LAW REFORM COMMISSION OF NOVA SCOTIA

Contaminated Sites in Nova Scotia

Discussion Paper - April 2009

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

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The Law Reform Commission receives funding from the Law Foundation of Nova Scotia and from the Government of Nova Scotia.
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WHAT DO YOU THINK?

The Law Reform Commission is very interested in what you think about the issues raised in the Discussion Paper, *Contaminated Sites in Nova Scotia*.

This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law should deal with contaminated sites.

If you would like to comment on the Discussion Paper, you may:

- Fax the Commission at (902) 423-0222.
- Send an email to info@lawreform.ns.ca
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- Write to the Commission at the following address:

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Ir order for us to fully consider your comments before we prepare our Final Report, please contact us by **July 15, 2009.**

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments made. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information contained in submissions.

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SUMMARY

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

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

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

A number of the Minister's powers have implications for liability (responsibility at law). For example, where multiple persons are responsible for the creation of contaminated sites, the Minister may determine and allocate clean-up costs among them. For the most part, this Discussion Paper is concerned with regulatory liability, responsibility in accordance with the requirements of legislation (statutes, primarily the *Environment Act,* and regulations), rather than civil liability, principles of law used by a judge to decide a private dispute in the courts.

The legislation does not include compulsory and detailed guidelines with which to manage a contaminated site. In 1996, the Department adopted the Guidelines for Management of Contaminated Sites. The Guidelines include requirements about such subjects as notification of site contamination and the steps to be taken in site clean-up. The Guidelines do not take the form of legislation and as such, have no official status in law. They are also non-binding in nature. They enable contaminated sites to be managed in a voluntary fashion. The Guidelines are also not connected to site designation and contain no criteria to guide the Minister's decision about whether to designate a site.

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

The Law Reform Commission understands that fears about liability are discouraging landowners from cleaning up contaminated sites. In addition to uncertainty about the status of

clean-up certificates, the *Act* does not expressly allow agreements whereby liability may be transferred between parties, such as a vendor and purchaser. The lack of contaminated site clean-up means a risk of significant adverse consequences to human health and quality of life, as well as to environmental well-being, with harmful contaminants potentially remaining at many locations. This also has economic costs, as potentially useful land lies underused or not used at all.

In January 2008, the Attorney General of Nova Scotia requested that the Law Reform Commission examine a number of issues pertaining to contaminated sites in Nova Scotia. This Discussion Paper contains the Commission's preliminary proposals on how the law could be improved to promote the clean-up of contaminated sites, in particular so that they can be returned if feasible to productive use, while at the same time protecting human health and the environment. The Commission is distributing this Discussion Paper widely and is inviting comments on its suggestions. The Commission will take feedback received into account when deciding on the nature of its final recommendations for reform to government.

This Discussion Paper describes Nova Scotia's current regulatory regime pertaining to contaminated sites, summarizes equivalent approaches from elsewhere in the country, suggests what aspects should be changed, identifies some provisions which should remain unaltered, and in some instances, seeks further information. What follows is a summary of the Discussion Paper's most significant suggestions.

Aspects of Liability

- Government should act on its powers currently contained in the *Act* and create regulations to allow, and govern, agreements which would transfer regulatory liability, actual or future.

- Prior to acceptance of a transfer of liability agreement, a number of financial safeguards, such as the use of bonds or disclosure of assets, might have to be in place, depending on the circumstances.

- It should be possible to reopen a transfer of liability agreement in the event of some previously unknown aspect, such as fraud, which would make continuance of the agreement unfair or inappropriate.

- Government would have to provide its express consent to a transfer of liability agreement.

- Where a contaminated site has been remediated in compliance with government - approved standards, the Department of Environment should issue a document which identifies the property in question, its approved uses, as well as the clean-up standards applied, recognizes that those standards have been met, and releases the owner from current and future regulatory liability in relation to that property. The landowner should be able to register this document with the property's title at a Registry of Deeds.

- As a matter of prudence and reasonableness, a clean-up certificate would be subject to a number of limitations, such as for fraud and substantial change in land use.

- Given the probability that some persons responsible under the *Act* cannot be found or cannot pay, Government will likely have to make some provision to fund the clean-up of certain contaminated sites.

- In order to determine the type and size of funding potentially required in this province, government must determine what types of activities in the Nova Scotian context have likely resulted in contamination, on what scale, and in how many locations.

- Escheats legislation should be amended, to delay the Crown's liability in relation to ownership of property through process of law, until the Crown has the opportunity to investigate the site in question.

- Assuming that it did not contribute to contamination at the site, a municipality which acquires a property through a tax sale should be expressly excluded from regulatory liability for remediation of contamination which had occurred by the time the municipality acquired the property.

- The potential regulatory liability of a municipality for acts or omissions which took place after acquisition of a contaminated site, and which contributed to or worsened a contamination problem, should be limited to the value of the property.

Departmental Notification and Involvement

- Reporting to the Department should be mandatory when a landowner, or someone acting in place of the landowner, knows or ought reasonably to know that a property is contaminated, in accordance with legislative requirements.

- If a property is contaminated in accordance with the legislative requirements, notice of the contamination should be included in the environmental registry, for consultation by members of the public.

- The 1996 Guidelines for Management of Contaminated Sites, which lack official status in law, should be adopted by reference, and therefore given legal effect, through the regulations. This would clarify for all landowners the requirements they would have to meet in relation to a voluntary remediation process.

- Should the owner of a contaminated site not wish to participate in the voluntary process or fail to comply with an aspect thereof, then the Department could invoke the compulsory site site designation process.

- The trigger for departmental involvement, in the sense of investigating a site, should occur when the landowner, further to a requirement under the Guidelines, notifies the Department that contamination exists, in accordance with applicable standards, at the site.

- There should be a process, set out in the regulations, whereby a designated property which is

found not to be contaminated, or which is remediated to departmental satisfaction, could be removed from the list of designated sites.

Contaminated Site Professionals

- As a matter of reasonableness, effectiveness, and efficiency, the training, licencing, and monitoring of site professionals should be entrusted to one of the two professional bodies (Association of Professional Geologists of Nova Scotia and Association of Professional Engineers of Nova Scotia) recognized by the Department.

- The mandate of the supervising body should include overseeing people who are working as site professionals, yet who are not members of a professional association.

- All persons operating under the designation of "site professionals" should be required to maintain adequate and current professional liability insurance, the minimum level of which could be determined following consultations with insurance industry representatives.

The Commission welcomes comments on any aspect of this Discussion Paper and will take comments received into account when deciding on final recommendations for reform.

CHAPTER 1: BACKGROUND DETAILS

I Introduction

1) Industrialization - Benefits and Costs

For more than a century, Canadians have carried on industrial activities. In some aspects of industrial development, such as steel and coal production, Nova Scotia developed earlier than other provinces.[1] Heavy industries in Canada include steelmaking, shipbuilding, and petro-chemical production. We extract and process mineral resources. We derive wood products from our forests. Our factories produce a variety of goods, including automobiles, household articles, textiles, food items, and pharmaceuticals. Industrialization has also led to the development of certain facilities, such as retail gas stations, wharves, warehouses, and dry cleaning establishments.

Our industrial economy benefits us in many ways. It creates jobs and enables us to enjoy a high standard of living. Through the materials and products it creates, industrialization allows people to lead more comfortable, convenient, and enjoyable lives.

Industrialization is not, however, without serious drawbacks. One is pollution. Industrial processes may require the use of harmful substances or may produce them. Allowing those substances to escape into the air, water, or soil, sometimes over the course of decades, can lead to serious negative consequences for human health and the environment. In 2002, the federal Commissioner of the Environment and Sustainable Development warned, "Exposure to high levels of hazardous substances through the contamination of water, soil, and air has been linked to various adverse health conditions...[including] cancer, respiratory illness, reproductive problems and birth defects, nervous system disorders, allergic reactions, hypersensitivity, and decreased resistance to disease."[2] A 2006 publication of the British Columbia Ministry of Environment also acknowledged the potential environmental harm posed by contamination:

> "And even if a site does not pose a threat to people, it can still be an environmental hazard. Soil, water, and sediment at a site may contain substances that can injure fish or mammals;

[1] For examples of Nova Scotia's early industrial development, see Diane J. Gregory, *A History of Coal in Nova Scotia* ([S.l.]: Nova Scotia Department of Mines, 1978) at [8]; Judith Hogg Ryan, *Coal in our Blood: 200 Years of Coal Mining in Nova Scotia's Pictou Country* (Halifax: Formac Publishing Co. Ltd., 1992) at 2-8; and generally, James E. Candow, ed., *Industry and Society in Nova Scotia, An Illustrated History* (Halifax: Fernwood Publishing, 2001) at 6.

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

impair the reproduction of birds; and accumulate in the food web. These effects can be severe enough to impair or cause imbalance in, ecological functions or systems."[3]

2) Nature of Contaminated Sites

A "contaminated site" is land with soil or water (ground or surface) which contains unsafe levels of hazardous substances ("contaminants").[4] Common contaminants might include petroleum hydrocarbons, heavy metals, and toxic substances such as chemicals.[5] Contamination sometimes occurs naturally. More commonly, however, the accidental or deliberate release of materials, associated with industrial or commercial operations, leads to contamination. For example, a chemical spill may occur, barrels containing toxic substances might leak, or waste products might be buried on site. Contamination may also take place when a substance moves ("migrates") to the site or is brought there from another location. Contaminated soil, for instance, might inadvertently be trucked from one property to another, for use as landfill.[6]

As science develops, we become more aware of the effects of long-term exposure to certain substances. As a result, it is possible that an activity once perceived as safe is recognized in the fullness of time as having adverse consequences for humans or the environment. We now understand, for instance, that polychlorinated biphenyls (PCBs), most often associated with electrical equipment, may be harmful.[7] With the passage of time and developments in technology, we may also recognize that certain materials are released into the environment in ways formerly unknown.

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

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

[5] *Supra* notes 1 and 2. For a list of contaminants at federal government sites, see *supra* note 1 at 34. For a recent media report involving site contamination, the proposed solution, and projected cost, see CBC News, "Military to Clean Up Arsenic at Dartmouth Site," online: <http://www.cbc.ca/canada/nova-scotia/story/2009/02/09/ns-arsenic-dartmouth.html.> (date accessed: 9 February 2009).

[6] For a reported Nova Scotia case decision involving such a situation, see *Doug Boehner Trucking & Excavating Ltd.* v. *United Gulf Developments Ltd.,* 2006 NSSC 130.

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

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In terms of its nature and extent, contamination can vary significantly, depending on historical usage and conditions at individual sites. The size of contamination, for instance, might range from the enormity of the Sydney Tar Ponds, with some 700,000 tonnes of contaminated sediments,[8] to a single affected backyard, the result of a leaking residential oil tank.[9] As complete figures are not kept, getting an accurate idea about the number of contaminated sites, real or suspected, in Canada is difficult. Nonetheless, it is clear that contaminated sites constitute a serious concern throughout much of the country, including Nova Scotia. In 1997, one authority estimated that Canada as a whole had 20,000 to 30,000 known or suspected contaminated sites.[10] In 2001, another source estimated Nova Scotia to have 1,000.[11] A 2007 report, extrapolating from statistics derived for Quebec, suggested that Nova Scotia may have 1,730 contaminated sites.[12] The federal government also recently estimated that the land under its control includes 19,000 potential contaminated sites across Canada, with some 1,400 in Nova Scotia.[13]

In many cases, contaminated sites can be cleaned up ("remediated") to comply with accepted standards. This would enable the sites to be used again safely for the purpose of certain human activities. For instance, clean-up to one standard might permit the site to be used once again by industry, while remediation to a higher standard might allow the property to be developed for residential purposes. Until adequate remediation occurs, though, contaminated sites cannot safely be used to their full potential, if at all. Even if not in use, a contaminated site might pose certain risks. Unsuspecting humans, such as children, might wander onto the property. Contaminants might migrate from one site and adversely affect other areas. In addition to health and environmental risks,

[8] *Supra* note 1 at 11.

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

[10] Cited in DeSousa, *supra* note 4 at 2-3 to 2-4.

[11] Cited *ibid.* at 2-4.

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

[13] Treasury Board of Canada Secretariat, "Federal Contaminated Sites Inventory," online: <www.tbs-sct.gc.ca.> "Introduction" link (date accessed: 12 December 2008).

a contaminated site may pose threats to public safety. In British Columbia, for instance, gasoline has leaked from underground tanks, corroding wire insulation and causing short circuits in street lighting.[14]

3) Brownfields

The potential for cleaning up some contaminated sites has led to use of the term, "brownfields." One authority defined brownfields as "real property, the redevelopment of which is prevented, delayed or hindered because of the presence or potential presence of hazardous or potentially hazardous substances on or in the real property."[15] Another definition is "an abandoned, vacant, derelict or underutilized commercial or industrial property where past actions have resulted in actual or perceived contamination and where there is an active potential for re-development."[16] Both definitions recognize that though brownfields are suitable for redevelopment, fears over contamination mean that this is not taking place. Testing, using accepted techniques and standards, will confirm whether contaminants are present in unsafe levels at a site. In other cases, however, contamination is merely suspected, because of the nature of activities formerly carried on there. Although contamination may be actual or suspected, the result, a lack of development, is likely the same.

In many instances, brownfields occupy prime urban space, near waterways, railways, or other transportation networks. Earlier industrial undertakings often required large amounts of raw materials, which it was convenient to transport by rail or water. Another reason to locate an industrial undertaking in an urban area was to secure easy access to large numbers of workers. Especially where heavy industries, requiring a great deal of space, were undertaken on site, brownfields can be quite large in area.[17]

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

[15] Bernie Miller, "Legal Developments in Atlantic Canada with Respect to Brownfields Development" in Abdel-Aziz and Chalifour *supra* note 4 at 12-301.

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

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

In addition to posing a potential risk to human health and the environment, brownfields, because they are used to a limited extent or not at all, place a great deal of land in limbo. They often constitute an eyesore and as such detract from the quality of living in a particular neighbourhood or city. Their existence means that other land, currently not contaminated ("greenfields") must be found and developed for industrial or commercial growth. Municipalities may have to provide expensive new infrastructure, such as roads, to service those newly developed sites. With the limited use of brownfields, municipalities also do not benefit from the full potential of that tax base.

The National Round Table on the Environment and the Economy (NRTEE), organized by the federal government, has classified brownfields into three levels, based on potential for redevelopment. At the top level, in 15% to 20% of instances, a site's market value is much more than its projected clean-up costs. Finding buyers for these sites is generally not difficult. At the bottom level, another 15% to 20% of cases, are sites for which the cost of remediation will greatly exceed post-clean-up value. Demand to purchase and redevelop these properties tends to be low. In the middle, one finds the largest number of brownfield sites, between 60% and 70% of the total. It is estimated that land values after remediation at this level will be slightly above or below the cost of purchasing a brownfield and completing its clean-up.[18] Based upon these estimates, in the majority of instances, remediating a brownfield will either be a profitable proposition or close to it.

If brownfields tend to occupy such prime locations, and in many cases, show good potential for re-development, why do they remain idle or underused? The Law Reform Commission understands that the primary obstacle for dealing with the problem of contaminated sites relates to liability, in other words, responsibility at law.[19] Who, if anyone, is required by law to pay for the clean-up of a contaminated site?

4) Liability Issues

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

As a result, the issue of who is responsible at law for contamination at a site may require answers to a number of sub-questions:

[18] NRTEE, *Cleaning Up the Past, supra* note 16 at 5-6.

[19] Liability may take one of two forms. Regulatory liability follows the requirements of legislation (statutes and regulations). Civil liability is decided by reference to principles set out by judges in prior court decisions. For the most part, this Discussion Paper is concerned with regulatory liability.

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

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

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

(4) How far back in time or into the future will stretch a person's potential liability?

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

(6) Should someone, such as an innocent purchaser, who is connected to a property, but who did not cause its contamination, be required to clean it up?

(7) What standard of cleanliness will be imposed in the event of a contaminated site's remediation?

(8) If a person remediates a site according to accepted standards, will that person have to do so again if standards change in the future?

Aspects of liability in the context of contaminated sites remain unclear under Nova Scotian law, and for the most part, under the law of other Canadian jurisdictions. Associated risks may therefore look too large to justify new involvement with a contaminated site. For example, investors, attracted by the high global price of a particular mineral, might be interested in reopening an abandoned mine site. Those investors, however, would likely not be so enthusiastic once they learn that they might be held responsible for cleaning up any site contamination, even though they had no role in its occurrence. Prospective purchasers, developers, builders, and tenants, as well as financial institutions and units of government, may have similar concerns about getting involved with property.

As a result, in many instances, lack of clarity in the law may lead to an impasse. Liability fears mean that contaminated sites are not being remediated. This in turn means a risk of significant adverse consequences to human health and quality of life, as well as to environmental well-being, with harmful contaminants potentially remaining at many locations. This also has economic costs, in that potentially useful land lies underused or not used at all.

5) Origin of this Project

On January 31, 2008, the Attorney General of Nova Scotia, following a request from the

then-Nova Scotia Department of Environment and Labour,[20] sought the advice of the Law Reform Commission with respect to a number of issues relating to contaminated sites. Through the Attorney General, the Department asked the Commission to consider aspects of the following:

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

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

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

(4) the effect of changing standards - who will be required to pay for clean-up in the event that environmental standards change in the future.[21]

As a matter of clarification involving the scope of this project, the Law Reform Commission realizes that site contamination can result from a domestic fuel oil spill. The Commission also understands that in recent years, government and the insurance industry have worked to reduce the number of residential fuel oil spills in the province. These measures have included restrictions in insurance contracts (though not in legislation) about the age of storage tanks, higher limits on how much oil can be left behind after a spill, and better publicity about storage tanks and related equipment.[22] Nonetheless, given the scope of clean-up efforts generally required, the consequences of a domestic fuel oil spill may be financially devastating and psychologically distressing. The Commission does not doubt that domestic fuel oil spills pose serious problems for individual homeowners and for insurance providers.

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[20] In the meantime, a separate Environment Department has been established. For the most part, this Discussion Paper refers to this branch of government as "the Department."

[21] The full text of the issues which the Commission was asked to address is found at Appendix A.

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

For the most part, however, domestic fuel oil spills are beyond the scope of this Discussion Paper. Our mandate is primarily to deal with longstanding or historic contamination, generally the result of business or industrial uses, and to make proposals about how the law could be changed to facilitate the remediation of contaminated sites, so that they can once again be put to productive and safe use. Given their nature and location, domestic fuel oil spills tend not to remain undetected for too long, unlike other forms of contamination. Domestic fuel oil spills may involve matters of civil liability, which would take the form of private disputes between a homeowner and one or more of that person's insurer, fuel oil supplier, storage tank installer, or neighbours. Civil liability is decided by reference to principles set out by judges in litigation. This Discussion Paper focuses on regulatory liability, which follows the requirements of legislation (statutes and regulations). Moreover, addressing in a comprehensive fashion the problem of domestic fuel oil spills would require answers to a number of policy questions which go well beyond the legal sphere, and which are best left for government to decide, following consultations with interested groups, in particular the insurance industry. Should government set out legal requirements governing the manufacture, installation, and maximum age of storage tanks and related equipment? Should homeowners be required by law to carry insurance to deal with the consequences of a domestic fuel oil spill, and if so, what types of situations would it cover? If compulsory coverage is seen as a good idea, should there be a minimum level? Is the insurance industry willing to provide coverage for the results of domestic fuel oil spills? If so, will this coverage be seen as affordable?

