CONTAMINATED SITES: LIABILITY FOR REMEDIATION

KNOW THE RISKS, MANAGE THE RISKS

NOVEMBER 30, 2012

Christina Reed

CONTAMINATED SITES: LIABILITY FOR REMEDIATION

KNOW THE RISKS, MANAGE THE RISKS

I. INTRODUCTION

Any local government that owns or occupies land as a landowner, tenant or occupier has exposure to liability for environmental contamination. These risks do not always terminate when ownership or occupation of a contaminated site has concluded. The purpose of this seminar paper is to provide an overview of the risks and liabilities associated with ownership and occupation of contaminated or possibly contaminated land in British Columbia by local governments.

This paper will leave aside the question of producing and transporting hazardous substances, (although local governments engage in these acts through garbage collection and sewer services), but will instead focus on the routine corporate actions of buying, holding, selling and renting land.

II. SOURCES AND SCOPE OF POTENTIAL LIABILITY

There are a number of legal obligations imposed on owners and occupiers of contaminated sites in British Columbia, both under statute and common law. These responsibilities are not always extinguished on the property being transferred to a new owner.

A. Under the Environmental Management Act

The main source of environmental obligations and liability imposed on current and former owners and occupiers of real property in British Columbia is the *Environmental Management Act*. Together with its regulations, the EMA defines various kinds of hazardous wastes, and it regulates the release, storage, disposal and transportation of hazardous wastes. It also contains a complete regime for identifying, categorizing, and requiring remediation of land and water contaminated with hazardous wastes, and identifying parties responsible for the costs of remediation. The Ministry of Environment oversees compliance with the many requirements contained in this statute and its regulations, through designated officials described as "Directors" under the EMA.

Under section 1 (1) of the EMA, "remediation" is defined as an action to eliminate, limit, correct, counteract, mitigate or remove any hazardous substance or its adverse effects on the environment or human health, and includes the investigations, reports and plans required to implement remediation of a property. This definition is broad and encompasses many activities from site investigation, to site clean-up according one of several methods of remediation as recommended by a qualified environmental consultant (called an "approved professional"

under the EMA), to verification that the clean-up complies with the requirements of the EMA, applicable standards, and the requirements imposed by a Director.

The following is a summary of the salient points of the legislation, but the current legislation and regulations should always be consulted directly.

1. Who are 'responsible persons'?

The EMA states that a person can bring an action against a 'responsible person' for contribution to remediation costs. A Director also issues an order against a 'responsible person' requiring actual remediation of a property or contribution to remediation costs.

Section 45 of the EMA defines responsible persons for costs of remediation in relation to a contaminated site broadly: "a current or previous owner" or "operator" of a contaminated site or a site from which a contaminating substance has migrated; and a "producer" or "transporter" of a substance that has caused the site or a neighbouring site to become contaminated.

"Owner" is defined as a "person" who is in possession, has the right of control, occupies or controls the use of, or has an estate or interest, legal or equitable, in the contaminated site (s. 35 EMA).

"Operator" is defined as "person" who is in control of or responsible for <u>any</u> operation at a contaminated site (s. 35 EMA).

"Person" is defined as including a governmental body and any director, officer, employee or agent of a person or government body (s. 35 EMA).

The categories of responsible persons are very broad because the statute was drafted with the goal of "making polluters pay". The statute casts a broad net of liability, but then includes a number of circumstances where those persons are exempted from liability. Therefore, the EMA, its regulations and the case law that interprets these exemptions all need to be considered on a case-by-case basis to see if a local government is or is not a responsible person in any given context. These exemptions include (this is not an exhaustive list):

- Local governments whose connection with the contaminated site is limited to exercising regulatory authority over the contaminated site, carrying out remediation of a contaminated site or providing advice or information with respect to the contaminated site or activities on it (exception from the "operator" definition in s. 39(2) EMA).

- Owners and operators of the site who owned or operated the site when it was not a contaminated site and did not dispose of, handle or treat a substance that, in whole or in part, caused the site to become a contaminated site (s. 46(1)(e) EMA).

- The "innocent purchaser" exemption: "an owner or operator who establishes that

> (i) at the time the person became an owner or operator of the site,
>
> (A) the site was a contaminated site,
>
> (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
>
> (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
>
> (ii) if the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
>
> (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site" (s. 46(1)(d) EMA).

