

Toxic Real Estate In British Columbia: Liability

by WALDEMAR BRAUL Barrister &
Solicitor

edited by ANN HILLYER Barrister &
Solicitor Staff Counsel



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EXECUTIVE SUMMARY

This report is the second of a three part series on toxic contamination of land in British Columbia. Volume I identifies the key issues involved. Volume III sets out a draft statute on prevention and clean-up of pollution. Volume II, this report, discusses the main principles governing liability for contaminated land in British Columbia today. It is organized according to four broad areas of liability: the real estate transaction, the development process, pollution torts, and statutory liability.

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Chapter One introduces the subject. Land and buildings -- real estate -- are "toxic" if they are contaminated with substances that pose a significant threat to natural ecosystems or to human health and well-being. The report focuses on the legal uncertainties, but the subject is fraught with other uncertainties as well. Where are the contaminated sites and how contaminated are they? What conclusions can be drawn from toxicity and other tests? Can test results be extrapolated? What will be the likely effects of short-term and long-term exposure to certain substances? How fast will contaminants break down without intervention and what will be the toxicity of the breakdown products? To what extent are "synergistic" effects likely? What constitutes appropriate clean-up standards?

Types of contamination common in B.C. include industrial sites, community landfill sites, buildings and facilities containing toxics such as PCBs or asbestos, leaking underground storage tanks, and farms or other areas treated with chemical pesticides and herbicides.

Chapter Two focuses on liability in the real estate transaction. The main conclusion of this chapter is that in the absence of express terms in the contract of purchase and sale the basic rule is *caveat emptor* -- buyer beware -- subject to traditional exceptions. But, in the few cases which have proceeded thus far, the courts have sympathized with purchasers who unwittingly purchase contaminated property. To provide relief from the rule of *caveat emptor* in situations involving contaminated land, the courts consider:

- the doctrine of fraud, where the vendor has deliberately or recklessly failed to disclose material defects;

- the doctrine of error *in substantialibus*, where the vendor makes an innocent but important misrepresentation about a problem with the property; and
- the tort doctrine of negligence, which may apply where a vendor/developer acts unreasonably while selling defective new homes.

However, *caveat emptor* is still the basic rule and purchasers should take precautions to avoid problems rather than relying on possible legal remedies. Both purchasers and vendors should consider making investigations prior to a transaction. They should carefully structure the agreement to clarify the respective responsibilities for potential or actual contamination problems. Drafting warranties and representations is a critical step, and if there may be a contamination problem a lawyer should be consulted.

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Real estate agents are in a particularly vulnerable position at the centre of a real estate transaction. They owe duties to their principals -- typically the vendor -- in both contract law and the law of agency. They are also bound by the law of negligent misrepresentation regarding statements which may be relied upon by third parties, such as prospective purchasers or lenders. Also, a realtor's employer may be vicariously liable for the realtor's fraud or negligent misrepresentation. A summary of considerations for realtors is set out in Figure 1.

In addition to realtors, a variety of other parties could be drawn into litigation arising from a transaction involving contaminated real estate: lawyers, environmental consultants, land assessors, lending institutions and receivers.

Chapter Three examines liability issues in the context of development or redevelopment of real estate. Municipalities in British Columbia generally are responsible for regulating the development of land. While provincial legislation sets out municipal powers for a number of land use planning matters, it is silent on municipal regulation of contaminated land.

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In response to this uncertainty, municipalities have established an ad hoc procedure of referring development applications to the Waste Management Branch of the B.C. Ministry of Environment for review. The Waste Management Branch, in turn, relies on two sources to assess contamination: the Pacific Place Standards, and the Special Waste Regulation under the Waste Management Act.

Both sources are far from ideal. The Pacific Place Standards serve only as guidelines, and thus have no legal force. Moreover, the Pacific Place provisions must be adapted to other conditions, which are highly variable. This leaves owners and developers uncertain as to the necessary degree of clean-up -- and cost -- until the conclusion of negotiations with the Branch. The Special Waste Regulation is not designed to deal with historically contaminated sites and, therefore, has limited application as a guide for the clean-up of these sites. These uncertainties take on considerable importance given the potentially enormous costs of cleaning up contaminated sites.

In addition, Chapter Three covers three key liability issues that arise in the development process. It concludes that:

- *Whether municipalities or the provincial government can be held liable for negligent assessment of a contamination problem depends on whether a court would characterize the error in question as a policy decision or an operational decision. But this distinction is difficult to predict in*

- advance, and municipalities and government agencies should exercise prudence by assuming that any decision or action could attract liability if it is negligent.*
- *Whether developers or others are legally obligated to meet clean-up standards set by the Waste Management Branch based on the Pacific Place Standards is not beyond doubt, because these Standards are merely internal government guidelines and have no specific legislative basis. Municipalities generally lack statutory authority to require developers to meet particular requirements in relation to potential contamination problems. But, as a practical matter, municipalities are not obligated -- except regarding building permits -- to approve an application where the developer ignores or challenges these procedures. Nevertheless, the role of municipalities in dealing with contaminated land problems should be clarified by legislation.*
 - *Whether municipalities have a duty to disclose information in their possession about contamination problems depends on the situation. There is no general provincial "Access to Information Act" in B.C. Nor is there a general obligation to disclose information imposed by the Municipal Act. However, where a municipality responds to a request for information -- as municipalities routinely do -- it may be held liable for damages caused by its negligent failure to provide complete information. Moreover, a municipality often has a duty to disclose information relevant to a statutorily-required hearing or meeting.*

Chapter Four discusses so-called pollution torts. A tort is a wrong done by one party to another, which gives rise to a right to sue for damages, an injunction or other judicial relief. The common law of tort is a critically important source of remedies for victims of contamination, because the relevant provincial and federal statutes do not provide a comprehensive regime for dealing with the liability issues. The key torts are private nuisance, negligence and the principle of Rylands v. Fletcher. Despite its importance, tort law contains numerous inherent limitations. Establishing causation -- that the defendant caused the harm to the plaintiff -- is often the most difficult problem for plaintiffs.

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Chapter Five examines pollution statutes in relation to contaminated land in B.C. Both provincial and federal statutes are in force, but they focus on on-going sources of pollution rather than contamination which has already occurred.

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The provincial government's authority to require a person to clean up a contaminated site, under section 22 of the Waste Management Act, definitely applies to persons who caused the pollution on or after April 6, 1977. But there is some doubt that it applies to persons whose polluting activity occurred prior to that date.

*When a person attempts to have land approved for development, potential contamination problems are addressed through the procedures discussed in Chapter Three. But where land is not slated for redevelopment there are some problems with the statutory requirements for clean-ups. One is that the Ministry of Environment lacks the power to require a person to provide information or to investigate where the Ministry **suspects** there is a contamination problem but lacks "reasonable grounds" to be **satisfied** that there is pollution -- the trigger for the Ministry's power to order a clean-up. A second problem is that the Waste Management Act allows the Ministry to require multiple parties to clean up a contaminated site, but does not contain provisions for allocating their respective shares of the cost. Nor does the Act allow the Ministry to recover its costs where it takes measures in place of a party which has failed to comply with a clean-up order. Another problem is that generally speaking the legislation restricts reporting requirements to "special wastes" -- the most hazardous substances -- and does not require reporting of the existence of other contaminants that are less hazardous but nevertheless may cause problems. Lastly, the pollution legislation applicable in B.C. -- both provincial and federal -- includes provisions imposing liability for **offences** on a broad range of parties who allow or contribute to an offence. However, the Ministry of*

Environment's power to issue a clean-up order under the Waste Management Act was held not to apply to a landlord who was innocent and unaware of polluting activities by its tenant.

Clean-up operations are governed by two regimes. The Special Waste Regulation under the Waste Management Act provides detailed standards governing storage and disposal of waste that meet the criteria for special wastes. Clean-up of contaminated land is also covered by the general requirement in the Waste Management Act to obtain a permit to dispose of waste.

Two key defences to charges under provincial or federal pollution legislation in B.C. are 'due diligence' and 'officially induced error.' The statutes expressly provide that it is a defence to a charge if the accused person took reasonable care -- due diligence, or similar wording -- to prevent the occurrence of the offence. A defence may also be available where an accused person reasonably relied upon the erroneous legal opinion or advice of an official.

Chapter Six sets out conclusions. Liability for contaminated land in B.C. stems from contract law, tort law and statute law. A wide range of parties may be liable, and the law is characterized by a relatively high degree of uncertainty. Awareness of potential contamination problems is the single most important defence against incurring liability. The law itself is in flux. Both the case law and the legislation are expected to develop rapidly in the near future.

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PREFACE

The [West Coast Environmental Law Research Foundation](#) (WCELRF) is a non-profit, charitable society devoted to legal research and education aimed at protection of the environment and promotion of public participation in environmental decision-making. It operates in conjunction with the West Coast Environmental Law Association (WCELA), which provides legal services to concerned members of the public for the same two purposes.

Since the founding of the WCELA in 1974, both organizations have dealt with toxic contamination issues on innumerable occasions. The problem is not new. What is new is the widespread concern about toxic contamination among the general public, in business and in government. This concern reflects society's rapidly expanding environmental awareness, as well as a growing recognition of the potentially enormous financial costs of failing to properly handle our toxic waste. The failure to properly handle toxic waste is vividly shown at the Expo '86 site: decades of polluting industries have left a legacy of contamination which will require millions of dollars to clean up. Many other sites have also been found to be contaminated from improper disposal of hazardous substances.

WCELRF has in recent months addressed the issues of toxic contamination of land and buildings. In September 1989, WCELRF published *Toxic Real Estate in British Columbia: Identification of Issues*, the first report in a series of three. This first report identified as a major concern the general question of "who pays?" It also noted the glaring absence of legislation to comprehensively deal with the problems of historically contaminated property. It was beyond the scope of that first report to assess these issues in any depth.

This report, the second of the series, focuses on liability for cleaning up the toxic contamination of land and buildings. It is not intended to be a comprehensive, technical legal document. Rather, the intent of this report is to present the salient issues and principles of liability in a readable, layperson's format. It is intended to be an educational resource for persons interested in contaminated land or buildings, or for persons who are looking for solutions to contamination problems. This report, it is hoped, will make readers more aware of the specific steps they might take to protect themselves against liability and will allow readers to identify the parties who may be responsible for cleaning up a contamination problem.

The third volume of this series, *Toxic Real Estate in British Columbia: Draft Statute for Discussion*, will present a draft model statute to promote discussion regarding law reform issues. It will be published in July, 1990.

The B.C. government recently announced that it intends to pass legislation dealing with contaminated land problems. Such legislation has not yet been tabled. It is hoped, however, that the three reports in this series will serve as a basis for constructive discussion of this issue.

The views expressed in this report are those of the author alone.

Finally, readers are reminded that this report is educational and does not constitute legal advice. Readers concerned about liability in a particular situation are urged to seek legal advice from a lawyer.

Waldemar Braul

Vancouver, June 1990

Chapter 1 - INTRODUCTION

1.1 THE TYPES OF LIABILITY

Toxic Real Estate in British Columbia: Identification of Issues, published in September 1989, identified numerous growing concerns about the toxic contamination of land and buildings in British Columbia. The central question raised in that report was straightforward: "Who must take the steps -- and pay the bills -- to clean up the contamination?" [(1) -- 1. . W. Braul, J. Russell and W.J. Andrews, *Toxic Real Estate in British Columbia: Identification of Issues*, [West Coast Environmental Law Research Foundation](#), Vancouver, 1989, at p. 2.] However, the report concluded that, "Numerous complex legal principles govern liability for cleaning up toxic real estate." [(2) -- 2. . *Ibid.*, at p. 25.] This report examines those principles of liability in greater depth. It identifies the major areas of potential liability in order to promote the prevention of liability and to help reduce the uncertainty surrounding this topic. We trust that this will result in greater remedial action to clean up contaminated land.

Numerous complex legal principles govern liability for cleaning up toxic real estate.

This report analyses four main areas where liability for cleaning up contaminated land may arise:

- *during the real estate transaction;*
- *during the redevelopment process;*
- *where neighbours or subsequent owners of contaminated real estate take action; and*
- *where certain provisions of pollution statutes apply.*

Chapter Two discusses how liability arises in the real estate transaction. Exceptions to the traditional rule of "buyer beware" (or caveat emptor) often apply in the sale of contaminated property. Moreover, potential liability is not limited to the vendor of contaminated property -- it also can extend to the realtor, appraiser, environmental consultant, lawyer, and lender.

Chapter Three examines how liability for clean-up costs may arise during the redevelopment process. It describes a recently-instituted procedure in which municipalities and the British Columbia Ministry of Environment require assessments and clean-ups of contaminated sites by prospective developers. This chapter focuses on three issues arising from the new procedure:

- *whether there is adequate statutory authority for municipalities and the provincial government to require that developers conduct assessments and clean-ups;*
- *whether municipalities and the provincial government can be held liable for negligent assessment of contamination; and*
- *whether municipalities must disclose information respecting contamination.*

Chapter Four focuses on how victims of contamination can use the common law of tort to sue the owners and occupiers of polluting property. For instance, persons suffering leachate pollution from neighbouring contaminated land increasingly will look to tort law for remedies, given the high costs of clean-up. Also, current owners of contaminated land may seek tort remedies against former owners.

Chapter Five discusses the application of pollution statutes and, in particular, the retroactive effect of sections authorizing the provincial government to order clean-ups, the requirements governing clean-up operations, and some of the defences available to persons charged with pollution offences. Again, potential liability extends not only to current polluters but also to past polluters and current and past owners, occupiers and others, including lenders, who exercised control or management of contaminated land and buildings.

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Chapter Two through Chapter Five illustrate that substantial areas of uncertainty exist in the law governing liability. Such legal uncertainty is not entirely surprising. Issues concerning toxic contamination of land have only recently caught the attention of the public and legislators. During the past decade, Love Canal, the Expo '86 site contamination, and the Saint-Basile-le-Grand PCB fire have made the public aware of the problems associated with toxic contamination of land. However, many of the issues related to legal liability in this area have not yet been settled. [(3) -- 3. . A draft model statute to promote discussion regarding law reform issues will be presented in Toxic Real Estate in British Columbia: Draft Statute for Discussion, the third volume of the Toxic Real Estate series.]

The remainder of Chapter One includes, as background, a discussion of issues related to toxic contamination of land, such as the concept of toxicity and the problem of uncertainty. It also identifies a number of different types of contaminated sites. [(4) -- 4. . These subjects are treated more thoroughly in Toxic Real Estate in British Columbia: Identification of Issues, supra, note 1.]

1.2 WHEN IS REAL ESTATE ``TOXIC''?

Real estate, comprising land and buildings, is ``toxic" if it is contaminated with substances that pose a significant threat to natural ecosystems or to human health and well-being. Common contaminants of land and buildings include heavy metals such as chromium, lead and arsenic; industrial pollutants such as polycyclic aromatic hydrocarbons (PAHs) and pentachlorophenols (PCPs); and products such as polychlorinated biphenols (PCBs) and asbestos. These and many other contaminants are considered toxic substances, that is, substances which cause ``temporary or permanent adverse effects in living organisms or their offspring, such as behavioural abnormalities, cancer, genetic mutation and physiological or reproductive malfunctions." [(5) -- 5. . P. Muldoon and M. Vallente, Toxic Water Pollution in Canada: Regulatory Principles for Reduction and Elimination, The Canadian Institute of Resources Law, Calgary, 1989,

at p. 10.]

Real estate ... is ``toxic" if it is contaminated with substances that pose a significant threat to natural ecosystems or to human health and well-being.

1.3 THE PROBLEM OF UNCERTAINTY

In addition to the problem of legal uncertainty, there are several other unanswered questions in relation to toxic contamination of land.

Where are the contaminated sites and how contaminated are they?

To date, no one has undertaken a comprehensive study documenting the extent and degree of contamination of land and buildings in British Columbia. No agency or public body has compiled an inventory of contaminated sites, although the Province has completed an inventory of PCB storage sites. [(6) -- 6. . ``British Columbia Inventory of PCB Waste in Storage", June 26, 1989 (B.C. Ministry of Environment).] Moreover, there is no central registry or data bank which compiles the information that does exist. [(7) -- 7. . Compiling a comprehensive list of contaminated sites would be difficult, especially for old industrial sites, given that government concern for close monitoring of pollution discharges has arisen only in the past two decades.]

What conclusions can be drawn from toxicity tests?

*There is often sharp scientific debate over the validity of tests of the toxic effects of a particular contaminant. In addition, while more studies do not always result in greater consensus, the resources committed to the production of new chemicals have far outstripped the resources allocated for testing their environmental and health effects. [(8) -- 8. . S. Epstein, *The Politics of Cancer*, rev. ed., Anchor Press/Doubleday, New York, 1979, at p. 27. In 1979, Epstein estimated that 700 new chemicals were being added annually to the 55,000 chemicals already in use in North America.]*

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Can test results be extrapolated?

Debate also arises about whether tests of a contaminant on certain species at certain concentrations can be used to draw conclusions about the likely effect of the contaminant at other concentrations and on other species.

What will be the likely effects of short-term and long-term exposure to certain substances?

The adverse effects of many toxic substances on humans or other species, especially at the levels often found in polluted soil, may not appear for decades after exposure. This makes it exceedingly difficult to reach definitive conclusions about cause-and-effect relationships.

How fast will contaminants break down without intervention, and what will be the toxicity of the breakdown products?

The rate at which contaminants break down varies considerably, depending on both the particular contaminants and on environmental conditions. With the limited state of our current knowledge, these complex processes often defy prediction. Equally problematic is the determination of the possible toxicity of the products which result from the breakdowns.

To what extent are "synergistic" effects likely?

In many situations, substances that interact with each other produce a total toxic effect which is greater than the sum of the effects of the individual substances acting independently. Therefore, it can be very difficult to determine the actual toxic effect where a site is contaminated, as is frequently the case, with more than one substance.

How clean is clean?

There is considerable debate over what constitutes appropriate clean-up standards. Determining these standards involves difficult decisions regarding the level of risk to human health and the environment that is acceptable, as well as difficult decisions regarding the allocation of scarce resources.

There is considerable debate over what constitutes appropriate clean-up standards.

1.4 TYPES OF CONTAMINATION

1.4.1 Industrial Sites

During the past century, industrial operations in British Columbia have used and discharged into the environment a large number of chemical substances. It was a common industrial practice to bury waste in a vacant portion of an industrial site, to discharge waste into a ditch or a nearby waterbody, or to leave it

at a local dump. Prospective purchasers of land that is or may have been used for industry or as a dump should be aware that studies of such sites in British Columbia have detected potentially dangerous substances such as PCBs, phenols, creosote, chromium, copper, heavy metals, arsenic, chemicals used for treating wood, notably PCPs and other chlorinated phenols and PAHs. [(9) -- 9. . T.S. Spearing and Associates, *Study of Inactive and Active Waste Disposal Sites at Federal Facilities in British Columbia*, prepared for Environment Canada, 1984; C.L. Garrett, *Arsenic: Chemicals in the Environment*, Environment Canada, 1988, at p. 16, noting a study conducted in 1986; C.L. Garrett, *Chlorophenols: Chemicals in the Environment*, Environment Canada, 1988, at pp. 21-22; C.L. Garrett, *Toxic Chemicals Profile: Summary Report*, Environment Canada, 1982.]

