

**Contamination Issues on Expropriation:**

**The Contaminated Site Regulatory Framework and its Impact on Expropriation**

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**Contamination Issues on Expropriation**

- **Regulatory Framework**
  - ◆ Statutory scheme
  - ◆ Triggers for cleanup
  - ◆ Remediation cost recovery
- **Common Law Principles & Application**
- **Expropriation Scenarios**
  - ◆ Payment of reduced value for "dirty" site
  - ◆ Payment of full "clean" value when contaminated
  - ◆ Use of cost recovery action

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**Regulatory Framework**

- **Environmental Management Act, S.B.C. 2003, Chapter 53, Part 4**
  - ◆ originally in Waste Management Act
  - ◆ came into force April 1997
- **Contaminated Sites Regulation, B.C. Reg. 375/96 as amended**

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### Regulatory Framework

- **Statutory liability for “contaminated sites”**
  - ◆ a site with substances above prescribed levels
- **“Responsible Persons” are liable:**
  - ◆ for remediation of contaminated sites
  - ◆ can be ordered to clean up
  - ◆ persons who cleanup can recover remediation costs from RPs
  - ◆ liability is absolute, retroactive, joint and several

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### Responsible Persons

- **Current and prior “owners”**
- **Current and prior “operators”**
- **Producers and transporters**
  - ◆ who cause disposal, handling or treatment that caused contamination
- **Other persons designated by Regulation**

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### Responsible Persons (Cont'd)

- **“Owner” means a person who:**
  - ◆ is in possession, has the right of control, occupies or controls the use of real property
  - ◆ includes a person with any legal or equitable interest in the real property
  - ◆ does not include secured creditors
- **“Operator” - a person who is or was:**
  - ◆ in control of or responsible for any operation on a contaminated site
  - ◆ does not include secured creditors

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**Responsible Persons (Cont'd)**

- "Person" includes a government body and any director, officer, employee or agent of a person or government body
- "Government Body" means a federal, provincial or municipal body, including an agency or ministry of the Crown in right of Canada or British Columbia or an agency of a municipality

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**Responsible Persons (Cont'd)**

- An expropriating authority (EA) can be a responsible person
  - ◆ usually will be a "government body"
  - ◆ as an owner once title vests
  - ◆ as an operator once in control of or responsible for an operation at the site
  - ◆ BUT exemptions do apply

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**Responsible Persons: Exemptions**

- Persons not RPs include
  - ◆ government body that involuntarily acquires ownership other than by expropriation
  - ◆ government body that "possesses, owns or operates a roadway, highway or right of way for sewerage or waterworks on a contaminated site, to the extent of the possession, ownership or operation"
  - ◆ in each case, no exemption for contamination caused by the government body

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**Responsible Persons (Cont'd)**

- **Broad Scope**
  - ♦ "... the definition of "owner" in the Act is broader than the common law meaning of owner, and legal ownership of real property is not required for a person to be an owner under the Act"
  - ♦ "... it is possible that, within the context of the contaminated sites scheme, an owner of personal property situated on someone else's real property, can be an "owner" of the real property for the limited purposes of Part 4 of the Act"

Canadian Pacific Railway Company v. Deputy Director of Waste Management, EAB No. 1999-WAS-048(a), October 18, 2006

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**Cleanup Triggers under the EMA**

- **Contractual obligations**
  - ♦ Purchase, sale, lease or financing
- **Redevelopment**
- **Decommissioning**
- **Third party claims**
  - ♦ neighbours & new owners
- **Ministry: remediation orders**
- **Good corporate citizen**
- **Contamination itself is not a trigger**

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**Development Trigger**

- **Statutory prohibition unless**
  - ♦ no site profile trigger
  - ♦ MOE directs no site investigation required
  - ♦ MOE issues an approval in principle or certificate of compliance
- **Applies to permits and approvals for:**
  - ♦ subdivision approval
  - ♦ rezoning approval
  - ♦ development permit involving excavation
  - ♦ soil removal
  - ♦ demolition permit in decommissioning
- **Triggers investigation not remediation**

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**Decommissioning Trigger**

- **Dismantle a building or structure**
- **Otherwise decommission a site**
- **Where site was**
  - ◆ used for an industrial/commercial purpose
  - ◆ listed in Schedule 2 of CSR
- **Obligation is on the owner**
  - ◆ Submit site profile 10 days in advance
- **Triggers investigation not remediation**

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**Remediation Orders**

- **Issued by MOE**
  - ◆ where the environment is impacted
- **Can order one or more RPs to clean-up**
- **Those ordered can seek to add others**
- **Factors in who to order**
  - ◆ private agreements
  - ◆ most substantial contribution to contamination
  - ◆ degree of involvement with the contamination
  - ◆ diligence exercised

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**Remediation Orders (Cont'd)**

