

**ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**HAMILTON BEACH BRANDS CANADA, INC., GERALD ANTHONY
DIROCCO, 2441577 ONTARIO INC., and CARILLION CANADA INC.**

Appellants

- and -

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Respondent

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I. PART I – INTRODUCTION

1. The order of Vice-Chair Robert V. Wright of the Environmental Review Tribunal (“ERT” or “Tribunal”) dated September 1, 2017 in ERT Case No. 17-025, dismissed a motion brought by the Appellants (identified as Orderees in the Tribunal reasons for the order) that sought to quash an order issued April 12, 2017 by the Director, Ministry of the Environment and Climate Change (“Director”) under section 18 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (“EPA”). The section 18 order requires the Appellants to delineate contamination that has migrated from their property to off-site properties. On appeal to this Honourable Court, the Appellants seek to: (1) set aside and reverse the Tribunal order; and (2) set aside the section 18 order of the Director.

Appellants’ Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at paras 5, 100.

Appellants’ Factum: paras 1, 12, 82.

2. Vice-Chair Wright, in dismissing the motion before him, found that a Director has jurisdiction to make an order under section 18 of the *EPA* requiring a person who owns or owned or who has or had management or control of an undertaking or property that is contaminated to delineate contamination that has migrated to off-site properties. Vice-Chair Wright interpreted, section 18(2) of the Act such that: (1) the Director has jurisdiction to make an order regarding existing, ongoing and future adverse effects, as that term is defined in the *EPA*; (2) the adverse effect does not have to be related to the potential off-site migration of a contaminant, nor must the contaminant be on an Orderee’s property at the time the order is made; and (3) a section 18 order may require work on-site and off-site to address an adverse effect.

Appellants' Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at paras 5, 97-98.

3. The submission of the Canadian Environmental Law Association (“CELA”) and Lake Ontario Waterkeeper (“LOW”) (collectively “CELA and LOW” or the “Intervenors”) is that the interpretation of section 18 of the *EPA* by Vice-Chair Wright is in accordance with: (1) statutory and case law interpretation of related provisions in environmental statutes from other provinces comparable to section 18; and (2) international law principles not referred to by the parties before the Tribunal or before this Honourable Court.

II. PART II – THE FACTS

4. CELA and LOW accept the facts as stated by Vice-Chair Wright.

Appellants' Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at paras 7-9 (referring to Part 3 of the Director's order).

Appellants' Factum: para 13 (referring to para 7 of Tribunal reasons for order).

Appellants' Appeal Book, Tab 3: Director's Order, Part 3.

III. PART III – ISSUES AND LAW

A. Issue 1: Whether, on the basis of comparable legislation in other provinces, section 18 of the *EPA* should be interpreted to apply to existing (past), on-going, and future adverse effects, whether on-site or off-site?

1. Introduction: The Position of the Appellants

5. The Appellants assert that the result of the Tribunal order is: (1) contrary to and undermines the objective of Brownfields legislation, which seeks to encourage and not discourage the purchase and development of contaminated sites; and (2) diametrically opposite to the purpose of Brownfields legislation, namely, to ensure the cleanup and development of contaminated land and to reduce the liability of an owner.

Appellants' Factum: paras 11, 78.

6. The Appellants also argue that section 18 of the *EPA* only authorizes orders that: (1) deal with prevention of environmental harm before it occurs; and (2) only in respect of potential off-site migration of contamination that is on the site of the person that is subject to the order at the time the order is made. The Appellants argue further, however, that: (1) the Director's order (and the Tribunal decision that upholds it) requires evaluation of environmental harm that has already occurred (past or "historic contamination"); and (2) on properties that are off-site of the property of the persons who are subject to the order. This, the Appellants say, is an impermissible expansion of the jurisdictional scope of section 18 authority.

Appellants' Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at paras 17-34.

Appellants' Factum: paras 3, 6, 8-10, 47-48, 52, 54-55, 57, 59, 64-66, 69(b), 80-81.

7. For the reasons set out below, CELA and LOW submit that the Tribunal's interpretation of the law is consistent with: (1) contaminated site (Brownfield) regimes similar to the *EPA* in other provinces; and (2) provisions in the environmental laws of other provinces similar to section 18.

