CONTAMINATED LANDS IN BRITISH COLUMBIA

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NOTE TO READER: This paper is intended to introduce some of the concepts related to liability for contaminated lands and is not intended to be read as legal advice. The members of the Edwards, Kenny & Bray Environmental Practice Group would be pleased to discuss particular fact situations with you.

I. INTRODUCTION

The environment is making business more complicated including land transactions. The potential for exposure to liability continues to increase and the complexity of the regulatory regime continues to expand. In June of 1993 a long series of amendments to the British Columbia *Waste Management Act* containing detailed rules for regulating contaminated land received third reading in the British Columbia legislature. The group of amendments were contained in Bill 26. In April of this year these amendments, together with comprehensive regulations became law and are incorporated into the *Waste Management Act*, R.S.B.C. 1996.

It is useful to look at the contaminated lands rules in the context of the environmental regulatory framework in British Columbia. There are three parts to the regulatory framework:

(1) the permitting of acceptable levels of intrusive activities or polluting activities and the supervision of those permits;

(2) the process of sanctioning those who pollute without a permit or in excess of levels established in those permits; and

(3) the direction of the clean-up or remediation of lands which have been polluted.

This paper will concentrate on the third category.

Contamination issues likely will become more important in buying and selling real estate and can significantly impact on market value. The dynamics of accounting for risk in market value seem to work this way:

- Local government has statutory discretionary powers to order "clean-up" of lands it considers to be contaminated. Clean-up costs can be very expensive;

- Government can restrict the use of lands it considers to be contaminated (probably more out of government concern for its own liability than for concern for public health);

- Ownership or other involvement with contaminated lands can bring exposure to expensive litigation from adjoining property owners and others;

- Financial institutions are reluctant to lend on contaminated lands (usually for the above 3 reasons).

Clean-up costs and diminishment in property values often are unexpected, unplanned for and, to a degree, uncontrollable. The instinct to share the misery can be almost irresistible. Disputes ordinarily take shape in one or more of the following forms:

- disputes between vendors and purchasers over who should be responsible for clean-up;

- disputes between landlords and tenants;

- disputes between government and potentially responsible persons over allocation of liability;

- disputes between government and potentially responsible persons over standards of remediation;

- disputes between adjoining landowners over "travelling" or "migrating" contamination; and

- disputes between insureds and insurers.

II. THE BILL 26 SCHEME FOR LIABILITY

The starting point in Bill 26 is the concept of a "responsible person". Bill 26 delineates in great detail who are and who may not be potentially responsible persons. It goes on to provide mechanisms for allocating liability and pronounces that liability generally will be joint and several (as well as "absolute" and retroactive). Liability attaches notwithstanding the fact that the introduction of a substance into the environment was not prohibited at the time it was introduced and notwithstanding the terms of any expired or current permit or approval. Bill 26 also provides for the responsibility to provide information on various triggering events and at various levels of sophistication and detail. Significantly, Bill 26 also empowers the Ministry to designate sites to be "contaminated sites" and creates a contaminated site registry. The registry can be accessed through B.C. Online.

The object of Bill 26 is to identify contaminated sites (by way of site profiles, site investigations and a site registry), and to then fasten liability to responsible persons for clean-up of those sites.

It is significant to note in looking at the definitions of "owner", of "operator" and of "person" that directors and officers can be personally liable for clean-up.

Section 27 (1) of Bill 26 states that:

> *A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.*

The scheme of the Act is such that there are two types of liability mechanisms. The first is a remediation order directing a responsible person to carry out work and the second is a cost recovery type remedy directing a responsible person to pay compensation with respect to work carried out by others.

Section 26.5 provides, *inter alia*, that the following persons are responsible for remediation at a contaminated site:

(a) A current owner or operator of the site;

(b) A previous owner or operator of the site.

"Owner" is defined in section 26 as meaning:

> *a person who is in possession of, has the right of control of, occupies or controls the use of real property, including without limitation a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 20.31 (3).*

"Operator" is defined as meaning:

> *a person who is or was in control of or responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 20.31 (3).*

"Contaminated site" is defined in section 26 as meaning:

> *an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains*
>
> *(a) a special waste, or*
>
> *(b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions.*

Special waste is equivalent in British Columbia to hazardous waste in the United States. There is an existing regulation under the *Waste Management Act* which deals with special waste. The Regulation to Bill 26 (the *Contaminated Sites Regulation)* sets out a series of contamination criteria.

Bill 26 provides that a remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss relating from the release or threatened release of a contaminating substance.

III. REMEDIATION ORDERS

Under Bill 26, a manager may issue a remediation order to any responsible person. The order can compel remediation, can compel cash contribution towards remediation, and can deal with security for remediation.

Section 27 of Bill 26 provides that:

> *(7) A person receiving a remediation order under subsection (1) or actual notice of a remediation order under subsection (11) shall not, without*

the consent of a manager, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and where the person does so, the manager, notwithstanding any other remedy sought, may commence a civil action against the person for the amount of the diminishment or reduction.

