COMPENSATION OF POLLUTION VICTIMS

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AT THE

CORPORATE LIABILITY AND VICTIM COMPENSATION CONFERENCE

MAY 29-30, 1984 - TORONTO

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I INTRODUCTION

The need for compensation for victims of pollution incidents is probably one of the most hotly-contested topics of debate between industry and environmentalists. The current common-law tort system, which I will discuss briefly later, is seen by environmentalists as too problem - ridden to provide fast, economical remedies to victims of pollution. Industry, on the other hand, argues that its rights are being abrogated by legislative attempts to provide for clean-up of spills and slowly emanating pollution, and to provide speedier, simpler methods of arriving at compensation determinations.

Submission to the Ontario Legislature of Part IX of the Environmental Protection Act ('EPA') brought into the public forum much of the debate in Ontario. Then Minister of the Environment Harry Parrott put forward his rationale for a compensation and clean-up scheme as:

> ....I believe that those who create the risk should pay for restoration as a reasonable condition of doing business. It is not up to an innocent party whose land or property has been damaged. At present persons manufacturing and handling contaminants are not legally responsible in the absence of fault or other legal ground of liability. Common law and the existing provisions of the Environmental Protection Act are inadequate in spelling out the necessary procedures to control and clean up spills and to restore the natural environment.

The principle that if a loss must fall somewhere it should be upon the person conducting an enterprise for the purpose of profit rather than upon its completely innocent neighbour is a major departure point for industry. The primary argument which I'm sure we'll hear from industry representatives today is that they should not be required to pay for clean-up and compensation where they have not been at fault. The logical conclusion to that argument is that the innocent victim and the environment pay or society as a whole pays. The real question is one of equity.

Since Part IX of the EPA was passed 4½ years ago, the industry lobby appears to have gained some momentum, evidenced by non-proclamation of Part IX. Hence Part IX is not in force, and the cost of the approximately 1000 spills per year[2] is still, to a great extent, borne by innocent members of the public and the environment, rather than by industry.

In 1981 the Economic Council of Canada published a study by John Swaigen on the topic of compensation of pollution victims.[3] Extensive discussion of compensation schemes in Canada, the United States, Sweden and Japan was provided. Many of those schemes were relatively new, with little experience to draw from. Three and one-half years later, the situation has remained relatively unchanged.

In 1980, a report for the U.S. Senate Committee on Environment and Public Works[4] described six case studies of compensation for toxic substances pollution, including what it described as at least 3 immediately apparent conclusions.

These, briefly, were:

(1) The legal mechanisms in the states studied are generally inadequate for redressing toxic substances related harms. Traditional tort law presents substantial legal barriers to recovery.

(2) Seeking compensation for pollution related injuries is usually cumbersome, time-consuming and expensive. Thus, injured parties filed few cases and rarely obtained final judgments.

(3) Compensation ultimately provided to the injured parties is generally inadequate.[5]

A. The Common Law

The problems in Ontario, and with the common law system in Canada generally, are not markedly different from those described by the Senate Committee. The common law causes of action which might provide compensation to pollution victims include nuisance, negligence, riparian rights, and the doctrine in Rylands and Fletcher (strict liability). For a time it was thought that a cause of action might arise from breach of a statute, but a recent Supreme Court of Canada case, The Queen in Right of Canada v. Saskatchewan Wheat Pool[6] decided that breach of statute in itself did not create a nominate tort. Also, the strict liability cause of action has been restricted to narrow circumstances where the substance entering onto the plaintiff's land was known by the user to be especially hazardous, and to "unnatural" uses of land.

Defences recognized by the courts include an act of God, an intervening cause, reasonable use the property by the defendant, plaintiff's consent, and statutory authority.

