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REPAIR, RESTORATION AND REMEDIATION ISSUES IN COMMERCIAL TENANCY

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I. EXPRESS LEASE COVENANTS:

Leases should contain covenants that deal with the condition of the premises during and after the tenancy. A landlord will want to ensure that the lease includes express tenant covenants to maintain and repair the premises during the lease and to deliver up the premises in good repair at the end of the lease term, subject only to exceptions for reasonable wear and tear and damage by fire. Nowadays, it is also good practice to include an express covenant not to contaminate the premises. A landlord should also take care to ensure that the tenant's covenants relate back to the condition of premises at the date of original occupancy in the event of a lease renewal. The rest of this section discusses these covenants in greater detail.

A. Covenant to Maintain and Covenant to Leave Premises in Good Repair:

While similar, the covenant to maintain in good repair and the covenant to leave in good repair constitute two separate obligations. The former is a covenant that continues throughout the term of the lease[1], while the latter is a covenant that arises at the end of the lease. Aside from this important distinction, these covenants can otherwise be analysed contemporaneously.

In the absence of an express agreement, there is no obligation on a tenant to keep premises in repair, although, there is an implied covenant to treat the premises in a tenant-like manner (discussed below).[2] The implied covenant to treat the premises in a tenant-like manner will be replaced by an express covenant to repair.[3]

Schedule 4 to the *Land Transfer Form Act*[4] contains three separate covenants dealing with repair

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obligations:

· the covenant to repair and keep the premises in repair during the term of the lease (covenant #3),

· a covenant permitting the landlord to enter the premises and view the state of repair and further requiring the tenant to make good on any repairs within three months of written notice from the landlord (covenant #9), and

· a covenant to deliver up the premises in good and substantial repair, at the end of the lease term or sooner if the term is brought to an end, subject to the exception for reasonable wear and tear and damage by fire (covenant #13).

Usually, a landlord's remedy for a tenant's breach of one of these covenants is in damages. Many landlords, however, require their tenants to pay deposits up front and include provisions in the lease permitting the landlord to deduct the cost of any repairs from the deposit before refunding the balance at the end of the term. There can also be additional clauses permitting the landlord to re-enter in the event of a tenant's breach of its repair obligations.[5]

1. What is the standard of repair required?

Often, repair covenants are not strictly enforced until the lease comes to an end, and the tenant moves out and fails to deliver up the premises in good repair. A tenant is not obliged to return new and different premises to the landlord than that which he took possession of at the beginning of the lease. Repair, as opposed to perfection, is the test. As stated by Cummings J. (as he then was) in *Homestar Holdings Ltd. v. Old Country Inn Ltd.* (1986), 8 B.C.L.R. (2d) 211 (S.C.) at p. 226:

Clearly the duty imposed is a reasonable one, as the cases cited by both the plaintiff and the defendant indicate. Both quote in their argument the statement in *Royal Trust Co. v. R*. [1924] Ex. C.R. 121 at 125; Repair and not perfection is the test.

In *Manchester v. Dixie Cup Company (Canada) Ltd*., [1952] 1 D.L.R. 19, the Ontario Court of Appeal interpreted a covenant which required the lessee to "well and sufficiently repair, maintain and keep...in good and substantial repair...reasonable wear and tear and damage by fire, lightning and tempest only excepted." At page 31 of that decision, the Court states:

Therefore, the covenant with which we are here concerned cannot be construed as imposing on the tenant a duty to put the premises in a state of good and substantial repair. The respondent's duty under this covenant was to keep the premises in the state of repair in which they were at the commencement of the

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term, excepting only such non-repair as might be caused during the term by reasonable wear and tear, fire, lighting and/or tempest.

In *Stief Ltd. v. MacDonald Pontiac Buick GMC Ltd.* (1983), 44 N.B.R. (2d) 394, the New Brunswick Court of Queen's Bench reiterated the point that the tenant's obligation is to keep the premises in the state of repair and condition in which they were at the time when the tenant took possession.

A general covenant to repair is construed having reference to the condition of the premises at the time when the covenant begins to operate. For a tenant, the covenant begins to operate at the commencement of the lease term. For an assignee, however, the covenant only begins to operate as of the date of the assignment. The assignee's obligation to repair only runs from the date of the assignment.[6]

2. What is the landlord's remedy for breach of a repair covenant?

The basic measure of damages for breach of a covenant to restore leased premises to their original condition on the determination of a lease is the cost necessary to put the premises into the state of repair in which they should have been left.[7]

Where a tenant covenants to deliver up the premises in good repair at the end of the lease term, but fails to do so, the landlord is entitled not only to the cost of putting the premises in repair, but is also entitled to compensation for the inability to use the premises while repairs are underway.[8]

In *Church of Scientology of B.C. v. Ahmed* (1983), 44 B.C.L.R. 297 (B.C.S.C.), the court concluded that the measure of damages for a breach of a covenant to repair or restore the premises was the actual cost of repair or restoration, rather than any diminution in value caused by the failure to repair or restore. In that case, the court substantially discounted damages to reflect the rundown condition of the premises at the commencement of the lease term.

