

# RETROSPECTIVE LIABILITY FOR ENVIRONMENTAL CONTAMINATION

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*Can governments issue cleanup orders, based on environmental statutes, requiring polluters to clean up contamination they caused before the statutes were passed? This article argues that such orders are retrospective, not retroactive, in operation and may be valid in some cases. It analyses the judicial presumption against retrospectivity, which does not always apply and which can be overcome by specific statutory language. Exceptions to the presumption are examined in detail. Finally, the article explores the possibility of challenges to such orders based on the Canadian Charter of Rights and Freedoms.*

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*Les gouvernements peuvent-ils ordonner, en vertu de lois sur l'environnement, que les personnes qui polluent nettoient la contamination qu'elles ont causée avant l'adoption de ces lois? Dans cet article l'auteur suggère que ce genre d'ordonnance est rétrospectif et non rétroactif dans son application et peut donc être valable dans certains cas. L'auteur analyse la présomption légale d'invalidité de la rétrospectivité qui ne s'applique pas toujours et qu'on peut éviter par une disposition expresse. Elle examine en détails les exceptions à cette présomption et, en conclusion, explore la possibilité de voir ces ordonnances contestées en vertu de la Charte canadienne des droits et libertés.*

## Introduction

Today, more and more properties are undergoing environmental audits. In some cases, the audits are required by regulatory authorities. In other cases, land owners perform such audits in order to obtain financing or insurance, or in order to be able to sell their property. Not surprisingly, the more properties are audited, the more that are found to be contaminated. In many, perhaps most cases, the contamination occurred years ago when environmental consciousness was not yet a household word and when regulators were much more lax.

Once contamination is found, the enormous cost of cleanup often drives both regulators and private parties to seek recovery from those originally responsible for the pollution, no matter how many years ago. Will they succeed? Can the original polluters be made to pay now for their past environmental sins?

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This article focuses on whether governments can issue administrative orders under current environmental statutes to those who polluted the land many years ago. In particular, it focuses on those cases where the pollution occurred prior to enactment of the statutory authority for the administrative order.

There are a number of related problems which are not dealt with in this article. First, several environmental statutes require the person who presently owns or occupies contaminated property to clean it up, regardless of whether they had anything to do with the original contamination of the property. For example, section 22 of the British Columbia Waste Management Act<sup>1</sup> authorizes a regional waste manager to order a person who owns or occupies land on which a substance which causes pollution is or was located, to carry out any remediation required by the manager. However unfair the current owner may consider such provisions, they raise no question of either retroactivity or retrospectivity, because they are based only on the present relation of the person to the land and the present condition of that land.

Second, it is not necessary for the purposes of this article to consider prosecution. The provincial statutes that regulate toxic real estate all have limitation periods, which in most cases range from six months to two years. The Ontario provision,<sup>2</sup> which purports to delay the commencement of the running of the limitation period until the offence has been discovered by certain officers of the Ministry, is an aberration whose constitutionality is in doubt. Federal statutes, such as the Canadian Environmental Protection Act,<sup>3</sup> do create some indictable offences which have no limitation period, but no attempt has been made by Parliament to make such offences retrospective. That is, there is no suggestion in any of those provisions that a person could be prosecuted for pollution which occurred prior to the enactment of the particular offence.

Third, this article does not consider questions of liability between private parties, in contract or in tort. Such cases raise questions of timing, particularly the question of when the statute of limitations begins to run. However, this is outside the scope of this article.

### *I. What is Retrospectivity? What is Retroactivity?*

Ordinarily, statutes act in the present tense. They affect only those acts and omissions which occur while the statute is in force.

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<sup>1</sup> S.B.C. 1982, c. 4.

<sup>2</sup> Environmental Protection Act, R.S.O. 1990, c. E.19, s. 195.

<sup>3</sup> R.S.C. 1985, c. 15.3.

A retroactive statute is one which has effect as of the time prior to its enactment. The statute operates backward and changes the law as of some date prior to its proclamation.

A retrospective statute also attaches new consequences to an event that occurred prior to its enactment.<sup>4</sup> It is distinguished from a retroactive statute because a retrospective statute takes effect only from and after its enactment. In other words, it gives an act done prior to its enactment a different legal effect, but that difference applies only after enactment of the statute. Retrospective statutes operate only in the future, after enactment, but do so by changing the legal effect of an event which occurred in the past.<sup>5</sup>

Most current environmental statutes claim retrospective, not retroactive, effect. Some legislators have indicated that they may be prepared to adopt retroactive legislation if retrospective statutes do not prove effective.

