External Review of Remediation Liability Provisions: the *Waste Management Amendment Act,* 1993

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Liability Provisions: The *Waste Management Amendment Act, 1993*

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Submitted to:

Ministry of Environment, Lands and Parks

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Dr. Ray Payne
Director, Evaluation and Economics Branch
Policy, Planning and Legislation Department
Ministry of Environment, Lands and Parks
4th Floor, 737 Courtenay Street
Victoria BC V8V 1X4

Dear Dr. Payne,

On May 27, 1996, I was retained by the Evaluation and Economics Branch of the Ministry of Environment, Lands and Parks to conduct an external review of the remediation liability provisions of the Waste Management Amendment Act, 1993 and associated draft regulations.

In accordance with the terms of reference of this retainer, I enclose my final report and recommendations.

This report is the product of a collaboration between myself and my colleague, Professor Diana Belevsky.

Sincerely,

Chris Tollefson
Associate Professor
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Acknowledgements

We wish to acknowledge the work of our research assistant, Matt Pollard (UVic Law '98) who played an instrumental role at all stages of this review process.

C.T.
D.B.

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Executive Summary

We have been retained by the Ministry of Environment, Lands and Parks to conduct an independent review of the remediation liability provisions of the *Waste Management Amendment Act* (the "WMAA") and associated draft regulations. The WMAA was passed by the British Columbia Legislature on June 15, 1993 but has not been proclaimed.

We were advised that this review was commissioned in the light of reservations expressed by some stakeholders about the WMAA liability regime. An integral part of our review, therefore, consisted of consultations with key stakeholders to determine and document the nature of any benefits and concerns associated with the liability provisions of the Act and regulations.

The second component of our review involved a legal analysis of the WMAA liability regime. As part of this analysis we developed a detailed hypothetical case study that applied the full range of the WMAA liability provisions to a contaminated site and compared the liability implications with those that would arise under the present legal framework, namely Part 3.1 and s. 22 of the *Waste Management Act*. We then went on to answer the following questions:

- is the legislation consistent with the Ministry's policy of polluter pays?
- how do the liability provisions compare to those in contaminated site legislation in other Canadian, United States and overseas common law jurisdictions?

- do the Act and draft regulations ensure clear and predictable circumstances for the assignment of liability for contaminated site clean-up?
- is there potential for beneficial or negative, and unforeseen, impacts on business and on local or provincial governments?
- is there a potential for "third party" windfall profits arising out of the liability provisions?
- is there a potential for undue transaction costs?
- are the liability provisions of the Act an improvement on the current legal framework under Part 3.1 and section 22 of the *Waste Management Act* and the common law?

On the basis of our review, we were asked to submit a report to the Ministry of Environment, Lands and Parks which evaluates options for addressing any liability concerns we identified.

Analysis and Conclusions

Is the legislation consistent with the Ministry's policy of polluter pays?

In general, our conclusion is that the WMAA will operate in a manner that is consistent with the polluter pays principle. We are, however, concerned that in some limited respects the regime may be overbroad, in the process imposing liabilities on responsible persons that are disproportionate to their relative contribution to site contamination. This danger, we concluded, may be minimized by clarifying:

- the meaning and implications of the doctrine of "joint and several liability" as it applies under the WMAA regime
- the circumstances in which a parent corporation will incur liability for the actions of a subsidiary
- the circumstances in which a director, officer or employee of a corporate entity may incur liability

How do the liability provisions compare to those in contaminated site legislation in other Canadian, United States and overseas common law jurisdictions?

On the basis of our comparative analysis we concluded that the liability model adopted under the WMAA incorporates elements found in many contaminated sites liability regimes (albeit in a more express form), casts a relatively wide net of initial liability but also offers greater flexibility than most regimes in the variety and expandability of exemptions from liability, and provides some modest yet worthwhile innovations in terms of alternative dispute resolution and liability-capping mechanisms.

Do the Act and draft regulations ensure clear and predictable circumstances for the assignment of liability for contaminated site cleanup?

The main concern in this regard related to managers' cleanup orders issued pursuant to s. 20.5 of the WMAA. We concluded that the circumstances in which such orders may be made should be spelled out more clearly and that managers should be strongly encouraged, where it is justified on the evidence, to apportion liability within the terms of their cleanup order.

Is there potential for beneficial or negative, and unforeseen, impacts on business and on local or provincial governments?

We reported on a number of concerns expressed to us by stakeholders with respect to potential unintended impacts of the WMAA. One of the most serious claims was that the Act will generate negative environmental protection impacts. For example, we were told that the liability provisions will result in a chill on redevelopment, because a vendor will not want to sell a property only to be subject to potential long-term liability for remediation. In addition, we were told that the principle of absolute liability embodied in the Act will actually deter responsible behaviour.

In our view, the Act will not generate these kinds of effects. Vendors of property have various means of addressing the risk of potential future liability, including obtaining remediation covenants and indemnification warranties from the purchaser or requiring the purchaser to post funds into trust to secure site cleanup. In addition, a vendor might also seek to cap its liability by relying on the minor contributor or voluntary remediation agreement provisions in the Act. On the absolute liability point, we note that diligence is still relevant under the WMAA (see ss. 20.5(4)(b)(ii) and 20.51(3)(e)) and the larger regulatory context (including criminal and quasi-criminal regulation). Therefore, we anticipate that people will continue to perceive that they have an interest in acting in a diligent manner.

We noted and commented on a number of other concerns specific to certain business sectors and to governments. Overall, our conclusion was that no major changes to the legislation are warranted in response to any of the many concerns noted. We recommend only minor changes to the regulations to address some specific concerns with respect to trustees and receivers/receiver-managers.

Is there a potential for "third party" windfall profits arising out of the liability provisions?

The concern over potential windfall profits relates to the scenario where a person purchases a contaminated site at a price that is discounted because of contamination, and that person remediates the site and then seeks to recover the costs of remediation from other responsible persons under s. 20.41(4). If the purchaser is able to recover remediation costs from prior owners and operators in addition to taking the benefit of a discount equal or greater than remediation costs, the cost recovery amounts to a windfall.

We concluded that the purchaser may be able to recover from responsible persons other than the vendor, because those persons cannot rely on the contract or any other defences at common law or in equity and there is no provision in the legislation for a court to allocate liability between responsible persons with reference to private agreements or general fairness concerns. The regulations therefore need to be amended to specify that a court should allocate on the basis of specified criteria. In addition, although the vendor should be able to rely on the contract as a defence, it is not clear that defences are available to defendants in a cost recovery action, because of the principle stipulated in the Act that responsible persons are absolutely liable. In our view, defences need to be expressly preserved in the regulations.

Is there a potential for undue transaction costs?

For the purposes of this question, we defined "transaction costs" as the costs incurred by private or public sector players (responsible persons, governments, insurers, the Ministry and so on) in the process of allocating cleanup liabilities as opposed to costs incurred in actually carrying out remediation. As the reference point in terms of determining whether these transaction costs were "undue," we used transaction costs under the present regime.

We concluded that the WMAA represents a significant advance over the present regime in terms of reducing uncertainty and thus transaction costs. At the same time, however, we concluded that the level of certainty and thus transaction costs under the WMAA could be enhanced through, among other things, implementation of our recommendations in various areas.

Are the liability provisions of the Act an improvement on the current legal framework under Part 3.1 and Section 22 of the Waste Management Act and the common law?

We compared the WMAA liability regime to the current regime under the *Waste Management Act* using three criterion: certainty, efficiency and fairness. We concluded that in all three respects the WMAA represents an improvement over the current regime. The WMAA enhances certainty by clearly specifying the legal principles which govern liability allocation and by eliminating much of the current uncertainty surrounding "who is in" and "who is out" of the liability net. For these and other reasons, addressed in our discussion of transaction costs, we also concluded that the WMAA is the more "efficient" liability regime. Finally, by reducing uncertainty and offering new possibilities for negotiated settlement of liability disputes, the WMAA represents a "fairer" regime than currently exists.

Recommendations

We recommend:

Joint and Several Liability

That the WMAA or regulations be amended to affirm the judicial power to apportion liability where the harm is divisible.

- *That the WMAA or regulations be amended to affirm that joint and severally liable responsible persons are entitled to seek contribution from any other responsible person in accordance with the procedures followed under section 4 of the Negligence Act.*
- *That, for the purposes of allocating these rights of contribution, the WMAA or regulations should be amended to direct courts to consider causation-related factors including the defendant's degree of involvement in the contamination and the nature and quantity of contamination at the site attributable to that person; relative diligence; any remediation measures taken by the defendant; and other factors relevant to a fair and just allocation.*
- *That the issue of orphan shares be revisited, as part of a general review of the legislation, three years after proclamation of the WMAA.*

Liability of Directors, Officers and Employees

- *That, in private cost recovery actions, the plaintiff should be required to prove that the "director, officer, employee or agent of a person or government body authorized, permitted or acquiesced" in the activity giving rise to the liability, and that the WMAA or regulations be so amended.*
- *That the Ministry develop and publish a policy statement describing the circumstances in which a manager's order under s. 20.5 would name a "director, officer, employee or agent of a person or government body."*

Liability of Parent Corporations for Contamination Attributes to Subsidiaries

- *That, in private cost recovery actions, where the parent of a subsidiary corporation is sued, the plaintiff should be required to prove that the parent "authorized, permitted or acquiesced" in the activity giving rise to the liability, and that the WMAA or the regulations be so amended.*
- *That the Ministry develop and publish a policy statement describing the circumstances in which a manager's order under s. 20.5 would name the parent of a subsidiary corporate "responsible person."*

Manager's Orders Under s.20.5

- *That a regulation describing the circumstances in which a manager is justified in invoking the s. 20.5 order power be enacted or, alternatively, that the Ministry develop and publish a policy statement on this subject.*
- *That the Ministry develop and publish a policy statement confirming that managers will apportion liability in s. 20.5 orders, where apportionment can be justified on the available evidence.*

Appeals and Judicial Review

- *That a regulation describing the circumstances in which a manager is justified in invoking the s. 20.5 order power be enacted or, alternatively, that the Ministry develop and publish a policy statement on this subject.*
- *That the Ministry develop and publish a policy statement confirming that managers will apportion liability in s. 20.5 orders, where apportionment can be justified on the available evidence.*

Certificates of Compliance

- *That the Ministry develop and publish a policy statement describing the exceptional circumstances in which it might be appropriate for a manager to require the holder of a certificate of compliance to engage in further remediation.*

Unintended Impacts on Business and Government

- *That s. 24 of the regulations be amended to clarify that receivers/receiver-managers may continue to be involved in remediation even if there are insufficient available funds.*
- *That s. 24.1(5)(b) of the regulations be amended to clarify that a trustee may be involved in ongoing trust administration duties where the trust property is transferred to the government in trust for remediation.*

Potential for Windfall Profits

- *That a section be added to the regulations stating that a defendant to a private cost recovery action may assert all legal and equitable defences and any rights under agreement or statute.*
- *That, for the purposes of allocating rights of contribution in private cost recovery actions, the WMAA or regulations should be amended to direct courts to consider private agreements and price paid for the site relative to its market value at the time of sale if it had been remediated.*

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Part I - Introduction

We have been retained by Ministry of Environment, Lands and Parks ("the Ministry") to conduct an independent review of the remediation liability provisions of the *Waste Management Amendment Act*, S.B.C. 1993, c. 25 ("WMAA" or "the Act") and associated regulations. The Act was passed by the Legislature of British Columbia on June 15, 1993 but has not, as yet, been proclaimed. During the intervening period, various drafts of the associated regulations have been the subject of ongoing stakeholder consultations. A third draft of these regulations has been circulated and it is this draft that we have been asked to consider for the purposes of this review.

The Review Process

We are advised that this review was commissioned in the light of reservations expressed by some stakeholders about the liability regime contemplated by the Act. An integral part of the review process was consultation with selected stakeholders to determine and document the nature of any benefits and concerns associated with the liability provisions of the Act and any suggested changes. The list of stakeholders that we met with is set out in Appendix A to this report. We also conducted interviews with Ministry staff and advisors to gain an understanding of the Ministry's rationale for the remediation liability provisions of the Act and staff views on anticipated impacts and noted criticisms of those provisions.

The second component of the review was a legal analysis of the liability provisions of the Act and regulations. Specifically, we analyzed whether the Act and regulations are consistent with the "polluter pays" principle, whether they are sufficiently clear and predictable, and whether there is potential for unintended effects including windfall profits and undue transaction costs. We also completed a comparative analysis of the liability provisions with reference to contaminated site legislation in other common law jurisdictions.

We have been asked to submit a report to the Ministry of Environment, Lands and Parks which sets out our findings and evaluates options for addressing legitimate liability concerns identified in the course of our review. Our terms of reference stipulate that these options may include combinations of the following:

- amending the Act or the draft regulations
- enacting only a part of the Act
- enacting all of the Act and regulations as currently proposed, and
- policy direction

The structure of this report is as follows: Part II is an analysis of a detailed hypothetical case study, applying both the liability provisions under Part 3.1 and s. 22 of the *Waste Management Act* and the new Act and regulations; Part III is an assessment of the liability provisions of the Act and regulations based on a number of specific questions posed in our terms of reference; and Part IV sets out our recommendations.

The Scope of this Report

This review is concerned exclusively with the remediation liability provisions of the Act and regulations. This limitation is stated explicitly in our terms of reference. Our focus is thus on the identification of, and the rights and duties attaching to, "responsible persons" under the liability regime. Other important issues such as those relating to remediation standards and the impact of the Act and regulations on the liability of municipalities in tort are beyond the scope of this review.

We have also been advised by the Ministry that our review is to proceed on the basis of the "polluter pays" principle being a stated Ministry policy. This premise imposes some important limitations on the scope of our review. The three central principles of the liability regime are retroactivity, absolute liability, and joint and several liability. In our view, implementation of the "polluter pays" principle with respect to historical pollution is inconceivable unless the liability regime operates retroactively (or, as some prefer to characterize it, retrospectively). Similarly, we are of the view that implementation of the polluter pays principle cannot realistically be contemplated unless the liability regime is absolute. Were the liability regime to afford a general due diligence defence to all polluters (based on custom and practice or legal authority prevailing at the time the pollution occurred), it would, in our view, completely undermine the Ministry's polluter pays policy. Therefore, it is not within the scope of our mandate to undertake an evaluation of the broad principles and philosophical and economic arguments underlying retroactivity and absolute liability.

Different considerations, however, apply to the third principle of the liability regime: joint and several liability. An arguable case can and has been made that joint and several liability is not prerequisite to implementation of the polluter pays principle. Indeed, joint and several liability may, in some circumstances, lead to outcomes which are inconsistent with that principle. Therefore, we have concluded that it is appropriate and necessary to consider both the advisability of retaining the principle of joint and several liability as a feature of the liability

regime as well as the implementation implications of this principle in terms of business efficacy and fairness to affected interests.

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Part II - Hypothetical Case Study

In this Part, we analyze a hypothetical case to demonstrate the operation of the Act and regulations, and to compare it with the present legal framework under Part 3.1 and section 22 of the *Waste Management Act*.

Fact Pattern

In 1960, a municipality sold a site to a small wood preserving company, ABC Wood Preservers Ltd. The site was located in an industrial area and was owned and used by the municipality as a solid waste landfill site through the 1940's and 1950's. ABC carried on wood preserving operations there until 1970, when it sold the property to Pacific Wood Products Ltd., a subsidiary of Big Forest Products Inc. Pacific Wood Products ran its wood preserving operations on the site in accordance with the standards of the day, and observed all applicable laws and regulations. ABC was not as careful in its operations (partly because at the time there were virtually no standards for avoiding contamination), and routinely discharged effluent onto the site.

In 1976, Pacific Wood Products sold the site to Canwood Limited, another major forest products company. Although Canwood owned the site from 1976 to 1978, it never actually carried on any operations there. The company's plan, before business conditions changed, was to build a new facility, and to this end it had XYZ Contractors Ltd. tear down the old plant. In addition, Canwood's environment division conducted a soil cleanup on the site. The cleanup was discussed with the Ministry of Environment, who did not indicate major concerns.

Canwood sold the vacant, cleaned-up site in 1978 to Crystal Window Inc. Crystal Window constructed a small plant and ran an "eco-friendly" window and door manufacturing operation there until 1985, using the least toxic materials available at the time and taking care to be diligent about disposing of materials in an environmentally responsible way.

The site changed hands again in 1985 when it was purchased by Prime Property Investment Co. ("PPI"), who recognized the site's potential, given changing land use patterns, for future retail/office development. To generate interim revenue, PPI leased the site to Bob's Paint Co., a small paint distributor. Two year later, in 1987, PPI sold the property to FBN Developments Inc. Unfortunately, FBN made some imprudent investments and went bankrupt in 1989. FBN's property vested in a Trustee in bankruptcy. Bob's Paint Co. operated on the site until 1990.

In 1990, the Trustee sold the site to Triangle Development Limited. Prior to the sale, Triangle engaged an environmental consultant to do an audit. The consultant found serious wood preserver effluent contamination on the site, and significant contamination from the landfill. There was also some minor paint and solvent contamination, some of which was traced to leaking cans marked "Bob's Paint Co." and some of which was from the landfill. No

contamination was attributable to Crystal Window's operation. The consultant's advice was that if Triangle was required to clean the site it could potentially be very expensive. Triangle thus negotiated a substantial reduction in the purchase price, which reflected the state of contamination and the anticipated cleanup costs. In return, Triangle agreed by contract with the Trustee to accept all environmental liability associated with the site.

Triangle intends to develop a retail/office complex on the site. All of the former owners and operators still exist, but ABC, Crystal Window and Bob's Paint Co. have limited assets, and FBN is bankrupt. In addition, it has become apparent that the contamination on the site has migrated to an adjacent property, owned by 1234 Co.

The Issues

The issues in the comparative application of the two legislative regimes are as follows:

- how is the extent and type of site remediation determined?
- how, or by what mechanisms, might remediation be implemented?
- who is responsible for remediation?
- how might costs be allocated to the parties that have liability?

Analysis

SCENARIO 1: UNDER PART 3.1 & S. 22 OF THE *WASTE MANAGEMENT ACT*

1. Extent and Type of Remediation

The extent and type of site remediation is a matter within the discretion of the director and manager under s. 22(2)(f). That section provides that a person may be required to carry out remediation "in accordance with any criteria established by the director and any additional requirements specified by the manager."

2. Remediation Mechanism

Under this scenario, remediation may be undertaken pursuant to a manager's order under

s. 22. A manager may issue a remediation order where he or she is "satisfied on reasonable grounds that a substance is causing pollution." Under s. 1 of the WMA, "pollution" means "the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment." Thus, there is a threshold test which must be met before a manager may exercise the order power, although it is highly discretionary. Of course, voluntary remediation is also possible.

3. Persons Responsible

Section 22(1) sets out three categories of persons who may be subject to a manager's order. Triangle could be subject to an order under s. 22(1)(c) as the current owner of land on which a

substance that is causing pollution is located. ABC, Pacific Wood Products, Crystal Window and Bob's Paints could potentially be named in an order under s. 22(1)(b) as persons who caused the pollution. 1234 Co., owner of the adjacent site contaminated by migration, could also be ordered to remediate under s. 22(1)(c) as "the person who owns or occupies the land on which the substance is located."

In addition to the current owner and any person who "caused or authorized" the pollution, a manager may issue a remediation order to "the person who had possession, charge or control of the substance at the time it escaped or . . . was introduced into the environment." This charge and control criterion set out in s. 22(1)(a) is vague, but it appears to attach liability to some former owners. A simple example would be where a person owned a property that has an underground oil storage tank, and that tank started to leak while that person was the owner. An owner will have *control* over everything on the site, and to the extent that contamination was ongoing (i.e. substances were being introduced into the environment) during the period of ownership, that person could fall within the ambit of s. 22. It is our understanding that this provision has been used to support orders against former owners who did not cause or authorize the pollution.

If that is indeed the effect of s. 22(1)(a), then all other former owners (the Trustee for FBN, PPI, Crystal and Canwood) could also be named in a remediation order. In addition, although s. 22(5) explicitly excludes municipalities from the categories of persons potentially subject to a manager's order, the Minister may exercise the order power against a municipality under s. 22.3. Thus, the municipality is liable to be named in the order, being a former owner and having caused or authorized pollution at the site.

Finally, it should be noted that there is some question about whether s. 22 has retrospective effect, at least with respect to pre-1977 activities. In the *West Fraser* case, the B.C. Supreme Court held that s. 22 applies to activities that occurred in 1978 because the language of the section refers back in time (e.g. "a person who *had* possession of a substance . . ."), and imposes no obligation that was not imposed by the *Pollution Control Act* which was in force when the pollution that was the subject of the manager's order took place. Thus, we know that s. 22 applies at least back to 1977, when the *Pollution Control Act* came into force. Moreover, the court stated that "Even if the presumption against retrospective operation applies, and it is not at all apparent that it does, the clear intent of the legislation is to allocate the cost of pollution on those people who caused it in the protection of the public interest." This suggests that s. 22 also applies to pollution caused before 1977, and could be used against Pacific Wood Products and ABC.

4. Allocation Mechanisms

Section 22 is silent on the manager's power to allocate liability for remediation as between the parties. The Ministry's current position, as we understand it, is that the manager has the power only to name parties in an order, without any indication as to their relative responsibility.

