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OUTLINE AND RESOURCES

PROJECT 589 C

"The Consequences of the Bill 220 Amendments to the *Environmental Protection Act*: Defining Responsible Parties and their Liabilities under Administrative Orders"

The Canadian Institute for Environmental Law and Policy

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The following is an outline and list of resources for Proposal #1499, (Project #589C), "Consequences of the Bill 220 Amendments to the Environmental Protection Act: Defining Responsible Parties and Their Liabilities Under Administrative Orders". The outline and list of resources are subject to modification during the drafting process. The complete bibliographic reference for each resource has not been set out in every instance, but can be provided upon request.

Consequences of the Bill 220 Amendments to the Environmental Protection Act: Defining Responsible Parties and Their Liabilities Under Administrative Orders

OUTLINE AND RESOURCES

Introduction/Abstract

On June 28, 1990, the Ontario legislature enacted Bill 220, *The Environmental Protection Statute Law Amendment Act, 1990*, S.O. 1990, c. 18 ("Bill 220") which amended a number of provisions of the *Environmental Protection Act*, R.S.O. 1980, c. 141, now R.S.O. 1990, c. E.19[1] (the "EPA").[2] This paper focuses on those amendments which extended the scope of potential liability under administrative orders, for example, control orders, stop orders, orders to take remedial and preventive measures and waste removal orders, to include previous owners, persons in occupation or persons having the charge, management or control of the source of contaminant, undertaking or land.[3]

The objectives of the research are (1) to study the effects of the extended potential liability created by the Bill 220 amendments, (2) to examine the jurisprudence on liability under administrative orders in Ontario, the United States, other jurisdictions in Canada and, to a lesser extent, Europe, and (3) to make recommendations for law reform to achieve the legislative goals of the EPA, while recognizing the commercial implications and repercussions of extended liability.

In carrying out these objectives, the paper will review and analyze the legislation and case law in Ontario, the United States, other Canadian jurisdictions and, briefly, the European Community and present the results of consultation with a number of parties affected by the amendments, including members of the business community, private and public sector legal counsel, environmental and other interest groups. The remainder of paper is divided into three parts as

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[1]The section numbers used throughout this paper are those of the Revised Statutes of Ontario, 1990.

[2]Bill 220 also amended the *Ontario Water Resources Act*, R.S.O. 1980, c. 361, now R.S.O. 1990, c. O.40). These amendments did not extend the scope of liability under administrative orders to former parties however and are not discussed in this paper.

[3]Sections 7, 8, 17, 18 and 43 respectively. These sections as amended by Bill 220 will be discussed in detail in Part II. Other Bill 220 amendments will be briefly noted where relevant.

follows: Part I - the state of the law in Ontario prior to the enactment of Bill 220, Part II - the changes effected by Bill 220, and Part III - conclusions and recommendations for reform.

As the potential consequences of the Bill 220 amendments for a number of parties, particularly those members of the business community such as secured lenders, trustees in bankruptcy and receivers, are great, there is an urgent need for the development of policies for the implementation and enforcement of the EPA which specifically set out the scope and extent of liability of potentially responsible parties under administrative orders in a manner which provides both certainty and fairness. Due to the amendments, a broader spectrum of parties potentially may be required to comply with administrative orders requiring clean up of contamination from activities or on properties irrespective of their causal connection or contribution to the contamination and whether or not parties at fault can be found. On the face of the legislation, liability is based neither on fault nor possession. For example, it is conceivable that a former owner having no causal connection to polluting activities or contamination on a property may be held liable for clean up. In practice, it may be that administrative orders will only be issued against previous owners who caused or contributed to or had control of the polluting activities. With the enactment of Bill 220, Ontario has gone further than any other Canadian jurisdiction (and perhaps the United States in some respects) in potentially extending liability under administrative orders beyond the defensible concept of polluter pays to that of deep pocket pays. The polluter pays approach to liability does not necessarily require a narrow definition of polluter.

Clean up of contaminated property is a serious problem in Ontario and indeed throughout Canada. Comprehensive legislation is required to regulate this area. The Bill 220 amendments reflect the Ontario government's concern and desire to clean up spills and discharges of contaminants into the environment as expeditiously and efficiently as possible. But the amendments were poorly drafted and are in need of clarification. In order to be effective, the legislation must not only be tough, but it must be clear, fair and consistently applied. It must also adhere to principles of logic and commercial reality. The objectives of achieving rapid clean ups of contamination and spills and protecting the environment must be balanced against those of stimulating economic activity in Ontario and maintaining a sound economic base, recognizing that, at least for the very short term, Canada's resource-based economy consists of a number of industries which give rise to environmental degradation to some extent. The concept of sustainable development requires that the true costs of business activities, including the costs of environmental compliance, should affect the ability of businesses to raise capital. Responsible business practices in lending and purchasing must be encouraged, for these can be extremely efficient and effective in enforcing environmental obligations and policing environmental compliance. However, if parties are to be held to such high standards, the legislation must clearly specify their duties and defences available to them.

I: State of the law in Ontario prior to Bill 220

This section of the paper will summarize the law in Ontario as it existed prior to the enactment of Bill 220, through a review of the relevant legislation, decided court and administrative decisions, government policies and legal principles. The public perception of the state of the law and its satisfaction with the liabilities

imposed by it will be set out based upon discussions held with members of the business community, legal counsel, environmental and other interested groups.

1. Statutory environmental regime

(i) overview of Ontario's statutory environmental regime, including relevant historical and background information

(ii) introduction of the polluter pays principle and the concept of sustainable development

Resources:
Interpretation Act
OECD Recommendation on the Implementation of the Polluter Pays Principle, November 14, 1974
B.A. Chomyn Associates, Contaminated Sites Program - Effective Legislation, prepared for CCME Task Group on Contaminated Sites, March 31, 1991
Our Common Future: The World Commission on Environment and Development (the "Brundtland Report")

(iii) examination of the relevant provisions of the EPA and of administrative orders in Ontario generally

Resources:
John Tidball, Legislative Overview, Conference on Liabilities for Environmental Contamination, June 13, 1989
Dianne Saxe, Legal Instruments used by the MOE, November 22, 1988

2. Case law

(i) review of court decisions dealing with environmental liabilities under administrative orders resulting from ownership, occupation and charge, management and control of a source of contaminant, undertaking or property. It should be noted that there is relatively little jurisprudence directly on point and that, in resolving many of the legal issues relating to these liabilities, it is sometimes necessary to draw analogies from cases which address similar liabilities and legal principles in different contexts.

