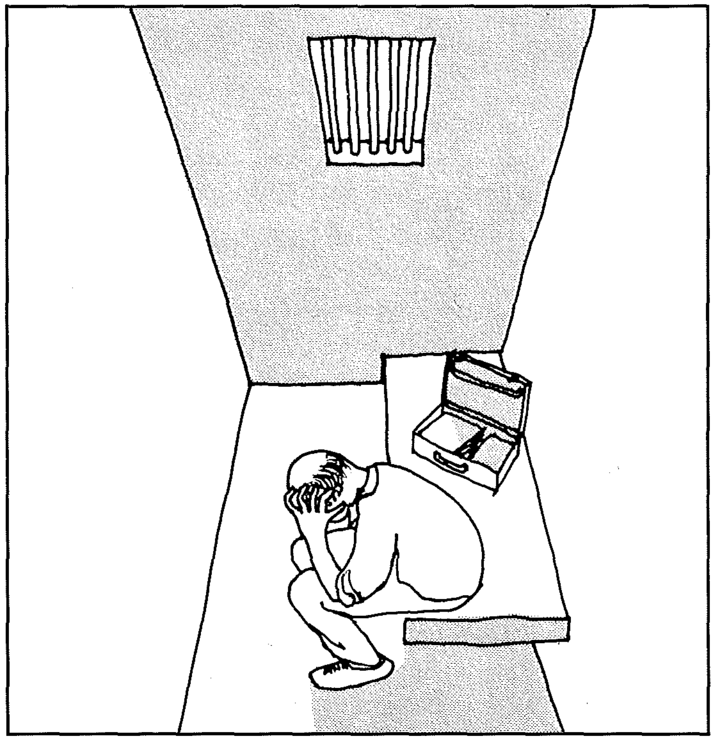
THE COMPANY POLLUTED - SO WHY DID I GET CHARGED?



"... Through stiff jail sentences that the courts will be encouraged to enforce, corporate leaders will be held legally accountable for their acts ..."

The Honourable Thomas McMillan, Minister of Environment, November 19, 1986.

"... corporate directors, employees and agents can be fined, as individuals, a maximum of $5,000 a day for first convictions and $10,000 for subsequent convictions. For the most serious convictions they can be imprisoned for up to one year."

The Honourable James Bradley, Ontario Minister of the Environment, July 3, 1986.

"... the Metropolitan Solicitor is to advise ... of any contraventions of the Order (of Prohibition to pollute) with a view to ... commence contempt of court proceedings against any offending company and its officer(s) and director(s).

The Metropolitan Toronto Executive Committee, February 3, 1987.

Individual liability of directors, officers and employees for corporate pollution offences.

A one-day conference
January 21, 1988
Toronto

Canadian Environmental Law Research Foundation

The public demands action . . .

Headlines, polls and election results all show that environmental protection has moved to the top of the public agenda. The public is worried about health effects linked with toxics and is sending a clear message to governments that it wants action on pollution.

So governments have responded . . .

Governments have got the message. They are prosecuting more offenders than ever before.

In Ontario, with creation of the Ministry of the Environment Investigations and Enforcement Branch in 1985, the number of enforcement staff increased from 13 to 65. In the past two years prosecutions increased 231%, while convictions rose 142%. During the recent Ontario election, Premier Peterson pledged to double yet again the number of staff available for inspection, investigation and enforcement.

At the same time, governments are arming themselves with new and tougher legislation. In recent years the Ontario government has introduced the MISA program, which will set stricter standards on industrial discharges to water, has revised its air pollution regulations and has enacted Bill 112, which significantly increases fines and provides for jail sentences for serious pollution offences. The federal government is in the process of enacting the Canadian Environmental Protection Act, which will increase regulatory requirements and provide for fines of up to one million dollars a day and jail sentences.

By not only prosecuting the company but also its officers, directors and employees

Increasingly, charges are being laid against individuals as well as companies. The Ontario Ministry of the Environment prosecuted 15 individuals in the 1984-85 fiscal year, 39 the next year and 46 in 1986-87. Figures for 1987-88 show the trend is continuing.

In the summer of 1986, a corporate officer was sentenced to jail for contempt of court in connection with a pollution offence. The sentence was appealled and will again come to trial in the spring of 1988.

In the future, as more individuals are prosecuted under recently enacted Ontario legislation which imposes on corporate officers a duty of reasonable care to prevent accidents which may cause pollution, it is likely that more jail sentences will be handed down.

What is happening is clear. Governments are prosecuting more vigorously, they are moving to increase penalties for pollution - including jail sentences - and they have adopted a new policy of increasingly prosecuting individuals as well as the companies they represent.

If you are an officer, director or employee of a business corporation, it is *essential* that you know exactly what your personal pollution liability is and how you can best protect yourself. You have a similar liability if you work for a municipal government.

This one-day conference will give you the facts you *must have* in today's changing climate.

AGENDA AND SPEAKERS

Morning Program:

- development of Canadian environmental law over the past decade: changing requirements, tougher penalties, increased individual liability
  Professor J.G.W. Manzig, *Faculty of Law, University of Windsor*

- trends in individual versus corporate liability in Canada and other countries
  Mr. John D. Honsberger, *Raymond and Honsberger, Toronto*

- pollution offence liability of officers, directors and employees under Ontario law
  Mr. Rod McLeod, *Miller, Thomson, Sedgewick, Lewis and Healey*
  - former Deputy Minister, Ministry of the Environment

- pollution offence liability of officers, directors and employees under Canadian law
  Mr. George Cornwall, *Environment Canada*
  - responsible for the Enforcement and Compliance Policy of the new Canadian Environmental Protection Act

- individual liability under municipal by-laws *plus* liability of municipal officers to provincial or federal prosecution
  Mr. Harry Poch, *Legal Department, Metropolitan Toronto*

LUNCHEON PANEL: Prosecuting the individual: good, clean hardball or dirty pool?

The Honourable James Bradley, Minister of the Environment (invited)

Dr. Frank Frantisak, Vice-President
Environmental Services, Noranda Inc.

Mr. Duncan MacDonald, Programs Co-ordinator,
Ontario Federation of Labour

Afternoon Program:

- the extent to which insurance coverage may or may not provide complete protection for pollution offences
  Mr. John Morrison, *Vice-President, Marsh and McLennan*

- directors and officers - minimizing liability, defences
  Mr. Roger Cotton, *McCarthy and McCarthy*

- employees - when can you be charged? What if you are?
  Ms. Michelle Swenarchuk, *Counsel, Canadian Environmental Law Association*

CONFERENCE INFORMATION

This one-day conference will be held on January 21, 1988, 9:00 a.m. to 4:30 p.m., at the Canadian Bar Association conference rooms, 120 Adelaide St. West, between Bay and York.

Fee for the conference is $350.00 per person. Cheques should be made payable to the Canadian Environmental Law Research Foundation. Lunch and coffee will be provided.

Each delegate will receive a conference binder, containing papers delivered at the conference and other relevant information.

When four people from one organization register for the conference and pay with one cheque, a fifth person can be admitted free of charge.

There will be a full refund for cancellations received in writing prior to 5:00 p.m. on January 8, 1988.

For further information contact Mr. Doug Macdonald or Ms. Karen Hamilton at:

Canadian Environmental Law Research Foundation
243 Queen Street West, Fourth Floor
Toronto, Ontario M5V 1Z4
(416) 977-2410

REGISTRATION FORM

Enclosed is my cheque for $350.00 per person payable to Canadian Environmental Law Research Foundation. Please register the individual(s) listed below.

First Name Last Name

Position

First Name Last Name

Position

Company/Firm

Address City Province Postal Code

Phone

☐ Yes, please add me to your mailing list

Specific areas I am interested in include:

The organizers reserve the right to change program date or content without further notice, and assume no liability for these changes.

Canadian Environmental Law Research Foundation

Fondation canadienne de recherche du droit de l'environnement

January 21, 1988

Dear Colleague:

Welcome to the one-day conference titled "The Company Polluted - So Why Did I Get Charged?"

If there is anything you need during the conference please contact me, Ms. Karen Hamilton or Ms. Shirley Thompson, the CELRF staff who will be in attendance during the course of the day.

Unfortunately the Minister, Mr. Bradley, is not able to attend. However, the Ministry is well represented by Ms. Dianne Saxe of the Legal Services Branch.

The panel discussion between Ms. Saxe, Mr. Frantisak and Mr. Macdonald will be recorded and a transcript mailed to conference delegates as soon as possible.

Governments in Canada are increasingly considering additional steps they can take to achieve compliance with environmental law in the most cost-effective manner possible. Laying charges against individuals as well as the company may well be one such step but it carries with it certain implications which should be thoroughly debated before it is adopted as general policy.

It is hoped that today's conference will be a useful discussion to that essential and timely debate.

Yours truly,

Doug Macdonald
Executive Director

DM/vb

243 Queen Street West, 4th Floor, Toronto, Ontario, M5V 1Z4 (416) 977-2410

THE COMPANY POLLUTED - SO WHY DID I GET CHARGED?

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Canadian Environmental Law Research Foundation

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THE COMPANY POLLUTED - SO WHY DID I GET CHARGED?

A one-day conference on individual liability of directors, officers and employees for corporate pollution offences.

AGENDA

8:30 am - 9:00 am	Registration
9:00 am	Welcome and Background Remarks Doug Macdonald, Canadian Environmental Law Research Doundation
9:05 am	Development of Canadian Environmental Law Professor J.G.W. Manzig
9:30 am	Individual versus Corporate Liability John Honsberger
10:00 am	Liability under Ontario Law Rod McLeod
10:30 am	COFFEE
11:00 am	Liability under Canadian Law George Cornwall
11:30 am	Liability under Municipal By-Laws Harry Poch

243 Queen Street West, 4th Floor, Toronto, Ontario, M5V 1Z4 (416) 977-2410

A G E N D A - (continued)

12:00 noon	LUNCH
1:00 pm	PANEL DISCUSSION: Dianne Saxe Ontario Ministry of the Environment Frank Frantisak, Noranda Inc. Duncan MacDonald Ontario Federation of Labour
2:00 pm	Insurance Coverage John Morrison
2:30 pm	Minimizing Liability of Directors and Officers Roger Cotton
3:00 pm	COFFEE
3:30 pm	Employee Liability Michelle Swenarchuk
4:00 pm	Questions and Discussion from the Floor
4:30 pm	Adjournment

BIOGRAPHICAL INFORMATION ON SPEAKERS

J.G.W. Manzig: Dr. Manzig holds bachelor and masters degrees from the Dalhousie University Law Faculty and a doctorate in Civil Law from Cologne University. He is a member of the Ontario and the Nova Scotia Bars, and a professor of law, teaching, among other subjects, Environmental Law, Land Use Planning Law and Municipal Law at the University of Windsor Law Faculty. He chaired the 1985 Spills Regulation Panel of the Ministry of the Environment and presently serves as Director of the Environmental Compensation Corporation, the Great Lakes Institute, and The Canadian Environmental Law Research Foundation. He also is an associate-editor of the Canadian Environmental Law Reports.

John D. Honsberger: Mr. Honsberger joined the firm of Raymond & Honsberger in 1950 and is precently the senior partner. His experience has been principally in the area of commercial law such as bankruptcy, secured creditors, financing and international transactions and particularly international insolvencies. He has been appointed the Head of several courses at the Law Society of Upper Canada and has lectured on the law of bankruptcy at the undergraduate and masters level at York University. In 1986 he received both the Law Society Medal and the County of York Law Association Centennial Medal.

Roderick McLeod: Mr. McLeod is a graduate of Queen's University and the University of Toronto and was called to the Bar in 1969. He has served as a crown prosecutor and in 1983 was appointed Deputy Minister, Ministry of the Solicitor General. In 1985 he was appointed Deputy Minister, Ministry of the Environment and in late 1987 left that position to join the firm of Miller, Thomson, Sedgewick, Lewis and Healey.

George Cornwall: Mr. Cornwall obtained a degree in Civil Engineering in 1961 from the University of Toronto and continued his studies in the U.S.A. at Northwestern University (Master of Science in Sanitary Engineering) and John Hopkins University in Baltimore. In 1967 Mr. Cornwall was appointed Assistant Professor of Civil Engineering at the University of Waterloo. Since joining the Department of the Environment in 1971 he has held a number of positions, and since 1986 he has served as Director of the Management and Emergencies Branch of Environmental Protection within Environment Canada. Mr. Cornwall is responsible for the Enforcement and Compliance Policy of the new Canadian Environmental Protection Act.

Harry Poch: Mr. Poch worked with the Ministry of Environment, Water Quality Branch as an environmental scientist in 1973 and 1974 before being called to the Bar in 1977. He was an associate and then partner in a Toronto law firm practicing predominantly in the areas of municipal and environmental law. Since 1984 he has held the position of Solicitor with the Municipality of Metropolitan Toronto Legal Department, responsible for environmental litigation for Metropolitan Toronto. He was Editor-in-Chief of both the Canadian Environmental Law Reports and the Canadian Environmental Law Newsletter from 1978 to 1981.

Dianne Saxe: Ms. Saxe graduated from Osgoode Hall Law School and was called to the Bar in 1976. She has worked with the Ontario government as a Barrister and Solicitor in many roles including Crown Attorney. Since 1985 she has acted as prosecutor for the Ministry of the Environment in cases against corporations and individuals throughout the province. She has written many articles and is a leading speaker on enforcement for the Ministry of the Environment.

Frank Frantisak: Dr. Frantisak received his degree in Chemical Engineering in 1957 and his doctorate in 1965. From 1969-70 he worked on developing the Air Pollution Index for the Ontario government. In 1973 and 1974 he helped develop the Hazardous Waste Substances Act for the Ministry of the Environment. In 1977 he joined the Environmental Services, Noranda Incorporated and is now the Vice-President.

Duncan MacDonald: Mr. MacDonald was educated at McMaster University and the University of Western Ontario. He is currently the Programs Co-ordinator for the Ontario Federation of Labour and has been on staff there since 1976. In his present position his responsibilities include co-ordination of OFL programs in the areas of environment, peace, security, disarmament and workers' compensation.

John Morrison: Mr. Morrison holds a degree from the University of Toronto. He began his insurance career with Marsh & McLennan in 1970 and since then has held a number of positions with the firm. He has addressed numerous audiences on a wide range of liability-related insurance issues.

Roger Cotton: Mr. Cotton is an associate of the law firm of McCarthy and McCarthy and practices exclusively in the areas of environmental, municipal and land use planning law. He is National Chairman of the Environmental Law Section of the Canadian Bar Association, a member of the executive of the Environmental Law Section of the Canadian Bar Association - Ontario, and has authored a number of articles on environmental law.

Michelle Swenarchuk: Ms. Swenarchuk is a graduate of Osgoode Hall Law School. She has previously served as a specialist in labour, aviation and family law in private practice and as union counsel. She has acted as counsel at the Canadian Environmental Law Association, specializing in environmental law and native rights, since 1986.

THE COMPANY POLLUTED - SO WHY DID I GET CHARGED?

PARTICIPANTS LIST

Ken Adams
Supervisor, Claims Grant
Contracts and Review
Ministry of the Environment
135 St. Clair Avenue West
Toronto, Ontario
M4V 1P5

Dana Atwell
Environmental/Industrial
Hygiene Supervisor
Shell Canada Products Ltd.
Coronna, Ontario
NON 1GO

Bob Anderson
General Counsel and Secretary
Proctor and Gamble Inc.
P.O. Box 355, Station A
Toronto, Ontario
M5W 1C5

Ed Bagnall
Director of Manufacturing Operations
Baxter Corporation
89 Centre Street
Alliston, Ontario
LOM 1AO

Mr. David Anderson
Ontario Hydro
700 University Avenue
Toronto, Ontario
M5G 1X6

Rod Barr
Plant Manager
Court Industries Co. Ltd.
200 Bunting Road
St. Catharines, Ontario
L2M 3Y1

Cliff Armstrong
Accommodation Services Manager
Ontario Hydro
700 University Avenue
Toronto, Ontario
M5G 1X6

Rolf Beck
Vice-President
Corporate Development
Paperboard Industries Corp.
144 Front Street West
Suite 600
Toronto, Ontario
M5J 1G2

Jack Belletrutti
Process Engineering Manager
Refinery
Shell Canada Products Ltd.
Corunna, Ontario
NON 1GO

Dr. P. J. Cairns
Head of Infectious Diseases
Agriculture Canada
Health of Animals
110 Stone Road West
Guelph, Ontario
N1G 3W4

David Bevan
Plant Engineer
Howell Packaging
Division of Dover Industries
3230 Mainway Avenue
Burlington, Ontario
L7M 1N5

Mr. Clive Carman
Ontario Hydro
700 University Avenue
Toronto, Ontario
M5G 1X6

J. E. Boddaert
Secretary-Treasurer
Craft Originators Inc.
41A Brockley Drive
Hamilton, Ontario
L8E 3C3

S. Thornton Cass
President
Craft Originators Inc.
41A Brockley Drive
Hamilton, Ontario
L8E 3C3

Michael Boyle
Purchasing Agent
E.S. Fox Limited
61 Thorold Road East
Welland, Ontario
L3C 3T9

David Chesher
Production Manager
Eldorado Resources Ltd.
1 Eldorado Place
Port Hope, Ontario
L1A 3A1

Dr. Raymond Brouzes
Director, Environmental Affairs
Alcan Aluminum
1188 Sherbrooke St. West
Montreal, Quebec
H3A 3G2

J. D. Cook
Manager, Environmental
Affairs Division
Esso Petroleum Canada
55 St. Clair Avenue West
Toronto, Ontario
M5W 2J8

Orval Cooper
President
Cooper Plating Inc.
580 Denison Street
Markham, Ontario
L3R 1B9

John Ferris
Environmental Co-ordinator
Trafalgar Refinery
Petro-Canada Products
P.O. Box 520
Oakville, Ontario
L6J 5B5

Jack Dinsdale
Construction Services
Administrator
Ontario Hydro
Box 1000
Bowmanville, Ontario
L1C 3W2

Al Fields
Technical Associate
Health and Environment Labs
Kodak Canada Inc.
3500 Eglinton Avenue West
Toronto, Ontario
M6M 1V3

Cyril Doucet
Vice-President, Administration
Pulp and Paper Research Institute
570 Boul. St. Jean
Pointe Claire, Quebec
H9R 3J9

Mander Gardiner
Manager, Plant Engineering
Black and Decker Canada
100 Central Avenue
Brockville, Ontario
K6V 5W6

Jean R. Dube
Vice-President, Human Resources
and Industrial Relations
Rolland Inc.
2000 McGill College Avenue
Suite 1400
Montreal, Quebec
H3A 3H3

Richard Gould
Maintenance Manager
Waltec Sinkware Inc.
1000 Kindred Road
Midland, Ontario

Charles Ferguson
Director, Environmental Affairs
Inco Limited
Suite 2200, P.O. Box 44
Royal Trust Tower
Toronto Dominion Centre
Toronto, Ontario
M5K 1N4

Larry Green
Manager, Environmental
Services and Security
Kodak Canada Inc.
3500 Eglinton Avenue West
Toronto, Ontario
M6M 1V3

Brian Harding
Engineering Technician
Ivaco Rolling Mills
P.O. Box 322
L'Orignal, Ontario
KOB 1KO

J. C. Kempling
Manager, Environmental
Services
Esso Petroleum Canada
55 St. Clair Avenue West
Toronto, Ontario
M5W 2J8

Lindsay Harrower
Chief Officer
Health Safety and Fire Protection
Canada Centre For Inland Waters
867 Lakeshore Road
Burlington, Ontario

Bob Lalonde
CIL Inc.
P.O. Box 1900
Kortright, Ontario
NON 1HO

Douglas Haslam
President
D.A. Stuart Inc.
43 Upton Road
Scarborough, Ontario
M1L 2C1

Peter E. Lawford
Vice-President, Corporate and
General Counsel
Lacana Mining Corporation
120 Adelaide Street West
Suite 1900
Toronto, Ontario
M5H 1T1

Norbert Hoffman, Sr.
President
Norev Sandblasting Limited
169 Fielding Road
Copper Cliff, Ontario
POM 1NO

Sergio Legati
Vice-President, Manufacturing
Tonolli Canada Ltd.
1333 Tonolli Road
Mississauga, Ontario
L4Y 4C2

Don Hoshowsky
Technical Manager
Reter Resource Recovery
P.O. Box 1584
Brantford, Ontario
N3T 5V6

Annette Lemelin
City Solicitor
P.O. Box 3012
St. Catharines, Ontario
L2R 7C2

George Lunin
Vice-President
Sherwood Industrial
Office Systems
287 Idema Road
Markham, Ontario

Bill Marshall
Purchasing Manager
Screen Print Display Adv. Ltd.
P.O. Box 400
Brantford, Ontario
N3T 5N3

Dan Lyons
Safety Co-ordinator
Dufferin Construction Co.
505 North Service Road East
Oakville, Ontario
L6H 1A5

William H. Martin
Vice-President, Natural Resources
CIP Inc.
1155 Metcalfe Street
Montreal, Quebec
H3B 2X1

Michael Lywood
Environmental Engineer
Regional Municipality of Niagara
P.O. Box 1042
Thorold, Ontario
L2V 4T7

Bob Masson
General Counsel and
Corporate Secretary
St. Lawrence Starch
Port Credit, Ontario

Doug MacDonald
Unit Supervisor
SUNCOR
55 Mockingbird Lane
Kamaki, Ontario
NON 1EO

Eric McGuiness
The Hamilton Spectator
44 Frid Street
Hamilton, Ontario

R. K. MacEachern
Manager, Operations and Programs
Esso Petroleum Canada
55 St. Clair Avenue West
Toronto, Ontario
N5W 2J8

John McLatchy
Environment Canada
Conservation and Protection
351 St. Joseph Blvd.
Hull, Quebec
K1A 1C8

R. McLean
DOMTAR
P.O. Box 300
Senneville, Quebec
H9X 3L7

W. G. Nicholl
Bristol-Myers Pharmaceutical
231 Dundas Street East
Belleville, Ontario
K8N 5C2

John Miles
Division President
Slater Steels
Hamilton Specialty Bar Division
319 Sherman Avenue North
Hamilton, Ontario
L8N 3P9

Peter Nielsen
Development Co-ordinator
Scarborough Public
Utilities Commission
1530 Markham Road
Scarborough, Ontario
M1B 3M4

Pat Mycan
Engineer
CTS of Canada, Limited
80 Thomas Street
Streetsville, Ontario
L5M 1Y9

Paul Orser
Plant Engineer
Redlaw Industries
255 West Street South
Orillia, Ontario
L3V 6L3

Glen Myers
Manufacturing Manager
Shell Canada Products Ltd.
Corunna, Ontario
NON 1GO

Mr. Craig Palmer
Consoltex Inc.
P.O. Box 730
St. George Street West
Alexandria, Ontario
KOL 1AO

James Neate
General Manager
Films and Technical Services
Hoeckst Canada Inc.
100 Tempo Avenue
Willowdale, Ontario
M2H 2N8

Keith Perrett
Legal Department
Imperial Oil Limited
111 St. Clair Avenue West
Toronto, Ontario
M5W 1K3

Suzanne Poirier
B & B (Canada) Limited
1908 Belmore Lane
Gloucester, Ontario
K1B 4Z8

Bernard Poirier
B & B (Canada) Limited
1908 Belmore Lane
Gloucester, Ontario
K1B 4Z8

Jerry J. Pomor
Regional Environment Engineer
Canadian National Railways
460 - 133 Main Street
Winnipeg, Manitoba
R3C 2P8

Ray Pomroy
Plant Manager
Lever Brothers Limited
1 Sunlight Park Road
Toronto, Ontario
M4M 1B6

Jean-Marie Sala
Manager
Environmental Affairs
Alcan Smelters and
Chamicals Limited
1188 Sherbrooke Street West
Montreal, Quebec
H3A 3G2

Al Schuldt
Assistant Manager
Environmental Control
Stelco Inc.
P.O. Box 2030
Hamilton, Ontario
L8N 3T1

Carl Sharp
Director - Engineering and
Operations
City of Thunder Bay
500 Donald Street East
Thunder Bay, Ontario
P7E 5V3

Byron Simmons
Maintenance Department
City of Oshawa
Public Works Department
50 Centre Street South
Oshawa, Ontario
L1H 3Z7

Mr. Joseph Small
Greater Canada Colour
Printing
3565 Eagle Street
Stevensville, Ontario
LOS 1SO

Robert Tanaka
General Manager
Eldorado Resources Ltd.
1 Eldorado Place
Port Hope, Ontario
L1A 3A1

Mr, Greg Tanner
Texaco Canada
Jarvis, Ontario
NOA 1JO

Walter Tarnawsky
Manager, Quality Assurance and
Process Control
Court Industries Co. Ltd.
200 Bunting Road
St. Catharines, Ontario
L2M 3Y1

Bruce E. Thom, Q.C.
City Solicitor
City of Mississauga
Legal Department
300 City Centre Drive
Mississauga, Ontario
L5B 3C1

Paul Unitas
Technical Department
Tremco Limited
55 Esandar Drive
Toronto, Ontario
M4H 1G7

Maurice Victor
Director of Plant Operations
Wyeth Limited
2109 Ottawa Street
P.O. Box 1600
Windsor, Ontario
N9A 6R7

Donley Watkins
President
Endur Systems Inc.
425 Enfield Road
Burlington, Ontario
L7T 2X5

Ross Williams
Director, Environmental Affairs
Quebec and Ontario Paper Company Ltc
P.O. Box 1040
Thorold, Ontario
L2V 3Z5

Jack A. Williamson
Engineering Manager
Waltec Sinkware Inc.
1000 Kindred Road
Midland, Ontario

Philip J. Wolfenden
Vice-President, Human Resources
and Labour Relations Counsel
Decoma International
30 Confederation Parkway
Concord, Ontario
L4K 3P7

Maxwell Zalev
Zalev Brothers Construction
Windsor, Ontario

II. Federal Environmental Policies and Legislation Since the Seventies - On a Changing Course

(1) The 1970's - The Regulatory Thrust

The environmental concerns of the Canadian Public triggered by Rachel Carson's Silent Spring[1] and the U.S. environmental movement in the sixties had intensified by the beginning of the seventies. To this, the federal government initially responded with a flurry of legislative activity, culminating in the creation of the Department of the Environment in 1971,[2] the proclamation of the Canada Water Act,[3] the Clean Air Act,[4] The Environmental Contaminants Act,[5] and other statutory enactments. By the mid-seventies, many of these new statutes had been pushed to the implementation stage through regulatory standard setting[6] and some noticeable improvements, especially in single source pollution abatement, were achieved.[7]

The best publicized environmental success story at the federal government level was achieved through a Canada-U.S. reference to the International Joint Commission pursuant to the 1972 Water Quality Agreement which commissioned extensive lower lakes research and resulted in the reversal of the far advanced eutrophication of Lake Erie.[8] The environmental problems of general Great Lakes pollution uncovered by this research activity then led to the 1978 Water Quality Agreement which extended the scientific inquiry to the upper lakes and connecting channels and also widened the scope of the research mandate to include toxic pollution.[9]

However, the initial thrust of legislative activity could not be maintained through a determined implementation and enforcement policy. The reasons for this may have been a lack of political commitment on the part of the federal cabinet, because of a perceived lessening of public pressure and other, more pressing political priorities. It may also have been because of effective resistance by business and industry against any aggressive enforcement policies that would demand major financial commitments by the private sector in the fact of a slowing economy and increased competition from abroad. The fact is, that the federal government's implementation and enforcement record of its environmental legislation during the first decade was lacklustre at best.[10]

While the success of reversing the very critical condition of Lake Erie back to a state where commercial fishing operations could resume may have reinforced the widely held notion that any environmental damage could be "fixed" by scientists and engineers, given the right amount of financing, such trusting, facile view was soon to be severely tested by some well publicized environmental disasters and by some less than encouraging scientific discoveries.

First came the realization that dilution and dispersion were not the proper answers to pollution after all, and that those abatement methods had created probably more serious problems than they attempted to solve.

There now was the Love Canal, the mercury in the English and Wabigoon Rivers, the toxic leachate entering the Niagara river and the role played by "super stacks" in the long range transport of pollutants and the occurance of acidic precipitation affecting the lakes and forests of the Canadian shield.

Then came the recognition of persistent toxics as probably the major environmental problem facing our generation, because of the phenomenon of bio-accumulation and travel through the food chain. This discovery was due to the rapid advance of analytical technology, allowing the detection of toxics down to parts per billion. For the first time the capacity of scientists to find toxics appeared to outstrip their ability to interpret those findings in relation to their impact on human health or their general impact on the ecology. Many questions were raised and no ready answers were forthcoming from the scientific community. The uncertainties, readily acknowledged by the scientists, created apprehension and confusion on the part of the public and presented a major dilemma for the environmental policy makers.

Finally, the increased scientific research activity produced results that pointed to the ecosystemic scope of many of the environmental problems. As a result, entirely different, technologically more sophisticated solutions would be called for than those used to deal with the easily identifiable point source pollution problems of the early seventies. This clearly raised the potential cost picture for clean-up, restoration and prevention of pollution to unexpected levels and the spectre of the irreversibility of some types of environmental degradation had to be considered.

(2) The 1980's - Retrenchment

By the late seventies, those changing parameters of environmental management and protection may have become politically less attractive to federal politicians, particularly in the light of the new priorities of constitutional reform and the Quebec Referendum. There was one more, short flutter of legislative activity toward the end of the decade, before the federal profile in the environmental field underwent a noticeable change.

Of that legislation, two enactments are of interest, because of their impact on the question of personal liability: the Transportation of Dangerous Goods Act[11] and the amendments to the Fisheries Act.[12] The former statute could only be effectively enforced after comprehensive regulations had been promulgated; however, this was not done until July 1st, 1985. Still, at the time of the Act's passage, the substantial, maximum fines provided for contraventions of the Act reflected a changing, more aggressive attitude towards acts of pollution.[13]

The Fisheries Act amendments are significant for the same reason. Prior to the 1977 amendments, the maximum fine for a violation of the provisions of the Act was $5,000,[14] an amount hardly sufficient as a deterrent in major pollution incidents. Under the amendments a breach of s. 33(2) can now result in a maximum fine of $50,000 - for the first offence, and a maximum of $100,000 - for each subsequent offence, each day constituting a separate offence.[15] It is worth mentioning in this context that the Penalties and Forfeitures Proceeds Regulations promulgated pursuant to s. 67 of the Fisheries Act provide that where a prosecution by a private citizen results in the levying of a fine, that citizen is entitled to one half of the fine, as well as one half of the proceeds from the sale of any equipment used in the violation of the Act, where such equipment had been confiscated and sold.[16]

After the enactment of the Fisheries Act amendments, the DOE became part of the 1978 federal government re-organization, in which the Department was relieved of most of its resource management responsibilities with the removal of fisheries and oceans from its jurisdiction.[17] From this point on, one can see a gradual change in federal environmental policy from the initially vigorous regulatory position of the early seventies to a more and more advisory, guideline-setting role, designed to leave the actual implementation and enforcement of environmental policies of the Provinces.[18] Then, possibly in order to maintain its profile in the eyes of the public, the DOE moved to assume an environmental advocacy role,[19] primarily through improved contact with environmental interest groups, public consultation programmes and public education campaigns.[20]

This new stance showed some early success with the 1980 prohibition of the manufacture, importing or use of PCB's. In this case, the DOE transmitted the considerable public concern about persistent toxics to the federal cabinet advocating a quick response to the problem, which then resulted in federal-provincial action.[21] The present drive of the DOE to obtain passage through Parliament of the new Environmental Protection Act appears to confirm that the Department still knows how to work the environmental community as well as public and private interest groups. This draft legislation and the public consultation process certainly has raised the profile of Environment Canada. We will hear more about the potential impact of the new Federal EPA on personal liability later today.

