LAW REFORM COMMISSION OF NOVA SCOTIA

Contaminated Sites in Nova Scotia

Final Report - December 2009

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The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act* to *Establish an Independent Law Reform Commission.*

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Law Reform Commission of Nova Scotia

To: The Honourable Ross Landry
Minister of Justice and Attorney General

In accordance with section 12(3) of the *Law Reform Commission Act,* we are pleased to present the Commissioner's Final Report, ***Contaminated Sites in Nova Scotia.***

Anthony Chapman, Q.C.
President

Justice Kevin Coady
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EXECUTIVE SUMMARY

A contaminated site is land with soil or water which contains unsafe levels of hazardous substances. The presence of those substances is often the result of longstanding industrial activity. Many contaminated sites can be safely cleaned up and put back into productive use.

The *Environment Act* is legislation which governs contaminated sites in Nova Scotia. Possessing a contaminated site is not unlawful in itself, and the *Act* imposes no requirement in general to investigate or report suspected contamination. When, however, contamination has caused, is causing, or may cause an "adverse effect," as defined under the *Act*, a landowner or other persons responsible will have obligations to satisfy under the legislation. The scope of persons potentially responsible for the clean-up of a contaminated site is quite broad.

The Minister's powers under the *Act* are wide-ranging. Among others, he or she may order a specified activity to stop and may require the clean-up of a site. The Minister may also designate a site as contaminated. Until 2006, the designation power (which has never been used) was the only means of identifying a contaminated site under the legislation. As a result of recent changes to the *Act*, it now provides for contamination in fact, in accordance with whatever standards have been adopted by the Minister.

A number of the Minister's powers have implications for liability (responsibility at law). For example, where multiple persons are responsible for the creation of contaminated sites, the Minister may determine and allocate clean-up costs among them. The Minister's authority to assign and apportion liability is subject to generalized factors which provide limited guidance and uncertain protection against disproportionate liability.

The legislation does not include compulsory and detailed guidelines with which to manage a contaminated site or deal with liability issues. In 1996, the Department adopted the Guidelines for Management of Contaminated Sites. The Guidelines include requirements about such subjects as notification of site contamination and the steps to be taken in site clean-up. The Guidelines do not take the form of legislation and as such, have no binding status in law. They enable contaminated sites to be managed in a voluntary fashion.

A landowner cleaning up a contaminated site will likely employ a site professional, a person who performs a variety of roles related to the identification, management, and remediation of contaminated land. Upon completion of a clean-up, a site professional, on behalf of the landowner, will typically present to the Department a certificate setting out the nature and extent of clean-up which has been completed. At the moment, the Department does not approve these certificates, and provides no indication of their effect in terms of fulfilling regulatory liabilities.

Fears of uncertain liability discourage landowners and developers from cleaning up contaminated sites. The lack of contaminated site clean-up means a risk of significant adverse consequences to human health and quality of life, as well as to environmental well-being. This also has economic costs, as potentially useful land lies underused or not used at all.

In January 2008, the Attorney General of Nova Scotia requested that the Law Reform Commission examine a number of issues pertaining to contaminated sites in Nova Scotia. The

Department's request was made in the furtherance of s.4(2)(m) of the *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c.7, which commits the Province to develop regulatory tools to stimulate redevelopment of contaminated land and contribute to economic development while protecting the environment, by the year 2010. A Discussion Paper was published in April of 2009, and written submissions received from a number of parties. This Final Report sets out the Commission's recommendations for the improvement of the current legislative regime, to promote the clean-up of contaminated sites while at the same time protecting human health and the environment. The most significant recommendations are as follows:

Recommendations:

1. New regulations should include a list of classes of persons who should not bear regulatory liability for contaminated sites. The list should be modeled on those in other jurisdictions, deriving from and more concretely applying CCME Principle 9.

2. Retrospective applicability of the *Environment Act* should be subject to new regulations, adopted pursuant to ss. 91(1)(d) and (b), providing a more certain application of the liability allocation factors in section 129(1) of the *Act* by exempting certain classes of persons from liability and creating a process to allocate liability amongst those responsible for the contamination.

3. The *Environment Act* should retain the potential application of joint and several liability, in the absence of consensual resolution of the allocation issues or a binding allocation decision as provided below.

4. An adjudicative process (not necessarily oral) should be available to determine the relative liability of one or more of the responsible persons. The Regulations would provide for an allocation tribunal to be constituted at the option of any one or more responsible persons, or the Minister. The tribunal's allocation would depend on the respective contribution of a party to contamination, and the CCME's principles of liability allocation more generally. Costs would be in the discretion of the panel. Decisions would be published. Review would be available on a correctness standard for questions of law and mixed law and fact.

5. New regulations under s. 91(1)(dh) of the *Act* should provide for the Minister to consent to be bound to agreements between private parties transferring liability for regulatory compliance.

6. Express consent from the Minister would be required for the agreement to be binding on the Minister, and the regulations should provide for a number of possible financial and other safeguards as a condition for such consent, depending on the circumstances, such as the use of bonds and disclosure of assets.

7. Upon completion of remediation according to the remedial action plan, and receipt of the site professional's undertaking to that effect, the government should be bound to issue a meaningful document to the responsible party, which:

    a. identifies the property in question and the nature and extent of the contamination which was dealt with;

b. describes the approved uses for the property according to the standards of the day, and the clean-up standards applied;

c. acknowledges that the relevant standards have been met, and releases the owner and successors in interest from current and future regulatory liability in relation to the remediated contamination.

8. The release would be subject to certain re-openers, such as fraud or material lack of disclosure, but not including a change in applicable standards applying to the same or equivalent category of land use.

9. The release would not bind the Minister as against any proponent of a redevelopment which involved a higher standard of land use.

10. The provincial government should be in a position to fund the clean-up of certain contaminated sites. In many cases one or more of the 'persons responsible' under the *Act* ought not to bear clean up costs, or may not be in a position to do so. Development of many contaminated sites simply will not proceed absent investment of public funds in site remediation, or the acceptance of risk that the public may have to bear such expense in the future.

11. The provincial government should examine the scope of contaminated sites and orphan sites in particular, in order to determine the type, amount and source of funding needed.

12. Funds might be sourced from industry levies or general revenues, and recoverable by way of liens or other enforceable security against lands which are remediated at public cost, the enforcement of which would be in the Minister's discretion. Surcharges on property transactions or fees for Ministerial certificates should not be used.

13. Government bodies acquiring land involuntarily, or by tax sale, ought to be subject to regulatory liability consistent with that of private owners. A limited exception would apply to contamination which is not currently causing harm to any party or serious environmental damage, and presents no reasonably foreseeable risk of doing so. The exemption would cease upon the property's sale or voluntary transfer, or when the government owner caused the property to be put into use for the government owner's own benefit.

14. A landowner, lessee, and any other party with an interest in the property, or any other responsible person, should be required to report any contamination exceeding legislative standards or guidelines, as of the time when the person knows or ought reasonably to know of such contamination.

15. After investigation and determination of contamination, notice of the contamination and all further records of remedial activity should be included in the environmental registry, for consultation by members of the public.

16. A notice of potential contamination, and any record of activity to confirm contamination, should not be included in the environmental registry.

17. The regulations should promote and provide opportunities for voluntary, informal, and effective solutions, backed by the prospect of compulsory action through ministerial order.

18. A site designation process should be retained in legislation. The Minister, or the person responsible, should be able to require the site designation process in advance of an order. Removal of the designation would be automatic upon completion of the remedial action plan.

CHAPTER 1: BACKGROUND

I INTRODUCTION

1) Industrialization

For more than two centuries, Nova Scotians have carried on industrial activities, including steelmaking, shipbuilding, and petro-chemical production. We extract and process mineral resources. We derive wood products from our forests. Our factories produce a variety of goods, including textiles, food products, and pharmaceuticals. Our industrial economy creates jobs and enables us to enjoy a high standard of living. Through the materials and products created through industrialization, we lead more comfortable, convenient, and enjoyable lives.

On the other hand, industrial processes may require the use of harmful substances, or may produce them. Allowing those substances to escape into the air, water, or soil, sometimes over the course of decades, can lead to serious negative consequences for human health and the environment. In 2002, the federal Commissioner of the Environment and Sustainable Development warned, "Exposure to high levels of hazardous substances through the contamination of water, soil, and air has been linked to various adverse health conditions...[including] cancer, respiratory illness, reproductive problems and birth defects, nervous system disorders, allergic reactions, hypersensitivity, and decreased resistance to disease."[1] In 2006, the British Columbia Ministry of Environment acknowledged the potential ecological harms posed by contamination:

> "... [E]ven if a site does not pose a threat to people, it can still be an environmental hazard. Soil, water, and sediment at a site may contain substances that can injure fish or mammals; impair the reproduction of birds; and accumulate in the food web. These effects can be severe enough to impair or cause imbalance in, ecological functions or systems."[2]

2) Nature of Contaminated Sites

As used in this report, a "contaminated site" means land with soil or water (ground or surface) which contains unsafe levels of hazardous substances ("contaminants").[3] Common contaminants

[1] Office of the Auditor General of Canada, Report of the Commissioner of the Environment and Sustainable Development, Chapter 2: The Legacy of Federal Contaminated Sites (Ottawa: Minister of Public Works and Government Services Canada, 2002) ("Report of the Commissioner of the Environment and Sustainable Development") at 5.

[2] British Columbia, Ministry of Environment, "An Introduction to Contaminated Sites in British Columbia" (January 2009), online:< www.env.gov.bc.ca/epd/remediation > "Fact Sheets" link, at 1 (date accessed: 29 January 2009) ("An Introduction to Contaminated Sites in British Columbia").

[3] Definition adapted from those in Christopher A. De Sousa, "Brownfields Redevelopment in Canadian Cities: Justifications and Directions" in Ahab Abdel-Aziz and Nathalie Chalifour, eds., *The Canadian Brownfields Manual* (Markham, Ont.: LexisNexis Canada Ltd., 2004) at 2-2 and "An Introduction to Contaminated Sites in British Columbia," *supra* note 1.

include petroleum hydrocarbons, heavy metals, and other chemicals.[4] Contamination sometimes occurs naturally, such as with arsenic in groundwater. More commonly, contamination results from the accidental or deliberate release of materials associated with industrial or commercial operations. Chemicals may spill during transfer, storage containers may leak, waste products may be buried. Contamination may also migrate from another property, often carried by groundwater flow. Contaminated soil may inadvertently be trucked from one property to another, for use as landfill.[5]

As science develops, we become more aware of the effects of long-term exposure to certain substances. An activity once perceived as safe may come to be recognized as having adverse consequences for humans or the environment. Polychlorinated biphenyls (PCBs), once used in electrical equipment, for example, are now generally considered to have harmful effects on human health and the environment.[6] With the passage of time and developments in technology, we may also recognize that certain materials are released into the environment in ways formerly unknown.

Contamination can vary significantly in terms of nature and extent, depending on historical usage and conditions at individual sites. The extent of contamination might range from the enormity of the Sydney Tar Ponds, with an estimated 700,000 tonnes of contaminated sediments,[7] to a single affected backyard, the result of a leaking residential oil tank.[8]

Contaminated sites constitute a serious concern throughout much of the country, including Nova Scotia. The exact number is not known, but in 1997 the National Roundtable on the Environment & the Economy estimated that there were 20,000 to 30,000 known or suspected contaminated sites in Canada.[9] In 2001, another source estimated Nova Scotia to have 1,000.[10] A 2007 report by the Environmental Careers Organization, extrapolating from statistics derived for Quebec, estimated that

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[4] Report of the Commissioner of the Environment and Sustainable Development*, supra* note 1. For a list of contaminants at federal government sites, see Report of the Commissioner of the Environment and Sustainable Development*, supra* note 1 at 34. For a recent media report involving site contamination, the proposed solution, and projected cost, see CBC News, "Military to Clean Up Arsenic at Dartmouth Site," online: <http://www.cbc.ca/canada/nova-scotia/story/2009/02/09/ns-arsenic-dartmouth.html.> (date accessed: 9 February 2009).

[5] *E.g., Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2006 NSSC 130.

[6] The Canadian Press, "Costs Soar by $583m in Dew Line Clean-Up" Chronicle Herald (22 December 2008) A4. Another example involves vermiculite, a popular form of attic insulation, used for six decades. In some instances, vermiculite contains asbestos, which has been linked to cancer. See Kelly Shiers, "N.S. May Take Action to Recover Asbestos Cash" Chronicle Herald (15 January 2009) B5.

[7] *Supra* note 1 at 11.

[8] Small amounts of contamination can still create serious problems. For example, dealing with the consequences of a relatively minor spill of fuel oil from a residential storage tank can be very expensive. See *Sheridan v. Rickey Beals Heating*, 2008 NSSC 311; *Pracz v. Nova Scotia (Minister of Environment & Labour)*, 2004 NSSC 61.

[9] National Roundtable on the Environment & the Economy, *Removing Barriers: Redeveloping Contaminated Lands for Housing* (Ottawa: National Round Table on the Environment and the Economy, Canada Mortgage & Housing Corporation, 1997), cited in DeSousa, *supra* note 3 at 2-3 to 2-4.

[10] C. De Sousa "Contaminated Sites Management: The Canadian Situation in International Context," (2001) 62 *J. Env. Management* 131 at 133, cited in DeSousa, *supra* note 3. at 2-4.

Nova Scotia may have 1,730 contaminated sites.[11] The federal government recently estimated that the land under its jurisdiction includes almost 20,000 confirmed or suspected contaminated sites across Canada, including 1,545 in Nova Scotia.[12] The discrepancies indicate the lack of reliable data, but in no way diminish the evident significance and pervasiveness of the problem.

In many cases, contaminated sites can be cleaned up or otherwise managed ("remediated") to comply with accepted standards and permit re-development. Remediation to one standard might permit the site to be used once again by industry, while remediation to a higher standard might allow the property to be developed for residential purposes. Until remediation occurs, though, contaminated sites cannot safely be used to their full potential, if at all. The unused sites may remain a danger to human health and the environment, or present potential problems in other respects. In British Columbia, for instance, gasoline has leaked from underground tanks, corroding wire insulation and causing short circuits in street lighting.[13]

Brownfields

Brownfields are a subset of contaminated sites, where contamination or perceived contamination results in underutilization. The National Roundtable describes them as, "abandoned, vacant, derelict or underutilized commercial or industrial property where past actions have resulted in actual or perceived contamination and where there is an active potential for re-development."[14] They have also been described as, "real property, the redevelopment of which is prevented, delayed or hindered because of the presence or potential presence of hazardous or potentially hazardous substances on or in the real property."[15]

In many instances, brownfields occupy prime urban space, near waterways, railways, or other transportation networks. Such sites afforded easy access to raw materials shipped by rail or water, and the necessary labour from populated urban centres.[16]

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[11] Environmental Careers Organization (EcoCanada), *Who Will Do the Clean Up? Canadian Labour Requirements for Remediation and Reclamation of Contaminated Sites 2006 - 2009* (Calgary: EcoCanada, 2007) at 30.

[12] Treasury Board of Canada Secretariat, "Federal Contaminated Sites Inventory," online: <http://www.tbs-sct.gc.ca/fcsi-rscf/> (date accessed: 4 Nov 2009).

[13] British Columbia, Ministry of Environment, "Why Clean Up Contaminated Sites?" (August, 2005), online: <www.env.gov.bc.ca/epd/remediation> "Fact Sheets" link, at 1 (date accessed: 13 January, 2009).

[14] The National Round Table on the Environment and the Economy (NRTEE), *Cleaning Up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (Ottawa: NRTEE, 2003) at A-3.

[15] Bernie Miller, "Legal Developments in Atlantic Canada with Respect to Brownfields Development" in Abdel-Aziz and Chalifour *supra* note 3 at 12-301.

[16] For example, the former location of the Canadian National Railway repair shops in Moncton, some 285 acres in size, was contaminated by numerous industrial substances. Following three years of work and the expenditure of $15 million, the site was successfully remediated and now has business, recreational, and residential uses. See *ibid.* at A-6; Canada Mortgage and Housing Corporation (CMHC), *Brownfield Redevelopment for Housing, Case Studies, Brownfield Initiatives: The Atlantic - Based Risk Corrective Action (RBCA) Process*, available online, through the "Brownfield Redevelopment for Housing in Canada - Case Studies" link at <http://www.cmhc.ca/en/inpr/su/sucopl/sucopl_004.cfm > (date accessed 11 February 2009).

In addition to posing a potential risk to human health and the environment, there are a number of direct and indirect disadvantages associated with unremediated brownfields. They often constitute an eyesore. Developers, wary of potential liability, will be inclined to use undeveloped land for new industrial, commercial and residential development. Not only does this entail the loss of undeveloped greenspace, but municipalities may have to provide expensive new infrastructure, such as roads, to service those newly developed sites. The unused lands represent lost tax revenue.

The National Round Table on the Environment and the Economy (NRTEE), organized by the federal government, has classified brownfields into three levels, based on potential for redevelopment. At the top level, in 15% to 20% of instances, a site's market value is much more than its projected clean-up costs. Finding buyers for these sites is generally not difficult. At the bottom level, another 15% to 20% of cases, are sites for which the cost of remediation will greatly exceed post-clean-up value. Demand to purchase and redevelop these properties tends to be low. In the middle, one finds the largest number of brownfield sites, between 60% and 70% of the total. It is estimated that land values after remediation at this level will be slightly above or below the cost of purchasing a brownfield and completing its clean-up.[17] The majority of brownfield sites, therefore, represent opportunities for the development of profitable enterprise.

If brownfields tend to occupy such prime locations, and in many cases, show good potential for re-development, why do they remain idle or underused? One answer is the prospect of uncertain liability for the remediation of such sites. In many cases it is not clear who is required to pay the costs of remediation, and to what extent.

4) Liability Issues

The longstanding nature of industrial activity at many contaminated sites can make liability a difficult question. It may not be possible to identify or locate the person or company responsible for contamination. In some cases, successive activities may have contributed to a site's contamination. Even if a responsible party can be found, that person or company may not have the financial means to pay for its share of clean-up costs.

Resolving the issue of who is responsible at law for contamination, and to what extent, may require answers to a number of questions:

1. How should liability be divided among multiple contributors to contamination?

2. If a responsible party cannot be found or cannot pay, what are the consequences?

3. Should the Government, though not responsible for contamination, ever pay for the clean-up of a contaminated site?

4. How far back in time or into the future will a person's potential liability extend?

[17] NRTEE, *Cleaning Up the Past*, supra note 14 at 5-6.

5. If a person made reasonable efforts ("due diligence") to avoid contamination, should this be taken into account?

6. Should someone, such as a landowner, who is connected to a property but who did not cause its contamination, be required to pay for its remediation? Does the answer depend on the availability of insurance?

7. Against what standard should the remediation be assessed?

8. What is the effect of changing standards on sites that have been remediated to the previous standard?

The answers to such questions clarify the costs of any potential redevelopment. Unfortunately, those answers remain unclear in many cases. The risks associated with such uncertainty may ward off investment in a contaminated site. Investors may be deterred from reopening a mine site, for example, by the prospect of potential liability for full clean up of past contamination. Prospective purchasers, developers, builders, and tenants, as well as financial institutions and units of government, may have similar concerns about re-developing any area where the existence of contamination is known or suspected.

5) Origin of this Project

On January 31, 2008, the Attorney General of Nova Scotia, following a request from the then-Nova Scotia Department of Environment and Labour,[18] sought the advice of the Law Reform Commission with respect to a number of issues relating to contaminated sites. The Department's request was made in the furtherance of s.4(2)(m) of the *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c.7, which commits the Province to develop regulatory tools to stimulate redevelopment of contaminated land and contribute to economic development while protecting the environment, by the year 2010.

Through the Attorney General, the Department asked the Commission to consider the following:

1. regulatory liability - who will be responsible, as a result of legislation (statutes and regulations), for a contaminated site after clean-up, and whether regulatory liability could be transferred;

2. notification requirements and criteria for departmental involvement - who is required, and under what circumstances, to inform the Department about a suspected or known contaminated site, and under what circumstances will the Department require action in relation to a contaminated site;

3. qualifications and insurance needs for site professionals - people whose work involves testing, monitoring, remediating and certifying the clean-up of contaminated sites; and

[18] Now simply Nova Scotia Environment.

4. the effect of changing standards - who will be required to pay for clean-up in the event that environmental standards change in the future.[19]

The Commission examined legislation, case law, and environmental standards and regulatory practices pertaining to contaminated sites in Nova Scotia, as well as comparative information from other provinces. The Commission convened an advisory group, comprising people with expertise in matters relating to contaminated sites, and held several meetings with officials from the Environment Department, the Department of Health and the Halifax Regional Municipality. In addition, a number of governmental authorities and other interested parties from Nova Scotia and beyond were consulted on specific issues dealt with herein.

The Commission published a Discussion Paper in April of 2009, which was disseminated widely among environmental practitioners and site remediation specialists, various government offices and other public bodies, the insurance and finance industries, and environmental organizations, as well as being made available generally to the public. The Commission received written submissions from a number of interested parties.

