ENVIRONMENTAL LAW: A NEW AND BASIC CONSIDERATION IN BUSINESS AND BANKING LAW... THE PRACTICE IN CANADA AND IMPLICATIONS FOR JAMAICA

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September 18, 1996

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I. INTRODUCTION

Environmental law has attained unprecedented prominence in Canada. Legislatures have been very busy, enacting a wide array of environmental statutes. The common law has also been heavily used in recent years, as litigants seek remedies for pollution.

A large portion of the new legislation and case law is relevant to business and banking lawyers in Canada. Canadian lawyers recognize the need to carefully monitor changes in environmental law. Jamaican lawyers will likely face the same challenges as the government proceeds with its ambitious law reform plans under the *Natural Resources Conservation Authority Act*.

This paper highlights which environmental law issues are especially relevant for Canadian business and banking lawyers.

II. STRICTER ENFORCEMENT OF ENVIRONMENTAL PROHIBITIONS

The Broad Prohibitions Against Pollution

Canadian environmental statutes create broadly worded prohibitions. For example, the federal *Fisheries Act* prohibits the "deposit of deleterious substances" into water frequented by fish, and the British Columbia's *Waste Management Act* prohibits the "introduction of waste into the environment" which would cause pollution. Terms such as "deposit", "waste" and "environment" are not defined with any precision. A person who breaches an environmental prohibition could be prosecuted by the Crown.

Environmental legislation provides for stiff sentences. A conviction could lead to a sentence of substantial fines (up to $3 million in some jurisdictions) and jail terms (up to 2 years). The courts interpret these strong sanctions to mean that a party which breaches an environmental prohibition is, in effect, committing a "criminal" or "quasi-criminal" act. The penal consequences of environmental offences means, according to the courts, that "pollution offences must be approached as crimes" and that sentencing should relate to "deterring a crime".

Prosecutors in Canada have charged and obtained convictions not only against private corporations, but also against government agencies (crown corporations, government ministries and municipalities) and directors of corporations.

The Defence of Due Diligence

The defence of due diligence provides immunity in prosecutions. Case law has clearly established that a party charged with an environmental offence must be acquitted if it shows that the offence occurred in spite of its reasonable care.

Neither legislation nor the courts prescribe a 'code' of due diligence, but the growing case law provides some guidance. The courts have found, for example, that lack of due diligence arises from:

* improper design and operation of equipment;
* failure to take remedial action on becoming aware of a potential problem;
* failure to make efforts to ascertain the causes of a problem;
* failure to anticipate normal natural hazards;
* failure to require an independent contractor to inspect a system;
* failure to properly maintain a system and to control discharges to the maximum extent possible;
* treating a spill as insignificant; and
* failure to act quickly to remedy a problem and failure to investigate the possible consequences of one's operation.

'Pleading poverty' does not advance the case for due diligence. In the *Bata* case, for example, the court did not attribute importance to the evidence showing that environmental measures suffered as a result of financial cut-backs. At the same time, the courts do not exact "superhuman efforts" and expect only that environmental problems be dealt with a "high standard of awareness and decisive, prompt and continuing action. The courts recognize that it takes time and resources to address problems.

Permit Exemptions

A fundamental feature of Canadian environmental law is that regulators may issue permits to discharge waste. These permits serve as exemptions to broadly stated prohibitions against discharging waste into the environment.

Most industries in Canada operate under environmental permits. Failure to comply with the permits may result in regulators prosecuting the permittee (for breaching a prohibition), ordering

the permittee to remediate, or even ordering the permittee to shut down operations. Permitting therefore becomes an essential part of an industry's management strategy.

III. LIABILITY OF CORPORATE DIRECTORS AND OFFICERS

Canadian law allows the courts to sanction not only a corporation which is guilty of an environmental offence or a civil wrong, but also, the directors, officers, employees and agents of that corporation in certain circumstances.

The Conventional Standard of Liability

A common approach is found in British Columbia's *Waste Management Act*, which states in section 34(10) that:

> where a corporation commits an offence under this Act, any employee, officer, director or agent of the corporation who **authorized, permitted or acquiesced** in the offence commits the offence notwithstanding that the corporation is convicted.

Similar wording is found in numerous other provincial statutes and the federal *Fisheries Act* and the *Canadian Environmental Protection Act*.

Whether a director or officer has "authorized, permitted or acquiesced" in an offence depends, of course, on the specific conduct in light of the particular offence being charged. In some cases, it may seem implausible that a corporate director or officer "permitted or acquiesced" in an offence committed by the corporation. In others, directors or officers who took a direct hand in or deliberately ignored the polluting activity would be exposed to personal liability.

Directors and officers can also incur civil liability for environmental harm. This risk arises especially where an environmental regulator has the power to order a "person" to remediate contamination or where a plaintiff seeks tort remedies. The courts have, in a number of high-profile civil cases, pierced the corporate veil to assign liability directly to the corporation's directing mind, eg. the president or a director. The courts are especially willing to do so if it is necessary to provide a remedy for the plaintiff when the corporation is insolvent or is otherwise not a source of compensation.