In order to take advantage of this exemption category, a local government would have to meet each of the above criteria. For example, when deciding whether a person made "all appropriate inquiries", the Director or a court would consider the personal knowledge of the previous owner or operator of time of site acquisition, the relationship of the price to the value of the site if it were uncontaminated, commonly known information about the property, and the feasibility of detecting any contamination by appropriate inspection.

- A government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body contributed to the contamination of the site (s. 46(1)(g) EMA).

- A government body that possesses, owns, or operates a road, highway or right of way for sewer or water, except if the government body placed or deposited contamination in those places (s. 46(1)(l) and (2) EMA).

- A person who is a current or previous owner of a statutory right of way, section 219 covenant, restrictive covenant or easement on the contaminated site, so long as that

person is able to establish that the use of the site did not result in contamination (section 22 of the Contaminated Sites Regulation ("CSR").

- With respect to directors and officers of a responsible person, s. 35(4) of the CSR provides that they cannot become liable for the costs of remediation unless they themselves have "authorized, permitted, or acquiesced in the activity which gave rise to the cost of remediation".

Anyone who wants to establish that they are not a responsible person under an exemption has the burden to proving all the above elements of the exemption on the balance of probabilities.

Further, section 50 of the EMA creates a category of person called a "minor contributor", being a responsible person who can demonstrate that 1) only a minor portion of the contamination present at a contaminated site can be attributed to that person, 2) no or minor remediation costs are required as a result of the contamination attributable to that person, and 3) in all circumstances the application of joint and separate liability to that person would be unduly harsh. A person applying to the Director to be considered as a minor contributor in respect to a site must provide full information to the Director with respect to the condition of the site on the dates when applicant was the owner or operator of the site, any and all activities and land uses carried on at the site, the nature and quantity of contamination at the site that could be attributable to the applicant, all measures taken by the applicant to exercise due diligence, and all measures taken by the applicant to prevent or remediate contamination.

To sum up, any person who is a responsible person under the EMA (an owner, operator, producer or transporter), but does not fit into an exception category or cannot be classified as a minor contributor under section 50, is liable for the cost of remediating a contaminated site.

2. What is a "Contaminated Site"?

A contaminated site is an area of land in which the soil or any groundwater or surface water contains hazardous waste or other substance prescribed by the EMA or its regulations in quantities or concentrations exceeding prescribed amounts or exceeding risk-based criteria (section 39(1) EMA). The Director has authority to determine whether a site is a contaminated site, as well as determining the boundaries of a contaminated site (section 44 EMA). In making that determination, the Director must follow various criteria for contamination levels of any given substance according to land use type, groundwater qualities, surface water quality, and concentrations of regulated substances on the site, all of which are set out in the regulations to the EMA. For example, if a property is used for the primary purpose of residential housing, or is a multi-family dwelling or institutional facility such as a school, hospital, prison or community centre, the property is subject to "residential land use" standards and the concentration of hazardous substances on the property must not exceed the numerical 'ceilings' for various contaminating substances that are allowed for residential properties under the CSR. The standards are also contextual to the local background concentration of a regulated substance

that may naturally occur in the environment. The intention of the Ministry in bringing the EMA into effect was to have contextual standards sensitive to the actual or probable risk that any given amount of contamination would or be likely to harm people, animals and the environment.

Generally, a site must be determined to be a contaminated site before the other processes for remediation under the EMA can take effect. If a site has not yet been determined to be a contaminated site, but the owner goes to court to seek contribution for remediation costs from other responsible persons, the court can make a determination whether a site is a contaminated site in the context of that litigation (section 47(8) EMA).

(a) Site Profiles

A site profile is a standardized form that requires information about past and present users of the site as well as basic land description. The site profile form is a schedule to the Contaminated Site Regulation. There are several points at which an owner may be required to prepare a site profile, such as:

Upon Transfer: a seller of real property who knows or reasonably should know that the property has been used for a prescribed purpose, such as a prescribed industrial or commercial purpose, must provide a site profile to the prospective purchaser of the property and to the Director.

At subdivision: the Approving Officer is prohibited by section 85.1 of the *Land Title Act* from approving a subdivision until a site profile has been received by the Approving Officer from the owner and sent to the Director, or until the Director has otherwise indicated that any site contamination issues have been resolved. The Approving Officer may "opt out" of involvement in the contaminated sites program under section 4(4) of the CSR, which would exempt all subdivision applications in that local government's jurisdiction from this requirement.

