July 17, 2002

The Advisory Panel on Contaminated Sites
Suite 400 – 601 West Broadway
Vancouver, B.C.
V5Z 4C2

Attention: Margaret Eriksson
Panel Chair

Re: Request for Submissions dated June 4, 2002

We write on behalf of the Environmental Law Section of the Canadian Bar Association, BC Branch to provide some members' recommendations for legislative changes to the contaminated sites regime in British Columbia (Part 4 of the *Waste Management Act* and the *Contaminated Sites Regulations*).

This submission is composed of two parts. The first part sets forth certain underlying principles that we recommend the Panel take into account when conducting its review of the contaminated sites regime. The second part is comprised of submissions from individual members of the Section, copies of which are attached.

PART I: **UNDERLYING PRINCIPLES**

1. The regulatory regime for contaminated sites in British Columbia should continue to be based on the principle of polluter pays. This principle encourages the internalization of costs of pollution by persons principally responsible for such pollution.

2. The principle of absolute, retroactive and joint and several liability should be maintained. However, exceptions to liability must be clarified and include some form of closure with respect to a responsible person's liability. These exceptions to liability should also address the effect of changes in the law.

3. The statutory cause of action for recovery of remediation costs should be maintained. However, the current cost recovery provisions should be clarified to address such matters as:

    - applicable limitation periods
    - principles for allocation of liability
    - availability of declaratory orders with respect to allocation of future remediation costs

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4. Voluntary remediation and non-litigious processes in the Act, while laudatory, have proven to be ineffective. Such processes include voluntary remediation agreements, allocation panels and minor contributor status designations. These mechanisms need to be made operational.

5. The Act should be amended to include regulatory incentives to encourage and facilitate the remediation of brownfield and orphan sites.

6. The Act should be amended to differentiate between simple and complex contaminated sites so that stakeholders involved in simple contaminated sites need not be subject to the same regulatory regime as is applicable for complex contaminated sites. Such amendments should enable the timely and cost effective remediation of simple contaminated sites.

7. The effect of contaminated sites and remediation techniques on adjacent landowners should be taken into account. Issues such as notification, the right to comment on proposed remediation techniques and compensation for losses such as diminution of land value should be considered by the Panel.

PART II: INDIVIDUAL SUBMISSIONS

Attached please find submissions from individual members of the Section. Each submission represents the views of the author and not the Section.

CONCLUSION

We hope the foregoing comments are of assistance when the Panel prepares its recommendations and report to the Minister.

We look forward to participating in any further opportunities for public comment with respect to the Panel's recommendations or any proposed legislative amendments to the contaminated sites regime.

Yours truly,

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cc CBA (BC Branch)
CBA (BC Branch) Environmental Law Section - Members

SUBMISSION TO THE

MINISTER'S ADVISORY PANEL ON CONTAMINATED SITES

On Proposed Amendments To

Waste Management Act, RSBC 1996, c 482

Issued by:

Canadian Bar Association

British Columbia Branch

Environmental Law Section

July 2002

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1. INTRODUCTION

1. Attached as Appendix A is a paper, dated June 6, 2002, entitled "Recent Changes in Contaminated Sites Liability Risks for Directors, Officers, Employees and Parent Companies".

2. By letter dated June 4, 2002, the Minister's Advisory Panel on Contaminated Sites (the "Panel") requested review and comment on the *Waste Management Act*, R.S.B.C. 1996, c. 482 as amended (the "Act") and the *Contaminated Sites Regulation*, B.C. Reg. 375/96 as amended (the "Regulation").

3. The following comments reflect the writer's experience with several litigation files involving cost recovery actions pursuant to section 27(4) of the Act.

4. The comments below are general. Reference to specific actions or parties cannot be made due to solicitor-client privilege and confidentiality. All of the cases have been settled or are no longer current and none is the subject of a reported court decision.

2. PANEL TERMS AND CONCERNS

5. The Panel Terms of Reference (the "Terms") list several concerns expressed by stakeholders. One of the Panel's purposes is to "provide recommendations on how the regime can be improved to address the concerns listed in the Terms". The Panel has requested submissions "about what works or does not work well in the current contaminated sites system."

6. There are four main stakeholder concerns:

   a. Management model is cumbersome, overly stringent and slow;

   b. Money going to administrative, legal and consulting rather than clean up;

   c. Too much litigation and administrative proceedings; and

   d. Absolute, retroactive, joint and several liability is unfair, leading to investor chill and brownfields.

7. Some of the issues raised at a meeting between the Panel and the CBA-BC Environmental Law Section on June 21, 2002 included:

   a. Alternative Dispute Resolution - need effective ADR process;

   b. Certificate of Compliance - provides some certainty for lenders;

c. Cost Recovery Action - substantive and procedural concerns;

d. Liability - need for closure and unnecessarily wide net of liability;

e. Low/High Risk sites - should distinguish law/high risk and focus on high risk; and

f. Government - need clear criteria or leave to market forces.

3. RECENT EXPERIENCE IN COST RECOVERY LITIGATION

8. The writer's experience in several cost recovery actions appears to confirm the above four major stakeholder concerns and also to relate to the above issues 5 a, c, d and e.

9. Some of our files have involved gas station sites. In one case, it was necessary to remediate the site prior to sale. The Ministry of Environment (now the Ministry of Water Land and Air Protection) (the "Ministry") issued a Remediation Order naming several corporate and individual persons, including an officer/director of a small company which had had no contact with the site for 15 years. It appeared that the person had been named as a responsible person on the basis of hearsay evidence of a possible spill on the site in the early 1980's. It appeared further that the alleged spill was not illegal in the early 1980's. The Order led to an appeal to the BC Environmental Appeal Board (the "EAB") and complex cost recovery proceedings involving several additional parties who were also responsible persons under the Act. The appeal and court proceedings imposed substantial expenses on all parties and were expected to be protracted. The process was particularly onerous for one person who had long since retired and left the community in which the site was located. The action was settled just prior to examinations for discovery, expected to take one week, which would have been quite costly for all parties.

10. In another gas station case, the Ministry requested a preliminary site investigation due to evidence of hydrocarbon contamination and potential migration to neighbouring properties. The owner/operator, without substantial assets, faced the prospect of considerable expenses for site investigations, consultants' reports, legal representation and other legal costs to contest a Remediation Order and to conduct cost recovery proceedings against prior owners and substantial corporate defendants. Resort to the allocation panel and minor contributor provisions of the WMA did not appear to offer any practical benefit or saving of expenses.

11. Other files involved contaminated sites for which Pollution Abatement Orders had been issued but the Ministry had not issued a formal determination that the sites were contaminated. Cost recovery litigation was commenced against other responsible persons in each case. After expenditure of considerable experts and legal fees, as a result of court decisions in and following August 1999, it became unclear whether the actions could continue without obtaining formal

Ministry determinations. Recent amendments to the Act have not clarified this issue whether a formal determination is required for sites for which the Ministry has issued Pollution Abatement Orders.

12. In another cost recovery action, directors, officers and an employee of an apparently insolvent corporate owner were added as defendants. Determination of the individuals' liability required interpretation of the phrase "authorize, permit or acquiesce" in the section 35(4) of the Regulation. The section had/has not been interpreted by a court. In fact the entire claim against the individual defendants under the Act was without precedent and it was unclear how a judge unfamiliar with the Act would rule in such a case. Courts also had not determined what portion of the considerable legal costs, including fees and disbursements, are recoverable by a successful plaintiff in a section 27(4) cost recovery action. The lack of precedent or guidelines appeared to complicate advice to clients as to risks and benefits as a guide to settlement negotiations and thus may have served to protract the litigation.

13. In another action, it appeared that a site was being contaminated by migration of chemicals from a neighbouring property. Due to inconsistent court rulings and lack of precedents, it was unclear whether the site owner could immediately commence a cost recovery action or proceed to court quickly to apply for summary judgment. Was it first necessary to: (1) obtain a formal determination from the Ministry; (2) incur remediation costs; or (3) complete remediation? In addition, such cases often require expert evidence which may be contested and may prevent speedy resolution of the disputes. The novelty of these actions also contributes to cost of the litigation due to the necessity for considerable research and preparation of new and untested pleadings.

4. DISCUSSION

14. In the writer's view, the above cases illustrate a need to:

    a. Fashion an effective alternative dispute resolution process to resolve these disputes prior to protracted administrative and court proceedings;

    b. Provide clear guidelines for cost recovery proceedings - substantively and procedurally;

    c. Distinguish between low risk small sites, such as rural gas stations, and high risk sites posing threats to health or the environment and provide different procedures for each;

    d. Review the breadth of the liability net, particularly the inclusion of directors and officers as responsible persons based solely on their status; and

e. Review the principles of liability in Part 4, particularly absolute liability, with a view to providing for a defence of due diligence.

15. In the paper attached as Appendix A to these comments, the writer reviews the provisions of the Act and the Regulation relating to the liability of directors and officers. Reference is made to the recent EAB decision in *Lawson* holding that directors and officers are responsible persons under the Act based solely on their status. It may be also that the courts will interpret the phrase in section 35(4) of the Regulation, "authorize, permit or acquiesce" to include a director's failure to make inquiries about particular environmental precautions. In the writer's view, unrestricted directors' exposure to liability may lead to director and investor "chill" making it difficult to find qualified persons to serve as corporate officers and directors.

5. CONCLUSIONS

16. In conclusion, generally speaking, on the basis of the writer's experience in the above and other cases, it appears that:

a. the liability net in the Act and the Regulation may be cast too widely, particularly in view of the recent EAB decision in *Lawson*;

b. there are procedural and substantive problems with the current cost recovery model which appear to impede its effectiveness in implementing the polluter-pay principle; and

c. the principles of liability in Part 4 appear to impose an unduly onerous burden on cost recovery defendants, particularly those without fault or negligence and not connected with the contamination of a subject site.

6. RECOMMENDATIONS

17. On the basis of the above comments, the writer adopts several of the recommendations of some members of the CBA-BC Environmental Law Section as follow:

a. Exceptions to the principle of absolute liability should be clarified and include some form of closure with respect to a responsible person's liability. These exceptions to liability should also address the effect of changes in the law;

b. Current cost recovery provisions should be clarified to address matters such as:

i. applicable limitation periods;
ii. principles for allocation of liability; and

iii. availability of declaratory orders with respect to allocation of future remediation costs; and

c. Voluntary remediation and non-litigious processes in the Act need to be made operational.

18. Finally, the writer recommends that the principles of liability, as applied to directors, officers, employees and agents, should be clarified.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 18, 2002

James M Mackenzie
Barrister and Solicitor

APPENDIX A

RECENT CHANGES IN CONTAMINATED SITES LIABILITY RISKS FOR DIRECTORS, OFFICERS, EMPLOYEES AND PARENT COMPANIES

James M Mackenzie
Associate Counsel
Singleton Urquhart
Legal Counsel

June 6, 2002

1. INTRODUCTION

Directors, officers[1], employees and parent companies face significant (and sometimes unexpected) exposure for remediation costs under the B.C. *Waste Management Act* (the *"WMA").* This risk probably also extends in some cases to municipal government employees and officials. The exposure arises from their status as "persons responsible for remediation at a contaminated site" under section 26.5 of the *WMA.* These costs may range into the millions of dollars, sometimes exceeding the value of the land that has been contaminated. There are three main areas of liability risk related to remediation of contaminated sites under the *WMA*: remediation orders (section 27.1), cost recovery actions (section 27) and criminal liability (section 54(14) and (20)).

The much-publicized U.S. Federal Government claims against Vancouver financier Robert Friedland for clean-up costs at the Summitville Mine in Colorado are examples of corporate director liability under the U.S. federal *Comprehensive Environmental Response, Compensation and Liability Act* ("*CERCLA*"). The *WMA* provisions are modelled to some extent upon the *CERCLA* sections.

