Citation: Workshop Holdings v. CAE Machinery Ltd. 2003 BCCA 56

Date: 20030128

Docket: CA029172

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

WORKSHOP HOLDINGS LTD.

APPELLANT
(Plaintiff)

AND:

CAE MACHINERY LTD., formerly known as CAE SUMNER LTD., formerly known as CANADIAN SUMNER IRON WORKS LIMITED

RESPONDENT
(RESPONDENT)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Huddart
The Honourable Madam Justice Levine

D.F. McCrimmon	Counsel for the Appellant
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G. Morley & N. Brown	Counsel for the Intervenor, Attorney General of B.C..
Place and Date of Hearing:	Vancouver, British Columbia 28-30 October 2002
Place and Date of Judgment:	Vancouver, British Columbia 28 January 2003

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine

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Reasons for Judgment of the Honourable Madam Justice Huddart:

Background

[1] This appeal requires this Court to interpret a provision found in Part 4 of the ***Waste Management Act***, R.S.B.C. 1996, c. 482, giving a cause of action to a person who has incurred remediation costs in cleaning up a contaminated site. The particular question to be answered is whether a manager's final determination under s. 26.4 that a site is contaminated is a statutory prerequisite to a cost recovery claim under s. 27(4).

[2] Section 27(4) provides:

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

[3] The appeal is from an order dismissing the appellant's action to recover costs it incurred in remediating a site. The reasons of the trial judge can be found at [2001] B.C.J. No. 2179 (S.C.) [Q.L.], 2001 BCSC 1470. In ***No. 158 Seabright Holdings Ltd. et al*** **v.** ***Imperial Oil Limited-Compagnie Petroliere Imperiale Ltee. et al***, [2001] B.C.J. 1922 (S.C.) [Q.L.]; 2001 BCSC 1330, the trial judge refused similar relief

to the two defendants. Appeals from his orders were heard together with this appeal (CA29081 and CA29082).

[4] For ease of reference the relevant provisions of Part 4 of the ***Act*** and the ***Contaminated Sites Regulation***, B.C. Reg 375/96 are set out in Appendix A to these reasons. For the purposes of this appeal, a brief summary of the facts will suffice.

[5] The respondent, CAE, is alleged to have operated an iron and brass foundry at 1216 – 1224 East Pender Street, Vancouver, B.C. between 1924 and 1949. Subsequent owners of that property incorporated Workshop in 1997 to develop the site into commercial strata titles. Section 26.1 of the ***Act*** requires any person seeking approval for a subdivision of land that has been used for industrial or commercial activity to provide a site profile to the approving officer, and in some circumstances to the Regional Waste Manager. Workshop retained an environmental consulting firm to carry out a site investigation and prepare a site history. Copper and zinc pollution was found, likely caused by the dumping of those components of brass when the foundry was operated on the site.

[6] Faced with the need to remediate this pollution in order to develop its property, Workshop considered its options under

the ***Act***. It saw two possible avenues to remediation: the independent remediation route or the administrative route.

[7] On the independent remediation route permitted by s. 28, it could acknowledge the site was contaminated, take responsibility for the cleanup, seek an approval in principle from the manager under s. 27.6 of the ***Act***, clean up the site, obtain a certificate of compliance, develop it, and subsequently bring a cost recovery action against other responsible persons under s. 27(4). Workshop saw no requirement along the independent remediation route for a final determination by the manager under s. 26.4(2) or (3) that the site was contaminated. It would, however, have understood its claim was subject to an application for minor contributor status by any responsible person, and to the manager's power to intervene in the process in a variety of ways.

[8] To the extent the manager agreed, Workshop could avoid being forced to comply with the alternate administrative process it saw as designed to enable the manager to effect remediation fairly by way of an order to responsible persons under s. 27.1(1) in circumstances where neither the current owner nor anyone else was willing to accept responsibility for remediation. The absence of fair process from the previous

regulatory mechanism (then s. 22 of the ***Act***, now s. 31) was criticized in ***Imperial Oil v. British Columbia (Regional Waste Manager)*** (1998), 51 B.C.L.R. (3d) 93 (S.C.).

[9] For business reasons, Workshop chose to remediate independently in co-operation with the Waste Management Branch so it could obtain an approval in principle for its remediation plan, and, ultimately a certificate of compliance. It did not seek, nor did the manager suggest, a final determination under s. 26.4(2) or (3). However, the manager did give the site a contaminated site designation and number and list it in the Contaminated Sites Registry on 3 February 1998, after granting approval in principle in January 1998, in compliance with his duty under s. 26.3 of the ***Act.*** By that approval, the manager was authorizing implementation of a "remediation plan for a contaminated site." Under the scheme of the ***Act***, that authorization would be valid only for the use specified in the remediation plan. Workshop carried out the remediation, first informing CAE of this work in April 1998, after it had been completed. On 22 July 1998, the Assistant Regional Waste Manager issued a certificate of compliance under s. 27.6(2) of the ***Act.***

[10] He did not make a formal determination that the site was contaminated under s. 26.4 of the ***Act***. However, in a letter

dated 18 January 2001 to counsel for Workshop, he wrote, "… despite the absence of a determination, site investigation information submitted to the ministry in 1997 and 1998 indicated that the site was contaminated at that time."

[11] On 12 March 1999, Workshop commenced its cost recovery action under s. 27(4) claiming $119,000.00 from CAE as costs of remediation for which it is responsible. CAE applied by way of summary trial under Rule 18A for an order dismissing the action on the primary ground that the manager had not made the prior determinations of a "contaminated site" and "responsible person" required by s. 26.4, and the corollary ground that CAE had not received the notice prior to those determinations that would have permitted it to comment on a preliminary contaminated site determination under s. 26.4(2) and to appeal the final determination, whether made under s. 26.4(2) or (3), to the Environmental Appeal Board under s. 26.4(5).

The Position of the Parties

[12] The respondent maintains the statutory cause of action is available only if a final determination of a contaminated site is first obtained. In its view, any person who chooses to remediate independently under s. 28 is precluded from seeking

contribution from third parties under s. 27(4). According to this interpretation, a person in the position of the appellant, who accepts responsibility as an owner of land and remediates under s. 28, may look only to the common law for a remedy against an earlier polluter. The respondent finds support for this position in three decisions: ***Swamy v. Tham Demolition Ltd.*** (2000), 81 B.C.L.R. (3d) 293, 2000 BCSC 1253 (***Swamy No. 1***); ***Beazer East Inc. v. British Columbia (Environmental Appeal Board)*** (2000), 84 B.C.L.R. (3d) 88, 2000 BCSC 1698; and ***Swamy v. Tham Demolition Ltd.*** 2001 BCSC 551 (***Swamy No. 2),*** as well as the trial judge's reasons in this matter.