Answers to these above-noted questions and related ones would require access to a great deal of information, not currently available to the Commission and some of it likely confidential, about the number and nature of spills, the Atlantic Canadian insurance market, and the construction of storage tanks. Before taking a policy position, a governmental decision-maker would also have to be conscious of potential effects on a broader scale, such the financial consequences of not taking action.

Although it does not make domestic fuel oil spills a focus, this Discussion Paper does mention them when they have a connection to regulatory liability, such as in the context of "orphan sites" discussed at part 6 of Chapter 2.

Consistent with its usual approach to project development, Commission staff researched legislation, case law, and environmental standards pertaining to contaminated sites in Nova Scotia, as well as comparative information from other provinces. To help identify relevant issues, the Commission formed an Advisory Group, comprising people with expertise in matters relating to contaminated sites. The Advisory Group met on four occasions from June to September 2008. Commission staff held several meetings with officials from the Environment Department and also met with representatives from the Department of Health and the Halifax Regional Municipality. In addition, a number of governmental authorities from outside the province were consulted.

Having taken into account comments received to-date and the results of our research, the Commission has prepared this Discussion Paper. It represents the Commission's preliminary position on the issues brought to its attention by the Department. In an effort to obtain as much

feedback as possible, the Commission is giving the Discussion Paper a wide circulation. In addition to making this document available at its website, the Commission is sending copies to a range of institutions and individuals with an interest in contaminated sites and their remediation.

II The Approach in Nova Scotia

1) The First Environmental Statute

Nova Scotia's first statute involving the environment as a whole was the 1973 *Environmental Protection Act*.[23] It did not deal specifically with contaminated sites. Instead, its focus in terms of contamination was on dealing with the inappropriate release of harmful or hazardous substances into the environment. However, some of its language was broad enough to cover contaminated sites. For example, s. 26(1)(b) gave the Minister the authority to take all steps necessary to repair any injury or damage where it was in the public interest to do so. Another example was s. 54, which provided that if a person caused pollution due to the failure to comply with the *Act*, or through some else's negligence (lack of care), the Minister could take action to remedy the pollution and sue to recover the costs of such remedial action, or seek damages if the pollution could not be remedied effectively.[24]

2) Influence of the CCME Principles

By the late 1980's or early 1990's, governments across Canada recognized contaminated land as a significant problem. Following encouragement from government and business, the Canadian Council of Ministers of the Environment (CCME) formed a national task force, comprising a core group[25] and a broader advisory group, to examine the remediation of contaminated sites, including responsibility for their clean-up.

The task force focused on remediation of existing contaminated sites. In 1993, it issued a report which identified 13 principles which have become very influential in Canadian environmental legislation. These principles are summarized at attached Appendix B. Individual principles will be discussed at various points where relevant in this Discussion Paper. By way of introduction, it is helpful, though, to mention a number of them now.

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

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

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

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

Guided by the CCME principles, the provinces and territories created legislation which in varying degrees addressed such matters as the investigation and identification of contaminated sites, the determination of persons responsible for remediation, the development of remediation plans, the allocation of liability, and the sharing of remediation costs. More precisely, by 2004 five jurisdictions (Nova Scotia, Alberta, British Columbia, Manitoba and the Yukon) had incorporated most of the 13 principles into their legislation relating to contaminated sites. Two jurisdictions (Ontario and Quebec) had incorporated about half of the principles, with the remaining Canadian jurisdictions opting for only a few.[26]

3) The Current *Environment Act*

a) Origin

In addition to reflecting the CCME principles, Nova Scotia's current *Environment Act* [27] consolidated the essence of a large number of statutes, some dating to the early twentieth century.[28] The goal was to locate in one statute as many provisions relating to the environment as possible.

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

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

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

b) The Current Statute and Contaminated Sites

i) Release Provisions

By way of introduction, one should note that for most of the *Environment Act*'s history, a distinction existed between contaminated sites as so designated under the *Act* and those existing in fact. This resulted in two potential ways of dealing with contaminated sites. Until 2006, a ministerial order was required to declare ("designate") a property to be a "contaminated site." Where this was not done, those sections of the *Act* dealing with the adverse effects of releases into the environment, as well as the general compliance powers, could be used. That latter process, the use of release provisions, is still available. As will be discussed below, however, an expanded definition of "contaminated site" may reduce reliance on release provisions in terms of dealing with contaminated sites.

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

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

The "person responsible" for an adverse substance's release is required to report it once that person knows or ought to know about it.[29] If that person voluntarily reports details of the extent of the release, as obtained by proper testing (through an environmental audit or environmental site assessment),[30] and complies with the terms of any agreement negotiated with the Minister, no prosecution will ensue over the release.[31]

The *Act* gives the term "person responsible" a broad meaning, to include the owner of a substance or thing, as well as any previous owners, including anyone who has had care, management, or control of the substance.[32] The owner or occupier of the land upon which the release occurred is included. Among others, a successor, assignee, executor, receiver, or agent of a "person responsible"

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

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

[31] *Supra* note 27 at s. 70(1).

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

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

The *Act* further provides that the persons responsible for the release should take all reasonable measures to prevent, reduce, and remedy the adverse effects of the substance, as well as rehabilitate the environment to a standard prescribed by the Department.[33]

Section 125 provides the Minister with a large number of wide-ranging powers. Among others, the Minister may order a specified activity to stop, may order a release to stop, and may order the clean-up of a site. Further to s. 126, in situations when the Minister believes there is a likelihood of an irreparable, adverse effect, he or she can order that an operation or activity be shut down.[34]

For a property to become contaminated, at some point in time an adverse release must have occurred. Nonetheless, the Law Reform Commission understands that the *Act*'s release provisions were meant to apply only to new or contemporaneous polluting activities and therefore were not designed to deal with existing contamination caused by the earlier activities of owners, occupiers or other persons in control of the property. In other words, the release provisions were not created with longstanding or historical contamination in mind.

ii) Specific Contaminated Sites Provisions

Part VIII, which has only six sections, specifically addresses contaminated sites, including historical contamination.[35] Section 87(1) allows the Minister to designate a property as a contaminated site if of the opinion that a substance that may cause, is causing, or has caused an adverse effect upon the environment is present on the site. Until December 2006, the *Act* defined a contaminated site as a property so designated by the Minister, and the provisions of Part VIII applied only to such sites. The Minister's power to designate a site as contaminated has never been applied.[36] Instead of Part VIII, the province relied on other sections of the *Act* that give the Minister authority to issue orders directly to those who fall within the broad definition of "person responsible."

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

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

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

[36] In 2000, a report published by the Department stated that since the adoption of the *Act* in 1995, the Minister had not designated any contaminated sites in the province. See Nova Scotia Department of the Environment, *Nova Scotia's Environment Act, Legislative Review Process, 2000* ([S.l.]: The Department, 2000) at 21. Since 2000, no ministerial designations have occurred: Telephone communication with departmental official, Nova Scotia Department of the Environment, 6 March 2009.

As a result of changes made to the definition of contaminated sites in 2006, any site "with concentrations of a contaminant or contaminants that exceed standards prescribed or adopted by the Minister that has caused, is causing, or may cause an adverse effect" is also now a contaminated site, without the need for ministerial designation.[37] Rather than depending on a ministerial decision, this new definition makes the existence of a contaminated site a matter of fact. Section 3(c) provides "adverse effect" with a broad definition, namely "an effect that impairs or damages the environment, including...the health of humans or the reasonable enjoyment of life or property." The term "environment" is also wide-ranging. Defined at s. 3(r) as "the components of the earth," it includes, among others, air, land, water, layers of the atmosphere, organic and inorganic matter, and living organisms.

Possessing a contaminated site is not unlawful in itself, and the *Act* imposes no requirement in general to investigate or report suspected contamination.[38] Although the language used at s. 69 of the *Act,* which sets out the duty to report a release, may be wide enough to capture contaminated sites, regardless of when the release occurred, the Law Reform Commission understands that this provision was not meant to deal with historic or longstanding contamination. How "regulators" (departmental officials who supervise compliance with environmental legislation) are to become aware of contaminated sites is somewhat uncertain. Although amendments enacted in 2006 authorize the Minister to develop regulations respecting the identification and notification of the discovery of contaminated sites, none have been created to date.

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

The Minister has a great deal of discretion under the *Act*. Section 87(1) allows a site to be designated as a contaminated site on the basis of the Minister's opinion. Nonetheless, s.87(2) requires the Minister to follow departmentally established standards, criteria, and guidelines before making such a designation. To date, the Department has only adopted the "Guidelines for Management of Contaminated Sites" of 1996.[39] They do not take the form of legislation and as such, have no official

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[37] *Supra note* 27 at s.3(l), as amended by S.N.S. 2006, c.30, s. 2. In 2000, a committee set up to study the *Environmental Act* had recommended that "contaminated site" should be more precisely defined, based on specific scientific criteria. See *ibid* at 21.

[38] Robert G. Grant and Meinhard Doelle, "Nova Scotia," in Leonard J. Griffiths, ed., *Contaminated Property in Canada*, (Scarborough, Ontario: Carswell, 1996) at 9-19; *Legislative Review Process, 2000, supra* note 36 at 23.

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

status in law. They are also non-binding in nature. [40] Rather, they enable contaminated sites to be managed in a voluntary fashion. The Guidelines are also not connected to site designation and contain no criteria to guide the Minister's decision about whether to designate a site.

Complying with the Guidelines will spare a landowner from having to follow the process that would otherwise follow designation under the *Act*. The owner will, still however, have to respect other requirements in the legislation. Failure to follow the Guidelines will, however, likely result in designation.[41] The Guidelines include directions on how to approach notification about a contaminated site, what actions must be taken, the role of the government regulator, alternatives to litigation in the event of disputes, the determination of remediation standards, the qualifications for site professionals, and the nature of a "compliance certificate," which confirms for the Department that remediation has been completed. The self-described purpose of the Guidelines emphasizes appropriate, cost-effective, and consistent management of contaminated sites, as well as protection of the public interest. A pillar of this approach is to make "site owners assume responsibility to the maximum extent possible."[42]

Once the Minister makes a preliminary determination that a site is contaminated, he or she must give notice in writing to a number of parties (any person responsible for the contaminated sites, any registered owner of real property affected by the designation, and the municipality where the contaminated site is located). Before the Minister makes a final decision with reasons, those parties will be given an opportunity to comment on the preliminary designation.[43] If designation as a contaminated site does occur, the notice to that effect must be registered in an environmental registry, which the Minister is required to set up further to s. 10.

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

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

[41] Grant and Doelle, *supra* note 38 at 9-8.

[42] Guidelines, s*upra* note 39 at 1.

[43] *Supra* note 27 at s. 88.

Section 125 sets out a variety of powers that may be incorporated into a ministerial control order. A number might apply to contaminated sites. For instance, further to s. 125(1)(h), a responsible person may be required to "carry out clean-up, site rehabilitation or management." Section 132(2) of the *Act* also provides that if the party does not comply with the order, the Minister can take whatever action is required to carry out its terms and can recover reasonable amounts involved in so doing.

The broad scope of liability produced by the wide definition of person responsible for contamination, the fact that the Minister has discretion to determine when contamination exists, as well as the provisions' application to historical contamination, is softened somewhat by the fact that section 129 lists a number of factors which shall guide the Minister, "if such information is available or accessible," before making an order. These include whether the substance was present at the site when the person responsible became owner, occupier, or operator, and whether that person knew or ought to have known of the presence of the offending substance. Other factors include whether the presence of the substance was caused solely by the act or omission of an independent third party over whom the person responsible had no control, and the economic benefits, such as a lower purchase price, which the person responsible might have received because of the property's contaminated condition. Consideration of these factors could result in a less severe order, or none at all.

It is also noteworthy that s. 90(e) of the *Act* gives the Minister authority to create lists of persons who are not responsible for rehabilitation at a contaminated site, and s.91(b) empowers the "Governor in Council" (provincial Cabinet) to make regulations designating persons or classes of persons who are not "persons responsible for contaminated sites."[44]

Section 134 makes it clear that if more than one person is named in a ministerial order, all persons named in the order are "jointly and severally responsible" for payment of the costs of carrying out that order. This could involve the costs of stopping ongoing contamination and any rehabilitation involved (if so ordered) as well as the costs of cleaning up an historically contaminated site.

The concept of joint and several liability, when included in legislation, enables the Government to require one or more of the responsible parties to pay for the full amount of the clean-up cost. A person who pays more than his or her fair share is left to seek contribution from the other responsible parties. From the perspective of government, joint and several liability is efficient. It need only pursue one responsible person. To the person who has paid a disproportionate amount and who must attempt to collect from other parties, however, the concept would be unfair and costly.

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

The 1996 Guidelines at page 2 define a "certificate of compliance" as "[a] certificate provided to [the Department] in a prescribed format confirming that the guideline has been followed and that the remedial objectives have been met." A site professional, a person whose work involves the testing, monitoring, remediating and certifying the clean-up of contaminated sites, prepares the certificate on behalf of the site's owner.

Until the *Act* was changed in 2006, it referred explicitly at s.90(c) to "certificates of compliance." The authority to require a compliance certificate now seems based on more general language. Under the current s.90(c), the Minister may, among others, adopt "procedures or protocols...for the assessment, rehabilitation or management of contaminated sites." Certificates of compliance, do not, however, protect against future liability under legislation:

> "While the Department of Environment ...has adopted standards for remediation of contaminated sites . . . there is no statutory process for 'regulatory approval' of remediation. This is commonly misunderstood because there are non-regulatory guidelines in place for the management of contaminated sites. However, under the current legislative framework the Department of Environment... does not give binding, irreversible approvals of remediation, notwithstanding the acceptance of a [certificate of compliance] under the *Guidelines*."[45]

Although amendments enacted in 2006 authorize the provincial Cabinet to make regulations "respecting the regulatory liability of persons responsible for the contaminated site following the completion of remediation and site closure . . .," none have ensued.

As a result of s. 137, a person "aggrieved" by a decision or order made by a departmental administrator or ministerial delegate may appeal it to the Minister. If disagreeing with the Minister's appeal decision, or indeed any ministerial order made under the *Act,* the aggrieved person may appeal to the Nova Scotia Supreme Court on the authority of s. 138. The Supreme Court's decision in relation to a s. 138 appeal is final.

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

This chapter has discussed the 1996 Guidelines, which are not legally binding, but which have a connection to the law. Two other non-binding government policies or directives are applied in conjunction with the legislation. These are Risk-Based Corrective Action (RBCA - pronounced "Rebecca") and the Domestic Fuel Oil Spill Policy.

In Atlantic Canada, most contaminated sites identified to date have involved petroleum pollution. In April 1999, the four Atlantic Provinces devised RBCA for the management of

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

petroleum hydro-carbon contaminated sites in both soil and groundwater.[46] RBCA is administered on a collaborative basis by the Atlantic Partnership on RBCA Implementation (PIRI).[47] It is meant to supplement, rather than replace, contaminated sites guidelines in the respective provinces.

With origins in the United States, RBCA was adapted for use in Atlantic Canada. It takes the form of both a philosophical approach and specialized software. It reflects the perspective that land showing signs of contamination need not be made pristine in order to become usable again. Rather, the extent of clean-up depends on what level of associated risk would be appropriate for people and the environment. This is known as a "risk-based approach."

Under the RBCA approach, characteristics of a contaminated site are taken into account. This is in contrast to a "criteria-based approach," whereby certain accepted numerical guidelines are applied to all contaminated properties. RBCA involves two generic land uses - residential and commercial, and three types of hydro-carbons - gasoline, diesel or heavy oil.

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

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

5) Domestic Fuel Oil Spill Policy

A petroleum spill is considered to be a release of a contaminant under the *Act*. To provide guidance to domestic fuel oil users in Nova Scotia, the Department applies a policy document about

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

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

the remediation of domestic oil spills, including their assessment, remediation, and reporting.[48] A domestic fuel oil spill is defined by the policy as "the release of fuel oil on a residential land use property with three or less units, from a petroleum storage tank with a capacity of less than or equal to 500 imperial gallons (2270 liters)."[49] The "person responsible" for a fuel oil spill is defined broadly. It could include, for example, current and previous owners of a site, a person acting for the owner, and any person the Minister thinks has caused or contributed to the spill.

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

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

The "person responsible," property owner, or their insurance company must retain a certified clean-up contractor or a site professional to manage the assessment and remediation of a domestic fuel oil spill. The policy document establishes minimum eligibility requirements for both certified clean-up contractors and site professionals.[50]

III Aspects of Legislation Across Canada[51]

This section of the Discussion Paper summarizes Canadian legislative provisions of relevance to the administration and remediation of contaminated sites and compares those approaches to the law in Nova Scotia. It also introduces or elaborates on concepts and issues which should be considered when discussing the nature of a contaminated sites regime. The purpose of this section is not to provide an exhaustive and detailed description of legislation. Rather, it is meant to provide a sense of the types of related measures in place elsewhere in Canada.

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

[49] *Ibid.* at 1.

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

[51] In an effort to reduce the number of footnotes, the Discussion Paper, when summarizing regulatory approaches from across the country, generally does not cite individual statutes or section numbers. Readers seeking more information are invited to consult the list of main environmental statutes and guidelines (Appendix C).

1) General Approach

A province is considered to take a "punitive approach" to the control of contaminated sites if upon discovery or identification of such a site, the legislation authorizes the local environmental minister or department to issue an order requiring the responsible person to clean up the site to a specified level and to impose sanctions if this is not done.[52] On the other hand, if the provincial legislation encourages voluntary clean-up as a first step, with ministerial or departmental action only taking place if nothing is done, the approach is characterized as "semi-punitive."

Nova Scotia seems to have adopted a semi-punitive approach towards remediation of contaminated sites. The province does not initiate the identification or clean-up of contaminated sites, but encourages private property owners and other potentially responsible persons to do so. If private initiatives do not follow the identification of a contaminated site, the province must decide whether to issue a clean-up order.

The majority of other Canadian jurisdictions also have in place a semi-punitive approach which encourages voluntary compliance with statutory revisions, or the development of clean-up agreements, whether among responsible parties or between responsible parties and government.[53] Only New Brunswick and Manitoba appear to have adopted a basically punitive approach which relies on a ministerial order to achieve contaminated site clean-up.[54]

2) Reporting Requirements

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

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

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

[53] This Discussion Paper does not trace the regulatory approach in Nunavut, which tends to adopt legislation from the Northwest Territories. Given some distinct legal concepts in Quebec, the Discussion Paper also does not always include a reference to the practice in that province.

[54] In practice, however, these provisions may encourage a voluntary clean-up approach before any official action is taken.

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

3) How Wide Is Liability?

In terms of liability, contaminated sites provisions and environmental legislation in general tend to reflect two assumptions. The first is the "polluter pays" principle, namely that polluters ought to pay for the clean-up of their contamination. This principle is specifically declared to be operative in some statutes, like the Nova Scotia *Environment Act* at s. 2(c). In other statutes, the principle is only implicit.

The second assumption, especially relevant to contaminated sites, is that where the actual or primary polluters cannot be made to pay for the costs of cleaning up their pollution, because they are not identifiable or are financially unable, then other persons involved with a contaminated site or its operation must be made responsible for the clean-up. In some cases these secondary polluters will be persons who have knowledge about, or knowingly benefitted from, the polluting activities. In other instances, though, a person deemed responsible under legislation might have no involvement with having contributed to a site's contamination. This can result in a lack of consistency and indeed fairness, in that non-polluters are being made liable though an ostensible application of "polluter pays." One legal commentator recently suggested, "In various ways, the 'polluter pays' principle mutated into a regulatory regime whereby a broad range of parties having even limited contact with the contaminated property could bear liability for the cost of clean up."[55]

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

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

4) Retrospectivity and Retroactivity

Once a statute is created, at what point in time is it deemed to have effect? Does it operate only with respect to the future, to events which occur after its creation? Can it also look to the past, to situations which predated its creation? When a statute applies a "backwards in time" perspective, it is either retroactive or retrospective. If retroactive, a statute looks back in time and changes the law as of a certain date. Retrospective legislation operates for the future but, in so doing, imposes new legal consequences in respect of past actions, events or statutes. Both terms indicate a reaching back in time, but only a legislative provision that specifically changes the law as of a certain past date is truly retroactive.