Even though the manager has the power to issue a remediation order against all persons who fall within s. 22(1), there is also a discretion to name only some potentially responsible parties. For example, the manager might name only those parties who contributed significantly to the contamination. It is important to recognize that exercising discretion not to name a party in an

order is a form of allocation. The point is that allocation *does* take place under s. 22, albeit in a blunt way and in a way that is not transparent, in that the factors informing the manager's decision on whether to name a party are not articulated anywhere in the legislation.

With respect to private agreements allocating liability between responsible parties, it is clear that such agreements cannot fetter the manager's discretion. It follows that the manager could not take into account the agreement between Triangle and the Trustee in the sense of issuing an order that reflects the specific terms of that agreement. But it is still open to the manager to exercise his or her discretion not to name the Trustee in the order.

In the light of all of the above, it would be realistic to predict that, in this case, the manager would name ABC, Pacific Wood Products, the Trustee and Triangle in the remediation order. It is common practice for the manager, prior to issuing the order, to notify the parties and give them an opportunity to sort out the matter themselves through negotiation. If negotiation is not successful, an order would be issued.

Although the WMA is not explicit in this regard, there is authority to the effect that the parties named in a s. 22 order are jointly and severally liable for the costs of carrying out the terms of the order. Furthermore, the WMA provides no mechanisms to assist the named parties in allocating liability. The parties named in the order would thus be left to their own devices to allocate responsibility as among themselves, in the face of joint and several liability and significant legal uncertainty regarding contribution actions and the feasibility of cost recovery. (Note that the Trustee's obligation to comply with an order is limited to the extent that estate assets less trustee's fees permits.) If no resolution is reached, recourse to the courts in the form of judicial review of an order or an action for cost recovery is likely.

To recover costs in a civil action, a party who incurred cost remediating a site would have to do one of the following:

(i) prove the elements of a common law cause of action in negligence, nuisance, under the rule in *Fletcher* v. *Rylands* ("strict liability"), or trespass; or

(ii) establish a claim for contribution based on

(a) the equitable doctrine of unjust enrichment

(b) application of s. 4 of the *Negligence Act*.

Further, where substances have intermingled and/or individual parties' contributions cannot be determined, lengthy litigation could result, diluting the remediator's recovery. Also, the "shares" of liability of any parties who are insolvent or deceased (or otherwise unable to pay) would likely

be absorbed by the remediator. Thus a civil action for cost recovery suffers from uncertainty as to its availability at common law and the adequacy of any contribution eventually recovered.

While it is extremely unlikely that Triangle would be able to recover against previous owners or lessees at common law, 1234 Co. as adjacent landowner whose property was contaminated by migration may well be able to bring an action against the current owner of the property or the polluters for civil damages in nuisance, or against the polluters under the rule in *Fletcher* v. *Rylands*. For a more detailed discussion of common law liability, see Part III, section G of this report.

SCENARIO 2: NEW LEGISLATION AND DRAFT REGULATIONS

1. Extent and type of remediation

Under the WMAA, the extent and type of site remediation required is determined according to standards set out in Division VI of the regulations. In addition, there are specified criteria for determining whether a site is contaminated, set out in Division V of the regulations and s. 20.1 of the WMAA. Thus, the new regime relies on formal standards rather than a wide discretion on the part of the director and manager.

2. Remediation Mechanisms

Beyond the power in the manager to order remediation (s. 20.5), the new regime makes provision for voluntary and independent remediation. A responsible person or persons may enter into a voluntary remediation agreement with the manager under s. 20.61, which will include a schedule of remediation and provisions for financial contribution. Such an agreement discharges the responsible person(s) from further liability (s. 20.61(2)). In addition, s. 20.8 provides that a responsible person may undertake independent remediation procedures on a site.

It should be noted that under s. 20.5, the manager is directed to take certain factors into account in deciding who to name in an order. Subsection (4) directs the manager to take into account private agreements, relative responsibility for the contamination and due diligence, although only "to the extent feasible without jeopardizing remediation requirements." Subsection (3) of s. 20.5 may also provide some direction to the manager on factors to consider in making a remediation order, although it is not clear whether it applies generally or only with respect to the question of whether remediation should be commenced promptly.

In this case, therefore, the manager could order any one of the parties who is a "responsible person" to undertake or contribute to remediation. The other possibility is that Triangle would undertake independent remediation pursuant to s. 20.8, or in conjunction with another responsible person who agrees to undertake remediation or contribution to remediation subject to a voluntary remediation agreement.

3. Persons Responsible

The new regime initially casts a wide net of responsibility, and then excludes certain persons from that net.

Starting point: persons responsible for remediation

Subject to a number of exemptions set out in s. 20.4, s. 20.31 identifies the broad class of "responsible persons" which includes all current and previous owners and operators of the site. Thus, the current owner (Triangle) and all former owners (the Trustee for FBN, PPI, Crystal Window, Canwood, Pacific Wood, ABC and the municipality) are responsible persons, subject to possible exemptions discussed below. In addition, Bob's Paint Co. is a previous "operator" and a responsible person under s. 20.31(1)(b).

This class of potentially responsible persons is further broadened if one takes into account the definitions of "owner," "operator" and "person" in s. 20.1(1). These definitions are reproduced here for convenience:

"owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including without limitation a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 20.31(3) [exercised control over the handling of substances or caused contamination];

"operator" means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a contaminated site, but does not include a secured creditor...

"person" includes a government body and any director, officer, employee or agent of a person or a government body;

Big Forest Products, the parent company of Pacific Wood, may be a responsible person if it had a "right of control" over the site because that renders it a previous "owner" of the site. Furthermore, the definitions of "person" and "operator" suggest that the directors, officers and employees of each of the responsible persons listed above may be potentially liable. The issues of parent/subsidiary and director/officer liability are discussed in detail in Part III, section C of this report. In addition, XYZ Contractors could fall within the meaning of "operator" because it was responsible for tearing down the old wood preserving plant on the site and thus is a "person who...was...responsible for any operation located at a contaminated site."

In sum, every one of the actors in the case study falls within the initial wide net of responsibility.

Persons not responsible under s. 20.4

Some of the identified potentially responsible persons may be exempted from liability under s. 20.4. The burden of proving that the exemption applies lies in all cases with the responsible person seeking the exemption: s. 20.4(3).

- innocent acquisition exemption

Section 20.4(1)(d) provides that an owner or operator who purchased a contaminated site and (i) had "no knowledge or reason to know or suspect that the site was a contaminate site," (ii) "undertook all appropriate inquiries into the previous ownership and uses of the site" and made inquires into previous ownership and potential liability "consistent with good commercial or customary practice at the time" is not a responsible person, provided that (iii) the person did not cause or contribute to the contamination of the site or transfer any interest in the site without disclosing any known contamination. Section 25 of the regulations clarifies this exemption by setting out what must be considered in determining whether there was appropriate investigation and inquiry.

In this case, Crystal Window and PPI may fall within the innocent purchaser exemption. We can take as given that neither of them caused or contributed to contamination on the site or failed to disclose known contamination to purchasers. We can further assume, for the purposes of this exercise, that there was no actual knowledge of contamination. The matter then boils down to (i) whether there was "no reason to know or suspect" that the site was contaminated and (ii) whether they undertook "all appropriate inquiries."

It is important to note that the relevant question is whether *at the time of acquisition* there was no reason to know of or suspect contamination. Given that market participants were not fully attuned to the issue of contamination until the late 1980s, which is when environmental due diligence became a customary practice, and that there would have been no signs of contamination on the site (because it had been cleaned up by Canwood), it is unlikely that Crystal Window or PPI had reason to know of or suspect contamination. The matter of the landfill contamination may complicate this somewhat, however. If either Crystal Window or PPI knew that the site had been used as a landfill, it may have been reasonable for them to suspect that there was contamination.

The second criterion is whether the owner made the normal investigations into potential liability prior to acquisition. This ends up being a factual question, namely what was "good commercial or customary practice" at the time of acquisition. It may end up being a particularly thorny question in this case, since the date of acquisition as far as PPI is concerned (1985) falls within the transition period between the time that no consideration was given to contamination and the time that environmental due diligence became an established business practice (late 1980s). Another issue is whether there was an obligation on PPI to investigate potential contamination caused by Crystal Window, and if it did not do so, whether the exemption is lost, even if Crystal Window did not contaminate the site, because "appropriate inquiries" were not made.

The innocent purchaser exemption is not self-applying; its application requires judgment and brings with it uncertainty. PPI's ability to avail itself of the exemption will depend on its ability to prove that it undertook appropriate inspection and inquiry in accordance with the business custom of the real estate industry in 1985. Provided that Crystal Window did not know that the site had been used as a landfill, it is likely within the scope of the innocent purchaser exemption.

- innocent owner/operator exemption

Section 20.4(1)(e) provides an exemption for an owner or operator who, during its ownership or operation, "did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site." Since Crystal Window's operations were eco-friendly, it might look to this exemption as well. Again, it would bear the onus of proving all elements of the exemption. PPI might also try to engage this exemption because it simply leased the site to Bob's Paint Co. and had no basis for knowing that the lessee "planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site.": see s. 26 of the regulations, which modifies lessor liability under s. 20.4(1)(e) of the Act.

However, s. 20.4(1)(e) applies only to "an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site." Despite Canwood's cleanup, contamination from the municipal landfill remained on the site. Therefore, it appears that this exemption does not apply to either party because the site was already contaminated at the time of acquisition.

- contamination by migration exemption

1234 Co. would be exempt under s. 20.4(1)(i) as a person who owns a site "that was contaminated only by the migration of a substance from other real property not owned or operated by the person." Responsibility for the contamination is placed instead on the current and previous owners and operators of the site from which the substance migrated: see s. 20.31(2).

- change of use exemption

Section 20.4(1)(l) creates an exemption for a responsible person who undertook remediation on a site, if another person subsequently proposes to change the use of the site and provide additional remediation. This exemption might be engaged if, for example, Triangle remediates the site to a commercial standard and launches a s. 20.41(4) cost recovery action against the other responsible persons. Canwood might argue that it should not be a responsible person because it already cleaned up the site.

If we assume that Canwood's cleanup amounted to remediation to an industrial standard, it seems that the principle embodied in the exemption should apply. The problem is that this exemption is available only with respect to a site "for which a certificate of compliance or conditional certificate of compliance was issued." Therefore, it seems that Canwood would be a responsible person despite its prior cleanup efforts. But it is important to note that the cleanup is not irrelevant; it has bearing with respect to allocation of liability and the determination of minor contributor status.

- construction on contaminated sites

Section 22 of the regulations states that "a person is not responsible for remediation merely on account of having provided contracting or consulting services relating to the construction of buildings and facilities at a contaminated site." Although it might be argued that tearing down a building is the exact opposite of construction, it is likely that XYZ will be considered to have

provided a service "relating to the construction of buildings" because it cleared the site for further construction.

- trustee in bankruptcy

Certain exemptions from liability for receiver-managers and trustees in bankruptcy are set out in s. 24 of the regulations. In accordance with s. 24(2), the Trustee will not be personally responsible for remediation, despite having been an owner of the site, unless it exercised control over or imposed requirements on Bob's Paint Co. with respect to the treatment, handling or disposal of substances *and* was grossly negligent or guilty of willful misconduct in the exercise of that control *and* such control or requirements cause the site to be contaminated. Since the Trustee was not involved in the Bob's Paint Co. operation except as lessor, the exemption will apply.

Moreover, the Trustee falls within s. 22(5)(e)(i) of the regulations, which provides that a receiver's obligation to comply with a remediation order terminates when the receiver "disposes of a contaminated site to a person who agrees, in writing, to accept responsibility for remediation under section 20.31 of the Act," as did Triangle.

4. Allocation Mechanisms

The WMAA provides that responsible persons are absolutely and jointly and severally liable, but also provides various mechanisms for allocating liability among responsible persons.

- manager's order

Section 20.5(4) sets out the criteria that the manager shall consider when deciding who to name in an order. Those criteria include private agreements and degree of diligence exercised by the persons responsible. Thus, if the manager issues an order requiring remediation to be undertaken, he or she may take into account the private agreement, and the fact that ABC, Pacific Wood Products and the municipality contributed most substantially to the site becoming a contaminated site. It should be noted, however, that these factors cannot operate to jeopardize remediation requirements, which suggests that if a person who caused only a relatively small (although not "minor") amount of contamination is the only responsible person still in existence or financially capable of remediating, that person will still be named in the order.

- allocation panel

Section 20.51 provides for the establishment of an allocation panel, an expert body that will give an opinion to the manager on whether a person is a responsible person and what share of remediation costs that person should bear. Subsection (3) directs the allocation panel to take into account a number of specific factors including degree of toxicity of the contaminating substances and the relative degrees of diligence exercised by the responsible persons. The opinion is advisory only, and does not bind the manager. Any person may request that the manager appoint an allocation panel.

The allocation panel would be useful in providing an opinion as to the relative contribution of ABC, Pacific Wood, Bob's Paint Co. and the municipality. Although the wood effluent contamination attributable to ABC and Pacific Wood might be indivisible, the allocation panel could at least recognize Pacific Wood's relative diligence. Ultimately, however, the responsible persons are jointly and severally liable; an allocation panel opinion may identify ABC's relative contribution, but if ABC is financially incapable of remediating, its share of liability will have to be absorbed by the remaining responsible persons.

- minor contributor status

Section 20.6 allows the manager to determine that a responsible person is a minor contributor if the person demonstrates that (i) only a minor portion of the contamination can be attributed to the person; that (ii) either no remediation would be required as a result of that person's contribution or the cost of remediation attributable to the person would be only a minor portion of the total remediation costs; *and* (iii) the application of joint and several liability to that person would be unduly harsh.

Section 32 of the regulations provides further guidance as to what information is relevant to the determination of minor contributor status, and it is useful to reproduce it here:

32. A responsible person applying for minor contributor status...shall provide information to a manager, to the extent that the information is reasonably ascertainable, respecting

(a) the condition of the contaminated site at the time the applicant

> (i) became an owner or operator at the site,
> and
> (ii) if applicable, ceased to be an owner or
> operator at the site,

(b) any activities and land uses carried out by the applicant while located at the site,

(c) the nature and quantity of contamination at the site attributable to the applicant,

(d) all measures taken by the applicant to prevent or remediate contamination,

(e) contamination on the site or released from the site which is attributable to

> (i) the applicant, and
> (ii) other persons at the site, and

(f) all measures taken by the applicant to exercise due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site, including any measures taken to prevent foreseeable acts of third parties which may have contributed to the contamination at the site.

In the light of these factors, it is likely that Crystal Window, Canwood and PPI would seek minor contributor status on the basis that no remediation is required as a result of their activities on the site. Also, Canwood's remediation efforts are directly relevant under subsections (a) and (d) of s. 32. Bob's Paint Co. could also seek minor contributor status because its contribution to the total contamination was minor. Note that the allocation panel may provide advice to the manager on whether a person is a minor contributor.

Once a person is determined to be a minor contributor, the manager "shall determine the amount or portion of remediation costs attributable to the responsible person.": s. 20.6(2). The minor contributor's liability is capped at that amount, according to s. 20.6(3).

- voluntary remediation agreement

A manager may enter into a voluntary remediation agreement with any of the responsible persons. The agreement shall include, according to s. 20.61(a), "provisions for financial or other contributions by the responsible person." A voluntary remediation agreement releases the responsible person who entered into it from further liability and reduces the total potential liability of the other responsible persons by the amount specified in the agreement. Thus, it is a mechanism available to any responsible person who wants to settle their liability with the regulator.

- statutory cause of action

Another allocation mechanism is found in s. 20.41(4), which creates a statutory cause of action for cost recovery against any responsible person(s). This section provides a mechanism that is different from the common law contribution action which potentially is available under the old regime. The action is to proceed "in accordance with the principles of liability set out in this Part" and is available only against responsible persons to recover "reasonably incurred" costs of remediation.

If Triangle decides to undertake remediation of the site, it could pursue this statutory cause of action against one or more responsible persons. Those persons would be jointly and severally liable, but the various allocation criteria in Part 3.1 may guide the court in apportioning liability. There is, however, considerable uncertainty surrounding the operation of this section: see Part III, sections C and E of this report. The other possibility is that a manager issues an order. If any responsible person incurs remediation costs under a manager's order, that person can similarly pursue cost recovery.

Summary

Under s. 22 of the WMA, it is likely that ABC, Pacific Wood Products, Bob's Paint Co., the Trustee and Triangle would be named in an order. The municipality would be subject to a s. 22.3 order from the Minister. In addition, 1234 Co. could be subject to an order as owner of the adjacent site contaminated by migration. The named parties would then be left to their own devices to allocate liability. Alternatively, Triangle could remediate the site voluntarily, and would have the option of pursuing cost recovery at common law. However, it is unlikely that such an action would succeed because "suing up the title" is not established in Canadian law. 1234 Co. may have a better chance to recover at common law from parties who actually brought the substances to the origin property, or from Triangle as current owner.

Under the new regime, all former owners and operators including the municipality are caught in the initial broad net of responsible persons. In addition, Big Forest Products and XYZ Contractors are caught. The Trustee and XYZ are then exempted under the regulations, and Crystal Window (and possibly PPI) is exempted as an innocent purchaser. Canwood, PPI and Bob's Paint Co. are minor contributors. In the end, then, the municipality, ABC, Pacific Wood Products, Big Forest Products and Triangle are responsible persons, and Canwood, PPI and Bob's Paint Co. are responsible persons with minor contributor status that caps their liability. Those persons are also responsible for the migration to the adjacent site. The responsible persons have recourse to an allocation panel for advice on how liability should be allocated. They also have the option of entering into a voluntary remediation agreement, which will allow them to settle the matter of their liability. Finally, any responsible person who incurs remediation costs can pursue a statutory cause of action for cost recovery.

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Part III - Discussion

A. Is the Legislation Consistent with the Ministry's Policy of Polluter Pays?

1. Introduction

As we note in Part I, the "polluter pays" principle is a central feature of Ministry policy and as such is a foundational precept of the WMAA. It is also a principle for which there is broad support among Canadian governments and within the broader stakeholder community which we consulted in our review.

In this section of the report, we intend to examine and evaluate the consistency of the liability regime in terms of the Ministry's polluter pays policy in relation to four discrete issues raised by the legislation:

- the absence of a causation requirement as a precondition to imposing liability
- the implications and mechanics of joint and several liability, and of contribution
- the liability of directors, officers and employees as "responsible persons"
- the liability of parent corporations for subsidiaries

In each of these areas, the meaning and implications of a polluter pays policy requires scrutiny.

2. The Absence of a Causation Requirement as a Precondition to the Imposition of Liability

Imposing remediation liability on statutorily-defined classes of responsible persons (such as "owner" and "operator") is often criticized for diverging from traditional common law rules that ordinarily require a plaintiff to establish a causal relationship between the defendant's actions and harm incurred.

The policy rationale for diverging from this common law requirement is clear. To impose upon government the obligation in every case of meeting a strict common law causation threshold through costly litigation would thwart the overriding goal of promoting efficient cleanup of contaminated sites. Citing this rationale, American courts have consistently rejected arguments by CERCLA defendants that a causation requirement should be read into the legislation. American courts have also responded to this critique by observing that to impose a general causation requirement would make CERCLA's causation-based exemptions from liability redundant.

For reasons similar to those adopted by the American courts, we do not find the causation critique compelling when assessed in the context of the polluter pays principle. One of the principal reasons why governments have concluded that a statutory response to the problem of contaminated sites is necessary is that the common law, partly because of its insistence on causation being strictly proven, was not succeeding in making polluters pay. Statutes like the WMAA (and, for that matter, the WMA), which permit the imposition of cleanup liabilities without strict proof of causation, are thus an attempt to remedy a perceived deficiency in the common law. Moreover, while statutes of this kind typically eliminate the requirement to prove causation, to varying degrees they allow defendants to raise defences to liability which turn on issues of causation. In this regard, the WMAA must be considered a relatively liberal statute containing more causation-based exemptions than most comparable laws of its kind.

