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POLLUTER PAYS AND THE PUBLIC INTEREST:

A Submission to the Minister's Advisory Panel on Contaminated Sites

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INTRODUCTION

BC's Contaminated Sites Regime (CSR), which consists of Part 4 of the *Waste Management Act* and its associated Contaminated Sites Regulation has been in effect since April 1, 1997. The creation of this comprehensive regulatory regime was the result of an extensive multistakeholder process that took place over a number of years. The final result was a regime that could balance competing public policy interests: ensuring that the environment is protected through remediation of contaminated sites while at the same time satisfying the business interest in providing polluters certainty and predictability with respect to their legal obligation to clean up contaminated sites. The CSR is modeled on the well known US Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). While not every party was completely satisfied with the CSR, indeed, that is the nature of complex public policy development, the CSR had the support of all significant stakeholders when it came into effect.

The BC government has made clear that it is changing the way in which environmental protection efforts will be conducted in the province. Their strategic direction is set out in their ministry service plans which outline a move towards increased delegation of decision-making, greater reliance on external expertise, results-based standards, and innovative approaches to achieving compliance.

Recent initiatives indicate that the government intends to shift the delivery of services from the public to the private sector in areas that have traditionally been off limits. In the resource sector, the government has served notice that it intends to radically alter the manner in which all industrial activities are regulated in the province by downsizing the public service even further, and shifting from a prescriptive to a results-based approach. These changes will affect the manner in which standards are established and enforced, and will have an impact on environmental and human health. It is important that in this context, that a unique regime like CSR not be restructured when it is already achieving these goals.

The regulation of contaminated sites is necessarily complicated due to the historical nature of contamination and industrial activity. As with any new and complex regulatory regime, there have been concerns with the implementation of the CSR. The Advisory Panel on Contaminated Sites' Terms of Reference are heavily weighed towards the interests of business, which is also whom the CSR was designed to regulate. These terms of reference question whether the current regime is "unnecessarily cumbersome, expensive and bureaucratic", or "overly prescriptive and stringent in application" or whether the liability principles have "resulted in investors being fearful of investing in, or redeveloping contaminated land". The concerns that have been expressed are unsubstantiated; there is no evidence that the present regime inhibits commercial activity, except where doing so is necessary to protect the public good. Indeed, if one considers the amount of development occurring in downtown Vancouver, it seems that the contrary is the case.

As noted above, the purpose of the CSR is to balance the often competing need to ensure environmental and human health are protected with business interests. In our view, the Terms of Reference have ignored other important considerations, such as the extent to which the CSR has:

- Protected innocent landowners and the public interest by having contaminated sites remediated as expeditiously as possible;

- Provided appropriate incentive to encourage polluters to clean up contaminated sites;
- Maintained baseline standards for environmental quality and human health; and
- Protected the public, and the taxpayer, from liability for orphaned or abandoned sites.

We are supportive of the submission of the Canadian Bar Association, BC Branch, Environmental Law Section. Our recommendations build upon and elaborate the principles identified by the CBA Environmental Law Section; there are a number of points we believe must be clarified in order to ensure that the essential components of a just, equitable and efficient and accountable CSR regime remain intact and can be strengthened.

RECOMMENDATIONS

Recommendation 1: The fundamental framework and structure of the CSR is consistent with the government's strategic initiatives and must be maintained; the focus of this review must be on refining the current system, not revisiting first principles.

Efforts to "fine tune" the implementation of the CSR, while at the same time ensuring efficient and effective remediation have been underway through the Contaminated Sites Implementation Committee (CSIC, of which West Coast Environmental Law has been an active participant) since the late 1990s. In our view, the CSIC process has been largely successful, the fine tuning efforts have remedied a number of the issues that have arisen with the current system; this approach should continue.

The fundamental framework created by the CSR has proven effective and should be maintained. It is a substantially workable system, and 6 years of experience have given those involved in contaminated site remediation in BC a good sense of how it can be improved. The Contaminated Sites Advisory Panel presents a fresh opportunity to clarify how the CSR should be implemented. It would be regressive to abandon this sophisticated, well developed framework and return to the pre-1996 approach of remediating contaminated sites in BC. The comprehensive approach of the CSR is currently being used as a model by other jurisdictions undertaking contaminated sites reform initiatives (such as Ontario and Quebec). The concerns raised in the Terms of Reference, to the extent that they may be substantiated, are being addressed by the process that is already in place.

