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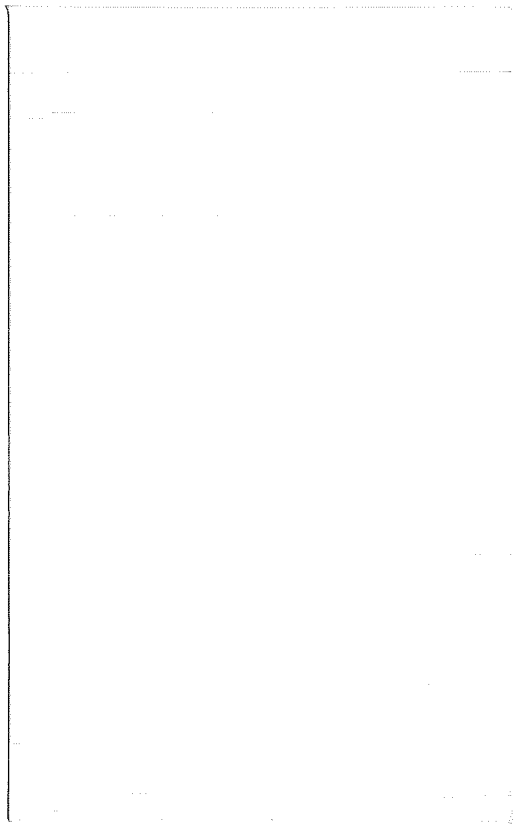

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CONSEQUENCES OF THE BILL 220/90 AMENDMENTS TO THE ENVIRONMENTAL PROTECTION ACT: DEFINING RESPONSIBLE PERSONS AND THEIR LIABILITIES UNDER ADMINISTRATIVE ORDERS

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Abstract

This report sets out a number of important policy issues relating to the imposition of liabilities under the administrative order provisions of the Environmental Protection Act, R.S.O. 1990, c. E.19 (the "EPA"). Based on the goals and objectives of the legislation, a principled approach to imposing liability is set out. This is followed by discussion of and recommendations for the types of policies and legislative amendments which should be adopted in issuing orders to persons who may be held responsible under the EPA. The purpose of these recommendations is to assist the government in achieving the objectives of the EPA, in light of its concurrent and sometimes conflicting obligations to stimulate and manage the economy. Possible changes which could be made to legislation such as the Bankruptcy Act, R.S.C. 1985, c. B-3 are also suggested, followed by a brief discussion of several non-legislative options which are currently being pursued by the government. The report concludes with a summary of recommendations.[1]

Introduction

On June 28, 1990, the Ontario legislature enacted Bill 220/90, 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).[2] This paper focuses on those amendments which extended the scope of potential liability under administrative orders, in particular, control orders, stop orders, orders to take remedial and preventive measures, waste removal orders and orders relating to waste management and disposal systems, to include previous owners, persons in occupation or persons having the charge, management or control of the source of contaminant, undertaking, land or site.[3]

The potential consequences of the Bill 220 amendments for a number of parties, particularly members of the business community such as secured lenders, trustees in bankruptcy and receivers, are great and there is an urgent need for the development of policies for the implementation and enforcement of the administrative order provisions in the EPA which specifically set out the scope and extent of liability of potentially responsible parties in a manner which provides both certainty and fairness. As a result of the amendments, a broader spectrum of parties may be required to comply with administrative orders to, for example, clean up 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 and 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 however, 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 jurisdictions in the United States in some respects) in extending potential liability under administrative orders beyond the defensible concept of "polluter pays", which does not necessarily require a narrow definition of polluter, to that of "deep pocket" pays.

Clean up of contaminated property is a serious problem in Ontario and indeed through Canada. Comprehensive legislation is required to regulate the area. The Bill 220 amendments reflect the Ontario government's concern about this issue and its desire to prevent, control and remediate contamination as expeditiously and efficiently as possible. But the amendments are in need of clarification. In order to be effective, the legislation must not only be tough; it must also be clear, fair and consistently applied. And it must adhere to principles of logic and reflect commercial reality. The government's responsibilities to protect the environment must be balanced with those to stimulate economic activity in Ontario and maintain a sound economic base, recognizing that, at least for the 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 and conduct operations. Responsible business practices in lending, investing 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 high standards by statute, the legislation must clearly specify their duties and defences available to them.

1. Principles

A. What are the goals and objectives of the EPA and how should these be reflected in the imposition of liabilities under administrative orders?

In order to develop policies for implementing the administrative order provisions of the EPA, the goals and objectives of the legislation must be identified. The express purpose of the EPA is "to provide for the protection and conservation of the natural environment" (s. 3). The natural environment is defined as "the air, land and water, or any combination or part thereof" (s. 1(1)(k)). This purpose is intended to serve as a guide to the interpretation of the various provisions of the EPA. In addition, the Interpretation Act, R.S.O. 1990, c. I-11, s. 10, provides that provincial statutes shall be largely and liberally construed, which may mean that, in some instances, protection of the environment will take priority over the imposition of liabilities in the most equitable manner. Political pressures and public opinion may also have some influence.[4]

The following goals and objectives may be identified as consistent with or appropriate to the broadly-stated purpose of the EPA:

- protection of the public health and welfare and the environment;
- orderly, efficient and effective remediation of environmental degradation;
- prevention and deterrence of future contamination;
- promotion of compliance and self-regulation;
- provision of incentives for environmental protection;
- requirement that "polluters pay" for the costs of environmental degradation, to avoid imposing the burden on the taxpayer (the "polluter pays principle")[5];
- equitable imposition and allocation of liabilities;
- avoidance of unjust enrichment or deprivation;

- clarity and precision in defining responsibilities;
- sufficient flexibility and discretion for the regulators to enable them to address a wide range of situations;
- consistency with developed theories of liability and legal principles; and
- consistency with legislation which may impact on or be affected by it.[6]

The legislation cannot be applied so as to achieve all these objectives in every situation and the government therefore must attempt to reach a reasonable balance among them, while recognizing that, in some instances, certain goals must take priority over others. For example, in an emergency, the precise allocation of liabilities among persons responsible may be less important than clean up, with the result that equitable notions of fairness will be subordinated to protection of the public and the environment.

The approach taken should also be pragmatic and consensual: the government's objectives may be compromised if the legislation is applied in an arbitrary and unreasonable manner. They may also be compromised if the parties involved do not work together. However, the adoption of a consensual approach may result in delay and inefficiency and may not be appropriate in certain situations, although it might also be more likely to result in a solution which is acceptable to all parties. One example of a consensual solution is where the parties involved (such as secured creditors and their agents) obtain the acquiescence of the Ministry of the Environment (the "MOE") to a court order which deems a receiver not to be a responsible person for certain purposes provided that stipulated conditions are met. Another example is where the MOE agrees to limit the liability of a secured creditor to the amount of its net recoveries provided that a number of rules are followed.[7] These examples

illustrate the MOE's desire to adopt a reasonable approach to compliance with administrative orders (see further in section 4 below).

The government must endeavour to avoid a "lose-lose" situation in which, for example, a secured creditor abandons its security rather than risk exposure to liability as a result of taking steps to protect its security or to assist the debtor in continuing operations. In this scenario, contaminated property or other assets may be allowed to depreciate and the risk of ongoing damage or threat to public health and safety and the environment increased. Environmental liabilities should be imposed to the greatest extent possible on the private sector in a manner which is both fair and predictable. This will ensure that the environmental costs of business activities are paid for by the most appropriate parties. As a matter of social policy, it is preferable that these costs are passed on to the consumer and regulated by the economic forces of the marketplace, rather than to the general taxpaying public.

The emphasis throughout this report is on the development of principles and the need for these principles to be reflected clearly in the legislation. One important factor in this process is the absence of a "Superfund" or superfund-type scheme in Ontario, similar to that which exists in the United States, to ensure clean up from an industry-generated and/or public fund where responsible parties cannot be identified or made to pay. This means that in Ontario a broad approach must be taken to the imposition of liabilities in order to protect the public purse. As a result, in some instances recovery may be sought from "deep pockets" who have benefited from polluting activities, even where the benefits do not match compliance costs precisely. Without a superfund-type safety net, the provincial government's cost recovery mechanisms must also be highly effective.[8]

B. A principled approach to identifying responsible persons under the EPA

Legislation which imposes liability on responsible persons should set out a clear and precise definition of such persons in order to provide them with a sufficient degree of certainty and predictability. Failure to define responsible persons appropriately may result in inefficient regulation at one extreme and in non-compliance and the legislation being brought into disrepute at the other.

The concept of the "polluter pays" principle is easily understandable in theory, but its application to practice is more complex, particularly when related issues such as the types, limits and allocation of liability among responsible persons are considered. The initial and most difficult component of the principle is that of determining the identity of responsible persons. This is crucial because hard policy issues in terms of equitably imposing liabilities are dealt with at the definitional level, including the creation of exemptions. Defining liability broadly will ensure that, ultimately, environmental degradation will be remedied and the taxpayer will only be called upon as a last resort. However, such an approach may result in the imposition of liability on parties not responsible, either directly or indirectly, for the contamination. The broad approach is also simpler to apply but it fails to recognize different degrees of responsibility, for example, from parties who directly contributed to contamination, to those in control who failed to prevent the contamination, to those whose contribution to the contamination was indirect. It can be justified to some extent on the basis that the public purse is protected at the expense of a party which profited in some measure or received a benefit from its involvement with the degradation, either financially or otherwise, or who will profit from any remediation funded by the taxpayer. In addition, in many instances parties have the opportunity to allocate risk among themselves

and/or obtain insurance. This approach ultimately will also result in more responsible environmental behavior.

Although the wording of the parties potentially responsible under each of the administrative order provisions in the EPA varies, for the purposes of this report these parties may be divided into the following four categories:

(1) an owner or previous owner of the source of contaminant, undertaking or property;

(2) a person who is or was in occupation of the source of contaminant, undertaking or property;

(3) a person who has or had the charge, management or control of the source of contaminant, undertaking or property; and

(4) a person who causes or permits the discharge of a contaminant (this category will be dealt with as part of (3)).[9]

From a literal reading of the EPA, liability under the administrative order provisions is not necessarily based on causation, fault or negligence in each case. However, such an application of these provisions would sometimes produce unreasonable results. Legal responsibility should be imposed on the basis of some causal connection to the contamination, although negligence or other fault should not be necessary. This approach recognizes both the primary objective of imposing liability which is to achieve prompt clean up and restoration of the environment, as well as the secondary goal of requiring that the polluter internalize the risk and costs of environmental degradation. The polluter may then pass these costs along to the consumer in the pricing of goods and services or engage in some other form of risk allocation. The following set of principles is proposed as the basis upon which liability should be imposed. These principles will be referred to throughout this report.

Recommendation #1:

It is recommended that the principles upon which liability should be imposed on persons under administrative orders in the EPA should be:

(1) first, the extent of their ability to exercise influence and control over the pollutants, polluting activities or contaminated property (in the words of the EPA, persons with "charge, management or control" of a source of contaminant, undertaking or property). This should include liability for contribution to pollution, for example, by "causing" or "permitting" it; and

(2) secondly, the extent of their derivation of a benefit, financial or otherwise, from the pollutants, polluting activities, property or from compliance with an administrative order.

This extended notion of polluter is one which recognizes that the costs of compliance may be great and that, in order to ensure compliance, liability should be spread as widely as possible. It also recognizes that giving those with influence and/or control a financial stake in the avoidance and remediation of contamination is an effective way to deter it. The linkage of responsibility with influence and/or control and/or benefit is consistent with equitable notions of fairness and accepted legal principles. The degree of these factors required to give rise to liability will be examined in greater detail below, but it should be noted that knowledge or intention may not be necessary and that the assessment of benefit is a relative one, that is, the position of the potentially responsible party must be compared to that of the taxpayer and the victims of pollution. In the words of Dickson, J., writing for the court in the Supreme Court of Canada decision of R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 (S.C.C.):

> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control": Lord Evershed in Lim Chin Aik v. The Queen, [1963] A.C. 160 at p. 174. The purpose, Dean Roscoe Pound has said (Spirit of the Common Law (1906)), is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale". As Devlin, J., noted in Reynolds v. G. H. Austin & Sons Ltd., [1951] 2

> K.B. 135 at p. 149: "a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark". Devlin, J., added however: "if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim.[10]

The following dictionary definitions of "influence", "control" and "benefit" are helpful for determining the parameters of liability based on these concepts.

"Influence" is defined in The Concise Oxford Dictionary (7th ed.) ("Oxford") as the "action of person or thing on or upon another, perceptible only in its effects; ascendancy, moral power" and in Black's Law Dictionary (5th ed.) ("Black's") as "power exerted over others. To affect, modify or act upon by physical, mental or moral power, especially in some gentle, subtle, and gradual way".

"Control" is defined in the Oxford as: "the power of directing, command, directing an activity; restraint, means of restraint, check" and the act of dominating, commanding, exerting control over; checking, verifying; regulating and in Black's as the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee".

In tort law, in the context of attributing negligence leading to an accident to the defendant, the plaintiff must prove that the defendant was in "control" of the situation. Professor Linden, in Canadian Tort Law (4th ed.), notes that the words control or management "... are not holy; they are merely meant to express the idea of responsibility ... the idea of control has no merit or force as a concept on its own; it is only a shorthand expression for saying that the defendant was the one responsible".[11]

"Benefit" is defined in Black's as "advantage; profit; fruit; privilege; gain; interest".

It is useful to compare the definition of responsible persons in the EPA with that in other environmental statutes. For example, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601-9675 ("CERCLA", also known as "Superfund"), a federal environmental statute in the United States, imposes liability for clean up of a contaminated site on the following four broad classes of responsible persons:

(1) the owner and operator of a facility (facility is defined as including a building, site or area);

(2) any person who **at the time of disposal** of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (emphasis added)

(3) any person who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances at a facility; and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities selected by the person, from which there is a release or a threatened release (s. 107(a)).[12]

The CERCLA definition connects the liability of the responsible party to the event in one of the four categories: the person who owned or operated a facility is linked to the time of disposal in s. 107(a)(2). This linkage, which is not contained in the EPA definition, creates a logical limit to the liability for actors in the past.

Another example is the definition of person responsible in Alberta's proposed Environmental Protection and Enhancement Act (the "EPEA") which is as follows:

""person responsible", when used with reference to a substance or a thing containing a substance, means

(i) the owner and previous owner of the substance or thing,

(ii) every person who has or has had charge, management or control of the substance or thing, including the manufacture, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii) (s. 1(ii))."[13]

It should be noted that Part X of the EPA which regulates spills creates a nexus between both the "owner of the pollutant" and the "person having control of the pollutant" and the discharge, such that liability is limited to the owner and person having control **immediately before the first discharge of the pollutant** (s. 91(1)). This is similar to the definition of "owner of a substance" in Part 4 of the EPEA which regulates the "Release of Substances" and which is limited to the owner **immediately before or during the release** (s. 94(a)). It is also similar to the scope of liability under abatement orders issued pursuant to section 22 of British Columbia's Waste Management Act, S.B.C. 1982, c. 41. Under this section, where a contaminated site is actually causing pollution, an order may be issued to the person who had possession, charge or control of the substance **at the time it escaped or was emitted**, the person who owns or occupies the land on which the

substance is located or **on which the substance was located immediately before it escaped,** or any other person who caused or authorized the pollution.

