ENVIRONMENTAL LAW AND LIABILITY: DUE DILIGENCE IN THE '9OS

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1. Introduction

There are two sound, practical reasons to practice due diligence for anyone in industry today.

A. Contaminated land liability

Environmental clean-up of contaminated sites can be enormously expensive. Directors and officers may be personally liable to pay for part or all of the costs. Government can compel the clean-up of a contaminated site and the surrounding environment. The courts may also order clean-up action to be taken after a conviction. In Ontario, under the Environmental Bill of Rights, a statutory cause of action has been introduced. Residents can now sue for harm to public resources and obtain a restoration order from the courts compelling the defendant to clean up contamination and restore the environment.

B. Prosecution

Spills can result in charges against the company and its controlling minds. Other regulatory failures (failing to properly monitor, failing to meet effluent criteria, failing to report spills or discharges, improper or illegal waste disposal) can also result in charges. In Ontario several company owners or directors have gone to jail for improperly disposing of waste.

2. Liability for Contaminated land

A. Environmental Liability: The Common Law

The genesis of environmental protection legislation lies in the common law of torts - wrongs committed by one person against his neighbour. The courts assess civil liability according to these common law causes of action.

(i). Nuisance

Nuisance is the most frequently and successfully used common law cause of action in environmental cases. Nuisance arises when someone causes an unreasonable interference with an owner or occupier's use and enjoyment of property.

If the thing complained of (for example noise, odours, vibrations or actual physical intrusions of deleterious materials) interferes with the plaintiff's use or enjoyment of his

property, or causes actual damage to the plaintiff's property, the person causing the nuisance is liable to the plaintiff for damages. It does not matter whether the defendant's conduct is negligent, intentional or accidental.

The courts consider the character of the area in determining whether the disturbance of a neighbour's property is unreasonable in the circumstances. For example, strong odours from wastewater treatment pond affecting nearby residences might be found by the courts to be unreasonable, and thus an actionable nuisance.

A nuisance can be 'continued' or 'adopted' by a subsequent purchaser of the property if he knew of or permitted the nuisance. Knowledge or permission given to an employee will be sufficient to render the employer liable.

Nuisance may result from the accidental or intentional spill of a pollutant and from the failure to remedy its effects and clean it up within a reasonable time. It may also result where contamination escapes into the groundwater of neighbouring properties.

More stringent regulations and more sensitive detection mean that today's seemingly innocuous discharges may become tomorrow's pollution. The House of Lords recently decided a claim arising from historic contamination. In Cambridge Water the Court decided that where environmental harm was not foreseeable at the time of the pollution, the person who caused the contamination will not be liable in nuisance. The defendant tannery had polluted an aquifer with the solvent perchlorethylene (PCE). The accidental spills occurred before drinking water standards for PCE were introduced. At the time the PCE was spilled, the tanners thought it simply evaporated and posed no risk to groundwater. The Court concluded that at the time of the contamination the tanners' belief was reasonable, and they could not have been expected to foresee that pollution would result.

If this case is followed in Canada it may relieve many companies who unsuspectingly polluted groundwater using the normal industrial practices of the day. Those who emit contaminants today, however, will likely be held to a high standard of environmental management to prevent emissions that might cause contamination.

(ii). Negligence

The tort of negligence arises where an individual fails to exercise reasonable care causing damage to another which is reasonably foreseeable. Negligence only arises where the defendant's actions are in breach of a legal duty. This duty includes the prevention of the escape of substances from any newly acquired property (if the owner is aware or reasonably ought to be aware of that possibility).

Failure to investigate and prevent foreseeable injury to third parties can constitute negligence. Environmental audits and management system audits can help recognize and avoid potential negligence liability as they are some indication of reasonable care.

In the tannery case, Cambridge Water, supra, the tanners were not negligent under the standards prevalent at the time of the spills.