Resources:
R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299
Director, Ministry of the Environment v. Mississauga (1979), 9 C.E.L.R. 24
R. v. Holiday Farms Ltd. (1981), 12 C.E.L.R. 48
R. v. Placer Developments Limited (1983), 13 C.E.L.R. 42 (the court in this case arguably took a broad approach to the issue of charge, management and control)
Re Mac's Convenience Stores, Suncor Inc. (1984), 29 O.R. (2d) 9
R. v. Mac's Convenience Stores Inc. (1985), 14 C.E.L.R. 120
R. v. J. Brett Hill (May 24, 1988) [unreported]
Bogoroch v. Toronto (City) (1991), 27 A.C.W.S. (3d) 742
Re Blackbird Holdings Ltd. (July 24, 1990) [unreported]
*Emphasis will be placed on the recent Ontario Divisional Court decision of CN Railway Co. v. Ontario (EPA Director) (1991), 3 O.R. (3d) 609, in which the court addressed a number of relevant issues relating to environmental liabilities under administrative orders. The decision of the Environmental Appeal Board (the "EAB") was under appeal in this case (see (ii) below). It can be argued that

the court adopted a narrow approach in its interpretation of the EPA, that is, it ignored the possibility of a party being held liable as an owner regardless of whether the party also had the charge, management or control of a source of contaminant. The case seems to be sending a message to the legislature that greater precision is required in order to broaden the scope of liability to parties such as owners and mortgagees not in possession of a source of contaminant. Although the sections under consideration in this case predate the Bill 220 amendments, the analysis with respect to which parties may be liable under administrative orders as owners, occupiers or persons having charge, management or control of a source of contaminant remains applicable to the amended sections of the EPA. In addition, the court, although stating that a liberal approach should be taken in construing the EPA, did not comment on the EAB's statement that the intention of the EPA "is to impose liability for rehabilitation of the environment on the persons who benefit from the use of the land, persons who own it or have the charge, control or management of it."

(ii) review of administrative decisions

Resources:
Re Blackbird Holdings Ltd. (July 24, 1990) [unreported]
*Emphasis will be placed on the EAB's decision in CN Railway Co. v. Ontario (EPA Director) (1990), 6 C.E.L.R. (N.S.) 165. The EAB took a broad approach to the imposition of liability under the EPA in holding that an owner of a source of contaminant was liable irrespective of fault and regardless of whether the owner had the charge, management or control of the source of contaminant.

Legal commentary:
Dianne Saxe, Ontario Environmental Protection Act Annotated (Canada Law Book Inc., 1991)
Mario Faieta, Case Comment: Canadian National Railway Co. v. Ontario (Director appointed under the Environmental Protection Act) 6 C.E.L.R. (N.S.) 237
Case comments on both decisions in Fasken Martineau Davis, Environmental Law Bulletin, June 1991 and February 1991
Case comment on EAB decision by Dianne Saxe, Hazardous Materials Management Magazine, December 1990
Case comments on both decisions by Harry Dahme, Environmental Law Alert, December 1990 and June 1991
Case comment by Stan Berger in Legal Emissions, Ministry of the Environment, Volume 3, Number 1, Spring 1991
Case comment by Lori Nicholls-Carr in The Compliance Report, February 1991
Case comment by Roger Cotton in Environment Policy & Law, July 1991
Environmentally Relieved, case comment by Derrick Tay in Commercial Insolvency Reporter, Vol. 4, No. 6 July, 1991

3. Government policies in issuing administrative orders

(i) review of relevant MOE policies
Public Consultation, 16-09-01, February 16, 1989

(ii) review of relevant decisions regarding exercise of administrative discretion

(iii) potentially responsible parties

Resources:
Canada Metal Co. Ltd. v. MacFarlane (1973), 41 D.L.R. (3d) 161
796833 Ontario Inc. v. Merritt et al. (December 4, 1990) [unreported]
Re Mac's Convenience Stores (supra)
R. v. Mac's Convenience Stores (supra)
CN Railway Co. v. Ontario (EPA Director) (supra)
Re Blackbird Holdings Ltd. (supra)
Dianne Saxe, Contaminated Land, Law Reform Commission of Canada, 1989

4. Other legal principles

(i) creditor/debtor relationships
mortgages, receivership, bankruptcy and other lending arrangements, both secured and unsecured, entered into by banks, trust companies, investors, etc. (for example, personal property security, chattel liens)

Resources:

Texts:
Falconbridge on Mortgages
Bennett, Receiverships
Duncan & Honsberger, Bankruptcy in Canada
Lightman & Moss, The Law of Receivers of Companies
Anne Hardy, Crown Priorities in Bankruptcy

Articles:
Rebecca E. Keeler, Enforcing Security Against Business Assets: Impact of Environmental Statutes on Recovery, National Insolvency Review, Vol. 8, Nos. 4 and 5
Geoffrey B. Morawetz, Legal Responsibilities and Liabilities in a Workout, Canadian Insolvency Association ("CIA") 1989 Seminar, May 2, 1989
CIA Standards of Professional Practice, June 16, 1989
Albert Lando, The Environmental Look See: Potential Liabilities for Receivers and Trustees, CIA 1989 Seminar
Dianne Saxe, Bankruptcy and Insolvency, CIA 1989 Seminar
Dianne Saxe, Trustees and Receivers: The Environmental Hot Seat, 76 C.B.R. 34
Robert M.C. Holmes, Senior V.P., Coopers & Lybrand Limited, Receiver's Liability for Environmental Problems, Seminar on Cleaning Up Contaminated Sites: Managing Environmental Risk and Responsibility, January 24, 1990

Cases:
Canada Trust Company v. Bulora Corporation Limited (1980), 34 C.B.R. (N.S.) 145, affirmed 39 C.B.R. (N.S.) 152 (receiver required to comply with order of Fire Marshall to the detriment of secured creditors and not to be guided solely by the recovery of assets)
Clifford Van & Storage Company Limited, etc. (1989), 73 C.B.R. 129 (trustee liable as trustee and personally to landlord for the negligent and careless manner in which the trustee occupied the premises of the bankrupt)
Glick and Glick v. Jordan (1967), 11 C.B.R. 70 (motion by trustee to strike statement of claim dismissed because Bankruptcy Act does not confer immunity on trustee such that he could not be liable to a third party for a tort; action in contract may lie against trustee personally)

MacManus v. Royal Bank of Canada et al. (1983), 47 C.B.R. 252 (receiver negligent in disposing of chattels, guarantor recovered damages from bank and receiver because not bound by provisions of debenture contract)
Peat Marwick Ltd. v. Consumers' Gas Co. (1980), 29 O.R. (2d) 336 (receiver-manager is agent of debenture holder for some purposes and is agent of debtor company for other purposes)