Finally, it should be noted that the Law Reform Commission of Canada has for some years studied the questions of whether a safe environment should be recognized as a fundamental value and thus receive Criminal Code protection from seriously harmful or endangering conduct. The recommendations contained in the Commissions' Protection of Life Project working paper entitled "Crimes against the Environment"[22] certainly break new ground and reflect some current thinking on the criminal liability of the polluter.[23] As such, the recommendations may give a fair indication of the future direction of Criminal Code reform in this area.[24]

III. Environmental Management and Protection in Ontario Since the Seventies: Raising the Stakes for Polluters

(1) The 1970's - A Sound Statutory Foundation - Hesitant Implementation and Enforcement

In the early seventies, the majority of the Provinces were ill-prepared to actively join the federal government's aggressive regulatory approach to environmental protection and were quite willing to concede the leadership in the setting of environmental policies to Ottawa.[25] The Province of Ontario was one of the exceptions. It passed the Environmental Protection Act, 1971 (E.P.A.)[26] and at the same time created, as a successor to the Department of Energy and Resources Management, a new Ministry of the Environment, giving it responsibility for the new Act and the Ontario Water Resources Act (OWRA).[27]

The E.P.A. incorporated and expanded the existing statutory enactments governing air pollution; in its wide prohibition of impairment of the natural environment[28] the Act also provided an alternate and expanded basis for prosecuting water pollution offences,[29] providing an alternative to the enforcement sections of the Ontario Water Resources Act;[30] it also created a new legal basis for the management and disposal of waste.[31]

The third of the main Environmental Protection Statutes, the Pesticides Act, was passed in 1973,[32] and with the enactment of the

Environmental Assessment Act in 1975, which gave the Province a statutory basis for potentially comprehensive environmental planning and management, a good statutory foundation was created for effective environmental protection and management, all under the jurisdiction of the Ministry of the Environment.

While the initial public reaction to the new environmental legislation may have been generally positive, the implementation and enforcement policies soon met with some criticisms.[33] Nevertheless, a look at the structure of fines under the Acts and some annual prosecution statistics leads to the conclusion that there was a very slow but consistent trend towards greater prosecution activity during the period of 1975 and 1984, accompanied by an increasing level of fines. The EPA initially imposed a maximum fine of $5,000 for the first offence and of $10,000 for each subsequent offence or day (where the offence continues) for violation of any provision, regulation or order made under the Act.[34] The OWRA provided the same structure of fines under its general prohibition section,[35] as did the Pesticides Act.[36]

By an amendment to the EPA in 1981 section 147 was added, whereby the maximum fines under the EPA and under s. 16(1) OWRA were raised for certain cases involving hauled liquid industrial or hazardous waste. Here we see the first minimum penalty imposed ($2,000), with a maximum of $25,000 for the first offence, and a minimum of $4,000 and a maximum of $50,000 for each subsequent offence for every day or part thereof on which the offence occurs or continues.

A survey of successful prosecutions in the period from 1975 to 1984 indicates that the range of fines imposed depended entirely on the nature of the offence and the Act and section prosecuted under. Fines under EPA prosecutions, however, ranged substantially higher and also, by far exceeded the number of prosecutions under the other two Acts.

The range of fines for a violation of the general prohibition under s. 13 was between $50 to $10,000, and for a violation of s. 39 (Prohibition as to deposit of waste) from 0 - $7,000.[37] Fines under the Pesticides Act averaged in the range between $400 - $1,000, while fines under the OWRA ranged between $25 and $1,000, with an exceptional fine of $25,000 in a prosecution under s. 16 (the general offence section).[38]

In the context of today's topic, it is important to point out that changes were more frequently laid against corporations than individuals, with the ratio varying depending on the Act under which charges were laid. Corporations accounted for 56% of those charged under the Pesticide Act, 60% under the OWRA and 62% under the EPA.[39]

Finally, a comparison of the annual number of prosecutions in the years 1978, 1983, and 1987 show the result of the new, more aggressive enforcement policy adopted since 1985. In 1978 there were 49 prosecutions under the EPA, 8 under the OWRA and 4 under the Pesticides Act. In 1983, there were 66 prosecutions under the EPA, 23 under the OWRA and 18 under the Pesticides Act; and in 1987, there were a total of 165 prosecutions under the EPA and OWRA and 13 under the Pesticides Act.[40]

(2) The 1980's - Towards a New Profile and Active Enforcement Policies

After the last of the four major pieces of environmental legislation had been enacted in 1975, no new statute was passed that had a potential impact on personal liability until the introduction of Part IX of the EPA, then commonly referred to as the Spills Bill, which happened to be at the time of the nearly disastrous Mississauga train derailment. The imposition of a strict reporting duty for all parties involved in a spill,[41] as well as the imposition of absolute liability on persons in control and the owners of the spilled contaminant for clean up and restoration of the natural environment,[42] coupled with a compensation scheme for spill victims,[43] all probably were welcome signs for the public that the provincial government had decided to take charge of sudden and accidental spill problems. There was clearly less enthusiasm for the new legislation on the part of business and industry. That may be one of the reasons why it took about three years before the first draft regulation, which was necessary for the proclamation of Part IX, was produced. It took another three years and a change of government before the "Spills Bill" finally took effect.[44]

In the context of the "Spills Bill" it should be noted that the Dangerous Goods Transportation Act, 1981[45] was passed pursuant to Federal-Provincial negotiations to supplement the Federal statute by provisions regulating intra-provincial road transport of dangerous goods. Eventually, Ont. Reg. 363/85 was enacted to make federal regulatory standards applicable to the transportation of dangerous goods on Ontario's highways. This, indirectly, also adopted the packaging, loading and documentation requirements of the Federal Regulation, SOR/85-77.[46] The Ontario Act provides in s. 4 a $50,000 - maximum fine on the first convictions, a $100,000 - maximum fine on each subsequent conviction, or imprisonment for a term of not less than two years, for every person violating the prescribed safety requirements for vehicles, container and packaging referred to in s. 3. Violations of any other provisions of the Act can attract a maximum fine of $10,000 or up to one year imprisonment.

In 1980, there was another development with a potential impact on the personal liability of the officers and employees of polluters: the decision on the part of the MOE to move towards a change in the enforcement process by creating a Special Investigation Unit (SIU). That 14 member unit of police trained investigators became operational in January 1981, and was soon to take charge of all particularly problematic investigations, including those involving the illegal dumping of industrial waste.[47]

By the early summer of 1985, with Mississauga, Bhophal and the PCB spill in Kenora still firmly on the voters mind, the provincial election was fought with the environment as a prominent issue. This was not surprising since there had been signs in the press[48] and in various submissions to the MOE that the public perception of governmental action in the field of environmental management and protection was becoming quite negative.[49]

When the new government took office, it immediately proclaimed part IX of the EPA to take effect later that year.[50] The new Minister then announced the formation of a new Investigation and Enforcement Branch in the Ministry, which was to absorb the former S.I.U. The development of such a separate branch within the Ministry reporting to an Assistant Deputy Minister was one step towards the fulfilment of the election promise of an aggressive, but fair, predictable and consistent enforcement policy. The branch started operations on January 1st, 1986 and by now has 42 investigators stationed in 17 locations across the Province. Between April 1986 and March 1987 the new branch conducted 1,100 investigations, 260 of which resulted in prosecutions or other enforcement action.[51] This compares to 54 cases prosecuted in 1984-85 and 86 cases in 1985-86.[52]

The creation of the I.E.B. appears to reflect a change in the Ministry's traditional approach to pollution abatement, which was that of negotiation in order to achieve voluntary compliance with mutually agreed to emission standards and abatement control programs. Prosecution was considered an avenue of last resort, perhaps in some way signalling "a confession of failure" on the part of the abatement officer. By separating the abatement from the prosecution function, any conflicts in the role of the abatement officers was terminated. At the same time, the move created flexibility to move from an almost exclusively "compliance through negotiation" approach to a policy placing a greater degree of emphasis on the alternative of achieving compliance through consistent and predictable enforcement.[53]

While the last 8 years have seen a steady increase in the size of the fines imposed by the courts in successful environmental prosecutions, it appears that at least some of the members of the judiciary felt that the level of maximum fines was in many cases no deterrent, but rather little more than a licence to pollute.[54] The recent amendments to the EPA, OWRA and Pesticide Act by the Environment Enforcement Statutes Law Amendment Act,[55] certainly remedy that problem. Since that Act and its far reaching implications for the personal liability of directors, officers and employees will be the subject of a lecture later in today's programme, I will refrain from further comment. Suffice it to say that Bill 112 has raised the stakes of the game for all polluters, be they individuals or corporation, and now we will have to wait to see whether the courts are willing to deal a winning hand to the environment, where this is appropriate.

END NOTES

1. Rachel Carson, Silent Spring (1962), "For the first time in the history of the world, every human being is now subjected to contact with dangerous chemicals, from the moment of conception until death .... They have entered and lodged in the bodies of fish, birds, reptiles, and domestic and wild animals so universally that scientists ... find it almost impossible to locate subjects free from contamination.

2. Department of the Environment Act, S.C. 1970-71-72, c. 42.

3. Canada Water Act, R.S.C. 1970, c. 5 (1st Supp.).

4. Clean Air Act, S.C. 1970-71-72, c. 47.

5. Environmental Contaminants Act, S.C. 1974-75, c. 72.

6. See: Environmental Quality Strategic Review, Follow-on Report of the Task Force on Program Review (Feb. 21st, 1986) at p. 30-31.

7. Ibid., at p. 31. The report singles out regulations under the Fisheries Act, specifically addressing point source pollution by pulp and paper mills which were promulgated in conjunction with federal-provincial financial incentives to achieve the incorporation of environmental objectives in the Pulp and Paper modernization program.

8. See: IJC, Great Lakes Regional Office, Reports issued under the 1972 and 1978 Great Lakes Water Quality Agreements, (Nov. 1980) at pp. 1 & 2.

9. See: "A perspective on the problem of hazardous substances in the Great Lakes Ecosystem," 1980 Annual Report, Great Lakes Science Advisory Board (Nov. 13th, 1980), (at pp. i, ii, and 51-55).

10. Supra, fn. 6, at p. 34, The Follow-on Report points out: that by 1986 there had never been a prosecution under the Canada Water Act; that only five substances had by then been listed by Regulation as environmental contaminants under the Environmental Contaminants Act, and neither DOE, nor the Department of Health and Welfare had ever carried out a prosecution under that Act; that by 1986 only two court actions had been initiated by the DOE under the Clean Air Act, and only three prosecutions launched under the Ocean Dumping Control Act. The only statute which saw ongoing federal enforcement was the Fisheries Act, but even there, the authors of the report found that the prosecutions were more in reaction "... to fisheries imperatives them to balanced environmental responses."

11. S.C. 1980/83, C. 35, received royal assent July 17th, 1980, proclaimed in force to a limited extent as of Nov. 1st, 1980.

12. Fisheries Act, R.S.C. 1970, c. F-14.

13. Supra, fn. 11, s. 6 provides a maximum fine of $50,000 for a first offence and $100,000 for each subsequent offence, or a term of imprisonment not exceeding 2 years.

14. For a survey of the level of fines imposed under the old section see Estrin, Environmental Law (1984), p. 83 (§ 114) and compare p. 84 (§ 115) for fines under the amended section.

15. Supra, fn. 12 (as amended by 1976-77, c. 35, s. 7).

16. C.R.C. 1978, c. 827.

17. This also meant the loss of responsibility for the Fisheries Act which, with the substantially increased penalties, had just become the most effective water pollution abatement tool in the Department's arsenal. Also note, supra, fn. 6, at p. 35. The report concludes that an attempted administrative arrangement, whereby the DOE and the Dept. of Fisheries and Oceans were to share responsibility for prosecutions under the Act did not work satisfactorily because of the diverging perspectives of the two departments.

18. Supra, fn. 6, at p. 34.

19. Ibid., at pp. 38-40. The report is quite critical of this "advocacy role" of the DOE, pointing out what in its author's view appears to be the "downside" of such an approach: the loss of DOE's "... credibility as an objective arbitrator of national standards, often involving significant economic trade-offs, and as an effective and credible regulator."

20. See, e.g. the Response Report, 1982 Public Consultation Program (March 1983), by Environment Canada, Ontario Region.

21. Supra, fn. 6, at p. 36. See also "A review of the Toxicology and Human Health Aspects of PCB's (1978-1982)", Environmental Health Directorate, Health Protection Branch, Dept. of Natl. Health and Welfare.

22. Law Reform Commission of Canada, Crimes against the Environment, Working Paper 44 (1985).

23. Ibid., Chapter Three - "Recommendations", pp. 67-70; see attached Appendix A.

24. In the same context see also the Protection of Life series study paper: "Sentencing in environmental cases", prepared for the Law Reform Commission by J. Swaigen and G. Bunt. It contains a very useful review of current sentencing principles or objectives and make very interesting recommendations for reform.

25. Supra, fn. 6, at p. 30. The report refers to the limited provincial environmental expertise at the time.

26. R.S.O. 1980, c. 141.

27. R.S.O. 1980, c. 361.

28. S. 13(1) (am. by S.O. 1983, c. 52, s. 4).

29. Supra, fn. 26, s. 19. The provisions of the EPA bind the Crown. This is not the case with the OWRA.

30. Supra, fn. 27.

31. Supra, fn. 26, Part V of the Act.

32. The Pesticides Act, R.S.O. 1980, s. 376.

33. See: Estrin and Swaigen, Environment on Trial, 1978. See also J.R. Willms, The Environmental Assessment Act, 1975; paper delivered Dec. 11, 1980 at CBAO, Continuing Legal Education program: Environmental Law for the General Practitioner.

34. Supra, fn. 26, s. 146; this is the general penalty section; in addition, s. 47 provided a maximum fine of $2,000 for contravention of any provision of Part V (Waste-Management) and s. 72 a maximum fine of $1,000 for violation of Part VII (Sewage Systems).

35. Supra, fn. 27, s. 16(1).

36. Supra, fn. 32, s. 34.

37. See: The Canadian Environmental Law Research Foundation, Toxic Contaminant Litigation in Ontario (1986), A Study prepared for the Great Lakes Institute, University of Windsor, at pp. 199-202.

38. Ibid., at p. 203-205.

39. Ibid., at p. 209.

40. See the record of prosecution activity, Legal Services Branch, MOE, Ontario (as of Dec. 1987).

41. Supra, fn. 26, s. 80.

42. Ibid., s. 81.

43. Ibid., ss. 87, 91.

44. See Report of the Spills Regulation Advisory Panel, Ontario Ministry of the Environment, (Oct. 1985), at p. 1.

45. S. O. 1981, c. 69.

46. M. B. Jackson, Q.C., The Statutory Regimes, Transportation of Dangerous Goods and The Spills Bill, Continuing Legal Education, CBAO, Sept. 12, 1985, at p. 3.

47. See Swaigen, Prosecutions by the MOE, 1984 Annual Institute, Continuing Legal Education, CBAO, Feb. 4th, 1984, at p. 1.

48. Editorial, "Pollution, when is it a Crime?", Windsor Star, Jan. 29th, 1983 as quoted by Swaigen and Bunt, Sentencing in Environmental Cases, Study paper - Protection of Life Series, Law Reform Commission of Canada (1985), at p. 45.

49. See Submissions of the Conservation Council of Ontario and Federation of Ontario Naturalists to Symposium on Environmental Regulation, sponsored by Environment of Ontario, Nov. 1-2, 1984.

50. Supra, fn. 44.

51. See A. Douglas, Director, IEB, Environment Ontario on Sept. 9th, 1987 addressing MEA-MOE Liaison Committee, at p. 4.

52. See R. Clark, Asst. Director, IEB, Environment Ontario, on June 18th, 1987 addressing OPA Seminar. Mr. Clark also reported that simultaneously with the creation of the I.E.B. the Ministry's Legal Services Branch was almost doubled in size.

53. See Rankin and Finkle, The Enforcement of Environmental Law: Taking the Environment Seriously (1983), 17 U.B.C.L.R. 35, at p. 37 ff., for an interesting discussion of environmental regulation as a bargaining process. See also Thompson, Environmental Regulation in Canada (1980), at p. 55.

54. Supra, fn. 49, at p. 4.

55. S.O. 1986, c. 68.

Appendix A

Law Reform Commission
of Canada

Working Paper 44

CRIMES
AGAINST
THE ENVIRONMENT

1985

CHAPTER THREE

Recommendations

What follows is a series of recommendations based upon the various analyses and conclusions of this Working Paper. They are formulated in individual and general propositions rather than in the legislative form of a *Code* offence in order to invite comment on the major elements and goals of the new offence being proposed. In our view, it would be premature at this stage of the consultation to draft and propose actual *Code* sections. That drafting awaits the final Report to Parliament on this issue, a Report which will be finalized largely in the light of consultations on this Working Paper.

A New Offence

1. That a new and distinct *Criminal Code* offence be added to the *Code*, that of a "crime against the environment."

2. That the role and justification for this offence be that of repudiating and deterring conduct which seriously compromises a fundamental societal value and right, that of a safe environment or the right to a reasonable level of environmental quality.

3. That the protection of the environment for its own sake in the absence of identifiable human values, rights or interests, should not be an object of this new *Code* offence.

4. That this new offence should be formulated in general terms as regards substances, contaminants, emission standards and range of activities which fall within its scope, not limiting its present and future applicability by excessive specificity and detail.

Nature and Scope

5. That the general range of activities which *Code* offences against the environment should expressly prohibit would be conduct which seriously damages or endangers the environment:

(a) by means of direct physical acts; or

(b) in the course of the manufacture, transportation, use, storage or disposal of any hazardous or potentially hazardous goods, wastes or other contaminants.

6. That the scope of the offences against the environment should extend to:

(a) environmental pollution which

(i) seriously and directly damages the quality of the environment, or

(ii) seriously and directly endangers the quality of the environment;

(b) in either case listed in (a), unauthorized conduct, normally involving as a necessary condition a serious and dramatic breach of a federal or provincial statutory prohibition or standard;

(c) in either case listed in (a), conduct for which there is no overriding social utility which could result in otherwise seriously harmful or endangering pollution being minor in nature or even tolerable and justifiable;

(d) especially environmental pollution which thereby seriously harms or endangers human life or health;

(e) not only immediate and known harms and dangers to human life and health, but also those which are likely to result in the foreseeable future;

(f) only by express exception, that environmental pollution which deprives others of the use and enjoyment of one or more elements of the natural environment, causing very serious consequences although resulting in no serious harm or danger to human life or health; such instances would be in the nature of "catastrophes," an example being the loss of livelihood of an entire community as a result of pollution.

Excluded from the scope of this offence should be environmental pollution which damages, destroys or endangers private property, without harming or endangering human life and health.

The Mental Element

7. That the mental element required for a crime against the environment should be intention, recklessness or negligence.

8. That the degree of negligence required for criminal liability should be that which falls well below the standard of reasonable care required for ordinary or civil negligence.

9. Whereas intentional or reckless pollution could by exception incur criminal liability under this new *Code* offence even in the absence of harm or danger to human health, negligently harming or endangering the environment should only incur such liability if the pollution causes or risks death or bodily injury.

Omissions

10. That *Criminal Code* offences against the environment should prohibit not only acts which seriously harm or endanger the environment, but also harmful or endangering omissions.

11. That omissions should be included in these *Code* prohibitions by means of a specific duty to take reasonable care to prevent or mitigate grave environmental damage, destruction or danger when one has created the danger or has control over it.

12. That the greater the dependence of the public and the greater the dangers to the environment and health created by the activities of individuals or groups, the stricter and more onerous should be their duty to ensure environmental safety.

13. That for this offence, the "duties imposed by law," the omission of which could incur criminal liability, should consist both of the duties attached to the specific *Code* offences, and the duties imposed by federal and provincial environmental statutes; the flagrant and dramatic violation of the latter duties would be a necessary condition of criminal liability for omission.

Proving the Offence

14. That procedural reforms such as reverse onus or prosecutorial discovery of the accused may not be justified for these offences since they may violate the rights of the accused; nor would such reforms be necessary for the successful prosecution of at least the most serious and flagrant environmental offences, despite technical complexities, scientific debates and the problems and burden of proof.

Using the Jury

15. That the jury trial may well be the ideal and normal vehicle for determining whether or not an accused's pollution of the environment was so gross, so far beyond what was authorized, and so lacking in social utility relative to the harm caused or risked, that it merits repudiation as a crime against the environment.

16. That if the jury trial becomes the normal form for prosecutions under this new *Code* offence:

(a) the accused would have a right to a jury trial, and the Crown would be able to require a jury trial even when an accused elects to be tried by a judge alone;

(b) only in the event that both the accused elects and the Crown consents to trial by judge alone would a jury not be involved.

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THE DEVELOPMENT OF CANADIAN ENVIRONMENTAL LAW FROM THE PAST DECADE TO TODAY: CHANGING REQUIREMENTS, TOUGHER PENALTIES, INCREASED INDIVIDUAL LIABILITY

J.G.W. Manzig
January, 1988

THE DEVELOPMENT OF CANADIAN ENVIRONMENTAL LAW FROM THE PAST DECADE TO TODAY: CHANGING REQUIREMENTS, TOUGHER PENALTIES, INCREASED INDIVIDUAL LIABILITY

CONTENTS

I. Introduction

It is the purpose of this opening lecture to provide the background for today's discussion of the personal liability of company directors, officers and employees for their corporation's environmental offences. I will attempt to do this by means of a brief, summary reference to the major Federal and Ontario statutory enactments of the seventies and eighties, particularly as far as they have affected personal, quasi-criminal liability. I will also try to single out some of the extra-legal factors that appear to have played a decisive role in shaping today's legal rules governing corporate or individual liability for polluting the Ontario environment. Let me hasten to add that given the time constraints of today's program, this talk can do little more than set the stage for the following, more detailed discussions; otherwise, the topic would have deserved a much more exhaustive coverage.

Canadian Environmental Law Research Foundation
Conference
Toronto, Ontario, January 21, 1988

The Personal Liability in Ontario of Corporate Directors, Officers, Officials and Employees under Environmental Laws

John D. Honsberger
Raymond & Honsberger
Toronto, Ontario

The author gratefully acknowledges the invaluable assistance of Robert Judge in reasearching this paper.

THE DEVELOPMENT OF CANADIAN ENVIRONMENTAL LAW FROM THE PAST DECADE TO TODAY: CHANGING REQUIREMENTS, TOUGHER PENALTIES, INCREASED INDIVIDUAL LIABILITY

CONTENTS

The Personal Liability in Ontario of Corporate Directors, Officers, Officials and Employees under Environmental Laws

Introduction

Environmental protection is increasingly being recognized by many to be an over-riding fundamental human value to which other values must be subordinated. This paper considers one aspect of this readjustment of values by examining the personal liability of directors, officers and shareholders for environmental damage. It traces the history of such liability from traditional common law principles through strict liability, penal liability and recent statutory liability imposed by environmental statutes. It examines by way of comparison comparable legislation in the United States, England, Scandinavia and Japan.

The paper also indicates how environmental laws, (1) have substantially eroded the general rule of corporate limited liability which is the main advantage of the corporate form for structuring a business; and (2) in the United States which may be a forerunner of what we may expect in Canada have turned traditional concepts in the law of property such as the rights of a bona fide purchaser or lender for value upside down creating what has been described as a "hibernating time bomb".

I. **Common Law Doctrines of Corporate and Personal Liability**

The traditional understanding of the nature of the role of corporate directors and officers is that they are agents of their corporation. Corporations by necessity must act and contract through the aid of such agents. A corporation is however, a legal person. It is a legal entity separate from its shareholders. Being such an entity, it is capable of participating in most forms of transactions including owning property, injuring others by its actions, committing crimes and being prosecuted for polluting the environment. Difficult problems can arise when the necessary intention of a corporation must be demonstrated to establish liability for alleged crimes or torts.

Most crimes require evidence of a guilty mind. Some torts require the proof of actual knowledge. In each case the corporate mind must be established through the actions, knowledge and decisions of the directors, officers or employees who are and who must be the "directing minds" within the corporation and consequently accountable for its action or omission. These considerations go to the liability of the corporation, but not directly to the liability of its directors or officers.

An officer or director of a corporation, as a rule, is not liable for a tort or an offence committed by it unless he or she has in some way actually and personally participated with the corporation in the illegal act whether as a principal accessory or in some way as an aider and abetter. [1] This leads one to consider the nature and liability of directors generally.

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1 U.S. v. Amrep Corp. (C.A. 2 N.Y.) 560 F2d cert. den 434 U.S. 1015.

(i) Liability as a Fiduciary

Directors are first and foremost fiduciaries. As such they must act in good faith toward the company in dealing with it and on its behalf. Lord Greene in Re Smith & Fawcett Ltd. said:

> They must exercise their discretion *bona fide* in what they consider - not what a court may consider to be in the interests of the company [2]

As Gower has written in his book Modern Company Law: [3]

> Directors, once their appointments take effect are fiduciaries and must therefore display the utmost good faith towards the company in their dealings with it or on its behalf.

Thus, if a director breaches his duty as a fiduciary he may be liable to be sued for damages.

(ii) Liability Arising Out of the Failure to Exercise Due Care in Carrying Out Director's Duties

A director is also expected to use reasonable care, skill and diligence in the performance of his duties. [4]

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2 [1942], 2 All E.R. 542 at 543.

3 3rd ed. 1969, p. 519.

4 [1925] Ch. 407 at p.428 *et. seq.*

Again, if a director fails to exercise reasonable care, skill and diligence in the performance of his duties he has exposed himself to possible action being taken against him. If, for example, a director knowingly assists or permits the corporation of which he is a director to damage the environment and expose the corporation to liability the director also may be liable personally for any resulting damage.

(iii) The Business Judgment Rule

Generally however, and provided the requisite standard of care has been met, there will be no liability imposed on a director for an honest error of judgment. As a result, the courts will not override the decisions of directors in the absence of fraud or bad faith.

This so-called business judgment rule recognizes that, as a business corporation is profit-oriented, the decisions of directors will involve at times both the assumption or avoidance of risks and that some of these decisions may eventually prove erroneous.

The rule does, however, make it more difficult to impose personal liability upon directors. Modification of environmental legislation to impose new duties on directors and officers was in part designed to get around the Business Judgment Rule.

There is, however, some indication that the courts are becoming more reluctant in allowing the Business Judgment Rule to be invoked by directors by way of defence in some actions such as a negligence action.

For example, a recent and important American decision held that in order for a director to rely upon the Business Judgment Rule he must exercise an informed business judgment. [5]

I believe that a Canadian Court would not extend the protection of the Business Judgment Rule to a director whose judgment had been ill-considered or improvident. This opinion is corroborated to some extent by a recent decision [6] whereby the Tax Court of Canada found a Director vicariously liable under the Income Tax Act for a violation by his corporation. In so doing, the Court considered a defence of reasonable care by the director as defined in Re City Equitable Fire Insurance Company.[7]

5 Smith v. Van Gorkum, 488 A 2d. 858.

6 Fraser v. M.N.R. 87 D.T.C. 250.

7 supra.

The Court rejected this defence finding that the director had made no diligent or independent inquiries that may have disclosed the corporate violation. It said:

> The cornerstone of the Business Judgment Rule is the independence and disinterestedness of the directors charged with responsibility for decisions. The rule states that a corporate transaction that involves no self-dealing by, or other personal interest of, the directors who authorized the transaction will not be enjoined or set aside for the directors' failure to satisfy the standards that govern a director's performance of his or her duties, and directors who authorized the transaction will not be held personally liable for resultant damages, unless:
>
> (1) The directors did not exercise due care to ascertain the relevant and available facts before voting to authorize the transaction; or
>
> (2) The directors voted to authorize the transaction even though they did not reasonably believe or could not have reasonably believed the transaction to be for the best interest of the corporation; or
>
> (3) In some other way, the directors' authorization of the transaction was not in good faith. [8]

This language is important when one considers recent Ontario environmental language, to be discussed later, which imposes a duty on directors and officers to know whether or not

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8 Ibid.

the corporation is polluting and to take reasonable steps to prevent the pollution.

(iv) Strict Liability

The personal liability of directors also has been extended by so-called strict liability legislation. In the normal case to convict a person it is necessary to prove the outward circumstances of the offence, the actus reus, and some mental element on the part of the offender, the mens rea. However, many of the so called "regulatory offences" or "public welfare offences" designed to protect public health and safety as opposed to those prohibiting immoral and wrongful conduct do not need the proof of intent or mens rea. In such cases the accused may be convicted on proof of the actus reus alone. The offence is mala in se-mala prohibita. This is known as strict liability which means that the accused may not say "I did not mean to break the law" or "I did not know the facts were such to make my conduct illegal". Strict liability means liability without fault. It is designed as a prod to stimulate increased care and efficiency - even by those who are already careful and efficient. Strict liability is the gadfly which stimulates the greater effort. [9]

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9 Hall, Principles of Criminal Law, p.300 1947, The Bobbs Merrill Co.

Mr. Justice Frankfurter described strict liability in an appeal which upheld the conviction of the president of a corporation for shipping adulterated drugs in this manner:

> Such legislation dispenses with the conventional requirement for criminal conduct--awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger....The offense is committed by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws.

(v) Statutory Representative Actions

A statutory representative action, colloquially and incorrectly sometimes referred to as a derivative action [10] may be brought against directors and officers in most jurisdictions. In British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and the federal jurisdiction, directors and officers are statutorily obliged to exercise their powers in the best interests of the corporations. [11] These jurisdictions permit any shareholder to bring an action on behalf of the

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10 Welling, Corporate Law in Canada, 1984, Butterworths, pp. 517-519.

11 CBCA, ABCA, MCA, SBCA, s.117(1)(a) BCCA.

corporation to seek judicial intervention whenever the Act is violated.[12]

Thus, where a corporation is fined or penalized for violation of environmental laws, a shareholder may seek to hold directors or officers responsible through the mechanism of a shareholder's statutory representative action.

(vi) Criminal Liability

Corporations in addition to possible civil liability may be subject also to possible criminal liability. There are a number of federal statutes that contain provisions establishing criminal penalties for environmental and pollution violations. I will mention only a few.

The Fisheries Act[13] provides that it is an offence to put or knowingly permit various deleterious substances into water frequented by fish or which flows into such water. Every person who violates the provision is guilty of an offence. However, in the case of a corporation it may be guilty of an offence, but it does not follow that directors, officers or employees may also be

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12 BCCA, s.225, ABCA, SBCA, MCA, CBCA, s.232; OBCA, s.245; NBBCA s.164.

13 R.S.C. 1970 C.F-14 s.33.

liable. However, they could be liable if they actively participated in the offence.

Similarly, it is an offence under the Navigable Waters Protection Act [14] to throw rubbish of any description into any navigable water that is liable to interfere with navigation.

The Transportation of Dangerous Goods Act [15] authorizes the destruction of any dangerous goods that on reasonable and provable grounds appear to an inspector to be abandoned or to have deteriorated and to be a danger to persons, property or the environment. The dangerous goods may be destroyed or otherwise disposed of by the inspector in such manner as is appropriate in the circumstances. Her Majesty in the right of Canada may recover the costs of taking any such measures from those responsible. Again, those responsible could include directors if they actively participated in the offence.

There are also penalties in such statutes as the Energy Supplies Emergency Act [16], Public Harbours and Ports Facilities

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14 R.S.C. 1970 C. N-19 s.19.

15 S.C. 1980-81-82 c.36, ss. 15(2), 18.

16 S.C. 1979 c.17.

Act [17], Canada Water Act [18] and in Gas Pipeline Regulations[19] made pursuant to the National Energy Board Act [20].

There are too a number of provincial quasi-criminal penalties. By way of example, the Ontario Environmental Protection Act [21] imposes a duty on every director or officer of a corporation who engages in any activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment contrary to the Act or its regulations to take all reasonable care to prevent the corporation from causing or permitting such unlawful deposit, addition, emission or discharge. Every person who fails to carry out such duty is guilty of an offence. A director or officer is liable to conviction whether or not the corporation is prosecuted or convicted. There is a similar duty and offence under the Ontario Resources Act [22]. Possible personal liability under both the Environmental Protection Act and the Resources Act will be discussed in greater detail later.

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17 S.C. 1977-78 c.30.

18 R.S.C. 1970 (1st Supp.) c.5.

19 C.R.C. 1978 c.1052.

20 R.S.C. 1970 c.N-6.

21 R.S.O. 1980 c.141 s. 147 as amended.

22 R.S.O. 1980 c.361, s.34(g) as amended.

(vii) Liability Under Securities Laws

In the United States directors and officers may be liable for nondisclosure of environmental matters pursuant to Blue Sky laws, the Securities Act of 1933 and Securities Exchange Act of 1934.