Rezoning: Section 946.2 of the *Local Government Act* prohibits local governments from approving, with respect to land used for a prescribed industrial or commercial activity, an application for zoning, a development permit or a development variance permit, the removal of soil or a demolition permit for structures if the applicant has not provided the local government with a site profile in accordance with the requirements set out in s. 40 of the EMA.

Demolition of industrial use buildings: When an owner demolishes a building or structure or otherwise decommissions a site specified in the regulations (such as chemical, metal smelting, mining and milling industries, petroleum and natural gas drilling, processing, distribution and storage, transportation industries, waste disposal industries, and wood, pulp and paper industries), a site profile must be sent to the Director.

When required by the director: if a person owns or occupies land that in the opinion of the Director may be a contaminated site due to any past or current use on that property or neighbouring property (section 40 (8) EMA).

Whoever completes a site profile is responsible to the Ministry for the accuracy of the answers in that form. In the case of a local government being required to complete a site profile, a staff person or local government officer would fill it out on behalf of the local government, answering questions to the best of his or her knowledge and the corporate knowledge of the local government.

When a local government or Approving Officer receives a site profile as part of a development, the site profile must be reviewed within 15 days of receiving it in accordance with the requirements in the CSR, and if the property was used for a prescribed use, shows any "yes" answers in Sections IV to IX, or raises other "alarm bells" as set out in that Regulation, the local government or Approving Officer must forward the site profile to the Director.

Under section 43 of the EMA, the Ministry keeps a site registry of all site profiles, preliminary site investigations, orders, approvals, voluntary remediation agreements, and determinations of whether a site is a contaminated site available for access by the public through the BC Online website. The goal of the registry is to be a public document of all milestones in the screening, identifications and cleanup of all sites in the Ministry's records.

(b) Site investigations

If a potential source of contamination is identified in the site profile process, an owner may decide to follow-up by conducting a site investigation. Site investigations are used to assess the nature, extent and concentrations of any hazardous substances on the site relative to the environmental quality standards contained in the EMA and its regulations. A site investigation may also include planning work for remediation in the future.

There are generally two phases to site investigations as required by the CSR. Stage 1 (preliminary site investigation) requires collection of relevant site information, a review of historical records, site reconnaissance visits, and interviews with persons of interest. If a site profile or Stage 1 investigation reveals contamination, then a Stage 2 (detailed site investigation) is normally required. Stage 2 investigation requires sampling, field analysis and laboratory analysis to determine the general location and degree of any contamination on site (s. 58 CSR).

3. When is remediation required?

(a) by Ministry

Under the EMA, the Director has the power and discretion to make several important determinations and requirements:

- The Director may order a person to undertake a Stage 1 or Stage 2 investigation (detailed or preliminary site investigation under section 41 EMA), at that person's own cost.

- The Director may issue a remediation order to any responsible person, which can include the requirement to undertake remediation, or contribute, in cash or in kind, towards the cost of another person who has recently incurred costs of remediation (s. 48 EMA). The Director can require that remediation begin promptly, considering adverse effects, or potential adverse effects, on human health or the environment, and the likelihood that the responsible persons will not act expeditiously or satisfactorily when performing remediation works. These remediation orders are quite rare, but the Director will get involved if human health and migration of contamination are at issue.

- The Director may make a decision about who, among various responsible persons, may be subject to a remediation order under section 48(4) of the EMA.

These are all administrative decisions, which are appealable to the Environmental Appeal Board under Part 8 of the EMA.

(b) Owner initiated

An owner (or occupier) may choose to remediate any contamination on his or her lands voluntarily without a government requirement to do so. The owner must notify the Ministry on initiating independent remediation (section 54 EMA). When undertaking independent remediation, the owner must meet all requirements of the EMA and related regulations, such as identifying and addressing any existing and potential negative effects on human health or the environment.

The owner may also wish to enter into a voluntary remediation agreement with the Ministry (section 51 EMA), which would lead to greater Ministry involvement with the remediation process, such as Approval in Principle of a remediation plan, time schedules for remediation, etc. If the owner enters into the voluntary remediation agreement and if the owner performs the remediation works according to the terms of the agreement, the owner as a responsible person is discharged from further liability in respect of that site.