Five years have passed since the contaminated sites provisions, now in Part 4 of the *WMA*, and the Contaminated Sites Regulation (the "CSR") came into force on April 1, 1997. The potential exposure is now real; it is not theoretical. The Waste Management Branch routinely names corporate directors and related companies on remediation orders and cost recovery actions include corporate directors and related companies as defendants.

There are other provisions of the *WMA* that also pose environmental liability risks, such as the pollution abatement order section 31 and the pollution prevention order section 33. In addition, there is potential environmental statutory civil and criminal liability under other provincial and federal statutes as well as tort liability for third party claims and liability for corporate shareholder and investor claims.

The subject of this paper is recent changes in contaminated sites law regarding liability risks for directors, officers, employees and related companies. Reference is also made to municipal employee and official risks. These parties may not have been directly involved with the discharge of contaminants by a company or a local government which owned or operated a contaminated site. Due to the extensive reach of the *WMA* liability provisions, however, these apparently peripheral parties may well be caught in the liability net. Over the past year, the B.C. courts and the B.C. Environmental Appeal Board (the "Board") have issued significant decisions on this subject. This year there have also been new

[1] This paper does not discuss in detail the difference in potential exposure of directors from that of officers. It appears that officers, with more day-to-day responsibility for and involvement in a company's activities, would probably face greater exposure than outside directors.

amendments to the *WMA* and the Contaminated Sites Regulation relating to risks of environmental liability.

This paper reviews the several bases for environmental liability risks for corporate acts and omissions under the contaminated sites sections in Part 4 of the *WMA.* The paper also reviews strategies to manage and reduce the risk of environmental liability for corporate or municipal government acts or omissions. These strategies include indemnification of directors and officers, environmental impairment insurance and corporate environmental management systems.

2. WASTE MANAGEMENT ACT [2] AND REGULATIONS

WMA section 26(1) contains important definitions. The section defines the word "operator" to mean a person who is or was in control of or responsible for any operation located at a contaminated site. "Owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including a person who has any estate or interest, legal or equitable, in the real property. "Person" includes any director, officer, employee or agent of a person or a government body. "Government body" includes a municipal government body. The B.C. *Interpretation Act*[3] defines "person" to include a corporation. "Responsible person" means a person described in *WMA* section 26.5.

WMA section 26.5 identifies persons who are responsible for remediation at a contaminated site. Those persons include: (a) a current owner or operator of the site; (b) a previous owner or operator of the site; (c) a person who produced a substance and caused the substance to be handled in a manner that caused the site to become a contaminated site; (d) a person who transported a substance and caused the substance to be handled in a manner that caused the site to become a contaminated site; and/or (e) a person who is in a class designated in the regulations as responsible for remediation. In addition, a current or previous owner or operator of a site from which a substance migrated to contaminate another site is responsible for remediation at the latter site.

WMA section 27(1) deals with cost recovery actions. It provides that a person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. "Costs of remediation" means all costs of remediation including legal and consultant costs associated with seeking contributions from other responsible persons. Section 27(4) provides that any person, including a responsible person and a manager, who incurs costs in carrying out

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2 R.S.B.C. 1996, c.482.

3 R.S.B.C. 1996, c. 238.

remediation at a contaminated site may pursue in an action the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in *WMA* Part 4.

Recent Amendment. Section 27 was recently amended on May 9, 2002 to clarify preconditions for cost recovery actions. Section 27(6) provides that a site that is the subject of such actions must be determined or considered to be or to have been a contaminated site before the court can hear the matter. Section 27(8) provides that the court may determine, unless otherwise determined or established under Part 4, whether: a person is a responsible person for remediation at a contaminated site; the costs of remediation which have been reasonably incurred; the apportionment of shares of the costs of remediation at a contaminated site; and such other determinations as necessary to a fair and just disposition of these matters.

WMA section 27.1 deals with remediation orders. It provides that a manager (a Waste Management Branch official) may issue a remediation order to any responsible person. A remediation order may require a person to undertake remediation; contribute towards another person who has reasonably incurred costs of remediation; and/or give security in an amount and form subject to conditions the manager specifies. When considering who will be ordered to undertake or contribute to remediation, a manager must, to the extent feasible, without jeopardizing remediation requirements, take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and name one or more persons whose activities contributed most substantially to the site becoming a contaminated site.

WMA section 27.1(7) provides that a person receiving a remediation order or actual notice of a remediation order must 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.

WMA Section 54(14) provides that if a corporation commits an offence under this Act, an employee, officer, director or agent of a corporation who authorized, permitted or acquiesced in the offence commits the offence even though the corporation is convicted. Section 54(20) provides that a person who fails to comply with a remediation order under section 27.1, diminishes or reduces assets the person knows or reasonably should know will be used to comply with the terms and conditions of an order made under section 27.1(7) or fails to comply with a provision of the CSR commits an offence and is liable to a penalty not exceeding $200,000.

CSR section 35(1) provides that for the purposes of determining compensation payable under *WMA* section 27(4), 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. CSR section 35(4) provides that in an action under *WMA* section 27(4) against a director, officer, employee or agent of a person, 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. CSR section 35(5) provides that in an action under *WMA* section 27(4), a corporation is not liable for the cost 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 cost of remediation.

Recent Amendment. A recent amendment to the CSR on February 4, 2002, section 60.1, now provides that a responsible person who carries out a site investigation that discloses that one or more substances has migrated or is likely to have migrated to a neighbouring site and is or is likely causing contamination of that site, must provide written notification. The person must notify the owners of the neighbouring site, with a copy to the Ministry, within 15 days after becoming aware of the migration. CSR, section 57 contains a similar notification requirement for a responsible person who carries out an independent remediation.

3. CASE LAW

Since 1997, there have been only seven B.C. Supreme Court decisions interpreting the above contaminated sites provisions[4]. Most of the cases relate to procedural issues in cost recovery actions against responsible persons and do not deal specifically with director and officer liability. There has been some inconsistency in the cases. The cost recovery procedures, however, have been clarified to some extent by the May 9, 2002 amendments to the WMA.

Beazer. In *Beazer East Inc. v. Environmental Appeal Board*,[5] the Court commented on the status of parent companies as responsible persons and their inclusion in remediation orders arising from the acts and omissions of their subsidiaries. The decision includes significant interpretations of the "owner", "operator" and "responsible person" provisions of the *WMA*. The Court's analysis of the "owner" and "operator" provisions in the context of parent company liability is also relevant to director, officer and employee liability.

A key issue for the Court was whether Beazer, as the parent corporation of a subsidiary company which was an operator of a contaminated site, was itself an "owner" or "operator" of the site and as such was a "responsible person" and liable for costs of remediating the site under a remediation order. The Court

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4 *O'Connor v. Fleck*, 2000 BCSC 1147; *Swamy v. Tham Demolition et al*, 2000 BCSC 1253; *Beazer East Inc. v. Environmental Appeal Board*, 2000 BCSC 1698; *Swamy v. Tham Demolition*, 2001 BCSC 551; *No. 158 Seabright Holdings Ltd. et al v. Imperial Oil Limited-Compagnie Petroliere Imperiale Ltee et al*, 2001 BCSC 1330; *Workshop Holdings Limited v. CAE Machinery Ltd. et al*, 2001 BCSC 1470; *336332 B.C. Ltd. v. Imperial Oil Ltd. et al*, 2002 BCSC 587.

5 2000 BCSC 1698. Under appeal.

held that a parent corporation cannot be said to have "control of" or be "responsible for" an operation on a site merely by virtue of its ownership of 100% of the shares of the subsidiary. The Court concluded, however, that Beazer made decisions or had authority to make decisions with respect to the subsidiary's operations on the site. The parent Beazer therefore was generally "in control" of its subsidiary's wood preserving operation at the site and was accordingly a previous operator.

North Fraser. The B.C. Environmental Appeal Board considered the issue of director and officer liability in North Fraser Harbour Commission v. British Columbia (Ministry of Environment Land and Parks) ("North Fraser"). In North Fraser the Deputy Director of Waste Management named Thomas Lawson, a director of wound up companies Globe West Products Inc. and Globe Asphalt Products Ltd, as a person responsible for remediation of a heavily-contaminated site at 9250 Oak Street, Vancouver.[6]

Lawson. In *Lawson v. Deputy Director of Waste Management* [7], Lawson appealed his inclusion as responsible person on the ground (among several others) that the Deputy Director erred in concluding that he is a responsible person under the WMA. He argued that he cannot be a person responsible for remediation, either in his personal capacity or as a corporate director and officer. In response, the Board held that a director or officer of a corporation can be deemed responsible for remediation under the WMA. The Board held further that Lawson may be named in his capacity as president and director of several companies found to be previous owners and operators.[8]

The Board's decision on this issue is sweeping and confirms director and officer responsibility regardless of causation. In other words, directors and officers may be responsible persons solely due to their status as corporate directors and officers. The Board stated:

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6 [1999] B.C.E.A. No. 57, Appeal Nos. 98-WAS-14(b) and 98-WAS-28(a) dated August 23, 1999. In a decision on a preliminary issue of law and jurisdiction in *North Fraser*, the Board commented on *WMA* director and officer liability:

"Mr. Lawson as the president and director of Globe West is caught by the definition of "person" found in section 26(1) of the *Waste Management Act*, which includes any director or officer of a person. In that case, the deputy director found that Mr. Lawson was directly involved in decision making on the site and organized the decommissioning process. In addition Mr. Lawson physically attended at the site, made decisions and conducted negotiations relating to financing of the operations." (para. 191).

...

"The statute extends the definition of a responsible person to include a director and officer of a company who was or is an owner or operator of a contaminated site." (para.196).

7 unrep., September 12, 2001 at p. 32 (BC EAB). Under appeal.

8 *Lawson*, p. 38.

"With respect to the question of causation, the Panel finds that there need not be a causal link between the contamination at a site and the directors or officers of that site's owners and operators, in order for those directors to be persons responsible for remediation."[9]

4. DISCUSSION OF LIABILITY RISKS

In *Beazer*, the Court concluded that the remediation order provisions are a summary process for the identification of contaminated sites and the speedy remediation of the site, whereas the cost recovery sections deal with culpability and allocation of liability. For example, a director, officer, employee, agent or parent company could be named as a responsible person but may not be liable in a cost recovery action if they did not authorize, permit or acquiesce in the activity which gave rise to the contamination of the site.

4.1. Waste Management Act and Regulations

4.1.1. Remediation Orders

On the basis of *Beazer*, it is probably unlikely that a parent company would be found to be an owner or operator and therefore a responsible person liable for costs of remediation solely due to the fact of their status as related corporation. Some element of control appears to be necessary for liability. The courts have not yet held that a director, officer or employee might be held to fall within the *WMA* definition of "owner" or "operator" solely due to their legal status, including the WMA definition of "person". The Environmental Appeal Board in *Lawson*, however, held that a person's status as director or officer brings with it responsibility for remediation. That decision is under appeal.

If an officer's, director's, employee's or agent's acts or omissions brought them within the definition of "owner" or "operator", they would probably be a responsible person. As a responsible person, they would be liable to be named in a remediation order. Generally speaking, on the basis of *Beazer*, it appears that there must be some element of control for liability risk exposure. To be characterized as an "owner", a party would have to meet one or more of the elements of the definition of that term: (1) is in possession of the real property; (2) has the right of control of the real property; (3) occupies the real property; (4) controls the use of real property; or (4) has an estate or interest, legal or equitable, in the real property. According to *Beazer*, the phrase "right of control" means a legally enforceable right. The word "controls", however, may include factors other than a "legally enforceable right", such as financial control. It is conceivable that "controls" could extend to a range of activities by persons other than officers and directors, such as investors, shareholders or possibly third parties.

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[9] *Lawson*, p. 30.

To be characterized as an "operator", the party would have to meet one of the following elements of the definition: (1) is or was in control of any operation located at the contaminated site; and (2) is or was responsible for any operation located at the contaminated site. The phrase "in control of" probably relates to factual control by a party "of any operation" on the contaminated site. A party who makes the decisions with respect to an operation is "in control of" the operation. There is probably no requirement for personal day-to-day attendance at the site. A party who has the authority to make the decisions with respect to an operation is "responsible" for the operation.

