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PAPERING THE SETTLEMENT OF A COST RECOVERY ACTION UNDER THE BC ENVIRONMENTAL MANAGEMENT ACT

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I. INTRODUCTION

Lawyers and clients dealing with claims for the remediation of contaminated sites often assume that, once we've reached agreement on the business terms of a settlement the hard work is done and the details will take care of themselves. As a wise teacher once told me, illustrated to great effect on the classroom chalk board by dividing the word "assume" into three small words:

One should never assume unless you want to make an "ass" out of "u" and "me".

The settlement of a statutory cost recovery action commenced under section 47 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA") is no different from the settlement of any other cause of action. Don't simply assume that everything will fall into place after you've reached agreement on liability and quantum. When settling a cost recovery action under the EMA, reaching agreement on the costs of remediation and the allocation of liability among responsible persons is not enough. No settlement is truly complete until the parties have agreed on the wording of a comprehensive release.

When I am acting for a Defendant in a cost recovery action, I try to make it my practice to present the form of settlement agreement and mutual release my client wants, at the beginning of negotiations. It's often easier to get a consensus on the form and content of the release before you start negotiations on the business terms. If you don't resolve the form and content of the release before resolving the business terms, then you may find that the goodwill shown by all parties in the early stages of negotiations has dissipated once they have finished fighting over the business terms. If you wait until the business terms have been negotiated before you consider the wording of a release, then you may find that discussions break down and you're left with having to look at the following issues:

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· Has a settlement agreement been reached (on all essential terms) or merely an agreement to agree (with key terms still to be negotiated)?

· If a settlement agreement has been reached, then what terms are implied as a part of that settlement agreement?

· What protection is afforded to the Defendants by the expiry of limitation periods?

If you want to avoid having to deal with these issues **after** the business terms have been negotiated, then consider what matters you need to include in a release **before** you negotiate the business terms.

II. HAS A SETTLEMENT AGREEMENT BEEN REACHED OR MERELY AN AGREEMENT TO AGREE?

In *Calvan Consolidated Oil & Gas Ltd. v. Manning*, [1959] S.C.R. 253, Mr. Justice Judson put the question in this manner, at page 261:

"Whether the parties intended to hold themselves bound until the execution of a formal judgment is a question of construction and I have no doubt in this case. The principle is well stated by Parker J. in *Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284 at 288-289, in these terms:

'It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.'"

In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), Robins J.A. reviewed the applicable distinctions where written documents are required to formalize a contract, at pages 103 to 104:

"As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by memorandum, by exchanging correspondence or other informal writings. The parties may 'contract to make a contract', that

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is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

However, when the original contract is incomplete, because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal contract is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself."

In *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62 (C.A.), the BC Court of Appeal had to consider whether a settlement agreement had been reached when there was no discussion about the provision of a release. After agreeing on the amount it would pay to settle the Plaintiff's claim, the Defendant insisted on a release being executed by the Plaintiff. At page 70, McEachern C.J.B.C. states:

"In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted, then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably

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implied in the circumstances."

III. IF A SETTLEMENT AGREEMENT HAS BEEN REACHED, THEN WHAT TERMS MAY BE IMPLIED?

In *Fieguth v. Acklands Ltd.* (supra), the Plaintiff had accepted the Defendant's offer to settle in a breach of contract claim for wrongful dismissal. When the Defendant subsequently presented a release to the Plaintiff "containing covenants and indemnities that were excessive and unnecessary", and deducted income tax from the settlement funds, the Plaintiff argued that no final settlement had been reached because there had been no agreement on the terms of the release, the method and timing of payment of funds, the method of dealing with income tax implications or the terms of any indemnity agreement. At trial, the court agreed with the Plaintiff that there was no final settlement. On appeal, however, the Court of Appeal found that there was an enforceable agreement. At pages 70 to 72, Chief Justice McEachern summarized a number of principles on the formation and enforcement of settlement agreements. This summary of those principles from *Fieguth* is taken from paragraph 23 of Madam Justice Smith's decision in *Re Rickards Estate v. Diebold Election Systems Inc.*, 2004 B.C.S.C. 1357:

"1. It is necessary to separate the question of formation of contract from its completion.