2. Policies and legislative amendments

As noted above, the EPA may be characterized as delineating four general and broad categories of persons who may be held responsible under administrative orders. This approach is consistent with the government's goal of ensuring that environmental degradation is addressed by private parties rather than at the expense of the public purse, for the wide definition increases the possibility that persons associated with pollution will pay for it. However, it may also create uncertainty and unfairness for persons who potentially may be responsible: the categories are defined in a general as opposed to inclusive manner and there are no exemptions from, defences to or limitations for those who may be responsible. In order to balance the competing needs of certainty for potentially responsible parties and flexibility for regulators, consideration should be given to whether the definition of persons responsible in the EPA should be more precise or, alternatively, to whether the scope of the definition should be more narrowly focused.

The nature of environmental degradation is complex. Contamination often occurs as a result of many pollutants released by the activities of numerous actors over a number of years. These actors likely will have contributed to the contamination in varying degrees and therefore, resolving issues of liability in a completely equitable manner is difficult and at times impossible.

This part of the report sets out the policies and legislative amendments which should be adopted in implementing and enforcing the administrative order provisions of the EPA. The issue of whether changes or clarifications should be made by policies or by regulations or amendments to the legislation itself (or by some combination of the two) must reflect a decision which considers both the

legal limits to the ability to effect changes by policies and the greater administrative flexibility permitted by regulation through policy than through statutory amendments. Those who must comply with the law generally would prefer the certainty of legislative amendments, whereas those who apply the law often require the additional flexibility provided by policy or guidelines which may be adapted on a case-by-case basis.

Some of the recommendations for legislative amendments contained in this report have been implemented in legislation in other jurisdictions such as those in the United States. However, because the EPA provisions are still relatively new and untested, it might be preferable at this stage to develop guidelines or policies based on the recommendations and to undertake further consultation and empirical research before statutory changes are made, except in those instances where an amendment is clearly warranted.

Recommendation #2:

It is recommended that the EPA's broad approach to the imposition of liability should be maintained, but that provision should be made to narrow the range of potentially responsible persons by clearly defined exemptions, defences and limitations which would be available in certain instances as set out below. This will enable the government to address the complexities of pollution control, which include the fact that degradation often takes place over a number years as a result of many actors, activities and pollutants. It will also reflect the reality that not all parties should be held equally responsible as responsible persons.

A. Who should be responsible persons?

This section sets out classes of parties who should be considered responsible persons under the EPA's administrative order provisions and considers whether the liabilities currently imposed on them are appropriate. The discussion of each category is subdivided into the following three parts: (a) owner, (b) person in occupation, and (c) person having charge, management or control of a source of

contaminant, undertaking or property. These categories include former owners, persons in occupation and persons who had charge, management or control of a source of contaminant, undertaking or property. The discussion is followed by recommendations for the policies and legislative amendments which should be given consideration in imposing liability on these parties according to the principles set out in Recommendation #1 above.

(i) Generators of a contaminant

Generators of contaminants are the first actors in the chain of environmental degradation. They often are in a position to influence and control the discharge of the contaminants, including the quantity discharged. As a matter of policy, generators therefore should be held responsible for ensuring the proper handling and disposal of the contaminants which they produce.[14] This would encourage generators to internalize the costs of pollution.

(a) Owner

In keeping with the objectives of the EPA, a broad approach should be taken in imposing liability on a generator of contaminants as owner under the administrative order provisions in the act, such that liability should not be limited to, for example, the point at which the generator transfers contaminants to another party or to a waste disposal site.[15]

A generator should be liable as an owner where the generator owns the source of contaminant, undertaking or property, for example, where a company is generating contaminants on-site. A generator should also be liable as an owner of the contaminant where the generator is in a position of influence or control with respect to the contaminants or derives a benefit from them.

(b) Person in occupation

Similarly, a generator should be liable under an administrative order as a person in occupation where the generator occupies the source of contaminant, undertaking or property, such as when a company generates contaminants on-site. As will be discussed in section A(x) below, successors and assignees to generators, as well as to any other responsible persons, are bound under administrative orders issued pursuant to the EPA.

(c) Person having charge, management or control

A generator may also have charge, management or control of the source of contaminant, undertaking or property. As the creator of the contaminant, the generator is often in a position to influence or control its transportation and disposal or discharge. Where this is the case, the generator should be liable under an administrative order. No distinction between the contaminant and the source of contaminant should be drawn where the generator had influence or control of the contaminant or derived a benefit from it. In Contaminated Land, Dianne Saxe identifies the indicia of charge, management and control of a contaminant as "the legal ownership of the contaminant, legal and factual possession of the contaminant, and acts of dominion over the contaminant".[16] As a result of the Bill 220 amendments to the EPA, a generator now should be liable for contaminants which were in the generator's charge, management or control at any time in the past and which resulted in pollution. The generator must balance the risk of negligence from improper handling and control of a contaminant with liability for having charge, management and control as a result of becoming overly involved.[17] As will be discussed in detail in section A(iv) below, this is similar to the situation in which a lender may find itself.

Recommendation #3:

It is recommended that the generator of a contaminant should be liable under an administrative order as a responsible person where the generator is in a position to influence or control or derives a benefit from pollution resulting from the discharge or disposal of the contaminant.

(ii) Transporters of a contaminant

Transporters are usually intermediate actors in the lifecycle of contaminants. As a result of their expertise in the appropriate methods of transportation and haulage, transporters should be responsible for ensuring that adequate precautions are taken during their carriage of contaminants and held liable under the EPA's administrative order provisions accordingly. Transporters should be required to internalize the costs of contamination. They also have the opportunity to allocate risk.

(a) Owner

A transporter of a contaminant may be deemed by contract to have ownership of the contaminant during its transportation. Such a contractual term may be included to attract business or where a manufacturer of a dangerous product seeks to limit its liability. Where ownership has been transferred, the transporter should be liable as an owner.

(b) Person in occupation

A transporter of a contaminant will not normally be a person in "occupation" of the source of contaminant, undertaking or property.

(c) Person having charge, management or control

A transporter is in a position of charge, management and control of a contaminant during transportation and should be held liable under an administrative order where there is a discharge or spill of the contaminant during transportation or as a result of transportation which causes contamination. For example, the transporter often will choose the disposal site or destination of the contaminant and the safety precautions to be taken in handling it. It may be that a common carrier, who does not have the same degree of control over its load during transportation, should not be held to the same standard of liability.[18]

Recommendation #4:

It is recommended that the transporter of a contaminant should be liable as a responsible person under an administrative order where the transporter is in a position to influence or control or derive a benefit from the pollution which resulted from the transportation of the contaminant.

(iii) Landowners

Owners of land are expressly caught by the definition of persons responsible under certain of the administrative order provisions of the EPA, namely preventive orders and orders to remove waste. Landowners should be liable under the other order provisions in the circumstances noted below. However, as will be seen, not all landowners should be equally liable under administrative orders. This section examines the liabilities of the following parties who are landowners or related to the ownership of land in some way: current owners, purchasers, former owners, landlords and tenants. The liability of lenders under administrative orders, including those who become landowners (that is, who have title to land taken as security or who take title upon foreclosure), is considered separately under section A(iv) below.

Current Owners

(a) Owner

An owner is not defined in the EPA for the purposes of imposing liability under administrative orders (although an owner is defined in s. 25 of Part V of the EPA which regulates waste management). The meaning of the word will depend upon its ordinary meaning, the objectives of the EPA and the context in which it operates.[19]

According to Black's, an owner is:

> "[t]he person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, ... which he has a right to enjoy ...
>
> The term is, however, a nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the term also includes one having a possessory right to land or the person occupying or cultivating it.

At common law, an owner of land is one who has control or enjoyment of property. Owners may include those who hold the fee simple as well as those who hold the equity of redemption, beneficiaries of a land trust, holders of lesser interests such as easements which bring them into possession and those acquiring purchase rights under an agreement of purchase and sale. A lessee in possession has been held to be an owner. A mortgagee or nominee who is not in possession or control of property is unlikely to be an owner at common law.[20]

An owner may incur liability for trespass, strict liability, negligence and nuisance. An owner also may be liable under the Occupiers Liability Act, R.S.O. 1990, c. O-2, for damages to persons entering the owner's property if the damages

result from a dangerous condition of the property where the owner occupies or has management or control of it.[21]

It should be noted that Alberta's proposed EPEA defines an "owner" with regard to land as follows: "(i) the registered owner of the land, (ii) a purchaser of the land whose interest as a purchaser is shown on the certificate of title to that land, or (iii) a tenant or other person who is in lawful possession or occupation of the land" (s. 1(hh)).

To be consistent with the objectives of the EPA and the principle that regulatory statutes are to be liberally construed, the meaning of a landowner for the purpose of imposing liability under administrative orders should not be narrowly interpreted. Liability as an owner therefore should be imposed on those parties who are in a position to control or influence environmental degradation or who derive a benefit from the polluting activities or the land itself. This approach is consistent with the notion that power and rights should be linked to accountability and responsibility.

The imposition of liability on a landowner should not require that the party have caused or contributed directly to the contamination. This approach is justifiable for several reasons. First, the landowner is in the best position to control the contamination and thereby to protect the public interest and the environment. Secondly, the landowner stands to benefit financially from a clean up or control measures which increase the value of the property.[22]

On the other hand, imposing liability on a current owner for past contamination under an administrative order where the owner had no knowledge and no means of acquiring knowledge of the contamination may be unfair (unless, as will be discussed below, the owner derives a benefit from an increase in the

value of the land). In these circumstances, an owner should be entitled to a defence of "due diligence" provided a number of criteria are met, including that of making all appropriate inquiries regarding contamination at the time of purchase (see further below in this section under the heading "Purchasers"). This defence will not result in a lesser standard of conduct for an owner because by definition the owner is already required to do everything possible in order to establish the defence.

CERCLA provides for a defence to liability for clean up of a contaminated site where a defendant can show that the release or threat of release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third party, if the defendant can establish by a preponderance of evidence that (1) due care was exercised with respect to the hazardous substance, taking into consideration the characteristics of the substance in light of all relevant facts and circumstances, and (2) precautions were taken against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. This is known as the "due diligence" defence and originally it was not available where the act or omission of a third party occurred in connection with a "contractual relationship, existing either directly or indirectly with the defendant" (CERCLA, s. 107(b)). A defendant will also have a defence where the release was solely as a result of an act of war or God.

As a result of amendments which were made to CERCLA in 1986 by the Superfund Amendment and Reauthorization Act, Public Law 99-499, 100 Stat. 1613 (1986) ("SARA"), the definition of contractual relationship was amended to exclude land contracts, deeds or other instruments transferring title or possession, where the defendant acquired the property after the disposal of the hazardous

substance. The defendant must establish by a preponderance of evidence that, at the time of acquisition, the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility, or the land was acquired through escheat or other involuntary transfer, or through inheritance or bequest (CERCLA, s. 101(35)(A)). Parties who may qualify for the "innocent landowner" defence include involuntary landowners such as beneficiaries under estate or succession laws, municipalities acquiring land through tax default and the government through escheat.

In order to meet the test of an innocent landowner who "had no reason to know", the defendant must have made "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability" (CERCLA, s. 101(35)(B)). The court is required to consider any specialized knowledge or experience of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence of contamination on the property and the ability to detect contamination by inspection (CERCLA, s. 101(35)(B)). The landowner must still exercise due care in managing the property to avoid foreseeable acts or omissions of third parties.

The goal of these legislative provisions is to promote careful and thorough examinations of properties by prospective purchasers and the defence therefore is a difficult one to establish. Case law in the United States illustrates that the defence will not be available to a landowner who is ignorant through blindness, that is, who has failed to make inquiries and acquire the appropriate degree of knowledge prior to purchasing a property.

Recommendation #5:

It is recommended that a landowner, including a purchaser, former owner, landlord, etc., should not be liable under an administrative order where the landowner can establish on a balance of probabilities that the landowner:

1. acquired the property after contamination had occurred;

2. did not cause, permit or contribute to the contamination, which includes both the original release and any subsequent one (that is, there was no influence or control over the contamination);

3. had no knowledge and no reasonable means of acquiring knowledge of the contamination or acquired the property involuntarily (the level of due diligence required may vary according to the person seeking the protection of the defence -- for example, a commercial real estate developer should be held to a higher standard when conducting an audit or inspection than an unsophisticated home buyer;

4. cooperated with the government in reporting the contamination when the landowner became aware of it and/or in assisting with compliance with the administrative order; and

5. did not acquire a benefit, financial or otherwise, from the contamination or clean up (conversely, liability of the landowner could be limited to the extent that the landowner did acquire a benefit, provided the preceding criteria are met).[23]

It is recommended that consideration should be given to the creation of such a defence in the EPA.

(b) Person in occupation

A landowner may also be liable to comply with an administrative order under the other categories of persons responsible described above. For example, an owner of land may also be a person in occupation of the source of contaminant, undertaking or property and liable accordingly.

(c) Person having charge, management or control

An owner should also be liable as a person having charge, management or control of the source of contaminant, undertaking or property where the owner is

in a position of influence and/or control or derives a benefit from the polluting activities.

Recommendation #6:

Subject to Recommendation #5, it is recommended that a current owner should be liable under an administrative order where the owner is in a position of influence or control or has derived a benefit from the polluting activities. It should not be necessary for the owner to have caused or contributed directly to the pollution. Where the contamination occurred prior to the period of ownership, the innocent landowner or due diligence defence should be available to the owner who can establish the criteria of the defence set out in Recommendation #5 above.

The analysis under the following four categories of "landowners" (purchasers, former owners, landlords and tenants) will not be subdivided into (a) owner, (b) person in occupation, and (c) person having charge, management or control in each case. The focus instead will be on the particular characteristics of these types of "landowners".

Purchasers

The guiding principle in a land purchase is that of caveat emptor ("let the buyer beware"). This means that the purchaser bears the burden of ensuring that the land is free from defects and fit for the purchaser's intended purposes. The purchaser must use express warranty for protection. The vendor is however under common law duties not to misrepresent the nature of what is being sold and to disclose latent defects (such as the existence of contamination on a property) of which the vendor is aware. Failure to carry out these duties may lead to liability.[24]

The torts of nuisance and trespass also impose responsibility on a purchaser for existing problems which the purchaser does not remedy. A purchaser does not necessarily acquire ownership of personal property on its land and can avoid ownership by contract. However, the purchaser may be liable as the person having

charge, management or control of the personal property which is a source of contaminant, for example, where drums containing contaminants leak. The purchaser clearly has a financial interest in avoiding contamination from leakage.[25]

The purchaser is essentially in the same position as a current owner and should be liable under an administrative order on the same basis, that is, where there is influence and/or control over or benefit from contamination. Similarly, in the case of past contamination, the purchaser should be liable unless the purchaser can establish the criteria of the innocent landowner defence outlined in Recommendation #5 above.