In addition to the limitations inherent in the causes of action, there are many disadvantages of the tort system. These are enumerated by Swaigen[7], in the context of compensation schemes as follows:

> Any attempt to supplement or replace the tort system with a new compensation scheme must deal with the disadvantages that result from an expensive, time-consuming struggle between unevenly matched opponents. These disadvantages include the need to prove causation, cost, delay, difficulties in establishing the appropriate cause of action and basis of liability, restrictions on the scope of damages, difficulties in measuring damages, the lack of availability of class actions, and inadequate limitation periods."

One text writer, Atiyah, estimates the cost of operating the tort system at nearly double the amounts paid out in compensation. This cost is composed of the third party liability insurance system

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and the costs of the settlement process, which is comprised of:

- the detailed examination required to determine the causes of every accident that gives rise to a claim
- the expertise needed to ascertain cause and fault
- the expense of interviewing witnesses and collecting evidence
- the difficulties involved in assessing the amount of compensation.[8]

While it may appear that these problems are merely part of the litigation system, my submission is that they are exacerbated in pollution cases because of the complex nature of pollutants, scientific uncertainty, and the often extreme inequality between the parties. The recent case between an anti-spray group in Cape Breton and a Swedish multinational[9] is a telling example.

With that background, I would now like to deal with some of the existing statutory mechanisms respecting compensation in Ontario and the rest of Canada, my reading of industry's response to government and tribunal or court initiatives, and future directions.

II EXISTING COMPENSATION MECHANISMS

A. Ontario

1. Certificates of Approval

Although Certificates of Approval, which are conditional permissions granted under the EPA for various activities, including the operation of landfill sites,[10] might not appear to be the most logical place to start this discussion, I'm doing so because of the demonstrated practical applicability of such mechanisms. Unlike the Part IX provisions of the EPA, practical remedies are now in place under Certificates of Approval for two landfill sites with which I have been involved.

The first example relates to the Maple landfill site, which is now owned by Metropolitan Toronto and which is intended to serve Toronto's waste disposal needs for the next two to three decades. The Certificate of Approval provides for 4 types of financial guarantees: insurance coverage (including pollution liability insurance), a performance bond, a small claims trust fund, and a post closure trust fund.[11] These guarantees were provided only after the Environmental Appeal Board, subsequent to a lengthy hearing at which evidence on financial guarantees was adduced, ordered these specific measures.[12] Reasons given for these conditions were the necessity of ensuring the financial ability of the owners and operator of the site to carry out the terms and conditions imposed by the Board and the proper operation of the site both before and after closure.

The order for a Small Claims Trust Fund is the most interesting from the perspective of providing a simple and speedy process for small damage claims. The Board stated that it was

> ...intended to give immediate relief to persons in the neighbourhood of the site, in the event that, after commencement of the preparation of the site, such a person suffers, as a result of the activities at the site, damages to his property with respect to water quality, water quantity and nuisance, among others. Such damages are to be investigated by the Ministry of the Environment and any awards made on a no-fault basis.[13]

The amount of the fund was $100,000, to be established by the onwer and the operator prior to the commencement of operations, with a $5000. maximum for each claim. The Director under the EPA was to make the claims determinations.

The second example is provided by the Ridge landfill site Certificate of Approval.[14] The Environmental Assessment Board, after approximately 3 months of hearings with respect to expansion of a site which had previously accepted liquid industrial waste, made recommendations with respect to both comprehensive environmental impairment liability insurance and a small claims security fund.[15] The conditions ultimately imposed elaborated requirements that the insurance be provided on a claims made basis (ie, the coverage responds if the claim is made during the term of the policy, so it is available when the insured becomes aware of the injury), that it cover non-sudden and gradual pollution, that minimum coverage be $5M, and that the coverage remain in force at all times, including after the closure of the site, until the Director determines that it is no longer necessary.[16] Also, the Small Claims Security was to be in the form of a Letter of Credit for $100,000. to meet claims arising from off-site impacts up to a maximum of $5,000. per claim. The Director was to decide, on evidence "satisfactory to him," that a claimant had incurred actual loss from the operation of the site, and if the owner did not provide compensation within 60 days of the Director's decision the Director could apply the funds available under the Small Claims Security. The Security was to be replenished after claims were paid out; inflationary increases in the total fund were provided for; and the individual compensation limit could be increased for inflation on an annual basis by the Director.[17]

Although it appears that the provisions discussed above will make compensation easier to obtain in cases where landfills cause groundwater contamination or other problems off site, the weaknesses include the ad hoc nature of these provisions, the small amounts for which an individual can claim on a no-fault basis, and the uncertainty engendered by the vague wording of some conditions.