## II. *The Issues*

As an example, let us consider a client, ABC Company, for whom retrospectivity is very important. ABC Company and its predecessors operated a chemical plant from 1925 to 1970. During that time, the surrounding land became substantially polluted. In 1970, the factory was closed and the premises were sold to an arm's length purchaser. In 1971 the provincial government adopted an environmental statute which authorized the Ministry to issue cleanup orders to those who had contaminated land. In 1991 the Ministry issues such an Order to ABC Company, requiring it to clean up the chemical plant property. The Ministry argues that the Act is retrospective and therefore that the Order is valid. Must ABC Company pay?

A three part analysis should be employed to answer this question:

1. Is the Act subject to the presumption against retrospectivity or retroactivity?
2. If the Act is subject to the presumption, has the effect of the presumption been overcome by clear legislative language?
3. If the Act is not subject to the presumption, or if the effect of the presumption has been overcome by clear legislative language, can the Act be attacked as being contrary to the Canadian Charter of Rights and Freedoms?<sup>6</sup>

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<sup>4</sup> E. Driedger, *Construction of Statutes* (2nd ed., 1983), pp. 185-203.

<sup>5</sup> D. Doherty, *What is Done is Done: An Argument in Support of the Purely Prospective Application of the Charter of Rights* (1982), 26 C.R. (3d) 121.

<sup>6</sup> Constitution Act, 1982, Part I.

### A. *Is the Act Subject to the Presumption Against Retrospectivity or Retroactivity?*

Attempts to impose liability for past environmental contamination are increasingly common in Canadian environmental statutes. For example, Part 3 of the Alberta Land Surface Conservation and Reclamation Act<sup>7</sup> expressly authorizes orders requiring former tenants to repair damage to land which occurred prior to 1963. Similarly, section 7 of the Ontario Environmental Protection Act<sup>8</sup> has provided since June of 1990 that:

... the Director may issue a Control Order directed to

- (a) an owner or previous owner of the source of contaminant,
- (b) a person who is or was in occupation of the source of contaminant, or
- (c) a person who has or had the charge, management or control of the source of contaminant.

The Ministry of the Environment interprets this as applying to those who owned or occupied land prior to 1990.

Such sections can only apply to contamination which occurred prior to their enactment if they are given retrospective effect. Unfortunately for enthusiastic regulators, there is a traditional statutory presumption that statutes do not have retrospective effect unless the legislature's intention to do so is clear and unambiguous.<sup>9</sup> This presumption was recently restated by the Supreme Court of Canada in *Angus v. Sun Alliance Life Insurance Co.*<sup>10</sup> As La Forest J. said:<sup>11</sup>

The rule against retrospective application should certainly have effect ... where a party is deprived of a defence to an action by the operation of the new statute. ... This is the whole point of the presumption. The law is leery of retrospective legislation to begin with: the legislature will not likely be presumed to have intended a provision to have retrospective effect when the provisions substantially affect vested rights of a party.

<sup>7</sup> R.S.A. 1980, c. L-3.

<sup>8</sup> *Supra*, footnote 2.

<sup>9</sup> E. Driedger, *Statutes; Retroactive Retrospective Reflections* (1978), 56 Can. Bar Rev. 264; P. Côté, *Contribution à la théorie de la rétroactivité des lois* (1989), 68 Can. Bar Rev. 60; M. Krauss, *Réflexions sur la rétroactivité des lois* (1983), 14 R.G.D. 287; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, (1988), 52 D.L.R. (4th) 193; *Snider v. Smith* (1988), 55 D.L.R. (4th) 211, [1989] 4 W.W.R. 167 (Alta. C.A.); *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, (1989), 57 D.L.R. (4th) 458; *Nova, An Alberta Corporation v. Amoco Canada Petroleum Corporation*, [1981] 2 S.C.R. 437, (1981), 128 D.L.R. (3d) 1; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, (1975) 66 D.L.R. (3d) 449; see also *A.-G. Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, (1986), 66 N.R. 380; *R. v. Gamble*, [1988] 2 S.C.R. 595, (1988), 45 C.C.C. (3d) 204; *Dubois v. The Queen*, [1985] 2 S.C.R. 350, (1985), 23 D.L.R. (4th) 503.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at pp. 266-267 (S.C.R.), 193 (D.L.R.).