This approach is justified on the basis that a purchaser has the opportunity to control or influence the clean up or continued contamination of a property at the time of purchase. The purchaser will also benefit from any remediation performed. The purchaser also has the opportunity to obtain protection from liability through contractual warranties and factual or financial assurances such as environmental audits or performance bonds. To ensure that these opportunities are taken advantage of, the purchaser should be liable under any administrative order issued after purchase to the extent that the purchaser knew or should have known of the contamination prior to purchase. This is consistent with the common law principle of caveat emptor. The purchaser must therefore make the appropriate inquiries before purchasing a property. If contamination is discovered, the purchaser may contractually allocate responsibility for clean up to the vendor or accept an abatement in the purchase price. Holding purchasers responsible in this manner will ensure that properties are carefully examined for contamination prior to purchase, with the result that vendors will be forced to

clean up in order to make a sale. Purchasers will also be encouraged to ensure that pollution does not occur once the sale has taken place.

Recommendation #7:

Subject to Recommendation #5, it is recommended that a purchaser should be liable under an administrative order on the same basis as a current owner. The purchaser should not be liable where the purchaser can establish the criteria of the innocent landowner defence set out in Recommendation #5.

Former Owners

The liability of a former owner should be governed by the same principles of influence and control and benefit as apply to a current owner. The innocent landowner defence should also be available to a former owner.

An important additional factor which complicates the issue of imposing liability under an administrative order on a former owner is that of the retrospectivity of the Bill 220 amendments. The problems associated with retrospective liability are discussed further in section 2D below, but it should be noted here that, on balance, the general unfairness of imposing liability retrospectively on parties who were in compliance with the existing legislation is necessary in the context of environmental degradation. Much of the contamination present today predates the enactment of the legislation and without retrospective liability, the taxpayer will be subject to enormous, if not prohibitive cleanup costs. This result is particularly undesirable in light of the large deficits currently faced by government.[26]

In many situations there will be a range of owners, from those who owned the property or the source of contaminant at the time of the contamination and were in a position of influence and control, to those who owned the property at a later date and either further contributed to the contamination or knew of it and did

nothing, or failed to make the appropriate inquiries, to those who had no means of knowledge and did not contribute to the contamination in any way and finally, to those whose period of ownership predated the contamination. All these parties are potentially responsible persons under the EPA's administrative order provisions.[27] Owners whose ownership predated the contamination and whose activities predated the creation of the circumstances leading to the contamination should not be held liable under administrative orders. Former owners who abandon property or take steps to evade responsibility through technical transfer of ownership should be held liable where they are in a position of influence and/or control or benefit.

Administrative orders generally are issued to protect the public and clean up, control or prevent environmental degradation in the most efficient and expeditious manner possible. The government therefore should not be required to conduct a judicial inquiry into the precise liabilities of the responsible parties prior to issuing an order to them. However, it should be required to determine, as far as is reasonably possible in the circumstances (bearing in mind that this may not be possible or only to a lesser extent in an emergency or urgent situation), which parties had influence and control of or derived a benefit from the polluting activities during the period of their ownership.

Recommendation #8:

It is recommended that an owner whose period of ownership predated the contamination and whose activities did not create the circumstances which resulted in the contamination should not be liable under an administrative order. An intermediate owner who had no knowledge or means of acquiring knowledge of the contamination and did not contribute to the contamination would likely be able to meet the criteria of the innocent landowner defence set out in Recommendation #5 and should not, as a matter of policy, be named as a person responsible on an order. An owner who abandoned property or otherwise took steps to evade responsibility through technical transfer of ownership should also be held responsible where there was influence and/or control or benefit.

Landlords

A landlord should be liable as a person responsible under an administrative order, provided the landlord has the requisite degree of dominion or control or derives a benefit from the polluting activities of the tenant or will benefit from compliance with an order. (As the landlord collects rent, thereby receiving a benefit from the tenant, this will generally be the case.) Liability should be imposed on a landlord regardless of the landlord's knowledge of the contamination and regardless of the landlord's contribution to it where the landlord rents to a tenant which the landlord knows or should know will cause contamination. This will encourage landlords to make appropriate inquiries of their tenants. The landlord's liability for activities which occurred before the landlord's period of ownership which cause contamination should be subject to the innocent landowner or due diligence defence. The landlord should be liable for having "charge, management or control" of a source of contaminant, undertaking or property in a manner similar to that of the secured creditor which exerts control over a borrower (see section A(iv) below).

Recommendation #9:

It is recommended that a landlord should be liable under an administrative order provided the landlord meets the criteria of influence and control or benefit. The landlord should also be eligible for the innocent landowner defence for contamination which predated the landlord's ownership provided the criteria set out in Recommendation #5 are established.

Tenants

A tenant should be liable under an administrative order where there is sufficient influence, control or benefit. The innocent landowner defence should be available to a tenant who exercises due diligence prior to entering into a tenancy agreement. This will encourage the tenant to make the appropriate inquiries

before signing a lease and to allocate risk of liability at this time or accept the responsibility with an abatement in the rent. A tenant should also be liable as a person in occupation of a source of contaminant and as a person having charge, management or control.

Recommendation #10:

It is recommended that a tenant should be liable under an administrative order where the criteria of influence and/or control or benefit are met. The tenant may also qualify for the innocent landowner defence set out in Recommendation #5 for contamination which predated the tenancy.

(iv) Lenders

The four principal ways in which lenders can be affected by environmental liabilities under administrative orders, both indirectly and directly, imposed by the EPA should be noted at the outset of this discussion.

1. As a result of their debtors being required to comply with administrative orders, lenders may find that these debtors are unable to meet their loan payments or even carry on business. The orders may relate to land which is currently or was at some time in the past owned or occupied by the debtors or in their charge, management or control.

2. The value of the security taken by lenders, if contaminated or subject to an administrative order, particularly where the collateral consists of real estate, may be severely diminished or worthless.

3. Lenders may incur direct liability under administrative orders as an owner or former owner, occupier or former occupier, or person having or who had charge, management or control of a source of contaminant, undertaking or property. This effect on lenders is potentially the most serious one because the

liability bears no relation to the amount of the loan or the value of the security taken. As will be discussed below, monitoring, realizing on or enforcing security by lenders through measures such as the appointment of a receiver/manager ("receiver"), foreclosure, or otherwise acquiring control of or title to contaminated assets may trigger liability under administrative orders for lenders. Lenders also may be liable as a result of agreements to indemnify agents who realize on their security. The personal liability of agents and fiduciaries such as receivers and trustees will be discussed in section A(v) below.

4. The priority of secured lenders may be superseded by a statutory lien created in the EPA for the recovery of the government's costs of carrying out an order where the responsible persons fail or refuse to do so. This lien has the same priority as a municipal tax lien, that is, ranking ahead of secured creditors and other registered charge holders. Part XIV provides that the government "may issue an order to pay the costs of doing any thing caused to be done ... under this Act [the EPA] to any person required by an order or decision made under this Act to do the thing"[28] and, where the order relates to real property and the municipality in which the property is situated is directed to recover the amounts specified in the order, the municipality shall have a lien on the property for the amounts in the order. These amounts shall be deemed to be municipal taxes and shall be collected in the same manner and with the same priorities as municipal taxes. (ss. 150(1) and 154(2)). However, as will be discussed below in section 3B(ii), recently proposed amendments to the Bankruptcy Act in Bill C-22 will abolish all claims of Crown priority created by both federal and provincial statutes.

The focus of this section is on the direct liability of lenders under administrative orders noted in paragraph 3 above. A discussion of issues relating to compliance with orders and the priorities of claims in an insolvency and bankruptcy and the effects on secured creditors is set out in section A(v) below.

(a) Owner

The first case in Canada to rule on the issue of direct lender liability under an administrative order in an environmental context was the recent decision of the Ontario Divisional Court of Canadian National Railway Co. v. Ontario (EPA Director) (1991), 3 O.R. (3d) 609 (Ont. Div. Ct.) aff'd 7 O.R. (3d) 97 (O.C.A.) ("CNR").[29] In this case, the court considered the issue of whether a mortgagee not in possession of property could be liable under an administrative order as an owner or a person in control of a source of contaminant. The court held that the mortgagee, although technically an owner, was not an owner within the meaning of the EPA:

> The fact that the technical, legal ownership of the plant is in the mortgagee does not make it an owner within the definition ... To be an owner within the meaning of the Act, and subject to the serious responsibility imposed by it, there must be possession or dominion over the facility or property. See Wynne v. Dalby (1913), 30 O.L.R. 67, 16 D.L.R. 710 (C.A.), at p. 74 O.L.R., pp. 715-16 D.L.R. There was no such possession or dominion by Abitibi [the mortgagee] in this case. We do not believe it makes any difference whether a mortgagee such as Abitibi had knowledge of the contamination or not. If a mortgagee has taken no active steps with respect to gaining or obtaining control of the property, it is not responsible.
>
> In our opinion, Abitibi is not responsible as a mortgagee. At best, it had the right to obtain control in the future through its remedies under the mortgage. It was not actually in control of the plant at the time of the order. (pp. 623-4)

It therefore appears that a lender which is technically a legal owner will not be liable as an owner of a source of contaminant under the administrative order provisions of the EPA in the absence of possession or dominion over it. This is

consistent with the American approach to owner liability under CERCLA. The definition of "owner or operator" in CERCLA exempts from liability "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility" (CERCLA, s. 101(20)). This section will be discussed further below.

However, a lender which forecloses on security, purchases property at a sheriff's sale or otherwise acquires title to the property taken as security, should be liable as any other purchaser. The lender should be subject to the innocent landowner defence provided the lender can meet the criteria set out in Recommendation #5 in section A(iii) above, such that there was no contribution to or control over the contamination and the appropriate inquiries were made before entering into the loan, during the term of the loan and prior to a workout or enforcement of the loan agreement. This approach will encourage lenders to take steps to discover contamination and enable them to allocate and reflect the risks of liability in the terms of the loan, for example, by stipulating an increased rate of interest and requirements for compliance and monitoring. It will also encourage borrowers to prevent and control environmental degradation and force them to pay for the true environmental costs of their businesses. The borrowers will be able to pass these costs along to their customers which will result in more efficient environmental regulation determined by market forces.

(b) Person in occupation

A lender not in occupation of a source of a contaminant, undertaking or property should not be liable as a person responsible, but when the lender takes possession either directly or indirectly through an agent such as a receiver or

through the exercise of certain powers over the borrower, the lender should be liable as a person in occupation.

(c) Person having charge, management or control

The issue of when a lender has "charge, management or control" of a source of contaminant, undertaking or property is one which has attracted a great deal of attention in both Canada and the United States, particularly in the financial communities on both sides of the border.[30] As a result of recent decisions in the United States in which lenders have been held liable for clean up, the courts and the federal government are in the process of determining the parameters of "lender liability" under s. 101(20)(A) of CERCLA and of defining the scope of lending activities which will not give rise to liability for lenders. Their focus in interpreting s. 101(20)(A) is on a determination of when a lender is "participating in the management of a facility". The competing desires of certainty (of bankers) and flexibility (of government) are proving to be difficult to reconcile and will be discussed below.

The Ontario Divisional Court in CNR held that an unexercised contractual right of re-entry is not a sufficient basis upon which to impose liability on a lender as a person in control under an administrative order. However, a lender who does take possession could be liable. One commentator has criticized this approach on the basis that it penalizes lenders who get involved with the problems of their borrowers, while rewarding those lenders who do nothing, even where they are aware of the problems.[31] This commentator compared the CNR decision to a recent ruling in the United States in which the court held that a lender who does not take possession of a facility could be liable for "participating in the management" of it if the lender participates in "the financial or operational

management of the facility to a degree indicating a capacity to influence the borrower's treatment of hazardous wastes".[32] The mortgagee in Fleet Factors allegedly became involved in the management of the business in a manner which was "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." The court's rationale was as follows:

> Our ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.
>
> Similarly, creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support. (p. 1558)[33]

The Fleet Factors decision has been criticized by members of the American banking community and legal commentators for its ruling that a lender could be liable where there was no **actual** influence. However, even with this arguably low threshold of liability, the court held that merely monitoring and engaging in discrete financial decisions to protect a security interest would not give rise to liability under CERCLA for a lender.

As a result of the confusion created by the Fleet Factors decision, the United States Environmental Protection Agency ("USEPA") published a proposed rule on "Lender Liability Under CERCLA" in the Federal Register on June 24, 1991 for comment. The purpose of the rule is to define the meaning of the security interest exemption in section 101(20)(A) of CERCLA and to clarify the "range of activities that may be undertaken by a private or governmental lending institution or other entity that holds a security interest ... without ... voiding the exemption."

The rule also addresses the liability of governmental entities which involuntarily acquire ownership or possession of contaminated facilities. The final rule, which will not have the force of law, was released on April 24, 1992 and took effect on April 29, 1992, the date of its publication in the Federal Register (57 FR 18344). In addition, several bills have been introduced in the Senate (S 2827 and S 2319 to exempt lenders from environmental liability) and Congress (HR 2085 to permit lenders to foreclose on properties taken as security without incurring CERCLA liability).[34]

One American legal commentator has argued that lender liability ought to be based on an agency or "instrumentality" theory, such that liability will result where the borrower becomes the agent or instrument of the lender. The test for liability is "a strong showing that the creditor assumed actual, participatory, total control of the debtor. Merely taking an active part in the management of the debtor corporation does not automatically constitute control, as used in the instrumentality doctrine, by the creditor corporation." The control required must amount to "total domination".[35]

Another legal commentator in the United States has argued that, in order to determine whether a lender should be liable as "participating in the management" of a facility, a "cumulative test" should be applied, that is, one which looks for total domination and control amounting to ownership. According to this commentator, such an approach would encourage lenders to monitor to the benefit of society, the lender and the borrower. It would also give lenders an adequate degree of certainty. The commentator points out that lenders are expert monitors and efficient risk spreaders and therefore must be held to a high and predictable threshold which will provide them with the appropriate incentive to act as "quasi-[US]EPA monitors".[36]

In Canada, one legal commentator has argued that "only those lenders who are directly involved or are negligent in the ownership or control of property encumbered by hazardous waste should ultimately be held liable". In order to protect the environment, lenders should be encouraged to monitor borrowers, but should not themselves be liable.[37]

For the purposes of analyzing a lender's "charge, management or control" of a source of contaminant, undertaking or facility, the lending relationship may be divided into two broad stages: (1) during the term of the loan, and (2) upon enforcement of security.