(iii). Rylands V. Fletcher - Strict Liability

The 1868 House of Lords decision in the case Rylands v. Fletcher gave rise to a cause of action having a significant effect in the area of environmental law. In Rylands v. Fletcher, the owner of property constructed a reservoir to supply water to his factory. When the water leaked into a coal mine on the neighbouring property, the owner of the reservoir had to pay for the resulting damage.

Where a person brings a non-natural substance onto his land and it escapes and causes damage, that person is responsible for all damage resulting from the escape.

This cause of action arises whether or not the defendant intended to cause harm. It is different from the tort of nuisance, where damage must result from unreasonable actions of the defendant. The fact that the defendant was not negligent is not a defence to this tort, which is why it is often referred to as 'strict liability'. Those who choose to have non-natural uses of their land are strictly liable for any resulting injury to others. The owners of a property from which the substance escapes may be liable for damage caused by its escape even if the substance causing the damage was brought onto the property by a previous owner.

The Cambridge Water case, discussed above, suggests that if the damage was not reasonably foreseeable the defendant may not be liable under this cause of action.

(iv). Trespass

A trespass arises where there is a direct and unauthorized interference with the private property of another. A plaintiff need not show that he has suffered actual damage in order for liability to be imposed.

The physical intrusion of gas or effluent onto another property constitutes a trespass. Failure by a purchaser to prevent continuing escape of a polluting substance has been held by the courts to constitute continuing trespass.

(v). Riparian Rights

An owner of land which borders on a watercourse has a right to the continued flow of the water in its natural quantity and quality. This right is subject to the ordinary, reasonable use of other riparian owners.

An upper riparian owner who alters the quality or the quantity of water flowing past a lower riparian owner's land to the detriment of that other riparian owner may be liable for all the consequential damages of that alteration. For example, an upper riparian owner has been found liable for the death of cattle from drinking water contaminated as a result of his action. A lower riparian owner may seek an injunction to restrain alteration and compensation for damages he has suffered.

(vi). Toxic Torts
Litigation which combines some or all of these causes of action is sometimes known as "toxic tort" litigation.

Canadian examples range from the efforts of Nova Scotia residents to stop the spraying of defoliants on forests, to the claims for damages by B.C. crab fishermen for loss of income since Fisheries and Oceans Canada closed Howe Sound due to excessive levels of dioxins and furans.

B. Environmental Liability: Ontario Environmental Bill of Rights

(i). New Cause of Action
Ontario's Environmental Bill of Rights (EBR), was proclaimed in force February 15, 1994. It introduces a new right for any Ontario resident to sue for significant harm to a public resource. The term "public resource" includes air, water (not including non-navigable streams or water bodies on private land), public land or any related plant or animal life or ecological systems. This new cause of action includes the power to sue even before a contravention has occurred, so long as it is imminent.

It is interesting to note that Bill 26 specifically provides that the Class Proceedings Act, 1992 will not be available to plaintiffs under this part of the EBR. This restriction will make it difficult and possibly expensive for plaintiffs to successfully sue for damage to a public resource. The result may be that civil lawsuits for restoration will be rare and limited to cases where significant harm has taken place, or to political issues where substantial sums of money can be raised by the plaintiff.

A similar cause of action was proposed in British Columbia environmental legislation, but has been dropped from the agenda for the time being.

(ii). Conditions Precedent to Suing
The right to sue arises where a person has contravened or will imminently contravene a prescribed act, regulation or instrument. Significant harm to a public resource must result.

A resident who wishes to sue under this cause of action must first apply for an investigation of a contravention under the EBR's investigation provisions. The action may only be brought if the plaintiff has not received an appropriate response from the Minister to whom the request was directed, or if the response is not reasonable. This may entail a considerable delay while the complaint and Minister's response are processed. There is a two year limitation on this type of claim. The result is a heavy burden on the plaintiff to move quickly and to fund its own case.

(iii). Restoration Orders
The EBR does not permit damages to be awarded in this type of lawsuit, but the court is given extensive powers to order the defendant to negotiate and enter into a plan to restore any damage to the environment, and to order an injunction to prevent any contravention. The court may order, as part of a restoration plan, that the defendant pay money to the Minister of Finance towards preventing harm to the environment and restoring damage caused by the contravention.

