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Discussion after the Speeches of John N. Hanson and Michael I. Jeffrey

Discussion

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Discussion After the Speeches of John N. Hanson and Michael I. Jeffery*

QUESTION, *Professor King*: John, on these cases that you cited, do you have problems of proof or causation?

ANSWER, *Mr. Hanson*: The answer depends on what you are trying to prove. From an enforcement point of view, one of the virtues of Superfund — or from a defendant's point of view, one of the vices of Superfund — is that you don't need a great deal to prove, for example, that the waste in question is actually what is released or threatening to release from a particular site, to hold a party liable. It's enough that some hazardous substance or waste is released or threatening to release from the site, and that the hazardous substances in question are also at the site.

Assume that you send a barrel of waste to a site, and it's the tightest barrel known to man. It will never leak, and there's no question about it, but the site at which it's located has a leak of a hazardous substance. You're a liable party. Causation does not have to be proven as it does in the typical common law sense. One must, however, if trying to prove that you are a responsible party at the site, link you to the site, so that you fall within one of the four categories of liable parties.

The short answer to your question is that you do have proof problems. Also, when it's in a trans-boundary context, you may well encounter difficulties or formalities in obtaining the discovery necessary to meet your burden.

QUESTION, *Professor King*: Is there concern in Canada about the loss of jobs where environmental matters are concerned?

ANSWER, *Mr. Jeffery*: It's been clear in the last number of months, as the recession has taken a much greater toll, that the idea of preserving jobs has become much more important. That's not to say that environmental concerns have receded all that far. What it does mean, to a certain extent, is that the government is paying a little bit more attention to trying to negotiate and balance some of the interests than it has in the past.

So, I think, in answer to your question, both the unions and the public at large are starting to say that there has to be a better balancing of interests, and if environmental concerns are directed at discouraging economic investment, then ultimately we're not going to have the funds

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to pay for much of what we want, like recycling programs, etc., because the tax revenue base is going to decrease. I think that's a problem in all jurisdictions.

QUESTION, Mr. Mason: I think you indicated that it's very problematic in Canada to get a good joint assessment at the provincial and federal levels, because they have very different schemes. How do you get a full environmental assessment without having a joint assessment?

ANSWER, Mr. Jeffery: I wasn't trying to imply that we won't have joint environmental assessments. I think that will be more the norm than having just a provincial assessment or just a federal assessment. The real problem is still going to be, once you decide on the assessment, the documentation of the state making up the assessment. The other side is how do you bring the public into that process? At the federal level, the process has been very different than that at the provincial level, at least in Ontario. Also, how are you going to combine the two different processes, and how is an appointed person in Ontario going to interface with a more ad hoc type of panel established at the federal level for, say, public hearings?

These are, I think, problems that are going to have to be worked out in the future. We haven't gotten to that yet, and there have, in fact, been very few joint federal-provincial reviews.

QUESTION, Ms. H. Campbell: Mr. Hanson, you mentioned the penalty that ensued for failure to comply with an order under Superfund. Are there some other administrative penalty structures on which you could comment?

ANSWER, Mr. Hanson: The short answer is that there are many of them. Each statute has its own particular penalty regime, and they periodically get amended by Congress to send another message. They're not all identical in their specifics, but they almost always have a civil set of penalties and a criminal set of penalties.

QUESTION, Mr. Trimble: My understanding was that there's a fifth category under Superfund, liable parties. Would this cover a Canadian generator whose waste ends up in the U.S., if that generator did not arrange for its waste to end up here?

ANSWER, Mr. Hanson: A Canadian generator who doesn't arrange for U.S. disposal, but whose waste ends up here, may not be reachable, even though technically it's a generator. If a Canadian generator also arranges for its waste to end up in the States, then you probably have not only a Superfund-liable party, but you probably also have enough of a contact with the U.S. such that a U.S. court could reach out and exercise jurisdiction.

QUESTION, Mr. Trimble: What is the potential liability, if any, of a U.S. parent corporation for a Canadian subsidiary that disposes of waste in the U.S.?

ANSWER, Mr. Hanson: Assuming, of course, that the Canadian

subsidiary arranged for disposal in the U.S., the answer is that it depends. It is theoretically possible for the parent to be held liable, if the subsidiary is found liable, and the parent's corporate veil can be pierced. That usually happens only when there is not enough money at the subsidiary level, and when there is a need to do it. It's a hard thing to do. It's a little easier now than it used to be, but it's still very, very difficult to do.