In Canada generally-accepted-accounting practices require auditors to disclose possible contingent claims against a corporation which would include possible environmental claims.

A company that fails to disclose a possible contingent environmental action in its financial statement may be guilty of an offence. [23] Where a company is guilty of the offence every director, officer or person who authorized, permitted or acquiesced in such offence is also guilty of an offence. [24]

II. Government Policy Relating to the Environment

I have already indicated that most governments are showing increased concern in respect of the environment. Environmental statutes primarily have been enacted because an

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23 See for example, Securities Act R.S.O. 1980 c.466 s.118(1)(b).

24 Ibid, s. 118(3).

acceptable level of corporate and individual behaviour in respect of the environment has not been achieved through existing laws. As a consequence, special purpose statutes have been enacted.

In the United States growing public concern over the environment may be said to have been crystallized in 1962 with the publication of "The Silent Spring by Rachael Carson". 1970 became for the United States, the year of the Environment [25]. The National Environmental Policy Act was enacted that year as well as several other related statutes. Indeed, between 1962 and 1976 it has been estimated that Congress enacted more than 35 major regulatory measures. Obviously, environmental protection had become governmental policy in the United States. Whether it was an informed policy or not is another question. One writer commenting upon the activity of Congress noted:

> Several points can be made about this legislative surge. First, it was a reaction to a perceived crisis. Second, most Congressmen and Senators had little idea of what they were voting on. Third, scant consideration was given to any cost-benefit analysis of the problem to be solved and the means of solving it. Fourth, guidelines and standards were established which make the federal judiciary the main arbiter of what is

25 "No one can say for sure how or why the environment burst into national prominence in 1970. Certainly, national concern had been mounting for a long time, and the tempo had increased greatly in the last decade", Environmental Quality, First Annual Report of the (U.S.) Council on Environment Quality, p.5.

> an unreasonable risk of injury to health or the environment.[26]

There is no question, however, but that governments in the United States have become much more informed on environmental policy and this policy has become one of the most important current issues in that country.

The policy discussion in the United States is now in the realm of the comparative importance of the environment and traditional private and property rights. This will be discussed in some detail later.

It should be noted, however, at this point that the United States has been the pioneer in imposing personal liability under environmental statutes. Its legislation has been the primary drafting model for legislation in other jurisdictions.

Personal liability has been imposed by four methods: 1. The definition sections of most statutes define a person to be either a corporation or an individual; 2. In some statutes

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26 Tunney, The Federal Legislative Process; Misinformation, Reaction and Excessive Delegation, 7 Environmental Law 499, 501, Spring, 1977.

reference is made to specific individuals such as directors, officers, officials and employees; 3. In other statutes liability is imposed upon owners and occupiers which can include individuals; 4. In still others liability is imposed upon "responsible corporate officers".

Ontario is one of the jurisdictions that has enacted environmental legislation based upon earlier environmental statutes in the United States.

III. **Ontario Environmental Hazards Legislation**

Ontario enacted the Environmental Protection Act in 1971.[27] It was substantially amended in 1986.[28] When the Minister of Environment, Honourable J. Bradley introduced the legislation he said in part:

> I am pleased to introduce legislation that dramatically restructures the existing enforcement provisions of ...the Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act (so as to provide) for jail sentences and quintriple fines for pollution offences. It also gives the court the power to strip polluters of ill-gotten gains...the current penalty structure is little more than a licence to pollute our air, our water and our food chain...

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27 S.O. 1971, c.86.

28 S.O. 1986, c.68.

> ...where legal responsibility can be proven, corporate directors, employees and agents can be fined as individuals a maximum of $5,000.00 a day for first convictions and $10,000.00 a day for subsequent convictions. For the most serious offences, they can be imprisoned for up to one year.
> ...The legislation will clarify that corporations are responsible for the conduct of their employees and agents. This will be a strong incentive for corporations to set up proper pollution preventive systems, properly train and supervise employees and provide in contracts with their agents that activities on behalf of the corporation must be carried out in an environmentally sound manner.
> ...The general thrust of this legislation reflects the (view that) environmental protection (is) a fundamental human value...[29]

The following section relating to the duties of directors and officers was added to each of the Environmental Protection Act [30], Ontario Water Resources Act [31] and the Pesticides Act [32].

> (1) Every director or officer of a corporation that engages in an activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation

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29 Debates, Legislative Assembly Ontario July 3, 1986, pp. 2114-2116.

30 s.147a.

31 s.75.

32 s.348.

> from causing or permitting such unlawful deposit, addition, emission or discharge.
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

The new thrust of the Ontario environmental legislation against officers and directors of a corporation is in part a recognition of the difficulty of successfully bringing criminal or quasi-criminal actions against corporations and their directors. This has been due primarily to the fact that it is always difficult, particularly in a large corporation because of the division of tasks within a corporation, [33] to identify the individual who made a particular decision.

It is apparently now the duty of all directors and officers to make continuous, diligent and independent inquiries to ascertain whether the corporation is polluting the natural environment. This would not be dissimilar to the inquiries a

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33 Comment, Prosecuting Corporate Polluters: The sparing use of criminal sanctions (1985) 62 U of Detroit L.J. 659 at 661 city Nat'l. Inst. of Law Enforcement & Crim. Justice, U.S. Dep. of Justice, Illegal Corporate Behaviour XXI, 1977.

director or officer must take in order to rely upon the Business Judgment Rule.

It is to be noted that the duty is apparently unqualified and in a sense imposes strict liability. If a corporation engages in an activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment contrary to the act and regulations, a director or officer must take reasonable steps to prevent the pollution.

The potential liability of officers and directors is very great. Virtually every manufacturing company and many others are potential polluters.

A director or officer cannot now say I did not know the corporation was polluting the natural environment. He or she, however, may say that I took "reasonable" steps to prevent the pollution. It remains to be seen what conduct is considered to be reasonable in this context. It would seem that the duty of care imposed upon a director or officer has not changed significantly. The principal effect of the new legislation has been to reverse the onus of proving reasonable or unreasonable conduct.

One might, however, expect charges under this new legislation as were recently made in the United States and which resulted in a conviction of the wife of the owner of an auto-wrecking company. She was an officer in the company, but did not participate in the business. She, however, was convicted with the company and other officers for illegally burning wrecked vehicles. The court held that she had sufficient managerial authority to discover and remedy the violations, but had failed to act. [34] The new Ontario legislation would not however, require the director to remedy the violation, but only to take reasonable steps to prevent it from occurring.

Many actions result in unexpected reactions. One indirect result of the new liability imposed upon directors and officers is that it may cause the opposite result than that intended. The obvious and stated policy of the legislation is to preserve and protect the environment. New and onerous duties are imposed upon corporate directors and officers designed to make corporations more responsible. The burden would seem to be so great that it could very well inhibit responsible individuals from becoming officers and directors of corporations. This would

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34 State v. Kailua Auto Wreckers Inc. 62 Hawaii 222, 615 P 2nd 730 (1980).

not seem to be in the overall interest of the state. An honorarium of a few hundred dollars for each meeting of a board of directors will not balance the potential liability imposed upon directors. It may well be an unexpected result of the new legislation that responsible individuals will decline to accept appointments as directors. Strawmen and judgment-proof individuals may take their place. It is of course open to corporations to insure their directors and officers against environmental claims, but the cost is substantial and it is increasingly difficult to arrange indemnity insurance of this nature.

There have been three Ontario cases relating to environmental hazards involving directors two of which particularly indicate the concern of the Ontario Court of Appeal to excessive jealousness in the prosecution of environmental offences.

In Regina v. Jelco Manufacturing Ltd. and Alexander[35] a municipality obtained a prohibition order under a municipal by-law relating to pollution control. On the failure to comply with the order the corporation and its president were found in contempt of court and fined $2,000.00 each on ten convictions

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35 (1987), 57 O.R. (2A) 776.

for contempt of court. On appeal the Ontario Court of Appeal set aside the fines on the basis that there was not sufficient evidence to indicate that the accused were aware of the prohibition orders.

Regina v. B.E.S.T. Plating Shoppe Ltd. and Slapas[36] also involved a municipal pollution by-law and the conviction of the accused corporation and its president of contempt of court for refusing to comply with an order of prohibition. The corporation accused was fined $100,000.00. The president of the corporation was sentenced to prison for a period not to exceed six months. The Court of Appeal reversed the convictions on the grounds that a fair trial had not been afforded the accused in that a reasonable opportunity to prepare a defence and call witnesses was not given.

Fines of almost $3 million were imposed against an Ontario company for breaches of the Environmental Protection Act and the Water Resources Act [37]. In addition the president was fined $50,000.00 in his personal capacity. The Court of Appeal upheld the convictions and fines. The fine of the company was

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36 (1987), 59 O.R. (2d), 145.

37 Re Eagle Disposal Systems Ltd. et al and Minister of Environment et al (1984), 47 D.R. 2d 323 (CA) Affg. 44 O.R. (2d) 518 (Osler J.).

not paid as it declared bankruptcy shortly after the decision of the Court of Appeal.

The cases indicate the extent that lower courts are prepared to enforce pollution offences against corporate directors. The first two of the cases also indicate the concern of the Court of Appeal that traditional safeguards to a fair trial cannot be sacrificed. This would seem to be a signal to the legislature. The Court of Appeal in Ontario is not prepared to enforce environmental legislation at a cost of abandoning procedural safeguards and traditional constitutional and property rights unless clearly and constitutionally directed otherwise by the legislature.

IV. The United States Experience

Recent environmental legislation in the United States has gone beyond merely imposing duties and personal liability on directors and officers. A brief description of this legislation may give some sense of the extent of legislative concern in Ontario over pollution by showing how far beyond imposing liability on directors and officers the legislation might have gone.

The cleanup of inactive and abandoned hazardous waste sites in the United States is recognized as the most pervasive and dangerous environmental problem. It is said that approximately 57 million tons of hazardous wastes are produced yearly in the United States [38]. Ninety per cent of these wastes are disposed of in an environmentally unsafe manner [39]. More than personal liability on directors and officers is necessary to fund enormous clean-up costs.

Courts in the United States interpreting the new generation of environmental statutes have chosen to ignore the corporate form and have held corporate officers individually liable. [40] Environmental liens have been liberally recognized. These liens are designed to secure the cost of cleanups which federal and state agencies incur. Such liens, at least on filing, become a first priority charge upon the assets of a debtor, superior even to prior perfected, consensual and non-

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38 Vollmann, Double Jeopardy: Lender Liability Under Superfund. (1987), 166 Real Estate Journal 3 at p.4 Citing U.S. Environmental Protection Agency, Everybody's Problem: Hazardous Waste 1, (1980).

39 Ibid.

40 New York v. Shore Realty Cor., supra; United States v. Northeastern Pharmaceutical and Chemical Co. 579 F. Supp. 823 (W.D. Mo. 1984) affd. in part, rev'd. in part 28 Environment Report cases (BNA) 1385 (8th Cir. Dec. 1, 1986); United States v. Mottolo 605 F. Supp. 989 (D.N.H. 1985).

consensual liens and security interests [41] and bona fide purchases.

The United States Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted in 1980. [42] The goals of CERCLA are (1) to facilitate cleanups when hazardous subjects are released into the environment or when a release is threatened and (2) to hold responsible parties liable for the costs of this cleanup. The Environmental Protection Agency may finance the cleanup of hazardous wastes and subsequently bring civil actions against responsible parties to recover the costs of such cleanups or require a responsible person to remove hazardous materials.

Parties can be held responsible for the release of hazardous substances irrespective of fault.[43] Liability is extended to (1) current owners of hazardous substance facilities; (2) past owners or operators of hazardous substance facilities at the time of disposal; (3) persons who arrange for treatment or

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41 Murphy, "The Impact of 'superfund' and other Environmental Statutes on Commercial Lending and Investment Activities" (1986) 41, Bus. Law. 1133.

42 Pub Law No. 96-510, 94 Stat. 2772 Codified at 42 U.S.C. ss. 9601 - 9657.

43 See eg. New York v. Shore Realty Corp. 759 F2d 1632 (2d. cir. 1985).

disposal of hazardous substances at the facility, and (4) persons who transport hazardous substances to a site from which there is a release or threatened release of a hazardous substance. [44]

The inchoate nature of the retroactive environmental liens have gone beyond eroding the limited liability concept of corporations. They have created a chilling effect upon real estate and many other normal commercial transactions. As I mentioned earlier one court has described this to be a "hibernating time bomb".

Lawyers, bankers, corporate directors and officers are reacting or at least learning to live with such a drastic upheaval in property law where state and federal environmental lien provisions create inchoate or "secret" liens enforceable against an intervening bona fide purchaser even though filed subsequently to the time such purchaser's interest arose. A hazardous environment has been created for lenders and property owners.

However, as one court said in respect of the priorities between a trustee in bankruptcy and a super lien holder, innocent

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44 CERCLA s.107(a).

creditors are indeed subservient to the rights of a larger innocent public to have a clean environment. It stated:

> We think it proper that the response costs incurred by Tennessee and recoverable under CERCLA be deemed an administrative expense (ie. a preferred claim in priority to secured or unsecured creditors). In Reading v. Brown, 391 U.S. 471 (1968), the Supreme Court expanded the concept of administrative expenses to include damages resulting from the estate's post-petition negligence. The creditors argued then that making the response costs an administrative expense is unfair to the generally innocent creditors who suffer at the expense of the petitioner's higher priority claim. The Reading Court's response is applicable to this case: "Existing creditors are, to be sure, in a dilemma not of their own making; but there is no obvious reason why they should be allowed to escape that dilemma at the risk of imposing it on others equally innocent." Id. at 482, 483. Indeed, the protection of innocent creditors would not be furthered by a contrary holding that permits creditors to benefit from their silence while the debtor violates the law. [45]

V. Liability of Directors and Others Under Foreign Environmental Legislation

(i) England

The major environmental statute in England is the Control of Pollution Act, 1974.[46] When an offence has been committed under it by a body corporate and it is proved to have

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45 In re Wall Tube & Metal Products Company 831 F2d. 118 (6th Cir. 1987).

46 44 Statutes, 1191.

been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he or she as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly. Where the commission by any person of any offence under the Control of Pollution Act, 1974 is due to the act or default of some other person that other person is guilty of an offence.

(ii) Scandinavia

All Scandinavian business leaders or corporate executives can be held criminally responsible for violations of statutory provisions which occur in connection with their enterprises. [47] The imposition of criminal liability on the executive makes criminal provisions as effective as possible, since management is best able to prevent offences being committed. [48] The Scandinavians have gone almost as far as to find that leaders incur liability for all theoretically avoidable offences (a sort of respondent superior criminal liability). This almost amounts to absolute criminal liability. It makes

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47 Kruse, Criminal Liability for Negligence of Business Leaders (1984), 10 Aveth Law Bulletin 971 at 972.

48 Ibid at 974.

prosecutions against Scandinavian directors, officers and executives for environmental offences quite effective.

The liability of Scandinavian directors and officers is potentially extended by the Nordic Convention of 1974. It is an epoch-making convention. The signatories are Denmark, Finland, Norway and Sweden. The Convention considers harmful environmental activities and deals with them as if there were no boundary lines between the signatories. Any person who is affected or may be affected by an environmental nuisance in any of the signatory countries has a right through domestic procedures to challenge the activity that permits it and to question measures taken to prevent damage. [49]

(iii) Japan

Japan has a wide ranging Environmental Pollution Control Law [50]. It provides in part:

> (Purpose of the Law)
> Article 1
> The purpose of this law is to contribute to the prevention of environmental pollution adversely affecting the health of persons, in combination with the control measures based

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49 Van Lier, Acid Rain and International Law, 1974 Sythoff & Noordhoff, The Netherlands pp. 186-189. This book is in the Great Library of the Law Society of Upper Canada.

50 Law No. 132 of 1967 as amended.

upon other laws or ordinances designed to prevent such pollution, by punishing those acts, etc. which cause such pollution in the conduct of business activities.

(Crime with Intent)
Article 2
1. A person who knowingly endangers the lives or health of the public by discharging those substances which adversely affect the health of persons (including the substances which become so hazardous when accumulated in human bodies; hereinafter the same) in the conduct of activities of industrial plants or places of business shall be punished by imprisonment with prison labour for not more than three years or a fine not exceeding three million yen.

2. A person who, as the result of the offence mentioned in the preceding paragraph, caused the death or bodily injury of another shall be punished by imprisonment with prison labour for not more than seven years or a fine not exceeding five million yen.

(Crime by Negligence)
Article 3
1. A person who, through failure to exercise necessary care in the operation of his business, endangers the lives or health of the public by discharging those substances which adversely affect the health of persons, in the conduct of activities of industrial plants or places of business, shall be punished by imprisonment with or without prison labour for not more than two years or a fine not exceeding two million yen.

2. A person who, as the result of the offence mentioned in the preceding paragraph, causes the death or bodily injury of another shall be punished by imprisonment with or without prison labour for not more than five years or a fine not exceeding three million yen.

(Concurrent Punishment)
Article 4
In case the representative of a corporation, or the proxy, employee or worker of a corporation or of an individual commits any of the offences mentioned in the preceding two Articles, in connection with the business of the corporation or individual, not only the violator shall be punished but the corporation or individual shall be punished by fines prescribed in the Articles concerned.

It will be noted particularly, that in respect of a corporation "the proxy, employee or worker" of a corporation is subject to the same fines prescribed in respect of corporations as well as being subject to imprisonment. [51]

Conclusion

The legislatures of Canada, its provinces, especially Ontario, the United States and most Western Nations have adopted strong policies to protect the natural environment. Substantial legislation in support of that policy has been enacted. The rule of corporate limited liability has been modified considerably. Increasingly, directors and officers are being made personally liable for corporate activities.

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51 See Japan Laws, statutes, etc. Environmental Laws and Regulations in Japan, 1974, Environmental Agency, Japan. This book is in the Great Library of the Law Society of Upper Canada.

The legislation in the United States has gone the farthest. The result has been substantial erosion of traditional concepts of corporate liability, procedural safeguards and property rights. Appellate courts in the United States in general have supported the far reaching environmental legislation.

It remains to be seen what will transpire in Canada. In general, the new Ontario legislation has not greatly changed the law in respect to the personal liability of directors and officers. A largely unconditional liability has been imposed upon directors and officers. But, the liability is only to take reasonable steps to prevent and correct environmental hazards. However, the much more onerous legislation of the United States is an indication of what we might expect soon in Canada.

It would seem though that Canadian Appellate Courts as demonstrated particularly by that of Ontario will not be persuaded by zealous legislators to scrap traditional rights of individuals to their property and procedural safeguards unless they are clearly and constitutionally directed to do otherwise. Our appellate courts take their obligations seriously to give a careful, sober, second view of the decisions of lower courts.

They seem to be less liberal than their counterparts in the United States concerning environmental legislation.

There is no doubt but that the protection of the natural environment should be a matter of very high priority. It remains to be seen whether the priority should be unconditional in light of the practical limitations on legislators and proponents of environmental legislation by the constitution.

However, the environmental laws in Canada should not be developed in isolation. They must be and will be regarded in the context of the rapidly developing international law encompassing the planetary ecosystem. This is attempting to balance ecological, legal and economic interests on a global scale. At a minimum there will be a substantial modification to traditional rules of corporate liability. Corporate directors and officers must be aware of their expanding liability in respect of corporate environmental offences.

The new rule for directors and officers concerning environmental hazards is <u>Caveat diribitor</u>. Let the director beware!

ENVIRONMENTAL PROTECTION LEGISLATION:
PERSONAL LIABILITY OF
OFFICERS' AND DIRECTORS'

Roderick M. McLeod, Q.C.

Miller, Thomson, Sedgewick, Lewis & Healy

formerly Deputy Minister of
Environment
(Ontario)

Assistance in materials preparation by

J. Alex Langford Q.C.
Miller, Thomson, Sedgewick, Lewis & Healy

John Swaigen, Counsel
Ministry of the Environment

January 21, 1988

Toronto

Canadian Environmental Law Research Foundation

CONTENTS

A. INTRODUCTION

A.1 The question of corporate environmental responsibility is a crucial one; in today's highly complex inter-dependent society, even a temporary lapse in judgment within the corporate context can cause extremely serious harm.

A.2. As the Ontario Law Reform Commission put it in its Report on Class Actions:

> "...(W)e live in a corporate society, characterized by mass promotion, and mass consumption. The production and dissemination of goods and services is now largely the concern of major corporations, international conglomerates, and big government, whose many and diverse activities necessarily affect large numbers of persons in virtually all aspects of their lives. Inevitably, dramatic changes in production, promotion, and consumption have given rise to what may be called "mass wrongings" -that is, injury or damage to many persons caused by the same or very similar sets of circumstances.
>
> Large scale pollution of rivers or the atmosphere can affect countless persons over a long period of time ... and in the wake of such misconduct, the individual is very often unable or unwilling to stand alone in meaningful opposition."

A.3 Difficulties in defining the penal responsibility of corporations have arisen from two key facts about corporations.

(a) They are not human. They are artificial constructs, and therefore, the question of how to punish them for wrongful behaviour, and even whether it is appropriate to punish such artificial constructs has been a continuing debate in legal circles for hundreds of years. As Edward, the first Baron Thurlow said in the 18th century, "Did you ever expect a corporation to have a conscience, when it has no soul to be dàmned, and no body to be kicked?" (There is a version of this quote, which may be apocryphal, that the Lord

Chancellor then added in a stage whisper, "and by God, it ought to have both".)

(b) The second problem is the nature of corporate decision-making. Corporations are structured not only vertically, but also horizontally. Much decision-making is collective. Wrongs often occur not through bad actions, but through omissions. Many of these omissions occur not because of something that one single person did, but because of a failure to communicate clearly amongst several people who share responsibility for carrying out functions. As the Law Reform Commission of Canada put it, in attempting to define criminal responsibility for the actions of groups, "Most corporations function through the cumulative efforts of many individuals performing diverse roles."

A.4 The result of this second aspect of corporate behaviour is that it is difficult to allocate fault to individuals within a corporation. Taken together, these facts give rise to the problem that it goes against the grain to punish only an artificial construct when we all know that that artificial construct is made up of individuals; yet it is very difficult to allocate blame to the individuals.

A.5 However, it is not an either/or situation. Liability for both criminal offenses and regulatory offenses is cumulative. The law recognizes the possibility of convicting both corporations and the individuals within those corporations who contribute substantially to the offence. The difficulty has been that while the responsibility of the corporation for offenses committed by its personnel has been clear and the liability of the employees at the lowest rungs of the corporate ladder, who committed the offence has been clear, the responsibility of the directing minds and wills of the corporations for offences committed by such employees has been obscure.

A.6 On December 18, 1986, the Ontario Legislature addressed one very important aspect of the question of corporate environmental responsibility;

namely, the responsibility of officers and directors of corporations to ensure that the corporation does not pollute. On that date the Environmental Enforcement Law Amendment Act was proclaimed, significantly amending the Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act.

A.7 Section 147a of the Environmental Protection Act provides:

> (1) Every director or officer of a corporation that engages in an activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful deposit, addition, emission or discharge.
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

B. THE LIABILITY OF CORPORATIONS AND EMPLOYEES (A SHORT NOTE)

B.1 The basis of liability of corporations under environmental protection legislation, for negligent acts of employees and agents was set out clearly and succinctly in R. v. Sault St. Marie:

> "The responsibility of the corporation is to set up and fully implement appropriate systems to prevent the commission of offenses by its employees and agents. If the directing mind and will of the corporation has done this, and the employees or agents commit offenses despite the corporation's best efforts, the corporation will not be convicted:
>
> Mr. Justice (now Chief Justice) Dickson for the Court, in R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 stated at pp. 377-8:
>
> "Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating willful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself."

B.3 While the concept of "directing mind and will" is also fraught with difficulties, it has been clarified to a great extent by the Supreme Court of Canada in the Canadian Dredge and Dock case. (Canadian Dredge and Dock Co. Ltd. et al. v. The Queen (1985), 19 C.C.C. (3d)2.). Whether a person is directing mind and will does not depend on the person's title, but on his functions. A corporation can have more than one directing mind. If an employee has been delegated substantial discretion to decide how to carry out duties, he may well become the directing mind and will of the corporation within the scope of those duties. Although this case was decided in the context of criminal law, it is highly likely that the same principle will apply in relation to regulatory or public welfare offenses.

B.4 The liability of the employee who turns the valve or pulls the switch carelessly is also reasonably clear. His or her liability is also based on negligence. If the employee or independent contractor has fallen below the standard of care to be expected of a reasonable and prudent person in that person's position, the person can be convicted of the offence.

C. LIABILITY OF DIRECTORS AND OFFICERS PRIOR TO THE ENVIRONMENTAL AMENDMENT ACT (ONTARIO)

C.1 Logically, one would expect on the basis of the analysis in the Sault Ste. Marie case, that directors and officers who neglect to set up the pollution prevention system envisioned by the Supreme Court of Canada, with the result that an employee acts negligently, would also be guilty of the offence. If the offence does not require mens rea to convict the directors, those who fail to establish a corporate policy of pollution prevention or indeed those who establish a corporate policy or "corporate culture" that is conducive to committing environmental offenses would appear to be at risk of conviction. Similarly, officers who fail to instruct employees, and make available adequate training and supervision would also be at risk.

C.2 Nevertheless, a decision of the Ontario Court of Appeal suggests that officers and directors of corporations are not on the same footing as the corporation or the employees. In R. v. Fell (1981), 61 C.C.C. (2d) 456, the Court of Appeal ruled that conviction of a corporation for an offence under the Combines Investigations Act was not a bar to conviction as well of one of its officers who was the directing mind of the corporation. However, notwithstanding the fact that the offence was one of strict liability, and therefore, the corporation could be convicted on the basis of negligence, the principal could be convicted only if he (1) actually committed the offence or (2) was a party to the offence, which required him to have mens rea.

C.3 It can be argued, on the other hand that this dictum does not suggest proof of mens rea is necessary. It is at best, however, unclear.

C.4 It can also be argued that the case is distinguishable, and would not apply to provincial public welfare offenses, because the Combines Investigations Act is essentially criminal law, rather than civil law. However, it is noteworthy that the party provisions of Part 24 of the Criminal Code, which apply to such an offence are identical to the party provisions of section 74 of Ontario's Provincial Offences Act.

C.5 As a result, it was, after the Fell case, at the very best, questionable whether officers and directors had any duty to avoid negligent omissions by employees and agents of the corporation that was enforceable in law.

D. OTHER CANADIAN AND ONTARIO LEGISLATION WITH RESPECT TO THE PERSONAL LIABILITY OF DIRECTORS AND OFFICERS

D.1 Many Federal Statues impose liability on a director or officer who "directed, authorized assented to or acquiesced or participated in" the proscribed activity or omission.

D.2 A number of Ontario Statutes impose liability on a director or officer who "authorized, permitted or acquiesced" in the proscribed activity or omission.

D.3 Other Ontario Statutes impose liability where the director or officer "knowingly concurs" in the corporate offence.

D.4 Still other Ontario Statues impose either a strict liability type of offence with a "twist" that the onus on the director or officer to establish due diligence arises on proof of the commission of the actus reus by the corporation or an absolute liability on the director or officer upon proof of the commission of the offence by Corporation.

E. THE NATURE OF THE SECTION 147A DUTY

E.1 The Environmental Enforcement Statute Law Amendment Act, 1986, addresses the question raised by the Fell case by setting out clearly that officers and directors do have such a duty, and that it is an offence to fail to take all reasonable steps to carry out that duty.

E.2 In doing so, it seems to fall some where between D.1 to D.3 above on the one hand, and D.4 (both types) on the other.

E.3 The section does not specifically set out the precise duty on each officer and director.

E.4 Two approaches were possible in drafting this provision.

(a) One approach was to spell out in detail the precise nature of the obligations of officers and directors of corporations:

- The danger was that this would be too inflexible and ultimately too narrow.
- It would be impossible for the Legislature to foresee and list every kind of conduct that might be culpable, given the diversity of corporate structures and cultures.

- The advantage of this approach is that the duties are relatively clear and require less interpretation by the Courts.

(b) The second approach was to spell out the duty in general terms, as Ontario has done.

- The advantage is that the Courts can apply well-established principles of determining fault to the conduct in each case and build up a body of common law on an incremental basis which reflects this wide diversity of corporate structures and behaviours.

- The basic principle is that of common law of negligence.

- A person has a duty of care commensurate with the expertise and understanding that a person in his position would be expected to have to avoid foreseeable injuries to others.

- The Courts have a great deal of experience in applying this test in a diversity of situations, including the liability of officers and directors to the shareholders of their corporations.

E.5 I do not intend today to suggest to you a comprehensive list of behaviours by officers and directors that might be considered negligent. You are in a much better position to judge the appropriate standard of care in your particular corporation or for your clients than I am. However, I would like to outline some of the obligations I think the Legislature felt might be appropriate. But, first, a very important qualifying phrase in section 147a ...

F. "THAT ENGAGES IN AN ACTIVITY THAT MAY RESULT IN THE DEPOSIT ... OF A CONTAMINANT ..."

F.1. This qualifying phrase has been included to make it clear that a duty does not apply to directors and officers of every corporation, but only to those corporations whose activities entail substantial risk to the natural environment. Service-oriented corporations, for example, will seldom engage in activities having a substantial and direct negative impact on the environment through pollution. For example, companies that distribute advertising material door-to-door may leave unwanted material on doorstep, and some of it might even blow around and become litter. Although these companies might potentially be liable to prosecution for littering under Part VIII of the Environmental Protection Act, under exceptional circumstances, I would suggest that it is unlikely that the nature of the company's business is such that the corporation would be considered to fall within Section 147a.

F.2. Compare, for example, an outside director appointed because of his financial expertise, to the board of (a) a chemical company or (b) an insurance company. Director (a) is covered by section 147a. Director (b) may not be.

G. THE RESPONSIBILITY OF DIRECTORS

G.1. The board of directors is responsible for overseeing the affairs of the corporation. In practice, however, many responsibilities are delegated to the officers. Historically, directors have on occasion played only a passive role in respect to ensuring compliance by the corporation with the law.

G2. The Legislature has declared that directors should be required to take a more active role with respect to compliance with environmental protection law.

G.3. At a minimum, a board of directors should be required to address the issue of establishing the pollution prevention "system" suggested by the Sault Ste. Marie decision.

G.4. Each director should have responsibility, at a minimum, to ensure that the board of directors instructs the officers to set up a system of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the board on the operation of this system, and to ensure that the officers are instructed to report any substantial non-compliance to the board in a timely manner.

G.5. The directors collectively are responsible for carrying out diligent and thorough reviews of environmental compliance reports provided by the officers of the corporation. At the same time, directors should be justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel and other third parties.

G.6. The Board should also substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies responsible for environmental protection.

G.7. Each director will be charged with knowledge of the matters which come before a board meeting whether or not he attended that meeting and, if he did attend, whether or not he paid attention.

G.8. No director will, in the ordinary course, be believed, to have been diligent if there is no contemporary written record. The board minutes should show activity and decision. However, excessive recording, in board minutes, particularly of the rejection (even if for sound financial reasons) of a more expensive solution can subsequently be incriminating and may therefore be better handled by advice from legal counsel which, if properly sought, can be protected by solicitor client privilege.

G.9. Beyond these general guidelines, it is difficult to be specific. however, some very practical considerations may be useful:

(a) Profile: macro - beach closings
- drinking water
- acid rain
- great lakes water quality
- effect on Ontario's reputation in the U.S.

local - affected citizens
- jobs

(b) "Senority"
(c) Compensation
(d) Environmental track record of company

H. THE RESPONSIBILITY OF OFFICERS

H.1 Officers have responsibilities commensurate with their functions within the corporation to:

1. Implement the environmental policy established by the board;
2. Set up the system for environmental protection;
3. Ensure that the system is being implemented and maintained;
4. Carry out environmental audits for this purpose;
5. Review compliance with environmental laws at reasonable intervals in light of all the circumstances;
6. Ensure that environmental concerns brought to their attention are promptly addressed, or if this is beyond their control, are brought to the attention of the Board or other appropriate officers.