In some cases, the tenant may be able to claim an equitable set-off against the landlord's damages, to the extent that the tenant may have spent money to improve and expand the premises.[9] In *Norbury*, there was no clause in the lease which stated that improvements made by the tenant became the property of the landlord at the end of the lease. In the absence of an equitable set-off or special circumstances, a tenant who builds upon or improves the leased property cannot compel the landlord to compensate him or her or prevent the landlord from possession of the improvements at the end of the tenancy.[10]

In some cases, the cost of repair claimable against the tenant may be discounted if the effect of the repairs is to put the premises in better condition than they were at the commencement of the lease term. The level

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of discount generally depends on the extent of the improvement in the condition of the premises from the beginning to the end of the lease term, after repairs. If the repairs do not improve the condition of the premises, but merely put the premises back into the same condition they were in at the beginning of the lease term, then there should be no global discount to the cost of repair.[11]

Unless the lease stipulates a right of re-entry on breach of the covenant to repair, the law will generally limit the landlord's remedy to damages.

3. When is repair a landlord's responsibility?

In the absence of a positive covenant from the landlord to repair certain items, the landlord has no repair obligations even for those items which are specifically excluded from the tenant's responsibility. For instance, if the tenant's repair obligation contains a specific exception for "reasonable wear and tear" (see, for example, covenant #13, Schedule 4 to the *Land Transfer Form Act*) then the tenant is not obligated to repair those items but there is no express obligation requiring the landlord to do so either. If a tenant wants to ensure that the landlord takes care of structural repairs, then it should specify that obligation in the lease.

B. Reasonable Wear and Tear Excepted:

"A covenant to repair during the term of the lease may be qualified by an exception for 'reasonable wear and tear'".[12] The concept of reasonable wear and tear was explained by Talbot J. in *Haskell v. Marlow*, [1928] 2 K.B. 45 (Eng. K.B.) at pages 58-59[13]:

The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition but is not liable for what is due for reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repairs is alleged and proved in fact, it lies on the tenant to show that it comes from within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences; but, if he does nothing and in the result more and more water gets in, the roof and walls decay and ultimately the top

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floor or the whole house becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, and that therefore he is not liable under his obligation to keep the house in good repair and condition. In such a case the want of repair is not in truth caused by wear and tear. For the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of defect is caused by reasonable wear and tear, and the tenant is not liable in respect of it.

In *Regis Property Co. Ltd. v. Dudley*, [1959] A.C. 370 (H.L), Lord Denning accepted the reasoning in *Haskell*, and stated:

I have never understood that in an ordinary house a "fair wear and tear" exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are necessary to stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for this slate coming off but he ought to put in another one to prevent further damage.

Thus, the exception for reasonable wear and tear does not absolve a tenant from the obligation under the covenant to protect against and repair damage arising as a consequence of the wear and tear. A tenant Is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear, from producing others which wear and tear would not directly produce.

If the covenant to leave the premises "in good repair" doesn't contain the express exception for normal wear and tear, then the exception won't be implied: Wat*erfield v. Northwest Wholesale Co.* (1995), 102 Man. R. (2d) 4 (Man. C.A.). In the absence of an exclusion for reasonable wear and tear items, the tenant in the *Waterfield* decision was responsible for repairing holes in walls caused by nails, screws and hooks.

C. Covenant Not to Contaminate:

Although environmental issues may be covered by the implied covenant to return the premises uncontaminated, discussed below, it is prudent for a lease to provide that a tenant "will not bring, or leave, harmful materials on the premises and that the tenant will comply with all environmental laws."[14]

A term should be included to expressly include the failure to remediate contamination during earlier lease terms as a default under the current lease. Further, a term should provide that the covenant will survive the

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termination or expiration of a lease. These terms would allow a landlord to terminate a lease for breach if a tenant refuses to remediate environmental contamination.[15]

D. Covenants Upon Renewal of Lease:

It is prudent to include a term in the lease ensuring that all obligations relate back to the condition of the premises as of the date of original occupancy. In *O'Connor*, *supra*, the lease contained a term that stated:

Provided that after the term herein or any renewal thereof, the building must be reinstated to the condition existing at the time of original occupancy by the Lessee, at the Lessee's cost…

If the tenant decides to defer its repair obligations until it vacates the premises completely, such a clause would prevent it from arguing that it is only responsible to repair the premises to the condition commencing at the beginning of the most recent lease renewal.

II. IMPLIED LEASE COVENANTS:

A. Covenants Implied by Relationship of Landlord and Tenant:

At common law, in the absence of an express written term, there are two fundamental terms implied into a lease. First, the covenant of quiet enjoyment by landlord. Second, a covenant by the tenant to use the property in a proper and tenant-like manner by the tenant. There is also a third covenant that has recently been implied by the courts that, at the end of the term, the tenant will return the premises to the landlord uncontaminated.[16] These last two types of implied covenants can have a significant impact on a tenant's repair and restoration obligations.

1. Covenant to use the property in a tenant-like manner:

At common law, if there is no express covenant or agreement dealing with the matter, there is implied in every lease a covenant by the tenant to treat the premises in a "tenant-like manner." The covenant is implied as a matter of law from the relation of landlord and tenant.[17]

In *Warren v. Winterburn* (1907) 6 W.L.R. 498, Lampman, C.C.J. said:

To use in a tenant-like manner means to use in an ordinary and proper manner, or in the manner in which an ordinary man would use his own premises…

In *Warren v. Keen*, [1953] 2 All E.R. 1118, [1954] 1 Q.B. 15 (C.A.), Denning L.J. held that a tenant must repair

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damage caused wilfully or negligently, but beyond that, must only perform the tasks that a reasonable tenant would do:

But what does to use the premises in a tenant like manner mean? It can, I think, best be shown by some illustrations. The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently; and he must see that his family and guests do not damage it; and if they do, he must repair it. But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it.