(ii) lender liability under administrative orders

Resources:
Michael Jeffery, Environmental Liability for Lenders: A Canadian Perspective, The Urban Lawyer, Vo. 23, No. 2, Spring 1991
Canadian Bankers Association (the "CBA"), The Effect of Environmental Liability in Canada on Borrowers, Lenders and Investors, November 1991
S.D.N. Belcher, Executive Vice-President, Credit Policy, the Bank of Nova Scotia, A Canadian Banker's Perspective on Proactive Due Diligence, 11 July, 1991
G. Bruce Taylor, Lender Liability, March, 1989, CIA (lengthy article dealing with a number of lender liability issues and providing a good bibliography)
Geoffrey Thompson, Environmental Liability in Canada: The Risks for Lenders, Receivers and Trustees, September 17, 1990 (comprehensive review of US legislation and case law, Canadian legislation and case law [CEPA, BC's Waste Management Act], appointment of agents such as receivers and trustees in bankruptcy in tort law and pursuant to statute, recommendations re: credit analysis, loan documentation, participation in management and realization procedures)
William A. Tilleman, Due Diligence Defence in Canada for Hazardous Clean-Up and Related Problems: Comparison with the American Superfund Law, Journal of Environmental Law and Practice, Vol. 1, No. 2, March 1990, 179 (looks at similarity of clean-up laws between the US and Canada [focusing on Alberta], US statutory defences, cases, Canadian common law defences, concludes that only lenders directly involved or negligent in the ownership or control of property encumbered by hazardous waste should be held liable - need to encourage lenders to monitor, not impose liabilities on them, in order to clean up sites - need statutory or common law defences (discusses actus reus and due diligence defences) and theories of equitable subordination and alter ego to "control indecorous lender behavior")
Derrick C. Tay, Managing the Risk of Environmental Liability by Dealing with the Regulators and The Impact of Potential Environmental Law Liability on Creditors' Rights, 1991 (2 articles)
MacAulay and Mancuso, Advising Lenders Regarding Environmental Concerns, The Advocate 575 (British Columbia)
Tay and Wakefield, Lenders Need Greater Awareness of Potential Environmental Liability, National Creditor/Debtor Review, Vol. 4, No. 2
Osler, Hoskin & Harcourt, Environmental Issues: The Lender's Perspective and Banking Law Update, Vol. 2, No. 4, November 1989
Jodene Baker, Lenders' Environmental Liability, 6 Banking & Finance Law Review 189
Tory Tory DesLauriers & Binnington, Lender Liability for Environmental Damage, March 1991
Alan Peters, Lender Liability: Liabilities to Other Creditors, Parts I and II, National Creditor/Debtor Review, Vol. 5, Nos. 3 and 4
Geoffrey Thompson, Environmental Liability, National Creditor/Debtor Review Vol. 6, No. 2

Dennis K. Fitzpatrick, Liability for Exercising Management or Control of Borrowers by Lenders and Their Agents, National Creditor/Debtor Review, Vol. 6 No. 1 (useful for application of its theory and analysis to environmental liability issues)
Geoffrey Hydon, Vice-President, Bank of Montreal, Toronto, A Banker's Perspective on Lender Liability and Responsibility, Commercial Insolvency Reporter, Vol. 3, No. 4, February, 1990 (useful for application of theory to environmental claims)
Brian Farlinger, Environmental challenges for business customers - and their banks, Canadian Banker, Vol. 99 No. 1 - January-February 1992 (discusses how banks are affected by environmental challenges faced by their business customers, lender liability and the search for solutions - basically sets out the CBA position)
Andrea E. Grimaud, Commercial lenders consider the environment, ibid.
Andre Prevost, Eco age lenders and the law (focuses on recourses government authorities can exercise to recover clean up and other associated costs of environmental damage), ibid.
Felice O'Neill, Environmental Liability for Lenders, October 30, 1991, conference on Environmental Liability in Real Estate and Business Transactions

(iii) purchase and sale of real estate and other business transactions, including landlord and tenant law

Resources:
Claire Bernstein, Financial Post, June 11, 1988, Buying polluted land may leave new owner liable
Dianne Saxe, New environmental law can strike decades later, Lawyers Weekly, January 1988
Dianne Saxe, Toxic Real Estate: How Clean is Clean?, Hazardous Materials Management Magazine, Nov./Dec. 1989
Steven J. Trumper, Avoiding Environmental Liability in Real Estate and Business Transactions: The Vendor's Perspective, National Property Review, Vol. 3, No. 9
Steven J. Trumper, Environmental Liability in Real Estate and Business Transactions - The Vendor's Perspective, October 30, 1991, conference on Environmental Liability in Real Estate and Business Transactions
Norman S. Rankin, Negotiating and Structuring Real Estate and Business Transactions to Avoid Environmental Liability - An Overview and the Purchaser's Perspective, same conference as above
Donald R. Cameron, Managing the Risk: Identifying, Assessing and Resolving Environmental Issues in Business and Real Estate Acquisitions, 1990
David O. Cox, Toxic Real Estate Transactions, October 1989
John C. Ruderman, Environmental Risk and Responsibility in Real Estate and Business Transactions: The Vendor's Perspective, January 24, 1990, conference on Cleaning Up Contaminated Sites: Managing Environmental Risk and Responsibility
Mary C. Hall, Environmental Implications in the Purchase and Sale of Real Estate, 1991
Leonard Griffiths, Negotiating and Structuring Business Transactions to Avoid Environmental Liability, 1990
Toxic Real Estate Manual, Corpus Information Services, June 1988
Karen Sisson, Toxic Real Estate: More Than You Bargain For, Intervenor, March, April 1989

(iv) tort liabilities for contaminated land

Resources:
Sevidal et al. v. Chopra et al. (1987), 64 O.R. (2d) 169
Heighington et al. v. The Queen (1987), 60 O.R. (2d) 641
Linden, Canadian Tort Law
Negligence Act
Norman S. Rankin, Environmental Common Law Causes of Action and Remedies, January, 1990, Canada's Environmental Laws, Canadian Bar Association, National CLE Program
Dianne Saxe, Contaminated Land (supra)

Interviews with members of the business community, private and public sector legal counsel and other interest groups
Canadian Bankers Association
American Bankers Association
Canadian Insolvency Association
BC Insolvency Association
Private legal counsel
Public legal counsel - Ministry of the Environment ("MOE")
Municipal legal counsel (Metropolitan Toronto)
Banks
Trust Companies
Trust Companies Association
Trustees in bankruptcy
Superintendent of Bankruptcy, BC
Receivers
Borrowers
Insurance companies
Canadian Life and Health Insurance Association
Insurance Bureau of Canada
Pension plan managers
Other investors
Canadian Chemical Producers Association
Environmental consultants
Environmental groups (Pollution Probe, Canadian Environmental Law Association)

5. Conclusion

This section will examine the impetus for the amendments, in order to determine whether there was a need for change, either expressed or implicit, as a result of the failure of the existing law to impose liabilities under administrative orders and/or as a result of public pressure and political will to enact increasingly stringent environmental laws.
The following are some of the possible reasons for the legislation which will be considered:
-the need to better reflect the polluter pays principle and the concept of sustainable development in the legislation?
-recognition of the difficulty of holding past owners liable under administrative orders? (see John C. Turchin, Toxic Real Estate: Ontario's Legal, Regulatory and Policy Framework, September 1990)
-the establishment of the National Contaminated Site Remediation Program ("NCSRP") and the federal/provincial bilateral agreements to fund clean ups on the legislation?
-the Hagersville tire fire

-the liberal government's political agenda as result of the upcoming fall election and other political considerations

It appears that the required changes may not have been satisfactorily addressed by Bill 220. This assessment will take place in Part III of the paper, "Conclusions and Recommendations", following an examination of the effects of the changes in Part II.

II: Changes Effected by the Bill 220 Amendments

This section will analyze the changes effected by the Bill 220 amendments from a critical perspective, again with an emphasis on the legislation, decided court and administrative decisions in Ontario, government policies and enforcement procedures and relevant legal principles. The public perception of and reaction to the amendments will be summarized based on the interviews described in Part I above. The American approach to imposing environmental liabilities under administrative orders will be compared and contrasted to the approach taken in Ontario. The law in other Canadian jurisdictions and, briefly, recent initiatives of the European Community and several European countries will also be examined.

