



## The Polluted and Convoluteds: Is Environmental Law in British Columbia Really Industry-Friendly?

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### Overview

On May 13, 2003 the Government of British Columbia introduced Bill 57, a new and hopefully improved *Environmental Management Act* ("EMA"). The subsisting and highly controversial *Waste Management Act* is intended to become, in essence, the EMA. The introduction of the EMA follows the province's recent, major review of environmental legislation.

The aim of the EMA is said to introduce "modern-day tools for environmental management". It remains to be seen whether the latest version of British Columbia environmental legislation is any more manageable or practical than prior versions. In many respects, it remains the same as its predecessor, with many of the same problems. Some of these problems may be resolved in revised regulations to the EMA, but the legislature will not sit again until October of this year and, because Bill 57 was not passed before the end of the current session, this legislation will have to be reintroduced in October as well.

It is worthwhile to examine Bill 57 now because it is clearly the government's intention to pass this or very similar legislation in the fall of 2003. The provincial government has indicated its preference to make the EMA merely a foundation for further environmental legislation, thus allowing significant future changes to be introduced by regulations. An extensive consultation process has been promised prior to the issuance of any new or amended regulations.

Environmental management in British Columbia will likely face several years of uncertainty as stakeholders and the government lock horns over interpretation of the new legislation, just as they did over the *Waste Management Act*. A comprehensive final report generated by the Contaminated Sites Review Panel was released May 13, 2003 coinciding with the introduction of Bill 57. As yet, it is unclear how the Panel bettered the years of analysis that preceded the 1997 amendments to the *Waste Management Act*, and the Ministry of Water, Land, and Air Protection ("the Ministry") itself does not view the Panel as driving the legislative amendment process. The Ministry has, however, said they will continue to review the report and apply it where appropriate.

Many major concepts remain the same in the EMA, including, in particular, those sections that determine who is responsible for cleaning up contaminated sites. However, some interesting changes have been made.

## Major Repairs

The legislation has rectified the problem of current and future land owners or users being liable for clean-up due solely to a change in standards occurring after site clean-up has been completed. Also, the ability of the Ministry to reopen Certificates of Compliance ("Certificates"), on the grounds of changes to the standards enacted after site clean-up, has been eliminated. This is new, and it is key. Industry has been pleading for this type of added certainty in the remediation process. However, such Certificates may be carefully worded to leave open the door to additional monitoring that could lead to further remediation. Contaminants or migration not covered in the original Certificate could also be subject to new clean-up orders.

Cost recovery lawsuits may proceed whether or not a Director has determined "responsibility" for a contaminated site or made any of the other "determinations" the Director may make under the EMA. Therefore, if remediation has been carried out at a site that has not been determined a "contaminated site", the court must simply make the determination. The court may also determine whether a person is responsible for remediation of a contaminated site, whether costs of remediation have been "reasonably incurred" (and the amount of such costs), and may then apportion such costs among responsible persons. This brings the legislation in line with current case law interpreting the *Waste Management Act*.

It remains an open question whether a cost-recovery lawsuit can proceed when a site is only partially cleaned up. Currently, case law appears to have interpreted the cost recovery provisions as being triggered only once a clean-up has been completed. This approach is too onerous on land owners and must be sorted out.

A mechanism has been put in place where the Minister may establish the Waste Management Trust Fund. Unlike funds in other jurisdictions, such as the American Superfund, this fund is not for environmental clean-up of orphan sites or other abandoned properties. Rather, this fund is for clean-up of inadequately-closed waste management facilities and for their long term care and maintenance. It is unclear how this fund will be financed.

The recent innovation of designating classes of professionals to be established in a roster format has been shifted from the regulations to the EMA itself. The Procedures for the Roster of Professional Experts, drafted pursuant to the Contaminated Sites Regulation, will apparently remain in force with no substantive changes. The procedures for seeking "external review" may also remain in, as both are forms of consultant-based approvals rather than government-based.

The Ministry touts the EMA as enabling the use of economic instruments to encourage positive environmental performance. Such instruments include modified fee structures based on environmental performance, discharge trading systems to allow trading of discharge credits in exchange for reducing discharges below allowable levels, relief from regulatory requirements in exchange for positive environmental behaviour, and recognition of industry-led certification systems to acknowledge companies that demonstrate "exemplary environmental performance". Applied examples of these instruments include reduced reporting requirements that apply to companies with long and excellent histories of environmental management, the federal Environmental Choice Program with its Eco Logo, which marks products to denote environmentally responsible behaviour, and trading of government commitments regarding regulatory requirements for company expenditures on pollution prevention equipment. The latter involves the government possibly

committing to approving certain discharge levels or concentrations in exchange for a corporate commitment to spend money to prevent pollution.