(iv). Defences
The defence of due diligence will be available to a defendant who can prove that he has taken every precaution reasonable in the circumstances to prevent the act or omission that caused the harm.

A defendant will not be liable if it can satisfy the court that the contravention was authorized by a statute of Canada or Ontario, or by a regulation or instrument issued by the government.

The term "instrument" as used in the EBR includes a certificate of approval. If a defendant can satisfy the court that it complied with an interpretation of an instrument that the court considers reasonable, the defence will be successful.

C. Administrative Orders

(i). Duty to Clean-up and Restore After a Spill
The owner and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect are required under Part X of the EPA to "forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and restore the natural environment."

The duty comes into force immediately upon the person becoming aware of the spill and the likelihood of the adverse effect.

The Minister has the power to make orders preventing further damage or spills and for clean-up and restoration against a wide range of individuals and institutions. Anyone subject to the order (except the owner or controller) is entitled to be compensated by the owner or controller for the costs of complying with the order.

(ii). Minister's and Director's Orders
Under certain circumstances, breaches of the EPA permit government officials to issue administrative orders requiring clean-up and prevention of pollution, restoration of the environment and payment of costs for work done by the government.

The OWRA contains many corresponding provisions authorizing administrative orders. A party may be prohibited from discharging sewage into any waters and may be ordered to regulate the discharge according to conditions set out by an MOEE Director. A Director may also make an order concerning the maintenance, repair and operation of sewage works. Under s.32, a Director has broad powers to order a person who owns, manages or controls a sewage works to take measures to clean up or prevent impairment of water quality.

A variety of administrative orders may be made against owners and former owners of land and businesses, those who managed and controlled businesses and those who caused or permitted a discharge of contaminants. These orders are binding on successors and assigns; a purchaser of a business subject to an order would be bound by that order. A mortgagee who has not taken possession of a property will not be liable to clean up a property or pay costs. In King (Township) v. Rolex Equipment Co. a municipality was able to have a receiver appointed to clean up a property and take the costs from the sale of the property in priority to the mortgagee's interest. A receiver's liability will generally be limited. However, the receiver will be liable for contamination caused by the receiver's negligence.

Orders made under the EPA and OWRA may be appealed to the Environmental Appeal Board.

Recent Environmental Appeal Board decisions have held that these orders can have retrospective effect. The Appeal Board has found companies and their directors liable for clean-up of pollution even where the business changed hands before the law was amended in 1990 to make former owners and controllers liable.

Orders can require extensive work to be done for:

- prevention of pollution;
- clean-up of contaminated property;
- clean up of a spill and restoration of the environment;
- removal of waste or contaminated soil;
- design and installation of new equipment and treatment systems; and
- the study and monitoring of operations and site conditions.

Where an order has been made, the MOEE may do the clean-up and collect the costs from individuals or companies who were subject to the order. After the work is done, the MOEE may identify parties who could have been subject to the order and make a costs order to collect costs from them. Orders to collect costs may be enforced in the same manner as court judgements. In some circumstances clean-up costs can be collected through municipal taxes, resulting in a statutory lien against the property.

Parties affected by an order must comply with the order unless they appeal it and apply for and receive a stay of the order pending the hearing of the appeal. To avoid

prosecution for failing to comply with the order while awaiting a stay hearing, companies who are subject to orders routinely apply for interim stays.

To convince the Environmental Appeal Board that a stay pending an appeal is appropriate, one must demonstrate that there is no danger to the health or safety of any person, that there is no serious risk of impairment of the quality of the natural environment, and that there would be no serious risk of injury or damage to any property, plant, or animal life. In other words, one must convince the Board that a delay in carrying out the order would not result in adverse effects. The Divisional Court decision in Northern Wood Preservers held that the onus rests upon the applicant for a stay to show that the applicant will suffer irreparable harm if the stay is not granted and that the balance of convenience favours granting the stay.