2. Overview

8. Modern environmental legislation rests in part on the foundation of an older, public welfare, concept; the idea that government has a responsibility to defend and advance public-well-being in the public interest. That concept is now firmly imbedded in Canadian jurisprudence and its importance heightened by the ever-increasing complexities of modern society. Just as pollution offences have long been viewed as public welfare offences, enacted in the interests of public health, so too is pollution that is

to be managed by administrative measures. Ministers, or their delegates, have the responsibility of protecting the public interest in the environment, and must make their decisions in consideration of that interest.

Intervenors' Book of Authorities, Vol. 1, Tab 1: Paul Muldoon et al, *An Introduction to Environmental Law and Policy in Canada* 2d ed. (Toronto: Emond, 2015) at 8.

Intervenors' Book of Authorities, Vol. 1, Tab 2: *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1327.

Appellants' Book of Authorities, Tab 15: *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at para 34.

9. The purpose of statutes, like the *EPA*, is to protect public and societal interests by creating regulatory, rather than criminal, offences. The Act's provisions are intended to encourage compliance with orders for the general welfare of society and the *EPA*'s status as remedial legislation entitles it to a generous interpretation.

Intervenors' Book of Authorities, Vol. 1, Tab 3: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para 16.

Appellants' Book of Authorities, Tab 11: *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] 3 S.C.R. 323 at para 9.

3. Comparable Provisions in the Statutes of Other Provinces

10. Nonetheless, in interpreting a statute, the courts often consider enactments in other jurisdictions. Statutes in other provinces that are "similar in purpose and structure" and intended to achieve the same policy objectives can provide guidance on the legal context under "which statutes are enacted and operate". The "courts may presume that despite minor differences, the statutes all express the same policy objectives and implement the same solutions". The case law interpreting the provisions of related statutes can also assist with interpretation.

Intervenors' Book of Authorities, Vol. 1, Tab 4: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014) at 424, 428, 430.

11. In this regard, the *EPA* is not the only statute in Canada purporting to deal with: (1) “adverse effects” from “discharges” of “contaminants” to the “natural environment”; (2) preventive and remedial authority; or (3) on-site and off-site conditions. Related environmental legislation in other provinces has been drafted broadly to address environmental concerns, achieve the same policy objectives as the *EPA*, and draws on similar language in doing so.

12. The Tribunal’s interpretation of section 18 of the *EPA* is consistent with the statutory frameworks and their interpretation under these related provincial laws.

a. British Columbia

13. The British Columbia *Environmental Management Act* (“British Columbia law”) is the primary statute that regulates contaminated sites in that province. The policy objectives and regulatory framework of the British Columbia law are very similar to the *EPA*. Both statutes seek to prevent and remedy environmental contamination and establish principles for determining liability for remediation of such sites.

Intervenors’ Factum, Schedule B: *Environmental Management Act*, S.B.C. 2003, c. 53, Part 4 (Contaminated Site Remediation).

14. The British Columbia law, like the *EPA*, grants broad preventive and remedial powers to Directors to ensure achievement of environmental protection objectives. Both statutes also establish a specialized tribunal to expeditiously and effectively address questions regarding site contamination, and the determination of liability for remedying such contamination. Indeed, the British Columbia courts have held that the Supreme Court of Canada’s analysis of the *EPA* statutory and liability regime provisions in *R. v. Consolidated Maybrun Mines* is relevant and applicable to the British Columbia law as well.

Intervenors' Book of Authorities, Vol. 1, Tab 5: *Swamy v. Tham Demolition Ltd.*, 2000 BCSC 1253 (B.C.S.C.) at paras 34-36, 39-41.

i. Director's Powers to Issue Preventive and Abatement Orders under British Columbia Law

15. Section 83(2) of the British Columbia law provides the Director with authority in the event a substance is causing pollution, to issue an order requiring a person to do work listed in paragraphs (a) – (f) therein. These include undertaking an investigation to determine the extent and effects of the pollution, abate the pollution, and carry out remediation. The measures that a Director can impose under the British Columbia law are similar in many respects to those that can be imposed under section 18(1)1-8 of the *EPA*. Similarly, section 83(1)(b) of the British Columbia law mirrors section 18(1) of the *EPA* and authorizes the Director to issue an order to a person who “owns or occupies the land on which the substance is located *or on which the substance was located immediately before it was discharged into the environment*” (emphasis added).

