

# EXTRACTIONS



a newsletter from O'CONNOR ASSOCIATES

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## DEFINING DUE DILIGENCE

Usually in a criminal prosecution the Crown must prove that the defendant *intended* to commit the wrongful act. But most environmental charges have been different since 1978 when the Supreme Court of Canada held that the Crown need only prove that the defendant *committed* the environmental offence. Then the defendant must prove that he or she used due diligence to *prevent* the occurrence of the offence. Due diligence usually means that up-to-date environmental procedures are in place and that employees follow them.

To decide what due diligence is in a particular case, the courts consider several questions:

- Was the defendant as careful as is common in the business community for this activity?
- Is the commonly accepted standard of carefulness too lax in the circumstances?
- How great was the potential damage to the environment from this activity?
- Could the defendant have chosen alternatives to avoid or minimize injury to others?
- Should the defendant have foreseen that there was a potential source of damage or harm?
- Could the defendant have influenced the care with which the activity was carried out?
- Should the defendant be excused because he or she relied on wrong advice from a government official who administers the particular statute?

Some recent lower court decisions suggest that placing the burden on the defendant to prove due diligence may violate the *Charter of Rights and Freedoms*. The Supreme Court may soon have to reaffirm its earlier decision in light of the *Charter*.

[from *Compliance Monitor* Vol. 2, No. 4, April 1991 p. 1 and *Canadian Lawyer*, Vol. 15, issue 4, May 1991 p. 34]

## REDUCING COSTS AN INCENTIVE

Amendments to the US Comprehensive Environmental Response Compensation and Liability Act (CERCLA) are pushing industry toward permanent waste treatment remedies like incineration.

A study by the National Environmental Technology Applications Corporation (NETAC) also predicts that:

- developing permanent treatment for solvents, VOCs, metals and organics will be first priority
- containment will become a secondary remedy
- land disposal will still be important for residual waste

The study suggests that industry will be looking to these new alternatives because proven waste treatment methods are so expensive.

[from *Groundwater Newsletter*, Vol. 20, No. 10, May 31, 1991]

## ENVIRONMENT BEFORE CREDITORS

The Alberta Court of Appeal has put environmental concerns ahead of a secured creditor in an important bankruptcy ruling. Northern Badger Oil and Gas defaulted on a \$1.3 million loan held by Panamericana de Bienes y Servicios and went into bankruptcy in 1987 leaving 7 non-productive wells. The court has held that those wells must be safely abandoned according to an Energy Resources Conservation Board order and that the \$200 000 cost must come from the remaining assets of the bankrupt company before any creditors are paid. This decision emphasizes the need for lenders to consider possible environmental problems before lending their money.

A similar report comes from New Jersey where the state Environmental Cleanup Responsibility Act holds a lender responsible for an environmental cleanup of a bankrupt borrower. Last year 26 banks with assets totalling \$26 billion reported that they refused to make \$188 million in loans because of potential environmental liability compared to \$66 million in 1989. In addition, 5 of these banks wrote off \$4 million in loans rather than foreclose on collateral property with environmental problems.

[from *The Lawyer's Weekly*, Vol. 11, No. 13, July 26, 1991 p. 1 and *Superfund*, April 19, 1991 p. 3]

## COMPOSTING WOOD WASTE

Agriculture Canada researchers in Quebec have discovered that a method for composting fish waste will also work for wood waste. The method produces rich compost at less than half the cost of commercial compost. The simple technique consists of alternating layers of waste and peat in long narrow piles. Plastic pipes set cross-wise into the pile have holes to let oxygen in to fuel the composting process.

Researchers will continue to test this method which may safely dispose of the 200 000 tonnes of waste sludge the pulp and paper industry generates annually.

A similar project is under way in British Columbia. The province has committed \$300 000 over 2 years from the Sustainable Fund to construct a facility to compost fish waste with wood waste. Niels Holbek, Director of the UBC Research Farm at Oyster River on northern Vancouver Island and the Mt. Washington Community Futures Committee came up with the idea to provide long term environmental and economic benefits to the region. Other contributors are: Employment and Immigration Canada (\$430 000) and UBC and the fish industry (\$225 000).

[from *Can. Env. Control Newsletter*, No. 431, p. 3563 and No. 439 p. 3627]

## POLLUTERS PAY LEGISLATION

The Michigan Legislature recently enacted extensive amendments to the state's Environmental Response Act. Dubbed the "polluters pay legislation", the state counterpart to CERCLA seeks to encourage quicker cleanups of contaminated sites and to require those responsible to do the cleanup or to pay for it. Some highlights of the new law are:

- requires property sellers to notify purchasers of the nature and extent of any contamination
- mandates reporting of spills
- gives the State access to information and in some cases to the property
- allows citizens to sue if the Act is violated
- pays rewards of up to \$10 000 for information leading to a conviction under the Act

[from *Michigan Bar Journal*, July 1991 p. 688-695]

## TECHNOLOGY IN PERSPECTIVE

The Hazardous Waste Action Coalition, a US association of engineering and science firms, recently released an updated report, *The Hazardous Waste Practice: Technical and Legal Environment 1991*. In a chapter on the state of technology, the association maintains that it is uneconomic to apply hydrogeologic techniques developed for large scale water resource studies to the micro-scale of a hazardous waste site. While the models used may be sophisticated enough to deal with almost any hydrogeologic setting, the expense of collecting enough data to define completely the subsurface contamination may not be justified. The report urges regulators to reconsider what remediation can be accomplished in a reasonable time and at a reasonable cost.

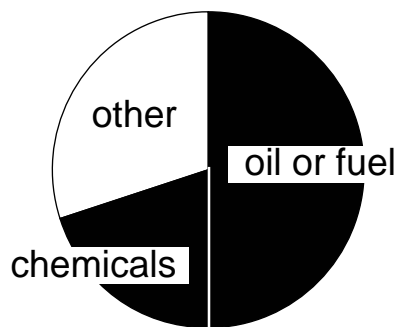
[from *Groundwater Pollution News*, Vol. 3, No. 22, June 10, 1991]

## SPILL REPORTS UP

Industry reported 5345 spills to the Ontario Spills Action Centre in 1989, up 20% from 1988. Ontario Environment Minister Ruth Grier suggested that "Strict reporting requirements and increased enforcement have convinced industry that it is in its best interest to report all spills."

The 5 industries with a total of 60% of reported spills were: transport, petroleum, chemicals, electric utilities and metallurgy.

### Materials spilled



[from *Environmental Digest*, Vol. 2, No. 5 March 6, 1991 p. 5]

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