However, there are four principal exceptions. First, there is no presumption against retrospectivity where an enactment is merely procedural, and does not change the substantive law. This exception does not apply, however, where procedural changes interfere with rights which accrued or were accruing at the time of the enactment.

Second, an Act is not always considered to be retrospective (and therefore subject to the presumption) merely because it gives effect to antecedent facts in determining future rights and liabilities.<sup>12</sup> Driedger<sup>13</sup> suggests that a distinction should be drawn depending on whether the prior fact is an event (in which case the Act may be retrospective) or a characteristic (in which case it may not). For example, the words "where by the fault of two or more persons damage or loss is caused" have been held to describe an event and are therefore subject to the presumption.<sup>14</sup> On the other hand, the words "damages resulting from ... the operation of a motor vehicle" have been held to describe a characteristic (of the type of damage), and were therefore not affected by the presumption.<sup>15</sup>

Third, even where liability is based upon a past event, the presumption against retrospectivity applies only when the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty. Exclusion from certain kinds of employment or liability to higher insurance premiums are not considered to be "prejudicial".<sup>16</sup>

Fourth, the presumption does not apply even where prejudicial consequences are based upon a past event, where the new prejudicial consequences act primarily as protection for the public against future risks, rather than as punishment for a prior event.<sup>17</sup>

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<sup>12</sup> *Re Ward and Manitoba Public Insurance Corp.* (1974), 49 D.L.R. (3d) 638, [1975] 2 W.W.R. 53 (Man. C.A.); *R. v. Vine* (1875), L.R. 10 Q.B. 195; *Re a Solicitor's Clerk*, [1957] 1 W.L.R. 1219, [1957] 3 All E.R. 617 (Q.B.D.); see also *Hornby Island Trust Committee v. Stormwell* (1988), 53 D.L.R. (4th) 435, 30 B.C.L.R. (2d) 383 (B.C.C.A.).

<sup>13</sup> *Loc. cit.*, footnote 9.

<sup>14</sup> *Maxwell v. Callbeck*, [1939] S.C.R. 440, [1939] 3 D.L.R. 580.

<sup>15</sup> *Nadeau v. Cook*, [1948] 2 D.L.R. 783, [1948] 1 W.W.R. 284 (Alta. S.C.). Driedger's approach is not completely satisfactory, but neither is the case law in this area. I doubt that the difficult distinction between "events" and "characteristics" contributes anything to the public good. However, it definitely increases the obscurity and uncertainty of the law. It would be preferable to overrule the inconsistent cases and obliterate the distinction.

<sup>16</sup> *Re a Solicitor's Clerk*, *supra*, footnote 12; *Re Ward and Manitoba Public Insurance Corp.*, *supra*, footnote 12.

<sup>17</sup> Driedger, *op. cit.*, footnote 1, p. 203; *Brosseau v. Alberta Securities Commission*, *supra*, footnote 9; *Canada v. RCMP Public Complaints Commission*, [1991] F.C. 529, (1990), 123 N.R. 120 (Fed. C.A.); *Re Barry and Alberta Securities Commission* (1986), 25 D.L.R. (4th) 730, 67 A.R. 222 (Alta. C.A.), [1989] 1 S.C.R. 301, (1989), 57 D.L.R. (4th) 508.

1. *Are Environmental Laws Authorizing Administrative Cleanup Orders Merely Procedural?*

The procedural exemption is a narrow one which should not apply to environmental cleanup statutes. Such statutes do more than change the procedure which the Crown must follow in order to have contamination cleaned up: they create a substantive obligation to remediate where none existed before.

The procedural exemption is narrowed even further by the restriction that the changes must not interfere with rights which accrued or were accruing at the time of the enactment. For example, a statutory amendment which related only to the procedure to be followed prior to issuing a permit was recently held not to fall within the procedural exemption, because it affected accruing rights. In *Tilbury East (Township) v. Chatham (City)*,<sup>18</sup> the Township attacked the validity of a Certificate of Approval held by the City. The City operated its waste disposal site under the authority of a Certificate of Approval which was a renewal of a Certificate originally issued in 1972. The City first filed its application for the Certificate in June of 1972. At that time, the Director of the Ministry of the Environment had the right but not the duty to hold a public hearing prior to issuing Certificates of Approval of this type. Four days later, the statute was amended to provide that such hearings were mandatory. At the time of the amendment, the City's application and its supporting material were complete and showed *prima facie* grounds for the issuing of the Certificate. However, it would not have been possible for the Certificate to have been issued prior to the amendment, since the City was required to publish notice of its application three times over a period of weeks. Presumably, the purpose of giving notice was to allow members of the public to challenge the acceptability of the application.