The New Standard

Ontario's personal liability provision goes further than the above-noted British Columbia and federal statutes. Ontario's legislation establishes a **positive** duty on directors and officers to "take all reasonable care to **prevent** the corporation from causing or permitting such unlawful deposit". This provision was used to find senior officials at the Bata Corporation (a shoe manufacturer) personally liable.

Whether or not the Ontario-type positive duty should be used in British Columbia has been the subject of a good deal of recent debate. The proposed British Columbia *Environmental Protection Act* includes an Ontario-type positive duty on directors. Many U.S. jurisdictions have in recent years amended their statutes to impose a positive duty to prevent environmental harm. The Ontario-type positive duty to prevent offenses is not a remote possibility in British Columbia and other Canadian jurisdictions.

When will a Crown prosecutor decide to charge a director or officer?

Crown prosecutors have a very broad and independent discretion. The decision to prosecute depends, in large part, on whether the court's sentence would send out a message to effect appropriate conduct in the corporate world. Deterrence and punishment are key considerations.

Which directors and officers will be most exposed to charges?

The *Bata* decision is the leading case on this question. It stated:

* for directors and officers with **on-line responsibilities**, the judicial focus will be on the individual's operational responsibilities and how they were discharged; and

* for directors and officers with **general responsibilities**, the judicial focus will be on how they set environmental policy and seek its enforcement.

IV. CITIZEN PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

A third feature of recent environmental law is the significant effect of public involvement in decision-making. Public involvement takes several forms, as discussed below.

Multi-Stakeholder Consultations

As a general rule, Canadian governments engage some form of multi-stakeholder consultations when considering new policy or law. The general public and specialized industry and environmental organizations have all demanded consultation on the formation of environmental policies and laws. In British Columbia, for example, extensive consultations have in recent years been held with a wide variety of industries, First Nations, environmental groups and the general public on numerous environmental issues, ranging from forestry practices to waste disposal to environmental assessment. In today's political climate, it is difficult of conceive of any significant law reform proceeding without deliberate consultations with the end goal of achieving consensus. This new era of consultation means that industry will have to invest in law reform activities. A decision not to participate in these exercises is made with considerable risk.

Access to Information

Another predominate theme of government in Canada today is 'access to government information'. Numerous jurisdictions have enacted legislation to generally provide a right to obtain access to government-held information (thus reversing the government's common law right to retain information). This legislation also deals with the controversial matter of third party interests. Environmental organizations have exploited the new legislation.

The exemptions to disclosure are specific and narrowly construed. In the environmental context, one of the critical exemptions pertains to "confidential business interests" (or "third party interests"). Corporations, especially those required to provide information as part of permitting procedures, disclose a considerable amount of information to government. Much of this information deals with the sensitive matter of environmental performance, and thus is attractive to environmental organizations and the general public. Needless to say, a good deal of the procedural disputes under access to information legislation concerns whether industry information held by government is exempt from the general rule of disclosure.

A common feature of access to information legislation is that an independent body or official, and not the government, is responsible for determining whether the information ought to be

disclosed. Significantly, jurisdictions such as British Columbia have "override" provisions which allow the independent body of official to compel disclosure if it is in the "public interest", even if it falls within an exemption to disclosure.

Statutory Causes of Action

Legislators have in recent years provided citizens with statutory rights to sue for civil damages arising from environmental problems. These causes of action appear to remove some of the difficulties of standing and evidence which create obstacles to victims of pollution under tort law. Aside from civil actions, a few , which provide citizens with certain remedies respecting compensation. Some examples include:

* the yet-to-be proclaimed British Columbia *Waste Management Amendment Act, 1993* (Bill 26), which enables a plaintiff to sue "responsible persons" for contributions for the remediation costs,

* Ontario's *Environmental Protection Act*, which provides that a person who suffered damage from a spill (which may include a sudden disposal of waste) or has cleaned up the spill may apply for compensation from the provincial government,

* the federal *Fisheries Act*, which provides commercial fishers with the right to sue for lost income attributable to an unauthorized deposit of deleterious substances, and

* the *Canadian Environmental Protection Act*, which provides a statutory right to claim compensation for loss or injury to person or property as a result of conduct which is contrary to any provision of the Act or its regulations; and

* the Yukon *Environment Act* allows any two citizens to petition the Minister of Environment to investigate an environmental problem.

Aside from these civil actions, some jurisdictions have gone so far as to provide citizens with powers usually left to prosecutors. Statutory enforcement proceedings such as found in Ontario's *Environmental Bill of Rights Act* enable citizens to, in effect, act as prosecutors by undertaking enforcement action.

V. CONTAMINATED SITES

Uncertainty and Unfairness of the Traditional Approach

In the 1980s, the Canadian public became concerned that soil and groundwater at contaminated sites could cause problems to human health and the environment. The concerns focused on sites which were contaminated by leaking underground tanks, historic industrial practices of burying wastes on-site, and end-of-pipe discharges, some of which were underway for the past century. The uniform reaction of Canadian legislators in the 1980s was to provide regulators with strong powers to order remediation at problematic sites.

The New Approach to Regulating Contaminated Sites

In recent years, however, the remediation order powers have been strongly criticized by industry as being unfair and uncertain. Industry, secured creditors, professional advisors and parties involved in real estate transactions have strenuously argued, for instance, that a party never really knows when they might face an order, that 'deep pockets' are especially vulnerable, that the lack of objectively verifiable standards makes predicting liability impossible, and that the ordered remediation applies excessively conservative measures.

