

**2002 FALL SEMINAR**

**B.C. EXPROPRIATION ASSOCIATION**

**CONTAMINATED  
SITES:**

**LIABILITY ISSUES -  
FIVE YEARS LATER**

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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.

## CONTAMINATED SITES:

### LIABILITY ISSUES - FIVE YEARS LATER

#### I. OVERVIEW

1. In April of 1997, amendments to the *Waste Management Act* came into force together with the companion *Contaminated Sites Regulation*. These amendments and the Regulation comprise a sophisticated and complex regulatory regime. We now have the benefit of a few decisions of the B.C. Environmental Appeal Board and the B.C. Supreme Court to assist in interpreting these new rules. We also have a book of experience over the last few years which tells us how government regulators have interpreted their powers.

While “polluter pay” is clearly an underlying principle of the regulatory regime, polluter pay does not necessarily mean that sole responsibility falls upon the person who deposited the contamination. Polluter pay, in the context of the regulatory regime, really means those who are **responsible** for pollution must pay. The statute sets out those persons who are or can be responsible persons and it is those persons who must pay for clean-up; and it is in that context that the statute gives meaning to polluter pay.

2. 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;
  - cost recovery and/or indemnity actions between or among potentially responsible persons;
  - disputes between adjoining landowners over "travelling" or "migrating" contamination; and
  - disputes between insurers and insureds over coverage for environmental events.
3. The process of applying the cost recovery cause of action has been stalled by two decisions of the B.C. Supreme Court involving the same parties. I am referring to the two *Swamy v. Tham* decisions. In those cases, the courts found that a number of pre-conditions had to be met before a cost recovery action could be brought. Those pre-conditions included the designation by the regulatory authorities that the site was in fact a contaminated site and a finding by regulatory authorities as to who the responsible persons were. In *Seabright v. Imperial*, *Swamy v. Tham* was not followed with the result that those pre-conditions were removed at least in that case. The result has been that there is an uncertainty in the law because different judges of the same court, the B.C. Supreme Court, have come to a different

conclusion on the law. Imperial appealed the *Seabright* decision which was originally scheduled to be heard by our Court of Appeal in April of this year. A couple of weeks before the appeal, the British Columbia legislature amended the *Waste Management Act* to largely bring it in line with what the judge found in the *Seabright* case. To a large extent, then, the law has been clarified and the pre-conditions to cost recovery have been removed. We can expect that more cost recovery actions will now proceed to trial.

4. Things, however, are changing and changing rapidly. Next week the B.C. Court of Appeal will hear an appeal from the *Seabright* decision on the issue of statutory pre-conditions to a cost recovery action. Also next week, the B.C. Government Advisory Committee will issue its final report to government on recommended changes to the statutory contaminated sites regime. It may recommend that cost recovery actions be abolished.
  
5. Valuation of contaminated real estate is a tricky exercise. The contamination issue has three main components for valuation purposes. Firstly, the parameters and nature of the remediation approach must be evaluated. This is not an exact science and may be divided out between present and essential remediation and potential future remediation. Next, the remediation approach or approaches must be costed out. Finally, consideration must be given for the potential discount the market may place on contaminated land over and above remediation costs. This is sometimes referred to as "stigma" or a discount for uncertainty and commercial irrational over-reaction.

## II. LIABILITY CONCEPTS

1. The two principal liability mechanisms contained in the contaminated lands regime in British Columbia are cost recovery actions under section 27(4) of the B.C. *Waste Management Act* ("the WMA") and remediation orders under section 27.1 of the WMA.
  
2. The statutory cost recovery action allows any person who incurs costs in remediating a contaminated site to recover those costs, to the extent that such are reasonably incurred, in an action in the British Columbia Supreme Court against one or more persons who fall under the statutory definition of "responsible person". Under the present state of the law, costs must be incurred before those costs can be recovered.
  
3. A regulatory official, a manager, carrying out functions under the WMA has a discretion, but not a duty, to order remediation of a contaminated site. The person or persons so ordered again must be "responsible persons" within the definitions contained in this WMA.
  
4. The group of responsible persons centres on past and present owners and operators of contaminated sites. To the extent that parent corporations control or have controlled the use of the site, those parent corporations can also be responsible persons even absent direct ownership or direct operation at the contaminated site. The WMA also specifically excludes certain persons from responsibility.