2. Part IX of the Environmental Protection Act

The Part IX, or Spills Bill, provisions of the EPA, which deal with spills of pollutants rather than slow or regular contamination, were passed in December of 1979, but have not as yet been proclaimed. The objectives of these provisions are:

- to provide a mechanism for instant action when a spill occurs
- to provide a specific authority so that a spill can be dealt with quickly
- to provide an incentive for better handling in order to prevent spills
- to provide a simple mechanism to compensate victims of spills.[18]

Although the duty of an owner or person having control of a spilled pollutant to do everything practicable to prevent, eliminate and ameliorate adverse effects and to restore the natural environment[19] is fairly clear, the nature and extent of compensation liability is less clear. John Swaigen, who participated in lobbying efforts by the Canadian Environmental Law Association, describes the process and its results with respect to the Part IX provisions as follows:

> The original version... said only that the compensation liability did not depend upon proof of fault or negligence. In response to requests to clarify the nature of the compensation liability, the Minister amended the Bill to provide that it was absolute.

> Industry representatives reacted strongly against the concept of unlimited absolute liability. As a result, the Ministry introduced into the Bill a compensation fund to alleviate any hardship to industry that might result. After further lobbying by industry, absolute liability for compensation was replaced by liability with exceptions similar to those in the Fisheries Act and the Arctic Waters Pollution Prevention Act. Ultimately, industry representatives were successful in having the Bill further amended to provide that if an owner or a person in control of a pollutant establishes that he took all reasonable steps to prevent the spill he is not liable for compensation.[20]

Since that time, the Canadian Manufacturers' Association ('CMA') has maintained that Part IX provides an unacceptably narrow definition of the circumstances under which owners and persons in control of a spilled pollutant will not be considered to be responsible under Part IX. Although, to my knowledge, the CMA still argues that fault should exist before liability can be found,[21] the only action at common law which requires fault is the negligence action. Also, although Dr. Parrott originally intended that liability should result even when damage was caused by an Act of God and other uncontrollable events, the legislation now provides many of the normal defences.[21a]

The Part IX definition of "loss or damages" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income. The inclusion of loss of income would appear to address problems which manifested themselves after the Mississauga derailment, where many people's only loss was pecuniary,[22] however, the requirement that damages be direct will undoubtedly limit the scope of recovery.[23]

One of the major new provisions in Part IX is the establishment of an Environmental Compensation Corporation.[24] It's purposes include the provision of financial assistance to those suffering loss or damage as a direct result of a spill, or of clean-up duties ordered by the Minister, and the owner or person having control of a pollutant who must pay compensation may also apply for assistance. No experiences of this Corporation's operation has been gained since it has not yet been established. Also, regulations defining classes of persons entitled to payment, conditions to and limits of payment, claims procedures, and exemptions have not been promulgated.

Briefly, although Part IX would be an improvement to victim compensation law if the government acts on its promises, problem areas still exist. For example:

- victims must still initiate court action against a polluter unless he cannot be found or the pollution source cannot be established

- amendments to the original bill have created uncertainty with respect to what type of liability has been created

- the limitation period is only two years (as opposed to the 6 year tort limitation period) from when the person knew or ought to have known of his loss or damage

- routine discharges and gradual emissions are not covered.