Secured creditors have been particularly active in seeking law reform for contaminated sites. Secured creditors' concerns arise from the fact that their mortgage interests constitute "ownership" at a contaminated site, and that regulators may order owners to remediate contamination. These orders can apply to secured creditors regardless of whether they caused the contamination. Secured creditors' concerns became even more acute after the U.S. *Fleet Factors* case of 1993. That case held that a secured creditor may be held liable as a CERCLA "owner or operator" on account of **mere ability** to effect environmental controls over the borrower.

To deal with secured creditor concerns, a number of Canadian jurisdictions have sought to provide exemptions for secured creditors. For example, British Columbia's *Waste Management Amendment Act, 1993* (Bill 26) provides the following rules as to when a secured creditor becomes liable for remediation:

> (3) A secured creditor is responsible for remediation at a contaminated site if :
>
> (a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part,

caused the site to become a contaminated site, or

(b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site,

but a secured creditor is not responsible for remediation where it acts primarily to protect its security interest, including without limitation where the secured creditor

(c) participates only in purely financial matters related to the site,

(d) has the capacity or ability to influence any operation at the contaminated site in a way that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a way as to cause or increase contamination,

(e) imposes requirements on any person if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or

(f) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take. (emphasis added)

These provisions were the result of close consultations between the British Columbia government and the financial services sector. Paragraph (d) addresses the concern arising from the *Fleet Factors* case. Paragraph (d) provides immunity for those secured creditors who have mere capacity -- which is unexercised -- to influence an operation which could result in contamination.

The policy of providing limited protection to secured creditors is also evident in U.S. legislation. The federal *Superfund* legislation excludes from liability persons who "without participating in the management of a vessel or facility, hold indicia of ownership primarily to protect securing interests in the vessel or facility". Many states have adopted the same principle.

The *Superfund*'s liability exclusion for holders of security interests has received clarification in the form of the Environmental Protection Agency's Lender Rule. The Rule provides a considerable degree of certainty as to pre- and post- foreclosure activities which are "indicia of ownership primarily to protect security interests" at the site. The Rule provides numerous examples of activities which do not constitute "participation in the management of a facility", but perhaps most importantly states that such participation "does not include the mere capacity or unexercised right or ability to influence facility operations"

(thus off-setting the potential effect of *Fleet Factors*). It also provides that activities such as workouts and imposition of environmental compliance requirements will not attract liability.

The Lender Rule has proven to be advantageous to lenders in U.S. litigation. For example, *Michigan v. Tiscornia* held that *Superfund*'s secured creditor exemption, as clarified by the Lender Rule, shielded a Michigan bank from contamination cleanup liability, even though the bank exercised significant influence on the borrower. This influence was, importantly, not in the nature of managing the contaminating activities at the site. The court in *Ashland Oil v. Sonford*, in applying CERCLA and the Lender Rule, held that even though the secured creditor foreclosed its security interest in assets abandoned by the trustee in bankruptcy, and briefly held title to the assets, this was not enough to attract liability. The Lender Rule, the court held, requires that the foreclosing lender take steps to sell the property expeditiously, including listing the property within 12 months. In this case, the lender held title to assets, including barrels and equipment, for several weeks primarily to facilitate the transfer of the assets to a buyer. These steps, in the view of the court, constituted acts designed to primarily protect the secured interest in the assets of the contaminated site.

The Lender Rule has been the model for law reform in many U.S. jurisdictions, including Maine, Massachusetts, Colorado, Illinois, Louisiana, Missouri, Oregon, and California. A number of other states have adapted the Rule to produce unique provisions:

(a) New Jersey's 1993 amendment to the *Spill Compensation and Control Act* provides new civil penalties for any lender that forecloses on a facility and subsequently fails to notify state environmental officials of hazardous substance releases at the facility that occurred before or after foreclosure and shields assets of fiduciaries (fiduciaries are not covered by the EPA Rule);

(b) Vermont's 1993 amendment allows and lenders and fiduciaries to agree on a cleanup plan with the state, with a cap on liability, in the event of foreclosure; and

(c) New Hampshire's 1993 legislation describes environmental management steps a foreclosing lender must do at the site prior to sale (eg. reporting environmental conditions and attending to emergencies).

VI. 'CAVEAT EMPTOR' IN REAL ESTATE TRANSACTIONS: DOES IT STILL APPLY?

The Historic Rule

Historically, real estate in Canada has been transferred without representation and warranties regarding environmental matters. The general pattern, however, is quickly changing. Many residential and most commercial real estate contracts today use environmental representations and warranties. A common concern in the environmental representations and warranties is the extent of contamination of the property.

In those transactions where representations and warranties do not apply, the common law rule of *caveat emptor*, or "buyer beware", assigns liability. Under this rule, the purchaser takes the risk of the quality and condition of the subject property. Traditionally, *caveat emptor* has had harsh consequences for the purchaser:

> [A] purchaser must form his own judgement. ... [There] is **no obligation upon a vendor to disclose all known facts which may be material to the purchaser's judgement**... (emphasis added).