However, there is little data on how many industrial sites in British Columbia are contaminated and the degree of contamination on those sites. One study identified as "concerns" mercury emissions from a Kamloops smelter, fluoride and PAH emissions from the Kitimat smelter, and heavy metal releases from the Trail smelter. [(10) -- 10. . Garrett, *Toxic Chemicals Profile*, *Ibid.*] Another study identified cyanide and mercury releases in connection with gold mining operations in British Columbia. In the Trail area, arsenic levels in the soil have been found to exceed the federal health limits. [(11) -- 11. . Garrett, *Arsenic: Chemicals in the Environment*, *supra*, note 9.] Very high arsenic levels also have been found in soils in the vicinity of two abandoned mine sites in the Yukon. [(12) -- 12. . *Ibid.*]

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In recent years scientists have discovered dioxins and furans in waters near British Columbia pulp mills. [(13) -- 13. . Department of Fisheries and Oceans, *Backgrounder: Crab, Prawn and Shrimp Fishery Closures, December 1, 1988*; Health and Welfare Canada, Health Protection Branch, *Backgrounder to Health Hazard Assessment of Dioxins and Furans in Fish Sampled in Various Locations in British Columbia, May 19, 1989*; Environment Canada, *Pacific Region Pulp and Paper Industry Effluent Annual Summary, 1987*; Department of Fisheries and Oceans, *National Dioxin/Furan Fish Sampling Program: Additional Salmon Information, Ottawa, May 19, 1989*; F.T.S. Mah et al., *Dioxins and Furans in Sediment and Fish from the Vicinity of Ten Inland Pulp Mills in British Columbia*, Inland Waters Directorate, Pacific and Yukon Region, Environment Canada, 1989.] This raises the possibility that further contamination may arise when sludge from pulp mill treatment facilities is burned, disposed of in a landfill site, or used as fertilizer.

1.4.2 Community Landfill Sites

Former landfill sites contain a wide array of hazardous wastes. [(14) -- 14. . MacLaren Engineers, *Waste Reduction and Recycling in the GVRD: A Blueprint for Comprehensive Resource Management*, Vancouver, 1989.] If adequate measures are not taken to secure a landfill site, sooner or later contaminants will leach into surface and groundwaters. Landfill sites, once "capped", can become very attractive for development, including residential development. But experience shows that these sites are long-lasting sources of pollutants such as methane gas.

1.4.3 Toxic Buildings and Facilities

Polychlorinated biphenyls (PCBs) have been used extensively in buildings and facilities, primarily as coolants in electrical systems. [(15) -- 15. . For a review of PCBs in the British Columbia context see C.L. Garrett, *Polychlorinated Biphenyls (PCBs): Chemicals in the Environment*, Environment Canada, 1985. Garrett notes a number of data limitations but finds that high PCB levels have been found near certain industrial facilities, probably due to leaks or spills from electrical or hydraulic equipment containing PCBs.] PCBs were banned in new installations in the late 1970s but the removal of existing PCBs is proceeding slowly. The most serious problem associated with PCBs arises when they are involved in a fire, since uncontrolled combustion of PCBs produces the much more dangerous dioxins and furans. As buildings and facilities age, the potential threat of fire increases. [(16) -- 16. . British Columbia does not

have a treatment facility which could destroy PCBs, except at very low levels of concentration. This issue is discussed in greater detail in Toxic Real Estate In British Columbia: Identification of Issues, supra, note 1.] Until recently, PCBs were shipped from British Columbia to facilities in other provinces and countries for disposal. Increasingly, these facilities do not accept PCBs from outside their borders.

As long as asbestos remains in an undisturbed state it is only a potential threat.

Asbestos poses another serious problem in buildings and facilities. Due to its high resistance to heat and electricity, asbestos has been applied in a wide variety of uses such as insulation for electrical wiring, hot pipes, and furnaces and in the manufacture of theater curtains, residential siding, and acoustical plaster. As long as asbestos remains in an undisturbed state it is only a potential threat. However, when asbestos breaks down it forms a dust of tiny fibres in the air which can adhere to moist lung tissues, causing diseases such as asbestosis, lung cancer and mesothelioma. Litigation in the United States has resulted in a dramatic decrease in the value of property contaminated with asbestos. [(17) -- 17. . Industrial Union Department, AFL-CIO v. Hodgson, 499 F. 2d 467 (1974); Reserve Mining Co. v. EPA, 514 F. 2d 492 (8th Cir. 1975).] It is not uncommon to see real estate advertisements in the United States promoting "asbestos-free" buildings. [(18) -- 18. . W. Glenn, D. Shier, K. Sisson and J. Willms, Toxic Real Estate Manual, Corpus Information Services, Don Mills, 1988, at p. 90.]

1.4.4 Leaking Underground Storage Tanks

Underground storage tanks represent another major source of soil contamination. [(19) -- 19. . Association of Professional Engineers of British Columbia, Control of Leaking Underground Storage Tanks, Brief to the British Columbia Government, September 1989.] Many tanks, especially those installed before the mid-1970s, were constructed with little protection against corrosion and tank failure. Dealing with an underground tank is a very costly undertaking. Simple removal of an underground tank may cost in the range of \$10,000, but removal of a tank which is leaking and remediating the polluted soil or groundwater can cost much more.

1.4.5 Other Sources of Contamination

There are a variety of other sources of contamination of land. Pesticide and herbicide use may lead to contamination of land. Improper disposal of such chemicals may taint the soil or, as found in Ontario studies, the use and disposal of commonly-used chemicals such as the pesticide atrazine can pollute groundwater. [(20) -- 20. . Greenprint for Canada Committee, Greenprint for Canada, Ottawa, 1989, at p. 10.] In addition, intensive pesticide and herbicide use can destroy micro-organisms in the soil, rendering it less fertile, and contribute to soil erosion.

Other potential sources of toxic contamination of land include urban stormwater runoff and the long-range transport of airborne pollutants, which causes, for example, acid precipitation.

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Chapter 2 - THE REAL ESTATE TRANSACTION

2.1 LIABILITY OF THE VENDOR

2.1.1 Caveat Emptor

The fundamental legal basis for assessing liability in real estate transactions is the contract of purchase and sale. For example, the purchaser can protect him or herself by including in the contract of purchase

and sale express representations and warranties about the quality and condition of the subject property. However, where the contract is silent about a contentious issue, the courts apply the common law rule of caveat emptor or "buyer beware." [(21) -- 21. . Professor Bora Laskin, as he then was, stated that the harsh effects of caveat emptor are not mitigated for the purchaser even where the property is "dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms." See "Defects of Title and Quality", *Caveat Emptor and the Vendor's Duty of Disclosure, Special Lectures, Law Society of Upper Canada, 1960, at p. 389.*] Under this rule, the purchaser takes the risk of the quality and condition of the subject property.

However, where the contract is silent about a contentious issue, the courts apply the common law rule of caveat emptor or "buyer beware."

Traditionally, caveat emptor has had harsh consequences for the purchaser: [(22) -- 22. . *Geiger v. Popowich, [1949] O.W.N. 287, at p. 288.*]

[A] purchaser must form his own judgement. ... [There] is no obligation upon a vendor to disclose all known facts which may be **material** to the purchaser's judgement... (emphasis added).

Under the caveat emptor rule, the vendor does not have a duty to disclose defects which are not patently obvious before or at the time of sale. [(23) -- 23. . *Halsbury's Laws of England, Viscount Simonds, R. Hon., Editor in Chief, 3rd ed., Vol.34, Butterworths, London, 1960, at p. 213-4.*]

While caveat emptor is the general rule, it has always been subject to certain exceptions. Especially in the past decade, courts have increasingly used these exceptions -- which come from both contract law and tort law [(24) -- 24. . Although theoretically tort law and contract law are quite separate, the courts in many of the cases discussed here do not expressly state precisely which branch of the law the courts are relying on.] -- to provide relief for purchasers who unwittingly have purchased contaminated property. The main exceptions are discussed below.

2.1.2 The Doctrine of Fraud

Caveat emptor does not apply where the vendor is found to be fraudulent. [(25) -- 25. . E.A. Suderman, "Fraud", *Real Estate Litigation -- 1987, The Continuing Legal Education Society of British Columbia, Vancouver, 1987.*] "Fraud" is an "elastic concept." [(26) -- 26. . Laskin, *supra*, note 1.] It applies to situations where the vendor used deliberate ill-intent to deceive the purchaser and also to situations where the vendor showed a reckless disregard for accuracy [(27) -- 27. . Suderman, *supra*, note 5.] or a lack of candor. [(28) -- 28. . *Tuttahs and Tuttahs v. Maciak and Maciak (1980), 6 Man. R. (2d) 52 (Q.B.).*]

The doctrine of fraud, especially in recent cases, has become an important source of relief for purchasers of property with undisclosed environmental problems. In a leading case, *McGrath v. MacLean et al.* [(29) -- 29. . *McGrath v. MacLean et al. (1979), 95 D.L.R. (3d) 144 (Ont. C.A.), at p. 151-2.*], the court stated the general principle that a vendor must disclose a known material defect which is dangerous or is likely to be dangerous. [(30) -- 30. . See also *J.V. DiCasteri, The Law of Vendor and Purchaser, Carswell, 3rd ed., Toronto, 1989, at para. 239.*] The following cases illustrate this principle:

The doctrine of fraud ... has become an important source of relief for purchasers of property with undisclosed environmental problems.

- *Sevidal v. Chopra* [(31) -- 31. . *Sevidal v. Chopra et al. (1987), 64 O.R. (2d) 169 (Ont. H.C.).* This case dealt with a subdivision which was contaminated with radioactive soil in the 1940s, a fact which was known to federal officials. The court found that the vendors, the purchasers' real estate agents, and the Atomic Energy Control Board had a duty to disclose this material defect to the purchasers. The defendants were found liable for the damages suffered by the purchasers.

] and *Heighington v. Ontario* [(32) -- 32. . *Heighington et al. v. The Queen in Right of Ontario et al.* (1987), 60 O.R. (2d) 641 (Ont. H.C.). This case had a result similar to *Sevidal, ibid.*, except that the Ontario government was also found liable for not disclosing information regarding the contamination when it allowed the subdivision to be built. In both cases, the damage awards were based on the reduced value of the property due to the contamination.], where the undisclosed important defect in a residential development was the presence of radioactive soil;

- *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* [(33) -- 33. . *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1980), 21 B.C.L.R. 345; *aff'd* (1983), 39 B.C.L.R. 43 (C.A.).

], where the vendor was aware that certain commercial property contained a radioactive contamination, yet he advised the purchaser in a conversation that the property had "excellent fill" without telling him of the contamination; [(34) -- 34. . *Ibid.*, at p. 353.] and

- *Tuttahs v. Maciak* [(35) -- 35. . *Tuttahs v. Maciak, supra, note 8, at p. 58.* The court found that the pollution evolved from being minor, in which case it appeared that the purchasers could "make do", to one of "alarming proportions".

], where the hidden and important defect in a restaurant was the presence of gasoline in the drinking water.

Courts often sympathize with the purchaser in these situations. In *Sevidal v. Chopra* [(36) -- 36. . *Sevidal v. Chopra, supra, note 11.*], the court placed a duty on the vendor not only to disclose a latent defect on the subject property but also to disclose a problem in a nearby property which would pose a potential danger to the purchaser.

In *Sevidal v. Chopra*, the court placed a duty on the vendor not only to disclose a latent defect on the subject property but also to disclose a problem in a nearby property which would pose a potential danger to the purchaser.

2.1.3 Error in substantialibus

Caveat emptor also may not apply in situations where the vendor is "innocent" in the sense of not knowing about the presence of serious environmental problems regarding the subject property. Specifically, the doctrine of error in substantialibus -- error as to substantial matters -- allows the purchaser to rescind the transaction and have the purchase monies returned [(37) -- 37. . For example, in *Fesserton v. Wilkinson* (1914), 17 D.L.R. 858 (Ont. S.C.), the court stated at p. 348: "The purchaser has the right to refuse to accept something other than what he thought he was purchasing and which the contract calls for...". This doctrine as also been applied in cases involving fraud. See *Gronau v. Schlamp Investments Ltd.* (1974), 52 D.L.R. (3d) 631 (Man. Q.B.); *Mann v. Raiton Holdings Ltd.*, (1984), 3 W.W.R. 42 (B.C.S.C.)] in certain situations where the vendor makes an innocent and important misrepresentation of the subject property. The courts use various approaches to defining an "important" misrepresentation. For example, courts and legal writers have said that the defect must be "material" [(38) -- 38. . *Re Stieglitz and Prestolite Battery Division v. Eltra of Canada Ltd. et al.* (1980), 119 D.L.R. (3d) 672 (Ont. H.C.)], that a misrepresentation of a defect must go to the "root of title" [(39) -- 39. . *D.H. Lamont, Real Estate Conveyancing, Law Society of Upper Canada, Department of Continuing Education, Toronto, 1976, at p. 165.*], or that the purchaser must receive something "completely different" than what was bargained for. [(40) -- 40. . *Alessio v. Jovica* (1973), 42 D.L.R. (3d) 242 (Alta. C.A.)] These somewhat different approaches reflect the unsettled state of the law in this area. [(41) -- 41. . In *Alessio, ibid.*, at p. 256, the court in fact stated that there was no "hard and fast rule" as to what defines an important misrepresentation. Adding to the uncertainty of this body of law are several anomalous in substantialibus cases where the misrepresentation was not innocent but fraudulent (for example, *Mann, supra, note 17*) and where the relief granted was damages rather than rescission. See *McMaster University v. Wilchar Const. Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.)] Since

judicial interpretations of the doctrine of error in substantialibus vary, purchasers should not necessarily expect relief where they discover innocent and important misrepresentations.

...the defect must be "material", ... a misrepresentation of a defect must go to the "root of title", or ... the purchaser must receive something "completely different" than what was bargained for.

2.1.4 Liability of the Developer-Vendor

In British Columbia, some residential builders voluntarily offer a limited warranty plan covering defects of up to \$3,000 in value, an express contractual exception to caveat emptor up to that sum. [(42) -- 42. . New Home Warranty Program of British Columbia and the Yukon, "Schedule A", Rev.07/88.] Other jurisdictions have mandatory new home warranty plans which effectively reverse the caveat emptor rule for new homes. [(43) -- 43. . For example, see Ontario's New Home Warranties Plan Act, R.S.O. 1980, c. 350.]

THE LEAKING OIL TANK

A Vendor's home used heating oil in the 1950s and 1960s. In 1970, the Vendor converted to natural gas and plugged the underground oil tank. In 1989, the Vendor sold his house to the Purchaser. The Vendor did not know whether the tank leaked and he did not disclose the presence of a tank to the Purchaser. Shortly after the sale, the Purchaser excavated and discovered that the tank had leaked. The remediation will be costly, so the Purchaser sues the vendor.

Some Legal Considerations:

- *1. The general rule is caveat emptor, unless one of the exceptions to the rule applies.*
- *2. The Vendor has a duty to disclose certain "material defects" known to the Vendor. The court would consider whether the leaked oil is a major or a minor defect. If the defect posed a potential danger to the Purchaser, the Vendor would be more likely to be found liable. [See Tuttahs and Caleb in Sections 2.1.2 and 2.2.]*
- *3. The Purchaser might seek relief against the Vendor on the basis that the defect resulted in the Purchaser receiving something completely different than what the Purchaser bargained for. [See the doctrine of error in substantialibus, in Section 2.1.3. Note especially the uncertainties regarding how the court applies this doctrine.]*
- *4. The Purchaser should carry out reasonable investigations. At issue would be whether the Purchaser should reasonably know that such old houses were once heated with oil and that oil tanks remain in the ground and could leak. [See Section 2.2.]*

The court held that while caveat emptor protected the vendor in a contractual sense, the vendor was nonetheless liable under tort law for negligently constructing a defective house.

In addition to exceptions to caveat emptor based on contract law, the law also provides relief for purchasers based on tort law in certain situations where a vendor-developer sells defective homes. [(44) -- 44. . Fraser-Reid v. Droumtsekas (1979), 103 D.L.R. (3d) 383 (S.C.C.) which adopted Dutton v. Gobnor Regis United Bldg. Co., [1972] 1 A11 E.R. 462 (C.A.).] In these situations, the purchaser is not limited to damages based on breach of contract alone. In Ordog v. Mission [(45) -- 45. . Ordog v. Mission (1980), 110 D.L.R. (3d) 718 (B.C.S.C.)], a builder sold the plaintiffs a new house that was found to have construction defects in the foundations. The court held that while caveat emptor protected the vendor in a contractual sense, the vendor was nonetheless liable under tort law for negligently constructing a defective house. The reasoning behind this and other similar cases [(46) -- 46. . See also Smith v. Melancon, [1976] 4 W.W.R. 9 (B.C.S.C.) and DiCatri, supra, note 10, c. 7, para. 241.] is that the developer or builder reasonably should be expected to provide new and mass-produced houses without substantial defects.

2.2 Caveat Emptor: STILL RELEVANT

One should not conclude from these cases that caveat emptor no longer applies where the subject property has environmental problems. Caveat emptor is still the basic rule and the mere presence of pollution or an environmental problem is not necessarily sufficient to avoid the rule. In Caleb v. Potts [(47) -- 47. . Caleb v. Potts (1986), 7 A.C.W.S. (3d) 107 (Ont. C.A.)], the vendor knowingly sold property on which the wellwater supply was polluted by methane gas. The court found that while this defect would lower the value of the property since the water had a noxious taste, the defect was minor and would not render the property unsafe. As a consequence, there was no fraud and caveat emptor applied. [(48) -- 48. . It may be difficult to reconcile this case with another water pollution case referred to above, Tuttahs v. Maciak, supra, note 8, which found that the gasoline-contaminated water was "unfit for human consumption". The court in Tuttahs v. Maciak provided few, if any, facts respecting the pollution.]

Purchasers should take reasonable steps to discover potential problems. Numerous cases have cited the need for purchasers to make appropriate inquiries, to carry out diligent research, and to obtain appropriate representations. [(49) -- 49. . In Hartlen v. Falconer et al. (1977), 5 R.P.R. 153 (N.S.S.C.), the purchaser inspected the subject land prior to closing and noticed a dug well which was full of water but did not inquire about the water quality or fluctuations. Shortly after the closing, the purchaser discovered that the well dried up frequently and had poor water quality. The court dismissed the purchaser's action for damages, noting that the purchaser had an opportunity to inspect and to obtain representations from the vendor.] Moreover, a purchaser who investigates but does so negligently will not be able to avoid caveat emptor. [(50) -- 50. . In Hoy v. Lozanovski (1987), 43 R.P.R. 296 (Ont. D.C.), the vendor had intentionally suppressed information about a latent termite problem. The purchaser, however, undertook his own investigation of the property prior to the sale and negligently overlooked the termite problem. The court held that because the purchaser undertook an investigation he could not rely on the vendor's silence and the purchaser was responsible for his own negligence.]

.. a purchaser who investigates but does so negligently will not be able to avoid caveat emptor.