Recommendation 2: The principles of joint, several, retroactive and absolute liability are essential components of the CSR.

These liability principles are fundamental to the CSR. It is these concepts that give effect to the polluter pays principle, which is an essential component of a just regime for addressing contaminated sites. Virtually every legal regime in Canada and the United States contains these baseline principles in one form or another. Joint and several liability is legislated in every law addressing contaminated sites in Canada.

Even in cases where the parties responsible under the CSR are not polluters per se, the CSR ensures that liability is assumed by those who have a degree of moral responsibility, rather than shifting liability or costs onto the public and the environment. For example, the liability principles in the CSR capture beneficiaries, who often profit from contamination. Landlords are a good example of a beneficiary. It is important to ensure that people who use property do so in a manner that does not pollute, or will avoid pollution in the future.

The most important function of these principles is to operate as an economic incentive to encourage potentially responsible parties to take responsibility and remediate contaminated sites where their actions have caused or contributed to environmental degradation. Taken together, these principles are the most appropriate mechanism available to guarantee that clean up responsibility is allocated fairly, as responsible parties must consider the extent to which they caused or contributed to the contamination at issue.

If these principles were removed from the CSR, BC would return to the situation as it existed prior to the CSR, whereby current landowners would be responsible for contamination by virtue of ownership, and would bear the burden, primarily through the courts, of attempting to recover clean up costs. This would revert to a regime where there are severe limitations on recovery from past polluters, as the provisions of the *Limitations Act* would act as a bar to recovery. If a landowner could not afford to do so, it is likely that sites would be abandoned, as with the exception of very few sites (such as the Expo lands in downtown Vancouver), clean up costs will exceed property values, and it is cheaper for landowners to walk away. This is certainly the case in rural communities, where contaminated properties are often incapable of being sold because the property value has diminished so dramatically.

Indeed, the parties responsible for contamination from the largest point source of metals contamination in North America, the Britannia Mine, have directly acknowledged the importance of these liability principles in concluding a clean up plan for the Britannia Mine site.[1] These principles provide not only the incentive to clean up contaminated sites, but also encourage brownfield redevelopment.

Recommendation 3: No changes should be made to the liability principles. If any changes are considered, they should be done by way of narrowly defined and limited exceptions, as is currently the case with the CSR.

The CSR contains a list of parties to whom the liability principles do not apply, to ensure that the application of joint and several liability is not unfair. These exemptions have been built into the system to add an additional "fairness" dimension to the implementation of the CSR. In our view, this approach is the only meaningful way to carve out exceptions to the liability principles.

Recommendation 4: Exit tickets or a liability sign-off, if considered at all, should only be provided in clearly defined and limited circumstances.

West Coast has strong reservations about providing exit tickets to persons who remediated a site to a particular standard. It is not unheard of that further clean up may be required in the future as our understanding of toxicity and migration of contaminants improves, or in the event that conditions at a remediated site change and pose an additional threat to human health or the environment.

One such example is the Koppers site in Burnaby, that was originally cleaned up to standards that were current in 1980, but was recently found to be a major source of contamination in the Fraser River. The cost of this additional clean up and long-term operation and

[1] Vancouver Sun, Friday April 13, 2001, p. B1 "Britannia cleanup costs ex-owners $30 million; Past owners admit legislation brought them to cleanup talks".

maintenance is in the range of $50 million. If exit tickets are uniformly provided once remediation is complete, clean up for sites such as this would likely fall on the taxpayer, and any innocent party whose property value or health were impacted as a result of contamination from this site would not have any recourse against the polluting or contributing parties. If the public was unable to fund such a clean up, the site would become an orphaned or abandoned site.