The court held that, by filing an application which was complete and complied with the Ministry policy of the day, the City acquired a right to a Certificate of Approval which was accruing prior to the statutory amendment. This was not altered by the fact that the Certificate could not then be issued pending completion of public notice. Nor did the court give any weight to the fact that the public had not yet had an opportunity to make its submissions. Accordingly, the court held that the amendment did not apply retrospectively to the City's application. The original Certificate and its subsequent renewals were therefore held to be valid.

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<sup>18</sup> May 15, 1991, Ontario Court, General Division, per McGeary J. Similarly, a change in the method of hearing citizen complaints against police officers, which included the establishment of an independent commission, was held *not* to qualify for the "procedural" exemption in *Canada v. RCMP Public Complaints Commission*, *ibid*.

## 2. *Do Environmental Cleanup Statutes Depend Upon an Event or upon a Characteristic?*

As mentioned above, some environmental statutes contain provisions which relate to the liabilities of present and past owners of property. A statute which requires the owner or occupant of property to clean it up bases liability on a characteristic of that person, namely his or her relationship to the property. If Driedger's analysis is valid, these provisions are not retrospective and should apply, even if the contamination occurred prior to adoption of the statute.

However, a statute which imposes liability on those who caused contamination is based upon an event, namely the occurrence of the contamination. The statute should therefore be subject to the presumption against retrospectivity, and should not apply if the event (the contamination) occurred before the statute was enacted.<sup>19</sup>

## 3. *Do Environmental Cleanup Statutes Have Prejudicial Consequences?*

They do. The obligation to pay for a cleanup of toxic real estate is certainly a new duty. In addition, the costs (usually tens or hundreds of thousands, but sometimes millions of dollars) are undoubtedly heavy enough to prejudice seriously the finances of many a company.

## 4. *Do the New Prejudicial Consequences Act Primarily as Retribution for the Occurrence of Contamination or as Protection for the Public Against Risks?*

This is the most difficult part of the analysis. In fact, governments seek to impose environmental cleanup liabilities on the original polluter both to protect the public from the results of the pollution, and to impose retribution on the original person responsible. To decide which of these is primary in any particular case will require the courts to weigh the risk of harm to the public against the financial interests of the "person responsible".

One of the leading examples of this exemption outside the environmental context is found in *Brosseau v. Alberta Securities Commission*.<sup>20</sup> In that case, Brosseau was alleged to have committed improprieties in the preparation of a prospectus. Several years after the alleged behaviour, the Alberta Securities Act<sup>21</sup> was amended to authorize the Securities Commission to make orders barring persons from trading securities and/or imposing additional requirements upon them. The Commission gave

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<sup>19</sup> *Re Rempel-Trail Transportation Ltd. and Neilsen* (1978), 93 D.L.R. (3d) 595 (B.C.S.C.).

<sup>20</sup> *Supra*, footnote 9.

<sup>21</sup> S.A. 1981, c. S-6.1.

notice that it was considering issuing such an order against Brosseau. Brosseau argued that the Commission could not issue such orders based upon behaviour that occurred prior to enactment of the authorizing legislation.

The Supreme Court of Canada ruled that the Commission had jurisdiction to issue the orders:<sup>22</sup>

The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

Unfortunately for regulators, the broad wording used in this case is not directly transferable to environmental cleanup orders. *Brosseau* and all the cases referred to in the judgment involved prohibitions which had a limited minor effect on the defendant: one was forbidden to open an inn, one to work as a clerk, and one to trade securities. All other careers were unaffected. In each case, the defendant was merely required to refrain from activities for which he had shown himself to be unfit. Brosseau himself conceded in argument that he did not object to ceasing to trade securities; his objection was to the risk of a finding of improper behaviour, which was in no way dependant on the amendments. In other words, none of these cases involved requirements comparable to the potentially crushing effect of environmental cleanup orders. None involved orders to do work or to pay money. None required the courts to weigh the risks of harm to the public against a major burden proposed to be imposed on the "person responsible".<sup>23</sup>

No comparison between these harms has yet been made in an environmental case which raises questions of retrospectivity. However, a similar weighing occurred in the insolvency case of *Panamericana de Bienes y Servicios, e.a. v. Northern Badger Oil and Gas Limited*.<sup>24</sup> In that case, the court weighed the risk of harm to the public against the legitimate financial claims of a prior creditor. The court resolved the dilemma by distinguishing between an administrative order to do work necessary in the public interest, and a monetary claim by the Crown to recover the costs of work already done.