A person who supports the absolute nature of the polluter pays principle would likely agree with the need for a statute which can reach "backwards in time," especially where contaminated sites are involved.

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

In several provinces, the statutes do not contain a statement that indicates a general intention to have a "backwards in time" effect, but do contain provisions that appear to achieve this. Only New Brunswick appears to have neither an explicit statement of backwards effect nor specific provisions that indicate such an intention.

British Columbia clearly uses the term "retroactively" to indicate the intention to have its statute reach backwards in time. Its *Environmental Management Act* at s. 47(1) declares that "a person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the site." Nonetheless, the British Columbia Court of Appeal has interpreted identical language in the *Waste Management Act*,[56] the predecessor statute to the *Environmental Management Act*, as not having retroactive effect. The court noted that the *Waste Management Act*, as a whole, did not contain a statement indicating it was meant to apply backwards in time in relation to a specific date. Lacking such a date, the court stated, the statute, speaking retroactively, would catch in its net any individual or corporation who had contributed to the contamination of real property as far back as Confederation. Such a breathtaking result, the court concluded, could not have been contemplated by the legislature. Instead, the court found that the

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

relevant section in the *Waste Management Act* (section 47 in the *Environmental Management Act*) was a clear example of retrospective legislation.[57]

5) Joint and Several Liability

The concept of joint and several liability, when included in legislation, enables the Government to require one or more of the responsible parties to pay for the full amount of the clean-up cost. A person who pays more than his or her fair share is left to seek contribution from the other responsible parties. In theory, the use of joint and several liability is another means of supporting the "polluter pays" principle. Joint and several liability provisions exist in seven of the jurisdictions reviewed, although in different degrees.

Nova Scotia, Ontario and British Columbia contain quite broad statements of the principle. For example, s.134(1) in the Nova Scotia *Act* provides, "all persons named in the order are jointly responsible for carrying out terms of the order and are jointly and severally liable for payment of the costs of doing so," including any costs incurred by the Minister. B.C.'s statute similarly relates joint and several liability to the cost of remediation. However, legislation in provinces such as Nova Scotia, Ontario, Manitoba and Saskatchewan also makes it clear that joint and several liability only applies in the absence of any voluntary agreement entered into by the parties.

The provinces of New Brunswick, Manitoba and Saskatchewan apply joint and several liability to the situation where the persons involved fail to comply with a government order and, presumably, the government was forced to take action to incur the cost of remediation.

Alberta appears to have the most limited application of the doctrine of joint and several liability. Its application there is limited to three distinct scenarios, namely: (1) to pay for "orphan shares"[58] of liability under agreements where there is no fund available to pay for these shares; (2) to deal with the situation where a number of shell or holding companies are involved with a contaminated site and there is uncertainty or limited information available as to their actual relationship; and (3) to deal with the situation where there is no information or a lack of information available upon which the fair allocation of liability may be made. Four jurisdictions (P.E.I., Quebec, Yukon and Northwest Territories) make no reference to the principle of joint and several liability.

6) Third Party Agreements re Cost of Remediation

Where multiple parties are responsible for a contaminated site, they may voluntarily agree among themselves as to how responsibility for the contamination, including the costs of remediation, should be shared. In most Canadian jurisdictions, legislation requires that government,

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

[58] The concept of orphan shares is discussed further below at part III(8).

in order to be bound, must consent to such a voluntary agreement. Agreements can also take the form of an agreement between government and all or some other responsible persons regarding allocation of liability costs. When such an agreement is reached, it precludes other liabilities being imposed unless circumstances change.

Section 91(dh) of the Nova Scotian statute authorizes the provincial Cabinet to make regulations that permit the transfer of regulatory liability between parties. None, however, have been developed. Of the 11 other jurisdictions surveyed, five specifically allow for some kind of third party agreement to be reached. Manitoba and Saskatchewan expressly require governmental consent. British Columbia specifically permits voluntary remediation agreements to be entered into by the polluters and the Ministry, but there is no reference to third parties allocating responsibility among themselves. The latest report of the CCME recommends that buyers and sellers should have the option of transferring regulatory environmental liability associated with contaminated sites from one to the other.[59] Given the past influence of the CCME recommendations upon provincial and territorial legislation, including British Columbia, one B.C. legal commentator has suggested that it is perhaps safe to assume that the principle of liability transfer will become part of that province's environmental law in the near future.[60]

Alberta allows the parties to enter into allocation agreements and, if approved by the Department, no environmental protection order can be issued against the parties as long as the agreement is carried out.

Six jurisdictions make no specific reference to third party agreements with regard to allocation of liability or costs of remediation. The Northwest Territories, though it does not have a specific provision dealing with third party agreements which allocate costs or liability, does authorize the Minister to enter into agreements with any person regarding the administration and enforcement of the *Act* and the regulations.[61] Given a broad interpretation, the reference to administration and enforcement of the *Act* could include private agreements between the Ministry and third parties, or agreements between third parties themselves.

7) Minister's Discretion Regarding Contamination

Persons who might be involved with contaminated sites in some way, and who as a result might be held responsible for the contamination, have an understandable desire for clear, objective

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[59] Canadian Council of Ministers of the Environment (CCME), *Recommended Principles on Contaminated Sites Liability* ([S.1.]: CCME, 2006) at 11.

[60] Bereti, *supra* note 57 at 70. Section 48(4) of the B.C. *Environmental Management Act* currently does require the departmental Director, when deciding on a remediation order, to take into account private agreements among responsible persons respecting liability for remediation, if those agreements are known to the Director. This provision, therefore, appears to recognize the possibility of third party agreements.

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

standards to determine if a site is contaminated. Having such a question determined solely on the basis of ministerial discretion would not be consistent with that wish.

At first glance, it might appear that the Minister in most provinces has an unlimited discretion to determine whether a site is contaminated. However, a closer examination reveals that only in New Brunswick, Quebec, and Alberta is the Minister authorized to conclude that a site is contaminated without giving consideration to any specific fact or question. In Manitoba, for example, the Minister has to determine if the site "is a threat to human health or safety."

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

In some provinces, such as P.E.I. and Nova Scotia, the Minister is required to take into account criteria established by regulations, while in B.C., he or she must consult other sources. The B.C. statute directs its Minister to consider several sources of information including (a) the site profile; (b) the detailed investigation and site information; and (c) other available information.

8) Orphan Sites and Orphan Shares

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

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

In Alberta, the guidelines distinguish between orphan sites and shares. With respect to orphan shares, joint and several liability will be imposed in a number of situations already described in the section involving joint and several liability.[62]

In British Columbia, the Minister determines whether a site is contaminated or not, and if so, whether it is an orphan site. He or she then determines if it is a high or low risk. If the risk is high, he can take action to clean it up and then try to recover costs from responsible persons, or others

[62] See discussion above at part III(5).

who are identified. If no other responsible persons are identified, then the costs are paid out of a consolidated revenue fund and remain a debt to the fund.

9) How Clean Is Clean and Who Determines the Level of Remediation?

From the point of view of the person responsible for contaminated property, and in the interest of certainty, it is important to know to what level of cleanliness a contaminated property must be returned. The ideal situation from the polluter's point of view is to have such questions spelled out in the statute, but no Canadian legislation does this. Manitoba's statute comes the closest to the ideal by listing factors that the Minister must consider when determining what level of clean-up to require.

In Nova Scotia, s.90(c) of the *Environment Act* authorizes the Minister to "adopt or establish standards, policies, guidelines, procedures or protocols, including risk based assessment and management models and tools, for the assessment, rehabilitation or management of contaminated sites." Additionally, the Cabinet can enact regulations dealing with rehabilitation criteria used for the purpose of rehabilitation and clean-up of contaminated sites. No such regulations have been created. The Nova Scotia Guidelines also state that current applicable standards, guidelines, and criteria published by the CCME and adopted by the Department can be used in the remediation process, as well as other contaminated sites standards, guidelines and criteria accepted or published by the Department for specific applications.

Like Nova Scotia, the majority of jurisdictions provide for clean-up levels to be established by regulation, as is the case in Alberta, Newfoundland, P.E.I., Ontario, British Columbia, Yukon, New Brunswick and Saskatchewan. Newfoundland and Saskatchewan authorize the Minister to set standards and criteria in regulations, and New Brunswick gives the Minister sole discretion to determine the appropriate level of contamination assisted by guidelines. Similarly, in the Yukon, the guidelines state that the Minister of the Department of Resources, Wildlife and Economic Development must approve which approach to remediation is to be used, namely (1) criteria based; (2) modified criteria based; or (3) risk based.

10) Clean-Up Certificates and Future Liability

Clean-up or compliance certificates offer useful evidence that a site has been cleaned up to a prescribed standard. They are desired as a governmental stamp of approval which would allow a formerly contaminated site to re-enter the normal course of commercial activity with little or no concern about its environmental history.[63] Certificates are therefore considered valuable by both vendors and purchasers. If the purchaser is a real estate developer, a compliance certificate can

[63] "Comfort letter" and "environmental clearance" are other terms used to denote the same concept. See Burgess, *supra* note 28 at 57.

facilitate development because some municipalities require such a document before approving any re-zoning or subdivision activities. Similarly, financial institutions are more willing to advance funds to a purchaser of land who comes to them possessing a clearance certificate.

The majority of provinces and territories provide for some form of certificate which acknowledges that remediation work has been completed on the contaminated site to the satisfaction of the Department. Authority for this recognition is found in the legislation or guidelines. In this regard, they can be seen as extinguishing liability for past actions. However, they do not guarantee immunity against future regulatory action should standards change. If this happens, responsible persons, as defined in the relevant legislation, may be legally liable for remediation costs. In Nova Scotia, certificates of compliance, which are prepared by a site professional on behalf of a landowner, do not affect future legal liability.[64]

In Quebec, the document is called a Notice of Decontamination. However, these documents provide little, or no, immunity from future liability. Saskatchewan government policy is to offer "informal comments" on clean-up efforts, but no official certificates.[65] In P.E.I. and the Northwest Territories, the guidelines stipulate that the Department will acknowledge receipt of a closure report which states that no further action is required. In Ontario, however, the record of certification does not include an order or declaration that the site is clean.

In Alberta, the guidelines seem to provide some limited protection against future liability for some facilities, while British Columbia, with its Approvals in Principle and Certificates of Compliance, does appear to offer more finality than other provinces. This was also the opinion of legal commentators[66] with regard to B.C.'s earlier statute, the *Waste Management Act*,[67] and its predecessor, the *Waste Management Amendment Act*.[68] Some provinces like Manitoba try to leave open the possibility of future regulatory actions by stating in the clearance certificate that clearance is based on current regulations only.

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

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

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

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

[68] *Waste Management Amendment Act*, S.B.C. 1993, c. 25.

11) Government Cost Recovery Provisions

If a site owner is unknown, uncooperative, or lacks money, government might take the initiative to have the property cleaned up. All provinces have some form of provision allowing for government to recover the cost of remediation it has carried out.

12) Cost or Liability Allocation

As more than one person may be responsible for the creation of a contaminated site, a procedure for determining the degree of responsibility for each person involved is important. Nova Scotia, Newfoundland, Manitoba, Saskatchewan, Alberta, British Columbia, and Yukon have statutory provisions dealing with cost or liability allocations. Five other Canadian jurisdictions (New Brunswick, P.E.I., Quebec, Ontario and Northwest Territories) do not. In the case of Ontario, the Minister can exclude a responsible person from liability.

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

Manitoba's *Contaminated Sites Remediation Act* provides that responsible persons are to be given a specified length of time to agree upon the apportionment of costs for remediation of the site and to submit the agreement to the director for approval. If no voluntary agreement can be reached, or if the parties request, the director may appoint a mediator to assist in the development of an apportionment agreement. Failing this or if requested by the parties, the director will direct the Clean Environment Commission to apportion the costs at an apportionment hearing.[69]

In Nova Scotia, the parties are first encouraged to resolve disputes or agree on aspects of remediation, including apportionment, on a voluntary basis. If the parties cannot reach agreement between themselves or with the Department, s.4.2 of the Guidelines for the Management of Contaminated Sites in Nova Scotia enables any party to give written notice to the others requesting the unresolved issues to be submitted to alternative dispute resolution (ADR). Either mediation or arbitration can be used. In addition, the Nova Scotia *Environment Act* at s. 89 allows the minister to refer any matter to ADR, including the allocation of costs between parties responsible for a contaminated site in any dispute arising over site responsibility or remediation.

A number of jurisdictions besides Nova Scotia promote voluntary agreements with relation to the allocation of remediation costs. However, what if an agreement is not possible? In the provinces of Manitoba, Saskatchewan, and British Columbia, if the parties cannot reach an agreement, an

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

allocation committee or panel is used either to make a decision (Manitoba and Saskatchewan), or to give advice, as is the case in British Columbia. In the Yukon, the statute authorizes the use of ministerial advisors to determine the share of responsibility for clean-up costs. The advisors are required to consider specifically listed factors when reaching their decision.

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

In provinces where there is no allocation panel or its equivalent and the parties themselves cannot voluntarily reach an agreement as to responsibility and extent, the legislation generally imposes joint and several liability as a fallback position, as in Newfoundland and Ontario.

13) Liability of Government

Since all levels of government can, and do, own property, some of which can become contaminated,[70] it is important to determine whether such entities are subject to provincial environmental provisions dealing with contaminated sites. In relation to the liability of government, Canadian jurisdictions differ in terms of their approaches to scope and language used. For example, statutes in Newfoundland and P.E.I. respectively purport to apply both to the provincial and federal governments. Saskatchewan uses the term "Crown," the extent of which is not defined. The Northwest Territories and Yukon only refer to the territorial government being bound. New Brunswick is unique, by making no reference to whether its statute binds government.

In Nova Scotia, s.4 of the *Environment Act* provides that both federal and provincial Crowns are bound by the *Act*.[71] Therefore, with respect to contaminated sites which they own, the *Act* treats those levels of government like any other person. Unlike other landowners, however, the provincial

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

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

Crown may be responsible for contamination on a property that it did not realize it owns. This is a possible result of applying the concept of "escheat" (ownership reverting to the Crown).

According to legal theory, the law does not wish land to be without an owner. This could occur when a person dies without a valid will and any possible heirs under intestacy legislation, or where a corporation is dissolved. In those instances, through the escheat process, the law transfers ownership of any lands in question to the Crown.[72] Those lands could be contaminated. Indeed, people involved with a corporation which has financial problems may want it to have it dissolved, because they face large potential liability with respect to remediation costs, but insufficient assets to pay for clean-up.

Neither the *Escheats Act*[73] nor the *Corporations Miscellaneous Provisions Act,*[74] both of which are relevant to escheats, contains provisions which could be used to protect the provincial Crown in Nova Scotia from liability in this context. Of note, however, is s.5(5) in the *Proceedings Against the Crown Act*,[75] which states:

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

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

Section 27(1) of the *Corporations Miscellaneous Provisions Act* is also relevant in this context. Upon dissolution of a corporation, its real property is automatically transferred to the provincial Crown, which does not seem to have an opportunity to decide whether it wishes to accept the risks associated with ownership:

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

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

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

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

> "Where a corporation is dissolved, the lands, tenements and hereditaments situate in the Province of which the corporation was seised, or to which it was entitled at the time of its dissolution, shall for all purposes be deemed to escheat to Her Majesty in right of the Province and the Attorney General shall cause possession thereof to be taken in the name of Her Majesty."

It is not known how many corporations have been dissolved in Nova Scotia, nor the percentage of those dissolved corporations which owned real property. To provide some idea, though, it was recently reported that there were 750,000 dissolved corporations in Ontario.[76]

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

Under the *Municipal Government Act*, when municipal taxes relating to a property are unpaid, the municipality acquires a status similar to that of a secured creditor. The municipality has a first lien, which it can enforce by having the property sold (generally at public action) and the proceeds applied, in priority to any other claimants, to payment of the municipal tax bill. The lien does not make the municipality the owner of the property. However, where no bid received was sufficient to satisfy the full amount of outstanding taxes, interest and any expenses, a municipality may bid and purchase the property.[77] In the situation where no sufficient bids are received, it is possible that a municipality chooses to acquire a property, not for reasons of future profit, but to be in a position to maintain and protect the property, until the tax bill is paid or a new owner purchases the property. What the municipality might not realize, however, is that the property in question is contaminated.

Saskatchewan provides protection for municipalities by framing a definition of "persons responsible" that excludes them. The Manitoba statute states that municipalities are not deemed to be a person responsible if it becomes a property owner by virtue of a tax sale. Alberta provides immunity for municipalities in relation to historic or private property acquired as a result of tax recovery, but British Columbia holds municipalities liable for contaminated sites owned by a municipality or for off-property damage caused by contamination that originates from municipal property. In Ontario, an order under environmental legislation cannot be issued against a municipality unless the order follows gross negligence or willful misconduct by the municipality or its representatives, or from circumstances prescribed by the regulations.[78]

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[76] Saxe, *supra* note 72. No information is provided about how many of those corporations owned land.

[77] S.N.S. 1998, c. 18, ss. 133-134, 141, and 143.

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

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

14) Liability of Secured Creditors

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

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

In Ontario, there is no liability for secured creditors if they merely tried to conduct an investigation relating to the secured property, took action to try and preserve or protect the secured property, or took any action in response to a perceived danger to the health or safety of a person, or

the impairment of the natural environment or damage to property, plant or animal life.[79] If a secured creditor becomes the owner of property by virtue of a foreclosure, no order is to issue unless there was gross negligence or willful misconduct on the part of the creditor.[80]

Having set out the legislative context, by discussing Nova Scotia's approach to contaminated sites and summarizing equivalent provisions from elsewhere in the country, this Discussion Paper now considers in detail the issues that form part of our Terms of Reference and offers proposals for reform.

[79] *Ibid* at ss. 168.17(1) and (2).

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

CHAPTER 2: ASPECTS OF LIABILITY

1) Introduction

Concern about potential liability seems to be the main reason why contaminated sites remain unremediated. A discussion about aspects of liability is therefore fundamental to this Discussion Paper. Liability is responsibility at law. In this context, we are concerned for the most part with regulatory liability (determined in accordance with statutes and regulations), rather than civil liability, decided by a judge as part of a law suit.

Depending on the circumstances, establishing liability in the context of contaminated sites may be complex. It might involve a number of properties, persons, activities, substances, and even points in time. When devising a regime to deal with aspects of liability under statute, it is important to keep in mind a number of guiding considerations, some of them potentially conflicting.

Most generally, one should consider what is the underlying basis for regulatory liability. Is the main motivation to ensure that contaminated sites are cleaned up, regardless of how they arose, or is it more specific, that those who caused contamination, through careless acts or omissions, should be required to remediate, or are both rationales equally important? In other words, is the regime meant to be remedial, punitive, or both? The polluter pays principle needs to be kept in the forefront. This may lead to conflict with another aim, ensuring fairness in the imposition of liability. One should also strive for clarity, simplicity, and cost-effectiveness in devising a legislative liability regime. For example, government needs to be able to act quickly to deal with an environmental concern, without having to await a judicial decision about who is responsible to pay for clean-up. When government must redress an environmental problem, its costs, and therefore potential financial exposure for taxpayers, should be kept as low as possible. A liability scheme should recognize the value of transforming contaminated sites into useful properties, as well as economic benefits, aside from the land itself, associated with clean-up efforts. Furthermore, development efforts need to be sustainable, in the sense of taking into account and reducing environmental impacts.[81]

As mentioned earlier, depending on the facts, deciding on liability in a particular situation may require answers to a number of sub-issues. In the interest of completeness, this portion of the Discussion Paper considers those subsidiary questions on an individual basis and sets out the Law Reform Commission's proposals for change.