Put another way, under the traditional notion of *caveat emptor*, the vendor does not have a duty to disclose defects which are not patently obvious before or at the time of sale.

The Judicial Empathy for Purchasers of Toxic Real Estate

While *caveat emptor* is the general rule, it has always been subject to certain exceptions. The exceptions take on particular relevance in 'toxic real estate' transactions. Especially in the past decade, courts have increasingly used the exceptions to provide relief for purchasers who unwittingly have purchased contaminated property. The main exceptions are discussed below.

Cases Involving Fraudulent Vendors

Caveat emptor does not apply where the vendor is found to be fraudulent. "Fraud" is an elastic concept. It applies to situations where the vendor used deliberate ill-intent to deceive the purchaser and also to situations where the vendor showed a reckless disregard for accuracy or a lack of candour.

The doctrine of fraud, especially in recent cases, has become an important source of relief for purchasers of property with undisclosed environmental problems. In a leading case, *McGrath v. MacLean*, the court stated the general principle that a vendor must

disclose a known material defect which is dangerous or is likely to be dangerous. The following cases illustrate this principle.

* *Sevidal v. Chopra.* This case dealt with a subdivision which was contaminated with radioactive soil in the 1940s. Prior to signing the sale agreement, in 1983, the vendors knew that radioactive material was located in the general neighbourhood in which their property was located. After signing the sale (or 'interim') agreement, but before completing the transaction, the vendors learned that the material was actually in their yard. They did not inform the purchasers of either of those facts prior to signing or prior to completion. The judge found as a fact that the radioactive material in the back yard did pose a potential risk and hazard to the occupants. In this case, the true state of affairs with respect to the radioactivity on the property was not discoverable by the purchasers even through the Atomic Energy Control Board, as it was the Board's policy not to reveal its actual findings for a particular site except to the current owners of the property. The defendant vendors were found liable in deceit for their concealment of the fact that radioactive soil was located in the area of the house prior to signing the agreement and the discovery of radioactive material actually on their property prior to closing. (The court also found that the Atomic Energy Control Board had a duty to disclose the information.)

* *Heighington v. Ontario.* This case had a result similar to *Sevidal*, except that the Ontario government was also found liable for not disclosing information regarding the contamination when it allowed the subdivision to be built. The Ontario Government was found liable in negligence for failing to take steps, after government agents became aware of the radioactivity of the site in 1945, to see that the contaminated soil was removed because it was foreseeable that if it remained, the health of future occupants could be endangered.

* *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* The vendor was aware that certain commercial property contained a radioactive contamination, yet he advised the purchaser in a conversation that the property had "excellent fill" without telling him of the contamination. The Court of Appeal held that the vendor's half truth amounted to deceit in the circumstances. The Court found it significant that there was no evidence to suggest that the plaintiffs were aware of the existence of the radioactive waste or that they

were put on the inquiry. One of the judges, in a separate judgement, also found the vendors liable in the alternative for failing to disclose the inherently dangerous nature of the radioactive slag:

> The vendor of land on which is situated an inherently dangerous substance is guilty of fraud if he sells such land to a purchaser without warning the purchaser that, if the dangerous substance is not used or disposed of in a specified manner or in the manner prescribed by statute, the purchaser and/or strangers to the contract may suffer a serious risk of injury.

* *Tuttahs v. Maciak.* The hidden and important defect in a restaurant was the presence of gasoline in the drinking water. The court found that the pollution evolved from being minor, in which case it appeared that the purchasers could "make do", to one of "alarming proportions".

* *Hartnett v. Wailea Construction et al.* The vendor was found liable for selling a residential building lot unfit for the purpose for which it was intended. The vendor knew the zoning of the area and thus knew that the lot was to be used for the construction of a residence. He also knew, after obtaining a soils investigation report as required by the municipality, that the site was unsuitable for that purpose unless special foundation techniques were used or unless the subsoil was excavated and replaced. The vendor was found liable in fraud for concealing a latent defect known to him. The municipality breached its duty to warn the purchasers that the site had once been a dump and a soils report was needed.

As is evident, courts do not show great hesitation in applying the doctrine of fraud, especially when the subject property poses hazards for the purchaser. A good indication of the courts' receptiveness is reflected in *Sevidal v. Chopra*, where the court placed a duty on the vendor not only to disclose a latent defect on the subject property but also to disclose a problem (radioactive soil) in a **nearby** property which would pose a **potential** danger to the purchaser.

Although the above decisions appear to reflect a trend towards increased vendor disclosure, it should be stressed that these decisions do not represent a broad basis of case law. Future litigation and legislation will no doubt address issues such as: whether foreseeable harm (of potential danger) is a necessary

component of fraudulent non-disclosure; if so, how much risk is required to establish liability; and is there a wider disclosure duty in the absence of potential or actual danger?

Cases Involving "Innocent" Vendors

Caveat emptor also may not apply in situations where the vendor is not fraudulent, i.e., "innocent" in the sense of not knowing about the presence of serious environmental problems regarding the subject property. The courts have not articulated a theory of holding innocent vendors of contaminated property liable, but a number of cases suggest certain approaches which could result in such liability. Perhaps the approach used most often to provide relief to purchasers is the so-called doctrine of *error in substantialibus* -- error as to substantial matters. Essentially, this doctrine allows the purchaser to rescind the transaction and have the purchase monies returned where the vendor makes an innocent but important misrepresentation of the subject property.