Intervenors' Factum, Schedule B: *Environmental Management Act*, S.B.C. 2003, c. 53, (Part 7 – Powers in Relation to Managing the Environment), s. 83.

16. The italicized portion of section 83(1)(b) makes it clear that the Director's authority to issue an order under section 83 of the British Columbia law is not confined to the property on which the contaminant was first discharged. In this regard, a Director's authority under the British Columbia law is consistent with the Tribunal's interpretation in the case at bar that the Director had authority to order the Appellants to conduct work off-site. The broad scope of the Director's authority over owners and operators under both British Columbia law and the *EPA* are necessary given that contamination once discharged into the natural environment does not necessarily remain within property boundaries but can migrate off-site.

ii. Responsibility for Contaminated Site Remediation under British Columbia Law

17. The British Columbia law, like the *EPA*, casts a broad net of liability for contaminated site remediation. Under the British Columbia law, persons who may be held liable include all current and previous “owners” and “operators” of a contaminated site, subject to certain provisions for exemption.

Intervenors’ Factum, Schedule B: *Environmental Management Act*, S.B.C. 2003, c. 53, Part 4 (Contaminated Site Remediation), s. 45(1)(a) and (b).

18. Liability under section 18 of the *EPA* is contingent on the status or role of a person, as opposed to fault. Similarly, the British Columbia law imposes absolute liability on “owners” and “operators” and the extent of their knowledge, expertise, or fault is irrelevant.

Intervenors’ Book of Authorities, Vol. 1, Tab 6: *Dolinsky v. Wingfield*, 2015 BCSC 238 (B.C.S.C.) at para 58.

19. In this regard, in *Gehring v. Chevron Canada Ltd.*, the British Columbia Supreme Court stated:

“The scheme of the *EMA*, like environmental statutes in many jurisdictions, removes the burden of proving causation or fault-based conduct. It takes the practical approach that the contamination exists, and must be remediated. The legislation imposes responsibility even though a party may have acted consistently with the standards which existed at the time the contamination occurred or spread” (emphasis added).

Intervenors’ Book of Authorities, Vol. 1, Tab 7: *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639 (B.C.S.C.) at para 133.

20. Liability under the British Columbia law, like the *EPA*, is joint and several and a “responsible person” may be liable for the full cost of clean-up, irrespective of the extent of the person’s involvement with contamination of the property. Any past owner may be found to be a “responsible person” and there is no time limit for pursuing a previous

owner. Consequently, liability may be imposed on a “responsible person” for historic contamination. Moreover, under the British Columbia law a contaminated site is not defined by a reference to property boundaries. Thus, a contaminated site can encompass more than one property.

Intervenors’ Factum, Schedule B: *Environmental Management Act*, S.B.C. 2003, c. 53, Part 4 (Contaminated Site Remediation), s. 47(1).

Intervenors’ Book of Authorities, Vol. 1, Tab 8: *Zamani v. Ma*, 2015 CarswellBC 3783, 2015 BCPC 366, [2016] B.C.W.L.D., 1700, 262 A.C.W.S. (3d) 386 at paras 33, 39-40.

Intervenors’ Book of Authorities, Vol. 1, Tab 9: *Superior Fine Papers Inc. v. Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No. 22, 59 C.E.L.R. (3d) 179 at para 137.

Intervenors’ Book of Authorities, Vol. 2, Tab 10: *Re Hopkinson*, [1993] O.E.A.B. No. 38 at paras 84-103.

21. The British Columbia law expressly provides that where a substance migrates from one site to another, the current and previous “owners” and “operators” of the site from which the substance migrated are responsible for off-site remediation.

Intervenors’ Factum, Schedule B: *Environmental Management Act*, S.B.C. 2003, c. 53, Part 4 (Contaminated Site Remediation), s. 45(2)(a) and (b).

22. Furthermore, the British Columbia law exempts from the status of “responsible person” any person who owns or operates a contaminated site, if the site became contaminated only by the migration of a substance from another property not owned or operated by the person. Therefore, the British Columbia law firmly entrenches liability for off-site migration with the “owners” and “operators” of the property that is/was the source of the contamination.

Intervenors’ Factum, Schedule B: *Environmental Management Act*, S.B.C. 2003, c. 53, Part 4 (Contaminated Site Remediation), s. 46(1)(j).