2. Covenant to return the premises uncontaminated:

In today's commercial world, unless a lease provides otherwise, it is implied within a lease that lands are to be returned uncontaminated.[18] It is not clear from the case law, however, whether a covenant to return the premises uncontaminated is implied by the mere relationship of landlord tenant or by reason of the "business efficacy" test (discussed below) used by courts to imply terms into contracts. In *Progressive*, Loo J. quoted from the decision of Lutz J. in *Darmac* and implied a term into a commercial lease stipulating that, on the termination of the lease, the tenant would return the lands uncontaminated:

Lutz J., at page 17:

In my view, in today's commercial world, unless a lease provides otherwise, it is implied within a lease that lands are to be returned uncontaminated. Contaminated lands are not saleable lands. Perhaps, when this particular lease was entered, environmental concerns were minimal, but they have become prominent in recent years. Although environmental damage was not directly addressed when this lease was entered, the tenants are responsible for any contamination they cause.

I find that it was an implied term of the leases between the plaintiff and the defendant that on the termination of the leases, the defendant would return the lands uncontaminated.[19]

The decisions in *Progressive* and *Darmac* were applied in *O'Connor*, where Smith J. determined whether it was an implied term of a lease that, upon its expiry, the tenant would return the property and premises uncontaminated:

The question is whether a term that the premises would be returned uncontaminated is necessary to give

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business efficacy to the contract, such that it would go without saying and is inevitably necessary to give effect to the intentions of the parties.

Smith J. answered this question in the affirmative and concluded that such a term arose by implication in that decision. By referring to the "business efficacy" test in O'Connor, Smith J. seems to suggest the covenant is implied as a matter of contract law.

In *O'Connor*, it was further held that, although the tenant's covenants to maintain and leave in good repair were both qualified by the reasonable wear and tear exception, this exception did not allow a tenant to leave behind industrial waste.

B. Covenants Implied by the Law of Contract:

A commercial lease is not simply a conveyance, it is also a contract to which the law of contract applies.[20] As such, the principles of law governing the circumstances in which terms may be implied into agreements also apply to commercial leases. The most common statement of the law governing implied terms is taken from *Luxor (Eastborne), Ltd. v. Cooper* [1941] A.C. 108, [1941] 1 All. E.R. 33 (H.L.). Lord Wright stated at pages 52-53:

...There have been several general statements by high authorities on the power of the court to imply particular term in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which they have intended should govern their agreement, whether oral or in writing. It is well-recognized, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicted that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The intention must arise inevitably to give effect to the intention of the parties.

This passage has been cited with approval in *Olympic Industries Inc. v. McNeill* (1993), 86 B.C.L.R. (2d) 273 (C.A.) and in *Snarpen Contracting Ltd. v. Arbutus Bay Estates Ltd.* (1996), 75 B.C.A.C. 161 (B.C.C.A.).

In *Luxor*, Lord Wright (at p. 57) quoted Scrutton L.J. in *Reigate v. Union Manufacturing Co. (Ramsbottom)* [1918] 1 K.B. 592 (C.A.), who stated at p. 605:

The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in a business sense to give efficacy to the contract: that is, if it is such a

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term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case," they would have both replied, "Of course, so and so will happen: we did not trouble to say that it is too clear." Unless the court comes to such a conclusion as that, it ought not to imply a term which the parties have not expressed.

These cases focus on the "business efficacy" test for implying terms. A court can imply a term when it is obvious what the parties intended. In *Lyford v. Cargill Co. of Canada Ltd.*, [1943] 3 W.W.R. 81 (B.C.S.C), Farris J. referred to *Luxor* and stated, at p. 95:

To my mind this case establishes no new principle of law, and restates only that the principle that the Court cannot rewrite a contract by finding that the terms should be implied which should have been reasonably incorporated into the contract, and the Court can only imply terms in a contract (a) when it is obvious that it was the intention of the parties to include as part of the contract a certain term, or (b) where business efficacy demands that such term be implied.

The principles that emerge from these cases indicate that the court must only consider the intentions of both the parties when determining whether a term should be implied. The court must not consider what would be a better, more reasonable or more fair contract. The court's role is to interpret and not to construct the agreement. A term can be implied only where a court can confidently ascertain the intentions of the parties. A term cannot be implied if there are express terms dealing with the matter.

In *Morguard Bank of Canada v. Eagle Mgmt. Services Ltd.* (1985), 31 B.L.R. 183 (B.C.S.C), McLachlin J., as she then was, emphasized the idea that a term should not be implied if there is doubt about the intentions of the parties. At p. 189 she states:

What the Court seeks to do in adding a term of the contract is to give effect to the real intentions of the parties. Where that intention is not clear, the Court will refuse to imply a term, since to do so would be to make a new contract for the parties which either or both of them might not have agreed to had the omitted matter been drawn to their attention at the time of contracting. Moreover, the intention of the parties on the omitted matter must not be a matter of conjecture; it must emerge clearly from the document.[21]

III. STATUTORY COST RECOVERY ACTIONS:

Common law liability may arise where a party suffers damage to their person or property as a result of environmental contamination. The common law causes of action on which a land owner or landlord may rely to seek recovery of damage for such contamination include breach of contract (e.g. express or implied lease covenants), nuisance, trespass and negligence.