Having taken into account comments received to date and the results of our research and consultations, the Commission has prepared this Final Report.

6) Domestic Fuel Oil Spills

This Report does not address in any detail the specific liability issues that arise in relation to domestic fuel oil spills. Such spills involve many of the same issues of regulatory liability and environmental administration generally, but are distinct in a number of respects.

In recent years, government and the insurance industry have worked to reduce the number of residential fuel oil spills in the province. These measures have included restrictions in insurance contracts (though not in legislation) about the age of storage tanks, higher limits on how much oil can be left behind after a spill, and better publicity about storage tanks and related equipment.[20] Nonetheless, given the scope of clean-up efforts generally required, the consequences of a domestic fuel oil spill may be financially devastating and psychologically distressing.

The problems of domestic fuel oil spills give rise to specific policy questions which are outside the scope of this Report, and which are best left for government to decide. Should government set out legal requirements governing the manufacture, installation, and maximum age of storage tanks and related equipment? Should homeowners and/or fuel oil companies be required by law to carry insurance to

[19] The full text of the Terms of Reference as issued by the Attorney General is at Appendix A.

[20] Stephen Bornais, "Province Makes Oil Spills Easier to Clean Up After" *The Daily News* (2 December 2005)7; Michael Freill, "What You Need to Know about Your Heating Oil Storage System but Were Afraid to Ask!" *The Chronicle Herald* (16 October 2004) H2; [Nova Scotia] Environment and Labour, Homeowners Guide to Heating Oil Tank Systems, available online, at the Department of Environment's website: <www.gov.ns.ca/nse/petroleum/docs/OilTankGuide.pdf> (date accessed: 3 April 2009). Unlike Newfoundland and Labrador (N.L.R. 60/03) and Prince Edward Island (P.E.I. Reg. EC322/01), Nova Scotia does not have regulations in place to govern domestic fuel oil storage tanks.

deal with the consequences of a domestic fuel oil spill, and if so, what types of situations would it cover? If compulsory coverage is seen as a good idea, should there be a minimum level? Is such insurance available to homeowners and/or oil suppliers at affordable rates?

This Report does deal with domestic fuel oil spills, to the extent that a generalized regulatory liability regime for contaminated sites may apply to them, but any generalized regulatory regime must acknowledge the need for distinctive policy approaches to the liability of innocent homeowners, and the practice of remediating such spills.

II THE APPROACH IN NOVA SCOTIA

1) The First Environmental Statute

Nova Scotia's first statute involving the environment as a whole was the 1973 *Environmental Protection Act*.[21] It did not deal specifically with contaminated sites. Instead, its focus in terms of contamination was on dealing with the inappropriate release of harmful or hazardous substances into the environment. However, some of its language was broad enough to cover contaminated sites. For example, s. 26(1)(b) gave the Minister the authority to take all steps necessary to repair any injury or damage where it was in the public interest to do so. Another example was s. 54, which provided that if a person caused pollution due to the failure to comply with the *Act*, or through some else's negligence (lack of care), the Minister could take action to remedy the pollution and sue to recover the costs of such remedial action, or seek damages if the pollution could not be remedied effectively.[22]

2) Influence of the CCME Principles

During the late 1980s and early 1990s, governments across Canada recognized contaminated land as a significant problem. Following encouragement from government and business, the Canadian Council of Ministers of the Environment (CCME) formed a national task force, comprising a core group[23] and a broader advisory group, to examine the remediation of contaminated sites, including responsibility for their clean-up.

The task force focused on remediation of existing contaminated sites. In 1993, it issued a report which identified 13 principles which have become very influential in Canadian environmental legislation. These principles, as updated in 2006, are summarized at attached Appendix B. Individual principles will be discussed at various points where relevant in this Report. By way of introduction, it will be helpful to identify the main thrust at this point.

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[21] S.N.S. 1973, c. 6.

[22] The term "pollution" was defined in the Act at section 2(h) as acts or omissions that cause "a detrimental alteration or variation of the physical, chemical, biological or aesthetic properties of the environment."

[23] The core group comprised governmental representatives from Nova Scotia, Ontario, Canada (federal government), Manitoba and Alberta, plus five stakeholder organizations (Canadian Bankers Association, Canadian Environmental Law Association, Canadian Chemical Producers Association, West Coast Environmental Law Association, and Canadian Petroleum Products Institute).

The 1993 CCME report set out the over-riding nature of the "polluter pays" principle. This means that as far as possible, people who cause pollution should be required to pay the cost of cleaning it up. The CCME principles also emphasize fairness. They cast a broad net for potential liability, while recognizing at the same time that it may not be fair to impose liability on certain parties, such as financial lenders, who had involvement with a site, but not with its contamination. The CCME principles support "sustainable development," which acknowledges that the needs of both the environment and the economy must be taken into account. The principles discourage litigation and emphasize that determining civil liability should depend on particular circumstances. Unless it created a problem, the CCME principles suggest, government should not have to pay for clean-up of a contaminated site. In addition, if a person is responsible for contamination, but cleans it up in accordance with accepted standards, he or she should be able to obtain a certificate from government, attesting that the remediation has been completed.

Guided by the CCME principles, the provinces and territories created legislation which in varying degrees addressed such matters as the investigation and identification of contaminated sites, the determination of persons responsible for remediation, the development of remediation plans, the allocation of liability, and the sharing of remediation costs. More precisely, by 2004 five jurisdictions (Nova Scotia, Alberta, British Columbia, Manitoba and the Yukon) had incorporated most of the 13 principles into their legislation relating to contaminated sites. Two jurisdictions (Ontario and Quebec) had incorporated about half of the principles, with the remaining Canadian jurisdictions opting for only a few.[24]

3) The Current *Environment Act*

In addition to reflecting the CCME principles, Nova Scotia's current *Environment Act,* [25] adopted in 1995, consolidated a large number of statutes, some dating to the early twentieth century.[26] The goal was to locate in one statute as many provisions relating to the environment as possible.

a) Release Provisions

For most of the *Environment Act's* history, a distinction existed between contaminated sites as so designated under the *Act* and those existing in fact. This resulted in two potential ways of dealing with contaminated sites. Until 2006, a ministerial order was required to declare ("designate") a property to be a Acontaminated site," thereby making the site formally subject to the contaminated sites provisions in Part VIII of the *Act*. Absent designation, those sections of the *Act* dealing with the adverse effects of releases into the environment, as well as the general compliance and enforcement provisions, applied. Those provisions still apply, although changes to the *Act* in 2006, discussed below, may bring the specific contaminated sites provisions into wider use.

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[24] See Environmental Law Centre (for Alberta Environment), A Review of Regulatory Approaches to Contaminated Site Management (Edmonton: Alberta Environment, 2004) at v-vi of Executive Summary. The extent of the principles' application varies among individual jurisdictions. The report is available online through the "Information" link at Alberta Environment, <http://environment.alberta.ca> (date accessed: 27 January 2009).

[25] S.N.S. 1994 - 95, c.1.

[26] J. Marshall Burgess, "Contaminated Sites: The Issues" (Paper presented to the Canadian Bar Association, National Issues in Environmental Law Conference)(22 October 1993, Halifax, NS)[unpublished] at 2.

Section 67 of the *Act* prohibits adverse releases into the environment:

> "67(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause an adverse effect, unless authorized by an approval or the regulations."

The "person responsible" for an adverse substance's release is required to report it once that person knows or ought to know about it.[27] The *Act* gives the term "person responsible" a broad meaning, to include the owner of a substance or thing, as well as any previous owners, including anyone who has had care, management, or control of the substance.[28] The owner or occupier of the land upon which the release occurred is included. Among others, a successor, assignee, executor, receiver, or agent of a "person responsible" will share that designation under the statute.

If that person voluntarily reports details of the extent of the release, as obtained by proper testing (through an environmental audit or environmental site assessment),[29] and complies with the terms of any agreement negotiated with the Minister, no prosecution will ensue over the release.[30]

The release can be the result, among others, of the generation, manufacture, treatment, sale, handling, distribution, use, storage, disposal, transportation, display or some application of a substance or thing.

The *Act* further provides that the persons responsible for the release should take all reasonable measures to prevent, reduce, and remedy the adverse effects of the substance, as well as rehabilitate the environment to a standard prescribed by the Department.[31]

Section 125 - dealing with the Minister's order making powers under the *Act* in general - provides the Minister with a large number of wide-ranging powers. Specific to releases, the Minister may order a specified activity to stop, may order a release to stop, and may order the clean-up of a site. Further to s. 126, in situations when the Minister believes there is a likelihood of an irreparable, adverse effect, he or she can order that an operation or activity be shut down.[32]

The *Act*'s release provisions were meant to apply only to new or contemporaneous polluting activities and therefore were not designed to deal with existing contamination caused by the earlier activities of owners, occupiers or other persons in control of the property. In other words, the release provisions were not created with longstanding or historical contamination in mind.

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[27] *Environment Act*, *supra* note 25 at s. 69(1).

[28] *Ibid* at s. 3(ak). A similarly broad definition applies to the concept of a person responsible for a contaminated site.

[29] Both terms involve investigations into the presence of contaminants. An environmental audit is a preliminary overview. An environmental site assessment is more thorough, being meant to identify the nature and extent of contaminants. See Canadian Council of Ministers of the Environment (CCME), *Guidance Document on the Management of Contaminated Sites in Canada* (Winnipeg: CCME, 1997) at 13-14.

[30] *Supra* note 25 at s. 70(1).

[31] *Ibid.* at s. 71.

[32] *Ibid.* at s. 126.

b) Contaminated Sites Provisions

Part VIII of the *Act*, which has only six sections, specifically addresses contaminated sites, including historical contamination.[33] In general, these sections contemplate a process whereby a site may be designated as contaminated, and then a variety of voluntary processes may ensue to determine the necessary clean up or management actions, and apportion liability. If the voluntary processes are not successful, the Minister retains the ability to impose an order on one or more responsible persons to clean up or otherwise deal with the contamination.

Section 87(1) allows the Minister to designate a property as a contaminated site if he or she is of the opinion that a substance that may cause, is causing, or has caused an adverse effect upon the environment is present on the site.

Until December 2006, the *Act* defined a contaminated site as a property so designated by the Minister, and the provisions of Part VIII applied only to such sites. The Minister's power to designate a site as contaminated has never been applied.[34] Instead, the province relied on other sections of the *Act* that give the Minister general authority to issue orders directly to those who fall within the broad definition of "person responsible" for contamination, discussed in the preceding section.

As a result of changes made to the definition of contaminated sites in 2006, any site "with concentrations of a contaminant or contaminants that exceed standards prescribed or adopted by the Minister that has caused, is causing, or may cause an adverse effect" is also now a contaminated site, without the need for ministerial designation.[35] Rather than depending on a ministerial designation, this new definition makes the existence of a contaminated site a matter of fact. Practically speaking, this means that the procedures under the *Act* and any regulations specific to contaminated sites may be binding, without the need for a formal designation.

Section 3(c) provides "adverse effect" with a broad definition, namely "an effect that impairs or damages the environment, including...the health of humans or the reasonable enjoyment of life or property." The term "environment" is also wide-ranging. Defined at s. 3(r) as "the components of the earth," it includes, among others, air, land, water, layers of the atmosphere, organic and inorganic matter, and living organisms.

Possessing a contaminated site is not unlawful in itself, and the *Act* imposes no requirement in general to investigate or report suspected contamination, aside from the release provisions discussed in the

[33] *Ibid.* at ss. 85-91.

[34] In 2000, a report published by the Department stated that since the adoption of the Act in 1995, the Minister had not designated any contaminated sites in the province. See Nova Scotia Department of the Environment, *Nova Scotia's Environment Act, Legislative Review Process, 2000* ([S.l.]: The Department, 2000) at 21. Since 2000, no ministerial designations have occurred.

[35] *Supra* note 25 at s.3(l), as amended by S.N.S. 2006, c.30, s. 2. In 2000, a committee set up to study the *Environmental Act* recommended that "contaminated site" should be more precisely defined, based on specific scientific criteria. See Nova Scotia Department of the Environment, *Nova Scotia's Environment Act, Legislative Review Process*, *supra* note 34 at 21.

previous section.[36] Although amendments enacted in 2006 authorize the Minister to develop regulations respecting the identification and notification of the discovery of contaminated sites, none have been created to date.

Section 85 states that Part VIII of the *Act* applies regardless of when the site became contaminated. Moreover, s.87(3) allows a site to be designated even though at the time the contamination occurred, the act that caused it was in accordance with the *Act* or any other prior law, the release of the offending substance was not prohibited by the *Act*, and even if the contamination originated off-site.

Section 87(2) requires the Minister to follow departmentally established standards, criteria, and guidelines before designating a contaminated site. To date, the Department has only adopted the "Guidelines for Management of Contaminated Sites" of 1996.[37] The Guidelines are not connected to site designation and contain no criteria to guide the Minister's decision about whether to designate a site.

The Guidelines do not take the form of legislation and as such, have no binding status in law.[38] Rather, they enable contaminated sites to be managed in a voluntary fashion. Complying with the Guidelines will spare a landowner from having to follow the process that would otherwise follow designation under the *Act,* or the imposition of a ministerial order. The Guidelines include directions on how to approach notification about a contaminated site, what actions must be taken, the role of the government regulator, alternatives to litigation in the event of disputes, the determination of remediation standards, the qualifications for site professionals, and the content of "compliance certificates," issued by site professionals to the Department in order to confirm that remediation has been completed. The self-described purpose of the Guidelines emphasizes appropriate, cost-effective, and consistent management of contaminated sites, as well as protection of the public interest. A pillar of this approach is to make "site owners assume responsibility to the maximum extent possible,"[39] regardless of whether they caused or contributed to the contamination.

The designation procedure in the *Act* - again, unused to date - entails a certain dialogue before designation is confirmed. Under section 88, once the Minister makes a preliminary determination that a site is contaminated, he or she must give notice in writing to a number of parties (any 'person responsible' for the contaminated sites, any registered owner of real property affected by the designation, and the municipality where the contaminated site is located). Before the Minister makes a final decision about whether a site is contaminated, along with required reasons, those parties are given an opportunity to comment on the preliminary designation.[40] If designation does occur, the notice to that effect must be registered in an environmental registry, which the Minister is required to set up further to s. 10.

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[36] Robert G. Grant and Meinhard Doelle, "Nova Scotia" in Leonard J. Griffiths, ed., *Contaminated Property in Canada*, (Scarborough, Ontario: Carswell, 1996) at 9-19; Nova Scotia Department of the Environment, *Nova Scotia's Environment Act, Legislative Review Process*, *supra* note 34 at 23.

[37] Nova Scotia, Environment and Labour, "Guidelines for Management of Contaminated Sites in Nova Scotia" (27 March 1996) [unpublished] ("Guidelines").

[38] *Fairmount Developments Inc. v Nova Scotia (Minister of Environment & Labour),* 2004 NSSC 126 at paras. 39-40.

[39] Guidelines, *supra* note 37 at 1.

[40] *Environment Act, supra* note 25 at s. 88.

Section 89 of the *Act* provides that the person responsible for the contaminated site, whether designated or not, may prepare a remedial action plan for the Minister's approval and enter into an agreement, with the Minister and any other parties deemed responsible for the contaminated site, which provides for sharing or apportionment of remediation costs. If the parties cannot agree on the remediation plan or the related costs, or if the Minister rejects the agreement as inappropriate, the Minister can refer the matter to alternate dispute resolution (ADR). ADR, which generally takes the form of mediation or arbitration, is used as a substitute for litigation. It is meant to be quicker, cheaper, and less adversarial than going to court. If the Minister thinks that ADR is inappropriate or if it is unsuccessful, he or she can impose a ministerial order.

The Minister may impose a variety of provisions in a ministerial order. These are set out at section 125 of the *Act*. For example, pursuant to 125(1)(h), a responsible person may be required to "carry out clean-up, site rehabilitation or management." Section 132(2) of the *Act* provides that if the party does not comply with the order, the Minister can take whatever action is required to carry out its terms and can recover reasonable amounts involved in so doing.

Section 129 lists a number of factors which shall guide the Minister in making an order under section 125, Aif such information is available or accessible." These factors derive from the CCME's Principle 12, concerning the allocation of liability for contaminated site remediation. The list includes whether the substance was present at the site when the person responsible became owner, occupier, or operator, and whether that person knew or ought to have known of the presence of the offending substance. Other factors include whether the presence of the substance was caused solely by the act or omission of an independent third party over whom the person responsible had no control, and the economic benefits, such as a lower purchase price, which the person responsible might have received because of the property's contaminated condition. The Minister is required to consider such factors in making an order assigning liability for site remediation.

Importantly, however, the *Act* does not define how such factors are to guide the Minister's decision, and dictates no procedural requirements before the decision is made. Section 129 therefore only slightly reduces the uncertainty of liability for site clean up, and offers very limited protection against an arbitrary assignment of liability. A court is not in a position to set aside a minister's order against any given party who may be named, simply because of that party's lack of involvement in the contamination, for example.

Section 90(e) of the *Act* gives the Minister authority to create lists of persons or classes of persons who are not responsible for rehabilitation at a contaminated site, and s.91(b) empowers the provincial Cabinet to make regulations designating persons or classes of persons who are not persons responsible for contaminated sites.[41] No such list or regulations have been enacted.

Section 134 provides that if more than one person is named in a ministerial order, all persons named in the order are "jointly and severally responsible" for payment of the costs of carrying out that order. In practice, this means that any one of the parties named in a remediation order could be liable for the

[41] Such lists, whether by regulation or otherwise, have not to our knowledge been created.

entire costs of clean up. From the perspective of government, joint and several liability is efficient. It need only pursue one responsible person and need not become involved in sorting out relative levels of responsibility between multiple parties. From the point of view of a potential purchaser/redeveloper, the concept increases the uncertainty about the extent of liability he or she may ultimately bear.

The *Act* makes no provision for the closure of regulatory liability, notwithstanding that the property has been remediated. In practice, the site professional responsible for the remediation delivers a "certificate of compliance", which the 1996 Guidelines define as "[a] certificate provided to [the Department] in a prescribed format confirming that the guideline has been followed and that the remedial objectives have been met." These certificates offer no protection *vis-a-vis* the government in terms of demonstrating that regulatory liability has been fulfilled, however:

> "While the Department of Environment ...has adopted standards for remediation of contaminated sites . . . there is no statutory process for 'regulatory approval' of remediation. This is commonly misunderstood because there are non-regulatory guidelines in place for the management of contaminated sites. However, under the current legislative framework the Department of Environment... does not give binding, irreversible approvals of remediation, notwithstanding the acceptance of a [certificate of compliance] under the *Guidelines*."[42]

Prior to 2006 the *Act* authorized the Minister to require such certificates of compliance but gave them no legal force. Now they are not even mentioned. Although amendments enacted in 2006 authorize the provincial Cabinet to make regulations "respecting the regulatory liability of persons responsible for the contaminated site following the completion of remediation and site closure . . .," none have ensued.

A ministerial order may be appealed to the Nova Scotia Supreme Court, pursuant to section 138 of the *Act*. In other words, a person who disputes the identification of a site as contaminated, or the remedial measures ordered, or the assignment of liability for the costs of that remediation, must incur the expense and inconvenience of initiating a court action. The Court's supervisory jurisdiction on such an appeal is limited; it cannot order what it thinks is fair or just. Rather, the court is bound to defer to the Minister's decision to a large extent; it can only correct a clear and obvious error in the Minister's decision itself,[43] or a significant unfairness in the manner in which it is reached.[44]

4) Risk-Based Corrective Action (RBCA) - Petroleum Contamination

In addition to the 1996 Guidelines, two other non-binding government policies or directives are applied in conjunction with the legislation. These are Risk-Based Corrective Action (RBCA - colloquially referred to as "Rebecca") and the Domestic Fuel Oil Spill Policy.

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[42] Miller, *supra* note 15 at 12-306.

[43] *Pracz v. Nova Scotia (Minister of Environment & Labour)*, 2004 NSSC 61 [*Pracz*], at paras. 21-47; *Pinsonnault-Flinn v Nova Scotia (Minister of Environment & Labour)*, 2004 NSSC 206 at paras. 63-66, 76-77, 79-81: the Minister's assignment of regulatory liability under the *Act* is subject to review by the courts only if 'patently unreasonable'. See generally *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, doing away with the concept of 'patent unreasonableness' and limiting deferential review to a more flexible 'reasonableness' standard.

[44] *Cie pétrolière Impériale ltée c. Québec (Tribunal administratif)*, 2003 SCC 58; *Pracz, supra*, note 43 at paras. 51-57. See generally *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.

In Atlantic Canada, most contaminated sites identified to date have involved petroleum pollution. In April 1999, the four Atlantic Provinces devised RBCA for the management of petroleum hydro-carbon contaminated sites in both soil and groundwater.[45] With origins in the United States, RBCA takes the form of both a philosophical approach and specialized software for assessing risks of contamination in a variety of scenarios. It reflects the perspective that land showing signs of contamination need not be made pristine in order to become usable again. Rather, the extent of remediation required depends on what level of associated risk would be appropriate for people and the environment. This is known as a "risk-based approach." RBCA is meant to supplement, rather than replace, contaminated sites guidelines in the respective provinces.