1. Bill 220

(i) summary of the Bill 220 amendments and analysis of the most relevant changes

(ii) background and contextual information which may provide assistance in interpreting the legislation

Resources:
Interpretation Act
Legislative debates, Hansard (these are very brief, as Bill 220 allegedly was enacted primarily in response to the Hagersville tire fire and, in other respects, made only "housekeeping changes" to the EPA [although there was some discussion about "accountability"])

2. The judicial response to the legislation

(i) review of court decisions

(ii) review of administrative decisions

3. Government policies for issuing administrative orders under the new provisions

(i) review of relevant MOE policies and enforcement procedures to determine what the government is attempting to accomplish and what it believes it may now do as a result of the amendments

(ii) review of relevant decisions regarding the exercise of administrative discretion in issuing orders

(iii) potentially responsible parties

Resources:

M.B. (Jim) Jackson, Managing Environmental Liabilities, October 1991
Royal Bank of Canada v. Oil Canada Ltd. (unreported 1990) (regarding appointment of receiver by court order on consent)
MOE agreements with potentially responsible parties such as receivers and trustees in bankruptcy

4. Reactions to the amendments
The amendments have potentially far-reaching effects on a number of parties, including the following: secured creditors, unsecured creditors, trustees, receivers, guarantors, municipalities, landlords, tenants, insurers, pension fund investors, insurance companies, successors and assignees, parent corporations, purchasers, etc.. The potential consequences of the amendments for these parties will be examined in this section.

Resources:
Michael Peterson, Bill 220: Ontario's New Environmental Clean-Up Legislation, February 20-21, 1991
Peter Menyasz, Ontario's Tough Bill 220, Environment Policy & Law, March 1991
Roger Cotton, Lenders Could Face Liabilities, Environment Policy & Law, September 1990
Dan G. Shand, Clean-Up of Contaminated Sites: Will Lenders Be Implicated?, Canadian Banking Law Newsletter, July/August 1990, (discussion of CCME National Contaminated Sites Remediation Program, Bill 220, legislation in B.C., Quebec and Alberta)
Steven J. Trumper, Who Bears the Cost of Clean Up, August 1990
Tyrus Reiman, Legal Update: Environmental Law, Canadian Lawyer, May 1991
Dianne Saxe, Caveat Creditor, CA Magazine, March 1991
Dianne Saxe, Startling Amendments to Ontario's Environmental Laws, Hazardous Materials Management Magazine, October 1990
Holden Day Wilson, Environment Watch, November 1990
John C. Turchin, Toxic Real Estate: Ontario's Legal, Regulatory and Policy Framework, September 1990
Bogart and Robertson, Environmental Seminar, Wellington Trust Company, September 1991
Scott Haggett, Financial Post, September 19, 1991, Environment concerns making leasing firms more cautious (also article in Real Property Reporter, Vol. 4, pp. 109-118 on this topic)
Diane Francis, Financial Post, November 5, 1991, Bill on environment hurts all businesses (discusses Algoma Steel Corp. situation, argues that the biggest problem is the effect of Bill 220 on pension funds holding mortgages and bonds in "dirty industries" - the holders will not be able to recoup their losses by seizing assets because of third party liability. The result may be writedowns or even huge losses. Canada's Superintendent of Financial Institutions, Michael Mackenzie, wants limits on liability, as long as owners and lenders are not fraudulent or totally negligent. Mackenzie says that equity markets, as well as debt markets, will be hampered [e.g., the financing of new mines or other heavy industry will be more difficult and expensive] and that there are no buyers of productive assets or real estate.)
Editorial, Financial Post, November 22, 1991, Don't Pass the Buck to Lenders (there is a concern that the EPA, as amended "will impose open-ended liability - not only on polluters but on those who lend money to them. ... The courts are trying to sort out what the imprecisely drafted legislation means, but it could very well be ... that banks involved in the operational management of a company

would be liable for its environmental damages. ... The Ontario legislation is so poorly drafted it is possible a court may find that the very act of ordering an environmental assessment could be construed as involving the lender in management or "ownership" of the company borrowing the money." The cost of borrowing will increase and in some cases money will not be available. "Cop-out" for governments to go after lenders. Need for consultation)
Bernard Simon, Financial Post, November 28, 1991, Shouldering the cleanup cost: Banks fear being liable for ecological damage (environmental liability is contributing to credit crunch in US [letter to President Bush], cites recent case in which a Montana bank was cleared of liability and sets out results of recent American Bankers Association ("ABA") survey)
Martin Mittelstaedt, Globe & Mail, January 11, 1992, Alas, poor bankers (despite the recession, banks are making enormous profits)

The results of interviews with the same parties as set out in Part I above, that is, members of the business community, legal counsel, environmental and other interest groups, to determine what their reactions are to the Bill 220 amendments and what initiatives they are taking or contemplating as a result. Additional resources are also listed.

(i) in particular, what are their responses to the following types of questions:
what are the implications/effects of the amendments?
what are the issues of particular concern to them?
what is wrong with the amendments (unfairness, uncertainty)?
what is right about them?
can they comply with the new law?
how is the MOE enforcing the new legislation?
have they been directly affected by environmental liabilities or required to rearrange their affairs to avoid incurring liabilities?
how should the laws be implemented?
what suggestions do they have for improvements?
what changes are necessary?
have they voiced their concerns to government?
what precautions are they taking?
what are the economic impact of the amendments, in light of the current downturn in the economy?
what are the specific consequences of the amendments (both negative and positive - see further under (iii) below), for example, increased cost of borrowing, abandonment of security, refusal of credit, reluctance of trustees and receivers to accept appointments where contaminated property involved [of particular concern as the numbers of receiverships and bankruptcies increase], environmental audits, new contractual arrangements

(ii) related issues
-proposed environmental bill of rights and class action legislation and amendments to the Bankruptcy Act (Bill C-22)
-difficulty of obtaining environmental impairment insurance

Resources:
First Report of the Standing Committee on Consumer and Corporate Affairs and Government Operations Regarding "Bill C-22, Bankruptcy Act Amendments" (the "Standing Committee")
Submission of the Canadian Life and Health Insurance Association Inc. to the Standing Committee

Letter sent by the Insolvency Institute of Canada to the Minister of Consumer and Corporate Affairs Canada re: First Report of the Standing Committee, October 24, 1991
Adrienne Scott, Proposed changes to the Bankruptcy Act may affect real property lien in Bill 220, Legal Emissions, Volume 3, Number 2, Fall 1991, p. 11
J. Frederick Sagel and Kent Thomson, Environmental Impairment Insurance: Canadian Perspective (Part III), Canadian Journal of Insurance Law - Vol. 4, No. 1

(iii) planning for liability
-environmental audits
-contractual risk allocation
-due diligence
-other initiatives

Resources:
CBA position paper, November 1991 (supra)
The Canadian Chamber of Commerce, Focus 2000: Achieving Environmental Excellence: A Handbook for Canadian Business
The Canadian Chemical Producers' Association, Responsible Care Program
Casey Mahood, Globe & Mail, November 26, 1991, Green factor becomes part of banking life (outlines initiatives of lenders and businesses, e.g. CIBC appointment of general manager of environmental risk, CICA study of role of accountants, professional association of environmental auditors with industry standards and CBA policy on environmental risk)

5. Environmental liabilities under administrative orders in the United States
In 1980, the federal government of the United States enacted the Comprehensive Environmental Response, Cleanup and and Liability Act ("CERCLA"), often referred to as "Superfund", to ensure the clean up of existing contaminated sites. CERCLA takes a broad approach to liability in terms of classifying potentially responsible parties. Liability is "strict"[4], joint and several and retroactive. The legislation also provides for certain exemptions and defences (in particular, for security interests and innocent landowners) which will be discussed in greater detail below. Other federal and state legislation which also regulates environmental clean ups will be examined, as will the law relating to creditor and debtor relations, such as bankruptcy and receivership, insofar it affects environmental liabilities.