The courts use various approaches to defining an "important" misrepresentation. For example, the courts and other legal authorities have stated that the defect must be "material", that a misrepresentation of a defect must go to the "root of title", or that the purchaser must receive something "completely different" from what was bargained for.

These somewhat different approaches reflect the unsettled state of the law in this area. Since judicial interpretations of the doctrine of *error in substantialibus* vary, purchasers should not necessarily expect relief where they discover innocent and important misrepresentations.

"Suing Up-Title"

The effect of *caveat emptor* may be weakened by what may be termed the "suing up-title" cases found in the U.S. These cases suggest that a current owner may recover damages from a former owner even though there is no contract between the two parties. In the absence of a contract, the courts apply the common law of torts to allow 'innocent' purchasers to obtain a remedy.

The "suing up title" approach is illustrated in *State of New Jersey, Department of Environmental Protection v. Ventron Corporation*. The case concerned a tract of land under which was buried 268 tons of toxic waste, primarily mercury. The waste had been created and stored on the property by both Ventron and Ventron's corporate predecessors in title. In 1974 Ventron sold

part of the tract of land to Robert Wolf, a commercial real estate developer, who planned to demolish the plant and construct a warehousing facility. In the course of the demolition initiated by Mr. Wolf, mercury-contaminated water flowed into a creek on the property. This discharge drew the attention of the Department of Environmental Protection and clean-up was ordered. Although Mr. Wolf knew that the site had been a mercury processing plant at the time of sale, he alleged that Ventron was in possession of material facts that were not disclosed to him. Accordingly, Mr. Wolf claimed, using the common law doctrine of fraud, against Ventron for non-disclosure of those material facts.

The court went further, and gave Mr. Wolf remedies against the parties which held the property **before** Ventron. To hold those parties liable, the court applied the torts of 'strict liability' (or *Rylands v. Fletcher*) and nuisance. To the court, it did not matter that Wolf did not have a contract with the former owners; what was significant was that they should be held liable under tort law. The court dismissed arguments that tort law should be restricted to its traditional use as a 'neighbour concept'.

The decision in *Ventron* was followed and extended in the New Jersey case of *T & E Industries, Inc. v. Safety Light Corporation*. In this case a purchaser of land brought tort claims against corporate successors to a radium processor which had dumped waste product onto land. The radium processor, the United States Radium Corporation (USRC), had ceased operations on the site in 1926. In 1943 USRC sold the site to another company, Arpin. Arpin was aware of the previous use of the land but unaware of the hazards created by that use. In contrast, USRC, which employed experts in radioactive substances, was aware of the hazards. Arpin sold the site in 1950 and the site changed hands three more times before T & E Industries purchased it in 1974. When the Department of Environmental Protection ordered T & E Industries to remediate the site, the company brought tort claims against the corporations, including Safety Light, that had emerged from a restructuring of USRC, alleging fraud because of the non-disclosure of the hazards. The court held that the successors of USRC were liable to subsequent purchasers (including T & E Industries) of property for damages caused by gamma radiation and radon gas even though a building constructed by an intervening owner in part created the dangerous concentration of radiation and gas.

The Safety Light Corporation argued that *caveat emptor* should govern liability in this case but the court rejected that argument with the observation that *caveat emptor* is not a defence where the subject property poses latent hazards, unless the purchaser knowingly accepts that specific burden. Nor did the court accept the argument that the defendant could not have reasonably foreseen, at the time the hazard was created, that the current owner (some 50 years later) would suffer harm -- the court held that the paramount principle is that the party responsible for creating toxic waste

should be the party responsible for clean-up of that hazard.

The significance of the *T & E Industries* case is its use of tort law beyond the traditional notion that tort law was confined to damage done to adjacent land-owners. This court stated that "we see no practical or legal distinction between the rights of a successor in title to use and enjoy its land and the rights of a neighbouring property owner. Both have rights and both can suffer injury through the acts of a prior owner."

Put simply, the principle is that the purchaser may sue "up-title" if the vendor was also the victim of fraudulent non-disclosure. Tort law will provide a remedy that contract law cannot in this type of situation.

It should be noted that neither the "innocent purchaser" nor the vendor in *T & E Industries* had knowledge of the hazard when it purchased the property. With two innocent parties to the transaction, the court traced the fault "up-title" to the party that created the problem. The decision raises the possibility that a purchaser who has obtained contaminated property from an "innocent vendor", that is, a vendor without knowledge of the contamination, may "sue up title" to obtain a remedy from the party responsible for the original contamination or from the last vendor who was aware of but failed to disclose the contamination.
The possibility of suing up title in a common law action is also supported by the Rhode Island decision in *Friends of Sakonnet v. Dutra*. The plaintiffs in this case sued using the tort of nuisance, alleging that the defendants were responsible for creating a faulty septic tank system that leaked into the Sakonnet River. The defendants made a motion for dismissal of the action on the basis that they no longer owned the property on which the septic tanks were installed. The court stated:

> This Court has discovered no Rhode Island (or other) precedent that bars recovery of nuisance damages simply because the defendants no longer control the instrumentality alleged to have caused the nuisance. If Rhode Island courts allow suits for nuisance damages to go forward although the nuisance itself has already been abated...it follows that suits should be allowed...against one who is alleged to have caused damages by a nuisance even if that person no longer controls the alleged nuisance.