Probably a party who is responsible for an operation could also be someone who is accountable for the operation but the accountability is not necessarily legally enforceable. To be "responsible for" an operation, a party would have to be liable to be called to account or be the primary cause of any operation located at a contaminated site. As indicated in *Beazer*, the word "responsible" probably would also include a party who brought about an operation in the sense of causing the operation to be carried out. Such a party would be responsible for the operation because, but for their actions or decisions, the operation would not have been carried out.

4.1.2. Cost Recovery Actions

WMA section 27(4) cost recovery actions are expected to account for the bulk of Part 4 litigation as has been the case under *CERCLA* in the United States since 1980. They probably constitute the most significant potential liability exposure for B.C. directors, officers, employees and related companies.

The elements of director, officer, employee, agent or parent company liability in a cost recovery claim are: (1) the defendant is a responsible person; (2) the plaintiff must have carried out "remediation"; (3) the remediation activity must have related to a contaminated site; (4) the plaintiff's costs of remediation must be reasonable; and (5) the director, officer, employee, agent or parent company authorized, permitted or acquiesced in the activity giving rise to the cost of remediation (CSR, sections 35(4) and 35(5)). This paper will deal with elements (1), (3) and (5).

Responsible Person

The first step is to establish responsibility, probably as a current or previous "owner" or "operator" as discussed above. There is also potential exposure, based on *Lawson*, for director and officer responsibility without causation, solely due to a person's status as director or officer.

Contaminated Site

An important element of the cost recovery action is that the remediation activity must relate to a contaminated site. The *WMA* section 26(1) provides that "contaminated site" means an area 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.

In most contaminated sites cases, as in *Beazer*, the Manager will have made a determination that the site is a "contaminated site". There is inconsistent case law on the issue whether a cost recovery action can proceed if the Manager has not made this determination. This uncertainty may be been resolved due to the recent amendments to section 27 of the WMA. Generally speaking, there must be a formal determination by the Manager or the site must be deemed to be a contaminated site as a result of certain procedures such as the issuance of a certificate of compliance.

Authorized, Permitted or Acquiesced

CSR sections 35(4) and 35(5) provide that in a cost recovery action against a director, officer, employee, agent or parent company of a person, the plaintiff must prove that the director, officer, employee or parent company authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation. This requirement confirms that there must be some element of involvement or control by the party to found liability in a cost recovery action.

The test appears identical to the one used with respect to offences under the *WMA*, section 54(14) which provides that if a corporation commits an offence under the *WMA*, an employee, officer or director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence even though the corporation is convicted".[10]

The term "authorize" means empowered, enabled, sanctioned, approved or permitted. The term "permitted" means the defendant's failure to prevent an occurrence which they ought to have foreseen. The term "acquiesce" means impliedly consented or tacitly agreed to, raised no objection to, accepted, permitted to be done.[11]

The leading B.C. case on interpretation of *WMA* section 54(14) is *R. v. Seraphim* [12] In *Seraphim*, the Court found that the principal question was whether the appellant Seraphim was properly found guilty as being the operating and directing mind of the operation. The Provincial Court Trial Judge stated:

> "The defendant, Seraphim, further demonstrated his supervisory role by receiving reports of the day to day common place details of the operation, and by attending at the site to deal with Ministry of Environment personnel when the future of the operation was on the line. He was, after all, an officer and the president of both companies. The Shorter Oxford English Dictionary defines 'president' in an appropriate context as 'the title of one who

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[10] Waldemar Braul, "Liability" in CLE, *Contaminated Sites: 1997 Legislation*, March 1997, page 6.1.1.9).

[11] *R. v. A & A Food Ltd.*, [1997] B.C.J. No. 2720 at para. 51 (B.C.S.C.).

[12] [1994] B.C.J. No. 1915 (S.C.); appeal allowed on another point, [1997] B.C.J. No. 1034 (C.A.).

> presides over the proceedings of a financial, commercial or industrial company.' And the word 'preside' means 'to exercise guidance, direction and control'."[13]

The Provincial Court Trial Judge also reviewed the role played by the appellant Seraphim in the operation and other reports received from time to time by him from his project manager and other employees. He concluded that the appellant "clearly and emphatically demonstrated that he was the operating and directing mind of the operation, which consisted of the defendant, Sumac and its wholly owned permit - holding subsidiary, 24K Mining".

In *A & A Food Ltd.*, Hood J. stated:

> "The company did not have in place a proper plan or system to deal promptly and decisively with the receipt of unlabeled product, which appeared to be a recurring problem. The failure to set up such a system, and to take any precautions to prevent the occurrence of the foreseeable offence, in my opinion, constituted the appellant's involvement in the offence. It was his responsibility to do so. He was the directing mind and will of the company, thus his acts were the company's acts".[14]

The cost recovery plaintiff, therefore, must prove the requisite degree of control by the director, officer, employee, agent or parent company. "Authorize" appears to require positive involvement but the terms "permit" and "acquiesce" appear sufficiently broad to encompass failure to establish an environmental management system or, perhaps, failure to make the inquiries required of a prudent party in this era of increased environmental regulation.

4.2. Criminal Liability

An extended discussion of *WMA* director, officer, employee or agent criminal liability is beyond the scope of this paper. The above passages from *Seraphim* illustrate the elements of proof required to convict a director, officer, employee or agent under *WMA*, section 54(14). The B.C. Court of Appeal overturned the conviction in *Seraphim* on the grounds that the Crown had not proven any harm to the environment as a result of the mining operations in question.

The defence of due diligence would be available to a director, officer, employee or parent company in a prosecution under the WMA. The defence originated in *R. v. Sault Ste Marie (City)*[15] and was reviewed in

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13 *Seraphim*, *supra,* note 12, para. 9.

14 *A & A. Food Ltd.*, *supra*, note 11, para. 26.

15 (1978), 85 D.L.R. (3d) 161 (S.C.C.).

detail in the celebrated case of *R. v. Bata Industries Ltd.* [16] In *Bata*, the Ontario Provincial Court convicted two company directors of Bata Industries Ltd. for corporate pollution offences under section 75(1) of the *Ontario Water Resources Act*. The Court concluded that the directors had not exercised due diligence - in other words, reasonable care - to prevent chemical waste escaping from storage drums on the company premises.[17]

The Court fined the directors $12,000 each and ordered the company not to indemnify them. The fines were reduced to $6,000 on appeal. The Ontario Court of Appeal reversed the non-indemnification order on the basis that it was beyond the jurisdiction of the Provincial Court. In doing so, the Court of Appeal noted that, in any event, the company by-laws probably prohibited indemnification of the directors for such criminal penalties.

The Provincial Court Judge identified various principles for a successful due diligence defence: (1) directors are responsible for reviewing environmental compliance reports provided by company officers but are justified in placing reasonable reliance on those reports; (2) a director should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties; (3) directors should be aware of their industry environmental standards; and (4) directors should immediately and personally react when they know that the system for addressing environmental problems has failed.

4.3. Tort Liability

Directors and officers also should be aware of potential tort liability for claims by third parties suffering damages as a result of company environmental management acts or omissions. The potential causes of action available include nuisance, negligence, strict liability and failure to warn. A detailed review of this subject is also beyond the scope of this paper.

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[16] (1992), 7 C.E.L.R. (NS) 245 (Ont. Prov. Div.); varied 11 C.E.L.R. (NS) 208 (Ont. Gen Div.); varied 18 C.E.L.R. (NS) 11 (Ont. C.A.).

[17] The trial judge commented on the degree of compliance with the due diligence standard by the three officers charged, Thomas Bata, the Chairman of the Board and a director; Douglas Marchant, the President and a director; and Keith Weston, the General Manager in charge of the site and a director. He concluded that Mr. Bata had caused an environmental protection system to be implemented. He was entitled to rely upon the system unless he became aware that it was defective. Mr. Weston was responsible for day-to-day plant operations and was responsible for compliance with environmental regulations. He was not entitled to rely on his manager. He should have personally inspected and assessed the site particularly after he knew there was a problem. Mr. Marchant had visited the site regularly and knew about the problem for over a year without acting. Accordingly, the court acquitted Mr. Bata and convicted Mr. Weston and Mr. Marchant.

4.4. Shareholder and Investor Actions

An additional area of exposure created by the *WMA* is the prospect of directors' and officers' liability to shareholders for mismanagement of a corporations's environmental risks. Any failure to deal with contamination or to properly manage an operation could result in significant liability to a corporation and a resulting diminution in value of the company's assets and therefore the value of its shares. The *WMA* therefore creates the real possibility of derivative shareholder actions. A detailed review of this subject is also beyond the scope of this paper.

4.5. Indemnification

Under the B.C. *Company Act* [18], a company requires court approval before it can indemnify a director for costs, charges or expenses of court proceedings to which they are a party. In the case of a "criminal or administrative action or proceeding", the *Company Act* requires the director or officer to establish reasonable grounds for believing that their conduct was lawful.[19] This requirement may be difficult for a director or officer to meet after a criminal conviction. Accordingly, companies probably will not be permitted to indemnify their directors for legal costs and pollution penalties resulting from criminal convictions. It is not clear whether a conviction under the *WMA* or other provincial or federal environmental statute would be classed as a "criminal action or proceeding".

It remains to be seen also whether a court might consider a *WMA* remediation order to be an "administrative action or proceeding". It is probable that a civil cost recovery action under section 27(4) would be covered by the normal indemnification agreement but would probably require court approval under the *Company Act.*

As noted by the Ontario Court of Appeal in *Bata* [20], some company by-laws prohibit indemnification of officers and directors for criminal penalties. Other by-laws may provide for indemnification in certain circumstances. *WMA*, section 26.1(4)(a) provides that when considering who will be ordered to undertake remediation, the Manager must take into account private agreements respecting liability between responsible persons. It may be that the Manager may have to consider a shareholders' agreement or other corporate document, such as company by-laws which provides for indemnification of directors and officers for remediation costs arising from corporate acts or omissions. This question has not yet been judicially considered.

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18 R.S.B.C. 1996, c. 62.

19 Section 128(1)(b).

20 *Supra.,* note 27.

The main concern for directors and officers in this area will be the possibility that the company may not have sufficient assets to indemnify them for the potentially considerable amount of remediation costs. To protect against this eventuality, it would be prudent for companies, directors and officers to purchase adequate directors and officers environmental liability insurance.

4.6. Environmental Impairment Insurance

Most directors and officers comprehensive general liability insurance policies do not cover pollution incidents or "fines or penalties imposed by law". This latter phrase would appear to encompass criminal, quasi-criminal and regulatory fines and penalties. It is not clear whether the phrase would include the costs incurred under remediation orders. A few policies include defence costs for pollution claims but these policies are rare and are usually only offered to large corporate accounts with policies in excess of $20 million.

In order to obtain pollution coverage, a company must usually purchase a specific pollution endorsement. Another option to consider is the purchase of an environmental impairment liability policy with a special director and officer endorsement. Such pollution policies, which are available from some underwriters in Canada, are expensive and provide limited coverage.[21]

Current and former company directors and officers found liable for company pollution offenses in British Columbia today may therefore face substantial personal fines without the protection of corporate indemnification or directors and officers liability insurance coverage. Under *WMA* cost recovery provisions, they may also be liable for remediation costs, which will also probably be excluded from the standard director and officer insurance coverage.

The issue of "owned property exclusion" also arises in these cases. Generally speaking[22], the policies often exclude losses or claims arising from clean up costs related to remediation at the covered locations, meaning the land owned by the corporation. Generally the policies are intended to provide for coverage of third party claims, not remediation of the covered location.[23]

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[21] Carriers offering specific environmental insurance include Zurich Insurance, American International Group and the Ian Elliot Group. See John R. Singleton, " Insurance Issues" in *Directors and Officers Liability*, B.C. C.L.E., April 26, 1996 at page 5.1.28.