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In addition to the usual common law remedies for contamination, the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA") provides a source of recovery from persons deemed responsible for the costs of remediation of contaminated sites. As a result, the EMA has significant implications with respect to the liability of tenants and landlords of contaminated sites. The following sections will explore those implications in greater detail.

A. Legislative Overview:

On April 1, 1997, Part 4 of the *Waste Management Act*, R.S.B.C. 1996, c. 482 ("WMA"), was proclaimed in force. The WMA was intended to strengthen and extend the principal of polluter-pay – the notion that a person who has contaminated or contributed to the contamination of real property should bear the costs of remediation.[22] The EMA repealed and replaced the WMA on July 8, 2004. The sections of the WMA and EMA relevant to this paper have different numbers but otherwise have not substantially changed.[23]

The purposes of the EMA were summarized by Gray J. in *Gehring v. Chevron Canada Ltd.*, [2006] B.C.J. No. 2880 (S.C.) 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 has created a new civil cause of action,[24] and further, has implemented a scheme which casts a wide net over parties responsible for the costs of contamination.[25]

The new cause of action, known as a 'cost recovery action', is established pursuant to s. 47(5) of the EMA and allows a person to recover the reasonably incurred costs of remediation from a "responsible person".[26] In order for those costs 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*[27] (the "CSR"), and the remediation costs must have already been incurred by the plaintiff.[28] Section 47(1) of the EMA provides that any person 'responsible' for contamination is absolutely, retroactively and jointly and separately liable to any person or government body for the reasonably incurred costs of remediation. Landlords and tenants should also be aware that s. 48 of the EMA permits a director of waste management to issue a remediation order to any person responsible for the contamination of a site.

Section 45 of the EMA sets out the categories of persons who are responsible for the remediation of a contaminated site. These persons include:

· a current or previous owner or operator of a site or a site from which a contaminating substance migrated;

· a producer or transporter of a substance who caused a site to become a contaminated site;

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· a producer or transporter of a substance who caused a substance to migrate to a contaminated site.

Section 46 of the EMA and sections 19-30, 32 and 33 of the CSR contain various exceptions to persons responsible for remediation of a contaminated site. Generally, these exceptions will apply to innocent purchasers/tenants of already contaminated sites and to owners/landlords whose sites become contaminated through no fault of their own. These exceptions are discussed in greater detail below.

Section 39 of the EMA defines an "owner" and an "operator". An "owner" is a *person* who is in possession, has the right of control, or occupies or controls the use of real property, including a person who has an estate or interest, legal or equitable, in the real property. An "operator" is a *person* who is or was in control of or responsible for any operation located at a contaminated site. A "person" is defined by the EMA to include a government body and any director, officer, employee or agent of a person or government body. Through the combined operation of responsible persons in s. 45, the retroactive liability provisions in s. 47, and the definitions of "owner", "operator", and "person" in s. 39, the EMA casts a wide net over persons who may be liable for the costs of remediation of contaminated sites.

B. Application of EMA and CSR to Landlord-Tenant Situations:

1. Holding tenants liable for remediation:

Typically, it will be property owners who seek to recover the costs of remediation from current or previous tenants. After all, owners, as opposed to tenants, have the greatest legal interest in a contaminated site. The statutory cost recovery action provides landlords with a useful tool to recover those remediation costs from tenants deemed to be responsible persons under the EMA.

(a) tenants as current or previous operators:

Pursuant to ss. 45(1)(a) and (b) and 39(1) of the EMA, a current or previous tenant may be deemed a responsible person for the costs of remediating a contaminated site if they are "a person who is or was in control of or responsible for any operation located at a contaminated site". Further, the current or previous tenant must not fit within an exemption under s. 46 EMA (discussed below). In *Beazer East, Inc. v. British Columbia (Environmental Appeal Board)*, [2000] B.C.J. No. 2358 ("*Beazer*"), the B.C. Supreme Court held that the words "in control of" related to factual control of "any operation" on the contaminated site and that there was no reason to give the words a restricted meaning so as to require there to be actual control of day to day operations. Given this broad interpretation, and given the fact that virtually all tenants control operations on their leased premises, the EMA casts a wide net of potential liability over current and previous

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tenants who are operating on a landlord's property.

It is worth emphasizing that the cost recovery action permits landlords to go back in time to recover from previous tenants, whose lease terms have long since expired, provided those tenants do not fit within an exception to persons responsible for the costs of remediation under s. 46 of the EMA.

(b) tenants as current or previous owners:

One does not normally think of a tenant as an owner. However, the decision of *Beazer East, Inc. v. British Columbia (Ministry of Environment, Lands and Parks)*, [2000] B.C.E.A. No. 15 (B.C.E.A.B.) indicates that ownership is not restricted to legal titleholders. In the decision, the British Columbia Environmental Appeal Board held that a former tenant of CNR was a former "owner" as defined in the EMA and thus a responsible person for the costs of remediation. While unintuitive, this finding is not particularly surprising given the broad definition of "owner" in the EMA; i.e., a person who is in possession, has the right of control, or occupies or controls the use of real property. Given this definition, most tenants will satisfy the definition of "owner" as enacted in the EMA.

