

CONTAMINATED SITES AND MIGRATION

**by
Richard E. Bereti
and
Frank L. Mandarino**

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I. INTRODUCTION

This paper discusses the *responsibility* and *liability* provisions of British Columbia's *Waste Management Act*¹ ("WMA") - carried over for the most part into the new *Environmental Management Act*² ("EMA") - from the perspective of victims of contamination due to migration from one property to another. Such victims are often neighbouring landowners or business operators, or perhaps neighbours to such neighbours, and so forth. Migration knows no property lines and can extend surprising distances, particularly where groundwater and surface water are impacted.

A truly *innocent* victim of migration wants to avoid spending money on a clean-up where the contamination on their land is present only because it migrated from a neighbouring property. However, where they are forced to clean up a site or they elect to do so, victims want to recover their costs.

II. OVERVIEW: THE WASTE MANAGEMENT ACT AND ENVIRONMENTAL MANAGEMENT ACT

Part 4 of the WMA, entitled "Contaminated Site Remediation," was proclaimed into force on April 1, 1997. The EMA received Third Reading in October of 2003 and is expected to come into force by the Spring of 2004.

The WMA provides two distinct avenues for which a *responsible person*, as defined in section 26.5 and 26.6 of the WMA (EMA, ss. 45 and 46, respectively) may be found responsible and/or liable for the contamination of a site.

The first avenue is found at section 27.1 of the WMA (EMA, s. 48) and the related provisions of the Contaminated Sites Regulation ("CSR"),³ which provide that a Manager may issue a *remediation order* to any *responsible person*. The second avenue is found in section 27(4) of the WMA (EMA, s. 47(5)), which provides a statutory cause of action for a *person* against one or more *responsible persons* where that person has incurred reasonable costs of remediation.

Alternatively, damages may be sought through various common law causes of action: trespass, nuisance, strict liability, negligence and the rule in *Rylands v Fletcher*. Contract provisions may also play a role, such as the indemnity provisions in a sale or lease agreement.

III. "CONTAMINATED SITE"

A. As Defined by the WMA

The determination of whether or not a site is contaminated is a trigger for many of the responsibility/liability provisions in the legislation. The distinction between responsibility and liability will be discussed below. Section 26(1) of the WMA defines *contaminated site* as an

¹ RSBC 1996, c. 482.

² RSBC 2003, c. 53 - Bill 57

³ B.C. Reg. 375/96, O.C. 1480/96

area in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contain:

- (a) a special waste, or
- (b) another prescribed substance

in quantities or concentrations exceeding the prescribed criteria, standards or conditions.⁴

Section 26.4 of the WMA provides that a Manager “may” determine whether a site is a contaminated site. Consequently, a Manager possesses considerable control over this key trigger.

However, the Manager’s discretion is governed by the WMA and CSR, which provide guidelines and procedures for determining what constitutes a contaminated site.⁵ Various standards and guidelines for remediation are contained in the CSR.⁶ The CSR provides the Manager with the discretion to rely on the advice of specified private sector professionals in assisting him with his determination as to whether or not a site is contaminated.⁷ The EMA will increase the involvement of such professionals in various aspects of the regulatory side of BC’s environmental legislation.

B. As Defined by the EMA

Under section 39 (1) of the EMA, the definition of *contaminated site* will be changed to read as follows:

“**contaminated site**” means an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

- (a) a hazardous waste, or
- (b) another prescribed substance

in quantities or concentrations exceeding prescribed risk based or numerical criteria or standards or conditions; [emphasis added]

The definition has been amended in the EMA to include the evaluation of sites according to *risk based* or *numerical criteria* guidelines. Notwithstanding that risk-based assessments occur now, this amendment is part of a re-focussed legislative intent to direct resources to the remediation of sites which present a real and substantial threat to human health and the environment, and to only undertake a specific remediation where the money spent is somewhat commensurate with the actual risk.

The proposed amendments to this regulatory system are discussed in detail in the Ministry’s Discussion Paper dated October 22, 2003, entitled “A New Contaminated Sites Regulatory

⁴ Subsection (b) is further defined in sections 11 and 12 of the CSR.

⁵ CSR, Part 5

⁶ CSR, Part 6

⁷ CSR, s. 15

Process – Investigation, Classification and Remediation Process Overview (the “Discussion Paper”).⁸

IV. RESPONSIBLE PERSONS

Once contamination has been established, the determination of liability, and specifically the determination of who is a *responsible person*, lies at the heart of the legislative scheme of the WMA. The relevant definitions are very broad.