The RBCA program and tools are administered on a collaborative basis by the Atlantic Partnership on RBCA Implementation (PIRI),[46] comprising representatives of stakeholders connected with the petroleum industry.

Under the RBCA approach, rather than simply applying numerical criteria for permissible contamination to all properties, varying characteristics of the contaminated site are taken into account in assessing risk and determining the appropriate criteria for that site. RBCA considers two generic land uses - residential and commercial, and three types of hydro-carbons - gasoline, diesel/fuel oil, and heavy oil.

Once site details are compiled, they are assessed, using computer software, against established standards. This provides direction about what type of remediation is needed. RBCA involves three levels (tiers) of site evaluation. Tier I uses generic standards, or numerical criteria, which can be applied to any type of property. If those standards are exceeded, one refers to the standards at tiers II and III, which are "site specific," calculated with the conditions of a particular property in mind.

The 2006 legislative amendments amended s. 90(c) of the *Act* by authorizing the Minister to "adopt or establish standards, policies, guidelines, procedures or protocols, including risk based assessment and management models and tools, for the assessment, rehabilitation or management of contaminated sites." This provision (which has not yet been applied) would enable procedures or protocols, such as RBCA, to be given the force of law in the form of regulations and therefore clarify what is legally required regarding remediation of sites.

5) Domestic Fuel Oil Spill Policy

A petroleum spill is considered to be a release of a contaminant under the *Act*. To provide guidance to domestic fuel oil users in Nova Scotia, the Department applies a policy document about the remediation of domestic oil spills, including their assessment, remediation, and reporting.[47] A domestic fuel oil spill

[45] Dufferin R. Harper and Sean Foreman, "Statutory Obligations - Contaminated Sites and Brownfields in Atlantic Canada" (Paper presented to the Canadian Bar Association's National Environmental Law CLE Conference, "Contaminated Properties and the Redevelopment of Brownfield Sites" (Toronto, 2002) [hereinafter National Environmental Law Conference 2002] [unpublished] at 6-8.

[46] For more information on RBCA and PIRI, see the latter's website at < www.atlanticrbca.com.>.

[47] Nova Scotia, Department of Environment and Labour, "Domestic Fuel Oil Spill Policy" (2005) [unpublished]. The document is accessible online, through the "Contaminated Sites" link at the Department's website: <http://gov.ns.ca/nse/contaminatedsites/docs/DomesticFuelOilSpillPolicy.pdf> (date accessed: 26 February 2009).

is defined by the policy as "the release of fuel oil on a residential land use property with three or less units, from a petroleum storage tank with a capacity of less than or equal to 500 imperial gallons (2270 liters)."[48] The "person responsible" for a fuel oil spill is defined broadly, in keeping with the *Act*'s approach. It could include, for example, current and previous owners of a site, a person acting for the owner, and any person the Minister thinks has caused or contributed to the spill.

The policy provides remedial criteria, set out in numerical tables, to be applied to all releases from domestic oil spill sites. Offsite effects from a domestic fuel oil spill (including both commercial and private properties) must also be remediated in accordance with the criteria.

The Department does not conduct the actual clean-up of the property, but is responsible under the Policy for ensuring that the work has been performed in accordance with governmental requirements. The Department has the authority to direct a person responsible to contain or clean up the affected areas to current remediation standards.

The "person responsible," property owner, or his or her insurance company must retain a certified clean-up contractor or a site professional to manage the assessment and remediation of a domestic fuel oil spill. The policy document establishes minimum eligibility requirements for both certified clean-up contractors and site professionals.[49]

[48] *Ibid.* at 1.

[49] These terms are discussed in more detail below at part (2) of Chapter 4.

CHAPTER 2: REGULATORY LIABILITY

I INTRODUCTION

This Chapter considers the issues of assigning and apportioning regulatory liability for contaminated sites - that is, public liability for regulatory compliance with legislation governing contamination. It does not deal with civil liability in respect of contamination as between private parties - mainly arising from tort law - which is not within the Commission's mandate for this project.

Establishing liability in the context of contaminated sites may be complex. It might involve a number of properties, persons, activities, substances, and even points in time. A liability regime under statute, which sets out rules and principles for how to establish such liability, must balance a number of complementary and competing considerations.

Most generally, is the regime meant to be remedial (ensuring clean up regardless of fault), or punitive (assigning liability only to those who are at fault for contamination)? Different values and policy objectives tend in either direction. How are these values, as well as the practical concerns arising in respect of either approach, to be reconciled? Beyond such basic policy issues are familiar problems of legislative design, such as the need for clarity, simplicity, flexibility and cost-effectiveness. In many cases government must act quickly to deal with an environmental concern, without having to await a judicial or quasi-judicial decision about who ought to be responsible for the cost. The nature and extent of contamination may dictate very different approaches in terms of the minimum level of expertise of the supervising contractor, the remedial standards to be applied, required notice, and a host of other dimensions.

Finally, there are the spin-off effects of the regime, which may require a re-thinking of the initial policy choices. A liability scheme should recognize the value of transforming contaminated sites into useful properties, as well as economic benefits, aside from the land itself, associated with clean-up efforts. This may require that a broad and flexible approach to assigning liability be narrowed and more tightly circumscribed, so as to reduce uncertainty which can serve as a disincentive to redevelopment.

II ASSIGNING REGULATORY LIABILITY

In terms of liability, contaminated sites provisions and environmental legislation in general tend to reflect two principles. The first is that the "polluter pays" - i.e., that polluters, rather than innocent parties, ought to pay for the clean-up or management of their contamination. This principle is specifically declared in the statutes of some jurisdictions, like the Nova Scotia *Environment Act* at s. 2(c). In other environmental statutes, the principle is implicit.

The second principle, especially relevant to contaminated sites, is that where the actual or primary polluters cannot be made to pay for the costs of cleaning up their pollution, because they are not identifiable or are financially unable, then other persons involved with a contaminated site or its operation must be made responsible for the clean-up. In some cases these secondarily liable parties will be persons who have knowledge about, or knowingly benefitted from, the polluting activities. In other instances, though, a person deemed responsible under legislation might have had no involvement with a

site's contamination. One legal commentator observed that, "In various ways, the 'polluter pays' principle mutated into a regulatory regime whereby a broad range of parties having even limited contact with the contaminated property could bear liability for the full cost of clean up."[50]

All Canadian legislation initially casts a very wide liability net, with broad discretion given, in some statutes, to the Minister to determine the person responsible for the contamination. The Nova Scotia *Act*, for example, authorizes the Minister to assign liability to any person he or she considers responsible for a contaminated site. New Brunswick, Newfoundland, P.E.I. and Ontario also provide their respective Ministers with a broad discretion to determine who is a responsible person. In other provinces, the statutes either provide a list of responsible persons or a broad definition of a responsible person, such as in Manitoba, Saskatchewan, and Alberta.

In a number of provinces where the liability net is widely cast, including Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia, legislation also expressly provides a list of exempted persons. British Columbia's *Act*, for example, exempts among others owners whose property has been contaminated by unrelated third parties, or who acquire properties without knowing, or having reason to know, that the property might be contaminated, or whose properties are contaminated through migration of contaminants from another property.[51] Such lists of exempt persons more concretely apply the liability allocation factors that are expressed in an unhelpfully general manner in the Nova Scotia *Act* at section 129. They provide clearer guidance to the Minister and interested parties as to the scope of liability, and reduce the potential for an unfair or arbitrary assignment of liability to non-culpable parties. Together with the opportunity to determine allocation of liability through a transparent and fair process, discussed below, they reduce the uncertainty that can dissuade redevelopment.

Recent amendments to New Brunswick's *Clean Environment Act*[52] provide discretion for the Minister to certify that a party will not later be held liable for remediation of existing contamination. The Minister has discretion to issue such a certificate if a remediation process has already been completed, or if "the certificate will improve the likelihood of the site being remediated in accordance with the standards and requirements prescribed by regulation or of being redeveloped." Such a certificate would not be available to any person who caused or contributed to the release of the contaminant, or who may have exacerbated its effects, but would be available, for example, to any person who might purchase the property for purposes of redevelopment.

Time will tell whether New Brunswick's innovation will bear fruit, in terms of bringing brownfields back into productive use. In some cases, polluters may be even more reluctant to sell properties known to be contaminated, knowing that the purchaser will be relieved of all regulatory liability. Should the anticipated remediation fail, the vendor would remain liable. In appropriate cases, however, such a certificate would resolve the uncertainty of redevelopers and thereby facilitate redevelopment. The appropriate case would be where the potential public liability for future remediation was acceptable, either because the property has been remediated to current standards, the original owner could yet be held liable, any future remediation was likely to be minor, or the expenditure of public funds would be regarded as appropriate in that case.

[50] Miller, *supra* note 15 at 12-304.

[51] *Environmental Management Act*, S.B.C. 2003, c.53, s.46.

[52] *An Act to Amend the Clean Environment Act*, S.N.B. 2009, c. 40, amending R.S.N.B. 1973, c. C-6 (not in force).

Nova Scotia's *Act*, at s. 90(e), provides that the Minister may list certain persons as not responsible for remediation at a given site, a power which could be used to similar effect. Regulations under s.91(1)(b) could more explicitly provide for the permanency of such Ministerial designation and the conditions under which it would be issued.

> ***Recommendation***
>
> New regulations should include a list of classes of persons who should not bear regulatory liability for contaminated sites. The list should be modeled on those in other jurisdictions, deriving from and more concretely applying CCME Principle 9.

III RETROSPECTIVITY

All of the provincial statutes are to some extent retrospective in effect, to the extent that they authorize the assignment of liability, regardless of when the contamination occurred. The statutes use various language. British Columbia's *Environmental Management Act* at s. 47(1) declares that "a person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the site."

The term 'retroactive' in this context does not mean liability for expenses incurred prior to the responsible person's involvement with the site, however. The British Columbia Court of Appeal noted that such language in the *Waste Management Act*,[53] the predecessor statute to the B.C. *Environmental Management Act*, might appear to catch in its net any individual or corporation who might be responsible for the contamination of real property as far back as Confederation. Such a result, the court concluded, could not have been intended by the legislature. Instead, the court found that the relevant section in the *Waste Management Act* (section 47 in the *Environmental Management Act*) was a clear example of retrospective legislation. In other words, the liability of the person responsible extends to contamination which occurred in the past, but not necessarily expenses incurred in the past in relation to such a site. [54]

Section 85 of the Nova Scotia *Environment Act* declares that Part VIII (the contaminated sites provisions) applies regardless of when a substance became present over, in or under a contaminated site. The statutes of Manitoba and Saskatchewan use similar language. In addition, in Nova Scotia the Minister's power to designate a site as contaminated further to s. 87 applies despite a substance having been released in accordance with any other law.

Discussion

Retroactive or retrospective liability for contaminated sites is intended to ensure that the taxpayer does not have to bear the costs of remediation. It is one of the tools which ensures that the polluter pays,

[53] R.S.B.C. 1996, c. 482 [repealed].

[54] See discussion in Richard E. Bereti, *British Columbia Environmental Management Legislation & Commentary* (Markham, Ont.: LexisNexis Canada Inc., 2007) at 30-31.

notwithstanding the passage of time or a subsequent sale of land. There is a certain unfairness, however, as it may result in liability for contamination according to legal requirements and technical standards which were not in effect at the time of contamination. As well, a new owner will be liable for contamination which he or she had no part in causing.

As one of the devices by which the liability for contamination can potentially be spread amongst a variety of non-polluting parties, unconstrained retrospective liability generates uncertainty and can lead to unfair results. The retrospective applicability of the *Environment Act* should be subject to principles for fair and certain assignment and apportionment of liability that are generally discussed in this Report. To some extent this would be accomplished by an appropriate list of non-responsible persons in the regulations. As discussed in the next section, principles for the allocation of liability, and processes for the binding application of those principles, would also improve the use of retrospective liability.

This type of approach would be consistent with CCME Principle 9, which is reflected at s.129(1) of the *Act*. A number of the liability allocation factors set out in Principle 9 are relevant specifically to the appropriate assignment of retrospective liability, including whether the person dealing with the substance followed the accepted industry standards and practices, and the laws of the day, whether and to what extent the person benefitted from the activity resulting in the contamination, whether a previous owner sold the property without disclosing the presence of the substance at the site to the purchaser, and whether the owner ought reasonably to have known of the substance's presence when he or she took ownership. A more certain application of these factors, in the form of rules and principles for assigning liability, would further reduce the potential for arbitrary assignment of liability on a retrospective basis.

Recommendation

Retrospective applicability of the *Environment Act* should be subject to new regulations, adopted pursuant to ss. 91(1)(d) and (b), providing a more certain application of the liability allocation factors in section 129(1) of the *Act* by exempting certain classes of persons from liability and creating a process to allocate liability amongst those responsible for the contamination.

IV ALLOCATION

As more than one person may be named as liable for the site, the means by which liability is apportioned among them is important. Nova Scotia, Newfoundland, Manitoba, Saskatchewan, Alberta, British Columbia, and Yukon have statutory provisions dealing with cost or liability allocations. Five other Canadian jurisdictions (New Brunswick, P.E.I., Quebec, Ontario and Northwest Territories) do not.

Section 134 of the Nova Scotia *Act* stipulates that the parties named in an order are jointly and severally responsible for payment of the costs of carrying out the terms of an order. However, the Minister and the parties responsible can agree to the apportionment of the costs of the remediation agreement.

If the parties cannot reach agreement between themselves or with the Department, s.4.2 of the Guidelines for the Management of Contaminated Sites in Nova Scotia enables any party to give written notice to the others requesting the unresolved issues to be submitted to alternative dispute resolution

(ADR). In addition, the Nova Scotia *Environment Act* at s. 89 allows the minister to refer any matter to ADR, including the allocation of costs between parties responsible for a contaminated site in any dispute arising over site responsibility or remediation.

A number of other jurisdictions provide for voluntary agreements with relation to the allocation of remediation costs.

Failing agreement, in Manitoba and British Columbia, an allocation tribunal may be used either to make a decision (Manitoba), or to give advice, as in British Columbia. In the Yukon, the statute authorizes the use of ministerial advisors to determine the share of responsibility for clean-up costs. The advisors are required to consider certain listed factors when reaching their decision.

Manitoba's *Contaminated Sites Remediation Act* provides that responsible persons are to be given a specified length of time to agree upon the apportionment of costs for remediation of the site and to submit the agreement to the director for approval. If no voluntary agreement can be reached, or if the parties request, the director may appoint a mediator to assist in the development of an apportionment agreement. Failing this or if requested by the parties, the director will direct the Clean Environment Commission to apportion the costs at an apportionment hearing.[155]

Section 48(2) of B.C.'s *Environmental Management Act* authorizes the Director to issue a remediation order to any responsible person. In that order, the Director can require the person to either undertake remediation (and bear the costs) or contribute in cash or in-kind towards the reasonably incurred remediation costs of another person. If the "responsible person" to whom an order has been issued disagrees with it, he or she may commence a court action to recover reasonably incurred costs from another "responsible person" or ask the Director to appoint an allocation panel. This panel is authorized to give the Director an opinion about whether the requesting party is a responsible person, or a minor contributor (a defined term under the *Act*) to the contamination, as well as advising as to the extent of the requesting party's contribution to the contamination.

Regardless of whether there is the option to convene an allocation panel, the legislation generally imposes joint and several liability as a fallback position. The concept of joint and several liability means that any one or more of the responsible parties named in the order may be obliged to pay for the full amount of the clean-up cost. A person who pays more than his or her fair share is left to seek contribution from the other responsible parties through civil action.

There are express joint and several liability provisions in seven of the jurisdictions reviewed. Nova Scotia, Ontario and British Columbia contain quite broad statements of the principle. For example, instead of providing for an allocation procedure, s.134(1) of the Nova Scotia *Act* simply provides, "all persons named in the order are jointly responsible for carrying out terms of the order and are jointly and severally liable for payment of the costs of doing so," including any costs incurred by the Minister. In Nova Scotia, as elsewhere, joint and several liability applies only in the absence of any voluntary agreement entered into by the parties, or an express allocation of such liability in the Minister's order.

[55] As of October 2008, there had not yet been a request for an apportionment hearing: Correspondence from Manitoba Clean Environment Commission (10 October 2008).

The provinces of New Brunswick, Manitoba and Saskatchewan expressly apply joint and several liability to the situation where the persons involved fail to comply with a government order. The government may take action against any one or more of them to recover the cost of remediation.

In Alberta, the application of joint & several liability is limited to three distinct scenarios, namely:

> (1) to pay for "orphan shares"[56] of liability under agreements where there is no fund available to pay for these shares;
>
> (2) to deal with the situation where a number of shell or holding companies are involved with a contaminated site and there is uncertainty or limited information available as to their actual relationship; and,
>
> (3) to deal with the situation where there is no information or a lack of information available upon which the fair allocation of liability may be made.

Four jurisdictions (P.E.I., Quebec, Yukon and Northwest Territories) make no express reference to the principle of joint and several liability.

Discussion

Joint and several liability is convenient for government, and maximizes the potential for clean up without the need for public funds. It allows apportionment of the full cost of a contaminated site's clean-up to any person named, regardless of that person's actual responsibility. Contamination is often the product of the actions of multiple polluters over time. Records relevant to establish volume and nature of discharges may be absent or incomplete. Even when such records are available it may not be possible to discern the distinct harmful effects associated with any one episode of contamination, particularly where two or more pollutants combined. Joint and several liability helps to lessen the likelihood that government itself might be left with the bill for site clean-up.

Joint and several liability may serve as an incentive for responsible parties to come to an agreement about the allocation of clean-up costs, minimizing the need for secondary litigation. By the same token, however, a party which would on fault-based principles be required to bear a greater share of the burden would have little incentive to negotiate if the default position was joint and several liability for regulatory purposes. Such a party would be aware that correcting the disproportionality through civil action would only be possible after a potentially long and costly trial brought by the party which has been required to pay a disproportionate share.

The main problem with joint and several liability arises simply from the failure to apportion liability fairly amongst contributing parties, either by agreement or through a tribunal process. A responsible person may end up paying a financial share larger than proportionate harm or risk arising from his or her actions. The party with sufficiently deep pockets but only a tenuous connection to the contamination makes an attractive target for regulatory action, but may not be able to recoup monies paid out through civil action. Such would be the case, for example, when other responsible parties are either unknown or are insolvent. Statute of limitations periods and corporate ownership may further

[56] The concept of orphan shares is discussed further below at Part VII.

limit civil recovery from responsible persons even though the *Act* does away with such obstacles to some extent in terms of assigning regulatory liability. In any event, civil action is costly, and only a portion of the legal costs are normally recoverable even if the party is successful.

In 2003, the B.C. Ministerial Advisory Panel recommended that all disputes related to contaminated sites, including allocation issues, should be resolved through a single process which incorporates both mediation and adjudication. The Panel also recommended that ADR for contaminated sites disputes should be administered by a third party arbitration centre established under the *Commercial Arbitration Act*. Under that statute, arbitration awards are binding and enforceable in the same manner as a judgement or order of the court. The arbitration process also contains a limited appeal mechanism.[57]

In 2006, the CCME expressed support for the development of a process that would facilitate the efficient clean-up of sites and the fair allocation of liability. It noted significant disagreement as to whether joint and several liability should be a component of this process. The CCME also recommended that in situations where there is more than one responsible person, a number of "liability-allocation" factors should be taken into account.[58]

The 2007 Final Report of the New Brunswick Brownfield Development Working Group recommended that:

> "A] dispute resolution mechanism be developed in legislation so as to provide a clear approach that must be followed when there are disagreements (involving the Crown and the parties) concerning whether or not a given party bears regulatory responsibility, and/or to what extent. The Working Group was of general agreement that such dispute resolution should not rely on the courts but rather involve arbitration of some other form."[59]

The New Brunswick legislature, however, made no express provision for such a liability dispute resolution mechanism in Bill 82,[60] its response to the Working Group's report.

In addition to its ease of application for government, joint and several liability may in some cases encourage consensual agreement between responsible persons about the allocation of liability between them. The prospect of being held responsible for 100% of clean-up costs may make co-polluters more amenable to reaching an agreement, outside of court, which allocates responsibility fairly among them. Avoiding the time and expense of litigation is a worthy objective, and the Department should make available ADR processes, including voluntary binding arbitration, in order to reach consensual

[57] "Final Report of the Minister's Advisory Panel on Contaminated Sites" (January 2003) [unpublished] at 128-129, available online, through the Legislative Library of British Columbia website: <http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/361809/ministers_panel.pdf> (date accessed: 12 March 2009) at 116-122.

[58] Canadian Council of Ministers of the Environment (CCME), *Recommended Principles on Contaminated Sites Liability* ([S.1.]: CCME, 2006) ("*Recommended Principles*") at 2, 7-8.