[22] For example, the Zurich Insurance Company environmental impairment policy excludes loss or claims "arising from **Cleanup Costs** incurred for the remediation of soil and/or groundwater contamination to or at the **Covered Location(s)**..." and "arising from **Cleanup Costs** incurred in the removal or remediation of contaminated soil, surface water, groundwater or other contamination in, within or under the **Covered Location(s**)". See Singleton, *supra*, note 21, Appendix B, pages 5.1.49 and 5.1.50.

[23] There is conflicting case law in the United States as to whether work done on an insured's own property to prevent third party property damage is recoverable where an owned property exclusion exists in a CGL

As noted above, the company may be permitted to indemnify the directors and officers, in limited circumstances, with respect to certain forms of liability. In the end result, directors and officers may be entitled to look to the company for indemnification with respect to some, but not all claims. This has led to the creation of two types of insurance; the first is designed to protect the corporation in the event that it is required to indemnify directors and officers; the second is coverage designed to protect directors and officers with respect to those claims where they are not entitled to indemnification from the company.[24]

4.7. Environmental Management System

Directors, officers and parent companies who wish to manage or reduce the risk of environmental liability exposure should ensure that their companies and subsidiaries establish systems to avoid pollution events. This will assist to support a due diligence defence for criminal proceedings and may also be of assistance in defending and avoiding cost recovery action actions. There are guidelines in some court decisions, including the *Bata* case, for steps which may be followed to reduce exposure. A due diligence defence may not be available as a defence to a cost recovery action. Whether or not a due diligence defence is available, however, it would be prudent to take all possible steps to avoid the contamination which may give rise to a cost recovery action against a director, officer, employee, agent or parent corporation.

The exact steps that may be required to establish a system acceptable to the courts will depend upon the particular industrial commercial activity in which the company is engaged. However, there are certain principles that might be followed:

Staff that are hired should possess the expertise or skill necessary to fulfill the requirements of their positions and there should be sufficient staff to carry out the company's environmental responsibilities.

Outside consultants should be property qualified for the scope of the work, retained on condition that they act within the requirements of the environmental regulations, are fully informed about the company's situation and are properly supervised.

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policy. In B.C., the answer will depend upon the wording of the policy and an analysis of the facts and circumstances of the spill or clean up. For example, in *Greenwood Forest Products Ltd. v. United States Fire Insurance Co.* (1982), 35 B.C.L.R. 323 (S.C.), the Court found that there was coverage despite the insurer's reliance on an owned property exclusion in an attempt to deny coverage. In *Greenwood*, the Court interpreted the owned property exclusion clause strictly against the insurer. Jonathan McLean and Rachel Fisher, "*Coverage for Owned Property Expenses in Pollution Cases"*, presentation at C.B.A. - B.C. Environmental Law Section meeting, Vancouver, B.C. , October 25, 2000.

[24] Gordon Hilliker, *Liability Insurance Law in Canada*, 2nd Edition, 1996, p. 205.

Proper training of employees on environmental responsibilities is crucial. Training and education programs for new and existing employees must cover areas such as transportation of dangerous goods, the *Waste Management Act* and Special Waste Regulations.

There must be appropriate supervision of employees to ensure they are capable of carrying out their functions.

Records, including production records and maintenance records, should be kept. While it may seem obvious, proper filing systems which allow information to be retrieved are very important. There should be a method of regular review of certificates of approval and correspondence with environmental regulators often require monitoring or follow up information.

Communication systems should be established to ensure that officers and directors receive information sufficient to determine whether further compliance systems are required. The officers and directors must be able to communicate their findings to corporate personnel who must in turn have a method to communicate procedures and policies to employees. A method for monitoring and reporting back to the officers and directors must be established.

A method of reporting any spills or other discharges to the Ministry of Water, Land and Air Protection is required and should include such details as whom to call in case of specific incidents.

When developing written policies and procedures, policies used in other industries and anything their own industry association has developed should be reviewed.

Keeping up to date on standards in the industry and changes in environmental law that affect the industry is important. The company should be subscribing to appropriate publications on services and having staff attend relevant conferences and seminars.

Proper maintenance of equipment and use of the best available technology to prevent pollution are important.

There should be regular inspection procedures within the company to ensure compliance. Records should be kept of the scope of the inspection, any problems encountered and what was done to address them. Whenever possible, there should be a written standard operating procedure for processes within a plant as well as specific instructions as to what to do in the case of various types of omissions and spills.

Emergency procedures for environmental incidents should be developed and disseminated.[25]

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[25] A Catherina Spoel, "Environmental and OHSA Compliance Policies and Implementation". In *Indecent Exposure Behind the Corporate Veil: Protecting Directors and Officers*, Canadian Bar Association - Ontario Continuing Legal Education, May 13, 1994, page 7.

5. CONCLUSIONS

In conclusion, recent changes in contaminated sites law, including court and Board decisions cases and statutory and regulatory amendments, continue and do not reduce the risks of environmental liability for directors, officers, employees and parent companies. These persons, including municipal government officials and employees, continue to face potential exposure arising from corporate or local government acts or omissions leading to contamination.

Strategies to manage and reduce the risk of environmental liability include environmental liability insurance and the establishment of effective state of the art corporate environmental management systems to avoid pollution incidents and to assist in establishing a defence of due diligence where available.

With these strategies, companies and local governments can cooperate with increasing legislative and judicial pressure for environmental protection. They can also retain vital access to a pool of experienced and competent persons to serve as corporate officers, directors, employees and agents and corporations may continue to benefit from the creation of subsidiaries.

APPENDIX B

SUBMISSION TO THE MINISTER'S ADVISORY PANEL ON CONTAMINATED SITES

Submitted by David G Perry
Singleton Urquhart

July 19, 2002

Thank you for the opportunity of making a submission. Given the very broad scope of the terms of reference of this Advisory Panel, it is conceivable that the government is considering a whole range of options from total repeal of Part 4 of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*"), all the way down to minor tinkering. Ideally, the scope of submissions to the Advisory Panel should properly reflect the scope of the intended amendment. Accordingly, if the province is considering a wholesale revamping of the system, it would be appropriate to allow a longer time-frame for submissions and a working paper first be circulated which would focus discussion on the issues that are most important to the government.

In an attempt to read between the lines of the terms of reference, it appears that the government's first concern is to reduce the cost of administering the system on the part of the Ministry of Water, Land and Air Protection and second, to ensure a more efficient use of resources by parties who are involved with the contaminated sites process. By efficiency I mean both the reduction in total costs and a reduction in administrative and legal costs in favour of a focus on actual remediation of sites.

1. GENERAL COMMENTS

It is very difficult to make meaningful submissions when there is little information available as to the nature of the problem.

When the contaminated sites provisions of the *Act* were introduced, the assumption was that there was an enormous environmental and health hazard in British Columbia which required comprehensive if not draconian powers on the part of the provincial government. The imposition of absolute and retroactive liability for activities that in many cases were sanctioned if not positively encouraged by past governments is an unprecedented and outrageously unfair exercise of government authority. Such a use of authority should be commensurate with the nature of the problem.

Experience to date has indicated that there are very few contaminated sites that pose an active threat to human health or that pose catastrophic risks to the environment. Rather, the experience has been that British Columbia has thousands of low risk sites that pose chronic but low level risks to the environment.

I may well be wrong in this assumption, but the province has not provided any analysis of the nature, extent and quality of the risk posed to health and the environment by the known or estimated stock of contaminated sites.

Given that the nature of the problem is of several orders of magnitude less than would be supposed by the extraordinary exercise of government power demonstrated by the passage of Part 4 to the *Act*, the most appropriate starting place in a review such as this is whether the contaminated sites provisions are necessary at all. The most pressing threat to human health in British Columbia posed by pollution surely

must be contamination of the air shed over the Fraser Valley and its direct link to negative health outcomes for many thousands, if not hundreds of thousands of citizens, and many hundreds if not thousands of premature deaths. The second greatest health and environmental impact in British Columbia is no doubt the discharge of effluent from major cities into the Juan de Fuca and Georgia Straights. If government funds are to be expended based on the urgency of the problem and on the basis of a cost benefit analysis, then all of the funds currently expended on the contaminated sites regime would be better directed toward addressing these two more pressing and urgent problems.

2. HISTORIC VS. CONTEMPORARY CONTAMINATION

At the outset I will make it clear that there is a fundamental difference between the exercise of retrospective and prospective regulatory power. If current operators or owners of property cause or permit the contamination of land, I have no philosophical opposition to holding those parties to a strict level of compliance and significant penalties. These powers are already contained within the *Act* under the pollution abatement Order provisions.

But when dealing with historic pollution, different moral standards must apply. Past pollution generally occurred with the knowledge of regulators and in very many cases under the terms of a permit. These activities benefited both the polluter (a meaningless term if there was no intent to pollute), the government of the day and society at large. Wood treatment facilities have proved to be some of the most problematic sites in B.C. Yet the wood produced by these facilities is an integral part of highways, ports, retaining walls, telephone poles and roadbeds throughout the province and the country.

Penal or administrative sanctions should only be assessed against guilty parties or where there is such a pressing social need that it is necessary to punish the innocent. When companies or individuals are forced today to spend millions of dollars cleaning up contamination that was actively encouraged or sanctioned by past governments, it violates moral imperatives that only a guilty person should be punished.

3. LOW RISK AND HIGH RISK SITES

A great deal of the uncertainty, transaction costs, and chill on investment that occurs as a result of the contaminated sites regime is because the triggers for land and parties to be enmeshed in the system are extraordinarily low.

Take, for example, the results of a very slow leak from an underground heating oil tank on a commercial property. It would only be necessary for a few litres of oil to escape from the tank for the surrounding soil to breach the prescribed standards as set out in the *Regulations* and, hence, become a contaminated

site. Because of the far-reaching effects of the definition of a responsible party, every owner, business operator, tenant, producer or transporter involved with the site, and all officers and directors and agents of each of those parties become potentially responsible persons. In other words, the equivalent of a bucket load of heating oil in an underground spill has the chilling effect of reducing the value of the property in question and exposing a cast of potentially hundreds of companies and individuals to the terrors of a costly, lengthy and mandatory government clean-up process.

This is clearly a case of using a hammer to kill a gnat.

On the other hand, expensive and dangerous sites such as Britannia Beach and Meadow Avenue would never have been cleaned up without the extraordinary powers granted to the Manager to force past owners and operators to contribute to the cost of clean-up.

The difficulty with the current system is high administrative and legal costs arises directly as a result of the enormous powers granted to the Ministry. The understandable reaction of a party that comes within the focus of a potential Order from the Ministry is to throw up roadblocks in an attempt to avoid potentially ruinous costs. This reaction may be economically rational when the costs of clean-up run into the millions of dollars, but are counter-productive when the costs are in the tens of thousands of dollars.

The current system then faces two related fundamental problems. The inclusion of low risk sites in a regime that punishes the innocent for even minor transgressions means that the use of regulatory authority is not commensurate with the perceived harm. Only extraordinary harm should attract extraordinary use of power. Following from this, the potential threat of extreme government sanctions increases the need for potentially responsible parties to protect themselves with costly transaction protection (i.e. insurance and complex contracts) and through litigation. The problems have the unintended effect of steering expenditures of funds away from remediation and towards litigation.

The solution is to create different tools and legal ramifications depending on the seriousness of the contamination. Assume for the sake of argument that there are under 50 major contaminated sites that pose significant risk to health or to the environment. Assume also that there are many thousands of low risk, contained or low contamination sites. It makes no sense to have the full panoply of powers in the contaminated sites provision apply when what is needed is a method of encouraging current owners to clean-up the low risk sites and a way for them to in turn attempt to share those costs with the parties that actually caused the contamination.

On the other hand, for the high risk, waterside, or potentially orphan sites it may well be necessary for the government to have broader powers.