Over the past decade or so, both the federal and state governments in the United States have been fine-tuning the liabilities imposed by their legislation and the judiciary has been developing and applying legal principles in its interpretation of the law. Therefore, an analysis of the American experience in terms of the merits and successes of its legislation in resolving difficult policy issues is a useful exercise. In particular, gaining an understanding of what CERCLA was intended to do and what it in fact did can assist us in assessing whether Bill 220 has succeeded in accomplishing its goals and whether we are or should be moving in the direction of Superfund liability. It may be that the American model is one to which we should look for guidance in implementing and interpreting our own legislation.

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[4]Known as absolute liability in Canada

(i) CERCLA

-overview
Resources:
CERCLA overview from ELR Stat. Out. 029, 11-89

-1986 amendments (Superfund Reauthorization and Amendment Act "SARA")
Resources:
Atkeson, Goldberg, Ellrod and Connors, Superfund Amendments and Reauthorization Act of 1986: An Annotated Legislative History, XVI ELR, No. 12, 10363

-response actions

-abatement actions
Resources:
Walter E. Mugden, Use of CERCLA s. 106 administrative orders to secure remedial action (to compel private parties to clean up)

-citizen suits

-elements of liability

-definition of responsible parties

-exemptions

-defences

-standard of liability

-allocation of liabilities

-contribution and response costs

-settlements

-expanding scope of liability

Resources:
Jones and McSlarrow, Superfund Case Law, 1981-1989, 19 ELR 10430
McSlarrow, Jones and Murdock, A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991, 21 ELR 10367
Daniel H. Squire, The U.S. Experience: The Broad Interpretation of Environmental Liability, ("Issues and Recent Developments in PRP Allocation": allocation of exposure has replaced liability as the key issue which provides the opportunity for creativity and "threatens to drown the entire Superfund process"), conference on Environmental Liability in Real Estate and Business Transactions, October 30, 1991
Lynne Huestis, Intervenor, Volume 15, Issue 1, US Superfund Laws and the "Polluter Pays" Principle
Dianne Saxe, What is Superfund?, Hazardous Materials Management Magazine, Jan./Feb. 1990

Superfund Research Symposium, Summary Report, ER, 11-29-91

(ii) Resource Conservation and Recovery Act ("RCRA")

-regulation of hazardous waste facilities
Resources:
United States General Accounting Office, May 1991, Hazardous Waste: Limited Progress in Closing and Cleaning Up Contaminated Facilities (relationship between RCRA and Superfund - RCRA was intended to regulate the management of hazardous waste, while Superfund was intended to clean up contamination at uncontrolled or abandoned sites and was to be phased out eventually as the sites were cleaned up; the RCRA program would remain to prevent environmental problems at hazardous waste sites in the future)

(iii) state Superfund programs and legislation

-overview of state programs and legislation
Resources:
An Analysis of State Superfund Programs: A 50-State Study, August 1989
Tough Real Estate Laws Break New Ground, Waste Age, October 1987
Toxic Real Estate Manual, Corpus Information Services, 1988

-interaction of state legislation with federal legislation
Resources:
State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?, 13 ELR 10348

(iv) lender liability under CERCLA

-interpretation of the security interest exemption
Resources:
Dealing with Challenges Facing Secured Creditors, Commercial Insolvency Reporter, October, 1989
Walter E. Mugden, Environmental Due Diligence for Lenders: Responding to Federal Superfund Enforcement
John O. Tyler, Emerging Theories of Lender Liability in Texas, Houston Law Review (May 1987)
Robert F. Carangelo, The Sins of the Son Should be Visited Upon the Father: Lender Liability Under CERCLA and New York State Law, 1990
Berz and Gillon, Lender Liability Under Cercla: In Search of a New Deep Pocket (analysis of Fleet Factors and In re Bergsoe decisions, efforts by Congress to amend CERCLA, Environmental Protection Agency ("EPA") clarifications and impact of the cases on commercial lending practices)
Margaret Murphy, The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities, The Business Lawyer, Vol. 41, May 1986 (lender, shareholder and successor corporation liability, environmental statutes affecting security interests in property, proposed federal statute)
Edward E. Shea, Protecting Lenders Against Environmental Risks: The U.S. Perspective, National Property Review, Vol. 3, No. 7 (summary of statutes and case law, alternatives [restrict lending, require assurances from borrowers and insurance], due diligence and checklists for the due diligence review)
Evan D. Flaschen, New Developments in Environmental Liability for United States Lenders, Commercial Insolvency Reporter, September, 1990 (examines Fleet Factors case)

Burcat, Shorey, Chadwell and O'Connell, The Law of Environmental Lender Liability, 21 ELR 10,464 (summarizes the law of lender liability and legislative and regulatory proposals, concludes that common law approach to lender liability should be used)
Roslyn Tom, Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA (author argues for a narrow interpretation of "participating in the management of" to encourage banks to monitor with the result that society, lenders and borrowers all would benefit (p. 928), courts should look at lender liability doctrines and the approach should be a "cumulative test" one, a standard which looks to total domination - this will provide lenders with certainty and incentive to monitor)
John P.C. Fogarty, The Legal Case Against Lender Liability, 21 ELR 10,243 (author argues that lenders' fears as a result of Fleet Factors decision are largely unfounded and that the decision of In re Bergsoe is not inconsistent with Fleet Factors)
Bradley S. Tupi, Guidice v. BFG Electroplating: Expanded CERCLA Liability for Foreclosing Lenders, ER 1-12-90
James O'Brien, Environmental Due Diligence, January 1990 (due diligence of lenders and purchasers)

-proposed Environmental Protection Agency Rule
Resources:
EPA Draft Proposal Defining Lender Liability Issues under the Secured Creditor Exemption of CERCLA (Sept. 14, 1990)
EPA Proposed Rule, Federal Register, Monday, June 24, 1991, Pt. II EPA
EPA Proposal to Limit Liability of Financial Institutions under CERCLA, summary in Environment Reporter
James P. O'Brien and Kathleen L. Nooney, EPA's Lender Liability Rule: A Significant Step for the Lending Community
Susan M. Campbell and Francis J. Quinn, Lender Liability in the US for Hazardous Waste Cleanup: New Proposed Rule Concerning Secured Creditor Exemption
G. Van Velsor Wolf Jr., EPA's Lender Liability Rule: No Surprises but more work Needed, 21 ELR 10,006
EPA's Lender Liability Rule: A Sweetheart Deal for Bankers? (criticisms from environmental groups)