1. During the Term of the Loan

As noted above, a lender who is not in a position of ownership, occupation or control of a source of contaminant, undertaking or property should not be liable under an administrative order. However, such orders may affect the financial viability of a borrower and its ability to meet credit payments. If this occurs, a lender may be caught in a "Catch-22" situation in which taking steps to protect its security may result in liability under an administrative order as a person having charge, management or control. The lender therefore must decide at this time whether to tighten controls and increase its monitoring of the borrower, perhaps even through the appointment of a receiver[38] (which may lead to liability), or whether to adopt a passive approach to the problem (which may put the security at risk). Similarly, if the lender interferes in the borrower's affairs to the extent of preventing the borrower from taking steps to avoid pollution (such as by not spending money on pollution control equipment), the lender could be found to have caused or permitted any pollution which results from such interference.[39]

2. Upon Enforcement of Security

A lender should not normally be liable under an administrative order for realizing on receivables. However, when a lender realizes on equipment and inventory, the degree of possession required by the lender to do so and whether the inventory or equipment is contaminated or the source of contaminant should be relevant factors to consider in imposing liability.[40]

When a lender appoints a receiver or forecloses on its security, the lender should incur liability as a person having charge, management or control of a source of contaminant based on the principled approach requiring influence and control or benefit outlined above. One unfortunate consequence of the current recessionary economic climate is that many businesses are experiencing financial difficulties. This means that the number of receiverships and bankruptcies is likely to increase and lenders will more often be required to assess carefully their potential liabilities in such situations. Lenders may choose to minimize their losses by making deals with borrowers not to enforce their security or by simply abandoning it, rather than appointing a receiver to continue operating the business, foreclosing or petitioning the borrower into bankruptcy, so as to avoid the cost of compliance with an administrative order which may far exceed the value of the security. This approach is taken at a cost to society, for abandoned contaminated sites become a problem which must be remedied at the expense of the public purse, particularly where the site poses a risk or threat of harm to the public and the environment.

In imposing liability on lenders under administrative orders, it is important to select an appropriate standard for doing so. In order to encourage lenders to conduct environmental audits and monitor borrowers for environmental

compliance and problems, this standard should be based on the principles of influence or control and benefit and should have precise and clearly defined parameters. Lenders have ample bargaining power when entering into transactions and can contractually allocate the risks of environmental liabilities, obtain indemnities and warranties and, in some instances, insurance to protect themselves and minimize their exposure to liability. These "institutional" changes will ensure that the true costs of borrowers' activities are reflected in their ability to obtain credit, as well as provide incentives for borrowers to engage in less environmentally-harmful business activities.

As previously noted, Bill 220 imposes retrospective liability on responsible persons. The imposition of this type of liability on lenders, when the polluting activities of borrowers were not prohibited by statute (although, as previously noted, these activities may have given rise to common law liability) and when environmental audits and indemnities were not industry practice, reflects a public policy to protect the taxpayer and a recognition that, relative to the taxpayer, the lender will have derived a greater benefit from the activities giving rise to the contamination (see further in section 2D below).

Arguments may be made for the imposition of limits on liability of lenders in certain circumstances, in order to encourage these parties to take beneficial actions where contamination arises and which may reduce the negative effects of the contamination, as well as to discourage abandonment or the use of bankruptcy proceedings to avoid liability. For example, liability could be limited to the value of the lender's recoveries or to the value of the security. These issues merit further study, including empirical research.

Recommendation #11:

It is recommended that lenders should be liable under administrative orders as owners, persons in occupation and persons having charge, management or control. The test for liability under the current EPA provisions should be based on the degree of control and influence lenders exert, as well as the benefit accrued or contemplated. In order to encourage lenders to monitor borrowers for environmental compliance, lenders should not usually be liable for engaging in normal lending activities such as performing audits and conducting loan workouts. The CERCLA exemption for security interest holders should be considered in Ontario as a legislative amendment. However, when a lender goes into possession of a source of contaminant, undertaking or property, it should be liable as any other purchaser would be and subject to the same innocent landowner defence where the appropriate criteria set out in Recommendation #5 are met. Further study is warranted in developing parameters for the control and influence test for lenders, the recommended security interest exemption and in considering the imposition of limits on lender liability. This should include a review of the USEPA rule on lender liability and a careful analysis of lending activities and the economic effects of lender liability in the United States, as well as in other jurisdictions.

(v) Receivers and Trustees

Prior to considering the personal liabilities of receivers and trustees in bankruptcy under administrative orders, this section will address the following four issues which affect administrative orders issued in the context of an insolvency or a bankruptcy:

(1) compliance with administrative orders;

(2) abandonment of property;

(3) priorities of compliance costs; and

(4) government cost recovery.

1. Compliance with administrative orders

When a debtor becomes insolvent or a bankrupt, a receiver or trustee may be required to comply with administrative orders relating to environmental protection before the secured creditors are paid or the debtor's assets distributed to them. The following two Canadian cases considered the issue of compliance

with administrative orders in the context of receivership in the first and receivership and bankruptcy in the second and the effect of this compliance on the priority of secured creditors.

In the decision involving a receivership, Canada Trustco v. Bulora Corporation Ltd. (1980), 34 C.B.R. (N.S.) 145 (Ont.S.C.), aff'd 39 C.B.R. (N.S.) 152 (C.A.) ("Bulora Trust"), the Ontario Court of Appeal held that a court-appointed receiver-manager was required to comply with an order issued under the Fire Marshal's Act, R.S.O. 1990, c. F-17, to demolish buildings (at a cost which was higher than their market value, but which did not exceed the value of the assets). The court found that the receiver had broad powers to carry on the debtor's business and it held that the receiver had a duty to comply with the demolition order. This duty arose out of the concern for the safety of the public and in spite of the fact that monetary prejudice to the creditors would result. The court commented that "it is indeed unfortunate that a creditor must suffer the loss resulting from the demolition. Nevertheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. A Receivership cannot and should not be guided solely by the recovery of assets."[41] This ruling indicates that, in a receivership, where an order is necessary to protect the public, compliance with the order will be required and will take precedence over the claims of secured creditors.

In the recent decision of the Alberta Court of Appeal of Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Limited (1991), 7 C.E.L.R. (N.S.) 66 ("Northern Badger"),[42] which involved a bankrupt oil company, the court-appointed receiver was required to comply with an order of the Energy Resources Conservation Board to properly abandon seven oil wells (at an estimated cost of $200,000) using assets of the estate which would otherwise be

payable to the secured creditors. The court held that the cost of abandonment ranked ahead of the secured creditors because, although there was a liability, there was no provable "claim" in the bankruptcy (see below under the heading "Trustees"). The court did not believe that a "public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it".[43] Because the order was not a claim provable in the bankruptcy, it was not subject to the priority scheme of the Bankruptcy Act. Instead, the receiver, as operator, "had a duty to abandon them [the oil wells] in accordance with the law."[44] However, the court commented that if the Energy Resources Conservation Board had done the work itself, it would only have had a claim for recovery in the bankruptcy, which would rank behind the secured creditors. The decision of the Court of Appeal overturned the ruling of the lower court which had characterized the order as a claim of the crown in the bankruptcy which ranked behind the claims of the secured creditors.[45]

The Northern Badger decision is a good decision from an environmental perspective, for it prevents a polluter from avoiding compliance with an order through bankruptcy. The decision is also consistent with the American approach to determining whether administrative orders should be categorized as "claims" in the bankruptcy and therefore stayed or whether they should be excluded from this categorization and therefore enforceable, as set out in Penn Terra Ltd. v. Department of Environmental Resources, 733 F. 2d 267 (3d Cir. 1984):

> The enquiry is more properly focused on the nature of the injuries which the challenged remedy is intended to redress - including whether the plaintiff seeks compensation for past damages or prevention of future harm - in order to reach the ultimate conclusion as to whether these injuries are traditionally rectified by a money judgement and its enforcement. (p. 278)[46]

In Contaminated Land, Dianne Saxe argues that orders prohibiting ongoing or repeated conduct and orders which prohibit future discharges, even where money must be spent to stop the discharge, are not claims. Orders requiring preventive or remedial measures should not be categorized as claims where there is a risk to the public, such as in the Bulora Trust case. She proposes the following scheme based on a review of the American jurisprudence to assist in resolving the issue of compliance with administrative orders in an insolvency or bankruptcy:

(1) present and future threats to the environment and public health and welfare should be distinguished from past problems; and

(2) regulatory requirements should be distinguished from monetary claims.

According to this approach, orders requiring action to avoid present and future threats to the environment must be complied with in priority to the claims of secured creditors, whereas monetary claims relating to the remediation of problems which arose in the past should not take priority over their claims.[47]

2. Abandonment of property

Another issue which relates to compliance with administrative orders in a receivership or bankruptcy is whether property which is of no value to the estate (such as contaminated land) can be abandoned.[48] The issue has not yet been resolved in Canadian law.

Where the estate has leased property, a trustee or receiver may decide not to enter into possession of it and can disclaim the lease and abandon the property to the landlord. In one decision in Ontario in which a trustee took possession of leased premises, the trustee was held personally liable to the landlord for damages as a result of the negligent and careless manner in which the trustee occupied the premises of the bankrupt. The trustee had removed all the valuables

and left garbage and water on the floor, with the result that the landlord was put to some expense in restoring the property.[49] Where the property is the debtor's, abandonment to the debtor, or to the crown or the municipality is more problematic from a policy perspective because the public purse may be at risk to pay for clean up.

In the United States, a trustee cannot abandon contaminated property which poses a danger to the public. This is an exception to the provision of the Bankruptcy Code, 11 U.S.C.A. s. 101 (West Supp. 1990), which permits a trustee to abandon property that is burdensome to the estate (s. 554). The leading decision on this issue is In re Quanta Resources Corp.; City of New York v. Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984). In this case, the company declared bankruptcy in the face of a $2.5 million cleanup bill for one waste oil disposal site in New York and an administrative order to clean up another site in New Jersey. Both sites contained PCB contaminated oil. The trustee, with approval of the bankruptcy court, abandoned the sites and fire protection and security measures were discontinued. The court of the Third Circuit held that the trustee was not permitted to abandon the properties in violation of state health and safety laws to protect the public without adequate safeguards:

> If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. (at p. 921)[50]

3. Priority of compliance costs

Where an administrative order must be complied with by a receiver or a trustee (that is, where there is a present or future threat to the environment or public health and welfare), the costs of compliance with the order should take precedence over the claims of secured creditors to the extent of the assets in the

estate. If this approach were not taken, it is likely that there would not be sufficient assets in the estate at the end of the day to ensure compliance.

4. Government cost recovery

As noted above in section A(iv), where the government carries out the work required under an administrative order as a result of the failure or refusal of the responsible parties to do so, its costs have a special priority and may be recovered as a municipal tax lien. CERCLA also creates a priority lien for recovery of the government's costs subject to encumbrances perfected before notice of the lien is filed in a central registry.

A number of states also have enacted environmental lien laws "to ensure that the increased value of the decontaminated property is available to offset the cost of publicly-funded cleanups."[51] These liens take a variety of forms. They may attach only to the real property affected by the order or to all of the property of the responsible person. They may take priority only over registered encumbrances perfected after the lien was filed or over all registered encumbrances whether perfected before or after the lien was filed. Liens which take priority over all previously perfected liens and interests are referred to as "superliens".[52]

However, as noted in section A(iv) above, recently proposed amendments to the Bankruptcy Act will abolish all crown liens. This means that the government will not likely be able to recover its costs in a bankruptcy. Such an outcome would be unfair, particularly in a situation in which the government was required to perform certain work to prevent a threat to the public health and welfare or the environment as a result of the responsible parties' failure to do so. It would also be unfair where the benefit of the expense accrues to the creditors through an

increase in the value of an asset. This issue is discussed further in section 3A(ii) below.

Receivers

A receiver may be privately appointed pursuant to a security instrument or by a court pursuant to the Courts of Justice Act, R.S.O. 1990, c. C-43. Parties such as interim receivers, monitors, consultants, managers and agents may also be appointed. Each of these parties can have different duties and responsibilities, but the criteria for imposing liability on them should be based on the same principled approach described in section 1B above. The discussion in this section will focus on the liability of receivers. A receiver often will have obtained an indemnification from the lender, however, as noted below, the receiver may incur personal liability as a person responsible in certain circumstances.

The appointment of a private receiver is a contractual remedy. The private receiver secures and realizes on the assets for the security holder and generally owes no fiduciary duty to the debtor, but has a general duty of care to act in a commercially reasonable manner in dealing with assets under the receiver's control. The receiver usually is deemed in the security agreement to be the debtor's agent, but an Ontario court has held that, regardless of the language in the security instrument, the receiver actually wears "two hats", such that the receiver is the debtor's agent in the occupation of the premises and the carrying on of the business, and the lender's agent in the realization of the security.[53]

A court-appointed receiver is appointed by way of an application for a court order. This receiver is an officer of the court and has a fiduciary duty to all the parties to deal with the debtor's assets according to the terms of the court order. The court-appointed receiver is not the lender's agent. The receiver acts as the

principal and may be personally responsible for liabilities arising from the receivership.[54]

The court order usually deems the receiver to be in possession. Legal ownership is not affected:

> "the appointment of a receiver does not vest title in the name of the receiver or in the name of the security holder. The appointment, however, revokes the licence to the debtor to deal with its property in the ordinary course of business and judicially authorizes the receiver to exercise the power of sale on realizing the property".[55]

The receiver will be entitled to indemnification out of the company's assets, but where the assets are insufficient to cover the cost of compliance with statutory obligations, the receiver will look to the lender's indemnification.[56]

A receiver usually has the following powers:

- to take possession of the debtor's assets;
- to carry on the debtor's business;
- to receive all funds; and
- to sell, lease or dispose of the debtor's assets.[57]

An insolvent debtor continues to be bound by environmental laws and civil obligations, including administrative orders. The debtor may also be prosecuted. A receiver who takes possession of property has the same obligations and responsibilities as the debtor, apart from liability to prosecutions for the debtor's prior offences.[58]

A receiver should be bound by administrative orders issued to the debtor as a successor (pursuant to s. 19 of the EPA). Alberta's proposed EPEA makes this explicit: the definition of "person responsible" includes "any successor, assignee, executor, administrator, receiver, receiver-manager or trustee" (s. 1(ii)(iii)).

Similarly, Part X of the EPA provides that a reference in that part "to an owner of a pollutant or a person having control of a pollutant includes a successor, assignee, executor or administrator of the owner of the pollutant or the person having control of the pollutant" (s. 91(5)).

The receiver should also be liable under administrative orders issued to the receiver directly as a person responsible. However, the extent of a receiver's personal liability under an administrative order and whether a receiver may abandon contaminated property where the assets in the estate are insufficient to pay for clean up have not yet been resolved in the Canadian courts. As a result of these uncertainties, receivers often are reluctant to accept appointments where there is evidence or a possibility of environmental contamination. The liabilities of receivers under the EPA's administrative order provisions require clarification and greater certainty.

(a) Owner

A receiver should not usually be required to comply with an administrative order as an owner of a source of contaminant, undertaking or property.

(b) Person in occupation

A receiver should be liable to comply with an administrative order as a person in occupation of a source of contaminant, undertaking or property where the receiver is in possession or occupation of the debtor's business.

(c) Person having charge, management or control

A receiver should be liable under an administrative order as a person having charge, management or control to the extent that the requisite degree of influence

and control over the debtor's business operations and assets is present. However, in order to encourage receivers to accept appointments where environmental contamination is present or likely, their personal liability should be limited to the extent of their fault or negligence. This restriction on liability will provide receivers with greater certainty and encourage them to take proper care in dealing with the debtor's business and assets.

Recommendation #12:

It is recommended that a receiver should be required to comply with administrative orders issued to an insolvent debtor as a successor to the extent of the assets in the estate. This should be made explicit in s. 19 of the EPA. A receiver should also be liable under an administrative order issued directly to the receiver as a person responsible to the extent of the assets in the estate. The cost of compliance should be an administrative expense to the estate.

