CONTAMINATED SITE LIABILITY .... HOW LEGISLATORS ARE RESPONDING

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I. INTRODUCTION

In the early 1980s, several heavily contaminated industrial sites in Canada triggered widespread public concern about their risk to human health and the environment. Since then, thousands of other sites have been discovered. The concerns focus on sites which were contaminated by leaking underground tanks, historic industrial practices of burying wastes on-site, and end-of-pipe discharges, some of which occurred for many decades.

The public demanded legislative action in the 1980s. The uniform reaction of Canadian legislators in the 1980s was to provide regulators with strong powers to order remediation at contaminated sites.

In recent years, however, the remediation order powers have been strongly criticized by industry as being unfair and uncertain. Industry, lenders, professional advisors and parties involved in real estate transactions have strenuously argued, for instance, that a party never really knows when they might face an order, that 'deep pockets' are especially vulnerable, that the lack of objectively verifiable standards makes predicting liability impossible, and that the ordered remediation applies excessively conservative measures. Some industry groups raise the more fundamental concern that society generally should pay for historic contamination which occurred in the absence of prohibitions, and not the parties who caused the contamination.

At the same time, victims of historic pollution have sought legislative rights to protect their interests. These victims include innocent purchasers of toxic sites and neighbours suffering migrating pollutants from such sites. The common law, it was argued, was insufficient to adequately invoke the polluter-pays principle.

Environmental non-government groups have also actively sought law reform. They generally advocated a system which mandates cleanups in an expedited fashion (thus mistrusting reliance on regulatory discretion).

These concerns have prompted law reform in Canada. In recent years, four of Canada's ten provinces -- namely British Columbia,

Alberta, Manitoba and Nova Scotia -- and the Yukon Territory have undertaken reform of their contaminated sites legislation. Other jurisdictions such as Saskatchewan have at least seriously considered the issues associated with contaminated sites.

This paper first describes the traditional, or 1980s, Canadian approach to dealing with contaminated site issues. The traditional approach is then compared with Canadian law reform taking place in the 1990s. The paper also notes, without undertaking a comprehensive comparison, differences and similarities of Canadian law and the U.S. contaminated sites statutes such as the *Superfund*. Lawyers in Jamaica will likely recognize the numerous difficulties and issues raised by Canada's traditional and new approaches to dealing with contaminated sites.

II. CANADA'S TRADITIONAL APPROACH TO CONTAMINATED SITE ISSUES

The following principles highlight the traditional Canadian approach to regulating contaminated sites.

Regulators rely on civil liability.

At most contaminated sites in Canada, regulators have two basic enforcement options:

* prosecute the polluters, or
* order them to remediate.

Regulators find prosecutions attractive in circumstances where a party at a site breaches a statutory prohibition. Environmental prohibitions in Canada are cast in very broad terms: e.g. "no person shall cause waste to be introduced into the environment". The breach of a prohibition constitutes an offence which could attract a conviction, a heavy fine and a jail term.

At most contaminated sites, however, prosecutions are irrelevant. Many sites were contaminated prior to the enactment of environmental prohibitions (the first of which appeared in the 1960s). Even if a prohibition was breached, a defendant polluter usually may rely on the defence of 'due diligence', a defence which is bound to succeed at those many sites where deposits were in accordance with general industry practice. Moreover, because environmental prosecutions must, in many Canadian jurisdictions, be launched within one or two years of the offence, regulators will simply be out of time when pursuing historic polluters. Nor can a prosecution succeed if the party has received a permit

which serves as an exemption to the prohibition. Finally, legislators wishing to use retroactive prohibitions (deeming, for instance, the pre-1960s polluting acts to be offences) would likely violate basic constitutional rights. Given these constraints to prosecutions, regulators turn to the option of remediation orders, which assigns civil liability.

Regulators exercise broad discretion for determining "contaminated sites" and appropriate remediation.

Canadian order powers traditionally grant regulators broad discretion to determine which sites require remediation. For instance, section 8 of Ontario's *Environmental Protection Act* requires that the regulator, to issue a stop order, must have "reasonable and probable grounds" to believe that a "contaminant" (undefined) poses an "immediate danger to human health" (also undefined).

Regulators have similarly broad discretion to specify the terms of remediation orders. Regulators may typically order site investigation, monitoring, removal, storage, and destruction of pollutants, restoration of sites, record-keeping, and reporting.

Environmental regulators in many Canadian jurisdictions appear to recognize that their broad discretion may create uncertainty in the marketplace, and accordingly publish policies to indicate which sites could attract remediation orders and how they should be remediated. Many policies are based on a guidance document published by the Canadian Council of Ministers of the Environment (CCME). Policies, it is important to note, are not legally binding on the regulators, but can provide some assistance. Policies are undergoing concerted review in some jurisdictions. For example, Ontario recently concluded a two-year review and adopted a new policy.