Given the above, it is clear that a tenant can be an owner under the EMA. This is probably not significant given that a tenant can, alternatively, be found liable as an operator. Only when a tenant is not "in control of or responsible for any operation located at the contaminated site", but still maintains possession, occupation, use or a right of control, will it be necessary for a landlord to rely on the definition of owner, as opposed to operator, in order to attribute liability to tenants.

(c) parent of tenant as current or previous owner or operator:

Given that tenants can attract liability under the EMA as "owners", it may be tempting for landlords to name a tenant's corporate parent as an "owner" or "operator", based on that parent's "right of control" over the leased premises. In determining whether the parent of a tenant is liable as an owner or operator, s. 35(5) of the CSR provides direction. It states that, in a cost recovery action, a corporation is not liable for the costs of remediation from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

(i) previous owner:

In *Beazer, supra*, the B.C. Supreme Court considered whether a parent corporation could be said to be an

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owner of a site by virtue of its "right of control" over shares of a subsidiary. The contaminated property was owned by CNR and had been leased to Atlantic, the operator of a wood treatment business. Beazer was the parent of Atlantic. The Ministry of Environment issued a remediation order under the EMA naming the owner, the tenant and the parent of the tenant as responsible persons. The parent argued that it was not an owner of the property because it did not have a right of control over the property through its subsidiary. Tysoe J. held that, while Beazer had the "ability" to control its subsidiary through shareholdings, it did not have the "right" over such control. To be a "right of control" within the meaning of the EMA, it must be a legally enforceable right. The right of a parent to control the shares of its subsidiary does not constitute a legally enforceable right to control or direct the use of the subsidiary's assets. For instance, Beazer's control over Atlantic's lease of CNR's property was not sufficient to constitute a legal right of control over the property. Thus, a parent's *de facto* control of a subsidiary through shareholdings does not amount to a legal right of control. Accordingly, the portion of the Board's decision finding Beazer to be a previous owner of the site was set aside.[29]

While the argument failed in *Beazer*, *supra*, a parent could still potentially be liable if the landlord, or other responsible person, established that the parent actually had some right of control over the actual property.

(ii) previous operator:

In *Beazer, supra*, the B.C. Supreme Court held that a parent corporation cannot be said to have "control of" or be "responsible for" an operation by virtue of its ownership of 100% of the shares of a subsidiary. It was held, further, that the words "in control of" in the definition of "operator" relate to factual control of "any operation" on the contaminated site and that there is no reason to give the words a restricted meaning so as to require that there be actual control of day to day operations.

In general terms, it is my view that the intention of the legislature was to include persons who made decisions or had the authority to make decisions with respect to any operation on the site. These are the persons who are potentially culpable because they were the ones who made or could have made decisions in relation to operations on the site, which may have included operations that caused or contributed to the contamination. A person who makes the decisions with respect to an operation is "in control" of the operation and a person who has the authority to make the decisions with respect to an operation is "responsible" for the operation. In my opinion, a person who is responsible for an operation is one who is accountable for the operation but the accountability is not necessarily legally enforceable.

I also believe in using the word "responsible", the Legislature intended to include persons who brought about an operation in the sense of causing the operation to be carried on or carried out. Such a person

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would be responsible for the operation because, but for the actions or decision of that person, the operation would not have been carried on or carried out.[30]

In determining that the parent had sufficient control and responsibility for operations at the site to be deemed a previous operator, the Court relied on the following categories of evidence: (i) financial control over the subsidiary, (ii) the organizational and decision-making structures that were in place, (iii) the control of the parent over the lease for the site, (iv) the signing of certain agreements, and (v) the involvement of the parent in the environmental affairs of the subsidiary.

Given the above, it is clear that a landlord will be more likely to succeed in establishing a parent as an operator as opposed to an owner. Ultimate success with respect to the former will depend on the facts of each case, and particularly, on the degree to which the parent exercises day to day control over the subsidiary. Consideration of s. 35(5) of the CSR will also be necessary. Establishing a parent as an operator, and therefore as a responsible person, may provide a valuable means of recovery for landlords with corporate tenants.

(d) tenants as producers of contamination:

Pursuant to s. 45(1)(c) of the EMA, tenants may be responsible persons for the remediation of a contaminated site if they have produced a substance which caused a site to become contaminated. In *O'Connor v. Fleck*, [2000] B.C.J. No. 1546 (SC), Smith J. held a former tenant that engaged in the operation of a brass and aluminium foundry to be a responsible person because the tenant was a contributor to the presence of the contamination at the premises.

2. Holding landlords liable for remediation:

Typically, it will be property owners who seek to recover the costs of remediation from current or previous tenants. However, there may be times where a current or previous tenant will seek contribution from current or previous landlords. Alternatively, where a current or previous tenant is sued by their current or previous landlord for the costs of remediation, the tenant will also have an interest in establishing the landlord as a responsible person. In both cases, establishing the current or former landlord as a responsible person may lessen the liability attributed to the tenant. The means by which a tenant may hold a previous owner liable under the EMA will most commonly be pursuant to s. 45(1)(a) or (b), as current or previous owners of a contaminated site.