The personal liability of a receiver should be limited to the receiver's fault or negligence. This will encourage receivers to accept appointments where there is an environmental problem on a property, without also providing them with complete immunity should they cause or contribute to contamination.

If there are insufficient assets in the estate to comply with an administrative order, the receiver should be permitted to return the property to the debtor upon giving reasonable notice to the MOE. Abandonment of property which poses a risk to the public or the environment should not be permitted where there are sufficient assets in the estate to remedy the problem.

Trustees

The situation of a bankrupt debtor is different from that of an insolvent debtor. The Bankruptcy Act is a federal statute which creates a scheme for the disposition of the debtor's estate. This Act sets up a hierarchy of creditors for the distribution of the assets in which secured creditors rank ahead of unsecured creditors. The goals of the Bankruptcy Act, which are to distribute the debtor's assets in an equitable and predictable order and give the debtor a fresh start after the bankruptcy, may conflict with the goals of provincial environmental protection legislation, particularly when the provincial government requires compliance with

an administrative order to clean up in order to protect the public and the environment.[59] According to principles of Canadian constitutional law, in the event of a direct conflict, the provisions of the Bankruptcy Act will be paramount to those of the EPA.

The effect of a bankruptcy is to stay all "claims" against the debtor and to prevent the commencement or continuation of civil suits without leave of the Bankruptcy Court (s. 49(1)). Judgements may not be enforced and civil suits for damages are stayed. Unpaid debts after the distribution of assets are discharged in the bankruptcy, including prior damage awards. The issue of when an administrative order is a "claim" and ought to be stayed and discharged in the bankruptcy has not yet been resolved by the courts. As discussed above, it appears that the automatic stay created by the Bankruptcy Act will apply to certain administrative orders and government claims for the payment of money.[60]

A trustee in bankruptcy is appointed pursuant to the Bankruptcy Act to, among other things, distribute the proceeds from a liquidation of the assets to secured and unsecured creditors according to the statutory scheme of priorities. The assets vest in the trustee and the bankrupt debtor can no longer deal with its property (s. 50(5)). A trustee is in a similar position to a court-appointed receiver in that the trustee is an officer of the court and not the agent of a secured creditor and may be personally liable if the assets in the estate do not cover the trustee's costs and liabilities. The trustee is entitled to indemnification out of the assets in the estate for liabilities incurred in carrying out its duties. The trustee may also have an indemnity from a petitioning creditor. A trustee may be personally liable for torts committed in the course of its duties.[61]

A trustee should be bound by administrative orders (to the extent these are not "claims" in the bankruptcy) issued to the debtor as a successor (pursuant to s. 19 of the EPA). As noted above, Alberta's proposed EPEA makes this explicit by defining "person responsible" as including "any successor, assignee, executor, administrator, receiver, receiver-manager or trustee" (s. 1(ii)(iii)).

The trustee should also be directly liable under administrative orders issued to the trustee as a person responsible. However, questions as to the extent of the personal liability of a trustee and whether a trustee may abandon contaminated property are subject to the same uncertainties as they are for receivers and, as a result, trustees are also reluctant to accept appointments where environmental contamination is present or a possibility. One recent example of a situation where a trustee refused to accept an appointment is that of the estate of the bankrupt Lamford Forest Products Ltd. in British Columbia. In this case, no trustee would accept an appointment to a highly contaminated property on Vancouver Island (and a "monitor" therefore was appointed) until the liabilities of the trustee were clarified.[62]

(a) Owner

The trustee is the "owner" of the assets of the bankrupt estate, although the trustee has a right to divest itself of all interest in any property with permission of the inspectors (s. 12(11)). The trustee should be required to comply with an administrative order as an owner of a source of contaminant, undertaking or property.

(b) Person in occupation

A trustee should be liable under an administrative order as a person in occupation of a source of contaminant, undertaking and property.

(c) Person having charge, management or control

A trustee should be liable to comply with an administrative order as a person having charge, management or control where there is the requisite degree of influence and control of a source of contaminant, undertaking or property. However, the personal liability of a trustee should be limited to the extent of the trustee's fault or negligence. This will provide the trustee with sufficient certainty and encourage the trustee to take the appropriate precautions in dealing with the assets in the estate.

Recommendation #13:

It is recommended that a trustee should be required to comply with administrative orders, including orders issued to the debtor and to the trustee directly (provided the orders are not claims in the bankruptcy), to the extent of the assets in the estate. This should be made explicit in s. 19 of the EPA. The costs of compliance should be an administrative expense to the estate.

The personal liability of a trustee should be limited to the extent of the trustee's fault or negligence. This will encourage trustees to accept appointments for estates containing contaminated assets, without also providing them with complete immunity should they cause or contribute to contamination.

If there are insufficient assets in the estate to comply with an administrative order, the trustee should be permitted to return the property to the debtor upon giving reasonable notice to the MOE. Abandonment of contaminated property that poses a risk to human health or the environment should not be permitted to the extent that there are sufficient assets in the estate to address the problem.

(vi) Officers, directors and employees of a corporation

Officers, directors and employees of a corporation should be liable under administrative orders as owners, persons in occupation or having the charge,

management or control of a source of contaminant, undertaking or property where they have the requisite degree of influence and/or control or derive a personal benefit from the polluting activities. This liability should be consistent with the common law liabilities of such parties, for example, for the committing the torts of nuisance, negligence and deceit.

Recommendation #14:

It is recommended that officers, directors and employees of a corporation should be liable under administrative orders where they are in a position of influence and control or derive a personal benefit from the polluting activities. This liability should be consistent with their liabilities at common law.

(vii) Governments

A government should be liable as a person responsible where it is an owner, person in occupation or having the charge, management or control of a source of contaminant, undertaking or property in the same manner as any other party. However, where the government acquires property involuntarily, for example, by escheat in the case of the crown or default in the payment of property taxes in the case of a municipality, it should be eligible for the innocent landowner defence set out above in Recommendation #5.

Recommendation #15:

It is recommended that a government should be liable under an administrative order as a person responsible where it is in a position of influence and control or derives a benefit from polluting activities. Where the government acquires property involuntarily, it should be eligible for the innocent landowner defence.

(viii) Other persons

As a general policy, any other persons who influence and/or control or derive a benefit from polluting activities should be liable under administrative orders as

persons responsible. Such persons could include real estate agents, property managers, environmental consultants and lawyers.

Recommendation #16:

It is recommended that liability under administrative orders should be imposed on any other persons who influence or control or derive a benefit from polluting activities as persons responsible, provided they meet the criteria of ownership, occupation or charge, management or control discussed in the previous sections.

(ix) Related corporations

Related corporations such as parent and associated corporations should be liable under administrative orders as persons responsible. This is consistent with legislation which regulates corporate taxation and securities.[63]

Recommendation #17:

It is recommended that liability under administrative orders should be imposed on related corporations such as parent corporations as persons responsible.

(x) Successors and Assignees

Section 19 of the EPA which provides that successors and assignees are bound under administrative orders should be amended to include parties such as executors, administrators, receivers, receiver-managers and trustees. It should be noted that subsection 91(5) in Part X regulating spills states that a reference in that part (except for section 92 regarding the duty to give notice to the MOE and other parties) "to an owner of a pollutant or a person having control of a pollutant includes a successor, assignee, executor or administrator of the owner of the pollutant or the person having control of the pollutant".

Recommendation #18:

It is recommended that section 19 of the EPA which provides that successors and assignees are bound under administrative orders should be amended to include

parties such as executors, administrators, receivers, receiver-managers and trustees.

B. Should there be a limited discretionary power to exempt potentially responsible persons?

A limited discretionary power to exempt potentially responsible persons in exceptional circumstances so as to avoid unfairness and inequity might be considered as an amendment to the EPA, although this power may be subject to abuse and must be carefully circumscribed. For example, precautions such as the requirements of formal adoption and public scrutiny could be mandatory.[64] Alternatively, government guidelines or policies directing the exercise of discretion could be required.

Recommendation #19:

It is recommended that a limited discretionary power should be considered as an amendment to the EPA to exempt responsible persons in exceptional circumstances. The power, if created, should be carefully circumscribed by mandatory requirements or guidelines directing the exercise of discretion.

C. Should liability be absolute?

Liability under administrative orders is generally "absolute", that is, the fault or negligence of responsible persons is not required.[65] This standard "has been found to provide a strong incentive for clean up of contaminated properties, especially when the properties are changing hands, and a strong deterrent against future contamination".[66] It is to be contrasted with the common law notion of strict liability which does depend on negligence or other fault (but with an onus of proof on the potentially liable party to prove the absence of such negligence or other fault) and would, if adopted, provide responsible persons with a defence of due diligence in certain instances.[67]

Examples of both these types of liability are contained in Part X of the EPA which regulates spills. Section 99 provides that the liability of responsible persons (that is, the owner of the pollutant and the person having control of the pollutant) for the direct costs of cleaning up a spill and restoration of the environment "does not depend on fault or negligence". However, liability for consequential damages as a result of the spill or its clean up is "strict", which means that the responsible parties must pay all such damages directly resulting from their own fault or negligence. These parties will have a defence for such damages if they can establish that they exercised due diligence to prevent the spill, or that the spill was caused by an act of war; God or a third party with intent to cause harm.

As discussed above, a party should not be held liable as a person responsible where the party had no influence and control over or derived no direct or indirect benefit from the pollution or activities resulting in the pollution. This is consistent with accepted common law theories of liability such as those in tort law.[68]

Recommendation #20:

It is recommended that liability under administrative orders should be absolute and should not depend on the fault or negligence of responsible persons. However, as noted in section A(iii) above, a strict liability standard is recommended for innocent landowners, such that a defence would be available to parties who can meet the criteria set out in Recommendation #5.

D. Should liability be retrospective?

Retrospective liability involves imposing liability on persons for conduct which occurred prior to the enactment of the legislation. There is clearly an element of unfairness to this type of liability, in that it may be imposed on persons regardless of whether they were in compliance with the existing legislative requirements and industry standards when the pollution occurred. The imposition of retrospective liability on parties cannot act as a deterrent to behavior in the future, nor can it

change conduct in any meaningful way. The law generally operates on the presumption that only future actions should be regulated and in this way creates expectations and guides behavior. The consequences of retrospective liability are that expectations are changed and actions which were taken in reliance on the law at the time are now penalized. In addition, in many cases former polluters are no longer involved with a site and therefore cannot pass the compliance costs on through revenues from current operations.

It may also be argued that the fairer approach is not to impose liabilities retrospectively, but to accept that the cost of past contamination is a social cost which society as a whole must bear. Taxpayers are better able to pay than former polluters and therefore should bear the financial burden of past laws which are now found to be inadequate.

On the other hand, retrospective liability is justifiable for the following reasons: (1) it is necessary to protect the public purse from paying for clean up of contaminated land because much contamination predates pollution laws; (2) past polluters are morally if not legally responsible for contamination (and, as noted above, past polluters may have been in breach of common law responsibilities); and (3) relative to the taxpayer, the polluter likely derived or intended to derive a greater benefit from the polluting activities.

CERCLA has been held to impose retrospective liability where past actions contributed to present damage and danger because such liability is civil, rather than criminal, and is reasonable under the circumstances. In the words of one court:

> Cleaning up inactive and abandoned hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability for the costs of cleaning up such sites

> upon those parties who created and profited from the sites and upon the chemical industry as a whole.[69]

And in the words of another court:

> While the generator defendants profited from inexpensive waste disposal methods that may have been technically "legal" prior to C.E.R.C.L.A.'s enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment. C.E.R.C.L.A. operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions ... C.E.R.C.L.A. does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined to be responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of clean up costs was not intended to act, nor does it operate in fact, as a criminal penalty or as a punitive deterrent.[70]

Legislation regulating contaminated land in Denmark and the Netherlands is also retrospective.[71]

Retrospective legislation may be subject to a challenge under the Canadian Charter of Rights and Freedoms, but it is arguable that it would be upheld under section 1 as "demonstrably justified in a free and democratic society" as necessary to protect the public welfare. In addition, the Charter does not protect property rights and has been held not to protect economic rights.[72]

There is a legal presumption against retrospective legislation. To avoid arguments that the presumption applies, it is necessary to state clearly that the legislation is retrospective.[73]

In the context of retrospective liability, the question of whether limits to such liability should be imposed arises. However, any limits to the extent of retrospectivity would be at best arbitrary and would have to be very lengthy in any event because environmental degradation often occurs over long time periods. As a practical matter, it will be increasingly difficult to identify and locate the

persons who may be held responsible as time passes and the government likely will be required to pay for contamination which occurred many years ago.[74] A limited discretionary power might be applied in circumstances where unfairness clearly would result, such as where a company operated a business which polluted in the 1930s, 40s and 50s, long before pollution controls were considered and the appropriate technology existed (and long before the EPA and the MOE came into existence). On the other hand, it would much more difficult for a company which carried on polluting activities in the early 1980s in disregard of industry standards to claim that retrospective liability under an administrative order was unfair.

Recommendation #21:

It is recommended that liability under administrative orders should be retrospective. Retrospective liability reflects the policy that former polluters should pay for pollution rather than present taxpayers. It is also recommended that there should be no express temporal limits on liability, for any such time periods would be at best arbitrary and would have to be very lengthy in any event. A discretionary power could be applied in situations in which unfairness clearly would result.

E. How should liability be allocated and apportioned?

This section addresses the following issues:

(i) should liability be allocated or apportioned among responsible parties on the basis of their respective responsibility for or contribution to contamination, or should liability be joint and several, such that the full remediation costs are the responsibility of each of the responsible parties, with the result that any one could be held liable for the total amount?

(ii) should there be mechanisms to allocate costs among responsible parties, either mandatory or discretionary, such as apportionment guidelines, arbitration or mediation?

(iii) should mechanisms be used to encourage settlements, for example, for parties such as minor contributors?

(iv) should a responsible party have a right to contribution and indemnity from other responsible parties and upon what basis?

(i) Joint and several liability

In many cases, it will be nearly impossible for the government to apportion liability among responsible parties accurately and equitably. Environmental damage is usually indivisible or not easily divisible, particularly where contamination has occurred over a long period of time and as a result of the activities of a number of parties. Therefore, even though the cleanup costs may not be the exclusive responsibility of any one party, these costs cannot readily be divided among the parties. To attempt to do so would require the resolution of complex issues and result in undue expense and delay. It would also defeat the purpose of administrative orders which is to protect the public and clean up environmental degradation in an efficient and expeditious manner, particularly when orders are issued in situations of emergency or urgency. The government therefore should be able to look to any one or more parties out of several who might be responsible for compliance.

In addition, joint and several liability ensures that the costs of remediation will be paid even where some parties cannot be located or lack funds to pay their shares. Liability under CERCLA is joint and several and several American

commentators have criticized joint and several liability for this very reason, stating that:

> this ... makes it attractive for the [US]EPA to focus its enforcement efforts on large, solvent entities, which is known as the search for the single "deep pocket". Banks are perceived as having very deep pockets. The 'deep pocket' syndrome means that financially viable entities can end up paying for the share of clean-up costs that should have been borne by others who are now unable to pay or who cannot be located.[75]

Although the government must be able to require full compliance from any one responsible person, as noted in section 2A(iii) above, the approach which should be taken by the regulatory authority in issuing an order is to name all the potentially responsible parties where there is a reasonable basis for doing so.[76] This will focus the liability in order to expedite compliance, with the result that environmental protection will precede cost allocation. The onus will then be on those parties named on an order to allocate the responsibilities of carrying out its terms among themselves. This approach will encourage the named parties to find any other parties who might be responsible and may increase the pool of responsible parties. Any disputes over the precise allocation of costs should be left to the parties and courts to sort out at a later date.