Regulators may issue remediation orders to a wide range of parties.

Canadian contaminated site statutes generally use broad language to prescribe who may be ordered to remediate. The most common legislative approach is to use one or more of the following three tests:

* ownership of the contaminated site or the contaminating substance;
* occupation of the contaminated site; or
* charge, management or control of the contaminated site or the contaminating substance.

The rationale for using such broad "responsible person" categories is self-evident: casting a wide liability net

increases the probability that parties associated with the site -- as opposed to taxpayers -- will pay for the remediation.

The order powers' broad "responsible person" definitions are typically not qualified by exemptions. For example, a party which purchased the contaminated site in spite of all due diligence is not exonerated.

The order powers assign retroactive, joint and several and absolute liability.

Canadian remediation order powers are uniformly retroactive. That is, they can impose liability even though the pollution occurred prior to relevant prohibitions or prior to the enactment of the order power. Legislators view retroactivity as an essential means of implementing the polluter-pay principle. Some jurisdictions expressly affirm that liability is based on conditions occurring prior to enactment of the order provisions: Manitoba's *Dangerous Goods Handling and Transportation Act*, for example, states in section 16(2)(d) and (e) that liability for remediation can apply "whether [the escape, etc. occurred] before or after this section comes into force". Other jurisdictions use language which strongly implies retroactivity.

A closely related and common feature of Canadian contaminated sites legislation is absolute liability (equivalent to "strict liability" in the United States). Absolute liability means than an industry is not exempt from an order simply because it followed industry-wide waste disposal practices or it received a government permit for the disposal. This principle is expressly stated in several Canadian statutes, and implied in other jurisdictions.

Remediation order powers in Canada impose joint and several liability. For example, joint and several liability is expressly established in federal, New Brunswick and Quebec environmental legislation. For all other jurisdictions, joint and several liability applies as a matter of common law. While joint and several liability is complex (having evolved through centuries of common law), one basic rule is that the courts will allocate liability to the extent that the evidence permits. Where, however, the damage is indivisible -- a common situation at many contaminated sites -- the courts generally allow the plaintiff to recover compensation from any one of the defendants. And, if a defendant is defunct or insolvent, the other defendants must assume that defendant's 'orphan share'. This latter aspect of joint and several liability is particularly contentious. Regulators issuing orders within this context of joint and several liability tend to jointly name the persons who are primarily responsible for the contamination, and do not appear to be compelled to allocate respective shares of liability.

There are no funds ear-marked for remediation.

Unlike the *Superfund* in the United States, Canadian jurisdictions have not established dedicated funds to remediate contaminated sites. One exception is a recently expired federal-provincial program (the National Contaminated Sites Remediation Program) whereby certain provinces and the federal government agreed to jointly raise $250 million to assist in remediating high risk orphan sites (where no owners can be found to remediate).

Canadian industry has frequently urged legislators to adopt an ear-marked superfund to pay for orphan sites (including orphan shares attributable to defunct or insolvent parties). Industry concerns were considered by the Canadian Council of Ministers of Environment in 1994. These consultations, however, failed to reach industry-government consensus on the fundamental question of who should contribute to a fund (eg. industry, consumers, taxpayers?). The reluctance by Canadian legislators to adopt funding mechanisms can be explained, at least in part, by the current 'anti-tax' climate and a recognition on the part of regulators that the powerful order powers can be exercised to ensure remediation.

Victims of pollution seek remedies in the common law.

In the context of contaminated sites, there are two types of victims: neighbours of contaminated sites who suffer leachate migration, and innocent purchasers of contaminated sites. Both types of victims look to the common law for remedies; the traditional legislative pattern in Canada does not provide remedies for these victims.

As for neighbours of contaminated sites, the common law torts of private nuisance, negligence and *Rylands v. Fletcher* have been particularly relevant sources of remedies. Tort law, however, is not a panacea for plaintiffs suffering intermingled pollution from various sources, as the onus falls on them to 'fingerprint' the pollution to specific defendants.

As for innocent purchasers of contaminated sites, the common law has been successfully applied to provide remedies. The courts have in recent years adopted creative approaches to providing remedies to victim purchasers, including using an expanded notion of 'fraud' as a means of avoiding the application of the age-old buyer beware rule.

(For a more detailed analysis of the common law, see the accompanying paper, *Environmental Law: A New and Basic Consideration in Business and Banking Law .... The Practice in*

Canada and Implications for Jamaica.)