Landlords should be aware that they may be held jointly and separately liable for contamination caused by their tenants should a remediation order be issued by a director of waste management. Pursuant to s. 29 of

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the CSR, owners will have no defence if:

(a) the owner voluntarily leased, rented or otherwise allowed use of the real property by another person,

(b) the owner knew or had a reasonable basis for knowing that the other person described in paragraph (a) planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site, and

(c) the person described in paragraph (a) used the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

In *O'Connor*, *supra*, for example, the owner/landlord sued a tenant for the costs of remediation under the WMA. While the tenant was the significant contributor to the contamination, it argued that the owner was also liable as a responsible person because he fell squarely within s. 29 of the CSR. That is, there was evidence to show that the owner had knowledge of the tenant's operations, he visited the site frequently, and he was familiar with the site. Smith J. refused to accept that the owner had no reasonable basis for knowing that the tenant's operations would cause the site to become a contaminated site. As a result, the owner was a responsible person despite taking no part in the actual production of contamination. However, the owner was not apportioned any liability based on s. 34 of the CSR. Section 34 provided that there may only be apportionment of liability to one or more responsible persons in an action or judgment, but that apportionment may be made only if it is justified by the evidence. The evidence in *O'Connor* did not justify apportionment because there was no evidence of contamination prior to the tenancy. Section 34 has since been repealed. Thus, had *O'Connor* been decided today, the owner may have been jointly and separately liable for the costs of remediation.

In *Gehring*, *supra*, the act of leasing a property to a commercial tenant was held to be an operation sufficient to attract liability as an "operator" under the EMA. Interestingly, none of the contamination occurred while the landlord owned the site, and none of the landlord's tenants were responsible for any contamination that occurred at the site. The contamination was, however, permitted to spread, and the landlord took no remedial steps to clean it. Because the landlord had already been deemed an "owner", the finding of "operator" had little effect. Nevertheless, *Gehring* indicates that landlords may be deemed responsible

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persons merely by act of leasing to commercial tenants.

3. Directors, officers and employees of current or previous landlord or tenant:

As explained above, a responsible person may include, among others, an "owner", an "operator", or a "person" who produced or transported a substance that caused a site to become contaminated. Section 39 of the EMA provides that an "owner" and "operator" is a "person". Section 39 defines "person" to include a director, officer, or employee. Section 35(4) of the CSR states that a director, officer, employee or agent will only be liable under s. 47(5) if the plaintiff can prove that the director, officer, employee or agent authorized or acquiesced in the activity which gave rise to the cost of remediation. Therefore, if a tenant or landlord can be classified as a responsible person under the EMA, other responsible persons may seek contribution from the directors of the tenant or landlord corporations provided the directors authorized or acquiesced in the activity giving rise to the cost of remediation.

In *Lawson v. British Columbia (Ministry of Water, Land and Air Pollution)*, [2001] B.C.E.A. No. 35, the B.C. Environmental Appeal Board considered whether a director or officer of a corporation could be deemed a responsible person under what is now s. 45 of the EMA for the purposes of a remediation order under what is now s. 48 of the EMA. While the decision in *Lawson* dealt with a remediation order, as opposed to a cost recovery action, the analysis as to responsible persons is the same. Lawson, the director of the former owner of a contaminated site, argued that he should not be liable for remediation because he did not cause the contamination. The Board reviewed the definition of owner, operator and person, and held that the definitions clearly indicate that owners and operators may be persons responsible for remediation, and that, through the definition of "person", owners and operators include directors and officers. With respect to s. 35(4) of the CSR, the Board held that the exemption only applies to the civil liability provisions set out in what is now section 47(5) of the EMA.[31] Thus, had Lawson been the subject of a cost recovery action, the plaintiff would have had the added burden of proving that Lawson permitted or acquiesced in the activity which gave rise to the contamination.

In *Gehring, supra*, the plaintiff purchased a property in 1992 which had been the site of various gas stations between 1940 and 1978. In 2004, the site was deemed contaminated. The plaintiff spent over $100,000 on remediation, and then sought contribution from other responsible persons through the cost recovery provisions in the EMA. The B.C. Supreme Court considered whether responsibility for the remediation of a contaminated site should be allocated amongst current and previous owners, previous operators, directors or employees of previous owners and operators, producers and transporters.[32] In her analysis, Gray J. affirmed that "person" includes any director of a person: "the definition of 'owner' is expanded to include

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not only a current or previous registered owner, but also a director and employee of a current or previous registered owner, so long as such an individual authorized, permitted, or acquiesced in the activity which gave rise to the cost of remediation.[33]

In *Gehring*, Gray J. found certain directors of previous operators to be responsible persons for carrying on the retail sale of gasoline at the property, which gave rise to the cost of remediation. The court also considered whether the director of a former owner of the property authorized, permitted, or acquiesced in the activity which gave rise to the cost of remediation. Gray J. held that none of the contamination occurred during the period of ownership by the owner, but that the gasoline nevertheless continued to seep and flow within the property during that period. Gray J. held, further, that the director acquiesced in the owner failing to take any steps to remove the contamination. In this regard, *Gehring* stands for the proposition that a director of an owner or operator will likely be deemed a responsible person under the EMA even if contamination did not occur during their ownership, occupancy or tenancy, provided they authorized, permitted, or acquiesced in omitting to remediate a contaminated site.