The government should be prepared to assist in this process of allocating responsibilities where the parties request or agree to it. For example, when responsible parties agree to comply with an administrative order, there should be a mechanism such as a contribution or cleanup agreement which would identify their obligations. The agreement could set out the parties thereto, their obligations, funding provisions, management of clean up, allocation of liabilities and indemnities.

Recommendation #22:

It is recommended that liability under administrative orders should be joint and several. A limited discretionary power could be used to avoid or alleviate an unfair result. (see also Recommendation #19.)

(ii) Cost allocation mechanisms

The imposition of joint and several liability may lead to unfairness in certain situations, such as that in which a minor contributor is held liable for the entire cost of compliance with an administrative order. To avoid or alleviate this type of result, mechanisms to allocate costs should be created.

The issue of the manner in which liabilities may be allocated is a complex one. It has been addressed in the United States, where one method of allocation considered was the "Gore amendment", proposed as an amendment to CERCLA. The amendment was not passed, but is contained in some state legislation and has been followed by several courts.[77] The Gore amendment sets out the following factors for consideration in allocating liabilities:

(1) the ability of the parties to demonstrate that their contribution to the release, discharge or disposal of the hazardous can be distinguished;

(2) the amount of the hazardous waste involved;

(3) the degree of toxicity of the hazardous waste;

(4) the degree of involvement of the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste, considering the characteristics of the waste;

(5) the degree of care taken by the parties regarding the hazardous substance, taking into account its characteristics; and

(6) the degree of cooperation of the parties with the authorities to prevent harm to the public or the environment.[78]

The American experience with mandatory apportionment is that litigation delays compliance or recovery of costs. Some states provide that apportionment will take place where "there is a reason for doing so" and direct the authorities to consider a number of factors.[79]

Recommendation #23:

It is recommended that apportionment guidelines should be developed. These guidelines should not be mandatory, because of the technical difficulties of distinguishing and identifying shares, the need of government for flexibility to deal with a wide variety of situations and their potential to lead to protracted and expensive litigation. They should be applied only where the parties agree to submit to them. The parties could also be required to submit to an informal procedure such as mediation to resolve any disputes which might arise from an application of the guidelines. Arbitration or any other formal dispute resolution mechanism such as an administrative tribunal is not recommended because of its potential for delay and expense, as well as its greater administrative requirements.

(iii) Settlement mechanisms

Settlements between responsible parties and the government should be encouraged, particularly where many parties are liable under an administrative order, some of whom are involved in litigation or lengthy negotiations regarding their liabilities. As well as providing a means of settling liability claims in an expeditious manner, a settlement procedure would reduce the costs of administering compliance and create a source of funds in the event that the remaining responsible parties fail to or are unable to carry out the terms of the order. CERCLA provides for a settlement procedure in which partial settlements with several parties are possible. In addition, a "de minimis" settlement may be reached with a party whose contribution is very minor. This party can settle out on a "several" basis upon making a cash payment of more than its estimated share.[80]

Settlement will not be feasible where the compliance costs and the contribution of the parties cannot be estimated. It will be most useful for minor contributors with a clearly identifiable liability.

Recommendation #24:

It is recommended that a mechanism for settlement should be created for parties who wish to resolve their liability in an expeditious and non-adversarial manner.

(iv) Contribution and indemnity

A right to contribution and indemnity entitles a responsible party to recover a portion or all of the costs of compliance with an administrative order from other responsible parties based on a number of factors. Such a right logically accompanies the principle of joint and several liability.

Part X of the EPA creates a right of contribution and indemnity which entitles responsible parties to allocate the costs of a spill among themselves on the following basis:

(1) where one person is at fault, that person must indemnify all the other responsible persons;

(2) where two or more persons are at fault, the costs must be allocated according to the degree of fault;

(3) where the fault of the parties cannot be determined, the costs are split evenly; and

(4) where none of the parties are at fault, the costs are allocated as the court considers "just and equitable in the circumstances" (s. 99(8)).[81]

This right to contribution and indemnity is enforceable by action in a court of competent jurisdiction. However, the right would appear to apply only to Part X of the EPA.

The Negligence Act, R.S.O. 1990, c. N-1, also provides for apportionment among tortfeasors to assist plaintiffs to recover where they are contributorily negligent. The principles of apportionment are similar to those in Part X of the EPA.

In the United States, responsible parties under CERCLA have a right to contribution and indemnity from other potentially responsible parties.[82] This right may be exercised in a separate action after payment has been made.[83]

In addition, common law causes of action should be expressly preserved. Section 122 of Part X contains such a provision and should be adopted as a general provision of the EPA.[84]

Recommendation #25:

It is recommended that a right to contribution and indemnity should be adopted as a general provision of the EPA. This provision would replace the section which currently exists in Part X (s. 99(8)). The right to contribution and indemnity should exist against parties not named on an order and even where no order has been issued. Common law causes of action should also be expressly preserved.

3. Other legislation affecting liabilities under the EPA

This section considers two proposed amendments to the Bankruptcy Act which will affect liabilities under the EPA's administrative order provisions. It also considers briefly the potential effects of the proposed Environmental Bill of Rights on administrative orders under the EPA.

A. Bankruptcy Act

(i) Should the Bankruptcy Act be amended to limit the liability of receivers and trustees under environmental statutes?

At hearings before the Standing Committee on Consumer and Corporate Affairs and Government Operations regarding amendments to the Bankruptcy Act (Bill C-22), the Canadian Bankers Association (the "CBA") expressed two concerns about the potential environmental liabilities of trustees and receivers: first, that statutory environmental liabilities, such as those created in the EPA, are imposed on parties in control of contaminated property, even where the contamination occurred prior to their possession of the property and even though they did not cause the contamination; and secondly, that liability is not limited in any way such that there may be liability for the entire cleanup costs. The CBA submitted that the Bankruptcy Act should be amended to include a provision to protect trustees and receivers.

In addition, the Insolvency Institute of Canada and the Canadian Insolvency Association made a submission that trustees and receivers should not be held liable for environmental liabilities which pre-date their appointment. Submissions were also made by the Canadian Life and Health Insurance Association Inc., a voluntary trade association which makes loans to businesses often secured by mortgages. Its submissions contained recommendations that: (1) as a result of

section 204 of the Bankruptcy Act which imposes liability for penalties or fines on any third parties "directly or indirectly" controlling the debtor, "consideration [should] be given to excluding from liability third parties attempting, in good faith, to protect their security"; and (2) "a provision [should] be added to the Bill to exempt from environmental liability trustees in bankruptcy and receivers acting in good faith."[85]

As a result of these submissions, the Committee, in its First Report, recommended the following:

> Trustees and receivers, who assume control of property in the case of a bankruptcy or receivership, should be exempt from liability for environmental problems that arose in connection with the property before their appointment.

The recommendation was not included in the draft bill.

The recommended exemption from liability is arguably too broad. It fails to address the situation in which an environmental problem arose before the appointment of a trustee or receiver, but was exacerbated or improperly dealt with by the trustee or receiver. At a minimum, words to the effect that personal liability would not be exempted to the extent of fault or negligence should be added. Alternatively, liability of trustees and receivers could expressly be limited to the assets in the estate. Although the liabilities of trustees and receivers should be defined with greater precision, these parties should not be immune from liabilities under administrative orders in every instance. One advantage to creating limits to or exemptions from environmental liabilities for trustees and receivers in the federal Bankruptcy Act, provided that these are reasonably drafted, is to avoid a situation in which there are a number of rules established under different and perhaps conflicting regulatory schemes, for example, the

federal Fisheries Act, R.S.C. 1985, c. F-42, provincial occupational health and safety acts and claims by municipalities under property standards legislation.

Recommendation #26:

It is recommended that consideration should be given to an amendment to the Bankruptcy Act to exempt trustees and receivers from environmental liabilities or to limit their liabilities in certain instances.

(ii) Should the Bankruptcy Act be amended to create a priority for the recovery of crown costs of carrying out administrative orders under environmental statutes?

As noted above, the Bill 220 amendments created a priority lien for the government to recover its costs of carrying out administrative orders from responsible persons where they fail or refuse to do so. However, the proposed changes to the Bankruptcy Act will abolish all claims of crown priority, created by both federal and provincial statutes (the only exceptions will be a priority for employer withholdings for federal income tax, unemployment insurance premiums and Canada Pension Plan premiums). If the changes are enacted, the Bankruptcy Act will require that any crown priority created by federal or provincial statute be registered in a federal registry prior to a bankruptcy in order to achieve the status of a secured claim in the bankruptcy. This claim will rank behind any other secured claims which were filed in the federal registry before the crown claim. In practical terms, in the context of site remediation this will mean that crown claims will be defeated in most corporate bankruptcies. The reason for this is clear: corporations usually will have given security to a bank or other creditor and the security will have been registered before the crown's claim for remediation costs.

Such a result is undesirable because there may be many instances in which the government is required to clean up property to protect the public or the

environment where the responsible parties fail or refuse to carry out the terms of an order and a bankruptcy later arises. The Bankruptcy Act should be amended to provide that the government has a secured claim for recovery of monies owing as a result of compliance with administrative orders issued pursuant to environmental statutes, with priority over claims of other secured creditors regardless of when they were created, in order to avoid a situation in which public funds are used for compliance, after which the property is sold with the profits accruing to the creditors. Two related issues discussed in section 2A(v) above are: (1) which property the priority should apply to, that is, should it apply to all the property of the debtor, or only to real property or to the real property in question; and (2) should the claim have the same priority over all the debtor's property or should there be a mixture of priorities depending upon the type of property? The experience resulting from the enactment of state "superlien" legislation in the United States should be reviewed in this regard.

Recommendation #27:

It is recommended that the Bankruptcy Act should be amended to create a crown priority in the event of bankruptcy for recovery of the crown's costs of compliance with administrative orders. This priority should rank ahead of all other secured creditors.

B. Environmental Bill of Rights

(i) What are the potential effects of the proposed Environmental Bill of Rights on administrative orders under the EPA?

The proposed Environmental Bill of Rights provides for public review of approvals, permits and orders before they come into effect. One of the most important consequences of this legislation in relation to the issuance of administrative orders will be the increased public participation in the decision-making process. For example, the act will allow for more notice and comment by

the public about new regulations and orders and petitions to the government to review existing orders. One difficult issue which arises from the proposed legislation and which requires further and careful consideration will be how to balance the need for efficient and effective clean ups with the need for an open, consultative and cooperative process.

Recommendation #28:

It is recommended that the effects of the proposed Environmental Bill of Rights on the administrative order provisions of the EPA should be considered.

4. Non-legislative options

The MOE is currently pursuing several non-legislative options relating to administrative orders which are designed to protect both private and public interests. Two examples briefly described above in section 1A above are discussed in greater detail in this section. It should also be noted that some of the recommendations set out in preceding portions of this report are for non-legislative procedures, for example, cleanup agreements, apportionment guidelines, mediation and de minimis settlements (see section 2E above).

A. Court orders

Responsible parties and the MOE may consent to a court order which permits a party such as a receiver to sell off assets without being deemed to be in control or possession of them. For example, in Royal Bank of Canada v. Oil Canada Ltd. (Ont. S. C., unreported June 6, 1990), the court appointed a receiver "with authority only to realize on the assets of Oil Canada, but without authority to take possession of the assets or to manage the business and undertaking of the company."[86] In addition, ownership, control and possession were deemed not to vest in the bank or the receiver. In this case, the lender was dealing with an oil company and was concerned that, in realizing on its security (the assets and undertakings of an oil refinery), it would incur responsibility for the disposal of oil in storage which leaked from its containers. The lender sought assurances that disposal would not result in liability. The drawbacks to this option for a secured creditor are that: (1) the court-appointed receiver will have a duty to all the creditors; (2) the parties may have to return to court for directions where powers are not set out in the order, which may be costly and time-consuming; and (3) other interested parties may become involved in the proceedings and affect the scope of the receiver's powers.[87]

B. Agreements to limit liability

The MOE may also enter into an agreement with a secured creditor (and a receiver or trustee) to limit liability. Such an agreement would not protect a creditor from liability for negligence or third party claims. The MOE has developed a set of rules for parties with a security interest in the land, where these parties did not cause the environmental problem and do not own the land, in order to restrict their exposure to the loss of their particular investment. Often a party, in exchange for carrying out certain work, will be permitted to retain a portion of recoveries even if the work does not remedy all of the problems.[88]

Although such non-legislative options currently are pursued on a case-by-case basis and therefore do not provide great certainty for responsible parties and may result in some delay in compliance, they also allow for flexibility and the opportunity for parties to work cooperatively toward acceptable solutions. To increase the effectiveness and consistency of this approach, guidelines should be created.

Consideration should be given to the creation of statutory authority for non-legislative options such as agreements to limit the liability of responsible persons. However, the legislation should not restrict the contents of the agreements; these should be established by administrative guidelines.

Recommendation #29:

It is recommended that consideration should be given to creating a statutory authority for non-legislative solutions, such as agreements to limit the liability of responsible persons. Consideration should also be given to the development of guidelines for the implementation of these non-legislative options. (See also Recommendation #19.)

Conclusion

The economic effects of the increasing environmental regulation of business activities and imposing liabilities on private parties to the greatest extent possible should be carefully considered, particularly in light of the need to stimulate the economy in these recessionary times. This will require detailed economic and business analysis. The issue of "jobs versus the environment" should also be examined, as should the issues of ensuring the competitiveness of businesses in Ontario and the avoidance of unfair advantages to off-shore businesses operating beyond the reach of the Ontario judicial system.

It has been argued that imposing liability on a wide range of responsible parties does not have adverse economic effects. The result is rather institutional changes such as environmental audits and other precautionary and "due diligence" measures.[89] In addition, payment for clean up of environmental degradation at public expense will not promote responsible behavior; instead the result will be the imposition of an unreasonable financial burden on a society which cannot afford it. And failure to take any action at all may create an unacceptable risk to the public health or the environment.

The most effective manner of enforcing the legislation must always be of utmost consideration in the development of legislative policy, bearing in mind that the end result of any policy or legislative amendment should be to encourage cooperation between the responsible parties and government, environmentally-responsible business activities and the most efficient use of private and public sector resources. This will often involve a difficult balancing of competing interests and a recognition that there are no simple solutions to many of the issues under consideration.

Summary of Recommendations

1. PRINCIPLES

PRINCIPLES OF LIABILITY

Recommendation #1:

It is recommended that the principles upon which liability should be imposed on persons under administrative orders in the EPA should be:

(1) first, the extent of their ability to influence and control over the pollutants, polluting activities or property (in the words of the EPA, persons with "charge, management or control" of a source of contaminant, undertaking or property). This should include liability for contribution to pollution, for example, by "causing" or "permitting" it; and

(2) secondly, the extent of their derivation of a benefit, financial or otherwise, from the pollutants, polluting activities, property or from compliance with an administrative order.