H.2 As in the case of directors, officers are entitled to rely reasonably on factual reports, opinions, and advice from consultants, counsel and other qualified third parties.

I. MUNICIPALITIES

I.1 Municipalities, of course, are corporations, and have officers. The officers of a municipal corporation are the officials so designated by statute; in the case of most municipalities, Part VI of the Municipal Act, and in the case of Regional Municipalities, the specific statute governing that municipality. Under Part VI of the Municipal Act, for example, the warden of a county, the mayor of a city or town, the reeve of a village or township is the Chief Executive Officer of the corporation. In the case of Metropolitan Toronto, the Chief Executive Officer is the Metro Chairman. Other officers include the Treasurer, Deputy Treasurer, and Tax Collectors. Department heads and assistant department heads, such as the municipal Engineer, or in the case of Metropolitan Toronto, the various Commissioners and deputy Commissioners, may also be officers.

I.2 Again, the responsibilities of such officers will vary with their duties, and it is not possible to give a definitive list. However, I would suggest, for example, that department heads would have the following responsibilities:

- Where the department head becomes aware of a problem and has the jurisdiction and the budget to solve it, he or she should do everything within his or her power to rectify the problem.

- Where the department head has the jurisdiction, but not the budget, he or she should report the situation to the Council or the Committee of Council to which he or she reports, and request the budget to solve it.

I.3 Although the position of an elected Municipal Councillor is in some respects analogous to that of a corporate director, I know of no jurisprudence suggesting that councilors are "directors" within the meaning of Section 147a.

It is doubtful therefore whether individual councilors would have the duties ascribed to "directors" in Section 147a.

I.4 However, the head of Council, as the Chief Executive Officer of a corporation, is in a different position. Presumably, once department heads or other councilors have brought violations or potential violations of environmental laws to his or her attention, the head of Council would have a duty to use his or her best efforts to ensure that the Council and the officers take all reasonable care to prevent the offence from happening.

J. CONCLUSIONS

Delegation is a fact of life. The Environmental Enforcement Amendment Act is not intended to prevent a reasonable degree of delegation. However, the Legislature in my view, has clearly declared that environmental protection is too important to delegate entirely to the lower levels of a corporation. Although the Legislature does not expect the board of directors or the officers of the corporations to make all environmental decisions, it is not acceptable for them to insulate themselves from all responsibility for environmental violations by delegating all aspects of compliance to subordinates.

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INDIVIDUAL LIABILITY
OF
DIRECTORS, OFFICERS AND EMPLOYEES
UNDER THE
CANADIAN ENVIRONMENTAL PROTECTION ACT

NOTES OF

G.M. CORNWALL

DIRECTOR

MANAGEMENT AND EMERGENCIES BRANCH

ENVIRONMENTAL PROTECTION

ENVIRONMENT CANADA

FOR PRESENTATION ON

JANUARY 21, 1988

AT A CONFERENCE ORGANIZED BY

CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION

INDIVIDUAL LIABILITY

OF

DIRECTORS, OFFICERS AND EMPLOYEES

UNDER THE

CANADIAN ENVIRONMENTAL PROTECTION ACT

STATUS OF CANADIAN ENVIRONMENTAL PROTECTION ACT (CEPA)

AT THE OUTSET, IT IS IMPORTANT FOR EACH OF US TO REMEMBER THAT CEPA HAS NOT YET BEEN PASSED BY PARLIAMENT. MY COMMENTS TODAY, THEREFORE, REFLECT THE CONTENTS OF BILL C-74 AS IT WAS TABLED IN JUNE 1987.

CEPA (BILL C-74) RECEIVED SECOND READING ON OCTOBER 23, 1987 AND THE BILL IS NOW BEFORE THE PARLIAMENTARY COMMITTEE. THE COMMITTEE HEARD ABOUT 20 WITNESSES IN NOVEMBER AND DECEMBER AND MORE WITNESSES ARE BEING HEARD THIS WEEK. THE COMMITTEE EXPECTS TO START CLAUSE BY CLAUSE REVIEW OF THE BILL AT THE BEGINNING OF FEBRUARY AND HOPES TO REPORT TO THE HOUSE OF COMMONS ON THE BILL BY MARCH OR APRIL AT THE LATEST.

IN CLAUSE BY CLAUSE REVIEW, THE COMMITTEE WILL GO THROUGH EACH SECTION OF THE BILL AND MAKE ANY CHANGES THAT THEY CONSIDER APPROPRIATE. THE COMMITTEE HAS HAD THE BENEFIT OF MANY WELL PREPARED PRESENTATIONS FROM INDUSTRY, FROM ENVIRONMENTAL GROUPS AND FROM OTHERS. IT ALSO CONTINUES TO RECEIVE ADVICE FROM ENVIRONMENT CANADA, HEALTH AND WELFARE CANADA, AND RESEARCH STAFF OF THE LIBRARY OF PARLIAMENT. THE BILL IS NOT YET FINALIZED; A NUMBER OF

CHANGES CAN BE EXPECTED. THE GOVERNMENT HAS ALREADY INDICATED THAT IT WILL PROPOSE CHANGES. FOR EXAMPLE PROVISIONS, WHEREBY PROVINCES CAN IMPLEMENT EQUIVALENT REGULATIONS AS AN ALTERNATIVE TO FEDERAL (OR PROVINCIAL) IMPLEMENTATION OF CEPA REGULATIONS, WILL BE ADDED.

CEPA OVERVIEW

- PART I DESCRIBES THE FEDERAL ROLE IN ENVIRONMENTAL QUALITY OBJECTIVES, GUIDELINES AND CODES OF PRACTICE. PART I IS NON-REGULATORY IN NATURE, ALTHOUGH IT DOES OUTLINE OBLIGATIONS FOR THE GOVERNMENT, IN PARTICULAR THE MINISTERS OF THE ENVIRONMENT AND OF NATIONAL HEALTH AND WELFARE.

- PART II DEALS WITH TOXIC SUBSTANCES. IT PROVIDES A COMPREHENSIVE SYSTEM FOR MANAGING CHEMICAL SUBSTANCES FROM THE RESEARCH AND DEVELOPMENT, THROUGH THEIR MANUFACTURE AND USE, TO DISPOSAL.

- PART III CEPA CARRIES OVER THE PHOSPHORUS DETERGENT CONTROLS FROM PART III OF THE CANADA WATER ACT.

- PART IV DEALS WITH FEDERAL ACTIVITIES AND UNDERTAKINGS UNDER FEDERAL JURISDICTION.

- PART V CONTAINS THE INTERNATIONAL AIR POLLUTION PROVISIONS FROM THE CLEAN AIR ACT.

° PART VI BRINGS THE OCEAN DUMPING CONTROL ACT INTO CEPA.

° PART VII IS THE GENERAL PART OF THE ACT CONTAINING A WIDE RANGE OF PROVISIONS INCLUDING:

- AUTHORITY FOR FEDERAL-PROVINCIAL AGREEMENTS;
- AUTHORITY FOR INSPECTORS TO DO INSPECTIONS AND INVESTIGATIONS; AND
- PENALTIES AND ENFORCEMENT MECHANISMS INCLUDING SECTION 114 ON INDIVIDUAL LIABILITY.

SECTION 114: LIABILITY OF DIRECTORS, OFFICERS

> 114. WHERE A CORPORATION COMMITS AN OFFENCE UNDER THIS ACT, ANY OFFICER, DIRECTOR OR AGENT OF THE CORPORATION WHO DIRECTED, AUTHORIZED, ASSENTED TO, ACQUIESCED IN OR PARTICIPATED IN THE COMMISSION OF THE OFFENCE IS A PARTY TO AND GUILTY OF THE OFFENCE AND IS LIABLE TO THE PUNISHMENT PROVIDED FOR THE OFFENCE WHETHER OR NOT THE CORPORATION HAS BEEN PROSECUTED OR CONVICTED.

THIS PROVISION IS NOT NEW TO EITHER FEDERAL OR PROVINCIAL STATUES. IT APPEARS IN THE CURRENT ENVIRONMENTAL CONTAMINANTS AND THE OCEAN DUMPING CONTROL ACTS (ODCA) AS WELL AS IN 29 OTHER FEDERAL STATUTES. THE FISHERIES ACT DOES NOT HAVE A PROVISION EQUIVALENT

TO SECTION 114 OF CEPA, BUT THIS HAS NOT PREVENTED PROSECUTION OF OFFICERS WHERE THEY PARTICIPATED IN THE OFFENCE. CEPA'S SECTION 114 IS SIMILAR TO SECTION 147A OF THE ONTARIO ENVIRONMENTAL PROTECTION ACT. THERE ARE SOME SIGNIFICANT LEGAL DIFFERENCES BETWEEN CEPA SECTION 114 AND ONTARIO EPA SECTION 147(A), BUT I WILL LEAVE IT TO THE LAWYERS TO COMMENT ON THESE DIFFERENCES. AS YOU CAN SEE THE CONCEPT OF DIRECTORS AND OFFICERS BEING RESPONSIBLE FOR THE ACTIONS OF THEIR CORPORATIONS IS NOT NEW. WHAT IS NEW, IS THE FEDERAL GOVERNMENT'S COMMITMENT TO FIRMER ENFORCEMENT OF ENVIRONMENTAL LAWS.

FOCUS

THE FOCUS OF THIS SEMINAR IS ON THE LIABILITY OF OFFICERS, DIRECTORS AND EMPLOYEES FOR ENVIRONMENTAL OFFENCES OF THEIR COMPANY. PAST PRACTICE UNDER FEDERAL LEGISLATION HAS BEEN TO PROSECUTE ONLY COMPANIES FOR ENVIRONMENTAL OFFENCES.

BUT THE LAW REFORM COMMISSION OF CANADA OBSERVED IN WORKING PAPER 16 (1976) ON "CRIMINAL RESPONSIBLE FOR GROUP ACTION" THAT:

> "BY 1941, IT HAD BECOME CLEAR THAT A CORPORATION COULD ALSO BE HELD CRIMINALLY RESPONSIBLE AS A "PERSON" FOR CRIMES INVOLVING ACTIVE WRONGDOING. THIS DEVELOPMENT IS NOT SURPRISING, HOWEVER, SINCE PARLIAMENT HAD IDENTIFIED A CORPORATION AS A "PERSON" FOR THE PURPOSES OF THE CRIMINAL CODE AS EARLY AS 1906, WITHOUT GIVING ANY INDICATION THAT LIABILITY WAS TO BE RESTRICTED TO A PARTICULAR CLASS OF CRIMINAL OFFENCE."

THE PUBLIC IS BECOMING INCREASINGLY AWARE THAT A CORPORATION IS NOT A FACELESS, FORMLESS THING BUT IS MADE UP OF AND RUN BY INDIVIDUALS INCLUDING CORPORATE OFFICERS. GOVERNMENTS TOO ARE LOOKING AT THE INDIVIDUAL LIABILITY OF OFFICERS, DIRECTORS AND EMPLOYEES WITHIN A COMPANY.

THE CANADIAN ENVIRONMENTAL ADVISORY COUNCIL IN ITS 1985 REPORT ON ENFORCEMENT PRACTICES OF ENVIRONMENT CANADA WAS SHARPLY CRITICAL OF THE ENFORCEMENT WORK OF THE DEPARTMENT. THE COUNCIL HAS BEEN CONCERNED FOR SEVERAL YEARS WITH WHAT IT HAS PERCEIVED AS AN INADEQUATE LEVEL OF ENFORCEMENT OF STATUTES AND REGULATIONS WHICH ARE DESIGNED TO PROTECT THE QUALITY OF THE ENVIRONMENT. THE CEAC REPORT DESCRIBES THE ENFORCEMENT PRACTICE AS INCONSISTENT AND SPOTTY.

THE FOLLOWING FIVE ISSUES HAVE AN IMPORTANT CONNECTION WITH SECTION 114.

I) PENAL PROVISIONS OF CEPA

THE MINISTER HAS REPEATEDLY SAID THAT ENVIRONMENT CANADA WILL GET TOUGHER WITH POLLUTERS. CEPA WILL PROVIDE THE LEGAL BASIS TO CARRY THIS OUT. SECTIONS 103 TO 107 PROVIDE FOUR CATEGORIES OF OFFENCES (SEE TABLE 1). SECTIONS 103 AND 104 - THE FIRST CATEGORIES - ARE SUMMARY CONVICTION OFFENCES WITH MAXIMUM FINES OF $200,000 AND/OR

SIX MONTHS IN JAIL. SECTIONS 105 AND 106 ARE MORE SERIOUS OFFENCES WITH MAXIMUM FINES OF $300,000 AND SIX MONTHS ON SUMMARY CONVICTION, OR $1,000,000 AND THREE AND FIVE YEARS IN JAIL ON INDICTMENT. SECTIONS 105 AND 106 ARE THE SO-CALLED HYBRID OFFENCES WHERE THE PROSECUTOR MAY ELECT TO PROCEED BY EITHER SUMMARY OR INDICTABLE PROCEDURE. SECTION 107 RELATES TO THE MOST SERIOUS VIOLATIONS AND PROVIDES FOR UP TO 5 YEARS IN JAIL ON INDICTMENT. THE DUE DILIGENCE DEFENCE IS AVAILABLE FOR SECTIONS 103 TO 105. FOR SECTIONS 106 AND 107 THE PROSECUTOR MUST PROVE THAT THE ACCUSED KNOWINGLY (106) OR INTENTIONALLY OR RECKLESSLY (107) COMMITTED THE OFFENCE.

IN COMPARISON, SECTION 33 OF THE FISHERIES ACT PROVIDES FOR A MAXIMUM FINE OF $50,000 FOR A FIRST OFFENCE AND $100,000 ON SUBSEQUENT CONVICTIONS. THERE IS NO PROVISION FOR JAIL SENTENCES UNDER SECTION 33 OF THE FISHERIES ACT.

WHILE THERE HAVE BEEN MANY PROSECUTIONS UNDER SECTION 33 OF THE FISHERIES ACT, AND A HANDFUL UNDER THE OCEAN DUMPING CONTROL ACT, THE HIGHEST FINES LEVIED TO DATE UNDER FEDERAL ENVIRONMENTAL PROTECTION LEGISLATION WERE UNDER THE OCEAN DUMPING CONTROL ACT (ODCA). THESE VIOLATIONS OCCURRED IN THE NORTHWEST TERRITORIES.

IN 1982 PANARCTIC OILS LTD. WAS FINED UNDER THE ODCA $85,000 AND $65,000 ($150,000 TOTAL) ON TWO COUNTS. IN 1987, GULF CANADA CORPORATION WAS FINED A TOTAL OF $180,000 ON EIGHT COUNTS OF VIOLATING THE ODCA.

CORPORATIONS CANNOT BE SENT TO JAIL. THE TRADITIONAL REGULATORY APPROACH OF SIMPLY FINING CORPORATIONS HAS IN THE PAST SHELTERED SOME CORPORATE OFFICERS AND DIRECTORS WHOSE INTENTIONAL ACTS WOULD WARRANT JAIL SENTENCES. WHILE JAIL SENTENCES ARE AVAILABLE FOR SERIOUS STRICT LIABILITY OFFENCES, IT IS MUCH MORE LIKELY THAT JAIL SENTENCES WILL BE CONSIDERED WHERE THE PERSON DELIBERATELY COMMITS THE OFFENCE. THE CONCEPT OF HAVING JAIL SENTENCES IS AN IMPORTANT COMPONENT OF CEPA, BUT SECTIONS 119 TO 129 CONTAIN A WIDE RANGE OF OTHER LEGAL REMEDIES THAT WILL ALSO BE AVAILABLE THROUGH THE COURTS. SECTION 122 CONTAINS A NUMBER OF INNOVATIVE MEASURES THAT CAN BE USED BY THE COURT IN SENTENCING. THESE SECTIONS ARE APPLICABLE TO BOTH INDIVIDUALS AND CORPORATIONS AND SUMMARIZED IN TABLE 2.

II) **CEPA ENFORCEMENT AND COMPLIANCE POLICY**

ENVIRONMENT CANADA IS COMMITTED TO IMPROVING ENFORCEMENT AND COMPLIANCE OF ENVIRONMENTAL LAWS. OUR ENFORCEMENT AND COMPLIANCE POLICY TELLS BOTH THE PUBLIC AND GOVERNMENT EMPLOYEES HOW WE WILL DO BUSINESS UNDER THE NEW LAW. INDUSTRY HAS OFTEN COMMENTED THAT THE ENFORCEMENT MEASURES OF CEPA ARE RATHER HARSH.

IT IS IN THE INTEREST OF GOVERNMENT, INDUSTRY AND, IN FACT, ALL CANADIANS THAT OUR ENVIRONMENT BE PROTECTED AND OUR ENVIRONMENTAL STATUTES BE EFFECTIVELY ENFORCED. ENVIRONMENT CANADA STILL PLACES EMPHASIS ON PREVENTION OF DAMAGE, AND THE POLICY STATES THAT ENFORCEMENT OFFICIALS WILL APPLY CEPA FROM THAT PERSPECTIVE. ENVIRONMENT CANADA WILL BE ASKING INDUSTRY AND OTHER LEVELS OF GOVERNMENT TO COLLABORATE IN THE DEVELOPMENT OF THE ENVIRONMENTAL QUALITY GUIDELINES, DIRECTIVES AND CODES OF PRACTICE REQUIRED UNDER CEPA. WE WILL BE ACTIVELY CONSULTING ALL INTERESTED PARTIES ON REGULATION DEVELOPMENT AND REVIEW, EVEN PRIOR TO CANADA GAZETTE PUBLICATION, AS WE HAVE IN THE PAST. WE INTEND TO PURSUE OPPORTUNITIES FOR TECHNOLOGY DEVELOPMENT AND TECHNOLOGY TRANSFER. WE WANT PEOPLE TO COMPLY, BUT WE MUST HAVE THE LEGAL TOOLS TO DEAL FIRMLY WITH THOSE WHO DO NOT OBEY THE LAW. THE ENFORCEMENT POLICY OUTLINES PROCEDURES AND CRITERIA WHICH WILL HELP ENSURE THAT FIRM ENFORCEMENT IS DONE FAIRLY AND PREDICTABLY.

IN OUR DRAFT POLICY PUBLISHED LAST JUNE, WE DID NOT SPECIFICALLY ADDRESS THE ISSUE OF WHEN WE WOULD PROSECUTE OFFICERS OF CORPORATIONS AS DISTINCT FROM THE CORPORATION ITSELF. UNDER THE HEADING OF "PROSECUTIONS" (PAGE 17-18 OF THE DRAFT POLICY), WE SET OUT THE CRITERIA WHERE ENFORCEMENT OFFICIALS WILL LAY CHARGES.

FOLLOWING CONSULTATION ON THE DRAFT POLICY, WE NOW PROPOSE THE FOLLOWING CRITERIA WHICH APPLY TO BOTH CORPORATIONS AND INDIVIDUALS:

ENFORCEMENT OFFICIALS WILL LAY CHARGES EXCEPT WHERE:

A) THEY DETERMINE, IN ACCORDANCE WITH THE CRITERIA OF THIS POLICY, A WARNING IS THE MOST APPROPRIATE ENFORCEMENT ACTION; OR

B) THEY DETERMINE THAT ISSUING A TICKET UNDER THE TICKETING REGULATIONS SATISFIES THE OBJECTIVES OF THE ACT AND THE POLICY; OR

C) THEY DETERMINE THAT, UNDER THE POLICY, AN ORDER BY THE MINISTER PROHIBITING ACTIVITIES INVOLVING A SUBSTANCE NEW TO CANADIAN COMMERCE, AN ORDER BY THE MINISTER FOR REMEDIAL MEASURES OR A COMPLIANCE GUARANTEE IS THE MOST APPROPRIATE RESPONSE.

ALTERNATIVES TO PROSECUTION IN A CRIMINAL COURT WILL NOT BE USED IN ANY OF THE FOLLOWING CIRCUMSTANCES:

- THERE IS DEATH OF OR BODILY HARM TO A PERSON;
- THERE IS SERIOUS HARM OR RISK TO THE ENVIRONMENT, HUMAN LIFE OR HEALTH;
- THE ALLEGED VIOLATOR KNOWINGLY PROVIDED FALSE OR MISLEADING INFORMATION, OR MADE A FALSE OR MISLEADING TEST OF A SUBSTANCE IN PURPORTED COMPLIANCE WITH THE ACT;
- THE HISTORY OF COMPLIANCE OF THE ALLEGED VIOLATOR INDICATES THAT HE OR SHE OR THE COMPANY MIGHT REPEAT THE OFFENCE;
- THE ALLEGED VIOLATOR OBSTRUCTED THE INSPECTOR IN CARRYING OUT THE INSPECTOR'S DUTIES AND RESPONSIBILITIES UNDER THE ACT;
- THE ALLEGED VIOLATOR CONCEALED OR ATTEMPTED TO CONCEAL INFORMATION AFTER THE OFFENCE OCCURRED; OR

- THE ALLEGED VIOLATOR DID NOT TAKE ALL REASONABLE MEASURES TO COMPLY WITH A MINISTERIAL ORDER, OR WITH A DIRECTION BY AN INSPECTOR.

THE SAME CRITERIA APPLY TO BOTH CORPORATIONS AND INDIVIDUALS. THE PRACTICAL PROBLEM BECOMES ONE OF EVIDENCE. AN INVESTIGATION MAY CLEARLY ESTABLISH EVIDENCE THAT A COMPANY COMMITTED AN OFFENCE. IN SOME CASES THE INITIAL INVESTIGATIONS MAY IDENTIFY THE OFFICERS OR EMPLOYEES WHO WERE RESPONSIBLE. HOWEVER, OBTAINING EVIDENCE TO SHOW WHICH OFFICERS OR EMPLOYEES PARTICIPATED IN COMMITTING THE OFFENCE MAY REQUIRE A MORE INTENSIVE INVESTIGATION.

III) **ENVIRONMENTAL AUDITS**

THE IMPORTANCE OF ENVIRONMENTAL AUDITS HAS BECOME WIDELY RECOGNIZED AND IS AN IMPORTANT ELEMENT OF OUR CEPA ENFORCEMENT AND COMPLIANCE POLICY.

ENVIRONMENTAL AUDITS ARE AN EVALUATION OF A COMPANY'S OR FACILITY'S OPERATIONAL AND MANAGEMENT PRACTICES IN RELATION TO THEIR IMPACT ON THE ENVIRONMENT. ENVIRONMENTAL AUDITS ARE AN INTERNAL MANAGEMENT TOOL, CARRIED OUT BY A COMPANY OR FACILITY ON A VOLUNTARY BASIS; THEY ARE NOT TO BE CONFUSED WITH AN INSPECTION OR COMPLIANCE AUDIT UNDERTAKEN BY GOVERNMENT IN ITS ROLE AS A REGULATOR. ENVIRONMENTAL AUDITS ARE OFTEN CONDUCTED BY INDEPENDENT EXPERTS, WHO MAY BE CONSULTANTS HIRED ON CONTRACT OR BY EMPLOYEES FROM OUTSIDE THE WORK UNIT BEING AUDITED. IT IS MOST IMPORTANT THAT THE AUDITOR, AS IN FINANCIAL AUDITS, BE INDEPENDENT. THE FINDINGS ARE USUALLY DOCUMENTED IN AN ENVIRONMENTAL AUDIT REPORT.

I BELIEVE THAT THE USE OF ENVIRONMENTAL AUDITS WILL SIGNIFICANTLY REDUCE THE RISK TO BOTH CORPORATIONS AND THEIR OFFICERS OF BEING CHARGED WITH AN ENVIRONMENTAL OFFENCE. CORPORATIONS THAT MAKE PROPER USE OF ENVIRONMENTAL AUDITS WILL BE LESS LIKELY TO COMMIT OFFENCES, AND PARTICULARLY SERIOUS ONES.

CORPORATE OFFICERS WHO CAN POINT TO A HISTORY OF TAKING PROMPT REMEDIAL ACTION TO FIX DEFICIENCES IDENTIFIED IN ENVIRONMENTAL AUDITS NOT ONLY PROTECT THEMSELVES AGAINST POLLUTION CHARGES BUT MAY ALSO CREATE EFFECTIVE "DUE DILIGENCE" DEFENCES.

IV) PAST FEDERAL ENVIRONMENTAL PROSECUTIONS OF OFFICERS

THE FEDERAL GOVERNMENT HAS SCANT EXPERIENCE IN PROSECUTING OFFICERS OF CORPORATIONS FOR ENVIRONMENTAL PROTECTION OFFENCES. ALTHOUGH THE FISHERIES ACT DOES NOT CONTAIN A PROVISION SIMILAR TO CEPA SECTION 114, OFFICERS OF COMPANIES HAVE BEEN CONVICTED ON FOUR OCCASIONS WHERE THEY PARTICIPATED IN THE COMMISSION OF THE OFFENCE. THESE CASES HAVE GENERALLY INVOLVED SMALL COMPANIES WHERE THE ACTS OF THE OFFICERS AND THE COMPANY ITSELF ARE INTERTWINED. IN SUCH CASES AN INVESTIGATION WILL IDENTIFY BOTH THE INDIVIDUAL AND THE COMPANY. ONE MIGHT EVEN SAY THE INDIVIDUAL IS INDISTINGUISHABLE FROM THE COMPANY. HOWEVER, IN THE CASE OF MEDIUM AND LARGER COMPANIES, ATTRIBUTING WRONGDOING TO A PARTICULAR EMPLOYEE, A SPECIFIC MANAGER OR AN INDIVIDUAL OFFICER AND GATHERING THE NECESSARY EVIDENCE TO PROVE SUCH AN ALLEGATION MAY BE A MORE DIFFICULT TASK. IN MANY POLLUTION CASES, THE INCIDENT IS THE RESULT OF A FAILURE OF MANAGEMENT SYSTEMS <u>TO PROPERLY CONSIDER ENVIRONMENTAL PROTECTION</u>. IN SUCH CASES, THE CORPORATION ITSELF IS FREQUENTLY THE MOST APPROPRIATE PERSON TO CHARGE.

V) CRITERIA FOR PROSECUTING INDIVIDUALS

WHILE OUR DRAFT POLICY CONTAINS NO SPECIFIC CRITERIA FOR SITUATIONS WHERE WE WOULD PROSECUTE THE INDIVIDUAL OFFICER OR EMPLOYEE, IT IS USEFUL AT THIS POINT TO EXAMINE THE PRACTICAL ISSUES THAT COULD BE INVOLVED:

A) IF AN OFFICER DELIBERATELY COMMITS OR ACTUALLY CAUSES AN OFFENCE AND IF THIS IS APPARENT FROM THE INVESTIGATION, WE WOULD LIKELY RECOMMEND PROSECUTION OF THE INDIVIDUAL.

B) IF A COMPANY COMMITS A VERY SERIOUS OFFENCE, WE MIGHT DECIDE TO INITIATE A MORE EXTENSIVE INVESTIGATION TO DETERMINE EXACTLY WHO WITHIN THE COMPANY WAS RESPONSIBLE FOR SPECIFIC ACTIONS AND TO DETERMINE IF AN INDIVIDUAL SHOULD BE CHARGED.

C) THE GOVERNMENT OFTEN LEARNS OF OFFENCES THROUGH EMPLOYEES WHO WERE DIRECTED BY THEIR MANAGER TO DO WHAT THEY CONSIDERED TO BE AN ENVIRONMENTAL OFFENCE. IN SUCH CASES WE WOULD NOT PROSECUTE THE EMPLOYEE. WE WOULD CERTAINLY CONSIDER PROSECUTING THE MANAGER.

D) IF AN EMPLOYEE MALICIOUSLY COMMITS AN OFFENCE (IN CIRCUMSTANCES WHERE THE EMPLOYEE EXPECTS THE COMPANY WOULD BE BLAMED FOR THE OFFENCE), WE WOULD PROSECUTE THE EMPLOYEE IF THE EVIDENCE WOULD SUPPORT THE CASE.

E) IF AN EMPLOYEE COMMITS AN OFFENCE BY DELIBERATELY ACTING CONTRARY TO THE INSTRUCTIONS OF HIS SUPERVISOR OR MANAGEMENT (WHERE THE INSTRUCTIONS ARE DESIGNED TO PREVENT ENVIRONMENTAL PROBLEMS), WE WOULD LIKELY RECOMMEND PROSECUTION OF THE EMPLOYEE.

SUMMARY

OUR OBJECTIVE IS TO PROTECT THE ENVIRONMENT. WE ARE INCREASING OUR OVERALL ENFORCEMENT AND COMPLIANCE ACTIONS. WE HAVE A MULTITUDE OF WAYS TO ACHIEVE OUR OBJECTIVES. THE PROSECUTION OF OFFICERS OR OTHER INDIVIDUALS WITHIN A COMPANY IS SIMPLY ONE OF THE WAYS TO PROTECT THE ENVIRONMENT. WE HAVE NO PARTICULAR DESIRE TO MAKE A SCAPEGOAT OF AN INDIVIDUAL OFFICER OR EMPLOYEE. HOWEVER, OFFICERS AND EMPLOYEES WHO PLAY A PRIMARY ROLE IN COMMITTING OR CAUSING AN OFFENCE MAY DESERVE PROSECUTION. THERE MAY EVEN BE A DETERRENT EFFECT ASSOCIATED WITH SUCH A PROSECUTION. DECISIONS TO PROSECUTE OFFICERS AND EMPLOYEES WILL BE DEPENDENT ON THE CIRCUMSTANCES OF INDIVIDUAL CASES. GENERAL CRITERIA, BEYOND WHAT WE HAVE ALREADY STATED IN THE POLICY, ARE DIFFICULT TO DEVELOP. THE FACTS OF EACH CASE WILL LIKELY DOMINATE SUCH DECISIONS.

TABLE 1
PENALTY PROVISIONS OF THE
CANADIAN ENVIRONMENTAL PROTECTION ACT
SECTION 103 TO 107

SECTION AND TYPE OF OFFENSE	MAXIMUM SUMMARY PENALTY	MAXIMUM INDICTABLE PENALTY
103 - OBSTRUCTING INSPECTOR	$200,000 AND/OR 6 MONTHS	N/A
104 - FAILING TO INFORM OR NOTIFY MINISTER; FAILING TO TEST; VIOLATING PHOSPHOROUS REGULATIONS	$200,000 AND/OR 6 MONTHS	N/A
105 - MOST SUBSTANTIVE PROVISIONS OF ACT AND REGULATIONS	$300,000 AND/OR 6 MONTHS	$1,000,000 AND/OR 3 YEARS
106 - KNOWINGLY PROVIDING FALSE OR MISLEADING INFORMATION IN CONNECTION WITH TOXIC SUBSTANCES	$300,000 AND/OR 6 MONTHS	$1,000,000 AND/OR 5 YEARS
107 - INTENTIONAL OR RECKLESSLY CAUSING A DISASTER, RECKLESS DISREGARD FOR LIVES OR SAFETY	N/A	UNLIMITED FINE AND/OR 5 YEARS

TABLE 2

LEGAL REMEDIES

AVAILABLE UNDER SECTIONS 119 TO 129

OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT

SECTION	DESCRIPTION OF SENTENCING TOOL
119	ABSOLUTE OR CONDITIONAL DISCHARGE
120	SUSPENDED SENTENCE
121	ADDITIONAL FINE BASED ON MONETARY BENEFITS
122	COURT ORDERS A) PROHIBITING AN ACTIVITY B) DIRECTING REMEDIAL ACTION C) DIRECTING OFFENDER TO PUBLISH FACTS RELATED TO CONVICTION D) DIRECTING OFFENDER TO NOTIFY PERSON AGGRIEVED BY CONDUCT E) POSTING BOND F) REQUIRING OFFENDER TO PROVIDE MINISTER WITH INFORMATION G) DIRECTING COMPENSATION OF COSTS TO MINISTER H) COMMUNITY SERVICE I) PAY FOR RESEARCH J) OTHER REASONABLE CONDITIONS
123	COMPENSATION TO AGGRIEVED PERSON
124	VARIATION OF ORDERS UNDER SECTIONS 119, 120, 122
125	FAILING TO COMPLY WITH COURT ORDER
126	TICKETING
127	INJUNCTION ON APPLICATION OF MINISTER
128, 129	CIVIL CAUSES OF ACTION

DETERRING CORPORATE POLLUTERS

Harry Poch

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DETERRING CORPORATE POLLUTERS

Harry Poch

1. INTRODUCTION

There is an almost universal abhorrence of corporate activities which create serious degradation of the natural environment. Yet the central issue of how to abate and prevent pollution has no easy solution. One response that has been imposed infrequently, but which is gathering increasing support, is deterring future culpable conduct through imprisonment of corporate officials who could or should have prevented deleterious emissions or discharges. This sanction has been put forward on the basis that sanctions and remedies taken against corporate entities have not deterred continuing emissions, and that executives will take positive steps to prevent pollution only when their liberty may be at risk.