(iii). The Northern Wood Preservers Case

In 1992 the Ontario Court of Appeal decided an important case concerning the allocation of liability for clean-up of contaminated land in Ontario, Northern Wood Preservers. NWP supplied Canadian National with treated railway ties and carried on business on land leased from CN. Abitibi had previously owned the preserving facility. Abitibi sold the business to NWP and took back a mortgage as security.

The creosote contamination appeared to have taken place over a number of years of facility operation. The Ministry orders were made before 1990 amendments to environmental protection laws which extended clean-up liability to former owners and operators of property and businesses where the natural environment has become polluted. At the time the orders were made, only current owners and operators were subject to orders.

a. Owner

CN owned property near the shore of Lake Superior. In 1938 it leased this property to Abitibi, which established a facility to treat railway ties for CN with wood preservatives. Over time the chemicals used in the process spilled, leaked and dripped into the soil and were discovered in sediments in the lake.

When NWP purchased the business in the early 1980's Abitibi ceased operating the business and took back a security interest in a lease. Under the lease terms, if NWP defaulted, Abitibi was entitled to take over the property.

The contamination resulting from the treatment of railway ties with wood preservatives by NWP and others prompted the MOE to make clean-up and pollution prevention orders against CN, Abitibi and NWP in 1987 and 1988.

Although CN's inspectors visited the site to ensure quality control, the railway ties were destined for use by CN, and notwithstanding that CN was the owner of the property, CN

was found not liable. It had not run the business, nor was it a person responsible for "the source of contaminant".

The Court of Appeal confirmed that the fact that a property is polluted was not sufficient to permit the MOE to order the owner of the real estate to clean it up if that owner did not cause the pollution. The Court held that CN was not the person responsible for the contaminant; it was merely "a reversionary owner of the contaminated soil".

The Environmental Appeal Board has recently upheld Ministry clean-up orders against landlords, notably in the LeLarco and Valentine Developments cases discussed below.

b. Mortgagee
The Court held that Abitibi, a holder of security not in possession, was not a person having charge, management or control of a source of contaminant, nor a person having management or control of the property or undertaking.

Even though Abitibi had operated the property until 1982, the Court determined that Abitibi's knowledge of the site and prior connection with the operation did not prejudice its status at the time of the orders was that of a mortgagee not in possession. As a "mortgagee" Abitibi did not have sufficient connection to the cause of the pollution to be responsible for clean-up.

Again, under the 1990 amendments to the Environmental Protection Act, Abitibi could probably be held responsible for the pollution as a former operator of the business.

c. Operator
The Environmental Appeal Board determined the NWP facility to be a continuing source of the contaminant. NWP was liable as the person in control of the source of contaminant.

(iv). Northern Wood Preservers - Discussion
a. Owners
The courts do not appear to support a wholesale "deep pocket" approach to liability for contamination. However, the 1990 amendments to the Environmental Protection Act engendered concerns that the legislation would result in substantial (and unpredictable) financial risk for anyone who was a past or present owner of contaminated land, whether or not they caused the pollution or owned the land at the time the contamination occurred.

The Ministry has continued to pursue its "deep pocket" approach. The Environmental Appeal Board has resisted this approach, and instead adopted a "fairness" analysis which relieves or reduces the liability of innocent parties. This "fairness" approach (discussed below) is currently under appeal.

It will be important that an owner be able to prove that it was not responsible for the contamination. Environmental site assessments both at the time of purchase and sale will

enable an owner of property or a business to establish that it was not responsible for contamination by providing evidence from the beginning and end of ownership. If the evidence can demonstrate that no negative environmental effects were attributable to the owner, the owner may argue that it should not be liable.

b. Mortgagees

This decision is somewhat reassuring to lenders. Even though Abitibi, the secured party, was aware of the state of the property, and had operated it in the past, Abitibi was not deemed to be in management or control. So long as the lender has not taken possession and control, the Courts will not likely support an MOE clean-up order against it.

c. Former Owners and Operators

The degree to which the 1990 amendments have broadened the range of parties who are liable remains to be determined by the courts. The Environmental Appeal Board has made a number of decisions, discussed below in the context of directors' and officers' liability, which have imposed retrospective liability on former owners, directors and officers. No court has ruled on its retrospective interpretation.