5. As a practical matter, it is prudent to carefully consider remedies to be pursued and the range of persons pursued. The greater the number of remedies, the greater the cost. Similarly, the larger the field of responsible persons targeted, the greater the cost. A remediation order ordinarily begins with an exchange of written submissions to the manager followed by an order. That order may be appealed to the Environmental Appeal Board. Ordinarily, those appeals are oral hearings which may last a few days to a few weeks. A judicial review is available at each of those stages. There is no appeal on the merits from the decision of the Environmental Appeal Board although there is right of appeal (albeit rarely used) to the Provincial Cabinet.
6. Liability under a remediation order is joint and several so that all responsible persons, whatever the level of culpability, equally share the burden of carrying out obligations under an order. If more than one person is named on an order, there is, however, no ready process to decide who should undertake the obligations.
7. There have been no cost recovery actions in British Columbia which have yet proceeded to trial. The statutory liability indicators, and the U.S. experience which is likely to be influential, to a large extent focus on "polluter pay".
8. Two regulatory developments have occurred recently. The WMA has been amended to clarify the basis under which cost recovery actions may be brought. This was necessitated by a conflict in the law between the *Seabright* case and another B.C. Supreme Court

decision. The second development is the appointment of an advisory panel to consider the restructuring of the entire regime - both remediation orders and cost recovery proceedings.

9. The other elements of the legal regime include impacts on development approvals, the potential for quasi-criminal pollution related charges and common law remedies related to misrepresentation, nuisance and trespass.

### III. THE LIABILITY NET - POTENTIALLY RESPONSIBLE PERSONS UNDER THE WMA

1. The scheme of the WMA 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. The primary liability provision is found in section 27(1):

*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.*

2. Section 26.5(1) 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(1) 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 26.5(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 26.5(3).*

3. Subsection (2) of 26.5 provides that the following persons are responsible for remediation at a contaminated site that was contaminated by migration of a substance to the contaminated site:
  - (a) A current owner or operator of the site from which the substance migrated;
  - (b) A previous owner or operator of the site from which the substance migrated.
  
4. The definition of "owner" includes anyone with an interest, legal or equitable, in the real property. A purchaser's interest in a contract of purchase and sale likely falls within this



definition. Having said that, it would be unusual for such to translate into any material consequences.

5. "Contaminated site" is defined in section 26(1) 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 other jurisdictions.

There is an existing regulation under the WMA which deals with special waste. Another regulation, the *Contaminated Sites Regulation* ("the CSR") sets out a series of contamination criteria.

6. Section 26.6 sets out a list of persons who are not responsible for remediation. To a large extent, the exemptions focus on complete absence of culpability, for instance:

*(d) an owner or operator who establishes that*

*(i) at the time the person became an owner or operator of the site,*

*(A) the site was a contaminated site,*

*(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and*

*(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with*

*good commercial or customary practice at that time, in an effort to minimize potential liability,*

- (ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and*
- (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;*
- (e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.*

7. The onus of proof under section 26.6(3) is on the person seeking to establish that he or she is not a responsible person.

8. Section 26.6(1)(1) states that:

*The following persons are not responsible for remediation at a contaminated site:*

- (i) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person.*

9. A Certificate of Compliance can act as a liability shield. Subsection (1) of s. 26.6(1) states that the following class of person is not a responsible person:

*A person who was a responsible person for a contaminated site for which a conditional certificate of compliance or a certificate of compliance was issued and for which another person subsequently proposed or undertakes to*

- (i) change the use of the contaminated site, and*
- (ii) provide additional remediation.*

10. The "finality" of a Certificate of Compliance is, however, affected by section 28.7:

*A manager may exercise any of the manager's powers or functions under this Part, even though they have been previously exercised and despite any voluntary remediation agreement, if*

- (a) additional information relevant to establishing liability for remediation becomes available, including information that indicates that a responsible person does not meet the requirements of a minor contributor,*
- (b) standards under the regulations have been revised so that conditions at a site exceed or otherwise contravene the new standards,*
- (c) activities occur on a site that may change its condition or use,*
- (d) information becomes available about a site that leads to a reasonable inference that a site poses a threat to human health or the environment,*

- (e) *a responsible person fails to exercise due care with respect to any contamination at the site, or*
- (f) *a responsible person directly or indirectly contributes to contamination at the site after the previous action.*

#### IV. COST RECOVERY ACTIONS

1. As stated by Mr. Justice Clancy in the recent B.C. Supreme Court *Seabright* decision:

*Section 27(4) [of the WMA] authorizes the bringing of a cost recovery action in the following language:*

*Subject to section 27.3(3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.*  
*(emphasis added)*