III. DEPARTURES FROM THE TRADITIONAL APPROACH

The traditional Canadian pattern of contaminated sites legislation has attracted substantial criticism, especially in recent years. The criticism has been acknowledged in numerous government discussion papers and analyses. These papers set the agenda for law reform. They identify two general goals:

* clearer definition of "contamination" and "remediation", and
* fair and expeditious allocation of liability.

These goals are reflected in new legislation in Alberta (1992), British Columbia (1993), Nova Scotia (1995), Manitoba (1996) and the Yukon Territory (1991 and 1996). All of these statutes are, when compared to their predecessors, far more prescriptive. Each adopts specific legal methods which are unique to that jurisdiction, as discussed in detail below in Part IV.

The new statutes, however, maintain a number of key principles of found in predecessor legislation. Specifically:

* Order powers still figure prominently in the new schemes. The difference of the new legislation is that the discretion is more structured. For instance, as discussed below, orders cannot be issued to persons who qualify for prescribed exemptions, or cannot be applied to sites unless the site exceeds prescribed quantitative conditions.

* Reform-minded legislators in Canada are not prepared to jettison the controversial principles of retroactive, joint and several, and absolute liability. The new statutes maintain the principles of joint and several, retroactive and absolute liability. These legislators appear to accept that retroactive, joint and several, and absolute liability is essential for implementing "polluter pay", and that any potential harshness can be mitigated with exemptions and other means of limiting liability. Under the new regimes, <u>if</u> a party does not qualify for an exemption and <u>if</u> the party does not limit liability with agreements, <u>then</u> the principles of retroactive, joint and several and absolute liability apply.

* The new statutes also continue to use the broad "ownership/ occupation/ charge" tests to determine responsible persons.

IV. LAW REFORM OF CONTAMINATION AND REMEDIATION STANDARDS

Legislative Standards of Contamination

Two approaches are evident in the new statutes. One approach embeds the requirements in legislation. This prescriptive approach presumes that legislation, not regulators, will determine "contamination" and "remediation" at any given site. This approach is found in British Columbia's and the Yukon legislation. Both statutes allow proponents to select from a variety of numerical standards for determining whether a site is a "contaminated site". Part-per-million measures for specified contaminants are set for different land uses (e.g. residential, industrial, etc.). Remediation of a contaminated site can be achieved by using any one of the applicable numerical standards.

The other approach relies on regulators to adopt guidance policies as to what constitutes "contamination" and "remediation". The legislators' expectation appears to be that regulators will follow the policies. The cost of this approach is uncertainty: legally, regulators are not bound by their policies.

Dispute Resolution to Settle 'Contamination' and 'Remediation'

The new Canadian statutes all recognize the need for non-judicial procedures to resolve disputes over whether a site is contaminated. For example, the new legislation in British Columbia and Nova Scotia provides for preliminary determinations as to whether a site is a contaminated site, opportunities for public comment, and final determinations. In a similar vein, the new Alberta, Manitoba and Yukon legislation requires the regulator to provide notice of an intention to designate a site as a contaminated site, and an affected person has rights to contest the proposed designation.

Approval of Remediation

All of the new legislation provides procedures for approving remediation. In most of the new statutes, agreements are the primary means of settling questions of appropriate remediation. For example, the British Columbia, Nova Scotia and Manitoba legislation enables regulators to enter into agreements with responsible persons to schedule remediation and to cap the amount of liability.

British Columbia's new legislation also provides approval in the form of "certificates of compliance". After remediation work has been conducted in accordance with numerical remediation standards (discussed above), the regulator may issue a certificate of compliance. The regulator may issue a conditional certificate of compliance if the site has been remediated using risk-based standards. The regulator may also issue an approval in principle of a remediation plan even before on-site work is carried out. This is an attractive option for parties seeking lender approval and municipal development approval.

Comparison with the United States

There is considerable debate in the U.S. over standards, but for different reasons than in Canada. In short, Canadian concerns focus on the uncertainty created by a lack of legislated standards, whereas American concerns centre on the multiplicity of legislated standards and the obligation to comply with so many of them. Responsible parties undertaking *Superfund* remediation are required to comply with all "applicable or relevant and appropriate requirements" (ARARs) of federal or state law. Critics propose making the ARARs requirements clearer and less onerous by revising the standard to a lesser one of "all legally applicable requirements" and setting a national cleanup guideline for disposal sites.