Again, knowledge of the conditions on the land possessed by any subsequent owner will be a key question for a court attempting to assign liability.

American common law decisions, though they do not have the strength of binding precedent in Canadian litigation, are often persuasive to Canadian courts. This is particularly so in areas where Canadian common law is developing (e.g. contaminated sites) and the

American experience is analogous and instructive.

Caveat Emptor: Still Relevant

One should not conclude from these cases that *caveat emptor* no longer applies where the subject property has environmental problems. *Caveat emptor* is still the basic rule and the mere presence of pollution or an environmental problem is not necessarily sufficient to avoid the rule. In *Caleb v. Potts*, the vendor knowingly sold property on which the well water supply was polluted by methane gas. The court found that while this defect would lower the value of the property since the water had a noxious taste, the defect was minor and would not render the property unsafe. As a consequence, there was no fraud and caveat emptor applied.

Under conventional Canadian real estate practice today, purchasers of industrial or commercial property seek terms and conditions which permit them access to the property and certain records of the vendor for the purpose of conducting an environmental analysis prior to the closing date. For example, prudent purchasers of industrial property should consider negotiating with the vendor for access to the following documents:

* correspondence with government agencies which are responsible for environmental matters;
* records respecting pollution equipment and permits;
* any contracts which indemnify the vendor in respect of environmental problems on the subject property, such as from a tenant, and which should be assigned to the purchaser;
* corporate records, such as minutes of directors' meetings;
* correspondence from concerned shareholders respecting environmental matters; and
* previous contracts of purchase and sale for the subject property.

There are a wide variety of methods of investigation available to purchasers. The nature of the investigation, or environmental audit, will depend on the particular property but could include the following methods:

* on-site inspection for signs of contamination such as discoloured vegetation, stained soils, and old equipment or barrels;

* a search of environmental agency files and discussions with such government authorities to determine their knowledge of any potential or actual pollution problems;

* a search of court records to determine if there has been an environmental lawsuit concerning the subject property;

* a search of land title office, municipal, and other records to determine the past ownership of the subject property and neighbouring properties, which might indicate whether the past owners operated activities which released harmful substances;

* preparation of an inventory of current and past uses of the subject property to determine whether it might be the source of pollutants into the general area; and

* preparation of an inventory of current and past uses of surrounding land to determine whether the adjacent property might be the source of pollutants onto the subject property or into the general area.

Careful investigation of the property is important to **both** the purchaser and the vendor. For instance, the investigation data serves as a baseline if future problems arise and there is a need to determine how much the vendor and purchaser contributed respectively to the particular problem.

Vendors, purchasers and realtors in Canada are becoming aware that the era of legislated vendor disclosure requirements has arrived in the United States and that the process of clarifying disclosure rules through legislation has begun in Canada. In fact, new vendor disclosure rules are contemplated in British Columbia's new contaminated sites legislation (Bill 26). Under Bill 26, vendors of industrial or commercial property will be required to disclose past commercial and industrial uses and the nature, if any, of environmental problems.

VII. TORT LAW AS A SOURCE OF ENVIRONMENTAL REMEDIES

Tort law, perhaps the original form of 'environmental law', has included numerous environmental cases in recent years. Most actions seek remedies either in nuisance, negligence, *Rylands v. Fletcher*, or negligent misrepresentation.

Nuisance

The law of nuisance in Canada, simply stated, refers to unreasonable interference with the use and enjoyment of property. The interference need not involve direct physical entry onto the affected property. Objectionable noises, unpleasant odours and even obscured vision have given rise to nuisance actions in which the cause of the complaint was generated beyond the lands of the plaintiff. As the focus of a nuisance action is the **effect**, as opposed to the **nature**, of the conduct, it is difficult to describe with any certainty the sort of conduct which is likely to attract liability.

Whether an intrusion onto someone else's property will constitute nuisance or not is heavily dependent on the facts of the individual case. The Supreme Court of Canada has noted that "it is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover". It is clearly impossible to lay down precise standards about what constitutes nuisance. What is fairly certain, however, is that the intrusion must be "substantial and serious and of such a nature that it is plain according to the accepted concepts of the day that it should be an actionable wrong". An "actionable wrong" is a complaint that has enough legal merit to be heard by a court. In deciding what an actionable wrong is, courts will consider what kind of action caused the damage, what the damages were, where they occurred and whether the damaging situation is a continuing one.

If the type of damages caused by the alleged nuisance is personal injury or actual physical damage to property, a court is likely to consider the action unreasonable, whatever the other factors. On the other hand, if the alleged nuisance consists of something more trifling -- such as noise from machinery or smells from farm animals -- the other factors above become more important.