2. The Court in *Seabright* set out what a plaintiff must establish at trial:

*Section 27(4) of the Act sets out the conditions a person must meet before bringing a cost recovery action. To come within the purview of the Act, Seabright must establish:*

- (a) *the incurring of costs;*
- (b) *that remediation has been carried out;*
- (c) *that remediation was carried out at a contaminated site;*

- (d) *that the costs of remediation were reasonably incurred; and,*
- (e) *that the persons from whom the plaintiff wishes to recover costs are responsible persons under the Act.*

3. The elements contained in s. 27(4) are defined in the statute and must be proven at trial in accordance with those definitions. "Costs of remediation" is defined [s. 27(2)]. "Remediation" is defined [s. 1]. "Contaminated site" is defined [s. 26(1)].
4. The Environmental Appeal Board in *Beazer* summarized the distinction between a manager's role if a remediation order is to be issued and the role of the court on cost recovery in this way:

*The Panel agrees with the submissions that the Act provides for a manager to proceed quickly to name responsible persons to a remediation order and that any person, including a responsible person, may pursue the reasonably incurred costs of remediation from one or more responsible persons at a later date through a cost recovery action.*

*In deciding who will be named to a remediation order, section 27.1(1) clearly states that a manager may issue a remediation order to **any** responsible person. However, there can be any number of "responsible persons" that have been involved with a contaminated site over the history of the site - from various transporters and producers, to various owners and operators. If a manager was required to name **all** responsible persons to an order and*

*require their participation in remediation at this stage, remediation might well be delayed.*

5. Section 35 of the CSR provides that:

- (1) *For the purposes of determining compensation payable under section 27(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 27(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 27 of the Act, any compensation payable by a defendant in an action under section 27(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 27(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 27(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. REMEDICATION ORDERS**

1. The remediation of contamination under the WMA is conducted under one of four regulatory streams:
  - Remediation can be conducted in accordance with an Approval in Principle leading to a Certificate of Compliance as set out in s. 27.6. Under this scenario after a mandated study of site contamination (a "site investigation"), the manager approves a remediation approach;

- Remediation may be conducted by way of independent remediation pursuant to s. 28 (1). Under this scenario a person conducting remediation makes his own decisions on remediation subject to oversight and “veto” by a manager;
  - Remediation may be conducted in accordance with a voluntary remediation agreement in accordance with s. 27.4. Under this scenario, which is rarely used, a responsible person proposes remediation and seeks to “cap” his or her liability by agreement with a manager; and
  - Remediation may, in appropriate circumstances, be conducted under a remediation order pursuant to s. 27.1. Under this scenario, a manager can order delineation and remediation of the contamination.
2. Under section 27.1 a manager may issue a remediation order to any responsible person. The order can compel remediation, can compel cash contribution towards remediation (cash contribution to my knowledge has not yet been the subject of a formal order), and can deal with security for remediation.
3. The legislature has provided managers with some guidance in section 27.1(4) with respect to which person or persons to name:
- (4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements*



- (a) *take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and*
- (b) *on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as*
  - (i) *the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and*
  - (ii) *the diligence exercised by persons with respect to the contamination.*

4. Under section 20(c), it is an offence giving rise to a potential penalty not exceeding \$200,000 to, *inter alia*, fail to comply with a remediation order.

## **VI. MANAGER'S DISCRETION TO ALLOCATE OR LIMIT LIABILITY**

1. Section 26.5 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).*

2. Section 38 of the CSR provides that:

*A responsible person applying for minor contributor status under section 26.5 of the Act must provide information to a manager, to the extent that information is reasonably ascertainable, respecting all of the following:*

- (a) *the condition of the contaminated site at the time the applicant*
  - (i) *became an owner or operator at the site, and*
  - (ii) *if applicable, ceased to be an owner or operator at the site;*
- (b) *any activities and land uses carried out by the applicant while located at the site;*

- (c) *the nature and quantity of contamination at the site attributable to the applicant;*
- (d) *all measures taken by the applicant to prevent or remediate contamination;*
- (e) *contamination on the site or released from the site which is attributable to*
  - (i) *the applicant, and*
  - (ii) *other persons at the site;*
- (f) *all measures taken by the applicant to exercise due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site, including any measures taken to prevent foreseeable acts of third parties which may have contributed to the contamination at the site.*

3. 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. The members have specialized knowledge in contamination, remediation or methods of dispute resolution. To date, perhaps given its non-binding nature, this has been a rarely used process. The allocation panel, under section 27.2, provides 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.*
4. The advisory panel has signalled that it may recommend a change in the legislation to make the dispute resolution process binding as opposed to non-binding.