3. Joint and Several Liability

(i) Background

Contaminated sites liability regimes that impose joint and several liability are also criticized on the basis that a polluter may end up bearing a legal liability to fund cleanup that is disproportionate to its contribution to on-site pollution, resulting in an attenuation of the polluter pays principle. This is because, under the principle of joint and several liability, where two or more parties are liable a plaintiff is entitled to seek full compensation for the harm incurred from any or all of the liable persons. The two most commonly mounted criticisms of joint and several liability, in the context of contaminated site legislation, are as follows:

- that it creates an incentive for plaintiffs to seek compensation from the most financially solvent defendant in the litigation (*the deep pockets criticism*)
- that it gives rise to inequities where a responsible person can no longer be found, or is insolvent, as the remaining defendants then become jointly and severally liable for the unavailable or insolvent parties' share (*the orphan share criticism*)

We will consider the validity of these criticisms, as part of an analysis of joint and several liability and contribution in the context of the Act, later in this section. Before doing so, however, it is worthwhile to be clear as to why joint and several liability has found such favour as a means of promoting the cleanup of contaminated sites. The answer is relatively straightforward. Without joint and several liability, where a plaintiff cannot individually attribute the harm caused by two or more polluters (in legal language, where the harm is "indivisible"), under common law rules of tort law there is a strong likelihood that the plaintiff will go uncompensated with the result that the polluters will *not* pay. A number of factors make this result more likely in context of contaminated sites:

- the harm is often an historical product of the actions of multiple polluters over time;
- records relevant to establishing volume and quality of discharges over time are often absent or incomplete;
- even where volumetric records are available, scientific barriers to disaggregating environmental harm exist, particularly where two or more pollutants have commingled and created harmful synergistic effects

Supporters of joint and several liability as a necessary vehicle for the cleanup of contaminated sites emphasize, however, that under the WMAA (and analogous legislation in other jurisdictions), various factors mitigate what some see as the potential harshness of a strict joint and several regime. These factors include:

- provisions which allow otherwise "responsible persons" to avoid liability (Ss 20.4(1)(a) to (m) of the WMAA and Ss 18 to 29 of the regulations.)
- provisions which cap the liability of minor polluters (e.g. protections for minor contributors)
- pre-litigation apportionment mechanisms (e.g. allocation panels)
- voluntary negotiated remediation agreements with government which cap the settling party's liability (e.g. s. 20.61(2) of the WMAA)

In light of the foregoing, we intend to address two questions in relation to the joint and several liability scheme contemplated by the WMAA:

- how will the joint and several liability regime operate?
- will this regime operate in a manner consistent with the "polluter pays" principle?

(ii) How will the Joint and Several Liability Regime Operate Under the Act?

Historical Background to Joint and Several Liability

To appreciate the complexities of joint and several liability and the right of contribution in the context of contaminated sites legislation, a brief discussion of the evolution of these legal doctrines is necessary.

The concept of joint and several liability has a long and well established history at common law. Joint and several liability evolved from the concept of joint liability. Originally, where two or

more defendants acted jointly to injure the plaintiff or together breached a common duty to the plaintiff, they would be held jointly liable for the entire injury which ensued. The correlative principle was that where two defendants acted independently to cause a single injury, the common law prescribed that they would be liable only for their own separate contribution to that injury. This latter result was commonly referred to as "several liability." Where the injury suffered was indivisible -- in other words, where the amount of harm contributed by each defendant defied precise measurement -- this principle of several liability gave rise to situations in which plaintiffs could be denied compensation entirely.

To combat this result, the modern principle of joint and several liability evolved. Consequently, today, in Canada and most other common law jurisdictions, joint and several liability applies both in situations traditionally embraced by the concept of joint liability (where two or more defendants acted in concert, or breached a common duty, resulting in a single harm) and in situations where two or more defendants, acting independently, have contributed to a single indivisible harm.

But while, in theory, the emergence of the modern doctrine of joint and several liability significantly enhanced a plaintiff's ability to secure compensation where she had suffered a single indivisible harm at the hands of multiple defendants, in practice courts often remained reluctant to impose joint and several liability. In large measure, this reluctance was a product of the inability, at common law, of defendants in such cases to demand contribution from their joint and several tortfeasors. Ultimately, in most instances within the last half century or so, the inability of liable parties to seek contribution from one another was remedied by statutory intervention. In England, for example, this occurred in 1935. Here in British Columbia, a right of contribution was first recognized in 1936 with enactment of the *Contributory Negligence Act*, and is now contained in s. 4 of our *Negligence Act*.

From a policy perspective, the most critical implication of joint and several liability in modern litigation is that it shifts the risk of joint defendants being insolvent or unavailable to satisfy a plaintiff's claim for compensation from the plaintiff to the defendants. We will return to the risk-shifting character of joint and several liability in the context of the WMAA later in the section. Before so doing, as part of a broader examination of how joint and several liability will operate under the Act, we propose first to examine the American experience with joint and several liability under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA) of 1980.

Joint and Several Liability under CERCLA

When CERCLA came into force many important interpretive questions were left to the courts. Consequently, what are now regarded as CERCLA's three foundational liability principles -- retroactivity, absolute liability, and joint and several liability -- are all the product of judicial interpretation. This contrasts to the WMAA which, in section 20.41, statutorily adopts this trio of principles as the basis for the liability regime.

It is instructive to note that American courts have come to the conclusion that CERCLA contemplates joint and several liability despite the fact that a statutory joint and several liability

provision was deleted from CERCLA during the course of the original Congressional debates on the law. Even in the absence of a direct statutory mandate to impose joint and several liability, American courts have approached the question of when and how such liability should apply in much the same way as they would in private tort litigation. This has meant courts have typically adopted a two stage inquiry.

In the initial "apportionment" stage, the sole question to be determined is whether the harm is divisible. If the harm can be divided, it is apportioned to each defendant who then becomes severally liable for cleanup costs of its apportioned share. The onus for establishing divisibility of the harm lies with the defendants. Even where the harm originates from a single contaminant used over time by different operators at the same site and reliable volumetric documentation exists, courts have been reluctant to conclude that the harm is divisible and should be apportioned. Where there is a commingling of contaminants and the potential for synergistic chemical interactions, judicial apportionment is even more uncommon.

Where a court concludes that the harm is indivisible, all of the defendants become joint and severally liable for the entire harm and a second "contribution" stage of analysis commences. In the contribution stage, the courts are called upon to allocate the costs of cleanup. In performing this role, the courts are given a broad discretion to do what is fair. Often, in this context, consideration is given to the so-called "Gore factors" which include quantum and toxicity of the contaminants discharged by the various defendants, their respective levels of involvement in the handling and/or discharge of the contaminants, the degree of care exercised, and the degree of cooperation extended to authorities after the fact to prevent harm to public health or the environment. Taking these and other fairness considerations into account, courts allocate to each defendant a fixed percentage of the cost of cleanup.

Since each defendant is jointly and severally liable, this percentage figure does not "cap" their liability to the plaintiff. But if they pay more than that percentage of the costs of cleanup in satisfying judgments against them, they are entitled to seek contribution(s) from co-defendants who have not fully paid their respective shares. The existence of this right of contribution was expressly affirmed in a provision of the *Superfund Amendment and Reauthorization Act, 1986* ("SARA"); a provision necessitated by uncertainty created by the fact that, in its original form, CERCLA was silent on the contribution issue.

By no means, of course, does this right of contribution guarantee that a defendant who pays more than its assessed share of the cleanup costs will be able to recover the excess from its codefendants If one of the codefendants is insolvent or unavailable, the remaining defendants automatically assume the liabilities of that "orphan share" *pro-rata*, thus diluting the adequacy of their right to contribution. In addition, under SARA a defendant who settles its liabilities out of court before trial is insulated from subsequent contribution actions brought by a non-settling defendant. This can lead to a situation in which the total costs of cleanup exceed the amount paid in by the settling defendant plus the amount for which the non-settling defendant is ultimately held liable. In this scenario, the shortfall is borne by the non-settling defendant.

Joint and Several Liability under the WMAA

The goal of this subsection is to predict how BC courts will interpret and apply the principles and provisions of the liability regime set out in the Act. At the outset, two important differences between CERCLA and the WMAA should be noted. The first is that the WMAA, unlike its U.S. counterpart, explicitly prescribes joint and several liability. Section 20.41 states:

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...

A second difference is that, unlike CERCLA, the WMAA does not explicitly recognize the right of defendants being sued in private cost recovery actions to pursue contribution actions against codefendants In light of the foregoing, what should we anticipate BC courts will do when called upon to interpret the Act with respect to joint and several liability and contribution?

To answer this we must first consider whether, and to what extent, BC courts will apportion liability. At common law, as has been discussed, courts apportion liability where the harm is divisible. This is also the approach American courts have taken under CERCLA. Will it be adopted in BC? We believe the answer is unclear. Assuming BC courts equate harm in this context with on-site contamination as US courts have done, it is possible that a BC court could conclude that joint and several liability is automatic even where the harm is divisible. The basis for this conclusion would be that the WMAA expressly prescribes joint and several liability and, conversely, does not provide a statutory basis for departing from that result whether due to "divisibility of harm" or otherwise.

There are several counters to this undesirable interpretation. The first is that the Act should not be read as ousting the inherent jurisdiction of the court to apportion at common law where the harm is divisible. Secondly, particularly where the harm is divisible, fairness to defendants would strongly favour such several liability, without the efficacy of the Act being undermined. Third, an argument could also be made that a liberal approach to apportionment should be taken in light of s. 20.51 which permits the establishment of allocation panels as a form of alternative dispute resolution. We note, however, that the factors set out in s. 20.51 -- which are an apparent adaptation of the Gore factors -- are ones which American courts deem relevant to contribution but not to the process of apportionment.

Even if BC courts conclude they retain jurisdiction to apportion where the harm is divisible we will likely see a judicial reluctance to apportion where there is commingling of contaminants or a paucity of documentation relating to the nature or quantity of the various defendants' contributions to the harm, particularly if the American caselaw approach to divisibility is adopted.

The next task is to consider the question of contribution. Consider first the situation of a "deep pockets defendant" ("DPD") who has been found jointly and severally liable in a s. 20.41(4) private cost recovery action brought by plaintiff "X" where the harm (on-site contamination) is indivisible. In these circumstances, is the court obliged to designate, as part of a contribution phase of its deliberations, how remediation costs should be allocated among DPD and the other codefendants? On what basis should such allocation be made? If such allocation is made, and X

demands and receives full payment of the entire judgment from DPD, what legal recourse exists for DPD to gain contribution from the other codefendants?

At common law, DPD has no right of recovery. As discussed, joint tortfeasors can seek contribution only if permitted to do so by statute. Such an entitlement does not, in our view, necessarily flow from the Act or the regulations. The closest the Act comes to recognizing a right to contribution is in s. 20.41(4) (the private cost recovery provision) which allows a person "who *incurs costs in carrying out remediation* at a contaminated site...to pursue an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons..." (emphasis added). In our illustration, however, this presumably would not avail DPD in that it was X that incurred costs in carrying out remediation.

The other potential statutory basis for a right of contribution is the *Negligence Act*. That Act specifically recognizes a right of contribution where two or more defendants have been found at fault and held jointly and severally liable for the harm suffered by the plaintiff (s. 4). The *Negligence Act* clearly contemplates that, in such cases, courts will make a finding as to the respective fault of each of the defendants for the harm incurred and that each defendant will have a right of contribution corresponding to this allocation.

Unfortunately section 4 of the *Negligence Act* leaves unanswered many of the questions posed earlier. First, as the language of the section clearly refers to findings of fault there is some doubt as to its application under a regime like the WMAA where fault is not requisite to liability. Logically one would expect that a liable party who is not at fault should not be denied a right of contribution that is enjoyed by a party who is at fault, but it is not entirely clear that logic will prevail over a literal reading of section 4.

Second, even if a court was prepared to undertake a contribution analysis under the authority of s. 4 of the *Negligence Act*, it is not clear what factors they would consider in allocating contribution rights. Section 4 directs that the allocation should mirror the degree to which each defendant has respectively been found to be at fault. Assuming BC courts were prepared to interpret this language of fault liberally, they might well seek guidance from the WMAA. The hope presumably would be that a court would then look to the factors set out in s. 20.51 which allocation panels are called upon to consider in providing advisory opinions to the manager. Again, however, one cannot assume that this would necessarily occur.

Third, a particularly thorny question arises where the plaintiff in a cost recovery action is also a responsible party. Under the *Negligence Act*, where the plaintiff contributes to his or her own injury (the analogous situation in private tort litigation), there is no right of contribution among defendants. This is because, under section 1 of the *Negligence Act*, joint and several liability cannot arise where the plaintiff is in some measure liable for his or her own injury or loss. Here again the fit between the *Negligence Act* and the WMAA is far from perfect in that the latter statute clearly contemplates joint and several liability even where the plaintiff has contributed to the harm. Whether courts would, therefore, feel free to ignore section 1 of the *Negligence Act* and treat section 4 as the basis for a right of contribution is difficult to say.

(iii) Will the joint and several liability regime under the WMAA operate in a manner consistent with the polluter pays principle?

Recognizing the high degree of uncertainty associated with offering such predictions, for the reasons set out in the previous two sections, it is possible to offer some tentative answers to this question as a conclusion to our discussion of joint and several liability.

Is the joint and several liability regime contemplated by the act consistent with a polluter pays policy? Our analysis suggests that the answer is a qualified yes. Integrated with the other liability principles found in s. 20.41, joint and several liability is consistent with, and is capable of advancing, a policy of polluter pays. The real problem to be addressed is one of overbreadth, that is, the potential that the joint and several liability may impose a legal liability on a polluter which is disproportionate with his or her actual contribution to the contamination.

In considering this question of overbreadth, it is important to be mindful that joint and several liability principles will not apply in every case. Risk averse responsible persons may be able to avoid the uncertainties of joint and several liability through various means (seeking minor contributor status, voluntary remediation and so on). And even if liability is litigated, a court may conclude that the harm is divisible and may apportion liability. Where it does, however, fall to a court to apply the doctrine of joint and several liability, it has been claimed (as we noted at the outset of this section) that the polluter pays principle is breached in two ways: the "deep pockets" and the "orphan share" scenarios.

It should be emphasized that the fact a plaintiff is entitled to look to one deep pockets defendant to satisfy a joint debt does not mean necessarily that that defendant will end up paying for more that its share of that debt. If an effective means of seeking contribution from codefendants is in place, and all of these codefendants are available and solvent, then the deep pockets defendant will not ultimately be out of pocket for more than its share of the joint debt. Where an overbreadth problem arises is when one (or more) of the codefendants is unavailable or insolvent. In this scenario, the deep pockets defendant (on a *pro rata* basis with the other solvent and available defendants) does indeed bear a disproportionate share of the total remediation bill.

Whether available and solvent defendants should bear this burden, or whether this is a burden that should be borne by the public, is ultimately a policy choice. From the perspective of principle, "polluter pays" implies that polluters should pay for pollution they have caused, or which we legally deem them to have caused. One could argue, with some force, that a corollary of the polluter pays principle is that a polluter should not be required to bear the costs of cleaning up pollution caused by others.

If this corollary is accepted, the policy implication is that government should assume liability for orphan shares in addition to its *de facto* liability for orphan sites. Compensating defendants that have been forced to incur liability for orphan shares is one of the main components of a modest CERCLA reform package announced in the Fall of 1995, currently being implemented by the US Environmental Protection Agency. To fund this new policy under CERCLA, the EPA has dedicated $50 million dollars for the fiscal year 1997 alone. We have no basis for determining by what magnitude such a measure would increase governmental liability under the WMAA.

Implementing a compensation scheme of this kind would have a number of other implications. One might well be that transaction costs would be substantially increased in litigation involving potential "orphan shares." This would be due to the fact that government (upon whom liability for such shares would devolve) would have a strong interest in participating in such litigation as a potentially "responsible person" for the purpose of disputing liability issues. Moreover, there would also be a danger that the looming presence of government, as effective insurer of all orphan shares, would adversely affect implementation of the polluter pays principle by influencing how other responsible parties conduct themselves under the regime, and potentially even how courts approach the task of interpreting and applying the legislation. Finally, it could be argued that, if government were to pick up the full cost of orphan shares, this would represent a significant departure from "polluter pays" towards a "public pays" approach. In short, the spectre of adopting such a policy raises a host of implications and questions which are beyond the scope of this review.

In view of these uncertainties, as well as the absence of an industry-supported insurance fund as exists in the United States, we would recommend against government undertaking across-the-board liability for orphan shares. We would, however, recommend that the issue of orphan shares be revisited, after the legislation has been in force for several years.

We are, however, of the view that, in the interests of promoting the polluter pays principle, some reforms to the WMAA liability regime are necessary. In particular, in our opinion there is a need to affirm the judicial power to apportion notwithstanding explicit statutory language adopting joint and several liability. We are also of the view that greater clarity is required with respect to contribution among jointly liable defendants. The legislation thus should explicitly recognize a right of contribution, and provide clear and effective procedures for the exercise of this right.

Recommendations:

We therefore recommend that the WMAA or regulations be amended to affirm the judicial power to apportion liability where the harm is divisible.

We recommend that the WMAA or regulations be amended to affirm that joint and severally liable responsible persons are entitled to seek contribution from any other responsible person in accordance with the procedures followed under section 4 of the Negligence Act.

We recommend that, for the purposes of allocating these rights of contribution, the WMAA or regulations should be amended to direct courts to consider causation-related factors including the defendant's degree of involvement in the contamination and the nature and quantity of contamination at the site attributable to that person; relative diligence; any remediation measures taken by the defendant; and other factors relevant to a fair and just allocation.

We recommend that the issue of orphan shares be revisited, as part of a general review of the legislation, three years after proclamation of the WMAA.

4. Liability of Directors, Officers and Employees as "Responsible Persons"

The next issue which needs to be addressed in this section concerns the implications of the liability regime under the Act for directors, officers and employees. For persons falling into one or more of those categories, concerns have been expressed that the liability regime is too broad and could lead to unfairness, particularly in the context of private cost recovery actions brought by third parties. Is this concern justified? If so, to what extent can this concern be addressed without undermining the overarching objective of polluter pays?

For convenience, in the discussion that follows, the term "director" will be used to include directors and officers since the legal principles applicable to both groups are synonymous. Many of the same fairness considerations apply, often with even greater force, to "employees" as well. Where different considerations become relevant, these will be specifically noted.

As a matter of civil (as opposed to criminal or quasi-criminal) law, as long as a director acts within the scope of their powers and the powers of the corporation, without negligence and without breaching a fiduciary duty, the director incurs no personal liability. Even where the corporation itself commits a tort, a director will be held liable only if he or she procured or directed the tortious act. Moreover, when a director is held personally liable, that liability is extinguished by the dissolution of the corporation, unless dissolution is set aside by the court.

This restrictive common law approach to directors' liability has been criticized on the basis that it does not provide adequate incentives to key players within corporate structures to take active steps to improve corporate behavior. As a result, in the area of environmental regulation and elsewhere, there has been a trend towards statutorily broadening the ambit of directors' liability. To date, however, this expansion has occurred mainly in the context of quasi-criminal liability for the breach of regulatory laws. As such the policy concern from the perspective of directors has been to ensure that they are not denied fair trial or other *Charter* protections when faced with prosecutions which, potentially, could lead to incarceration or substantial fines.

In relation to contaminated sites, the Act has deliberately eschewed quasi-criminal prosecutorial approach in favour of a civil law property rights-based approach. This does not mean that directors do not have important interests to be taken into account. What it does mean, however, is that caution should be employed when analogizing from one context to the other. For example, while defendants in quasi-criminal prosecutions enjoy *Charter* protection, there are no "*Charter* defences" which could be invoked by a "responsible person" under the Act regardless of whether that person was human or corporate.

It is useful to consider the American experience under CERCLA before turning to a consideration of implications of the Act for directors, officers and employees.

Directors' Liability under CERCLA

CERCLA makes no specific mention of directors. Liability has, however, been imposed on directors through judicial interpretation. From our research it appears that American courts impose liability on directors both directly (by interpreting the terms "person" and "owner or operator") and indirectly (by piercing the corporate veil at common law).

Courts have used the latter approach in the same circumstances in which they have pierced the veil to impose liability on parent corporations, namely, where the corporate form is being used as a "sham" or a mere "agent" for another party's activities. American courts have also held that the language of CERCLA can serve as a basis for imposing liability directly on directors. In this regard, two main lines of analysis have emerged. The first is that since the term "person" does not expressly exclude directors, officers or employees, where it can be shown that an individual in one of these categories had control of a facility which caused contamination, that individual should be held liable: *US v Mexico Feed and Seed Co*. Closely related to this analysis is the argument that a director or officer can qualify, depending on the circumstances, as an "owner" or "operator" for CERCLA purposes. Judicial opinion is divided as to whether it is sufficient for a director merely to have the unexercised capacity to prevent the harm, or whether it is necessary to show that the director actually participated in the activity leading to the harm.

Directors' Liability under the WMAA

Four provisions in the Act are particularly relevant to this discussion:

s. 20.1(1)..."person" includes a government body and *any director, officer, employee or agent of a person* or a government body

s. 20.31(1) Subject to s.20.4, the following *persons* are responsible for remediation at a contaminated site

s. 20.41(1) A *person* who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person...for reasonably incurred costs of remediation...

s. 20.1(1) ..."operator" means any *person* who is or was *in control of* or *responsible for* any operation located at a contaminated site

(emphasis added)

There are two differences between these provisions and CERCLA. The first is that CERCLA does not contain a definition of "person" which includes directors, officers and employees. Secondly, as will be discussed later, CERCLA defines the term "operator" inclusively and only by reference to a few specific situations (see subsection 5 below). Recognizing these distinctions, are BC courts likely to follow the lead of their American counterparts and interpret the liability of directors et. al. under our Act as being broader than their liability at common law?

The likely answer is yes. As CERCLA cases show, even where "person" is not defined specifically to include "directors," courts will give the word "person" its natural meaning, which includes "directors." The specific mention of directors in the definition of "person" in the WMAA makes this outcome a certainty. Moreover, our definition of "operator" signals a potentially broad liability for directors and others involved at various levels in corporations engaged in, or that were formerly engaged in, polluting activities. This is because our definition of "operator" appears to allow liability to be grounded not only in a director or other person's

actual exercise of control over an operation (i.e. "control of") but also where he or she merely had the capacity to exercise such control (i.e. "responsible for").