[13] In contrast, Workshop considers the Legislature intended s. 27(4) to provide a private remedy independent of the administrative process that underlies a manager's power to issue a remediation or pollution abatement order. It finds support for its position in ***O'Connor v. Fleck*** (2000), 79 B.C.L.R. (3d) 280, the first decision considering s. 27(4), and in ***Seabright***, *supra.*

[14] For his part, the Attorney General agrees with Workshop's submission that a court has concurrent and complementary jurisdiction to make a finding that a site is contaminated. He notes that jurisdiction is subject to the doctrine of issue

estoppel, as most recently explained in ***Danyluk v. Ainsworth Technologies Inc.***, [2001] 2 S.C.R. 460, 2001 SCC 44. If a final determination were a prerequisite to a cause of action under s. 27(4), it would also be a prerequisite to an approval in principle and certificate of compliance under s. 27.6. In such event, counsel for the Attorney submits, Clancy J. would have correctly found in ***Seabright****, supra,* that the assistant regional manager had made a final determination [under s. 26.4(3)], although he may not have been aware he was doing so and thus failed to fulfil his obligations under s. 26.4(2)(e) and (f). Responsibility for that error would fall to the manager, not deprive the appellant of a cause of action. The same inference would be open in this case.

Judicial Consideration

[15] In ***O'Connor,*** *supra,* D. Smith J. ordered a tenant to pay an owner of property compensation for the cost of remediating pollution on the site where the tenant had operated an aluminium and brass foundry under s. 27(4) of the ***Waste Management Act***, as an alternative to damages for the breach of express covenants in the lease. The court's jurisdiction to make an order where the manager had not made a final determination of a contaminated site was not challenged.

[16] In ***Beazer***, *supra,* Tysoe J. reviewed an order of the Environmental Appeal Board varying a manager's order to remediate pollution at the site of a wood treatment business. The manager's order had named Beazer as a responsible person by virtue of being a "producer," as well as a "previous owner" and "operator." The Board concluded Beazer was not a "producer" but otherwise confirmed the order. Mr. Justice Tysoe concluded the Board had erred in finding Beazer to be a "previous owner," but upheld its decision not to set aside the remediation order as against Beazer because it was a "previous operator." In his discussion of the appropriate standard of review, he noted at para. 46 of his reasons that in an action under s. 27(4) to allocate the costs incurred to comply with the remediation order, a court would be required to determine the identity of the responsible persons.

[17] That comment accords with the view expressed by the Environmental Appeal Board at pp. 38 and 39 of its reasons in ***Beazer East Inc. v. Assistant Regional Waste Manager*** (29 March 2000), No. 98WAS-01(b) (B.C.Env.App.Bd.) that a manager need not name all responsible persons in a remediation order, and that any person "may pursue the reasonably incurred costs of remediation from one or more responsible persons at a later date through a cost recovery action." That a cost recovery

action will necessarily follow remediation under a manager's order says nothing about the issue on this appeal.

[18] However, Justice Tysoe's comment that a court will have to determine the responsible persons in order to allocate responsibility among them for the costs of remediation is equally applicable to a cost recovery action following any remediation, and one would have thought, obvious from the words of s. 26.4(2) and s. 27(4). Justice Clancy expressed a similar view at para. 37 of his reasons in ***Seabright,*** *supra*:

[19] Hunter J. [in ***Swamy No. 1***] cannot be taken to have said that the court has no power to determine who are the persons responsible for the costs of remediation. Section 27(4) contemplates just such a finding. It refers to the pursuit of reasonably incurred costs of remediation from one or more responsible persons. Section 25 defines who are responsible persons. That section is not restricted to persons found to be responsible by the manager.

[20] Sensibly, the respondent has abandoned the position it took at trial, that the court did not have the jurisdiction to determine who are responsible persons.

[21] In both ***Swamy*** cases, one decided before and one after the ***Beazer*** case, the court concluded its role was restricted to

the allocation of the costs of remediation after it had been determined the site was contaminated. A party could not thwart the administrative process by bringing a cost recovery claim without first obtaining a final determination under s. 26.4(2) or (3).

[22] Before making a final determination of contamination under s. 26.4(2), the manager would have to make a preliminary determination (s. 26.4(2)(a)), give written notice to any person known to him or her who might be a responsible person (s. 26.4(2)(b)), and provide that person with an opportunity to comment on the preliminary determination (s. 26.4(2)(c)). After making the final determination he would be required to give written notice to the same people (s. 26.4(2)(e)(iv)), who would be able to appeal the determination under Part 7 of the ***Act*** (s. 26.4(5)).

[23] Under s. 26.4 (3), the manager could dispense with the procedures under s. 26.4(2)(a) to (c) and move directly to a final determination if requested to do so by a person who agreed to be a responsible person for the contaminated site. In that event, he would be required to give written notice of his final determination to any person known to him to be a responsible person as defined by s. 26.5.

[24] Influenced by an article by D. Belevsky and C. Tollefson, "Bill 26 Arrives" (1997), 55 *The Advocate* 185, an article by W. Braul "Liability Features of Bill 26" 4 *Journal of Environmental Law & Practice* 139, ***R. v. Consolidated Maybrun Mines Ltd***., [1998] 1 S.C.R. 706, ***Ontario Hydro v. Kelly et al.*** (1998), 39 O.R. (3d) 107 (Gen.Div.), and ***Derivative Services Inc. v. Investment Dealers Assn. of Canada***, [1999] O.J. No. 5307 (Gen.Div.) [Q.L.], Hunter J. in ***Swamy No. 1,*** *supra,* held the court could not determine any issue that fell within the jurisdiction of the Waste Management Branch, as a specialized administrative body. At para. 41 of his reasons for judgment he wrote that, as with the Ontario ***Environmental Protection Act*** being considered in ***Maybrun,*** the B.C. ***Waste Management Act*** was intended:

> … to be set up as a "complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed." Accordingly, the Waste Management Branch must be allowed to deal with issues within the Act's jurisdiction if the system is to be effective, rather than allow Ms. Swamy to seek from the court an independent determination of the issues that fall under the Act's jurisdiction.