Recommendation #2:

It is recommended that the EPA's broad approach to the imposition of liability should be maintained, but that provision should be made to narrow the range of potentially responsible persons by clearly defined exemptions, defences and limitations which would be available in certain instances as set out below. This will enable the government to address the complexities of pollution control, which include the fact that degradation often takes place over a number years as a result of many actors, activities and pollutants. It will also reflect the reality that not all parties should be held equally responsible.

2. POLICIES AND LEGISLATIVE AMENDMENTS

RESPONSIBLE PERSONS

GENERATORS -- Recommendation #3:

It is recommended that the generator of a contaminant should be liable under an administrative order as a responsible person where the generator is in a position to influence or control or derives a benefit from pollution resulting from the discharge or disposal of the contaminant.

TRANSPORTERS -- Recommendation #4:

It is recommended that the transporter of a contaminant should be liable as a responsible person under an administrative order where the transporter is in a

position to influence or control or derive a benefit from the pollution which resulted from the transportation of the contaminant.

LANDOWNERS

Due Diligence Defence -- Recommendation #5:

It is recommended that a landowner, including a purchaser, former owner, landlord, etc. should not be liable under an administrative order where the landowner can establish on a balance of probabilities that the landowner:

1. acquired the property after contamination had occurred;

2. did not cause, permit or contribute to the contamination, which includes both the original release and any subsequent one (that is, there was no influence or control over the contamination);

3. had no knowledge and no reasonable means of acquiring knowledge of the contamination or acquired the property involuntarily (the level of due diligence required may vary according to the person seeking the protection of the defence -- for example, a commercial real estate developer should be held to a higher standard when conducting an audit or inspection than an unsophisticated home buyer;

4. cooperated with the government in reporting the contamination when the landowner became aware of it and/or in assisting with compliance with the administrative order; and

5. did not acquire a benefit, financial or otherwise, from the contamination or clean up (conversely, liability of the landowner could be limited to the extent that the landowner did acquire a benefit, provided the preceding criteria are met).

It is recommended that consideration should be given to the creation of such a defence.

Current Owners -- Recommendation #6:

Subject to Recommendation #5, it is recommended that a current owner should be liable under an administrative order where the owner is in a position of influence or control or has derived a benefit from the polluting activities. It should not be necessary for the owner to have caused or contributed directly to the pollution. Where the contamination occurred prior to the period of ownership, the innocent landowner or due diligence defence should be available to the owner who can establish the criteria of the defence set out in Recommendation #5 above.

Purchasers -- Recommendation #7:

Subject to Recommendation #5, it is recommended that a purchaser should be liable under an administrative order on the same basis as a current owner. The purchaser should not be liable where the purchaser can establish the criteria of the innocent landowner defence set out in Recommendation #5.

Former Owners -- Recommendation #8:

It is recommended that an owner whose period of ownership predated the contamination and whose activities did not create the circumstances which resulted in the contamination should not be liable under an administrative order. An intermediate owner who had no knowledge or means of acquiring knowledge of the contamination and did not contribute to the contamination would likely be able to meet the criteria of the innocent landowner defence set out in Recommendation #5 and should not, as a matter of policy, be named as a person responsible on an order. An owner who abandoned property or otherwise took steps to evade responsibility through technical transfer of ownership should be held responsible where there was influence and/or control or benefit.

Landlords -- Recommendation #9:

It is recommended that a landlord should be liable under an administrative order provided the landlord meets the criteria of influence and control or benefit. The landlord should also be eligible for the innocent landowner defence for contamination which predated the landlord's ownership provided the appropriate criteria set out in Recommendation #5 are established.

Tenants -- Recommendation #10:

It is recommended that a tenant should be liable under an administrative order where the criteria of influence and/or control or benefit are met. The tenant may also qualify for the innocent landowner defence set out in Recommendation #5 for contamination which predated the tenancy.

LENDERS -- Recommendation #11:

It is recommended that lenders should be liable under administrative orders as owners, persons in occupation and persons having charge, management or control. The test for liability under the current EPA provisions should be based on the degree of control and influence lenders exert, as well as the benefit accrued or contemplated. In order to encourage lenders to monitor borrowers for environmental compliance, lenders should not usually be liable for engaging in normal lending activities such as performing audits and conducting loan workouts. The CERCLA exemption for security interest holders should be considered in Ontario as a legislative amendment. However, when a lender goes into possession of a source of contaminant, undertaking or property, it should be liable as any other purchaser would be and subject to the same innocent landowner defence where the appropriate criteria set out in Recommendation #5 are met. Further study is warranted in developing parameters for the control and influence test for lenders, the recommended security interest exemption and in considering the imposition of limits on lender liability. This should include a review of the USEPA rule on lender liability and a careful analysis of lending activities and the economic effects of lender liability in the United States, as well as in other jurisdictions.

RECEIVERS -- Recommendation #12:

It is recommended that a receiver should be required to comply with administrative orders issued to an insolvent debtor as a successor to the extent of the assets in the estate. This should be made explicit in s. 19 of the EPA. A

receiver should also be liable under an administrative order issued directly to the receiver as a person responsible to the extent of the assets in the estate. The cost of compliance should be an administrative expense to the estate.

The personal liability of a receiver should be limited to the receiver's fault or negligence. This will encourage receivers to accept appointments where there is an environmental problem on a property, without also providing them with complete immunity should they cause or contribute to contamination.

If there are insufficient assets in the estate to comply with an administrative order, the receiver should be permitted to return the property to the debtor upon giving reasonable notice to the MOE. Abandonment of property which poses a risk to the public or the environment should not be permitted where there are sufficient assets in the estate to remedy the problem.

TRUSTEES -- Recommendation #13:

It is recommended that a trustee should be required to comply with administrative orders, including orders issued to the debtor and to the trustee directly (provided the orders are not claims in the bankruptcy), to the extent of the assets in the estate. This should be made explicit in s. 19 of the EPA. The costs of compliance should be an administrative expense to the estate.

The personal liability of a trustee should be limited to the extent of the trustee's fault or negligence. This will encourage trustees to accept appointments for estates containing contaminated assets, without also providing them with complete immunity should they cause or contribute to contamination.

If there are insufficient assets in the estate to comply with an administrative order, the trustee should be permitted to return the property to the debtor upon giving reasonable notice to the MOE. Abandonment of contaminated property that poses a risk to human health or the environment should not be permitted to the extent that there are sufficient assets in the estate to address the problem.

OFFICERS, DIRECTORS AND EMPLOYEES -- Recommendation #14:

It is recommended that officers, directors and employees of a corporation should be liable under administrative orders where they are in a position of influence and control or derive a personal benefit from the polluting activities. This liability should be consistent with their liabilities at common law.

GOVERNMENTS -- Recommendation #15:

It is recommended that a government should be liable under an administrative order as a person responsible where it is in a position of influence and control or derives a benefit from polluting activities. Where the government acquires property involuntarily, it should be eligible for the innocent landowner defence.

OTHER PERSONS -- Recommendation #16:

It is recommended that liability under administrative orders should be imposed on any other persons who influence or control or derive a benefit from polluting activities as persons responsible, provided they meet the criteria of ownership, occupation or charge, management or control discussed in the previous sections.

RELATED CORPORATIONS -- Recommendation #17:

It is recommended that liability under administrative orders should be imposed on related corporations such as parent corporations as persons responsible.

SUCCESSORS AND ASSIGNEES -- Recommendation #18:

It is recommended that section 19 of the EPA which provides that successors and assignees are bound under administrative orders should be amended to include parties such as executors, administrators, receivers, receiver-managers and trustees.

DISCRETIONARY POWER

Recommendation #19:

It is recommended that a limited discretionary power should be considered as an amendment to the EPA to exempt responsible persons in exceptional circumstances. The power, if created, should be carefully circumscribed by mandatory requirements or guidelines directing the exercise of discretion.

ABSOLUTE LIABILITY

Recommendation #20:

It is recommended that liability under administrative orders should be absolute and should not depend on the fault or negligence of responsible persons. However, as noted in section A(iii) above, a strict liability standard is recommended for innocent landowners, such that a defence would be available to parties who can meet the criteria set out in Recommendation #5.

RETROSPECTIVE LIABILITY

Recommendation #21:

It is recommended that liability under administrative orders should be retrospective. Retrospective liability reflects the policy that former polluters should pay for pollution rather than present taxpayers. It is also recommended that there should be no express temporal limits on liability, for any such time periods would be at best arbitrary and would have to be very lengthy in any event. A discretionary power could be applied in situations in which unfairness clearly would result.

ALLOCATION OF LIABILITY

JOINT AND SEVERAL LIABILITY -- Recommendation #22:

It is recommended that liability under administrative orders should be joint and several. A limited discretionary power could be used to avoid or alleviate an unfair result. (see also Recommendation #19.)

COST ALLOCATION MECHANISMS -- Recommendation #23:

It is recommended that apportionment guidelines should be developed. These guidelines should not be mandatory, because of the technical difficulties of distinguishing and identifying shares, the need of government for flexibility to deal with a wide variety of situations and their potential to lead to protracted and expensive litigation. They should be applied only where the parties agree to submit to them. The parties could also be required to submit to an informal procedure such as mediation to resolve any disputes which might arise from an application of the guidelines. Arbitration or any other formal dispute resolution mechanism such as an administrative tribunal is not recommended because of its potential for delay and expense, as well as its greater administrative requirements.

SETTLEMENT MECHANISMS -- Recommendation #24:

It is recommended that a mechanism for settlement should be created for parties who wish to resolve their liability in an expeditious and non-adversarial manner.

CONTRIBUTION AND INDEMNITY -- Recommendation #25:

It is recommended that a right to contribution and indemnity should be adopted as a general provision of the EPA. This provision would replace the section which currently exists in Part X (s. 99(8)). The right to contribution and indemnity should exist against parties not named on an order and even where no order has been issued. Common law causes of action should also be expressly preserved.

3. OTHER LEGISLATION AFFECTING LIABILITIES UNDER THE EPA

BANKRUPTCY ACT

TRUSTEES AND RECEIVERS -- Recommendation #26:

It is recommended that consideration should be given to an amendment to the Bankruptcy Act to exempt trustees and receivers from environmental liabilities or to limit their liabilities in certain instances.

CROWN PRIORITY -- Recommendation #27:

It is recommended that the Bankruptcy Act should be amended to create a crown priority in the event of bankruptcy for recovery of the crown's costs of compliance

with administrative orders. This priority should rank ahead of all other secured creditors.

ENVIRONMENTAL BILL OF RIGHTS

Recommendation #28:

It is recommended that the effects of the proposed Environmental Bill of Rights on the administrative order provisions of the EPA should be considered.

4. NON-LEGISLATIVE OPTIONS

It is recommended that consideration should be given to creating a statutory authority for non-legislative solutions, such as agreements to limit the liability of responsible persons. Consideration should also be given to the development of guidelines for the implementation of these non-legislative options. (See also Recommendation #19.)

Endnotes

[1]The focus of this report is on civil liability under administrative orders. The related issues of liability to prosecution and third party compensation are beyond its scope. The document entitled "Outline and Resources", previously submitted to the Ministry of the Environment, has been appended as Appendix A for reference purposes. It should be noted that this report concentrates primarily on Part III of the "Outline and Resources".

[2]All references to sections in Ontario statutes contained in this report have been numbered according to the 1990 Revised Statutes of Ontario.

[3]EPA sections 7, 8, 17, 18, 43 and 44 respectively. Persons now responsible under the administrative order provisions of the EPA as a result of the Bill 220 amendments are as follows: (1) **control and stop orders** -- (i) an owner or previous owner of the source of contaminant; (ii) a person who is or was in occupation of the source of contaminant; or (iii) a person who has or had the charge, management or control of the source of contaminant (sections 7 and 8 respectively); (2) **remedial orders** -- any person who causes or permits the discharge of a contaminant (the amendments to this section relate to the effects of the discharge of the contaminant which result in liability and what the person who causes or permits the discharge may be ordered to do) (section 17); (3) **preventive orders** -- a person who owns or owned or who has or had management or control of an undertaking or property (section 18); (4) **orders to remove waste deposited on land not approved as a waste disposal site** -- an owner or previous owner, an occupant or previous occupant or a person who has or had charge, management or control of the land or building (section 43); and (5) **orders which relate to waste management and disposal systems** -- an owner or previous owner (section 44). (The changes have been underlined.) Other amendments to the EPA as a result of Bill 220 are noted in the report where relevant. Liabilities under administrative orders relating to spills (set out in Part X of the EPA) were not changed by the Bill 220 amendments. Section 97 of Part X imposes liability for clean up on the owner of the pollutant and the person having control of the pollutant.

[4]For an interesting discussion of the development of environmental law, see Paul Emond, "The Greening of Environmental Law", 36 McGill Law Journal 742 (1991). In this article, the author identifies the following three phases of environmental law: (1) symbolic regulation (which purports to prohibit pollution, but actually sanctions it through government approvals and is essentially a bargaining process to reconcile environmental protection with economic feasibility); (2) preventive regulation (during the mid-1970s and early 1980s, legislation was introduced to provide for environmental assessment procedures and strengthened and increased regulatory tools to clean up and remediate, as well as private mechanisms by which the parties to a transaction might identify and avoid environmental liability, such as environmental audits and risk assessments); and finally, (3) co-operative problem-solving (this phase, which has also been referred to as alternative dispute resolution, is less costly, lengthy and adversarial than the preceding two and is premised on the belief that society as a whole shares the problem of environmental degradation and therefore as a whole must resolve it). The third stage involves a redistribution of rights through their legislative recognition: "[r]ights define power, and without power that derives

from judicially enforceable rights, the public is not likely to be an effective participant in any form of co-operative problem-solving." (p. 762)

[5]In this report, the phrases "persons responsible" and "responsible persons" will be used to refer to "polluters" according to the extended notion of polluter described in section 1B. Although the polluter pays principle has not yet been defined in Canada, essentially it requires that polluters bear the costs of pollution prevention and control measures (both preventative and restorative) established by public authorities to ensure that the environment is in an acceptable state (synopsis of the OECD [Organization for Economic Co-operation and Development] Recommendation on the Implementation of the Polluter-Pays Principle, November 14, 1974).

[6]These principles are adapted from Contaminated Land, a draft working paper prepared by Dianne Saxe in the Protection of Life Series released by the Law Reform Commission of Canada, March 1990, at pp. 23-24. This report will be referred to on a number of occasions herein, for much of the analysis contained in Contaminated Land is useful and relevant to the discussion. The study is also often consistent with American law and jurisprudence which this author finds instructive for the purposes of developing and interpreting the law relating to environmental liabilities under administrative orders in Ontario.

[7]These rules are set out in "Environmental Liabilities and How to Handle Them", M.B. (Jim) Jackson, Ministry of the Environment, Legal Services Branch, October 16, 1991.

[8]The National Contaminated Sites Remediation Program, the creation of which was announced by the federal government in October 1989, is a very limited attempt by the federal and provincial governments to address the issue of the clean up of "orphan sites" in Canada. Although this issue is beyond the scope of this report, the establishment of a fund which could pay for remediation, research and third party compensation, for example, should be investigated further, as should the related issues of how the fund should be financed and by whom (for example, by industry, municipalities, owners of or others who benefit from "clean" property, etc.). The need to create such a fund is particularly important now in light of the proposed amendments to the federal Bankruptcy Act which will abolish all claims of crown priority created by federal and provincial statutes.