Even where the vendor is obligated to disclose a material defect, such disclosure needs to be made only in general terms. In Sorenson v. Kaye Holdings Ltd. [(51) -- 51. . Sorenson v. Kaye Holdings Ltd. (1979), 14 B.C.L.R. 204 (C.A.)], the vendor told the purchasers in general terms about a problem with a swimming pool. The court found that this generally-stated information was sufficient to enable the purchasers to assess their legal position and consequently did not constitute reckless disregard for the truth.

THE ASBESTOS HOUSE

*The Vendor puts her house on the market. The Vendor knows that the house has asbestos siding and that removal could be costly and raise health risks. The Vendor does not disclose the asbestos to the Purchasers. Soon after the sale closes, the Purchaser discovers the asbestos, and the Purchaser sues the Vendor for damages. **Some Legal Considerations:***

- *1. Given the rule of caveat emptor, the Purchaser may not have a remedy unless the presence of the asbestos siding can be characterized as a material defect.*
- *2. The Vendor has a duty to disclose all known material defects, but not **all** environmental problems. The court would determine if asbestos poses a material defect and, if so, the Vendor's silence could amount to fraud -- an exception to caveat emptor. [See Section 2.1.2.]*
- *3. The Purchaser should carry out reasonable investigations of the subject property. [See Section 2.2.]*

...purchasers should not assume that the doctrine of fraud is a panacea against the harshness of caveat emptor.

Finally, purchasers should not assume that the doctrine of fraud is a panacea against the harshness of caveat emptor. As plaintiffs, purchasers face a heavy evidentiary burden to prove fraud "by a preponderance of clear and convincing evidence..." [(52) -- 52. . DiCastrì, supra, note 10, at para. 161-2.]

2.3 PRACTICAL STRATEGIES FOR VENDORS AND PURCHASERS

2.3.1 Investigations

Frequently, parties in a real estate transaction set out in the contract of purchase and sale a number of conditions which must be fulfilled or waived by a specific date in order for the transaction to complete. For example, a typical contract of purchase and sale will stipulate conditions relating to the purchaser obtaining financing and conducting searches about various aspects of the property. A purchaser who wishes to investigate the possibility of toxic contamination of the subject property must include this condition in the contract of purchase and sale.

A purchaser who wishes to investigate the possibility of toxic contamination of the subject property must include this condition in the contract of purchase and sale.

*While it is clear that purchasers should make appropriate inquiries and carry out diligent searches, what constitutes a "diligent search" can vary greatly. In most cases, the residential purchaser will not conduct the same extensive and elaborate environmental studies that should be conducted by a purchaser of an industrial operation. For example, the residential purchasers in *Sevidal v. Chopra* [(53) -- 53. . *Sevidal v. Chopra*, *supra*, note 11.] and *Heighington v. Ontario* [(54) -- 54. . *Heighington v. Ontario*, *supra*, note 12.] were found not to have a duty to take the extraordinary measures of looking for radioactivity before buying.*

Purchasers of industrial or commercial property should consider including a condition in the contract of purchase and sale which permits them access to the property and certain records of the vendor for the purpose of conducting an environmental analysis prior to the closing date. For example, prudent purchasers of industrial

property should consider negotiating with the vendor for access to the following documents:

- *correspondence with government agencies which are responsible for environmental matters;*
- *records respecting pollution equipment and permits;*
- *any contracts which indemnify the vendor in respect of environmental problems on the subject property, such as from a tenant, and which should be assigned to the purchaser;*
- *corporate records, such as minutes of directors' meetings;*
- *correspondence from concerned shareholders respecting environmental matters; and*
- *previous contracts of purchase and sale for the subject property.*

*In addition, the purchaser of a business should consider negotiating the right to interview any of the vendor's employees who are responsible for managing the environmental affairs of the business. [(55) -- 55. . *M. Hardin and J. Edwards*, "Business Transactions: Environmental Law Problems and Possible Solutions", Chapter V in *Environmental Law and Practice, Volume II*, The Canadian Institute, 1988, at p. 1-21.]*

...the purchaser may wish to include in the contract of purchase and sale the right to collect air, soil, and water samples from the property...

*If the purchaser is concerned that the vendor or the vendor's files may not have sufficient information about potential pollution problems, the purchaser may wish to include in the contract of purchase and sale the right to collect air, soil, and water samples from the property either once or over a period of time. This environmental sampling, especially if done over an extended period, may seem costly at the time. However, given the high cost of clean-up, the heavy fines and measures which governments could impose on polluters, [(56) -- 56. . *Statutory liability is discussed in more detail in Chapter Five.*] and the potential*

legal liability facing polluters, [(57) -- 57. . Tort liability is discussed in more detail in Chapter Four.] it may be less expensive than discovering a problem after the closing date.

When negotiating conditions which allow purchasers to gather environmental information about the subject property or business, purchasers should realize that vendors might require confidentiality agreements to protect their industrial secrets.

There are a wide variety of methods of investigation available to purchasers.

There are a wide variety of methods of investigation available to purchasers. The nature of the investigation, or environmental audit, will depend on the particular property but could include the following methods:

- *on-site inspection for signs of contamination such as discoloured vegetation, stained soils, and old equipment or barrels;*
- *a search of Waste Management Branch or Environment Canada files and discussions with such government authorities to determine their knowledge of any potential or actual pollution problems [(58) -- 58. . If there is a difficulty in obtaining information held by the federal government, then recourse is available under the Access to Information Act, R.S.C. 1985, c. A-1. There is no comparable legislation in British Columbia, although if the British Columbia government refuses unreasonably to provide information a complaint can be made to the Ombudsman of British Columbia.*

](for example, whether a "release" of a hazardous substance has been reported as required by section 10 of the Waste Management Act [(59) -- 59. . Reporting requirements are discussed in detail in Chapter Five.);

- *a search of court records to determine if there has been an environmental lawsuit concerning the subject property;*
- *a search of land title office, municipal, and other records to determine the past ownership of the subject property and neighbouring properties, which might indicate whether the past owners operated activities which released harmful substances;*
- *preparation of an inventory of current and past uses of the subject property to determine whether it might be the source of pollutants into the general area; and*
- *preparation of an inventory of current and past uses of surrounding land to determine whether the adjacent property might be the source of pollutants onto the subject property or into the general area.*

A purchaser who does not wish to carry out an investigation could request that the vendor provide an environmental audit. However, if it is done by the vendor, the purchaser has less control over the scope and nature of the study.

Careful investigation of the property is important to both the purchaser and the vendor ...

ORGANIC LITIGATION

A Purchaser is looking at an Okanagan farm on which to conduct organic farming. A Vendor shows a property to the Purchaser. The Purchaser asks about previous use of pesticides on the property and is told that only normal pesticides have been used. After the sale, however, the Purchaser has tests done which show trace amounts of a banned pesticide in her first crop. This renders the produce unsaleable as organic produce and the Purchaser sues the Vendor.

Some Legal Considerations:

- 1. The court would first look at whether there was any express warranty in the contract of purchase and sale respecting pesticides. [See Section 2.1.1.]
- 2. Since the Purchaser required the property for a particular purpose, should she have undertaken a more thorough investigation of its past use? [See Section 2.2.]
- 3. The court would consider whether the presence of the pesticide was a material defect which the Vendor should have disclosed. One factor would be whether the Vendor knew that the Purchaser wanted to operate an organic farm.
- 4. The Purchaser might also argue fraud. Would she be able to prove "by a preponderance of clear and convincing evidence" that the Vendor deliberately or recklessly deceived her? [See Section 2.1.2.]

Careful investigation of the property is important to both the purchaser and the vendor for two reasons. First, the investigation data serves as a baseline if future problems arise and there is a need to determine how much the vendor and purchaser contributed respectively to the particular problem. Second, an investigation may be needed to ensure that the vendor's representations and warranties are true and complete.

2.3.2 Structuring the Deal

When negotiating the contract of purchase and sale, the contracting parties may wish to anticipate the possibility of environmental problems ...

These pre-closing investigations may reveal environmental problems in connection with the property. When negotiating the contract of purchase and sale, the contracting parties may wish to anticipate the possibility of environmental problems and include a variety of options to deal with any environmental problems that are discovered during pre-closing investigations. For example, if the investigation discloses a problem, the purchaser might be permitted not to follow through with the transaction, or the purchaser might be required to complete the transaction after the contamination is cleaned up. In the latter case it is important to specify the standards that will be used to judge clean-up. Alternatively, the purchaser might be permitted to delay the closing until environmental issues are resolved. Another option might allow the purchaser to "carve out" the contaminated portion of the property, if the property can be subdivided or if the property is comprised of more than one parcel.

2.3.3 Clean-Up Responsibilities

A purchaser may also wish to include in the contract of purchase and sale a clean-up plan for any problems that are discovered during an environmental investigation. Unless clean-up responsibilities are expressly allocated at the outset, the purchaser could discover that he or she is involved in a dispute about who will absorb the cost of clean-up.

As mentioned, the contract could provide for a right of termination should contamination be found in the course of a pre-closing environmental audit. Alternatively, the contract might allow for a price reduction to reflect the cost of clean-up if the investigations disclose a contamination problem. However, a possible drawback to this approach is that the cost of clean-up may exceed the value of the property.

In most cases, due to time constraints, the pre-closing investigation will only determine the extent and nature of a problem without being able to arrive at exact estimates of clean-up costs. Anticipating this, the parties could agree in advance to a joint clean-up plan to be implemented after the closing if a problem is found during the investigation. Such a plan could include establishment of a trust fund for clean-up costs and an agreement to share the costs according to a predetermined formula.

One author points out the advantage of such a cooperative undertaking:

Practically, this might be perceived as a continuing obligation to remedy the purchaser's environmental problems. However, there are some advantages for the vendor. First, it gives the vendor greater assurance that the transaction will close. Secondly, it locks in the purchaser of the property, avoiding the purchaser's right to terminate the transaction. And finally, it gives some assurance to both parties that at some time, the site will be environmentally clean. This is particularly important to a purchaser where the vendor will cease to have continuing substantial assets after the closing. [(60) -- 60. . N.S. Rankin, "An Overview and Discussion of Liability for Environmental Problems and Solutions", paper presented at Insight Conference, Cleaning Up Contaminated Sites, January 24, Vancouver, 1990.]

2.3.4 Representations and Warranties

...a prudent purchaser should consider specifying additional representatives and warranties from the vendor.

The standard form contract of purchase and sale for residential property currently used in British Columbia contains a warranty from the vendor that the subject house does not contain urea formaldehyde foam insulation (UFFI). [(61) -- 61. . De Michelle v. Peterkin (1985), 37 R.P.R. 173 (Ont. H.C.) illustrates the importance of a UFFI clause.] No other potentially toxic substances are mentioned on the form. Therefore, a prudent purchaser should consider specifying additional representatives and warranties from the vendor. The purchaser should realize, of course, that these proposals may be rejected by the vendor.

Drafting appropriate warranties to deal with contamination problems can be complex. There are two general approaches to phrasing these representations and warranties -- specification of particular substances or problems and specification of general types of problems. If the representations and warranties specify the substances which are of concern to the purchaser, the purchaser should be careful to consider all potentially hazardous substances. In Jonert v. Rothmans [(62) -- 62. . Jonert Investments Ltd. v. Rothmans, Benson & Hedges Inc. (1989), 15 A.C.W.S. (3d) 254 (Ont. H.C.)], the vendor warranted that there was no asbestos on the property. After the interim agreement was signed but before the closing, the purchaser discovered PCBs as well as asbestos on the property and insisted that both be removed. The court held that the purchaser's insistence that the vendor remove the PCBs, in the absence of an express warranty respecting PCBs, represented an unfounded repudiation of the contract. [(63) -- 63. . The court also found that the vendor's insistence on other terms after the interim agreement was executed constituted rescission. This case illustrates the need to settle these issues prior to entering into a contract of purchase and sale.]

Broadly-worded warranties also may not provide adequate protection for purchasers. For instance, if a purchaser obtains from the vendor a very broadly-worded warranty stating that "no toxic substances or contamination exist", the purchaser would face the difficult evidentiary task of proving in court that toxicity or contamination actually exists. Because there can be considerable uncertainty regarding whether a particular substance is toxic or whether a site is contaminated, [(64) -- 64. . See Toxic Real Estate in British Columbia: Identification of Issues, supra, note 1, Section 2.3.] purchasers should take note of the courts' cautious approach to construing broadly stated warranties. Warranty phrases such as "well insulated" and "clean" have not protected purchasers. [(65) -- 65. . In Scott-Poulson et al. v. Hope, [1958], 25 W.W.R. 427 (B.C.S.C.), the vendor warranted that the house was "well insulated". After the closing, the purchasers discovered difficulties in warming the house and extensive moth infestation in the walls. The vendor was unaware of the moth infestation at the time of the sale. The court held that, there being no fraud and no defect respecting good title, the purchaser would have to rely on an express or implied warranty that the property should have the quality in which it was deficient. In Cole v. Parry et al., [1920], 3 W.W.R. 73 (Man. Q.B.), the vendor's statement that land was "clean" was held to be a matter of opinion and not a statement of fact -- that the state of being "clean" cannot be ascertained by positive evidence.]

Warranty phrases such as "well insulated" and "clean" have not protected purchasers.

In any case, a vendor would likely be very reluctant to give a blanket warranty that no toxic problems exist, especially if the vendor has owned the property only for a short period of time and does not know the full history of the site. [(66) -- 66. . See Hardin and Edwards, supra, note 35, for a review of the important considerations in setting out warranties and indemnifications.]

Warranty terms should be drafted so that they are objectively verifiable by a court if a dispute arises.

Warranty terms should be drafted so that they are objectively verifiable by a court if a dispute arises. For example, a warranty might state that certain past uses of the property complied with environmental statutes or that the site does not contain hazardous substances as defined in a particular statute. [(67) -- 67. . For example, the warranty could refer to the list of hazardous substances found in the Canadian Environmental Protection Act, S.C. 1988, c. 22, or the definition of "special waste" in the Waste Management Act, S.B.C. 1982, c. 41.] However, even references to a statutory list of hazardous substances may have drawbacks since these lists may not be exhaustive of all the types of contamination which might be found on the property. [(68) -- 68. . An additional problem is that if the reference is to "special waste", some waste may be missed (generic waste).]

The vendor might attempt to limit his or her total liability arising from breaches of warranties or representations. For example, the vendor could insist on setting time limits for the liability to arise, imposing a minimum amount for a claim to avoid "nuisance" liability, or setting a ceiling on monetary liability. [(69) -- 69. . For example, liability could be limited to a maximum equal to the purchase price.]

The vendor may also negotiate representations from the purchaser. For example, in cases where the subject property has known environmental problems, the vendor might attempt to obtain a representation from the purchaser that the purchaser's operations will not make the problem worse. This could prove important if a dispute arose after closing over the extent to which the vendor and purchaser contributed to a particular problem.

2.3.5 Indemnities

Parties to a real estate transaction often will seek indemnities from each other pertaining to environmental matters. An indemnity expressly provides that the indemnifying party will compensate the indemnified party where the latter suffers loss, damage or injury in specific circumstances.

Indemnities can address many different situations. The following examples are particularly relevant in the context of a transaction involving contaminated real estate:

- *the vendor indemnifies the purchaser for liability arising from an environmental problem existing prior to the sale, which the purchaser has not agreed to assume;*
- *the vendor indemnifies the purchaser for loss or damage if the vendor fails to carry out an agreement to clean up the site; and*
- *the vendor indemnifies the purchaser for claims made by third parties against the purchaser for environmental problems caused by the vendor.*

2.4 LIABILITY OF REAL ESTATE AGENTS

2.4.1 The Law in a Nutshell

The realtor may find him or herself in the centre of litigation crossfire.

When a purchaser unwittingly buys property containing toxic substances, he or she may soon discover that the high cost of clean-up drastically reduces the value of the property. Such a purchaser will quickly

scrutinize not only the conduct of the vendor but also that of the realtor to determine if there is a basis for legal action. In addition, the vendor may assess the potential liability of the realtor in order to deflect his or her own liability. The realtor may find him or herself in the centre of litigation crossfire. In some cases, the realtor or the realtor's insurer may have greater assets than the vendor and thus become an inviting "deep pocket" for the purchaser or the vendor to sue.

REALTOR LIABILITY ---PRINCIPLES FOR REDUCING RISKS

Recognizing Basic Vendor-Purchaser Principles:

- *caveat emptor or buyer beware, except;*
 - *express warranties [See Section 2.1.1.]*
 - *fraud [See Section 2.1.2.]*
 - *error in substantialibus [See Section 2.1.3.]*
 - *developers/builders [See Section 2.1.4.]*
- *reasonable investigations [See Section 2.2.]*

- *Compiling The Listing*
 - *know the area [See Section 2.4.3.]*
 - *verify vendor information [See Section 2.4.2.]*
 - *agency office should double check [See Section 2.4.3.]*

- *Discovering Contamination After Listing:*
 - *must notify;*
 - *principal [See Section 2.4.4.]*
 - *others who may rely on information*

[See Section 2.4.1.]

- *Drafting Agreements:*
 - *get information before drafting [See Section 2.4.5.]*
 - *consult a lawyer upon any contamination problem*

[See Section 2.4.6.]

A realtor's duties are derived from several different legal principles, including those arising from the law of contract, tort and agency. The principles of contract law require a realtor to abide by any contracts the realtor enters into, such as the listing agreement with the vendor. In the standard form listing agreement, the realtor agrees to try to find a purchaser on the terms specified by the vendor in return for the vendor's promise to pay a specified commission to the successful agent.

Since the listing agreement contemplates that the realtor will act as an "agent" for the vendor, the realtor's duties are also governed by the law governing agents. Agency law provides that the central duty of the agent is to act in the best interest of the principal. This duty is reflected in the realtor's Standards of Business Practice [(70) -- 70. . Canadian Association of Realtors, Standards of Business Practice, 1989, Article 2.] which obliges the realtor to "protect and promote the interests of his client".

The realtor also has ... a duty ... to act honestly and to exercise reasonable care and skill when providing information and opinions which might reasonably be relied upon by third parties to their detriment.

The realtor also has duties arising from the tort of negligent misrepresentation, often referred to as the Hedley Byrne principle. [(71) -- 71. . Hedley Byrne v. Heller, [1963] All E.R. 575 (H.L.).] This principle imposes a duty on the realtor to act honestly and to exercise reasonable care and skill when providing information and opinions which might reasonably be relied upon by third parties to their detriment. [(72) -- 72. . For an example of the application of the Hedley Byrne principle to a real estate agent, see Broumas v. Royal Trust (1987), 51 Alta. L.R.(2d) 334 (Q.B), at p. 343-344.] Possible third parties include prospective purchasers, as well as others who may not even be known to the realtor. For instance, a lender may reasonably rely on certain information given to the purchaser by the realtor. The key point is that the realtor must be careful when dealing with anyone who might reasonably be expected to rely on his or her advice or who might pass on information to others who may rely on such advice. [(73) -- 73. . There are numerous texts addressing the duties of realtors. For example, see DiCastrì, supra, note 10, chapter 7; and P. Watts, Real Estate Practitioners Guide, 5th ed., Hudson Services Ltd., Vancouver, 1986, c. 7.] This broad duty is reflected in Article 3 of the Standards of Business Practice which obliges the realtor to:

...discover the facts pertaining to every property for which he accepts an agency which a reasonably prudent realtor would discover so that he may fulfill his obligation to avoid error, misrepresentation, or concealment of pertinent facts. [(74) -- 74. . Standards of Business Practice, supra, note 50.]