Convicted polluters lives and liberties have been at risk for over eight hundred years,(1) while more recently, common law, criminal and other statutory sanctions have permitted imprisonment.(2) Further, the Law Reform Commission of Canada in its recent study of environmental law has continued to propose imprisonment as a sentencing option.(3) Meanwhile, the public has been clamoring for stiffer sentencing of polluters,(4) and as Gilbert and Sullivan's Mikado stated:

> "My object all sublime,
> I shall achieve in time,
> is to make the punishment fit the crime,
> the punishment fit the crime."

Notwithstanding this apparent desire to sanction corporate officials, is there really a need for this type of intervention, and if so, how can it be applied effectively? Moreover, if incarceration is imposed, what types of pollution prevention programs and controls (i.e. positive externalities) will be mandated by what have been until now inattentive senior executives?

2. REMEDIES AND SANCTIONS OTHER THAN IMPRISONMENT

A number of judicial tools with the goals of preventing and reducing pollution have been developed; including fines, profit stripping, damages, forfeiture of property, injunctions, prohibition orders, plant closures and imprisonment. Each has a place in the context of environmental protection and control, but in deciding which remedy or penalty should be imposed, each should be canvassed to determine whether they are effective. It is submitted that this review is warranted since incarceration should only be imposed when other judicial sanctions and remedies are not as effective; it being one of the severest sanctions possible.

(a) Fines

All four levels of government recently have taken steps to increase the maximum fines which can be imposed to sanction polluters.

The proposed federal Environmental Protection Act[5] would permit fines of up to $1,000,000 and imprisonment up to five years upon conviction, while in the most serious of cases there would be no ceiling on the amount of the fine that can be levied.[6] Other federal statutes also permit the imposition of large fines.[7]

On December 18, 1986, the provincial Environmental Protection Act,[8] Ontario Water Resources Act[9] and Pesticides Act[10] were amended to permit imposition of fines up to $25,000.00 against individuals and $500,000.00 against corporations and other firms.[11] Minimum fines of $2,000.00 and $4,000.00 are also provided for when convictions related to hazardous wastes occur.[12] Further, under the Occupational Health and Safety Act, the maximum fine that can be imposed against anyone who is convicted of an offence is $25,000.00.[13]

Lower and upper tier municipalities also have requested legislation which would permit much larger fines than the presently authorized maximum of \$2,000.00.[14] In response, a Bill was introduced which would have increased the maximum fines for contraventions of municipal sewage control by-laws to \$10,000.00 on an individual being convicted and \$50,000.00 on corporations being convicted.[15] However, this Bill died with the proroguing of the Legislature;[16] but a more comprehensive sanction likely will be introduced during the present legislative session.[17]

The new and proposed fines in some situations may be high enough to deter polluting conduct. But, it is submitted that until charges are prosecuted in a more encompassing and regular manner and until the courts regularly impose large fines, these new maximum fines will have minimal deterrent value.

The imposition of large fines may be an effective incentive to install pollution control equipment or otherwise reduce pollution if a firm that does not hold a monopoly is sensitive by virtue of its serving a consumer products market, if it is small and privately held, or when there are regularly sanctioned excursions for which the fines are more costly than the cost of installing, operating and maintaining proper controls. Further, fines can be an effective deterrent if directed at individuals who are in positions of knowledge and control and who would be damaged personally by their imposition.

However, there will be little general deterrence when monitoring and enforcement is infrequent. Usually, charges are laid in response to upset situations, unusual events and accidental excursions, while routine monitoring of the thousands of regularly large polluters is not possible.[18] This will continue until there are adequate financial resources to permit employment of large numbers of trained monitoring, analytical and prosecutorial staff, as well as the establishment of larger laboratory facilities. Given ongoing governmental fiscal restraint, this is unlikely to occur in the foreseeable future. Furthermore, the Ontario government's MISA program,[19] which will depend on voluntary reporting of contraventions, likely will not curtail polluting, except in specifically enforced situations.

The Canadian Environmental Advisory Council[20] in its current report on federal enforcement practices[21] states that it "has been concerned for several years with what it perceived to be an inadequate level of enforcement of statutes and regulations which were designed to protect the quality of the environment"[22] and that "the study carried out by the Law Reform Commission and the observations made by Council point to defects in the implementation of Environment Canada's mandate to ensure compliance with the laws and regulations under its jurisdiction."[23] The Law Reform Commission of Canada also harshly criticized the federal government's enforcement strategy when it stated:

> "Our review of the EPS delegation scheme suggests that federal delegation of environmental enforcement authority amounts to a virtual abdication of responsibility for enforcement and has promoted discrepancies in the nature of enforcement responses across Canada."[24]

These conclusions are based on evidence that there has been a minimal and "uneven application of sanctions against industry despite a pattern of persistent, nation-wide non-compliance with federal standards for liquid effluent."[25] Even more recently, it has been shown that enforcement by all federal agencies has been minimal. For example, during 1985 and 1986 there were a total of 51 federal water pollution related convictions and 2 pesticides convictions, with an average fine of $5,039.00.[26]

The minimum fine was $250.00 while the largest was $30,000.00.(27) More astonishing is that across Canada there were only 144 charges laid in 1985 and 1986 by all five federal government departments involved in enforcing federal environmental legislation.(28)

In Ontario, the situation is no better. The Ministry of the Environment has only forty-two pollution investigators for the whole of the Province.(29) Only 11 water pollution prosecutions were commenced in 1986, resulting in 8 convictions and an average fine of only $6,063.00.(30) In commenting on these results, Alex Douglas, Director of Investigations and Enforcement with the Ministry of the Environment, has stated, "the courts have continued to give the Ministry signals that the penalties were not commensurate with the harm being done to the public" and "that fines were a licence to pollute and that they should be higher."(31) However, actual fines have not yet increased to any large extent in the last decade and the Ministry's much ballyhooed enforcement function hardly could be less active.

Metropolitan Toronto has only sixteen inspectors to monitor the more than 7,000 businesses which discharge into the sewer systems within the Metropolitan area. It is further constrained by only having one small industrial waste laboratory and six laboratory analysts.(32) Notwithstanding these limitations, 465 charges were laid in 1985 and 1986, with 403 convictions resulting.(33) The average fine was $778.00 with the minimum being $500.00 and the maximum being $2,000.00, the maximum fine which could be imposed.(34) However, only about 500 of these 7,000 or so businesses were inspected at least once during 1985 or 1986, allowing most industries to discharge with impunity.(35) Further, it is likely that many more full trials will occur when the allowable fine limit is increased. It is anticipated that without extremely large increases in appropriations, Metropolitan Toronto's number of charges will reduce drastically as there will not be adequate manpower and resources to handle what are now predominantly monitoring and testing programs that result in guilty pleas instead of full trials.

Elsewhere, municipalities have not, or on a very infrequent basis have laid charges under their sewage control by-laws.[36] It is only within the last few months that a few of the larger municipalities have laid more than a few charges.[37] In effect, municipal enforcement generally has been absent outside of Metropolitan Toronto.

Based on recent experience, it is obvious that the prosecution of water pollution offences has not been widespread and the imposition of fines has generally been of a magnitude that the fines become a cost of doing business and a licence to continue polluting.[38] Moreover, even in the few cases where a number of convictions are registered against one polluter with fines cumulatively totalling tens of thousands of dollars, collection often is impossible when a polluter sets up a series of shell corporations or otherwise hide its assets.[39]

In terms of an effective remedy to prevent continued corporate pollution, fining the firm alone may not be effective, especially where it may have the capacity to absorb the cost of the fine by passing it on to its customers. Except in a closely held corporation, a fine's deterrence may not be felt by the shareholders as the attitude of most shareholders is essentially that of the corporation itself: as long as dividends continue to be paid with reasonable expectation of appreciation, the shareholders will be satisfied with the operations notwithstanding the registering of occasional convictions. Indeed, the very saving of money by not installing proper anti-pollution devices and by ignoring fines may benefit the shareholders by increasing the short-run profitability of the company's operations and by allowing higher dividends to continue.

Accordingly, seeking convictions and large fines against corporate officials in cases where these officials are involved or could have prevented culpable conduct should be considered if deterrence is to occur.

(b) Profit Stripping

The low fines that usually have been imposed have become part of a polluter's cost of doing business, or as Mr. Justice Montgomery of the Supreme Court of Ontario recognized, "licencing fees for doing business."(40) Given the newly enacted fine structures courts may well impose much larger fines. But these sanctions may only become a larger cost of doing business. Accordingly, when the Province increased its fine provisions it also enacted profit stripping provisions.(41)

The Ontario Environment Enforcement Statute Law Amendment Act, 1986 provides that upon a conviction under the Environmental Protection Act, the Ontario Water Resources Act or the Pesticides Act, the court may increase the fine by an amount equal to the monetary benefit acquired by or that accrued to the convicted person as a result of the commission of the offence.(42) However, this sanction may not be an effective deterrent. Being reliant upon a conviction under one of these statutes, until a great deal more prosecution occurs most polluters will not be affected by this provision. Moreover, even if there is a conviction there is no requirement that this increased fine be imposed.

The proposed federal Environmental Protection Act would also permit a court to impose this type of additional fine.(43)

The problems that may arise when a prosecutor attempts to invoke this sanction may become legion. The onus will be on the prosecutor to provide sentencing evidence to show the amount of the monetary benefit. However, inevitably it will be the defendant that has the best resources to determine this amount. The defendant may be in possession of the financial records which may detail the benefit, but it can make it extremely difficult for the prosecution to search, and where necessary, seize relevant records. But even if records are accessible, they will not usually be set up to record a benefit/offence relationship. Further, it will be extremely difficult to ascertain if a defendant's monetary benefit accrued as a result of the commission of the offence or for one or more other reasons. Even if the company's records could provide for a determination of the monetary benefit, there is the possibility that the records would not be compiled until after sentencing takes place, for instance near the end of the company's fiscal year, which may be up to twenty-three months after the commission of the offence.

Sentencing hearings would also become lengthy and costly. Forensic accountants will have to be retained by the prosecutor to review the defendant's documents and to present evidence. Full cross-examination will be permitted and the defendant will often call evidence to rebut or minimize the prosecutor's evidence.

Evidence may have to be presented to show how the company's shares are distributed, whether the monetary benefit has been directed to subsidiary, associated or affiliated businesses and whether that distribution was in the normal course or related to the potential profit stripping. Financial documents that may have to be produced include audited and unaudited financial statements, interim statements where the period of valuation does not coincide with the fiscal year end, reconciliations of income shown on the statements and tax forms, extracts of directors and committee minutes and resolutions, shareholders and partners distribution agreements, equipment appraisals, management and engineering studies, employment and incentive contracts, franchise and royalty agreements, and subsidy agreements. Summaries may have to be prepared, including summaries of past, current and projected financial positions of the business, a summary of the business's previous operating results, a cash flow summary, a summary of salaries and other benefits provided to shareholders, owners and principal officers, as well as a summary comparing the company's historic budgeted results as opposed to actual results.

Further, there may be a real difficulty in determining the valuation period. In most cases there will be no specific valuation date and the valuation period will often have to be resolved by the court from conflicting testimony. Also, the valuation period may not coincide with the company's taxation period, so that a full determination of the monetary benefit may not be possible.

In the face of this complexity and uncertainty, prosecutors often may not pursue this additional remedy. When they do, what may result is a complex form of commercial litigation that could give rise to numerous appeals.

In any event, since profit stripping penalties have not been provided in enabling municipal statutes, most pollution convictions will not result in this additional sanction.

(c) Damages

To be an effective deterrent a damages award in an environmental tort action must be greater than the cost to the defendant of not repeating or not omitting to carry out the action that brought about the suit. Otherwise, there will be an economic incentive to repeat or not prevent the recurrence.

But, even if an award is of a large enough magnitude, the path to success is frought with difficulty and uncertainty. As Roman[44] and Tuohy and Trebilcock[45] have noted, the tort system is a lottery which only will permit success if standing, limitations, causation, foreseeablility, damage and injury requirements, quantification, evidentiary and onus difficulties, and collection problems are overcome. Even if these problems are surmounted, awards in most cases are so late in coming that even the successful plaintiff often cannot remember why he or she decided to commence the action.

If the unsuccessful defendant can internalize its damages as part of its cost of doing business there will be no specific deterrence. Also, if insurance is generally available at moderate rates or risks can be spread through reciprocal arrangements there will be little or no financial incentive to reducing or eliminating the problem, and general deterrence will not result.

Further, as each case is based on legal precedent that is dependent on a specific set of facts, defendants attempt to distinguish their conduct from factual situations upon which liability rested in other cases; often making it difficult for a plaintiff to succeed when the facts are not comparable with previous cases; resulting in a narrowing of situations in which liability will be imposed and damages awarded.

Moreover, a successful plaintiff can easily spend tens of thousands of dollars on experts and the gathering, analysis and interpretation of data. Further, legal fees are never fully recovered; whereas these fees if otherwise invested likely would have provided an interest income instead of an expense. And if unsuccessful, a plaintiff will also bear the opponents' costs in most cases.

Uncertainty and slowness in coming to a tort determination undermine general deterrance. Even if an award is substantial, there is no certainty that other polluters in comparable situations will be sued and fixed with liability; and in determining that to be the case or by ignoring damages awards, most polluters continue their ways without worry. In other words, tort liability is not widespread, and even when substantial damages are awarded they may have a specific but not necessarily a general deterrent effect.

(d) Forfeiture of Property

An effective penalty which may prevent recurrent pollution could be the court's imposition of forfeiture of licences, permits, equipment or vehicles.[46] However, given the historical desire by the courts to not infringe on property interests, the courts if authorized to order the seizure of property may only be disposed to forfeiture of property that is only directly associated with the commission of an offence. Further, this probably will not occur unless it can be demonstrated that this type of action is necessary to prevent the commission of further offences or unless it could be shown that the defendant's activity was so wanton or reckless that it probably would risk or cause damage to the environment or physical harm or danger to one or more people.

In Ontario, the Environmental Protection Act provides for the seizure of vehicle permits and licence plates of any vehicle suspected of being used in the commission of an offence involving hazardous waste or hauled liquid industrial waste in circumstances involving risk of harm to the environment.[47] If the owner of the vehicle is convicted then the permit can be suspended and the plates can be detained for up to five years, as long as the court is satisfied that further use of the vehicle is likely to result in further harm.[48] However, comparable sanctions are not available in relation to other sources of pollution, even if the same type of offence and harm to the environment occurs.

Forfeiture provisions are also found in the proposed federal Environmental Protection Act, federal Environmental Contaminants Act, Fisheries Act and Migratory Birds Convention Act,[49] but it appears that this type of provision has only been invoked infrequently by federal environmental authorities.[50] Again, with such infrequent imposition of a strong sanction, polluters can continue their actions with almost certain impunity.

Municipalities have no right to seek forfeiture of property causing harm to the environment.[51]

But, all four levels of government can seek seizure if a polluter is found in contempt of a court order restraining or preventing recurrent pollution.[52] This penalty has been granted infrequently,[53] but it is possible that it could be imposed if other sanctions that are imposed for contempt of court fail to prevent a further contravention.

(e) Injunctions

The courts will only enjoin an event or operation in extraordinary circumstances when the injury is not trivial nor temporary and if other relief will not prevent the commission of the offence, damage or nuisance.[54] Injunctions have been invoked in few environmental cases[55] and will not be ordered on an interim basis before trial unless the court is satisfied that the application is not frivolous, there is a substantial issue to be tried, the applicant has a prima facie right to the relief sought, the threatened harm to the applicant cannot be adequately compensated by damages, some irreparable injury or damage is likely to occur and the balance of convenience favours the granting of the injunction.[56]

In cases where there is recurring pollution, a governmental authority can establish all of these elements. The Supreme Court of Canada has held that a municipality is entitled to seek injunctive relief to prevent the contravening of its by-laws.[57] It is in the public interest that the enforcement of a municipality's by-laws must prevail over the interests of other persons in that the public has a direct and substantial interest in their enforcement. Also, the Supreme Court of Ontario has held that where a municipality's by-laws are flagrantly violated, the court ought to assist the municipality by granting interlocutory relief.[58] Where charges have been laid for contraventions of the by-law, which the company is aware of, any further contraventions would demonstrate that the breach is of a serious nature and that the operations should not be permitted to continue until trial.

Whether or not an interim injunction is granted, the court will be most willing to grant a permanent injunction if the offender is aware of its violation,[59] and the infringement of the law is clear, persistent and likely to continue.[60] Also, the court must be reasonably satisfied that unless the injunction is granted there is a danger that the company will continue to use its premises in contravention of the law.[61]

In light of these stringent tests which often are difficult to prove, and the possible need to take action to protect the environment on an expedited basis, the proposed federal Environmental Protection Act would permit the Minister of the Environment to apply to a court for speedy injunctive relief to prevent a breach of the Act, without the necessity of fulfilling the normal common law tests that the courts otherwise apply before issuing an interim injunction.[62]

However, in cases not taken under this proposed legislation, as the burden on an applicant seeking an injunction is so high and as the court's discretion will only be invoked in limited circumstances, an injunction usually only acts as a specific deterrent, not as a general deterrent to widespread pollution.

(f) Prohibition Orders

It is open to a municipality or the province upon having a conviction entered to apply to the court for an order prohibiting the continuation or repetition of the offence.(63) The proposed federal Environmental Protection Act would also permit this relief.(64)

The Supreme Court of Ontario has canvassed whether a provincially appointed Judge presiding over Provincial Offences Court has the power to make an order of prohibition.(65) It was found that such order is not analogous to an injunction which is a remedy within the exclusive jurisdiction of Judges appointed under s. 96 of the Constitution Act, 1867-1982, and is not a power analogous to or broadly conforming to the power exercised by the Courts mentioned in s. 96 of the Constitution Act, 1867-1982. The power was found intra vires the Legislature of the Province of Ontario and within the Judge's power.

The court, however, usually will only impose a prohibition order if there is a lengthy prior record or if the event leading to the application was of great magnitude, and another conviction and fine will not deter future contraventions.(66)

There appears to be no bar to seeking either an order of prohibition or an injunction. The order of prohibition can be "... in addition to any other remedy ...". As noted by the Supreme Court of Ontario, none of the equitable principles in injunction proceedings apply in an application for an order of prohibition.(67)

As a deterrent, a prohibition order has no immediate effect as it is a restatement of existing law that prohibits or regulates certain events,[68] which if contravened at a later time can lead to the imposition of a contempt of court citation, a fine, imprisonment and sequestration of property,[69] whereas an injunction can be used to prevent a polluting event, but only in extraordinary circumstances, save for the more permissive opportunity provided to the Minister in the proposed federal Environmental Protection Act.[70]

(g) Shutting Off Essential Services

Federal and municipal environmental legislation in Ontario do not allow the shutting off of a polluter's essential services by representatives of these levels of government in cases of continuing or repetitive pollution. The only power to sever water service is by reason of the consumer's non-payment of water rates.[71]

Notwithstanding this lack of authority, the Regional Municipality of Peel, to the west of Metropolitan Toronto, has seen the need to enact a by-law which purportedly permits the severance of sewage service in cases of persistent pollution.[72] However, that municipality has recognized that the by-law is invalid and is now seeking legislation to authorize this power.[73] Other municipalities, including Metropolitan Toronto, are also seeking legislation which would permit the cutting-off of water and sewage service to polluters in cases where the responsible municipal official believes that it is necessary to do so.[74] In Metropolitan Toronto's case, the requested legislation would only allow this to happen by order of a court after a hearing on notice to the polluter. Moreover, the order would only issue after the court reviewed most of the principles that it now does on an interim injunction application.[75] As with prosecutions, this proposed remedy will only be as effective as the municipality's monitoring capability, while it probably will not result in general deterrence as it will only be directed at specific polluters that have persistent records of pollution.

(h) Analysis

All of the described environmental sanctions and remedies have their place. Unfortunately, either alone or in combination, they have not deterred pollution to any great extent. When deterrence has occurred it usually has been on a specific basis, with little or no general effect.

As noted, fines have been regarded as a cost of doing business and will remain a licence to pollute in light of the general lack of enforcement, low levels of fines imposed by the courts(76) and the impossibility of monitoring the many discharges on a routine basis. Also, as long as polluters can hide behind corporate veils and shells, collection will remain a problem, thereby minimizing the effect of being fined.

Profit stripping also will be dependent on achieving a conviction. Given the general lack of prosecution as well as the lack of available monitoring resources this penalty will be utilized rarely. Further, complex commercial type litigation will result and valuation problems will be inherent to the process, making it cumbersome and ineffectual.

Damages are as likely as a winning lottery ticket, but even if forthcoming can be eaten away by horrendous fees and costs. Further, factual situations leading to awards are necessarily narrow and difficult to replicate, thereby reducing any general deterrent effect.

Forfeiture of property which will prevent ongoing polluting discharges and emissions is also dependent on a conviction. The general lack of prosecution militates against this sanction being used widely, and when it is, judicial conservatism and the maintenance of the free enterprise ethic will probably reduce its application to the direst of cases.

An injunction is an extraordinary remedy which usually focuses on a specific location so that general deterrence is not usually accomplished.

Severing services is not yet permitted, but if it is ever authorized, the same equitable principles in interim injunction cases probably will be applicable; making it difficult to obtain this penalty.

Prohibition orders are reliant on successful prosecutions, and for the same reasons that fines and profit stripping will not create general deterrence, these orders will not be effective. Also, as the orders are a restatement of the law, issuance should have the same lack of salutory effect that existing laws have had.

Overall, due to a lack of prosecution, the lack of adequate monitoring and laboratory resources and the site specific effects of most of these sanctions, the goal of preventing pollution has not and likely will not be assisted to any great degree by their imposition. Accordingly, if deterrence is to be accomplished, imprisonment of corporate officials should be considered.

For all of these reasons, the answer to my first question is yes there is a need for imprisonment in certain cases.

3. IMPRISONMENT

(a) Offences

Existing Criminal Code offences which upon conviction could result in imprisonment are criminal negligence,(77) common nuisance,(78), mischief,(79) dangerous substances,(80) offensive volatile substances,(81) causing a disturbance,(82) and offences against animals.(83)

The proposed federal Environmental Protection Act will allow imprisonment to be imposed for a term of up to three years if convictions are entered for any of the following indictable offences: providing the Minister of the Environment with false or misleading information on testing results or failing to provide him with certain information; manufacturing or importing a substance in contravention of conditions prescribed by the Minister; releasing substances into the environment in contravention of the Act and the regulations made pursuant to the Act; producing or importing a fuel with additives in excess of prescribed levels; operating a source of air contaminant in a manner that results in emissions in excess of standards; failing to report a spill to the persons identified in regulations or failing to take appropriate preventative or remedial action in cases of spills covered by the proposed Act; failing to comply with a Ministerial recall order; or failing to give the required export notice in cases where the export notification requirements apply; and failing to provide requested plans.(84)

The proposed Act would also allow for terms up to five years for the following indictable offences: providing the Minister with false or misleading information or notice in respect of toxic substances or the manufacturing or importing of certain new substances; knowingly or recklessly causing a disaster that results in a loss of the use of the environment, or knowingly, recklessly or negligently causing serious damage to the environment that results in a risk of death or serious harm to another person or that results in death or serious harm.(85)

The Ontario Environmental Protection Act permits imprisonment of up to twelve months for offences involving hauled liquid industrial waste or hazardous waste, contamination of the natural environment or non-compliance with a Ministry of the Environment Director's order.(86) The Ontario Water Resources Act allows for the same term of imprisonment on being convicted of discharging or depositing material that impairs water quality where it is discharged or deposited into water or on a shore, riverbank or defined water supply area.(87) Twelve months imprisonment can be imposed for a conviction under the Ontario Pesticides Act in relation to contraventions of a Director's stop order, or where pesticides or things containing pesticides are released into the environment that are likely to or do cause injury, damage, harm, material discomfort, adverse health effects, impairment of human safety or the quality of the environment, or the loss of the use of plants or animals.(88)

In Ontario, imprisonment cannot be imposed for a contravention of a municipal law. However, incarceration is possible for a short period in limited circumstances in unsuccessful collection proceedings,(89) as well as in contempt of court proceedings arising from a breach of a court order issued pursant to a municipal law.(90) Imprisonment can also occur if contempt is cited as a result of a breach of a federally or provincially authorized court order.(91) Incarceration upon a finding of contempt can be up to two years,(92) although recent judicial creativity has attempted to extend this term to a longer penitentiary sentence.(93)

However, section 7 of the Canadian Charter of Rights and Freedoms(94) provides that no one should be imprisoned except in accordance with the principles of fundamental justice.(95) Accordingly, if imprisonment is to be imposed the accused must be accorded due process of law, including the right to counsel, the right to a full answer and defence, the right to cross-examine the prosecution's witnesses, the right to production and examination of all documents relied on by the prosecution, the right not to be called as a witness in proceedings taken against that witness, the right to a full trial within a reasonable period of time after being charged, the right to know with certainty what the charge is, the right to reasonable adjournments, the right to a reasonable adjournment prior to sentencing and the right to call witnesses during the sentencing portion of a trial. If any of these rights are not provided and such omission cannot be reasonably justified,(96) then the sentence will be overturned.(97)

Further, the Charter of Rights and Freedoms states that a term of imprisonment of five years or more only can be imposed, if there was a jury trial.(98) Otherwise, the jail term will be overturned.(99) Moreover, if a jail sentence is of indeterminate length it will be quashed for uncertainty.(100)

Factors leading to a determination as to whether imprisonment should be imposed if a conviction is registered include gravity of the offence, general and specific deterrence, past record and character of the polluter.(101) In environmental pollution cases other factors which have been considered in arriving at a just and fair disposition by way of punishment for an environmental offence include the nature of the environment affected, the extent of the damage or injury inflicted, the degree of criminality in the manner of committing the offence, the extent of attempts to comply, the speed and efficiency to rectify the problem or clean-up the pollution, the voluntary reporting of breaches, the size and wealth of the polluter, and the amount of profit or savings realized as a consequence of the offence.(102)

Save for general deterrence, all of these factors are specific to the polluter in each case, and are not considered with a view to preventing pollution elsewhere. When general prevention is warranted in pollution cases, which I submit is necessary in light of the historical lack of prosecution, the ineffectiveness of sanctions and the continuing degradation of the environment, then a drastic remedy should be imposed;

this being the imprisonment of those who control corporate affairs and who could prevent incursions. Being a severe sanction which will drastically disrupt the lives of the convicted as well as their families and which can have devastating long-term effects on their social and employment affairs, imprisonment should be imposed with extreme care and in accordance with procedural fairness. Also, given these externalities I believe that imprisonment should only be imposed when other penalties and remedies have been flouted or disregarded, have not resulted in an effective pollution control program, or when harm or damage can be or is so severe as to warrant the denial of liberty.

(b) Attribution

"The question of corporate environmental responsibility is a crucial one; because in today's highly complex inter-dependent society, even a temporary lapse in judgment within the corporate context can cause extremely serious harm."(103) However, corporate accountability has often been shifted from those who are in charge to those who are not in a decision-making position, for example to an employee, or to the artificial construct of the corporation, thereby avoiding full responsibility.

In an attempt to ensure that corporations do not pollute, the Ontario Legislature recently amended the Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act, so as to place responsibility for pollution and accountability in a corporation's officers and directors.(104) The proposed federal Environmental Protection Act would also place some responsibility and accountability on a polluting corporation's board of directors and officers.(105)

However, the question that still arises is which officer or director should be blamed, or as put at the outset of this paper, how can imprisonment be applied effectively?

In criminal environmental law, a director or officer can be held liable[106] where he or she personally participated,[107] aided,[108] abetted,[109] counselled[110] or conspired[111] in some aspect of the culpable activity.

The proposed federal Environmental Protection Act, however, provides that where a corporation commits an offence under the Act, any officer or director who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.[112] But, an officer or director can demonstrate his or her innocence if he proves that the offence took place without his knowledge or consent and that he took all reasonable care to ensure compliance with the Act. But, this defence would not be possible for offences involving fraud[113] or knowingly or recklessly causing a disaster that results in a loss of the use of the environment, or knowingly, recklessly or negligently causing serious damage to the environment that results in a risk of death or serious harm to another person or death or serious harm.[114]

The Ontario Environmental Protection Act, Ontario Water Resources Act and Pesticides Act require that every director or officer of a company that engages in an activity that may pollute in contravention of these Acts or regulations take all reasonable care to prevent the corporation from causing or permitting the unlawful event.[115] This requirement is stated to be a "duty".[116] Further, under the Ontario Business Corporations Act, 1982, every officer and director is mandated to act honestly and in the coporations best interests. [117]

In effect, the proposed federal Environmental Protection Act would require mens rea on the part of an officer or director and, except in the crime-like offences,[118] permits the defence of due diligence.[119] Whereas, the Ontario statutes do not require mens rea, but do leave open the due diligence defence.(120) The question which then arises is how to identify the culpable officers and directors.

In the federal context the answer appears to be relatively straightforward. An officer or director must have had knowledge of the offence or must have consented to the offence, and except in criminal offences or the crime-like offences, the officer or director must not have taken all reasonable care to ensure compliance with the Act. As such, any officer or board of directors that sets up a framework where they are not exposed to the day to day activities and events which could cause pollution should be shielded from liability.

However, it is not so simple in the Ontario legislative context. The questions that must be answered are, firstly, does the company engage in an activity that may pollute in contravention of one of the Acts, and secondly, in the factual context of the corporation's activities was enough care taken by the officer or director to have prevented the illegal event.

Determining if a company has engaged in an activity that may pollute in contravention of one of the Ontario statutes can be accomplished through an environmental audit which reviews all of the corporation's activities, determines which events can lead to an offence and which previous activities could have been offensive.(121) Contrary to what the former Deputy Minister of the Environment has stated, a company's activities need not entail "substantial risk to the natural environment" and the company need not "engage in activities having a substantial and direct negative impact on the environment through pollution"(122) before it can be found to engage in an activity that may contravene one of the Ontario statutes. All that must be found is that the impugned event could arise from an activity that has been or could be undertaken by or on behalf of the company, without regard to the amount of risk or harm to the environment.

Direction has been provided by our highest court in determining what an officer or director must do to avoid liability. The Supreme Court of Canada in convicting a municipality on charges laid under the Ontario Water Resources Act, stated:

> "The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. The control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control"... The purpose ... is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of the public health or safety or morale"... As ... noted ... "a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark."(123)

In that decision the court found that it is a corporation's responsibility to provide and fully carry out appropriate systems to prevent the commission of offences by its employees. But if those persons who are the directing mind and will of the corporation do this, and despite these best efforts the offences are still committed by employees, the corporation as well as those officers and directors will not be convicted. Further, in coming to the Court's decision, Dickson, J. (now C.J.C.) stated:

> "Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating willful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself."(124)

The Supreme Court of Canada in another recent decision[125] has held that a corporation can have more than one directing mind and that this will depend on the persons' functions, not on his or her title. Therefore, if an employee has been delegated the responsibility to decide how to carry out duties or how to prevent polluting events, along with an officer or director, the employee could be found to be the corporation's directing mind and will within the scope of his or her duties.