Under the EMA contribution process (described below), the anticipated costs of remediation are not subject to contribution rules, but rather only the actual costs that have been expended, for example, by carrying out the investigation, preparing a report, legal and consulting costs, fees imposed by a Director under the EMA, and actual costs of remediation. This means that the owner must first perform the remediation work, and then look for contribution from other responsible persons.

There is no positive obligation in the EMA to clean up one's property if neighboring properties are not affected and the health of residents and occupants is not negatively affected. However, the longer contamination remains on a site, the larger the potential cost of remediation due to migration. A larger portion of the remediation costs will be borne by a 'later' owner, even if not the original polluter, if he or she becomes aware of the contamination but fails to take timely steps to abate the expansion or migration of the contamination to neighboring properties (*Gehring* v. *Chevron Canada Ltd.* [2006] BCJ 2880 (S.C.))

4. Standards for remediation

Before remediating the property, the responsible person for remediation purposes, in consultation with a qualified environmental consultant, may elect to remediate according to either a numerical standard or according to a risk-based standard, applicable to the use or type of property, all as set out in the CSR. The numerical standard refers to a threshold concentration of allowable contaminants based on a sample testing. The risk-based standard is used when removing all contaminated materials is impossible or impractical because of physical, technological or financial constraints. In these cases, the contaminated substances are managed on site, under an approved plan to ensure they do not pose a hazard to human health or to the environment. The involvement of a qualified environmental consultant is nearly mandatory when attempting to use a risk-based approach to remediation.

Any relocation of contaminated soils is also heavily regulated by the CSR, whether transporting contaminated soil offsite for treatment at a facility authorized under the EMA to accept contaminated soil, or depositing the contaminated soil at a suitable deposit site.

5. Ministry Processes

The EMA and Ministry staff refer to various "legal instruments", which are administrative decisions and approvals that carry legal weight, and can be reviewed by the Environmental Appeal Board. The most common instruments are:

Determination – issued by a Director to confirm if a site is or is not a contaminated site, as described above. As part of the determination, the Director defines the boundaries of the site by legal descriptions of properties at issue and a plan.

An Approval in Principle is a Ministry instrument whereby the Director certifies his or her consent to a proposed site remediation plan, and concurs that the proposed site remediation plan will result in a site satisfying the requirements of the CSR.

A Voluntary Remediation Agreement is an agreement signed by the owner and the Ministry approving the conditions required to address contamination on a property. This agreement can include provisions for financial contribution and a plan for remediation acceptable to the Director. If a responsible person enters into and performs the requirements under a voluntary

remediation agreement, that responsible person is discharged from further liability in respect of the site, but other responsible persons not named in the agreement are not discharged from liability. Further, an agreement of this type can include a clause stating that the responsible person is not required to begin remediation for a specified period of time if the contaminated site does not present an imminent or significant threat to human health (based on anticipated human exposure) or the environment.

Certificate of Compliance – certification from the Director that a contaminated site has been remediated to the applicable numeric standard, or does not exceed acceptable risk levels according to the risk-based standard of remediation, or the site has an adequate risk management system in place for any remaining hazardous substances on site. Applications for a Certificate of Compliance must be submitted by a qualified environmental professional.

While each of these processes involves dealing with Ministry staff, even owners undertaking small independent remediation projects are advised to try to obtain one of these instruments from the Ministry. This is in order to certify compliance with Provincial legal requirements, improve the marketability of the property, help obtain financing for development, and limit future liability for remediation of the site.

6. Allocation of responsibility among responsible persons

Any responsible person who does not fit into an exception category or who is not a minor contributor is potentially liable for the cost of remediation of a contaminated site. According to the EMA, a responsible person is "absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site" (section 47(1)). Liability applies, despite a person's due diligence at the time, and even if no legislation was in place forbidding the introduction of the contaminating substance into the environment, and despite the terms of any cancelled, expired, abandoned or current permit or approval (section 47(4) EMA). Responsible persons are liable for clean-up of contamination that occurred in the past, even before the enactment of environmental laws such as the EMA. If there are several responsible persons in respect of a contaminated site, all those persons are liable to pay the entire cost, if other responsible persons cannot or will not pay their share. All of these liability principles apply whether remediation costs are incurred as a result of a government-issued remediation order or because an owner or occupier voluntarily remediates the site.