[59] New Brunswick Brownfield Development Working Group, "Final Report: Options and Recommendations for Facilitating Brownfield Redevelopment in New Brunswick" (April 2007) [unpublished] at 2-3. The report is available online though the "Provincial Documents" link at Atlantic RBCA <www.atlanticrbca.com/eng/intro_documentation.html> (date accessed: 22 January 2009).

[60] *Supra*, note 52.

resolution of allocation disputes. To the extent that the possibility of joint and several liability encourages such resolution, it should be maintained.

Allocating regulatory liability on a joint and several basis may result in a clearly unfair result, however - such as when a party with evidently minimal responsibility for the contamination is named as a responsible party. In such cases the other parties will be disinclined to reach consensual resolution because the default position of joint and several liability will allow them to freeload. Subsequent civil action is, as discussed above, an imperfect and often hollow solution for the party which bears the disproportionate regulatory burden. The failure to provide a means to allocate costs fairly will discourage redevelopers from becoming involved with contaminated sites, if by doing so they make themselves attractive targets for regulatory action, without adequate recourse.

The prospect of joint and several liability should be subject, therefore, to an optional adjudicative process. An expedited hearing (not necessarily oral) should be available at the option of any named party or the Minister, to determine the relative liability of one or more responsible persons. The tribunal would comprise persons with expertise in contamination issues, liability and dispute resolution, and would be at liberty to obtain further legal and technical advice as it saw fit. The panel would be struck by the Minister on an *ad hoc* basis, from a roster maintained by the Department. Notice would be to all potential responsible persons and the Minister at a minimum. The tribunal would otherwise be responsible for its own rules to provide for natural justice.

The tribunal's allocation would depend in particular on the respective contribution of a party to contamination, and the CCME's principles of liability allocation more generally. The decision would be binding on the Minister, but not for purposes of civil liability. Costs would be in the discretion of the panel, in order to discourage abuse of such process, or quibbling where the respective responsibility of parties is liable to be different in only minor respects. Decisions would be published, in order to facilitate consensual agreement in subsequent cases. Given the often significant stakes and the inherently justice-laden considerations involved in allocating shares of liability, judicial review on questions of law and mixed law and fact should be available on a correctness standard.

Matters proceeding to a hearing are certain to be rare,[61] but the prospect would furnish suitable incentive and guidance for parties to resolve allocation disputes fairly.

A separate option, to the same effect, would be an allocation trial before the Supreme Court. Regulations could provide for a trial process such as is provided by British Columbia's *Environmental Management Act* at s. 47(5). The flexibility and expediency of the tribunal option, and the expertise of panel members in contamination issues, make it the ideal solution provided there are adequate means of appeal. There are, however, significant costs involved in constituting such tribunals, and the experience of other jurisdictions suggests that disputes which progress to the point of tribunal proceedings will be rare. With that in mind, there may be efficiency gains in providing recourse to the pre-existing infrastructure of the courts. Given the relatively discrete issues presented by such statutory allocation disputes, which are not fault-based, trials could proceed according to expedited procedures, such as

[61] Manitoba, which has a similar provision at s. 23 - 27 of its *Contaminated Sites Remediation Act*, C.C.S.M. c.C205, has never had a matter proceed to a hearing. British Columbia has had a similar experience with the option for an allocation panel under s.49(s) of its *Environmental Management Act*, S.B.C. 2003, c.53, but such may be expected given the non-binding nature of that process and the alternative of a binding allocation trial pursuant to s.47(5) of the *Act*; see, *e.g.*, See *Gehring v Chevron Canada Ltd.*, 2006 BCSC 1629.

those under Rule 57 of the *Nova Scotia Civil Procedure Rules* (Actions under $100,000), whether they were under $100,000 or not. Whether tribunal hearing or special trial, the point is to ensure effective access to justice for responsible persons who ought not bear disproportionate liability for clean up.

Recommendations

The *Environment Act* should retain the potential application of joint and several liability, in the absence of consensual resolution of the allocation issues or a binding allocation decision as provided below.

An adjudicative process (not necessarily oral) should be available to determine the relative liability of one or more of the responsible persons. The Regulations would provide for an allocation tribunal to be constituted at the option of any one or more responsible persons, or the Minister. The tribunal's allocation would depend on the respective contribution of a party to contamination, and the CCME's principles of liability allocation more generally. Costs would be in the discretion of the panel. Decisions would be published. Review would be available on a correctness standard for questions of law and mixed law and fact.

V THIRD PARTY AGREEMENTS

Potentially responsible parties may agree on allocation in advance of an order. Private parties to a transaction involving land may similarly wish to ensure that one or other of them bears all or a certain portion of any regulatory liability for contamination. Such agreements are not by themselves binding on the government, however, which reduces the certainty and confidence the parties wish them to instill. Both parties remain liable to be named in an order, leaving it to the parties themselves to restore their original bargain through costly civil proceedings. The problem has been identified as a major deterrent to financial institutions and developers becoming in any way involved with brownfield sites.[62]

Six jurisdictions in Canada specifically provide for the enforceability of such agreements as against the government. Manitoba and Saskatchewan expressly require governmental consent. British Columbia specifically permits voluntary remediation agreements to be entered into by the polluters and the Ministry, but there is no provision for the government to be bound to an agreement between private parties allocating regulatory liability. Alberta allows the parties to enter into allocation agreements and, if approved by the Department, no environmental protection order can be issued against the parties as long as the agreement is carried out. Amendments to New Brunswick's *Act*[63] provide that such agreements are effective against the Minister, notwithstanding the Minister's approval, only upon completion of remediation.

Five jurisdictions make no specific reference to third party agreements with regard to allocation of liability or costs of remediation. The Northwest Territories, though it does not have a specific provision dealing with third party agreements which allocate costs or liability, does authorize the Minister to enter into agreements with any person regarding the administration and enforcement of the *Act* and the

[62] At the moment, the *Act* only recognizes an agreement specifying remedial action and sharing of associated costs if the agreement involves both persons responsible and the Crown.

[63] *Supra*, note 52.

regulations.[64] Given a broad interpretation, the reference to administration and enforcement of the *Act* could include agreements between the Ministry and third parties binding the Ministry to a certain allocation of regulatory liability.

Nova Scotia's *Act* expressly permits the Minister to enter into agreements in respect of liability for contamination that has been identified and in respect of which a remedial plan has been developed, at s.89(1)(b). More generally, section 19(1) of the *Act* provides the Minister with virtually unlimited power to enter into any agreement with any person in respect of any matter pertaining to the environment. Certainly this could include an agreement transferring general or specific regulatory liability between private parties. Section 91(1)(dh) of the Nova Scotia *Act* authorizes the provincial Cabinet to make regulations specifically in respect of the transfer of regulatory liability between parties. None, however, have been developed.

In 2003, the National Round Table on the Environment and the Economy (NRTEE) recommended that, "provinces and territories establish legislation permitting binding contractual allocations of regulatory and civil liability among parties relevant to a brownfield site, upon filing of adequate financial assurances to cover site remediation costs."[65] The NRTEE had in mind the sale of a brownfield to an arm's length purchaser, who would have an opportunity to benefit from the future use of land after remediation. To allow the vendor to transfer regulatory liability along with the site, the NRTEE thought, would help to put brownfields back into the marketplace. The NRTEE strategy also recognized the need to impose financial safeguards in order to offer protection against those vendors who would "intentionally sell to shell companies, thereby freeing themselves of liability while stranding liability with an entity that is in no position to pay out legitimate claims arising from remediation."[66]

In 2003, a ministerial Advisory Panel in British Columbia recommended that owners of property should be allowed to transfer by contract both civil and regulatory liability when they sell a site. It was suggested that the purchaser can achieve closure of liability by undertaking the necessary risk management or remediation activities and obtaining a No Further Action Letter from the provincial environment department. As with other proposals in favour of transfers, a number of safeguards were recommended.[67]

In 2006, the Canadian Council of Ministers of the Environment (CCME) supported the possibility of transferring regulatory liability:

> "A principle that provides for a transfer of environmental regulatory liability between parties, if implemented together with the existing CCME principles, could help to address environmental regulatory liability issues with respect to both contaminated sites and brownfield sites. By helping to transfer liability, governments will be addressing one of the three key barriers to brownfield development. The other two key barriers are financial and lack of awareness."[68]

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[64] *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, s. 2.1.

[65] NRTEE, *Cleaning Up the Past*, *supra* note 14 at 25.

[66] *Ibid.* at 26.

[67] "Final Report of the Minister's Advisory Panel on Contaminated Sites" supra note 57 at 128-129.

[68] CCME, *Recommended Principles*, supra note 58 at 2, 11.

In 2007, a Working Group which studied contaminated sites in New Brunswick proposed that both regulatory and civil liability should be contractually transferable to another person.[69] In relation to regulatory liability, the proposal would allow the Crown to adhere to a multi-party agreement such as a purchase and sell contract. As a party, the Crown would be bound contractually and if all the parties agreed, the Minister would lose the authority to require other parties to undertake remediation activities. Such agreements would be restricted to special situations, according to the Working Group, where remediation and or development might not otherwise take place. As with the CCME and NRTEE proposals, certain conditions would also apply. Amendments to New Brunswick's *Act*[70] provide that such agreements will have the effect of removing the released party from the range of possible responsible persons under the *Act*, but will be only effective upon completion of a remediation process.

Discussion

The Minister's power to enter into agreements respecting the transfer of liability between private parties, whether crystallized into a remediation plan or merely in respect of anticipated liabilities, ought to be clarified through regulation adopted under ss.91(1)(dh). The regulations could also bind the government to respect agreements between private parties, provided certain conditions were met.

In particular, prior to acceptance of such an agreement, certain safeguards such as disclosure of assets, a security interest in favour of the Minister, or a bond, might be required. If the Minister were not a party, he or she would nevertheless have to expressly consent before being bound. The agreement would of course be subject to the accuracy of disclosure provided in the course of obtaining the Minister's consent.

It important that the procedures to obtain the Minister's agreement are suited for quick turnaround, and that the necessary personnel and resources are made available to the same end. Transactions for the redevelopment of contaminated sites cannot be unduly held up by administrative decision-making - if they are, the procedure will fall into disuse and any advantage lost. Regulations should provide a means for the Minister to retroactively agree, but not all parties will proceed in the absence of prior agreement from the Minister. At a minimum, the types of information which would be necessary to provide to the Minister in support of an application for approval should be fully determined and well publicized in advance, to eliminate unnecessary back-and-forth with Department staff.

Recommendation

New regulations under s. 91(1)(dh) of the *Act* should provide for the Minister to consent to be bound to agreements between private parties transferring liability for regulatory compliance.

Express consent from the Minister would be required for the agreement to be binding on the Minister, and the regulations should provide for a number of possible financial and other safeguards as a condition for such consent, depending on the circumstances, such as the use of bonds and disclosure of assets.

[69] N.B. Brownfield Development Working Group, *supra* note 59 at 4-5, 9-10.

[70] *Supra*, note 52.

VI COMPLIANCE CERTIFICATES

Clean-up or compliance certificates,[71] issued by the government, provide useful confirmation that a site has been cleaned up to a prescribed standard. They signify the government's stamp of approval, in order to allow a remediated contaminated site to re-enter the normal course of commercial activity with little or no concern about lingering regulatory liability. Certificates are therefore valuable to vendors, purchasers and others connected with redevelopment. Some municipalities require such a document before approving any re-zoning or subdivision activities. Similarly, financial institutions are more willing to advance funds with a clearance certificate in hand.

The majority of provinces and territories provide for some form of certificate which acknowledges that remediation work has been completed on the contaminated site to the satisfaction of the Department. To this extent, they limit *prima facie* liability for past actions; however, they do not guarantee immunity against future regulatory action, such as when standards change. If this happens, responsible persons, as defined in the relevant legislation, may be legally liable for further remediation costs.

In Quebec, the document is called a Notice of Decontamination. However, these documents provide little, or no, immunity from future liability. Saskatchewan government policy is to offer "informal comments" on clean-up efforts, but no official certificates.[72] In P.E.I. and the Northwest Territories, the guidelines stipulate that the Department will acknowledge receipt of a closure report which states that no further action is required. In Ontario, however, the record of certification does not include an order or declaration that the site is clean.

In Alberta, the guidelines provide some limited protection against future liability for some facilities. British Columbia, with its Approvals in Principle and Certificates of Compliance, offers more finality than other provinces. This was true of B.C.'s earlier statute, the *Waste Management Act*,[73] and its predecessor, the *Waste Management Amendment Act*.[74] Some provinces like Manitoba try to leave open the possibility of future regulatory actions by stating in the clearance certificate that clearance is based on current regulations only.

In Nova Scotia, Certificates of Compliance, which are prepared by a site professional on behalf of a landowner and delivered to the Department for acknowledgement under the 1996 Guidelines, do not

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[71] Also referred to as comfort letters and clearance certificates; see Burgess, *supra* note 26 at 57.

[72] Saskatchewan, Environment & Resource Management, "Environmental Liability and Contaminated Site Management: A Strategic Approach for Saskatchewan" at 13-14 [unpublished]; Gowlings, "New Legislation in Saskatchewan Impacting on Treatment of Contaminated Sites," online: About Remediation Site, <http://www.aboutremediation.com/PDFS/Sask_New_Leg_for_Contam_Sites%20Oct%202002%20-%20GSL.pdf> (date accessed: 19 January 2009).

[73] R.S.B.C. 1996 c. 482.

[74] *Waste Management Amendment Act*, S.B.C. 1993, c. 25. For commentary see Chris Tollefson & Diana Belevsky, "External Review of Remediation Liability Provisions: The Waste Management Amendment Act, 1993" (9 August, 1996)" [unpublished], online: British Columbia, Ministry of Environment, Environmental Protection, Land Remediation, Discussion Papers and Reports, <www.env.gov.bc.ca/epd/remediation/reports/external_review.htm.> (date accessed 19 January, 2009).

affect future regulatory liability at all.[75] The same is true of the Record of Site Compliance under the Domestic Fuel Oil Spill Policy. The Department does not give any approval of such documents or release from future liability. Subsection 91(1)(dh) of the Nova Scotia *Act* provides authority for the adoption of regulations which would determine liability following remediation, but none have yet been issued. As a result, under the current legislation and Guidelines framework, persons dealing with contaminated sites continue to bear potential regulatory liability even after remediation to provincially approved Guideline levels and notwithstanding that the Minister has accepted the remediation as reported by the site owner or professional consultant. The possibility of future regulatory liability is in some cases perceived to be a substantial problem, and thus a barrier to brownfield development. Indeed, one legal commentator has suggested that current legislation's failure to allow for closure of this risk is "the most significant gap that inhibits the implementation of the [NRTEE's] National Brownfield Strategy ...."[76]

There are a number of reasons for the current practice. Investigations to determine the nature and extent of contamination are often restricted by time and financial considerations, and as a result testing may not reveal all existing contamination on a site. Land use may change over time, with new uses requiring a higher level of remediation. Government policies and protocols, as well as contamination standards, may also change at some point in the future, as testing technologies change or risks to health and environment become better known.

The issue of changing regulatory standards is particularly contentious. In 2003, the Ministry's Advisory Panel on contaminated sites in British Columbia summarized the issues this way:

> "It comes down to an issue of who should bear the cost of historical contamination when society has changed the rules after gaining new knowledge about human health or environmental risks associated with particular substances. Should it be the current owners, who currently have control over contaminated sites although they may not have caused the contamination? Should it be past owners or operators, who caused or contributed to the problem even though their actions may have been legal at the time? Or should it be society as a whole, which has changed the rules relating to these sites?"[77]

In 1993, the CCME's Principle 12 recommended that:

> "A 'responsible person' who completes the cleanup of a contaminated site to the satisfaction of the regulatory authority, should be issued an official 'certificate of compliance' by that authority, certifying that the site has been remediated to the required standards. These certificates, however, should expressly state that they are based on the condition of the contaminated site as at the date of issuance and that remediation undertaken met the standards of the day; and that the responsible person may be liable for future cleanup (prospective liability) should further contamination subsequently be discovered."[78]

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[75] Miller, *supra* note 15 at 12 - 306.

[76] Miller, *supra* note 15 at 12-306 to 12-307. Mr. Miller referred specifically to New Brunswick in the passage quoted, but his suggestion was meant to apply equally to Nova Scotia.

[77] "Final Report of the Minister's Advisory Panel on Contaminated Sites", *supra* note 57 at 128-129.

[78] Cited in CCME, Guidance Document, *supra* note 29 at 10.

In 1996, at a meeting organized by the National Round Table on the Environment and the Economy, (NRTEE), the Canadian Home Builders' Association recommended that a current or a previous owner, who is a builder or a developer and who actively worked to remediate a site to the then - current requirements, should be exempted from liability for future clean-ups, unless the initial clean-up was conducted negligently.[79] The NRTEE noted that it was a contentious issue for governments to provide a certificate of compliance when a clean-up had been carried out as required by law and that the governments were reluctant to do so, as they might then assume potential liability.[80] Nonetheless, without specifically referring to certificates of compliance, NRTEE recommended that "federal, provincial and territorial governments should move quickly to align their environmental laws with CCME's 13 principles [including principle number 12]."[81]

In 2003, NRTEE held another conference entitled "Cleaning Up the Past, Building the Future, A National Brownfield Redevelopment Strategy for Canada." The conference noted:

> "In certain jurisdictions regulators will not provide an approval for a remedial action plan or certificate of completion after remediation. Even where these are available (in British Columbia for example), the protection afforded is limited, because liability can be reopened for a wide variety of reasons (principally related to changes in standards and changes in use.)"[82]

The conference therefore recommended, "That provinces and territories establish legislation providing for clear and unequivocal termination of all on-site and off-site regulatory liabilities upon issuance of regulatory approval of remediation, subject only to specified reopeners or fraud."[83] As a complementary part of this recommendation the conference further provided "that provinces and territories establish legislation providing for the registration on title of any right to regulatory liability termination or allocation."[84]

In 2003, CCME undertook a study to determine the relevance of the existing 13 CCME principles and the need for further work on principles to address the potential liability issues associated with brownfield sites. The study results, published in 2006, concluded that the existing 13 principles were still relevant, but that uncertainty about liability remained as a concern for developers and owners of real property that is or may be contaminated. This uncertainty hindered the development of brownfields.[85] Therefore, Principle 12 was amended to provide that a site should be re-designated as a contaminated site after issuance of a certificate of compliance only in situations where new evidence of a risk to health

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[79] National Round Table on the Environment and the Economy (NRTEE), *State of the Debate: Greening Canada's Brownfield Sites* (S.l.: NRTEE, 1998) at 27.

[80] *Ibid.*

[81] *Ibid.* at 38.

[82] NRTEE, *Cleaning Up the Past*, supra note 14 at 6.

[83] *Ibid.* at 26.

[84] *Ibid.*

[85] CCME, *Recommended Principles*, *supra* note 58 at 1.

or the environment appeared. A revised standard, or enhanced analytical capability applied to the old circumstances, by themselves would not be sufficient to impose new liability. The CCME saw this as a compromise between providing finality with a certificate of compliance and leaving the door open for prospective liability where a new risk was identified. It would permit member governments to hold responsible persons accountable to the fullest extent for contamination in cases where all the adverse effects of contamination could not be immediately known. At the same time, given the limited scope of prospective liability, such a provision would not, according to the CCME, cause widespread commercial uncertainty or significantly impair the ability of responsible persons to obtain credit.[86]

Also in 2003, just before the NRTEE published its "National Brownfield Redevelopment Strategy," the Minister's Advisory Panel in British Columbia noted the problem of the need for a reliable form of closure to cover situations where there is a change in the contaminated site regulation numerical standards or a subsequent landowner decides to change the land use. The panel noted that the current certificate of compliance did not satisfy stakeholders regarding future liability because it was subject to potential exemptions.[87]

In April 2007, the New Brunswick Brownfield Development Working Group made several proposals relating to government acceptance of remediation efforts. The Working Group recommended that liability for a site which has completed the regulatory process (for remediation) may be permanently closed, except for fraud and other re-openers such as the change of land use or failure to comply with conditions of closure. Obtaining closure would mean that persons responsible for site contamination would be protected from future regulatory requirements to undertake additional clean-up notwithstanding a change in standards. In order to obtain this closure the applicant would have to request a certificate of remediation completion. The committee recommended that site closure and the termination of regulatory responsibility should be universal, extending to all potentially responsible persons and not just to the proponent or applicant. In cases where a site had been granted permanent closure, but was later found to be in need of further remediation, the Working Group acknowledged that government would normally assume responsibility for the clean-up costs.[88]

In response to the Working Group's recommendations, amendments to New Brunswick's *Act*[89] provide that a person who has completed a remediation process may apply for permanent closure of regulatory liability, which would be effective to prevent any future order against any person in relation to the site and the release of the contaminant which was remediated. The permanent closure therefore extends only to the release of the contaminant that was remediated on "the site" which was the subject of the remediation. The circumstances in which the completion of a remediation process might entitle the responsible person to such permanent closure will be defined in regulations, not yet drafted. Significantly, the amended *Act* will not provide any exception to permanent closure, once granted, for changing regulatory standards in respect of the remediated contamination.

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[86] *Ibid.* at 10-11.