Realtors should also be aware of the doctrine of fraud. ... fraud arises not only where a person demonstrates a malevolent intent, but also where a person has a reckless disregard for accuracy.

Realtors should also be aware of the doctrine of fraud. As discussed, [(75) -- 75. . See Section 2.1.2 above.] fraud arises not only where a person demonstrates a malevolent intent, but also where a person has a reckless disregard for accuracy. The common remedy in fraud cases is damages, which can include punitive damages.

A realtor's employer or principal can be held vicariously liable for the realtor's fraud or negligent misrepresentation. For example, if a realtor is found to be personally fraudulent, both the realtor's principal and the realtor's employer can be held vicariously liable. This extension of liability applies where the realtor acted in the course of his or her service or employment, even if the principal or employer did not know about the fraudulent statement. [(76) -- 76. . For example, in Underwood v. Ocean City Realty (1985), 34 C.C.L.T. 128 (B.C.S.C.), the vendor's realtor was found liable for a fraudulent statement which was made without the knowledge of the principals or the employer, but these latter parties were found to be vicariously liable. The court assessed damages equally against the purchasers, the realtor, and the realtor's employer.]

These legal principles are discussed in more detail below in the context of contaminated land and buildings. Chart 1 sets out a summary of the main considerations for realtors seeking to protect themselves from liability.

2.4.2 Preparing the Listing

When a realtor enters into an agreement with a prospective vendor, agreeing to attempt to sell the vendor's property, the realtor often uses a standard form listing agreement. This agreement provides for information about the subject property, such as financial encumbrances, type of dwelling, size, and type of insulation. An information form accompanies the listing agreement and is used to compile additional information about the property. If the listing is being handled by a multiple listing service, this information will be given to the listing service and other realtors will have access to it.

Neither the standard form listing agreement nor the accompanying information form specifically provides for information respecting possible contamination. The information form, however, has a category where special concerns may be noted. The Fraser Valley Real Estate Board, for example, has a category entitled "Remarks" [(77) -- 77. . Fraser Valley Real Estate Board; Residential Data Input Form; Fraser Valley Real Estate Board; Multiple Listing Service Contract, March 28, 1990.] which could be used to make entries about possible hazardous conditions.

Potential purchasers rely on information in the listing agreement when making an offer. Therefore, realtors must be particularly careful when preparing the information for the listing. Realtors know from experience that some vendors provide incomplete information about their property. Some vendors know little about their property, especially if they have not lived on it. Others benignly overlook problems or see only the good aspects of their property.

If there is a sound factual basis for suspecting that information from the vendor is incorrect or misleading, the realtor has a duty to verify it.

The courts have found that a realtor can rely on the statements of his or her principal, the prospective vendor, when it is reasonable to do so. The practical result is that much depends on the facts of a particular case. If there is a sound factual basis for suspecting that information from the vendor is incorrect or misleading, the realtor has a duty to verify it. By failing to verify information, the realtor could unintentionally assist the vendor in deceiving an unsuspecting purchaser. This could leave the realtor liable along with the vendor for damages suffered by the purchaser. [(78) -- 78. . Watts, supra, note 53, at p. 8.]

2.4.3 Positive Duty to Look for Problems

The realtor also has a positive duty to look for material defects in the subject property when there is a factual basis for suspicion. In Jung v. Ip, the listing agent spent 15 minutes inspecting a property and gave information to the listing service that it was in "move-in condition". The purchaser relied on this information but after the sale discovered widespread termite infestation and sued for damages. The court found that the listing agent's statement was made recklessly without care for whether it was true:

I find that Mr. Leung [the listing agent] in fact did not know of the termite problem in the area at the time that the listing agreement was signed. I find that he ought to have known of the problem, which began as early as 1980, although it was not until 1985 that the Toronto Real Estate Board offered courses on the subject. [The sale was in 1984.] Mr. Leung should have known that Gamble Avenue was in a heavily infested termite area and that there were problems in the East York area. Mr. Leung's standard of performance is not to be admired and it fell below the normal practice of listing salesmen. He is liable to the purchasers for 20 per cent of their damages. [(79) -- 79. . Jung et al v. Ip et al. (1988), 47 R.P.R. 113 (Ont. D.C.).]

The court seemed to suggest that a realtor has a positive duty to be reasonably aware of historic or geographic factors which could alert the realtor to specific problems. That is, the realtor must be reasonably knowledgeable about geographical or historical factors which could give him or her a factual basis for suspicion. [(80) -- 80. . The same principle was applied in Sevidal v. Chopra, supra, note 11, but different facts produced different results. In that case, the listing agent and the employer did not know, nor reasonably should have known, of radioactive contamination, and so they were held not to be liable.] In light of this case, a realtor should be reasonably knowledgeable about factors such as locations of former industrial areas and possible sources of contamination.

...a realtor should be reasonably knowledgeable about factors such as locations of former industrial areas and possible sources of contamination.

The duty to verify information can extend beyond the listing salesperson. In Jung v. Ip the court held that the listing broker, the employer of the listing salesperson, also has a duty to verify information obtained by its employees in preparing a listing agreement, notwithstanding the practical difficulty in double-checking the employees' work. [(81) -- 81. . Jung v. Ip, supra, note 59, at p. 130.]

LISTING A PROPERTY

*The Listing Realtor conducts a 15-minute inspection of a residential property and prepares a listing agreement describing it as "move-in" condition. The property is in an area that recently received local media attention as having high lead levels, likely coming from a nearby battery recycling plant. No mention of the lead situation is made in the listing. The property is listed in the Multiple Listing Service (MLS). A Realtor sells the property to a Purchaser from Toronto. Neither of them have heard of the lead problem. The Purchaser soon learns that the property requires removal of top soil, and sues the Vendor, the Selling Realtor, the Listing Realtor, the Selling Realtor's employer and the Listing Realtor's employer. The Vendor, the Selling Realtor and the Selling Realtor's employer sue the Listing Realtor and the Listing Realtor's employer. **Some Legal Considerations:***

- *1. The court will consider whether the Listing Realtor ought to have known of the potential problem. If so, she could well be considered to have been negligent. [See Section 2.4.3.]*
- *2. If the Listing Realtor or the Selling Realtor were held to be liable, the Realtor's employer would likely be vicariously liable as well. [See Section 2.4.1.]*
- *3. Did the Listing Realtor breach her duty to the Vendor? The Vendor might argue that had he known of the lead problem he would not have sold the property and incurred the expense of litigation. [See Section 2.4.1.]*
- *4. Is the Vendor liable to the Purchaser? Was there an express warranty regarding the lead? A material defect? Fraud? [See Section 2.4.1.]*
- *5. Was the Selling Realtor negligent in failing to double-check the listing information? If so, does the Selling Realtor have a claim against the Listing Realtor? [See Section 2.4.3.]*

2.4.4 Discovering "Bad News"

While attempting to sell a property, a realtor may discover a potential contamination problem. For example, he or she may find that a property was a former dump site or that a property has an abandoned underground tank. The temptation exists not to disclose this bad news to the vendor in order to keep the property value -- and the commission -- as high as possible. But the realtor has a duty to convey to the vendor/principal any information which could influence the vendor/principal's judgement respecting the subject property. [(82) -- 82. . Wood v. St. Jules (1976), 69 D.L.R. (3d) 481 (Ont. C.A.); Canada Permanent Trust v. Christie (1979), 16 B.C.L.R. 183 (S.C.).] A prudent vendor needs to know about the presence of toxic problems, in part to avoid future litigation and liability. If the vendor is later sued by the purchaser of property that is found to be contaminated and the realtor did not disclose the problem to the vendor, the vendor may claim against the realtor for fraudulent non-disclosure of the contamination. [(83) -- 83. . While not involving contaminated property, the principle of realtor disclosure is illustrated in Parna v. G. & S. Properties Ltd. (1968), 15 D.L.R. (3d) 336 (S.C.C.) and in Reichl v. Rutherford-McRae Ltd. (1965), 51 D.L.R. (2d) 332 (B.C.S.C.).]

2.4.5 Drafting Agreements

The realtor's duties include drafting legally enforceable documents. [(84) -- 84. . Chand v. Sabo Brothers Realty Ltd. et al., [1979] 2 W.W.R. 248 (Alta.).] Since there are no provisions relating to contamination problems in the standard form contract of purchase and sale of residential

property, vendors and purchasers may ask realtors to draft and insert such protective provisions into the agreement. In commercial real estate transactions, lawyers are more likely to be responsible for drafting the agreements.

When faced with requests to draft ... legally enforceable documents ... realtors should recognize the inherent difficulties of drafting clauses to deal with contamination problems.

When faced with requests to draft these provisions, realtors should recognize the inherent difficulties of drafting clauses to deal with contamination problems. Without thorough and sometimes costly research it can be difficult, if not impossible, to know which substances might be present. Site-specific knowledge is critical because the courts will not provide relief to the purchaser where the vendor warrants against the presence of one toxic substance but another is later found. [(85) -- 85. . Jonert v. Rothman's, supra, note 42.]

As discussed, a broadly worded warranty that "no toxic substances exist" is also problematic because the definition of "toxic" is fraught with scientific uncertainty. [(86) -- 86. . See Chapter One.] Toxicity depends on a host of factors such as the species exposed, the duration of exposure, and the presence of other chemicals. [(87) -- 87. . See Section 1.3.] There is no commonly accepted list of substances that a court necessarily would find to be "toxic". Therefore, the prudent course of action for realtors is to take all reasonable steps to determine the extent of possible contamination and then to apply professional judgement in drafting the agreement.

2.4.6 Seeking Other Professional Advice

Part of the realtor's professional judgement is in recognizing when other professional expertise is required. For example, a well-intentioned realtor might convey information in a technically inaccurate way, causing others to misinterpret the information. Agreements which address serious or complex technical matters should be referred to legal and environmental professionals for advice. An ounce of professional prevention is worth a pound of litigation "cure".

Part of the realtor's professional judgement is in recognizing when other professional expertise is required.

2.5 LIABILITY OF LAWYERS, ENVIRONMENTAL CONSULTANTS AND LAND ASSESSORS

The Hedley Byrne principle that a professional adviser can be held liable for making negligent statements in the absence of contract and without fiduciary relations applies to other parties in the real estate transaction as well as the realtor. Therefore, a purchaser who unknowingly buys contaminated real estate may seek a remedy against other professionals involved in the transaction.

Lawyers may be held liable if they misstate the legal status or other qualities of the subject property. This may apply, for example, where a lawyer is negligent in conducting or failing to conduct searches regarding regulatory compliance of the property. [(88) -- 88. . Edinburgh Financial Investors Ltd. et al. v. Kelner et al. (1987), 45 R.P.R. 125 (Ont. H.C.).] In addition, if a lawyer retains an environmental consultant to conduct an environmental audit on the property and if the audit is negligently prepared and relied upon, the lawyer may be vicariously liable for the consultant's negligence. Indeed, the "deep pockets" of the lawyer's insurance fund will likely be very attractive if the environmental consultant is underinsured.

... the lawyer may be vicariously liable for the [environmental] consultant's negligence.

Environmental consultants may be held liable if they negligently provide inaccurate information or negligently reach incorrect conclusions which are relied upon by someone whom the consultant could reasonably have foreseen would do so.

BAD ADVICE

A Developer bought land adjacent to the Fraser River, in an area once used for industrial purposes. Prior to the purchase, the Developer had retained an Environmental Consultant who determined that contamination would cost \$50,000 to clean up. The developer completed the clean-up and sought development approval. However, the municipality refused to approve the development, because the provincial agency concluded that extensive additional clean-up is required. The cost of these measures would be prohibitive, so the Developer sues the Environmental Consultant.

Some Legal Considerations:

- *1. The Environmental Consultant may be liable for damages if it can be shown that the Consultant was negligent in determining the cost of clean-up, and that the failure to obtain development approval was a reasonably foreseeable consequence of the error. [See Section 2.5.]*

Land assessors may be held liable if they are careless in estimating the effect of toxic substances on the value of real estate in circumstances where this information should be known to them. [(89) -- 89. . Roberts v. Montex Dev. Corp. (1983), 100 D.L.R. (3d) 660 (B.C.S.C.); Esselmont v. Harker Appraisals Ltd and Harker (1979), 14 B.C.L.R. 116 (S.C.); Raylon Investments Ltd. v. Bear Realty Ltd. (1981), 20 R.P.R. 288 (B.C.S.C.); Clarkson Co. Ltd. v. Penny and Keenleyside Appraisals Ltd., [1985] 5 W.W.R. 538 (B.C.S.C.).]

2.6 LIABILITY OF LENDING INSTITUTIONS AND RECEIVERS

Until recently, environmental liability has rarely been a significant concern for lending institutions and receivers in Canada. However, the increasing likelihood that contaminated sites will be required to be cleaned up has raised a number of concerns for lenders. [(90) -- 90. . For exhaustive reviews of lender exposure to environmental liability, see G. Thompson, "Environmental Liability: The Growing Risks for Lenders, Receivers and Trustees", paper presented at Insight Conference, Vancouver, March 2, 1989; A.J. Coombe and P.J. MacNaughton, "Lender Liability and Site Remediation", The Clean-up of Toxic Real Estate, Industrial Plants, and Natural Resource Sites, The Canadian Institute, February, 1990; F.A. O'Neill, "Liability for Environmental Problems -- the Lender's Perspective", paper presented at Insight Conference, Cleaning up Contaminated Sites, Vancouver, January 24, 1990.]

2.6.1 Unexpected Clean-Ups and the Borrower's Financial Viability

Prudent lenders will want to ensure that purchasers who borrow money to acquire property do not buy contaminated property requiring clean-up. The costs of an unexpected clean-up [(91) -- 91. . See Chapter Five which provides details of statutory liability.] or liability to third parties [(92) -- 92. . See Chapter Four which provides details of tort liability.] could devastate the borrower's business, jeopardize the borrower's ability to make loan payments, and reduce the value of the lender's security interest in the property.

Prudent lenders will want to ensure that purchasers who borrow money to acquire property do not buy contaminated property requiring clean-up.

Geoffrey Thompson suggests that the lender undertake to become familiar with the security property and that the lender negotiate appropriate warranties and representations from the borrower. He states:

Lenders should evaluate the environmental risks inherent in any loan transaction. Lenders should be aware of all present and past uses of property given as security. They must become aware of the business operations of the borrower and learn whether any potentially hazardous chemicals or substances are used.

He adds:

The commitment letter [confirming the loan] should require the borrower to pay the cost of any environmental audit deemed necessary in the discretion of the lender. It should also contain a condition precedent to advancement of funds that the borrower provide the lender with appropriate representations and warranties that the property is not contaminated with hazardous substances and that the borrower and all prior owners have not violated environmental laws and regulations. [(93) -- 93. . Thompson, supra, note 70.]

2.6.2 Lender Liabilities Upon Foreclosure

If a borrower unknowingly purchases contaminated property and must undertake an expensive program of remediation, either to be able to use the property or to satisfy a clean-up order, [(94) - 94. . For example, an order issued under section 22 of the Waste Management Act, S.B.C. 1982, c. 41. See Chapter Five below for detailed discussion of the effect of statutory clean-up orders.] the borrower's financial position may deteriorate to the point where a lender will consider a foreclosure action. A lender should proceed cautiously at this point, since by foreclosing and appointing a receiver a lender may be considered to have assumed a position of ownership or control of the property and, thus, be considered to have assumed responsibility for cleaning up the site. [(95) -- 95. . The legal implications in a foreclosure proceeding are complex matters lying beyond the scope of this paper. Some guidance is provided in O'Neill, supra, note 70.]

Environmental audits are essential in determining if and when a lender should foreclose or realize on a defaulting borrower's property ...

Environmental audits are essential in determining if and when a lender should foreclose or realize on a defaulting borrower's property since "the results of the audit may assist the lender in determining the preferred method of realization and in deciding whether to take title to the property granted as security." [(96) -- 96. . Coombe and MacNaughton, supra, note 70.]

2.6.3 Lender Control Over Borrower Operations

Another problem arises where the lender does not go as far as to foreclose on the borrower's property, but nonetheless exerts some control over its activities. Some provisions in federal and provincial statutes allow for liability against parties who exercise control over the operation of the polluting activity. For example, the provincial government can use the Waste Management Act to order a clean-up by a person who "had possession, charge or control" of the polluting substance. [(97) -- 97. . Waste Management Act, S.B.C, 1982, c. 41, section 22.] Similarly, the federal government can use the Canadian Environmental Protection Act to assess liability against a person who "owns or has charge of a [polluting] substance" or who "causes or contributes" to a release of a polluting substance. [(98) -- 98. . Canadian Environmental Protection Act, S.C. 1988, c. 22, section 36.]

... statutory provisions send a clear message to lenders to avoid "controlling" the borrower's business, or to be aware of the potential consequences if they do.

*While to date no Canadian case has dealt with lender liability for environmental problems, these statutory provisions send a clear message to lenders to avoid "controlling" the borrower's business, or to be aware of the potential consequences if they do. Moreover, recent U.S. cases illustrate that a lender may be found to "control" the borrower's polluting operation. [(99) -- 99]. Lender liability has occurred in spite of statutory exemptions for holders of "security interests". A 1985 decision by the U.S. District Court for the Eastern District of Pennsylvania found a lender liable for environmental damages because he had undertaken a direct influence on the day to day operations of the borrower; *United States v. Mirabelle 15 Env'tl. L. Rep. 20994, (E.D. Pa. 1985)*. One practical effect of this wide scope is that a new party -- often one with the greatest financial resources -- will assist in clean-up problems. See also S. King, "Lenders' Liability for Cleanup Costs", *Environmental Law*, Vol. 18, Northwest School of Law, Portland, Oregon, 1987-88, at p. 241-291 (1988); and H. Gwillim, unpublished memorandum, West Coast Environmental Law Association, February 21, 1990.] Coombes and MacNaughton state:*

*In order to protect the lender from liability and maintain the value of the security held by the lender, the lender will want to become more knowledgeable about the borrower and the borrower's business than was necessary in the past. However, at no time will the lender want to appear to be controlling the operations of the borrower. If the lender's dealings with the borrower can be construed as participation in management, a court may find that the lender is the person in charge if hazardous wastes contaminate any site in which the borrower holds an interest. [(100) -- 100]. Coombe and MacNaughton, *supra*, note 70, at p. 33-34.]*

Lenders should be aware that Canadian environmental statutes generally provide a due diligence defence. Under this defence, a defendant who commits a statutory offence escapes liability if the defendant shows that he or she took all reasonable care to avoid the prohibited activity. [(101) -- 101]. Both the Waste Management Act, S.B.C. 1982, c. 41, and the Canadian Environmental Protection Act, S.C. 1988, c. 22, provide a "due diligence" defence. See sections 34 and 125 respectively.] What constitutes due diligence depends on the specific circumstances. To be able to argue due diligence, the lender should ensure that the loan commitment letter issued by the lender specifies that the borrower must furnish an environmental audit as a condition to the loan agreement. Coombes and MacNaughton suggest that:

*The performance of an environmental audit is probably the single most important act available to the lender to prove that it has been duly diligent. [(102) -- 102]. Coombes and MacNaughton, *supra*, note 70, at p. 24.]*

They also suggest that the audits should be updated occasionally throughout the term of the loan, demonstrating an established system of due diligence.