The "costs of remediation" include all costs of actual remediation, including the preparation of a site profile, any site investigations, qualified environmental consultant fees, legal costs associated with seeking contributions from other responsible persons, and fees imposed by the Director (section 47(3) EMA).

Actual remediation orders or determinations as to contribution from various responsible persons made by a Director are rare. Most remediation projects are small- to medium-sized

owner initiated projects. Section 47(5) of the EMA provides owners who initiated remediation the ability to apply directly to the courts to allocate responsibility and recover the costs of remediation from the other responsible persons in accordance with the principles of liability set out in the EMA. The court may rule on whether or not a person is a responsible party, whether all costs are reasonable costs that can be recovered, and what proportion of the costs should be allocated to the various responsible persons. This is a way of recovering some (or all) reasonably incurred costs of remediating their property and any neighbouring property affected by migration of contaminants. However, if the other responsible parties are impecunious or otherwise unavailable or unable to bear the costs of remediation, the owner will have to bear all remediation costs alone. Despite the goal of the EMA to make polluters pay for remediation costs, current owners, unless they fall under an exemption may find themselves responsible for remediation costs when other more culpable persons are not present or not able to pay when it becomes necessary to remediate the property. Even worse, proceeding with a court action to seek contribution from other responsible persons can be a lengthy and expensive undertaking for an owner who just paid to have property remediated, and full actual legal costs spent (special costs) may not be awarded as part of the costs of remediation.

Finally, responsible person should be aware that there is a monetary penalty for failing to comply with the Director's remediation order (section 115 EMA).

B. Common Law Liability

There are various causes of action that were available to owners and occupiers under the common law before the introduction of the EMA, and court action under those common law principles is still available despite the enactment of the EMA. These common law causes of action can be used by a landowner when there is contamination on a property but where the facts do not fit within the EMA regime. An example would be a property not falling within the definition of "contaminated site" under the EMA because the concentration of contaminants present is not high enough to trigger the requirements of the EMA (and therefore no basis for an owner-initiated cost recovery action). These common law remedies are limited and can be more difficult to prove than the elements required under the EMA processes. The potential remedies available to a plaintiff differ among these various causes of action, and are beyond the scope of this paper.

1. Rylands v. Fletcher

The rule in *Rylands v. Fletcher* stems from a UK case from 1868, making a defendant strictly liable for damage. This rule is available if:

- a defendant owner or occupier is found to have made a non-natural, special, unreasonable or extraordinary use of the land,

- the defendant brought or kept on his land anything that is likely to do mischief if it escapes,
- the substance in question in fact escaped, and
- damage was caused to the plaintiff's property as a result of the escape.

Municipalities are familiar with this rule having regard to a statutory defense in section 288 of the *Local Government Act* for cases based on nuisance or the rule in *Rylands v. Fletcher* if damages arise out of the breakdown of a sewer system or drainage system. This rule could also be used to impose liability on an owner who discovers contamination, but fails to abate that contamination resulting in migration of contaminants onto neighboring properties.

2. Nuisance

Nuisance is a type of harm that is suffered, rather than a kind of conduct that is forbidden. Generally, a nuisance is an unreasonable interference with the use and enjoyment of the plaintiff's land. This may be physical damage to the land or interference with the existence of a right to land, or injury to the health, comfort of convenience of the plaintiff. The plaintiff has the onus of proving actual damage through unreasonable interference with the use and enjoyment of land. Once that is shown, the onus of proof shifts to the defendant to prove that the defendant's use of the land, which directly or indirectly caused the harm, was reasonable.

3. Breach of Contract

This cause of action may be available if there is a contract between parties that was breached – such as a requirement to provide a site profile, or the requirement to provide a Certificate of Compliance confirming remediation of a contaminated site.

4. Negligent/intentional misrepresentation

A seller of real estate has a duty to ensure the accuracy of his or her representations to the prospective buyer regarding the condition of the property. A buyer will generally rely on the seller's representations, especially in the absence of any other direct source of information about the property. It is likely that in most cases such reliance will be found to be reasonable, especially for property that does not have an obvious industrial history. For example, if a seller of residential property makes an unqualified representation that there is no underground oil tank on a property, and an oil tank is later discovered, the seller will be liable, regardless of the seller's actual knowledge of the tank at the time of sale.