The lack of flexibility in *Superfund* remediation standards has also been severely criticized. Critics argue that the current focus of the EPA on removal and permanent remediation and the lack of flexibility in remediation standards result in millions of dollars being spent remediating sites to high standards which are likely inappropriate for sites that may never see residential use. These criticisms are less pronounced in Canada, where land use factors have been applied in guidance policies and, more latterly, in legislation. In fact, land use factors are basic elements in British Columbia's standards. British Columbia is also providing remedy selection options for different types of remediation (e.g. on-site management versus removal etc.). *Superfund* reform proposals from both the Administration and Republican Congressional leaders appear to contemplate similar approaches, including the use of "national risk goals".

The issue of approval for remediation in the United States has primarily focused on the concept of "final approval". Neither *Superfund* nor Environmental Protection Agency guidance presently provides a complete release from future liability. The issue of liability "re-openers" for responsible persons who have settled their contribution share through settlement agreements is very contentious. A proposed response to these criticisms is the concept of "final covenants". Provided that the specified conditions are met and the settling party pays a premium to offset the risks of remedy failures, future liability resulting from unknown conditions, etc., proposed *Superfund* revisions contemplate providing a final covenant not to sue for any future remediation costs. State governments are also considering the "covenant not to sue" approach and the Environmental Protection Agency has indicated it may consider introducing such options administratively pending reauthorization. The "final approval" issue has not been as pronounced in Canada.

V. LAW REFORM FOR ALLOCATION OF LIABILITY

Requiring Regulators to Consider Factors

All new statutes require the regulators to consider certain factors when assigning liability for remediation. Alberta's new legislation requires the regulator to consider factors such as when the substance became present at the site, the circumstances by which the person acquired the site, disclosure by vendors, whether the person took all reasonable care at the site, and whether the person followed accepted industry practice and standards. A similar approach is used in new legislation in Nova Scotia, Manitoba, and British Columbia.

Statutory Rights to Assert Exemptions

British Columbia's and Manitoba's approach to assigning liability differs from other Canadian law reform in one key respect: it gives potentially "responsible persons" a right to assert exemptions; immunity does not depend solely on the regulator's discretion. For example, British Columbia's statute provides 11 exemptions from "responsible person" liability, and another 11 exemptions are proposed in the draft regulation. The exemptions apply to a wide range of parties, e.g. certain types of 'innocent' secured creditors, fiduciaries, transporters, producers, purchasers, landlords, consultants and local governments. The regulator cannot issue a remediation order against a person who successfully asserts an exemption, and even if a person does not qualify for an exemption, the regulator

must consider the allocation factors noted above.

Protection for Minor Contributors

The new Canadian statutes generally recognize the need to protect minor contributors. In these statutes, the regulators must now consider, before issuing a remediation order, the relative amount of the contamination attributable to the proposed responsible person. The same approach is proposed in the Saskatchewan and Manitoba discussion papers.

British Columbia provides protection for minor contributors in another way as well. A responsible person who does not qualify for an exemption can obtain minor contributor status to be used as a shield against future orders and private cost recovery actions.

Agreements to Settle Liability

Governments traditionally enter into private agreements to settle liability without enabling legislation. For example, Ontario's regulators have prepared a standard form agreement which contemplates that, under given conditions, secured creditors may enter a borrower's site to carry out investigations without attracting liability under its contaminated sites legislation. British Columbia's regulators, even before the new legislation, have often negotiated restrictive covenants and other agreements to settle remediation issues with property owners. These agreements have been entered into on an *ad hoc* basis.

Legislators, however, have seen the merit of establishing 'omnibus' rules for entering into agreements. The new statutes (except the Yukon's) set out criteria and processes for settlement agreements. The Saskatchewan discussion paper proposes similar procedures.

Other Means of Dispute Resolution

British Columbia's new legislation provides responsible parties with an opportunity to seek an opinion about liability from an independent allocation panel. These opinions may be used by the regulator to consider whether a person qualifies for an exemption and whether the manager should enter a voluntary remediation agreement or confer minor contributor status on responsible persons.

Comparison with the United States

Superfund contains provisions designed to settle liability, including exemptions (e.g. innocent purchasers, act of god, act of war), special protection for minor contributors and opportunities to enter agreements. These provisions have been severely criticized as being too limited. In *Superfund* reauthorization debates over the past 3 years, Congressional Democrats and Republicans and the Administration have proposed numerous amendments. Proposals which have gained broad support include the following:

* more express statements of the factors which the court should apply when allocating liability;
* alternate dispute resolution;
* improved "de minimis" liability limitation and settlement options, and a new "de micromis" exemption;
* protection for small businesses against unreasonable delays in finalizing settlement agreements, with a release from liability if agreements unreasonably delayed;
* a liability ceiling limiting municipal liability to 10%. (The only current exemption is for municipalities that acquire ownership involuntarily through tax default etc.);
* clarification of the innocent landowner exemption; and
* exemptions for certain transporters and small business or non-profit arrangers of transport; and
* voluntary non-binding allocation, where potentially responsible parties would be able to avoid joint and several liability if they privately allocate 100% of the liability.