2. Whether a contract is formed depends upon whether the parties have reached an agreement on all essential terms.

3. It is common with settlements that the deal is struck before documentation can be completed. In such cases, if there is an agreement on the essential terms a contract has been formed and the settlement is binding.

4. Generally speaking, litigation is settled on the basis that a final agreement has been reached which the parties intend to record in formal documentation, rather than on the alternative basis that the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete.

5. A settlement implies a promise to furnish a release (and a Consent Dismissal if an action has been commenced).

6. Where an agreement has been concluded with documentation to follow, either party can tender whatever documents he or she thinks appropriate without thereby rescinding the settlement agreement.

7. If the documents are not accepted, there must be further discussion, but neither party is released or

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discharged until the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

8. Not every disagreement over documentation consequent upon a settlement amounts to repudiation of a settlement.

9. Parties who reach a settlement should usually be held to their bargains, and dispute should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar."

In *Imperial Oil Ltd. v. 416169 Alberta Inc.*, 2002 A.B.Q.B. 386, (2002), 310 A.R. 338 (Q.L.), the court noted at paragraph 10 that "a release is another virtually universal requirement in the settlement of litigation". In that case, the parties had agreed to a release but not a specific form of release. When negotiations broke down over the form of release, the Plaintiff argued that the absence of a specific form of release created a fundamental uncertainty. At paragraph 14 of the decision, the court rejected that submission for the following reasons:

"But a release is not such an unusual document as to create a fatal level of uncertainty. A release can be fairly described as 'a conventional document that requires only the filling in of blank spaces or the completion of minor details which the parties can impliedly be taken to have agreed upon': *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991) 79 D.L.R. (4th) 97 (Ont. C.A.) at 106. The words and conduct of both parties show that it was a term of the settlement agreement that the release would be fair and commercially reasonable having regard to the context of the 1993 dispute and its resolution. This term is sufficiently certain that a Court could, if necessary, issue a binding declaration of right setting out the Plaintiff's entitlement to the release. To put it another way, if the numbered company prepared, signed and tendered a form of release, the Court could rule on whether it had complied with its obligations."

A. What is Included in a Simple or Basic Release?

In *Fieguth v. Acklands Ltd.* (supra) B.C.L.R. at page 72, the BC Court of Appeal concluded that the Plaintiff was entitled to the settlement funds "upon furnishing a general release": That begs the question, what is included in a general release?. At page 72, McEachern C.J.B.C. suggests that "insisting upon a release with covenants and indemnities may have been some evidence of unwillingness to complete the contract...".

In *Great Sandhills Terminal Marketing Centre Ltd. v. J-Sons Inc.*, 2008 S.K.C.A. 16 (CanLII), [2008] 7 W.W.R.

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297, the Plaintiff commenced legal action against various Defendants seeking damages for economic losses alleged to have been suffered as the result of the negligent construction of a grain terminal. Although the parties were able to settle the action, talks broke down over the negotiation of an appropriate form of release. After concluding that the parties had entered into a binding settlement agreement, the Saskatchewan Court of Appeal described the remaining issue at paragraph 41:

"The remaining issue was the performance of the agreement by execution of releases containing fair and commercially reasonable terms consistent with the intentions of the parties, and the provision of notices of discontinuance."

In the circumstances of that case, having concluded that the parties had reached a binding settlement agreement before negotiations broke down over the form of release, the Saskatchewan Court of Appeal ordered that, if the parties couldn't settle on the appropriate form of release within 30 days, then "judgment will issue dismissing the within action and releasing the appellants from any liability to the Respondents **in relation to any cause of action pled in the Statement of Claim**": para. 48.