Gehring also stands for another, perhaps more controversial, principle. Gray J. held that a director and employee of a company, which had operated a gas station at the site between 1949 and 1963 and which had dissolved in 1970, was not liable because the company had ceased to exist: "The definition of 'owner' refers to the definition of 'person'. Neither definition refers to entities that have ceased to exist."[34] As support for this interpretation, Gray J. cites Newbury J.A.'s *obiter dicta* analysis in *British Columbia (Hydro and Power Authority) v. British Columbia (Environmental Appeal Board)*, [2003] B.C.J. No. 1773 at paras. 58-61, despite that decision being unanimously overturned at the Supreme Court of Canada. In *B.C. Hydro*, Newbury J.A. opined that a dissolved company cannot be a previous owner or operator of a site if it has been dissolved because the term "person" is not defined to include bodies corporate that no longer exist. Gray J. notes that, while not legally binding, Newbury J.A.'s *obiter* analysis is persuasive. If a tenant or landlord company has been dissolved, Gehring stands for the principle that its directors, officers and employees will not be responsible for the remediation of a contaminated site. This is surprising given the purposes of the EMA and its retroactive effect.

4. Dissolution of landlord or tenant companies:

Given the reasoning in *Gehring*, *supra*, it would seem that dissolved companies will not be responsible persons under the EMA. Given the current state of the law, some have casually commented that it might make sense to use single purpose companies to own, operate or lease a property.[35] Upon sale or termination of the lease, simply wind-up the company, and according to *Gehring*, no liability will flow to the company or to the directors, officers or employees. To avoid such outcomes, landlords may want to

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consider including lease provisions that will address these issues.

5. Amalgamation of landlord or tenant companies:

If a corporate tenant or landlord is found to be a responsible person under the EMA, the successor of that corporate entity will not be protected from liability through amalgamation with other entities. This was confirmed by the British Columbia Environmental Appeal Board in *Beazer*, *supra*, where the previous tenant of a contaminated site argued that it was not an owner or operator of the site because it had nothing to do with the site or any operation on the site. Instead, the previous tenant argued, it simply happened to amalgamate with the operator after the contamination had come to end. In rejecting the previous tenant's arguments, the Board relied on the Supreme Court of Canada decision in *R. v. Black & Decker Manufacturing Co. Ltd.* (1974), 43 D.L.R. (3d) 393. In *Black & Decker*, it was held that no company is created or extinguished on amalgamation and that the effect of an amalgamation is to blend and continue the amalgamating companies into the amalgamated company. It was also noted that the effect of the amalgamation will depend on the wording of the governing corporate legislation. Both B.C. and federal corporate legislation contain similar words to the effect that amalgamated companies continue as one.[36]

Tysoe J.'s reasoning in *Beazer* is supported by the dissenting opinion of Rowles J.A. in *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*, [2003] B.C.J. No. 1773 (CA), which was unanimously adopted at appeal to the Supreme Court of Canada.[37]

Given the above, landlords and tenants found to be responsible persons will not be absolved of liability simply by reason of an amalgamation.

6. Landlord and tenant exceptions from and defences to liability:

Section 46 of the EMA and ss. 19-30, 32 and 33 of the CSR contain various exceptions to persons responsible for remediation of a contaminated site. Generally, these exceptions apply to innocent purchasers/tenants of already contaminated sites and to owners/landlords whose sites become contaminated through no fault of their own.

Section 46(1)(d) of the EMA and s. 28 of the CSR together provide an innocent acquisition exemption to an owner/tenant of a contaminated site. An owner/tenant will not be liable where it can establish that the site was already contaminated upon acquisition, that the owner/tenant had no knowledge or reason to know or suspect that the site was a contaminated site, and the owner/tenant exercised due diligence in an effort to minimize potential liability.

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Section 46(1)(e) also provides a defence to an owner/tenant who acquires a site that is not contaminated, but which subsequently becomes contaminated through no fault of the owner/tenant. Owners seeking contribution from tenants who cause contamination should be aware that this defence may be defeated by operation of s. 29 CSR, summarized above.

Section 35(1) of the CSR provides that a defendant named in a cost recovery action under s. 47(5) of the EMA may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

As noted above, s. 35(4) and (5) provides a defence to directors, officers, employees, agents, and parent corporations provided they did not authorize, permit or acquiesce in the activity which gave rise to the costs of remediation.

C. Limitation Periods:

1. 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:

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].[38]

2. 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

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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 have recovered those costs through its cost recovery action.[39]

In *B.C. Hydro*, *supra*, 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.[40] 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.[41]

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 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 1993, 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 a triggering event for a cost recovery action occurs; 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.

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- 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 would apply.[42] 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 filed with the City Clerk within two months from the date on which damage was sustained.[43] 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.

D. Costs that Can be Recovered:

1. Reasonable costs:

Section 47(1) of the EMA provides that persons responsible for remediation will be liable for reasonably incurred costs of remediation. Section 47(3) states that "costs of remediation" means all costs of remediation and includes costs of preparing a site profile, costs of carrying out a site investigation and preparing a report, legal and consulting costs associated with seeking contributions from other responsible persons, and fees imposed.

In *Canadian National Railway Co. v. A.B.C. Recycling Ltd.,* [2005] B.C.J. No. 982 (SC), virtually all of the plaintiffs remediation costs were held to be reasonable. Kirkpatrick J. held that a property owner cannot be faulted for adopting a careful and cautious approach to remediation. This decision is worth referring to for a detailed analysis of what remediation costs are reasonable.