With respect to the low risk/high risk division, I would go so far as to recommend that a separate *Act* should be passed dealing with the high risk sites. This would send a clear signal that only sites that meet

a test such as a pressing and urgent threat to the health or environment would be considered for inclusion in such a far-reaching regime. I would also suggest that the government would have to take positive steps for a site to be declared a high risk contaminated site. This would involve a degree of procedural fairness such as found in the current provisions for making a preliminary and final determination under the *Act*. Only at the end of such an investigation would it be possible to designate an area a highly contaminated site@, which would allow the Manager to take such steps as are described under the current Part 4 of the *Act*.

All other sites would be exempt from clean-up Orders and, ideally, it would not be necessary to list them on the site registry. This would go a long way to relax the current investment chill around land purchase in British Columbia and would greatly reduce the administrative costs to government and transactional costs incurred by the private sector in routine land transfers. For the low risk sites, the cost recovery provisions could be retained, which would encourage current landowners or affected parties to clean-up sites while still giving them an opportunity to recover those costs from historic polluters.

This would create market incentives to clean-up low risk contaminated sites. Currently the value of brownfield or orphaned sites is effectively zero. Potential purchasers are deterred because the potential liability may exceed the value. If purchasers were exempt from the Order process, then land would have value equal to the remediated value minus remediation costs. If the cost recovery provisions were retained, then remediation costs are potentially smaller as they may be shared amongst a greater number of parties.

This would mean a considerable cost savings for the provincial and local governments as well. A mandatory registry for low risk sites is a misallocation of scarce public resources. Public funds should be expended on sites where there is a danger to health or the integrity of the environment. The current system requires at least one level of government, provincial or municipal, to review every property transaction involving commercial or industrial property. Unless there is a clear and pressing need for public oversight, why expend these funds? Regulatory power should be focussed on those areas where it is most needed - high risk sites.

An important part of the high risk or ordered sites regulatory regime would be a form of alternative dispute resolution. The basic format of the current *Act* is to remediate first, allocate second. However, it appears to have been unforeseen by the drafters of the *Act* that parties faced with mandatory Orders to expend upwards of $20 million dollars on clean-up are reluctant to be named to such an Order. They therefore take all steps available at law in an attempt to avoid being allocated the costs. This is particularly so when the site involves one such as Meadow Avenue where the number of deep pockets are few and the most responsible parties have the fewest available resources. As a result, it is understandable that the big pockets who are named to an Order would take as many steps as are available to them at law in order to avoid being named to an Order in the first place.

The solution to this is to join the two processes. Ordering remediation inherently involves a decision on allocation. Because of the great lag time between issuing an Order and obtaining a final judgment in a cost recovery action, naming a party to an Order inherently involves a decision on allocation of liability. As a result, a Manager contemplating a Remediation Order should take into account relative degrees of fault and make as fair an Order as possible in allocating the costs. This should be a mandatory part of the process of making a Remediation Order. In order to encourage parties to participate in this process and avoid administrative law review or subsequent cost recovery litigation, I would strongly urge that a form of mandatory dispute resolution be incorporated into the high risk site process. In the course of such a mediation, all potentially responsible parties and the provincial government would participate. The result could be a form of voluntary remediation wherein even minor contributors would agree to be responsible to an agreed on cap, either in dollar terms or a percentage term, on the understanding that they would avoid lengthy and potentially ruinously expensive legal and administrative proceedings.

Such a procedure would be particularly effective on large complex sites. As it stands, litigation may well continue for many years. I am thinking particularly of the Meadow Avenue site where remediation has only just begun in spite of an Order having been issued in 1997. The delay is not the fault of the parties, but the fault of the system.

4. CLOSURE

Just as I have suggested that it should become more difficult to get into the contaminated sites system, particularly when there is a low risk site, it should also be much easier to get out. The current system is ostensibly motivated by the desire to encourage remediation of sites, but the primary motivation appears to be to ensure that the public is never liable for a site. Unfortunately the emphasis on avoiding orphan sites has undermined the primary goal: ensuring remediation of sites.

This is reflected in the reluctance of developers to purchase any property with a history of contamination, no matter how slight, and the largely increased transactional costs involved in providers of mortgage financing to avoid liability. A very simple and elegant solution has been found in the recent changes exempting purchasers of mining properties from the provisions of the *Waste Management Act*. In order to encourage further development there has simply been an exemption for purchasers of a historic mine from being named for a clean-up of previously existing contamination. I would propose that this same provision be applied to all contaminated sites. If a potential property purchaser could be assured that they would be exempt from clean-up, they would be far more likely to purchase and develop a property knowing they were not faced with the risk of incurring liabilities that could greatly exceed the value of the land. Incentives to remediate would come from the marketplace. A remediated property would clearly have significantly greater value and a market could be created where developers purchase undervalued

and contaminated sites, remediate them to a level acceptable to the market, and bring historic commercial and industrial land back into production. Developers are reluctant to do so now as they face both the risk of being named to an Order and of being sued under cost recovery actions.

Under the high risk regime, it would be much easier to obtain cooperation from parties if they were able to properly assess the degree of financial exposure. The current system essentially tells potentially responsible parties that they are at risk to pay an indeterminate amount of remediation costs over an indeterminate period of time. No rational corporation or individual can make decisions based on that level of liability. The solution is to allow permanent exemptions for parties who comply with Orders or mediated agreements on contaminated sites.

Government has been reluctant to contain liability because of the possibility of finding greater levels of contamination in the future or that sites may become orphaned if too many parties are exempt. A possible solution is the creation of a fund, financed by a small portion of the Property Purchase Tax, that would be set aside to remediate high risk orphaned sites. Given the experience over the past five years, it is highly likely that there will be very few such sites and the size of such a proposed fund can be adjusted accordingly.

5. CONCLUSION

1. These comments are necessarily very general. The government would be well advised to develop a comprehensive position paper or draft legislation and encourage comments based on that framework.

2. Before designing an appropriate regulatory regime, we need better information about the nature of the problem. What is the nature of the threat to human health and the environment from contaminated sites?

3. It offends every conception of justice to punish the innocent, particularly when their actions were given contemporary governmental seals of approval.

4. Extraordinary power should only be exercised if it is necessary to prevent extraordinary harm.

5. A distinction should be made between high risk and low risk sites.

6. A high risk site regulatory regime should include:

    a. The necessity for regulators to take positive steps to designate the site as contaminated;

    b. Mandatory alternate dispute resolution at the beginning of the process; and

c. Combination of the remediation and allocation steps to reduce transaction costs and delays.

7. A low risk site regulatory regime should include:

   a. No power to make Orders by the regulators;

   b. No inclusion in a site registry;

   c. Exemptions for new purchasers; and

   d. Retention of cost recovery provisions.

8. Under both regimes, there must be closure for the parties.

9. There should be a remediation fund of last resort for high risk orphaned sites.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2002.

David G Perry
Singleton Urquhart

APPENDIX C

***WASTE MANAGEMENT ACT* AND**

CONTAMINATED SITES REGULATION

RESPONSE LETTER DATED JULY 19, 2002

Edwards, Kenny & Bray

July 19, 2002

By Courier

July 19, 2002

Advisory Panel on Contaminated Sites
Suite 400
601 West Broadway
Vancouver, B.C.
V5Z 4C2

Attention: Margaret Eriksson

Dear Sirs/Mesdames:

Re:	***Waste Management Act* and Contaminated Sites Regulation**

The following are our submissions regarding your review of Part 4 of the *Waste Management Act* and the *Contaminated Sites Regulation*. Some of our submissions are of a general nature while others are more specific.

These submissions represent the personal views of the lawyers in our firm who practice in the environmental area. They do not necessarily represent the views of any of our clients.

1. Efficiency, fairness and a principled allocation of responsibility should be the guide posts for the statutory regime.

   In terms of efficiency, the statute should not require sites to be "cleaned-up" if the nature of the contamination does not justify clean-up. Similarly, the level of "clean-up" should not exceed that which is justifiable. Clean-up criteria must be founded on acceptable science and must be consistent with the level of environmental and human health risk acceptable to Canadians. Risks of many sorts are a part of day-to-day life. It is not readily apparent that clean-up standards should be perceived differently. It is important to keep in mind that, for the most part, the issue is not the introduction of new contaminants but rather, whether there is sufficient justification for the removal of contamination already in place. No one can question the responsibility of government to safeguard the environment. The issue that requires clear thinking, however, is measuring the benefits of particular clean-up levels against already accepted standards for environmental and human health risk and the costs of associated with achieving those standards.

2. The ability to recover costs for necessary remediation is an important part of a fair and principled allocation of responsibility.

   Why should a current owner be solely responsible for historical contamination? Other than being a "convenient victim" there is no principled basis for 100% current owner responsibility unless that owner has bargained to accept that responsibility.

   Joint and several responsibility makes sense, given the need for regulatory efficiency on clean-up orders. It is not so easily justified on cost recovery.

3. One potential fine tuning change, and one which requires more than a little thinking through, is amending the statute to stipulate that new owners who acquire land after the amendment cannot proceed with cost recovery or can only claim up to one-half of the new owner's remediation costs.

   One of the "thinking through"issues is how that would impact on real estate sale and development in British Columbia.

4. The requirement for site profiles in respect of commercial land sales should be reconsidered. This requirement is waived in virtually every transaction. In those few instances where the site profile is not waived, it is likely that the site profile is simply not provided (from ignorance of the legislative requirement). The policy "benefit" of warning purchasers of potential contamination likely has minimal real life value and is outweighed by the bureaucratic cost of having to waive the site profile.

5. In order for the considerable backlog in respect of remediated sites waiting for certificates of compliance and other regulatory approvals, the statute and regulation should be amended to permit certified professionals to issue such documents and to provide immunity from legal proceedings against such certified professionals, solely in respect of their "administrative" role in signing such documents.

6. A definition of moderately risky contaminated sites should be developed and simplified procedures should be put in place to expedite the remediation and "administrative" involvement and issuance of certificates of compliance for such sites.

7. Although this may be a debatable issue, it is arguable that to achieve greater fairness where a contaminated site is remediated to the "standards" of the day, the party owning the land at the time of such remediation should not be responsible for any future remediation arising out of a change in standards (but that party should be responsible if that party wants to use the land for a purpose requiring a "cleaner" site, such as changing from a commercial use to a residential use).

8. The limitation date in respect to cost recovery proceedings should be specified in the statute. The time period, say two years, should not begin to run until remediation has been completed. In terms of what facts would indicate completion, the issuance of a certificate of compliance or a conditional certificate of compliance would be events with a date certain. Where there is no certificate of compliance (voluntary remediation), then perhaps language could be developed similar to the *Builders Lien Act* to the effect that the time begins to run when the remediation is completed, abandoned or otherwise terminated. Presumably, the claiming party will know when the remediation has been completed.

9. Alternatively, if the limitation period is triggered by the commencement of remediation, the court should be specifically empowered by the statute to grant a declaration in respect to future remediation costs in the event of a cost recovery action in a lengthy remediation.

Yours truly,

Edwards, Kenny & Bray

APPENDIX D

REQUEST FOR SUBMISSIONS DATED JUNE 4, 2002

CBA RESPONSE LETTER DATED JULY 17, 2002

Joyce Thayer
Barrister & Solicitor
Environmental Legal & Litigation Services

July 17, 2002

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July 17, 2002

The Advisory Panel on Contaminated Sites
Suite 400 – 601 West Broadway
Vancouver, B. C.
V5Z 4C2

Attention: Margaret Eriksson
Panel Chair

Re: CBA Response to Request for Submissions dated June 4, 2002

I have had the opportunity to review the submissions made on behalf of the Canadian bar Association, B.C. Branch setting out the underlying principles which the Branch recommends be taken into account by the Panel when conducting its review of the contaminated sites regime set out in Part IV of the *Waste Management Act* (the "*WMA*") and the *Contaminated Sites Regulation* (the "*CSR*").