In *Abouchar v. Conseil Scolaire De Langue Francaise d'Ottawa Carleton* - Section Publique (2002), 58 O.R. (3d) 675, [2002] O.J. No. 1249 (Ont. S.C.), the Defendants made a comprehensive offer to settle two wrong dismissal actions and four human rights complaints brought by the Plaintiff. In consideration for a $250,000 payment, the Plaintiff agreed to sign a "complete and final" release. The offer to settle didn't make any reference to the terms of that release. When the Defendants presented the Plaintiff with a draft release containing a non-disclosure provision, the Plaintiff refused to sign the release. At paragraph 11 of the decision, Sedgwick J. concluded:

"The terms of the release must be in accord with the offer to settle that was accepted by the Plaintiff. In my view, a 'complete and final' release does not entail the inclusion of a non-disclosure clause. Such clause does not constitute by necessary implication a term of the settlement reached by the parties. The gist of a 'complete and final' release is for the Plaintiff to discharge the Defendants (and other persons referred to therein) from any action, complaint, claim, indebtedness, etc. In my opinion, the non-disclosure clause is not part and parcel of a release. If one wishes to insert one, it must be negotiated."

Imperial Oil Limited v. 416169 Alberta Inc., (supra), had to consider the contents of a release in the settlement of an action in damages for hydrocarbon contamination of certain lands. The Defendant owned a shopping centre in west Edmonton. The Plaintiff, Imperial Oil, owned and operated a gas station on adjacent lands. The gasoline was stored in underground storage tanks and at some point some leakage occurred. It was subsequently discovered that the leaked hydrocarbons had migrated across the property line and

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contaminated a part of the shopping centre site. The numbered company commenced an action against Imperial Oil claiming damages for the contamination. The parties subsequently worked out the terms of a remediation agreement to clean up the contamination. After the terms of the remediation agreement were settled, Imperial Oil stipulated that execution of a release and indemnity with respect to any claims brought against it would be required, upon completion of the remediation work. The numbered company responded to that request as follows, at para. 5 of the judgment:

"I have some difficulty in understanding the release and indemnity agreement which you drafted. If you require a release I am willing to provide you with a release upon my acceptance of the remediation report, which release will be a general release in connection with all matters arising out of the lawsuit commenced by 416169 Alberta Inc. The form of release which you have drafted releases future claims which may arise, for example, should there be subsequent seepage of hydrocarbon contamination from your client's lands onto the shopping centre site. There was never any intention to grant a release in that situation."

The content of the release was left unresolved but the terms of settlement were carried out. Imperial Oil remediated the contamination and obtained and provided remediation reports confirming that the work had been completed. Nothing was done to advance the lawsuit that had been commenced by the numbered company. Eventually Imperial Oil, frustrated by its inability to resolve the litigation that had been started in 1993, commenced its own action seeking a declaration that there had been a settlement agreement reached in 1997 and that it had performed all of its obligations under that settlement agreement. The court concluded that a settlement agreement had in fact been reached. It was a term of the settlement agreement that a release would be provided and the court concluded that the release had to be "fair and commercially reasonable having regard to the context of the 1993 dispute and its resolution". At paragraph 17 of the judgment, the court found that there was a "covenant to provide a commercially reasonable release". It then reviewed the specific areas of dispute between the parties about the release and found as follows:

1. the release should not include future claims but should cover all matters up to the date of the discontinuance of the 1993 action: paras. 21 and 23;

2. the numbered company was not required to sign a release containing an indemnity clause. Any indemnity agreement was inconsistent with the covenant to provide a general release for the claims arising out of the 1993 litigation: para. 22;

3. the scope of the release did not extend beyond the shopping centre lands, which were the subject matter of the dispute, and did not cover conditions "near" the property: para. 24;

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4. the scope of the release was confined to hydrocarbon leakage and contamination, and not any other type of contamination: para. 24;

5. the release had to encompass all of the matters alleged in the original Statement of Claim and all of the work carried out pursuant to the remediation agreement: para. 24;

6. the parties entitled to the benefit of the release included Imperial Oil Limited and its partner, McColl-Frontenac Petroleum Inc., even though McColl-Frontenac wasn't a party to the original action: para. 25.