-proposed legislation
Resources:
Irvin M. Freilich, Taking Aim at Superfund, J. Air Waste Manage. Assocn, October 1991, Volume 41, No. 10
certain references from preceding section

-American Bankers Association ("ABA") lobby
Resources:
Materials from ABA: 18-page submission dated July 24, 1991 from ABA to EPA re: EPA's Proposed Rule; results of ABA survey of community bankers; Statement of ABA on Lender Liability under Superfund, November 13, 1991, Charles E. Waterman

(v) landowner liability under CERCLA

-interpretation of innocent purchaser defence
Resources:

Stephen L. Poe, Sale of REO Properties under CERCLA: An Area of Continuing Environmental Risk For Lenders, 29 American Business Law Journal 43 (REO = real estate owned, i.e., real property, other than bank reserves, that national banks are allowed by law to own and in this article refers to any property acquired by an institutional lender, national bank, etc.. Article addresses CERCLA liability risks encountered by a lender/seller in the context of selling real property acquired by foreclosure - even if lender qualifies for innocent purchaser defence, may still incur liability for CERCLA response costs when sells property)
Sandra E. Marcus, The Price of Innocence: Landowner Liability under CERCLA and SARA (problems with CERCLA legislation and role of courts in expanding liability; impact of SARA amendments on landowner liability)
Phillip B. Rarick, The Superfund Due Diligence Problem: The Flaws in an ASTM Committee Proposal and an Alternative Approach, 21 ELR 10,505 (CERCLA s. 101(35) defence for innocent landowner - author examines proposal of ASTM [formerly American Society for Testing and Materials, an industry coalition representing lenders, realtors, environmental consultants and legal community] which sets out a guide for laypersons in conducting Phase I environmental site assessments for audits, concludes it is inadequate and proposes an alternative
Emerging Contours of the CERCLA "Innocent Purchaser" Defence, 20 ELR 10,483

(vi) municipal liability under CERCLA
-case law
Resources:
Sarah Robichaud, B.F. Goodrich v. Murtha and EPA's Municipal Settlement Policy: Municipalities are not Exempt from CERCLA Liability, 21 ELR 10,456

-proposed legislation
Resources:
Irvin M. Freilich (supra)

(vii) government liability under Superfund
-case law
-proposed legislation

(viii) other legal issues relating to CERCLA liability

-creditor/debtor arrangements, including mortgages, receivership, bankruptcy and other lending arrangements
Resources:
Richard L. Epling, Treatment of Statutory Cleanup Liens in Bankruptcy (state and federal statutory liens ought to be avoidable in a bankruptcy)
Norman I. Silber, Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters (discussion of Ohio v. Kovacs and In re Quanta Resources)
Joel R. Burcat, Foreclosure and United States v. Maryland Bank & Trust Co.: Paying the Piper or Learning How to Dance to a New Tune?", 17 ELR 10098
S. Scott Massin, Recent Developments in Bankruptcy and the Cleanup of Hazardous Waste, 19 ELR 10427 (overlap of bankruptcy and hazardous waste law; article looks at the structure of bankruptcy law and surveys court decisions on the overlap)
Drabkin, Moorman and Kirsch, Bankruptcy and the Cleanup of Hazardous Waste, 15 ELR 10168

Mirsky, Conway and Humphrey, The Interface Between Bankruptcy and Environmental Laws, The Business Lawyer, Vol 46, February 1991 (overview of environmental laws, lender liability under environmental laws, application of environmental laws in bankruptcy, etc.)
Joel S. Moscowitz, Trustee Liability Under CERCLA, 21 ELR 10,003

-other business transactions, including landlord and tenant relationships, parent and successor corporations

-due diligence

-environmental audits

-environmental impairment insurance

-alternatives to Superfund, for example, a National Environmental Trust Fund

Cases:
The following is a list of some of the cases which will be considered in this section of the paper:
In re Quanta Resources Corp. (1985 and 1986) (trustee sought to abandon a facility, on appeal, abandonment was not permitted)
Ohio v. Kovacs (1985) headnote (state's claim dismissed because its claim that respondent required to fulfill its obligation pursuant to an injunction to clean up a hazardous waste disposal site was essentially one for payment and as such was a liability on a claim dischargeable under the Bankruptcy Code)
In re T.P. Long Chemical Inc. (1985) (costs incurred to clean up a waste site are administrative expenses under Bankruptcy Code recoverable from the bankrupt estate, but not from funds in which another creditor holds a security interest; also trustee may not voluntarily abandon property under Bankruptcy Code s. 544; EPA could only recover from BancOhio, a secured creditor, if it acted for creditor's benefit [which it did not in this case])
US v. Mirabile (1985) (a bank that foreclosed on a facility and assigned its right to purchase was not liable as an owner; financial involvement is not sufficient to give rise to liability under CERCLA; management participation is required)
US v. Maryland Bank & Trust Company (1986) (a bank that foreclosed on a facility and purchased the facility at the foreclosure sale, may be held liable as a current owner four years after the purchase)
Tanglewood East Homeowners (1988) (issue was liability of subdivision developers)
US v. Nicolet, Inc. (1989) (application of federal law re: determination whether defendant was alter ego of subsidiary; corporate veil can be pierced where subsidiary is a member of potentially liable class of persons; corporate stockholder may be directly liable; both individuals and corporations are caught by CERCLA; corporate parent can be directly liable and a mortgagee can be liable in certain instances)
Guidice v. BFG Electroplating and Manufacturing Co. (1989) (bank holding a mortgage on contaminated property is not liable under CERCLA prior to foreclosure, but may be liable for cleanup costs after purchasing property at foreclosure sale; bank not owner or operator under CERCLA s. 107(a) before foreclosure; mortgagee is exempt under s. 101(20)(A) provided does not participate in managerial and operational aspects of facility and acts only to protect security interest; exemption does not apply when secured creditor purchases at foreclosure sale)

US v. Fleet Factors (1990) (bankrupt cloth printing facility - secured creditor may be liable under CERCLA section imposing liability on owners and operators even though not an actual operator, by participating in financial management of facility to a degree indicating a capacity to influence the facility's treatment of hazardous waste - therefore the motion for summary judgement was not successful)
In re Bergsoe Metal Corp (1990) (secured creditors not participating in facility management are not liable for cleanup costs; paper title alone does not constitute "ownership" for cleanup purposes, therefore the local port authority which held the deed to property on which lead recycling plant was located as part of transaction for the purpose of providing financing for plant not liable)
In re Chateauguay Corp. (1991) (unincurred CERCLA response costs for prepetition releases or threatened releases of hazardous substances are "claims" dischargeable in bankruptcy)
O'Neil v. QLRCI (1991), 32 ERC 1661

6. Environmental liabilities under administrative orders in other Canadian jurisdictions
Although Ontario's EPA is one of the most comprehensive and toughest pieces of environmental legislation in Canada, other Canadian jurisdictions are now moving to enact legislation which imposes liabilities under administrative orders on a broad range of parties. This section will compare and contrast such legislation and case law across Canada with that in Ontario.