[25] Madam Justice Stromberg-Stein agreed in ***Swamy No. 2,*** *supra.* She also noted at para. 25 of her reasons that the

truncated procedure under s. 26.4(3) Ms. Swamy used to obtain a final determination her property was a contaminated site could not be used to "thwart procedural fairness and the principles of natural justice." She went on to suggest that "it would be prudent" for anyone wishing a final determination "binding on others" to follow the procedure set out in s. 26.4(2) to ensure procedural fairness.

[26] Because Ms. Swamy had not undertaken remediation before either decision, these holdings are *obiter dicta.* Moreover, the reasoning in these decisions was influenced by, if not predicated on, the doctrine of collateral attack, as enunciated in ***Maybrun****, supra.* That doctrine applies where an administrative order has been made, as it was in ***Beazer****, supra*. However, by way of extrapolation, the doctrine has been helpful to courts called upon to consider issues of deference to the jurisdiction of tribunals more generally, as ***Kelly*** and ***Derivative Services***, *suprae*, illustrate. It is less helpful in considering a statutory scheme that provides a role for the judicial process by creating a new civil cause of action under which a remediator has the right to recover in a court. Nevertheless, the principles that underlie the doctrine are important, that a court's interpretation and application of any statutory scheme should advance not hobble

the integrity of the scheme and that a legislature's intention as to who should decide what is to be respected.

[27] Perhaps because ***Beazer***, *supra*, concerned a manager's remediation order, that clearly required a determination of contamination under s. 26.4, and the ***Swamy*** cases concerned a claim to recover costs in advance of remediation, a remedy clearly not provided in the ***Act,*** the courts did not consider how independent remediation procedures or voluntary remediation agreements with the manager, might fit within their analyses of the statutory scheme the Legislature enacted to identify and remediate contaminated sites at the polluter's expense.

[28] Section 27.4(1) authorizes a manager to enter a voluntary remediation agreement with a person who agrees to be a "responsible person" under the ***Act***. That voluntary agreement discharges the responsible person's further liability for the contamination. In effect, this procedure permits the fixing of a person's contribution to the remediation of a site. By s. 39(3) of the ***Contaminated Sites Regulation***, B.C. Reg. 375/96, the manager must notify any persons identified as other potential responsible persons and allow those persons not less than 15 days to give notice if they wish to review or

make representations about any proposed voluntary remediation agreement.

[29] Section 28 permits a responsible person to carry out "independent remediation" upon notice to a manager when starting, and within 90 days of completing remediation, "whether or not a determination has been made as to whether the site is a contaminated site" (s.28(1)(a)), "whether or not a remediation order has been issued with respect to the site" (s. 28(1)(b)), or "whether or not a voluntary remediation agreement … has been entered into" (s.28(1)(c)). It also authorizes the manager to issue an approval in principle and certification of compliance to a responsible person who wants to remediate independently.

[30] Without mentioning either s. 27.4 or s. 28, Mr. Justice Ralph considered the interpretation of s. 27(4) by Hunter and Stromberg-Stein JJ. binding on him and thus on Workshop. In his reasons for judgment, he noted that Workshop did not undertake the remediation process to thwart the administrative procedure, had obtained an approval in principle and certificate of compliance, and had completed the remediation, but did not consider those differences sufficient to distinguish the ***Swamy*** cases. He saw an action without a final determination under s. 26.4 as taking away from potentially

responsible persons not only the procedural protection provided by that section, but in addition, the opportunity to seek the appointment of an allocation panel under s. 27.2, and to request a minor contribution finding under s. 27.3. It is not clear from his reasons why he concluded a potentially responsible person could not take advantage of these provisions. Nothing in the ***Act*** precludes their use. Nor does there seem to be a practical impediment to recourse to them. If a defendant in a cost recovery action considers that action is interfering with its request for an allocation panel's advisory opinion or with a manager's designation of a minor contributor status, a stay of the action pending the receipt of such opinion or decision could provide appropriate relief.

[31] In ***Seabright***, *supra,* Clancy J. integrated the independent remediation procedure with the cost recovery provisions of the ***Act***, while accepting the proposition that a final determination of a contaminated site was a precondition to private action under s. 27(4), by holding that such determination did not have to be made explicitly by government officials. He inferred from the manager's decision to grant an approval in principle for Workshop's remediation plan and a certificate of compliance that the site was contaminated and,

therefore, refused CAE's application for dismissal of the cost recovery action.

[32] With this history of judicial consideration of Part 4 of the ***Act***, it is not surprising the Canadian Bar Association lobbied the government for clarification of its intention in enacting that part of the ***Act.*** That lobbying effort resulted in the ***Waste Management Amendment Act, 2002***. The amendments will limit the reach of these reasons, and make this case of only historical interest. They are consistent with the decision of Clancy J. in ***Seabright***, *supra*. However, no party to this appeal or to the ***Seabright*** appeals suggested the provisions of the ***Waste Management Amendment Act, 2002*** amending Part 4 of the ***Act*** may have any effect on this appeal. I agree this is the effect of s. 4 of the ***Interpretation Act***, R.S.B.C. 1996, c. 238, in the absence of any assertion the amendments have retroactive or retrospective effect.

[33] Before I turn to a consideration of the ***Act*** as it was before the 2002 amendments, it will be useful to review briefly its history and comparable Canadian legislation.

Legislative History

[34] The current waste management regime finds it origins in the ***Pollution-control Act,*** S.B.C. 1956, c.36. That statute

established the Pollution-control Board, empowered to set pollution levels and to issue orders with a view to controlling water pollution. The bones of that administrative decision-making regime remained in place for 30 years, although the ***Act*** was amended several times, before the substantial changes with which this case is concerned were introduced in 1993. The intervening changes reflect a growing concern with the environment.

[35] In 1967, the Legislature transferred responsibility for the ***Act*** from the Ministry of Municipal Affairs to the newly created Ministry of Environment. Three years later, the ***Act*** was made binding on the Crown and its scope was extended to include air and land pollution by the ***Pollution Control, 1967 (Amendment) Act***, S.B.C. 1970, c. 36. The first cost recovery system for government was introduced 10 year later in 1977. The Minister was authorized to take immediate clean-up action in the event of an emergency and then recoup the costs by filing a certificate of costs in the Supreme Court.

[36] In 1982, the Legislature amalgamated the ***Litter Act*** and the ***Pollution Control Act*** into the new ***Waste Management Act***, S.B.C. 1982, c. 41. Two of the Bills stated rationales were the promotion of the identification, control, and storage of special wastes and the enhancement of spill prevention and

disclosure mechanisms. (*Hansard*, 14 June 1982, p.8172). Other innovations included the imposition of strict liability for unauthorized discharge of pollution as well as a decentralized permit process.