- **An exempt government body**
  - ◆ involuntarily acquisition not by expropriation
  - ◆ roadway, highway, sewer line or waterworks
  - ◆ is not an RP
- **Remediation orders only issued to PRs**
  - ◆ pollution prevention or abatement orders can still apply

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**Cost Recovery Actions**

- **Statutory cause of action**
  - ◆ section 47(5) of EMA
- **Available to any person who incurs remediation costs**
  - ◆ not limited to RPs
- **Able to recover reasonably incurred costs of remediation from RPs**

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**Cost Recovery Actions (Cont'd)**

- **Costs of remediation means all costs of remediation including**
  - ◆ site profile, investigation and report costs
  - ◆ legal and consulting costs in seeking contribution
  - ◆ MOE and municipal fees

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**Cost Recovery Actions: Advantages**

- **Can avoid the Limitation Act**
- **No need to prove causation**
- **No *caveat emptor***
- **No duty of care to prove**
- **No need for interference with use of property**
- **Typical issues include**
  - ◆ identification of RPs and exemptions
  - ◆ contribution by the RPs to contamination
  - ◆ standard of cleanup
  - ◆ reasonableness of remediation costs

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**Common Law Claims**

- **Cost recovery does not capture all claims**
  - ◆ no economic losses (business loss or diminution in value)
  - ◆ no advance funding
  - ◆ no personal injury or health issues
- **Companion common law claim is typical**
  - ◆ negligence, nuisance & strict liability
  - ◆ occasionally trespass
  - ◆ standard of care & breach
  - ◆ limitations apply
  - ◆ not limited to RPs or remediation costs

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**Application to Expropriation**

- **Expropriation per se is not a trigger for investigation (or remediation)**
- **Once an expropriating authority becomes an "owner" then it is subject to the EMA**
- **Expropriating authority will usually be a "government body" and the EMA will apply to it except for exemptions**

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**Application to Expropriation**

- **The exemption for gvt bodies re: roadway, highway, sewer line or waterworks means not an RP**
  - ◆ Are still an "owner"
- **Investigation can be triggered if the expropriating authority/owner:**
  - ◆ seeks subdivision or municipal permits
  - ◆ decommissions a site used for an industrial or commercial purpose listed in the CSR, Schedule 2

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**Application of Underlying Policy**

- **EMA underlying policy:**
  - ◆ promote the prompt cleanup of contaminated sites with the polluter responsible for paying remediation costs (BCCA in *Workshop Holdings*)
- **In expropriation:**
  - ◆ after receiving compensation, the owner should be in the same economic position as before the expropriation (ECBC website)

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**Expropriation Scenarios**

- **Scenario #1**
  - ◆ Expropriating authority (EA) makes payment based on reduction of market value to account for contamination
  - ◆ EA incurs remediation costs
  - ◆ Owner did not cause the contamination
- **Scenario #2**
  - ◆ EA pays on full "clean" market value
  - ◆ Later EA determines site is contaminated
  - ◆ EA incurs remediation costs
  - ◆ Owner did not cause the contamination

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**Expropriation Scenario #1**

- **Cost recovery action *is* available for EA**
  - ◆ a person who has incurred remediation costs
    - even if EA is not an RP
  - ◆ against who: the expropriated owner?
    - yes that owner is an RP
    - but CSR says: account for the price paid
    - policy would say "no" as double recovery
  - ◆ recovery from other/real polluters?
    - Yes, against all RPs
    - windfall? unless costs beyond price deduction
    - CSR provision may be invalid

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**Expropriation Scenario #1**

- **Can the prior owner utilize the EMA cost recovery action?**
  - ♦ recovery of the deduction in market value from the real polluters
- **Likely no**
  - ♦ deduction in market value is economic loss
  - ♦ costs of remediation not incurred by owner
  - ♦ potential common law action v. other RPs
  - ♦ loses benefits of statutory action
  - ♦ has action under Expropriation Act
- **Policy objectives are not met**

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**Expropriation Scenario #2**

- **Expropriating Authority (EA) position**
  - ♦ may be an RP/has incurred remediation costs
  - ♦ cost recovery action is available
  - ♦ prior (expropriated) owner is an RP and therefore a target
  - ♦ all other RPs (polluters) also targets
  - ♦ should be no allocation of liability to EA
    - may not be an RP
    - in any event did not cause contamination

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**Expropriation Scenario #2**

- **Expropriated owner position**
  - ♦ is an RP and accordingly a target for the action
  - ♦ any damages in remediation costs against the owner are deemed remediation costs that can be recovered from other RPs
  - ♦ the tools of the statutory action are available
  - ♦ if really innocent
    - argue minor contributor and no allocation
- **Policy objectives are met**

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**Cost Recovery Factors**

- Price paid for the property by the person seeking cost recovery
- Relative due diligence of the RPs
- Amount of contaminating substances and toxicity by each RP
- Degree of involvement in causing contamination
- Any remediation measures by the RP
- Other factors for "fair and just allocation"

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**Thank you.**

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