23. The Intervenors submit that in the case at bar, the Director’s order, and the Tribunal decision that upheld it, which required the Appellants to undertake delineation and related work off-site, is consistent with the principles for liability established in

British Columbia for contaminated sites. Furthermore, there are compelling policy reasons as to why the Appellants' arguments regarding the scope of liability under section 18 of the *EPA* should not be adopted. The arguments of the Appellants would create perverse incentives by exempting persons who have or had ownership, management or control of a property or undertaking from liability for off-site contamination that originated from their site. This approach could motivate such owners to passively permit contamination to migrate off-site in order to reduce their liability under the *EPA*. The Intervenors submit that the Appellants' interpretation would defeat the purposes of the *EPA* of protection and conservation of the natural environment.

b. Alberta

i. Director's Powers to Issue Environmental Protection Orders under Alberta Law

24. The wording of the environmental protection order authority under section 113(1) of the Alberta *Environmental Protection and Enhancement Act* ("Alberta law") is comparable to section 18(2) of the *EPA* in that it addresses in one section potential, on-going, and past "adverse effects". Section 113(1) states in part:

“...where the Director is of the opinion that (a) a release of a substance into the environment may occur, is occurring or has occurred, and (b) the release may cause, is causing or has caused an adverse effect, the Director may issue an environmental protection order to the person responsible for the substance.”

Intervenors' Factum, Schedule B: *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E.12, (Part 5 – Release of Substances), s. 113(1).

25. The Alberta law defines an “adverse effect” broadly and in terms similar to that of the *EPA*, to mean “impairment of or damage to the environment, human health or safety or property”.

Intervenors' Factum, Schedule B: *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E.12, s. 1(b).

26. The Appellants argue that what they call the solely preventive focus of section 18 of the *EPA* is underscored by, and must be interpreted in the context of, section 17 of the *EPA* (the heading for which reads "Remedial orders"). However, section 112 in the Alberta law, using much the same language as section 113(1), imposes a duty on a person responsible to take "remedial measures" where a substance "may cause, is causing or has caused an adverse effect". Again, the effect of such language is that section 112 of the Alberta law addresses future, present, and past adverse effects in one section even though it appears under a heading entitled: "Duty to take remedial measures".

Intervenors' Factum, Schedule B: *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E.12, (Part 5 – Release of Substances), s. 112.

27. Furthermore, section 113(1) of the Alberta law has been upheld as applying to both on-site and off-site contamination. In a series of cases all entitled *Re Gas Plus Inc.*, the Alberta Environmental Appeals Board ("Board") affirmed, and eventually recommended expansion of, a section 113(1) environmental protection order issued by the provincial environmental regulator (Alberta Environment) requiring that a gas station owner and operator prepare a delineation plan to determine the extent of contamination and remediation needed at the gas station site (the source of contamination) and portions of a residential area in Calgary. In one of the Board's decisions, it recommended expanding the Alberta Environment order with a series of measures to, among other things, require the owner/operator to confirm the location of all contaminated material, both on-site and off-site, by carrying out delineation, including the collection and analysis of groundwater, soil, and soil vapour data. Although the owner/operator did not challenge the order on the ground that section 113(1) of the Alberta law cannot be used to address

pollution that has migrated off-site, in none of these decisions did the Board question the authority of Alberta Environment to issue such an order.

Intervenors' Book of Authorities, Vol. 2, Tab 11: *Re Gas Plus Inc.*, [2011] A.E.A.B.D. No. 12 (Alberta Environmental Appeals Board) at paras 70-74, 78-79, 82.

Intervenors' Book of Authorities, Vol. 2, Tab 12: *Re Gas Plus Inc.*, [2011] A.E.A.B.D. No. 22 (Alberta Environmental Appeals Board) at para 84.

Intervenors' Book of Authorities, Vol. 2, Tab 13: *Re Gas Plus Inc.*, [2012] A.E.A.B.D. No. 13 (Alberta Environmental Appeals Board) at para 31.

ii. **Responsibility for Contaminated Site Remediation under Alberta Law**

28. The Alberta law, like the *EPA* and British Columbia law, casts a wide net of liability with respect to contaminated sites. Section 123 of the Alberta law states that the law's contaminated sites regime applies regardless of when a substance became present in, on, or under a site. Section 125 allows a Director of Alberta Environment to designate a site as contaminated when the Director is of the opinion that a substance is present in an area of the environment and may cause, is causing, or has caused a significant adverse effect. Section 129 of the Alberta law states that the Director may issue an environmental protection order similar to a section 113 order to a person responsible for a contaminated site and the order can be in relation to the contaminated site as well as the environment affected by the contaminated site.

