnify him for any compensation that he pays to the victim.

S 68i(6) currently provides that:
where two or more persons are liable to pay compensation under this section, they are jointly and severaly liable to the person suffering the loss, damage, cost or expense but as between themselves, in the absence of an express or implied contract, each is liable to make contribution to and indemnify each other in accordance with the following principles:

In order to counteract this tendency, the Canadian Manufacturers Association has recommended that S 68i(6) be amended by deleting the phrase "in the absence of an express or implied contract".

The Association further recommends that S 68i(7) be amended to read as follows: the right to contribution or indemnification under subsection 6 may be enforced by action in a court of competent jurisdiction. Such right to contribution or indemnification cannot be diminished or excluded by private contract and all such contracts are null and void.

We support these amendments.

13. Duty to Act

Under S 68c(1) the owner of a pollutant and the person having control of the pollutant that is spilled...shall forthwith do everything practicable ... to restore the natural environment.

We agree with the Canadian Manufacturers Association that the duty to clean up and restore the environment should be expanded to include a person causing

a spill. Consequently, we support the suggestion that S 68c(1) should be amended to read as follows:

every person who spills or causes or permits a spill of a pollutant, the owner of a pollutant and the person having control of a pollutant that is spilled... shall forthwith do everything practicable to restore the natural environment.

If this amendment proves acceptable to your Committee corresponding changes in other sections such as 68d(2) (a), (b), (c) may have to be made.

14. Notice of discharge

Under S 68b

(1) every person having control of a pollutant that is spilled...

shall forthwith notify:

(i) the Ministry;

(j) the municipality...

We support this section as it has been drafted. However, industry has suggested that there may be difficulty with the term "forthwith".They suggest that it should be replaced by phrases; such as, "shall make reasonable efforts to notify". We suggest that the term "forthwith" is not unreasonable since under S 68b(2) this duty only comes into effect when the person "knows or ought to know that the pollutant is spilled and is causing or is likely to cause adverse effects." Furthermore, the suggested alternatives are more subjective, unnecessarily vague and more likely to lead to disputes. However, if your Committee has any difficulty with the term "forthwith" we would suggest the phrase "promptly and with reasonable dispatch" or "at the first opportunity".

15. Compensation fund

There appears to be a consensus regarding the need for the establishment of a fund to ensure that victims will receive adequate compensation. We support this concept and we suggest that the fund should be established on the basis of the following principles:

(a) the fund should be financed by industry and not by the public purse. We do not accept the "general welfare argument" as outlined in this brief. Furthermore, public funding would not provide industry with an incentive to improve its handling procedures.
(b) A victim should be able to receive compensation from the fund as a matter or right. In the event of a dispute between the victim and the fund, procedures should be established for impartial arbitration or appeal.
(c) A victim should have the option, at his descretion, of recovering compensation either from the fund or directly from the responsible parties.
(d) The fund should have a duty to take all necessary legal action to recover the compensation it pays out from the responsible parties, unless they are impecunious. If the fund fails to seek this indemnity, the industry as a whole will be subsidizing careless handlers. Contribution to the fund could become a license fee for carelessness.
(e) Individual handlers should be required to carry insurance so that they will be able to compensate the victim directly or to reimburse the fund.

16. Acts of God

It has been suggested that liability should not be imposed where spills are caused by acts of war, insurrection, terrorism or "Acts of God". We have no quarrel with the first three defences. In regard to Acts of God, the nuclear industry has developed trucks which can withstand 100 m.p.h. collisions. If this defence were not created, a greater incentive would be given to industry to perfect and apply this technology. However, if an "Act of God" defence is to be provided, it should be provided by specifically stipulating the precise Acts of God which will constitute a defence. An Act of God has been defined as, "an accident or event which happens independently of human intervention and due to natural causes, such as a storm, an earthquake, etc.". Given the uncertainty of this definition, God may be accused of many things. To avoid extensive litigation, we believe that a precise listing of events; such as hurricanes, toranadoes, etc. should be provided in the legislation.

17. Farmer's Exemption

It has been suggested by some that the farm community should be exempted from this

legislation. In this regard, the O.E.C.D. estimates that pollution from farm activities will increase by 50% between 1978 and 1985. Farm pollution may be a serious source of spills and we cannot support a carte blanche exemption. If the availability of insurance is the real concern, group insurance should be available through farm cooperatives. Alternatively,it is here that the government could assist the farm community by ensuring that group insurance is available.

Furthermore, if a farm spill occurs the victim will often be another farmer. We believe that it is important to protect the farmer as a potential victim rather than to exempt him from liability.

18. Restoring the Natural Environment

Industry takes exception to its duty to do everything "practicable to restore the natural environment". A number of spokespersons have suggested replacing "practicable" with "reasonable in the circumstances". They would prefer to "take remedial action or reclaim the natural environment". We believe that the terms of Bill 24 should be retained.

It has been suggested to you that the duty to restore the environment requires industry to bring dead animals back to life. This is simply not true. The court does not interpret the law to require the impossible. We agree with what Dr. Landis told your Committee; namely, that the law often requires a party to put, as nearly as possible, another party back into the position he would have been in had it not been for the breach of law. Bill 24 merely adopts this recognized principle of law.

We submit that the term "practicable" is much more objective than the term "reasonable". It is a more appropriate term because it makes reference to the

technology and the equipment available to accomplish the task. Both the Ministry and the industry are likely to be aware of the available technology which is used in practice to effect restoration. Because of its highly subjective nature, neither of them is likely to know what is "reasonable" in the circumstances. This term is almost devoid of meaning without extensive interpretation by the courts. Each time a stronger word is replaced by the word "reasonable", the cumulative effect is to encourage extensive litigation.

It has been suggested to you that the word "practicable" does not take into account questions of cost. We do not agree. The word "practicable" is not devoid of any cost consideration. Both the Canadian government and the U.S. government in its environmental legislation differentiate between terms such as "best practicable technology" and "best available technology". They often require only the best practicable technology rather than the best technology available. The difference is that best practicable technology takes into account the cost of the equipment.

The duty to do everything practicable to restore the environment is a relatively objective test compared to the test suggested by industry representatives. Some discretion is necessary in deciding how much restoration must be done in each case. The real question is whether this discretion should be broadened or narrowed and whether it should be exercised primarily by the person who causes the spill or by the Ministry.

In conclusion, although we believe that some improvements can be made, we strongly

support the principles of Bill 24: that the producers of a product are responsible for cleaning up the environment after a spill and restoring it as nearly as practicable to its previous conditions; that the government may step in to ensure clean-up and restoration if the person responsible for the spill cannot be located or is otherwise unable or unwilling to do so and to charge the cost of this to the person responsible; and to make both the producers and the handlers of contaminants absolutely liable for compensating the innocent victim of a spill for injury or harm.