D. Liability of Directors and Officers

Directors and officers of companies which violate environmental laws can be personally charged or ordered. They can be charged either as primary defendants who breached the law, or as directors or officers who failed in their duty to properly manage the company.

(i). Prosecution of Directors and Officers

Section 194(1) of the EPA provides:

> Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to the Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.

A similar duty is established in section 116(1) of the OWRA:

> Every director or officer of a corporation that engages in an activity that may result in the discharge of any material into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters 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 discharge.

Any director or officer who fails to carry out this duty under either the OWRA or the EPA may be guilty of an offence and subject to prosecution.

(ii). Liability Under Administrative Orders

MOEE frequently makes orders against corporate directors and officers along with orders against the company, pursuing an aggressive "deep pockets" philosophy.MOEE's practice has been to select former and current corporate owners, directors, officers and investors who have assets or successful businesses. The degree of responsibility does not always appear to be a consideration. MOEE often ignores polluters who caused the contamination if they are too difficult to find, have hidden their assets, or are insolvent. Ministry lawyers argue that making orders against a "wide range of actors" sends a message to the business community. The Ministry's bottom line is that anyone who does business with a polluter may be liable to clean up. This approach forces parties with peripheral involvement to litigate or accept some share of costs.

The Environmental Appeal Board has struggled with principles for allocating of responsibility, often because parties have been unable to prove that they did not contaminate. According to the Appeal Board, environmental site assessments could have helped them relieve some parties of some or all liability.

a. "Fairness Considerations"

Once MOEE makes a clean-up order the companies and individuals who are subject to the order are obligated to carry it out. The only alternative is an appeal to the Environmental Appeal Board. The Appeal Board is entitled to review Ministry orders and uphold, revoke or amend them.

Recently, the Appeal Board has refused to apply the deep pockets approach to individuals, especially when complying with the orders would bankrupt them. The Appeal Board has adopted a "fairness" approach from the Canadian Council of Ministers of the Environment policy guidelines on contaminated land to the allocation of liability. In the Appletex case (under appeal, see below) the Appeal Board stated:

> Although it is crucial to raise private sector standards of care, there is also a need to take into account the realities of the marketplace in which actors were operating at the time of their activities, the standards of conduct prevalent at the time the risk was created, the balancing of competing interests and the allocation of responsibility in a fair manner, and the potentially crushing impact that unlimited personal liability may have on individuals.

Factors considered by the Board in determining the extent of individual liability include:

- degree of responsibility for the contamination;
- actual benefit or profit from the business or property;
- degree of control;
- steps taken to reduce the risk; and
- standard of care exercised by the individuals.

Companies or individuals may be able to shelter under the Appeal Board's "fairness" approach if they can establish that they had limited authority, or no control over the cause of the contamination, and did not profit from it.

advantage of the contribution of others to alleviate his or her responsibility to establish that contribution by keeping accurate records.

However, the Board was able to examine a detailed inventory prepared by trustees in bankruptcy at the time the individuals first invested. Based on the inventory, it was able to infer that investors' contributions to the pollution were small compared to those of past owners and operators. If a site assessment document had been available to the Appeal Board, an expensive and lengthy record-review process could have been unnecessary.

3. Prosecution for Spills

A. Provincial Environmental Protection Statutes

A number of statutes create duties to protect the environment from adverse effects resulting from the discharge of pollutants or contaminants into the environment. Violations of provisions of these statutes may give rise to prosecution and conviction. Penalties can include substantial fines and, in some cases, imprisonment. The Environmental Protection Act (EPA) and the Ontario Water Resources Act (OWRA) are the most important Ontario statutes. Frequently the Ministry of Environment and Energy (MOEE) lays charges under both statutes for the same acts or omissions. The EPA is primarily directed at regulating waste handling and disposal, and discharges to air, soil and groundwater. The OWRA is concerned mainly with surface water.