2) Retroactivity/Retrospectivity

Section 85 of the *Environment Act* states that Part VIII (which involves contaminated sites) applies regardless of when a substance became present over, in, on or under a contaminated site. Retroactive or retrospective application of legislative provisions designed to deal with contaminated

[81] Some of these factors are adapted from those identified in CCME, *Guidance Document, supra* note 30 at 10.

sites is sometimes justified as supporting the polluter pays principle. It is also suggested that if one does not apply a retrospective approach, as part of the widest liability net possible, some polluters will escape liability, which means that the taxpayer may have to pay their clean-up costs. Another rationale is economic, suggesting that as the polluter has benefitted economically from disposing of waste at a site, the polluter, rather than the taxpayer, should bear the cost of clean-up in the present. That rationale assumes the possibility of determining which polluter benefitted from the polluting activity. The economic argument may also fail to take into account the possibility that persons other than the polluter, such as consumers, benefitted from the pollution having taken place.

An approach to liability which looks backwards in time certainly has its critics. The main argument against this approach is that it is unfair, as it subjects people to legal requirements and technical standards which were not in effect at the time that the person responsible made certain choices about his or her activities. It is difficult, it not impossible, to adhere to the law if its criteria change after the fact. It has also been pointed out that as it looks backwards in time, a retrospective approach serves no deterrent purpose. Moreover, if combined with joint and several liability, retrospectivity in legislation may mean that polluters who contributed only a small amount to a problem may be visited with a disproportionately large share of responsibility.

In 2003, the Ministry's Advisory Panel on contaminated sites in British Columbia summarized the essential problem in this context as follows:

> "It comes down to an issue of who should bear the cost of historical contamination when society has changed the rules after gaining new knowledge about human health or environmental risks associated with particular substances. Should it be the current owners, who currently have control over contaminated sites although they may not have caused the contamination? Should it be past owners or operators, who caused or contributed to the problem even though their actions may have been legal at the time? Or should it be society as a whole, which has changed the rules relating to these sites?"[82]

The Law Reform Commission appreciates both the usefulness and drawbacks of retaining a retrospective aspect to our environmental legislation. The "polluter pays" principle would be upheld in some instances. Someone who contaminated a property would not be able to escape responsibility simply by having sold the land. On the other hand, taking a retrospective approach could be unfair to some landowners and could mean that a dark cloud of potential liability may hang over past events, not unlawful when they occurred.

As fairness will vary according to the circumstances, the Law Review Commission is of the view that we should not lose sight of what seems to be the main goal of government in this context,

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

namely the clean-up of contaminated sites. Ideally, this should take place fairly, expeditiously, and economically, and should be done by those who created the problem. Retaining a retrospective provision in our legislation may help to achieve these aims in some instances. In other situations, this may not be possible, or some objectives might be favoured at the expense of others.

The Commission suggests that the retrospective applicability of the *Environment Act* should be retained, but on a discretionary basis. In situations where contamination occurred before the *Act* was in effect, the minister would consider all relevant factors before deciding whether to include a person within the liability on a retrospective basis. This type of approach, the Commission notes, would be consistent with number 9 of the CCME recommended principles, which are also reflected at s.129 of the *Act*. A number of "liability allocation factors" set out at principle 9 would be relevant in this context, including whether the person dealing with the substance followed the accepted industry standards and practices, as well as laws, of the day, whether the person benefitted from the activity resulting in the contamination and to what extent, whether a previous owner sold the property without disclosing the presence of the substance at the site to the purchaser, and whether the owner ought recently to have known of the substances presence when he or she took ownership.

The Law Reform Commission suggests:

- Retrospective applicability of the *Environment Act* should be retained, but on a discretionary basis.
- Whether to apply the *Environment Act* retrospectively would be for the Minister to decide, after having taken into account relevant "liability allocation factors," originating with number 9 of the CCME recommended principles and adopted at s.129 of the *Act*.

3) Third Party Agreements

Assume that an agreement is reached for the sale of a brownfield. The vendor and purchaser may agree that the vendor will assume all of the environmental regulatory liabilities associated with past use of the property. If subsequently discovering that the property is contaminated, the regulator could still issue an order against either the buyer or the seller. The Government, however, not being a party to the agreement between vendor and purchaser, would not be bound by its terms. If found responsible under statute for clean-up, the buyer would then have to seek financial recovery from the seller in relation to costs of any clean-up action. The

problem has been identified as a major deterrent to financial institutions, including lending agencies and developers, from becoming in any way involved with brownfield sites, particularly if such sites are known to be contaminated or were formerly contaminated.[83]

In 2003, the National Round Table on the Environment and the Economy (NRTEE) recommended that "provinces and territories establish legislation permitting binding contractual allocations of regulatory and civil liability among parties relevant to a brownfield site, upon filing of adequate financial assurances to cover site remediation costs."[84] The NRTEE had in mind the sale of a brownfield to an arm's length purchaser, who would have an opportunity to benefit from the future use of land after remediation. To allow such a transfer of liability to take place, the NRTEE thought, would help to put brownfields back into the marketplace. The NRTEE strategy also recognized the need to impose financial safeguards in order to offer protection against those vendors who would "intentionally sell to shell companies, thereby freeing themselves of liability while stranding liability with an entity that is in no position to pay out legitimate claims arising from remediation."[85]

In 2003, a ministerial Advisory Panel in British Columbia recommended that owners of property should be allowed to transfer by contract both civil and regulatory liability when they sell a site. It was suggested that the purchaser can achieve closure of liability by undertaking the necessary risk management or remediation activities and obtaining a No Further Action Letter from the provincial environment department. As with other proposals in favour of transfers, a number of safeguards were recommended.[86]

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

> "A principle that provides for a transfer of environmental regulatory liability between parties, if implemented together with the existing CCME principles, could help to address environmental regulatory liability issues with respect to both contaminated sites and brownfield sites. By helping to transfer liability, governments will be addressing one of the three key barriers to brownfield development. The other two key barriers are financial and lack of awareness."[87]

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

[84] NRTEE, *Cleaning Up the Past,* s*upra* note 16 at 25.

[85] *Ibid.* at 26.

[86] "Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 82 at 128-129.

[87] CCME, *Recommended Principles, supra* note 59 at 2.

In 2007, a Working Group which studied contaminated sites in New Brunswick proposed that both regulatory and civil liability should be contractually transferable to another person.[88] In relation to regulatory liability, the proposal would allow the Crown to adhere to a multi-party agreement such as a purchase and sell contract. As a party, the Crown would be bound contractually and if all the parties agreed, the Minister would lose the authority to require other parties to undertake remediation activities. Such agreements would be restricted to special situations, according to the Working Group, where remediation and or development might not otherwise take place. As with the CCME and NRTEE Table proposals, certain conditions would also apply.

Risk management is a cornerstone of doing business in our country. One aspect of risk management is deciding when it would be appropriate to share risk, at a cost, with other parties who are willing to assume part of that risk. That consideration underlies insurance coverage. One party, the insured, allocates to another party, the insurer, a portion of risk, in exchange for the payment of a premium. In the event that the risk materializes and the insured suffers a loss or causes a loss to a third party, the insurer redresses that loss through a financial payment.

How is the topic of risk management relevant to contaminated sites? A property owner who wishes to sell a site may understandably be wary about future liability should, for example, standards change or previously unknown contamination be discovered at the site after the sale. That owner may therefore wish to transfer not only title to the property, but any potential future regulatory risks to the purchaser.

The Law Reform Commission thinks that in general, there is nothing wrong with that proposition. Transfer of liability agreements are recognized in other contexts. For example, one corporation, by virtue of contract, may acquire both the assets and liabilities of another.[89] As for the specific context of contaminated sites, by accepting a number of provisions in the *Environment Act,* the House of Assembly has expressed its approval in general for the potential to transfer liability. Section 91(1)(d) empowers the provincial Cabinet to make regulations "respecting procedures to cover the allocation of liability or agreements negotiated under [Part VIII]," and s.91(1)(dh) allows for regulations "respecting the regulatory liability of persons responsible for the contaminated site following the completion of remediation and site closure, or for the transfer of regulatory liability between third parties." The Commission suggests that government should act on its powers currently contained in legislation and create regulations to allow, and govern, agreements which would transfer regulatory liability, actual or future, under the *Act*.

The Law Reform Commission cautions, however, that a transfer of liability agreement involving a contaminated site should not allow obligations to be avoided. In other words, what should not be tolerated is a type of sleight of hand trick which would permit persons responsible to circumvent what they otherwise would have been required to do. Some safeguards are therefore

[88] N.B. Brownfield Development Working Group, *supra* note 52 at 4-5, 9-10.

[89] See *Markborough Properties Ltd.* v. *Dartmouth (City)* (1989), 9 R.P.R.. (2d) 149 (N.S.S.C.T.D.).

required. Otherwise, an unscrupulous party may be tempted to transfer liability for a site to a "shell" corporation with little or no assets. Although in favour of allowing transfer of regulatory liability under statute, the Commission therefore also suggests that prior to acceptance of such an agreement, certain financial requirements, such as the use of bonds or disclosure of assets, might have to be in place, depending on the circumstances. If clean-up of a site has been completed prior to sale, which the Commission understands is the usual commercial practice in Nova Scotia, there may be no concerns about possible future liability and therefore need for a bond. As a matter of practicality, figuring out the amount of a bond will require some indication about the nature and extent of contamination. This could further encourage the clean-up of a site prior to the property's sale. In the event however, that clean-up does not occur prior to the site's sale, government will wish to ensure that the new owner will have the financial means to deal with likely future clean-up requirements.

It should also be possible to reopen a transfer of liability in the event of some previously unknown aspect, such as fraud, which would make continuance of the agreement unfair or inappropriate.

Finally, the Government would have to provide its express consent to a transfer of liability agreement. This would serve two purposes. It would bind the Government. In general, a third party, not mentioned in a contract, is not bound by its terms.[90] Second, this would allow government to exercise an overall, supervisory role and would require the parties to be transparent.

The Law Reform Commission restricts its proposals to aspects of regulatory liability. It takes no position on the topic of civil liability, which is a far wider area of study, and which engages a multiplicity of issues which are beyond the scope of this Discussion Paper.

[90] Law Reform Commission of Nova Scotia, *Final Report: Privity of Contract* (Third Party Rights) (Halifax: The Commission, 2004) at 1.

The Law Reform Commission suggests:

- Government should act on its powers currently contained in legislation and create regulations to allow, and govern, agreements which would transfer regulatory liability, actual or future, under the *Act*.
- Prior to acceptance of a transfer of liability agreement, a number of financial safeguards, such as the use of bonds or disclosure of assets, might have to be in place, depending on the circumstances.
- It should be possible to reopen a transfer of liability agreement in the event of some previously unknown aspect, such as fraud, which would make continuance of the agreement unfair or inappropriate.
- The Government would have to provide its express consent to a transfer of liability agreement.

4) Joint and Several Liability

Joint and several liability is convenient for government to apply. It allows recovery of the full cost of a contaminated site's clean-up from any person responsible, regardless of that person's actual share of the liability. Government does not have to spend time and money trying to determine the proper share and responsibility of each wrongdoer. Proving that a particular defendant caused a particular portion of contamination might otherwise be difficult in the case of contaminated sites. Contamination is often the product of the actions of multiple polluters over time, records relevant to establish volume and nature of discharges could be absent or incomplete, and even when such records are available there may be scientific barriers distinguishing among harmful effects, particularly where two or more pollutants combined. Given its nature and ease of application, joint and several liability helps to lessen the likelihood that government itself might be left with the bill for site clean-up.

Some see the prospect of joint and several liability being imposed by statute as an incentive for responsible parties to come to an agreement about the allocation of clean-up costs. This promotes, it is suggested, alternate dispute resolution (ADR) and thus minimizes the amount and cost of secondary litigation.

Joint and several liability has its critics. The main concern is expressed in terms of fairness. Some argue that the principle is unfair because it may mean that a particular polluter may end up paying a financial share larger than his or her proportionate contribution to the contamination. The person deemed most financially capable of paying (having "deep pockets") may not be able to recoup

monies paid out beyond his or her own individual liability, because other responsible parties are either unknown or are insolvent. This may distort the polluter pays principle. Some might argue also that as a matter of policy it is preferable for government, through taxpayers, to bear the risk of unknown or insolvent defendants.

In 2003, the B.C. ministerial Advisory Panel recommended that all disputes related to contaminated sites should be resolved through a single process which incorporates both mediation and adjudication. One such dispute could involve how costs should be apportioned between responsible persons. The Panel also recommended that ADR for contaminated sites disputes should be administered by a third party arbitration centre established under the *Commercial Arbitration Act*. Under that statute, arbitration awards are binding and enforceable in the same manner as a judgement or order of the court. The arbitration process also contains a limited appeal mechanism.[91]

In 2006, the CCME expressed support for the development of a process that would facilitate the efficient clean-up of sites and the fair allocation of liability. It noted significant disagreement as to whether joint and several liability should be a component of this process. The CCME also recommended that in situations where there is more than one responsible person, a number of "liability-allocation" factors should be taken into account.[92]

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

> "[A] dispute resolution mechanism be developed in legislation so as to provide a clear approach that must be followed when there are disagreements (involving the Crown and the parties) concerning whether or not a given party bears regulatory responsibility, and/or to what extent. The Working Group was of general agreement that such dispute resolution should not rely on the courts but rather involve arbitration of some other form."[93]

Although the New Brunswick report does not specifically mention the issue of joint and several liability, the above-quoted recommendation is clearly directed at the issue of liability and allocation of clean-up costs.

From the perspective of a government regulator, joint and several liability can be an efficient and effective tool. In the view, however, of a person or company who is required to pay a disproportionately large portion of clean-up costs the concept would be a blunt and unfairly applied instrument. The gap between these viewpoints reflects conflict between two guiding principles of our environmental legislation. In defence of joint and several liability, one may suggest that it upholds

[91] "Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 82 at 116-122.

[92] CCME, *Recommended Principles, supra* note 59 at 7-8.

[93] N.B. Brownfield Development Working Group, *supra* note 52 at 4.

the "polluter pays" principle. It allows government to force a polluter to pay, without government having to engage in the time and expense of deciding which polluter should pay and how much. "Polluter pays" is therefore treated as involving any polluter. On the other hand, one could argue that joint and several liability lacks fairness, in that it may mean that one party is being forced to carry a financial burden greater than his or her share of responsibility. This perspective interprets "polluter pays" to mean all polluters in a particular instance. Is there some way of reconciling these opposing concerns?

The Law Reform Commission is of the view that in addition to its ease of application for government, joint and several liability can be an effective tool for bringing polluters to the negotiating table, in order to reach an agreement about allocating responsibility under statute. The prospect of being held responsible for 100% of clean-up costs, in the Commission's view, should make co-polluters more amenable to reaching an agreement, outside of court, which allocates responsibility among them. Avoiding the time and expense of litigation in the courts is a worthy objective. The Commission also notes that joint and several liability is used in other legislative instances, to promote and protect objectives for the common good. For example, the *Health Protection Act*[94] empowers medical officers to issue orders in situations where there is a threat to public health. The order can be directed to more than one person, for example, the owner and the occupier of a residence. Where the order is directed to more than one person, s. 28 of that *Act* allows for joint and several liability for payment of costs involved in carrying out the terms of the Health Hazards order, including costs incurred by the medical officer. The Commission favours retaining the potential application of joint and several liability in the statute.

However, the Law Reform Commission also thinks that this concept should only be applied in the event that multiple polluters are not able to reach an agreement. As a result, the Commission suggests that the use of joint and several liability should be integrated within a process that promotes a solution outside the courts. The Commission therefore suggests that the Minister should only apply joint and several liability once a good faith attempt at ADR, which should be mandatory in the event of a dispute about allocating costs among co-polluters, has failed.[95]

The Law Reform Commission is aware that allocating regulatory liability on a joint and several basis could result in a manifestly unfair result. For example, though the Commission's proposal to retain joint and several liability would not prevent a person responsible, who thinks that he or she has paid a disproportionate share, to seek contribution from others, this would provide little comfort if other parties had disappeared or were unable to pay their fair share. As a result, consistent with its proposal about the retrospectivity approach, which recommended taking into

[94] S.N.S 2004, c. 4.

[95] The difficult task which a court may face in allocating responsibility among multiple parties connected to site contamination is illustrated by the decision in *Boehner*, *supra* note 6, rev'd in part by 2007 NSCA 92.

account the liability allocation factors at s. 129, the Commission thinks that the Minister should expressly be required, prior to applying joint and several liability, to consider whether this would produce a manifestly unfair result.

The Law Reform Commission suggests:

- The *Environment Act* should retain the potential application of joint and several liability.
- The Minister should only apply joint and several liability if persons responsible have unsuccessfully made a good faith attempt to achieve alternative dispute resolution (ADR).
- The Minister should expressly be required, prior to applying joint and several liability, to consider whether this would produce a manifestly unfair result.

5) Clean-Up Certificates

Should the government issue a clean-up certificate that wipes the liability slate clean in relation to past contamination? Under the current legislative framework in Nova Scotia, the Department does not give binding approval of remediation, despite a landowner's submission of a certificate of compliance pursuant to the Guidelines.

Unless the applicable legislation is changed, persons dealing with contaminated sites will continue to have potential regulatory liability. This will be the situation even when sites are cleaned up to provincially approved Guideline levels and the Minister has accepted the remediation as reported by the site owner or professional consultant. The likelihood of future regulatory liability might be small, but it is perceived to be a substantial problem or barrier to brownfield development. Indeed, one legal commentator has suggested that current legislation's failure to allow for closure of this risk is "the most significant gap that inhibits the implementation of the [NRTEE's] National Brownfield Strategy in [Nova Scotia]."[96]

Government departments are reluctant, however, to give a site a clean bill of health in so far as contamination is concerned for several reasons. As investigations to determine the nature and extent of contamination are often restricted by time and financial considerations, testing conducted

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

may not reveal all existing contamination on site. Land use may change over time, with new uses requiring a higher level of remediation. Government policies and protocols, as well as contamination standards, may also change at some point in the future.

In 1993, in number 12 of then - 13 principles, the CCME recommended that:

> "A 'responsible person' who completes the cleanup of a contaminated site to the satisfaction of the regulatory authority, should be issued an official 'certificate of compliance' by
>
> that authority, certifying that the site has been remediated to the required standards.
>
> These certificates, however, should expressly state that they are based on the condition of the contaminated site as at the date of issuance and that remediation undertaken met
>
> the standards of the day; and that the responsible person may be liable for future cleanup (prospective liability) should further contamination subsequently be discovered."[97]

In 1996, at a meeting organized by the National Round Table on the Environment and the Economy, (NRTEE), the Canadian Home Builders' Association recommended that a current or a previous owner, who is a builder or a developer and who actively worked to remediate a site to the then - current requirements, should be exempted from liability for future clean-ups, unless the initial clean-up was conducted negligently.[98] The NRTEE noted that it was a contentious issue for governments to provide a certificate of compliance when a clean-up had been carried out as required by law and that the governments were reluctant to do so, as they might then assume potential liability.[99] Nonetheless, without specifically referring to certificates of compliance, NRTEE recommended that "federal, provincial and territorial governments should move quickly to align their environmental laws with CCME's 13 principles [including principle number 12]."[100]

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

> " In certain jurisdictions regulators will not provide an approval for a remedial action plan or certificate of completion after remediation. Even where these are available (in British

[97] Cited in CCME, *Guidance Document*, s*upra* note 30 at 10.