In our view, there should be no diminishment of retroactive liability. In the event that exit tickets are considered, such exemption should be provided in narrowly defined and clearly articulated circumstances, and any exit ticket must be accompanied by a funding mechanism to cover the costs of orphaned site clean up. This funding mechanism should be developed with monies contributed by the polluters, or responsible parties, such as is the case with CERCLA in the US, to ensure that the taxpayer is not bearing an additional burden for unforeseen clean up expenses.

Recommendation 5: The CSR must provide better protection for innocent landowners and members of the public who may be affected by offsite contamination.

Currently, the cost recovery action provisions, which are the civil action provisions in the CSR, can only be used to claim costs of remediation against responsible parties after they have been incurred. There is no remedy in the CSR for innocent landowners whose property values and health are threatened by migrating contaminants from adjacent contaminated sites.

This problem is of real concern throughout rural BC, where problems of leaking underground storage tanks from abandoned, or old, gasoline stations are ubiquitous. In one particularly unfortunate situation in Salmo, a group of residents' land was contaminated in this manner, albeit below the thresholds for human health risk, provided that the residents do not use their property (i.e. one resident has been denied a permit to put a root cellar on his property because of the contamination). In this case, the residents have lost their businesses; they have suffered a substantial decrease in the value of their properties; they have been unable to obtain financing to restart their business because they cannot use their land as security; and they are unable to sell the land. A Ministry issued remediation order was the subject of a judicial review petition filed by the oil company, further delaying any prospect the residents had at cleaning up their land in order to recover the lost property value. In the meantime, some of the residents' lives have been on hold, as they have no other means to make amends. In circumstances such as this, impecunious innocent landowners are unable to ensure that their interests are protected by the CSR.

Currently, the cost recovery action provisions are inadequate because they require parties to carry out remediation before recovering costs. This clearly is financially impossible for many citizens whose property values are eliminated by contamination from neighbouring gas stations or other sources. It is essential that government be able to intervene on behalf of citizens who have no other recourse. It is also essential that the cost recovery action not be limited to those with sufficient financial resources to fund remediation; up front apportionment of liability and interim cost orders should be considered.

The cost recovery action provisions should be extended to provide that innocent landowners and affected parties are able to ensure timely clean up of contaminated sites; a set of conditions could be developed to ascertain when these clean up provisions would apply.

A further problem in this regard is that the CSR contains no requirement to consult with affected property owners when determinations are being made as to how to remediate a contaminated site. In the Salmo case, the residents had no formal input into this process, despite the fact that their lives and their property values are directly affected by whatever remediation decisions are taken with respect to the property.

Recommendation 6: Existing inoperational provisions of the current CSR, such as allocation panels, minor contributor status, and voluntary remediation agreements should be operationalized before fundamental reforms are considered.

These mechanisms were designed to encourage responsible parties to resolve liability issues and undertake clean up without the need to commence a cost recovery action or other means of enforcing clean up. These mechanisms have been underutilized to date, and while some of the problems have been identified, particularly through the CSIC process, no real effort has been made to make these provisions operational.

In particular, consideration should be given to strengthening the role and function of allocation panels. In our view, an independently appointed allocation panel that is capable of making a binding ruling with respect to liability would promote timely cleanups. Some of the benefits of strengthening the role of an independent and binding allocation panel are:

- It would remove Ministry staff from the position of having to make internal judgment calls about liability issues, and allow the Ministry staff to focus on environmental protection and remediation;

- The creation of a specialized panel, similar to a specialized tribunal would allow for the development of a body of expertise around liability allocation issues, and the evolution of consistent criteria or regularly accepted practice that could be applied in resolving liability; and

- If need be, the decisions of these panels could be subjected to appeal, under circumstances determined by statute.

Further, if a binding, independent allocation panel was able to make orders regarding interim payments, it would allow a responsible party to proceed with remediation, and in particular would provide support to innocent landowners (see recommendation 5 above) as it would ensure that money would be available up front to enable remediation to occur.

Recommendation 7: Potentially responsible parties should be required to provide notice that a site may potentially be contaminated regardless of whether it is being subjected to the CSR.

In many situations, it is possible for a company in possession of a contaminated site to "sit on" the site and ignore the CSR unless and until the company wishes to convey the property, at which time they will require an approval in principle or a certificate of compliance. In these circumstances, the notice provisions of the CSR will not apply. This problem should be remedied to provide that companies must give notice according to the CSR as soon as they are aware of contamination, not when they are seeking an approval in principle or a certificate of compliance.