[87] AFinal Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 57 at 123.

[88] N.B. Brownfield Development Working Group, *supra* note 59 at 6-7.

[89] *Supra*, note 52.

Discussion

Generally, a law imposing liability will restrict the duration of potential liability for the act in question - particularly if the remedy required at the time has been undertaken. In civil actions, the plaintiff is not ordinarily entitled to reopen the court's prospective assessment of damages at some future date, notwithstanding that his or her injury or loss may turn out to be worse than expected. A bankrupt, after complying with legislative requirements, including the passage of a certain amount of time, will once again be able to acquire assets without fear of them being seized by creditors. These and other restrictions acknowledge that an end must come to liability once the assigned penalty or remedy has been discharged. There are counter-examples of course, where regulatory standards evolve, requiring new investment in an ongoing enterprise from time to time. But where the point is to resolve uncertainty in order to deal with a societal problem like brownfields, there is great value in settling liability as of a certain time, allowing the party which bears such liability to move forward with confidence once the burden has been discharged.

Under the current Nova Scotia framework, however, a property owner who remediates site contamination receives no closure. There is no formal, legally binding acknowledgment from government that current clean-up standards have been met, and in particular, nothing limits future liability. In fact, the Department expressly disclaims any such limit. Except where remediation is to a pristine condition, the result for the responsible person, and any potential purchaser or redeveloper, is perpetual potential liability under statute.

In view of the need to promote greater certainty, a responsible person who remediates a property in compliance with government - approved standards should have that initiative acknowledged and sanctioned by government. This should take the form of a meaningful document, issued by the Minister to the responsible party and successors in interest, which identifies the contaminated area in question and the nature and extent of the contamination which was dealt with. The document would describe the approved uses for the area according to the standards of the day, and the clean-up standards applied. Finally, the document would recognize that those standards have been met, and most importantly, release the owner from current and future regulatory liability in relation to the remediated contamination. The document would be issued automatically, following receipt of a binding undertaking of a licensed site professional that the contamination has been remediated according to the remediation plan agreed to in advance, and that the contaminated area otherwise met all then-current remediation standards. Section 91(1)(dh) of the *Act* provides for the making of regulations to give effect to such certificates and to prescribe their contents.

A clean-up certificate should not provide an absolute release from regulatory liability. It would be subject to certain re-openers, such as fraud or material lack of disclosure, but not including a change in applicable standards applying to the same category of land use. The CCME's 2006 compromise position - allowing for 're-designation' only in response to new evidence of a risk to health or environment - would not solve the uncertainty of potential future liability in any meaningful way, because for the most part standards will change precisely because of a newly-identified risk to health or environment. Any such exception to the release of liability is likely to maintain the *status quo*.

The Certificate would not bind the Minister as against any proponent of a redevelopment which involved a higher standard of land use, on the other hand. That is, the proponent of a residential redevelopment could not rely on a Certificate issued in respect of remediation to a standard acceptable for industrial use - the proponent would be liable for further remedial action required to bring the

property into suitable condition for residential development. Similarly, a change in zoning by the municipality would not result in new liability for the original responsible party, but any developer under the new zoning would bear liability for the additional remediation that might be necessary.

Recommendations

Upon completion of remediation according to the remedial action plan, and receipt of the site professional's undertaking to that effect, the government should be bound to issue a meaningful document to the responsible party, which:

(a) identifies the property in question and the nature and extent of the contamination which was dealt with;

(b) describes the approved uses for the property according to the standards of the day, and the clean-up standards applied;

(c) acknowledges that the relevant standards have been met, and releases the owner and successors in interest from current and future regulatory liability in relation to the remediated contamination.

The release would be subject to certain re-openers, such as fraud or material lack of disclosure, but not including a change in applicable standards applying to the same or equivalent category of land use.

The release would not bind the Minister as against any proponent of a redevelopment which involved a higher standard of land use.

VII ORPHAN SITES

At section 86, the Nova Scotia *Environment Act* deals with orphan sites, where "a person responsible for the contaminated site cannot be identified or is unable to pay for the costs." The Minister may enter into agreements and establish programs to pay for the cost of cleaning up such sites. A related concept, not dealt with specifically in the *Act*, is the "orphan share." This term refers to the situation where there is more than one responsible person involved with the contaminated property, and an allocation of liability may have been made, but at least one of the parties cannot be identified or is unable to pay its share of the remediation costs.

Besides Nova Scotia, legislation in only three provinces (Newfoundland, Alberta, and British Columbia) contains specific references to orphan sites or shares. In Ontario and Saskatchewan, though there is no specific reference to orphan sites as such, the statutes contain provisions that authorize the Minister to take remedial action in situations where the identity of the person responsible cannot be ascertained, which is one of the characteristics of an orphan site.

In Alberta, the guidelines distinguish between orphan sites and shares. With respect to orphan shares, joint and several liability can be imposed, as described above.[90]

[90] See discussion above at Part IV.

In British Columbia, the Minister determines whether a site is contaminated or not, and if so, whether it is an orphan site. He or she then determines if it is a high or low risk. If the risk is high, he can take action to clean it up and then try to recover costs from responsible persons, or others who are identified. If no other responsible persons are identified, then the costs are paid out of a consolidated revenue fund and remain a debt to the fund.

There is presently no stand-alone fund maintained by the provincial government to finance clean-up activities relating to contaminated sites in Nova Scotia. The Federal government currently maintains a program to assist with remediation of non-federal land where the federal government may share some responsibility for the contamination. From 1990 to 1996 the National Contaminated Sites Remediation Program made available approximately $250 million toward contaminated site remediation nationally. The shared 50-50 federal/provincial program was intended to support the assessment and remediation of orphan sites on provincial land, where a responsible person could not be found or the owner was unable or unwilling to remediate. The program supported remediation at two sites in Nova Scotia.

The National Contaminated Sites Remediation Program funded clean up of nine sites in New Brunswick. In 1995 the New Brunswick government assumed full responsibility for funding, allocating $750,000 per year. Over the years that budget shrunk from $750,000 to $400,000 to $200,000 and finally, by 2005, the last year of provincial involvement, to $125,000. No government funding is currently set aside for remediation of contaminated sites on an as-needed basis.

In 2007, New Brunswick established an Environmental Trust Fund intended to provide assistance to community groups, municipalities, non-profit organizations and institutions engaged in furthering sustainable development.[91] The fund lists six categories of projects eligible for financial assistance, one of which is restoration. This category would cover projects that enhanced the quality and sustainability of New Brunswick's air, land, and water resources, thus reducing the risk to human life, biological diversity and personal property. The New Brunswick Department advises that this fund has not, however, been used to clean up an orphan contaminated site.

In Manitoba, mining is a significant primary resource industry. In 2007, mineral production was worth $2.5 billion. Mining can also have serious negative consequences, in the form of environmental contamination. In some cases, mine owners may disappear or may refuse or be financially unable to carry out the clean-up of a mine and surrounding lands that is no longer operating. In 2008, the Manitoba government announced $19 million funding to continue the clean-up of orphan or abandoned mines during the next two years. This followed an announcement the previous year of a $26.8 million commitment for the rehabilitation of orphan and abandoned mines. The source of these funds was the "Environmental Liability Account," created in 2006, which holds some $80 million.[92]

In Alberta, the Orphan Well Association (OWA) is a not for profit organization which manages the abandonment and reclamation of upstream oil and gas orphan wells and related facilities. The OWA

[91] New Brunswick, Department of Environment, "Environmental Trust Fund: Application Guide for 2009-2010," online: <http://www.gnb.ca/0009/0373/0002/0002-e.asp> (date accessed: 18 February 2009).

[92] Manitoba, "$19 million Committed to Rehabilitate Orphaned Mines in Manitoba" (news release 22 May, 2008) copy available though the "News Release" link at Manitoba, Science, Technology, Energy and Mines, Mineral Resources Division <http://www.gov.mb.ca/stem/mrd/index.html > (date accessed: 18 February 2009).

operates with direction from government and private industry and with funding provided by the latter. The funds are generated through a levy on industry participants.[93] In 2007, the Alberta Energy Utilities Board was reported to have estimated an expenditure of $100 million, in cost sharing with industry, over the next five to 10 years on the clean-up of orphan sites. The Board estimated liability for reclamation of current upstream oil and gas activities at between $5.9 billion and $8.8 billion.[94]

In October 2000 the government of Alberta introduced the Underground Petroleum Storage Tank Site Remediation Program to provide financial assistance to remediate contamination related to underground petroleum storage tanks. This program was closed to new applicants in March 2002. The sum of $60 million was committed to help remediate the sites of some 930 applicants, including 66 municipalities. The program is designed to assist municipalities which acquired a property through a tax recovery and small owners (five or fewer) of retail gas stations. In August 2006 the government committed an additional $50 million to be made available to applicants to cover the higher costs of the more heavily contaminated site clean-ups, namely those which would cost more than $110,000.[95]

In 2000, Saskatchewan established a Centenary Fund to support a four-year program to clean-up contaminated sites.[96] The $6,500,000 program remediated six high risk contaminated sites and implemented a program to clean-up abandoned service stations and their underground tanks. The Orphan Fuel Storage and Sales Facility Clean-Up Program, provided for the remediation of hydro carbon - contaminated properties which municipalities have typically acquired through tax enforcement procedures. The program focused on cleaning up "high risk" to "moderate risk" sites and resulted in the assessment of some 436 sites and the clean-up of 103 sites.[97] Although the four-year contaminated sites clean-up program concluded in 2004, some funds remained and continued to be applied to the clean-up of contaminated sites in the province.[98] Industry signed agreements to provide funding assistance for clean-ups contingent on provincial government funding. In kind contributions were also received from local governments, the Saskatchewan Urban Municipalities Association and the Saskatchewan Association of Rural Municipalities.[99]

British Columbia does not have a special fund to help finance the clean-up of contaminated sites, whether they are orphan sites or otherwise. In 2003, the ministerial Advisory Panel on contaminated sites suggested that general revenue funding and existing ministry fee structures were inadequate to

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[93] Further details about the OWA are available at its website: <www.orphanwell.ca> (date accessed: 24 February 2009).

[94] EcoCanada, *supra* note 11 at v.

[95] Alberta, "Province provides $50 Million for Tank Site Remediation" ("New Release, 25 August 2006"), online: <www.gov.ab.ca> (date accessed 9 August 2008); Alberta Municipal Affairs, Tank Site Remediation Program, online: <http://www.municipalaffairs.gov.ab.ca/am_tank_site_remediation_program.cfm> (date accessed: 12 March 2009).

[96] Government of Saskatchewan, "Saskatchewan Cleaned up for the Province's Centennial" (News release, 7 June 2004), online: <www.gov.sk.ca > (date accessed: 9 August 2008).

[97] *Ibid.*

[98] The Saskatchewan Ministry of Environment advised that the remaining funds were expected to be expended by the end of the 2008 fiscal year.

[99] Government of Saskatchewan, *supra* note 96.

properly support contaminated site management in the province. It was the panel's opinion that a new self-sustaining funding initiative was required.[100] Specifically, the panel recommended the establishment of "a dedicated trust fund, the BC Land Remediation Fund, by April 1, 2004 to administer, monitor, support and encourage the remediation of contaminated sites in British Columbia."[101] The fund was intended to support a number of new ministry initiatives, including the remediation of orphan sites. Funding for the proposed Land Remediation Fund would come from a number of sources including: 1) an environmental levy on hazardous chemicals; 2) a tax or industry sponsored levy on gasoline and diesel fuel; 3) a portion of monies from the lease, sale and management of crown lands; 4) underground storage tank, bulk fuel and bulk chemical tank registration and licensing fees; and 5) regulatory agency recovery fees.[102]

In 2007, the New Brunswick Brownfield Development Working Group recommended that provinces and territories which agree to post-remediation termination of regulatory and civil liability should establish legislation setting up an insurance fund for liabilities falling to the province or territory after the exhaustion of the term of the post-remediation private insurance. The Working Group further recommended that this system be funded by a system of fees associated with the application for an issuance of permanent site closure documents. The amount of these fees was to be set on a sliding scale based on the financial risks involved for each site.[103] Amendments to New Brunswick's *Act*[104] provide for regulations in respect of such a fund, but such regulations have yet to be developed.

Discussion

Clearly, clean-up of certain contaminated sites in Nova Scotia will have to be undertaken with public funds. Although estimates provide only rough guides and vary widely, there may be hundreds, if not thousands, of contaminated sites in the province. The party or parties that ought to bear clean up costs for any given site may not be identifiable, or solvent. In some cases, the release from liability contemplated by certain recommendations herein will create orphan shares.

Governments have the ultimate responsibility to help protect human health and the environment on behalf of the public. Particularly where contamination creates serious adverse effects or may do so if left unaddressed, the government will have to act.

Outside the business or industrial context, the province may face the prospect of an orphan site in relation to a contaminated residential property, most likely the consequence of a domestic fuel oil spill. Cleaning up the effects of such a spill can be extremely expensive. Costs in the range of $100,000 or

[100] "Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 57 at 128-129.

[101] *Ibid.* at 26.

[102] Fees 4 and 5 would be charged for overseeing and reviewing the remediation of high risk sites and for other services. It was also suggested that fees for the issuance of "no further action letters" and the conduct of information searches and site registration could also be charged.

[103] N.B. Brownfield Development Working Group, *supra* note 59 at 7.

[104] *Supra*, note 52.

more are not uncommon.[105] Insurance coverage notwithstanding, the homeowner may not have the money to fund a clean-up in compliance with the departmental requirements, or it may be unjust to require the homeowner to pay. If there is no other party who ought to bear the costs, the province should be in the position to assume the remediation expenses, in order to protect human health and the environment.

It is not surprising that other provinces make provision for funding which is targeted to remedy particular types of contaminated site. But to determine the type and size of the funding programs required, and the most appropriate source of funds, the Province must determine what types of activities in the Nova Scotian context have likely resulted in contamination, on what scale, and in how many locations.

Addressing the particulars of the Nova Scotian context will also point to possible industry participation. Gasoline retailers may be willing to contribute to a fund to remedy the clean-up of former service stations, but not if their contribution might be used to fund the remediation of problems caused by other industrial activities, such as mining. Industry participation could extend beyond funding, to provide information and advice, which could be used by government in a proactive and preventive way to prevent future orphan sites. The insurance industry, for instance, would likely be in a position to share details about the extent to which regulations in other jurisdictions governing fuel oil transport and storage have helped to lessen the number and size of domestic fuel oil spills.

Therefore, while it is clear that some funding is necessary, the nature and extent of such programs must be decided with a true and accurate picture of the scope of the problem of orphan sites and orphan shares, consultations with affected stakeholders, and in consideration of the range of options from other jurisdictions.

As an ideal, public funds for the remediation of orphan sites should derive, as closely as possible, from the industries or activities which are responsible for the contamination at such sites. Alternatively, they may derive from general revenues. In both cases they may be recoverable by way of statutory liens on the orphan properties in question, enforceable at the Minister's option. Fees on applications for certificates of remediation completion or release from regulatory liability should not be used. Such fees impose further financial burdens on responsible persons who have remediated their own sites, often at significant cost, in order to fund the remediation of sites contaminated by others. Neither should general surcharges on property transactions be considered a useful source of funds, since they forego the incentives to adopt better prevention strategies that industry-specific levies provide.

[105] *Supra* note 9; Kim Moar, "Man Sues Company for Oil Leak" The Daily News (26 August 2005) 4; Ian Fairclough, "Firm, N.S. Tussle over Bill" The Chronicle Herald (12 June 2006) B1. In terms of potential environmental and health costs, one litre of spilled oil can contaminate 1,000,000 litres of drinking water. See InfoPEI, "Oil Tank Regulations," under the links, "Environment and Land," followed by "Environmental Protection," online: <www.pe.ca/infopei> (date accessed: 7 April 2009).

Recommendations

The provincial government should be in a position to fund the clean-up of certain contaminated sites. In many cases one or more of the 'persons responsible' under the *Act* ought not to bear clean up costs, or may not be in a position to do so. Development of many contaminated sites simply will not proceed absent investment of public funds in site remediation, or the acceptance of risk that the public may have to bear such expense in the future.

The provincial government should examine the scope of contaminated sites and orphan sites in particular, in order to determine the type, amount and source of funding needed.

Funds might be sourced from industry levies or general revenues, and recoverable by way of liens or other enforceable security against lands which are remediated at public cost, the enforcement of which would be in the Minister's discretion. Surcharges on property transactions or fees for Ministerial certificates should not be used.

VIII LIABILITY OF GOVERNMENT

All levels of government own real property which can become contaminated,[106] and thereby *prima facie* subject to regulatory liability. Canadian jurisdictions differ in terms of their approaches to governmental liability. For example, statutes in Newfoundland and P.E.I. respectively purport to apply both to the provincial and federal governments. Saskatchewan uses the term "Crown," the extent of which is not defined. The Northwest Territories and Yukon only refer to the territorial government being bound. New Brunswick is unique, by making no reference to whether its statute binds government.

In Nova Scotia, s.4 of the *Environment Act* provides that both federal and provincial Crowns are bound by the *Act*.[107] Therefore, with respect to contaminated sites which they own, the *Act* treats those levels of government like any other person. Unlike most other landowners, however, the provincial Crown may be responsible for contamination on a property that it did not realize it owns, as a result of an escheat.

When a person dies without a valid will and any possible heirs under intestacy legislation, or where a corporation is dissolved, the law transfers ownership of any lands in question to the Crown.[108] Those lands could be contaminated. Indeed, people involved with a corporation which has financial problems may want it to have it dissolved, because they face large potential liability with respect to remediation costs, but insufficient assets to pay for clean-up.

[106] The contamination may not even occur as a result of government-sponsored activity. For example, a road owned by a municipality may serve as the conduit of contamination from one privately-owned property to another. See Marc McAree, "Municipalities Face Liability for Contamination of Roadways" *The Lawyers Weekly* (26 September 2008) 14.

[107] Given the conflicting nature of case law, whether a provincial statute may validly bind the federal Crown is uncertain. See Peter W. Hogg, *Constitutional Law of Canada* (looseleaf edition) at 10-19 to 10-20; Paul Lordon, *Crown Law* (Toronto: Butterworths, c1991) at 131. The Law Reform Commission does not take a position on the constitutionality of s.4 of the *Act*, as it relates to the federal Crown.

[108] Dianne Saxe, "New Laws Tame Government's Fear of Contaminated Land Escheats" *The Lawyers Weekly* (22 February 2008) 9.

Neither the *Escheats Act* [109] nor the *Corporations Miscellaneous Provisions Act,* [110] limits the liability of the provincial Crown in Nova Scotia in this context. Of note is s.5(5) in the *Proceedings Against the Crown Act*:[111]

> **"5(5) Where property has vested in Crown**
> Where property vests in the Crown by virtue of any rule of law that operates independently of the acts or the intentions of the Crown, the Crown is not, by virtue of this *Act*, subject to liability in tort by reason only of the property being so vested, but this subsection is without prejudice to the liability of the Crown under this *Act* in respect of any period after the Crown, or any person acting for the Crown, has in fact taken possession or control of the property or entered into occupation thereof."

Section 5(5) would protect the Crown in relation to torts (civil liability) which occurred prior to the time when the Crown took possession of the property. It would not apply to regulatory liability, including a requirement under an *Environment Act* order to pay for the clean-up of a property.

It is not known how many corporations have been dissolved in Nova Scotia, nor the percentage of those dissolved corporations which owned real property. To provide some idea, though, it was recently reported that there were 750,000 dissolved corporations in Ontario.[112]

Municipalities form a third level of government in Canada. They are also governed by Nova Scotia's *Environment Act*, which treats a municipality as a "person" under s. 3(aj). In the context of contaminated sites, Nova Scotia legislation contains no exclusions for the liability of municipalities.

Under the *Municipal Government Act*,[113] when municipal taxes relating to a property are unpaid, the municipality acquires a status similar to that of a secured creditor. The municipality has a first lien, which it can enforce by having the property sold (generally at public action) and the proceeds applied, in priority to any other claimants, to payment of the municipal tax bill. The lien does not make the municipality the owner of the property. However, where no bid received was sufficient to satisfy the full amount of outstanding taxes, interest and any expenses, a municipality may bid and purchase the property.[114] In the situation where no sufficient bids are received, it is possible that a municipality chooses to acquire a property, not for reasons of future profit, but to be in a position to maintain and protect the property, until the tax bill is paid or a new owner purchases the property. The municipality may or may not be in a position to know whether there is any contamination of the property.

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[109] R.S.N.S. 1989, c. 151.

[110] R.S.N.S. 1989, c. 100.

[111] R.S.N.S. 1989, c. 360.

[112] Saxe, *supra* note 108. No information is provided about how many of those corporations owned land.

[113] S.N.S. 1998, c. 18.

[114] *Ibid.*, ss. 133-134, 141, and 143.