[37] The ***Waste Management Amendment Act, 1987***, S.B.C., c. 51 created a Waste Management Fund to be used for environmental clean-up necessitated by inadequate closure of waste management facilities, and long-term care and maintenance of waste management facilities. The Minister could recover expenditures upon filing a certificate of costs in the Supreme Court, if the Court found the expenditure was not excessive or unnecessary. The Minister of Environment described the Bill's purpose this way:

> This bill will emphasize the need for greater care and control of special wastes, and the spill or escape of special wastes from such care and control could be subject to penalty even if pollution was not determined to have occurred.
>
> (*Hansard*, 25 June 1987, p.2029)

[38] Enforcement mechanisms under the ***Act*** as it was in 1987 were entirely administrative. The manager could cancel or suspend permits and approvals under s. 23 (now s. 36), seek a restraining order from the court under s. 24 (now s. 37), or make a pollution abatement order under s. 22 (now s. 31).

[39] The ***Waste Management Amendment Act, 1990,*** S.B.C. 1990, c. 74, introduced the first mention of a contaminated site to the ***Act:***

> 7. …where a contaminated site has been remediated to the satisfaction of a manager, the manager may issue a certificate of compliance …

[40] The ***Waste Management Amendment Act, 1993***, S.B.C. 1993, c. 25, Part 4, built on that small beginning to create a statutory scheme to encourage identification and remediation of contaminated sites, and to allocate the financial burden that purpose would entail. Opposition by industry and business to the proposed changes led to a comprehensive external review with stakeholders before the amendments were declared in force on 1 April 1997.

[41] Fundamental to the new scheme were three principles: absolute liability, retroactivity, and joint and several liability, all in aid of the underlying governmental policy of "polluter-pay," to which the Minister referred on first reading (*Hansard,* 19 May 1993, p. 6423). To permit public notice, a contaminated site registry was created, and as the Minister explained on second reading (*Hansard,* 8 June 1993, p.6946-7):

> The proposed amendments will maintain the principle that the polluter pays, but introduce fair and consistent administrative processes.
>
> …
>
> An important feature of this bill is that it establishes an orderly process for the assessment and cleanup of contaminated sites.
>
> …
>
> These amendments introduced consistency and fairness of process, which does not currently exist….
>
> …
>
> There are also provisions to encourage voluntary and independent remediation of contaminated sites by responsible parties.

[42] The amendments drew on United States Superfund legislation, ***The Comprehensive Environmental Response, Compensation, and Liability Act,*** enacted in 1980 in response to the Love Canal scandal and intended to address U.S. contaminated sites. The U.S. statute also provided for absolute, retroactive joint and several liability; designated current or past owners or operators of contaminated sites as well as transporters as potentially responsible persons; and created a private cause of action: Ruth Crowley and Fred Thompson, *Retroactive Liability, Superfund and the Regulation of Contaminated Sites in British Columbia*, (1995) 29 U.B.C.L.Rev. 87-116, online Q.L. (JOUR) at paras. 5-7.

[43] As with the Superfund legislation, the basic idea of Part 4 is that sites become contaminated over many years of use by many different users. The policy underlying the new

scheme is to strive to hold those who benefited economically from that contamination responsible for its remediation.

[44] As Professors Tollefson and Belevsky noted at p. 58 of their final report "External Review of Remediation Liability Provisions: ***The Waste Management Amendment Act, 1993***" (31 July 1996), online: http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/reports/external_review.html, traditional common law analysis was thought insufficient to allocate the costs of pollution remediation properly. Limitation periods were considered to pose a significant barrier to the recovery of damages at common law for historical pollution. Contract analysis focuses only on current and immediately previous owners of a site. Negligence imposes a burden on those bringing an environmental action to establish causation as well as the failure to meet the appropriate standard of care. This is a difficult burden when contamination is the result of the activities of many businesses over many years. At page 60, they noted that the principle of retrospectivity is important to ensure the net can be cast sufficiently widely to capture all previous polluters, not just the current or penultimate owners or operators of the land.

[45] In these reasons I shall use the word "retroactive" because that is the word the Legislature used in s. 27(4). In

doing so I should not be taken as expressing any opinion as to whether liability under that provision is retroactive or retrospective. That question was not before us.

[46] The concepts of absolute and joint and several liability facilitate actions against alleged polluters, make recovery of damages from multiple defendants more likely, and remove the burden of proving causation or fault-based conduct.

[47] In words the appellant would approve, District Court Judge Edward Weinfeld wrote of the comparable Superfund private cause of action (for its relevant provisions see Appendix B) in ***New York v. Exxon Corp***. (1986, SD NY) 633 F Supp 609 at paras. 6 and 7:

> The private recovery provisions of the statute ... assure an incentive for private parties, including those who may themselves be subject to liability under the statute, to take a leading role in cleaning up hazardous waste facilities as quickly as possible.

He went on to conclude that governmental approval or expenditure is not a condition precedent to the bringing of a private action under the statute because:

> …to require private parties to await governmental approval would be to restrict the overall national effort to the volume of activity which the federal government could centrally supervise, and this would defeat the Act’s basic intent.

[48] In the same vein, District Judge Highsmith wrote in ***Marriott Corp. v. Simkins Industries Inc.*** (1993, SD Fla) 825 F Supp 1575 at para. 2:

> The shift in the regulation [as a result of a 1990 amendment] from agency to private party responsibility reinforces the prevailing judicial view that government approval prior to initiation of private action is not required…Therefore, the Court concludes that Marriott did not need to obtain governmental approval prior to filing this private cost recovery action.

[49] These authorities suggest the harnessing of market forces for environmental clean-up was the object of the inclusion of s. 27(4) in Part 4. But that is not the sole object of the contaminated sites provisions. Part 4 gives managers the statutory power to issue remediation orders to persons he determines are “responsible persons” and to enter into voluntary agreements with persons who acknowledge they are "responsible persons" under the ***Act*** for "contaminated sites,” as well as providing the private cause of action so private parties will have an incentive not to pollute and to remediate when they do so. It does not create a fund for remediation of all types of contaminated sites, although it permits the Crown to remediate on its own account and collect from the polluters, either by certificate or by an action under s. 27(4).

[50] The twin pillars of absolute liability and joint and several liability are not new to Canadian environmental legislation. Absolute liability provisions are found in the ***Arctic Waters Pollution Prevention Act***, R.S.C. 1985, c. A-12, s. 7.(1); ***Fisheries Act***, R.S.C. 1985, c. F-14, s. 42.(4) and the ***Clean Environment Act***, S.N.B. 2002, c. C-6, s. 34. Joint and several liability provisions are contained in the ***Fisheries Act***, *supra*, s. 42.(1) and (3); ***Environmental Protection Act***, R.S.N.W.T., 1988, c. E-7, s. 16(2) and the ***Environmental Protection Act***, R.S.O. 1990, c. E.19, s. 99(8).