Section 26(1) of the WMA (EMA, s. 39(1)) contains the following key definitions:

“person” includes government body and any director, officer, employee or agent of a person or government body;

“operator” means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a contaminated site, but does not include a secured creditor unless a secured creditor is described in section 26.5(3) [EMA, s. 45(3)];

“owner” means a person who is in possession of, has a right of control of, occupies or controls the use of real property, including, without limitation, a person who has an estate or legal interest, legal or equitable, in the real property, but does not include a secured creditor unless a secured creditor is described in section 26.5(3) [EMA, s. 45(3)];

“Responsibility,” as opposed to liability, leads to potential obligations under the WMA and opens one up to the exercise of discretion by the Ministry in simply getting a contaminated site cleaned up. If you’re responsible, the Manager has access to you (or more importantly your resources) to effect a given clean-up. Responsibility can also lead to liability, as any responsible person may be sued under s. 27(4) for their share of liability for the costs of clean-up.

Responsible persons may, however, avoid ultimate “liability” at a contaminated site. For example, a Manager may order a company to clean up a site, as a responsible person in the manager’s eyes, only to see the same company establish at the subsequent trial in the cost recovery action that it has no liability due to the court’s interpretation of a decades-old lease indemnity involving a third party. Similarly, one may be found ultimately liable for the costs of a given clean-up without ever having been found to be a responsible person by the Manager or by a judge at trial. An example of this is where liability is found to lie with a company that is not a responsible person but is captured by an environmental indemnity contained in the land’s purchase documents.

Section 26.5 of the WMA (EMA, s. 45) attaches responsibility to both current and previous *owners* and *operators*, as well as current and previous *producers* and *transporters* of a contaminating substance, and even certain secured creditors.⁹ In the B.C. Court of Appeal’s decision in *British Columbia (Hydro and Power Authority) v. British Columbia (Environmental Appeal Board)* (2003) B.C.L.R. (4th) 201, Madame Justice Newbury summarized the key statutory provisions relating to *responsible persons*, at page 218, as follows:

⁸ found on the Ministry’s website at http://wlapwww.gov.bc.ca/epd/waste_mgt_review/

⁹ See *O’Connor v. Fleck*, (2000) 79 B.C.L.R. (3d) 280 (S.C.) for a discussion regarding responsible persons in the context of landlord-tenant relations.

It will be recalled that the term “responsible person” is defined to mean the person described in section 26.5. Section 26.5(1) states:

- 26.5(1) subject to section 26.6, the following persons are responsible for remediation at a contaminated site:
- (a) a current owner or operator of the site;
 - (b) a previous owner or operator of the site;
 - (c) a person who
 - (i) produced a substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
 - (d) a person who
 - (i) transported or arranged for transport of a substance; and
 - (ii) by contract, agreement, or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
 - (e) a person who is in a class designated in the regulations as responsible for remediation.

Subsection (2) contains similar provisions defining “responsible person” in connection with property contaminated by the **migration** of a substance from elsewhere to the contaminated site. [emphasis added]

This last subsection of the WMA to which Madame Justice Newbury refers in the above quotation, reads as follows:

- (2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation at a contaminated site that was contaminated by **migration** of a substance to the contaminated site:
- (a) a current owner or operator of the site from which the substance migrated;
 - (b) a previous owner or operator of the site from which the substance migrated;
 - (c) a person who:
 - (i) produced the substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to **migrate** to the contaminated site;

- (d) a person who:
 - (i) transported or arranged for transport of the substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site. [emphasis added]

The WMA and EMA provide that a victim of migration can place, if not deflect, responsibility onto another party if it can be shown that the other party is in fact a *responsible person* because they are the source of the problem, as outlined in section 26.5 (2) of the WMA (EMA, s. 45). This course of action is in line with the court's discussion in *Beazer East Inc. v. British Columbia (Environmental Appeal Board)*, (2000) 84 B.C.L.R. (3d) 88 (S.C.), in which the legislative intent behind the determination of *responsible persons*, in the context of *operators*, is described as follows:

[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 who 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 the person who has the authority to make the decisions with respect to an operation is "responsible" for the operation. In my opinion, the person who is responsible for an operation is one who is accountable for an operation but the accountability is not necessarily legally enforceable.