Mandlebaum and Collins, drawing from U.S. experience, suggest that on-going monitoring of the borrower's operations is essential:

*For higher risk businesses, the lender may wish to receive copies of permit applications, certain routine filings, notices of violation, or any other documents indicating environmental enforcement interest in a particular property. In extreme cases, the lender may wish periodically to have the right to enter and to inspect. Location of a problem may trigger default or allow the lender to take additional collateral. [(103) -- 103]. D.G. Mandelbaum and B.K. Collins, "Lenders and the Environmental Laws: An Ounce of Prevention", 43 *Consumer Finance Law Quarterly Report* 66, 1989, at p. 71.]*

2.6.4 Tort Liability of Lenders

Neighbours who suffer damages from polluting activities might sue those parties who exercised control over the polluter, such as a lender, ...

Lenders should also be concerned about potential tort liability, especially if they have some managing or controlling function in the polluting activity. Neighbours who suffer damages from polluting activities might sue those parties who exercised control over the polluter, such as a lender, as well as the polluter itself. Tort liability is discussed more fully in Chapter Four.

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Chapter 3 - THE DEVELOPMENT PROCESS

General awareness of the problem of contamination of land is having an impact not only in the sale of property but also in the redevelopment of property. With the growing recognition that many former uses of land have left a legacy of contamination, municipalities and the Waste Management Branch of the B.C. Ministry of Environment have recently adopted ad hoc procedures for the assessment and clean-up of sites where redevelopment has been proposed. This chapter describes and analyses the new procedures. It also identifies three areas where liability remains uncertain, in spite of these new procedures.

3.1 THE NEW Ad Hoc PROCEDURES

In British Columbia, provincial legislation [(104) -- 104. . For example, see the Municipal Act, R.S.B.C. 1979, c. 290; Vancouver Charter, S.B.C. 1953, c. 55.] gives municipalities the primary responsibility for regulating the development of land, including powers to approve applications for subdivision, re-zoning, building permits, and development permits. This legislation also includes provisions enabling municipalities to regulate geophysical conditions such as soil stability and floodplains. However, there are no provisions which specifically provide for the municipal regulation of contamination hazards. Legislative authority to deal with these hazards is left primarily to the provincial Waste Management Branch. [(105) -- 105. . The Ministry of Environment's authority for regulating contaminated land is found in various provisions of the Waste Management Act, S.B.C. 1982, c. 41, and the Environment Management Act, S.B.C. 1981, c. 14. A more detailed review of provincial powers is given in Chapter Five.]

The fact that legislation does not expressly enable municipal regulation of contamination hazards has not precluded municipalities from taking practical steps to implement ad hoc procedures to regulate these sites.

The fact that legislation does not expressly enable municipal regulation of contamination hazards has not precluded municipalities from taking practical steps to implement ad hoc procedures to regulate these sites. [(106) -- 106. . Another description of these new procedures is found in L. Huestis et al., Contaminated Sites Management In The Province of British Columbia: A Review of Provincial Roles and Responsibilities, prepared for the Waste Management Branch, Ministry of Environment, Province of British Columbia, February, 1990.] These new procedures begin with municipal screening of development proposals. Currently, many Lower Mainland municipalities apply two types of review to applications for approval of development of land:

- **archival research** to determine past uses of the subject and neighbouring sites to assess whether any of these sites might be contaminated; and
- **interdepartmental referrals** within the municipality to enable different departments to consider whether contamination might exist. [(107) -- 107. . Personal communication with Cameron Gray, City of Vancouver, February 1, 1990.

]

If municipal screening discloses a potential contamination problem, the municipality usually refers the development application to the Waste Management Branch. [(108) -- 108. . For example, see Manager's Report to Vancouver City Council, Vancouver, January 12, 1990.] To the best of our knowledge, no municipality in British Columbia carries out its own detailed site assessments or reviews developers' site assessments in relation to contamination problems. [(109) -- 109. . Municipalities are reluctant to carry out detailed assessments for two reasons: lack of expertise and lack of statutory mandate either to assess a potential contamination problem or to formulate an appropriate clean-up plan. See Manager's Report, ibid.] For example, the City of Vancouver informs would-be developers that:

If municipal screening discloses a potential contamination problem, the municipality usually refers the development application to the Waste Management Branch.

Authority for assessing potential hazards associated with soil contamination lies with the Provincial Ministry of Environment. [(110) -- 110. . Manager's Report, supra, note 5, at p. 3.]

When the Waste Management Branch receives an application from a municipality, it undertakes a detailed review of the contamination problem. Normally the Branch requests a site assessment report from the developer, who retains an environmental consulting firm to prepare the report. Waste Management Branch officials, in conjunction with the developer's consultant, assess the problem and determine whether a clean-up of the site is necessary.

If the Branch concludes that a clean-up is required, it requests that the developer prepare a clean-up plan. The Branch reviews this plan, taking into account two important sources: the "Pacific Place Standards" [(111) -- 111. . Ministry of Environment, British Columbia Standards for Managing Contamination At the Pacific Place Site, Victoria, April 5, 1989. The "Pacific Place Standards" were developed through a provincial review of the Quebec standards, which in turn were borrowed from the Netherlands.] and the Special Waste Regulation. [(112) -- 112. . Special Waste Regulation, B.C. Reg. 63/88.]

If the Branch concludes that a clean-up is required, it requests that the developer prepare a clean-up plan.

The Pacific Place Standards were developed as clean-up standards for the Expo '86 site. They contain maximum contaminant concentration standards of "cleanliness" which address human health and environmental considerations. The standards take into account levels of human health risk, such as projected deaths per million resulting from exposure to a particular contaminant.

However, the Pacific Place Standards of "cleanliness" are not specifically authorized by any statute and serve as administrative guidelines only. This raises the question of whether the Branch has the authority to impose these standards on developers. [(113) -- 113. . This matter is discussed in Section 3.2.2.]

Also, since the Pacific Place Standards were developed to deal with the specific geographic considerations of the Expo site, they are not applicable universally to all sites with contamination problems in other areas, some of which could have substantially different physical attributes and future uses. Therefore, it is not clear how the Pacific Place Standards will be applied to different sites, and developers and purchasers may not be able to predict with any certainty what degree of clean-up will be required and what the cost will be. [(114) -- 114. . This matter is discussed in Section 3.2.]

The second source for reviewing and developing clean-up plans, the Special Waste Regulation, [(115) -- 115. . Personal communication with Dr. J. Wiens, Waste Management Branch, September 7, 1989.] sets out numerous requirements for handling, storing and disposing of "special waste". It also includes requirements for siting and operating "special waste facilities", as defined in the Waste Management Act.

The Special Waste Regulation applies only to sites which contain "special waste". However, many sites contain waste but fall outside the qualitative or quantitative standards defining "special waste". But while the Special Waste Regulation may not apply, there is nothing to preclude the Branch from requiring clean-up of these sites.

When the Branch reviews a developer's clean-up plan it advises the municipality as to whether the plan meets the Pacific Place Standards and the Special Waste Regulation, if applicable. In spite of requests by some municipalities, the Branch does not provide a certificate or comfort letter stating that the site will be considered "clean" if remediation is carried out according to the developer's clean-up plan. [(116) -- 116. . Approximately fifty applications from the City of Vancouver are now in the process of being reviewed under this new procedure. See Manager's Report, supra, note 5.]

Currently, numerous development permit applications are being reviewed by the Waste Management Branch to determine if the sites require remediation. In only a few cases has the review been completed, [(117) -- 117. . See Gray, supra, note 4.] and in even fewer has the clean-up plan been prepared and implemented. This review process has lengthened considerably the time required to obtain development approval.

Generally, municipalities will not approve a development application until a clean-up has been completed. [(118) -- 118. . See Manager's Report, supra, note 5, p. 3.] This causes considerable concern for developers who are reluctant to undertake a costly clean-up without any assurance of development approval. [(119) -- 119. . Letter from Maureen B. Enser, Urban Development Institute Pacific Region, to the Office of the City Clerk, Vancouver, January 16, 1990.] As a result, the City of Vancouver is contemplating granting approval of a development application prior to the actual clean-up, subject to certain conditions. [(120) -- 120. . Possible conditions include requiring a developer to provide a bond or requiring a developer to grant a covenant under section 215 of the Land Title Act, R.S.B.C. 1979, c. 219 to provide notice that a clean-up might not have been adequately carried out. See Manager's Report, supra, note 5.]

Generally, municipalities will not approve a development application until a clean-up has been completed.

Presently, it appears unlikely that municipalities will use a bylaw or resolution to approve a particular clean-up plan. [(121) -- 121. . In fact, the Manager's Report, supra, note 5, recommends at p. 4 that such express approval not be given.] Rather, it appears more likely that municipalities will approve or disapprove clean-up plans in an informal or indirect way. [(122) -- 122. . Based on personal communications with Lower Mainland municipal officials.]

3.2 THE UNRESOLVED QUESTIONS

The current ad hoc procedure for review of development applications to determine potential toxic contamination is a practical necessity but is far from perfect. Several key legal questions arise. First, given that municipalities and the Waste Management Branch have undertaken certain assessment functions, to what extent can they be held liable for negligence if they inadequately carry out these functions? Second, is there adequate legislative authority for municipalities and the Waste Management Branch to require that developers conduct assessments and clean-ups? Third, do municipalities have a duty to disclose information about contamination of sites? [(123) -

- 123. . Two recent studies have identified numerous deficiencies in the administrative practice and legal framework and have suggested law reform. See Huestis, *supra*, note 3; and D. Saxe, *Contaminated Land*, unpublished research paper prepared for the Law Reform Commission of Canada, March 16, 1990. See also J. Russell and W.J. Andrews, *Toxic Real Estate in British Columbia: Draft Statute for Discussion*, [West Coast Environmental Law Research Foundation](#), Vancouver, 1990.]

3.2.1 Liability for Negligent Regulation of Contaminated Lands

In certain situations, public bodies such as municipalities and the Waste Management Branch can be held liable for negligently regulating hazardous conditions. Liability could arise during the screening activity carried out by municipalities or during the detailed review carried out by the Waste Management Branch. In these instances, municipalities and the Waste Management Branch must ensure that their acts or omissions conform with reasonable standards of care and do not cause reasonably foreseeable harm to others such as purchasers or developers.

In certain situations, public bodies such as municipalities and the Waste Management Branch can be held liable for negligently regulating hazardous conditions.

We are not aware of any Canadian cases in which a public body was found liable for negligently assessing a contamination problem. Numerous cases, however, have dealt with the duties of public bodies in regulating other types of hazards and several principles have emerged.

In many cases, courts have distinguished between policy decisions and operational decisions. In general, a public body is immune from liability when making a policy decision, even if it errs. However, once a policy decision is implemented, if the operational steps are undertaken negligently, a public body may be held liable for damages arising from its negligence. [(124) -- 124. . City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2 at p. 24.]

...once a policy decision is implemented, if the operational steps are undertaken negligently, a public body may be held liable for damages arising from its negligence.

*A number of cases illustrate the immunity inherent in negligently-made **policy** decisions. In Grande v. Nelson, [(125) -- 125. . Grande v. Nelson (1989), 42 M.P.L.R. 286 (B.C.S.C.)] the City of Kamloops approved two plans of a subdivision. Subsequent purchasers found that the soil had been inappropriately filled and compacted prior to approval of the subdivision plans. The judge concluded that the approving officer was making a "discretionary or judgmental exercise, and liability cannot be imposed upon him, even if his discretionary exercise was a negligent one." [(126) -- 126. . Ibid., at p. 300.]*

In Bowen v. City of Edmonton (No.2), [(127) -- 127. . Bowen v. City of Edmonton (No. 2) (1977), 3 M.P.L.R. 129 (Alta. S.C.)] the plaintiffs purchased property in an undeveloped subdivision to build a residence and applied for a development permit. The City refused the permit application, having recently discovered major problems with soil stability in that area. Evidence showed that prior to the time of the purchase the Provincial Planning Board had recommended a soil analysis, but the City had not carried it out. The court found the municipality negligent for allowing the subdivision without adequate soil analysis but did not hold it liable, because this was a policy decision.

Several other cases illustrate when public bodies have been found liable in making operational decisions. In Just v. Province of British Columbia, [(128) -- 128. . Just v. British Columbia, unreported decision of the Supreme Court of Canada, File No. 89-121, December 7, 1989.] a boulder rolled down slopes above the Squamish Highway and hit the plaintiff's car, killing his daughter and causing him very serious injuries. The provincial Ministry of Highways had set up a

system for inspection and remedial work upon the rock slopes, [(129) -- 129. . Inspection and recommendations were made by engineers and the work was effected by a rock scaling crew responsible for performing remedial work throughout the entire province. The Ministry had instituted a system of checking for loose boulders, using visual inspections from the highway unless rock falls or a history of instability in an area indicated a need for the rock engineer to climb the slope.] but this did not prevent the accident. The court found the provincial government liable, holding that the inspection system was part of the operational aspect of a governmental activity.

In Rothfield v. Manalagos, [(130) -- 130. . Rothfield v. Manoklakos, [1989] 2 S.C.R. 1259.] various home owners sued the City of Vernon, alleging negligence on the part of the City's building inspector. The court imposed liability on the municipality, holding that the building inspector's decision to approve the plans of a retaining wall and to permit construction of houses were operational ones.

In Grewal v. Saanich, [(131) -- 131. . Grewal v. District of Saanich (1989), 38 B.C.L.R. (2d) 250 (C.A.)] the plaintiffs bought a serviced lot from a developer and obtained a building permit from the municipality. Shortly after building their home they found numerous cracks throughout the house, caused by unsuitable soil conditions. The court held the developer liable for negligently breaching its implied warranty that the property was a suitable building site. The court also held the District of Saanich liable for negligently allowing construction when it knew there were serious soil problems. A careless inspection prior to approval of the building permit was held to be an operational matter.

The distinction between policy and operational decisions can be difficult to identify. [(132) -- 132. . Prof. P. Hogg reviewed Just, Rothfield and other Supreme Court of Canada cases in "Crown Liability" in Taking the Government to Court: Advanced Issues in Public Law, The Continuing Legal Education Society, February, 1990, at p. 4.1.13 and concluded that:

What the foregoing propositions tend to conceal is the indeterminate character of the distinctions upon which the law now relies. There is an unbroken continuum from planning [or 'policy' decisions] down to implementation, and there are elements of policy in the most mundane of operational decisions. It is obvious that reasonable judges will differ in their assessment of the scope of a public body's 'policy' exemption.] For instance, it is difficult to reconcile why the failure to inspect soil conditions did not give rise to liability in Bowen while the failure to inspect in Just did. In light of this, municipalities and the Waste Management Branch should assume that any of their actions or decisions could be considered operational and could result in liability if conducted negligently.

...municipalities and the Waste Management Branch should assume that any of their actions or decisions could be considered operational and could result in liability if conducted negligently.

3.2.2 Statutory Authority to Require Assessments and Clean-ups

As discussed, the new ad hoc procedures for reviewing development applications require the developer to furnish an assessment and, where required by the Waste Management Branch, to prepare and implement a clean-up plan. However, current legislation does not expressly enable municipalities to insist on assessments and clean-ups as conditions of development approval. [(133) -- 133. . The Waste Management Branch's authority over contaminated land arises primarily from its authority to grant approvals to discharge waste into the environment pursuant to section 3 of the Waste Management Act and to apply the Special Waste Regulation on sites containing 'special waste'. Huestis, supra, note 3, states at p. 17 that 'it is less clear whether the Ministry has authority to control remediation plans where the excavated material does not involve special wastes and is going to a permitted facility.'] Therefore, it is necessary to consider whether

municipalities in British Columbia have the authority to do so. [(134) -- 134. . Huestis, supra, note 3, p. 16; Manager's Report, supra, note 5.]

The courts have not yet considered this question. However, the legislation [(135) -- 135. . For example, see the Municipal Act, R.S.B.C. 1979, c. 290; the Land Title Act, R.S.B.C. 1979, c. 219.] governing development approval provides municipalities with considerable discretion in deciding whether to approve development applications. Arguably, the factors municipalities may consider in exercising this discretion include environmental factors. The following statutory provisions allow municipalities some discretion in making decisions regarding redevelopment of sites:

- **Re-zoning:** *Section 963 of the Municipal Act provides municipalities wide discretion in decisions regarding zoning and rezoning. [(136) -- 136. . It is possible that concern for the possibility of adverse health effects from contaminated land could be a factor in refusing an application.*

]

- **Subdivision:** *Subsection 85(3) of the Land Title Act grants the approving officer discretion to refuse a subdivision application if the plan is contrary to public interest, and subsection 86(1) grants the officer the power to reject a subdivision proposal if studies indicate an unacceptable environmental impact.*
- **Development Permits:** *Section 976 of the Municipal Act states that a municipality may require that in certain designated areas, a developer must obtain a development permit, and that in deciding whether to grant the permit a municipality can take into account broad environmental considerations. [(137) -- 137. . Section 976 of the Municipal Act provides that a development permit is required before land can be subdivided or a building or structure can be constructed. Even if property is properly zoned and has received subdivision approval, an application for a development permit can still be rejected if site contamination is found to exist.*

]

As a practical matter, developers ``voluntarily" provide assessments and clean-ups when requested by municipalities because to fail to do so could result in a rejection of their redevelopment application. In any event, developers generally will want to clean up their contaminated sites to avoid future liability.

...developers generally will want to clean up their contaminated sites to avoid future liability.

While legislation dealing with zoning, subdivision, and development provides municipalities with considerable discretion, it must be exercised within certain limits. One limit is set out in paragraph 988(5)(b) of the Municipal Act which requires that a municipality cannot ``require work or service ..." unless authorized by a provincial statute. Numerous cases have rejected a public authority's attempts to use discretionary authority as a justification for imposing conditions which were not authorized by statute. [(138) -- 138. . For example, Thiessen Cattle v. Alberta Planning Board (1986), 35 M.P.L.R. 9 (Alta. C.A.); Piccadilly v. Delta (1979), 14 M.P.L.R. 35 (B.C.S.C.); Canadian Occidental Petroleum Ltd. v. City of North Vancouver (1982), 46 B.C.L.R. 179 (B.C.S.C.); Independant Canadian Business Association v. City of Vancouver (1986), 2 B.C.L.R. (2d) 210 (B.C.S.C.).] A disgruntled developer might attempt to rely on these cases if the developer does not want to go through an environmental assessment because of the high clean-up costs and additional financing costs caused by the delay of going through the environmental assessment, without any assurance of development approval.