[51] The principle of retroactivity is more controversial. However, provisions with retroactive or retrospective effect can be found in other Canadian environmental legislation. For example, a proposed amendment in Bill 72, ***An Act to amend the Environment Quality Act and other legislative provisions with regard to land protection and rehabilitation,*** 2nd Session, 36th Leg., Quebec, 2002, s. 2 allows the Minister of Environment, when land contamination is "...likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment in general, or to be detrimental to property..." to issue an order for a "rehabilitation plan" against "any person or municipality that, -- even before the coming into force of this section,

had emitted, deposited, released or discharged all or part of the contaminants or had allowed the contaminants to be emitted, deposited, released, or discharge..." Another example is the "responsible persons" provision of Manitoba's ***The Contaminated Sites Remediation Act***, C.C.S.M., c. C205, s. 9(1). Subsections (b) and (d) refer respectively to "a person who was an owner or occupier of the site at a time when the contamination occurred or at any time thereafter" and "a person who owned or had possession, charge or control of a contaminant of the site immediately before or at the time of its release."

[52] Similarly, statutory causes of action for damages suffered as a result of pollution are found in other Canadian environmental legislation. Section 42(3) of the federal ***Fisheries Act***, *supra,* permits licensed commercial fishers to bring civil actions against owners or those who have the “charge, management or control” of a “deleterious substance” that has been “deposited in waters frequented by fish.” A private cost recovery action is set out in s. 15(3) of Saskatchewan’s Bill 71 ***Environmental Management and Protection Act, 2002***, 3rd Session, 24th Leg., Saskatchewan, 2002 for unauthorized discharges which cause “loss or damage”, including pecuniary loss. However, I have been unable to

locate any provision comparable to s. 27(4) of the ***Act*** in any other Canadian legislation. It appears that only British Columbia has created a cause of action specific to contaminated sites.

[53] With that review as background, I turn to the task at hand.

Discussion

[54] The ultimate question on this appeal is whether the Legislature intended to permit cost recovery actions without a final determination of contamination under s. 26.4 when it enacted s. 27(4) as part of the legislative scheme to identify and remediate contaminated sites contained in the contaminated site remediation provisions in Part 4 of the ***Act*** and the *Contaminated Sites Regulation*, B.C. Reg. 375/96.

[55] This task of interpretation requires an analysis of that legislation following the principle mandated by the ***Interpretation Act***, R.S.B.C. 1996, c. 238, s.8:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

That principle accords with the rule of statutory interpretation most recently affirmed in ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42 at para. 26, from Elmer Driedger's ***Construction of Statutes*** (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[56] The first consideration must be the words of the ***Act***, in this case of Part 4 because that Part encapsulates the entire scheme for the identification and remediation of contaminated sites.

[57] An owner of land who learns that his land may be contaminated in the course of an investigation for the purpose of sale or development will look to Part 4 to determine how he might remediate the land. If he is concerned about business efficacy, on the plain words of Part 4, he is likely to choose the independent remediation route to an approval in principle and certificate of compliance. By taking responsibility for the remediation, an owner can carry out a speedy clean-up without the delay inherent in the administrative processes set down in ss. 26.4(2), 27.1 and 27.4.

[58] The owner’s cost recovery could be limited by a manager’s determination under s. 27.3(1) that a responsible person is a minor contributor to the contamination and, thus, entitled to the benefit of a limitation of liability under s. 27.3(3). Aside from that statutory limitation, the owner would be taking the risk that he might not later be able to establish in an action under s. 27(4) that the site was contaminated, that his costs of remediation were reasonably incurred, or that another person should bear some or all the responsibility for the contamination.

[59] This last risk befell the plaintiff in ***Busse Farms Ltd. v. Federal Business Development Bank***, [1996] S.J. No. 780 (Q.B.), aff'd [1998] S.J. No. 786 (C.A.) [Q.L.], leave to appeal dismissed [1999] S.C.C.A. No. 73. The defendant bank, who had obtained a gas station site by foreclosure, paid $65,000 to remediate the site after its "as is" sale to Busse. Despite the remediation, no major gas company was willing to supply gas to the site for fear of potential liability stemming from the previous contamination. Busse's action for damages under the statutory cause of action provided by the Saskatchewan ***Environmental Management and Protection Act***, S.S. 1983-84, c. E-10.2 was dismissed because the bank did not come within the definition of those responsible for pollution under

that legislation. (For the wording of the relevant provision see Appendix C.)

[60] This reading of Part 4 advances one purpose of the ***Act,*** the speedy cleanup of contamination. If a final determination under s. 26.4 is a prerequisite to a statutory cost recovery action by a person who remediates independently under s. 28, the advantage of that process to a non-polluting owner is lost. The practical effect of the interpretation the respondent would have this Court adopt is that any owner who wants to seek compensation for its costs of remediation would be required to take the administrative route to its end, potentially at judicial review in the Supreme Court and any further appeals, before commencing the process for an approval in principle of a remediation plan. This practical effect would subvert if not destroy the commercial attractiveness of the speedy clean-up the independent remediation procedure permits and must have been designed to encourage.

[61] Section 27(4) does not contain any words that suggest a court cannot determine by application of the statutory definitions whether a site is a "contaminated site," any more than it contains words precluding a court from determining whether a defendant is a "responsible person." On a plain reading, it creates a statutory cause of action for any person

who has remediated a contaminated site, -- defined in s. 26(1) to mean an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains a special waste or other prescribed substance -- to recover its “reasonably incurred” clean-up costs from other "responsible persons".

[62] The phrase “contaminated site” is defined in Part 4. The Legislature had the opportunity to specify that a manager’s final determination that a site was contaminated was necessary to bring a piece of land within the meaning of that phrase, either as part of the general definition, or for the particular purpose of a particular provision. But there is no such provision or any provision anywhere in Part 4 that suggests a court is precluded from making a finding that a site is contaminated, as a fact incidental to a cost recovery action. Nor is there any provision in Part 4 expressly requiring a final contaminated site determination under s. 26.4 (or a responsible person ruling under s. 26.5) comparable to s. 27.1(6) requiring such a determination and ruling when the manager has made a remediation or pollution abatement order. There is no provision requiring an explicit contaminated site determination under s. 26.4 before a manager issues an approval in principle or a certificate of compliance

under s. 27.6, although his authority must be read as limited to contaminated sites.