B. What is Covered by a Consent Dismissal Order?

A Consent Dismissal Order is a final determination of the cause of action as if it had been decided on the merits. In order to understand what protection is provided by a Consent Dismissal Order, it is important to examine the specific cause(s) of action involved.

Common law causes of action will often be pleaded with a statutory cost recovery action under the EMA. Common law causes of action which are often included are breach of contract, nuisance, trespass and negligence.

For example, a landlord dealing with contamination caused to the landlord's property as a result of the tenant's business operations may sue for breach of express lease covenants to repair and restore the property, breach of implied covenants to return the property and the premises in an uncontaminated condition, and for costs of remediation incurred by the landlord under the EMA. See, for example, *O'Connor v. Fleck* (2000), 79 B.C.L.R. (3d) 280 (S.C.).

The tort of nuisance requires proof of physical injury to land or an unreasonable interference with the use and enjoyment of land in the sense that the interference would not be tolerated by an ordinary occupier. Anyone who actively creates a nuisance, or fails to take action in the face of a duty to do so can be held liable. This liability continues so long as the offensive condition remains, regardless of the Defendant's ability to abate it and stop the harm: *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (Ont. S.C.) at paras. 59 to 66. Since nuisance is the establishment of a state of affairs, the tort is a continuing wrong until the nuisance is abated. A consent dismissal of an action in nuisance will only dispose of claims arising from that state of affairs to the date of the dismissal.

The tort of trespass to land consists of the act of placing or projecting any object on another person's land without lawful justification. The act complained of must be a physical interference with the Plaintiff's land. An oil spill at sea which results in natural forces carrying the oil to the Plaintiff's land is a sufficient physical

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interference to constitute the tort of trespass to land: *Southport Corporation v. Esso Petroleum Ltd.*, [1956] A.C. 242.

The leading case on the assessment of damages for trespass to land is *Kates v. Hall*, [1991] B.C.J. No. 263, 56 B.C.L.R. (2d) 322 (C.A.). That decision establishes that the Plaintiff can recover the cost of restoring the property to its previous state even if the alterations to the property have had no impact on the market value of the property. Where there is no measurable diminution in value of the property, the court will consider the difference in cost between "meticulous restoration" and reasonable repairs. Where there has been diminution in value, the courts will balance the actual benefits to the Plaintiff of meticulous reinstatement against the extra cost to the Defendant over and above damages based on the diminution in value of the land. One of the factors the courts consider in the balancing process is the use to which the injured party has and will put the property.

Each day that a trespass continues constitutes a fresh trespass and is actionable as such: *Johnson v. BC Hydro and Power Authority*, [1981] B.C.J. No. 2146, 27 B.C.L.R. 50, 123 D.L.R. (3d) 340 (B.C.S.C.). A consent dismissal of a trespass action will only dispose of claims up to the date of that dismissal. If the trespass continues after that date, then a fresh cause of action arises.

While a consent dismissal of a statutory cost recovery action will dispose of that action, it will not dispose of future claims for future costs of remediation to be incurred. In *Gehring v. Chevron Canada Ltd.*, [2006] B.C.J. No. 2880 (S.C.), Madam Justice Gray summarized the purposes of the EMA, beginning at para. 31. These purposes include the prevention of pollution and the expeditious remediation of contaminated sites. To ensure that expeditious remediation occurs, the legislature created a new civil cause of action (*Workshop Holdings Ltd. v. CAE Machinery Ltd.*, [2005] B.C.J. No. 940 (S.C.) at para. 20) and implemented a scheme which casts a wide net over parties responsible for the costs of remediation (*Beazer East Inc. v. British Columbia (Environmental Board)*, [2000] B.C.J. No. 2358 (S.C.) at para. 168). The new cause of action created, known as a cost recovery action, is established pursuant to section 46(5) of the EMA and allows a person to recover the reasonably **incurred** costs of remediation from a responsible person. In order for those cost to be recovered, certain triggering events must first have occurred: the site must be a contaminated site as defined in the EMA and the Contaminated Sites Regulation, BC Reg 375/96 and amendments (the "CSR"), and the remediation costs must have already been **incurred** by the Plaintiff: *O'Connor v. Fleck* (supra) at para. 285; *Swamy v. Tham Demolition Ltd.*, [2001] B.C.J. No. 721 (S.C.) at para. 26. Future costs of remediation that may be incurred are not part of the statutory cause of action and are not recoverable under the EMA. By limiting the statutory cause of action to past costs, already incurred, the legislature has ensured that remediation steps are actually taken.