4. PREVENTATIVE CARE

In light of these judicial tests and the new provincial requirements, the positive externality of the undertaking of preventative care programs has recently started to occur.[126] I believe that for many directors to avoid imprisonment Boards of Directors of companies that may pollute must:

1. ensure that an environmental audit of the corporation's past, present and planned activities is undertaken if there is any chance that the corporation has or will engage in an activity that is offensive. This would involve at least an operations, maintenance and policy review, in conjunction with a legal analysis,
2. establish a "proper system" to prevent the commission of an offence and ensure the "effective operation" of the system. Each director should therefore ensure that the Board instructs the corporation's officers to set up a system which will ensure compliance with the relevant environmental laws, that the Board require that such officers regularly provide compliance reports to the Board, and in any event, report any potential, actual or possible contraventions in a timely manner,
3. thoroughly review these reports and require the appropriate officers to forthwith take whatever action is necessary to maintain or bring about compliance,

4. require that the officers report any environmental concerns brought to the officers' attention, either by the public, governmental authorities, employees, supervisors or other representatives of the company. The Board must then determine how these concerns are to be dealt with and by whom, and then ensure that the appropriate officers ensure that any problems have been corrected, with full interim and final reports brought back to the Board in a timely manner, and
5. if there are any prior environmental charges or convictions or any which are forthcoming, have these brought to the Board's attention. It should then ensure that the compliance system takes these alleged or proven violations into account.

It will not matter if an individual member of the Board does not have special environmental knowledge or expertise. All Board members will have to take an active role in ensuring that a proper structure is operating and responding appropriately. However, by electing one or more Board members that have special knowledge or expertise, other Directors could more easily ensure that there is a proper structure and that their potential liability is minimized.

Officers must also take appropriate steps to minimize their own potential imprisonment. They should:

1. review their assigned and statutory responsibilities to determine how their duties and powers interact with the corporation's environmental activities,
2. carry out these duties and powers by setting up systems and contingency plans to protect the environment, ensure that these systems and plans are effectively operated and maintained, and take whatever action is necessary

until these systems are operating in compliance with environmental laws, including shutting down operations which could result in pollution,

3. have environmental audits undertaken, have compliance reports carried out at reasonable intervals and provide these audits and compliance reports to the Board of Directors in a timely manner. The officers also should review these audits and reports and be satisfied that they are complete and accurate,

4. ensure that the Board's environmental directives, policies and requests are carried out, with the resulting activities reported back to the Board,

5. set up effective vertical and horizontal reporting systems, and bring any environmental complaints, concerns, charges and convictions to the Board's attention with a recommended course of action and advice as to how these matters are being or have been dealt with,

6. ensure that all officials, employees and representatives of the corporation are properly trained to respond effectively to environmental problems and occurrences and that these persons quickly report all such matters and remedial and preventative action to an officer of the corporation as well as any governmental authorities that must be notified,(127)

7. notify the Board when an officer believes that he or she does not have authority to ensure environmental compliance,

8. in any event, whether or not the officer believes that he or she has authority, in a situation where compliance is not occurring or an impugned event is likely to occur, take all possible steps to stop or prevent the event, and

9. ensure that all officials, employees and representatives of the company within their areas of responsibility are aware of their potential individual liability if they are negligent or reckless, if they do not carry out statutory requirements such as notifying governmental authorities, or if they are to blame or are a cause of a polluting event.

If all of these activities are carried out, it is less likely that in the event that there is an illegal event, an officer or director will be liable and face imprisonment. This is all the more important, since even if officers and directors insurance is available, it will not insure against incarceration.

In the case of municipalities, the Chairman, Mayor, Reeve, Chief Administrative Officer, department heads and deputy department heads are statutory officers. In their respective departments and offices, they must take all reasonable care to prevent the municipal corporation and its representatives from causing or permitting any activity that may result in an unlawful deposit, addition, emission or discharge of a contaminant into the natural environment, the unlawful discharge or deposit of any material of any kind that may cause the impairment of a watercourse or other water, or any unlawful act in respect of the use or management of pesticides that may cause injury, damage, harm, material discomfort, adverse health effects, impairment of human safety or the quality of the environment, or the loss of the use of plants or animals.[128]

If any such unlawful event occurs, and the responsible officer did not take all reasonable care to prevent the corporation or its representatives from causing or permitting such event, then that officer or director can be charged under the appropriate provincial statute and held personally liable.

Further, the Supreme Court of Ontario has held that municipal councillors are "officers" of a municipal corporation. Where the municipality is ordered by a court, tribunal, Director, inspector or Minister that a matter should be undertaken or that something should not be done and the council refuses, then the "Chairman and councillors" can be held personally in contempt of court.(129) However, no action will lie against an individual councillor for a corporate act authorized by the council unless that act is maliciously done by the individual councillor and the municipality's name is used as a mere colour for the malicious act, or unless the act is ultra vires and is not and cannot be in the contemplation of law a corporate act at all.(130) But, those councillors sitting on a committee of council that exceeds its express authority so as to prevent the taking of all reasonable care to prevent the municipal corporation and its representatives from causing or permitting an activity that may result in an unlawful discharge or emission can be found personally liable for their acts and subject to imprisonment.(131)

Morever, if a committee or council does not carry out its statutory duty of taking all reasonable care to prevent the municipal corporation and its representatives from causing or permitting an activity that may result in an unlawful discharge or emission, the responsible committee or the council could have an order of mandamus issued, requiring that reasonable preventative care be undertaken. If this were to occur, then the costs of the mandamus application could be ordered to be paid individually by councillors who had voted against taking the preventative measures. If these councillors cannot be determined, presumably all members would be individually liable for these costs.(132)

Accordingly, if municipal officers are to minimize their potential environmental liability under the Province's environmental statutes, they should:

1. have environmental audits of all environmentally related activities within their jurisdiction undertaken,
2. have environmental training programs developed and carried out,
3. ensure that there are proper environmental reporting systems and notification procedures in place,
4. have remedial action and contingency plans developed and understood by municipal staff,
5. ensure that there is regular compliance monitoring,
6. ensure that all staff are advised of their potential personal liability if they are negligent, reckless or the cause of a polluting event,
7. do everything within his or her authority to rectify a problem if there is an authorized budget, and
8. if funds are not yet authorized, report the situation to council or the committee of council to which he or she reports.

If a committee of council or the municipal council becomes aware of potential or actual violations of Provincial environmental laws, these bodies must take all reasonable care to ensure that the event is stopped and prevented from recurring. Municipal councillors must therefore give full consideration to the municipal bureaucracy's increased budget needs instead of taking a fiscally restrained approach to matters which could lead to environmental offences.

5. CONCLUSIONS

If a sentence is to have a widespread effect, it appears that an unpleasant consequence must be visited upon corporate officials so that the principles of deterrence and example discourage the committing of prohibited acts by the offenders and other people.[133] Moreover, it is appropriate to impose imprisonment against officers or directors who are statutorily mandated to control the affairs of the corporation and to act honestly and in its best interests,[134] especially where those individuals have knowledge of or knowledge of the potential for the company's impugned action, the seriousness of the results of that action, have not taken adequate steps to try to prevent ongoing contraventions, and moreover, when the officials and the corporation will not pay fines.[135]

The record of lawbreaking by polluters in Ontario, as noted in the Ministry of the Environment's most recent presentation of enforcement data, continues unabated,[136] with industry continuing to resist efforts to crack down on polluters.[137] With traditional non-incarceration sanctions and remedies being ineffective, the imprisonment of culpable corporate officials may well be **the** judicial tool that results in the positive externality of officers' and directors' preventative care programs that, as Dean Roscoe Pound and Dickson, J. have stated, will "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety."[138]

ENDNOTES

(1) The Assize of the Forest as recorded by Roger of Hoveden in 1184 A.D. stated that where any of the King's woods were destroyed and the forester in charge was unable to account satisfactorily for the destruction, he was not to be fined, but had to answer with his own body.

(2) (i) common law contempt of court in Regina v. B.E.S.T. Plating Shoppe Ltd. and Siapas (1986), 1 CELR (N.S.) 85 (H.C.J.), revd. in part at (1987), 59 O.R. (2d) 145; (1987), 1 CELR (N.S.) 145 (C.A.);

(ii) Germany's Criminal Code, s. 330, (1978) Bundestags-Drucksache 8/2382 (Lower House Publication 8/2382); Japan's Law for the Punishment of Crimes Relating to the Environmental Pollution which Adversely Affects the Health of Persons, Law No. 142 of 1970, Article 2;

(iii) Environment Enforcement Statute Law Amendment Act, 1986, S.O., c. 68, ss. 15, 41 and 47.

(3) Crimes Against the Environment; Working Paper 44, Law Reform Commission of Canada, Ottawa, 1985, p. 45, wherein it is stated: "In our view, imprisonment, as well as sufficiently large fines, should be available as the major sentencing options."

(4) Environmental Issues in Alberta: The Opinions of Edmonton Residents, RMD Report, 82/17, wherein 70% of those polled supported more rigorous enforcement of environmental statutes even if it led to higher prices.

(5) Proposed Environmental Protection Act, tabled for public review by the federal Minister of the Environment, Spring and Summer 1987.

(6) Ibid, ss. 52(1), 53(d), 67(b) and s. 54

(7) For example: Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12, s. 18(1)

(8) R.S.O. 1980, c. 141

(9) R.S.O. 1980, c. 361

(10) R.S.O. 1980, c. 376

(11) Supra 2(iii), ss. 14, 16, 41, 47

(12) Ibid, ss. 15, 16(1), 41, 47

(13) R.S.O. 1980, c. 321, s. 37(1)

(14) Provincial Offences Act, R.S.O. 1980, c. 400, s. 62

(15) Bill 97, s. 11

(16) Bill 97 received first reading on June 24, 1987

(17) Telephone conversation with John Tomlinson, counsel, Ministry of Municipal Affairs on September 27, 1987.

(18) Metropolitan Toronto Works Department inspectors, who are the prime pollution monitoring officials in the Metropolitan Area routinely monitor less than 10% of what they estimate to be about 7,000 regular large polluters.

(19) Municipal Industrial Strategy for Abatement:

Late in June, 1986, The Honourable Jim Bradley, Minister of the Environment, held a press conference at which a White Paper, entitled "Municipal-Industrial Strategy for Abatement (MISA)", was presented as a policy and program statement for controlling municipal and industrial discharges into surface waters.

The Minister's Foreword indicates that eventually every major discharger of contaminants into Ontario waterways will be required to reduce pollution therein. Receiving bodies of water will be analyzed, and strict pollution control standards for municipal sewage plant effluents will be established. One might assume that plants located on a receiving body as large as Lake Ontario might be permitted higher pollutant discharge than a plant discharging to some small river or water course, although that may not necessarily be the case. The indication is given that when better technology is developed, new and lower limits will be imposed. The latter would appear to require constantly changing standards to be satisfied, so that improvements to, or expansion of, treatment facilities might never cease.

The Paper goes on to discuss the existence of toxic materials in watercourses in various parts of the Province, and the desire to remedy the condition by minimizing discharges from recognized sources of pollution. The effort will be achieved through establishment of regulations for each industrial sector and the municipal sector. No mention is made of any controls proposed for Federal or Provincial operations. A monitoring regulation will be established, requiring each industrial company to monitor its effluent for a wide range of contaminants, with this self-monitoring program to be policed by the Ministry taking samples from time to time on unannounced visits. It is anticipated that the MISA program will cover all major toxic polluters of waterways within three years. Monitoring of the municipal sector, consisting of some 400 sewage treatment plants taking wastewater from some 12,000 industries, will also be undertaken.

Monitoring regulations for petroleum refining industries have been drafted and regulations for organic chemical industries are planned to be published by mid-1988, while abatement regulations are to be introduced nine to 12 months thereafter. Pilot studies of certain sensitive and confined aquatic areas are planned, one of which is Toronto Harbour. The industries, municipalities, and the public, are to be consulted on the development of the MISA program, and there will be 60 days for interested parties to submit written comments on the White Paper.

(20) Reporting to the federal Minister of the Environment, the Council membership when this latest report was made in January, 1987 consisted of: Mr. T. Beck, Chairman, Calgary, Alberta; Dr. S.A.M. Conover, Hardy Associates Ltd., Dartmouth, Nova Scotia; Mr. J.L. Fryer, National Union of Provincial Government Employees, Ottawa, Ontario; Dr. J.A.F. Gardner, University of British Columbia, Vancouver, B.C.; Dr. L. Giroux, University of Laval, Ste-Foy, Quebec; Mr. B.A. Hubert, Boreal Ecology Services Ltd., Yellowknife, N.W.T.; Madame L.B. Lepage, Federation des associations pour la protection de l'environnement des lacs, Montreal, Quebec; Dr. D. MacKay, Professor, University of Toronto, Toronto, Ontario; and Dr. J.S. Rowe, University of Saskatchewan, Saskatoon, Saskatchewan.

(21) Environment Practices of Environment Canada; Canadian Environmental Advisory Council, Ottawa, January, 1987.

(22) Ibid, Preface

(23) Ibid, p. 8

(24) Policing Pollution: The Prosecution of Environmental Offences; Draft Study, Law Reform Commission of Canada, p. 93.

(25) Supra 21, p. 1

(26) Responses to an inquiry on May 26, 1987 by The Honourable Charles Caccia, former federal Minister of the Environment, from the Minister of Agriculture, the Minister of the Environment, the Minister of Indian Affairs and Northern Development, the Minister of Transport and the Minister of National Health and Welfare.

(27) Ibid, while 14 of the 53 convictions resulted in fines of not more than $1,000 and only 6 convictions resulted in fines of more than $10,000.

(28) Ibid

(29) Ministry of the Environment, Investigations and Enforcement Branch.

(30) Report on the 1986 Industrial Direct Discharges in Ontario; Ministry of the Environment; October, 1987, pp. 54-55.

(31) Page 4 of notes of a speech by Alex Douglas, Director of Investigations and Enforcement Ministry of the Environment, to the Municipal Engineers Association, June, 1987.

(32) Metropolitan Toronto Works Department, Water Pollution Control Division, Industrial Waste Control Branch.

(33) Memorandum dated September 29, 1987 from D.A. Clough, Director, Water Pollution Control, Metropolitan Toronto Works Department, to G.H. Rust-D'Eye, Metropolitan Solicitor, in the author's files.

(34) Ibid

(35) Information from D.A. Clough, Director, Water Pollution Control, Metropolitan Toronto Works Department.

(36) For example, the Regional Municipality of Ottawa-Carlton has laid less than 10 charges during 1985, 1986 and until October, 1987, as advised by Douglas Cameron, Regional Solicitor, on October 7, 1987.

(37) The Town of Markham, abutting Metropolitan Toronto, had not laid any charges under its sewage control by-law No. 436-86 until the spring of 1987, when 46 charges were laid with 7 convictions and 30 charges still outstanding, as advised by Rob Robinson, Solicitor, Markham Legal Department, in correspondence to the author on October 8, 1987.

(38) Infra 40 (H.C.J.) at 82

(39) Affidavit of Carmen Pelligra in Metropolitan Toronto v. Siapas, S.C.O. File No. RE 1445/87; Applicant's Record, p. 203, parag. 7.

(40) Regina v. Jetco Manufacturing Limited and Alexander (1986), 1 CELR (N.S.) 79 at 82 (H.C.J.); rev'd. (1987), 57 O.R. (2d) 776 (C.A.).

(41) Supra 2(iii), ss. 15, 41, 47

(42) Ibid, these being Environmental Protection Act, s. 146c, Ontario Water Resources Act, s. 70, and Pesticides Act, s. 34b.

(43) Supra 5, s. 65

(44) Roman, A; Class Actions in Environmental Rights in Canada; CELRF, Toronto, 1983, c. 3

(45) Tuohy, C. and Trebilcock, M; Policy Options in the Regulation of Asbestos-Related Hazards; Ontario Royal Commission on Asbestos, Policy Paper No. 3, 1982, pp. 7.4-7.14

(46) Rules of Civil Procedure, R.60.09, 60.11(5)(f)

(47) Supra 8, s. 47a(2)

(48) Ibid, s. 47b(1)(2)

(49) (i) Supra 5, s. 49(2)

(ii) R.S.C. 1985, c. E-12, s. 13(2)

(iii) R.S.C. 1985, c. F-14, s. 58

(iv) R.S.C. 1985, c. M-7, s. 7

(50) Nadin-Davis; Sentencing in Canada; Carswell, Toronto, 1982 at 181.

(51) Any such right would have to arise in a municipality's constituting or other applicable legislation.

(52) Pursuant to the Supreme Court's inherent jurisdiction to enforce orders of its lower courts. Also see: Rules of Civil Procedure, R.60.09.

(53) A writ of sequestration has been issued when the officers and servants of a defendant corporation knew that a nuisance was being committed. See: Browne v. Britnell & Co. (1924), 27 OWN 232 (H.C.).

(54) (i) City of Toronto v. Bulczack and Bulczack, /1961/ O.R. 92 at 96 (H.C.J.); and

(ii) Cahill v. Metropolitan Toronto (unreported decision of Gray, J., November 25, 1985 (S.C.O.)).

(55) (i) K.V.P. Company v. McKie, /1949/ SCR 698;

(ii) Gauthier v. Naneff, /1971/ 1 OR 97; and

(iii) Supra 54(ii).

(56) (i) Morgantaler et al. v. Ackroyd (1983), 42 OR (2d) 659 at 664 (H.C.J.); and

(ii) Supra 54(ii) at 4.

(57) Polai v. City of Toronto, /1973/ SCR 38 at 41.

(58) Metropolitan Toronto v. N.B. Theatrical Agencies Inc. (1984), 44 OR (2d) 574 (H.C.J.)

(59) Ibid

(60) (i) Supra 54(i); and

(ii) Supra 58.

(61) Ibid (i)

(62) Supra 5, s. 70

(63) Municipal Act, R.S.O. 1980, c. 302, s. 326

(64) Supra 5, s. 66(1)(a)

(65) Mudry v. City of Toronto (1981), 14 MPLR 42 (Div. Ct.)

(66) (i) Stevens v. Shepherd et al. (1980), 14 MPLR 250 (Co. Ct.);

(ii) Regina v. F.W. Woolworth Co. Ltd. (1974), 16 DLR (3d) 345 (C.A.); and

(iii) Regina v. S.S. Kresge Co. Ltd. (1975), 65 DLR (3d) 628 (P.E.I.C.A.).

(67) Supra 65, at 49

(68) Supra 66

(69) Supra 52

(70) Supra 5, s. 70

(71) (i) Public Utilities Act R.S.O. 1980, c. 423, s. 27(3)(4); and

(ii) St. Lawrence Rendering Company Ltd. v. Cornwall, /1951/ OR 669 (H.C.)

(72) Regional Municipality of Peel By-law No. 9-75, s. 8.

(73) As evidenced by the Regional Municipality of Peel's August 25, 1986 request to the Ministry of Municipal Affairs that the Province of Ontario amend the Regional Municipality of Peel Act.

(74) Clause No. 7 of Metropolitan Toronto Works Committee Report No. 6, confirmed by Metropolitan Council on May 29, 1987.

(75) Ibid

(76) (i) Regina v. Fabricated Plastics Limited (1978), 8 CELR 174 (Ont. Prov. Ct.) where 2 convictions gave rise to fines totalling $9,000;

(ii) Regina v. Sheridan (1972), 4 CELN 1 (Ont. Dist. Ct.) where a fine of $1,000 was imposed;

(iii) Regina v. Kenaston Drilling (Arctic) Limited (1973) 2 CELN 42 (N.W.T.S.C.), where on appeal the fine was increased to $2,000;

(iv) Regina v. Panarctic Oils Ltd. (1973), 2 CELN 168 (N.W.T. Mag. Ct.), where a fine of $3,000 was imposed;

(v) Regina v. Giant Yellowknife Mines Ltd. (1975), 4 CELN 69 (N.W.T. Mag. Ct.), where a $2,000 fine was imposed;

(vi) Regina v. York Sanitation Co. Ltd. (1978), 8 CELR 146 (Ont. Prov. Ct.), where 42 convictions gave rise to fines totalling $26,500;

(vii) Regina v. B.L.S. Sanitation (1976), 6 CELN 13 (Ont. Dist. Ct.), where on appeal a $500 fine was increased to $10,000;

(viii) Regina v. Greater Vancouver Regional District and Sewerage Drainage District (1981), 10 CELR 157 (B.C. Prov. Ct.), where each accused was fined $5,000;

(ix) Regina v. Cyprus Anvil Mining Corporation Limited (1975), 5 CELN 117 (Y.T. C.A.), where a $5,000 fine was reduced to $4,500 on appeal;

(x) Regina v. Canadian Pacific Limited (1977), 9 CELR 52 (B.C. Prov. Ct.), where a $4,000 fine was imposed;

(xi) Regina v. Echo Bay Mines Ltd. (1980), 12 CELR 38 (N.W.T. Terr. Ct.), where a $7,000 fine was imposed;

(xii) Regina v. Placer Development Limited (1982), 12 CELR 58 (N.W.T.S.C.), where the accused was fined $4,000 on each of 4 counts and $1,000 on each of 5 counts, totalling $21,000;

(xiii) Regina v. Cyanamid Canada Inc. (1981), 11 CELR 31 (Ont. Prov. Ct.), where a $1 fine was imposed; and

(xiv) Supra 27, 31, 34.

(77) Criminal Code, R.S.C. 1985, c. C-46, s. 202

(78) Ibid, s. 176

(79) Ibid, s. 387

(80) Ibid, ss. 77-79

(81) Ibid, s. 174

(82) Ibid, s. 171

(83) Ibid, ss. 400-403

(84) Supra 5, s. 52

(85) Ibid, s. 54

(86) Supra 8, ss. 146a(2), 147(1)

(87) Supra 9, 68(1)

(88) Supra 10, s. 34c(1)

(89) Supra 14, s. 70(3)(4)(5)

(90) Supra 63

(91) Supra 52

(92) Regina v. Cohn (1984), 48 OR (2d) 65 at 73 (C.A.)

(93) Supra 40 (H.C.J.) at 84

(94) Canadian Charter of Rights and Freedoms, s. 7, in Part I of the Constitution Act which is Schedule B of the Canada Act 1982, c. 11 (U.K.).

(95) Supra 92 at 76, 90

(96) Supra 94, s. 1

(97) Supra 40 (C.A.)

(98) Supra 94, s. 11(f)

(99) Supra 92 at 76, 87

(100) Supra 2(i) (C.A.) at 153

(101) (i) Re Tilco Plastics Ltd. and Skurjat, /1966/ 2 OR 547 (H.C.), affd. at /1967/ 1 OR 609 n. (C.A.); and

(ii) Regina v. Sheridan (1973), 10 C.C.C. (2d) 545 (Dist. Ct.).

(102) (i) Regina v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.);

(ii) Regina v. United Keno Hill Mines Limited (1980), 10 CELR 43 (Yukon Terr. Ct.); and

(iii) Regina v. Kenaston Drilling (Arctic) Ltd., (1973) 12 C.C.C. (2d) 383 (Yukon Terr. Ct.).

(103) Officers' and Directors' Liability, in Proceedings on Corporate Environmental Responsibility and Liability; McLeod, R.M. and Swaigen, J.Z.; Canadian Bar Association, May 22, 1987, p. 1.

(104) Supra 2(iii), ss. 17, 42, 48

(105) Supra 5, s. 58

(106) Canadian Dredge and Dock Co. Ltd. et al. v. The Queen (1985), 19 CCC (3d) 2 (S.C.C.)

(107) (i) Regina v. Hendrie (1905), 11 OLR 202 (C.A.);

(ii) Regina v. Donovan, /1921/ 3 WWR 635;

(iii) Regina v. Nelson, /1929/ 1 WWR 665 (Alta. S.C.);

(iv) Regina v. Campbell, /1912/ 5 DLR 370 (Que. K.B.);

(v) Regina v. Grubb, /1915/ 2 KB 683 (Court of Crim. App.);

(vi) Dellow v. Busby, /1942/ 2 All E.R. 439 (K.B.); and

(vii) Regina v. Sommers (No. 7) (1958), 26 WWR 254 (B.C.S.C.).

(108) (i) Regina v. Hays (1907), 14 OLR 201 (C.A.);

(ii) Regina v. Sovsky, Bresler & H. Bresler & Sons Ltd. (1944), 30 Cr. App. R. 84(Court of Crim. App.); and

(iii) Regina v. Continental Cablevision Inc., /1974/ C.P.R. (2d) 209 (Prov. Ct. Crim. Div.).

(109) Ibid

(110) Ibid

(111) (i) Burnes v. Pernell, /1849/ HL 496;

(ii) Regina v. Aspinall, /1876/ 2 QB 48 (C.A.); and

(iii) Regina v. McNamara et al. (No. 1) (1981), 56 CCC (2d) 193.

(112) Supra 5, s. 58

(113) Ibid, s. 60

(114) Ibid

(115) Supra 104

(116) Ibid

(117) S.O. 1982, c. 4, s. 134(1)

(118) Supra 5, ss. 53, 54, 60

(119) Ibid, s. 60

(120) Supra 2 (iii), ss. 17, 42, 48

(121) Environmental Audits: The Role of Counsel and The Question of Privilege, in Proceedings on Corporate Environmental Responsibility and Liability; Cotton, R.; Canadian Bar Association, May 22, 1987.

(122) Supra 103, p. 5

(123) Supra 102(i) at 371

(124) Ibid, at 377-378

(125) Supra 106

(126) Infra 137

(127) Supra 8, ss. 14(1), 80

(128) Supra 120

(129) (i) Re Bolton and County of Wentworth (1911), 23 OLR 390 (H.C.); and

(ii) Re Regional Municipality of Halton and Town of Milton (1981), 12 OMBR 292 (H.C.J.).

(130) Kelliher v. Smith (1931), 4 DLR 102 at 113-114 (S.C.C.)

(131) Town of New Glasgow v. Brown (1907), 35 SCR 586

(132) (i) Re Stratford Local Option By-law (1915), 35 OLR 26 (H.C.); and

(ii) Re West Nissouri Continuation School (1917), 38 OLR 207 at 255 (H.C.).

(133) Supra 102(ii) at 55

(134) (i) Supra 117; and

(ii) MacKell v. Ottawa Separate School Trustees (1917), 12 OWN 265 at 266 (H.C.).

(135) Supra 2(i) (H.C.J.)

(136) Supra 30

(137) Since the imposition of imprisonment of the Presidents of B.E.S.T. Plating Shoppe Ltd. and Jetco Manufacturing Limited by the High Court of Justice (see: Supra 2(i) and 40), and written warnings being given in 1987 to over 150 other officers and directors of 19 other corporations that had been previously convicted at least 3 times under the Metropolitan Toronto sewage control by-law, at least 8 of these corporations have had special meetings of directors called to set up proper pollution control procedures and to ensure that proper equipment is installed to prevent further contraventions.

(138) (i) Pound, R.; Spirit of the Common Law (1906); and

(ii) Supra 95(i) at 371.

Marsh &
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Marsh & McLennan Limited
1 First Canadian Place
P. O. Box 58
Toronto, Ontario
M5X 1G2
Writer's Direct Dial No. 868-2681

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January 19, 1988

Mr. Doug Macdonald
Executive Director
Canadian Environmental Law
Research Foundation
243 Queen Street West
Toronto, Ontario
M5V 1Z4

Dear Mr. Macdonald:

Re: January 21, 1988 CELRF Conference

Enclosed is the paper which is to be delivered at this conference. I look forward to meeting with you on Thursday.

Yours very truly

John B. Morrison
Vice President

JBM:mdf
Encl.

TABLE OF CONTENTS

I. BACKGROUND

The extent to which insurance is available to cover claims arising from pollution or environmental impairment has, for all practical purposes, diminished considerably over the years.

Prior to 1982 coverage for corporations and for their directors, officers and employees would have been provided under most General Liability programs on a relatively broad basis. Generally speaking, coverage would have been provided for gradual as well as "sudden and accidental" events although coverage would not have been provided for claims arising out of deliberate emissions even when such releases were considered safe and met all regulatory requirements.

From about 1982 onward, coverage was removed for gradual pollution events with most General Liability insurance programs providing coverage for "sudden and accidental" events only.

In response to an emerging need for a broader form of insurance, the Environmental Impairment Liability policy was introduced and marketed in the mid 1970's. As of January 1, 1982, there were approximately 15 insurance companies providing this form of coverage and within the next year, there were about 40 insurers writing Environmental Impairment Liability coverage. At that time, the insurance market was in a very competitive phase and this stimulated insurer interest in various lines of coverage, including pollution insurance.

In 1983 the market began to collapse and by January 1985 there were only a handful of companies providing Environmental Impairment Liability insurance. To further complicate matters there was another important development in early 1985. At that time, most General Liability insurers which, to that point, had been providing "sudden and accidental" coverage, began to impose an absolute pollution exclusion. In other words, no Pollution coverage whatsoever was provided in the General Liability insurance program. Coincident with this, insurers which underwrote Directors and Officers liability coverage began to impose an absolute pollution exclusion in Directors and Officers Liability policies, as well.

The only policy form which has remained unaltered is the standard automobile policy form which does not contain a pollution exclusion. The automobile policy does, therefore, provide coverage for most liabilities arising out of the spill of pollutants from a motor vehicle.

There are numerous reasons for the collapse of the pollution liability market. The principal reasons are:

1. Losses, particularly in the United States were much greater than had been anticipated. It should be noted that in the context of this type of insurance, or generally any type of liability insurance, Canadian Corporations are, for various reasons, directly affected by what happens in the United States. While there are no ready statistics, insurers in the U.S. have been faced with monumental claims from pollution related losses. This has happened in Canada also, but to a much lesser degree.

2. Liberal court interpretations, again predominantly in the United States, resulted in an inability to adequately define exposures.

3. The imposition of complex regulations and stringent legislation in U.S. and Canadian jurisdictions.

4. New toxins and their potential effects were being discovered on a regular basis.

5. Greater public awareness, eg. Bhopal, Times Beach, Love Canal, etc.

6. Underwriting was largely geared toward production of business rather than an understanding of the potential exposures.

The property/casualty insurance market is cyclical in nature and clearly, over the past few years, it has dramatically changed the manner in which it has responded to the need for pollution liability insurance.

We have recently been in the midst of the most difficult insurance market ever encountered. 1985 and 1986 were exceptionally problematical from the standpoint of obtaining adequate coverage and limits. Also the cost of virtually all forms of insurance rose dramatically during this period. In early 1987 we saw the beginning of an improvement in the market and this improvement progressed throughout the year. While there has been a general market improvement there has not been a significant change in the position of the industry insofar as pollution insurance is concerned. There are, however, a number of facilities which currently provide Environmental Impairment Liability coverage and in some cases it may be possible to negotiate "sudden and accidental" coverage into the General Liability program.

II PROTECTION FOR DIRECTORS, OFFICERS AND EMPLOYEES

(a) Insurance

This conference deals with individual liability faced by directors, officers and employees for corporate pollution offences. In examining this from an insurance standpoint it should be noted that:

1. Coverage for liability which may be incurred by individuals is generally tied to coverage which is arranged for the corporation itself. Most third party liability policies, written in the name of the corporation, are extended to include coverage for any director, officer or employee while acting in such capacity.

   Any discussion in this paper relating to coverage available to the individual is, therefore, in the context of coverage which has been arranged by the corporation, but which would provide protection for personal liabilities of its directors, officers and employees.

2. Of the numerous remedies which are built into our judicial system, insurance is available as a protection for individuals in relatively few areas. Other papers delivered in this program have examined, in detail, the potential liabilities faced by individuals. Insofar as environmental matters are concerned the use of regulatory offence provisions that deter corporate misfeasance by piercing the corporate veil and fixing liability for breaches of statutory provisions directly upon directors and officers is becoming increasingly popular.

   Recent legislation relating to amendment of certain provisions of the Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act provides not only an express power to affix liability personally upon a director or officer, but also a potentially draconian penalty. For example, the relevant amendment to the EPA reads as follows:

147a.

(1) Every director or officer of a corporation that engages in an activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment contrary to this act or the regulations has the duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful deposit, addition, emission or discharge.

(2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

(3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

Considering only the penalties set out in the EPA, a director or officer of a corporation in breach of the Act could be liable for the following penalties:

- for breaches of the EPA involving hauled liquid industrial waste or hazardous waste that actually results in damage or injury, fines between $2,000 and $10,000 for a first conviction and $4,000 to $25,000 in the case of subsequent convictions for each day that the breach continues and/or imprisonment for up to one year.

- for breaches involving liquid industrial waste or hazardous waste that may result in damage or injury, the above fine maximums are reduced to $5,000 on first convictions and $15,000 on subsequent convictions, with the same minimums and possible incarceration.