[63] There are, moreover, provisions implying the contrary. Section 28 provides that the manager may issue a certificate of compliance under s. 27.6 to "the responsible person" who remediates under s. 28(1)(a) "whether or not" a contaminated site determination has been made. Section 26.4(4) provides that the lack of a final determination "does not mean that a site is not a contaminated site."

[64] Importantly, s. 26.4(1) provides discretion to the manager to determine whether a site is contaminated. The exercise of that discretion triggers the mandatory requirements that provide the fair procedures to which the respondent considers all potentially responsible persons known to a manager are entitled. There is no similar protection for those ultimately found to be responsible in a cost recovery action, not known to the manager. It is difficult to conceive the Legislature would create a private cause of action and make any claim under it dependent on a discretionary decision of a public servant. I cannot find that intention in s. 27(4) when read alone or in the context of the entire Part 4.

[65] This conclusion does not mean s. 26.4 has no utility. It provides a means of reducing risk for those owners who, like

Ms. Swamy and unlike the appellant Workshop, are unwilling to remediate at their own risk. But that purpose is incidental to its primary function of providing the fair and consistent administrative process the Minister of Environment promised would give integrity to the remediation and pollution abatement orders missing from the regulatory mechanism in the Act as it was in October 1995 when the order at issue in ***Imperial Oil v. British Columbia***, *supra*, was issued.

[66] The court's process provides that integrity to the cost recovery action, as it does to the manager's recovery of expenditures from the Consolidated Revenue Fund to remediate contaminated sites under Division 6 of the ***Act***. I see a remediation order under s.27.1, a cost recovery action under s. 27(4), and the manager's cost recovery power under s. 28.5(2) as alternate methods of achieving the legislative policy of "polluter pays."

[67] That some known potentially responsible persons may lose procedural protections they would have if a responsible person had not undertaken remediation with the attendant benefits and risks, is insufficient reason to read into the statutory scheme an intention not plainly evident from an ordinary reading of Part 4 by an ordinary person affected by it.

[68] It is not unusual for a statutory scheme to employ a number of policy instruments to pursue a common objective. Part 4 of the ***Act*** provides for mandatory remediation by the remediation order process set out in s. 27.1, voluntary or independent remediation by responsible persons, subject to approvals by the manager under ss. 27.4, 27.6, and 28, and a civil cost recovery process through the courts under s. 27(4). Each process serves a different purpose within the overall objective of promoting speedy remediation of contaminated sites at the polluter's expense.

[69] The coercive remediation order is available to the manager to implement government's cleanup priorities. Voluntary and independent remediation permit private parties to remediate under the manager's supervision. The cost recovery action permits all those who remediate to recover their reasonably incurred costs of doing so, however they came to remediate, from those who a court finds were responsible for the pollution.

[70] Simply put, s. 27 is not ambiguous when read alone. It does not become so when read in the context of Part 4, or its object or its purpose. It creates a new civil cause of action, entire unto itself, as a means of requiring the polluter to pay and encouraging an owner to remediate. It

follows I would allow the appeal, set aside the order dismissing the action, and remit the matter to the Supreme Court.

“The Honourable Madam Justice Huddart”

I AGREE:

“The Honourable Madam Justice Rowles”

I AGREE:

“The Honourable Madam Justice Levine”

APPENDIX A

Excerpts from the *Waste Management Act*, R.S.B.C. 1996, c. 482 and *Contaminated Sites Regulation*, B.C. Reg. 375/96

Determination of contaminated sites

26 (1) In this Part:

"contaminated site" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

(a) a special waste, or

(b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;

"contamination" means the presence, in soil, sediment or groundwater, of special waste or another substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;

Site registry

26.3 (1) The minister must

(a) establish a site registry, and

(b) appoint a registrar to manage the site registry.

(2) A manager must provide to the registrar, in a form suitable for inclusion in the site registry, information respecting

(a) all site profiles, preliminary site investigations and detailed site investigations that the manager receives,

(b) all orders, approvals, voluntary remediation agreements and decisions, including determinations

under section 26.4 (3), made by the manager under this Part,

(c) pollution abatement orders requiring remediation under section 31,

(d) notifications of independent remediation under section 28 (2),

(e) declarations and orders made by the minister under section 28.4, and

(f) other information required by the regulations.

***

(4) The registrar must enter by notation into the site registry information referred to in subsections (2) and (3) and decisions of the appeal board.

(5) In accordance with the regulations, the registrar

(a) must provide for reasonable public access to information in the site registry, and

(b) may impose fees for providing services and supplying information from the site registry.

26.4 (1) A manager may determine whether a site is a contaminated site and, if the site is a contaminated site, the manager may determine the boundaries of the contaminated site.

(2) Subject to subsection (3), in determining whether a site is a contaminated site, a manager must do all of the following:

(a) make a preliminary determination of whether or not a site is a contaminated site, on the basis of a site profile, a preliminary site investigation, a detailed site investigation or other available information;

(b) give notice in writing of the preliminary determination to

(a) the person submitting a site profile, a preliminary site investigation or a detailed site investigation for the site,

(iv) any person known to a manager who may be a responsible person under section 26.5 if the site is finally determined to be a contaminated site;

(c) provide an opportunity for any person to comment on the preliminary determination;

(d) make a final determination of whether or not a site is a contaminated site;

(e) give notice in writing of the final determination to

(a) the person submitting a site profile, a preliminary site investigation or a detailed site investigation for the site,

…

(iv) any person known to the manager who may be a responsible person under section 26.5, and

(v) any person who has commented under paragraph (v).

(*Regulation 15(1) requires 15 days' notice)*

(3) A manager, on request by any person, may dispense with the procedures set out in subsection (2) (a) to (c) and make a final determination that a site is a contaminated site if the person

(a) provides reasonably sufficient information to determine that the site is a contaminated site, and

(b) agrees to be a responsible person for the contaminated site.

(4) The lack of a determination under subsection (2) or (3) does not mean that a site is not a contaminated site.

(5) A final determination made under this section is a decision that may be appealed under Part 7 of this Act.

Division 3 — Liability

Persons responsible for remediation at contaminated sites

26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

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

(b) a previous owner or operator of the site;

…

General principles of liability for remediation

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

(2) For the purpose of this section, **"costs of remediation"** means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and…

(3) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

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

Remediation orders

27.1 (1) A manager may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;

(c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.