Intervenors' Factum, Schedule B: *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E.12, (Part 5 – Release of Substances), ss. 123, 125, 129(1)(2)(4)(a).

29. Accordingly, it is submitted that both the Alberta law's general environmental protection order authority and its contaminated site environmental protection order authority are similar in all material respects (e.g. ability to address past, present and future contamination, both on-site and off-site) to section 18 of the *EPA* and how it was interpreted by the Tribunal in the case at bar.

c. Nova Scotia

i. Minister’s Powers to Issue Control Orders under Nova Scotia Law

30. Section 71 (“Duty to take remedial measures”) in conjunction with section 125 (“Ministerial control order”) of the Nova Scotia *Environment Act* (“Nova Scotia law”) impose a duty on any person releasing a substance into the environment that has caused, is causing or may cause an adverse effect to, among other things, prevent, reduce and remedy the adverse effects of the substance. The Nova Scotia law also authorizes the Minister where he or she believes on reasonable and probable grounds that the Act has been, or will be contravened, to issue an order. The combined effect of the two sections, which the case law shows have been applied together, is comparable to section 18(2) of the *EPA* in that they address existing (or past), on-going, and potential (or future) “adverse effects”.

Intervenors’ Factum, Schedule B: *Environment Act*, S.N.S. 1994-95, c.1, (Part VI – Release of Substances), s. 71, (Part XIII – Orders), s.125.

31. The Nova Scotia law defines “adverse effects” in broad terms to mean effects on the environment that negatively affect aspects of human health.

Intervenors’ Factum, Schedule B: *Environment Act*, S.N.S. 1994-95, c.1, s. 3(c).

32. Ministerial orders issued under the combined authority of sections 71 and 125 of the Nova Scotia law, which required a person to examine the extent of off-site pollution migration from a property that was the source of the contamination, have been upheld by the courts as a reasonable exercise of Ministerial authority. In *IMP Group International Inc. v. Nova Scotia (Attorney General)*, the Nova Scotia Supreme Court upheld a section 125 order issued to the owner of industrial property (and source of contamination) that required the owner to characterize and assess off-site groundwater and use off-site

monitoring wells to test for the vertical and horizontal presence of perchloroethylene (“PCE”) in the groundwater. The court also found all the directions in the order to be within the authority provided to the Minister under the Nova Scotia law, following a review of the particulars of the order against the provisions of section 125.

Intervenors’ Book of Authorities, Vol. 2, Tab 14: *IMP Group International Inc. v. Nova Scotia (Attorney General)* 2014 NSSC 191 (N.S.S.C.) at paras 20-25, 51-52.

ii. Responsibility for Contaminated Site Remediation under Nova Scotia Law

33. The Nova Scotia law, like the environmental laws in Alberta, British Columbia and Ontario (under the *EPA*), also casts a wide net of contaminated site liability in conjunction with the general authority to issue orders and the factors that may be considered before doing so. Furthermore, Ministerial orders can require the person to whom the order is directed to restore not only the contaminated site but the environment affected by the contaminated site.

Intervenors’ Factum, Schedule B: *Environment Act*, S.N.S. 1994-95, c.1, (Part VIII–Contaminated Sites), ss. 85, 87, 89 (Part XIII – Orders), ss.125, 129.

4. Summary

34. Accordingly, the Intervenors respectfully submit that the foregoing clearly indicates that comparable provisions from other provinces: (1) impose liability on owners irrespective of fault; (2) embrace both preventive and remedial measures often within a single provision; and (3) provide authority for environmental regulators to impose measures applicable to both on-site and off-site circumstances. Therefore, the Tribunal’s interpretation of section 18 of the *EPA* in the case at bar, when considered in the broader legal context, is consistent with environmental liability regimes established under related statutes from other provinces.

B. Issue 2: Whether, on the basis of international law principles, section 18 of the EPA should be interpreted to apply to existing (past), on-going, and future adverse effects, whether on-site or off-site?