MUNICIPAL DISCLOSURE

A Developer plans to purchase a parcel of land for subdivision purposes. The Developer asks the municipal planning department to provide applicable bylaws and "other information". Municipal archives contain land use records showing that a portion of this parcel served as a dump in the 1940s. A planning official provided some information to the Developer, but did not consult the archives and did not reveal the previous use as a dump. The Developer buys the parcel and finds that the previous dump renders the parcel unsuitable for development. The Developer suffers a financial loss, and sues the Municipality.

Some Legal Considerations:

- *1. Since the municipality provided **some** information in response to the inquiry, it may have been obligated to provide **complete** information. [See Section 3.2.3.]*
- *2. In retrospect, the Developer should have done his own research into previous uses of the land. Was this contributory negligence? [See Section 2.2.]*

Municipalities have considerably less discretion when considering approval of building permit applications than when dealing with

zoning, subdivision or development permit applications. Peter Kenward has reviewed various provisions of the Municipal Act and has concluded that:

*Thus, in a proper case, a municipality can refuse to approve a rezoning, subdivision or development permit application. At present, however, a municipality cannot refuse to approve a building permit on the basis of environmental concerns. An applicant is entitled to a building permit if his application complies with the building code. Neither the Municipal Act nor the building code presently authorize the withholding of building permits on the basis of contamination. [(139) -- 139. . Kenward, Rankin, and Benson, "Minimizing Liability in Corporate and Real Estate Transactions", *Avoiding Environmental Liability in Real Estate and Business Transactions*, March, 1989, The Canadian Institute, Toronto, p. 38.]*

The City of Vancouver has recognized this limit on its discretion and has proposed changes to the Vancouver Charter which would enable the City to withhold a building permit on environmental grounds. [(140) -- 140. 37. Manager's Report, supra, note 5, at p. 9.]

The City of Vancouver ... has proposed changes to the Vancouver Charter which would enable the City to withhold a building permit on environmental grounds.

Turning to the role of the Waste Management Branch, another possible limit on the authority to apply the current development application review procedures arises from the fact that the clean-up standards applicable to a specific site are often not readily apparent. This uncertainty over clean-up standards raises the possibility of judicial review. The problem is two-fold. First, there is no express statutory authority for imposing clean-up standards on a specific site. Second, it is arguable that the standards themselves are subjective and determined arbitrarily by Waste Management Branch staff, who adapt the Pacific Place Standards to sites with physical and land use attributes that are very different than those at Pacific Place. Therefore, a developer may be uncertain about the exact standard to be applied to a particular site until negotiations between the Branch and the developer's consultant take place.

The Branch's use of non-statutorily-based guidelines in the form of the Pacific Place Standards could be found to be void under Canadian administrative law, if exercised in an arbitrary fashion. [(141) -- 141. . Signcorp v. City of Vancouver (1986), 9 B.C.L.R. (2d) 238 (S.C.).] A developer faced with high clean-up costs might argue that public bodies cannot derogate property rights in an arbitrary fashion and that any standards imposed must be reasonable and have some basis in

law. [(142) -- 142. . For example, *Canadian Institute of Public Real Estate Companies v. City of Toronto* (1979), 7 M.P.L.R. 39 (S.C.C.).]

3.2.3 What is the Duty of Municipalities to Provide Information?

Parties concerned about toxic contamination of real estate will look to municipalities to furnish information, since municipalities regulate land use and have archives and numerous records. Increasingly, municipalities will be visited by prospective developers, purchasers, realtors, environmental auditors, and lawyers seeking information about the possibility of contaminants on various sites.

Traditionally, municipalities have often provided information to their citizens as a matter of courtesy or public relations. One of the main activities of planning departments, for example, is responding to inquiries about the application of municipal bylaws.

...a recent case imposed liability against a municipality that negligently failed to provide complete information to a prospective purchaser in the municipality.

*However, a recent case imposed liability against a municipality that negligently failed to provide complete information to a prospective purchaser in the municipality. In *Hartnett v. Wailea Construction et al.*, [(143) -- 143. . *Hartnett v. Wailea Construction et al.* (1989), 43 M.P.L.R. 298 (B.C.S.C.).] Mrs. Hartnett visited Delta City Hall and told the "lady behind the counter" that she and her husband were planning to purchase a specific lot. She asked whether the municipality had any information which "was needed for the design of the house". The clerk provided some information but did not disclose an internal planning department memorandum which considered the property's problematic soil conditions. It appears that the clerk did not know that the memorandum existed. The court found the municipality negligent in not providing the requested information [(144) -- 144. . Mr. Justice Gibbs stated at p. 306-7: "The failure to provide that critical information in response to the specific request of Mrs. Hartnett was a breach by the municipality of the duty of care then arising through the legal proximity of the plaintiffs and the municipality to whom they were looking for advice and information."] and the municipality was required to pay for a portion of the damages sustained by the Hartnetts.*

LEAD AND CADMIUM

A Developer owns vacant land in an area historically used for heavy industry. She seeks approval to develop townhouses on the land. City Hall accepts the application, conducts a rezoning hearing, and gives approval to develop. The Developer constructs and sells the townhouses. Purchasers sue the Developer and City Hall when they find abnormally high traces of lead and cadmium in their soil.

Some Legal Considerations:

- 1. City Hall may be found negligent for approving development of a contaminated site. The key is whether the court will characterize the error as a policy decision or an operational decision [See Section 3.2.1.]
- 2. The court's analysis of the Developer's liability to the Purchasers will start with the contract of purchase and sale. If no express terms of the contract are relevant, then caveat emptor will govern unless one of the exceptions applies. [See Section 2.1.]
- 3. If none of the exceptions apply, however, the Purchasers could argue that the court should utilize the tort law of negligence to provide a remedy. [See Section 2.1.4.]
- 4. The Purchasers, the Developer and City Hall could each sue the original polluters. That subject is discussed in the next Chapter.

Hartnett does not settle the question of how far a municipality must go in reviewing its files in responding to a specific request for information. In Hartnett, the information sought was close at hand. The planning memorandum was directly related to the subject property and was prepared in response to a recent subdivision application regarding that property. The court imposed a duty to disclose in spite of the fact that Mrs. Hartnett had not specifically requested the particular memorandum, but only asked for information needed for the design of her house. However, it is not clear from this case whether more remote information must be disclosed, such as data showing the past use of a particular lot. [(145) -- 145. . It is also interesting that neither of the parties in Hartnett v. Wailea, nor the court, considered the traditional common law doctrine holding that municipalities have no duty to disclose information to members of the public, see Re Simpson and Henderson, (1976), 13 O.R. (2d) 322 (H.C.).]

Consequently, the City of Vancouver has adopted a policy to refuse to provide information regarding the condition of soils or construction materials present on any site. [(146) -- 146. . City of Vancouver Planning Department, Administration Bulletin, May 16, 1989. The Bulletin also alerts the applicant to types of uses which may involve toxic substances and advises that the applicant seek more information from the Waste Management Branch, giving the Branch's address and phone number.] This raises the question of whether a municipality is obligated to release certain information.

Legislation in British Columbia does not impose a general duty on municipalities to disclose information. [(147) -- 147. . The Municipal Act, R.S.B.C. 1979, c. 219, specifies that a municipality must only disclose bylaws, council minutes, and financial statements. See subsections 244, 397(3), 956(8) and 955(5).] Nor does British Columbia have a general Access to Information Act which would require municipalities to allow citizens access to municipal information, [(148) -- 148. . In contrast, Ontario's Municipal Act, R.S.O. 1980, c. 302, subsection 78(1) provides that any person may inspect records or documents in possession of the municipal clerk, subject to certain exceptions such as interdepartmental memos and communication with lawyers. Law student Heather Northrup has examined access to information legislation in the State of Washington and Ontario and found that ``B.C. is a jurisdiction not keeping up with the trend towards open government." See ``Municipal Information", unpublished essay prepared for [West Coast Environmental Law Research Foundation](#), 1990, at p. 19.] although several municipalities have bylaws respecting access to information [(149) -- 149. . For example, City of Vancouver, Resort Municipality of Whistler, District of Saanich.] to clarify what is available to the public.

Legislation in British Columbia does not impose a general duty on municipalities to disclose information. Nor does British Columbia have a general Access to Information Act ...

The municipal duty to disclose information about contamination may also arise in situations where a municipality is conducting a statutorily-required meeting or hearing. In these situations, municipalities must ensure that the information it relies upon is

disclosed to participants in the meeting or hearing. The rationale for this duty of disclosure was put this way:

Anything less than full disclosure of the relevant information restricts the scope of the analysis and the consequent representation a home owner might otherwise make to the council at the public meeting. Leaving home owners ignorant of the pertinent information in the possession of the council frustrates the objective of a public meeting and denies those home owners whose property is affected by the by-law a full opportunity to be heard at a fair and impartial public hearing. [(150) -- 150. . Karamanian v. Richmond (1982), 38 B.C.L.R. 106 (S.C.) at p. 111.]

Illustrating this principle, one case held that a municipality has a duty to disclose to the public a report considered by council in making a rezoning decision. [(151) -- 151. . Eddington v. Surrey

(1989), 26 M.P.L.R. 229 (B.C.S.C.)] Accordingly, municipalities should take care to disclose to developers and other affected persons any reports respecting contaminated land which council relies on when determining development applications, in cases where a public hearing is required.

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Chapter 4 - POLLUTION TORTS

4.1 THE COMMON LAW AS A CLEAN-UP TOOL

The common law is law derived from judgements of the courts, as distinguished from law created by statutes enacted by legislatures. Canadian common law has evolved through centuries of legal history beginning in England [(152) -- 152. . The law of Quebec includes the Civil Code, which descended from France.] and continuing in Canada. Chapter Five contains a discussion of British Columbia and federal statutes in relation to toxic contamination of land. Because these statutes have significant limitations in defining liability for damages caused by contamination, however, common law remedies remain important for victims of contamination.

...common law remedies remain important for victims of contamination.

Chapter Two contains a discussion of the importance of the common law of contract and tort in the real estate transaction. This chapter -- Chapter Four -- highlights the common law of tort in dealing with the contamination of real estate in two other contexts:

- *the rights of neighbours to sue existing and previous owners and occupiers of contaminated property for environmental damages when the contamination affects a neighbouring property; and*
- *the rights of existing owners of contaminated real estate to sue previous owners using tort law rather than contract law.*

A number of legal "causes of action" have evolved in the area of tort law, each dealing with a different type of damages. The causes of action known as private nuisance, negligence and Rylands v. Fletcher have the most relevance as sources of remedies for plaintiffs in litigation involving contaminated real estate. Each of these is discussed below.

4.2 PRIVATE NUISANCE

Landowners or occupiers may be subject to actions in private nuisance if pollution from their land unreasonably interferes with other owners' or occupiers' use and enjoyment of their land, or if the pollution causes actual damage to another property or injury to the health of the occupier. [(153) -- 153. . Not included in this discussion is the tort of "public nuisance". The main feature of this tort is a defendant's actual or potential interference with an interest held by society generally. Because a public nuisance breaches public rights or our social welfare, this action is usually commenced by the provincial Attorney General. Traditionally, a private citizen may sue for public nuisance only where the citizen can demonstrate "special damages" over and above the general suffering or inconvenience to the public. It is now arguable that there is "public interest standing" to allow a citizen to bring an action for public nuisance even where the citizen does not suffer damages over and above those suffered by the general public; but Canadian courts have not yet decided this question.] A nuisance may be caused, for example, by a leaking underground oil tank, [(154) -- 154. . Brewer v. Kayes, [1973], 2 O.R. 284 (D.C.)] burning garbage, [(155) -- 155. . Plater v. Town of Collingwood, [1968] 1 O.R. 81 (H.C.)] noise pollution, [(156) -- 156. . Banfai v. Formula Fun Centre (1984), 51 O.R. (2d) 361 (H.C.)] or water pollution. [(157) -- 157. . In

situations involving waterways, under the common law, the owner of land abutting a watercourse may have been able to bring an action to enforce riparian rights, the right to the continued flow of the water in its natural quantity and quality, subject to the ordinary reasonable use of the upper riparian owners. See *Scarborough Golf and Country Club Ltd. v. City of Scarborough* (1988), 41 M.P.L.R. 1 (Ont. C.A.). Therefore, a prospective purchaser of land bordering upon a watercourse should investigate whether contamination of the subject property is adversely affecting a downstream owner's riparian rights. For example, toxic contaminants from an old dump site could leach into a stream and adversely affect a downstream owner's riparian rights. The law of riparian right has been altered by statute, such as the Water Act, R.S.B.C. 1979, c. 429. A full discussion of how legislation has altered the law of riparian rights is beyond the scope of this report. However, it has been argued that while statutes may abridge substantially the riparian owner's right to use water, the owner can still maintain an action for damages arising from polluted water. See R. Franson and A. Lucas, *Canadian Environmental Law*, Vol. 1, Pt. 3.9.4.2.]

One important aspect of private nuisance, ...is that the creator of a nuisance remains liable even after he or she has no further interest in the property or ceases to occupy property.

*One important aspect of private nuisance, especially in the context of contaminated land, is that the creator of a nuisance remains liable even after he or she has no further interest in the property or ceases to occupy property. In *Roswell v. Prior*, [(158) -- 158. . *Roswell v. Prior*, n.d., 12 Mod. 635, 88 E.R. 1570.] the defendant erected a building which interfered with the plaintiff's right to enjoy natural daylight. [(159) -- 159. . This is also known as the common law doctrine of "ancient lights".] However, before the plaintiff commenced the action against the defendant, the defendant leased the building to a third party. The Court held:*

*And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it... [T]he putting it out of one's power to abate a nuisance is as great a tort as not to abate it when it is in your power to do it. And it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages... [(160) -- 160. . *Roswell v. Prior*, supra, note 7, at p. 1573.] (emphasis added)*

*Adopting this principle, one Canadian case held that the liability of the creator of the nuisance continues as long as the offensive condition remains, regardless of the subsequent occupier's ability to abate it or stop the harm. [(161) -- 161. . *Jackson v. Drury Construction Co. Ltd.* (1974), 4 O.R. (2d) 735 (C.A.).]*

*Another important aspect of private nuisance is that it may well be available to a current owner to obtain damages from a previous owner of the same land. We are not aware of any Canadian cases in which this question has been decided. Two cases, however, are scheduled to go to trial soon. The first is *Sprung Enviroponics Ltd. v. the City of Calgary and Imperial Oil Ltd.*, [(162) -- 162. . *Sprung Enviroponics Ltd. v. City of Calgary and Imperial Oil Limited* (1988), Statement of Claim, Calgary, Suit No. 8801-12601. If this case goes to trial, it could be the first Canadian case on point.] in which the purchaser Sprung is suing the vendor City and Imperial Oil, which owned the land prior to the City, for damages caused by hydrocarbon vapours allegedly arising from deposits made by Imperial Oil. In the second case, the Regional Municipality of Ottawa-Carleton is suing numerous former owners of a coal gasification operation for damages caused by contamination of the land. [(163) -- 163. . Personal communication with P. Wilson, Barrister & Solicitor, Regional Municipality of Ottawa-Carleton, January 19, 1990.]*

...private nuisance ...may well be available to a current owner to obtain damages from a previous owner of the same land.

At least three recent American decisions bear examination when considering the issues which are likely to be raised in these cases. In two of these decisions former interest-holders were found

liable in private nuisance for contaminating the subject land, [(164) -- 164. . *State Dept. of Environ. Protect. v. Ventron* (1983), 468 A.2d 150 (N.J.S.C.) 160; *T & E Industries Inc. v. Safety Light Corp.* (1988), 546 A.2d 570 (N.J.C.A.)] and in one the action was dismissed. [(165) -- 165. . *Philadelphia Electric Co. v. Hercules Inc.* (1985), 762 F.2d 303 (U.S.C.A.)] In *Ventron*, where the plaintiffs were successful, the court stated:

Even if they [the polluters] did not intend to pollute or adhered to the standards of the time, all of these parties remain liable. Those who poison the land must pay for its cure. [(166) -- 166. . State Dept. v. Ventron, supra, note 13.]

“Those who poison the land must pay for its cure.”

Uncertainty exists regarding whether private nuisance is available against an owner who purchased the property after the contamination occurred. In one Canadian case the court held that a purchaser of land becomes liable for damages if he or she knows about a condition on the land which is causing a nuisance but fails to rectify the problem. [(167) -- 167. . *Gertsen v. Metropolitan Toronto and Borough of York* (1973), 2 O.R. (2d) 1 (H.C.)] An English court has held that even a purchaser who is not aware of the pollution or the damage being caused to others at the time of purchase may be found liable for the nuisance if he or she adopts the nuisance by failing to take reasonable means to prevent the pollution. [(168) -- 168. . *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880 (H.L.)] In contrast, U.S. courts seem to require an affirmative act of adoption of the nuisance before the new owner can be held liable. [(169) -- 169. . *National Wood Preservers Inc. v. Commonwealth of Pennsylvania Department of Environmental Resources* (1980) 414 A.2d. 37.]

4.3 NEGLIGENCE

A landowner or occupier may be held liable for damages in negligence where his or her conduct falls below a reasonable standard [(170) -- 170. . The “reasonable” person is a hypothetical person who exercises “those qualities of attention, knowledge, intelligence and judgement which society requires of its members for the protection of their own interest and the interests of others”. See *American Law Institute, Restatement of the Law, Second: Torts, 2d ed., Revised. Volumes 1-3, para. 283(b), St. Paul, Minnesota, 1965.*] and the damage is reasonably foreseeable. Courts have imposed liability in negligence where defendants failed to prevent pesticides from drifting onto neighbouring land, [(171) -- 171. . *Bridges Bros. Ltd. v. Forest Protection Ltd.* (1976), 72 D.L.R. (3rd) 335 (N.B.Q.B.)] buried garbage without due regard for its effects on a neighbour's enjoyment of his or her land, [(172) -- 172. . *Gertsen v. Metropolitan Toronto and Borough of York, supra, note 16.*] and allowed leaks from pipes or tanks to enter neighbouring subsurface soil. [(173) -- 173. . *Beaulieu v. Riviere Verte* (1970), 13 D.L.R. (3d) 110 (N.B.C.A.)]

A defendant is not required to prevent absolutely the discharge of any pollutants, but must employ reasonable methods to prevent the problem or deal with it after the fact. Also, a current owner must use reasonable care to deal with a known problem even though the problem was initially caused by a former owner's carelessness.

...a current owner must use reasonable care to deal with a known problem even though the problem was initially caused by a former owner's carelessness.

There are a number of defences a defendant can raise in response to a negligence action. These include contributory negligence -- that the plaintiff's own negligence contributed to his or her loss -- and voluntary assumption of risk -- that the plaintiff knowingly consented to the potential harm.

4.4 THE PRINCIPLE OF *Rylands v. Fletcher*

The case of Rylands v. Fletcher established a basis of responsibility in tort for unintended and non-negligent harm. [(174) -- 174. . Rylands v. Fletcher (1868), 37 L.J. Ex. 161 (H.L.)] In that case, the defendant mill owners had constructed a water reservoir on their land to supply water to their mill. Unknown to the defendants, the reservoir site contained an unused shaft of an abandoned mine. Water broke through the shaft and flooded an adjoining mine of the plaintiff. The defendants had taken all reasonable care, but were nevertheless held liable for the damages. The court said that:

[A] person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and, if he does not do so, is prima facie answerable for all the damages which is the natural consequence of its escape. [(175) -- 175. . Ibid., at p. 164.]