(i) Federal

-legislation
Canadian Environmental Protection Act
Resources:.
Vigod and Lindgren, Overview of Federal Law, Regulation and Policy, November 1, 1991

(ii) The National Contaminated Site Remediation Program ("NCSRP")

-overview

-orphan sites (Kemtec, etc.)
Resources:
Barrie McKenna, Globe & Mail, August 27, 1991, Cleanup costs hinder sale of Kemtec plant
Barrie McKenna, Globe & Mail, September 11, 1991, Quebec, creditors bicker over Kemtec as danger looms
Barrie McKenna, Globe & Mail, October 9, 1991, Quebec lender petitions Kemtec into bankruptcy
Ann Gibbon, Globe & Mail, Bankruptcy petition filed against Kemtec
Barrie McKenna, Globe & Mail, December 7, 1991, Toxic shock for taxpayers (Kemtec, NCSRP, lists a number of environmental orphan sites)
Donna Kell, Guelph Mercury, September 29, 1991, Bank cuts ties to contaminated Guelph factory
Guelph Mercury, October 10, 1991, Ministry cleans spill on IMICO property
Bruce Bonham, Guelph Mercury, October 11, 1991, Guelph residents want action on IMICO
Suzanne Solo, Guelph Mercury, November 16, 1991, Striking a deal for disaster (in-depth summary of IMICO history and current situation)

-federal/provincial cost-sharing agreements and requirement for provincial "polluter pays" legislation

(iii) British Columbia

-legislation
Waste Management Act
Bill 68 (amendments to the Waste Management Act)
Resources:
West Coast Environmental Law Association, Toxic Real Estate in British Columbia, 1989-1990 (three-part study)
Ministry of Environment, New Directions for Regulating Contaminated Sites: A Discussion Paper, January 1991, (contains proposals under consideration by the Ministry of the Environment and which appear to favour the American approach to liability [Superfund approach])

-cases
West Fraser Timber Co. v. British Columbia (Regional Waste Manager), November 18, 1988 (British Columbia Supreme Court and British Columbia (Regional Waste Manager) v. British Columbia Railway Co. (1990), 4 A.C.W.S. (2d) 677 (British Columbia Court of Appeal) (re: which parties must comply with order under s. 22 Waste Management Act - BC Rail not liable as owner because it was not in occupation of the lands when the pollution occurred, had not caused or authorized it and was not aware it had occurred - affirmed on appeal)
Lamford Forest Products Ltd. (Re) (1991) (issue is appointment of trustee in bankruptcy to estate holding contaminated land)
Randy Ray, Lamford Forest Products case: Potential liability making trustees nervous: lawyer, Environment Policy & Law, June/July 1991
Signcorp. v. Vancouver (City) (1986) (arbitrary exercise of administrative discretion ultra vires)

(iv) Alberta

-legislation
Hazardous Chemicals Act
Environmental Protection and Enhancement Act (Bill 53 and Draft Regulations) - omnibus bill to consolidate and repeal 9 other statutes

-cases
Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Limited, (1989) 75 Alta. L.R. (2d) 185 (Alta. Q.B.) and (1991) (Alberta Court of Appeal, Files #311698 & 11713) (court-appointed receiver required to comply with order of Energy Resources Conservation Board to properly abandon unused oil wells before secured creditors could receive any money from the estate)
Wallco Building Products (1984) Ltd. and the Royal Bank of Canada, Environmental Law Centre Newsletter, Vol. 6, No. 1, 1991 (order against bank under Alberta's Hazardous Chemicals Act - bank not a "person responsible")
Alberta (Director of Pollution Control) v. Bavarian Lion Co. (1990), 76 Alta. L.R. (2d) 394
Sprung Enviroponics Ltd. v. The City of Calgary and Imperial Oil Ltd., Environmental Law Centre Newsletter, No. 5, Vols. 1-2, 1990 (re: common law duties of landlord/vendor to purchaser)

Other resources:

Case comment on Northern Badger, Environmental Law Alert, August 1991
Provincial law upheld over federal Bankruptcy Act, case comment, Environment Policy & Law, August/September 1991
Roger Cotton, Appellate court ruling on Badger Expands liability in bankruptcies, Environment Policy & Law, August 1991
Derrick C. Tay, Bankruptcy: A Shield Against Environmental Liability?, Commercial Insolvency Reporter, Volume 3, Number 6, June, 1990
Fasken Campbell Godfrey, Environmental Law newsletter, Must a Trustee in Bankruptcy Comply with Environmental Clean-up Orders?, October 1990 and Alberta Court Says the Environment Ranks First, September 1991
Claire Bernstein, Business second to environment and Costs of a cleanup even affect lenders, The London Free Press and the Toronto Star, September 28 and 30, 1991
Martin Mittelstaedt, Bankrupt firm's assets must go to cleanup, Globe & Mail, July 11, 1991
William A. Tilleman, The Northern Badger Case: more questions than answers, Energy Environment Report, September 16, 1991
Don Hogarth, Financial Post, July 3, 1991, 'Green' ruling chills receivers, creditors
Phil Lalonde, Lenders and their agents beware: the Northern Badger case, Environmental Law Alert, 2 Env. L. Alert, No. 6, August 1991
Tom Onyshko, Environmental liability creates uncertainty for creditors, The Lawyers Weekly, November 29, 1991

(v) Quebec

-legislation
Environment Quality Act
Bill 65 (implementation of polluter pays principle)

-policy on land development affecting owners of contaminated lots and municipalities

(vi) Nova Scotia

-legislation
Environmental Protection Act
A Discussion Paper on Environmental Law Enforcement in Nova Scotia

(vii) Northwest Territories

-legislation
Environmental Protection Act
Environmental Rights Act

(viii) Yukon Territory

-legislation
Environment Act (to be proclaimed)

(ix) Other provinces (Prince Edward Island [Environmental Protection Act], Newfoundland [Department of Environment Lands Act], Manitoba [Environment Act], Saskatchewan [Environmental Management and Protection Act])

Resources:
Compilation of Provincial Legislation Relating to Contaminated Sites
Program Manager's Guide to Effective Contaminated Sites Legislation (companion to above)

7. Environmental liabilities in other countries

(i) adoption of polluter pays principle by OECD
Resources:
OECD Recommendation on the Implementation of the Polluter-Pays Principle, November 14, 1974
Henri Smets, Environmental Accidents: The Polluter Now Pays, OECD Observer, October-November 1989

(ii) strict liability for waste in the European Community's ("EC") Waste Management Act
Resources:
Smith and Hunter, The Revised European Community Civil Liability for Damage From Waste Proposal, 21 ELR 10718 (EC initiative of proposed Directive on Civil Liability for Damage from Waste which would create a far-reaching toxic tort and cleanup liability regime, holding waste producers strictly and jointly and severally liable for injuries caused by their waste until it is turned over to a licensed waste disposal or recycling facility. If the producer of waste cannot be identified, the landowner where waste is located would be deemed the producer and held strictly liable.)
Bulletin of Legal Developments, The British Institute of International and Comparative Law, 1991 No. 15, 9 August 1991, p. 171 and 1991 No. 16, 30 August 1991, p. 189
Thieffrey and Nahmias, Hastings International and Comparative Law Review, Vol. 14, No. 4, The European Community's Regulation and Control of Waste and the Adoption of Civil Liability (strict liability standard)

(iii) European countries
Resources:
Dianne Saxe, Contaminated Land, 1989
Dianne Saxe, Dutch Environmental Law, Hazardous Materials Management, June 1991
Environmental Control in Europe, Clayton Environmental Consultants Newsletter, November 1986
A.J. Waite, An English Perspective of US and UK Environmental Regulation, 5 Natural Resources and the Environment 33 (includes regulatory techniques and a discussion of contaminated land)
European Environmental Yearbook, Land Reclamation, DocTer, Institute for Environmental Studies/Milan

III: Conclusions and Recommendations

This section will provide a detailed discussion of the key policy and theoretical issues relating to liabilities under administrative orders and set out conclusions and recommendations for the types of policies which should be adopted in order to effectively implement and interpret the legislation. It will also discuss possible changes which should be made to the legislation in order to achieve the objectives of the government, while recognizing the commercial realities in Ontario today.