I also believe in using the word "responsible," this legislature intended to include the person who brought about an operation in the sense of causing the operation to be carried on or carried out. Such a person would be responsible for the operation because, but for the action or decisions of that person, the operation may not have been carried on or carried out. This is consistent with the second definition of the word "responsibility" which I quoted above from the concise Oxford dictionary (namely "being the primary cause").¹⁰

V. PERSONS "NOT" RESPONSIBLE: THE EXEMPTIONS

The fact that the owner of the source property may be responsible for the contamination of their site pursuant to sections 26.5 (1) and (2) of the WMA (EMA, s. 45) may not necessarily prevent a finding that the victim of migration at a neighbouring property is also a *responsible person*. It may be the case that the victim of migration is not able to identify the person actually responsible for the migration of the contaminants, for example, or that the science is simply not clear as to the source. Therefore, the legislature created the exemption provisions found in section 26.5 (3) and 26.6 (1) (EMA, ss. 45 and 46, respectively) that may be used to shield the victim of migration.

The various exemptions found in section 26.6 (1) of the WMA (EMA, s. 46(1)), under the heading "Persons not responsible for remediation," include the following:

- 26.6 (1) The following persons are **not** responsible for remediation at a contaminated site:

¹⁰ at p. 120.

- ...
- (i) a person who owns or operates a contaminated site that was contaminated only by the **migration** of a substance from other real property not owned or operated by the person [emphasis added];

Although section 26.6(1)(i) of the WMA specifically provides an exemption for victims of migration, section 26.6(3) (EMA, s. 46(3)) requires that a party seeking to establish that he or she is not a *responsible person* has the burden of proving “all elements of the exemption on a balance of probabilities.” This can often be a challenge, from a scientific point of view, that can consume significant resources. However, if one can establish that the source is elsewhere, the exemption may carry the day.

VI. THE “REGULATORY CONSEQUENCES”

At page 219 of the Court of Appeal’s decision in *B.C. Hydro, supra*, Madame Justice Newbury provides a useful characterization of two key concepts found in the provisions of the WMA: “regulatory” and “financial” consequences. The Court explains them as follows:

The concept of “responsible person” or “responsibility” under Part 4 is, as the Deputy Director of Waste Management suggested in his factum, a statutory term of art. As he submitted, section 26.5 is not so much a definition section “as much as it is a detailed description (along with section 26.6) of the person subject to two distinct consequences, which collectively comprise “responsibility” in this novel statutory regime.” He characterizes the two consequences as “regulatory” - as described in section 27.1 - and “financial” - as described in section 27(1).

Remediation Orders - Regulatory

As with the Manager’s discretion to determine whether a site is contaminated under section 26.4 of the WMA (EMA, s. 44), section 27.1 of the WMA (EMA, s. 48) provides a Manager with the discretion to then decide whether a remediation order is issued, against whom it is ordered, and what the scope of that order will be.

The scheme is discussed by Madame Justice Newbury in the *B.C. Hydro* decision, at page 219:

Under section 27.1(1), a manager may issue a remediation order to any responsible person, requiring that that person undertake remediation, contribute “in cash or in kind” to another person who has reasonably incurred remediation costs, or give security on condition specified by the manager. When considering “who will be ordered to undertake or contribute to” remediation, the manager must take certain factors into account, including the terms of any private agreements between responsible persons regarding liability for remediation. Also under subsection (4), the manager must “name one or more persons whose activities, directly or indirectly, contributed most substantially” to the contamination of the site. The manager may obtain a “non-binding” opinion of an “allocation panel” as to whether a person is a responsible person or was a “minor contributor” to the contamination; or concerning the share of remediation costs that should be contributed to a particular responsible person (I note parenthetically that no argument was advanced in this case as to whether section 27.1 confers on the manager the powers of a superior court judge contrary to section 96 of the *Constitution Act*. We shall assume this section is valid for purposes of this appeal). Section 27.1(5) states a remediation order does not affect the right of a person affected by the order to obtain relief under an agreement, other than legislation or common law.

A person who receives a remediation order is deemed in it to be a *responsible person* and is therefore obligated, generally, to participate in the clean-up of the contaminated site. The Manager's decision may then be appealed to the Environmental Appeal Board, whose decision can be reviewed by the Supreme Court of British Columbia on judicial review. Hence, there are "regulatory" consequences to being "responsible."