Set out below are my comments respecting the principles as articulated by the Branch and further comments which I respectfully put forward for the panel's consideration:

PART 1: UNDERLYING PRINCIPLES

1. *The regulatory regime for contaminated sites in British Columbia should continue to be based on the principle of polluter pays. This principle encourages the internalization of the costs of pollution by persons principally responsible for such pollution.*

Comment:

The current regime reflects not only the principle of polluter pays but also the companion principle that those who directly or indirectly benefit from the polluting activities (e.g. landlords) should pay for the costs associated with remediating contaminated sites. Part IV is designed not only to deal with polluting activities which have already occurred, it also structured to include financial incentives which will act prospectively to prevent contamination in the future. The retention of the beneficiary pays principle is a key incentive to which is designed to ensure those who benefit from activities which could result in contamination take all possible steps to prevent contamination.

2. *The principle of absolute, retroactive and joint and several liability should be maintained. However, exceptions to liability must be clarified and include some form of closure with respect to a person's liability. These exceptions to liability should also address the effect of changes in the law.*

Comment:

The principle of absolute, retroactive and joint and several liability is fundamental to ensuring that there is a sufficient pool of responsible persons with the resources to undertake the expeditious cleanup of contaminated sites. The current regime is also designed to ensure that the costs of such cleanup, whenever they might be required are born by the private sector rather than the taxpayer. If changes are made to the exemptions to provide "closure" and address "the effect of changes in the law" it has to be understood that the effect of these changes will be to shift all or a large portion of the costs of any future cleanup which might be required from the private sector to the taxpayer.

3. *The statutory cause of action for recovery of remediation costs should be maintained. However the current cost recovery provisions should be clarified to address such matters as:*

- *Applicable limitation periods*
- *Principles for allocation of liability*
- *Availability of declaratory orders with respect to allocation of future remediation costs.*

Comment:

The statutory cause of action for recovery of remediation costs is an important mechanism which provides an incentive to those who own contaminated property to undertake remediation. Clarification with respect to the applicable limitation period is desirable. However, any change should ensure that litigation proceeds with dispatch. The limitation period should be the two year period for property damage and should start to run when remediation commences. As remediation in many cases requires decades to complete, as a matter of fairness to potential defendants, the provisions should also be amended to include recovery for reasonable future remedial costs so that litigation will not be put off indefinitely until all remedial costs have been incurred.

With respect to the principles which govern liability I am of the view that the apportionment principles set out in s. 27 of the *WMA* and s. 34 and s. 35 of the *CSR* provide sufficient guidance and flexibility to the court and the manager when undertaking the exercise of apportioning liability.

4. *Voluntary remediation and non-litigious processes in the Act, while laudatory, have proven to be ineffective. Such processes include voluntary remediation agreements, allocation panels and minor contributor status designations. These mechanisms need to be made operational.*

Comment:

Problems associated with these provisions as they are presently structured include the uncertainties which arise as a result of the interplay between the decisions of an allocation panel and the manager and the interplay between the regulatory process and the cost recovery provisions. Specific suggestions as to how these provisions might be modified to make them more certain and thus more useful to responsible parties are set out below:

a. <u>Allocation Panels</u>:

A first step would be the amendment of the provisions relating to allocation panels to make them binding on the Manager and allowing the manager to request that an allocation panel be appointed. However, the bigger problem which needs to be resolved is the interaction between the regulatory regime and the cost recovery provisions. No one is going to utilize an allocation panel unless there is some mechanism put in place to resolve the more important issue which is whether or not such opinions would be binding on the court in cost recovery actions. All decision made by an allocation panel should be stated to be final and binding (they would of course as a matter of fairness be subject to appeal).

b. <u>Voluntary Remediation Agreements</u>:

As currently structured the provisions relating to Voluntary Remediation Agreements (“VRAs”) require any responsible person, including minor contributors, to undertake site investigations and either provide a schedule for remediation or demonstrate that the contaminated site does present an imminent or significant threat or risk to human health or the environment, prior to approval of the voluntary remediation agreement. If a person receives minor contributor status it would also make sense that they be allowed to enter into a VRA by paying into a remedial fund dedicated to the site their share of the remedial costs once they are ascertained. Allocation panels should be given the authority to undertake the exercise of quantifying this amount at the request of the manager of the person seeking minor contributor status. This decision should be (while subject appeal) stated to be final.

c. Minor Contributor Status Designations:

While one of the primary tools which is designed to provide protection to a party who can establish that their contribution to the contamination at a site is *de minimus* there is no statutory guidance on what constitutes "a minor portion of the contamination present at the site" and what constitutes "a minor portion of the total costs of remediation required at the site." There seems no reason in theory why a fixed percentage figure could not be selected to provide guidance to the allocation panel, the court or the manager when making such a decision. It should be clearly set out in the WMA that any such decision made by an allocation panel is final.

5. *The Act should be amended to include regulatory incentives to encourage and facilitate the remediation of brownfield and orphan sites.*

Comment:

While the goal is laudable, the is it less clear that regulatory incentives could facilitate the development of brownfield sites beyond that which is currently taking place without providing financial incentitives.

The recent legislation passed in Ontario and the United States which seeks to promote the development of brownfield sites is based on the provision of government funds and financial incentives to encourage brownfield development. The costs/benefits to the taxpayer which would result from instituting any such scheme in British Columbia need to be carefully considered.

In Ontario one of the key incentives is a proposed rebate of property and education taxes. In B.C. it is unlikely that this could be utilized as it is my understanding that assessment authorities generally devalues property to zero when provided with evidence of contamination.

One measure which could facilitate the development of such sites would be provisions which make it clear that those who take an option on such property and undertake investigations to determine whether or not the costs of remediating the site make development worthwhile are given an exemption from responsibility under s. 26.6.

6. *The Act should be amended to differentiate between simple and complex, contaminated sites so that stakeholders involved in simple contaminated sites need not be subject to the same regulatory regime as is applicable for complex contaminated sites. Such amendments should enable the timely and cost effective remediation of simple contaminated sites.*

Comment:

There are already clear mechanisms in place which make provision for the distinction between simple and complex sites. Remedial actions undertaken at simple sites which are low risk can already be reviewed by a member of the roster of expert consultants. Only AIPs, CCoCs and Cocs for simple sites are presently subject to Ministerial review. If these activities are also to be delegated to the roster of professionals safeguards will have to be put in place to ensure that such approvals meet standards which are accepted by other sectors such as purchasers and financial institutions who incorporate such approvals into their due diligence investigations.

7. *The Act should be amended to recognize the effect of contaminated sites and remediation techniques on adjacent landowners. Issues such as notification, the right to comment on proposed remediation techniques and compensation for losses such as diminution of land value should be considered by the Panel.*

Comment:

The current provisions as they relate to notification require notification of independent remediation as contemplated under the act. However, the recent amendments to the WMA seem to make allowance for a party undertaking remediation entirely outside of the regulatory regime. The WMA should be amended to ensure that the notification provisions in the CSR apply to all remedial activity.

The current regime includes a statutory cause of action that can only be utilized by persons who have incurred costs of remediation. These provisions are of no use to property owners who do not have the resources to remediate their property and then seek recovery under section 27(4) or the resources to fund litigation outside of the framework of the *WMA*.

New provisions should be added to section 27 of the *WMA* and section 35 of the *CSR* allowing those property owners who fall within the definition of persons not responsible for remediation under section 26.6 (1) (i) to bring an action for recovery of the costs of remediation prior to such costs being incurred. This could be combined with a provision which would allow them to recover legal and consultant costs associated with seeking contribution from the persons responsible for the contamination (presently the provisions allowing for recovery only apply to costs associated with recovery from 'other responsible persons').

II. PART TWO: GENERAL COMMENTS

The Terms of Reference for the Minister's Advisory Panel indicate that you are given the task of developing "a new policy framework for the regulation of contaminated sites in British Columbia" to address perceived problems with the current regime The new policy framework is part of an overall business plan for the Ministry which is designed to "reduce government costs, reduce the costs of those that must meet environmental standards, reduce conflict and litigation, eliminate service backlogs and focus efforts in areas where there is the greatest risk to the environment."

While the current legislative regime has its shortcomings, it is sound and tested legislation which can with minor modifications function efficiently to achieve these service delivery goals. Indeed the replacement of Part IV with an entirely new regime would be counterproductive as it would simply set off a extensive new round of litigation and administrative proceedings given the high stakes which are associated with the remediation of such sites.

The Terms of Reference identify the following four concerns expressed by unidentified stakeholders respecting the current regime which has been in place since April 1, 1997. My specific comments on each of these concerns are set out below:

- *The existing contaminated sites model is:*
  - *Unnecessarily cumbersome, expensive and bureaucratic,*
  - *Overly prescriptive and stringent in application, and*
  - *Plagued by lengthy approval processes that must be completed before clean up and redevelopment of property can occur.*

Comment:

I have no doubt that administrative improvements can be achieved with respect to the time it takes to achieve Ministry approvals reducing the costs associated with seeking such approvals. I am also certain that the *WMA* can be improved to provide greater certainty and predictability. However, the application of the standards and criteria currently set out in the regulations which are based on CCME guidelines modified from time as new scientific information becomes available is rather than being overly stringent and prescriptive, the minimum necessary to protect human health and the environment.

- *Money is being spent unnecessarily on administrative proceedings, legal and consultant costs rather than actually cleaning up contaminated sites.*

Comment:

I have been counsel in proceedings in which enormous sums have been expended on litigation and administrative proceedings. However, such expenditures were the exception rather than the rule. In addition, the initial expenditures on legal and consultant fees which were undertaken when the *WMA* was first enacted have over time lessened as guidance has been provided by the Court and the Environmental Appeal Board respecting the interpretation and application of Part IV of the *WMA* and the *CSR*.

An excessive amount of time and resources are being spent of lawsuits and administrative proceedings to determine responsibility.

Comment:

While there are a few high profile proceedings which appear to consume an excessive amount of time and resources, such expenditures are again the exception rather than the rule and are not mandated by the provisions of the WMA. Nothing in the WMA precludes reasonable persons from utilizing ADR mechanisms to achieve resolution of issues of responsibility at an early stage at low cost. The litigation associated with interpreting key provisions of Part IV of the WMA relating to issues of responsibility have by in large been the subject of judicial scrutiny. Any changes in the legislation would simply open a new Pandora's Box of litigation.

- *The principle of absolute, retroactive, joint and several liability included in the legislation may lack fairness and has resulted in investors being fearful of investing in, or redeveloping contaminated land in British Columbia leading to the creation of numerous unproductive brownfield sites.*

Comment:

The principle of absolute, joint and several and retroactive liability was not new to part IV of the *WMA* but reflected the common law principles which the courts had had already developed prior to April 1997. The key goal of part IV of the WMA is the expeditious cleanup of contaminated sites to standards which protect human health and the environment. While there may be a principled basis for modifying the application of some of these principles in the context of other types of litigation they are the cornerstone of Part IV. Any abandonment of these principles would result in a restriction in the pool of parties available to pay for the costs of remediation which would (1) work to the disadvantage of those in the private sector who voluntarily undertake remediation and then seek recovery of these costs from other responsible parties and (2) shift a large portion of the costs of remediation from the private sector to the taxpayer.

With respect to the redevelopment of orphan sites for which no responsible persons with assets can be located, any concerns about future liability for those who undertake development of such sites can be dealt with by amending section 26.6 to expand the group of persons who are not responsible to include those who undertake remediation of orphan sites to Ministry standards.

Yours truly,

Joyce Thayer
Barrister & Solicitor

APPENDIX E

POLLUTER PAYS AND THE PUBLIC INTEREST:

A Submission to the Minister's Advisory Panel on Contaminated Sites

Karen Campbell, Staff Counsel
West Coast Environmental Law

July 2002

INTRODUCTION

BC's Contaminated Sites Regime (CSR), which consists of Part 4 of the Waste Management Act and its associated Contaminated Sites Regulation has been in effect since April 1, 1997. The creation of this comprehensive regulatory regime was the result of an extensive multistakeholder process that took place over a number of years. The final result was a regime that could balance competing public policy interests: ensuring that the environment is protected through remediation of contaminated sites while at the same time satisfying the business interest in providing polluters certainty and predictability with respect to their legal obligation to clean up contaminated sites. The CSR is modeled on the well known US Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). While not every party was completely satisfied with the CSR, indeed, that is the nature of complex public policy development, the CSR had the support of all significant stakeholders when it came into effect.