(i) The Environmental Protection Act: Air, Waste, Groundwater

The EPA's pollution offence is set out in s.14(1):

> Despite any other provisions of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.

Adverse effect is defined in the EPA and includes impairment of the quality of the natural environment, injury or damage to property or plant or animal life, harm or material discomfort to any person or impairment of the safety of a person. Any adverse effect on a person's health, interference with normal conduct of business, loss of enjoyment of normal use of property or the rendering of any property or plant or animal life unfit for human use are also defined as adverse effects. For example, intermittent foul-smelling solvent emissions from a furniture painting plant were found to have caused an adverse effect because neighbours were forced to stay indoors and lost the use of their properties during the smell events. The judge in this case (R. v. Commander Business Furniture) found that the smell constituted an adverse effect even though there was no health risk. The company was convicted under the EPA.

(ii) The Ontario Water Resources Act: Discharges to Surface Water
Section 30(1) of the OWRA establishes an offence for water pollution:
Every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence.

The OWRA provides that the quality of water will be deemed to be impaired if any material discharged (or any derivative of such material) causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or any other living thing in the water or in the soil in contact with the water. According to the Act, an offence may be deemed to have taken place even if there has been no actual impairment of water quality, so long as the material that was discharged had the potential to cause the impairment. The discharge of an inherently dangerous material (such as PCB's) in any amount, can constitute an offence as it may be deemed to impair water quality. Failure to report a spill or discharge is also an offence (see below).

(iii) Spill or Discharge Reporting
Where a spill or discharge of a pollutant takes place, the EPA imposes onerous duties on the owner/controller of the pollutant, including, in certain cases, the duty to compensate those who have suffered injury as a direct result of the spill.

Special provisions in Part X of the EPA (known as the Spills Bill) govern the reporting of spills and the duties on those who own or control spilled pollutants.

Discharges must also be reported if they are likely to cause an adverse effect (EPA), or if they may impair the quality of water (OWRA). Air emissions from stationary sources of air pollution must be reported if they do not comply with the standards set out in Regulation 346 (formerly Reg. 308). A stationary source of air pollution may include a facility that treats contaminated soil or water.

MOEE prepared a Model Sewer Use By-law which has been adopted by many municipalities across the province. Discharges which exceed the regulated limits specified in a municipality's sewer use by-law must be reported, and may also result in a prosecution under the by-law.

Where a spill that is likely to have an adverse effect occurs, the EPA imposes a reporting duty on everyone who had control of the pollutant and everyone who spilled or caused or permitted the spill. The report must be made forthwith, which has been interpreted by the courts to mean as soon as health and safety precautions have been taken and emergency spill containment and prevention measures are under way. Notification must go to the Ministry of Environment and Energy, the local municipality (or regional municipality if applicable), the owner of the pollutant and the controller of the pollutant.

Failure to report a spill is an offence that can result in substantial fines. However, the evidence used to base charges for spills and discharges often comes from information provided in compliance with the statutory duty to report.

In the Weil's Food Processing case, it was held that the mandatory reporting provisions of the EPA and OWRA violate s.7 of the Charter. However, the mandatory notification requirement is lawful in circumstances where the spill report is not used as evidence in the prosecution of the individual who made the report.

Where individual directors are charged and tried along with a company, the courts may refuse to allow the spill report to be used in evidence against any of the defendants. In the Courtaulds Fibres case, however, only the company was charged and the judge found that the spill report was admissible against the company.

B. Federal Prosectutions - The Fisheries Act.

Most prosecutions for spills of wood preservatives are laid under the Fisheries Act. Section 36(3) establishes the federal offence for spills into water. It prohibits any person from allowing the deposit of substances harmful to fish into water where fish may be found. It also prohibits the deposit of such substances in a place under any conditions where the result will be that the substances enter the water.