VII. THE "FINANCIAL CONSEQUENCES": COST RECOVERY ACTIONS

A. Legislative Framework

Section 27(4) of the WMA (EMA, s. 47(5)) provides a statutory cause of action, known as a *cost recovery action*, for a *person* and/or a Manager against one or more *responsible persons*, to pursue their reasonable costs incurred in carrying out remediation at a contaminated site. For the purpose of section 27 of the WMA, subsection (2) (EMA, s. 47(3)) provides that "costs of remediation" means all costs of the remediation, including legal and consultant costs incurred while, for example, seeking contributions from other responsible persons.

The mechanisms associated with this statutory cause of action (and some history of the authorities) were also discussed by Madame Justice Newbury, in *B.C. Hydro, supra*, at page 220:

It will be noted that section 27(1) does not on its face require the issuance of a remediation order before it operates: all that the person or government body seeking recovery needs to show is that it has incurred, reasonably, remediation costs in respect of a contaminated site. Whether a person seeking recovery must nevertheless satisfy various regulatory conditions under Part 4 has been the subject of considerable litigation: see *Swamy v. Tham Demolition Ltd.* (2000) 81 BCLR (3d) 293 and [2001] BCJ No. 721, *O'Connor v. Fleck* (2000) 79 BCLR (3d) 280, and *No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.* [2001] BCJ No. 1922, all decisions of the Supreme Court of British Columbia; and the recent decision of this court in *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56 [2003] BCJ No. 165.

The migration of contaminants to adjacent sites was dealt with, peripherally, by Mr. Justice Clancy in *Seabright, supra* (S.C.). At trial, the Plaintiff alleged that adjacent residential property was, and continued to be, contaminated by the migration of substances from the main site. The Plaintiff knew of the contamination to the adjacent sites but did not remediate those properties, which remained contaminated at the time of hearing. The Plaintiff sought a declaration that the Defendants were also responsible for remediation of the adjacent sites and were therefore jointly and severally liable for costs incurred in the remediation of the adjacent lands.

In rendering his decision, Mr. Justice Clancy noted that the adjacent sites were separate from the main site based on the fact that the main site was the only property referred to in the certificate of compliance. Mr. Justice Clancy held that section 26.5(2) of the WMA does not support the position that the main site and adjacent site are to be treated as one contaminated site. He found that section 26.5(2)(b) of the WMA makes it clear that "a contaminated site that was contaminated by migration of a substance to the contaminated site" is to be treated separately.¹¹ Such a finding underlines the fact that victims of migration shoulder considerable onus to establish their "innocence," just as they must prove every element of the migration exemption.

¹¹ *Seabright, supra* (S.C.), at p. 108.

It should also be noted that under section 27(3) of the WMA (EMA, s. 47(4)), the bringing of a *cost recovery action* is not prevented by the lack of legislation, at the time the mess was made, prohibiting the introduction of any specific contaminant onto a site, or the terms of any permit, approval or waste management plan that authorized the discharge of waste into the environment.

B. Until Death Do Us Part

Section 27(1) of the WMA (EMA, s. 47(1)) provides that the *responsible person* is absolutely, retroactively, and jointly and severally liable to any person for reasonably incurred costs of remediation of a contaminated site. This is particularly harsh for a victim of migration who is unable to provide sufficient evidence to invoke the protection of the migration exemption. The victim of migration could be held liable for the entire cost of remediation, despite the victim's lack (or degree) of culpability, if the actual *responsible persons* are, for example, not solvent entities.

VIII. "REGULATORY" VS. "FINANCIAL"

A. Cost-Benefit Discussion

The existence of these two avenues has good and bad aspects. In order to appreciate the differences between the "regulatory" and "financial" avenues discussed above, it is helpful to consider the comments of Mr. Justice Tysoe in *Beazer, supra*, in which he notes that the remediation order or regulatory provisions are a summary process for the identification of contaminated sites and a speedy remediation of the site, whereas the costs recovery or lawsuit-related sections address the issues of culpability and allocation of liability through a potentially more time-consuming court process.¹²

Madame Justice Newbury offers the following:

Noteworthy for the purposes of this appeal, however, is that for "absolute" liability to arise, it appears the remediation costs must have been incurred by the person or government suing for recovery. That is not necessarily the case where an order is made under s. 27.1, which contemplates that the responsible person or persons named in the order may be required to carry out or contribute to remediation work yet to be done.¹³

This is the essence of the cost-benefit discussion regarding the two available approaches. A victim of migration may enjoy the benefits of the "absolute" liability associated with a cost recovery action if they are forced to sue, clean up a site, and then sue. If the victim of migration is willing to incur the necessary expenses to effect the remediation and can identify the responsible person or persons, the cost recovery provisions can be a friend. However, the victim of migration must be willing to finance the action without the assurance that the courts will endorse his position that the site was contaminated, the costs of remediation were reasonably incurred and another party should bear some or all of the responsibility for the contamination.¹⁴

¹² *Beazer, supra*, para 57.