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3. Other Ontario Mechanisms

Board of Negotiation proceedings have been established under section 134, Part XIV of the EPA to deal with cases where a contaminant causes damage to livestock or crops. For the process to commence, a request to investigate the matter must be made to the Minister within 14 days after the injury or damage becomes apparent. Very little is known about the effectiveness of this mechanism despite its 14 years of existence because hearings are held in camera and names of parties are not released.[25]

The EPA also provides a Waste Well Disposal Security Fund[26] which is to be provided by operators of deep well disposal facilities for compensation of damage to water sources used for ordinary household purposes or for watering livestock, poultry, home gardens, lawns, or irrigation, or for crops rendered unfit for use. Recovery is possible only on the basis of availability of funds.

The Pesticides Act[26a] provides compensation provisions for cases involving damages caused by only professional exterminators. These are largely in the form of third party liability insurance requirements.

B. Other Provinces

The Department of the Environment Act of Saskatchewan[27] provides a scheme based on the Part IX provisions of the EPA. The Saskatchewan amendments are in force, but as of November, 1983 there were no reported cases arising from these provisions.

Manitoba has enacted the Fisherman's Assistance and Polluters' Liability Act[28] which deals solely with financial loss to commercial fishermen from stationary sources of pollution when fishing is prohibited due to water contamination. The government may provide compensation, then bring an action against the polluter.

C. Canada

There are several pieces of federal legislation addressed to specific pollution situations including:

- The Pesticide Residue Compensation Act[29]
- The Arctic Water Pollution Prevention Act[30]
- The Canada Shipping Act, Part XX[31]
- The Fisheries Act, 1977 amendments[32]
- The Nuclear Liability Act[33]

The Pesticide Residue Compensation Act requires that a claimant for compensation prove that he is a farmer; that his products are so contaminated that their sale would be contrary

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to the federal Food and Drugs Act; that the contamination was caused by a pesticide registered under the federal Pest Control Products Act and used in accordance with recommended practices; that the presence of the residue is not the fault of the farmer or his predecessor; that he has taken steps to mitigate losses and to initiate any action available to him; and that as a condition of compensation he will give any consent required by the Minister of Agriculture so that the government may pursue a legal action on his behalf.[34] With these requirements, and the fact that no compensation is available for loss of the land or future crop losses that might result from contamination of the soil, the Act is of little use to victims of pesticide contamination.

The Arctic Waters Pollution Prevention Act provides almost absolute liability, relaxes causation requirements, and takes steps to ensure availability of funds by providing for joint and several liability of a number of different sources of pollution. It also requires evidence of financial responsibility by providing that funds secured by insurance or bonds are available for compensation of damages and providing for direct action against the insurer or bonder to recover the proceeds.[35] Failings of this Act from a victim compensation point of view, are that it involves court actions as the main enforcement tool, it provides for a maximum liability and the limitation period, which has been reduced from that available at common law, runs from the time of deposit rather than the time of harm.[36]

The Canada Shipping Act, Part XX provides for compensation through a government fund into which shipowners are required to make payments for pollution damage caused by ships carrying at least 1,000 tons of oil. Although funds are available, complications and time problems arise from the fact the victim must obtain judgment in the Federal Court of Canada, and attempt to enforce that judgment before seeking relief from the Fund, except where the responsible shipowner cannot be identified or where fishermen suffer loss of fishing income. If the source of pollution can be identified, the victim must prove causation, but if it cannot be identified, a remedy is still available.[37]

In 1981-82 $58, 633.80 was paid out of the Maritime Pollution Claims Fund under the Canada Shipping Act, while in 1982-83 the amount was $298,339.28.[38]

Amendments to the Fisheries Act in 1977, among other objectives, attempt to deal with the problems of lost income by fishermen as a result of pollution incidents other than those created by ships. This was necessary because at common law loss of income has been considered consequential rather than direct damage. The limitation period is only 2 years, the requirement to prove causation remains, and for property damage (as opposed to lost income) the plaintiff must rely on traditional common law remedies.[39] There have been no reported cases for

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compensation by the government or licensed commercial fishermen to December, 1983.