The BC government has made clear that it is changing the way in which environmental protection efforts will be conducted in the province. Their strategic direction is set out in their ministry service plans which outline a move towards increased delegation of decion-making, greater reliance on external expertise, results-based standards, and innovative approaches to achieving compliance.

Recent initiatives indicate that the government intends to shift the delivery of services from the public to the private sector in areas that have traditionally been off limits. In the resource sector, the government has served notice that it intends to radically alter the manner in which all industrial activities are regulated in the province by downsizing the public service even further, and shifting from a prescriptive to a results based approach. These changes will affect the manner in which standards are established and enforced, and will have an impact on environmental and human health. It is important that in this context, that a unique regime like CSR not be restructured when it is already achieving these goals.

The regulation of contaminated sites is necessarily complicated due to the historical nature of contamination and industrial activity. As with any new and complex regulatory regime, there have been concerns with the implementation of the CSR. The Advisory Panel on Contaminated Sites' Terms of Reference are heavily weighed toward the interests of business, which is also whom the CSR was designed to regulate. These terms of reference question whether the current regime is "unnecessarily cumbersome, expensive and bureaucratic", or "overly prescriptive and stringent in application" or whether the liability principles have "resulted in investors being fearful of investing in, or redeveloping contaminated land". The concerns that have been expressed are unsubstantiated; there is no evidence that the present regime inhibits commercial activity, except where doing so is necessary to protect the public good. Indeed, if one considers the amount of development occurring in downtown Vancouver, it seems that the contrary is the case.

As noted above, the purpose of the CSR is to balance the often competing need to ensure environmental and human health are protected with business interests. In

our view, the Terms of Reference have ignored other important considerations, such as the extent to which the CSR has:

- Protected innocent landowners and the public interest by having contaminated sites remediated as expeditiously as possible;
- Provided appropriate incentive to encourage polluters to clean up contaminated sites;
- Maintained baseline standards for environmental quality and human health; and
- Protected the public, and the taxpayer, from liability for orphaned or abandoned sites.

We are supportive of the submission of the Canadian Bar Association, BC Branch, Environmental Law Section. Our recommendations build upon and elaborate the principles identified by the CBA Environmental Law Section; there are a number of points we believe must be clarified in order to ensure that the essential components of a just, equitable and efficient and accountable CSR regime remain intact and can be strengthened.

RECOMMENDATIONS

Recommendation 1: The fundamental framework and structure of the CSR is consistent with the government's strategic initiatives and must be maintained; the focus of this review must be on refining the current system, not revisiting first principles.

Efforts to "fine tune" the implementation of the CSR, while at the same time ensuring efficient and effective remediation have been underway through the Contaminated Sites Implementation Committee (CSIC, of which West Coast Environmental Law has been an active participant) since the late 1990s. In our view, the CSIC process has been largely successful, the fine tuning efforts have remedied a number of the issues that have arisen with the current system; this approach should continue.

The fundamental framework created by the CSR has proven effective and should be maintained. It is a substantially workable system, and 6 years of experience have given those involved in contaminated site remediation in BC a good sense of how it can be improved. The Contaminated Sites Advisory Panel presents a fresh opportunity to clarify how the CSR should be implemented. It would be regressive to abandon this sophisticated, well developed framework and return to the pre-1996 approach of remediating contaminated sites in BC. The comprehensive approach of the CSR is currently being used as a model by other jurisdictions undertaking contaminated sites reform initiatives (such as Ontario and Quebec). The concerns raised in the Terms of Reference, to the extent that they may be substantiated, are being addressed by the process that is already in place.

Recommendation 2: The principles of joint, several, retroactive and absolute liability are essential components of the CSR.

These liability principles are fundamental to the CSR. It is these concepts that give effect to the polluter pays principle, which is an essential component of a just regime for addressing contaminated sites. Virtually every legal regime in Canada and the United States contains these baseline principles in one form or another. Joint and several liability is legislated in every law addressing contaminated sites in Canada.

Even in cases where the parties responsible under the CSR are not polluters per se, the CSR ensures that liability is assumed by those who have a degree of moral responsibility, rather than shifting liability or costs onto the public and the environment. For example, the liability principles in the CSR capture beneficiaries, who are often profit from contamination. Landlords are a good example of a beneficiary. It is important to ensure that people who use property do so in a manner that does not pollute, or will avoid pollution in the future.

The most important function of these principles is to operate as an economic incentive to encourage potentially responsible parties to take responsibility and remediate contaminated sites where their actions have caused or contributed to environmental degradation. Taken together, these principles are the most appropriate mechanism available to guarantee that clean up responsibility is allocated fairly, as responsible parties must consider the extent to which they caused or contributed to the contamination at issue.

If these principles were removed from the CSR, BC would return to the situation as it existed prior to the CSR, whereby current landowners would be responsible for contamination by virtue of ownership, and would bear the burden, primarily through the courts, of attempting to recover clean up costs. This would revert to a regime where there are severe limitations on recovery from past polluters, as the provisions of the *Limitations Act* would act as a bar to recovery. If a landowner could not afford to do so, it is likely that sites would be abandoned, as with the exception of very few sites (such as the Expo lands in downtown Vancouver), clean up costs will exceed property values, and it is cheaper for landowners to walk away. This is certainly the case in rural communities, where contaminated properties are often incapable of being sold because the property value has diminished so dramatically.

Indeed, the parties responsible for contamination from the largest point source of metals contamination in North America, the Britannia Mine, have directly acknowledged the importance of these liability principles in encouraging the negotiation of a clean up plan for the Britannia Mine site.[26] These principles provide not only the incentive to clean up contaminated sites, but also encourage brownfield redevelopment.

[26] Vancouver Sun, Friday April 13, 2001, p. B1 “Britannia cleanup costs ex-owners $30 million; Past owners admit legislation brought them to cleanup talks”.

Recommendation 3: No changes should be made to the liability principles. If any changes are considered, they should be done by way of narrowly defined and limited exceptions, as is currently the case with the CSR.

The CSR contains a list of parties to whom the liability principles do not apply, to ensure that the application of joint and several liability is not unfair. These exemptions have been built into the system to add an additional "fairness" dimension to the implementation of the CSR. In our view, this approach is the only meaningful way to carve out exceptions to the liability principles.

Recommendation 4: Exit tickets or a liability sign-off, if considered at all, should only be provided in clearly defined and limited circumstances.

West Coast has strong reservations about providing exit tickets to persons who remediated a site to a particular standard. It is not unheard of that further clean up may be required in the future as our understanding of toxicity and migration of contaminants improves, or in the event that a conditions at a remediated site change and pose an additional threat to human health or the environment.

One such example is the Koppers site in Burnaby, that was originally cleaned up to standards that were current in 1980, but was recently found to be a major source of contamination in the Fraser River. The cost of this additional cleanup and long term operation and maintenance is in the range of $50 million. If exit tickets are uniformly provided once remediation is complete, clean up for sites such as this would likely fall on the taxpayer, and any innocent party whose property value or health were impacted as a result of contamination from this site would not have any recourse against the polluting or contributing parties. If the public was unable to fund such a clean up, the site would become an orphaned or abandoned site.

In our view, there should be no diminishment of retroactive liability. In the event that exit tickets are considered, such exemption should be provided in narrowly defined and clearly articulated circumstances, and any exit ticket must be accompanied by a funding mechanism to cover the costs of orphaned site clean up. This funding mechanism should be developed with monies contributed by the polluters, or responsible parties, such as is the case with CERCLA in the US, to ensure that the taxpayer is not bearing an additional burden for unforeseen clean up expenses.

Recommendation 5: The CSR must provide better protection for innocent landowners and members of the public who may be affected by offsite contamination.

Currently, the cost recovery action provisions, which are the civil action provisions in the CSR, can only be used to claim costs of remediation against responsible parties after they have been incurred. There is no remedy in the CSR for innocent landowners whose property values and health are threatened by migrating contaminants from adjacent contaminated sites.

This problem is of real concern throughout rural BC, where problems of leaking underground storage tanks from abandoned, or old, gasoline stations are

ubiquitous. In one particularly unfortunate situation in Salmo, a group of residents land was contaminated in this manner, albeit below the thresholds for human health risk, provided that the residents do not use their property (ie. one resident has been denied a permit to put a root cellar on his property because of the contamination). In this case, the residents have lost their businesses; they have suffered a substantial decrease in the value of their properties; they have been unable to obtain financing to restart their business because they cannot use their land as security; and they are unable to sell the land. A Ministry issued remediation order was the subject of a judicial review petition filed by the oil company, further delaying any prospect the residents had at cleaning up their land in order to recover the lost property value. In the meantime, some of the residents lives have been on hold, as they have no other means to make amends. In circumstances such as this, impecunious innocent landowners are unable to ensure that their interests are protected by the CSR.

Currently, the cost recovery action provisions are inadequate because they require parties to carry out remediation before recovering costs. This clearly is financially impossible for many citizens whose property values are eliminated by contamination from neighbouring gas stations or other sources. It is essential that government be able to intervene on behalf of these citizen who have no other recourse. It is also essential that the cost recovery action not be limited to those with sufficient financial resources to fund remediation; up front apportionment of liability and interim cost orders should be considered.

The cost recovery action provisions should be extended to provide that innocent landowners and affected parties are able to ensure timely clean up of contaminated sites; a set of conditions could be developed to ascertain when these clean up provisions would apply.

A further problem in this regard is that the CSR contains no requirement to consult with affected property owners when determinations are being made as to how to remediate a contaminated site. In the Salmo case, the residents had no formal input into this process, despite the fact that their lives and their property values are directly affected by whatever remediation decisions are taken with respect to the property.

Recommendation 6: Existing inoperational provisions of the current CSR, such as allocation panels, minor contributor status, and voluntary remediation agreements should be operationalized before fundamental reforms are considered.

These mechanisms were designed to encourage responsible parties to resolve liability issues and undertake cleanup without the need to commence a cost recovery action or other means of enforcing cleanup. These mechanisms have been underutilized to date, and while some of the problems have been identified, particularly through the CSIC process, no real effort has been made to make these provisions operational.

In particular, consideration should be given to strengthening the role and function of allocation panels. In our view, an independently appointed allocation panel that is capable of making a binding ruling with respect to liability would promote timely

cleanups. Some of the benefits of strengthening the role of an independent and binding allocation panel are:

- It would remove Ministry staff from the position of having to make internal judgment calls about liability issues, and allow the Ministry staff to focus on environmental protection and remediation;

- The creation of a specialized panel, similar to a specialized tribunal would allow for the development of a body of expertise around liability allocation issues, and the evolution of consistent criteria or regularly accepted practice that could be applied in resolving liability; and

- If need be, the decisions of these panels could be subjected to appeal, under circumstances determined by statute.

Further, if a binding, independent allocation panel was able to make orders regarding interim payments, it would allow a responsible party to proceed with remediation, and in particular would provide support to innocent landowners (see recommendation 5 above) as it would ensure that money would be available up front to enable remediation to occur.

Recommendation 7: Potentially responsible parties should be required to provide notice that a site may potentially be contaminated regardless of whether it is being subjected to the CSR.

In many situations it is possible for a company in possession of a contaminated site to "sit on" the site and ignore the CSR unless and until the company wishes to convey the property, at which time they will require an approval in principle or a certificate of compliance. In these circumstances, the notice provisions of the CSR will not apply. This problem should be remedied to provide that companies must give notice according to the CSR as soon as they are aware of contamination, not when they are seeking an approval in principle or a certificate of compliance.