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<sup>22</sup> *Supra*, footnote 9, at pp. 321 (S.C.R.), 473 (D.L.R.).

<sup>23</sup> The mere intention to protect the public interest is not enough to escape the presumption. In *Canada v. RCMP Public Complaints Commission*, *supra*, footnote 17, the Federal Court of Appeal emphasized that virtually all statutes are adopted with this intention. Instead, the court weighed the serious risk to the privacy and security interests of the officers against the public interest in resolution of the complaints, and decided in favour of the officers.

<sup>24</sup> (1991), 81 D.L.R. (4th) 280 (Alta. C.A.), leave to appeal to S.C.C. refused Jan. 16, 1992.

Northern Badger Oil and Gas Limited was bankrupt. Prior to bankruptcy, a receiver manager had been appointed by a secured creditor and then a trustee in bankruptcy. The estate contained a number of valuable assets and also seven old, disused wells, which could cause significant contamination unless properly decommissioned. The receiver manager operated the business for some time and realized most of the assets. The Energy Resources Conservation Board ordered the receiver to take steps to decommission the seven wells, a step already required by provincial law, before paying any assets to the secured creditor. The decommissioning would more than exhaust the funds remaining in the estate. Instead of decommissioning, the receiver applied to the court for permission to pay the money realized to the secured creditor and to turn over the unrealized property, including the old, dangerous wells, to the trustee.

The trial court ruled in the receiver's favour, but this was reversed on appeal. The unanimous decision of the Court of Appeal drew a sharp distinction between claims for money, and obligations to do work to protect the environment. If the Crown had merely been seeking to recover its cost of having done work to protect the environment, this would be only a question of money and would be subject to the prior claim of the secured creditor. However, the obligation to seal properly the abandoned wells was a duty owed by the receiver to all of its fellow citizens. The Energy Resources Conservation Board's order therefore took priority over the rights of the secured creditor; the receiver was obliged to do whatever was necessary to obey the law before disbursing funds to the bank which had appointed it.

The same rationale can properly be applied to the question of retrospectivity. Orders which do not directly reduce pollution or its risks, such as an obligation to pay for a clean-up performed by others, do not directly protect the environment.<sup>25</sup> Where a government does work and then seeks to recover the cost of its work from a person it alleges to be responsible, the environment is no longer at risk. The public has already been protected and the only remaining question is whether that cost should be visited on the person alleged to be responsible. I suggest that this is a case where the claim is primarily in the nature of retribution and is not necessary to protect the public. The presumption against retrospectivity should therefore apply.

On the other hand, the environment is directly at stake where a responsible party is ordered to do clean-up work necessary to prevent pollution from occurring or from becoming worse or spreading. In such cases, the principal purpose of the order is to protect the public from future risks and the presumption should not apply.<sup>26</sup> Since many environ-

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<sup>25</sup> *Re Rempel-Trail Transportation Ltd. and Neilsen*, *supra*, footnote 19; *Ohio v. Kovacs* #2, 469 U.S. 274 (1985).

<sup>26</sup> *West Fraser Timber Co. v. Dreidger* (1988), 12 A.C.W.S. (3d) 366 (B.C.S.C.).

mental protection orders are intended to protect the public and the environment, they should be good candidates for this exception. However, it is important to note that the onus of establishing the exception falls on the Crown. If the evidence of public danger is weak, the Ministry high-handed and the cost heavy, the exception may not apply.

## II. *If the Presumption Applies, Has the Legislature Used Clear Wording to Overcome It?*

Traditionally, the Legislature has been able to overcome the presumption against retrospectivity through sufficiently clear language. For example, section 31.42 of the Environment Quality Act<sup>27</sup> provides:

Where the Minister believes on reasonable grounds that a contaminant is present in the environment in a greater quantity or concentration than established by regulation ... he may order whoever has emitted, deposited, released or discharged, **even before the 22nd of June 1990**, all or some of the contaminant to furnish him with a characterization study, a program of decontamination or restoration of the environment describing the work proposed for the decontamination or restoration of the environment and a timetable for the execution of the work. ...