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

[99] *Ibid.*

[100] *Ibid.* at 38.

> Columbia for example), the protection afforded is limited, because liability can be reopened for a wide variety of reasons (principally related to changes in standards and changes in use.)"[101]

The conference therefore recommended, "That provinces and territories establish legislation providing for clear and unequivocal termination of all on-site and off-site regulatory liabilities upon issuance of regulatory approval of remediation, subject only to specified reopeners or fraud."[102] As a complementary part of this recommendation the conference further provided "that provinces and territories establish legislation providing for the registration on title of any right to regulatory liability[,] termination or allocation."[103]

In 2003, CCME undertook a study to determine the relevance of the existing 13 CCME principles and the need for further work on principles to address the potential liability issues associated with brownfield sites. The study results, published in 2006, concluded that the existing 13 principles were still relevant, but that uncertainty about liability remained as a concern for developers and owners of real property that is or may be contaminated. This uncertainty hindered the development of brownfields.[104]

The CCME added a 14th principle, recommending the transferability between parties (such as a buyer and seller of land) of environmental liability associated with a contaminated site.[105] Principle 12, involving certificates of compliance, remained unchanged except for the suggestion that a site be re-designated as a contaminated site after issuance of a certificate of compliance only in situations where new evidence of a risk to health or the environment appeared. A revision of standards or enhanced analytical capability applied to the old circumstances would not be sufficient to impose new liability. The CCME saw this as a compromise between providing finality with a certificate of compliance and leaving the door open for prospective liability. It would permit member governments to hold responsible persons accountable to the fullest extent for contamination in cases where all the effects of contamination could not be immediately known. At the same time, given the limited use of prospective liability, such a provision should not, according to the CCME, cause widespread commercial uncertainty or significantly impair the ability of responsible persons to obtain credit.[106]

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[101] NRTEE, *Cleaning Up the Past*, *supra* note 16 at 6.

[102] *Ibid.* at 26.

[103] *Ibid.*

[104] CCME, *Recommended Principles,* s*upra* note 59 at 1.

[105] *Ibid.* at 11.

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

Also in 2003, just before the NRTEE published its "National Brownfield Redevelopment Strategy," the Minister's Advisory Panel in British Columbia addressed the problem of the need for a reliable form of closure to cover situations where there is a change in the contaminated site regulation numerical standards or a subsequent landowner decides to change the land use. The panel noted that the current certificate of compliance did not satisfy stakeholders regarding future liability because it was subject to potential exemptions.[107]

In April, 2007, the New Brunswick Brownfield Development Working Group made several proposals relating to government acceptance of remediation efforts. The Working Group recommended that a site which has completed the regulatory process (for remediation) may be permanently closed, except for fraud and other re-openers such as the change of land use or failure to comply with conditions of closure. Obtaining closure would mean that persons responsible for site contamination would be protected from future regulatory requirements to undertake additional clean-up should standards change. In order to obtain this closure the applicant would have to request a certificate of remediation completion. The committee recommended that site closure and the termination of regulatory responsibility should be universal, extending to all potentially responsible persons and not just to the proponent or applicant. In cases where site had been granted permanent closure, but later is found to be in need of remediation, the Working Group recommended that government should assume responsibility for the clean-up costs.[108]

The Law Reform Commission understands that because of liability concerns, some property owners may choose not to report potential contamination of their land, while others elect not to clean up known site contamination. Given current uncertainty about aspects of the law, this inactivity is understandable. Why, for example, should a property owner spend money to test and clean up a site if government is not willing to acknowledge these efforts in an official manner? In addition to the expense involved, the property owner risks the stigma associated with a known or suspected contaminated site, along with a likely reduction in the property value.

The Law Reform Commission notes that in other contexts, the law places restrictions on the duration of potential liability. Limitation of liability legislation, for instance, requires people who know or who ought to know that they have suffered a legally recognizable wrong, and intend to assert their rights in the courts, to do so within a set period of time. In personal injury lawsuits, once a victim receives compensation at trial, that person will not ordinarily be entitled to reopen the matter at some future date, should his or her injuries turn out to be worse than expected. If the parties are able to reach a negotiated settlement before trial, then the wrongdoer, in exchange for providing a payment to redress the victim's loss, will generally seek a "release," whereby the victim agrees to seek no future compensation from the wrongdoer in relation to the event which caused harm to the victim. Another example is from bankruptcy law. A bankrupt, after complying with legislative requirements, including the passage of a certain amount of time, will once again be able to acquire assets without fear of them

[107] "Final Report of the Minister's Advisory Panel on Contaminated Sites, *supra* note 82 at 123.

[108] N.B. Brownfield Development Working Group, *supra* note 52 at 6-7.

being seized by creditors. These and other restrictions acknowledge that an end must come to all litigation at some point. They also signal that a person who has done a legally recognized wrong and has paid compensation for it will not have to live under a cloud of future litigation pertaining to the same matter.

Under our current contaminated site system, however, a property owner who wishes to clean up suspected or actual site contamination receives no closure. There is no formal, legally binding acknowledgment from government that current clean-up standards have been met, and nothing is said about future liability. The result is perpetual potential liability under statute. The Law Reform Commission is aware of no other area of law in which such uncertainty is permitted to prevail.

As a matter of fairness, the Law Reform Commission is of the view that a contaminated site owner who remediates a property in compliance with government - approved standards should have that initiative acknowledged and sanctioned by government. This should take the form of a meaningful document, issued by the Department, which identifies the property in question, its approved uses, as well as the clean-up standards applied, recognizes that those standards have been met, and most importantly, releases the owner from current and future regulatory liability in relation to that property. The owner should also be able to register this document in connection with the property's title at a Registry of Deeds.

A clean-up certificate should not provide an absolute release from regulatory liability in all instances. It would not be fair, for instance, to allow a landowner to benefit from a certificate obtained through fraud. Moreover, the certificate would only provide protection in relation to a property's current use. It would not be prudent to permit a certificate which attests, for example, to the clean-up an industrial site to serve as a release from regulatory liability for residential purposes, which would require a higher standard of clean-up. The Law Reform Commission therefore suggests that as a matter of prudence and reasonableness, a clean-up certificate would be subject to a number of limitations, as for fraud and a substantial change in land use.

The Law Reform Commission is of the view that government should not be overly concerned about the liability implications, in the ordinary course of affairs, of issuing or approving a certificate that sets out objectively verifiable information, prepared by a qualified professional in accordance with accepted technical standards. If, however, the Department has concerns about liability resulting from work done outside government, then legislation could expressly indicate that by providing a clean-up certificate, government in no way is accepting any associated liability. Such a statement is commonplace in our legislation. It could take the form of a general protection against liability, or it could be more particularized. For example, s.504(4) of the *Municipal Government Act* provides that a municipality, in receipt of a certification or representation by an engineer, architect, surveyor or other person held to have expertise representing the thing certified or represented, will not be held liable for any loss or damage caused by negligence on the part of the person who prepared the document.[109]

[109] *Supra* note 77, s. 504(4).

Even legislative protections against liability, however, generally contain an exception for negligence attributable to government. The Law Reform Commission agrees with this limitation. In the Commission's view, government in general and the Department in particular should be held to the same reasonable standards of competence as other persons in society. As a result, the Commission does not favour an absolute protection for government in relation to clearance certificates. Rather, the Commission suggests that government should be protected from any loss or damage which follows an improperly prepared clearance certificate, unless that loss or damage can be attributed to negligence on the part of governmental officials or employees.

The Law Reform Commission suggests:

- Where a contaminated site has been remediated in compliance with government-approved standards, the Department should issue a document which identifies the property in question, its approved uses, as well as the clean-up standards applied, recognizes that those standards have been met, and releases the owner from current and future regulatory liability in relation to that property. The owner should be able to register this document with the property's title at a Registry of Deeds.

- As a matter of prudence and reasonableness, a clean-up certificate would be subject to a number of limitations, as for fraud and substantial change in land use.

- If the Department has concerns about governmental liability in relation to the issue of clearance certificates, the *Environment Act* should be amended to protect government, except for negligence on the part of governmental officials or employees.

6) Orphan Sites

How should Orphan sites be dealt with? In particular, is there a need for a legislatively-defined fund to support their clean-up?

Section 86 of the *Environment Act* authorizes the Minister to enter into agreements and establish programs and other measures necessary to pay for the costs of restoring and securing contaminated sites and the environment affected by contaminated sites where a person responsible for the site cannot be identified or is unable to pay for the costs.

In this context, it may prove helpful to set out the distinction between a fund and funding. In relation to a fund, the Law Reform Commission has in mind an amount of money set aside to assist in the clean-up of contaminated sites, but which has a means to grow in the future. This is distinct from a sum, allocated from general government revenues, to deal with contaminated sites on an as-needed or time-limited basis. The Law Reform Commission understands that at the moment, most Canadian

jurisdictions rely on setting aside a portion of government revenue for funding the remediation of contaminated sites.

There is no stand-alone fund to finance clean-up activities relating to contaminated sites in Nova Scotia. Shared federal-provincial funding arrangements have occurred in the past, but their nature and duration are unclear. One source suggested that a federal-provincial shared program, created in 1989, resulted in 45 sites across the country being remediated, in whole or in part. The mandate for that 50/50 shared fund expired in 1994 and was not renewed.[110] No details were mentioned about the program's impact in Nova Scotia. Another source stated that Nova Scotia had entered into a cost sharing arrangement with the federal government for the clean-up of orphan sites. A pre-condition for the federal contribution for the remediation costs was that there was no other person who was able to pay for the remediation. At that time, there was only one such orphan site in Nova Scotia, a property contaminated with PCBs at Five Island Lake.[111]

In the early 1990's, the federal and provincial government shared clean-up costs in New Brunswick on a 50/50 basis.[112] In 1995 the provincial government in New Brunswick assumed full responsibility for funding, allocating $750,000 per year. Over the years that budget shrunk from $750,000 to $400,000 to $200,000 and finally, by 2005, the last year of provincial involvement, to $125,000. No government funding is currently set aside for remediation of contaminated sites on an as-needed basis.

In 2007, New Brunswick established an Environmental Trust Fund intended to provide assistance to community groups, municipalities, non-profit organizations and institutions engaged in furthering sustainable development.[113] The fund lists six categories of projects eligible for financial assistance, one of which is restoration. This category would cover projects that enhanced the quality and sustainability of New Brunswick's air, land, and water resources, thus reducing the risk to human life, biological diversity and personal property. This fund has not, however, been used to clean up an orphan contaminated site.[114]

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[110] Halifax Regional Municipality, Planning and Development Services, "Brownfield Sites: An Options Paper for the Halifax Regional Municipality" (2002) [unpublished] at 48, available online: Halifax Regional Municipality, "Publications research" link, <www.halifax.ca/regionalplanning/publications/research.html> (date accessed: 29 January 2009).

[111] Grant and Doelle, *supra* note 38 at 9-25 - 9-26.

[112] Telephone communication with departmental official (New Brunswick Department of the Environment), 12 September 2008; email communication from departmental official, 15 September 2008.

[113] New Brunwick, Department of Environment, "Environmental Trust Fund A," online: <http://www.gnb.ca/0009/0373/0002/0002-e.asp> (date accessed: 18 February 2009).

[114] *Supra* note 112.

In Manitoba, mining is a significant primary resource industry. In 2007, mineral production was worth $2.5 billion. Mining can also have serious negative consequences, in the form of environmental contamination. In some cases, mine owners may disappear or may refuse or be financially unable to carry out the clean-up of a mine that is no longer operating. In 2008, the Manitoba government announced $19 million funding to continue the clean-up of orphan or abandoned mines during the next two years. This followed an announcement the previous year of a $26.8 million commitment for the rehabilitation of orphan and abandoned mines. The source of these funds was the "Environmental Liability Account," created in 2006, which holds some $80 million.[115]

In Alberta, the Orphan Well Association (OWA) is a "not for profit" organization which manages the abandonment and reclamation of upstream oil and gas orphan wells and related facilities. The OWA operates with direction from government and private industry and with funding provided by the latter. The funds are generated by the imposition of a levy on industry participants.[116] In 2007, the Alberta Energy Utilities Board was reported to have estimated an expenditure of $100 million, in cost sharing with industry, over the next five to 10 years on the clean-up of orphan sites. Moreover, the Board estimated liability for reclamation of current upstream oil and gas activities at between $5.9 billion and $8.8 billion.[117]

In October 2000 the government of Alberta introduced the Underground Petroleum Storage Tank Site Remediation Program to provide financial assistance to remediate contamination related to underground petroleum storage tanks. This program was closed to new applicants in March 2002. The sum of $60 million was committed to help remediate the sites of some 930 applicants, including 66 municipalities. The program is designed to assist municipalities which acquired a property through a tax recovery and small owners (five or fewer) of retail gas stations. In August 2006 the government committed an additional $50 million to be made available to applicants to cover the higher costs of the more heavily contaminated site clean-ups, namely those which would cost more than $110,000.[118]

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

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

[117] EcoCanada, *supra* note 12 at v.

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

In 2000, the provincial Centenary Fund was established to support a four-year program to clean-up contaminated sites in Saskatchewan.[119] The $6,500,000 program remediated six high risk contaminated sites and implemented a program to clean-up abandoned service stations and their underground tanks. The Orphan Fuel Storage and Sales Facility Clean-Up Program, provided for the remediation of hydro carbon - contaminated properties which municipalities have typically acquired through tax enforcement procedures. The program focused on cleaning up "high risk" to "moderate risk" sites and resulted in the assessment of some 436 sites and the clean-up of 103 sites.[120] Although the four-year contaminated sites clean-up program concluded in 2004, some funds remained and continued to be applied to the clean-up of contaminated sites in the province.[121] Industry signed agreements to provide funding assistance for clean-ups contingent on provincial government funding. In kind contributions were also received from local governments, the Saskatchewan Urban Municipalities Association and the Saskatchewan Association of Rural Municipalities.[122]

British Columbia does not have a special fund to help finance the clean-up of contaminated sites, whether they are orphan sites or otherwise. In 2003, the ministerial Advisory Panel on contaminated sites suggested that general revenue funding and existing ministry fee structures were inadequate to properly support contaminated site management in the province. It was the panel's opinion that a new self-sustaining funding initiative was required.[123] Specifically, the panel recommended the establishment of "a dedicated trust fund, the BC Land Remediation Fund, by April 1, 2004 to administer, monitor, support and encourage the remediation of contaminated sites in British Columbia."[124] The fund was intended to support a number of new ministry initiatives, including the remediation of orphan sites. Funding for the proposed Land Remediation Fund would come from a number of sources including: 1) an environmental levy on hazardous chemicals; 2) a tax or industry sponsored levy on gasoline and diesel fuel; 3) a portion of monies from the lease, sale and

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

[120] *Ibid.*

[121] The Saskatchewan Ministry of Environment anticipated that the remaining funds would be expended by the end of the 2008 fiscal year: email communication from departmental official (Saskatchewan Ministry of Environment), 10 October 2008.

[122] *Supra* note 119.

[123] Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 82 at 128-129.

[124] *Ibid.* at 26.

management of crown lands; 4) underground storage tank, bulk fuel and bulk chemical tank registration and licensing fees; and 5) regulatory agency recovery fees.[125]

In 2007, the New Brunswick Brownfield Development Working Group recommended that provinces and territories which agree to post-remediation termination of regulatory and civil liability should establish legislation setting up an insurance fund for liabilities falling to the province or territory after the exhaustion of the term of the post-remediation private insurance. The Working Group further recommended that this system be funded by a system of fees associated with the application for an issuance of permanent site closure documents. The amount of these fees was to be set on a sliding scale based on the financial risks involved for each site.[126]

Given the probability that some persons responsible under the *Act* cannot be found or cannot pay, it seems likely to the Law Reform Commission that government will have to make some type of provision to fund the clean-up of certain contaminated sites in Nova Scotia. Although estimates provide only rough guides and vary widely, there may be hundreds, if not thousands, of contaminated sites in the province. Despite the wide range of persons responsible identified in the *Act*, it might not be possible to locate a polluter, and even if so, one able to pay the cost of clean-up. If the Minister chooses not to apply the *Act* in a retrospective manner, or to allocate regulatory liability in a joint and several way, it is possible that government may not be able to find a financially solvent polluter to pay for all portions of a site's clean-up. More generally, Government has a responsibility to help protect human health and the environment. At the end of the day, therefore, in the event of contamination which leads to adverse effects or the possibility thereof, government will have to act. This will require funding, which may not be recoverable after completion of remediation work.

Outside the business or industrial context, the province may have to face the prospect of an orphan site in relation to a contaminated residential property, most likely the consequence of a domestic fuel oil spill. Cleaning up the effects of such a spill can be extremely expensive. Costs in the range of $100,000 or more are not uncommon.[127] What if a homeowner has inadequate insurance coverage or even no insurance? What if a homeowner has insurance, but his or her insurer refuses to pay for all or any of the clean-up costs? In these scenarios, the homeowner may not have the money to fund a clean-up in compliance with the departmental requirements. As a result, the homeowner

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

[126] N.B. Brownfield Development Working Group, *supra* note 52 at 7.

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

may do nothing or may become insolvent at some point during the clean-up process. If no other person responsible under the legislation can be located and made to pay for clean-up, the province would find itself in the position of having to decide whether to assume the remediation expenses, in order to protect human health and the environment.

The Law Reform Commission finds noteworthy the prevalence in other provinces of funding which is targeted to remedy a particular type of contaminated site. This makes sense. Whether funding for the clean-up of contaminated sites is needed, and if so, what will be its source, cannot be answered in the abstract. Rather, government must determine what types of activities in the Nova Scotian context have likely resulted in contamination, on what scale, and in how many locations. Answering those and related questions will point to the type and size of funding required in this province.

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

The Law Reform Commission suggests that details about possible orphan site funding may only be answered by the Department, with the benefit of information gleaned from its investigations about contaminated sites, from consultations with industry and from consideration of other governmental policies, priorities, and budgetary details.

The Law Reform Commission suggests:

- Given the probability that some persons responsible under the *Act* cannot be found or cannot pay, Government will likely have to make some provision to fund the clean-up of certain contaminated sites.

- In order to determine the type and size of funding potentially required in this province, government must determine what types of activities in the Nova Scotian context have likely resulted in contamination, on what scale, and in how many locations.

7) Liability of Government

The Law Reform Commission thinks that government, with respect to accepting both the benefits and burdens of property ownership, should be treated like any other person. If government expects citizens and corporations to act responsibly in relation to their land, then government correspondingly should be held accountable for the actions of its agents relating to government - owned land. This is reflected in the *Environment Act* at s. 4, which binds the provincial Crown and purports to bind the federal Crown. The Commission sees no reason for this approach to change.

What causes the Commission concern, though, is the prospect of government being deemed a person responsible under the legislation's wide liability net, despite not having sought ownership of a particular property.

In relation to the provincial government, this could happen through the escheat process. As discussed earlier in the Discussion Paper, though our legislation protects the Crown from liability in tort (civil liability), it seems to contain no protection against regulatory liability in relation to properties which the Crown acquires automatically, by process of law. The Commission suggests that there should be a means of delaying the Crown's liability in relation to ownership of land acquired through an escheat, until government has an opportunity to investigate the site in question.