In terms of fairness, broadening the potential liability of directors in this fashion raises significant concerns which go to, among other things, the question of who is a "polluter" for the purposes of the legislation. Even a director of a major corporation with liability insurance sufficient to defend him or herself may find defending against claims under the Act onerous, particularly given its retroactive application and the absence of a due diligence defence.

One well might respond that if the Ministry will determine who is named in administrative cleanup orders, a power it now exercises under s. 22 of the WMA, we should assume that this power will be used with restraint. There is merit in this argument. Nothing that we have seen suggests that the Ministry has or will abuse its power to make administrative orders against corporate or human persons. And, in the absence of such a concern, there is benefit in maintaining administrative flexibility to deal with various unforeseen situations. But the Act also anticipates that private persons will be able to bring cost recovery actions against "responsible persons." As one stakeholder has put it: "While the Ministry may only use this broad power [s. 20.5] sparingly, we do not expect that third party litigants seeking to recover remediation costs will be so restrained. Indeed, a plaintiff's lawyer who fails to sue directors, officers and employees in search of 'deep pockets' or 'multiple pockets,' may not be serving the best interests of his or her client."

If the potential for abuse in the context of private actions is the overriding concern, one solution might be to define "person" as not including directors, officers and employees for the purposes of such actions. While this suggestion has merit, it might foreclose private parties with meritorious claims (as well a government bodies seeking to recover their costs through private action) from looking to a corporate director for compensation in circumstances in which it may well be entirely appropriate to do so having regard to the polluter pays principle.

Another suggestion is to retain the possibility of proceeding privately against a director but require the party bringing the action to establish, as a prerequisite to liability, that the "director, officer or employee authorized, permitted or acquiesced" in the activity giving rise to the liability (whether that is transporting, handling or disposing of waste as the case may be). One of the factors favouring this formulation is that it is not new (it is a derivation of language found in s. 34(10) of the WMA). As such, it allows for flexibility in application and interpretation and is also a standard with which the regulated community is well accustomed to working.

Perhaps the key point to be borne in mind is the ultimate objective: polluter pays. In the context of directors and officers, particularly where there is a congruence of ownership and control, there will be many situations in which it may be perfectly appropriate to look behind the corporate veil to the people who actually comprise the corporation. In this regard, the common law does not provide much in the way of assistance; to meet this goal, therefore, statutory reform is necessary. With this as the starting point, the challenge is to decide how far one can broaden the ambit of potential liability before it becomes inconsistent with other considerations, including fairness and certainty.

Recommendations:

We therefore recommend that, in private cost recovery actions, the plaintiff should be required to prove that the "director, officer, employee or agent of a person or government body authorized, permitted or acquiesced" in the activity giving rise to the liability, and that the WMAA or regulations be so amended.

We further recommend that the Ministry develop and publish a policy statement describing the circumstances in which a manager's order under s. 20.5 would name a "director, officer, employee or agent of a person or government body."

5. The Liability of Parent Corporations for Contamination Attributable to Subsidiaries

The final area of concern in terms of the consistency between the Act's liability regime and the polluter pays principle flows from legal limits to liability traditionally enjoyed through corporate organization. It is a reality of modern business that much corporate activity is undertaken through subsidiary corporations which are either owned or controlled by parent corporations. To the extent that the liability regime seeks to make the polluter pay, identifying who should be considered the polluter becomes a key legal and policy question.

Liability for the acts or omissions of a subsidiary corporation can be attributed to a parent in two ways. The first is through operation of statutory language that extends liability directly to the parent corporation. The second involves indirect attribution by means of the common law doctrine of "piercing of the corporate veil." In the CERCLA context, American courts have held parent corporations liable for cleanup costs flowing from the activities of their subsidiaries directly, through interpretation of the language of CERCLA, and indirectly, by piercing the corporate veil.

In this subsection, we propose to review the American experience under CERCLA and then offer some views as to how the WMAA is likely to be interpreted.

The American Experience Under CERCLA

Attribution of liability to parent companies under CERCLA has turned on interpretation of the term "owner or operator" which is one of the key triggers for a finding that a person, including a corporate person, is liable to remediate under the statute. In determining whether a parent is an "owner or operator" courts have considered the level of parent's involvement in the subsidiary corporation or in the operations at the subsidiary's facilities. Some courts have deemed it sufficient that the parent have capacity to control, while others have required proof that the parent actually exercised control.

The less stringent approach is exemplified in *Idaho v Bunker Hill* where the court interpreted "owner or operator" as implying the "power to direct the activities of persons who control the mechanisms causing the pollution...[thus having] the capacity to prevent and abate damage." The more stringent approach has typically required proof that the parent is actively involved in the

activities of its subsidiary and, in particular, in its environmental planning and decision making processes.

American district courts have also held parent corporations indirectly liable by piercing the corporate veil and, in effect, deeming the parent to be the true "owner" for CERCLA purposes. Two theories have informed this indirect form of attribution. The first is variously described as the "sham," "alter ego" or "agency" approach. Under this approach, there must be evidence that the subsidiary is a mere instrumentality of its parent, based on a unity of interest or ownership arising in circumstances where to defer to the corporate veil would promote fraud or injustice.

Variation within the American CERCLA case law on parent liability has, of late, led some commentators to call for the enactment of separate new definitions of "owner" and "operator" as they relate to liability for the activities of subsidiaries.

Parent Corporation Liability under the WMAA

Before considering how the language of the WMAA may form a basis for attributing liability to a parent for actions of a subsidiary, it is useful to consider first the extent to which such liability is capable of being attributed in any event at common law. As in the US, Canadian courts are prepared to pierce the corporate veil at common law where the parent is employing a subsidiary corporate shell as a sham or an alter ego. Canadian courts also pierce the corporate veil where there is compelling evidence that the subsidiary is carrying on business as the mere agent of the parent.

The common law "sham" and the "agency" approaches could, if total domination of decision making or use of the corporate form for improper purposes were shown, serve as a basis for holding a parent company indirectly liable for the actions of a subsidiary who was a "responsible person" for the purposes of the WMAA. However, the language of the Act, in particular the definitions of "owner" and "operator," seem to contemplate an even broader parent liability than would otherwise exist at common law.

Unlike CERCLA, the WMAA provides general definitions for both "owner" and "operator":

"owner" means a person who is in possession of, *has the right to control of,* occupies or controls the use of real property...

"operator" means... a person who is or *was in control of* or responsible for any operation...

(s. 20.1; emphasis added)

Interpreted literally, the italicized phrase "has the right to control of" found in the definition of "owner" would appear to expand the potential liability of parent corporations considerably beyond the common law concepts of "sham" and "agency." Indeed, the terminology "right of control" would seem to justify attributing liability directly to a parent where the parent had only an unexercised capacity to control the affairs of its subsidiary.

Such a conclusion would be consistent with the more expansive approach to parent liability adopted by some courts under CERCLA, as illustrated in the *Idaho v Bunker Hill Co.* decision among others. On the other hand, this conclusion would arguably be inconsistent with the Act's treatment of secured creditors who are exempt from liability flowing from a capacity to control the affairs of a debtor unless they actually exercise such control. On balance, however, in the absence of a compelling reason to depart from the natural meaning of "right of control," a stronger interpretation would be that the Act broadens parent liability for subsidiaries to encompass the unexercised capacity to control.

In the previous subsection, we concluded that the broad definition of "operator" in the WMAA meant that directors and officers could be liable as responsible persons on the basis of an unexercised capacity to control as well as in situations in which they actually exercised control. In our view, due to the breadth of this language, there was a very real prospect that directors would be regularly caught up in the liability net in private cost recovery actions. As a result, we recommended that a cost recovery plaintiff be required to prove that the parties they have named "authorized, permitted or acquiesced" in the activity giving rise to the contamination. In the interests of maintaining regulatory flexibility we did not recommend that the s. 20.5 manager's order power be similarly fettered. We did, however, recommend that the Ministry develop and publish a policy concerning describing the circumstances in which it would be appropriate to name directors in their personal capacity.

We have concluded that similar considerations apply in relation to the liability of parent corporations for their subsidiaries. In our view, given the present definition of "owner", that there is a very real prospect that parent corporations frequently will be named in private cost recovery action involving their subsidiaries even where there is no evidence to suggest that the parent exercised any control over the subsidiaries activities. For this reason, given the retrospective and absolute nature of the liability contemplated by the Act, we have concluded that cost recovery plaintiffs should be required to prove that parent corporation "authorized, permitted or acquiesced" in the activity giving rise to the contamination. Consistent with our recommendations concerning directors we would not recommend that the s. 20.5 manager's order power be similarly fettered. We would, however, recommend that the Ministry develop and publish a policy statement describing the circumstances in which a manager's order would name the parent of a subsidiary corporation as a responsible person.

Recommendations:

We therefore recommend that, in private cost recovery actions, where the parent of a subsidiary corporation is sued, the plaintiff should be required to prove that the parent corporation "authorized, permitted or acquiesced" in the activity giving rise to the liability, and that the WMAA or the regulations be so amended.

We further recommend that the Ministry develop and publish a policy statement describing the circumstances in which a manager's order under s. 20.5 would name the parent of a subsidiary corporate "responsible person."

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B. How do the Liability Provisions Compare to those in Contaminated Site Legislation in Other Canadian, United States and Overseas Common Law Jurisdictions?

1. Overall Approaches

Overview of other jurisdictions

Regulatory approaches to allocating the costs of cleaning historically contaminated sites vary from broad discretionary order powers (New Brunswick), to regimes that rely predominantly on voluntary remedial efforts (Ohio). Most regimes impose full liability on one or more parties named from a statutorily-defined pool of "responsible persons," or use the implied threat of such liability to create incentives to reach negotiated pre-order settlements. "Polluter pays" principles generally inform the scope of "persons responsible," implying or expressly imposing retrospective liability for sites that were contaminated prior to enactment. However, current owners are almost invariably listed amongst those initially "responsible." Formal allocations of liability generally occur, if at all, only later, as liable parties sort out amongst themselves (by agreement or through the courts) proportionate responsibility. Several US jurisdictions rely predominantly on government-conducted and funded cleanups, with liability determinations taking place in actions for reimbursement of the fund.

Several substantial variations on these remedial orders / government fund schemes are represented in US jurisdictions. Ohio, Oregon and Michigan provide incentives intended to encourage remediation and redevelopment of abandoned urban sites through tax incentives (Ohio) or exemptions from liability for such developer/purchasers (Oregon and Michigan). New Jersey's *Industrial Sites Recovery Act (ISRA)* imposes liability on a current owner or operator only as a prerequisite to transfer of ownership or closure of an operation. A current owner or operator can avoid liability for remediation by maintaining the site's current use, or demonstrating that a new purchaser intends to put the property to substantially the same use and meets solvency requirements relative to the projected costs of remediation.

Overview of WMAA in comparison

In its overall approach, the WMAA brings together elements from a wide variety of statutes and jurisdictions. Its liability provisions rely upon mechanisms common to most contaminated sites statutes: joint and several, retrospective, and absolute liability. However, the WMAA imposes these characteristics expressly, whereas most statutes invoke them only by implication. Order powers under the WMAA are less discretionary than under some regimes, but are by no means unusually fettered. In attempting to supplement traditional regulatory-ordered cleanup with the perceived efficiencies of market-ordering, the WMAA's private cost recovery action provision is with the minority of Canadian jurisdictions but resembles provisions found in US statutes. The breadth of "responsible persons" under the WMAA is similar to that in most jurisdictions, however the scope and detail of the exemption provisions exceed those of any comparable jurisdiction. The WMAA's minor contributor status, voluntary remedial agreements, and allocation panel provide a wider range of liability capping and alternative dispute resolution mechanisms than most regimes, though not as many as some. Few jurisdictions feature conclusive closure mechanisms whereby parties can be assured that all potential liability is

extinguished. The WMAA's "certificates of compliance" and "voluntary remediation agreements" offer more finality than is available in most jurisdictions, but are not as conclusive as mechanisms available under some US statutes.

We turn now to a more detailed comparison of features.

2. Scope of Persons Potentially Liable

Owners and operators

The degree of definition of categories of responsible persons varies widely. CERCLA's list is skeletal, including only current owners or operators, owners or operators at time of release, arrangers for transport, and transporters who select destination sites. However, subsequent judicial interpretation of "owner or operator" has led to a very *wide* scope of liable persons under CERCLA, including secured creditors, manufacturers, trustees, employees, parent and subsidiary corporations, and tenants. Other jurisdictions set out comprehensive, detailed lists of types of persons responsible and/or exemptions. Like B.C.'s WMAA, Manitoba's proposed statute includes a provision allowing the list of "persons responsible" to be expanded by regulation.

New Brunswick's statute provides the regulator with the power to order *any person* to undertake cleanup of a site, and such liability is also borne by that person's heirs, successors, administrators, and/or assignees. Conversely, the 1995 English statute allows for liability to be primarily imposed only on persons *who actually caused* or knowingly permitted the contamination. Only where the regulator has already undertaken all reasonable investigations to ascertain other directly responsible persons, and no such persons can be found, can current owners or occupiers be made liable. Recently passed amendments to Michigan's *Natural Resources and Environmental Protection Act* may focus liability even more narrowly, by providing means for current owners and operators and future purchasers to "immunize" themselves from liability by undertaking standardized site assessments and registering a cleanup plan, while imposing only fault-based liability on any past parties other than generators or transporters of hazardous waste.

Most jurisdictions include current owners and operators and the person responsible for the release itself within the "potentially liable" pool. Some jurisdictions implicitly exclude interim owners or operators, and/or provide explicit exemptions for "innocent purchasers" who have undertaken appropriate inquiries. Unwitting recipients of migrating contamination are also exempted from liability in some jurisdictions. Canadian jurisdictions do not typically provide any such exemptions from liability.

Fiduciaries and secured creditors

Where mentioned, fiduciaries tend to be included explicitly in the pool of persons responsible in Canadian jurisdictions, but explicitly exempted in the US In most jurisdictions, the question of fiduciaries' liability appears to be left to the courts' interpretations of "owner or operator" or "control." Where secured creditors are mentioned, they tend to be exempted so long as they

maintain a purely financial interest. The criteria [if any] each statute sets out to define when a secured creditor's management activities exceed "purely financial interests" vary widely.

Municipalities

Municipalities are excluded from liability for involuntary acquisition in many US jurisdictions, in some for legal expropriation as well.

Sectoral exemptions

Finally, some US jurisdictions provide sectoral exemptions for petroleum producers, recycled oil handlers, dry cleaning operators, pesticide use, domestic use, and beneficiaries of inheritances.

WMAA in comparison

The WMAA may be expected to cast a wide net of liability, particularly given its adoption of an "owner or operator" category not unlike that under CERCLA. However, the WMAA and draft regulations provide a greater number of more explicit exceptions from liability than does CERCLA. Some jurisdictions limit the scope of liable persons by more narrowly defining those "responsible," but no other jurisdiction features as comprehensive and detailed a set of exemptions as does the WMAA.

3. Joint and Several Liability and Contribution

Other jurisdictions

Some jurisdictions are silent regarding the type of liability imposed. Liability under these statutes is presumably as at common law: joint and several unless divisibility of harm can be shown. Other jurisdictions generally specify or imply joint and several liability, with opportunities for negotiated exclusions. The British, Ohio, and Michigan statutes expressly specify liability based on relative fault. Saskatchewan's statute stipulates that the *Contributory Negligence Act* applies.

Statutory causes of action allowing parties jointly and severally liable to seek contributions from other responsible parties, and to allocate their liabilities *to one another* in court, are expressly created by CERCLA, Oregon, and New Jersey. Contribution is clearly contemplated by implication in the Manitoba, Nova Scotia, California, Washington, and Ohio statutes.

WMAA in comparison

The WMAA is unlike most jurisdictions in imposing joint and several liability expressly rather than by implication, without expressly providing for apportionment where the harm is divisible. However, Alberta, Nova Scotia, California, and Washington also combine statutory joint and several liability with private cost recovery actions, though most of these jurisdictions expressly contemplate some circumstances under which apportioned several liability would instead be imposed. CERCLA, which also features private cost recovery, has been read by US courts to impose joint and several liability where harm is indivisible. The combination of joint and several

liability and cost recovery is interesting as the effect may be to shift discretion to mitigate or temper joint and several liability (in deciding who to name in remediation orders) in part from the regulator to the courts. However, under the WMAA, the government has retained the power to add classes of persons responsible or exemptions from responsibility by regulation This regulatory flexibility may provide an avenue for macro-level participation by the regulator in the operation of joint and several liability amongst private parties, in a fashion not available under other statutes.

4. Retrospectivity

Most statutes apply retrospectively by implication only. In the US, courts have concluded that retrospective application is a necessary element of "polluter pays" legislation in the context of the cleanup of historically contaminated sites, and have read provisions accordingly. Courts have given the existing *Waste Management Act* retrospective application at least through the period during which the earlier *Pollution Control Act* was in force, and have indicated a willingness to extend its application yet further. New Jersey's *ISRA* applies prospectively in the sense that liability to cleanup many industrial sites arises only when owners or operators of industrial operations seek to close down operation or transfer ownership to a party who intends to put the property to a different use. The WMAA's express imposition of "retroactive" liability is thus somewhat unusual among the statutes surveyed, though it will likely be identical in effect to the retrospective liability created in most jurisdictions.

5. Absolute Liability

Due diligence is often an element of exemptions from liability, but does not generally form a "defence" to civil liability under the contaminated sites regimes studied. Compliance with past law and practice does exempt persons from liability in California, Oregon, and Queensland. Liability in Nova Scotia and New Brunswick may arise expressly despite the terms of any permit. In short, while the WMAA's express imposition of "absolute liability" may be atypical, due diligence and lawful authority generally do not provide a basis for avoiding civil liability under most contaminated site statutes in any event. Thus, the WMAA's expressly-created "absolute" liability is likely slightly broader, but not substantially different, than the liability existing under civil recovery provisions in most jurisdictions.

6. Liability Capping

In many jurisdictions, agreements between the regulating agency and responsible persons statutorily limit liability. Some US statutes bolster agreements with "covenants not to sue." In Manitoba, parties may seek apportionment orders from a binding commission, or enter into regulator-approved private apportionment agreements; both mechanisms extinguish statutory and common law liability. Approximately half of the regimes studied featured a "minor contributor" status (usually discretionary). Past Congressional proposals for CERCLA reform in the US have included a 10% liability limit for municipalities.

Under the WMAA, responsible persons may cap liability by seeking minor contributor status or entering into voluntary remediation agreements with the Ministry. The WMAA does not include

binding apportionment by tribunal or panel, or unqualified covenants-not-to-sue. The WMAA thus provides more liability-capping mechanisms than most jurisdictions (certainly in Canada), but perhaps less sweeping limitations on liability than that available under some US regimes.

7. Alternative Dispute Resolution

The WMAA provides more alternative dispute resolution provisions than most regimes, but less than some.

Agreements

Even in jurisdictions or situations where formal statutorily-authorized agreements are not created, most regimes clearly anticipate administrative negotiation and agreement being part of the enforcement process. In those jurisdictions noted above where agreements provide statutory limitation of liability, the additional incentive to avoid regulatory orders make agreements a particularly relevant form of ADR. In Manitoba, apportionment agreements amongst parties themselves, if approved, extinguish statutory *and common law* liability relative to the contamination remediated. Voluntary remediation agreements under the WMAA limit liability.

Arbitration / tribunals

Liability-extinguishing "apportionment orders" may be sought by responsible parties from a tribunal established under Manitoba's proposed statute. Manitoba and Nova Scotia provide statutory authority for referral of matters to mediation. California's arbitration panel is non-mandatory, but binding on participants, and parties who do not participate lose any right of indemnification from participants.

Proposals for reform of CERCLA include government rebates of up to 50% of remediation costs for pre-1987 contributors who participate in non-binding arbitrated allocations of liability, and mandatory arbitration.

The WMAA creates a non-binding allocation panel. Costs of decisions are borne by the party requesting the decision. The panel appears intended to reduce litigation by providing a less expensive, speedier forum in which parties may be able to arrive at agreements amongst themselves, or accumulate evidence for use in attaining minor contributor status or settlements with the Ministry.

Partition of site

California and New Jersey allow for partition of properties where only part of the overall property is contaminated. Proceeds from the sale of any partitioned parcel go first to a fund for remediation of the remaining site.

Economic instruments

The Nova Scotia statute explicitly authorizes the development and use of "economic instruments," including tax instruments, tradable permits, and other policy devices. Ohio provides refundable tax credits to corporations undertaking cleanup and development of abandoned or underutilized inner-city contaminated lands ("brownfields"), and encourages local governments to provide property tax relief to landowners whose property taxes increase as a result of remediation. Oregon and Michigan allow releases from liability for new purchasers intending to remediate and develop. Legislation in Oregon and New Jersey allows the regulator to provide financial assistance to remediators, diluting deterrent or hardship effects of high up-front capital costs through negotiation of terms and schedules of repayment. The WMAA does not employ economic instruments, except to the extent that the private cost recovery action may be said to be "market-driven."

Other

Nova Scotia's statute specifically authorizes the Ministry to utilize *any* alternative dispute resolution mechanism, including conciliation, negotiation, mediation, or arbitration. The effect of any resulting contractual allocations of liability vis-a-vis actions for contribution or costs incurred by reason of an Order is not specified.