Whoever is named in the Order as being responsible for the source of contamination shall execute the work in accordance with the timetable, as approved by the Minister.

Prior to the adoption of the Canadian Charter of Rights and Freedoms,<sup>28</sup> the legislature was supreme and such clear wording could not have been attacked. However, it is now possible that even such undoubtedly clear wording cannot authorize retrospective legislation.

## III. *The Canadian Charter of Rights and Freedoms*

The traditional "rule" against retrospectivity was simply a statutory presumption. In the age of legislative supremacy, this was the strongest weapon the courts had. Today, in the new era of the Canadian Charter of Rights and Freedoms, the courts need no longer give the legislators the last word. Judges now have the power to elevate the presumption against retrospectivity to a constitutional principle.

### A. *Section 7*

The most flexible and widely used provision of the Charter is section 7:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In *Reference re Section 94(2) of the Motor Vehicle Act*,<sup>29</sup> the Supreme Court held that the principles of fundamental justice referred to in section 7

<sup>27</sup> R.S.Q., c. Q-2. (Emphasis added).

<sup>28</sup> *Supra*, footnote 6.

<sup>29</sup> [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

embody the basic tenets and principles not only of our judicial process, but also of the other components of our legal system. Whether any given principle is a principle of fundamental justice rests upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system as it evolves.

Could the presumption against retrospectivity and retroactivity be found to be a basic tenet of our legal system? It could, and should, based on the simple principle that everyone must make decisions about their actions in the particular context of the laws of their day. Only by reference to those laws, as they exist at the time, can anyone decide whether any possible action or omission is legal or illegal. One of the fundamental principles of a free society is that anything which is not forbidden is permitted. Acts and omissions which are not forbidden under the law of the day are therefore permitted. Once an act or event has occurred in reliance on the law of the day, it is unfair to change the law when it is no longer possible for the actor to choose to comply. Such retrospectivity or retroactivity denies even the conscientious an opportunity to comply with the law. It is therefore profoundly inconsistent with the rule of law.

This "fundamental principle" is tempered by the equally fundamental principle that each person must refrain from harming others. There is a major distinction between those acts which were honestly believed to be innocent when they occurred, and those acts which were known to endanger or harm others but which one "got away with" at the time. This distinction will have to be incorporated into any extension of Charter protection against retrospective legislation.

The relationship between retrospectivity, retroactivity, moral innocence and section 7 was considered in the case of *R. v. Finta*.<sup>30</sup> In that case, a person accused of committing Nazi war crimes under a post-war section of the Criminal Code<sup>31</sup> challenged the Code provision on the grounds of its retroactive effect. The court held that section 6(1.91) (now Section 7(3.71) of the Criminal Code<sup>32</sup>) was retrospective but did not breach the Charter.

Finta was charged with having taken an active role in the forced transportation and murder of thousands of Jews at Nazi death camps, acting under the order of his superiors and in accordance with German laws of that day. He was charged with kidnapping, murder and theft under the Criminal Code. He argued that it would be retroactive, unfair, and contrary to section 7 of the Charter to punish him now for acts which were legal when and where they took place.

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<sup>30</sup> (1989), 61 D.L.R. (4th) 85, 50 C.C.C. (3d) 236 (Ont. H.C.), affd. on this point, April 24, 1992 (Ont. C.A.).

<sup>31</sup> R.S.C. 1970, c. C-34, as amended, S.C. 1987, c. 37, ss. 1, 2.

<sup>32</sup> R.S.C. 1985, c. C-46.

Callaghan J. did not take issue with this general principle, but held that it did not apply to Nazi war criminals. He held that, regardless of the particular laws of Nazi Germany, he could look to the accepted principles of international criminal law which predated the Second World War, such as the Geneva Convention.<sup>33</sup> Under these principles, the mass torture, pillage and murder of innocent civilians was generally recognized to be a crime. At a minimum, such acts were not "morally innocent". The acts were therefore wrongful when they occurred, and there was nothing contrary to the principles of fundamental justice in punishing the perpetrators now.

A similar approach can and should be applied to environmental laws. It is true that most modern environmental statutes are relatively recent. However, earlier pollution may have contravened the general community standards of the times as to what was right or wrong. In some cases, early pollution infringed the generally worded prohibitions of the day against endangering human health. Municipal by-laws may be fruitful sources of legal prohibitions against the acts which resulted in contamination. Tort law may also provide a foundation for retrospective cleanup requirements. Pollution can constitute a wide variety of torts, including nuisance, trespass, negligence, breach of the rule in *Rylands v. Fletcher*,<sup>34</sup> or interference with the rights of downstream riparian owners.