VI. SUMMARY

Until recently, Canadian legislators have used a uniform and simple approach to regulating contaminated sites. Under a pattern set in the 1980s, all federal and 10 provincial governments provided regulators with powers to ascertain which sites should be remediated and to order any of a broad range of "responsible persons" to undertake remediation as specified by the regulator. The order powers were based on joint and several,

retroactive, and absolute liability.

Reform-minded Canadian legislators in British Columbia, Alberta, Nova Scotia, and the Yukon have sought to provide clarity respecting "contamination" and acceptable remediation. Their new statutes all provide rights to challenge the regulator's decisions and opportunities for reaching agreements respecting remediation. Nonetheless, Canadian law reform generally still leaves regulators with substantial discretion to designate contaminated sites and appropriate remediation: generally, the new safeguards apply to constrain or challenge the regulator after the initial decision is made. Arguments that the new regimes are still too uncertain can be anticipated. Arguably less regulatory discretion is found in British Columbia's new legislation, which grants "responsible persons" the right to choose from several alternative substantive legislated standards for determining contamination and remediation. The British Columbia system is in line with the U.S. pattern of using legislation (e.g. ARARs) -- as opposed to regulatory discretion -- as the source for determining standards. In contrast to the apparent multiplicity of ARARs, however, the British Columbia standards represent 'one stop' shopping.

The new Canadian statutes seek to allocate liability more fairly and settle more expeditiously. One common theme of the three new statutes is the requirement that the regulator consider specified factors mostly relating to the degree of contamination attributable to the candidate for a remediation order. A less common but emerging theme -- most notably in British Columbia's legislation -- is the provision of statutory rights to assert specified exemptions. The use of statutory exemptions parallels proposals to reform the *Superfund* legislation in the U.S. A third new legislative feature in Canada is the use of legislatively-based alternative dispute resolution mechanisms to settle liability issues. The Canadian interest in alternative dispute resolution is consistent with the intentions in various U.S. *Superfund* amendments (e.g. voluntary non-binding allocation).

In conclusion, Canadian legislators, however, clearly recognize the merits of current and proposed *Superfund* initiatives for settling liability: many Canadian liability allocation provisions are directly adapted from existing and proposed *Superfund* provisions. It is premature, however, to suggest that Canadian legislators will readily adopt all aspects of the *Superfund* approach. While five jurisdictions fall within the law reform camp, it is significant that five others and the federal government adhere to the traditional approach (which differs significantly from *Superfund*). Canadian legislators do not appear interested in establishing a fund. Nor are most Canadian legislators anxious to significantly reduce the discretion of regulators or embrace the detailed statutory approach typical of

U.S. regulatory regimes. The movement in Canada towards a higher degree of regulatory prescription is moderate (with the possible exception of British Columbia). Although Canadian legislators have paid close attention to *Superfund* issues, it is still an open question, however, whether Canadian legislators would follow the lead of any new U.S. legislation which scraps joint and several, retroactive and absolute liability. The *Superfund* experience is informative, but not determinative, for Canadian legislators. Canadian legislators will likely continue to be cautious and consider not only *Superfund* but U.S. state experience, law reform in other Canadian jurisdictions, and the unique contamination problems within their own borders. Canadian legislators are unlikely to undertake hasty law reform without a full consideration of each of these sources.

Finally, it is important to recognize how calls for law reform arise. A decade ago in Canada, contaminated sites were not in the 'Top 10' environmental issues. Legislators then, as they do today, prefer to deal with environmental problems prospectively. The legislative hesitance for dealing with historically contaminated sites problem is not surprising -- if legislation focuses liability on industry, legislators fear an aggressive attack on the legislation as being unfair. It is tempting to do nothing. At the same time, however, it is broadly recognized by both legislators and industry that **not** developing a systematic approach to remediating contaminated sites only leaves uncertainty and potential unfairness. And, perhaps most significantly, Canadian governments realized that without a systematic legislative approach, **they** could inherit the sites and the potential cleanup costs. Contaminated sites liability is now a central environmental concern of legislators in Canada.

The Canadian lesson for Jamaica is this: creating a system of allocating liability for historic pollution might not be viewed as a political high priority, but pressures will mount to address it. In the meantime, there is considerable uncertainty in the market (and costs of uncertainty), many disgruntled stakeholders, and a real possibility that the government might inherit an orphan site or two during this wait.