Because of the nature of nuisance and the high value the common law has put upon protecting private property rights, it is very difficult to establish a defence to this type of action. (It is also true that it can be difficult for the person suing to succeed with a nuisance action.) The case of *Russell Transport Ltd. v. Ontario Malleable Iron Co.* affirms that neither the reasonableness of the use that caused the nuisance nor the fact the accused took all reasonable steps to avoid creating the nuisance is a valid defence to a nuisance action. That is, due diligence is no defence to an action in nuisance.

A defence of "statutory authority" is available in limited circumstances. This defence asserts that the conduct complained of was expressly permitted by a government body prior to the complaint arising and was therefore lawful conduct. This defence was not well established in the common law, so its exact terms are still unclear. Simply stated, the principle is that the defendant must

have **no choice** about performing the action that caused the damage and the damage must be the inevitable consequence of performing the action: see *Tock v. St. John's Metropolitan Area Bd.*.

The defence of prescription is also available in nuisance actions. If a particular nuisance has, with the plaintiff's knowledge, existed continuously for a period of 20 years or more without objection, the remedy can be refused.

Consent is also a defence to a nuisance action. To establish this defence, the defendant must show either express consent or some positive act from which consent can be inferred. For example, consent of a plaintiff to a polluting chicken farm could be inferred from his regularly buying eggs from the defendant.

Negligence

The tort of negligence is founded on an unreasonable risk of harm which results in loss or injury to those to whom a duty of care is owed. The existence of a duty of care is a legal question to be resolved on a case-by-case basis. Generally it will be said to exist where a reasonable person should be aware that certain conduct will create such a hazard for others near him or her that care should be taken to avert that result. The court balances the likelihood and severity of the harm against the utility of the conduct and the costs of reducing or eliminating the risk. Very generally, as the first two factors (likelihood and severity) increase, so does the probability of a finding of negligence. Customary or usual practices are particularly relevant to the reasonableness of business or industrial conduct, although compliance with those standards does not necessarily determine the question of negligence. If an operation conformed in every way to relevant legislative requirements, a finding of negligence would be unlikely. Conversely, if it could be shown that a producer was frequently in breach of the requirements (eg. exceeding permit level), this could very well be evidence of negligence. Again, the mere fact of breaches would not be determinative of negligence.

Negligent conduct, however blameworthy, will not result in liability unless the plaintiff has suffered some actual loss or injury. The proof of loss rests with the plaintiff who must establish both the loss and the direct connection between the loss and the defendant's negligent conduct. This is known legally as establishing 'causation'. Causation can become very difficult to prove for many plaintiffs, especially where there is a complex set of factors contributing to the plaintiff's problem.
A common defence to a negligence action is that of contributory negligence. This involves an assertion that the plaintiff's conduct contributed to the damage the plaintiff suffered. This

defence has been codified in the *Negligence Act*. Section 1 of the *Negligence Act* states that where the fault of two or more persons results in damage to one of them, the liability to make good the loss shall be in proportion to the degree in which each person was at fault. Section 3 requires the courts to ascertain damages in dollars and fault in percentages.

The Rule in *Rylands v. Fletcher*

This common law rule arose in a 19th century case where the plaintiff was operating a coal mine with the permission of a landowner. The defendants owned a mill near the land under which Fletcher was working coal. Rylands obtained permission to build a reservoir to supply water to the mill. Unknown to Rylands and the authorities, the land under the reservoir had also been worked for coal. These tunnels connected to Fletcher's, and his tunnels were flooded by the reservoir water. Liability was imposed by Mr. Justice Blackburn through creation of the rule now known as the rule in *Rylands v. Fletcher*. He said:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape...

The *Rylands v. Fletcher* principle has been applied in the agricultural context. In 1977, the Manitoba Court of Queen's Bench did so in the case of *Cruise v. Niessen*. In that case, the defendant farmer had contracted with an aerial sprayer (who also was a defendant in this case) to release herbicides over his land. The herbicide drifted over a neighbouring farm and caused crop damage. In finding both defendants strictly liable for the damage, Mr. Justice Solomon stated:

> I agree with the corporate defendant that aerial spraying of herbicides by farmers can no longer be regarded as an unusual operation. Generally speaking, farmers have accepted aerial spraying of crops as standard good farming management on cereal growing farms. This acceptance of aerial spraying procedure, however, does not relieve the person using such method from the responsibility for damages such operation would do to neighbours' crops if the herbicide so applied is permitted to escape and damage crops on a neighbour's land....If, during such application, a farmer allows herbicide to escape onto his neighbour's land and damage that neighbour's crop, the farmer who released the herbicide is responsible under the principle of absolute liability established by *Rylands v. Fletcher*. It is not the aerial application that makes the user of herbicide liable for

> damages, it is the action of allowing the herbicide, or dangerous substance, to escape beyond his own property that makes the user liable for damage....(emphasis added)

It is clear from the decision that even ordinary or common practices may attract liability under this rule where inherently dangerous substances are involved and the risk of harm is great.

Negligent Misrepresentation

Persons who provide professional advice to developers, purchasers etc. may be held liable for providing erroneous information. This liability arises from the tort of negligent misrepresentation, often referred to as the *Hedley Byrne* principle.