Recommendation 8: A meaningful financial security requirement must be established to protect against orphaned sites and to provide incentive for clean up.

Financial security requirements should be strengthened to ensure that appropriate parties are held accountable for environmental remediation costs, and that such liability does not fall back on the public. The current CSR contains provisions to permit a manager to require financial security to cover remediation costs in certain circumstances. The purpose of this section is to ensure that ultimately, the public is not responsible for the costs of cleaning up a contaminated site, including future operation and maintenance costs.

Financial security is not a tax, nor is it an additional charge on a responsible party. Consistent with the polluter pays principle, security is a financial commitment that a party would have to pay as a result of its activity in any event. Requesting that a party pay this money up front is not unreasonable; indeed, if the responsible party successfully remediates the site, it will never even have to pay out this security.

As with commercial transactions, a lender, or person who may potentially be obliged to assume the costs for a particular risk (in this case, clean up costs for contamination), obtains security as a matter of course. The position of the Ministry is the same as that of a commercial lender or guarantor, in that if a site is not adequately remediated, it risks bearing ultimate responsibility for cleanup. It is entirely appropriate for the Ministry to impose security requirements to encourage private actors to take responsibility for the risks inherent in their activities.

The financial security provisions should be made mandatory in medium and high-risk sites. Amounts of security should be adequate to cover long-term operation and maintenance costs where "pump and treat" is the remediation option, or full remediation where feasible. Irrevocable letters of credit should be the preferred form of security, and should be obtained regularly from responsible parties to ensure that government is not exposing the public unnecessarily in the event that a polluter chooses to walk away from remediation obligations under the CSR.

The posting of financial security provides a benefit to business and polluters as it enables the company to quantify its cost and declare it on its books, rather than having to carry it forward as a potentially large contingent liability. Further, the actual cost of posting security is minimal as it is not an out-of-pocket expense. In those circumstances where financial security is exercised, it will promote brownfield clean up and redevelopment of contaminated sites.

Recommendation 9: A funding mechanism should be established to address current and future orphaned and abandoned sites.

Abandoned sites in BC now amount to a significant unfunded liability that ultimately falls upon the public. In some cases, the government has already assumed liability; sites such as Skeena Cellulose and the Expo lands in Vancouver are being remediated with taxpayers' dollars. This funding mechanism should be developed with monies contributed by the polluters, or responsible parties, such as is the case with CERCLA in the US. It would ensure that the taxpayer is not exclusively bearing an additional burden for unforeseen clean up expenses.

The notion of such a fund becomes particularly critical if any changes are made to the liability principles. In the absence of such a fund, even minor changes to the liability regime will add significantly to the public's exposure to cleanup costs.

Recommendation 10: No changes should be made to the appeal mechanisms to the Environmental Appeal Board, including the standing provisions.

In the wake of staff and budget cuts among agency staff responsible for contaminated sites management, it is more important than ever to ensure that the appeal system to the Environmental Appeal Board (EAB) is efficient, fair and available to third parties, such as adjoining landowners and the interested public. Several years ago, the original standing provisions were narrowed so that only aggrieved persons, as opposed to any persons, could appeal a decision of a manager to the EAB. If the CSR is to ensure and promote accountability, it cannot tolerate any further changes to the standing provisions for the EAB.

Equally important is the time limit for commencing an appeal. This was reduced in 1997, and powers residing in the Director to extend the time limit where justified were taken away. The present time limit of 30 days is already tight for aggrieved persons to appeal a decision, and creates a particular problem given the already narrow notice requirements in the CSR.

Recommendation 11: Limitation periods must not be reduced.

Underground contamination is sometimes slow and insidious. Detection, proof of causation and remediation are expensive, and often beyond the ability of innocent third parties to deal with. It is also not uncommon for problems to re-emerge at sites that were thought to have been remediated.