Saskatchewan provides protection for municipalities by framing a definition of "persons responsible" that excludes them. The Manitoba statute states that municipalities are not deemed to be a person responsible if it becomes a property owner by virtue of a tax sale. Alberta provides immunity for municipalities in relation to historic or private property acquired as a result of tax recovery, but British Columbia holds municipalities liable for contaminated sites owned by a municipality or for off-property damage caused by contamination that originates from municipal property. In Ontario, an order under environmental legislation cannot be issued against a municipality unless the order follows gross negligence or willful misconduct by the municipality or its representatives, or from circumstances prescribed by the regulations.[115]

The B.C. legislation includes an important restriction on government liability. Liability for remediation costs can be imposed if the person or government is an owner or operator of a contaminated site; however, section 46(1)(g) exempts a government body that acquires an ownership interest in a contaminated site involuntarily, unless the government body caused or contributed to the pollution. "Government body" is defined in s. 39 of the *Environment Management Act* as meaning a federal, provincial, or municipal body, including an agency or Ministry of the Crown in right of Canada or British Columbia or an agency of a municipality. Section 39(2) provides that a government body is not liable as an 'operator' of a facility only as a result of (a) exercising regulatory authority with respect to a contaminated site, (b) carrying out remediation of a contaminated site, or (c) providing advice or information with respect to a contaminated site or an activity that took place on the contaminated site. Section 46(2) provides immunity to a government body if that government body possesses, owns, or operates a roadway, highway, or right of way for sewage or water works on a contaminated site to the extent of the possession, ownership or operation, unless the government body places or deposits the contamination below the highway or other structure. Section 65(6) provides that a municipality is not liable for remediation if it grants a permit for removal or deposit of contaminated soil in the municipality.

Recent reforms in Ontario have attempted to lessen the potential liability of government in relation to land escheats. Since 2002, in the instance of land from a dissolved corporation, government only acquires possession when it registers notice of so doing in the land registry office. Moreover, since 2007, government does not become liable in tort in relation to escheated land until the Crown registers a notice that it intends to use the property for Crown purposes.[116] It is not clear whether these provisions, as currently drafted, would protect the Ontario government from regulatory liability in relation to a contaminated site that it acquired through escheat.

Discussion

In general, government, with respect to accepting both the benefits and burdens of property ownership, should be treated like any other person. The concern is the prospect of government being deemed a

[115] However, an order can be issued nonetheless if the Director has reasonable grounds to believe that as a result of the presence or discharge of a contaminant in or under the property, there is a danger to health or safety of any person, there is an impairment or serious risk of impairment of the quality of the natural environment or any use that can be made of it, or there is injury or damage or serious risk of injury or damage to any property or to any plant or animal life. See ss.168.13 and 168.14 of the *Environmental Protection Act*, R.S.O. 1990, c.E.19.

[116] See Saxe, *supra* note 108.

person responsible under the legislation's wide liability net, simply because it owns property that has fallen into its hands.

In relation to the provincial government, this could happen through the escheat process. Though the legislation protects the Crown from liability in tort (civil liability), it contains no protection against regulatory liability in relation to properties which the Crown acquires automatically, by process of law.

A municipality may acquire a property through a tax sale, following a lack of sufficient bids, only to discover after the fact that the property is contaminated. In instances where taxes are in arrears for three years or more, a municipality is required to put a property up for sale, subject to exceptions.[117] For larger municipalities, which organize a great number of tax sales over the course of a year, it is possible that a contaminated property will inadvertently be placed for sale. As mentioned earlier in the Report, where insufficient bids are received, to prevent a property from being subjected to decay or vandalism, a municipality may choose to purchase it at a tax sale with the intention of selling it as soon as feasible. Under the current legislation, however, that short period of ownership could make the municipality liable for the clean-up of site contamination.

Nevertheless, public bodies which acquire contaminated sites should not be exempt from regulatory liability. Neighbours and others who may be affected by contaminated sites ought to be able to rely on regulatory enforcement processes for protection. Civil action against the government owner is a poor substitute. Very often these are orphan sites in respect of which the public must be liable, at the first instance, in any event. The public body, as owner, will be in a position to recoup some or all of the costs of remediation by way of subsequent sale.

Where neighbours, tenants or others are not affected by the contamination, however, and there is no reasonably foreseeable prospect of them being so, there is little reason to subject the public purse to potentially massive involuntary liability for remediation on all escheated or abandoned land. Therefore, there should be a limited exception for involuntary governmental owners' liability, only to the extent that the contamination is not presently causing harm to any party or serious environmental damage, and presents no reasonably foreseeable risk of doing so. The exemption would apply only until the property is sold or the government owner puts it into use for its own benefit

Recommendation

Government bodies acquiring land involuntarily, or by tax sale, ought to be subject to regulatory liability consistent with that of private owners. A limited exception would apply to contamination which is not presently causing harm to any party or serious environmental damage, and presents no reasonably foreseeable risk of doing so. The exemption would cease upon the property's sale or voluntary transfer, or when the government owner caused the property to be put into use for the government owner's own benefit.

[117] *Municipal Government Act*, *supra* note 113, at s. 134(2).

IX SECURED CREDITORS

As the potential liability net is so wide, the liability of secured creditors and parties with similar relationships to contaminated sites may be uncertain. In an attempt to clarify their legal responsibility for the creation of contaminated sites, some provinces have included provisions in their statutes that outline the extent of that liability. Section 165 of the Nova Scotia *Environment Act* stipulates that a secured creditor is liable if he or she exercised care, management, or control of a site which caused it to become contaminated, or if the secured creditor became the registered owner of the contaminated site.

The provinces of Newfoundland and British Columbia limit liability to situations where the secured creditor exercises care, management, or control which led to contamination. Other provinces, like Manitoba and Saskatchewan, impose liability only if the secured creditor personally caused the contamination. The Alberta guidelines exempt secured creditors from liability for historic contamination.

In Ontario, there is no liability for secured creditors if they merely tried to conduct an investigation relating to the secured property, took action to try and preserve or protect the secured property, or took any action in response to a perceived danger to the health or safety of a person, or the impairment of the natural environment or damage to property, plant or animal life.[118] If a secured creditor becomes the owner of property by virtue of a foreclosure, no order is to issue unless there was gross negligence or willful misconduct on the part of the creditor.[119]

Section 165 of the *Environment Act* contains a number of limitations on liability for the benefit of secured creditors. At the moment, a secured creditor will only be responsible under the *Act* for remediation of a contaminated site in two instances. One scenario, further to s.165(3)(a), is where the secured creditor "exercised care, management, or control" of the site, or "imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance...," and those actions by the secured creditor caused the site to become contaminated. This seems generally fair. A secured creditor which is operating a site or which is providing instructions in relation to a substance which could lead to contamination should take the same precautions as any other prudent site operator and should be answerable for any negative consequences.

The second major instance of potential responsibility is found at s.165(3)(b). Barring an agreement with the Minister further to s.89, a secured creditor which becomes "the registered owner" of a contaminated site will be responsible for its clean-up. This instance of potential liability is subject, however, to important restrictions. A secured creditor will not be responsible "where it acts primarily to protect its security interests." This concept is illustrated through a number of examples (which are not meant to be exhaustive). For instance, one relates to the secured creditor who "participates only in purely financial matters related to the site." Moreover, a secured creditor will not incur liability where it "appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take."

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[118] *Environmental Protection Act (Ontario), supra* note 115 at ss. 168.17(1) and (2).

[119] *Ibid.* at s. 168.18, paragraph 1. Five other Canadian jurisdictions have no provision relating to the liability of secured creditors.

There is very little reported case law on this section of this *Act*. Of note, however, is the decision in *Pentagon Investments.*[120] In that case, the plaintiff mortgagee had foreclosed on three properties and purchased them at a sheriff's sale. The mortgagee's aim was to resell the properties. The mortgagee then discovered environmental problems at two of the sites. The mortgagee retained an engineering company to conduct environmental assessments and remedy contamination. The costs incurred were considerable. The mortgagee brought an action for deficiency (meaning that it was still owed money) and sought to recover its environmental costs as part of a deficiency judgment. The mortgagee then asked the court to decide whether the environmental testing and clean-up costs could be recouped as a "protective disbursement."

Having taken note of s.165 of the *Environment Act*, which sets out the circumstances in which a secured creditor would be liable for rehabilitation of contaminated premises, the court allowed the plaintiff's claim for environmental testing and clean-up costs as legitimate protective disbursements. These were reasonable expenses, meant to preserve the property's value in the period before it was resold by the mortgagee:

> "At the present proceeding there was found environment contamination on two of the sites. I find the remedy of these deficiencies was essential to preserve and protect the property with a view to recovery by the plaintiffs of some of its claim on the covenants. I will direct that recovery of a reasonable amount for this remedial work be classified as protective disbursements. The plaintiffs entered possession of the property before foreclosure and bought the properties at the sale. It paid the full cost of the remedial work which was necessary for the resale of the property. The steps taken by the plaintiff were reasonable, and I will consider the report of an independent engineer to determine a reasonable cost."[121]

There is no indication that the secured creditor was concerned that taking over control (indeed purchasing, with an intention to resell) a contaminated site would lead to liability problems. More specifically, all indications are that the mortgagee had testing and clean-up conducted, not because of concerns about its own responsibility under the *Act*, but to facilitate the properties' resale.

At s. 165(4), the *Act* further specifies that, "Notwithstanding clause 3(b) [*liability if secured creditor becomes the registered owner*], a secured creditor is not responsible for the rehabilitation of a contaminated site beyond the value of the assets the secured creditor is administering." That is, in those situations in which the secured creditor may be liable for remediation the liability will be capped at the value of such assets. This is so even if the secured creditor becomes the registered owner. It is not clear, however, which assets are meant to be covered by the phrase "assets the secured creditor is administering". It may be thought to apply to only the contaminated site. Alternatively, it may include other properties of the same polluter which the secured creditor has acquired by foreclosure. Or it may apply to the other assets of the polluter held by the lender, such as investment or operational accounts.

The phrase is not in widespread use in other statutes,[122] and the Commission is not aware of any definitive interpretation by a court. However, the same language appears in section 165(1), as follows:

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[120] *Royal Trust Corp. of Canada v. Pentagon Investments Ltd.* (2000), 184 NSR (2d) 267 (S.C.).

[121] *Ibid.* at para. 14.

[122] Other than in Newfoundland, which has adopted the language of the Nova Scotia *Act*.

165(1) Responsibility of lenders and trustees

Notwithstanding anything contained in this *Act* or any other enactment respecting the protection or rehabilitation of the environment, receivers, receiver managers, trustees, executors or administrators of a person responsible, and their agents and employees, are not responsible for the rehabilitation of a contaminated site under any such provision **beyond the value of the assets the persons are administering** less the reasonable costs and fees of the administration, in relation to their position as receiver, receiver manager, trustee, executor or administrator of the assets of a person responsible, in respect of any adverse effect that occurred

(a) before the appointment of the receiver, receiver-manager, executor, administrator or trustee; or

(b) after appointment, except where the adverse effect occurred as a result of the failure of the receiver, receiver manager, trustee, executor or administrator to exercise due diligence.

In this context the sense of the phrase is plain - that the trustee ought not to be liable for any greater amount personally than the beneficiary's assets can sustain. The *Act*'s use of the same phrase to limit the quantum of liability in regard to both trustees and secured creditors indicates the Legislature's intention that they ought to be in the same position. As responsible persons, neither is liable for any greater amount than the value of the assets of the polluter held by the trustee or lender.

Discussion

The Commission has received no indication that the general thrust or particulars of section 165 are causing any great difficulty or uncertainty that would discourage lending in the context of contaminated sites. The Commission makes no recommendation in this regard.

CHAPTER 3: NOTICE, ENFORCEMENT AND ACCESS TO INFORMATION

How should the Department become aware of the existence of contaminated sites, actual or potential? What standards ought to govern the decision to take regulatory action in respect of a site, particularly by means of a ministerial order? What records of Departmental knowledge and involvement ought to be available to the public?

I NOTIFICATION

1) Mandatory Reporting

There are a number of ways of getting information about contaminated sites. The Department may send out inspectors to identify suspected contaminated areas or confirm contamination. This may follow historical knowledge of industrial or commercial activity, or information provided in media reports or by individuals. Owners and others may provide information on a voluntary basis. Or, legislation may impose the duty to report actual or suspected contamination.

Obtaining relevant information may not be easy. Determining the presence of contaminants may not be possible without a proper environmental testing. However, those connected with a property may not wish it to be tested, over concern that labeling the site as contaminated will result in negative publicity, or legal liability.

There are, therefore, advantages to a mandatory notification regime. In the case of sites where contamination is only suspected, because of past use or perhaps the allegations of neighbours, notice of such suspicion would allow the Department to either require that testing be done or undertake testing at its own expense. The need to know about sites where contamination exceeds acceptable levels is important for health reasons. Knowing the existence of such sites would allow the Department to establish priorities for clean-ups. Having information about the number of contaminated sites requiring some degree of remediation can also give some guidance as to the number of qualified professional persons required to bring about such clean-up.[123] In addition, a more complete record of contamination and potential contamination can further redevelopment opportunities:

> "Historical land use can often indicate potentially contaminated sites. Mapping these areas and creating an historical land use database would allow planners to designate contaminate risk areas in Official Plans and Zoning By-laws. This would give interested parties early notice of the sites, promote awareness, as well as facilitate land use planning".[124]

There are also some drawbacks, from an administrative perspective. Upon identification of suspected or known contaminated sites, the public, if aware of them, will expect something to be done by way of assessment, clean-up or both. These demands could strain regulatory resources, particularly if there are

[123] See EcoCanada, *supra* note 11 at viii. To help in gauging demand for environmental assessment and remediation work, that report suggested that "[f]ederal, provincial, territorial, and municipal governments consider developing a database of non-federal contaminated sites that is compete, reliable, comparable, and flexible."

[124] Halifax Regional Municipality, Planning and Development Services, "Brownfield Sites: An Options Paper for the Halifax Regional Municipality" (2002) [unpublished] at 58, available online: Halifax Regional Municipality, "Publications research" link, <www.halifax.ca/regionalplanning/publications/research.html> (date accessed: 29 January 2009).

numerous sites identified. In addition, the demands for immediate action could burden the government with the cost of assessment or clean-up that a more manageable process would allow to be passed on.

There are also issues of uncertainty in compliance, particularly if reporting is required in relation to suspected sites. Would historical use be sufficient to produce a suspicion of contamination that must be acted upon? How can a property owner actually know that the property is contaminated unless the site evaluation is completed? Is it enough to have a neighbour complain about suspected contamination based on some factor other than historic use?

Having reported the actual or suspected contamination, the property owner may be required by the regulator to conduct testing and perhaps to conduct a clean-up as well. Both of these activities would involve cost. In addition, the value of the property may fall as a result of the stigma of contamination becoming attached to it. The stigma may also apply to nearby, but non-contaminated properties. For the local municipality, this could result in a loss of taxation revenue.

At present, Nova Scotia Environment collects information involving contaminated sites on a case-by-case basis. The Department might receive information further to situations involving property development, site assessments that are done by property owners, complaints to the department by offsite property owners, or known past activities.

Part VI of the *Environment Act* concerns releases of contaminants, and provides among other things for the mandatory reporting of such releases by the person responsible, and voluntary reporting of other non-compliance. Part VI does not govern longstanding or historical contamination, however.

Under s.1.1 of the 1996 Guidelines for Management of Contaminated Sites in Nova Scotia, if an owner knows or is notified that a site is "potentially contaminated," he or she is required to evaluate the potential impacts and risks in order to decide what action to take. More specifically, s.1.2(c) requires the owner to evaluate the site in a reasonably timely manner to determine whether there are off-site impacts, as well as unacceptable on-site impacts or risks to human health and safety or to the environment. Identification of contamination may be made using one or more of the phases of environmental site assessments set out at s.1.3. "Require" in this context does not mean legally bind, since the Guidelines do not have the force of law.

If either or both of these impacts are discovered, the owner is required to notify affected third parties, determine whether remediation or on-going site management is required, and make a contaminated site notification report to the Department.[125] If there is a direct and immediate threat to human health or the environment, it has to be dealt with immediately and separately from the Guideline process. If none of the impacts or risks identified at s.1.2(c) of the Guidelines are identified, no further action is required, apart from the owner advising the notifying party in writing.

The primary role of the Department is to ensure that the Guideline process is followed. When the Department receives a notification report stating that action is required at the site, it will decide if ongoing departmental involvement is required, receive all reports and information submitted by the

[125] It is uncertain how the third party determines if a site is contaminated or how strong that person's suspicion should be.

owner, evaluate reported concerns, and decide whether the Guidelines are to be followed. If so, the Guidelines will require the owner to create a remedial plan and to carry it out. No designation as a contaminated site, however, is involved.

2) The Use of Registries in Nova Scotia

The *Environment Act* requires the Minister to establish an "environmental registry." The departmental website describes the registry as "a set of records defined in Nova Scotia *Environment Act,* s. 10, which are considered to be in the public domain and made routinely available to the public upon request." The Registry is meant to contain a variety of materials, including, further to s.10(i)(c), "notices of designation given pursuant to the *Act*." To request access to records through the Environmental Registry, an application form for each civic address to be searched has to be completed and an application fee paid.

Section 10(2) of the *Environment Act* provides that "all information under the control of the department is accessible to the public, subject only to the *Freedom of Information and Protection of Privacy Act"* [FOIPOP]. The major potential restriction, set out at s. 20 of FOIPOP, prohibits in general the disclosure of private, personal information: "the head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third person's personal privacy." This prohibition is subject to a number of qualifications and illustrative principles that significantly narrow its application. It does not apply to corporations, for example. Section 20(2)(b), permits the disclosure if it is, "likely to promote public health and safety or to promote the protection of the environment." Also noteworthy is s. 20(4) which provides:

> (4) a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> > (a) the third party has, in writing, consented to or requested the disclosure;
> > (b) there are compelling circumstances affecting anyone's health or safety;
> > (c) an enactment authorizes the disclosure;

There are other provisions of FOIPOP that may limit the disclosure of contaminated sites information. Section 17(1) provides, "the head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy...." Subsection (2) provides an important qualifier:

> (2) the head of a public body shall not refuse to disclose pursuant to subsection (1) the results of product or environmental testing carried out by or for the public body, unless the testing was done
>
> > (a) for a fee as a service to a person, a group of persons or an organization other than the public body; or
> > (b) for the purpose of developing methods of testing.

In October of 2000, an Advisory Committee established by the Nova Scotia Department of the Environment as part of the Legislative Review Process published a report which recommended that the department compile and maintain a provincial inventory or registry of contaminated sites, separate from

the Environmental Registry.[126] The 2006 amendments to the *Environment Act* added s. 91(1)(db), which authorizes Cabinet to make regulations regarding the identification and notification of contaminated sites, and s. 91(1)(di), in regard to regulations for "the filing and transfer of records of site condition and certificates of property use, and with respect to the filing of environmental notices on property title respecting records of site condition and certificates of property use." No such regulations have been enacted.

3) Reporting in other jurisdictions

All Canadian jurisdictions have statutory provisions that require the reporting to the appropriate government department of any new or current spills, or of the release of toxic contaminants into the environment. Once on notice, the department can monitor, investigate, and take steps to counteract the contamination or direct that the polluter do so.

No jurisdiction requires the reporting of historical contamination, however. Two provinces, Newfoundland and Ontario, make the reporting of historical contamination optional, and in two other provinces (Alberta and British Columbia), the statutory provisions are ambiguous in this regard.

Section 40(1) of the British Columbia *Act* requires persons who seek re-zoning or subdivision of land, or who wish to sell land and who know, or reasonably should know, that the land is or was used for industrial or commercial activities, to provide a site profile. The site profile describes the condition of the land involved and the extent to which it contains contaminants. Additionally, if the Director, on the basis of information other than that contained in a site profile, reasonably suspects that the site may be contaminated, he or she can order the owner or operator of the site to undertake a preliminary investigation. In some cases a site investigation may disclose that toxic substances have migrated offsite or are likely to do so. In such a situation, s. 60 of the B.C. statute requires that the responsible person must provide written notice to the affected neighbor within 15 days.

The Northwest Territories (N.W.T.) comes closest to imposing such a duty. Its Guideline provides that if a property owner is notified that the site is potentially contaminated, he or she must report this. There is a similar provision in the Nova Scotia Guidelines. Presumably, if the owner personally discovers the potential contamination, he or she must also report it. However, being a guideline provision, as is the case in Nova Scotia, it is non-binding. The important point here is that the trigger for reporting in the Northwest Territories is whether someone thinks the site is potentially contaminated.

The N.W.T. Guideline provides that contaminated sites are areas of land, water, ground water or sediment that have levels of contaminant exceeding the remediation criteria. The N.W.T. statute defines a contaminated site as one in which the contaminants exceed numerical standards. The term "contaminant" is defined in the statute, and one component of that definition is that the substance may cause "adverse effects". The definition of "adverse effect" is similar to Nova Scotia's. Thus, the Guideline imposes the duty on the basis of: 1) whether the site has contaminant(s) that exceed numerical standards; and, 2) whether the contaminant(s) result in a negative impact on the environment or public health by impairing or damaging either of them.

[126] Nova Scotia Department of the Environment, *Nova Scotia's Environment Act, Legislative Review Process, supra* note 34 at 21.