In a case where the principle of Rylands v. Fletcher is applied, a polluter cannot escape liability simply because precautions were taken. Liability here depends not on carelessness but on mere proof of damage caused by the escape of a dangerous substance, provided the initial presence of the substance constituted a non-natural use of the land.

The principle of Rylands v. Fletcher has been applied in cases involving poisonous fumes from a fumigation plant, [(176) -- 176. . Schubert v. Sterling Trusts Corp., [1943] O.R. 438.] gasoline from a storage tank pump, [(177) -- 177. . Newell v. R.E. Newell Fisheries Ltd. (1982), 54 N.S.R. (2d) 652.] gas vapor from a factory, [(178) -- 178. . Heard v. Woodward (1954), 12 W.W.R. (N.S.) 312 (B.C.S.C.); Mortimer v. B.A. Oil Co. Ltd., [1950] 1 W.W.R. 49 (Man. C.A.); Chandler Elec. Co. v. H.H. Fuller & Co. (1892), 21 S.C.R. 337 (S.C.C.) .] arsenic from a smelter, [(179) -- 179. . Cairns v. Canada Refining Co. (1914), 6 O.W.N. 562 (C.A.) .] methane gas from a municipal landfill, [(180) -- 180. . Gertsen v. Metropolitan Toronto, supra, note 16.] and herbicide sprayed from an airplane. [(181) -- 181. . Mihalchuk v. Ratke (1966), 55 W.W.R. 555 (Q.B.); Cruise v. Neissen (1977), 2 C.C.L.T. 53, rev'd 4 C.C.L.T. 59 (Man. C.A.) .] On the basis of these cases, it seems plausible that a plaintiff suffering damages from leachates originating from a neighbouring contaminated site could successfully sue the owner of that site for relief.

...it seems plausible that a plaintiff suffering damages from leachates originating from a neighbouring contaminated site could successfully sue the owner of that site for relief.

4.5 DEFENCE OF STATUTORY AUTHORITY IN TORT ACTIONS

In a tort action brought against a polluter, the polluter may have a defence if the government has provided statutorily-based approval for the polluting activity, such as a permit to discharge particular pollutants into the environment under the Waste Management Act.

In a leading case on the defence of statutory authority, Tock v. St. John's Metropolitan Area Board, [(182) -- 182. . Tock v. St. John's Metropolitan Area Board, [1989] 2 S.C.R. 1181.] some members of the court affirmed the following principles:

Firstly, if the legislation imposes a duty on a person or party [to undertake an action] and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence. Secondly, if the legislation merely confers an authority but is specific as to the manner or location of doing the thing authorized and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, the nuisance is itself authorized and there is no recovery absent negligence. On the other hand, if the legislation confers an authority on a public body and also gives it a discretion, not only whether or not to do the thing authorized but also how to do it and in what location, then if that public body decides to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. If the public body implements the

thing authorized in a way or at a location which gives rise to a nuisance, it will be liable therefor, whether there is negligence or not. [(183) -- 183. . Ibid., at p. 3.]

4.6 THE LIMITS OF TORT LAW

As discussed, pollution victims have used tort law successfully in numerous cases against past and present owners of polluting land. However, prospective plaintiffs who have suffered damages as a result of toxic contamination should be aware of the inherent limitations of tort law. [(184) -- 184. . For a more detailed analysis of the limits of tort law, see J. Swaigen, Compensation of Pollution Victims in Canada, Economic Council of Canada, Ottawa, 1981.]

4.6.1 Proof of Causation

To obtain relief in tort law, a plaintiff must prove "causation", i.e., that the defendant caused the plaintiff's damages. For example, in a claim for damages arising from exposure to a toxic chemical the plaintiff must prove that the exposure caused the particular injury. It may be difficult, however, for a plaintiff to prove that the damage was caused by the defendant because:

It may be difficult...for a plaintiff to prove that the damage was caused by the defendant...

- *a variety of sources of pollution may have contributed to the damage;*
- *scientific consensus on the toxic effects of particular substances frequently is not available;*
- *injurious effects may not appear for many years after exposure and, in many cases, studies assessing injurious effects have not been undertaken; [(185) -- 185. . The long periods before symptoms appear can make it difficult to prove that a chronic disease such as cancer or disabling lung disease is, on a balance of probabilities, caused by a particular exposure. The plaintiffs in some of the U.S. "Agent Orange" cases could not meet the burden of proving, with an adequate statistical basis, that exposure to Agent Orange was linked to the plaintiffs' diseases, or had yet produced discernible physical damage: see Payton v. Abbott Laboratories (1982), 437 N.E. 2d 171 (Mass. Supreme Judicial Court).*

] and

- *it is often difficult to establish that a health problem has been caused by exposure to a particular toxic chemical, rather than by other factors such as radiation, diet, drugs and personal habits.*

4.6.2 Identifying and Finding the Defendant

It also may be difficult for the plaintiff to identify the party responsible for the harm, especially when the contamination stems from numerous sources. The common practice in these cases is to sue all possible contributors.

It also may be difficult for the plaintiff to identify the party responsible for the harm...

Even if the polluter can be identified, in some cases there may be no point in taking action because the polluter is no longer a financially viable corporation.

4.6.3 Cost of Litigation

Litigation arising from toxic contamination usually involves complex scientific questions requiring extensive expert evidence. Therefore, this litigation tends to be very lengthy and expensive.

4.7 LIMITATION PERIODS

Statutory limitation periods may impose practical limitations on using tort law to recover damages or to compel clean-up of contaminated sites. Potential claimants should seek legal advice immediately in order to minimize the chance that a statutory limitation period would bar a claim.

GROUNDWATER CONTAMINATION

Occupants of a housing development notice a steady degradation of their yard vegetation and that the well water tastes odd. Some trees are losing their leaves at an abnormal rate. Hydrologists conclude that the source of the problem is chemical contamination of the groundwater. The likely source is a nearby municipal landfill, but there are also some heavy industries in the area. The Municipality has received the appropriate provincial permit to operate the landfill.

Some Legal Considerations:

- *1. The Occupants could bring an action against the Municipality in private nuisance, negligence and the rule in Rylands v. Fletcher. [See Sections 4.2, 4.3 and 4.4.]*
- *2. The Occupants would have to prove that it was the Municipality that caused the problem. An alternative would be for the Occupants to sue **all** of the potential sources of contamination, but it might be difficult to identify them all. [See Section 4.7.1.]*
- *3. The Municipality would likely argue that its provincial permit is a complete defence to the claim. Was the pollution an inevitable consequence of the permit? [See Section 4.6.]*

4.8 THE INSURERS' RESPONSE TO POLLUTION TORTS

During the 1960s and 1970s, industries generally purchased comprehensive general liability (CGL) insurance which did not contain pollution exclusions. Since that time there has been a great deal of litigation, especially in the U.S., over whether these standard CGL policies cover environmental clean-up costs. In general, coverage under CGL policies is limited to sudden and accidental loss.

...environmental impact coverage ...is often difficult to obtain and the premiums are very high due to the potentially enormous claims which could arise from environmental damage.

Although some insurers now offer environmental impact coverage insurance, it is often difficult to obtain and the premiums are very high

due to the potentially enormous claims which could arise from environmental damage. Insurers usually require a site assessment from the insured before providing this coverage.

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Chapter 5 - STATUTORY LIABILITY

There are a number of pollution statutes applicable in British Columbia, including the provincial Waste Management Act and Environment Management Act and the federal Fisheries Act and the

Canadian Environmental Protection Act. Generally speaking, these statutes are aimed at regulating current activity, as opposed to allocating responsibility for contamination which has already occurred.

For example, the general prohibition against disposal of waste into the environment in section 3(1.1) of the Waste Management Act states that "no person shall, in the course of conducting an industry, trade or business, introduce or cause or allow waste to be introduced into the environment." However, a great deal of the contamination of land and buildings in B.C. has arisen from historic activity, that is, industrial activity which occurred decades or even a century ago. In many cases the industries have ceased operations. [(186) -- 186. . See W. Braul, et al., Toxic Real Estate in British Columbia: Identification of Issues, supra, at p. 7-15.] In particular, many sites in British Columbia had already been contaminated long before the enactment of British Columbia's first Pollution Control Act [(187) -- 187. . Pollution Control Act S.B.C. 1956, c. 36.], the predecessor of the current Waste Management Act. [(188) -- 188. . For example, the "Expo site" in Vancouver was contaminated primarily in the early part of the Twentieth Century. See "Summary of Soils Remediation Issues for Parcels 8 & 9 of the Pacific Place Project" prepared by Soils Remediation Group, n.d. Similarly, many sites along the Fraser River and around Burrard Inlet have also been sites of industrial activity for most of the past century.] This is one of the reasons that present pollution laws are inadequate tools for dealing with contaminated land. [(189) -- 189. . See L. Huestis, et al., Contaminated Sites Management in the Province of British Columbia: A Review of Provincial Roles and Responsibilities, prepared for the Waste Management Branch, Ministry of Environment, Province of British Columbia, February, 1990. The third part of this Toxic Real Estate series, Toxic Real Estate in British Columbia: Draft Statute for Discussion will deal with this area in further detail.]

...a great deal of the contamination of land and buildings in B.C. has arisen from historic activity, that is, industrial activity which occurred decades or even a century ago.

This chapter focuses on the existing federal and British Columbia statutes in the context of the following questions:

- *1. Do current environmental statutes apply retroactively and assign clean-up responsibilities to those who polluted before pollution prohibitions existed?*
- *2. What statutory requirements apply to contaminated sites which are not scheduled for redevelopment?*
- *3. Which parties can become liable for pollution from contaminated property?*
- *4. What requirements apply to clean-up operations? and*
- *5. What defences are available for statutory pollution offences? [(190) -- 190. . Issues specific to the development process have been examined separately in Chapter Three above.*

]

5.1 RETROACTIVE EFFECT OF CLEAN-UP ORDER POWERS

The main legislative mechanism for achieving clean-ups in British Columbia is the provincial clean-up order power, which provides officials within the Ministry of Environment with broad discretionary powers to compel parties to clean up contaminated sites in specified situations. [(191) -- 191. . Important order powers are found in sections 10 (2) and 22 of the Waste Management Act, S.B.C. 1982, c. 41, and sections 5 and 6 of the Environment Management Act, S.B.C. 1980-81, c. 14. These powers are discussed in Section 5.2.] Unlike some other jurisdictions, there are no provisions in British Columbia statutes which expressly assign clean-up liability to specific parties such as past owners or occupiers. [(192) -- 192. . An example of legislation which does assign liability to specific parties is the U.S. Superfund legislation.]

...there are no provisions in British Columbia statutes which expressly assign clean-up liability to specific parties such as past owners or occupiers.

A key issue respecting clean-up order powers is whether they are retroactive, whether an order can apply to former owners, occupiers or others who contributed to contaminating a property. This is especially contentious where the pollution was not illegal at the time it occurred.

*There has been limited litigation on the retroactive effect of order powers and, since the retroactive application of such order powers is complex, [(193) -- 193. . A leading text on retroactive effect of statutory provisions is E. A. Driedger, *The Construction of Statutes*, 2nd ed., Butterworths, Toronto, 1983. Some courts recognize a distinction between retroactive and retrospective effect. In this paper they will be considered to be the same and covered by the term "retroactive".] it is sometimes difficult to predict which parties and persons can be subject to the order powers.*

...it is sometimes difficult to predict which parties and persons can be subject to the order powers.

Section 22 of the Waste Management Act, states that an order can apply to parties who "had possession, ...of a [polluting] substance...." [(194) -- 194. . Subsection 22(1) states:

*22(1) Where a manager is satisfied on reasonable grounds that a substance is **causing** pollution, he may order the person who **had** possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment, or any other person who caused or authorized the pollution to do any of the things referred to in subsection (2) (emphasis added).] In *West Fraser et al. v. Driedger* [(195) -- 195. . *West Fraser v. Driedger*, unreported decision of the Supreme Court of British Columbia, November 18, 1988, Lander J., Vancouver Registry No. A882352.], the court considered whether section 22 applied to parties who "had possession" of a polluting substance prior to the 1982 enactment of the Waste Management Act. In this case, Domtar owned and operated a mill in 1978, when an explosion at the mill caused a pentachlorophenol (PCP) spill. In subsequent weeks, Domtar took steps to contain and bury the PCPs on-site. Later that year Domtar sold the mill. In 1986, a subsequent mill owner's employee, while operating a back-hoe, accidentally cut into the contained PCPs, causing them to escape.*

*In 1987, the Ministry of the Environment made an order under section 22 of the Waste Management Act requiring Domtar -- among others -- to assist in the clean-up. Domtar argued that section 22 could not be applied to events occurring before the enactment of the section in 1982. [(196) -- 196. . More particularly, Domtar argued that for section 22 to have retroactive effect prior to 1982, the wording of the order power must clearly express the legislator's intention to assign liability to persons who had polluted in the absence of statutory prohibitions.] However, the British Columbia Supreme Court held that section 22 does apply to pre-1982 events because the predecessor statute, the Pollution Control Act, 1967, had a similar order provision, section 26, which was in force from 1977 to 1982, i.e., during the time Domtar contributed to the contamination. [(197) -- 197. . Accordingly, the court did not have to rule on whether the order power had retrospective or retroactive effect. Lander J. did comment, however, to the effect that section 22 had **retrospective** effect: "Even if the presumption against retrospective operation...[of the Act, section 22]...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." (at p. 13, emphasis added)] Domtar therefore was held liable for a share of the clean-up costs.*

MINISTER'S ORDER

In the 1950s and 1960s, Industry A buried its waste on site. In 1970, it installed new waste technology which eliminated the need for on-site disposal of its waste. In 1989, Industry A shut down and sold to Industry B. Industry B began excavations and discovered the buried waste. Tests disclose that it is very toxic. The Ministry of Environment orders both A and B to clean up the site immediately, pursuant to section 22 of the Waste Management Act.

Some Legal Considerations:

- *1. Does section 22 apply retroactively so that B must comply with the order even though its contribution to the pollution occurred prior to the adoption of section 22 or its predecessor section under the Pollution Control Act, 1967? [See Section 5.1.]*

*The British Columbia Supreme Court also has considered the retroactive effect of the order power under section 26 of the Pollution Control Act, 1967. In Rempel-Trail and Neilson, [(198) -- 198. . Re Rempel-Trail Transportation Ltd. and Nielson (1978), 93 D.L.R. (3d) 595 (B.C.S.C.)] a substance allegedly was dumped in 1976. However, section 26 of the Pollution Control Act, 1967 did not come into force until April 6, 1977. The court held that section 26 created a "new penalty, disability or duty" which did not exist prior to April 6, 1977, and that for it to extend retroactively such an intention must be stated in clear language. Since the provision contained no such clear language, the alleged polluter was not subject to the order power. [(199) -- 199. . More particularly, the court found it significant that the order could be found in the words of section 26, against "the person **causing and permitting** the pollution...". The use of the current tense was decisive in the court's holding against retroactivity.]*

It is uncertain from these cases whether section 22 of the Waste Management Act can be applied to parties who "had possession" of a polluting substance before April 6, 1977. Section 22's predecessor, section 26 of the Pollution Control Act, 1967, was found not to be retroactive. But while section 22 of the Waste Management Act and section 26 of the Pollution Control Act, 1967 are similar, [(200) -- 200. . In West Fraser v. Driedger, supra, note 10.] they are not identical. Thus, it remains for the courts, or the legislature, to clarify the law in this regard.

5.2 STATUTORY CLEAN-UP REQUIREMENTS FOR CONTAMINATED SITES NOT SLATED FOR REDEVELOPMENT

Many contaminated sites are vacant or are being used by industry. Because these sites are not undergoing or scheduled for redevelopment, they are not subject to requirements which are imposed as part of the redevelopment process. [(201) -- 201. . For discussion of liability in the redevelopment process see Chapter Three above. For discussion of legal requirements governing clean-up operations see Chapter Five below.] However, these sites are subject to pollution statutes where a site contains "special waste" [(202) -- 202. . Special Waste Regulation, B.C. Reg. 63/88.], where an emergency arises and an order power is exercised, [(203) -- 203. . For example, in the Waste Management Act and the Environment Management Act, supra, note 6.] or where there is a "release" from the site triggering a reporting requirement.

A site containing "special waste" must be managed in accordance with the Special Waste Regulation, [(204) -- 204. . Special Waste Regulation, B.C. Reg 63/88.] which contains a wide variety of treatment, disposal and treatment-facility requirements. However, if the contamination does not constitute "special waste" then few, if any, statutory provisions apply to owners or other persons connected with the site. [(205) -- 205. . The Fisheries Act, R.S.C. 1985, c. F-14 and the Waste Management Act, supra, note 6, would prohibit contaminated leachate from the site.]

...if the contamination does not constitute "special waste" then few, if any, statutory provisions apply to owners or other persons connected with the site.

Statutory provisions can also be triggered where, generally speaking, urgent or compelling conditions arise. These conditions are generally dealt with by government officials using statutory order powers to order certain parties to respond to the urgent conditions by taking action such as cleaning up the contaminated land.

The following statutory provisions contain order powers for dealing with contaminated sites which pose dangers or hazards:

- *Section 10 of the Waste Management Act: Where a "polluting substance" could "substantially impair" land, water, or air, the Minister can order a person who "has possession, charge or control" of the polluting substance, to "construct, alter or acquire at the person's expense any measure that the Minister considers reasonable and necessary to prevent or abate an escape or spill of the substance." [(206) -- 206. . In this section, "polluting substance" is defined to mean:*

...any substance, whether gaseous, liquid or solid, that could, in the opinion of the minister, substantially impair the usefulness of land, water or air if it were to escape into the air, or were spilled on or were to escape onto any land or into any body of water.]

- *Section 22 of the Waste Management Act: Where a manager of the Ministry of Environment is "satisfied on reasonable grounds that a substance is causing pollution", he or she may order the "person who had possession, charge or control" of the polluting substance to abate the pollution. [(207) -- 207. . For text of section 22 see note 9.*

]

- *Section 4 of the Environment Management Act: The Minister can declare that "an existing or proposed work, undertaking, or product use or resource use has or potentially has a detrimental environmental effect", in which case the Minister can make an order for corrective action. [(208) -- 208. . Environment Management Act, supra, note 6.*

]

- *Section 5 of the Environment Management Act: Where the Minister of the Environment considers that an environmental emergency exists and immediate action is necessary to prevent, lessen or control any hazard that the emergency presents, the Minister may declare an environmental emergency and order any person to provide labour, services, material, equipment or facilities or to allow the use of land for the purpose of preventing, lessening or controlling the hazard presented by the emergency.*
- *Section 6 of the Environment Management Act: The provincial government may clean up a site using public funds and then attempt to recover the expenditure as a "...debt due to the government recoverable...from the person whose act or neglect caused or who authorized the events that caused the environmental emergency in proportions the court determines."*

While these order powers appear very broad, a number of circumstances are not addressed by them. One key problem is that where the Ministry suspects that a contamination problem exists -- but lacks sufficient information to enable it to be "satisfied on reasonable grounds" -- the Ministry has no authority [(209) -- 209. . Under section 22 of the Waste Management Act.] to require a person to provide information or to investigate the situation. Thus, the Ministry may be precluded from obtaining the information that would allow it to exercise the order power.