From the point of view of a potential defendant, the principal problem with section 7 is that it does not protect corporations.<sup>35</sup> It is true that corporations can rely on section 7 in defence of prosecutions, since a corporation cannot be convicted under a law which itself violates the Charter.<sup>36</sup> However, corporations cannot rely on Section 7 in civil or administrative actions. Corporate defendants will, therefore, have to search the Charter for other sections upon which to base the same arguments.

## B. Section 8

Of the other sections, the one most likely to be relied on is section 8:

8. Everyone has the right to be secure against unreasonable search or seizure.

It is well established that section 8 does apply to corporations, and can be a very powerful tool with which to resist government action.<sup>37</sup>

<sup>33</sup> Callaghan J. relied heavily on the specific provisions of s. 11(g) of the Charter which provides that "any person charged with an offence has the right ... not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations".

<sup>34</sup> (1868), L.R. 3 H.L.330.

<sup>35</sup> *Irwin Toy Limited v. Quebec Attorney General*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577.

<sup>36</sup> *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, (1991), 84 D.L.R. (4th) 161; *R. v. Big M Drug Mart Limited*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321.

<sup>37</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, (1984), 11 D.L.R. (4th) 641.

As the Supreme Court said in *Hunter v. Southam Inc.*,<sup>38</sup> the purpose of section 8 is to limit whatever powers of search and seizure the federal or provincial governments already possess. It does not itself confer any power of even reasonable search and seizure. Accordingly, an assessment of the constitutionality of a statute authorizing any seizure must focus on its reasonable or unreasonable impact on the subject of seizure and not simply on its rationality in furtherance of valid government objectives.

Section 8 guarantees a "broad and general right to be secure from unreasonable search and seizure".<sup>39</sup> Can an order requiring a company to pay large cleanup costs be characterized as a "seizure"? Some cases have held that administrative orders which sterilize the use of private property can constitute a "seizure", even where the government itself receives nothing. For example, in *R. v. Halpert*,<sup>40</sup> the court held that there was a "seizure" when a weights and measures inspector sealed a measuring device which failed to comply with the regulations, thus preventing its use.

More directly on point is *R. v. Island Farm and Fishmeal Limited*.<sup>41</sup> In that case, the court considered section 7 of the Environmental Protection Act of Prince Edward Island:<sup>42</sup>

7(1) Where the Minister has reason to believe that an act or omission of a person, is or may be a contravention of this Act or the regulations or otherwise may be a threat to the environment or environmental health, the Minister may, in writing and subject to such terms and conditions as may be specified in the order . . . order the person to . . .

- (c) cease the activity specified in the order;
- (d) clean or repair, at that person's own cost, the area affected . . .
- (f) do any or all of those things specified in clauses (a) to (e).

In reliance on this section, the Minister ordered a fish processing company to cease operations and to remove a quantity of waste from its premises. Matheson J. held that this Order was a seizure, because it required the corporation to cease its business activities at the premises. The seizure was an unreasonable one because it was not made in compliance with the rules set down in *Hunter v. Southam Inc.*<sup>43</sup> Accordingly, the seizure contravened section 8 of the Charter and the order was quashed. The Crown appealed to the Court of Appeal.<sup>44</sup> The appeal was dismissed because the Order had not been properly executed by the Minister.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, at pp. 158 (S.C.R.), 651 (D.L.R.).

<sup>40</sup> (1984), 48 O.R. (2d) 249 (Ont. Co. Ct.).

<sup>41</sup> [1991] P.E.I.J. No. 51, (1991), 13 W.C.B. (2d) 15 (P.E.I.S.C.).

<sup>42</sup> R.S.P.E.I. 1988, c. E-9.

<sup>43</sup> *Supra*, footnote 36.

<sup>44</sup> [1992] P.E.I.J. No. 32 (P.E.I.C.A.).

However, in *obiter dicta*, the court of appeal held that the Order would have been valid if it had been properly made. The court agreed that an Order to cease production and to permit inspection does constitute a "seizure" within the meaning of section 8 of the Charter. However, it held that such a seizure was not unreasonable, or could be justified under section 1. Businesses regulated under the Environmental Protection Act have only a limited expectation of privacy, and one which must be balanced against the public need for a mechanism of discovery of polluting events.