In British Columbia and Ontario, though there is no general duty to report a contaminated site, the respective statutes do impose a duty to file a record of site conditions in circumstances where the party knows that the land was previously an industrial or commercial property, or situations where the person wishes to apply for a permit for redevelopment or re-zoning. For example, the B.C. *Environmental Management Act* at s. 40(1) requires persons who seek re-zoning or subdivision of land, or who wish to sell land and know or reasonably should know that the land is or was used for industrial or commercial purposes, to file a site profile with the Environment Department. The site profile describes the condition of the land involved and the extent to which it contains contaminants. Based on the information provided in the site profile, the Department may require a site investigation (either preliminary or detailed).

In 2003, the B.C. ministerial Advisory Panel criticized the site profile process, noting that in many cases it is not linked to any change in land use and there is no requirement that it be completed by a person who is knowledgeable or who is required to inform him- or herself about the potential environmental problems associated with the property. The Panel suggested that the preliminary site investigation is a better tool for assessing whether a property might have substances of concern associated with the property. The report also noted that no other Canadian province uses a site profile procedure or similar system and that 38 local governments in BC have opted out of the site profile system, a good indicator that it is not working.[127]

The Panel suggested that a site assessment should be mandatory in only two situations: when there is a change in land use, such as re-zoning, that may change the potential for human or other environmental receptors to be exposed to substances of concern on the site; or when an issue of concern is brought to the Minister's attention and the Ministry agrees that the site should be assessed.[128]

The Panel noted that various commercial transactions can act as voluntary triggers. These transactions, such as a sale, lease, or the financing of commercial or industrial properties could require potential environmental concerns at a particular site to be investigated. These would be voluntary site assessments.

The 2007 Final Report of the New Brunswick Brownfield and Development Working Group recommended that environmental legislation should clearly specify when a person has a duty to report the release of a contaminant or the discovery of existing contamination to the Department of the Environment.[129] The Working Group based its recommendation on a number of working premises. Only a property owner and persons who contributed to contamination should have to report it. Contamination that has caused or will likely cause an "adverse effect" to the environment or to a third party should be immediately reported. Historic contamination, which has not produced an adverse effect or appears not likely to do so, should be properly investigated, before there is any obligation to report. One should not, however, have to report contaminant releases or historic contamination if their amounts are lower than government standards. Finally, taking into account access to information legislation, government should exercise discretion about actively publicizing information about potentially contaminated sites. In other words, the Working Group felt that public's "right to know"

[127] "Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 57 at 46.

[128] *Ibid.*

[129] N.B. Brownfield Development Working Group, *supra* note 59 at 8.

might be subject to limits in favour of another (perhaps greater) public good, which is to avoid encumbering clean properties with the stigma of past contamination, in effect creating an unjustified list of the damned.[130]

Amendments to the New Brunswick *Act*[131] in response to the Working Group's report provide that any person who owns, leases, manages or has charge or control of a site, and any site professional, who has knowledge that a site is or may be contaminated by a 'contaminant of concern' (substances designated as such in regulations or by the Minister), other than a minor contamination event, must report the contamination.

4) Public Access Databases

The federal government, as well as the respective governments in British Columbia, Manitoba, Quebec, and the Yukon, maintain publicly accessible registries which contain information on specific contaminated sites. With the exception of the Yukon, those governments also make contaminated sites information available to the public on the internet.[132] The common objection to such public access is the potential for unjustified stigma, and consequent loss of property value for the subject site and neighbouring properties.

5) Discussion

In 2000, an Advisory Committee which studied the *Environmental Act* suggested, "In the absence of a functional means of identifying or designating sites, action and progress on contaminated site remediation and management has been sporadic."[133] That Committee recommended, "any person who knows or ought to know that a site is or may be a contaminated site must immediately report the site and any information pertaining to its contamination to the Department of the Environment."[134]

In light of the collective goals which underlie the *Act*, and the many benefits that derive from better and more complete information about contaminated sites, reporting to the Department should be mandatory when a landowner, or someone acting in place of the landowner, knows or ought reasonably to know that a property is contaminated, in accordance with legislative standards or criteria. Although adopting much of the 2000 Advisory Committee's recommendation, the Commission is of the view that it would go too far to impose a mandatory reporting requirement on "any person." Rather, the requirement should relate to someone who is responsible for the property in question, such as a lessee. This would not include a service provider or site professional. Similarly, the obligation should not apply

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[130] *Ibid.*

[131] Supra, note 52.

[132] The websites are available through links at the following addresses: www.bconline.gov.bc.ca [British Columbia]; www.gov.mb.ca/conservation/envprograms/contams [Manitoba]; and www.mddep.gouv.gc.ca/sol [Quebec].

[133] Nova Scotia Department of the Environment, *Nova Scotia's Environment Act, Legislative Review Process*, supra note 34 at 21.

[134] *Ibid.* at 23.

in respect of suspicion of contamination, which would run the serious risk of overburdening landowners and the department, and creating unjustified stigma. The Guidelines' approach of requiring further assessment in such cases, to confirm contamination exceeding the relevant standard, is preferable.

The *Act* currently authorizes the imposition of mandatory reporting. Section 91(1)(c) empowers the provincial Cabinet to make regulations "respecting the duties and rights of vendors, purchasers or other persons of property that may be contaminated," and more specifically, s. 91(1)(db) allows for the creation of regulations "respecting the identification and notification of the discovery of contaminated sites."

Once the Department is aware of confirmed contamination, either through mandatory or voluntary reporting, or its own investigation, a Notice of Contamination, and all further records of action taken in respect of the contamination, should be available to the public. This should be in a format easily searchable by Property Identification (PID) number, civic address, owner name, and otherwise. There should be seamless integration with the Property On-Line system, (by way of a flag on the parcel register and link to the contaminated sites registry). This system entails a disincentive to investigate suspected contamination, but it is outweighed by the benefits of public awareness and the corresponding incentives to remediate.

Notices of potential contamination, while certainly permissible under the regime envisioned here, would not be included in a publicly accessible registry, however. Neither would records of action taken to confirm the levels of contaminants at such sites. Such notices may be given in situations where mistake, hyper-vigilance, or even malice are involved. If fears about contamination turn out to be unfounded, the landowner and neighbours ought not to be subject to possible stigma, in addition to the inconvenience and expense of having to report and investigate potential contamination.

So that there is no confusion, the submission of required documents in respect of confirmed contaminated sites should be accompanied with the owner's consent to disclosure in the contaminated sites registry, in order that public access can be automatic, rather than requiring FOIPOP review. Those preparing official submissions would be aware of this and could self-censor any private information. Presently, obtaining records of contamination and remedial action on file with the Department can involve lengthy delays. This can thwart the objectives of the *Act*, to the extent that it may frustrate potential redevelopers who require such information before completing a purchase.

Recommendations

A landowner, lessee, and any other party with an interest in the property, or any other responsible person, should be required to report any contamination exceeding legislative standards or guidelines, as of the time when the person knows or ought reasonably to know of such contamination.

After investigation and determination of contamination, notice of the contamination and all further records of remedial activity should be included in the environmental registry, for consultation by members of the public.

A notice of potential contamination, and any record of activity to confirm contamination, should not be included in the environmental registry.

II REGULATORY ACTION

1) Definition of Contaminated Site

In Nova Scotia, a contaminated site is one that either (a) contains concentrations of a contaminant or contaminants that exceed standards prescribed or adopted by the Minister that has caused, is causing or may cause an adverse effect, or (b) a site that has been designated by the Minister as a contaminated site. The latter definition relies on the designation process in the *Act*, which has never been applied. The legislation does not set out the standards adopted by the Minister - these have been non-legislatively adopted by way of the 1996 Guidelines and elsewhere.

The term "contaminant," unless otherwise defined by the regulations, means a substance that causes or may cause an adverse effect. "Adverse effect," which forms part of the definitions of both "contaminated site" and "contaminant," "means an effect that impairs or damages the environment ... including the health of humans or the reasonable enjoyment of life or property."

The legislation in six other Canadian jurisdictions (B.C., Manitoba, Newfoundland, P.E.I., Saskatchewan, and the Yukon) defines contaminated site in some way. Relevant statutes in Alberta, New Brunswick, the Northwest Territories, and Ontario do not.

Five provinces define a contaminated site as one designated by the Minister or Director. In Nova Scotia, s. 87 requires the Minister to be of the opinion that the substance has caused, is causing or may cause an adverse effect, and to follow standards, criteria or guidelines established or adopted by the Department before making a designation. In P.E.I. and Newfoundland, a designation is made on the basis of standards and criteria that the Minister considers relevant. In Manitoba, the Minister's designation is based on current or foreseeable land use and whether or not the site is contaminated to a level that poses or may pose a threat to human health or the environment. In Saskatchewan the designation is based on the Minister's opinion that a substance may cause, is causing, or has caused an adverse effect and is present on the site.

In British Columbia a contaminated site is defined as an area of land in which the soil, water, or sediment contains either a hazardous waste or another prescribed substance in a quantity or concentration that exceeds prescribed risk based or numerical criteria or standard's or conditions. The Yukon statute defines a contaminated site as "an area of land, water, sediment, that contains a contaminant in an amount, concentration or level in excess of that prescribed by regulations or allowed by permit." A contaminant is defined as "substances in excess of the normal quantities in the environment and results from human activity that may cause an adverse effect."

2) Regulatory Confirmation of Contamination: Process & Substance

One approach that many of the provinces and territories use to confirm contamination, as a prelude to any further requirement for clean-up activity, is the designation of an area as a contaminated site. The designation process entails procedural and substantive dimensions.

a) Criteria for Designation

Only in New Brunswick, Quebec, and Alberta is the Minister authorized to conclude that a site is

contaminated without giving consideration to any specific fact or question. In Manitoba, for example, the Minister has to determine if the site "is a threat to human health or safety."

In Saskatchewan and Newfoundland, the Minister must determine whether the contaminating substance has caused, is causing, or may cause, an adverse effect upon the environment. In the Yukon, the emphasis is only upon past harm.

Another common basis of designation decisions include whether the contamination exceeds regulatory numerical standards which are normally set at a level to protect the environment and personal health and safety from damage or impairment. In some provinces, such as P.E.I. and Nova Scotia, the Minister is required to take into account criteria adopted or established by regulations, while in B.C., he or she must consult other sources. The B.C. statute directs its Minister to consider several sources of information including (a) the site profile; (b) the detailed investigation and site information; and (c) other available information.

b) The Nova Scotia Designation Procedure

Pursuant to Section 88, the Minister must give notice that he or she has made a preliminary determination that an area is to be designated or has been designated as a contaminated site. Notice must be sent to:

(a) any person responsible for the contaminated site that the Minister considers appropriate;
(b) any registered owner of real property directly affected by the designation; and,
(c) the municipality where the contaminated site is located.

Those parties notified of the preliminary decision are provided an opportunity to comment on the determination. After receiving the comments, the Minister makes a final decision about whether the site is contaminated and should be designated as such. He or she then gives written notice of the final decision to the three groups listed above, along with the reasons for the final decision. The Minister then files the decision in the environmental registry. Correspondingly, if the Minister decides to cancel a designation (either temporary or final), he has to give notice of the cancellation and also file it in the environmental registry.

Further to s. 89(1), once those responsible for the contaminated site have been notified of the designation, any of them may prepare a remedial action plan for the Minister's approval. If they do not provide such a plan, the Minister can issue an order under s. 125 of Part XIII of the *Act*. If the Minister approves the plan, the person responsible can enter into an agreement with the Minister, other responsible persons, or both. The agreement must set out the remedial action to be taken in respect of the contaminated site and allocate the costs involved.

In the event that the parties cannot reach an agreement, s. 89(3) permits the Minister to refer the matter to Alternate Dispute Resolution (ADR) under Part II of the *Act*. Nova Scotia appears to be unique in expressly providing allowing for ADR in this context.

In Nova Scotia it is not necessary to proceed against a property by way of the designation procedure. Indeed, that procedure has never been used. The Minister retains jurisdiction to issue an order in respect of a contaminated site in a variety of contexts, whether the site is designated as contaminated or not.

c) Designation Procedure in other Jurisdictions

The legislation in Saskatchewan, Newfoundland, British Columbia, Manitoba and the Yukon provides for a preliminary designation to be made by the Minister, followed by notification to various individuals and groups and a period of time within which they may respond to the Minister's preliminary decision.

Only two provinces, Alberta and P.E.I, do not provide for preliminary decisions. In P.E.I., after the designation is made, it must be registered, notice must be given, and the registered owner or occupier be given a chance to comment upon the designation. The Minister can postpone designation if agreement is reached with regard to the remediation plan.

The Alberta statute contains no reference to preliminary and final decisions being made by the Director. Instead, the Director makes a decision as to designation, and gives notice to a broad range of persons. Anyone directly affected by the Minister's decision can submit a statement of concern setting out that person's views on any remedial measures that should be taken with regard to the site. This is not a opportunity to contest designation but rather to lodge an argument or comments about the remediation phase of the designation process. Under the Alberta statute, there does not appear to be any opportunity for anyone to contest the designation decision, other than through judicial review.

The majority of provinces (Manitoba, British Columbia, Nova Scotia, Newfoundland, Saskatchewan and P.E.I.) provide notice to three types of interests:

(a) the person or persons responsible for the discharge of contaminants into the area;
(b) the registered owner or occupier of the area to be designated; and
(c) the municipality within which the land is located.

A few provinces (Saskatchewan, British Columbia, and Manitoba) also require notice of the preliminary decision to be sent to all persons with an interest in the land. The Yukon Territories requires notice to be sent to:

(a) any local community group;
(b) the Yukon First Nations; and,
(c) any interested government agency.

Following expiry of the time to submit comments, the Minister makes a final decision and gives notice to the same recipients that received notice of the preliminary decision. Usually, provision is made for the filing of the final decision in the environmental registry, where there is one (Nova Scotia, Prince Edward Island, British Columbia, and the Yukon) or in the land titles registry as in Manitoba. The legislation also provides for the cancellation of a designation (Nova Scotia, Newfoundland, Saskatchewan, P.E.I., and Manitoba).

The various *Act*s differ on whether a responsible person must prepare a remedial plan for the Minister's approval, as is the case in the Yukon, Newfoundland, and Saskatchewan, or whether it is optional, as in Nova Scotia, Alberta, and Manitoba. In the Yukon Territories, for example, the Minister can order a person to supply a remediation plan or, if the person wishes to change land use, he or she must provide a remediation plan. If the Minister approves of the remediation plan, he or she can enter into an agreement with one or more of the responsible parties or the responsible parties can agree amongst

themselves. The agreement will cover the remedial plan and the allocation of responsibility and costs as between the parties. While an agreement is in effect, several provinces provide that no prosecution for violation of the statute will be undertaken or commenced (in Saskatchewan and Alberta).

If a remediation plan is not submitted, or is rejected by the Minister, the Minister may proceed by way of compulsory order. In Manitoba, the Minister can require further investigation to be undertaken by the responsible person, while in Nova Scotia the matter can be referred to an ADR process before any final order is issued under s.125 of the *Environment Act*.

3) Discussion

Not every instance of property contamination will require a compulsory process. Many responsible persons can be expected to clean up a property on their own initiative or otherwise respond favourably to a departmental notice. Experience suggests there is no reason for site designation or a ministerial order in all or even the majority of cases.

In general, then, the regulations should promote and provide opportunities for voluntary, informal, and effective solutions, backed by the prospect of ministerial orders. This type of hybrid process can be achieved by formalizing the status of the 1996 Guidelines as legislation, with necessary amendments to cover the liability issues discussed elsewhere in this report and generally to bring them up to date with present-day practices. Whether by reference in the regulations, or as a new set of regulations based on the Guidelines approach, this would clarify for all parties the process and substantive liability issues that presently generate uncertainty.

The site designation process should be retained in legislation. The benefit of designation is to require a transparent process for determining whether a site is in fact contaminated in levels exceeding the objective standards adopted by the Minister, where there is some dispute about this. In particular, the process under s.88 provides for comments by those affected and requires reasons. This provides reassurance that the decision will be made appropriately, and the *Act* provides for a reasonable opportunity to appeal in cases of clear factual error. Indeed, as a means to ensure that the imposition of regulatory liability is well grounded in fact, the process should be available wherever there is dispute about the existence of contamination exceeding the relevant guidelines. One or more persons responsible, or the Minister, should be able to require the site designation process in advance of an order. Otherwise, in the face of a mistaken decision as to contamination, the person responsible will be required to challenge the Minister's eventual order in court. The limitations of such appeals under s.138 are discussed in the previous chapter.

Recommendations

The regulations should promote and provide opportunities for voluntary, informal, and effective solutions, backed by the prospect of compulsory action through ministerial order.

A site designation process should be retained in legislation. The Minister, or the person responsible, should be able to require the site designation process in advance of an order. Removal of the designation would be automatic upon completion of the remedial action plan.

CHAPTER 4: CONTAMINATED SITE PROFESSIONALS

I INTRODUCTION

Site professionals perform a variety of roles related to the identification, management, and remediation of contaminated land. They might perform work themselves, oversee the work of others, or certify for the Department the quality of completed rehabilitation work. Often, they will be involved in the preparation and implementation of the remedial action plan pursuant to section 89(1).

Instead of conducting its own separate determinations, the Department in many cases relies on site professionals to evaluate the appropriateness of measures taken in relation to contaminated site remediation. The site professionals report to the Department in written form, and sometimes through an interview. Having competent site professionals is essential to the remediation process.

Presently, the Department recognizes a site professional whose qualifications have been approved by one of two self-governing professional organizations, the Association of Professional Engineers of Nova Scotia (APENS) and the Association of Professional Geoscientists of Nova Scotia (APGNS). The Department also recognizes the credentials of those who have successfully completed a certification program administered by the Environmental Services Association of Nova Scotia (ESANS). This section examines options for ensuring that site professionals have the appropriate background, education and experience, continuing competence, and adequate protection for the public which relies on their work.

II NOVA SCOTIA

The *Environment Act* authorizes the Minister to pass regulations which would control and regulate the qualification of persons as site professionals, and the insurance that they might be required to carry.[135] No such regulations exist. The present standards are not legally binding.

Regarding basic credentials, both the Guidelines for Management of Contaminated Sites in Nova Scotia (1996) and the Nova Scotia Department of Environment and Labour (NSDEL) Guidance Manual for the Management of Contaminated Sites (1999) point out two ways in which a person may qualify as an environmental site professional. The first is to be licensed as a professional engineer by APENS. The second is for the person to be licensed by a licensing body that has been approved or authorized by the Department's Director of Resource Management and Pollution Control (or an alternate).[136] To gain the approval of the Director, the licensing body must be composed of persons with appropriate scientific and engineering expertise. It also must have established responsibility and accountability for setting, publishing, and enforcing appropriate professional standards; developing appropriate training and continuing education programs; and identifying appropriate upgrading requirements for licensing

[135] Specifically, s.91(1)(dg) authorizes the Cabinet to pass regulations "respecting the requirements for insurance and qualifications of site professionals who perform work, oversee work or who take responsibility for quality and accuracy of the work to rehabilitate contaminated sites, on behalf of the person responsible for the contaminated site."

[136] Nova Scotia Environment & Labour, "Guidelines", *supra* note 37 at 12; "NSDOE Guidance Manual for the Management of Contaminated Sites" (October 12, 1999) [unpublished] at 14. The Guidelines refer to a licensing body needing professional status pursuant to the "Professions Act of Nova Scotia." The Law Reform Commission is not aware of any statute, current or repealed, with that title.

renewal. The licensee must demonstrate that he or she has the appropriate level of knowledge and experience in all aspects of contaminated site activities, including investigation, remediation, and management.

Nova Scotia's Domestic Fuel Oil Spill Policy (2005) distinguishes between a "certified cleanup contractor" and a "site professional." The former requires "an appropriate level of combined education and experience in remediation of the petroleum hydrocarbon spills." The latter designation is based on having a bachelor's degree in engineering, science or applied science, as well as at least eight years of professional experience. More particularly, "a minimum of five years shall be of specific practical experience in all phases of environmental site assessment, development and implementation of remediation plans, compliance monitoring, and contaminated site health and safety." A certified clean-up contractor is only permitted to remediate a domestic fuel oil spill where contamination has not migrated under a building or onto other properties, as well as where the groundwater is non-potable and shows no Apresence of free product."

Although the Guidelines impose no specific insurance requirements, they do recommend that the site professional, their employer, or both have adequate, applicable insurance coverage.[137] The Domestic Fuel Oil Policy does not refer to insurance requirements for certified clean-up contractors. Site professionals require Errors and Omissions liability insurance protection of at least $1,000,000, with no exclusion for environmental risks.