8. Allocation Criteria

Volume and toxicity of substances released, and "equitable factors" are the most frequently stipulated criteria. Compliance with past standards or practice and due diligence are also featured in many statutes. Other factors include: effect of cleanup on property value or use (Manitoba), hardship (England), economic benefit derived from polluting activity (Manitoba, Oregon), and price paid and terms of conveyance (Oregon).

The WMAA falls into the minority of regimes that do not specify criteria for allocation of liability by the courts, though the criteria established for the allocation panel and who may be named in a manager's order may, by implication, be taken as instruction by courts.

9. Cost Recovery Actions

The WMAA is in the minority of jurisdictions in offering a statutory cost recovery action. Of the statutes surveyed, only CERCLA, Saskatchewan, California, Oregon, and Washington provide causes of action for remediation costs voluntarily or independently undertaken. Nova Scotia only allows for recovery of costs incurred as the result of an order.

10. Finality

Canadian statutes do not provide absolute guarantees against future liability. This may be a corollary of the parliamentary inability of governments to legally bind future governments. Degrees of finality may nevertheless be provided, in terms of liability capping provisions vis-a-vis other private parties, and in terms of setting up hurdles for future governments to overcome should they wish to revive liability (e.g. Alberta's statute offers a substantial degree of finality in that responsible parties who adhere to an approved remediation plan are protected from

regulatory orders). In the United States, however, a broad range of mechanisms have been developed to give some degree of finality to the liability of parties who have undertaken or funded their share of cleanup. Covenants-not-to-sue are statutorily mandated by CERCLA, Oregon, Washington, Ohio, and Michigan. However, the CERCLA, Oregon and Washington statutes require inclusion of a "reopener" clause where new contamination or risk of harm comes to light. Ohio, on the other hand, has the covenant "run with the land," protecting future owners and occupiers from liability as well as the remediating party. Michigan's "letters of determination" provide the most finality under any regime, protecting parties from further liability under the Michigan statute, other state laws, CERCLA, and the common law. Under Michigan's statute, new purchasers need only complete a "Baseline Environmental Assessment ("BEA") within 45 days of purchase, and disclose the result, in order to be so released from potential liability.

The WMAA is not unusual in its lack of finality. It is unclear what degree of "finality" a certificate of compliance under the WMAA provides vis-a-vis future orders and cost recovery suits. A more appropriate comparison to US "finality" provisions would be the voluntary remediation agreements under the WMAA. Voluntary remediation agreements discharge the responsible person from all further liability (though the WMAA preserves the rights of third parties to seek relief under other statutes or the common law). However, under s. 20.95, the Province retains the right to exercise its powers where additional information arises, use or condition of the property changes, or standards change, notwithstanding any voluntary remediation agreement. This may make voluntary remediation agreements under the BC statute somewhat less final than agreements under the Alberta or Michigan statutes. Overall, the WMAA provides a greater degree of finality than that provided in many jurisdictions, but somewhat less than that provided under several of the US regimes surveyed.

11. Conclusion: the WMAA in Context

The WMAA and CERCLA have many similar features: joint and several liability, retrospectivity, absolute civil liability, liability for current and previous owners and operators, arrangers for transport, and transporters, and private cost recovery actions. However, most of these features common to both statutes appear in virtually all contaminated sites regimes surveyed. The WMAA *is* somewhat unusual in expressly creating forms of liability which have arisen in other jurisdictions through judicial statutory interpretation. Indeed the substantial difference between CERCLA and the WMAA is that the WMAA appears to have incorporated exemptions, lender liability rules, refined definitions of "owner" and "operator," and forms of liability that were developed under the more skeletal CERCLA only through lengthy litigation and subsequent statutory amendment. In allowing for further exemptions to be developed through regulation, the WMAA will likely be able to respond more quickly to such interpretive quagmires, creating a liability regime which is considerably more flexible than exists under CERCLA.

Further, the WMAA appears to have drawn on a wider range of alternative dispute mechanisms and liability capping mechanisms than CERCLA. Though not as diverse in approach as the Nova Scotia statute, nor as some "brownfields"-directed initiatives in the United States, the WMAA's provisions do encompass mechanisms for liability limitation through non-judicial agreements,

discretionary "minor contributor" exemptions, and support from a non-binding allocation panel. The criteria identified for consideration by the allocation panel and manager, taken together, form a fairly comprehensive list (though economic benefit derived from remediation and/or pollution has been omitted); however, unlike many other statutes, the WMAA does not also explicitly instruct *courts* to consider these factors.

Finally, the breadth of liability potentially arising from private cost recovery actions created by the WMAA differs from the civil liability imposed by many other contaminated sites regimes where such liability only arises at the discretion of the regulator. The private cost recovery action is by no means unique to the WMAA, but is a relatively recent and largely untried innovation in most jurisdictions. The private cost recovery mechanism under CERCLA has existed longer, and is somewhat qualified, but has also operated only in the largely skeletal, undefined (and undeveloped) statutory context discussed above. Thus, it is difficult to compare the WMAA's cost recovery action to that under CERCLA, except to say that many of the exemptions and refinements which have been (rather arduously) developed in the US *through* private cost recovery litigation have been expressly provided in the WMAA and provide, in BC, the *starting point* or *framework* for private cost recovery litigation. This framework was, and is still, missing under CERCLA; a fact which may well account for the level of litigiousness associated with many CERCLA issues.

In conclusion, the WMAA incorporates fundamental elements of many contaminated sites liability regimes (albeit in a more express form), casts a relatively wide net of initial liability but also provides greater flexibility than most regimes in the variety and expandability of exemptions from liability, provides some modest but important innovations in terms of alternative dispute resolution and liability-capping mechanisms, and does not yet contemplate a need for the more sweeping exemptions contained in "brownfields"-motivated initiatives in some US states.

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C. Do the Act and Draft Regulations Ensure Clear and Predictable Circumstances for the Assignment of Liability for Contaminated Site Cleanup?

Another aspect of our mandate is to consider whether the liability regime will operate in a clear and predictable way. To answer this question we focus on several key features of the Act:

- apportionment, joint and several liability, and contribution
- managers' orders under s. 20.5
- appeals and judicial review
- certificates of compliance: s. 20.71

1. Apportionment, Joint and Several Liability, and Contribution

To reiterate, in section A we predicted that while courts will likely conclude that they retain a power to apportion liability, it is also likely that they will construe this power as being restricted to situations where they conclude the harm is divisible. Where the harm is indivisible, we predicted that courts will impose joint and several liability. In these situations, to minimize the

potential for hardship, we conclude that the liability regime should explicitly recognize a right of contribution and to provide clearer guidance as to how, and on what basis, the courts should define these rights and in what manner these rights may be enforced.

In our view, without the reforms we recommend in section A concerning apportionment and contribution, there is a significant potential for uncertainty as to meaning and application of these concepts under the Act. This uncertainty will undoubtedly translate into litigation with the likely result that it will be some time before an authoritative judicial interpretation is delivered.

One facet of the liability regime that we did not discuss in detail in section A was the nature and role of allocation panels under s. 20.51. Do these panels have the potential to clarify, or enhance the predictability of, liability assignment? If so, are there ways that they could be even more effective?

In our view, the answer to this first question is clearly yes. We anticipate that allocation panels will frequently be requested by parties involved in disputes surrounding the cleanup of contaminated sites. Just as experience has shown that pre-trial conferences have a positive effect in inducing settlements in civil litigation, one would expect that panel opinions on issues such as whether a party is "minor contributor" or "responsible person," and what share of the cleanup costs a party or parties should bear, will also promote "negotiated justice." We are also of the view that, in terms of balancing the need for flexibility and predictability, the factors set out in s. 20.51(3) provide useful guidance to panels in carrying out their role under the statute.

Having said this, can allocation panels be made even more effective in their role under the Act? The primary suggestion we have heard in this regard is that panel opinions should not be advisory but rather final and binding, subject only to limited rights of appeal or judicial review. It is contended that, by vesting allocation panels with such powers, protracted litigation over whether or how liability should be allocated among multiple parties will be prevented.

It is critical to appreciate just how far creating a binding allocation panel would depart from the current WMAA model. The philosophy of the current provision is dispute resolution. It contemplates that panels will assist the parties towards settlement by offering opinions on liability-related questions put by the parties. Although panels will hear evidence and deliberate, they will not adjudicate rights or responsibilities; their role will be to provide advice. As advisory bodies, they will not be subject to appeal, and will be able to carry on their inquiries in a relatively informal, non-judicial manner.

To propose that allocation panels should serve as surrogate courts would effectively eliminate their function as a forum for informal dispute resolution. It would also necessitate a fundamental rethinking of the Act in terms of the relationship between panels and the courts, and require careful consideration of an array of other issues including panel financing, constitution, independence and procedures. Further, it is uncertain whether a reform of this kind would simply promote, rather than reduce, litigation of liability issues. Without further detail on what this alternative role for panels would entail, and how it would fit into the broader legislative framework, we are unable to evaluate whether it would lead to superior results in terms of clarity and predictability.

2. Managers' Orders Under s.20.5

Apart from being sued in a private cost recovery action (s.20.41(4)) the other way a party can be held liable as a "responsible person" is pursuant to a manager's order under s. 20.5. During our consultations, various concerns relevant to the issues of clarity and predictability were raised in connection with this new order power:

Overlap between s. 20.5 of the WMAA and s. 22 of the WMA

One concern was that s. 20.5 of the Act will make the current order power, contained in s. 22 of the *Waste Management Act*, redundant. Therefore, it was contended that s. 22 should be repealed. We have raised this issue with Ministry officials and are satisfied that even if s. 20.5 is proclaimed, a role will remain for the s. 22 order power. One of the important distinctions between the sections is that s. 22 allows for an order to made directly against a polluter without the necessity to make reference to a particular site or sites. By virtue of its focus on site cleanup, and the fact that all liabilities are thus connected to a contaminated site or sites, s. 20.5 of the new Act serves a distinctive purpose. In our view, there is merit in both sections being retained.

Breadth of the s. 20.5 order power

A second concern is the breadth of the s. 20.5 order power. We have been advised that the Ministry considers it important for managers to exercise restraint in making orders. In the vast majority of cases, we are advised that disputes with respect to pollution abatement or contamination cleanup are resolved through negotiation between the Ministry and the parties involved. We are told that the Ministry contemplates that its managers will rely on s. 20.5 orders only in compelling circumstances, that is, where there is a threat to human health or a serious threat to the environment. Orders will not be made against responsible persons simply because a site has been found to be contaminated. Ministry officials acknowledge, however, that these "compelling circumstances" are not legal prerequisites to the making of a s. 20.5 order.

When we advised stakeholders that our understanding of Ministry policy was that the s. 20.5 order power would be used sparingly and thus would not be relied on as a means of spurring cleanup of run-of-the-mill contaminated sites, the reaction was often: if this is so, why is it not in the law, regulations or at least a policy manual of some kind? This, in our view, is a valid concern for several reasons.

First, if the Ministry intends to use a broad power only in a limited set of circumstances, and those circumstances can be described, then that description should be made generally available to the interested public. Leaving aside for the moment the question of what legal form that description should take, merely providing the description serves, in our view, a useful function in terms of educating the public as to how the Act will work and, in the process, reassuring them as to how and when the Ministry's new orders will be used.

Second, unless some attempt is made to describe and fetter the manager's discretion under s. 20.5, judicial oversight of how that power has been exercised is impaired if not thwarted. Thus there is value in describing the circumstances in which the power would properly be exercised,

even if that description was not exhaustive, as a means of facilitating accountability through effective judicial review.

Third, describing when the Ministry considers it appropriate for a manager to issue a s. 20.5 order may serve the useful purpose of promoting consistency in terms of the deployment of the order power by managers in different regions of the province. The goal of consistency is an important one. Stakeholders have advised us that, in their experience, administration of Ministry policy under the *Waste Management Act* varies across regions depending on the enforcement philosophy adopted by manager in the region in question.

This last concern is closely related to the question of how, assuming it is desirable to fetter the s. 20.5 order power, a threshold requirement should be framed in legal terms. One approach would be to amend the Act to stipulate that the order power may be exercised only where there is a threat to human health or a serious threat of harm to the environment. This approach would be the most effective from the perspective of fettering managerial discretion and ensuring judicial oversight. On the other hand, it may not be desirable from an administrative perspective in that as it would impose the most stringent constraints on the use of the order power.

If there is a desire to maintain flexibility in the use of the s. 20.5 order power, while signaling more clearly to stakeholders when such orders would be made and promoting consistency in their use across the province, two other alternatives could be considered. The first would be to pass regulations to clarify the circumstances in which such orders should be made. Regulations of this kind could then be considered by a manager pursuant to s. 20.5(3)(f).

A second alternative would be to develop and publish policy guidelines with respect to the use of s. 20.5 orders. In offering this alternative we are aware that the latitude for employing policy directives as a means of promoting consistent policy administration is constrained by virtue of the Environmental Appeal Board's decision in the *Beehive Burner Permits* case. Without questioning the merits of this decision, we would suggest that it speaks to the need for legislative reform that allows Ministry officials to take account of Ministry policy when carrying out mandates conferred on them under the *Waste Management Act* and other statutes. In this regard, we note that a reform proposal of this kind is contained in s. 28 of the September 6, 1994 draft of the *BC Environmental Protection Act*.

Recommendation:

We *therefore recommend that a regulation describing the circumstances in which a manager is justified in invoking the s. 20.5 order power be enacted or, alternatively, that the Ministry develop and publish a policy statement on this subject.*

Ability of a manager to apportion liability pursuant to a s. 20.5 order

Another concern expressed with respect to s. 20.5 relates to the uncertainty surrounding a manager's discretion to allocate liability. In its recent *Lamford Forest Products* decision, the Environmental Appeal Board implies that under the s. 22 of the WMA the ability of a manager to apportion liability between parties to an order is limited. In particular, the decision holds that a

manager has no discretion to take into account private arrangements with respect to responsibility for remediation when making such an order. We have also been advised by Ministry staff that the current practice, when making s. 22 orders, is for managers not to attempt to apportion liability but rather simply to name parties, who then become jointly and severally liable to comply with the order.

In our view, where there is reliable evidence to support apportioning liability, it is desirable that it be done. From the perspective of lending clarity and predictability to the liability regime, as well as from the perspective of fairness to responsible persons, apportioning liability would seem preferable to merely naming the parties and letting the chips fall where they may. Under the current WMA regime the latter approach has been especially unpopular with some parties due to the perception that the Ministry, by adopting this "hands off" stance, abdicates its responsibility to assist the parties in negotiating their way to a sensible and fair settlement. In this regard, we note that the approach we favour has been approved by the Ontario Environmental Appeal Board in the *Appletex* decision.

Will proclamation of s. 20.5 provide a basis for managers to apportion liability in instances where they have declined to do so under the existing regime? Our analysis of the section does not suggest a clear answer to this question. Unlike s. 22 of the WMA, s. 20.5(4) of the WMAA explicitly directs managers to "take into account private agreements respecting liability for remediation" and to consider other factors including "the degree of involvement" of persons who have contributed to the contamination and the level of "diligence" which they have exercised. However, these factors seem to be included for the purpose of guiding the determination of "who shall be ordered to undertake or contribute to remediation." They are not, it would appear, included for the purpose of assisting a manager to apportion liability within the confines of an order.

In our view it is both possible and desirable for a manager to apportion liability in s. 20.5 orders where that apportionment can be justified on the available evidence. As it currently reads, the Act neither provides for nor prohibits managerial apportionment; in short, it is silent on this issue. Moreover, by exercising a discretion not to name certain responsible persons while naming others, managers already exercise a *de facto* power to apportion. Consequently, to signal to managers and affected parties that apportionment may be addressed within the confines of a s. 20.5 order, all that would likely be necessary would be a regulation to this effect. Indeed, since the power to apportion is implicit in the broader power to issue s. 20.5 orders, a published statement of Ministry policy on apportionment by managers might well also suffice, subject to the constraints imposed by the *Beehive Burners Permit* decision discussed above.

Recommendation:

We therefore recommend that the Ministry develop and publish a policy statement confirming that managers will apportion liability in s. 20.5 orders, where apportionment can be justified on the available evidence.

3. Appeals and Judicial Review

Some stakeholders expressed the concern that proclamation of the Act will give rise to costly, protracted and unpredictable litigation with respect to liability issues. In this regard, they pointed to the American experience under CERCLA which, in their view, would be replicated here in British Columbia.

A critical difference between CERCLA and the WMAA is the degree of detail and comprehensiveness of the respective statutory regimes. Much of the CERCLA litigation, especially in the early 1980s, was directed at seeking judicial opinions on questions that CERCLA did not answer. As previously discussed, none of the three foundational principles of CERCLA -- retroactivity, absolute liability and joint and several liability -- was express in the original legislation. Moreover, CERCLA provided only three defences to liability; other exclusions from liability have been largely judicially created. It would appear that the drafters of the WMAA have tried to ensure that our courts will not have to reinvent the wheel. To this end, our Act -- as our comparative analysis confirms -- contains a level of detail and comprehensiveness which is virtually without parallel in North America.

This is not to imply that litigation with respect to legal issues raised under the WMAA will be insignificant. Experience suggests that new legislation, particularly where the law has major financial implications for the parties involved, tends to create work for lawyers. What does seem clear, however, is that some caution about extrapolating from the CERCLA experience in this respect is warranted.

It is necessary to consider, in concrete terms, how appeals and judicial review under the WMAA will proceed. The Act itself is silent on the availability of appeals and judicial review. As a result, upon the WMAA being proclaimed, contaminated sites-related appeals will be dealt with under the *Waste Management Act*. Given the broad definition of "decision" in s. 25 of the WMA, the following managerial determinations will give rise to rights of appeal:

that a site is contaminated

that a party is a "responsible person"

that a party is a "minor contributor"

the making of a s. 20.5 order

Appeals will also likely be available in situations involving other exercises of managerial power, such as where a manager enters into a voluntary remediation agreement or issues a certificate of compliance. The right of a party to appeal is broadly framed as being available where "a person considers himself aggrieved" by the exercise of legal power by a manager.

Under the WMA, the first appeal is to Director, and from there to Environmental Appeal Board. Judicial review to the courts from determinations of the EAB are generally restricted to questions of law. Such review has thus far been relatively rare. Ordinarily, courts will defer to the decisions of specialized administrative tribunals unless it can be shown that their decision making procedures were contrary to the principles of natural justice, that they acted outside their legal jurisdiction, or misinterpreted their legal mandate in an unreasonable fashion.

The procedures on appeal are set out in Ss 27 to 30 of the WMA. We note in this connection that Ss 27(1) and 28(1) should be amended to reflect the new managerial determinations which would give rise to appeal rights.

In the US, due to the volume of litigation in the early years of CERCLA, SARA brought in statutory restrictions on the right to seek judicial review administrative decisions and restricted the ambit of such reviews. As we have indicated, we do not anticipate that the WMAA will trigger the same amount of litigation as was experienced under CERCLA. If, after several years of experience under the WMAA, it becomes clear that existing appeal and judicial review procedures are inadequate, appropriate remedial options should then be considered.

Recommendations:

We therefore recommend that the adequacy of the WMA regime's appeal and judicial review procedures be revisited, as part of a general review of the legislation, three years after proclamation of the WMAA.

We also recommend a consequential amendment to sections 27(1) and 28(1) of the Waste Management Act confirming that the appeal procedures under the WMA apply to the new "decision" powers created by the WMAA.

4. Certificates of Compliance s. 20.71

The final stakeholder concern relevant to this section of our report concerns finality. Several stakeholders strongly objected to the possibility that, having conducted a Ministry-approved remediation and been issued a certificate of compliance, they could subsequently be ordered to conduct further remediation. These stakeholders argued that certificates of compliance should be a guarantee of finality; once a party has been provided with a certificate, that should be the end of the matter.

Clearly there is merit in the notion that, for a variety of reasons — business efficacy, fairness and certainty among others — a party who has remediated up to the Ministry's standard should not required to re-remediate if the standard changes. The counter to this argument is that, as a legal and democratic principle, governments cannot tie the hands of their successors. This principle creates certain risks to which we are all subject. These include the risk that a government-sanctioned activity in which we now engage free of regulation will in the future be regulated, or that an existing regulatory regime will be changed in a manner that adversely affects us. Moreover, in Canadian law, even if such a regulation is tantamount to expropriation of a property right no right to compensation arises.

Under the WMAA, two forms of certification are contemplated. The first is a certificate of compliance which certifies that the site has been remediated in accordance with the "prescribed numerical standards" set out in the legislation and any orders, plans and requirements made, approved or imposed by the manager. The second variety is a "conditional certificate of compliance" which is a more site-specific form of certification based on risk analysis as opposed to numerical analysis of site characteristics.

As we understand it, the Ministry's position is that it must retain the right to go behind a certificate, and require the holder to engage in further remediation, where that is required in the public interest. We understand, further, that such an action would not be taken lightly. It would not occur, for example, simply because at some time in the future the remediation standards changed. However, for example, where science reveals a new threat posed by a particular chemical or compound there should, according to the Ministry, be no fetter on its ability to take or order remedial action.

Since a conditional certificate of compliance is, by its nature, subject to continuing Ministry oversight, we see no basis for arguing that such certificates should in any sense be regarded as precluding subsequent review or, if necessary, revision. The real question to be considered therefore is whether, and to what extent, it might be appropriate to fetter the right of a manager to order to the holder of a certificate of compliance to undertake further remediation under the Act.

