

# Federal Supreme Court decision on 'polluter pays' principle and heirs' liability

July 25 2016 | Contributed by [Pestalozzi Attorneys at Law Ltd](#)

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In a recent decision<sup>(1)</sup> the Federal Supreme Court decided on the environmental liability of owners who make their property available to landfill operators in return for financial compensation. The court also confirmed the transfer of a former owner's cost-bearing duty to his heirs.

## Facts

Between 1965 and approximately 1975, the property concerned was used as a landfill. Such use was contractually agreed between the initial property owner and the landfill operator and the owner obtained financial compensation. The use as a landfill was authorised by the competent authority in 1969.

In 1981 the initial property owner died and his three heirs inherited the property. By subsequent transfers, the property was transferred to its current owner.

In 2012 a site assessment revealed a high possibility of subsoil pollution. On request of the current owner, the competent authority issued a ruling providing for the following clean-up cost allocation:

- 75% to the landfill operator; and
- 8.33% to each of the three heirs of the initial property owner (ie, 25% in total to the heirs).

The heirs challenged the ruling and requested an exemption from bearing any costs, claiming in particular that:

- the current owner was wrongly exempted from environmental liability;
- the initial owner merely owned the site and did not cause the pollution by his own conduct, and was therefore not liable to bear any costs; and
- should the court affirm the initial owner's liability, his cost-bearing duty did not transfer to the heirs.

## Legal framework

### ***'Polluter pays' principle***

Pursuant to the 'polluter pays' principle,<sup>(2)</sup> any person who causes measures to be taken under environmental law must bear the respective costs.

Regarding contaminated sites, the persons responsible bear the costs of the required investigation, monitoring and remediation. If two or more persons are responsible for site contamination, they must bear the costs according to their shares of responsibility. The first to bear the costs is the person who caused the measures through his or her conduct. Any person who is responsible only as the possessor of the site bears no costs if, by exercising the required care, he or she could not have

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had any knowledge of the pollution.

### ***Legal definition of 'polluter'***

Whereas the applicable environmental law provides a basis for the polluter pays principle, it does not explicitly define the meaning of the term 'polluter'.

Jurisprudence and prevailing legal doctrine base their interpretation of the term on the 'disturber' concept pursuant to police law principles. Accordingly, disturbers are not only those persons who cause a disturbance by their own conduct (eg, by operating a landfill), but are also those persons who control the source of a disturbance (eg, by owning a contaminated site).

Accordingly, the owner of a property at the time of the clean-up is generally considered to be a polluter, even if he or she acquired the property with the contamination and without any possibility of avoiding the damage. However, this does not mean that in any case such an owner may be held liable for related costs.<sup>(3)</sup>

### ***Transfer of environmental liability to heirs***

Pursuant to previous case law, the environmental liability of a polluter who caused the pollution by his or her own conduct may be transferred by way of inheritance.<sup>(4)</sup> Accordingly, such a polluter's a latent cost-bearing duty (ie, a cost-bearing duty that has not yet been finally determined at the time of the inheritance) may by operation of law be transferred to the heirs, provided that the heirs do not reject the inheritance.

It is the cost-bearing duty that is transferred to the heirs, not the position of the deceased as polluter. Such transfer of the cost-bearing duty is subject to the following conditions:

- the existence of a formal legal basis for the clean-up and cost-bearing duty at the time of inheritance; and
- the possibility of the heirs to reject the inheritance based on an informed decision, which requires that the clean-up and cost bearing duty is at least predictable at the time of inheritance.

### **Supreme Court decision**

#### ***Initial owner's liability***

As to the initial owner, the court noted that the contract concluded with the landfill operator referred to the prohibited deposit of certain substances near drinking water pipelines. This implied the initial owner's knowledge of the use of his property for the disposal of potentially environmentally hazardous substances. In addition, he obtained a financial benefit from making available his property for such use.

By providing the property for use as landfill, the initial owner caused an environmental risk assignable to him. The fact that the landfill was subsequently approved by the competent authority was not relevant for the court with regard to the initial owner's contribution to the pollution.

Accordingly, the court held that the initial owner contributed to the pollution by his own conduct and the court confirmed his environmental liability.

#### ***Current owner's liability***

When assessing the current owner's potential liability, the court pointed out that a property owner's lack of knowledge may lead to an exemption from cost bearing only if no indication of potential pollution existed, of which the owner had to be aware. The court held that the essential point in time for assessing the owner's knowledge is when he or she obtained ownership of the property.

The concerned landfill was no longer visible after 1975 and the current owner was not in the position to obtain internal authority information on the potential site contamination. In addition, he obtained ownership of the property only in 1997.

Accordingly, the court denied the current owner's knowledge at the relevant time as well as his environmental liability and therefore confirmed his exemption from cost bearing.

## ***Liability of heirs***

When assessing the potential liability of the heirs, the court confirmed the existence of a legal basis for the clean-up and cost-bearing duty in 1981 (ie, at the time of the inheritance).

In contrast, the court denied the predictability of a clean-up and cost-bearing duty at that time. It argued that despite the heirs' knowledge of the landfill, the authority's subsequent approval indicated environmentally safe use. Moreover, the environmental risk did not materialise at the time of inheritance. Therefore, the heirs had no reason to initiate further investigations regarding potential pollution in the future. Given these circumstances, the court denied the predictability of the clean-up and cost-bearing duty at the time of inheritance.

In the decision and following its previous jurisprudence,<sup>(5)</sup> the court held that the cost-bearing duty of the initial property owner did not transfer to the heirs and so they must therefore be released from any cost-bearing duty. In application of the relevant federal and cantonal statutory provisions, the concerned cost share of 25% must be paid by the community.

## **Comment**

The court confirmed its previous decision on both the owners' environmental liability and the transfer of such liability by way of inheritance.

As to the liability of owners that make available their property to landfill operators, the court clarified that such owners may be held liable for having contributed to the pollution by their own conduct not only if they participate in the profit of the landfill and are represented on the board of the landfill operator, but also if they knowingly and in return for financial compensation make available their property for use as a landfill.

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## **Endnotes**

(1) Federal Supreme Court, 1C\_418/2015, April 25 2016, planned for publication as principal decision.

(2) In particular, Articles 2 and 32d of Federal Act on the Protection of the Environment, SR 814.01.

(3) Federal Supreme Court, BGE 139 II 106, where the court held that such cost share is justified only if further circumstances are present, in particular if the current owner was in the position to prevent the pollution or if he or she obtains substantial economic benefit from the pollution or clean-up. For further details please see "[Federal Supreme Court confirms scope of 'polluter pays' principle](#)".

(4) BGE 139 II 106.

(5) *Ibid.*

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