> 36(3) ...no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish on in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any water.

The term "deposit" is defined widely by the Act:

> "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing.

The Act sets up a defence of compliance: the prohibition does not apply if the actions of the defendant complied with federal regulations. This defence has no application in the case of spills, however. There are numerous examples of Fisheries Act convictions under this section involving accidental or deliberate spills of wood preservatives.

The courts have determined that wood preservatives, based on their toxicity to fish, are deleterious substances. The expression "water frequented by fish" has been interpreted to include small streams. Successful Fisheries Act convictions depend on the ability of prosecutors to prove that the substance moved from the control of the defendant to water frequented by fish. Contamination of groundwater is not sufficient to support a conviction under the Fisheries Act unless the prosecutor can demonstrate that the contaminated groundwater subsequently discharged into a creek or river frequented by fish. In the Bell Pole case (discussed below), investigators were able to demonstrate that PCPs from the

company's dip tanks had entered groundwater and subsequently discharged into a nearby creek. As a result the company pleaded guilty.

Penalties for pollution offences were raised dramatically in 1991, with the maximum fine of $1 million and a potential jail sentence of up to three years. Section 79 of the Fisheries Act was also amended to give wide powers to the courts the power to make additional orders against a polluter who is convicted of an offence under the Act. These powers permit the court to:

- prohibit the defendant from engaging in any activity that would likely result in the continuation or repetition of the offence;
- direct the defendant to take action to remedy and prevent harm to fish, fisheries or fish habitat;
- direct the defendant to publish the facts relating to the commission of the offence;
- direct the defendant to pay the Minister of Fisheries and Oceans compensation for the cost of remedial or preventative action undertaken by the government as a result of the offence;
- direct the defendant to perform community service;
- direct the defendant to pay to the Crown an amount determined by the court to promote fishery management, conservation and protection;
- direct the defendant to post a compliance bond;
- direct the defendant to file additional information on his activities for up to three years after conviction; and
- require the defendant to comply with other conditions for securing good conduct and preventing repition of the offence.

These section 79 orders are often the most significant part of the sentence imposed by the court after a Fisheries Act conviction. For example, when Tioxide Canada pleaded guilty to s.36(3) charges in May of 1993, the court fined the company $1 million. In addition, the court ordered the company to pay an additional $3 million to the Crown to be used for projects to manage, restore and protect fish and fish habitat. Environment Canada's Canadian Wildlife Service and the Fondation Quebecoise de la Faune were designated by the court to oversee the projects which would benefit from the payments.

A number of court cases in the late 1980s and early 1990s dealt with deliberate and accidental spills of wood preservatives. Some companies were also convicted for sloppy housekeeping measures, for example allowing dripped chemicals from dipped lumber to drain into nearby rivers or bays.

In many of these cases the companies took conscientious remedial actions, in several cases spending hundreds of thousands of dollars to clean-up the pollution and upgrade their operations to remove the risk of future spills. These remedial actions were considered by the courts in reducing fines.

It is important to distinguish efforts to clean up and prevent contamination made after the offence from those made before. Anything done after the date of the offence may be taken into consideration by the court in reducing the sentence. Only actions take before the offence can be considered by the courts as contributing to a due diligence defence.

The courts have used s.79 orders against wood preservers to enforce environmental clean-up. In the Bell Pole case, a company used an oil-based pentacholorophenol (PCP) solution in two dip tanks to treat utility poles. Small amounts of PCP were spilled in the course of the company's operations. This contamination entered the groundwater under the site, and ultimately discharged into a nearby creek. The company was charged under the Fisheries Act. The court imposed a fine, and in addition, the company agreed to a negotiated s.79 order that provided for the clean-up of the property and the eventual decomissioning of the dip tanks. The eventual cost to the company of complying with the order will likely be close to $2 million.