2. Legal costs:

In *Canadian National Railway Co. v. A.B.C. Recycling Ltd.,* [2005] B.C.J. No. 2398 (SC), Kirkpatrick J. heard and decided on further submissions as to the manner in which legal costs are to be assessed pursuant to s. 47(3)(c). Kirkpatrick J. held that legal costs in a cost recovery action are to be assessed on a solicitor-client cost basis. This was overturned by the B.C. Court of Appeal, which held that costs in a cost recovery action are to be assessed on a party-and-party cost basis.[44]

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APPENDIX A

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APPENDIX B – LEGISLATION

Environmental Management Act, S.B.C. 2003, c. 53, Part 4 – Contaminated Site Remediation.

Contaminated Sites Regulation, B.C. Reg 375/96, Part 7 – Liability.

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[1] *Holman v. Knox* (1911), 3 D.L.R. 207 (Ont. C.A).

[2] E.K. Williams, *Williams & Rhodes Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988) at 11-1.

[3] *Standen v. Christmas* (1847), 116 E.R. 53, 10 Q.B. 135.

[4] R.S.B.C. 1996, c. 252.

[5] See covenant #14 of Schedule 4 to the *Land Transfer Form Act*.

[6] *Walker v. Hatton* (1842), 152 E.R. 462.

[7] *Buscombe v. Starke*, 30 D.L.R. 736, [1917] 1 W.W.R. 205 (B.C.C.A.), at p. 206 [***Buscombe***]; *Norbury Sudbury Ltd. v. Noront Steel* (1981) Ltd. (1984), 11 D.L.R. (4th) 686 (Ont. H.C.), at p. 698 [***Norbury***].

[8] *Bucombe, supra* note 7; *O'Connor v. Fleck* (2000), 79 B.C.L.R. (3d) 280 (B.C.S.C) [***O'Connor***]. See also *Duckworth Investments Ltd. v. Newfoundland Telephone Co.* (1983), 43 Nfld. & P.E.I.R. 341 (Nfld. T.D.) at page 348 and *Darmac Credit Corp. v. Great Western Containers Inc.* (1994), 163 A.R. 10 (Alta. Q.B.) at 24.

[9] *Norbury, supra*, note 7.

[10] *Dodds-Parker v. White* (1985), 51 Nfld. & P.E.I.R. 250 (Nfld. T.D.) at 254-255.

[11] *Buscombe*, *supra*, note 7.

[12] Richard Olson, *A Commercial Tenancy Handbook*, (Toronto: Carswell, 2004) at 6-33 [***Olson***].

[13] [***Haskell***].

[14] Olson, *supra* note 12, at 3-62.

[15] *Ibid*., at 3-63.

[16] *O'Connor*; *supra* note 8; *Darmac Credit Corp. v. Great Western Containers Inc*., (1994), 163 A.R. 10 (Alta. Q.B.) at 23, [1994] A.J. No. 914 [***Darmac***]; *Progressive Enterprises Ltd. v. Cascade Lead Products Ltd*. [1997] Civ. LD. 50 (B.C.S.C.).

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[17] *Marsden v. Edward Hayes Ltd.* [1927] 2 K.B. 1 (C.A.).

[18] *Darmac, supra* note 16; *Progressive Enterprises Ltd. v. Cascade Lead Products Ltd.*, [1996] B.C.J. No. 2473 (B.C.S.C.) at para. 33 [***Progressive***].

[19] *Progressive, supra* note 8 at 18.

[20] *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [1971] S.C.R. 562 (S.C.C.).

[21] Approved in *International Paper Industries Ltd. v. Top Line Industries Inc. (*1996), 20 B.C.L.R. (3d) 41 (B.C.C.A.).

[22] *British Columbia (Hydro and Power Authority) v. British Columbia (Environmental Appeal Board)*, [2003] B.C.J. No. 1773 (CA) at para. 1.

[23] See Legislative Conversion Table at Appendix A for section number changes between WMA and EMA.

[24] *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, [2005] B.C.J. No. 940 (SC) at para. 20.

[25] *Beazer East, Inc. v. British Columbia (Environmental Appeal Board)*, [2000] B.C.J. No. 2358 (SC) at para. 168.

[26] Section 47 and other relevant sections of the EMA and Contaminated Sites Regulation are included in their entirety at Appendix B.

[27] B.C. Reg 375/96 and amendments.

[28] *Swamy v. Tham Demolition Ltd.*, [2001] B.C.J. No. 721 (SC) at para. 26.

[29] At paras. 95-98.

[30] At paras. 110 and 111.

[31] At para. 131.

[32] For a useful and more general summary of *Gehring*, see Nicholas R. Hughes' article "Contaminated Site Update: Innocent Purchaser Responsible, Gasoline Manufacturer Not" online at <http://www.mccarthy.ca/article_detail.aspx?id=3386>

[33] At para. 50 and 51.

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[34] At para. 52 and 53.

[35] For example, see Hughes, *supra* note 11.

[36] *Business Corporations Act*, S.B.C. 2002, c. 57, s. 269 and *Canada Business Corporations Act*, S.C. 1985, c. C-44 s. 181.

[37] [2005] S.C.J. No. 2.

[38] At para. 66.

[39] See para. 64.

[40] At para. 65.

[41] At para. 66.

[42] William K. McNaughton, "Cost Recovery Actions for Prior Owners and Operators", Environmental Law Conference, Continuing Legal Education Society of B.C., (Vancouver: February 2004).

[43] *Vancouver Charter*, R.S.B.C. 1996, c. 55 s. 294.

[44] *Canadian National Railway Co. v. A.B.C. Recycling Ltd.*, [2006] B.C.J. No. 2186 (SC).

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