Two further limitations of section 22 were noted by Lynne Huestis:

...[T]he real effect of section 22 is to expose responsible parties to threat of criminal prosecution in default of the order. Currently, the Act only provides for criminal enforcement of section 22 of the Act. Section 22 does not purport to allocate cost between these parties. [However, i]t is still open to the parties named in a section 22 order to seek indemnification from other parties according to the relevant principles of common law and contract law.... [(210) -- 210. . Huestis, supra, note 4.]

Section 22 does not purport to allocate cost between [responsible] parties.

[I]t should be also be remembered that the Ministry does not have the power under the Waste Management Act to take remedial measures at the expense of parties in default of a section 22 order. Section 21 of the Waste Management Act allows an officer to enter upon lands for the purpose of investigating an alleged offence and to conduct tests and take away records relating to the alleged offence. The entry does not appear to allow an officer to take remedial measures to abate pollution. [(211) -- 211. . Ibid., note 4, at p. 21.]

Certain statutes applicable in British Columbia contain requirements to report releases of pollutants. The following requirements may be relevant to owners and occupiers of contaminated property: [(212) -- 212. . Other potentially important reporting provisions include section 38(4) of the Fisheries Act, supra, (report of spill of "deleterious substance") and British Columbia's Gas Safety Regulation 95/83 (person who caused an escape from a gas installation must notify all persons who "may be affected").]

- *Section 31 of the Canadian Environmental Protection Act: Owners including current owners, persons who contributed to the release, and property owners who are affected by the release of "toxic substances" that are regulated under CEPA must report a release of such toxic substances.*
- *Section 10(5) of the Waste Management Act: A person who had possession, charge or control of a substance that "escapes or is spilled" is required to report the problem. [(213) -- 213. . It should be noted that the Waste Management Act section 10(5) may not be enforceable because to date there are no reporting regulations. Draft reporting regulations have been circulated for comment and are expected to be adopted in the near future.*

]

- *Section 10(d) of the Special Waste Regulation: The owner of a special waste facility must immediately report any irregularities to the director or a manager.*

However, unless a substance qualifies as a special waste, [(214) -- 214. . See Special Waste Regulation, B.C. Reg. 63/88.] there is no general statutory rule compelling disclosure of the existence -- as opposed to the release -- of hazardous or potentially hazardous substances. [(215) -- 215. . For example, see section 43, Special Waste Regulation, B.C. Reg. 63/88, requiring registration of special waste.]

...unless a substance qualifies as a special waste, there is no general statutory rule compelling disclosure of the existence -- as opposed to the release -- of hazardous or potentially hazardous substances.

Certain statutory provisions contain notification requirements. Two are of particular relevance:

- *Section 215 of the Land Title Act: The provincial or local government may require the owner or developer to register on the title to the land a covenant restricting uses of the*

land. [(216) -- 216. . A section 215 covenant has been used on several occasions by the provincial government to prevent the use of land known to be contaminated, for example, sites at James Island and Big Bend. Personal communication with D. Doyle, April 2, 1990.

]

- *Section 320.1 of the Land Title Act: The Director of the Waste Management Branch may file on the title of contaminated property a notice specifying the nature of the contamination and the estimated period of contamination. [(217) -- 217. . This provision has rarely been used. Personal communication with D. Doyle, ibid.*

]

There does not appear to be any provision in a British Columbia statute equivalent to the Ontario provision which restricts the use of former landfill sites for a 25-year period after the disposal ended. [(218) -- 218. . Section 45 of Ontario's Environmental Protection Act, R.S.O. 1980, c. 85, states that:

No use shall be made of land...which has been used for the disposal of waste within a period of twenty-five years from the year in which land ceased to be so used...without relevant approval...]

5.3 THE SCOPE OF STATUTORY LIABILITY

Parties who are not actual polluters but who exert some control over the polluter may also be liable under various environmental statutes. Offence provisions in the Waste Management Act refer not only to persons who cause pollution but also to those who allow pollution to occur. For example, under section 34(10) of the Waste Management Act, an employee, officer, director, or agent of a convicted corporation also may be liable if he or she "authorized, permitted or acquiesced in the offence". The Fisheries Act has similar language [(219) -- 219. . Fisheries Act, R.S.C. 1985, c. F-14, s. 36(3).] and the Canadian Environmental Protection Act has even broader provisions [(220) -- 220. . Canadian Environmental Protection Act, S.C. 1988, c. 22, section 122.] to impose liability on corporate officers who acquiesce in the commission of an offence under the Act.

Offence provisions in the Waste Management Act refer not only to persons who cause pollution but also to those who allow pollution to occur.

In addition to facing liability for an offence, controlling parties may also be subject to clean-up orders. West Fraser v. Driedger [(221) -- 221. . West Fraser v. Driedger, supra, note 10.] illustrates the broad scope of liability in the context of a clean-up order made under section 22 of the Waste Management Act. In this case, the British Columbia Supreme Court upheld a clean-up order made by the manager of the Ministry of Environment against three parties who had some connection with the release of the hazardous substance pentachlorophenol (PCP). Those subject to the clean-up order were the party who owned the PCPs, the party who assisted in burying the PCPs, and the party who was responsible for bringing the buried PCPs to the surface.

TENANT BRINGS TOXIC SUBSTANCES ONTO PREMISES

A Tenant stores toxic waste on a leased property. The lease is silent about using or storing hazardous substances on the property . The Landlord does not come onto the property very often, and does not know about the toxic waste. Neighbours discover the tenant's storage of toxic waste and want the Ministry of Environment to order either the Tenant or the Landlord to clean them up.

Some Legal Considerations:

- 1. *The Ministry may not have the authority to require the Landlord to clean up the wastes, if the Landlord was an "innocent, ignorant (in the sense of not knowing) owner who had nothing to do with, and no knowledge of what had occurred."* [See Section 5.3.]
- 2. *A clean-up order against the Tenant would likely be valid.*

*Another important question with respect to current British Columbia legislation is whether a party can be required to clean up a site in the absence of knowledge of the presence or polluting effect of a hazardous substance. In *British Columbia Rail v. Driedger*, the power to order a clean-up under section 22 of the Waste Management Act was held not to apply to an owner of contaminated land who was "ignorant, in the sense of not knowing" about the contamination. Mr. Justice Gibbs stated that:*

Another important question...is whether a party can be required to clean up a site in the absence of knowledge of the presence or polluting effect of a hazardous substance.

"The theme of the act is that the person who has custody of polluting substances is responsible for safe custody, that the person who uses is responsible for safe use, that the person who transports is responsible for safe transportation, and that the person who fails to discharge is responsible and must accept liability for the remedial measures.

I would have to see much stronger and more specific words than those [of subsection 22(1)] to convince me that the legislature intended absolute liability on an innocent, ignorant (in the sense of not knowing) owner who had nothing to do with, and no knowledge of, what had occurred." [(222) -- 222. . B.C. Rail Co. v. R.J. Driedger et al., unreported decision of the Honourable Mr. Justice Gibbs, B.C. Supreme Court, August 4, 1988. Action No. A880329, at p.5-6.] (emphasis added)

Accordingly, Mr. Justice Gibbs set aside the Manager's order as against the owner of the land, British Columbia Rail.

RETROACTIVITY

A Sawmill dumped various wastes from its operation onto a vacant portion of its land. The Sawmill operated from 1940 to 1965. In 1965, it closed and the New Owner set up a light industrial operation. In the 1980s, Neighbours detect cadmium and PCBs in well water, caused by the dumped waste of the Sawmill operator. The Neighbours want the government to order a clean-up, and they want compensation for their damages.

Some Legal Considerations:

- 1. *Can the Ministry of Environment use its clean-up order powers against the Sawmill, which caused the pollution prior to the enactment of the order power? [See Section 5.1.]*
- 2. *Can the Ministry use its order power against the New Owner? Does the New Owner have "possession, charge or control" of the polluting substance? Or could the "ignorant landlord" analysis be extended to cover an "ignorant owner"? [See Section 5.3.]*
- 3. *The Neighbours could sue the New Owner and the Sawmill in tort for damages [See Chapter 4.]*

5.4 STATUTORY REQUIREMENTS GOVERNING CLEAN-UPS

A number of statutory provisions apply to clean-ups of contaminated land. The applicability of these provisions depends largely on whether the property to be cleaned up contains "special waste" as defined by the Special Waste Regulation. [(223) -- 223. . Special wastes fall into three basic classes:

- *specified substances such as waste oil, waste asbestos, pesticides;*
- *wastes that fail a leachate extraction test; and*
- *wastes that are specified as dangerous goods under the federal Transportation of Dangerous Goods Act and regulations.*

] Many statutory provisions apply to "special waste" but do not apply to ordinary, or generic, waste. [(224) -- 224. . An excellent overview of the Special Waste Regulations is found in L. Huestis, "Waste Management Issues: Legal Considerations in the Decommissioning and Remediation of Contaminated Lands and Industrial Plants", The Clean-Up of Toxic Real Estate, Industrial Plants and Natural Resource Sites: Cost-Effective Decommissioning Negotiation and Remediation Strategies, The Canadian Institute, February, 1990.] Special wastes tend to have higher concentrations of hazardous substances than do other wastes. The Special Waste Regulation requires that special waste be stored or disposed of in accordance with detailed standards.

Many statutory provisions apply to "special waste" but do not apply to ordinary, or generic, waste.

In addition, there are a number of related provisions:

- *Section 14 of the Special Waste Regulation: The owner of a "special waste facility" [(225) -- 225. . Under the Special Waste Regulation, "special waste facilities" mean "works that are designed to or do handle, store, treat, destroy or dispose of special waste...". An owner of such a special waste facility is obligated to manage the site under the Regulation.*

] -- a handling, storage, treatment, or disposal facility -- must prepare a written closure plan and seek approval of the plan from the Ministry.

- *Subsections 8(1) and 9(2) of the Waste Management Act: The Ministry is allowed to obtain financial guarantees respecting satisfactory completion of the proposed work.*
- *Section 33.1 of the Waste Management Act: The Minister may establish a waste management trust fund, funded via general revenues of the provincial government, to ensure "environmental clean-up necessitated by inadequate closure of waste management facilities".*
- *Subsection 33.1(7) of the Waste Management Act: The province may recover expenditures made for clean-up "from the person who was the owner of the waste management facility immediately before its closure".*

Storage of hazardous waste is a problem for parties cleaning up contaminated sites, since British Columbia has no treatment facility for hazardous substances and shipment to other jurisdictions for disposal is expensive. [(226) -- 226. . For a discussion of the lack of waste treatment facility in British Columbia see Toxic Real Estate in British Columbia: Identification of Issues, supra, note 1, at p. 18-19.] Accordingly, in many cases waste which has been extracted from a site must be stored. Storage facilities for special wastes require authorization pursuant to section 3.2 of the Waste Management Act and must meet the operational and performance requirements set out in Division 2, Part 4, of the Special Waste Regulation.

Storage of hazardous waste is a problem for parties cleaning up contaminated sites, since British Columbia has no treatment facility for hazardous substances and shipment to other jurisdictions for disposal is expensive.

Disposal requirements apply to both special and other wastes. Section 3 of the Waste Management Act contains the general prohibition that "no person shall, in the course of conducting an industry, trade or business, introduce ... waste into the environment." As a result, a party cleaning up a site must obtain a permit to dispose of waste even if it does not constitute special waste. Other provisions apply only to special wastes:

- *Section 5(3)(c) of the Waste Management Act: Dumping special wastes in unauthorized storage or disposal sites is prohibited.*
- *Section 39 of the Special Waste Regulation: The unauthorized disposal of special wastes in municipal landfills and sewage systems is prohibited.*
- *Section 19(2) of the Special Waste Regulation: clean-up operators can recycle or treat solid residues on site or take the residues to a waste management facility such as a secure landfill. [(227) -- 227. . The clean-up operator also has the option of requesting permission from the Ministry of Environment to dispose of the residue at a conventional (municipal) landfill if the solid residue does not pose a hazard.*

]

5.5 DEFENCES TO STATUTORY OFFENCES

When charged under either the Fisheries Act or the Waste Management Act, a defendant may raise the defence of due diligence and will be acquitted if it is accepted that he or she took all reasonable steps to prevent the offence from occurring. The leading case in this area provides that in public welfare statutes, such as pollution statutes, the accused may avoid liability:

...a defendant...will be acquitted if it is accepted that he or she took all reasonable steps to prevent the offence from occurring.

... by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. [(228) -- 228. . Regina v. City of Sault Ste. Marie (1978) 40 C.C.C. (2d) 353 (S.C.C.), at p.374, per Dickson J.]

Another important defence available to polluters is that of officially induced error. The leading case in this area has described it as follows:

The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise the defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given. [(229) -- 229. . Regina v. Cancoil Thermal Corporation and Parkinson (1986), 27 C.C.C. (3d) 295 (Ont. C.A.), at p.303, per Lacourciere J.A.]

Chapter 6 - CONCLUSIONS

Liability for contaminated land in British Columbia arises from several disparate sources. Primary sources of liability include:

- *contract law, for determining liability in the real estate transaction;*
- *tort law, for allocating liability among professional advisers, and between victims of pollution and owners or occupiers of polluting property; and*
- *statute law, primarily in the context of clean-up orders.*

When the principles of liability are applied in the context of contaminated land, as they increasingly are today, two dominant themes emerge. The first is that a wide variety of parties may be liable for the cost of clean-up or for damages caused by contamination. The net of liability includes parties who caused or contributed to the pollution, parties who innocently bought a contaminated site, and parties such as lenders or professional advisors who have but a tangential connection with the pollution.

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The second theme emerging in British Columbia is that the law is very uncertain. The common law has not established comprehensive principles of liability in this area. The courts have to date considered very few cases dealing with the "new" issue of contaminated land. Moreover, it is likely that it will be many years, if ever, before the courts have refined the law regarding liability for contaminated land to a comprehensive and certain set of principles.

The other main body of law -- statute law -- also suffers from major uncertainties with respect to the problem of contamination of land in British Columbia. Statutory powers to order clean up of contaminated sites, currently the main tools for achieving clean-ups, are designed to deal primarily with emergency conditions such as oil spills. These order powers were not designed to deal with the very different and unique problems associated with historically contaminated land and buildings, such as gradual leaching from old dump sites. Perhaps most glaring is the absence of legislation to deal with contaminated land in the development process -- the process through which land is approved for development or redevelopment. This process suffers from major uncertainties despite practical efforts by municipalities to deal with the legislative vacuum.

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In spite of these uncertainties, one can come to a number of general conclusions about those parties which should be especially concerned about potential liability.

*The **vendor** should be particularly mindful that caveat emptor -- buyer beware -- is not an absolute rule, and especially so in cases of dangerous environmental hazards. Courts have found vendors liable where they deliberately concealed a hazard, where they lacked malevolent intent but were reckless in describing the hazard, and even where the vendors had no knowledge but ought to have known of the problem.*

The **purchaser** should not assume, however, that caveat emptor has been reversed in the context of contaminated land. While the courts in recent years have sometimes relaxed this rule and granted relief to purchasers, caveat emptor is still the general rule. Therefore, it is important for the purchaser to conduct diligent investigations. One problem facing the purchaser, as well as the vendor, is the critical shortage of information respecting toxic contamination of real estate. Litigation dealing with problems of contaminated land has yet to define precisely how diligent a purchaser must be when carrying out investigations of land.

The **realtor** is a vulnerable party in the potential litigation cross-fire between the vendor and the purchaser. The realtor must have a thorough understanding about the problems associated with toxic contamination of real estate in order to protect his or her principal. In some cases the realtor will have to alert his or her principal, the vendor, to contamination problems. At the same time, the realtor must be very careful that he or she does not make negligent misstatements to members of the public, especially purchasers, who might be relying on information the realtor compiles and provides.

Lawyers' liability can be triggered in situations where a lawyer misstates the legal status or other qualities of the subject property. In addition, a lawyer should be aware that if he or she retains an environmental consultant to conduct an environmental audit the lawyer may become liable for errors and omissions made by that environmental consultant. This takes on particular significance because many environmental consultants do not carry errors and omissions insurance.

The liability of an **environmental consultant** typically will arise where the consultant provides inaccurate information or reaches incorrect conclusions in connection with an environmental audit.

Similarly, a **land assessor** could become liable if he or she negligently estimates the effect of toxic substances on the value of real estate in circumstances where this information should be known to the land assessor.

A **lender** should be concerned about the potentially devastating effect that a clean-up order or civil damages may have on a borrower's ability to repay. In addition, a lender could also become liable as the owner or occupier of the land if the lender forecloses on a property in such a way as to assume all the rights and duties of the borrower. A further danger facing lenders is that if a lender exerts any degree of control over the polluting borrower, the lender may find itself subject to liability as well.

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Municipalities face a complicated legal situation. Liability may arise in connection with conducting an assessment of potential contamination of a subject property, even at the early screening stage. There is also some question as to whether municipalities in B.C. have the statutory authority to insist on assessments and clean-ups. A further concern of municipalities is that, in the wake of the recent Hartnett [(230) -- 230. . Hartnett v. Wailea Construction et al. (1989), 43 M.P.L.R. 298 (B.C.S.C.)] decision, where a municipality provides information to members of the public it has a duty to provide a wide range of relevant information in its possession, even though it may have no system to retrieve this information.

Developers' liability arises most often when a developer sells a property with contaminated soil.

The liability of the provincial **Waste Management Branch** could arise where the Waste Management Branch conducts assessments of contaminated land.

Tenants and lessees, as occupiers of land, can also be subject to a clean-up order by the government, or found liable in court actions arising under common law.

Employers of any of the above parties can be liable for acts of their employees.

Many of these parties act in the absence of an adequate information base which could assist them in making informed decisions. But liability will be assessed in terms of how parties conduct their affairs in view of the information that was or should have been available in a particular situation. Perhaps the single most important step that any party can take to avoid or reduce its potential liability for toxic contamination problems is to be aware of the potential problem of toxic contamination of land and to proceed carefully in light of the possibility that contamination might exist. Parties should make a considered assessment of "the toxic contamination issue" and develop a reasonable approach to deal with a particular contamination problem, given time and financial constraints.

Perhaps the single most important step that any party can take to avoid or reduce its potential liability for toxic contamination problems is to be aware of the potential problem of toxic contamination of land and to proceed carefully in light of the possibility that contamination might exist.

Finally, readers should recognize that the law in British Columbia is in flux. Legislation to deal with the problems associated with toxic contamination of land will probably be introduced soon. Therefore, parties should keep a close watch on both the case law and, especially, new legislation which will likely deal specifically with toxic contamination of land. Such legislation may, like the U.S. Superfund legislation, even create retroactive liabilities and obligations. Once these new laws are in effect, parties will have to act quickly and effectively to protect their particular interests.

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