From 2002 to 2008, ESANS had a contract with the Department to perform a number of functions relating to the Domestic Fuel Oil Spill Program. ESANS received and evaluated applications for site professionals and certified clean-up contractors, recommended applicants for approval by the Department, administered a registry of active site professionals and certified clean-up contractors (currently some 55 in number), and facilitated courses for certified clean-up contractors. Effective December 31, 2008, the Department now fulfills those roles.[138]

III OTHER JURISDICTIONS

1) New Brunswick

Further to the Guidelines for the Management of Contaminated Sites (Version #2, November 2003), a New Brunswick site professional is responsible for ensuring professional competence for all work done as part of the management process, notifying the responsible party and the Environment Department about third party contamination and health risks, reviewing the contents of site-related reports, deciding if steps in the proposed remedial action plan have been completed, and completing a record of site condition. The site professional does this work on behalf of the responsible party.

A site professional is defined in the Guidelines as a person of appropriate qualifications further to requirements of the Association of Professional Engineers and Geoscientists of New Brunswick (APEGNB). Other professionals and technical experts, such as toxicologists and ecological risk-

[137] Nova Scotia, Environment & Labour, "Guidelines," *supra* note 37 at 14.

[138] Environmental Services Association of Nova Scotia (ESANS), "Domestic Oil Spill Program," online: < www.esans.ca/oilspill.html> (date accessed: 20 January 2009).

assessment specialists, may play an important role in contaminated site management, and the Department acknowledges this multi-disciplinary approach may be appropriate for certain sites. However, the site professional is responsible for ensuring that other technical experts are adequately qualified to carry out their portion of the work, and assumes responsibility for all environmental work undertaken for the project.

When the responsible party and the site professional are satisfied that the requirements of the rehabilitation plan have been met, the recommendation for closure can be made by forwarding a Closure Report and a Record of Site Condition signed by the site professional to the Department.

2) British Columbia

Until recently, British Columbia operated a "roster system" in relation to the identification of site professionals. The provincial environment department determined what classes of persons would be considered qualified to do site professional work and decided which members among those classes would be approved for inclusion on the roster of those who could be selected to work on contaminated sites.[139]

For a variety of reasons, this system was perceived as unsatisfactory.[140] In 2003, the ministerial Advisory Panel recommended the system's replacement by a self-governing, independent licensing Environmental Professional system. This recommendation came into effect four years later.

The Contaminated Sites Approved Professional Society was incorporated in B.C. in March 2007 to be a self-regulating professional society authorized to review site investigation, determine if a site is contaminated, and review remediation plans. As of July 1, 2008, almost all applications for contaminated site approvals (notably Certificates of Compliance and Approvals in Principle of Remediation Plans) will be reviewed by the Society members, acting as approved professionals.

Members of the Society are drawn primarily from three professions: 1) the Association of Professional Engineers and Geoscientists; 2) the College of Applied Biology; and 3) the British Columbia Institute of Agrologists. The Society's governing board includes representation from government (municipal and provincial) and the lay community.

Society members review investigation and remediation work, presumably conducted by persons hired by the property owner. Society members make recommendations for regulatory approvals. In so doing, members must apply legislative standards, ministry guidelines and protocols, Society by-laws as well as rules and practice guidelines. The reviews and recommendations are completed in a form called "The Summary of Site Condition". This is sent to the ministry with the application for approval. The ministry does the final vetting of the application and issues the requested approval, generally in the form of a Certificate of Compliance or Approval.

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[139] Bereti, *supra* note 54 at 15-16.

[140] Roster membership was seen as too restrictive, there were too few members, and roster members were perceived to be uninterested in doing smaller jobs. See "Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 57 at 53-55.

The Society is authorized to discipline its members and may conduct performance assessment or audits of its members' reviews both on a random and a targeted basis.

In order to be a member of the Society, a member must carry a minimum of $2 million of professional Errors and Omissions insurance. Apparently the province also supplies or makes available Approved Professional Indemnity insurance, which, for signatory members, provides protection for Errors and Omissions Claims exceeding the private insurance coverage limits.

The Society can charge fees for processing or administering applications, as well as for reviewing an applicant's experience and for conducting an examination. The current fee for the review of experience qualifications is $525.00, while the examination fee is $787.00. The fees seem designed to recover 100% of the examination development and administrative expenses incurred by the Society, though there is provision for government to subsidize the payment of additional expenses.

3) Quebec

In Quebec, the term "experts" is used rather than site or environmental professionals.[141] Government controls the province's site professional system. Nonetheless, the Ministry cannot be held legally responsible for work done by a site professional. The governmental involvement is divided among three units, all of which fall under the responsibility of the provincial environmental department. The Centre d'expertise en analyse environnmentale du Québec is a governmental agency which oversees the site professional system. The Service des lieux contaminés provides technical and scientific support. Regional offices of the department receive and evaluate the information provided by site professionals.

The Ministry of the Environment maintains a list of experts authorized to furnish the Certificates required by the different provisions of the Quebec *Environment Quality Act*. To join the authorized list, an applicant ordinarily requires a bachelor's degree in a relevant discipline (such as biology, chemistry, engineering or geology) and have at least 10 years' relevant experience (15 years for those without a degree). The applicant must successfully write an examination set by the Ministry and attend government-organized information sessions as required.

An open book exam tests applicants' knowledge of site professionals' tasks and responsibilities, as well as relevant legislation. The Centre d'expertise receives and processes complaints against site professionals, and if necessary, determines the applicable penalty. Both the provincial evaluation committee and the appeals committee include representation from government and professional groups.

A site professional must sign and adhere to a code of best practices. They cover such aspects as the need to serve clients in a conscientious and effective manner, confidentiality, honesty, continuing education, avoiding conflicts of interest, and maintaining good standing with one's professional body. A candidate must pay a $1,000.00 non-refundable fee in order to apply to be recognized as a Quebec site professional. It costs $200.00 to sit the provincial examination and, if successful, one has to pay $750.00 in terms of annual dues. The appeal fee is $500.00. Recognized site professionals must carry a minimum of $1,000,000 in insurance and inform clients that professional liability coverage is in place.

[141] Unless otherwise noted, information on Quebec's approach to site professionals is from Centre d'expertise en analyse environmentale du Québec, Mécanisme de Gestion de la Liste des Experts (Québec, QC: The Centre, 2007).

If a member of a professional body, an expert will be subject to Quebec's Professional Code.[142] Failing to adhere to the Code's requirements may make them subject to penalties or litigation. Non-professionals who nonetheless qualify as experts are not subject to the same type of control. One legal commentator has called into question this aspect of the Quebec system.[143]

4) Northwest Territories

The governing document is the Environmental Guideline for Contaminated Site Remediation (2003), which defines a qualified person as "A person who has an appropriate level of knowledge and experience in all aspects of contaminated site investigation, remediation and management."

Section 2.1 provides that if the Department of Resource, Wildlife and Economic Development (RWED) is notified of a contaminated site and an inspector decides that the problem cannot be resolved with limited remedial action, RWED will instruct the responsible party to obtain the services of a qualified person. The services of a qualified person are mandatory if there is evidence of groundwater contamination, or explosive vapors are present, or another party's property is affected.

Further to s. 2.2, the qualified person conducts the initial site assessment to collect necessary technical information. Once the environmental condition of the site has been assessed, the qualified person will compare it to applicable remediation criteria involving numerical limits in order to determine whether further investigation or remedial actions are required.

If the developed site specific remediation criteria are not exceeded, the qualified person may conclude that no further action is required and submit the evaluation report to RWED.

In accordance with s.2.3, if site conditions exceed the applicable remediation criteria, the responsible party and the qualified person will review the results of the site assessment and determine whether to remediate the site to the generic criteria or complete further work to develop site specific remedial criteria using a risk-assessment approach. Once the remediation criteria have been determined for the site, the qualified person must prepare a remedial action plan detailing the method for achieving these criteria, as well as the proposal for remedial action.

Pursuant to Section 2.4, once the remedial action plan is approved by RWED, the responsible person and the qualified person shall proceed to implement the plan and submit monitoring reports to RWED on a pre-determined schedule. When the responsible party and the qualified person are satisfied that the requirements of the plan have been met, they will prepare a closure report and forward this report to RWED. If RWED accepts the report, the Department will issue a letter advising that no further remedial action is required.

5) Ontario

The Ministry of the Environment, instead of conducting its own substantive review of environmental

[142] R.S.Q., c. C-26.

[143] Odette Nadon, "Civil and Regulatory Liability in the Province of Quebec" in Abdel-Aziz and Chalifour, supra note 4 at 6-37.

site assessments, relies on "qualified persons" to ensure that the work has been carried out in accordance with the required standards. Under the current regime, which was transitional and in effect only until October 1, 2009, members of particular professional or technological groups are identified as being suitably qualified persons under the legislation. For example, if only a Phase I environmental site assessment is necessary, it may be completed by one of the following: "a professional engineer, a professional geoscientist, a person who is registered as an applied science technologist or a certified engineering technologist, a registered architectural technologist, a professional agrologist and a registered chartered chemist."[144]

When the amended regulation comes into effect, the six categories of qualified persons will become only two. A qualified person must be either a licensed professional engineer or a registered geoscientist with membership in the Association of Professional Geoscientists of Ontario.

IV DISCUSSION

Site professionals may have to deal with a variety of types of contaminated sites with different combinations of toxic substances. Investigation, evaluation, and rehabilitation may require the services of different types of experts whom the site professional will have to oversee and coordinate. To the extent government in effect delegates the responsibility to oversee the integrity of remediation plans, it must ensure the competence of these site professionals and the quality of their work.

There are a number of approaches and specific options for ensuring the requisite level of competence among site professionals. One is to require membership in a well-recognized professional association which sets standards for theoretical education and technical training, which offers continuing professional development courses, which monitors the activities of its members to ensure that they maintain certain professional benchmarks, and which can discipline members if the appropriate standards of practice are not met.

A second approach, such as B.C. has implemented, is to entrust training, assessing of competence, and maintaining of standards to a specially-created independent body, which is administered by members of professional associations.

A third approach would be to develop or arrange for the delivery of a comprehensive course, under the auspices of the Department, covering all essential theoretical and scientific techniques and information required of a competent site professional. Certain basic academic requirements would be necessary and perhaps work experience as well, but the training course would be the main quality control apparatus.

A fourth approach is to maintain a roster and the attendant supervisory responsibilities in-house. Entry-level criteria could include professional designation and/or specialized third-party certification in contamination remediation, to the extent it is available.

Of course, these are not pristine, theoretically distinct and exclusive models. A viable system could incorporate elements of each. The point is to ensure:

[144] James Flagal, "In a Nutshell: The Brownfields Statute Law Amendment Act, 2001" in Abdel-Aziz and Chalifour, *supra* note 3 at 12-6.

(a) a basic level of competence;
(b) continuing education and practical experience;
(c) flexibility enough to ensure that the minimum qualification matches the complexity of the job;
(d) ongoing responsiveness to changing public and regulatory requirements; and,
(e) mechanisms to ensure that the public is adequately protected from, and fully compensated for, negligence or misconduct.

Defining the most appropriate system for ensuring competence of site professionals has much more to do with policy considerations, notably financial, than issues of legislative design within the Commission's competence. The duration and nature of training, the proper institution for delivering such training and maintaining continuing competence, the optimal number of site professionals in the province, the amount and type of insurance required, the level of relevant fees, the best means of compensation for and prevention of misconduct, and the source of funds for training and certification, are matters of a public policy or technical nature best left to government. Beyond pointing out the minimum criteria for an acceptable system, the Commission takes no position on these issues.

The Commission discussed at some length whether to entrust the supervision of site professionals' qualification, training, and licensing to an independent body, the administration of which would be shared by members of approved professional organizations, government, and the public at large. In this way, the perspectives of the main professional bodies whose members are involved in contaminated site remediation (not only engineers and geoscientists, but also applied biologists, chemists, and agrologists) could be taken into account. Ultimately, the Commission had insufficient evidence to justify such a recommendation, in the face of the administrative effort and cost that it would entail. The Commission encountered no indication of any pressing need for a broadened range of site professionals from other professional backgrounds, nor for an independent licensing body with monitoring and disciplinary powers more or less the same as those of the existing professional organizations. The members of those organizations are presently required to have appropriately specialized competence before undertaking any specialized remedial activity, and are subject to discipline for misconduct.

Nor is insurance necessarily a matter of independent self-government. It is the Commission's strong view that any site professional responsible for the submission of binding legal instruments and reports as to remedial work completed and current site conditions should be obliged to carry minimum levels of insurance, with coverage and amounts determined by regulation. But this can be imposed quite apart from any independent licensing body.

There are certainly advantages to having a specialized regime of competence, conduct and monitoring for site professionals. In lieu of creating its own society, Nova Scotia may wish to explore the option of creating a national or Atlantic region version of the B.C. society, in partnership with other interested jurisdictions.

APPENDIX A - Terms of Reference: Administrative Review of Regulatory Considerations for Contaminated Sites

APPENDIX A - Terms Of Reference: Administrative Review of Regulatory Considerations for Contaminated Sites

November 9, 2007

NSEL's Mission: To develop regulatory tools that use the framework within the *Environment Act* to stimulate redevelopment of contaminated land and contribute to economic development while protecting the environment by the year 2010 (*Environmental Goals and Sustainable Prosperity Act).*

Problem: NSEL wishes to establish an effective public policy regime that is clear and fair, and focuses on the polluter-pay principle to bring greater consistency and efficiency to questions of liability and risk management.

Boundaries of the review:

The reviewers are free to use their discretion in examining areas of interest related to this matter.

Specific Issues to be Addressed:

The advice of the Law Reform Commission of Nova Scotia is sought in addressing the aforementioned problem with consideration of the following areas:

Section 91(1)(dh) of the *Environment Act* provides the authority for the Governor in Council to make regulations respecting the regulatory liability of persons responsible for the contaminated site following the completion of remediation of the site closure, or the transfer of regulatory liability between third parties. It is imperative that the regulatory regime established by the Province on this matter provides a mechanism to alleviate the liability concerns of those involved in this industry while protecting the province from incurring unacceptable liability.

Section 91(1)(a) of the *Environment Act* enables the Governor in Council to make regulations respecting assessment of and clean up criteria for contaminated sites, while Section 91(1)(db) relates to the notification requirements for the discovery of contaminated sites. Provincial governments have taken different approaches to the level of contamination that must be reported to both the regulatory agency and any affected neighboring properties as well as the point at which clean up is required. The predominant approaches require notification and clean up where there is either (1) any presence of contaminants or (2) any presence of contamination in excess of a generic, but scientifically derived, clean up criteria. This is a critical decision point as it engages the regulatory agency, has significant cost implications for persons responsible for contaminated sites, can affect third-party property owners and ultimately is an important factor affecting both civil and regulatory liability.

Section 91(1)(dg) provides the authority to determine insurance needs and qualifications for site professionals working in this industry. The Department currently recognizes a combination of self-governing professional organizations (Association of Professional Engineers of Nova Scotia and Association of Professional Geoscientists of Nova Scotia) and other certification programs such as that of the Environmental Services Association of Nova Scotia (see www.esans.ca/oilspill.html). In moving forward, consideration must be given to liabilities

associated with continuing the current practice of recognizing other professional organizations versus creating an in-house program to qualify individuals to work in this industry.

Contaminated sites are cleaned up to the standard of that time. However, as research into contaminant behavior and impacts on human health and the environment improves, those standards are continuously modified. Should standards change, impacts may exceed the revised standard, creating possible liability issues for the current owner, the regulatory agency, the site professional and the person responsible for the original clean up.

Desired Outcomes/Outputs:

A final report outlining the findings and recommendations of the study, as well as advice on any matters deemed relevant by the reviewers. The review will include research, a published Discussion Paper, and stakeholder input.

APPENDIX B - CCME Recommended Principles on Contaminated Sites Liability

APPENDIX B - CCME Recommended Principles on Contaminated Sites Liability (Summary)[145]

1. The principle of "polluter pays" should be paramount in framing contaminated site remediation policy and legislation.

2. In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of "fairness".

3. The contaminated site remediation process should enshrine the three concepts of "openness, accessibility, and participation".

4. The principle of "beneficiary pays" should be supported in contaminated site remediation policy and legislation, based on the view that there should be no "unfair enrichment".

5. Government action in establishing contaminated site remediation policy and legislation should be based on the principles of "sustainable development", integrating environmental, human health and economic concerns.

6. There should be a broad net cast for the for the determination of potential responsible persons. However, prior to entering the actual liability-allocation stages of the process, the following persons should have a conditional "exemption" based up clearly defined statutory exemptions: (a) Lenders; lenders who hold a security interest in the property of a borrower should be granted a pre-foreclosure exemption from liability, beyond the outstanding balance of the debt, unless the lender had actual involvement in the control or management of the business of the borrower; and (b) Receivers, Receiver-Managers, Trustees (including trustees acting in a fiduciary capacity); these persons should be exempt from personal liability for pre-existing contamination, and only be liable if they fail to take reasonable steps to prevent further contamination, or otherwise fail to satisfactorily address ongoing environmental concerns at the site.

7. Remediation legislation should provide the necessary authority and means to enable the recovery of public funds expended on the remediation of contaminated sites from those person deemed to be responsible for such sites. Furthermore, member governments should strive to achieve environmental priority over all other claims or charges on an estate that has entered receivership or bankruptcy.

8. Member governments should pay particular attention to the design of a process which will facilitate the efficient cleanup of sites and the fair allocation of liability. Further, this process should discourage excessive litigation to the maximum extent possible by promoting the use of alternative dispute resolution procedures.

9. A list of factors should be established for use in the liability-allocation process to allocate the liability of responsible persons depending upon the specific circumstances of their involvement, and in relation to the involvement of other responsible persons. The following list of "liability allocation factors" is suggested for use in cases where there is more than one responsible person to be considered in the allocation process. The list may not be exhaustive. Liability allocation factors:

[145] *Recommended Principles*, supra note 58.

a) when the substance became present at the site:

b) with respect to owners *or previous owners, including, but not limited to:

i) whether the substance was present at the site when he took ownership.

ii) whether the owner ought to have reasonably known of the presence of the substance when he took ownership.

iii) whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of contaminants at the site.

iv) whether the presence of the substance was caused solely by the act or omission of an independent third person;

v) the price the owner paid for the site and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase.

c) with respect to a previous owner, whether that owner sold the property without disclosing the presence of the substance at the site to the purchaser;

d) whether the person took reasonable steps to prevent the presence of the substance at the site;

e) whether the person dealing with the substance followed the accepted industry standards and practices of the day;

f) whether the person dealing with the substance followed the laws of the day;

g) once the person became aware of the presence of the substance, did he contribute to further accumulation or the continued release of the substance;

h) what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;

i) whether the person benefited from the activity resulting in the contamination, and what was the monetary value of their benefit;

j) the degree of a person's contribution to the contamination, in relation to the contribution of other responsible persons; and

k) the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.

* Includes lessees and other occupiers.

10. Alternative Dispute Resolution (ADR) procedures should be made available by member governments as a means to resolve issues of liability for contaminated sites. For example, four-step allocation process could be implemented as follows:

> Step 1 - Voluntary allocation - Upon designation of a contaminated site, and designation of responsible persons, the affected persons should be given a reasonable time-bound opportunity to allocate the cost of cleanup among themselves.
>
> Step 2 - Mediated Allocation - Failing Step 1, the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.
>
> Step 3 - Directed Allocation - Failing Step 2, the persons will be required to enter into an allocation process whereby an independent person or body will make an arbitrated apportionment of liability based upon its findings.
>
> Step 4 - Failing Steps 1, 2 and 3, liability will default to joint and several liability among all responsible persons.

11. Discretion should be retained by member governments to designate sites as contaminated sites; however, for the purposes of better predictability, governments should clarify their policies for determining which sites are to be designated, with a with a view to eventually harmonizing their site-designation processes. These site-designation policies should designate sites based upon (a) risk to human health; and (b) extent of environmental risk. In addition, there should be public input into the evaluation of significant sites being considered for designation, as well as public notice when a site designation occurs.

12. A "responsible person", who completes the cleanup of a contaminated site to the satisfaction of the regulatory authority, should be issued an official "certificate of compliance" by that authority, certifying that the site has been remediated to the required standards. These certificates, however, should expressly state that they are based on the condition of the contaminated site as at the date of issuance and that the remediation undertaken met the standards of the day; and that the responsible person may be liable for future cleanup ("prospective liability"), should further contamination subsequently be discovered.

13. Benchmarks should be developed for the remediation of contaminated sites, which will vary depending upon the land usage and the site location of a particular site. The use of such benchmarks will allow remediation plans or orders to be tailored on a site-specific basis. There should be full public input into the development of these benchmarks.

14. For the purpose of facilitating the appropriate remediation of a site, the regulatory environmental liability associated with a contaminated site may be transferred between parties (*e.g.* buyer and seller) in accordance with applicable federal, provincial and/or territorial legislation and with full disclosure of all information regarding the site.

- Legislation, regulations or site specific agreements could set out the requirements for such a transfer.
- The transfer could be recognized by government subject to requirements, including assurances

that the site has been or will be remediated; and the receiving party(ies) has the capacity to carry out the remediation and any regulatory requirements related to that remediation.

APPENDIX C - Advisory Group Members And Comments on Discussion Paper

APPENDIX C - Advisory Group Members & Comments on Discussion Paper

Members of Advisory Group:

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Kate Graves	Member of the Community