Recent reforms in Ontario have attempted to lessen the potential liability of government in relation to land escheats. Since 2002, in the instance of land from a dissolved corporation, government only acquires possession when it registers notice of so doing in the land registry office. Moreover, since 2007, government does not become liable in tort in relation to escheated land until the Crown registers a notice that it intends to use the property for Crown purposes.[128] It is not clear whether these provisions, as currently drafted, would protect the Ontario government from regulatory liability in relation to a contaminated site that it acquired through escheat. Nonetheless, the Commission is of the view that these provisions could serve as a model to provide direction for a statutory amendment which would protect the provincial Crown in Nova Scotia from such liability.

In terms of municipalities, the Commission can foresee the possibility that a municipality would acquire a property through a tax sale, following a lack of sufficient bids, only to discover after the fact that the property is contaminated. The Commission notes that in instances where taxes are in arrears for three years or more, a municipality is required to put a property up for sale.[129] In general, a municipality is not required to hold a tax sale if the solicitor for the municipality advises that a sale of the property would expose the municipality to unacceptable risk of litigation.[130] Without an awareness of the use to which a property was put, supplemented in some instances by testing, it is difficult to see

[128] See Saxe, *supra* note 72.

[129] *Municipal Government Act*, s*upra* note 77 at s. 134(2).

[130] *Ibid.* at s. 134(4)(a).

how such an opinion could be rendered in some situations. For larger municipalities, which organize a great deal of tax sales over the course of a year, it is possible that a contaminated property will inadvertently be placed for sale. As mentioned earlier in the Discussion Paper, where insufficient bids are received, to prevent a property from being subjected to decay or vandalism, a municipality may choose to purchase it at a tax sale with the intention of selling it as soon as feasible. Under the current legislation, however, that short period of ownership could make the municipality liable for the clean-up of site contamination.

Operating on the assumption that a tax sale is a necessary enforcement mechanism performed in the public interest, and not a profit-making device, the Commission is of the view that a municipality which acquires a property through a tax sale should be expressly excluded from liability under the *Act* for remediation of any contamination which had occurred by the time the municipality acquired the property. This proposal assumes that the municipality did not contribute to contamination at the site.

After acquiring a contaminated site through a tax sale, a municipality, as result of actions or omissions by its employees or agents, might worsen a contamination problem. For example, municipal employees might add to the contamination or allow it to spread. In such instances, occurring after acquisition of a contaminated site, the Law Reform Commission does not think that municipalities should be totally free of responsibility under the *Act*. Rather, like any other landowner, the municipality should be answerable for a problem which it helped to cause. On the other hand, the Commission acknowledges that a municipality, like a secured creditor, might consider itself compelled to acquired through a tax sale a property that turns out to be contaminated. Section 165 of the *Act* in general limits the regulatory liability of a secured creditor to the value of the "assets" administered. Taking these competing considerations into account, the Commission suggests that the potential regulatory liability of a municipality for acts or omissions which took place after acquisition of a contaminated site, and which contributed to or worsened a contamination problem, should be limited to the value of the property.

The Law Reform Commission suggests:

- The *Environment Act* should continue to bind the provincial Crown and purport to bind the federal Crown.
- Escheats legislation should be amended, to delay the Crown's liability in relation to ownership of land acquired through process of law, until the Crown has an opportunity to investigate the site in question.
- Assuming that it did not contribute to contamination at the site, a municipality which acquires a property through a tax sale should be expressly excluded from regulatory liability for remediation of any contamination which had occurred by the time the municipality acquired the property.
- The potential regulatory liability of a municipality for acts or omissions which took place after acquisition of a contaminated site, and which contributed to or worsened a contamination problem, should be limited to the value of the property.

8) Secured Creditors

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

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

secured creditor will be protected where it "appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take."

At s. 165(4), the *Act* further specifies that a secured creditor "is not responsible for the rehabilitation of a contaminated site beyond the value of the assets the secured creditor is administering." The *Act* does not specify what is meant by assets. A secured creditor may administer multiple properties which belong to a single debtor. As the *Act* does not define the term "assets," it is uncertain whether the secured creditor's potential liability would be limited to the value of a debtor's property or properties which are contaminated, or to the value of all the debtor's land administered by the secured creditor. Depending on the circumstances, the difference in limits on potential liability could be quite large.

There is very little reported case law on this section of this *Act*. Of note, however, is the decision in *Pentagon Investments*.[131] In that case, the plaintiff mortgagee had foreclosed on three properties and purchased them at a sheriff's sale. The mortgagee's aim was to resell the properties. The mortgagee then discovered environmental problems at two of the sites. The mortgagee retained an engineering company to conduct environmental assessments and remedy contamination. The costs incurred were considerable. The mortgagee brought an action for deficiency (meaning that it was still owed money) and sought to recover its environmental costs as part of a deficiency judgment. The mortgagee then asked the court to decide whether the environmental testing and clean-up costs could be recouped as a "protective disbursement."

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

> "At the present proceeding there was found environment contamination on two of the sites. I find the remedy of these deficiencies was essential to preserve and protect the property with a view to recovery by the plaintiffs of some of its claim on the covenants. I will direct that recovery of a reasonable amount for this remedial work be classified as protective disbursements. The plaintiffs entered possession of the property before foreclosure and bought the properties at the sale. It paid the full cost of the remedial work which was necessary for the resale of the property. The steps taken by the plaintiff were reasonable, and I will consider the report of an independent engineer to determine a reasonable cost."[132]

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

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

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

The Law Reform Commission is not aware of any problems associated with the application of s.165. Nonetheless, before making any proposal about s.165, including the possibility that it remain unchanged, the Commission would like additional information about how s. 165 affects secured creditors and related interests in practice. For example, do secured creditors consider the responsibility for clean-up provision at s.165(3)(a), which links the phrase "care, management or control" to another requirement, that this caused a site to become contaminated, sufficiently clear, or would it benefit from the addition of illustrative examples? Also, are secured creditors troubled by the *Act*'s failure to define the term, "assets"? The Commission requests feedback about whether s.165 is seen as beneficial or the source of any concern, and if so, what are the specifics.

The Law Reform Commission invites comments:

- about whether s.165 of the *Environment Act,* which involves the responsibility of of secured creditors and related interests, is seen as beneficial or is the source of any concern, and if so, in what respects.

CHAPTER 3: DEPARTMENTAL NOTIFICATION AND INVOLVEMENT

Before a decision to order the clean-up of a contaminated site may be made, the Department must know about the site. This raises two questions. How does the Department become aware of the existence of contaminated sites, actual or potential? Second, what determines whether the Department will become involved, investigating or ordering the clean-up of a site?

I. Notification

1) What is the Argument for Mandatory Reporting?

In the case of sites where contamination is only suspected, because of past use or perhaps the allegations of neighbours, having this information would allow the Department to either require that testing be done to confirm the contamination or to have the test conducted by the Department itself at its own expense. From the Department's perspective, the need to know about sites where contamination exceeds acceptable levels is important for health reasons. Knowing the existence of such sites would allow the Department to establish priorities for clean-ups. Having information about the number of contaminated sites requiring some degree of remediation can also give some guidance as to the number of qualified professional persons required to bring about such clean-up.[133] In addition, it has been suggested, in relation to municipalities, that this could point to possible redevelopment opportunities:

> "Historical land use can often indicate potentially contaminated sites. Mapping these areas and creating an historical land use database would allow planners to designate contaminate risk areas in Official Plans and Zoning By-laws. This would give interested parties early notice of the sites, promote awareness, as well as facilitate land use planning".[134]

While there are advantages to the Department in having mandatory reporting there are also some drawbacks. Upon identification of such sites, the public, if aware of them, will likely expect something to be done by way of assessment, clean-up or both. If there are numerous contaminated sites identified, even with a priority system, a clean-up timetable may also not be fast enough to suit the public. The Department might in some circumstances be stuck with the cost of assessment or clean-up.

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[133] See EcoCanada, s*upra* note 12 at viii. To help in gauging demand for environmental assessment and remediation work, that report suggested that "[f]ederal, provincial, territorial, and municipal governments consider developing a database of non-federal contaminated sites that is compete, reliable, comparable, and flexible."

[134] Halifax Regional Municipality, "Brownfield Sites," *supra* note 110 at 58.

As far as property owners are concerned, the point at which the report must be made may be difficult to determine. Would historical use be sufficient to produce a suspicion of contamination that must be acted upon? How can a property owner actually know that the property is contaminated unless the site evaluation is completed? Is it enough to have a neighbour complain about suspected contamination based on some factor other than historic use?

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

2) How Does the Department Become Aware?

There are a number of ways of getting information about contaminated sites. The Department could be proactive and send out inspectors to identify suspected contaminated areas. This could follow historical knowledge of industrial or commercial activity, or information provided in media reports or by individuals. People could be encouraged, to provide information on a voluntary basis. Another means would be to make mandatory the reporting of historic contamination.

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

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

A 2006 publication of the Nova Scotia Department of Environment and Labour states:

> "Each regional office will maintain a tracking system itemizing all contaminated site files. This system may include a computer - based spreadsheet and is to include new files, the progress of the file, and current status. When there is activity on the file the system is to be updated."[135]

[135] Nova Scotia, Environment and Labour, "Procedure for the Administration of Contaminated Site Files" (2006) [unpublished] at 3.

The Commission concludes that though the Department does collect details on contaminated sites, these have not been compiled and organized in a way that they could be searched by the public.[136]

Section 70 of the *Environment Act* seems to provide for situations where a person has conducted an environmental audit or site assessment and discovered that the *Act* is being violated. In such a situation the person may voluntarily report the violation to the Department and give details of that violation. If the person does this and enters into an agreement with the Department to remediate the site, the person will not be prosecuted for non-compliance with the *Act*. Section 70, however, is included in the part of the *Act* that deals with releases and is therefore not meant to govern longstanding or historical contamination

Under s.1.1 of the 1996 Guidelines for Management of Contaminated Sites in Nova Scotia, if an owner knows or is notified that a site is "potentially contaminated," he or she is required to evaluate the potential impacts and risks in order to decide what action to take. More specifically, s.1.2(c) requires the owner to evaluate the site in a reasonably timely manner to determine whether there are off-site impacts, as well as unacceptable on-site impacts or risks to human health and safety or to the environment. Identification of contamination may be made using one or more of the phases of environmental site assessments set out at s.1.3.

If either or both of these impacts are discovered, the owner is required to notify affected third parties, determine whether remediation or on-going site management is required, and make a contaminated site notification report to the Department.[137] If there is a direct and immediate threat to human health or the environment, it has to be dealt with immediately and separately from the Guideline process. If none of the impacts or risks identified at s.1.2(c) of the Guidelines are identified, no further action is required, apart from the owner advising the notifying party in writing.

The primary role of the Department is to ensure that the Guideline process is followed. When the Department receives a notification report stating that action is required at the site, it will decide if ongoing departmental involvement is required, receive all reports and information submitted by the owner, evaluate reported concerns, and decide whether the Guidelines are to be followed. If so, the Guidelines will require the owner to create a remedial plan and to carry it out. No designation as a contaminated site, however, is involved.

[136] The Department recently confirmed that it does not maintain a centralized list of brownfields that are for sale. See Catherine Roberts, "Reclaimed Land Can Hold Great Development Potential" *Chronicle Herald* (27 January 2009) E4.

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

3) The Use of Registries in Nova Scotia

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

Section 10(2) of the *Environment Act* provides that "all information under the control of the department is accessible to the public, subject only to the *Freedom of Information and Protection of Privacy Act*" [FOIPOP]. One must, therefore, examine the latter statute to determine the nature of any constraints on information requests. The relationship between the two statutes suggest that the government has decided to take an open approach to the disclosure upon request of information pertaining to contaminated sites. As is discussed at part I(6) of this chapter, however, whether this openness is actually being implemented in practice is another matter.

A major potential restriction, set out at s. 20 of FOIPOP, prohibits in general the disclosure of personal information: "the head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third person's personal privacy." This prohibition is subject to a number of exceptions which reduce its scope. Section 20(2)(b) permits the disclosure if "likely to promote public health and safety or to promote the protection of the environment." Also noteworthy in this context is s. 20(4) which provides:

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

FOIPOP does not expressly indicate that its references to "individual" and "personal" do not include a corporation. Nonetheless, this is implicit in a number of places in the *Act*. For example, in the definitions section, the term "personal information" is defined by reference to "recorded information about an identifiable individual," including factors such as race, age, and blood type, which would not apply to a corporation. Moreover, s. 43 of FOIPOP refers to the instance of a deceased individual and an individual under the age of majority.

Going further afield, s. 17 of FOIPOP may potentially be of relevance to contaminated sites. Section 17(1) provides generally, "the head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic

interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy....” Subsection 2 provides an important qualifier:

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

In October of 2000, an Advisory Committee, established by the Nova Scotia Department of the Environment as part of the Legislative Review Process, published a report which recommended that the department compile and maintain a provincial inventory or registry of contaminated sites.[138] When the Advisory Committee made that recommendation, the Environmental Registry was already operational, so we have to assume that the Advisory Committee was recommending a separate contaminated sites registry. In 2006, as part of amendments made to the *Environment Act,* s. 91(1)(db) was added, in order to authorized Cabinet to make regulations regarding the identification and notification of contaminated sites. No such regulations have been enacted.

4) Reporting Requirements or Suggestions from Other Jurisdictions

No other Canadian jurisdiction imposes a clear duty to report historic contamination. The Northwest Territories (N.W.T.) comes closest to imposing such a duty. Its Guideline provides that if a property owner is notified that the site is potentially contaminated, he or she must report this. This is similar to one of the Nova Scotia Guidelines. Presumably, if the owner personally discovers the potential contamination, he or she must also report it. However, being a guideline provision, as is the case in Nova Scotia, it is non-binding. The important point here is that the trigger for non-binding reporting in the Northwest Territories is whether someone thinks the site is potentially contaminated.

The N.W.T. Guideline goes on to explain that contaminated sites are areas of land, water, ground water or sediment that have levels of contaminant exceeding the remediation criteria. The N.W.T. statute defines a contaminated site as one in which the contaminants exceed numerical standards. A contaminant is defined in the statute, and one component of that definition is that the substance may cause “adverse effects”. The term “adverse effect” is defined in a way quite similar to that of Nova Scotia. The net result appears to be that the important factors that govern non-binding reporting are 1) whether the site has contaminants that exceed numerical standards, and 2) whether the contaminants produce some kind of negative impact on the environment and public health by impairing or damaging either of them.

[138] *Legislative Review Process, 2000, supra* note 36 at 21.

In British Columbia and Ontario, though there is no duty to report a contaminated site, the respective statutes do impose a duty to file a record of site conditions and circumstances where the party knows that the land was previously an industrial or commercial property, or situations where the person wishes to apply for a permit for redevelopment or re-zoning. For example, the B.C. *Environmental Management Act* at s. 4(1) requires persons who seek re-zoning or subdivision of land, or who wish to sell land and know or reasonably should know that the land is or was used for industrial or commercial purposes, to file a site profile with the Environment Department. The site profile describes the condition of the land involved and the extent to which it contains contaminants. Based on the information provided in the site profile, a site investigation (preliminary or detailed) could be required by the department.

In 2003, the B.C. ministerial Advisory Panel criticized the site profile process, noting that in many cases it is not linked to any change in land use and there is no requirement that it be completed by a person who is knowledgeable or who is required to inform him- or herself about the potential environmental problems associated with the property. The Panel suggested that the preliminary site investigation is a better tool for assessing whether a property might have substances of concern associated with the property. The report also noted that no other Canadian province uses a site profile procedure or similar system and that 38 local governments in BC have opted out of the site profile system, a good indicator that it is not working.[139]

The Panel suggested that a site assessment should be mandatory in only two situations: when there is a change in land use, such as re-zoning, that may change the potential for human or other environmental receptors to be exposed to substances of concern on the site; or when an issue of concern is brought to the Minister's attention and the Ministry agrees that the site should be assessed.[140]

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

The 2007 Final Report of the New Brunswick Brownfield and Development Working Group recommended that environmental legislation should clearly specify when a person has a duty to report the release of a contaminant or the discovery of existing contamination to the Department of the Environment.[141] The Working Group based its recommendation on a number of principles. Only a property owner and persons who contributed to contamination should have to report it.

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[139] "Final Report of the Minister's Advisory Panel on Contaminated Sites," s*upra* note 82 at 46.

[140] *Ibid.*

[141] N.B. Brownfield Development Working Group, *supra* note 52 at page 8.

Contamination that has caused or will likely cause an "adverse effect" to the environment or to a third party should be immediately reported. Historic contamination, which has not produced an adverse effect or is not likely to do so, should be properly investigated, prior to being reported to government. One should not, however, have to report contaminant releases or historic contamination if their amounts are lower than government standards. Fifth, taking into account access to information legislation, government should exercise discretion about actively publicizing information about spills. In other words, the public's "right to know" should be balanced against another (perhaps greater) public good, which is to avoid encumbering clean properties with the stigma of past contamination, in effect creating an unjustified list of the damned.[142]

5) Public Access Databases

The federal government, as well as the respective governments in British Columbia, Manitoba, Quebec, and the Yukon, maintain publicly accessible registries which contain information on contaminated sites. With the exception of the Yukon, those governments also make contaminated sites information available for public viewing on the internet.[143] Although specifically referring only to brownfields, a Nova Scotian departmental official recently expressed caution that creating a publicly accessible database of brownfield sites could lead to "stigma," either in relation to a contaminated property that is being sold or adjoining properties.[144]

6) Discussion and Proposal

Whether to require mandatory reporting of known or suspected site contamination could be a polarizing question. Some people would undoubtedly point to the stigma associated with land that may be contaminated. This stigma may negatively affect the land's market value. It might also affect the value of other, nearby properties. The Law Reform Commission notes, however, that the *Act* is motivated by the need to protect matters of collective importance, namely human health and the environment. The Commission is not convinced that someone concerned about his or her property's market value would not agree with the primacy of protecting human health and the environment. Human health and the environment involve all Nova Scotians, not just those with a vested financial interest. If government is deprived of relevant information, then human health and the environment may suffer. The Commission notes that in 2000, an Advisory Committee which studied the *Environmental Act* suggested, "In the absence of a functional means of identifying or designating sites, action and progress on contaminated site remediation and management has been

[142] *Ibid.*

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

[144] *Supra* note 136.

sporadic."[145] That Committee recommended, "any person who knows or ought to know that a site is or may be a contaminated site must immediately report the site and any information pertaining to its contamination to the Department of the Environment."[146] In light of the collective goals which underlie our environmental legislation, and taking into account the 2000 recommendation, the Law Reform Commission thinks it best to err on side of caution and to require mandatory reporting, in a wide sense. As a result, the Commission suggests, reporting to the Department should be mandatory when a landowner, or someone acting in place of the landowner, knows or ought reasonably to know that a property is or may be contaminated, in accordance with legislative requirements. Although adopting much of the 2000 Advisory Committee's recommendation, the Commission is of the view that it would go too far to impose a mandatory reporting requirement on "any person." Rather, the requirement should relate to someone who is responsible for the property in question, hence the reference to a landowner or person acting in his or her place.

Once again, the Law Reform Commission notes, the power to make regulations requiring mandatory reporting already forms part of our law. Section 91(1)(c) empowers the provincial Cabinet to make regulations "respecting the duties and rights of vendors, purchasers or other persons of property that may be contaminated," and more specifically, s. 91(1)(db) allows for the creation of regulations "respecting the identification and notification of the discovery of contaminated sites."