- for other breaches that result in actual pollution, fines of up to $5,000 per day on a first conviction and up to $10,000 per day on subsequent convictions and/or imprisonment for up to one year.

- for non polluting breaches, fines of up to $5,000 per day on a first conviction and up to $10,000 per day on subsequent convictions.

The severity of these available sanctions, and the willingness of the judiciary to use such sanctions, including incarceration, to signify its disapproval of environmental irresponsibility as demonstrated by certain recent decisions (B.E.S.T. Plating and Jetco) must be carefully considered by directors and officers of corporations involved in such hazardous endeavours.

Clearly, insurance does not deal with matters such as incarceration, nor will it apply for fines or penalties which may be levied against individuals. Essentially, insurance may be available to pay damages assessed in an environmental tort action. Costs incurred in defending such an action would also be covered under an insurance policy. The specific areas for which insurance may be available today are outlined below:

Automobile Liability Insurance

The Standard Automobile Policy provides coverage for most liabilities arising out of the spill of pollutants from a motor vehicle, at least to the extent that the spill results in bodily injury, death or property damage and if the event arises out of the ownership, use or operation of the motor vehicle.

The Non-Owned Automobile Policy provides coverage with respect to liability arising from the use or operation of any vehicle which is used on behalf of the Insured but which is not owned by, or leased to the Insured.

Comprehensive General Liability Insurance (CGL)

An element of coverage may be provided under this type of policy. As mentioned previously, most insurers were prepared to provide "sudden and accidental" pollution insurance until 1985 at which time insurers began to exclude coverage for pollution losses altogether.

While there has not been a significant improvement in the position taken by insurers today, it would appear that they are becoming somewhat more flexible on the pollution issue. It may be possible to negotiate a degree of coverage under the CGL program at this time.

Excess Liability Insurance

In most cases, the limit of insurance carried by most corporations, under their Automobile and CGL policies is relatively low - typically $1,000,000. Most corporations augment this by carrying excess, or Umbrella Liability insurance. Again, depending upon the circumstances and the insurance markets involved, it may be possible today to obtain an element of "sudden and accidental" pollution coverage.

Environmental Impairment Liability Insurance (EIL)

This type of coverage was introduced well before the recent liability insurance "crisis" to respond to exposures which were not adequately addressed by the General Liability Policy.

EIL coverage is a relatively new form of insurance which responds to liability for damages caused by long-term or gradual pollution and can include sudden and accidental events as well. Examples of gradual pollution would include the leaching of contaminants from a dump onto the water table over a long period of time or sickness or disease caused by smoke or gas emissions from a factory over a period of years. The market for EIL insurance is very limited at this time.

While policy wordings differ from insurer to insurer a general outline of the nature of coverage provided by this type of policy is given below.

Coverage trigger	Claims made, meaning that for coverage to apply the claim must be made during the policy period, although the event could have occurred before the policy period.
Site Specific Coverage	In most cases the policy would not provide coverage on a blanket basis. All insured locations must be scheduled.
Definition of Environmental Impairment	Claims arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in Bodily Injury or Property Damage. One facility providing EIL insurance broadens the scope of coverage to include..... interference with or diminution of any environmental right or amenity protected by law This facility also broadens the definition of environmental impairment to include... generation of smells, noises, vibrations, light, electricity, changes in temperature or any other sensory phenomena but not fire or explosion.

Clean Up Costs	May or may not be covered depending upon the insurer involved. In no event would coverage be provided for sites owned, rented or occupied by the Insured.
Territory	Canada only or Canada and the U.S. depending upon insurer.
Defence Costs	Covered and included within the limit of liability
Principal Exclusions	Any claim arising from environmental impairment if the Insured knew about or could reasonably have foreseen such environmental impairment prior to the inception of the policy. Environmental impairment based upon or attributable to the Insured's intentional, willful or deliberate non-compliance with any statute, regulation, ordinance or instruction of any governmental agency or body. Any amount which the Insured may become obligated to pay for fines or penalties. Environmental impairment arising out of the ownership, maintenance, operation, use, loading or unloading of any automobiles, any vessel or watercraft, any oil or gas drilling platform situated off-shore, any deep water ports.

Liability arising out of bodily injury to any employee of the Insured.

Any costs for property damage to, or clean up within, property owned or occupied or rented to, or used by the Insured.

Insurance Markets

For Canadian corporations there are essentially three markets which provide EIL coverage. There are other facilities in the U.S., however these are small in number and do not offer significant limits. The market which would be most suitable for a Canadian corporation would depend upon the size and nature of operations of the corporation itself. The three markets are as follows:

Ontario Pollution Liability Association

This is a pool, comprised of approximately 30 insurance companies which provides a limited form of coverage. This facility has a maximum limit of $1,000,000 per claim and $2,000,000 annual aggregate. The deductible amount would range from $500 to $10,000. Coverage is restricted to Canada only. This facility would be suitable for smaller commercial operations and those which do not generate large quantities of hazardous wastes and do not use hazardous chemicals or large quantities of other chemicals in their day-to-day operations.

Ian Elliott Ltd.

This facility underwrites a program on behalf of a small group of Insurers. The maximum limit is $1,500,000 per claim and annual aggregate. The minimum deductible is $10,000. Coverage is restricted to locations in Canada.

This facility is generally suitable for companies which, in their day-to-day operations, would produce hazardous emissions or effluents, which generate hazardous waste, or which use hazardous chemicals or dangerous substances.

American International Group

The principal U.S. facility, available for Canadian corporations, is the American International Group. The maximum limit available from this insurer is U.S. $15,000,000 per claim and annual aggregate. Deductibles generally range between $50,000 and $1,000,000 depending upon the exposure.

This facility is suitable for large industrial organizations or any others which have a particularly severe pollution exposure.

Obtaining Quotations

With a completed application form it is generally possible to obtain a premium indication. Based on the indication, if there is interest in proceeding to purchase coverage, the insurer will arrange an environmental risk assessment of each location to be covered. This would be conducted by either in-house or independent engineering consultants and the cost is borne by the applicant for insurance. Once these assessments are completed, the insurer will provide a firm quotation (or possibly decline to provide coverage).

One final point should be mentioned concerning the availability of insurance. It is possible to buy substantial limits - U.S. $215,000,000 - to cover against the "big bang" type of event.

In response to the need for capacity which arose in the last 2-3 years, certain special purpose markets were developed. XL Insurance Company and ACE Insurance Company, for example, provide pollution coverage on a "sudden and accidental" basis. XL can provide a limit of U.S. $75,000,000 excess of $25,000,000 and ACE can provide a limit of

U.S. $140,000,000 excess of $100,000,000. These companies were capitalized by the initial policyholders and now write excess Liability insurance principally for U.S.-based multinational corporations, although Canadian companies are amongst the policyholders of each at this time.

(b) Indemnification

It is clear that directors and officers of Canadian corporations are not only faced with expanding statutory obligations and responsibilities, but also an increased exposure to personal liability. Accordingly, in addition to taking the steps required to meet the required standard of conduct, "prudent" directors and officers should avail themselves of whatever statutory protection that is available to them. To this end, a brief summary of CBCA section 119 and OBCA section 136, governing the indemnification of directors and officers, is provided.

A corporation may, at its option, indemnify a director for any expense reasonably incurred by him in settling, defending or meeting liability for any action against him on the part of anyone but the corporation if he meets the fiduciary duty of acting honestly and in good faith with a view to the best interests of the corporation. If the matter was penal in nature, the director must also have had reasonable grounds for believing his conduct was lawful. If the director was substantially successful on the merits in his defence of the matter, indemnification ceases to be an option of the corporation - he is entitled to it as of right.

If it is the corporation which is suing the director, whether directly or by means of a derivative action, it can only indemnify such director with court approval, which approval will not be granted if he did not act honestly and in good faith, etc., and, if the matter was penal, he did not have reasonable grounds for believing his conduct was lawful.

It is in the interest of directors and officers of corporations to ensure that protection is provided to them, by means of corporate by laws, or indemnification contracts to the fullest extent legally permissible.

(c) Loss Prevention

Obviously the risk of incurring liability, whether corporately or individually, can be minimized through the identification of exposures and the implementation of procedures which will eliminate or minimize pollution. To this end Marsh & McLennan Limited has available extensive services for its clients and other organizations. The following is a brief description of the environmental services which are currently available:

- <u>Environmental Risk Assessment</u>

  This service is intended to assess management practices relative to water, air and ground pollution potential. It consists of document reviews, management interviews, site surveys, regulatory agencies and waste contractor reviews, and a risk assessment report. The result provides management an understanding of the nature and extent of its potential pollution exposures, the strengths and weaknesses of its environmental management program and recommendations designed to address the program's deficiencies and limit exposures to liability.

- <u>Hazardous Materials Management Consulting</u>

  When our clients have specific concerns on environmental matters, often relating to regulatory compliance or potential liabilities, we can assist in such areas as:

  - hazardous waste identification
  - hazardous materials handling and storage practices
  - waste stream evaluations
  - treatment, storage and disposal practices
  - employee training
  - transportation
  - emergency planning

- Hazardous Waste Audit

  The scope of this is limited to an evaluation of management practices relating to the generation, handling, treatment, storage, transportation and disposal of hazardous wastes.

- Management of Underground Storage Tanks

  The scope of this service includes providing assistance to management in identifying potential pollution exposures from underground storage tanks, reviewing environmental safeguards, establishing testing, reporting and monitoring programs, and developing an impairment contingency plan.

- Environmental Management in the Healthcare Industry

  Healthcare organizations are unique in the type of waste generated, stored, transported and disposed of. Effective control of these substances is unlikely if management is not aware of the risks they present. This service helps identify and evaluate existing and potential environmental pollution exposures and can assist in the development of comprehensive environmental management plans. This area of service is similar to other environmental services previously described, but is specific to the unique conditions of healthcare institutions.

IV CONCLUSION

Of all the risks we face in today's society, few have been the subject of as much public debate and scrutiny as the risks of pollution and environmental contamination.

This growing awareness is supported by the fact that an increasing, albeit relatively small, number of firms are being assessed for violations of environmental regulations and damage to the environment, resulting from their improper handling of hazardous materials.

The problem is that few firms are fully knowledgeable of the regulations and many are unaware of their potential exposure to liability.

To protect the assets and reputation of their companies, top management and risk managers are faced with three primary concerns:

- Is our firm in full compliance with all environmental regulations?

- Is our firm exposed to environmental impairment liability?

- What is the potential of our exposure?

From all the confusion and controversy surrounding environmental pollution liability, one certainty has surfaced: those who use, handle, store, transport or dispose of hazardous materials can be held liable corporately and personally, for environmental damage caused by those materials.

THE COMPANY POLLUTED - SO WHY DID I GET CHARGED?

Minimizing Pollution Offence Liability of Corporate Directors and Officers

1. INTRODUCTION

The Courts, as well as the public, have expressed concern over corporations' lack of compliance with, and ability to avoid convictions or substantial penalties under, environmental legislation. The concerns and difficulties with respect to punishment of corporations alone may relate to their status; they are artificial constructs. The appropriateness of "punishing" such artificial constructs and the mode of "punishment" for wrongful behaviour has been the subject of considerable controversy over many years.

The paradox is demonstrated by the apt comment, in the 18th Century, by Edward, the first Baron Thurlow: "Did you ever expect a corporation to have a conscience when it has no soul to be damned, and no body to be kicked."[1] The nature of corporate decision-making raises obvious procedural and definitional issues in the "punishment" of corporations. Much of corporate decision-making, actions and omissions are as a result of the cumulative efforts of many individuals performing diverse roles, with the result that it is difficult to determine who, within the corporation, is at fault, if anyone is at fault at all.[2] The foregoing difficulties in defining the responsibility of corporations help to explain why director-officer liability has been imposed by legislation.

A major step towards increasing the sanctions available to control polluters was the proclamation, on December 18, 1986, of the Environmental Enforcement Statute Law Amendment Act ("Bill 112").[3] The legislation provides for increased penalties to be imposed on individuals and corporations, including officers and directors, that are convicted under the Environmental Protection Act,[4] (the "EPA"), the Ontario Water Resources Act,[5] and the Pesticides Act.[6] Of significance for the purposes of this paper is the provision respecting personal liability of officers and directors, irrespective of whether the corporation is prosecuted or convicted.

Section 147a of the EPA, as enacted pursuant to s. 17 of Bill 112, provides:

> "s. 147a. (1) Every director or officer of a corporation that engages in an activity that may result in the deposit, addition, emission or discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful deposit, addition, emission or discharge.
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted." (emphasis added)

A similar provision is found in s. 75 of the Ontario Water Resources Act[7] and s. 34g of the Pesticides Act[8] as enacted by s. 42 and s. 48, respectively, of Bill 112.

Before embarking on a review of s. 147a of the EPA, it should be mentioned that the proposed Canadian Environmental Protection Act ("Bill C-74, CEPA"), which received second reading on October 23, 1987, also provides for liability of directors and officers of the corporation. Section 114 of the draft CEPA provides:

> "s. 114. Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."

Section 117 of the draft CEPA expressly recognizes the defence of due diligence. That section provides:

> "s. 117. No person shall be found guilty of an offence under this Act, other than an offence under section 106 (fraud) or section 107 (damage to environment and death or harm to persons), if the person establishes that he exercised all due diligence to prevent its commission."

The defence of due diligence has been the subject of considerable discussion elsewhere and does not need further explanation in this paper. Suffice it to say that this defence, as set out in the well known case of R. v. The City of Sault Ste. Marie[9] has come to mean that:

- mens rea is not an ingredient of the offence, and
- an accused may be acquitted if, on a balance of probabilities, he uses all reasonable care to avoid the particular event giving rise to the prosecution.

2. A CLOSER LOOK AT DIRECTOR AND OFFICER LIABILITY UNDER SECTION 147a OF THE EPA

a. Are Directors and Officers of Every Corporation Liable?

The qualifying phrase in s. 147a(1) that "every director or officer of a corporation that engages in an activity that may result in the deposit .... of a contaminant" indicates that the duty on directors and officers does not apply to every corporation, but only to those corporations whose activities entail risk to the natural environment. However, the qualifying phrase does little to decrease the scope of liability of directors and officers when one considers that there are few corporations that are not engaged in an "activity that may result in the deposit .... of a contaminant". Also, the language of the EPA has been cast in the broadest terms. For example, a "contaminant" has been defined as virtually any substance which may have an adverse affect on plants, animals or humans.[10] Consequently, very few corporations, if any, can totally ignore the ramifications of s. 147a.

b. Who is a Corporate Officer?

While s. 147a makes it clear that "every director or officer of a corporation ..." is at risk of being prosecuted, the question of who is an officer of a corporation is not at all clear. While directors are, of course, readily identifiable, it may not be a simple matter to ascertain, with any level of certainty, who the officers of a corporation may be in fact.

The EPA does not provide a definition of an officer. Corporation statutes are of little assistance in this regard as they either do not provide a definition (Canadian Business Corporations Act[11] ("CBCA")) or fail to give a comprehensive definition (Ontario Business Corporations Act, 1982[12] ("OBCA")).

The OBCA defines officer as including persons that the board of directors specifically designates as an officer or anyone who holds the position of chairman or vice chairman of the board of directors, the president, the vice president, the secretary or assistant secretary, the treasurer or assistant treasurer or the general manager of the corporation. These would be obvious candidates in the corporate hierarchy. However, the legislation makes it clear that the category is not restricted to persons holding these titles. Rather, an officer is a person that performs functions normally performed by persons holding these traditional titles whether or not they hold that specific title.[13] In addition, a person is a "senior officer" if he or she holds one of five highest paid positions in the corporation.[14] In a small corporation, it is conceivable that a person at a relatively low level of management or even a secretary could be a senior officer or officer.

c. What is the standard of care that must be met by directors and officers and which directors and officers may be liable?

Determining the standard of care that directors and officers must meet is of importance both in terms of avoiding liability and establishing a due diligence defence. Section 147a simply states that the directors and officers are required to take "all reasonable care" to prevent pollution by the corporation. Case law interpreting the phrase "all reasonable care" indicates that the wording does not require that all steps be taken, only those that could be reasonably expected under the circumstances. The case law makes no distinction between "all reasonable care" and "reasonable care". The degree of "reasonable care" to be exercised is dependent upon the circumstances of the case.[15] Of some comfort is the finding that "reasonable care" has been limited not to include personal risk to the family of the accused.[16] The phrase "all reasonable care" was used by the Supreme Court of Canada in R. v. The City of Sault Ste. Marie[17], where it was stated that a strict liability offence is one where the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

This involves consideration of what a reasonable man would have done in the circumstances.

Whether or not a particular director or officer has taken "all reasonable care" appears to depend, to some degree, on the character of the management structure of the corporation and his/her particular responsibility in the corporate hierarchy. Under corporate law, directors have the duty to manage or supervise the management of the business and affairs of the corporation "in the best interests of the corporation".[18] Accordingly, it is recognized at law that the directors are primarily responsible for the operation of a corporation. However, the corporate legislation recognizes that many of these powers may be delegated to the officers[19], and managing committee or managing director.[20] When directors delegate their powers, they must exercise due care in selecting competent officers.[21] Directors may be absolved from liability if, as part of managing the business of the corporation, they rely, in good faith, upon financial reports or reports of lawyers, accountants, engineers, appraisers or other professionals.[22]

Directors of a large corporate structure often rely upon a group of professional managers to operate the business, with the result that they have little involvement in the day-to-day operations of the business. The standard of care applicable to directors may, therefore, be that they must take "all reasonable care" in selecting a competent manager to operate the business on a daily basis. If this is the case, the delegation of extensive powers to govern the business of the corporation may result in the insulation of directors and senior officials from liability for alleged violations of environmental laws.

This is not to say that directors can turn a blind eye to the operations of the business. There must still be an adequate flow of information from the manager to the directors respecting the goals, programs and activities of the corporation as they relate to environmental matters. This is especially true of independent outside directors. They too should undertake active and rigorous scrutiny of corporate environmental activities, by keeping abreast of and acting upon information supplied by the managers/officers.

Where the business of the corporation is effectively operated by professional managers, only those officers with powers and duties relating to environmental activities may be liable for violations of environmental laws. Officers' liability (i.e., liability of the managers) will depend upon whether they exercised "all reasonable care" when exercising their powers and duties in relation to the environmental activities for which they are responsible.

In conclusion, if directors have delegated their power over an activity to a competent officer and they have kept abreast of and acted upon information supplied by the officer/manager respecting the goals, programs and activities of the corporation as they relate to environmental matters, and they have no knowledge of any circumstances which may indicate a possibility of pollution resulting from the activity and they are not deliberately ignoring facts which may result in pollution, then they may have discharged their duty to take "all reasonable care" and thereby avoid liability for violations of environmental laws. The same may be said with respect to officers within a corporate hierarchy if the officers have specialized duties and responsibilities which are not at all connected with the activity that resulted in the alleged pollution.

3. HOW TO INCREASE AWARENESS OF ENVIRONMENTAL ISSUES

To say that directors and officers must keep abreast of environmental issues and laws and their application is to state the obvious. Given the recent director and officer liability provisions in the Ontario Bill 112 and the federal draft CEPA, they must do so in order to ensure adequate compliance with such laws.

The following suggestions are offered as the most common actions taken by officers and directors in order to enhance their awareness of environmental issues:

1. retain the services of an environmental manager/director who is to be responsible for keeping abreast of environmental laws and issues, and informing officers and directors of such laws and issues;

2. retain and/or consult legal counsel experienced in environmental law;

3. establish and circulate an environmental newsletter that addresses new developments in the environmental field;

4. attend, and obtain written materials from environmental programs and conferences;

5. subscribe to environmental law newsletters or reporting series;

6. take notice of actions taken by competitors and industry associations in regard to environmental matters and compliance with environmental laws;

7. identify interest groups that are active in environmental lobbies, since their opinions and observations often play a significant role in the alteration of laws in Canada; and

8. maintain contact with various government authorities, most notably the Ministry of the Environment. In addition to direct contact, attend Ministry-sponsored conferences, public meetings, etc.[23]

4. PREVENTATIVE CARE TO LIMIT OR AVOID DIRECTOR-OFFICER LIABILITY

a. Directors

In an effort to comply with environmental laws and, in the event of non-compliance, minimize or avoid liability, the board of directors should consider the following actions:

1. develop a written environmental policy by which the corporation is to guide its activities. Such

a policy may state, for example, that the corporation, its officers and directors shall take every available precaution towards ensuring that their activities do not result in unacceptable adverse effects on human health and well-being and on the environment;

2. consider retaining the services of an environmental manager/director who is knowledgeable in both current environmental standards and technical matters. This will assist the board in keeping abreast of all new developments in the application of environmental laws;

3. ensure that an environmental audit (i.e., systematic, documented, objective examination of company performance as it relates to meeting environmental requirements) of the corporation's past, present and future activities is undertaken, and that an ongoing environmental audit program is in place;

4. address the issue of establishing a pollution control program. The board should be prepared to spend an appropriate amount of time in determining the most efficient and economically feasible environmental control systems applicable to the business of the corporation. In doing so, the board should consider future developments so as to ensure that the system is not already, or will not soon become, obsolete. Experts, who can advise as to the kinds of technology available, should be consulted;

5. establish a proper environmental protection program and ensure the effective operation of such program so as to ensure compliance with relevant environmental laws. This will usually entail a routine monitoring plan to determine, for example, the levels of discharge. It may also mean setting up of a regular maintenance plan to ensure that pollution control equipment that could fail and thereby cause adverse effects on the environment are regularly checked and repaired so as to minimize the likelihood of their malfunctioning with the result of an environmental catastrophe (these matters may soon be legal requirements in any event);

6. ensure that officers regularly provide reports on environmental matters to the board. Such reports should be diligently and thoroughly reviewed by the board;

7. ensure that officers report to the board any potential or actual non-compliance with environmental laws and require the appropriate officers to forthwith take necessary action to maintain or bring about compliance;

8. ensure the establishment of remedial and contingency plans to handle spills or accidents and procedures to be followed to rectify or address non-compliance with environmental laws. For example, procedures for informing the appropriate authorities in the event of an accident should be understood and followed by all employees;

9. ensure that officers report to the board any environmental concerns brought to the officer's attention, either by the public, government authorities, employees, supervisors or other representatives of the corporation. The board must then ensure that these concerns are dealt with in an appropriate timely manner; and

10. ensure that any prior or forthcoming environmental charges, prosecutions or convictions, if any, are brought to the attention of the board. It should then ensure that the compliance system take these alleged or proven violations into account.[24]

b. Officers

To comply with environmental laws and, in the event of non-compliance, minimize liability, officers should consider the following steps:

1. consult legal counsel experienced in environmental matters so as to keep abreast of all new developments in the application of environmental laws and regulations;

2. consult regularly with the environmental manager/director, on day-to-day issues of concern;

3. implement the environmental policy established by the board;

4. ensure, in writing, that all employees and representatives of the corporation are aware of their individual, as well as the company's, legal responsibilities to comply with environmental legislation, such as, for example, the statutory requirement to notify the Ministry of a spill;

5. review assigned and statutory responsibilities of officers to determine how their duties and powers interact with the environmental activities of the corporation;

6. ensure that the pollution control program is put in place;

7. implement the environmental protection program and ensure that it is properly operated (i.e., monitoring and maintenance of the program);

8. ensure that environmental audits are undertaken and have ongoing audit reports carried out at reasonable intervals. On being satisfied that the audits and ongoing reports are complete and accurate, the officers should submit same to the board in a timely manner;

9. ensure that employees and representatives of the corporation are properly trained with respect to contingency plans and remedial and preventative measures to respond effectively to environmental problems and that such employees report, in a timely manner, such matters to the appropriate officers of the corporation as well as appropriate government authorities that are required to be notified;

10. notify the board when an officer believes that he/she does not have authority to ensure environmental compliance;

11. where there is non-compliance or potential non-compliance with environmental laws, officers should ensure that all reasonable steps are taken to stop or prevent the non-compliance;

12. ensure that environmental concerns that are brought to the attention of the officer are addressed in a timely manner; and

13. generally ensure that the board's environmental directives, policies and requests are carried out, with the resulting activities reported back to the board.[25]

5. PROTECTION OF DIRECTORS AND OFFICERS IN THE FORM OF INDEMNIFICATION AND INSURANCE

In the event of prosecution against directors and or officers for an offence resulting from non-compliance with environmental laws and regulations, directors and or officers may be subject to the penalties imposed under the environmental legislation, including substantial fines. Accordingly, directors and officers should consider an indemnification from the corporation and the need for environmental insurance which covers directors and officers.

Corporate statutes allow the corporation to indemnify its directors and officers under certain circumstances. Section 136(1) of the OBCA[26] provides that:

> "136(1). A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or

> officer of such corporation or body corporate, if,
>
> (a) he acted honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) in the case of a criminal or administrative action or proceeding that is enforced by monetary penalty, he had reasonable grounds for believing that his conduct was lawful."

Therefore, provided that a director or officer exercised his/her duties in good faith, and in the best interests of the corporation, and had reasonable grounds for believing that his/her conduct was lawful, then the corporation may indemnify such directors and officers against all costs, charges and expenses that are reasonably incurred in respect of an environmental prosecution. Officers and directors without such indemnification may wish to consider obtaining guarantees, similar to the above indemnification, from the corporation.

Directors and officers may also wish to consider obtaining some form of environmental pollution insurance, such as Environmental Impairment Liability Insurance ("EIL"), that covers not only the corporation but also directors and officers.

While it is beyond the scope of this paper to review the different forms of environmental pollution insurance, the following briefly highlights the coverage offered by EIL insurance. EIL insurance indemnifies the insured (defined to include any officer, director, stockholder, partner or employee of the insured corporation while acting in his/her capacity as such and the personal representatives of the insured corporation with respect to liability incurred by the insured corporation) against all damages that the insured is legally obligated to pay under the concept of joint and several liability and all costs and expenses (defined to include costs and expenses of litigation, compromise, settlement, adjustment and investigation of claims) incurred by the insured in the investigation, defence or settlement of any claim covered by the insurance policy. EIL insurance responds to an insured's liability for damages caused by long-term or gradual pollution as well as sudden and accidental pollution events (with restrictions). The sudden and accidental pollution events coverage is much broader than that which has, in the past, been provided by the insurance industry under, for example, a general liability policy. An example of gradual pollution that may be covered by EIL insurance could include sickness caused by smoke and gas emissions from a factory over a period of years. Coverage specifically includes off-site clean-up costs and protects the insured from many liabilities emanating from the "Spills Bill" (Part IX of the EPA) and other similar legislation.

In view of increased enforcement activities of, and prosecutions by, the Ministry of the Environment, coupled with the increased penalties under Bill 112 that directors and officers may be subjected to for pollution offences, it is suggested that directors and officers seriously consider obtaining an indemnification from the corporation and environmental pollution insurance that covers directors and officers as well as the corporation.

6. LEGAL DEFENCES TO A PROSECUTION

While it is beyond the scope of this paper to comprehensively deal with all of the various legal defences that may be available to a director or officer in defending against a prosecution for a pollution offence, the following is a brief review of selected defences:

1. Due diligence defence: Since the milestone 1978 decision of R. v. Sault Ste. Marie,[27] "public welfare" prohibitory provisions of environmental legislation have been held to be offences of strict liability. As previously set out, the Supreme Court of Canada decision has come to mean primarily that:

    - mens rea is not an ingredient of the offence; and
    - an accused may be acquitted if, on a balance of probabilities, he uses all reasonable care to avoid the particular event giving rise to the prosecution.

    In this regard, proper design, installation, maintenance, inspection and successful communication of such information and directions are requried. The Court held that an accused employer or principle must show that (i) it established a proper system to prevent the commission of the offence; and (ii) it took all reasonable steps to ensure the effective operation of the system.[28]

2. A "mistake of fact" may lead to an acquittal of the accused if he proves that he reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.[29]

3. Mitigation of the damage will not succeed as a defence, for the due diligence is in the prevention of the offence. Therefore, a clean-up or reduction in damage after the event does not affect liability, although it may be a mitigating factor in sentencing.[30]

4. Acts of God are a defence. An Act of God is an extraordinary occurrence or circumstance to which no man contributed, which the accused could not have foreseen and could not have guarded against. This defence is rarely successful.[31]

5. Deliberate disobedience or sabotage by employees is a defence.[32]

6. Inaction or condonation by government officials is not a defence. Any company choosing to operate an activity which places the public health or safety at risk is held to have access to the necessary expertise to conduct that activity safely.[33] However, the opposite opinion was advanced in the case of R. v. North Can. Enterprises Limited,[34] which held that immunity from prosecution might be granted where the Court finds that the Ministry of the Environment was aware of the construction of a sewage works and failed to take any action to require the person responsible for it to meet Ministry requirements for approval. However, this case may be limited on its facts to the particular provisions under the Ontario Water Resources Act.[35]

7. THE ATTITUDE OF THE AMERICAN COURTS RESPECTING DIRECTOR-OFFICER LIABILITY

A brief review of American case law may be of assistance in determining the approach that Canadian Courts may take when considering director-officer liability. Unlike

Ontario Bill 112 and federal draft CEPA, neither the legislative history nor the express language of the American hazardous waste statutes specifically provide for director-officer liability. Nevertheless, American Courts have liberally interpreted hazardous waste statutes to find corporate officer liability.[36]

In United States v. Northeastern Pharmaceutical and Chemical Co.,[37] the defendant corporation's manufacturing process produced toxic by-products. During the defendant president's absence, the vice-president of the defendant corporation was responsible for the operation of the plant. During that absence, corporate employees deposited several drums of hazardous waste into a trench on a nearby farm. The Court held the vice-president liable for illegal disposal of waste under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), finding that he had supervised the disposal of the waste. Notwithstanding the fact that the president had no prior knowledge of the illegal disposal of the hazardous waste and that he was over one thousand miles away during the disposal period, the Court found him liable by relying on the fact that the president had the capacity and general responsibility as president to control the disposal of hazardous waste.

In United States v. Ward,[38] the defendant was the president of a corporation dealing with electrical voltage transformers. The corporation stored transformer insulation fluid containing polychlorinated biphenyls on the company's premises. The president contracted with a third party for disposal of the waste. Without the president's knowledge, the third party sprayed the toxic waste along roadsides. The Court held the president personally liable under CERCLA, notwithstanding the fact that he was unaware of the illegal dumping. Liability was imposed on the corporate officer, simply because he was personally involved in the decision to have the third party dispose of the hazardous wastes. The Court explained its decision stating:

> "to give the statute the interpretation argued by ... Ward (president) ... would allow generators of hazardous waste to escape liability ... by closing their eyes to the method in which their hazardous wastes were disposed of."[39]

In United States v. Pollution Abatement Services, Inc.,[40] the defendant president and vice-president operated an industrial waste disposal service adjacent to a creek. An action was filed against the defendents under the Rivers and Harbors Act, alleging that the defendants were discharging refuse into the creek. In finding the corporate officers liable, the Court stated that there was no reason to shield from civil liability those corporate officers who are personally involved in or are directly responsible for statutorily proscribed activity.

The above cases demonstrate that the American Courts have taken a liberal approach to impose liability on corporate officers. Corporate officers that are personally involved in, or directly responsible for, statutorily proscribed activity respecting environmental matters, may be held personally liable for environmental offences. Simply closing their eyes to the method in which pollution matters are dealt with (i.e., method of waste disposal) will not absolve corporate officers and directors from personal liability.

8. CONCLUSION

Courts and the public have, in the past, shown frustration when registering convictions and imposing penalties against corporations. In some ways, "punishing" an artificial construct, such as a corporation, alone went against the grain of common sense. This may help to explain the new emphasis that has been placed upon directors and officers liability for pollution offences. Bill 112 (and CEPA) reflect this increased public concern over environmental issues. It remains to be seen whether the judiciary will support the imposition of substantial fines and imprisonment of corporate directors and officers.

In the meantime, a number of steps may be taken by directors and officers to ensure compliance with environmental laws and, in the event of non-compliance, minimize or avoid liability. We have outlined those steps that may be taken. We also suggested a number of ways in which officers and directors could increase their awareness of environmental issues and thereby improve their ability to comply with environmental laws. For the purpose of protecting directors and officers, in the event of a prosecution, we suggested that directors and officers consider obtaining indemnification from the corporation as well as some form of environment pollution insurance. Finally, we outlined a number of defences to environmental prosecutions.