We agree with stakeholders who contend it would be unfair were the Ministry to require the holder of a certificate of compliance to remediate merely because of an incremental change in the standards. For their part, Ministry officials whom we have consulted agree that this would indeed be unfair and assert that they have no intention to acting in such a fashion. The real question, on which there appears to be a genuine difference of perspective, therefore, can be distilled as follows: who should bear the risk that, at some time in the future, the Ministry will perceive there is a need for further remediation on a site due to scientific advances or due to the emergence of contaminant-related problem that was not identified or fully anticipated when the certificate was issued? Should this risk be borne by the certificate holder or by the public?

In our view there are compelling arguments on both side of this issue. If the failure to identify, anticipate and fully deal with the problem was occasioned by negligence or neglect on the part of the Ministry, the argument that a manager should not be able to go behind the certificate is particularly compelling. Apart from circumstances such as these, however, we believe that the decisive consideration is the polluter pays principle. If this principle is adopted as the starting point, then it becomes clear that the risk of new harms being identified should not be borne by the public at large. Rather, like the risk of new regulation, it is a risk that is a cost of living in a regulatory state.

In summary, we do not recommend altering the substantive policy or legal language in s. 20.71. We do, however, recommend that a Ministry policy on when it will seek further remediation following issuance of a certificate of compliance be developed and published.

<u>Recommendation:</u>

We therefore recommend that the Ministry develop and publish a policy statement describing the exceptional circumstances in which it might be appropriate for a manager to require the holder of certificate of compliance to engage in further remediation.

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D. Is there Potential for Beneficial or Negative, and Unforeseen, Impacts on Business and on Local or Provincial Governments?

In this section, we report and comment on concerns expressed to us by stakeholders with respect to potential unintended effects of the WMAA, in terms of both business and environmental protection impacts.

1. Environmental Protection Impacts

Greenfield development

One identified possible negative impact is the phenomenon of "greenfield" development. The Business Council of British Columbia has explained the issue in these terms:

In addition to being unnecessary, the Act may actually have unintended and adverse implications for the very goal of environmental protection it is supposedly designed to achieve. Faced with potential liability under the Act, many developers of residential and even industrial property will choose to undertake those developments on "greenfield" sites rather than assuming the liability associated with remediating and redeveloping "brownfield" sites. In the case of industrial developments, the result may be two contaminated sites instead of one. This has certainly been the experience in the United States.

Although this argument may have some merit, in our view it is important not to assume that the American experience will simply repeat itself in British Columbia. There is a different legislative and regulatory regime, and more importantly, a different set of land use patterns and real estate market conditions. We do not have the same extent of historical industrialization, and there is, generally speaking, a higher demand for inner city residential property in our urban areas.

Chill on development

It is argued that the WMAA will prevent sites from being cleaned up through the normal market process of redevelopment because either (i) no one will buy the property due to concern over becoming a responsible party and inheriting joint and several liability or (ii) the current owner is not prepared to undertake remediation and will not sell to a third party because the current owner is not certain that the prospective purchaser can manage the contamination or will act responsibly. Thus, the effect of potential liability is to "freeze" any possibility for development and remediation rather than to promote development and cleanup

With respect to point (i), if one assumes that market participants are rational economic actors, they will be willing to purchase contaminated sites as long as the sale price of the site reflects

potential liability (less potential recovery) as a cost of redevelopment. Thus, the claim is true to the extent that no one will buy a site if the price does not take liability for contamination into account or if remediation is simply not economically feasible. On point (ii), it is consistent with the overall goal of remediation that there is a responsibility on the current owner to find a purchaser who will deal with the contamination problem in an appropriate way. Otherwise, the owner could avoid liability for remediation simply by selling the site to a "shell" company that assumes liability but has no real means of remediating.

Even if the owner/vendor finds a responsible purchaser and they enter into an agreement in which the purchaser assumes liability for remediation, another "chill" issue remains. Although the vendor will be able to rely on the agreement with the purchaser as a defence to a private cost recovery action, the contract is no defence to a manager's order; under s. 20.5, a manager is directed to take private agreements into account only "to the extent feasible without jeopardizing remediation requirements." But no rational vendor would sell a property at a discount only to be subject to potential liability under a manager's order.

This will not result in a chill on market transactions, however, because there are various ways for the vendor to deal with the risk of liability. A vendor may obtain from the purchaser a remediation covenant and either (i) a warranty that the purchaser will indemnify the vendor for costs of remediation if the vendor is named in a manager's order or (ii) funds (i.e. the discount) posted in trust to secure the cleanup. The other obvious alternative is for the vendor to remediate the site before selling, but that will not always be feasible. For example, there may be a site that is ripe for redevelopment in three years but has an existing viable use. It is much more efficient for the purchaser to remediate in three years as part of the redevelopment process than for the vendor to do it now.

It is also open to the vendor to seek minor contributor status (if appropriate) under s. 20.6 of the WMAA, or to enter into a voluntary remediation agreement under s. 20.61. Minor contributor status will cap the vendor's liability to the amount set by the manager; this makes liability a certainty rather than a potential long-term risk. A voluntary remediation agreement also removes uncertainty in that it discharges the vendor from further liability under the Act. There is the flexibility, as well, to agree under the VRA that remediation will be commenced in the future; see s. 20.61(3). This mechanism allows remediation to go hand in hand with redevelopment, in a way that makes practical sense.

We were apprised of another version of the chill effect that applies specifically to residential redevelopment. The argument is that the WMAA will have a chilling effect on residential redevelopment on contaminated sites because (i) the stigma associated with contamination has a very negative market effect in the residential market (i.e. people just do not want to live on a contaminated site) and (ii) a purchaser of a unit in a residential development on a remediated contaminated site may become a responsible person in the future, even though the site has been remediated, because s. 20.95 precludes finality under the WMAA. This potential liability, it is argued, will reduce market demand for such properties, which in turn may mean that properties are not developed and cleaned up.

The actual impact of the stigma phenomenon is extremely difficult to assess. One solution might be finality, so that a site may be given a "clean bill of health" when taken to the market. On the other hand, it may be that stigma is indelible. In other words, it is not clear whether the residential market will be positively influenced by any sort of certification once a site is known to have been contaminated.

Deters responsible behaviour

Some stakeholders claim that the WMAA does not encourage businesses to act in an environmentally responsible way because it imposes absolute liability. The argument is as follows:

. . . environmental legislation should encourage the use of innovative solutions and best commercially available technology to prevent contamination from occurring. Strict liability fosters that objective, but absolute liability does not. A company is less likely to be willing to incur the often high cost of implementing the best technology where a defence of due diligence is not available notwithstanding the investment. Absolute liability does not really promote appropriate behaviour, in that no matter what action a party takes to prevent or mitigate a problem, the mere fact that the problem exists will make that party liable. It wrongly places the emphasis on cleanup after the fact than on prevention of contamination.

It may be true that absolute liability does not generate an incentive for environmentally responsible behaviour where a problem created by someone else exists in the first place and liability cannot be avoided by preventing contamination. But under the WMAA, the diligence exercised by persons with respect to the contamination can be taken into account by the manager under s. 20.5(4)(b)(ii) when deciding who will be named in an order and by the allocation panel under s. 20.51(3)(e). Due diligence is also relevant to attaining minor contributor status: see s. 32(f) of the regulations. We appreciate that the manager is precluded from taking diligence into account in a case where that will jeopardize remediation requirements, and that allocation panel decisions are not binding on the manager. However, the existence of a likelihood that diligence will be taken into account in determining liability under the Act means that it is still in the best interests of a potentially responsible person to exercise diligence. Moreover, one should not forget that business and industry operate with regard to the entire regulatory context, and thus environmental due diligence remains relevant to criminal and quasi-criminal liability. In short, we anticipate that people will continue to perceive that they have an interest in acting in a diligent manner.

It has been suggested that some petroleum producers might stop participating in training and guidance programs for independent station operators with respect to proper handling of products because of a concern that these programs may be used as evidence of "control" and therefore may result in liability under the Act. We see actual liability flowing from such action as unlikely, because it would require a conclusion that the producer "*caused* the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site" (s. 20.31(1)(d)(ii)) or, by virtue of the training program "is or was in control of or responsible for any operation located at a contaminated site" (definition of "operator" in s. 20.1(1)). Moreover, s. 18 of the regulations provides that a producer is not responsible for

remediation where the producer "merely required adoption of standards of . . . operation of works at the site which were intended to prevent contamination." However, what transpires in the end will depend on the industry's perception of the risk of liability.

We are also advised that the prospect of liability for contamination being reopened under s. 20.95 will not be an incentive for large companies in the petroleum industry to remediate to a higher standard than required, because the industry is too competitive. Thus, the possibility of a current beneficial environmental impact from that provision is unlikely.

2. Business Impacts

General

We were advised that the prospect of the WMAA has caused some industries to decide not to invest in new operations in British Columbia. We assume that the Government has anticipated this and considered these sorts of macroeconomic impacts in arriving at policy decisions.

Petroleum industry

Petroleum industry representatives stated that the new regime might lead to restrictions on the supply of their products, particularly to small businesses. This, in turn, will have the greatest impact on small towns across the province. The problem is explained as follows:

In jurisdictions where a broad based liability scheme is legislated, manufacturers and suppliers will be forced to make risk management decisions that may have undesirable implications on small business. They will be inclined to limit the supply of materials and products to parties who are financially capable of indemnifying them in the event that the manufacturer or supplier is required to finance remediation for contamination caused by the product at a customer or third party site. This reluctance to deal with small businesses will be an inevitable consequence of the uncertain liability that exists. Additionally, manufacturers and suppliers will be reluctant to sell to intermediaries, e.g. jobbers, due to the risk of liability that may result from the co-mingling of their product with others and the uncertain use and final destination of their product.

We note that Ss 18 and 21 of the regulations are designed to address this potential impact. Furthermore, any risk of liability caused by a lack of certainty in the regulations will have to be balanced against the loss of market opportunities.

Petroleum industry representatives also pointed out that in an industry like theirs where there are many old inactive sites, responsible persons may bear an impossible evidentiary burden when it comes to demonstrating that their activity did not cause contamination. Records may not be available and the recollections of employees might not be reliable. The potential effect of this situation would be to make an innocent party liable. Possible solutions offered include a limitation period or a provision for the burden to shift to the responsible party only if there is some reasonable basis for suggesting that they caused the contamination.

Although there may indeed be some unfairness here, the solutions offered may compromise the objective of making the polluter pay: see discussion of the causation issue in Section A.

Receivers/Receiver-managers

From this sector we learned of an unintended effect of s. 24 of the regulations: it could terminate their involvement at a contaminated site when it would actually be desirable for them to remain involved. Section 24(4) requires a receiver to give notice to a manager if the receiver does not have sufficient available funds to comply with remediation requirements under Part 3.1 or a s. 22 order, and s. 24(5) terminates the obligation of the receiver to comply with those requirements if the receiver gives notice to a manager under subsection (4). But, according to the receivers, there may be very good commercial and environmental protection reasons for wanting the receiver's continued involvement. Thus, the regulations should not terminate their involvement in remediation just because there are insufficient available funds. Rather, they should be permitted to negotiate with the Ministry over what steps to take. They recognized that the public interest was furthered by having a receiver acting as "caretaker" of a contaminated site rather than creating an orphan site.

Recommendation:

We recommend that s. 24 of the regulations be amended to clarify that receivers/receiver-managers may continue to be involved in remediation even if there are insufficient available funds.

Trustees

Section 24.1 of the regulations has the potential to generate unintended effects with respect to estates and trusts matters. The Trustees noted that the regulations, particularly s. 24.1(9) which requires a trustee to decide whether to terminate the appointment, might result in a flood of "orphan estates." Within a relatively short period of time, a trustee would have to weigh all questions of potential personal liability and fiduciary duties with respect to gifts of contaminated property when they would usually be "getting on with distribution." Further, significant costs could be involved for any trustee seeking to assess such concerns comprehensively (that is, engineering studies, estimates of costs of remediation, etc.). The Trustees noted these concerns, particularly where an order is lingering during the 30-day period, might lead to a flood of "orphan estates," where no person is willing to administer the trust. They felt this was inappropriate, particularly where there is a pressing need for the trust funds to support a beneficiary or where a will might remain undistributed for some time.

In a similar vein, s. 24.1(5) may end up creating an unintended or at least avoidable burden on government. If trust property is transferred to the government for remediation, it is not clear whether the government will remediate the site and then convey it to the intended beneficiary, or continue to administer any trust that is "ongoing" in relation to the property (for example, distribution of income). The Trustees suggested that it might be wiser to reduce the incentive for trustees to terminate their involvement so that government does not inadvertently acquire these

increased duties. They suggest that trustees be allowed to retain responsibility for the site vis-a-vis the trust while the government undertakes or funds remediation at the site.

In our view, there is merit in the concern that the government not be burdened with estate administration duties, and we think that s. 24.1(5) warrants clarification in that regard. However, we are of the view that the "orphan estates" argument is overstated. A flood of orphan estates is likely only if it is economically unattractive for trustees to take on or continue with an appointment. But trustees are exempt from personal liability for remediation under s. 24.1(3) of the regulations, and the funds available for remediation are exclusive of the claims of the trustee for remuneration and indemnification (s. 24.1(1)).

The Trustees were also concerned that the regulations will generate conflicts of interest for them. They said that, with respect to the distribution of available funds, a tension would arise between a trustee's caution in ensuring that her liability was as limited as possible, and her fiduciary duty to the beneficiaries of the will and to the estate. On the one hand, trustees may seek to keep as much of the trust property undistributed ("keeping it in the pot" of money actually available for remediation) so that actual funds available would match the statutory funds available used in determining the trustee's potential liability. On the other hand, trustees should be distributing the testamentary gifts as expeditiously as possible.

Another potential conflict of duties might arise in the context of conveying the property to a beneficiary. Should a trustee seek an agreement from the beneficiary to accept responsibility for remediation? In some cases, pressing beneficiaries to enter into this sort of agreement regarding testamentary gifts or bequests, for example, might be difficult or inappropriate. Further, what would the trustee's priority be in negotiating such a written agreement: personal exclusion from liability or the best interests of the beneficiary?

While some might interpret the WMAA as generating conflicts, the priority under the Act is remediation and that should be the guiding principle. This means that the trustee's obligation to comply with the applicable remediation requirements must take priority over the distribution of the trust property. It is also clear that the trustee has a fiduciary duty toward the beneficiaries. Nothing in the WMAA changes that aspect of the relationship. Therefore, pressing a beneficiary to enter into agreements to take on liability for remediation will be inappropriate where that is not in the beneficiary's best interest.

Finally, the Trustees expressed a concern about lay trustees and administrators of estates unwittingly taking on major liability under the WMAA. The regulations make it clear, however, that a trustee will not take on personal liability unless he or she exercised control over the handling of a substance that caused contamination, *and* the trustee was *grossly negligent* or guilty of *willful misconduct* in the exercise of such control (s. 24.1(2)).

In light of all of the above, we recommend as follows:

<u>Recommendation:</u>

We recommend that s. 24.1(5)(b) of the regulations be amended to clarify that a trustee may be involved in ongoing trust administration duties where the trust property is transferred to the government in trust for remediation.

3. Impacts on Governments

Municipal governments

The principal unintended effect of the WMAA on municipal governments relates to owners seeking to have the assessed value of their property decreased because of contamination. The consequent impact on the tax base is of considerable concern to municipalities. We are told that the concern is very real, and that property owners are already seeking reassessments on the basis of a site profile disclosing contamination. We are also told that the stigma of contamination alone will result in a ten per cent decrease in property values.

There is some debate, however, over whether reassessment will be a widespread phenomenon. It could be argued that the problem is overstated, and that the stigma of contamination and its market impact will deter property owners from having their sites declared contaminated. If that is the case, only those property owners who do not intend to sell their sites for a considerable period of time would be encouraged to seek reassessment.

The other factor to bear in mind is that even *without* the WMAA property owners are now seeking reassessment as a result of the market now being attuned to potential liability for contamination, and contamination now being a factor relevant to the determination of market value. Thus, the remedy for this problem does not lie in any refinement to the liability provisions of the WMAA.

Municipal stakeholders also indicated that the Ministry has not appreciated the extent of potential liability of municipalities for landfill sites. One suggestion is that, where a municipality is one of multiple responsible persons on a former licensed landfill site, there should be a provision limiting the liability (of transporters and producers as well as municipalities) to ten per cent of total cleanup cost. Otherwise, municipalities face the daunting spectre of joint and several liability. They also suggest that some provision be made to exempt municipalities from liability for their solid waste disposal sites, where toxic substances have been dumped in sites otherwise only containing and intended to contain municipal waste.

Provincial government

The Province's exposure to liability is significant, given the extent of its landholdings and the fact that many holders of land tenure agreements have engaged in activities that may have caused contamination (for example, resource extraction, forestry, agriculture, communications) while the tenure document did not address liability for contamination. Where the Province had a reasonable basis for knowing that the lessee intended to use the property to handle or treat substances that would cause contamination, the innocent lessor exemption under s. 20.4(1)(e) of the Act will not apply: see s. 26 of the regulations.

It is also the case that the Province is at the root of title to most land as original landowner, and is the residual owner of almost all of the foreshore. This may raise a concern that the Province could be dragged into countless disputes as a former owner with very deep pockets. It is likely, however, that in many cases the Province would be able to rely on the innocent owner exemption in s. 20.4(1)(e). The result of this exemption is that the Province would not be a responsible person, and thus could not be named as a defendant in a private cost recovery action.

Provided that the extent of the Province's potential liability under the WMAA is appreciated, there are no apparent unintended impacts on the Province as land owner.

4. Fairness Issues

Some potential results of the liability regime that follow from the principles of retroactive and joint and several liability might constitute unintended effects because they may be seen to be unfair or unduly harsh. Many stakeholders warned of the "deep pocket defendant" problem and the problem of "Ma and Pa" who go bankrupt just because they happened to own a gas station in the 1950's. At the same time, however, these impacts may be consistent with the "polluter pays" principle, and it would be difficult to address such scenarios in advance without compromising that principle or other principles of fairness such as horizontal equity between responsible persons. (See discussion in Section A.)

5. Standards Issues

Some stakeholders are of the view that the Ministry has failed to appreciate the impact of the WMAA in terms of the number and nature of sites that will be considered contaminated according to the standards. As the Business Council of British Columbia puts it: "The fear is that the proposed standards will cast a very wide net, resulting in many sites being declared 'contaminated sites' even though they pose absolutely or virtually no risk to human health or the environment." In our view, this issue is outside the scope of this report. We note the concern, however, because it was widely expressed.

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E. Is There a Potential for "Third Party" Windfall Profits Arising out of the Liability Provisions?

The concern over potential windfall profits under the WMAA liability provisions relates to the scenario where a person purchases a contaminated site at a price that is discounted because of the contamination, and that person remediates the site and then seeks to recover the costs of remediation from other responsible persons under s. 20.41(4). If the purchaser is able to recover remediation costs from prior owners and operators in addition to taking the benefit of a price discount equal to remediation costs, the cost recovery amounts to a windfall. In short, the purchaser is able to get a discount for taking on liability that he or she then effectively shifts to third parties.

In this section, we explore the possibility of windfall profits and consider whether it is a realistic concern. A windfall is possible only if the cost recovery action is successful. Thus, the issues center around how the statutory cause of action will operate, what defences are available and, in particular, whether the vendor will be able to rely on the agreement as a defence or a factor for a court to consider in allocating liability. Two scenarios are considered: the first is where there is a private agreement in which the vendor and purchaser explicitly agree that all environmental liability and remediation costs will be borne by the purchaser in return for the discount; and the second is where there was a price discount but no contractual assumption of liability by the purchaser. We also assume that there are several other former owners and operators of the site.

1. The Statutory Cost Recovery Action

Section 20.41(4) creates a statutory cause of action in the following terms:

. . . 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.

Since, in our example, the purchaser has remediated the site and has incurred costs of remediation, he or she may launch a s. 20.41(4) action against any responsible person. The group of responsible persons will include the vendor as a former owner unless the vendor falls within an exemption. We will assume for the purposes of this analysis that the vendor is a responsible person under the Act and that there are other former owners and operators who are also responsible persons. All of these people are potential defendants in the cost recovery action.

How or even whether a court will allocate liability as between those defendants is unclear. There is no section in the Act or regulations that explicitly sets out the principles by which liability for remediation costs will be allocated between the defendants to a cost recovery action. A court's only guidance is the provision in s. 20.41(4) that the action is to proceed "in accordance with the principles of liability set out in this Part."

The one clear principle of liability in the WMAA is that it is retroactive, absolute and joint and several: s. 20.41(1) stipulates that a responsible person is "jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site." It is arguable that there are other principles of liability in the WMAA that temper joint and several liability, such as the direction in s. 20.5(4) to the manager to take a number of factors, including private agreements, into account in deciding who to name in an order, or even the provision for minor contributor status and allocation panels. In our view, however, even at the level of the "spirit and intent" of the WMAA, joint and several liability is the overarching principle. For instance, the s. 20.5(4) consideration by the manager of private agreements is permissible "only to the extent feasible and without jeopardizing remediation requirements." This is evidence of the legislature's intention to give joint and several liability precedence over apportionment in the interests of effecting remediation.