The limitation period for causes of action arising from contamination need to be clearer, and need to recognize and allow for these factors. Given the above factors, there is probably justification for adding some contamination-related causes of action to the list of those that are not governed by a limitation period in section 3(4) of the *Limitations Act*. At a minimum, the limitation period for tort remedies and cost recovery actions should be extended to 6, instead of 2 years. Although a separate process, we would be concerned if the Civil Liability Review were to reduce any limitation period for related causes of action, including the ultimate limitation period in section 8(1)(c) of the *Limitation Act*.

Similarly, offence provisions are subject to limitation periods of only 6 months to 2 years, and are sometimes triggered upon sudden discharges or spills. These provisions need to be extended given that contaminants often take long periods of time to migrate.

Recommendation 12: Baseline regulatory functions must be maintained by government; the Ministry must indicate what it will not privatize or contract out in order to maintain environmental standards.

One of the mechanisms by which the Ministry has chosen to address the combination of budgetary cutbacks and requirement for regulatory oversight to ensure that public health and the environment are protected, has been the establishment of a Roster of Professional Experts, which perform basic regulatory tasks with regard to contaminated site remediation. These experts undertake reviews and make recommendations regarding the issuance of

approvals in principle and certificates of compliance for some contaminated sites under the CSR.

While the Ministry retains an element of regulatory oversight, the responsibility for analyzing these sites is being undertaken by a private sector engineer, paid for by the company responsible for remediating the contaminated site.[2] We are concerned about pressure to extend this practice from low to moderate risk contaminated sites to higher risk sites and to more activities.

There are a number of concerns with this approach:

- Private sector contractors are not subject to the same levels of accountability as public employees. The current system contains no peer review.

- Currently, the responsible party and the contractor sign off on their own work. Indeed, there is no mechanism to prevent the same company from conducting the remediation and signing off on the approval in principle or certificate of compliance through the Roster of Professional Experts. This clearly gives rise to actual or perceived conflicts of interest. Even if there is no actual conflict, permitting a contractor in the same office to review the work of a colleague performing a regulatory function gives rise to a perception of conflict.

- There is virtually no oversight by the Ministry, and audits are only undertaken after the fact and in a limited number of cases. Thus it is virtually impossible for the Ministry to identify situations where the contractor is in a conflict of interest position, in order to maintain a good working relationship with the company.

- Private sector contractors do not have the same level of institutional background and experience as those in the public service charged with administering standards. There is no means by which to ensure that contractors develop consistent in-house expertise or institutional memory on company behaviour and field conditions in regional offices as is the case with in-house staff. Both of these elements are critical for effective and efficient public policy administration and should be valued and promoted.

- The accreditation process for these contractors has been problematic to date. In 1999, only 2 of 24 applicants passed the accreditation exam, and in early 2001, the Ministry took the drastic measure of removing one of the experts from the roster for substandard work. While this provides some reassurance that MWLAP is attempting to maintain rigorous standards, we have serious concerns that current pressure on the Ministry will result in these standards being lowered.[3]

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[2] *Protocol for Contaminated Sites – Independent Remediation for Low to Moderate Risk Sites: Extent manager may rely on statements by qualified professionals*, MWLAP 1999.

[3] See www.elp.gov.bc.ca/epd/epdpa/contam_sites/roster/ministry_release_of_exam.html for the results of the 1999 exam; the removal of one expert from the Roster was mentioned by Ron Driedger at a Canadian Bar Association meeting on May 8, 2001, in Vancouver.

- Any diminution of environmental standards, or further diminishment in auditing or enforcement capacity will result in greater public exposure in a context where there is already extensive reliance on private contractors.

The Ministry must indicate what it is not prepared to privatize or contract out. Government should indicate what it intends to continue doing, and must commit to no further allocation to rostered experts. In any situation where discretion is exercised where there is a risk to public health and the environment, that discretion should be exercised by public servants who are not subject to being captured by economic or other interests. In addition, the audit procedures currently in place should be strengthened to monitor, review and enforce the performance of these contractors.

Finally, questions of accountability and liability must to be considered before making any further moves toward privatization or contracting out. As was the case in Walkerton, Ontario, the apparent short term savings can translate into much higher long term costs and can be fatal. We question whether it is really more efficient and cost effective to have essential services delivered outside the public service.