Once reporting is done, government will have an opportunity to investigate. If the site is indeed contaminated, should this information be publicly available? The Law Reform Commission thinks that having information about contaminated sites accessible to the public should promote their remediation. If a company is involved, its principals will likely realize that its reputation may suffer if it does not take quick enough action to clean up contamination. If the presence of contaminated sites is truly a problem in Nova Scotia, then it seems to the Commission that any measure which tends to promote remediation should be adopted. The Law Reform Commission is therefore of the view that if a property is contaminated in accordance with legislative requirements, notice of the contamination should be included in the environmental registry, for consultation by members of the public.

It would be premature, though, to insist that notices of potential contamination be included in a publicly accessible registry. The Law Reform Commission acknowledges that it is suggesting a high standard in terms of reporting. With the adoption of that high standard would come a responsibility, to help ensure that it does not result in unnecessary stigma in relation to a property. The duty to report potential contamination may be triggered by reasonable concerns. It might also be triggered, however, in situations where mistake, hyper-vigilance, or even malice are involved. If a landowner had to report suspected contamination, but fears about contamination turn out to be unfounded, the Commission does not think that it would be fair to subject a property to possible public stigma, in addition to the inconvenience and expense experienced by the landowner in having to report potential

[145] *Legislative Review Process, 2000, supra* note 36 at 21.

[146] *Ibid.* at 23.

contamination. As a result, the Commission suggests that a notice of potential contamination should not be included in the environmental registry.

In light of s.10(2) of the *Environment Act*, as well as how personal information is treated under FOIPOP, one would not expect that it would be difficult to obtain information under the Department's control that pertain to site contamination. The Law Reform Commission has received reports, though, that this is not the case in practice. Rather, the Commission understands that obtaining a property's environmental details that are on file with the Department can involve lengthy delays. This can prove frustrating, for instance, for potential purchasers, who may require this information before deciding whether to buy a property and at what price. As the Commission has not conducted extensive research on this issue, it is not aware of the extent or frequency of these reported delays. This may be a question requiring further investigation as part of the preparation process for the Final Report on this topic. The Commission therefore invites comments on how well the process for obtaining departmentally - controlled, but publicly accessible, information on site contamination is working in practice.

The Law Reform Commission suggests:

- Reporting to the Department should be mandatory when a landowner, or someone acting in place of the landowner, knows or ought reasonably to know that a property is contaminated, in accordance with legislative requirements.
- If a property is contaminated in accordance with the legislative requirements, notice of the contamination should be included in the environmental registry, for consultation by members of the public.
- A notice of potential contamination should not, however, be included in the environmental registry.

The Law Reform Commission invites comments:

- On how well the process for obtaining departmentally-controlled, but publicly-accessible, information on site contamination is working in practice.

II When Does the Department Get Involved?

1) Definition of Contaminated Site

Simply because the Department has been notified about a contaminated site does not

mean that it will (or even should) act. The Department may require additional information, keeping in mind its provincial criteria for contaminated sites. For example, the Department would not reasonably investigate a property if there was no evidence to indicate the presence of contaminants. In some instances, the Department could be placed in a "Catch 22" type situation. It may need additional information in order to decide whether to act. However, as in the instance of an uncooperative property owner, it may need to take some action in order to get the information it requires.

To obtain this information, the Department could either investigate, using its own officials, or it could order persons responsible for the contaminated site to provide reports, and other materials that would enable the Department to confirm whether the site is contaminated. If so, then further action, requiring clean-up measures, could be taken. This part of the chapter discusses the legal requirement or trigger, for government involvement.

In Nova Scotia, a contaminated site is one that either (a) contains concentrations of a contaminant or contaminants that exceed standards prescribed or adopted by the Minister that has caused, is causing or may cause an adverse effect, or (b) a site that has been designated by the Minister as a contaminated site. The latter definition relies on a process that has never been applied, while no specific changes have been made to the legislation in order to permit the application of the former definition.

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

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

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

In British Columbia a contaminated site is defined as an area of land in which the soil, water, or sediment contains either a hazardous waste or another prescribed substance in a quantity or concentration that exceeds prescribed risk based or numerical criteria or standard's or conditions.

The Yukon statute defines a contaminated site as "an area of land, water, sediment, that contains a contaminant in an amount, concentration or level in excess of that prescribed by regulations or allowed by permit." A contaminant is defined as "substances in excess of the normal quantities in the environment and results from human activity that may cause an adverse effect."

2) Site Designation

One approach that many of the provinces and territories use to control and regulate contaminated areas is to designate an area as a contaminated site as a prelude to any further requirement for clean-up activity to be undertaken. It thus becomes important to understand the basis for making such a designation decision.

A frequently referred-to criterion upon which a Minister's decision to label an area of land as a contaminated site is based is whether it contains a substance that may cause, is causing, or has caused an adverse effect (as in Alberta, Newfoundland, and Saskatchewan).

Although defined slightly differently in different jurisdictions, one common element of the concept is some evidence of impairment or damage to the natural environment, human health, or both. Another common factor mentioned that forms the basis of designation decisions include whether the contamination exceeds regulatory numerical standards which are normally set at a level to protect the environment and personal health and safety from damage or impairment (as in British Columbia, the Yukon, and Manitoba).

The decision to designate is not a completely arbitrary one, for in several provinces, the Minister, before making a determination must consult external standards, criteria, or guidelines. In British Columbia, for example, the statute specifies the evidence upon which a decision must be based and specifically refers to site profiles and site investigations.

"Adverse effect" is also a factor in the Minister's decision in the Yukon Territories, but in a more indirect way. The main consideration is whether the concentration of contaminants in a given area exceeds the regulation limits. One part of the definition of a contaminant involves it causing an "adverse effect."

3) Consequences of the Designation Decision

a) The Nova Scotia Designation Procedure

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

(a) any person responsible for the contaminated site that the Minister considers appropriate;

(b) any registered owner of real property directly effected by the designation; and
(c) the municipality where the contaminated site is located.

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

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

In the event that the parties cannot reach an agreement, s. 89(3) permits the Minister to refer 8the matter to Alternate Dispute Resolution (ADR) under Part II of the *Act*, Nova Scotia appears to be unique in allowing for ADR in this context.

b) <u>Designation Process in Other Canadian Jurisdictions</u>

The legislation in Saskatchewan, Newfoundland, British Columbia, Manitoba and the Yukon provides a preliminary decision to be made by the Minister with regard to designation, followed by notification of various individuals and groups and a period of time within which they can respond to the Minister's decision. Their comments will usually take the form of arguments or reasons as to why an area should not be designated as a contaminated site.

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

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

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

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

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

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

Following a reasonable period of time, during which the Minister or Director considers the comments received, the Minister makes a final decision and gives notice to the same recipients that received notice of his preliminary decision. Usually, provision is made for the filing of the decision in the environmental registry, where there is one (Nova Scotia, Prince Edward Island, British Columbia, and the Yukon) or in the land titles registry as in Manitoba. The Minister is also given the authority to cancel a designation that has been made (Nova Scotia, Newfoundland, Saskatchewan, P.E.I., and Manitoba).

Once a final decision to designate a site has been made, the jurisdictions differ somewhat on the point of whether a responsible person must prepare a remedial plan for the Minister's approval, as is the case in the Yukon, Newfoundland, and Saskatchewan, or whether they have the option of doing so, as is the case in Nova Scotia, Alberta, and Manitoba. In the Yukon Territories, for example, the Minister can order a person to supply a remediation plan or, if the person wishes to change land use, he or she must provide a remediation plan. If the Minister approves of the remediation plan, he or she can enter into an agreement with one or more of the responsible parties or the responsible parties can agree amongst themselves to the remediation plan. The agreement will reflect agreement as to the plan itself and also agree on the allocation of responsibility and costs as between the parties. While an agreement is in effect, several provinces provide no prosecution for violation of the statute will be undertaken or commenced (in Saskatchewan and Alberta).

If a remediation plan is not submitted, or if submitted is rejected by the Minister, he or she is free to issue an order in the form of a stop order or environmental protection order or a remediation order. In Manitoba, the Minister can require further investigation to be undertaken by the responsible person, while in Nova Scotia the matter can be referred to an ADR process before any final order is issued under s.125 of the *Environment Act*.

c) Provinces with No Designation Procedure

In jurisdictions without designation procedures (New Brunswick, the Northwest Territories and Ontario), the involvement by the Environment Department in any contaminated site situation will vary.

In New Brunswick, the Department would have to rely on the general prohibition against the release of a contaminant or waste into the environment that would affect the environment or the health, safety or comfort of people, affect the health of animals, or cause damage, such as to plant life or property, it would not cover historic contamination.

In the Northwest Territories, the non-binding Guideline requires the reporting of potential site contamination so that an evaluation can be done. There is a possibility for voluntary reporting of statutory violations made evident by an environment audit or site assessment. Armed with this information, the Chief Protection Officer can enter into an agreement for rehabilitation, or if this is not possible, issue a clean-up order. The Northwest Territories statute contains a general prohibition against releases that is very similar to that of Nova Scotia and so because of that wording, it cannot be applied to contaminated site situations.

In Ontario, apart from emergency situations where the Director is authorized to issue a stop order to control the effect of old contamination, if he thinks there is a danger to the health or safety of persons, the Department only gets involved if a person files a Record of Site Conditions as part of or as a prelude to a request for a Certificate of Use. The site profile has to include assessments by a qualified professional that either declares the site conditions in conformity with regulatory limits regarding on-site substances, or not in conformity with plans to remediate. If a certificate is not issued, use of the property is restricted and an order under Section 7 or 8 (Control or Stop Orders) can be issued for a violation of Section 6, which is the general prohibition against release of contaminants. If a certificate is issued, no Stop Orders or Control Orders will be issued.

Only Ontario seems to have provisions that enable the regulatory regime to be activated in the case of contaminated sites. The Northwest Territories can do so only if there is a voluntary reporting, and even then the action is limited to reaching an agreement. Although the Guideline refers to the Department issuing a clean-up order if an agreement cannot be reached, it is not clear upon what legal basis this action is to be taken.

d) Any Alternative to Designation?

In three jurisdictions, Nova Scotia, Manitoba and Alberta, the Department can still take action regarding contaminated sites without invoking the designation process as a result of other provisions in the relevant statutes. Indeed, in Nova Scotia, the ministerial designation power has never been applied. The common requirement is that some adverse or injurious effect must be anticipated.

Two provinces, Prince Edward Island and Newfoundland, appear to be without any back up position to deal with contaminated sites. The designation process appears to be the only option.

In Saskatchewan and the Yukon, any action to control site contamination outside of the designation process is doubtful. If action is possible, the basic test or criteria is an "adverse effect" in Saskatchewan and "contamination in excess of the regulations and which might cause unsafe conditions and irreparable damage to the environment" in the Yukon.

4) Discussion and Proposal

The Law Reform Commission does not think that the availability of a compulsory site designation process should be eliminated. A compulsory process might be required, for example, to deal with a landowner who would otherwise not comply with departmental requirements.

On the potential for "stigma" associated with a site that is designated as contaminated, the Law Reform Commission accepts that designation should not be made prematurely or arbitrarily. One would not wish a site to be labeled inaccurately as contaminated. However, if designation is made on the basis of objective criteria, and therefore pertains to a situation of fact, the Commission is of the view that any ensuing stigma, though unfortunate, is not a sufficiently strong reason to justify not making a site designation.

On the other hand, the Law Reform Commission is not of the view that every instance of property contamination would require some type of mandatory solution. Some landowners will clean up a property on their own initiative or will respond favourably to a departmental notice. Second, applying a designation process to every potential contaminated site in the province would likely have significant resource implications for the Department. It may simply not have the staff and budget required to deal with that number of possible locations.

If a landowner is willing to cooperate with the Department, it is likely that significant savings of money and time will result. If a voluntary system is in place, the Law Reform Commission thinks that those who opt for that route should be rewarded, through a less onerous process.

In instances where remediation is required, the Law Reform Commission favours a combination approach, one which promotes voluntary, informal, yet effective solutions, but which, in necessary situations, is backed up by the prospect of formal and mandatory requirements. The Commission thinks that this type of hybrid process can be achieved by formalizing the status of the 1996 Guidelines and making them part of a system which retains the prospect of site designation. The Department is best placed to identify how well the remedial aspects of the Guidelines work in practice. From a legal perspective, however, the Commission thinks that the Guidelines, which lack official status in law, should be adopted by reference, and therefore given legal effect, through the regulations. This would clarify for all landowners the requirements they would have to meet in relation to a voluntary remediation process. If requirements change, then the fact that they are part of

legislation will encourage public awareness. Should the owner of a contaminated site not wish to participate in the voluntary process or fail to comply with an aspect thereof, then the Department could invoke the compulsory site designation process.

The legislative foundation for making the1996 Guidelines or similar standards part of our law is already in place. Section 91(1)(a) of the *Act* empowers the provincial Cabinet to make regulations "respecting assessment and rehabilitation criteria, used for the purpose of defining, determining or designating contaminated sites, or for the rehabilitation and clean-up of such sites."

When should government get involved in investigating a potential contaminated site? The Law Reform Commission is of the view, as a matter of fairness, clarity, and helpfulness, that the "trigger" to bring into effect departmental involvement should not only be identified, but made part of law. The Commission's Advisory Group also agreed on the need for some type of trigger. Apart from suggesting that the trigger should be tied to an amount exceeding government accepted guidelines, the Advisory Group did not, however, have any specific suggestions about its character.

The Law Reform Commission notes that a trigger would have to be consistent with definitions in the *Act*. To not be too unwieldy, the trigger would likely have to refer in general terms to more specific guidelines or criteria. Contamination may vary widely in terms of its specific components. Attempting to incorporate all possible contingencies and amounts into a trigger, the Commission thinks, would make it too cumbersome. Moreover, standards change with the progress of science. One would wish to avoid the requirement to having to amend a regulation which embodied the trigger on every occasion that health or environmental standards were altered.

As a simple, fair and effective trigger, the Law Reform Commission suggests that departmental involvement, in the sense of investigating a site, should occur when the landowner, further to a requirement under the Guidelines, notifies the Department that contamination exists, in accordance with applicable standards, at the site. Through this approach, one would avoid the stigma of labelling a site as "contaminated" when its contamination was only suspected.

As a matter of fairness, the Law Reform Commission suggests that there should also be a process, similarly set out in the regulations, whereby a designated property which is found not to be contaminated, or which is remediated to departmental satisfaction, could be removed from the list of contaminated sites. The Commission notes that a similar proposal as made in 1994 by a committee set up to consult Nova Scotians on the draft *Environment Act*.[147]

[147] *Report of the Consultation Committee of the Nova Scotia Round Table on Environment and Economy* (Halifax: Department of Environment, 1994) at 57.

The Law Reform Commission suggests:

- In instances where remediation is required, a combination approach, one which promotes voluntary solutions, but which is backed up by the prospect of formal and mandatory requirements, should be used.

- The 1996 Guidelines, which lack official status in law, should be adopted by reference, and therefore given legal effect, though the regulations. This would clarify for all landowners the requirements they would have to meet in relation to a voluntary remediation process.

- Should the owner of a contaminated site not wish to participate in the voluntary process or fail to comply with an aspect thereof, then the Department could invoke the compulsory site designation process.

- The trigger for departmental involvement, in the sense of investigating a site, should occur when the landowner, further to a requirement under the Guidelines, notifies the Department that contamination exists, in accordance with applicable standards, at the site.

- There should be a process, set out in the regulations, whereby a designated property which is found not to be contaminated, or which is remediated to departmental satisfaction, could be removed from the list of contaminated sites.

CHAPTER 4: CONTAMINATED SITE PROFESSIONALS

1) Introduction

Site professionals perform a variety of roles related to the identification, management, and remediation of contaminated land. They might perform work themselves, oversee the work of others, or certify for the Department the quality of completed rehabilitation work. For instance, they might be involved in the preparation and implementation of a "remedial action plan" designed to deal with the effects of contamination.

Instead of conducting its own separate determinations, the Department seems to rely on site professionals to evaluate the appropriateness of measures taken in relation to contaminated site remediation. The site professionals report to the Department in written form, and sometimes through an interview. Given this reliance, having competent site professionals is essential to the remediation process.

At the moment, according to the Terms of Reference for this Project, the Department recognizes a site professional whose qualifications have been approved by one of two self-governing professional organizations, the Association of Professional Engineers of Nova Scotia (APENS) and the Association of Professional Geoscientists of Nova Scotia (APGNS). The Department also recognizes the credentials of those who have successfully completed a certification program administered by the Environmental Services Association of Nova Scotia (ESANS). With potential liabilities in mind, the Department has raised with the Law Reform Commission the need to examine whether to continue present practices or whether the Department should develop an in-house program to qualify individuals to work in the contaminated site industry.

2) The Situation in Nova Scotia

The *Environment Act* authorizes the Minister to pass regulations which would control and regulate the qualification of persons as site professionals, and the insurance that they might be required to carry.[148] No such regulations exist. As a result, any direction on this issue is to be found in materials that are not legally binding.

Regarding qualifications, both the Guidelines for Management of Contaminated Sites in Nova Scotia (1996) and the Nova Scotia Department of Environment and Labour (NSDEL) Guidance Manual for the Management of Contaminated Sites (1999) point out two ways in which a person may qualify as an environmental site professional. The first requires a person to be licensed as a professional engineer by APENS. The second is for the person to be licensed by a licensing body

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

that has been approved or authorized by the Department's Director of Resource Management and Pollution Control (or an alternate).[149] The Law Reform Commission assumes that the latter route is how a professional geoscientist may become recognized as a site professional. Unlike APENS, APGNS is not mentioned in the Guidelines or the Guidance Manual. To gain the approval of the Director, the licensing body must be composed of persons with appropriate scientific and engineering expertise. It also must have established responsibility and accountability for setting, publishing, and enforcing appropriate professional standards; developing appropriate training and continuing education programs; and identifying appropriate upgrading requirements for licensing renewal. The licensee must demonstrate that he or she has the appropriate level of knowledge and experience in all aspects of contaminated site activities, including investigation, remediation, and management.

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

Although the Guidelines impose no specific insurance requirements, they do recommend that the site professional, their employer, or both have adequate, applicable insurance coverage.[150] The Domestic Fuel Oil Policy does not refer to insurance requirements for certified clean-up contractors, though site professionals require Errors and Omissions liability insurance protection of at least $1,000,000, with no exclusion for environmental risks.

From 2002 to 2008, ESANS had a contract with the Department to perform a number of functions relating to the Domestic Fuel Oil Spill Program. ESANS received and evaluated applications for site professionals and certified clean-up contractors, recommended applicants for

[149] 1996 Guidelines, *supra* note 39 at 12; "NSDOE Guidance Manual for the Management of Contaminated Sites" (October 12, 1999) [unpublished] at 14. The Guidelines refer to a licensing body needing professional status pursuant to the "*Professions Act* of Nova Scotia." The Law Reform Commission is not aware of any statute, current or repealed, with that title.

[150] Guidelines, *ibid* at 14.

approval by the department, administered a registry of active site professionals and certified clean-up contractors (currently some 55 in number), and facilitated courses for certified clean-up contractors. Effective December 31, 2008, the Department now fulfills those above-noted roles.[151]

3) Use of Site Professionals in Other Parts of Canada[152]

a) New Brunswick

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

A site professional is defined in the Guidelines as a person of appropriate qualifications further to requirements of the Association of Professional Engineers and Geoscientists of New Brunswick (APEGNB). Other professionals and technical experts, such as toxicologists and ecological risk-assessment specialists, may play an important role in contaminated site management, and the Department acknowledges this multi-disciplinary approach may be appropriate for certain sites. However, the site professional is responsible for ensuring that other technical experts are adequately qualified to carry out their portion of the work, and assumes responsibility for all environmental work undertaken for the project.