(3) When considering whether a person should be required to undertake remediation under subsection (2), a manager may determine whether remediation should begin promptly, and must particularly consider the following:

(a) adverse effects on human health or pollution of the environment caused by contamination at the site;

(b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;

(c) the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

(d) in consultation with the chief inspector appointed under the *Mines Act,* the requirements of a reclamation permit issued under section 10 of that Act;

(e) in consultation with a division head under the *Petroleum and Natural Gas Act,* the adequacy of remediation being undertaken under section 84 of that Act;

(f) other factors, if any, prescribed in the regulations.

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a contaminating substance.

(6) If a remediation order or a pollution abatement order requiring remediation under section 31 is issued, and a manager has not yet determined if a site is a contaminated site under section 26.4, the manager must, as soon as reasonably possible after the issuance of the order,

(a) determine whether the subject site is a contaminated site, in accordance with section 26.4, and

(b) make a ruling as to whether the person named in the order is a responsible person under section 26.5,

and if the person is not found to be a responsible person under paragraph (b), the manager making the order must compensate, in accordance with the regulations, the person for any costs directly incurred by the person to comply with the order.

(7) A person receiving a remediation order under subsection (1) or actual notice of a remediation order under subsection (11) must not, without the consent of a manager, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of

the remediation order, and if the person does so, the manager, despite any other remedy sought, may commence a civil action against the person for the amount of the diminishment or reduction.

(8) A manager may provide in a remediation order that a responsible person at a contaminated site is not required to begin remediation for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to

(a) human health, given current and anticipated human exposure, or

(b) the environment.

(9) A person who has submitted a site profile under section 26.1 (8) must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation,

(a) disposition of real or personal assets, or

(b) subdivision of land

until he or she requests and obtains written notice from a manager that the manager does not intend to issue a remediation order, and if the manager gives notice of the intention to issue a remediation order, or if the manager issues a remediation order, subsection (7) applies.

(10) A manager may amend or cancel a remediation order.

(11) A manager making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest with respect to the contaminated site that is registered in the land title office at the time of issuing the order.

Allocation panel

27.2 (1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.

(2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:

(a) whether the person is a responsible person;

(b) whether a responsible person is a minor contributor;

(c) the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination if the costs of remediation are known or reasonably ascertainable.

(3) When providing an opinion under subsection (2) (b) and (c), the allocation panel must, to the extent of available information, have regard to the following:

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

(b) the amount of substances causing the contamination;

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

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

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

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

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

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

(4) A manager may require, as a condition of entering a voluntary remediation agreement with a responsible person, that the responsible person, at his or her own cost, seek and provide to the manager an opinion from an allocation panel under subsection (2).

(5) A manager may consider, but is not bound by, any allocation panel opinion.

(6) Work performed by the allocation panel must be paid for by the person who requests the opinion.

Minor contributors

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

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

(b) either

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

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

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

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

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

Division 4 — Implementation of Remediation

Voluntary remediation agreements

27.4 (1) A manager may, on request by a responsible person including a minor contributor, enter into a voluntary remediation agreement consisting of

(a) provisions for financial or other contributions by the responsible person,

(b) a certification by the responsible person that the person has fully and accurately disclosed all information in the person's possession regarding site conditions and the person's activities respecting that site,

(c) security in an amount and form which may include real and personal property, subject to conditions the manager specifies,

(d) a schedule of remediation acceptable to the manager, and

(e) requirements that the manager considers to be reasonably necessary to achieve remediation.

(2) A voluntary remediation agreement discharges the responsible person who entered into the voluntary remediation agreement from further liability but does not

(a) discharge from liability other responsible persons not named in the voluntary remediation agreement but reduces the total potential liability of other responsible persons by the amount, if any, specified in the voluntary remediation agreement,

(b) affect or modify in any way any person's right to seek or obtain relief under other legislation or under the common law, including, but not limited to, damages for injury or loss resulting from contamination, or

(c) prevent the manager from entering into a further voluntary remediation agreement.

(3) A manager may stipulate in a voluntary remediation agreement that a responsible person at a contaminated site is not required to begin remediation for a specified period of time, if the responsible person demonstrates that the contaminated site does not present an imminent and significant threat or risk to

(a) human health, given current and anticipated human exposure, or

(b) the environment.

Certificates of compliance

27.6 (1) On application by a responsible person, a manager may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the manager,

(b) has been approved by the manager, and

(c) may be implemented in accordance with conditions specified by the manager.

(2) A manager, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if

(a) the contaminated site has been remediated in accordance with

(i) prescribed numerical standards,

(ii) any orders under this Act,

(iii) any remediation plan approved by the manager, and

(iv) any requirements imposed by the manager, and

(b) any security in an amount and form, which may include real and personal property, required by the manager has been provided relative to the management of substances remaining on the site….

Independent remediation procedures

28 (1) A responsible person may carry out independent remediation

(a) whether or not a determination has been made as to whether the site is a contaminated site,

(b) whether or not a remediation order has been issued with respect to the site, or

(c) whether or not a voluntary remediation agreement with respect to the site has been entered into.

(2) Any person undertaking independent remediation at a contaminated site must

(a) notify a manager in writing promptly on initiating remediation, and

(b) notify a manager in writing within 90 days of completing remediation.

(3) A manager may at any time during independent remediation by any person

(a) inspect and monitor any aspect of the remediation to determine compliance with the regulations,

(b) issue a remediation order as appropriate,

(c) order public consultation and review under section 27.5, or

(d) impose requirements that the manager considers are reasonably necessary to achieve remediation.

(4) On request from the responsible person, and on receiving information respecting independent remediation, suitable to a manager, the manager may

(a) review the remediation in accordance with the regulations and any requirements imposed under subsection (3)(d), and

(b) issue an approval in principle, a certificate of compliance or a conditional certificate of compliance under section 27.6.

…

Part 8 – Miscellaneous

…

Offences and Penalties

54. (20) A person who

(c) fails to comply with a remediation order under section 27.1,

(f) fails to comply with the terms and conditions required by a manager in a voluntary remediation agreement under section 27.4(1),

(g) fails to notify a manager of independent remediation under section 28(2),

(h) fails to comply with requirements of a manager regarding independent remediation under section 28,

commits an offence and is liable to a penalty not exceeding $200 000.