¹³ *BC Hydro, supra*, at p. 220.

¹⁴ see *Busse Farms Ltd. v. Federal Business Development Bank*, [1996] S.J. No. 780 (Q.B.), affirmed [1998] S.J. No. 786 (C.A.), leave to appeal dismissed [1999] S.C.C.A. No. 73. (Plaintiff unable to show that Defendant was responsible, pursuant to the relevant legislation).

On the other hand, a victim of migration may choose to rely on the administrative process set out in sections 26.4, 27.1 and 27.6 of the WMA (EMA, ss. 44, 48 and 60, respectively). Again, the victim of migration under the regulatory process is at the mercy of the Manager's discretion not only to determine the nature and timeliness of a remediation order but also to determine whether or not any such order will be issued at all. Also, by alerting the Manager to the existence of a potentially contaminated site, (the victim's own land in this example), the victim of migration exposes himself to the possibility that he will also be labelled a *responsible person*. This concern is further compounded by the possibility that no other party would be identified as being a *responsible person*. There are no guarantees and the Manager's mandate is to effect a clean-up.

B. Further Vigilance And Further Victimization

A somewhat common scenario that arises in the context of migrating contaminants is where the contaminants flow through the site of one party ("Victim #1") and onto the site of another party ("Victim #2"). This circumstance may increase the potential that Victim #1 is found to be responsible, both in the context of the "regulatory" and "financial" avenues. Victim #1 is a victim vis-à-vis the source property but he is the source vis-à-vis Victim #2.

In a situation where the original wrongdoer is insolvent, there is an increase in the potential severity of the effect of the absolute, retroactive, joint and several liability elements of the *cost recovery action*. In such a scenario, the liability of Victim #1 may be 100% if it is shown, for example, that he should have stopped the migration to Victim #2; he loses his exemption and the real polluter is gone. Victim #2 may escape all liability at the expense of Victim #1. Victim #1 is, after all a "source" site, as far as Victim #2 is concerned and under the language of s. 26.5(2).

Therefore, at law, it may be prudent for Victim #1 to take the necessary precautions to ensure that the migratory path of the contaminants terminates on his own site. Once Victim #1 is aware of potential migration to Victim #2, Victim #1 must give notice to all concerned and may acquire positive duties to act.

IX. COMMON LAW REMEDIES: A FURTHER ALTERNATIVE

The common law remedies available to a victim of migration may include common law causes of action such as trespass, nuisance, strict liability, negligence and failure to warn. This paper will address nuisance and strict liability.

A. Nuisance

The principles of nuisance, which have been applied in the context of contaminated sites,¹⁵ can be summarized as follows:

Nuisance is a field of liability. It describes a type of harm that is suffered, rather than a kind of conduct that is forbidden. In general, a nuisance is an unreasonable interference with the use and enjoyment of land by its occupier or with the use and enjoyment of a public right to use and enjoy public rights of way. For the most part, whether the intrusion resulted from the intentional,

¹⁵ see *Colonial Developments (IV) Ltd. v. Petro-Canada* [1996] A.J. No. 1140 (Alberta Court of Queen's Bench)

negligent or non-faulty conduct is of no consequence, as long as the harm can be categorized as a nuisance¹⁶.

In regards to private nuisance, Linden provides the following summary:

Private nuisance may be defined as unreasonable interference with the use and enjoyment of land. This may come about by physical damage to the land, interference with the existence of an easement, profit prendre or other similar right, or injury to the health, comfort or convenience of the occupier. In short it is an environmental tort.

...

The harm in nuisance cases is normally caused indirectly, in contrast to trespass, which arises from the direct, physical invasion by the Defendant or some tangible object. The injury in nuisance, then, is often termed 'consequential.' In nuisance, actual damage is an essential element to be proved, whereas trespass is actionable without proof of damage.