IV. COST RECOVERY REMEDIES

There are four types of cost recovery remedies available under Bill 26:

(a) A manager (that is, a regional provincial government regulatory official) may recover costs expended by government on orphan sites from responsible persons during or after remediation conducted by government. The amount specified can be recovered in an action in the British Columbia Supreme Court.

(b) A manager can also commence a court action against any responsible person for costs carried out in remediation of a contaminated site.

(c) Any person who incurs costs in carrying out remediation of a contaminated site may commence a court action for reasonably incurred costs of remediation against any potentially responsible person.

(d) Finally, a manager may issue a remediation order to a responsible person which may require that person to "contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation".

Section 35 of the Regulation provides that:

(1) *For the purposes of determining compensation payable under section 20.41 (4) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.*

(2) *In an action between 2 or more responsible persons under section 20.41 (4), the following factors must be considered when determining the reasonably incurred costs of remediation:*

(a) *the price paid for the property by the person seeking cost recovery;*

(b) *the relative due diligence of the responsible persons involved in the action;*

(c) *the amount of contaminating substances and the toxicity attributable to the persons involved in the action;*

(d) *the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;*

(e) *any remediation measures implemented and paid for by each of the persons in the action;*

(f) *other factors relevant to a fair and just allocation.*

(3) *For the purpose of section 20.41 of the Act, any compensation payable by a defendant in an action under section 20.41 (4) is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the Negligence Act.*

(4) *In an action under section 20.41 (4) of the Act against a director, officer, employee or agent of a person or government body, the plaintiff must prove that the director, officer, employee or agent authorized,*

permitted or acquiesced in the activity which gave rise to the cost of remediation.

(5) In an action under section 20.41 (4) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

V. MANAGER'S DISCRETION TO ALLOCATE OR LIMIT LIABILITY

Section 27.3 provides that:

(1) A manager may determine that a responsible person is a minor contributor if the person demonstrates that

(a) only a minor portion of the contamination present at the site can be attributed to the person,

(b) either

(i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or

(ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and

(c) in all circumstances the application of joint and several liability to the person would be unduly harsh.

(2) When a manager makes a determination under subsection (1) that a responsible person is a minor contributor, the manager shall determine the amount or portion of remediation costs attributable to the responsible person.

(3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

In determining allocation of liability issues, the manager may appoint an "allocation panel" composed of members of a twelve person panel appointed by the Minister of Environment, Lands and Parks. A panel is now in place. The members are to have specialized knowledge in contamination, remediation or methods of dispute resolution. The allocation panel would then provide a non-binding opinion to the manager with respect to allocation issues. In providing the opinion, the allocation panel shall, to the extent of available information, have regard to the following:

(a) the information available to identify a person's relative contribution to the contamination;

(b) the amount of substances causing the contamination;

(c) the degree of toxicity of the substances causing the contamination;

(d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;

(f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;

(g) in the case of a minor contributor, factors set out in section 27.3 (1)(a) and (b);

(h) other factors considered relevant by the panel to apportioning liability.

VI. INDIRECT LIABILITY

Liability of directors, officers, employees and parent corporations arises within the interpretation of the meaning of "owner" and "operator" as referred to above. "Person" referred to in the definitions of "owner" and "operator" is defined to mean:

> *a government body and any director, officer, employee or agent of a person or government body.*

Section 35 of the Regulation states that with respect to a cost recovery action against a director, officer, employee or parent corporation, a plaintiff must prove that the director, officer, employee or parent corporation "authorized, permitted or acquiesced" in the activity which gave rise to the cost of remediation. Two issues arise here. The first is that the qualification applies only to one type of cost recovery action. Secondly, there is an issue as to whether the Regulation can lawfully "amend" the statute.

VII. COMMON LAW RIGHTS OF ACTION

In addition to clean-up orders initiated by government, and associated actions for "contribution" between responsible persons (and potential actions against professionals for negligent advice), there are essentially two types of lawsuits associated with contaminated lands:

- Actions brought by purchasers who discover contamination after sale;
- Actions brought by adjoining land owners for the movement of contamination onto those lands.

Purchasers of contaminated real estate can bring action either in breach of contract or for misrepresentation, either fraudulent or negligent. Ordinarily, there will not be a condition or warranty in the contract of purchase which directly applies and traditionally the principle of *caveat emptor* has governed in the absence of fraudulent or negligent misrepresentation. Recently, however, the courts have been receptive to arguments based on "implied" warranties or conditions based on a duty to warn. Also, it has been held in some cases that a failure to disclose some aspect of the property which renders it inherently dangerous is a fraudulent misrepresentation entitling the purchaser to escape the transaction: [See *C.R.F. Holdings Ltd. v. Fundy Chemicals* (1982), 33 B.C.L.R. p. 291 (B.C.C.A.); and *Sevidal v. Chopra* (1987), 2 C.E.L.R. (N.S) 173 (Ont. S.C.)]. Some cases illustrate that concealment by a vendor of a material fact relating to the property may be translated into a fraudulent misrepresentation. Examples include houses infested with cockroaches or termites, houses insulated with urea formaldehyde or houses constructed in violation of building codes and without permits.