The *Hedley Byrne* principle imposes a duty on professional advisors to act honestly and to exercise reasonable care and skill when providing information and opinions which might reasonably be relied upon by third parties to their detriment. Possible third parties include prospective purchasers, as well as others who may not even be known to the professional adviser. For instance, a lender may reasonably rely on certain information given to the purchaser by an appraiser, realtor, or environmental consultant who is retained by an owner of a contaminated site. The key point is that the professional advisor must be careful when dealing with anyone who might reasonably be expected to rely on his or her advice or who might pass on information to others who may rely on such advice.

The *Hedley Byrne* principle may have been modified somewhat by recent case law. The *Wolverine* case from Ontario indicates that advisors such as environmental consultants may be able to limit their liability by placing disclaimers in their reports or stating in writing that a report should not be passed on to third parties without the consent of the report's writer. A recent B.C. case indicates that *Hedley Byrne* may get watered down even further. In the case of *327973 British Columbia Ltd. v. HBT Agra*, the British Columbia Court of Appeal found HBT, a geotechnical consultant to a prior property owner not liable to the subsequent owner, a developer. HBT had prepared a report for the owner of the property to allow the owner to secure subdivision of the property. The owner later sold the property to a developer. The developer discovered that HBT's report was incorrect and sued HBT. The court ruled that HBT was not liable to the developer as it was not aware that the report would be presented to and used by the developer, nor that the report would be relied on for development purposes.

The recent case law, while alerting professional advisors to potential liability, does not prescribe a code of conduct. As a result of this uncertainty, parties dealing with potentially contaminated sites, as a matter of practice, ensure that any

reports, audits etc. they are relying on are authorized for use by them and have been prepared for the purposes for which they intend to use them. Environmental auditors, consultants etc. should consider using strong disclaimers and other contractual mechanisms to limit the use of their reports by third parties.

VIII. ENVIRONMENTAL ASSESSMENT

From Policy to Legislation

In the 1970s and 1980s, many Canadian jurisdictions developed environmental assessment policies which were applied to major development proposals. This traditional reliance on policy has given way to legislation. The shift occurred for a number of reasons. One reason is that one of Canada's most important assessment policies, the federal assessment policy, was in fact found by the courts not to be a 'policy', but a statutory instrument, meaning that the process was subject to judicial review of decisions. A second reason for the shift from policy to legislation is that both environmental and industry groups supported a regulatory approach grounded in rights, as opposed to the heavy regulatory discretion inherent in the policy approach.

A complicating factor in Canada is that the environmental constitutional powers to regulate the environment are divided between the federal government and the 10 provincial governments. This constitutional arrangement means that a project proponent will often face two sets of environmental assessment requirements -- one provincial and one federal. It is not uncommon to find that a province's policy on assessment will differ significantly from the federal government's. Needless to say, industry is concerned about the potential delays associated with the dual approaches.

Features of the New Assessment Legislation

The key features of the new environmental assessment legislation in Canada include:

* **triggers** to define what is a "project" which might be a candidate for review and when a "project" must be submitted for review, i.e., at what stage of a proposal does the environmental assessment legislation apply?

* **a screening procedure** which seeks to determine whether a triggered project creates the types of impacts which should be the subject of detailed impact assessment;

* **panel review** of a "triggered" and "screened" project. The panel undertakes a detailed review of an environmental impact statement. The panel members tend to be 'independent' persons with significant powers to run hearings;

* **mediation** opportunities to settle differences between the proponent and others outside the hearing room;

* **broad opportunities for citizen involvement**, eg. generous rules of standing for environmental groups to provide evidence and make submissions. These rights extend to not only the hearing of the panel, but also to decisions made respecting screening. Citizen involvement is, in some jurisdictions, assisted with intervenor funding paid either by the proponent or by government;

* **central information registries** provide 'one window' shopping for the information which has been furnished with respect to a particular assessment procedure;

* **panel decisions are advisory**, i.e., they are not final in the sense of binding government. Needless to say, however, the decisions will have considerable clout when presented to politicians who have the final say; and

* **judicial review** of the government's and panel's decisions is possible, and often sought by environmental organizations. The application for review is brought before the 'superior courts' in Canada. The courts have tended to consider procedural issues, not substantive ones (deferring to the panels and government as experts on substantive matters).

IX. SUMMARY

Environmental law in Canada is no longer an exotic area of legal practice. Corporate and banking lawyers who, only years ago, read of environmental issues in the newspapers now have had to develop expertise in environmental law. Environmental law has entered the mainstream of Canadian legal practice.

In summary, business and banking lawyers now recognize the following basic principles:

1. Stricter enforcement of environmental prohibitions makes

companies more vulnerable to quasi-criminal and criminal convictions.

2. Stricter enforcement makes company directors and officials vulnerable.

3. Legislators are increasingly providing the public with a say in environmental decisionmaking; most notable are legislative causes of action allowing pollution victims to sue and even prosecute polluters.

4. Lenders and the many parties who were involved in financial transactions at historically contaminated sites fear they might be order to remediate the sites.

5. The common law 'buyer-beware' rule is under attack where the subject property is contaminated.

6. Pollution victims are increasingly using common law torts such as private nuisance to seek civil remedies against polluters.

7. New formal environmental assessment legislation requires proponents of moderate and large-sized economic projects to undertake detailed procedures.