

Problems with (Non) Polluter Pays

6 Minute Environmental Lawyer 2013

Dianne Saxe, Ph.D. in Law
Saxe Law Office
envirolaw.com



Environmental (out)law

- Environmental law increasingly out of step with:
 - Natural justice,
 - Rule of law,
 - Other areas of law
 - Real estate
 - Corporate
 - Securities
 - Planning?

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Why?

- Liability for contaminated sites
 - Moving benchmarks
 - Impossible targets
 - Exploding costs
- Blind search for deep pockets
- Regardless of the consequences

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Polluter Pays: the Theory

- Polluters, not the public or the victims, should pay for environmental damage.
- Ubiquitous in provincial, federal and international laws and in political speeches.
 - *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58.

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In Theory:

- Promotes fairness
- Deters pollution
- Aids the social contract
- Should be consistent with rule of law

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In Real Life

- Applied retroactively (*Imperial, Beazer East*)
 - It was legal at the time
 - The standards have changed
 - Others changed the site
- But erratically (*Berendson, Inco*)
- Big problems with fairness, certainty, predictability

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Where's the polluter?

- In all the hard cases, the polluter is gone:
 - insolvent
 - dead
 - disappeared.
- E.g. Giant Mine
- Then what happens?

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Who's "the polluter"?

- The weaker the link to the actual polluter, the worse fairness, certainty and predictability get:
 - Corporate successor? (*BC Hydro*)
 - Director of polluter? (*Currie, Cooley*)
 - Employee of polluter? (*Lee*)
 - Innocent purchaser? (*Montague*)
- And then?

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Making the Innocent Pay, #1

- Innocent owner/ occupier, ever
- Justification?
 - Financial benefit from remediated property (worth more if clean)
 - Opportunity to protect (due diligence before purchase)
- Impact often devastating
- Conflict with property law

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Making the Innocent Pay, #2

- Last directors, regardless of fault:
 - *Escheats Act* proposal
 - Allegedly “polluter pay”
 - *Baker v. Director, MOE*
- Severe conflicts between corp and directors, between environmental and corp law

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Making the Innocent Pay, #3

- The pollution victim (*Kawartha Lakes v. Director, MOE*)
- Assuming the victim will later be compensated
 - Polluter would ultimately pay
 - See: *Kawartha Lakes* (2009) at para. 87-88.

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But no one ever has

- No reported Ontario case where innocent party won compensation for cleanup costs imposed by order.

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Compensation from Crown?

- EPA s. 101 - creates a right to compensation from the Crown for cost and expense reasonably incurred to carry out an order or direction relating to a spill.
 - The Crown, in turn, may bring a subrogated action against the guilty party.
- No one yet.

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Gap b/w Orders and tort

- Very broad orders
- Weak appeal rights
- Little or no chance of tort compensation
- Fairness irrelevant
- Arbitrary MOE discretion

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Result:

- Unfair
- Arbitrary
- Unpredictable
- Deters investment in Ontario
- Undercuts the social contract
- Inconsistent with rule of law

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Questions?

Saxe Law Office

720 Bathurst Street, Suite 204
Toronto, Ontario M5S 2R4
Tel: 416 962 5009 / 416 962 5882
Fax: 416 962 8817
admin@envirolaw.com

envirolaw.com

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