Responsibility for private nuisance is not restricted to the occupier of adjoining lands. Anyone who actively creates a nuisance whether or not in occupation of the land from which it emanates, can be liable and this 'liability continues so long as the offensive condition remains regardless of his ability to abate it and stop the harm.'¹⁷ [citations omitted]

Furthermore, actions in nuisance may not only be brought against the party that caused the nuisance but also against a party that permits the nuisance to continue.¹⁸

In private nuisance claims, the plaintiff has the onus to prove that there has been an unreasonable interference with the use and enjoyment of his land. Once that is shown, the onus of proof shifts to the defendant to establish that the use of the land was reasonable.¹⁹

The potential remedies available to a Plaintiff in a private nuisance claim include injunctive and compensatory relief.²⁰

B. The Rule in *Rylands v. Fletcher*

Another potential common law cause of action is that of strict liability, which has been referred to as an extension of the law of nuisance (*Smith Brothers Excavating Windsor Ltd. v. Camion Equipment and Leasing Inc. (trustee of)* [1994] O.J. No. 1380 (Ont. Ct of Justice - Gen. Div.), at para 213). The principles of this cause of action are summarized by Lord Blackburn in the oft-cited House of Lords decision in *Rylands v. Fletcher*:²¹

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.²²

¹⁶ Allen M. Linden, *Canadian Tort Law* 6th Edition (Butterworths: Toronto, 1997), p. 523

¹⁷ Linden, p.530-531.

¹⁸ Linden, at p. 542.

¹⁹ Linden, p. 531.

²⁰ Linden, p.552-553

²¹ (1868), L.R. 3 H.L. 330

²² *Ibid*, pp..279-280.

As Linden states in his text, there has been some confusion regarding this principle due to slight variations in terminology used by some of the justices of the Court of Appeal. This “flexibility” has the potential of serving the interests of both Plaintiffs and Defendants in migration disputes:

They all seemed to be merely reiterating law that had already been settled. Nevertheless, their permutation and combinations of the three simple ideas incorporated in these statements - non-natural use, mischief, and escape - have exercised judges and scholars for over a century now. The words are so flexible that courts which are hostile to strict liability may restrict their operation, whereas courts which are friendly to strict liability may stretch them to embrace a great many activities of modern living.²³

Again, the WMA employs the term “absolute” liability, a powerful legal concept that has yet to be addressed by the courts to any degree.

C. Utility of Common Law Causes of Action

Both nuisance and strict liability have been addressed by Canadian courts in the context of contaminated sites (see *Colonial Developments (IV) Ltd. v. Petro-Canada* [1996] A.J. No. 1140 (Alberta Court of Queen’s Bench) and *Smith Brothers Excavating Windsor Ltd. v. Camion Equipment and Leasing Inc. (trustee of)* [1994] O.J. No. 1380 (Ont. Ct. - Gen. Div.)). However, in British Columbia the WMA appears to be the weapon of choice for parties dealing with issues related to contaminated sites. This trend will likely continue as the Ministry attempts to bring further utility and refinement to the legislative framework through the introduction of the EMA and the anticipated amendments to the CSR.

The victim of migration should “ask for the moon,” whatever the cause of action or statute being employed. There are various reasons why a victim of migration might seek to have his site remediated in accordance with reasonable standards to facilitate its proposed use. It may be the case, however, that the victim of migration may be able to obtain a level of remediation that would return the land to a “pristine state” (see *Tridan Development Ltd. v. Shell Canada Products Ltd.*, [2002] O.J. No. 1 Docket No. C34404 (Ont. C.A.); application for leave to appeal dismissed, [2002] S.C.C.A. No. 98). The victim of migration should consider (and plead) all potential options, including any common law remedies that may be available, in order to obtain the highest level of clean-up possible.

X. POTENTIAL SUMMARY DISPOSITION

As a victim of migration progresses with his cost recovery claim, it will be useful to consider the various legal alternatives to a lawsuit and full trial. These alternatives include Rules 34, 33 and 18A of the *B.C. Rules of Court*.

A. Rule 34: Point of Law

Rule 34 provides for the summary disposition of a point of law raised by the pleadings where such a determination will “immeasurably” shorten the trial or result in a substantial savings of costs. Rule 34 is restricted to a question of law; evidence is not to be considered by the court except in prescribed cases such as the interpretation of a contract. The facts set out in the

²³ Linden, p. 503

pleadings are presumed to be true. Sometimes, victims of migration need only clear a single legal issue to prevail. Rule 34, although perhaps under utilized, may serve well.