Therefore, unless a court is prepared to rely on other principles of liability peppered throughout Part 3.1 which apply to allocation panels and managers' orders and which are subordinate to the principle of joint and several liability, responsible persons who are unsuccessful in defending a cost recovery action will likely be held jointly and severally liable. If the contamination is clearly divisible, courts may be able to impose several liability, though this is by no means certain. Even if apportionment occurs, it would be based on divisible shares of contamination rather than agreements as to liability.

Furthermore, it is not obvious that a court would have the power to engage in a second "contribution" stage of the analysis to allocate liability among defendants based on factors other than share of harm. As explained in Section A above, the US experience is that courts will rely on broad principles of fairness in allocating liability. The difficulty is that the WMAA and regulations do not explicitly recognize the right of defendant to seek contribution, nor is such a right available at common law.

2. Defences To a Cost Recovery Action

A defence is distinct from allocating rights of compensation among and between liable parties through "rights of contribution" in that it will operate to absolve defendants of liability so they are not jointly and severally liable in the first place. It has been argued that the absolute liability principle in s. 20.41(1) means that a defendant will not be able to assert any defences to a cost recovery action. In our view, the concept of absolute liability outside the penal context is uncertain enough that there may be merit in that argument. It is necessary to discuss the defences that might be available, however, to establish the groundwork for evaluating suggested modifications to the legislation.

Defences available to the vendor

If the vendor entered into an explicit agreement with the purchaser in which the purchaser accepted liability for contamination, the vendor would be able to block a cost recovery action in that such an action would constitute a breach of contract.

Where there has been no contractual assumption of environmental liability by the purchaser but the property has been transferred at a discounted rate, the vendor might attempt to rely on proprietary estoppel. The vendor would need to establish that the purchaser's words or conduct led her to believe that the purchaser would not insist on his legal rights, including any legal rights arising under the statute (or, in the case of past transactions, any legal rights arising under future statutes), *and* that the purchaser knew or intended that the vendor would act on that belief, *and* that the vendor acted on that belief to her detriment (i.e. would not have sold the property at that discount but for the belief).

This last element, detriment, might not be apparent at first blush, since the vendor would have been jointly and severally liable for the costs of remediation in any event as current owner (depending on the circumstances of her acquisition and activity in the interim). However, the detriment is real in that she has lost the increase in property value which she would have realized

had she performed the remediation on the site, rather than transferring the site to the purchaser at a discounted rate and having the purchaser realize the full value of the cleaned-up property.

It should be noted that *silence* does not raise an equity. Thus, while the discounted price alone very probably could not sustain the raising of an estoppel, some other conduct such as at least acknowledging that the reduced price was due to the contamination of the site (and the implied assumption that *caveat emptor* will lead to the liability for that contamination passing with the property) is required. Further, the application of estoppel to statutorily-created rights, though contemplated by Lord Denning in *Crabb* and adopted in principle by the BC Court of Appeal in *Hastings Minor Hockey*, is as yet untested in BC courts.

The vendor might also try to claim unjust enrichment. To claim unjust enrichment, the vendor must show that the purchaser was enriched at his or her expense, and that it would be unjust to allow the purchaser to retain the benefit. This appears simple enough, but the reality is that it is difficult to make out a claim for unjust enrichment.

As it usually arises in the doctrine of restitution, unjust enrichment is available only where the enriched party has already received the benefit. Thus, application of the doctrine as a defence to a statutory cause of action, even if a regulation were enacted to preserve equitable and legal defences, is by no means assured. Moreover, unjust enrichment remains an ambiguous and uncertain legal doctrine, and thus provides, at best, an unreliable basis for a defence. At the end of the day, all that can be said is that a vendor who did sell the property at a discount in reliance on the understanding that the purchaser would assume liability might be able to rely on the proprietary estoppel defence and/or unjust enrichment. We must emphasize that there is considerable legal uncertainty associated with these doctrines, so the risk of liability is significant.

Defences available to other responsible persons

The defences available to the vendor do not preclude the possibility of a windfall, even where the vendor can rely on a contract, because the purchaser may seek recovery against responsible persons further up the chain of title than the vendor. These parties have no contract with the purchaser on which they can rely, and estoppel is not an available argument because these defendants have had no course of dealings with the purchaser, and their past actions could not have been undertaken in reliance on the yet unstated promise of a remote third party (i.e. the purchaser). Further, the question of how they have been detrimentally affected by the current owner's assumption of liability, or even his having paid a discounted price for the property, is unclear. Conceivably they would have been liable to any current owner who incurred remediation costs, and would have transferred the property to any interim owner whether or not the current purchaser ever existed. One other possibility is for these defendants to argue that a court should relax the rule of privity of contract to allow third parties who have an "identity of interest" with the vendor to rely on the assumption of liability provision in the contract between the vendor and purchaser. This would be a novel claim, however, in that the extension of contractual exclusion provisions to third parties has been applied only in the employment context, to give employees the benefit of an exclusion clause in a contract between their employer and a third party. Persons who are responsible for remediation at site are in a very

different situation than employees who incurred liability in the course of their employment. And unlike the vendor, who took a discount on the sale of the site and in effect already paid for remediation, these former owners and operators will not have incurred any remediation costs up to that point, and would be unlikely to engage the sympathies of a court. Finally, these responsible persons would have difficulty arguing unjust enrichment because the purchaser was not enriched at their expense, to the extent that they are responsible for remediation anyway. Rather, the purchaser was really enriched at the expense of the vendor, who bore the entire cost of remediation through the discount.

3. Conclusion

This analysis indicates that there is potential for a purchaser to obtain windfall profits under the WMAA:

(i) it is not clear that defences are available to defendants in a cost recovery action;

(ii) where there is a private agreement between the vendor and purchaser in which the purchaser agrees to accept liability in return for a price discount, the purchaser might be able to recover from responsible persons other than the vendor by pursuing a cost recovery action. This is because these other responsible persons cannot rely on the contract or any other defence, and there is no provision under the WMAA for a court to allocate rights of contribution between responsible persons with reference to private agreements or general fairness concerns;

(iii) where the vendor sold at a discount reflecting the costs of remediation but the purchaser did not contract to assume liability, the vendor might be liable under a cost recovery action because she is a responsible person, common law defences are unreliable, and, again, there is no provision under the WMAA for a court to take the price discount into account and to allocate rights of contribution on that basis.

<u>Recommendations:</u>

We therefore recommend that a section be added to the regulations stating that a defendant to a private cost recovery action may assert all legal and equitable defences and any rights under agreement or statute.

We further recommend that, for the purposes of allocating rights of contribution in private cost recovery actions, the WMAA or regulations should be amended to direct courts to consider private agreements and price paid for the site relative to its market value at the time of sale if it had been remediated.

F. Is There a Potential for Undue Transaction Costs?

In this section we consider the question of whether the liability regime is likely to generate undue transaction costs.

1. Defining the Question

There are two nuances to this question that deserve attention. The first centers around defining what is, and what is not, a transaction cost. The other nuance is in the question of whether these transaction costs are likely to be undue. Before proceeding further, we will consider each of these aspects of the question.

In the context of contaminated sites remediation, what is a transaction cost? On this point we think that the definition offered by American economist Lloyd Dixon, a leading researcher on transaction costs under CERCLA, is useful:

Transaction costs, unlike the costs to investigate and remediate the site, do not contribute directly to the cleanup process; instead, they are incurred in the process of assigning liability among the various parties involved at a site.

It is not always easy to separate expenditures into cleanup costs and transaction costs. While legal costs are generally regarded as transaction costs, non-legal costs can be either transactional or "cleanup" in nature. For example, engineering studies done by a "responsible person" for the purpose of seeking "minor contributor" status or to contest a s. 20.5 order would be transactional. In contrast, "engineering studies are not transactional if they contribute to a better understanding of how to clean up the site."

If we think of transaction costs as the costs incurred by private or public sector players (responsible persons, governments, insurers, the Ministry and so on) in the process of allocating liabilities for cleanup, we can then consider the next part of the question: when do these costs become "undue"? The answer will vary of course, depending on who is answering the question. The question also presumes a reference point: "undue" must be relative to some fixed standard or alternative. In our discussions with stakeholders we have thus posed the question in relation to the level of transaction costs under the current regime.

2. Stakeholder Responses

The stakeholder reaction to this question had two dimensions. The first was a general perception that transaction costs relating to contaminated sites had risen significantly in recent years. Since the late 1980s, and certainly as of the early 1990s, what constitutes duly diligent behavior in relation to all types of commercial transactions -- buying land, acquiring companies, taking or realizing on security, administering wills and estates -- has changed dramatically. In many of these contexts, the ordering of an environmental audit or a "phase one" engineering report is just one of the many steps prudent business people, and those who are called upon to advise them, are now expected to undertake as a matter of course.

At the same time, many stakeholders did not anticipate that proclamation of the Act would greatly change the way that they now do business. This is because many businesses already

conduct themselves as if the WMAA were in force. This is particularly true with respect to businesses that operate on a national basis and, with the benefit of this perspective, can see that contaminated sites legislation (of the kind which has been passed in BC) has arrived or is on the horizon in every major Canadian jurisdiction. While some have postponed the development of detailed staff training programs until it is clear when proclamation of the WMAA will occur, in terms of key decision making processes it is assumed that the Act, or some variant of the Act, is on the way.

Of course it is not only the prospect that the WMAA will be proclaimed that has caused this change in business practices with respect to environmental matters. It is critical to appreciate that the changed business practices we have seen in the contaminated sites area is a small part of a more fundamental reordering in the way businesses have come to deal with environmental issues over the last decade or so. This reordering is, in turn, a function of evolving social values, consumer preferences, common law principles and perceptions of corporate self-interest.

3. Analysis

Do these observations assist us in assessing the magnitude of the transaction costs associated with implementation of the liability regime under the WMAA? If transaction costs are conceived of in broad, colloquial terms, as being costs imposed on business in anticipating and dealing with the Act, the question becomes virtually unanswerable. This is due to the difficulties associated with distinguishing between changes in corporate behavior attributable to the prospect or reality of having to deal with the Act and changes attributable to other exogenous causes referred to earlier.

If, however, we employ the narrowly focused definition of transaction costs set out above, and use the current liability under the WMA as our reference point, we are able to get much closer to a reliable answer to the question posed at the outset of this section. The most common criticism we heard from stakeholders about the current regime was its uncertainty with respect both to when they would be made subject to a cleanup order and how liability would play out as among responsible persons in the wake of such orders.

Where there is uncertainty in the process of assigning liability, transaction costs (in our definition) will inevitably be high. We think that most stakeholders would agree that, from this perspective, the liability regime contemplated by the Act not only does not impose undue transaction costs relative to the current regime, but may well entail lower transaction costs by reducing former uncertainties. This, it is suggested, will occur through various means including greater clarity in the definition of (and exclusions from) "responsible person," measures designed to promote pretrial apportionment, prescribed standards defining what constitutes a contaminated site, and closure and liability-capping mechanisms.

Yet, although the Act represents a significant leap forward in terms of certainty and thus in reducing transaction costs, there remains, in our view, room for improvement. One of the most important areas in which the Act could be enhanced from the perspective of certainty, as discussed in section A *infra*, is in relation to joint and several liability and contribution. Other

areas where uncertainty within the Act could be reduced, with a corresponding benefit in terms of transaction costs, are as follows:

- clarification of the liability of directors, officers, employees and agents of responsible (corporate) persons
- clarification of the liability of parent corporations for their subsidiaries
- clarification of the circumstances in which the s. 20.5 manager's order will be used
- clarification of the defences available to private cost recovery actions
- clarification of Ministry policy with respect to when new remediation requirements might be imposed on the holders of certificates of compliance

We would hasten to emphasize that a truly reliable evaluation of the magnitude of transaction costs associated with the Act can be accomplished only after it has been in force for some time. In this regard, it is instructive to report on a series of recent studies on transaction costs under CERCLA. These empirical studies, conducted in the early 1990s and sponsored by the RAND Corporation, reveal some interesting findings. Employing the definition of "transaction cost" used here, the studies showed that private sector transaction costs were indeed significant, ranging from 23% to 31% of all private sector CERCLA liability outlays. The data confirmed that transaction costs were significantly greater at sites involving large numbers of "responsible persons." The studies also showed that "responsible persons" with a small share of the total liability usually bear a disproportionate percentage share of transaction costs.

Most intriguing, however, was how the most recent of these studies addressed the question of whether CERCLA transaction costs were, on the whole, excessive. The studies compared CERCLA litigation to three other benchmarks: asbestos litigation, airline crash litigation and general tort litigation. The results are summarized as follows:

As a percentage of total outlays, private sector transaction costs under CERCLA are somewhat less than defendant transaction costs as a percentage of outlays in tort litigation generally (35%) and much less than asbestos claim litigation (50%), although higher than airline crash litigation (14%). On this basis, the study concluded that "the transaction-cost share generated by the [CERCLA] process appears to be in the range of shares generated by tort litigation."

We do not offer these findings because we consider it likely that similar results would obtain in British Columbia if the WMAA is proclaimed. Nor do we mean to be taken to suggest that a contaminated sites liability model should be considered successful if it manages to achieve lower transaction costs than tort litigation. Indeed, in our view, this would be far too modest a goal. What these American studies do show, however, is the importance of clearly defining what we are talking about when we use the term "transaction cost" and ensuring that when we use the term we are clear about the analytical benchmarks for comparison. In attempting to answer this question, we hope we have at least done that much.

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G. Are the Liability Provisions of the Act an Improvement on the Current Legal Framework Under Part 3.1 and Section 22 of the *Waste Management Act* and the Common Law?

On paper, the contrast between the current contaminated sites liability framework under the WMA and the proposed liability framework under the WMAA is striking. The former is skeletal, consisting of a few brief provisions. The WMAA liability regime is highly comprehensive and is further elaborated in a detailed set of regulations.

On closer scrutiny, however, there are a number of functional similarities between the two legal regimes. In this section, our primary task is to assess whether the liability framework under the WMAA represents an improvement over that which currently exists under the WMA. As liability for contaminated sites among private parties may also arise through common law actions, independent of or in conjunction with the WMA, an assessment of whether the new Act improves upon these actions is also in order. We begin with an examination of the WMAA in the context of the common law. Next, we identify and discuss the common features of the WMA and the WMAA. We then identify the distinctive features of the WMAA. Finally, we offer some conclusions with respect to the question posed.

1. Does the WMAA Improve Upon the Common Law?

Common law actions relating to contamination of land provide, at best, an inadequate basis for dealing with historically contaminated sites. Of primary concern is the six-year limitation imposed by the *Limitation Act*. Where a remediating party has owned a property since 1990, and the contamination occurred prior to 1990, rights of recovery will be *prima facie* extinguished. Only by showing that they were incapable of knowing of the contamination or the identity of the polluter within the six year limitation period will a landowner be permitted to "postpone" the limitation period and bring an action. Many plaintiffs who purchased property after the mid-1980s when environmental site assessments began to be widely employed may not be able to invoke this "postponement." Longtime owners may similarly be denied access to the courts if they could have discovered the contamination before 1990. Thus, the *Limitation Act* poses a significant barrier to common law recovery of damages for historically contaminated lands.

Common law liability for contamination of property may arise under contract, trespass, negligence, private nuisance, or the tort in *Rylands v. Fletcher* ("strict liability"). Contract law focuses on only the current owner and immediately previous vendor. Consequently, either the current owner or immediately previous owner will bear the entire cost of cleanup for contamination which may have been deposited over decades by many industrial owners or operators. Beyond situations where the vendor happens to be the polluter, or where the purchaser expressly accepts liability for contamination cleanup or the discounted price of the property reflects the full costs of remediation, contract law simply cannot fairly or effectively impose responsibility for remediation.

Negligence and nuisance are also inadequate in that a plaintiff must show that the present damage (i.e. costs of remediation) was reasonably foreseeable by the past polluter. Under negligence, the plaintiff bears the additional burden of demonstrating that a polluter did not

adhere to an appropriate standard of care. Where past polluters abided by the practices and laws of the time, recovery by current owners will be highly unlikely. Recovery will be even more difficult where polluters actually held permits for their activities. Neither *Rylands v. Fletcher* nor nuisance provides firm ground for a current owner to sue previous polluter/owners of the same site, since any "escape" or nuisance will have occurred on the polluter/owner's own property. To succeed under *Rylands v. Fletcher*, a plaintiff must also show that the polluter was putting the property to "non-natural use," and that the remediation costs are a "natural consequence" of the escape. Nuisance and "environmental" trespass require that a plaintiff show interference with "reasonable use and enjoyment" of property, an ill-defined benchmark which creates uncertainty for all parties involved, particularly in its application to soil contamination.

Other problems generally arising with the use of tort actions to recover costs of remediation include the following:

- The burden of showing that the damage was caused by a polluter rests with the plaintiff. In many cases, for scientific reasons this burden will be insurmountable.
- Where multiple parties potentially contributed to the contamination, the plaintiff may have enormous difficulty demonstrating which parties actually contributed.
- Where the plaintiff is deemed to have contributed to her own loss, liability will be several and the risk of any defendant being unavailable or insolvent will remain with the plaintiff. The circumstances under which a court might so deem a plaintiff in the context of contaminated sites are unclear.

The WMAA is clearly an improvement over the common law in providing a statutory cause of action for recovery of costs of remediation. The Act allows recovery in situations where compensation would otherwise be unavailable solely by operation of the *Limitation Act*. The burden on the plaintiff of demonstrating causation is alleviated by the Act, correcting a major bias against recovery at common law. The statute nevertheless attempts to attach liability only to those truly responsible for pollution, by providing a comprehensive array of exemptions. Where the plaintiff no longer bears a burden of showing causation, these protections are essential to ensuring that innocent parties are not inadvertently swept up into joint and several liability. The provision of "minor contributor" status and voluntary remediation agreements protects responsible parties from joint and several liability in a manner unavailable at common law. The Act also corrects the inability of a current owner to recover from past owners of a single site. Further, the Act eliminates the requirement that a plaintiff demonstrate that past polluters failed to meet a duty of care, or take preventative action in the face of reasonably foreseeable damage. This principle of absolute liability is critical to a "polluter pays" approach, though it may raise concerns of fairness in some situations. The Act also gives all parties more certainty in determining when an adverse impact on a plaintiff's property gives rise to a cause of action, by replacing the amorphous common law notion of "reasonable use and enjoyment" with standards prescribed by regulation.

The only advantages which the common law may still offer over the WMAA are that damages under the common law are not limited to "reasonable costs of remediation," that the common law more clearly takes account of contractual allocations of liability, and that rights of contribution and apportionment are more clearly recognized under the common law as modified by the

Negligence Act. It is worth noting that recovery in tort for damages other than "reasonable costs of remediation" is not precluded by operation of the WMAA, and that the second and third advantages noted above could be incorporated into the WMAA without difficulty through statutory or regulatory amendment.

2. Functional Similarities Between the WMA and the WMAA

In several key respects, we anticipate that the current operation of the WMA liability regime will parallel the way that the WMAA would operate, if it is proclaimed. These include the following:

- the circumstances in which a manager may order cleanup
- the scope of defences to a manager's cleanup order
- the principle of retrospectivity
- the principle of joint and several liability

Circumstances in which a manager may order cleanup

Under both statutes, managers are given broad discretion to decide *when* to order parties to undertake remediation. As will be discussed shortly, however, the two regimes differ significantly in terms of the scope of a manager's discretion in deciding *who* to name in an order.

Defences to a manager's order

Neither under the WMA, nor under the WMAA can a party named in a manager's cleanup order resist liability by raising defences of due diligence or lawful authority. Thus, in legal terms, both are absolute liability regimes.

The principle of retrospectivity

While s. 22 of the WMA does not explicitly state that it is to operate retrospectively, both the legislative language and judicial decisions tend to support this interpretation. As a result, under the WMA a party who is named in a cleanup order incurs a liability which is retrospective. In other words, the order "looks back" (taking into account their past status or actions) and "acts forward" (attaching to that status or action new consequences - i.e. remediation responsibilities - effective as of the date of the order).

The WMAA is much more explicit in its retrospective application, but in practical terms will operate in the same fashion as s. 22 orders. Retrospectivity (or in the language of the WMAA, "retroactivity") is one of the WMAA's general principles of liability. A conceptual distinction between the WMAA and the WMA is that retrospective liability for remediation under the WMA derives solely from the s. 22 order power whereas the WMAA creates a retrospective liability which exists independently of a manager's order. Functionally, in terms of retrospective application of the WMAA manager's order power, this distinction has no impact on the liability of responsible persons. As before, their liability will be retrospective.

Where this conceptual distinction will make a difference, as discussed below, is in relation to private cost recovery actions. In this context, the existence of the principle of retrospectivity serves as the basis for a party to recover its "reasonably incurred costs of remediation" from responsible persons in the absence of a manager's order: see s. 20.41(4)

Joint and several liability

There is also substantial similarity, at least in practical terms, between the operation of the two regimes in terms of joint and several liability. As a practical matter, under s. 22 of the WMA, managers do not apportion liability. Instead, the practice is to name all parties who have substantially contributed to the contamination. Neither these orders nor the WMA explicitly purport to impose joint and several liability; however, we understand that joint and several liability is generally accepted as an implication of being named in such an order. Consequently, being named in an order often motivates parties to seek a negotiated settlement with other "responsible persons" rather than risk the uncertainties and costs of litigation.