Recommendation 13: No reduction of standards should be permitted.

The current standards that are incorporated into the CSR must not be diminished any further. Earlier this year, significant concern was generated in the Lower Mainland over a shipment of hazardous waste to Richmond for disposal. The disposal of this waste would have been illegal in the state in which it originated (Oregon), but was legal based on BC standards. Although the Richmond case stemmed from inadequacies in BC's Special Waste Regulation, we are extremely concerned that any diminution of standards under the CSR could only increase incidences of a similar nature in the future.

Recommendation 14: Resources need to be increased, and at a minimum, maintained to meaningfully deal with contaminated sites across the province.

Business concerns regarding delay in issuing approvals in principle or certificates of compliance could be reduced by having more staff available implement the CSR. While business has drawn considerable attention to the few high risk sites that are extremely costly to remediate, and to the administrative burden of cleaning up low risk sites, we note that that these examples tend to be the exception not the rule. There are many medium to high risk sites that exist across the province for which the Ministry must maintain adequate staff and resources to ensure they are remediated. The need for resources includes not only staff to oversee the implementation of the CSR, but also to ensure that monitoring and compliance efforts are undertaken. Recently, the Ministry of Environment in Ontario added 65 additional compliance officers to address non-compliance issues.

Indeed, at one point there was discussion at CSIC about how the CSR system could potentially be crafted as a "break even" regime, whereby the money collected from fees and other services (the user pay portion) could, and perhaps should, be applied directly back to cover the administrative expenses of operating the regime, instead of having these fees being paid into central government revenues.

We make a number of additional recommendations below that can assist with strengthening compliance capacity.

Recommendation 15: Terminate the private prosecution stay policy.

Even though the CSR is primarily a civil liability regime, criminal prohibitions are an important part of it (see s. 54(20) of the *Waste Management Act*). Another means of achieving increased citizen participation is through direct enforcement action such as private prosecutions. The BC Ministry of the Attorney General has operated under a policy of taking over conduct of, and then "staying" private prosecutions must be ended. Its effect is to operate as a bar to citizen enforcement of the offence provisions of the *Waste Management Act*. Given that government initiated enforcement action is diminishing, as the field staff either no longer exist or face increasing workload pressures, our environment cannot be protected if no one has the capacity or ability to safeguard it. Interestingly, Ontario permits private prosecutions to proceed, despite years of government cutbacks and deregulation.

Recommendation 16: Pollution prevention, pollution abatement and remediation orders need to be enforced by the Ministry and should be filed as orders of the court to ensure enforcement can occur.

Currently, when the Ministry issues pollution prevention, pollution abatement, or remediation orders under the CSR, they are civil orders, and should the responsible party fail to meet the requirements of the order, the only way that the Ministry can pursue enforcement is through a prosecution.

These orders should be filed with the Supreme Court registry, thereby giving them the same effect as a court order. Then, any breach of an order would constitute contempt of court, and the Ministry could pursue a direct remedy without having to pursue a costly and protracted prosecution. This would ensure that ordered parties have incentive to fulfil the requirements of the order, thereby ensuring the public interest in environmental protection. This is especially true since the penalty for not carrying out a remediation order is low (maximum $200,000), and thus it may be less expensive for a responsible party to ignore an order than to fulfil it.

In any event, there is a need to ensure that the Ministry has the resources to enforce orders once they have been issued. In practice, an order is a last resort remedy, as it is recognized that the Ministry works with the responsible party to the extent possible in encouraging remediation independent of the order provisions; thus, when an order is issued, the Ministry must have the capacity to enforce it.

Recommendation 17: Brownfield redevelopment is an important issue that must be addressed by way of government policy and initiative.

A considerable amount of volunteer time was dedicated at the CSIC table to exploring mechanisms to encourage brownfield redevelopment. It is important that this work not be lost, and that serious consideration be given to promoting brownfield redevelopment. There are a number of mechanisms available, including tax incentives, revolving loan funds based on CERCLA, and the possibility of exit tickets for liability for those who redevelop brownfield lands. Proposals of this nature should be part of any recommended changes to the CSR.

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