[9]The precise wording defining responsible persons under the EPA's administrative order provisions as amended by Bill 220 is set out in endnote 3 above.

[10]The liability in R. v. Sault Ste. Marie was "quasi-criminal". The case involved a prosecution under the Ontario Water Resources Act, R.S.O. 1990, c. O-40 (the "OWRA", which is a provincial regulatory environmental statute, but it is submitted that the principles of liability for control enunciated by the court are relevant in the context of civil liability to comply with an administrative order. In fact, the standard of control required to impose liability on a defendant in a quasi-criminal prosecution where the purpose is punishment and deterrence of the offender, should be more than adequate for the standard required to impose liability under an administrative order where the purpose is to prevent, control or remediate contamination. See also the discussion in Contaminated Land at pp. 351-53.

[11]Linden, Canadian Tort Law (4th ed.) (Toronto: Butterworths, 1982), p. 227

[12]Many states have enacted similar legislation, although the categories of responsible persons vary. In some states, liability has been expanded and in others, liability is defined in terms of the types of activities which attract it.

[13]The EPEA was introduced in the Alberta legislature as Bill 53 in June 1991. It was reintroduced in the spring session of the legislature. In December 1991, an eleven-member task force was established by the provincial government to examine liability issues related to contaminated sites. The task force recently submitted its final report dated April 1992 to the Alberta Environment Minister. This report contains thirty recommendations for the revision and implementation of the provisions in Bill 53 which address contaminated sites. These recommendations will be considered during debate of the bill in the legislature.

[14]"Contaminant" is broadly defined in s. 1(1)(c) of the EPA as "any solid, liquid, gas, odour, heat, sound vibration, radiation or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect" ("adverse effect" is also broadly defined in s. 1(1)(a)). It is submitted that liability should be imposed on generators for contamination resulting from their discharge and disposal (including abandonment) of a contaminant, but it should not necessarily be imposed on generators in perpetuity so as to give rise to product stewardship for generators.

[15]Section 42 in Part V of the EPA regulating waste management stipulates that ownership of waste that is accepted at a waste disposal site by the operator of the site is transferred to the operator upon acceptance and, where the waste is deposited but not accepted, ownership of the waste is deemed to be transferred to the operator immediately before the waste is deposited. (There are other limitations as well, such as the requirement that the waste disposal site have a certificate or provisional certificate of approval and that there not be a contract to the contrary. In addition, liability is only limited in terms of ownership of the waste; common law liability may still arise.) This may be contrasted to the American approach under CERCLA where the generator remains liable for its waste upon transfer. It should be noted that "waste" is defined in Part V of the EPA for the purposes of that part and has been given a narrow interpretation in various court and administrative decisions.

[16]Contaminated Land, p. 179

[17]See section A(iv) below and Contaminated Land at p. 179, footnote 406.

[18]Ibid., p. 183

[19]E. Driedger, The Construction of Statutes (2nd ed.) (Toronto: Butterworths, 1985). See also the recent decision of Canadian National Railway Co. v. Ontario (EPA Director) (1991), 3 O.R. (3d) 609 (Ont. Div. Ct.), aff'd 7 O.R. (3d) 97 (O.C.A.) in which the court gave a narrow interpretation to the definition of owner under a section 7 control order. See further below under the heading "Lenders", Section A(iv).

[20]Haberl v. Richardson, [1951] O.R. 302 (C.A.)

[21]Linden, op. cit., p. 600. Although a complete discussion of common law liabilities is beyond the scope of this report, common law theories of liability will be noted where relevant. The statutory definition of occupier "includes, a person who is in physical possession of premises, or (ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, notwithstanding that there is more than one occupier of the premises" (s. 1(a)).

[22]Contaminated Land, p. 195

[23]This is similar to the CERCLA defence and to Dianne Saxe's proposal in Contaminated Land at pp. 359-60.

[24]Contaminated Land, p. 192. See also the cases of Heighington et al. v. The Queen (1987), 60 O.R. (2d) 641 and Sevidal et al. v. Chopra et al. (1987), 64 O.R. (2d) 169.

[25]Ibid., p. 194 at footnote 433

[26]Any contractual allocation of liability between a former owner/vendor and the current owner/purchaser should not affect liability to third parties such as governments. It should also be noted that, even in the absence of legislation imposing liability, parties have had common law responsibilities such that the contamination which they caused in the past was not necessarily legal. For example, causes of action in nuisance, negligence and misrepresentation might have been successfully litigated, although at the time the conduct was tolerated or not considered harmful due to lack of knowledge of the negative environmental effects.

[27]The issue of allocating liabilities where there is a number of persons will be discussed in section 2E below.

[28]The same provision was created in the OWRA, but is of lesser significance in the context of this report because it relates to water works and sewage works, rather than the remediation of contamination.

[29]The sections under consideration in the CNR decision predated the Bill 220 amendments, such that the definition of "person responsible" did not include predecessors, but the analysis with respect to who is an owner, person in occupation or person having charge, management or control remains relevant.

[30]In 1990, the American Bankers Association published the results of a survey on the effects of lender liability for environmental contamination on its member banks, and the Canadian Bankers Association released a position paper, "Sustainable Capital: The Effect of Environmental Liability in Canada on Borrowers, Lenders, and Investors" in November 1991.

[31]Mario D. Faieta, "The Northern Wood Preservers Decision", 6 C.E.L.R. (N.S.) 237 at p. 242

[32]U.S. v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir., Ga., 1990) ("Fleet Factors")

[33]Ibid, p. 1558. See also Faieta, op. cit., pp. 242-43. A number of other courts in the United States have interpreted the meaning of this exemption and lenders have been found to be liable for taking possession of and participating in the management of businesses which pollute. A detailed discussion of these cases is beyond the scope of this report.

[34]57 FR 18344 and Faieta, op. cit., p. 244

[35]Joel R. Burcat, Linda J. Shorey, Ronald W. Chadwell and David R. O'Connell "The Law of Environmental Lender Liability", 21 ELR 10,464 at p. 10,475

[36]Roslyn Tom, "Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA", 98 Yale Law Journal 925

[37]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, p. 179

[38]As will be discussed in section 2A(v) below, when a receiver is appointed pursuant to the terms of a credit arrangement, the lender will usually be liable as the principal of the receiver or as a result of having given an indemnification to the receiver.

[39]This could trigger liability under a section 17 remedial order.

[40]Felice O'Neill, "Environmental Liability for Lenders", Environmental Liability in Business and Real Estate Transactions, The Canadian Institute, October 30, 1991, p. 7

[41]p. 152

[42]Leave to appeal to the Supreme Court of Canada dismissed with costs January 16, 1992 (1992 S.C.C. Bulletin 88).

[43]p. 78

[44]p. 79

[45]Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Limited (1989), 75 Alta. L.R. (2d) 185

[46]Contaminated Land, pp. 372-73

[47]Ibid, p. 372

[48]Subsection 20(2) of the Bankruptcy Act enables a trustee, with permission of the inspectors, to divest of real property in the estate.

[49]Clifford Van & Storage Company Limited, etc. (1989), 73 C.B.R. (N.S.) 129 (Ont. S. C.) See also Dianne Saxe, "Trustees and Receivers: The Environmental Hot Seat", 76 C.B.R. 34 at p. 40.

[50]See also ibid. at pp. 40-41

[51]Arlene Elgart Mirsky, Richard J. Conway and Geralyn G. Humphrey, "The Interface Between Bankruptcy and Environmental Laws", The Business Lawyer; Vol. 46, February 1991 623 at p. 688

[52]These states include Arkansas, Illinois, Connecticut, Massachusetts, New Hampshire, New Jersey, Maine, Texas and Tennessee.

[53]Peat Marwick Ltd. v. Consumers' Gas Co. (1980), 35 C.B.R. (N.S.) 1 (Ont. C. A.). See also Geoffrey Thompson, "Environmental Liability in Canada: The Risks for Lenders, Receivers and Trustees", Toxic Real Estate, The Continuing Legal Education Society of British Columbia, September 17, 1990, pp. 4.5.33-4.5.34.

[54]Ibid., p. 4.5.36

[55]Ibid., p. 4.5.36. See also Frank Bennett, Receiverships (Canada: Carswell, 1985) at p. 21.

[56]Ibid., p. 4.5.38

[57]Robert M. C. Holmes, "Receiver's Liability for Environmental Problems", Cleaning Up Contaminated Sites: Managing Environmental Risk and Responsibility, Insight Educational Services, January 24, 1990, pp. 9-10

[58]Contaminated Land, pp. 213-14

[59]See ibid., pp. 218-19. See also the unanimous Supreme Court of Canada decision of Industrial Acceptance Corp. v. Lalonde, [1952] 2 S.C.R. 109 (S.C.C.) at p. 120: "The purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit his rehabilitation as a citizen unfettered by past debts."

[60]Ibid., p. 219

[61]Thompson, op. cit, pp. 4.5.38-4.5.39

[62]Lamford Forest Products Ltd. (Re), Vancouver Registry No. 1799/90 (B.C.S.C. in Bankruptcy) (unreported December 16, 1991). The site of the bankrupt company's saw mill on Vancouver Island was heavily contaminated with a variety of toxic substances and PCBs were stored on-site. A pollution abatement order was issued to the bankrupt company pursuant to section 22 of the Waste Management Act, S.B.C. 1982, c. 41. The bankruptcy court addressed the following two issues: (1) the extent of the trustee's personal liability for remediation beyond the assets in the estate; and (2) the priority of the compliance costs with the order in the bankruptcy. With respect to (1), the court ruled that, "in the same way that a trustee does not become liable for the other debts of the bankrupt, the trustee cannot be held personally liable for the costs of cleanup beyond the funds realizable from the estate." (However, personal liability could result from improper disposal of the PCBs under other legislation). This ruling followed from the wording of s. 22(1)(a) of the Act stipulating that the order could be issued to "the person who had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment". With respect to (2), the court held that the cleanup cost was a law of general application which must be obeyed by the party that "has stepped into the shoes of the bankrupt ... to the extent the

assets of the estate will permit". In reaching this conclusion, the court rejected arguments that the cost was an administrative expense or a claim in the bankruptcy.

[63]Contaminated Land, p. 355

[64]Ibid., pp. 362-63. Dianne Saxe notes that CERCLA does not contain such an exemption.

[65]This is the standard to which responsible persons under CERCLA are held. It is also the standard adopted by the European Community in its recently proposed "Directive on Civil Liability for Damage from Waste" (amended proposal for a Directive on civil liability for damage caused by waste, 34 O.J. Eur. Comm. (no. C 192) 6 (1991)), which would create an extensive toxic tort and cleanup liability regime. The waste producer would be held strictly liable for injuries caused by its waste until the waste is turned over to a licensed waste disposal or recycling facility.

[66]Contaminated Land, p. 256

[67]These terms are used to refer to notions of civil liability and are not to be confused with the same terms which have different meanings when used in a criminal context.

[68]For example, a subsequent purchaser is not liable in nuisance until he becomes aware of the problem and has had an opportunity to abate it. See Contaminated Land at p. 357

[69]U.S. v. Northeastern Pharmaceutical and Chemical Company Inc., 810 F.2d 726 (8th Cir. 1986)

[70]U.S. v. Monsanto Company, 28 E.R.C. 1177 at 1188

[71]Contaminated Land, p. 361

[72]Ibid, p. 361

[73]A complete discussion of when the presumption against retrospectivity applies and how it may be rebutted is beyond the scope of this report. See further in Dianne Saxe, Environmental Offences: Corporate Responsibility and Executive Liability (Aurora: Canada Law Book, 1990) at pp. 68-69 and in Driedger, The Construction of Statutes.

[74]As noted above in endnote 8, alternatives such as a fund financed by industry, municipalities and/or other parties are beyond the scope of this report and should be explored further.

[75]G.L. Klotz and E.C. Siakotos, "Lender Liability under Federal and State Environmental Law: Of Deep Pockets, Debt, Defeat and Deadbeats" (1987), 92 Commercial Law Journal 275 at p. 279

[76]Cases have held that the party with authority to issue an order is not required to conduct a judicial inquiry into liabilities prior to issuing the order, but that the party's determination must be reasonable. See, for example, Re Mac's

Convenience Stores, Suncor Inc. and the Minister of the Environment for Ontario (1984), 48 O.R. (2d) 9 (Ont. H. C.).

[77]Contaminated Land, p. 270. See, for example, U.S. v. Stringfellow, 20 E.R.C. 1905 at p. 1910.

[78]In Contaminated Land, Dianne Saxe identifies the following similar factors upon which allocation of liability should be based:
(1) the role of the parties in compliance with an order, including their contribution to clean up and cooperation during the process;
(2) the contribution of the parties to the contamination, based on their fault, influence and control, profit and knowledge;
(3) the avoidance of unjust enrichment, for example, as a result of an increased property value; and
(4) the resources of the parties, that is, their ability to pay. [pp. 365-67]

[79]Waldemar Braul, Ministry of Environment, BC Environment, "New Directions for Regulating Contaminated Sites: A Discussion Paper", January 1991, p. 19

[80]Contaminated Land, p. 273

[81]In the recent decision of U.S. v. Oskin W. Meyer Inc. 33 E.R.C. 1041, (U.S. C. A. 6th Cir. 1991), the court, when considering the liability of a landlord for clean up of a site which a tenant had contaminated, looked at the following criteria:
(1) the ability of a party to distinguish its contribution to the contamination;
(2) the amount of contaminants contributed;
(3) the toxicity of the contaminants contributed.
(4) the degree of involvement in the generation, transportation, treatment, storage or disposal of the contaminants;
(5) the degree of care exercised by each party, considering the nature of the contaminants;
(6) the degree of cooperation with government officials to prevent harm to the public or the environment;
(7) the state of mind of the parties;
(8) the economic status of the parties;
(9) any relevant contracts between the parties;
(10) traditional equitable defences; and
(11) any other factors necessary to balance the equities in the circumstances. (See also Dianne Saxe, Ontario Environmental Protection Act: Annotated, (Aurora: Canada Law Book, 1990) at p. IX-18.1)

[82]U.S. v. Ward 22 E.R.C. 1235

[83]U.S. v. South Carolina Recycling and Disposal, 20 E.R.C. 1753

[84]Section 122 of the EPA provides that, "[e]xcept as expressly provided in this Part [X], nothing in this Part limits or restricts any right or remedy that any person may have against another person."

[85]"Submission of the Canadian Life and Health Insurance Association Inc. to The Standing Committee on Consumer and Corporate Affairs and Government Operations Regarding "Bill C-22, Bankruptcy Act Amendments"", August 1991, pp. 7-8

[86]Rebecca E. Keeler, "Environmental Liability in an Insolvency: Bankruptcy and Insolvency Preparing for Troubled Times", National Insolvency Review - Vol. 8, No. 5, at pp. 72-73

[87]Ibid., p. 73

[88]See endnote 7 above.

[89]Contaminated Land, p. 392