The Nuclear Liability Act was enacted to provide compensation for personal injury and property damage caused by nuclear accidents. The operator of a nuclear installation, with some help from the government, must carry a total of $75.M. in insurance.

An Interdepartmental Working Group, which recently released a Review of the Nuclear Liability Act,[40] included in its description of the functions served by the Act, the following: channelling all liability for compensation of third parties to the operator; making the operator, negligent or not, absolutely liable for damages and injuries caused by his nuclear installation; providing an insurance structure which ensures the operator will have sufficient funds to pay compensation; providing for the establishment of a Claims Commission; and providing a limit on the operator's liability.[41]

One of the major problems with the Act, in addition to the inadequate amount of insurance provided in comparison to damage caused by a major incident (estimated to be $14B),[42] is the failure of the Act to deal with long term effects of radiation exposure (ie, cancer).

Despite a concerted lobbying attempt by the Canadian Environmental Law Association in 1981/82 to increase from 10 years the time within which any action (for example, claims of cancer victims) might be taken, the Working Group reviewing the Act stated that long-term effects have not been determined by Parliament to merit a special compensation mechanism, and the Act is not the proper instrument for dealing with long-term effects.[43]

III INDUSTRY RESPONSE

I will briefly deal with my perceptions of the industry response to victim compensation initiatives, although that view will certainly be adequately and eloquently presented by other speakers.

From experience with the Spills Bill provisions of the EPA, it is obvious that major stumbling blocks include the imposition of liability without fault and the cost of and availability of insurance. In the Spills Bill debates, industry claimed insurance wasn't available and the government concluded that it was available. Details of that debate will, I assume, be provided by insurance representatives and others.

Self-insurance has been suggested by one major landfill operator as a way of circumventing the requirement to obtain Environmental Impairment Liability Insurance.[44] In that case, however, outside insurance coverage was required by the Director of Approvals.[45] Self-insurance has apparently also been suggested to the Ontario Environmental Minister with respect to the requirements under Part IX of the EPA.

Generally, it appears that industry representatives like the current system as it is, and will lobby tirelessly to maintain the status quo.

IV FUTURE DIRECTIONS

From my point of view, we must eventually develop a comprehensive method of providing victims of pollution with adequate compensation. Workmen's Compensation, no-fault accident insurance and countless other initiatives point the way.

Problems with the costs of the court-oriented legal system, and the principle of equity where there is no fault, warrant a major restructuring. The Mississauga train derailment (where hundreds of people were forced out of their homes and businesses were closed down for several days due to the release of deadly chlorine gas) and the Dow Chemical mercury spill (which caused Lake Erie and Lake St. Clair to be closed to commercial fishing) show the need for expanded liability and streamlined procedures. The Canadian and provincial governments, however, have not responded in a co-ordinated or committed way.

Proposals for a federal victim compensation program in the United States is seen by the Office of Management and Budget as "an open-ended fiscal threat".[46] The topic is still current and a cause of much interest in Ontario because of the government's failure to proclaim Part IX of the EPA. In the United States, the American Bar Association's Standing Committee on Environmental Law devoted its 1983 conference to the subject of federal legislation to provide compensation to victims of toxic torts.[47] It therefore appears that the debate will continue in the near future. In the end, it is hoped that government will step in to make industry accountable, and to provide mechanisms to establish fair compensation in an efficient, timely manner.

NOTES

1. Minister's Statement, Thursday, December 14, 1978.

2. Compendium of Background Information for The Environmental Protection Act, 1978. Since that information was provided, spills appear to be occurring at approximately the same rate, according to 1980 and 1981 information from Transport Canada (592 for 1980 and 666 for 1981 were known which was approximately the same number as the Ministry of Environment reported up to 1980. It is assumed that another 300 to 400 occur each year but are unreported.)