Under the WMAA, joint and several liability is explicitly adopted as a general principle of liability. This means that, unless a manager's s. 20.5 order prescribes otherwise, all parties so named are jointly and severally liable to fulfill the terms of the order. Another implication is that "responsible persons" named in a private cost recovery suit are also presumptively jointly and severally liable.

Where, pursuant to a manager's order, a responsible person incurs more than its relative share of the total cost of carrying out remediation at a contaminated site, the WMAA provides for a statutory right of recovery against other responsible persons who have not paid their proportionate share. However, the WMAA does not provide a statutory right of recovery where the responsible person who has borne a disproportionate share of the cleanup costs is a defendant in a private cost recovery action. The WMA does not address rights of contribution.

3. Distinctive Features of the WMAA Liability Regime

In several important respects, however, the WMAA departs from the WMA liability regime. Among the key innovations found in the WMAA are:

- the definition of "responsible persons" and related exemptions from such liability
- the existence of a private cost recovery procedure
- the availability of various dispute resolution and liability capping procedures
- the scope of closure mechanisms

The definition of "responsible person"

Under the WMA, managers' orders may be made against three categories of person:

- anyone who had possession, charge or control of the pollution-causing substance at the time of its release into the environment;
- anyone who caused or authorized the pollution; or

- anyone who owned or occupied the land from which the pollution-causing substance was released, immediately prior to its release.

There are no exemptions, which would allow parties who *prima facie* fall within this broad net to escape, akin to those found in the WMAA (i.e. secured creditors, innocent owners, minor contributors).

The operative concept under the WMAA is "responsible person." A manager may make a s. 20.5 order against any responsible person, defined as follows:

- a current owner or operator of a contaminated site
- a previous owner or operator of a contaminated site
- producers of substances which caused contamination at the site
- transporters or arranger of transport of substances which caused site contamination
- a person who is in a class designated in the regulations as being responsible for remediation (no classes have been designated in the draft regulations)

The potentially wide ambit of this liability net is reduced considerably by virtue of over twenty exemptions to the definition of "responsible person" prescribed in detail by the WMAA and regulations. Accordingly, a party can be relieved of liability flowing from being named as a "responsible person" by proving that they fit into one of these exemptions. Guidance as to when a manager should exercise the discretion to name a responsible person is also provided by Ss 20.5(3) and (4).

The private cost recovery procedure

Another significant innovation in the WMAA lies in the ability of a party "who incurs costs in carrying out remediation at a contaminated site" to pursue an action against "responsible persons" for the recovery of "reasonably incurred" remediation costs. Actions of this kind are a corollary of the "general principles of liability" set out in the WMAA. Critical in this regard is the principle that "responsible persons" are retrospectively liable for "reasonably incurred costs of remediation," in relation to the contaminated site with which they were formerly involved, independent of a manager's order.

Dispute resolution and liability capping procedures

One of the main criticisms of the WMA is the absence of procedures that assist parties to ascertain and settle their liabilities outside of court. In apparent response to these concerns, the WMAA contains a variety of mechanisms intended to help responsible parties avoid being drawn into costly and unpredictable litigation. Four features of the WMAA deserve mention in this regard:

- The existence of the allocation panel provision allows responsible persons to seek the opinion of an independent, expert tribunal on various liability-related questions with a view to promoting early negotiated dispute resolution and efficient site cleanup.

- The availability of the "minor contributor" designation facilitates the early and efficient "exit" from potentially protracted liability battles by *de minimus* contributors.
- Early discharge from liability for responsible persons would also be available by way of a voluntary remediation agreement negotiated with, and entered into by, a manager.
- Proactive steps aimed at cleaning up a site and obtaining a certificate of compliance without the waiting for the site to be designated "contaminated" or being ordered to perform remediation would be facilitated under the "independent remediation" provisions.

Closure mechanisms

A final area in which the WMAA departs from the WMA concerns the procedures governing certificates of compliance. Under amendments to WMA passed in 1990, managers were empowered to issue a certificate of compliance to a party who had remediated a contaminated site to the manager's satisfaction. The open-ended nature of this provision has been criticized on the basis that it is too discretionary and uncertain, and that it has the potential for being inflexible to the extent that it does not expressly authorize alternative remediation techniques. WMAA attempts to respond to these concerns in two ways:

- A responsible person would be authorized to develop a remediation plan and have it reviewed by a manager with a view to having the plan given an "approval in principle": s. 20.71(1).
- A responsible person would be given a choice as to the method of remediation. The two options would be a risk-based remediation approach (which would typically be less costly and entail containment as opposed to removal of the contamination) or numerically-based remediation (which would typically entail contaminant removal and/or soil treatments).

4. Is the Liability Regime Under the WMAA an Improvement Over the Current WMA Regime?

In analyzing this question, we have compared the two liability regimes on the basis of three criteria: certainty, efficiency and fairness. Our conclusion is that in all of these respects, the WMAA represents a significant improvement over the present WMA regime.

Some of the most significant improvements relate to certainty. The WMA liability regime has been characterized by uncertainty with respect to both the applicable legal principles and when liability is triggered and who is potentially liable. The WMAA would eliminate much of this uncertainty by specifying the applicable legal principles and by providing detailed and comprehensive descriptions of "who is in" and "who is out" of the liability net. The WMAA also provides enhanced certainty in terms of the process of obtaining certificates of compliance.

Even after proclamation of the WMAA, however, some uncertainties will remain. Among these are the questions of when a manager should be entitled to make a cleanup order, the ambit of judicial power to apportion, and the availability of contribution rights. There are also new uncertainties associated with the introduction of the private cost recovery provision. On balance, however, the WMAA relieves much more uncertainty than it creates. And although it could be

even more effective in terms of promoting clarity and predictability, there is no question that in terms of certainty it is superior to the WMA.

Conceptually, certainty is closely related to efficiency. In section F, we analyzed whether implementation of the WMAA liability regime would lead to undue transaction costs. We defined "transaction costs" as being the costs associated with identifying, interpreting and applying (including disputing over) the legal liability rules, as opposed to costs associated with actually cleaning up contamination. Although, in our view, it is impossible to predict with any certainty what transaction costs under the WMAA will be in absolute terms, we have concluded that in relative terms they were likely to be significantly less than under the WMA. We are aware that there is some expectation within the Ministry that the private cost recovery action will also enhance efficiency by harnessing market forces for environmental cleanup. At this juncture, however, we believe it is too early to assess whether this will prove to be the case. Leaving aside private cost recovery, however, we are persuaded that the liability regime of the WMAA will operate more efficiently than its predecessor regime.

The final criterion is fairness. Fairness can be enhanced by certainty, just as uncertainty can lead to unfairness. We have heard the following various complaints of unfairness levelled against the current liability regime under the WMA: that parties do not know whether they will end up falling inside or outside the liability net; that dispute resolution mechanisms are ineffectual or non-existent; that minor players can get carried along for a long and expensive ride on the liability merry-go-round; and that procedures for negotiating one's way out of liability tangles are undeveloped. As discussed above, the WMAA responds to all of these criticisms. Clearly, however, questions remain as to the likely effectiveness of some of these responses. Moreover, as we pointed out in section C, there are several fairness issues that are not fully addressed by WMAA. In our view, among the most pressing of these is the need for a clearer articulation of the rules concerning apportionment and contribution. On balance, however, in terms of fairness we reach the same conclusion: although as it currently stands the WMAA could be improved, there is no doubt that it represents a significant improvement on the current regime.

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Part IV: Conclusions and Recommendations

Joint and Several Liability

It is possible, given explicit statutory adoption of the joint and several liability principle in s. 20.41(1), that courts will consider that their power to apportion liability has been fettered. In our opinion, where it is justified on the evidence, it is desirable that liability be apportioned among the defendants and, if appropriate, among the plaintiff and the defendants.

We therefore recommend:

- *that the WMAA or regulations be amended to affirm the judicial power to apportion liability where the harm is divisible*

We have concluded that it is uncertain whether a joint and severally liable responsible person has a right of contribution against other responsible persons who are parties to the proceeding. To advance the polluter pays policy it is critical that rights of contribution be clearly recognized and readily enforceable. This right of contribution should be available against any other responsible person, including against the plaintiff in a private cost recovery action.

We therefore recommend:

- *That the WMAA or regulations be amended to affirm that joint and severally liable responsible persons are entitled to seek contribution from any other responsible person in accordance with the procedures followed under section 4 of the Negligence Act.*
- *That, for the purposes of allocating these rights of contribution, the WMAA or regulations should be amended to direct courts to consider causation-related factors including the defendant's degree of involvement in the contamination and the nature and quantity of contamination at the site attributable to that person; relative diligence; any remediation measures taken by the defendant; and other factors relevant to a fair and just allocation.*
- *That the issue of orphan shares be revisited, as part of a general review of the legislation, three years after proclamation of the WMAA.*

Liability of Directors, Officers and Employees

We have concluded that the definition of "operator" broadens the liability of directors, officers, employees and agents beyond that which would otherwise exist at common law. Stakeholders have expressed concern about this expansion of liability, particularly in that the WMAA does not provide for a due diligence defence, operates retrospectively and may be relied on as a basis for pursuing compensation in private cost recovery actions.

We therefore recommend:

- *That, in private cost recovery actions, the plaintiff should be required to prove that the "director, officer, employee or agent of a person or government body authorized, permitted or acquiesced" in the activity giving rise to the liability, and that the WMAA or regulations be so amended.*
- *That the Ministry develop and publish a policy statement describing the circumstances in which a manager's order under s. 20.5 would name a "director, officer, employee or agent of a person or government body."*

Liability of parent corporations for contamination attributable to subsidiaries

We have concluded that the definitions of "owner" and "operator" broaden the liability of parent corporations for the acts or omissions of their subsidiaries beyond that which would otherwise exist at common law. We have concluded that this expansion of liability may well be justifiable on the basis of the polluter pays principle. But we are also of the view that there is a need to clarify the ambit of this liability in the interests of certainty and minimizing transaction costs.

We therefore recommend:

- *That, in private cost recovery actions, where the parent of a subsidiary corporation is sued, the plaintiff should be required to prove that the parent "authorized, permitted or acquiesced" in the activity giving rise to the liability, and that the WMAA or the regulations be so amended.*
- *That the Ministry develop and publish a policy statement describing the circumstances in which a manager's order under s. 20.5 would name the parent of a subsidiary corporate "responsible person."*

Manager's Orders under s. 20.5

We understand that the Ministry expects its managers to use s. 20.5 remediation orders as a last resort, where other approaches aimed at achieving voluntary remediation by the responsible parties have been tried and failed. We have concluded that there is considerable value in translating this expectation into legal language. We appreciate that it may be difficult to anticipate in advance all of the situations in which use of the s. 20.5 power could be justified in the public interest. However, we conclude that this does not justify delegating a virtually unfettered power to make s. 20.5 orders to managers, particularly given the potential for inconsistency to emerge in the use of this power in different regions of the province.

We therefore recommend:

- *That a regulation describing the circumstances in which a manager is justified in invoking the s. 20.5 order power be enacted or, alternatively, that the Ministry develop and publish a policy statement on this subject.*

We have concluded that, where it is justified on the available evidence, managers should apportion liability among the responsible persons who are named in a s. 20.5 order. In our opinion, there is no legal barrier preventing managers from apportioning in these circumstances; such a power implicit in s. 20.5.

We therefore recommend:

- *That the Ministry develop and publish a policy statement confirming that managers will apportion liability in s. 20.5 orders, where apportionment can be justified on the available evidence.*

Appeals and Judicial Review

We do not anticipate that proclamation of WMAA will lead to a volume of litigation similar to that experienced in the United States following proclamation of CERCLA. Consequently, we do not recommend reforming existing appeal and judicial review procedures at this time. We do, however, see merit in revisiting the question of the adequacy of these appeal and judicial review procedures after we have the benefit of some experience under the WMAA regime.

We therefore recommend:

- *That the adequacy of the WMA regime's appeal and judicial review procedures be revisited, as part of a general review of the legislation, three years after proclamation of the WMAA.*
- *That a consequential amendment be made to sections 27(1) and 28(1) of the Waste Management Act to confirm that the appeal procedures under the WMA apply to the new "decision" powers created by the WMAA.*

Certificates of Compliance

We believe there is a need to reassure stakeholders that a manager will not require the holder of a certificate of compliance to engage in further remediation except in exceptional circumstances. Accordingly, while we are not persuaded that a manager should be precluded from going behind a certificate, we have concluded that certainty and fairness requires that the Ministry develop and publish a policy statement describing the exceptional circumstances in which such an action would be justified.

We therefore recommend:

- *That the Ministry develop and publish a policy statement describing the exceptional circumstances in which it might be appropriate for a manager to require the holder of a certificate of compliance to engage in further remediation.*

Unintended Impacts on Business and Government

The regulations may require a receiver/receiver-manager or trustee to terminate his or her involvement in a contaminated site, even though it may be desirable to continue to have the receiver/receiver-manager or trustee involved.

We therefore recommend:

- *That s. 24 of the regulations be amended to clarify that receiver/receiver-managers may continue to be involved in remediation even if there are insufficient available funds.*
- *That s. 24.1(5)(b) of the regulations be amended to clarify that a trustee may be involved in ongoing trust administration duties where the trust property is transferred to the government in trust for remediation.*

Potential for Windfall Profits

The Act has the potential to generate windfall profits where a vendor sells a contaminated site at a discount equal to the costs of remediation and the purchaser remediates and then seeks to recover the costs of remediation from other responsible persons under s. 20.41(4).

We therefore recommend:

- *That a section be added to the regulations stating that a defendant to a private cost recovery action may assert all legal and equitable defences and any rights under agreement or statute.*

We have also concluded that it is not clear, given the general principle stipulated in s. 20.41(1) that responsible persons are absolutely liable for remediation, whether defences are available to defendants in a s. 20.41(4) cost recovery action.

We therefore recommend:

- *That, for the purposes of allocating rights of contribution in private cost recovery actions, the WMAA or regulations should be amended to direct courts to consider private agreements and price paid for the site relative to its market value at the time of sale if it had been remediated.*

General

Given the complexity of the WMAA liability regime, its impacts on business and other stakeholders, and the persistence of skepticism about its merits and practicality (among at least some segments of the stakeholder community we consulted), we are of the view that a general review of the operation of the liability regime should be undertaken in three years time. The mandate of that review would be to evaluate how effectively the regime has operated in terms of promoting the polluter pays principle. It would also consider how effectively the regime has promoted other values, including certainty and fairness, paying particular attention to areas of concern identified in this report. Based on the foregoing, the review would offer recommendations for law or policy reform, if necessary.

We therefore recommend:

- *That the Ministry commit itself to undertaking a general review and evaluation of the WMAA liability regime to be commenced on the third anniversary of proclamation of the legislation.*

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Appendices

Appendix A: Stakeholer Consultation Meetings

1. Lenders: Vancouver, June 11

Peter J. Carter, *Government Relations & General Counsel*, Credit Union Central of BC

Agnes D. Finan, *Regional Director BC & Alberta*, Canadian Bankers Association

Wayne L. Procter, *Manager, Lending Services*, Credit Union Central of British Columbia

Rod Snow, *Counsel for Canadian Bankers Association and Credit Union Central of BC*, Davis & Co. [via teleconference]

Victoria G. Wong, *Senior Counsel*, Royal Bank

2. Insurance: Vancouver, June 11

Keith Frew, *Manager, Communications Services*, Insurance Bureau of Canada

Kim Hamilton, *Manager, Casualty*, Munich Reinsurance Company of Canada

P. J. Hughes, *Manager, Commercial Lines*, General Accident Assurance Company of Canada

Janice Wavrecan, *District Manager, Commercial Lines Division*, Royal Insurance

3. Wills & Trusts Subsection, BC Branch, Canadian Bar Association: Vancouver, June 11

Kathleen Cunningham, Royal Trust

Marilyn Kerfoot, Royal Trust

Gordon MacRae, Douglas Symes & Brissenden

4. Canadian Petroleum Products Institute: Calgary, June 13

Lynn Calder, *Specialist, Assessment and Remediation*, Shell Canada

Gene Carigran, *Manager, Business Integration Industry & Govt. Relations*, Petro-Canada

Jan Clark, *Legal Department*, Shell Canada

5. Urban Development Institute: Vancouver, June 14

MaryJo E. Campbell, Ladner Downs

Maureen B. Enser, *Executive Director*, Urban Development Institute Pacific Region

Jim Malick, *Manager, Western Canadian Operations*, Norecol, Dames & Moore, Inc.

Sophie Megalos, *Municipal Liaison Officer*, Urban Development Institute Pacific Region

6. Business Council of British Columbia: Vancouver, June 14

Deborah Bisson, *Senior Advisor, Environmental Affairs*, Westcoast Energy Inc.

Phil de Leeuw, *Environmental Advisor*, Imperial Oil

Jock Finlayson, *Vice President--Policy & Analysis*, Business Council of BC

Martin Kyle, *Partner*, Lawson Lundell, Barristers and Solicitors

Brian Lockhart, *BC Regional Manager*, Canadian Chemical Producers' Association

Brian McCloy, *Vice President, Environment*, Council of Forest Industries

Deborah Overholt, *Associate*, Ladner Downs

David Parker, *Manager, Regulatory and Public Affairs*, Cominco Ltd.

David Pryce, *Manager, Environment and Operations*, Canadian Association of Petroleum Producers

Ken Sumanik, *Director, Environment & Land Use*, Mining Association of BC

7. Utilities: Vancouver, June 14

John Condon, *Environment Department*, BC Tel

8. Canadian Association of Petroleum Producers: Victoria, June 19

Rusty Miller, *Senior Regulatory Counsel*, Petro-Canada

9. Municipalities / Municipal Insurers: Vancouver, June 20

Ken Olive, *Executive Director*, Municipal Insurance Association of British Columbia

John Singleton, Municipal Insurance Association of British Columbia

Ken Vance, *Senior Policy Analyst*, Union of British Columbia Municipalities

10. Westcoast Environmental Law Association: Vancouver, June 20

Bill Andrews, *Executive Director*, Westcoast Environmental Law

Patricia Houlihan, *Staff Counsel*, Westcoast Environmental Law

11. City of New Westminster: Vancouver, June 21

Her Worship Mayor Toporowski

Peter Abley, *Manager, Building & Development Division*, City of New Westminster

Pat Connolly, *City Engineer*, City of New Westminster

Michael McAllister, *Solicitor*, MacKenzie, Murdy, & McAllister

12. BC Insolvencies Association: Vancouver, June 25

Roger S. F. Burgon, *Partner*, Price Waterhouse

Vincent Morgan, Davis & Company

Larry W. Prentice, *Senior Vice-President*, Ernst & Young

13. Council of Forest Industries: Vancouver, June 25

Caroline Findlay, *Corporate Counsel*, MacMillan Bloedel Limited

Brian McCloy, *Vice President, Environment and Energy*, Council of Forest Industries

Rick Young, *Supervisor, Environmental Assessments*, Macmillan Bloedel Limited

14. Canadian Petroleum Products Institute: Victoria, June 27

Philip P. de Leeuw, *Environmental Specialist, Engineering Services*, Imperial Oil

Robyn Roscoe, *Environmental Coordinator*, Chevron Canada Limited.

Allan P. Stolz, *Senior Advisor, Environment and Safety*, Petro-Canada

Appendix B:

Contact Pollution Prevention, and Remediation Branch for this Information

Appendix C: Statutes by Jurisdiction

Alberta

Environmental Protection and Enhancement Act, S.A. 1992, c. E-13.3

Saskatchewan

Environmental Management and Protection Act, SS 1984-84, c. E-10.2.

Manitoba

Proposed: *Contaminated Sites Remediation and Consequential Amendments Act* (Bill 34), introduced May 28, 1996.

Ontario

Environmental Protection Act, R.S.O. 1990, c. E 19

Quebec

Environment Quality Act, R.S.Q. 1977 c. Q-2

Nova Scotia

Environment Act, S.N.S. 1994-95, c. 1

New Brunswick

Clean Environment Act, R.S.N.B. 1973, c. c-6

PEI

Environmental Protection Act, R.S.P.E.I. 1988, c. E-9

Newfoundland

Waste Material Disposal Act, R.S.N. 1990, c. W-4

England

Environment Act, 1995 s. 57

USA - federal

Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")

42 USC §§9601-57

California

California Hazardous Substance Account Act, Cal. Health & Safety Code 25323 *et seq*

California Expedited Remedial Action Reform Act of 1994, Cal H & S Code 25396 *et seq*

Oregon

Hazardous waste and Hazardous Materials, ORS 465.200-465.455 (1995)

Washington state

Model Toxics Control Act, WAC 70.105D

Ohio

Voluntary Action Program, Ohio Rev. Code Ann. §§3746.01-3746.99 (Anderson 1994).

New Jersey

Spill Compensation and Control Act, NJ Stat Ann §§58:10-23.11 to 23.11z (West 1992 & Supp 1994)

Industrial Site Recovery Act, NJ Stat. Ann §§13:1K-6 to -35 (West 1996).

Michigan

Natural Resources and Environmental Protection Act ("NREPA"), MCL 299.20101, et

seq., and 1995 PA 71

Queensland (Australia)

Contaminated Land Act 1991 [No. 96, 1991 QA]

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