To the extent that anything is said at the time of purchase, then the vendor must not only not intentionally deceive but he must not negligently deceive. [See *Sedgemore v. Block Bros.* (1985), 39 R.P.R. 38 (B.C.S.C.); *Maple Leaf Foods Inc. v. 347772 B.C. Ltd.*, November 26, 1991, unreported Reasons for Judgment of the Honourable Mr. Justice McDonald, B.C.S.C.; and *Rainbow Industrial Caterers v. C.N.R.* (1989), 1 W.W.R. 714 (B.C.S.C.).] *Caveat emptor* is still alive and well, however, as seen in the recent decision of the B.C. Court of Appeal in *Crozman v. Ruesch* [1994] 4 W.W.R. 116.

Contractual disputes, needless to say, will involve close consideration of what the parties have bargained for. Sometimes the vendor assumes responsibility, sometimes the purchaser assumes that responsibility, and, sometimes the contract does not speak to responsibility. Often the issue of responsibility is clouded. The vendor and purchaser may have put their minds to contamination which is known at the time of sale but the contract may be silent as

to contamination which was unknown to both the vendor and purchaser at sale but which subsequently comes to light - and, on occasion, standards change so that the characterization of what constitutes contamination change.

Actions brought by adjoining land owners are framed in negligence, nuisance, trespass or under common law principles of strict liability. Even the Ministry can be found to be liable, if negligent, as was found in a recent Ontario case.

Nuisance is an unreasonable interference with the use or enjoyment of land by its occupier or with the use or enjoyment by the public of a public right of way. To succeed in an action in nuisance, it is not necessary for the plaintiff to prove that the interference resulted from intentional, reckless or negligent conduct. Rather, the court will focus on the nature of the interference. Accordingly, conduct that is entirely blameless may well result in liability. It is for this reason that the potential for recovery for environmental damage is more likely to be found in nuisance than negligence.

The law of trespass involves the intentional and direct interference with another's right to exclusive possession of his property. Trespass can involve a single event, and of particular relevance where limitations may be at issue, can involve a series of continuing trespasses - that is, a new trespass each day.

The principle surrounding a cause of action in strict liability is that a person who brings something onto his land which is not naturally there and which is likely to cause mischief if it escapes will be answerable for all damage which is the natural consequence of the escape. Liability will be found despite lack of fault or carelessness; accordingly, liability will attach to accidental discharge. A recent decision of the House of Lords, *Cambridge Water Co. v. Eastern Counties* [1994] 1 All E.R. 53, has restated the rule in *Rylands v. Fletcher* so as to include foreseeability.

Proving contamination and, particularly, proving the source of contamination, can be difficult and usually will be expensive. Strategies to reduce the scientific side of the dispute will not only tend to save the parties expert and legal fees but likely will also help to promote resolution, and, at a minimum will reduce the days of hearings.

VIII. STIGMA

At present, the concept of "stigma" is as much of a mystery to Canadian courts as it is to Canadian real estate appraisers. "Stigma" was defined by Richard Roddewig writing in the October 1996 *Appraisal Journal* in this way:

> *Stigma, as it applies to real estate affected by environmental risk, is generally defined as "an adverse public perception about a property that is intangible or not directly quantifiable." It is an additional impact on value, over and above the cost of cleanup or remediation. Stigma can occur on sites that once contained contaminants and have been cleaned up, on sites undergoing cleanup, or on sites that were never contaminated but neighbor a property that contains or once contained contaminants.*

Chalmers and Jackson writing in the January 1996 *Appraisal Journal* put it this way:

> *The fundamentals of real property valuation recognize that value reflects an anticipated stream of future benefits capitalized at a return necessary to attract capital to the opportunity. Contamination has the potential to decrease the stream of future benefits and to raise the return necessary to attract capital, both of which will decrease value. The valuation issues then become quantifying the decrease in future benefits (i.e., the direct costs of the contamination) and the increase in yields (i.e., the risk premiums due to the contamination).*

As stated, stigma can arise before, during and after cleanup. It is that extra amount in addition to the cost of cleanup by which, conceptually, the market discounts the value of

contaminated property. It arises, in my view, because of the combination of two factors. The first is that contamination related costs can be very expensive and the second is that there is considerable inherent uncertainty in what the costs of remediation will be and in connection with whether standards will change such that residual contamination might become problematic at some future time.

It is difficult both under American and Canadian regulatory regimes, including the new Bill 26 British Columbia regime, to achieve distance from a contaminated site. The list of potentially responsible persons is intended to create a very broad net. Risk and uncertainty likely will continue to be difficult issues for real estate valuators for some years to come.

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