3. Swaigen, "Compensation of Pollution Victims in Canada", Economic Council of Canada, 1981.

4. "Six Case Studies of Compensation for Toxic Substances Pollution: Alabama, California, Michigan, New Jersey, and Texas", Congressional Research Service of the Library of Congress, June 1980.

5. Ibid, at II and XV.

6. (1983), 143 D.L.R. (3d) 9.

7. See Note 3 supra, at 27.

8. P.S. Atiyah, Accidents, Compensation and the Law (London: Weidenfeld and Nicholson, 1975), at 456.

9. Palmer et al. v. Nova Scotia Forest Industries (1983), 12 CELR 157; (1984), 2 D.L.R. (4th) 397.

10. R.S.O. 1980, c.141 as amended, s.27.

11. Provisional Certificate of Approval No. A230610 issued to Crawford Allied Industries, Superior Sand, Gravel & Supplies Ltd., and W.M.I. Waste Management of Canada Inc. (Operator) on September 12, 1980, and later transferred to the Municipality of Metropolitan Toronto, s.16.

12. Environmental Appeal Board Order, March 28, 1980.

13. Ibid, at 7-8.

14. Provisional Certificate of Approval No. A021601 issued to Ridge Landfill Corporation Limited on July 25, 1983.

15. Environmental Assessment Board Report on the Public Hearing on the Application by the Ridge Landfill Corporation Limited for Approval of a Waste Disposal Site Extension, April 1982.

16. See Note 14 supra, conditions 55 and 56.

17. See Note 14 supra, conditions 61 to 63 inclusive.

18. Statements by then Minister of the Environment, Dr. Harry Parrott at Legislative Committee hearings on June 24, 1979.

19. See Note 10 supra, s.81.

20. See Note 3 supra, at 61.

21. Letter to Premier Davis from the Canadian Manufacturers' Association, 1981.

21a. See Note 10 supra, s.87(3).

22. The Mississauga train derailment occurred in November, 1979, causing massive dislocation to local citizenry.

23. See Note 3 supra, at 62.

24. See Note 19 supra, s.99.

25. The precedessor of s.134 was found in the Air Pollution Control Act, S.O. 1967, c.2 as amended by S.O. 1968 c.3, S.O. 1969, c.2, s.11. A more detailed description of the process is found in Swaigen (See Note 3 supra, at 56.)

26. See Note 19 supra, s.46.

26a. R.S.O. 1980, c.376.

27. R.S.S. 1978, c.D-14, amended by S.S. 1979-80, c.58; 1980-81, c.50.

28. S.M. 1970, c.32 (C.C.S.M. F100).

29. R.R.C. 1970 c.P11. Pesticide Residue Compensation Regulations SOR/72-9.

30. R.S.C. 1970 c.2 (1st Supp.).

31. R.S.C. 1970, c.S-9, ss. 734-751.

32. R.S.C. 1970, c.F-14, amended by S.C. 1976-77, c.35.

33. R.S.C. 1970, c.29 (1st Supp.). Proclaimed in force 11 October 1976 by S1/76-165.

34. See Note 3 <u>supra</u>, at 50.

35. Ibid, at 55-56.

36. Ibid, at 56.

37. Ibid, at 50-51.

38. Maritime Pollution Claims Fund Annual Reports 1981-82 and 1982-83.

39. See Note 3 <u>supra</u>, at 52-54.

40. Consultative Document C-79, Atomic Energy Control Board, <u>Review of the Nuclear Liability Act</u>, March 9, 1984.

41. Ibid, at 5.

42. See Note 3 <u>supra</u>, at 49.

43. See Note 40 <u>supra</u>, at 10.

44. This was suggested by Browning Ferris Industries Inc. during the Environmental Assessment Board hearing on the Ridge Landfill site expansion.

45. See Notes 14 and 15 <u>supra</u>.

46. 14 E.L.R. 10100, which cited INSIDE E.P.A., June 17, 1983, at 7.

47. 14 E.L.R. 10099.