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IV. WHAT PROTECTION IS AFFORDED BY LIMITATION PERIODS?

A. Common Law Causes of Action

For common law causes of action, limitation periods generally run from the time the cause of action arose. Pursuant to s. 6 of the *Limitation Act*, R.S.B.C. 1996, c. 266, the running of time with respect to a limitation period for an action for damage to property does not begin to run until a reasonable person would discover that damage giving rise to a cause of action has occurred. Thus, discoverability, incorporated into s. 6 of the *Limitation Act*, postpones the running of the limitation period up to the maximum thirty year ultimate limitation period. Once the ultimate thirty year limitation period is reached, the common law cause of action would expire, regardless of whether damage was discovered.

In *ML Plaza Holdings Ltd. v. Imperial Oil Ltd.*, [2006] B.C.J. No. 479 (S.C.), an action for damages resulting from negligent contamination of land, nuisance and breach of lease, Boyd J. stated as follows, at para. 66:

There is no dispute that where damage [to land] is the cause of action or part of the cause of action, a statute of limitations runs from the date of the damage and not from the date of the act which caused the damage. If there is fresh damage within the statutory period, an action in respect of those damages will not be barred [citations omitted].

B. Cost Recovery Actions Under the EMA

How limitation periods apply to the EMA is a more difficult question to answer. Because the EMA is an absolute liability and retroactive statute, one might assume that limitation periods do not apply to causes of action created by it. After all, s. 47(5) states that a person may commence an action to recover the costs of remediation from a responsible person "in accordance with the principles of liability set out in this Part". Presumably, "this Part" refers to Part 4 and Part 4 applies retroactively. On the other hand, s. 35(1) of the CSR provides that a defendant may assert all legal and equitable defences in an action under s. 47(5) of the EMA, including defences under other legislation, such as the *Limitation Act*. This indicates that limitation periods do apply to cost recovery actions under the EMA. Just how limitation periods apply, however, is far from clear.

In *ML Plaza*, *supra*, the plaintiff's common law claim in nuisance was statute barred by reason of expiry of the limitation period. The plaintiff in *ML Plaza* also failed in its statutory cost recovery action because it could not establish that it had incurred any costs of remediation (an essential element to the statutory cause of action). Had the plaintiff in *ML Plaza* incurred remediation costs, however, it was not in dispute that it could

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have recovered those costs through its cost recovery action: see para. 64.

In *B.C. Hydro v. BC (Environmental Appeal Board)*, [2003] B.C.J. No. 1773 (C.A.) at para. 65, Newbury J.A. considered the distinction between retroactive and retrospective legislation, but chose to pass by the interesting question of how a statutory limitation period or postponement thereof would operate in connection with retrospective or retroactive legislation. Newbury J.A. did confirm, however, that the EMA reaches back into the past in the sense that it attaches responsibility to past events or conduct: see para. 66.

In *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, [2005] B.C.J. No. 940 (SC), a property was used as an iron works and brass foundry between 1922 and 1941. The property was purchased by the father of the principal of Workshop Holdings Ltd. ("Workshop") in 1960. When Workshop began developing the property in 1997, it discovered brass contamination in the soil. The issue was whether the action was barred by a 30-year ultimate limitation period, which would have expired in 1979 at the latest. The court held that it was not statute barred. Any cause of action concerning the contamination of the property did not arise until 1997, when the current legislative scheme first created liability for a contaminated site within the meaning of the scheme. Workshop's cause of action was a new cause of action which did not exist prior to the inception of the legislative scheme.