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

b) British Columbia

Until recently, British Columbia operated a "roster system" in relation to the identification of site professionals. The provincial environment department determined what classes of persons would be considered qualified to do site professional work and decided which members among those classes would be approved for inclusion on the roster of those who could be selected to work on contaminated sites.[153]

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

[152] Only those jurisdictions which have specific provisions about site professionals are mentioned.

[153] Bereti, *supra* note 57 at 15-16.

For a variety of reasons, this system was perceived as unsatisfactory.[154] In 2003, the ministerial Advisory Panel recommended the system's replacement by a self-governing, independent licencing Environmental Professional system. This recommendation came into effect four years later.

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

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

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

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

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

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

[154] Some of the criticisms were that roster membership was too restrictive, that there were too few members, and that roster members were not interested in doing smaller jobs. See "Final Report of the Minister's Advisory Panel on Contaminated Sites," *supra* note 82 at 53-55.

c) **Quebec**

In Quebec, the term "experts" is used rather than site or environmental professionals.[155] Government controls the province's site professional system. Nonetheless, the Ministry cannot be held legally responsible for work done by a site professional. The governmental involvement is divided among three units, all of which fall under the responsibility of the provincial environmental department. The Centre d'expertise en analyse environnmentale du Québec is a governmental agency which oversees the site professional system. The Service des lieux contaminés provides technical and scientific support. Regional offices of the department receive and evaluate information from site professionals who they interview if necessary.

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

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

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

If a member of a professional body, an expert will be subject to Quebec's Professional Code.[156] Failing to adhere to the Code's requirements may make them subject to penalties or

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

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

litigation. Non-professionals who nonetheless qualify as experts are not subject to the same type of control. One legal commentator has called into question this aspect of the Quebec system.[157]

d) Northwest Territories

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

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

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

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

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

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

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

e) Ontario

The Ministry of the Environment, instead of conducting its own substantive review of environmental site assessments, relies on "qualified persons" to ensure that the work has been carried out in accordance with the required standards. Under the current regime, which is transitional and in effect only until October 1st of this year, members of particular professional or technological groups are identified as being suitably qualified persons under the legislation. For example, if only a Phase I environmental site assessment is necessary, it may be completed by one of the following: "a professional engineer, a professional geoscientist, a person who is registered as an applied science technologist or a certified engineering technologist, a registered architectural technologist, a professional agrologist and a registered chartered chemist."[158]

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

4) Analysis & Proposal

Site professionals may have to deal with a variety of types of contaminated sites with different combinations of toxic substances. Investigation, evaluation, and rehabilitation may require the services of different types of experts whom the site professional will have to oversee and coordinate. If government has decided not to do its own management of contaminated sites, including rehabilitation, and wishes to delegate these duties to site professionals, it will wish to ensure the competence of these site professionals and the quality of their work.

As shown by our survey of approaches in Nova Scotia and elsewhere, there are a number of options for ensuring the requisite level of competence among site professionals. One approach is to require membership in a well-recognized professional association which sets standards for theoretical education and technical training, which offers continuing professional development courses, and which monitors the activities of its members, to ensure that they maintain certain professional benchmarks.

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

Membership in a professional association presupposes a certain level of post-secondary education. Where the first or second approach is concerned, to help ensure a minimum level of competence, those candidates who do not have university education or at least a professional degree could be required to have a certain amount of work experience in the field of contaminated sites. A further safeguard of competence would be to require the licensing bodies to meet certain departmental

[158] James Flagal, "In a Nutshell: *The Brownfields Statute Law Amendment Act,* 2001" in Abdel-Aziz and Chalifour, *supra* note 4 at 12-6.

criteria, which apparently is what the Nova Scotia Department does at the moment. To ensure that relevant standards are being met, the Department may also require, as occurs in Quebec, candidates to pass an examination set by the Department.

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

The Department is understandably solicitous to ensure that site professionals are qualified and competent. Site professionals are entrusted with a great deal of responsibility. Having said this, whether the Department has in place the most appropriate system engages a large number of issues from outside the legal context. The duration and nature of training, the optimal number of site professionals in the province, the amount and type of insurance required, the level of relevant fees, and the size of the departmental budget for training and certification are matters of a public policy or technical nature best left to government. The Law Reform Commission therefore does not take a position on these issues.

Having said this, the Law Reform Commission does have some suggestions about the general nature of the system which could be appropriate for Nova Scotia. As a matter of reasonableness, effectiveness, and efficiency, the training, licencing, and monitoring of site professionals should be entrusted to one of the two professional bodies (APGNS and APENS) recognized by the Department. Members of these groups understand the type of work involved in site remediation and have experience in coordinating and supervising clean-up efforts. With this experience comes an awareness of what type of background is required, as well as what types of systems need to be in place to avoid oversights. In other words, members of these bodies should be well aware of industry best practices and how to implement them. If the Department had particular requirements or concerns, it could simply request that they be incorporated into the procedures put into practice by the professional bodies.

The Law Reform Commission discussed at some length the prospect of proposing that the Department entrust the supervision of site professionals' qualification, training, and licencing to an independent body, the administration of which would be shared by members of approved professional organizations, including some which are outside the fields of engineering and geology. In this way, the perspectives of all professional bodies whose members are involved in contaminated site remediation, not only engineers and geologists, but also applied biologists, chemists, and agrologists, could be taken into account. Moreover, if this independent body had a structure similar to that in B.C., provision could be made for governmental and lay representation on the governing board. This could contribute to greater awareness and acceptance of the work down by the independent body.

A number of considerations, however, convinced the Law Reform Commission that establishing a new, independent supervisory body would not be the best way to proceed in this province. The Commission has concerns about the cost and delay of setting up such a new structure, which would also have to be funded in the future. It would be more economical to rely, if possible, on structures and procedures which have already been created by existing professional bodies. The

Commission noted that B.C., with its much larger population, would enjoy a significantly greater tax base with which it could help support the creation of a new supervisory body. Also with our much smaller population in mind, the Commission questions how many site professionals from outside engineering and geology are actually at work supervising clean-up operations. In any event, the Commission reasoned, leadership in this field, and indeed, the majority of participants, would necessarily come from the ranks of professional engineers and geologists.

In the Law Reform Commission's view, the alternative to entrusting a licencing program to professional bodies, or an independent organization, namely an "in-house" program, would not be feasible, in light of likely departmental concerns about costs and potential liability. Creating a program from whole cloth and maintaining it, which would include the hiring and training of staff, and the preparation of manuals and examinations, in the Commission's view should be more expensive than reimbursing a professional or independent body for its expenses, many of which would relate to procedures already in place or which would be efficiently accomplished as an adjunct to existing programs. As for potential liability, any problems that may arise as part of the setting up or running of the program would be associated with the direct involvement of departmental employees.

What about site professionals who do not belong to a professional body? The Domestic Fuel Oil Spill Policy refers to both certified clean-up contractors and site professionals. In neither case is a professional designation needed, though those people from the latter category are required to have a relevant university degree. How could a professional or independent body supervise a person who is not a member of a professional association?

Direction on this issue, the Law Reform Commission suggests, could come from recent Ontario developments in relation to paralegals. In Ontario, only a qualified lawyer in good standing with the Law Society of Upper Canada (LSUC), which regulates the provision of legal services in the province, is entitled to practise law. Although not qualified to practise law, paralegals are authorized to provide certain legal services which clients may seek out because of cost or convenience. For example, a paralegal might be involved in the registration of incorporation documents.

Since 2007, Ontario legislation has entrusted the education, licencing, and regulation of paralegals to the LSUC. This includes overseeing the qualifications criteria and applications process, the preparation and communication of conduct rules and guidelines, and the complaints and discipline procedure. The LSUC carries on these roles as the organization in Ontario which "governs legal service providers in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct."[159] Taking the Ontario situation into account, the Law Reform Commission suggests that the mandate of the supervising body chosen by the Department to oversee site professionals should include people who are working as site professionals, yet who are not members of a professional association.

[159] Information about the supervision of Ontario paralegals is available through the "paralegal" link at the law Society of Upper Canada website, online: <http://www.lsuc.on.ca/index_en.html> (date accessed: 11 March 2009).

A member of a professional body would be required to maintain adequate insurance to cover instances of professional errors and omissions. The Law Reform Commission notes that further to the Domestic Fuel Oil Spill Policy, "site professionals" must also maintain insurance, though certified clean-up contractors do not have the same requirement. Cleaning up a domestic oil-spill can be very expensive, in part because of oil's propensity to spread through the ground after being spilled. If not discovered or cleaned up quickly enough, an oil spill could affect neighbouring properties. In the interest of protecting the public, the Commission thinks that all persons operating under the designation of "site professional" should be required to maintain adequate and current professional liability insurance. The Commission takes no position on the minimum level of insurance, which could be determined following consultations with insurance industry representatives.

In terms of potential governmental liability, the Commission notes that there are many contexts in which government provides a certification of skill. Should the holder of such a licence fall below required standards, it is that person who would be responsible for his or own conduct. Barring some type of systemic deficiency, or individual acts of negligence on the part of governmental officials, having found that a person has demonstrated a set of skills or acquired a certain type of training, government does not then become an insurer for those instances in which that person does not properly apply that background. For example, through the *Crane Operators and Power Engineers Act,* government supervises the examination and certification of crane operators in the province.[160] Section 12(1) of that *Act* expressly sets out the immunity from legal action of departmental employees and members of the examining committee or appeal board "for an act or omission done in good faith in the execution or intended execution of any power or duty pursuant to this Part or the regulations." However, government is not relieved of liability in respect to a "wrongful act."

The Law Reform Commission is of the view that the Department should not be concerned about its own liability in relation to site professionals if a qualification system is set up which is based upon objective, industry accepted standards, and which is re-enforced by appropriate testing and monitoring mechanisms. Nonetheless, if such concerns prevail, the Department could be protected through an express legislative provision. Consistent with the Commission's earlier proposal about clearance certificates, that provision should not, however, protect government from the consequences of negligence on the part of its employees and officials.

[160] S.N.S. 2000, c. 23.

The Law Reform Commission suggests:

- As a matter of reasonableness, effectiveness, and efficiency, the training, licencing, and monitoring of site professionals should be entrusted to one of the two professional bodies (Association of Professional Geologists of Nova Scotia and Association of Professional Engineers of Nova Scotia) recognized by the Department.

- The mandate of the supervising body should include overseeing people who are working as site professionals, yet who are not members of a professional association.

- All persons operating under the designation of site professionals should be required to maintain adequate and current professional liability insurance, the minimum level of which could be determined following consultations with insurance industry representatives.

- Although the Department should not be concerned about liability in relation to site professionals if a qualification system is set up which is based upon objective, industry accepted standards, and which is reinforced by appropriate testing and monitoring mechanisms, the Department could be protected through an express legislative provision. Not covered, however, would be negligence on the part of government employees and officials.

LIST OF RECOMMENDATIONS

Aspects of Liability

1. Retrospective applicability of the *Environment Act* should be retained, but on a discretionary basis.

2. Whether to apply the *Environment Act* retrospectively would be for the Minister to decide, after having taken into account relevant "liability allocation factors," originating with number 9 of the CCME recommended principles and adopted at s.129 of the *Act*.

3. Government should act on its powers currently contained in legislation and create regulations to allow, and govern, agreements which would transfer regulatory liability, actual or future, under the *Act*.

4. Prior to acceptance of a transfer of liability agreement, a number of financial safeguards, such as the use of bonds or disclosure of assets, might have to be in place, depending on the circumstances.

5. It should be possible to reopen a transfer of liability agreement in the event of some previously unknown aspect, such as fraud, which would make continuance of the agreement unfair or inappropriate.

6. The Government would have to provide its express consent to a transfer of liability agreement.

7. The *Environment Act* should retain the potential application of joint and several liability.

8. The Minister should only apply joint and several liability if persons responsible have unsuccessfully made a good faith attempt to achieve alternative dispute resolution (ADR).

9. The Minister should expressly be required, prior to applying joint and several liability, to consider whether this would produce a manifestly unfair result.

10. Where a contaminated site has been remediated in compliance with government approved standards, the Department should issue a document which identifies the property in question, its approved uses, as well as the clean-up standards applied, recognizes that those standards have been met, and releases the owner from current and future regulatory liability in relation to that property. The owner should be able to register this document with the property's title at a Registry of Deeds.

11. As a matter of prudence and reasonableness, a clean-up certificate would be subject to a number of limitations, as for fraud and substantial change in land use.

12. If the Department has concerns about government liability in relation to the issue of clearance certificates, the *Environment Act* should be amended to protect government, except for negligence on the part of governmental officials or employees.

13. Given the probability that some persons responsible under the *Act* cannot be found or cannot pay, Government will likely have to make some provision to fund the clean-up of certain contaminated sites.

14. In order to determine the type and size of funding potentially required in this province, government must determine what types of activities in the Nova Scotian context have likely resulted in contamination, on what scale, and in how many locations.

15. The *Act* should continue to bind the provincial Crown and purport to bind the federal Crown.

16. Escheats legislation should be amended, to delay the Crown's liability in relation to ownership of land acquired through process of law, until the Crown has the opportunity to investigate the site in question.

17. Assuming that it did not contribute to contamination at the site, a municipality which acquires a property through a tax sale should be expressly excluded from regulatory liability for remediation of any contamination which had occurred by the time the municipality acquired the property.

18. The potential regulatory liability of a municipality for acts or omissions which took place after acquisition of a contaminated site, and which contributed to or worsened a contamination problem, should be limited to the value of the property.

Departmental Notification and Involvement

19. Reporting to the Department should be mandatory when a landowner, or someone acting in place of the landowner, knows or ought reasonably to know that a property is contaminated, in accordance with legislative requirements.

20. If a property is contaminated in accordance with the legislative requirements, notice of the contamination should be included in the environmental registry, for consultation by members of the public.

21. A notice of potential contamination should not, however, be included in the environmental registry.

22. In instances where remediation is required, a combination approach, one which promotes voluntary solutions, but which is backed up by the prospect of formal and mandatory requirements, should be used.

23. The 1996 Guidelines, which lack official status in law, should be adopted by reference and therefore given legal effect, through the regulations. This would clarify for all landowners the requirements they would have to meet in relation to a voluntary remediation process.

24. Should the owner of a contaminated site not wish to participate in the voluntary process or fail to comply with an aspect thereof, then the Department could invoke the compulsory site designation process.

25. The trigger for departmental involvement, in the sense of investigating a site, should occur when the landowner, further to a requirement under the Guidelines, notifies the Department that contamination exists, in accordance with applicable standards, at the site.

26. There should be a process, set out in the regulations, whereby a designated property which is found not to be contaminated, or which is remediated to departmental satisfaction, could be removed from the list of contaminated sites.

Contaminated Site Professionals

27. As a matter of reasonableness, effectiveness, and efficiency, the training, licencing, and monitoring of site professionals should be entrusted to one of the two professional bodies (Association of Professional Geologists of Nova Scotia and Association of Professional Engineers of Nova Scotia) recognized by the Department.

28. The mandate of the supervising body should include overseeing people who are working as site professionals, yet who are not members of a professional association.

29. All persons operating under the designation of site professionals should be required to maintain adequate and current professional liability insurance, the minimum level of which could be determined following consultations with insurance industry representatives.

30. Although the Department should not be concerned about liability in relation to site professionals if a qualification system is set up which is based upon objective, industry accepted standards, and which is reinforced by appropriate testing and monitoring mechanisms, the Department could be protected through an express legislative provision. Not covered, however, would be negligence on the part of government employees and officials.

Invitation to Comment:

1. Whether s.165 of the *Environment Act,* which involves the responsibility of secured creditors and related interests, is seen as beneficial or is the source of any concern, and if so, in what respects.

2. How well the process for obtaining departmentally-controlled, but publicly-accessible, information on site contamination is working in practice.

APPENDIX A

Terms of Reference

Administrative Review of Regulatory Considerations for Contaminated Sites

November 9, 2007

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

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

Boundaries of the review:

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

Specific Issues to be Addressed:

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

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

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

ultimately is an important factor affecting both civil and regulatory liablity.

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

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

Desired Outcomes/Outputs:

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

APPENDIX "B"

SUMMARY OF RECOMMENDED PRINCIPLES BY CCME (2006)

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

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

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

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

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

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

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

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

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

   Liability allocation factors:
   a) when the substance became present at the site;
   b) with respect to owners* or previous owners, including, but not limited to:
      i) whether the substance was present at the site when he took ownership;

ii) whether the owner ought to have reasonably known of the presence of the substance when he took ownership;
iii) whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of contaminants at the site;
iv) whether the presence of the substance was cause solely by the act or omission of an independent third person;
v) the price the owner paid for the site and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase.

c) with respect to the previous owner, whether that owner sold the property without disclosing the presence of the substance at the site to the purchaser;
d) whether the person took reasonable steps to prevent the presence of the substance at the site;
e) whether the person dealing with the substance followed the accepted industry standards and practices of the day;
f) whether the person dealing with the substance followed the laws of the day;
g) once the person became aware of the presence of the substance, did he contribute to further accumulation or the continued release of the substance;
h) what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;
i) whether the person benefitted from the activity resulting in the contamination, and what was the monetary value of their benefit;
j) the degree of a person's contribution to the contamination, in relation to the contribution of other responsible, persons; and
k) the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.

* Includes lessees and other occupiers.

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

Step 1 - Voluntary allocation - Upon designation of a contaminated site, and designation of responsible persons, the affected persons should be given a reasonable time-bound opportunity to allocate the cost of cleanup among themselves.

Step 2 - Mediated Allocation - Failing step 1, the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.

Step 3 - Directed Allocation - Failing step 2, the persons will be required to enter into an allocation process whereby an independent person or body will make an arbitrated appointment of liability based upon its findings.

APPENDIX C

ENVIRONMENTAL LEGISLATION AND GUIDELINES CONSULTED

Alberta

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.

Guideline for the Designation of Contaminated Sites Under the Environmental Protection and Enhancement Act (2000).

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6.

British Columbia

Environmental Management Act, S.B.C. 2003, c. 53.

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

Manitoba

The Contaminated Sites Remediation Act, C.C.S.M. c. C205.

The Environment Act, C.C.S.M.. c. E125.

New Brunswick

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

Guideline for the Management of Contaminated Sites (2003).

Petroleum Product Storage and Handling Regulation, N.B. Reg. 87-97.

Newfoundland and Labrador

Environmental Protection Act, S.N.L. 2002, c. E-14.2.

Nova Scotia

Domestic Fuel Oil Spill Policy (2005).

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

Guidelines for Management of Contaminated Sites in Nova Scotia (1996).

Northwest Territories

Environmental Protection Act, R.S.N.W.T. 1988, c. E-7.

Environmental Rights Act, R.S.N.W.T. 1988, c. 83 (Supp.).

Environmental Guideline for Contaminated Site Remediation (2003).

Prince Edward Island

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

Petroleum Contaminated Site Remediation Guidelines (1999).

Ontario

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

Brownfields Statute Law Amendment Act, S.O. 2001, c. 17.

Records of Site Condition - Part XV.1 of the Act, O. Reg. 153/04.

Technical Standards and Safety Act, S.O. 2000, c. 16.

Quebec

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

Mécanisme de gestion de la liste des experts (2007).

Saskatchewan

The Environmental Management and Protection Act, 2002, S.S. 2002, c. E-10.

Yukon

Contaminated Sites Regulation, O.I.C. 2002/171.

Environment Act, R.S.Y. 2002, c. 76.