1. Policy issues
The following are some of the issues which will be addressed in this section:

(i) What are the objectives and underlying principles of the legislation and how can these best be reflected in the imposition of liabilities under administrative orders?
-protection of the environment and public
-orderly, effective, efficient cleanups
-protection of the public purse
-prevention and deterrence of future contamination (ensuring compliance)
-fair and accurate allocation of liabilities
-encouragement of self-regulation

(ii) How should "polluters" be defined?
-the adoption of the polluter pays principle requires a precise and workable definition of polluter. This is the most crucial aspect of the definition and many of the difficult policy issues in terms of equitably imposing liability must be dealt with at the definitional level. Casting a broad net of liability will ensure that a contaminated site has been remediated, but, on the other hand, this approach may lead to the imposition of liability on parties not responsible, either directly or indirectly, for the contamination. A broad approach is simpler to apply, but it fails to recognize varying degrees of responsibility among polluters, for example, for those who directly cause or contribute to environmental degradation, or those in or with the ability to control but who fail to prevent the contamination, or those whose contribution was indirect. Perhaps there should be different types of liability for different types of polluters and distinctions drawn between the manner in which and the amount which parties contribute to pollution. Protection of the public purse can to some extent be justified on the basis that a party profited or received a benefit from the polluting activities, either financially or otherwise, or who will profit from a publicly-funded remediation.
-should the approach to defining polluters be status-based or activity-based?
-how precisely should polluters be defined?
-should there be exemptions from and defences to the liabilities imposed by the definition?

(iii) What type of liability should be imposed on polluters and what should the extent of liability be? Should liability be absolute or strict, recognizing that a strict liability standard will provide a polluter with a defence in many instances? Should there be temporal or quantitative limits on liability and for which parties?

(iv) Should liability be retroactive? There are problems with retroactive liability, in that it involves imposing liability on persons who may have been in compliance with the existing legislative requirements at the time the pollution occurred. The imposition of liability now can not deter future behavior, nor can it change behavior. The law generally presumes that only future actions should be regulated and in this manner it creates expectations and guides behavior. In addition, in many cases, past polluters no longer involved with a site cannot pass the remediation costs on through revenues from operations.

(v) Should liability be allocated or apportioned among responsible parties on the basis of their respective responsibilities or contribution to contamination, or should the full remediation costs be the responsibility of each of the responsible parties, such that any one could be held liable for the total amount, irrespective of

their contribution to the total damage? If the latter, should the paying party have a right to contribution and indemnity from other responsible parties? Should there be mandatory allocation of responsibilities in certain instances? What mechanisms can be used to alleviate potential harshness to minor contributors, for example, settlements, apportionment guidelines or mediation?

(vi) How can the values of fairness and environmental protection be balanced? Real hardship and inequity must be avoided. Related to this are problems of perception - if the line is crossed between the perception of severity and absurdity, the law will not be complied with, the objectives of the legislation will be not be carried out and the administration of justice will be brought into disrepute (see further under 6 below). A lose-lose situation will result. For example, if potentially responsible parties such as banks abandon their security or enter into deals with their borrowers not to realize upon their security, there will be no clean ups at all (or only at the expense of the public purse). Borrowers will be let off the hook and in the banks' efforts to avoid the imposed self-policing, there will be no policing. Therefore, the most effective manner of enforcing the legislation must be considered, bearing in mind that the end results should be to encourage cooperation, good corporate citizenship and the most effective use of resources.

(vii) What are the economic effects of the increasing regulation of business activities and the discouragement of environmentally-risky businesses (radically restructuring the economy) and how can these be balanced against the need to stimulate the economy in these recessionary times? The issues of "jobs vs. the environment" and "sustainable capital" for "sustainable development"[5] must be considered (in terms of balancing the financing of effective clean ups, ensuring compliance and environmentally-responsible behavior), as well as those of the competitiveness of businesses in Ontario and providing unfair advantages to offshore lenders beyond the reach of the Ontario judicial system.

(viii) How much precision should there be in the legislation? How can the need for certainty in business and risk management be balanced against the need of the regulators for flexibility and discretion to deal with new and hard cases?

(ix) What approaches to statutory interpretation should be taken?
-principles of law reform
-common law models for lender liability

2. Problems with the Bill 220 amendments
Some of the problems to be considered are the following:
-the amendments are too vaguely or imprecisely worded
-there are discrepancies in the amendments (for example, definition of responsible person not amended)
-there are no guidelines for interpretation
-there is no allocation of costs and apportionment of liability, resulting in potential arbitrariness of the assignment of liability
-there is no right to contribution and indemnity (right to claim over between tortfeasors - Negligence Act) - spills part of the EPA has this type of provision
-liability is retroactive
-liability is status-based

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[5]CBA position paper

-liability is absolute
-liability is joint and several
-there are no exemptions and defences as in United States
-there is no defined standard of due diligence (if exemptions and/or defences are provided, there will be a need for regulations or guidelines setting out permissible activities and conduct)
-there is no private cause of action

3. Statutory amendments vs. policies and guidelines
Should changes or clarifications be made by policies or by regulations or amendments to the legislation itself, recognizing the legal limits to the ability to effect changes by policies and taking into account the greater administrative flexibility permitted by regulation through policy changes than through statutory amendment?

4. Options/Alternatives
Explore compromise solutions or options which can be worked out between the government and responsible parties to protect private interests, while at the same time protecting the public purse and the environment, such as remediation agreements, apportionment guidelines, de minimis settlements, mediation, etc..

5. Other legislative amendments

(i) Bankruptcy Act changes to exempt trustees and receivers or to provide for their insurance or indemnification

6. Reactions and responses (popularity and public perception of legislation)
Is it desirable to have laws which are perceived of as too harsh, unfair, onerous and favouring payment by "innocent" parties to protect the public purse? Does this bring the law into disrepute?

7. Planning for liability
Discuss compliance and planning issues (for example, due diligence, audits, risk management, contractual allocation of liability, insurance)

8. Conclusions and Recommendations (what went wrong and suggestions as to how to remedy the problems)
There is public support for tough environmental legislation and the political will to enact it. The public wants accountability for what are increasingly serious environmental problems in the province. Ultimately, a balancing act is required between effective clean ups, protection of the public purse and economic and business realities.

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