Contaminated site remediation regulations

58. Without limiting section 57, the Lieutenant Governor in Council may make regulations as follows:

(f) respecting the content of the site registry and the management of and procedures relating to the site registry, including requirements for persons to submit information to the registrar,

(k) respecting remediation orders, voluntary remediation agreements and voluntary remediation procedures,

(s) respecting compensation payable under Part 4,

(t) setting out the requirements for public notice and the opportunity for public comment that apply to particular initiatives under Part 4,

Contaminated Sites Regulation, B.C. Reg. 375/96

Part 5 – Contaminated Site Definition and Determination

Definition of contaminated site

11 (1) Subject to section 12 and subsections (2), (3) and (4) of this section, the definition of **"contaminated site"** in section 26 (1) of the Act, for the purposes of paragraph (b) of that definition, means a site at which

(a) the land use is agricultural, commercial, industrial, urban park or residential, and the concentration of any substance in the soil at the site is greater than or equal to

(i) the applicable generic numerical soil standard, or

(ii) the lowest value of the applicable matrix numerical soil standards,

(b) the surface water or groundwater which is located on the site, or flows from the site, is used, or has a reasonable probability of being used, for aquatic life, irrigation, livestock or drinking water use, and the concentration of any substance in the surface water or groundwater is greater than or equal to the concentration of that substance specified for that use in Schedule 6,

(c) the concentration of any substance not specified in Schedule 4, 5 or 6 in soil, surface water or groundwater is greater than or equal to the concentration established in a standard for that substance and use by the director, or

(2) A site is not a contaminated site with respect to a substance if the concentration of the substance in soil, surface water or groundwater at the site does not exceed the applicable site-specific numerical standard.

(3) A site is not a contaminated site with respect to a substance in the soil, surface water or groundwater if the site does not contain any substance with a concentration greater than or equal to the local background concentration of that substance in the soil, surface water or groundwater respectively.

(4) A site is not a contaminated site with respect to a substance in the soil if

(a) the site has been used for the application of

(i) sewage sludge,

(ii) composted organic materials, or

(iii) products derived from the materials described in subparagraphs (i) or (ii),

in compliance with the Production and Use of Compost Regulation or an authorization given under the Act, and

(b) the site has not been used for any commercial or industrial purpose or activity listed in Schedule 2.

15. (1) A manager must, after making a preliminary determination under section 26.4(2)(a) of the Act, provide an opportunity for written comments to be submitted to the manager during a period of not less than 30 days and not more than 60 days after delivering notice of a preliminary determination, with reasons for the preliminary determination, under section 26.4(2)(b) of the Act.

(2) A manager must, within 15 days after making a final determination under s. 26.4(2) (d) or (3) of the Act, deliver notice of the final determination, with reasons for the final determination, to the persons described in section 26.4(2)(e) of the Act.

Part 7 – Liability

Compensation payable for actions under section 27(4) of the Act

Clarification of liability principles

34 (1) Nothing in section 27 (1) of the Act shall be construed as prohibiting the apportionment of a share of liability to one or more responsible persons

(a) by a manager through the issuance of an order under section 27.1 of the Act, or

(b) in an action or judgement under section 27 (4) of the Act.

(2) Apportionment under subsection (1) may be made only if it is justified by available evidence.

35. (1) For the purposes of determining compensation payable under section 27(4) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

(2) In an action between 2 or more responsible persons under section 27(4), the following factors must be considered when determining the reasonably incurred costs of remediation:

Voluntary remediation agreements

39 (1) A responsible person requesting a voluntary remediation agreement under section 27.4 of the Act must provide all of the following information to a manager:

(a) a detailed site investigation;

(b) a remediation plan;

(c) a detailed description of the responsible person's past and present activities on the site, including the amount and characteristics of contamination at the site attributable to that person's activities;

(d) an estimate of the total cost of remediation;

(e) an estimate of the responsible person's share of the total cost of remediation and justification for the estimate;

(f) the name and address of any other person who the responsible person has reason to believe may, with respect to the subject contaminated site, be a responsible person as described in section 26.5 of the Act;

(g) a statement describing the responsible person's ability and plans to conduct and finance the remediation.

(2) For the purpose of section 27.4 (1) of the Act, a manager may enter into a voluntary remediation agreement with a responsible person to implement a wide area remediation plan.

(3) Before a manager enters into a voluntary remediation agreement with a responsible person, the manager must notify any persons identified as other potential responsible persons under subsection (1) (f) and allow those persons not less than 15 days to give notice if they wish to review or make representations to the manager about the proposed voluntary remediation agreement.

.

Part 9 – Remediation Plan Approval and Completion

Approval in Principle

47. (1) A responsible person may apply for an approval in principle of a proposed remediation plan under section 27.6(1) of the Act by submitting a request in writing to a manager and attaching or ensuring the manager already has

(a) copies of any preliminary and detailed site investigation reports prepared for the site,

(b) copies of any other site investigation and assessment reports prepared for the site, and

(c) the proposed remediation plan for which the approval in principle is sought.

…

49. (1) A person may apply for a certificate of compliance under section 27.6(2) of the Act or a conditional certificate of compliance under section 27.6(3) of the Act by submitting a request in writing to the manager.

(2) In support of the application referred to in subsection (1), the person requesting the certificate of compliance or conditional certificate of compliance must provide or ensure the manager already has information on all of the following:

…

> (b) compliance with all conditions set by a manager under section 47(3) if an approval in principle was issued prior to remediation;
>
> …

51. When a responsible person applies for and a manager issues an approval in principle, a certificate of compliance or a conditional certificate of compliance for a part of a contaminated site under section 27.6(6) of the Act, a manager must

> (a) provide, to the registrar, information on the part of a site to which the approval in principle, certificate of compliance or conditional certificate of compliance applies, and...

APPENDIX B

Excerpts from the U.S. *Comprehensive Environmental Response, Compensation, and Liability Act*

9607 Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Not withstanding any other provision or rule of law, and subject only to the defences set forth in subsection (b) of this section—

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance shall be liable for—

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan…

APPENDIX C

Excerpts from Saskatchewan *Environmental Management and Protection Act*, S.S. 1983-84, c. E-10.2, s. 13(3):

(3) Subject to subsections (4) and (5), any person, including Her Majesty in right of
Saskatchewan or in right of Canada, has a right to compensation from:

> (a) the owner of the pollutant and the person having control of the pollutant for loss or damage incurred as a result of:
>
> > (i) the discharge of a pollutant;
> >
> > (ii) neglect or default in the execution of a duty imposed pursuant to
> > section 9; or
> >
> > (iii) an investigation or action taken pursuant to section 3 or 8; and
>
> (b) any person to whom an order has been made pursuant to section 4 for loss or damage incurred as a result of the execution or intended execution,
> or neglect or default in the execution, of the order

without proof of fault, negligence or wilful intent.