In conclusion, there is little question that Bill 112 will dramatically change the attitude toward environmental prosecutions. In the past, negotiations with the Ministry of the Environment prosecutors often lead to guilty pleas and appropriate fines. However, with Bill 112 in effect (and with the enactment of CEPA), we may now expect an increased volume of environmental litigation, using all possible defences and increasingly sophisticated preventative mechanisms, such as environmental audits by corporations to assess compliance with environmental laws. Whether this will lead to an overall improvement to the quality of the environment is a matter that remains to be seen.

ENDNOTES

1. R.M. McLeod and J. Swaigan, "Officers and Directors' Liability", Corporate Environmental Responsibility and Liability, Canadian Bar Association - Ontario, Continuing Legal Education, May 22, 1987, pp.1,2.

2. Ibid at pp.1,2.

3. S.O. 1986, c.68.

4. R.S.O. 1980, c. 141 (as am.).

5. R.S.O. 1980, c. 361 (as am.).

6. R.S.O. 1980, c. 376 (as am.).

7. Supra, Note 5.

8. Supra, Note 6.

9. [1978] 2 S.C.R. 1299.

10. Supra, Note 4, s. 1(1)(c).

11. S.C. 1974-75-76, c. 33.

12. S.O. 1982, c. 4, s. 1(1).

13. Ibid, s. 1(1).

14. Ibid, s. 1(1).

15. R. v. C.P. Limited (1977), 2 Fisheries Poll. R. 99 (B.C. Prov. Ct.); Can. Tungsten Mining Corp. v. The Queen (1976), 5 C.E.L.N. 120 (N.W.T. S.C.).

16. R. v. Milaster (1982), 3 Fisheries Poll. R. 403 (B.C. Prov. Ct.); R. v. Western Forest Industries Limited (1978), 9 C.E.L.R. 57 (B.C. Prov. Ct.).

17. Supra, Note 9.

18. Supra, Note 12, s. 115(1); and Note 11, s. 117(1).

19. Supra, Note 12, s. 133; and Note 11, s. 116.

20. Supra, Note 12, s. 127(1) restricted by s. 127(3); and Note 11, s. 110(1) restricted by s. 110(3).

21. Supra, Note 12, s. 133; and Note 11, s. 116.

22. Supra, Note 12, s. 135(4); and Note 11, s. 118(4).

23. Based in part on E. Rovet, "Outline of Paper on Managing Environmental Liability", Industrial Waste Management Conference, Institute for International Research, November 23-25, 1987, p.8.

24. Based in part on R. Rovet, Ibid, at p.7; R.M. McLeod and J. Swaigan, Supra, Note 1, pp.5,6; M.G. McKenny, "New Enforcement Procedures in Ontario", Smart Waste Management Practices, Gordon Group Conference, May 28, 1987, pp.14,15.

25. Ibid.

26. Supra, Note 12.

27. Supra, Note 9.

28. Ibid, see also R. v. Elf Oil Canada Limited (1974), 2 Fisheries Poll. R. 27 (N.W.T. Mag. Ct.); R. v. Gulf of Georgia Towing Company, [1979] 3 W.W.R. 84 (B.C.C.A.); R. v. District of North Vancouver (1982), 12 C.E.L.R. 67 (B.C. Co. Ct.); R. v. Jack Cewe Limited (1981), 10 C.E.L.R. 120 (B.C. Prov. Ct.); R. v. Panartic Oils Limited (1983), 12 C.E.L.R. 29 (N.W.T. Terr. Ct.); R. v. MacMillan Bloedel Industries Limited (1973), 13 C.C.C. (2d) 459 (B.C. Prov. Ct.).

29. R. v. Chapin, [1979] 2 S.C.R. 121; R. v. Fabricated Plastics Limited (summary) (1979), 8 C.E.L.R. 172 (Ont. Prov. Ct.); R. v. North Arm Transportation Company Limited (summary) (1977), 9 C.E.L.R. 53 (B.C. Co. Ct.); R. v. Hill (1979), 8 C.E.L.R. 126 (B.C. Co. Ct.); R. v. Richmond Plywood Corporation (1981), 63 C.C.C. (2d) 99 (B.C. Co. Ct.).

30. R. v. C.P. Limited (1977), 2 Fisheries Poll. R. 99 (B.C. Prov. Ct.); R. v. Cyanamid Canada Incorporated (1981), 11 C.E.L.R. 31 (Ont. Prov. Ct.).

31. R. v. North Can. Enterprises Limited (1974), 20 C.C.C. (2d) 242 (Ont. Prov. Ct.).

32. Ministry of Environment v. Exolon Company of Canada (1981), 36 O.R. (2d) 530 (Prov. Ct.); R. v. Aberdeen Paving Limited (1981), 45 N.S.R. (2d) 344 (C.A.).

33. R. v. Placer Devs. Limited (1983), 13 C.E.L.R. 42 (Yukon Terr. Ct.); R. v. Spataro Cheese Products Limited (1981), 10 C.E.L.R. 128 (Ont. Prov. Ct.).

34. Supra, Note 31.

35. The preceding defences are taken from D.H. Wood, "Environmental Law and Regulation: Principles and Practice Applied to Industry", Smart Waste Management Practices Conference, The Gordon Group, May 28, 1987, pp.80,83.

36. H.J. Cronk and P. Huddleston, "Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?", [1987] 38 Mercer Law Review 677.

37. 579 F. Supp. 823 (W.D. Mo. 1984), aff'd in part, rev'd in part, 25 Env't. Rep. Cas. (B.N.A.) 1385 (8th Cir. Dec. 1, 1986).

38. 618 F. Supp. 884 (E.D.N.C. 1985).

39. Ibid, at p.895.

40. 763 F. 2d 133 (2d Cir.), cert. denied, 106 S. Ct. 605 (1985).

THE COMPANY POLLUTED -
SO WHY DID I GET CHARGED?

Minimizing Pollution Offence Liability
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Corporate Directors and Officers

Roger Cotton
McCarthy & McCarthy

Lori J. Nicholls
McCarthy & McCarthy

January 21, 1988

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RESEARCH FOUNDATION CONFERENCE

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Minimizing Pollution Offence Liability of Corporate Directors and Officers

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Copyright
Michelle Swenarchuk
Counsel
Canadian Environmental
Law Association

1. Liability of Employees to Criminal Prosecution

The applicable principle regarding which, if any, individual in a corporation might be criminally responsible for a pollution offence was established in the Supreme Court of Canada in the Sault Saint Marie case in 1978.[1] The case concerned a charge against the City under Section 32(1) of the Ontario Water Resources Act[2] (now Section 16(1), resulting from pollution of fresh water springs by a company contracted by the City to dispose of waste. The company was convicted, and the issue before the Supreme Court was whether the City was also guilty of the offence. The Court considered at length the nature of the "criminal" (mens rea) intent which must be established in public welfare offences, such as pollution charges, and established the three categories of offences now recognized. The three categories are:

1) Offences in which mens rea must be established (i.e. the true criminal offences)

2) Offences of "strict liability" in which mens rea need not be established for a conviction to occur, but in which an accused may raise the defences of reasonable care or a reasonable belief in a mistaken set of facts, and

3) Offences of "absolute liability" where lack of fault will not prevent a conviction, but mere performance of the proscribed act will result in a finding of guilt.

Having thus analyzed the nature of the mental element of intention to be proved for these offences, the Court then turned to the question of where, or within what individual in a corporate structure, the intent must lie in order to create individual liability. First, to establish liability in a defendant, corporate or individual, the court looks at the issue of whether the potential defendant had control of the actions causing the pollution:

> The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution ...
>
> *Prima facie*, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so ... but failed to do so ...
>
> In every circumstance the question will depend on an assessment of all the circumstances of the case. (p. 1330)

Then the court must consider defences available to the defendant (in criminal and strict liability offences). In discussing available defences, the court also focussed on the responsibility of an employee within the corporate structure.

> Since the issue is whether the defendant is guilty of an offence, the doctrine of *respondeat superior* has no application. The due diligence, which must be established, is that of the accused alone. Where an employer

> is chargedin respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilfull involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. (p.1331)

Thus, in a case where charges against both the corporation and individual employees are contemplated, the corporation may be acquitted and the employee convicted if the corporation had a proper system to prevent such an occurrence, but the employee acted without the corporation's direction. If the employee is the "directing mind" in regard to the action in question, he may be convicted.

Two reported cases provide examples of the application of these principles.

In the Baker case[3], both the corporate employer and the employee, Baker, were charged under Section 145 of the Environmental Protection Act, with completing false waybills regarding the reception, transportation and placement of liquid wastes. Baker, the company's dispatcher, characterized by the court as the "directing mind" of the corporation for this purpose, completed the waybills and deliberately omitted reference to an unauthorized storage facility for the wastes. The Court of Appeal rejected the lower court's position that evidence must show that Baker intended to deceive by his statements, and found that the section merely requires proof that the maker of the false statement knows it to be true, i.e. that the offence is one of strict liability within the terms of the Sault Ste. Marie decision. The case was referred back to the provincial court judge to establish a sentence. The court also commented that "The Environmental Protection Act is an important public welfare statute designed to protect the environment for all members of the public", an indication of the senior Ontario Court's current position on statutes of environmental protection.

The second reported case, R. v. St. Mary's Cement Ltd. et al., a decision of Provincial Offences Court Judge Camblin provides an example of a case in which the corporate defendant was acquitted, and the non-officer, non-director employee convicted. The case involved leakage of hydraulic fluid from a truck's steering system, which caused a fluid slick over one kilometer long in downtown Toronto, on which a police cruiser spun out of control, and other cars and streetcars had difficulty manoeuvering. The corporate and employee defendants were charged under Section 14(1)(e) of the Environmental Protection Act with causing or permitting the deposit or discharge of a contaminant, namely fluid from a motor into the natural environment that was likely to impair the safety of any person. The employee, Goszczynski, an experienced mechanic, had made repairs to the truck and then followed it back to the yards to which it was being driven, and apparently did not see, and did not prevent, the leakage and slick that many others reported and for which the truck was responsible. The Court found that the company, in providing a highly skilled and experienced mechanic, had taken the necessary steps to avoid pollution, but that the mechanic, being in control, "took a calculated risk which resulted in the aforementioned situation, and this charge being one of strict liability", he was convicted of the charge. For reasons not specified in the decision, the court professed great sympathy for the employee and set a fine of $500.00.

According to counsel for the Ministry of the Environment[5], a small number of other unreported cases of employee convictions exist, but the decisions do not clearly articulate judicial reasoning. These include:

> R. v. Burton[6], a conviction under Section 4 of the Pesticides Act and Regulation 751 under that Act, against a pesticide sprayer who applied four gallons of the pesticide chlordane to a house in which no pests existed, and which poisoned the ihabitants;
>
> R. V. Texaco and Green[8], in which the employee Green "turned on the tap" in the discharge of 22,000 gallons of caustic soda into the environment; and
>
> R. v. Andrews[9], in which two employee pesticide sprayers discharged a pesticide into a water course.

Conclusion:

Employees may be charged criminally with pollution-related offences, and may be convicted with or without their corporate employers, if the employee exercised actual control over the activity which caused the pollution. In strict liability offences, each accused will have the opportunity to invoke the defence of reasonable care (or due diligence), and where a corporate accused can show a system designed to prevent commission of the offence, and that the employee operated without the approval of the corporation, the employee may be convicted and the corporate employer acquitted.

2. Vulnerability of employees to employer discipline

(a) Right to refuse to pollute

Given the relative lack of decision-making power of an employee within a corporate structure, and the likelihood of employer discipline against an employee who refuses to carry out an order, even if that order may involve polluting the environment, employees, unions, and environmentalists have been concerned to obtain legislative protection of workers in the form of a right to refuse to pollute.

Although that protection now exists in Section 134b of the Environmental Protection Act[10], the right is not sufficiently clearly stated as to be readily understandable to workers or managers. More important, its existence is largely unknown to the public.

The section provides that employees cannot be disciplined or dismissed for complying with named environmental statutes, for seeking enforcement of the Acts, for providing information to the Ministry of Environment or a provincial officer, or for testifying in a proceeding relating to enforcement of these Acts or regulations.

The section then provides to an aggrieved employee the same procedure used in unfair labour practice complaints under the Ontario Labour Relations Act, namely the investigation of the complaint by a labour relations officer, and the right to a hearing before the Board if a settlement is not previously reached. In such a hearing, the burden of proof is on the employer to disprove its alleged contravention of the Act. This provision is consistent with treatment of unfair labour practice complaints under the Labour Relations Act. One complaint to the Labour Board has been made under section 134b of the Environmental Protection Act[12], but it was withdrawn without a determination on the merits. The employee alleged that he had been dismissed for refusing to perform a task which would have contravened Section 21 of the Environmental Protection Act, concerning pollution control devices on automobiles.

Some critics of the section have suggested that a procedure similar to that provided workers under the Occupational Health and Safety Act[13] should be added to the current EPA section. That procedure would provide that when an employee refused to perform a task, on grounds that it would contravene an environmental statute (i.e. the employee exercised a "right to refuse to pollute") an inspector would be called to report on whether the employee's judgment was correct, and the employee could continue not to perform the task pending delivery of the inspector's report, but could be re-assigned, though not in a punitive way. No other employee could be assigned the disputed task in the interim. The employee would receive full pay for the period of the dispute. If the inspector upheld the employee's view, the employer would not legally be able to assign any employee to perform the task; if not, the disputing employee could be ordered to complete the task.

The Ontario Federation of Labour may become involved in a lobbying campaign to add this procedure to that now provided in the Environmental Protection Act.

(b) Protection for "Whistle-blowers"

A limited protection for employees who report infractions of environmental laws is also contained in section 134b of the Environmental Protection Act, since employer reprisals are forbidden against employees who seek enforcement of the statutes, or provide information to the Ministry of the Environment or a provincial officer. No protection exists, however, if the employee reports on infraction to the press or a non-governmental organization, unless the Labour Relations Board could be convinced, on a complaint, that such an action was part of the employee's seeking the enforcement of the Act.

Lobbying initiatives are also being considered by labour and environmental groups to strengthen this protection.

NOTES

1. R. v. the Corporattion of the City of Sault Ste. Marie, [1978] 2 S.C.R. 1299

2. Ontario Water Resources Act, R.S.O. 1980, c.361, s. 16(1)

3. R. v. Mac's Liquid Disposal (1982) Ltd. & Thomas Baker, Ontario C.A., File No 1081/85, October 1987

3.a. Environmental Protection Act, R.S.O. 1980, c.141

4. R. v. St. Mary's Cement Ltd. et al., (1981) 11 C.E.L.R. 15

5. John Swaigen and Dianne Saxe, personal communications

6. R. v. Burton, July 1987,

7. Pesticides Act, R.S.O. 1980, c.376, and Regulation 751, R.R.O., 1980, as amended

8. R. v. Texaco and Greer, Cayuga Provincial Offences Court, Nov. 19, 1986

9. R. v. Andrews, Peterborough Provincial Offences Court, Oct. 28/87

10. The Environmental Protection Act, Section 134b, ss (2) provides:

11. Ontario Labour Relations Act, RSO 1980, s.89

12. Karel Draan, Complainant v. custom Muffler Ltd., Respondent v. Minister of the Environmen, Intervenor, [1985] O.L.R.B. Rep. October 1461

13. Occupational Health and Safety Act, R.S.O. 1980, c.321, s.23

M.O.E. Policy Manual

POLICY TITLE UNIFORM ENVIRONMENTAL ENFORCEMENT

NO. 05-05-01

Legislative Authority

Environmental Assessment Act
Environmental Protection Act
Ontario Water Resources Act
Pesticides Act
Provincial Offences Act

Statement of Principles

This policy describes the principles and procedures used by the Ministry to deliver a uniform approach to enforcing its Acts and Regulations. The Ministry will use an appropriate mix of legal remedies to ensure compliance with environmental law. The principles and procedures described below are to be applied to the public and private sectors.

Definitions

Control Documents A control document is any written instrument which carries statutory authority. These include Minister's reports, licences, permits, certificates of approval, control orders, orders, requirements and directions and program approvals.

May 6, 1986

Point of Contact Director
Investigations and Enforcement Branch

Effective Date
May 5, 1986

<u>Occurrence Report</u> — A written document by which environmental incidents are reported and recommendations for action identified.

1. Principles for Uniform Environmental Enforcement

1.1 Prosecution Principles

The Ministry will follow established principles of prosecution which include:

a) Prosecution will be the result of an informed judgement which includes the proper exercise of prosecutorial discretion;

b) Equal protection and benefit before and under the law;

c) Prosecution will be administered in an even-handed, non-discriminatory and fair manner which advances and protects the public interest;

d) Where there is sufficient evidence to prove all the essential elements of the offence but the proper exercise of prosecutorial discretion dictates no prosecution, the reasons for that decision shall be recorded in writing in the confidential investigative file;

e) The penalty requested by the Crown Prosecutor upon conviction will be commensurate with the seriousness of the offence, and the circumstances of the offender including the cooperation of the offender.

1.2 Considerations in The Application of Prosecutorial Discretion

For the purpose of section 1.1 a proper exercise of the principles of prosecutorial discretion shall include consideration of:

a) whether the violation poses a significant risk or adverse effect to humans or the environment;

b) whether pollution from the source is a serious obstacle to achievement of Ministry air quality or water quality objectives;

c) any unsatisfactory history of pollution control or negative attitude as indicated by the level of effort;

d) any unsatisfactory record of compliance with Ministry orders;

e) whether the violation seems deliberate in nature or, if not deliberate, the degree of negligence involved;

f) whether there has been concealment of information;

g) whether the violation was repeated or a warning was disregarded;

h) whether the prosecution is likely to have a deterrent effect on the sector generally or on others;

i) whether the credibility of the regulatory process with those regulated and the public requires prosecution; or

j) whether failure to prosecute would tend to bring the law into disrepute.

A minor offence may be prosecuted by way of ticket procedures.

1.3 Control Documents

The Ministry will use control documents as a means of limiting, eliminating and controlling pollution in Ontario. Any control document issued by the Ministry will be binding and enforced.

1.4 Preparation of Control Documents

Subject to the legislation and to other policies, control documents should be prepared such that they:

a) require intermediate steps in a control order to be completed in a timely and regular fashion;

b) require the installation of the pollution control equipment by the date specified;

c) require that pollution control equipment, once installed, is properly maintained and operated;

d) require that pollution control equipment be upgraded or modified as required to prevent occurrences;

e) specify the emission, discharge, and monitoring requirements that must be met;

f) include procedures to be followed during start-up, shutdown and breakdown, maintenance and decommissioning periods;

g) require that once equipment is installed, the person responsible so certifies in writing; and

h) require that once installed equipment is operating as required, the person responsible so certifies in writing.

1.5 Responsibility for Emissions and Discharges

The operator of any facility is at all times including during start-up, shutdown, breakdown, maintenance or decommissioning responsible to control emissions and discharges.

1.6 Changes in Status

The Ministry will ensure that conditions be included in all control documents requiring that the person subject to them report any significant changes that are made in the operation of the facility, emissions or discharges, or the legal status of the operation.

1.7 <u>Requests for Abatement</u>

a) Where the Ministry makes a written request for action to reduce, prevent or eliminate pollution, a reasonable time to comply will be specified;

b) In cases where compliance with written requests is not forthcoming within 180 days maximum, the Director and the Investigations and Enforcement Branch will apply formal sanctions against the polluter. This does not prevent the application of sanctions in a shorter time period. Sanctions may include additional terms or conditions on an approval or control order, or prosecution.

c) Policy 05-02 <u>Pollution Abatement Program: Development, Compliance and Enforcement</u> describes the Ministry's abatement program.

2. <u>Procedures for the Implementation of Uniform Environmental Enforcement</u>

2.1 <u>Monitoring</u>

Control documents will be reviewed regularly by the Operations Division to ensure compliance based on regular inspection, testing and monitoring consistent with administrative priorities and the nature of the facility.

2.2 <u>Evaluation Procedures</u>

The Director of the Environmental Approvals and Land Use Planning Branch will develop procedures for evaluation of applications for approval and apply them when considering applications.

2.3 <u>Control Document Update</u>

A periodic review should be undertaken by the Regional Director of control documents issued by the Ministry to ensure that they are current.

2.4 Occurrence Reports

Ministry staff will be required to document in an Occurrence Report any observed or reported violations. Also any action requested by the Ministry to address an occurrence should be documented in writing.

2.5 Examination of Financial Capability

Policy 02-01 Guidelines for an Economic Analysis of Private Sector Pollution Abatement and Environmental Protection Measures describes the content and application of economics and financial analyses to pollution abatement activities.

May 6, 1986

CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY-CIELAP

THE NEED FOR OBJECTIVE ANALYSIS

Public demand for environmental protection has increased dramatically in the past decade. An intensive effort is under way in Canada and in all other industrialized countries to establish programs and regulations to increase the level of environmental protection in an equitable and cost-effective way.

The development of environment policy is, however, complex and difficult because:

- the database is uncertain and constantly changing
- environmental protection, particularly respect to human health issues, has become highly visible, value-laden and emotionally charged.

Not surprisingly, discussion of environmental policy often focuses upon the short-term and the sensational, and tends to be clouded by suspicion and misunderstanding.

That is why there is a need for an organization, independent of both government and industry, which need not respond daily to the vagaries of environmental politics; an organization which can bring a long-term perspective to the task of thinking through and developing policy alternatives for public discussion.

THE CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY IS WORKING TO MEET THIS NEED.

OUR MISSION

Founded in 1970, the Canadian Institute for Environmental Law and Policy (CIELAP) is an independent, not for profit research and educational organization.

CIELAP's principal goals are to work to improve legal and economic policy effecting the environment, in a manner that will assist government, industry, public interest groups and individuals in their daily decision making and further the protection of human health and the preservation of the natural environment.
This involves:

- **an analysis of current environmental policy issues;**
- **identification of emerging environmental issues facing Canada and the world.**
- **undertaking research into, and the evaluation of, legal and economic policy options for public and private sector responses;**
- **a communication of the conclusions of the research results to lay and professional audiences in a clear non-partisan way.**

The Institute is unique among environmental groups. Our approach and philosophy has always been in-depth research combined with consultation. We believe that for change to occur, all parties who will be affected by and who can influence these changes must be involved. CIELAP promotes dialogue among governments, the private sector and non-government groups. These players are encouraged to reach consensus.

WHAT WE DO

Through our programs of **research, publication and policy dialogue**, CIELAP strives to achieve these objectives. In-depth research and dissemination of research results are integral to our activities. Policy alternatives are developed which are then opened for full public discussion by all parties at workshops, seminars and conferences.

"We cannot expect to maintain economic prosperity unless we protect the environment and our resource base."

Report of the National Task Force on Environment and Economy (1987)

"The Canadian Institute for Environmental Law and Policy is to be congratulated for its research into environmental law and policy and its efforts to ensure the protection of human health and the natural environment".

(Letter from The Honourable Jim Bradley, Minister, The Ontario Ministry of The Environment, March 13, 1990)

1989 - 1990 ACCOMPLISHMENTS

Program for Zero Discharge

In co-operation with the National Wildlife Federation of the United States, we are developing a set of policy and legal reforms designed to implement the Great Lakes Water Quality Agreement pertaining to "zero discharge" of persistent toxic chemicals. The National Wildlife Federation is developing model water quality standards and pollution control requirements while CIELAP is working on source reduction strategies. *This project is funded by The Donner Canadian Foundation, The Gund Foundation, The Joyce Foundation, The Laidlaw Foundation, The Charles Stewart Mott Foundation and Environment Canada, The Ontario Ministry of the Environment.*

A Regulatory Agenda for Solid Waste Reduction

This report, prepared for Metropolitan Toronto, recommends regulatory initiatives for the Federal, Provincial and Municipal governemnts for the reduction of municipal solid waste. Funded by *Metro Toronto SWEAP.*

Getting Serious about Waste Reduction

CIELAP sponsored a one-day conference on solid waste reduction regulatory initiatives in Canada, United States and Europe. *Funded by Metro Toronto SWEAP.*

From Pollution Prevention to Waste Reduction

A review of Ontario's hazardous waste policy, including current progress and future policy needs was completed. Recommendations were made for regulatory and non-regulatory action to be taken by the Ontario government. *Funded by The Ontario Ministry of the Environment and Tricil Ltd.*

Indonesia - Canada Twinning Project

A twinning program with Indonesia's legal aid foundation (LBH), to provide assistance in the implementation of environmental law and policy in the Surabaya Region. The project was undertaken jointly with *Pollution Probe*.

Canadian Environmental Law Reports

We edit a series of annotated law reports which are published six times a year by the Carswell Company.

OUR LEGACY

Since its inception in 1970, CIELAP has been in the forefront of the environmental legal and policy research and development. We have undertaken a wide variety of projects. Expertise has been acquired and papers published in the following areas:

Toxins in Air, Water and Land

Regulation of Toxic and Oxidant Air Pollution in North America.

Toxic Water Pollution in Canada: Regulatory Principles for Reduction and Elimination with Emphasis on Canadian Federal and Ontario Law.

Bridging the Gap: A Handbook for Scientists and Journalists on Toxic Pollution.

Toxic Real Estate Manual.

Hazardous/Solid Waste Management

Breaking the Barriers: A Study of Legislative and Economic Barriers to Industrial Waste Reduction and Recycling.

From Pollution Prevention to Waste Reduction: A Comprehensive Hazardous Waste Strategy for Ontario.

Ontario Hazardous Waste Management Forum, Conference Proceedings.

Ontario Hazardous Waste Policy: A Provincial Forum, Conference Proceedings.

A Regulatory Agenda for Solid Waste Reduction.

1990-1991 CIELAP POLICY ISSUES

FINANCIAL SUPPORT IS BEING SOUGHT FOR THE FOLLOWING PROJECTS:

Environmental Bill of Rights

Each person should have the right to a healthy environment guaranteed in law and governments should be obliged to act as trustees of all public lands, waters and resources for the benefit of present and future generations. Environmental rights laws are needed both at the provincial and federal levels. CIELAP will continue to push for appropriate legislation in this area.

Total cost:	$40,000
Geographic Scope:	Canada, Ontario
Researcher:	Paul Muldoon
Time:	Ongoing

Program for Zero Discharge: Eliminating Toxic Substances from the Great Lakes Ecosystem.

In spite of political goals for "zero discharge" into the Great Lakes basin, the levels of toxic substances in the lakes continue to increase. Current laws, policies and standards are still based on managing toxic wastes rather than reducing absolutely the total loadings of pollutants. This study is a co-venture between Canadian and United States non-government organizations: CIELAP, the Great Lakes Natural Resource Centre of the National Wildlife Federation, the Institute for Canada and the United States and Great Lakes United. Model water quality standards based on reducing absolute loadings at the source will be developed and the legal and institutional reforms necessary in all jurisdictions of the Great Lakes ecosystem to implement these source reduction standards will be documented. *Financial support (partial) has been received from the Donner Canadian Foundation, the Joyce Foundation, the Mott Foundation, the Laidlaw Foundation, Environment Canada, Ontario Ministry of the Environment.*

Total Cost:	US$759,510
Geographic Scope:	Great Lakes Basin (12 jurisdictions, 2 federal, 2 provinces, 8 states)
Researchers:	Paul Muldoon, Mark Van Putten, Jean Hennessey Konrad Von Moltke, Tim Eder, Marcia Valiante, John Jackson
Time:	November 1988-December 1991

Environment on Trial (3rd Edition)

A new edition of CIELAP's very popular book on Canada and Ontario's environmental laws: their content and how they are administered. It was first published in 1974, 1978 (2nd edition) and used extensively in university and high school environmental study courses.

Total Cost:	$178,000
Geographic Scope:	Canada, Ontario
Author:	John Swaigen
Time:	August, 1990-August, 1992

Compliance with Environmental Legislation

Research on the effectiveness of environmental policies, laws and regulations.

Total cost:	$98,000
Geographic Scope:	Canada, Ontario
Researchers:	T.B.A.
Time:	May, 1989 - December, 1990

Financial Investment Instruments as Incentives to Environmental Responsibility

Research into financial and investment vehicles designed to encourage industry and investors to shift capital towards a sustainable economy, the legislative changes required for implementation and the costs and benefits.

Total Cost:	$30,000
Geographic Scope:	Canada
Researchers:	J. Anthony Cassils, Jack Gibbons
Time:	June, 1989 - December, 1990

"We see . . . the possibility for a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base".

Our Common Future, Report of the Brundtland World Commission on Environment and Development (1987)

Future Directions for Biotechnology Development in Canada

Continuation of the Institute's research and dialogue with government and industry to develop a policy framework for biotechnology development and use in Canada. A "Biotechnology Primer" to encourage public participation in this new field is a component of this project and is timed to complement Ontario's "Green Paper" and the proposed regulations under CEPA.

Total Cost:	$30,000
Geographic Scope:	Canada, Ontario
Researcher:	Paul Muldoon
Time:	Ongoing

Options For Sustainable Development in Forestry

An assessment of the long-term economic impacts of consumptive and non-consumptive uses of Canadian forests; identification of legislative and policy initiatives required for a "sustainable development" approach to forest management.

Total Cost:	$80,000 (approx.)
Geographic Scope:	Canada (all provinces and territories), New Zealand, Sweden
Researchers:	Julian Dunster, Peter Morrison
Time:	October, 1990 - December, 1991

Key to Compliance

A handbook for small/medium companies that provides a convenient reference guide to environmental legislation in Ontario as well as a step by step guide to establishing an in-house environmental management system.

Total Cost:	$30,000
Geographic Scope:	Ontario
Researchers:	John Tidball & a CIELAP government and industry advisory committee.
Time:	September, 1989 - December, 1990

Canadian Environmental Law Reports Cumulative Index 1983 - 1986

Completion of the cumulative index of the first series of the <u>Canadian Environmental Law Reports.</u>

Total Cost:	$15,830
Geographic Scope:	Canada
Time:	November, 1990

Implications of Energy Regulation for Sustainable Development

Sustainable energy options for Ontario and the regulatory changes needed to implement these options.

Total Cost:	$80,000
Geographic Scope:	Canada
Researchers:	Jack Gibbons
Time:	Ongoing

Due Diligence

The first comprehensive text describing the defence of reasonable care ("due diligence") and the legal and policy issues raised by this new area of law, particularly as they affect environmental cases.

Total Cost:	$31,400
Geographic Scope:	Canada
Researcher:	John Swaigen
Time:	January/December, 1990

Leaking Underground Storage Tanks

An evaluation of the effectiveness of laws and government and industry policies and practices regulating one of Canada's most significant least publicised environmental problems - leaking underground storage tanks.

Total Cost:	$178,000
Geographic Scope:	Canada
Researcher:	John Swaigen
Time:	August, 1990 - August, 1992

Biotechnology Policy Development

Biotechnology Policy development (two volumes)

The Regulation of Biotechnology, Conference Proceedings

Compliance with Environmental Law

The Company Polluted - So Why Did I Get Charged?

Pollution and the Law.

Environmental Assessment in Ontario.

Environmental Management and Public Participation.

Protecting the Great Lakes Ecosystem

Protecting the Great Lakes: A Citizen's Guide to Cross-Border Litigation.

Cross Border Litigation: Environmental Rights in the Great Lakes Ecosystem.

Control at the Source: Regulating Industrial Sewer-use in Ontario.

Zero Discharge: A Strategy for the Regulation of Toxic Substances in the Great Lakes Ecosystem.

Canada and World Sustainable Development

The Law of Eco-development; a Canadian Perspective. A brief presented to the Brundtland World Commission on Environment and Development.

Energy Economics and Policy

Sustainable Development: Its Implications for Energy Policy in Canada.

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Our sincere appreciation to our supporters who furthered the Institute's environmental research with their contributions.

For more information on the work of CIELAP and a complete publications list, please contact:

Canadian Institute for Environmental Law & Policy

517 College Street, Suite 400
Toronto, Ontario
M6G 4A2

Telephone: (416) 923-3529
Fax: (416) 923-5949
Charitable Number: 380584-59
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