### **Minor Tinkering**

Some changes identified by the government include:

- The primary government decision-maker under the EMA is the "Director" of Waste Management.
- The availability of a permit for the storage of hazardous waste is eliminated and it is now simply required that hazardous waste be stored in accordance with the regulations - a form of self-policing.
- "Special waste" is renamed as "hazardous waste".
- The Minister is authorized to enact "codes of practice" so that persons may be exempted from certain requirements under the Act, such as classes or categories of waste to be disposed of under the EMA, if such persons comply with the applicable code of practice.
- The definition of "contaminated site" is narrowed so that the mere presence of "any" quantity of hazardous waste no longer brings the site within the definition.
- The EMA provides for a category of persons known as "approved professionals" who may perform professional services in respect of contaminated sites, such as contaminated site remediation, assessment and management. In the old legislation this was authorized by the Contaminated Sites Regulations.
- "Conditional certificates of compliance" in relation to contaminated sites are eliminated.
- Director is authorized to establish protocols that must be complied with in relation to technical matters associated with contaminated sites. Such protocols involve directions for allocation panels, public consultation and review processes and prescribing requirements respecting "remediation".
- The Minister is authorized to require area-based management plans in the interests of overall environmental management. Area-based plans are area-specific management plans which may be unique to a given area. These are regional rather than site-specific plans. They appear to be contemplated for vast, complicated sites requiring the involvement of many interested parties.
- An administrative penalty scheme is introduced as an alternative to prosecution. This means that, rather than resorting to the system of criminal prosecution, it will be possible to negotiate an agreement with the Ministry as an alternative to a monetary penalty. Such agreements may include projects that benefit both the community and the environment, such as streamside clean-up and restoration. The nature of such penalties will be developed by regulation following consultation with stakeholders.

- The EMA authorizes the development of regulations that provide for economic incentives to encourage environmentally responsible behavior.
- The EMA contains regulation-making authority in relation to the development of land that is subject to flooding.
- Regulation-making powers are assigned to the Minister.

### **The Road Ahead**

Lawyers will continue to raise important issues that either arise from the new legislation or remain unresolved. These include:

- a) Large numbers of regulatory appeals and litigation due to the breadth and severity of the liability provisions that continue under the EMA.
- b) Additional interpretation questions, i.e., the new definition of "contaminated site" is open to yet further interpretation.
- c) The arguable shift from regulators to courts in respect of the many "determinations" that can be made by either. Will the government cease making regulatory decisions as resources dwindle, given that courts can fulfil many of the same functions?
- d) Further delay in cost recovery if the court system is flooded with cost-recovery actions due to the withdrawal of regulatory decision-making.
- e) The extent of liability for roster professionals, their firms, or other professionals involved in contaminated sites remediation such as "external experts" - arguably a rostered professional may be an agent of government, and therefore immune from responsibility, but the scope (and existence for that matter) of any such immunity must be carefully considered.
- f) Limitation issues are still alive. Does the legislation provide for a 2 year limitation for damage to property or a 6 year limitation from the date remediation costs are incurred? Can you only proceed with a cost recovery action once you have completed the remediation or can innocent property owners proceed on an interim basis to recover the costs of remediation as they are incurred? If a party seeks cost recovery of legal fees charged as costs of remediation, do lawyers then waive privilege over their files? Are parties' actual litigation costs recoverable against responsible persons as costs of remediation or is a party only entitled to party-and-party costs of litigating such issues? These issues have been argued ever since the 1997 amendments took effect and the EMA has not resolved them. The regulations may ultimately do so.

### **And They're Not Finished Yet...**

The definition of "contaminated site" has deliberately been left open to allow the Ministry to complete a further review of the contaminated site remediation provisions. Contaminated sites will be split into four categories of seriousness. The roster professionals are expected to be restricted to reviewing and signing-off on all but the most serious category. The determination of what is a contaminated site currently depends solely on the presence of substances in excess of numerical standards in the Contaminated Sites Regulation. The regulations will be amended to introduce a second step in the process that evaluates whether a site poses a risk to human health

or the environment, making use of new risk-screening guidance. A single "comfort" document to be issued by the Ministry will be developed signifying that land is appropriate for a particular use, likely in the form of a "Certificate of Compliance".

The system of employing rostered professionals is underway. New regulatory provisions will be enacted to focus resources on high-risk sites and to expand the role of the rostered professionals. The Ministry is funding a steering committee to oversee rostered professionals. This funding will be used to develop the new Licenced Environmental Professional Board, exams and licenses for private consultants working on contaminated sites. The Committee is made up of professionals from the Association of Professional Engineers and Geoscientists of the Province of British Columbia.

Finally, the government is reviewing the current liability scheme under the existing and proposed legislation. Any changes to the concept of joint and several, absolute, and retroactive liability are bound to be controversial. It is unlikely that significant revisions will occur before the provincial election on May 17, 2005.

### **The Bottom Line**

The introduction of Bill 57, the *Environmental Management Act*, appears to represent a significant shift in the philosophy of British Columbia environmental regulation. While joint, several, absolute and retroactive liability remain, along with the concepts of "polluter pays" and "beneficiary pays," the regulatory intervention or prescriptive approach mandated by the previous legislation, something that was hamstrung by a chronic lack of resources, has been modified to attempt to incorporate a more commercially-friendly incentive-based approach. The result is a risk-based system rather than a solely standards-based system. The resultant focus on risks means the development of a classification system involving low, medium and high risk industries. It is envisaged that low-risk businesses will not need permits but rather must comply with regulations only. The intended result is the clearing of backlogged permit applications. The amendments do not mean that numerical standards are abandoned, but rather that the standards are applied only where appropriate; "risk" may become the buzz-word of the day. The prime consideration in evaluating "risks" will be a consideration of whether a site poses a risk to human health or the environment, using new screening risk assessment guidance.

It remains to be seen whether the somewhat revised approach will be any more successful than the old one. The success or failure of the new legislation will not likely be determined until the development of regulations under the EMA, and the degree to which industry and community concerns are incorporated in the new system. The fear remains that the current exercise of revising environmental management is more about reducing government expenditure and involvement than truly improving day-to-day management of environmental issues for the benefit of both business and the community at large.

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