5. Failure to Warn

While a seller has no statutory duty to warn about an obvious physical defect in the property, the seller may nonetheless have a legal duty, under the common law, to warn the buyer of a

latent (that is, hidden) defect that the seller knows or ought to have known. A good summation of the law in this area is contained in *44601 B.C. Ltd.* v. *Ashcroft (Village)* [1998] B.C.J. 1964 (S.C.):

> Where a buyer knows of a latent defect but fails to disclose it to a buyer, the seller may be held liable for fraudulent misrepresentation. But there is no duty for a seller to disclose a patent defect. Patent defects are those which are discoverable by conducting a reasonable investigation of the premises and making reasonable inquiries. In the case of patent defects, the rule of caveat emptor strictly applies. Furthermore, buyers will be held to a fairly high standard of inspection.

Canadian case law shows that courts are willing to recognize a duty on a vendor to warn a prospective buyer of known defects, particularly defects which could pose a hazard to human health.

III. STRATEGIES FOR OWNERS, BUYERS AND SELLERS

To recap, under the EMA, past and present owners and occupiers of land are generally all responsible persons for the purpose of remediating contamination unless they fall into an exemption category or are classified as a minor contributor. A current owner, unless he or she falls under an exception, is responsible for remediation costs if more culpable persons are not present or are not able to pay to remediate the property. Further, the common law causes of action discussed about can be another source of liability for local governments buying, holding, and selling land.

Before making a remediation order allocating financial responsibility to various responsible parties, the Director will take into account several criteria to make distinctions among the parties. A court, asked to decide the matter in a cost recovery action under the EMA, will look to similar criteria:

(a) the price paid for the property by the person seeking cost recovery;

(b) the relative diligence of the responsible persons involved in the action;

(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that

caused the site to become contaminated;

(e) any remediation measures implemented and paid for by each of the persons in the action;

(f) other factors relevant to a fair and just allocation (s. 35 CSR).

Part of these factors will be a review of private agreements among the responsible persons respecting responsibility for remediation. An agreement cannot make one party officially released from "responsible person" status but, for example, the sale of land for a nominal amount may be viewed by the Director as a release of the seller from responsibility for clean-up costs. So prudence is required when drafting purchase and sale agreements, including representations and warranties between the buyer and seller because they are likely to be scrutinized by the Director or a court to determine what the buyer and seller thought was the condition of the property and how the parties intended to divide responsibility for past and present contamination. A private agreement is one factor that the Director or a court will consider, but the private agreement is not binding on either decision-maker.

In most cases, local governments will be selling land that is believed to be uncontaminated – but the local government has no environmental report or other proof of its clean condition.

In this case, the contract should state that the buyer has the right to inspect the land and investigate for contamination, subject to reasonable terms such as the buyer's responsibility to restore the land after the investigation and the buyer's responsibility to indemnify the local government for builders' liens, accidents, etc. Local governments should have a standard "license to investigate" agreement available for all its land sales or include these terms in the contract of purchase and sale.

If a buyer is choosing not to undertake an environmental investigation, it may be worthwhile for the local government to incur the expense of obtaining an environmental report to satisfy itself and the buyer that the land is not contaminated. The buyer should be willing to pay a higher purchase price knowing the land is clean. The buyer should be willing to indemnify the local government from all future claims for remediation not described in the report. Finally, the existence of this report should be proof that the local government was an "innocent owner" and thus not a responsible person.

From a seller's perspective, some other risk management strategies are:

- sell the property "as-is, where-is", so long as the seller has no actual knowledge or suspicion that the property is contaminated.
- expressly not give any representations or warranties as to the state of the property.

- make the buyer solely responsible for all contamination caused or occurring both before and after the closing date (presumably, the purchase price will reflect this allocation of responsibility).

From a buyer's perspective, some risk management strategies are:

- get a site profile from the seller and any environmental studies of the property in the seller's possession. (Remember that the EMA requires a seller to provide a site profile to the buyer if the seller is selling property that the seller knows or reasonably should know was used at any time for a prescribed industrial or commercial purpose or other prescribed purpose listed in the CSR).

- get representations and warranties from the seller regarding the historical uses of the property, the current uses of the property and the current condition of the property.