Some commentators have speculated that the clock on the limitation period starts when the triggering events for a cost recovery action occur; i.e., when a site is deemed a "contaminated site" and costs of remediation are incurred. Under ss. 44(1) and (5) of the EMA, a site is considered to be or have been a contaminated site if a director of waste management:

- deems a site contaminated;
- appoints an allocation panel with respect to the site under s. 49 of the EMA.
- determines that a responsible person is a minor contributor with respect to the site under s. 50.
- entered into a voluntary remediation agreement with respect to the site under s. 51;
- issued an approval in principle with respect to a proposed remediation plan for the site under s. 53(1); or
- issued a certificate of compliance with respect to remediation of the site under s. 53(3).

If a cost recovery action is viewed by the courts as an action for damages in respect of damage to property, then a two year limitation would apply. If viewed as an action for the recovery of costs, a 6-year limitation

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would apply: see William K. McNaughton's paper, "Cost Recovery Actions for Prior Owners and Operators", Environmental Law Conference, Continuing Legal Education Society of B.C., (Vancouver: February 2004). It is important to remember that, for municipalities, notice in writing, setting forth the time, place, and manner in which such damage was sustained, must be filed with the City Clerk within two months from the date on which damage was sustained: *Vancouver Charter*, R.S.B.C. 1996, c. 55 s. 294; *Local Government Act*, R.S.B.C. 1996, c. 323, s. 286. And just as a new limitation period for a common law cause of action runs from the date new damage is incurred, it may well be that a new cost recovery action runs from the date new costs are incurred for the purposes of cleaning a contaminated site.

V. WHAT MATTERS SHOULD BE SPECIFICALLY NEGOTIATED TO INCLUDE IN A RELEASE?

A. Indemnities

In *Fieguth v. Acklands Ltd.* (supra), the form of release presented by the Defendant's lawyer was described by McEachern C.J.B.C., B.C.L.R. at page 65 as "an unusual one containing covenants and indemnities that were excessive and unnecessary". At page 67 he concluded it was an implied term of the settlement agreement that the employer was entitled to a simple release of the claim for wrongful dismissal but "the Defendant, not having stipulated for an indemnity agreement, was not entitled to anything of the kind".

If one of the parties to a settlement wants an indemnity included in a release, then it must be specifically negotiated. An agreement to provide a release in exchange for a sum of money does not require the Plaintiff to indemnify the Defendant in the event another party pursues a related claim against that same Defendant: *Witzke (Guardian ad Litem of) v. Dalgliesh*, [1995] B.C.J. No. 403 (Q.L.) (S.C.). In that case, the court concluded that since there had been no discussion of an indemnity, the two parties were not at ad idem and, therefore, there was no binding settlement agreement.

Norwich Union Life Insurance Co. (Canada) v. MGM Insurance Group Inc., [2005] 1 W.W.R. 196 (Man. Q.B.) confirms that a Defendant who wants the benefit of an indemnity from a Plaintiff against potential claims by third parties, must specifically bargain for that indemnity as part of the settlement agreement, because it will not be implied. In *Norwich*, five separate actions had been commenced against various Defendants. Three of those Defendants reached an agreement to settle the Plaintiff's claim against them. Under the terms of the settlement agreement reached, the Plaintiff agreed to release the Defendants in respect of the claims advanced by the Plaintiff in all five actions. The settlement offer which was accepted to create the settlement agreement did not stipulate the provision of an indemnity as well as a release. There was simply no discussion about the provision of an indemnity. When counsel for the Defendants sent a release and

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indemnity to counsel for the Plaintiff, the Plaintiff refused to provide the indemnity. At paragraph 23, McCawley J. states:

"I do not accept that, because there were multiple actions, the broad indemnification sought should have been in the mind of Plaintiff's counsel and is part of the normal practice such that it should be an implied term as was argued."