In taking this position, the court emphasized that the Environmental Protection Act was of a regulatory rather than of a criminal nature, and that the powers granted to the Minister were basically powers of inspection. Their purpose was not to penalize criminal conduct but to enforce compliance with the Act. Following the same reasoning as Cory J. in *R. v. Wholesale Travel Group Inc.*,<sup>45</sup> the court held that the standards of reasonableness which apply to investigations of a criminal nature do not apply to a regulatory inspection. Accordingly, they held that the Charter did not breach section 8 of the Charter.

The court of appeal did not explain how an Order requiring the company to shut down, without an opportunity to be heard, can be justified as merely a "mechanism of discovery" or "power of inspection". Since this entire part of the judgment was *obiter dicta*, the point is open for further debate.

Not all administrative orders are seizures. However, it is possible to conceive of a cleanup order which imposes costs so heavy as to destroy the economic value of a property, or so as to threaten the economic viability of a business as a whole. If *R. v. Island Farm and Fishmeal Limited* is rightly decided, such an order would be a "seizure". The seizure would contravene section 8 of the Charter if it were "unreasonable".

Such a seizure might be "unreasonable" because of the process by which it occurred. However, *Reference re Section 94(2) of the Motor Vehicle Act*<sup>46</sup> establishes that the Charter does more than guarantee fair procedures: a seizure may be unreasonable because of its substantive basis. A seizure which is based on retrospective liability may be substantively unreasonable for the policy reasons set out above, thus establishing a breach of section 8 and throwing the burden of justification upon the Crown under section 1 of the Charter.

### C. Section 1

Section 1 of the Charter reads:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>45</sup> [1991] 3 S.C.R. 154, (1991), 84 D.L.R. (4th) 161.

<sup>46</sup> *Supra*, footnote 29.

To defend retrospective laws under section 1, the Crown would have to show on a balance of probabilities that the objective of the law is pressing and substantial, that the law is rationally connected to the objective, and that the impact of the law is proportional to that objective.<sup>47</sup>

A court would probably agree that the need to clean up contaminated real estate is pressing and substantial, and that requiring those who caused the pollution to clean it up is rationally related to that objective.<sup>48</sup> The real question will be whether the imposition of retrospective liability impairs the right to be free from unreasonable seizure as little as possible, and whether the effect of retrospective liability is reasonably proportional to the objective to be achieved.

There is an obvious alternative to retrospective liability: payment of the cleanup costs by society as a whole. This would recognize that society as a whole benefited from the past economic activity which led to the pollution, through, for example, provision of jobs, payment of taxes, creation of foreign exchange. It would also give weight to the responsibility of society as a whole for its laws which allowed the pollution to occur. On the other hand, the Crown will argue that those who benefited financially from cheap waste disposal should pay now for its consequences.

In this balancing of competing interests, as in the evaluation of "fundamental justice", the deciding factors will probably be the good faith of the defendant, the economic benefit it received from the pollution, and the impact upon it of the impugned order. It would be harder for the Crown to justify an order which would financially devastate an old age pensioner than it would be to justify an order which caused no hardship to a wealthy multinational. Similarly, it would be harder for the Crown to justify a cleanup order imposed on a conscientious company which complied fully with the laws of its day, obtained all government permits, used the best available technology, and honestly believed its acts were innocent, than it would be to justify an order imposed on a company which knew its wastes were dangerous, yet simply hid them in a hole in its yard next to its neighbour's well. In the large middle ground of substantial but imperfect compliance, the result will depend less on the law than on the judge's sense of what is fair in the circumstances.

### *Conclusion*

This examination demonstrates that former polluters should not be too sanguine about their immunity from retrospective cleanup orders. On the other hand, governments may not find it as easy as they had hoped to

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<sup>47</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200.

<sup>48</sup> Although there is certainly room to argue that current methods of "clean-up", which amount to little more than moving contamination from one area to another, are not rationally connected to any benefit to the public interest.

impose cleanup liability retrospectively on those whose pollution occurred prior to the adoption of the authorizing statute.

Legislatures can authorize retrospective orders for the cleanup of pollution, even if such pollution occurred prior to the adoption of the authorizing statute. However, the legislation must be unmistakably clear; any ambiguity will usually be construed against retrospectivity. Even where statutory wording leaves nothing to be desired, it may be possible for defendants to use the Canadian Charter of Rights and Freedoms as the basis for an argument that retrospective orders are constitutionally unacceptable.