Recommendation 8: A meaningful financial security requirement must be established to protect against orphaned sites and to provide incentive for clean up.

Financial security requirements should be strengthened to ensure that appropriate parties are held accountable for environmental remediation costs, and that such liability does not fall back on the public. The current CSR contains provisions to permit a manager to require financial security to cover remediation costs in certain circumstances. The purpose of this section is to ensure that ultimately, the public is not responsible for the costs of cleaning up a contaminated site, including future operation and maintenance costs.

Financial security is not a tax, nor is it an additional charge on a responsible party. Consistent with the polluter pays principle, security is a financial commitment that a party would have to pay as a result of its activity in any event. Requesting that a party pay this money up front is not unreasonable; indeed, if the responsible party successfully remediates the site, it will never even have to pay out this security.

As with commercial transactions, a lender, or person who may potentially be obliged to assume the costs for a particular risk (in this case, clean up costs for contamination), obtains security as a matter of course. The position of the Ministry is the same as that of a commercial lender or guarantor, in that if a site is not adequately remediated, it risks bearing ultimate responsibility for cleanup. It is entirely appropriate for the Ministry to impose security requirements to encourage private actors to take responsibility for the risks inherent in their activities.

The financial security provisions should be made mandatory in medium and high risk sites. Amounts of security should be adequate to cover long term operation and maintenance costs where “pump and treat” is the remediation option, or full remediation where feasible. Irrevocable letters of credit should be the preferred form of security, and should be obtained regularly from responsible parties to ensure that government is not exposing the public unnecessarily in the event that a polluter chooses to walk away from remediation obilgations under the CSR.

The posting of financial security provides a benefit to business and polluters as it enables the company to quantify its cost and declare it on its books, rather than having to carry it forward as a potentially large contingent liability. Further, the actual cost of posting security is minimal as it is not an out-of-pocket expense. In those circumstances where financial security is exercised, it will promote brownfield clean up and redevelopment of contaminated sites.

Recommendation 9: A funding mechanism should be established to address current and future orphaned and abandoned sites.

Abandoned sites in BC now amount to a significant unfunded liability, that ultimately falls upon the public. In some cases, the government has already assumed liability; sites such as Skeena Cellulose and the Expo lands in Vancouver are being remediated with taxpayers dollars. This funding mechanism should be developed with monies contributed by the polluters, or responsible parties, such as is the case with CERCLA in the US. It would ensure that the taxpayer is not exclusively bearing an additional burden for unforeseen cleanup expenses.

The notion of such a fund becomes particularly critical if any changes are made to the liability principles. In the absence of such a fund, even minor changes to the liability regime will add significantly to the public’s exposure to cleanup costs.

Recommendation 10: No changes should be made to the appeal mechanisms to the Environmental Appeal Board, including the standing provisions.

In the wake of staff and budget cuts among agency staff responsible for contaminated sites management, it is more important than ever to ensure that the appeal system to the Environmental Appeal Board (EAB) is efficient, fair and available to third parties, such as adjoining land owners and the interested public. Several years ago, the original standing provisions were narrowed so that only aggrieved persons, as opposed to any persons, could appeal a decision of a manager to the EAB. If the CSR is to ensure and promote accountability, it cannot tolerate any further changes to the standing provisions for the EAB.

Equally important is the time limit for commencing an appeal. This was reduced in 1997, and powers residing in the Director to extend the time limit where justified were taken away. The present time limit of 30 days is already tight for aggrieved persons to appeal a decision, and creates a particular problem given the already narrow notice requirements in the CSR.

Recommendation 11: Limitation periods must not be reduced.

Underground contamination is sometimes slow and insidious. Detection, proof of causation and remediation are expensive, and often beyond the ability of innocent third parties to deal with. It is also not uncommon for problems to re-emerge at sites that were thought to have been remediated.

The limitation period for causes of action arising from contamination need to be clearer, and need to recognize and allow for these factors. Given the above factors, there is probably justification for adding some contamination-related causes of action to the list of those that are not governed by a limitation period in section 3(4) of the *Limitations Act*. At a minimum, the limitation period for tort remedies and cost recovery actions should be extended to 6, instead of 2 years. Although a separate process, we would be concerned if the Civil Liability Review were to reduce any limitation period for related causes of action, including the ultimate limitation period in section 8(1)(c) of the *Limitation Act.*

Similarly, offence provisions are subject to limitation periods of only 6 months to 2 years, and are sometimes triggered upon sudden discharges or spills. These provisions need to be extended given that contaminants often take long periods of time to migrate.

Recommendation 12: Baseline regulatory functions must be maintained by government; the Ministry must indicate what it will not privatize or contract out in order to maintain environmental standards.

One of the mechanisms by which the Ministry has chosen to address the combination of budgetary cutbacks and requirement for regulatory oversight to ensure that public health and the environment are protected, has been the establishment of a Roster of Professional Experts, which perform basic regulatory tasks with regard to contaminated site remediation. These experts undertake reviews and make recommendations regarding the issuance of approvals in principle and certificates of compliance for some contaminated sites under the CSR.

While the Ministry retains an element of regulatory oversight, the responsibility for analyzing these sites is being undertaken by a private sector engineer, paid for by the company responsible for remediating the contaminated site.[27] We are concerned about pressure to extend this practice from low to moderate risk contaminated sites to higher risk sites and to more activities.

[27] *Protocol for Contaminated Sites – Independent Remediation for Low to Moderate Risk Sites: Extent manager may rely on statements by qualified professionals*, MWLAP 1999.

There are a number of concerns with this approach:

- Private sector contractors are not subject to the same levels of accountability as public employees. The current system contains no peer review.

- Currently, the responsible party and the contractor sign off on their own work. Indeed, there is no mechanism to prevent the same company from conducting the remediation and signing off on the approval in principle or certificate of compliance through the Roster of Professional Experts. This clearly gives rise to actual or perceived conflicts of interest. Even if there is no actual conflict, permitting a contractor in the same office to review the work of a colleague performing a regulatory function gives rise to a perception of conflict.

- There is virtually no oversight by the Ministry, and audits are only undertaken after the fact and in a limited number of cases. Thus it is virtually impossible for the Ministry to identify situations where the contractor is in a conflict of interest position, in order to maintain a good working relationship with the company.

- Private sector contractors do not have the same level of institutional background and experience as those in the public service charged with administering standards. There is no means by which to ensure that contractors develop consistent in-house expertise or institutional memory on company behaviour and field conditions in regional offices as is the case with in-house staff. Both of these elements are critical for effective and efficient public policy administration and should be valued and promoted.

- The accreditation process for these contractors has been problematic to date. In 1999, only 2 of 24 applicants passed the accreditation exam, and in early 2001, the Ministry took the drastic measure of removing one of the experts from the roster for substandard work. While this provides some reassurance that MWLAP is attempting to maintain rigorous standards, we have serious concerns that current pressure on the Ministry will result in these standards being lowered.[28]

- Any diminution of environmental standards, or further diminishment in auditing or enforcement capacity will result in greater public exposure in a context where there is already extensive reliance on private contractors.

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[28] See www.elp.gov.bc.ca/epd/epdpa/contam_sites/roster/ministry_release_of_exam.html for the results of the 1999 exam; the removal of one expert from the Roster was mentioned by Ron Driedger at a Canadian Bar Association meeting on May 8, 2001, in Vancouver.

The Ministry must indicate what it is not prepared to privatize or contract out. Government should indicate what it intends to continue doing, and must commit to no further allocation to rostered experts. In any situation where discretion is exercised where there is a risk to public health and the environment, that discretion should be exercised by public servants who are not subject to being captured by economic or other interests. In addition, the audit procedures currently in place should be strengthened to monitor, review and enforce the performance of these contractors.

Finally, questions of accountability and liability must to be considered before making any further moves toward privatization or contracting out. As was the case in Walkerton, Ontario, the apparent short term savings can translate into much higher long term costs and can be fatal. We question whether it is really more efficient and cost effective to have essential services delivered outside the public service.

Recommendation 13: No reduction of standards should be permitted.

The current standards that are incorporated into the CSR must not be diminished any further. Earlier this year, significant concern was generated in the Lower Mainland over a shipment of hazardous waste to Richmond for disposal. The disposal of this waste would have been illegal in the state in which it originated (Oregon), but was legal based on BC standards. Although the Richmond case stemmed from inadequacies in BC's Special Waste Regulation, we are extremely concerned that any diminution of standards under the CSR could only increase incidences of a similar nature in the future.

Recommendation 14: Resources need to be increased, and at a minimum, maintained to meaningfully deal with contaminated sites across the province.

Many of business' concerns regarding delay in issuing approvals in principle or certificates of compliance could be reduced by having more staff available implement the CSR. While business has drawn considerable attention to the few high risk sites that are extremely costly to remediate, and to the administrative burden of cleaning up low risk sites, we note that that these examples tend to be the exception not the rule. There are many medium to high risk sites that exist across the province for which the Ministry must maintain adequate staff and resources to ensure they are remediated. The need for resources includes not only staff to oversee the implementation of the CSR, but also to ensure that monitoring and compliance efforts are undertaken. Recently, the Ministry of Environment in Ontario added 65 additional compliance officers to address non-compliance issues.

Indeed, at one point there was discussion at CSIC about how the CSR system could potentially be crafted as a "break even" regime, whereby the money collected from fees and other services (the user pay portion) could, and perhaps should, be applied directly back to cover the administrative expenses of operating the regime, instead of having these fees being paid into central government revenues.

We make a number of additional recommendations below that can assist with strengthening compliance capacity.

Recommendation 15: Terminate the private prosecution stay policy.

Even though the CSR is primarily a civil liability regime, criminal prohibitions are an important part of it (see s. 54(20) of the *Waste Management Act*). Another means of achieving increased citizen participation is through direct enforcement action such as private prosecutions. The BC Ministry of the Attorney General has operated under a policy of taking over conduct of, and then "staying" private prosecutions must be ended. Its effect is to operate as a bar to citizen enforcement of the offence provisions of the *Waste Management Act*. Given that government initiated enforcement action is diminishing, as the field staff either no longer exist or face increasing workload pressures, our environment cannot be protected if no one has the capacity or ability to safeguard it. Interestingly, Ontario permits private prosecutions to proceed, despite years of government cutbacks and deregulation.

Recommendation 16: Pollution prevention, pollution abatement and remediation orders need to be enforced by the Ministry and should be filed as orders of the court to ensure enforcement can occur.

Currently, when the Ministry issues pollution prevention, pollution abatement, or remediation orders under the CSR, they are civil orders, and should the responsible party fail to meet the requirements of the order, the only way that the Ministry can pursue enforcement is through a prosecution.

These orders should be filed with the Supreme Court registry, thereby giving them the same effect as a court order. Then, any breach of an order would constitute contempt of court, and the Ministry could pursue a direct remedy without having to pursue a costly and protracted prosecution. This would ensure that ordered parties have incentive to fulfil the requirements of the order, thereby ensuring the public interest in environmental protection. This is especially true since the penalty for not carrying out a remediation order is low (maximum $200,000), and thus it may be less expensive for a responsible party to ignore an order than to fulfil it.

In any event, there is a need to ensure that the Ministry has the resources to enforce orders once they have been issued. In practice, an order is a last resort remedy, as it is recognized that the Ministry works with the responsible party to the extent possible in encouraging remediation independent of the order provisions; thus, when an order is issued, the Ministry must have the capacity to enforce it.

Recommendation 17: Brownfield redevelopment is an important issue that must be addressed by way of government policy and initiative.

A considerable amount of volunteer time was dedicated at the CSIC table to exploring mechanisms to encourage brownfield redevelopment. It is important that this work not be lost, and that serious consideration be given to promoting brownfield redevelopment. There are a number of mechanisms available, including tax incentives, revolving loan funds based on CERCLA, and the possibility of exit tickets for liability for those who redevelop brownfield lands. Proposals of this nature should be part of any recommended changes to the CSR.