See also *Imperial Oil Limited v. 416169 Alberta Inc.* (supra) at para. 22 which concluded that an indemnity is not considered part of a release and should not be included, unless specifically negotiated.

B. Causes of Action Not Pleaded

In *Harris v. Braithwaite*, 2006 CanLII 51172 (Ont. S.C.), the Plaintiffs initiated a shareholder's oppression action against the Defendants and two of the Defendants counterclaimed alleging misappropriation of assets from the company. Before settlement discussions were entered, one of the Defendants learned of the existence of an alleged $40,000 debt owing to him by one of the Plaintiffs. The Defendants' counterclaim, however, was never amended to raise that additional claim in debt. The debt claim was disclosed to Plaintiff's counsel before the action was settled. The action was settled on terms that required execution of mutual releases. The form of release prepared by Plaintiff's counsel was a full and final release of all claims between all of the parties to the litigation and would have precluded the Defendant from attempting to recover the alleged debt owing to him by the Plaintiff. Counsel for the Defendants submitted that the form of release presented by Plaintiff's counsel was too wide and should be limited to only cover those issues pleaded in the Statement of Claim, Statement of Defence and Counterclaim. The court agreed and found there was no evidence that the settlement was intended to include issues which had not been pleaded. The settlement was limited to the matters at issue in the action. The terms of the implied release to complete the settlement had to reflect the agreement reached between the parties. In the absence of any evidence to suggest that the parties intended to provide a release which would cover all potential claims between the parties, the court concluded that the release had to be restricted to the causes of action set forth in the pleadings: paras. 25 and 26.

C. Confidentiality and Non-Disclosure Provisions

A confidentiality and non-disclosure clause is not an implied condition of a settlement and cannot be included in a release unless it has been specifically negotiated: *Abouchar* (supra) at para. 11.

If, however, the parties have settled an action on the understanding that a release will be provided which contains a confidentiality provision, then at a minimum, the clause should stipulate that there is to be no

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disclosure of information respecting the settlement of the lawsuit to anyone, including members of the media, unless compelled to do so by law: *Hughes v. The City of Moncton*, 2006 N.B.C.A. 83 (CanLII), 304 N.B.R. (2d) 92. In the *Hughes* decision, which involved the settlement of a wrongful dismissal claim brought by the former city solicitor, the New Brunswick Court of Appeal specifically approved the wording of a confidentiality clause at para. 9 which stated:

"IT IS FURTHER UNDERSTOOD AND AGREED that due to the nature of the subject matter of the within action, the parties have agreed that absolute confidentiality with respect to all terms and conditions of the discontinuance and settlement of the action is essential and is a condition of the within Release. The Releasor and Releasee expressly undertake and agree that there will be no disclosure or release by either of them of any information respecting the discontinuance or settlement of the within action to any person, including, but not limited to, all magazine, newspaper, radio, television and broadcast media and all journalistic or publishing interests unless compelled to do so by law."

D. Complex or Unusual Terms

Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc., [1995] O.J. No. 721 (Ont. Gen. Div.) is a decision which follows the BC Court of Appeal decision in *Fieguth v. Acklands Ltd.* (supra). At paragraph 24 of *Cellular Rental*, Chapnik J. states:

"It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, **no party is bound to execute a complex or unusual form of release:** although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice." (emphasis added)

The *Cellular Rental* decision was affirmed on appeal: [1995] O.J. No. 3773 (Q.L.) (Ont. C.A.).

VI. SUMMARY

By presenting the form of settlement agreement and mutual release your client wants, at the beginning of negotiations to settle a cost recovery action, you can avoid some of the problems created by settling an action without specifying the terms and conditions to be included in a release. If you enter into a settlement agreement without specifying the content of the release, then you will be limited to a general release with respect to the matters at issue in the specific causes of action pleaded. If you wish to include causes of action not specifically pleaded, indemnities, confidentiality and non-disclosure provisions, or complex or unusual terms, then those matters must be specifically negotiated because they are not part of the general release which is implied as a covenant into every settlement agreement.

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