B. Rule 33: Special Case

The stating of a “special case” under Rule 33 provides for the summary dismissal of all or part of an action, but is not restricted to a question of law. However, any facts to be considered must be agreed upon by the parties. If one party considers that an issue should be heard on a preliminary basis, it may seek an Order of the court to have that issue determined by way of special case. Saving the court and the parties time and money is of primary importance under Rule 33. The court’s decision on a special case is in the form of an “opinion.” The parties must consent to that opinion becoming a formal judgment. The special case may proceed by consent or upon leave of the court. Issues such as “apportionment” do not lend themselves to the use of the special case procedure (*Von Koenigsloew v. Kelly* (1997) 98 B.C.A.C. 267, 47 B.C.L.R. (3d) 286 (C.A.)).

C. Rule 18A: Summary Trial

The danger with proceeding under 18A is that an application could “snowball” into a massive effort by opposing parties to inundate the court with expert testimony in affidavit form in order to make all issues, technical and legal, appear inextricably intertwined. Their purpose would be to keep the Applicant involved with the hope of forcing it to contribute more toward settlement, even if he is likely an innocent or “almost” innocent victim of migration.

For this reason, if it is at all possible to have a single issue critical to one’s position determined summarily under Rule 33 or Rule 34, a “paper war” may be averted and the likelihood of success increased. As held in *Canadian Commercial Bank v. Park Meadow Estates Ltd.* (1985), 65 B.C.L.R. 169 (S.C.), “it may be unjust to determine a proceeding on a summary trial basis where there are multiple parties, complex evidence, and complex issues, particularly where the case involves an important and unsettled area of the law.” The foregoing quotation would likely prove a difficult hurdle to clear under Rule 18A; establishing that the issues are complex and novel is a particularly easy task in cases involving the WMA and science-based issues.

XI. SELF-REPORTING OF MIGRATION

A. The Provisions

Two new self-reporting provisions were added to the CSR, effective February 4, 2002.

Under sections 57 and 60.1 of the CSR, a *responsible person* who carries out a site investigation or independent remediation of a site pursuant to section 28(1) of the WMA (EMA, s.54), must, if the *responsible person* knows that one or more substances has migrated or is likely to have migrated to a neighbouring site and is or is likely causing contamination of the neighbouring site, provide written notification to the person or persons who own the neighbouring site and a copy of the notification to the Manager, within 15 days after the *responsible person* becomes aware of the migration or likely migration of each substance to the neighbouring site.

If any such migration exists, sections 57(1.1) and 60.1(2) of the CSR require the *responsible person* to provide the following:

- (a) the name and address of the person or persons who own the site or sites that are to be remediated/investigated;
- (b) the name, address and telephone number of the person to contact regarding the investigation/remediation activities to be undertaken at the site; and
- (c) a general description of the nature of the migration or likely migration of each substance.

B. Not retroactive

It should also be noted that the Ministry has issued a bulletin which provides that the remediation notice provision only applies to remediations ongoing as of February 4, 2002, or commenced after February 4, 2002. In regards to site investigations, the notice provisions apply to investigations completed after February 4, 2002.

C. Potential Issues

These relatively new notice provisions raise the following issues:

1. **WHO SHOULD REPORT?** The wording of this regulation appears to provide that these obligations only fall on *responsible persons*. In reviewing the caselaw, there does not appear to be any clear determination as to whether or not these obligations apply to all current and former owners and operators of a site undertaking remediation activities or site investigations, or if they only apply to owners and operators determined to be *responsible persons*. In regards to investigations, the CSR provides that it is the party carrying out the investigation who is responsible to report the migration, as opposed to the owner of the land. Therefore, it appears that if the investigations are carried out by a lessee or even a tenant, it would be their duty rather than the lessor's or landlord's duty to report the migration.
2. **TO WHOM?** It also appears that the Ministry considers that the owners of all sites which are affected by the migrating contamination should be notified, not just the owner of the site which is directly adjacent. The Manager must also receive notice.
3. **LIKELY MIGRATION?** This may lead to issues of a scientific nature in determining what constitutes "a likely migration," and whether this can be distinguished from a mere possibility of migration.
4. **SITE INVESTIGATION?** It should be expected that the Ministry will consider any testing or monitoring, audits or other reports to constitute "site investigations" and "independent remediation."
5. **INDEPENDENT REMEDIATION?** It should be noted that "independent remediation" is not defined in the CSR or the WMA, but "remediation" is defined to include "tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment." It should be expected that the Ministry will apply a relatively broad definition in order to incorporate further activities in this section. Therefore, *responsible*

persons should be aware that various events may trigger the notice requirements. The list is not settled, but the costs of holding back notice unreasonably could be high. Any actions that may exacerbate contamination can be costly to all concerned.