1. Introduction: The Position of the Appellants

35. The Appellants also invoke the “polluter pays” principle, a principle of international as well as domestic law, in support of their argument that section 18, a “fault-free” remedy, cannot be used to impose obligations on “innocent” owners to address contamination on off-site properties, even if it originated from their property. According to the Appellants, the Director’s authority to address off-site contamination is limited to “polluters” (i.e. persons who caused contamination) through section 17 of the *EPA*, a “fault-based” remedy.

Appellants’ Factum: paras 3-6, 69-73.

36. However, developments internationally suggest that the definition of “polluter” is a flexible term. The agreed facts for this case show that the Appellants could well qualify as “polluters” under international law principles, which have recognized the evolution and expansion of the term “polluter” over the years.

Appellants’ Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at paras 2-3, 7.

Intervenors’ Book of Authorities, Vol. 2, Tab 15: Priscilla Schwartz, “The Polluter-Pays Principle”, chapter 12 in *Research Handbook on International Environmental Law*, Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds (United Kingdom: Edward Elgar, 2014) at 247-248.

37. The Appellants also make additional arguments that the Intervenors submit are best answered by reference to other principles of international law not invoked by either of the parties. In particular, the Appellants state that the court should have regard to: (1) the prospective purpose of section 18 of the *EPA*; and (2) the interpretative assistance provided by the headings for sections 17 and 18, among other considerations.

Appellants' Factum: paras 59-70.

38. The Intervenors submit that certain principles of international law, applicable in the circumstances of this case, do not support the assertions of the Appellants.

2. Overview: International Law as an Interpretative Aid to Domestic Law

39. It is now common practice to invoke international law as an aid in interpreting domestic legislation. The presumption that legislatures intend to comply with international law applies to all legislation, federal and provincial, Acts and regulations, whether or not it is implementing legislation. Although international law is not binding on Canadian legislatures, it is presumed that legislation enacted both federally and provincially is meant to comply with, and to respect the values and principles of, international law.

Intervenors' Book of Authorities, Vol. 1, Tab 4: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014) at 567, 569.

40. These principles are important where, as here, each party argues that its interpretation of section 18 gives effect to the words of the *EPA* as a whole and that the wording of the section is unambiguous. In such circumstances, where two diametrically opposed interpretations of section 18 are being advanced by the parties, an interpretation that reflects international law principles is to be preferred.

Appellants' Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at para 13.

Intervenors' Book of Authorities, Vol. 1, Tab 4: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014) at 569.

a. The Prevention Principle

41. An international law principle relevant in the circumstances of this case is the principle of prevention. The prevention principle or approach attempts to anticipate

possible negative effects and uses instruments to avoid damage or to reduce/minimize the consequences if damage has nevertheless occurred. Put another way, preventive measures are not limited to simply averting future adverse effects. Rather they are intended to anticipate damage “or, where it has already occurred, try to ensure it does not spread”.

Intervenors’ Book of Authorities, Vol. 2, Tab 16: European Commission, “The Preventive and Precautionary Principles” in *Workshop on EU Environmental Legislation: Principles of EU Environmental Law* (Brussels: EC, 2012) Slide 13.

Intervenors’ Book of Authorities, Vol. 2, Tab 17: Nicolas de Sadeleer, “The Principles of Prevention and Precaution in International Law: Two Heads of the Same Coin?”, chapter 9 in *Research Handbook on International Environmental Law*, Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds (United Kingdom: Edward Elgar, 2014) at 182.

42. The Appellants assert that section 18 of the *EPA* is only prospective-looking (i.e. limited to averting the risk of adverse effects that have not yet materialized), as reflected, for example, in the section’s heading (“Order by Director re preventive measures”). Their position is fundamentally at odds with the prevention principle because the principle explicitly encompasses both preventive and remedial measures to ensure contamination does not occur but if it does, it does not spread. Accordingly, the prevention principle is broader than: (1) the Appellants’ interpretation of section 18; and (2) the title of the principle otherwise would suggest.

Appellants’ Factum: paras 69(b), 70.

b. The Precautionary Principle

43. The same arguments of the Appellants are also inconsistent with a second international law principle, the precautionary principle, which states that lack of scientific certainty must not be used as a reason to ignore or postpone preventive or remedial action when there are other good reasons to act, such as in circumstances of potentially serious or irreversible environmental harm.

Intervenors' Book of Authorities, Vol. 2, Tab 18: Marco Martuzzi, "The Precautionary Principle: In Action for Public Health" (2007) 64 *Journal of Occupational and Environmental Medicine* (2007) 569.