The principal consideration of the courts in sentencing convicted companies is deterrence. Courts have consistently ruled that sentences for Fisheries Act offences must be strict enough warn the public at large and other companies in the industry that pollution offences will carry significant fines. The threat of these fines is intended to ensure that companies using these toxic chemicals establish sound programs for avoiding environmental emissions and resulting damage.

The defence of due diligence is available to companies (and individuals) who have take all reasonable care in the circumstances to avoid the spill or discharge.

4. Due Diligence

We have already noted that the due diligence defence can only be established by proving that the individual or company charged took all reasonable precautions before the event occurred. Actions taken to mitigate environmental damage and prevent future occurrences may be taken into account at the time of sentencing, but cannot be considered as a defence.

The courts have stated that perfection is not required to prove due diligence. Reasonable actions in the circumstances are required, however. Courts will look at industry standards. Meeting these industry standards may be sufficient, or a higher level of performance may be required, depending on the circumstances. Woe betide the company that causes or permits a spill if its practices do not meet the standards common in its industry.

The courts have served notice that industries handling toxic materials are subject to a higher standard diligence than normal companies. In R. v. Nitrochem a company that regularly transported nitric acid was found liable for a spill into the St. Lawrence River

reach someone in authority at all times. Prompt spill reporting should be part of an emergency response program and anyone who may be present at an emergency should know who to contact and what must be reported.

(vii)Communicate with regulators. Plan for communications with regulators and ensure that designated personnel are trained to communicate with regulators, and document that communication. Documentation is important in case charges are laid at a later date and a record is needed for preparing the defence of individuals or the company.

B. Elements of a Successful Spill Response Program

(i) Detection Effective response and reporting can only be achieved when spills are promptly detected. Under environmental protection legislation spill response and reporting duties commence immediately when a person ought to know a spill has taken place.

Response Your program should comply with industry and Canadian Standards Association Emergency Planning For Industry standards. Consultation and coordination with your industry association, provincial and municipal agencies and citizens groups is important. It is also worthwhile to consult with the provincial spills reporting and response program or ministry for assistance in establishing your spills reporting policy. It is also important to understand that an opinion or undertaking given by an abatement officer as to what size of spill need not be reported will not bind an investigator who may seek to prosecute.

(ii) The program must be site specific and anticipate all possible spills and provide the appropriate response to them.

(iii) Training Employees And Management Every person who may be in line to respond or report should be trained and familiar with the company's spill response and reporting program and policy. Each person should know who to contact in the cases of a spill, and know how and to whom a spill must be reported if the person designated to report to the Ministry is not available. Employees should be sufficiently familiar with substances they may be exposed to so as to properly identify them to provincial and local responding agencies and emergency services.

(iv)Reporting Hierarchy. The proper chain of command should be clear and known to every employee who may be required to respond or report. Management should ensure the availability of a designated person and an alternate at all times.

(v) Know What And How To Report. Everyone who may have to report a release should be familiar with the company's reporting forms and understand what the law requires.

(vi)Documentation. Detection systems, training and responses should all be documented. A company required to prove that it has taken all reasonable precautions will find that

documentation is both a primary means of proof and a measure of the quality of planning and response.

5. Conclusion

Industries that use toxic chemicals must follow a high standard of environmental conduct. Key factors in maintaining due diligence are planning, training, anticipation and vigilance.

Compliance with industry standards is essential, but it is no guarantee of a successful due diligence defence. Companies that strive to exceed industry standards for safety and environmental management have a good chance of mounting a successful defence if an environmental event occurs.

To achieve due diligence you must:

- establish an environmental policy that has the full support and participation of management;
- anticipate all possible problems and design solutions;
- ensure that proper procedures are maintained;
- correct improper procedures, or design new ones where existing procedures are inadequate;
- ensure that equipment is maintained and is properly designed and includes adequate security devices, alarm devices and spill containment.

In the event that a company is prosecuted for a spill, discharge or other pollution event, or for failing to report an event, the existence of a thorough, well designed and documented environmental management program and a contingency response plan which are reasonable and which can be shown to be complied with by all designated personnel may establish a successful due diligence defence