- make the seller financially responsible for remediation of all contamination caused or occurring before the closing date. Remember that if the buyer is responsible only for post-closing contamination, it may not be possible for contamination to be dated with reference to the closing date. If contamination is discovered years later, it may not be possible to confirm the contamination did not occur during or before the buyer's ownership of the land.

- Due diligence. Due diligence. Due diligence!

The local government should consider whether environmental insurance would be of benefit in each particular transaction. Environmental insurance is increasingly available at a reasonable cost.

IV. STRATEGIES FOR LANDLORDS AND TENANTS

All of the same issues that apply in the sale of land will apply when local governments lease land. However those same issues will be magnified because of the continuing connection of both parties to the land over the same period of time.

Because both parties are likely to be "responsible persons" under the EMA if contamination is discovered on the property, parties should take steps to 'benchmark' the actual environmental condition of the property before the lease is signed, and then ensure that the lease is drafted to comfortably limit one's exposure to environmental risk for past, present and future contamination of the property.

Generally speaking, it is in the landlord's interest to allocate to the tenant as much responsibility and liability as may be possible for contaminants that are present or released from the property (which may even include pre-existing contamination). Conversely, tenants

will seek to avoid liability for contamination, including any contaminants released by the tenant itself. After starting from these "best case scenario" positions, a lease agreement is generally a compromise, allocating risk and responsibility for testing, remediation, actual costs of remediation, and fulfilling statutory obligations among the parties. Typically, the lease will be drafted to show the tenant accepts liability for contaminants introduced by the tenant (and those for whom the tenant is legally responsible) during the term of the lease, and the landlord either accepts liability for any pre-existing contamination or is silent on the extent of the landlord's responsibility for contamination.

When a landlord is leasing land, it is essential that the lease contain a clause outlining the condition which the land must be returned to at the time that the tenant surrenders the lease, and that the tenant must clean up contaminants in the event that they are later discovered to have been released onto or migrating from the property. The parties will need to consider what contaminants and to what extent/standards the parties will be required to remediate at the end of the term. In order to make these decisions when drafting the lease, each party will need to have a good understanding of:

(a) The environmental condition of the property before the beginning of the lease, and if contaminants are present, in what concentrations and as a result of what conditions or activities

(b) What is the risk of contaminants being released during the term of the tenancy by the tenant or others, and what contaminants those could be

(c) What will the use of the property be after the tenancy and whether there is any environmental risk from that use

(d) If contaminants are discovered, how long and what is the process for remediation? What are the likely costs of remediating pre-existing contaminants and the contaminants released during the tenancy? What is the likely extent of remediation that will be required to meet current environmental standards? What will happen if the standards change in the future?

For example, if the lease is for an industrial property, and there is a high risk of contamination, it makes no sense for the lease to require clean-up every time a spill or release occurs; it may not make sense to require the tenant to remediate until after the tenancy has ended. All of the provisions of the lease regarding responsibility and liability for environmental remediation should fit the context of the property and the activities of the landlord and tenant.

If there is a possibility for contamination occurring during the lease term, the Landlord should consider requiring the tenant to obtain a Certificate of Compliance from the Ministry after remediation, if it is pragmatic and possible to do so. While this may provide some comfort to the landlord that the property meets current environmental standards, it is a lengthy and

expensive process for the tenant to attain one. The Ministry can even refuse to "sign off" on a Certificate of Compliance, or it can reopen a Certificate of Compliance to re-evaluate site conditions and compliance with the statute.

An indemnity clause, or reciprocal indemnity clauses, should also be considered to allocate environmental risk that may occur during or after the lease. The scope and terms of any indemnity will also need to be carefully considered depending on the factors described above. Indemnities can contain limits on a party's exposure to liability by expressly providing wording for a cap on the amount payable under the indemnity or a limit on the time during which the indemnity will be enforceable. Remember that an indemnity can only be enforced if the party that is required to indemnify the other has the money to pay for the indemnity.

All of these items must be negotiated and contained in the lease. If one party attempts to renegotiate or 'open up' the lease after it has been signed to add these types of clauses or start to shift environmental risk in other ways, and the other party objects, that other party can allege that the lease contract has been repudiated. Therefore, parties to leases should carefully consider these issues well before the start date of a lease. Experienced legal counsel and a qualified environmental consultant should be involved to assist in drafting the lease agreement and assessing the possibility of risk to the parties.