XII. SUMMARY AND CONCLUSION

In the programme for this CLE, the following questions are posed; they are answered in brief below:

1. Are victims of migration *responsible persons*? Not if they are otherwise “innocent” and can establish that they are protected by the migration exemption set out at sections 26.5(3) and 26.6 of the WMA (EMA, ss. 45(3) and 46, respectively).
2. Must (or should) victims of migration clean-up their own land? A *responsible person*, as defined at section 26.5 of the WMA (EMA, s. 45), may be ordered or forced by the Ministry of Water, Land and Air Protection (the “Ministry”) to clean up a contaminated site. However, if the migration exemption is available to a victim of migration, no such order can be issued against her because she is not a *responsible person* under the WMA. There are occasions, however, where it may be economically expedient for such a victim to clean-up a site and then sue through a *cost recovery action* (WMA, s. 27(4); EMA, s. 47(5)) to recover all of their reasonably incurred costs associated with the clean-up. This course may be chosen where the victim wants control over the clean-up, for example.
3. Can the Manager²⁴ become an ally? Yes. The Manager will be seeking to order the real polluters in any given situation to shoulder the cost of clean-up. If the environment or human health are at risk such that the Manager’s attention can be captured, the victim of migration can urge the Manager to force those responsible to clean up the problem site. If the victim of migration needs a speedy clean-up for business reasons (because the property is slated to be sold, for example), the Manager may be of assistance, subject to the risks of involving the Ministry at all; the potential danger is that a victim of migration who notifies the Manager of a contamination problem may be exposing himself to potential liability and will, therefore, have to be prepared to show the Manager that he is not a “responsible person.” If unsuccessful in convincing the Manager of the applicability of the migration exemption, even an innocent victim may find their name on a remediation order.
4. Do victims of migration have to sue to get their land cleaned up? Not necessarily. They may involve the Manager, as discussed above, whereby the polluters pay for and/or carry out the clean-up. Victims may alternatively choose to clean-up their land (and then sue the actual wrongdoers). They may also convince the real polluters to clean up the site through negotiation; this is often the preferred course of action for all involved. Finally, one may decide to leave their land as is, and carry on with business as usual until the polluters or the Manager get around to cleaning up the migrated contaminants. Care should be exercised here, as it is often difficult to determine from where contamination is

²⁴ Section 1 of the WMA defines “Manager” as “a person employed by the government and designated in writing by the minister as a regional waste manager or as an acting, assistant or deputy regional waste manager”. The Manager is responsible for issuing remediation orders. Manager is now termed “Director” under the EMA.

flowing. If *you* are the polluter, you need to determine that fact and notify the Manager and your neighbours pursuant to the WMA.

5. Shortcuts to clean-up for victims of migration. Various approaches have merit:
 - (a) Explore the potential for a negotiated settlement with the real polluters.
 - (b) Consider whether resolution may be achieved faster by involving the Manager.
 - (c) Go back to the instrument that provided you with your interest in the land and look for a remedy there. This may be a Contract of Purchase and Sale or a Lease. Such agreements may contain specific environmental representations or warranties, an indemnity and/or release. They may also contain an arbitration clause or the like.
 - (d) If you have incurred the costs of clean up, consider the various legal alternatives to a full trial. Consider applications under Rule 18A, Rule 33 or Rule 34, or a Petition for specific relief, the objective being to have the matter decided on a restricted set of facts and issues, and heard according to a restrictive timetable that avoids the common delays associated with litigation. If you are an innocent victim, you may find a crucial legal or factual issue that can be determined summarily.
 - (e) Consider seeking *minor contributor* status from the Manager (WMA, s. 27.3; EMA, s. 50), remembering that this section is intended for those with at least “some” fault, not “no” fault.
 - (f) Consider seeking an allocation of responsibility from an *allocation panel* appointed by the Manager (WMA, s. 27.2; EMA, s. 49). This is not a binding decision and may only in rare circumstances benefit one with absolutely no fault.

The benefits of being a mere victim of migration are contained in the exemption and the “responsible person” provisions. The dangers lurk in the cost of and uncertainty with establishing the migration exemption. Often legal and scientific analysis is necessary before a case can be made that one’s land is polluted only because of migration from neighbouring property.

To clean-up and then sue under the cost recovery provision can also prove an expensive and frustrating proposition, even if ultimately successful. Finally, joint and several liability always hangs like a cloud regardless of how strong one’s defences might appear.