Intervenors' Book of Authorities, Vol. 2, Tab 19: European Environment Agency, *Late Lessons from Early Warnings: The Precautionary Principle 1896-2000* (Copenhagen: EEA, 2002) at 13, 15.

Intervenors' Book of Authorities, Vol. 2, Tab 17: Nicolas de Sadeleer, "The Principles of Prevention and Precaution in International Law: Two Heads of the Same Coin?", chapter 9 in *Research Handbook on International Environmental Law*, Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds (United Kingdom: Edward Elgar, 2014) at 184.

44. The precautionary principle has been adopted by the Supreme Court of Canada as an appropriate aid in the interpretation of Canadian environmental statutes, including the *EPA*. The principle recognizes, among other things, that: "Environmental measures must anticipate, prevent and attack the causes of environmental degradation".

Intervenors' Book of Authorities, Vol. 2, Tab 20: *114957 Canada Ltee. (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at paras 30-32.

Appellants' Book of Authorities, Tab 11: *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] 3 S.C.R. 323 at para 20.

45. The Tribunal's interpretation of section 18 of the *EPA* is consistent with the precautionary principle because the Tribunal recognized that "an adverse effect that may result from contamination is frequently an ongoing situation and not a single or static event or circumstance. There frequently is no clear line, or no line at all, between an existing and future adverse effect".

Appellants' Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at para 69.

46. In contrast, the argument of the Appellants is not consistent with the precautionary principle. Their argument, if adopted, would frustrate "attacking" existing environmental degradation under section 18 of the *EPA*. In the case at bar, the Director's order that is the subject of this appeal would require investigation and delineation of soil vapour, groundwater and surface water impacts on the off-site properties. The Tribunal's

decision states that the extent of the contamination on and off-site the property has not been fully delineated. Furthermore, the contaminants of concern to soil and groundwater include volatile organic compounds (“VOCs”), such as vinyl chloride, a known human carcinogen. Contaminated groundwater has reached the property boundary of the Appellants and is likely going off-site and may be discharging to an unnamed tributary that discharges to the Bay of Quinte located downstream of the Appellants’ property. An interpretation of section 18 consistent with the precautionary principle would recognize that precluding the Director from requiring persons to delineate the nature and extent of contamination that has migrated from their property onto neighbouring properties creates or exacerbates, not reduces, scientific uncertainty and the potential for environmental harm.

Appellants’ Appeal Book, Tab 2: *Re Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)*, (2017) ERT Case No. 17-025 (ERT) at para 7 (Tribunal noting that for purposes of motion Orderes [now Appellants] accept as correct the facts set out in Part 3 of the Director’s order); para 7, bullet 13 (order requiring investigation and delineation of soil vapour, groundwater and surface water impacts on off-site properties); para 7, bullet 15 (extent of contamination on and off the property has not been fully delineated).

Appellants’ Appeal Book, Tab 3: Director’s Order, Part 3, section 3.1 (2013 discovery of buried metal drums at site containing volatile organic compounds – “VOCs”); section 3.3 (2013 and 2014 investigations conducted on behalf of Appellants show soil and groundwater both highly contaminated with several substances, including vinyl chloride, a known human carcinogen; contaminated groundwater has reached property boundary and is likely going off-site); and section 3.6 (surface water samples collected by ministry from tributary that discharges to Bay of Quinte south of site showed detectable levels of VOCs indicating impacted groundwater leaving site may be discharging to tributary).

Appellants’ Factum: para 13 (Appellants say facts are not in dispute; they are summarized in para 7 of Tribunal decision).

3. Summary

47. Section 18 of the *EPA* reflects the prevention principle, which is broader than its title suggests and also embraces remedial, not just preventive, measures. Section 18 also reflects the precautionary principle, which embraces remedial, not just preventive,

measures in circumstances of scientific uncertainty and potentially serious and irreversible environmental harm. An interpretation that did not apply section 18 of the *EPA* to existing and on-going, as well as future, adverse effects, whether on-site or off-site, would be fundamentally at odds with both the prevention and the precautionary principles.

48. The Tribunal's interpretation of the scope of section 18 is in accordance with international law principles regarding the prevention of pollution and the application of the precautionary principle to environmental problems. Both principles recognize the need for government to take measures to not just prevent pollution but to also address existing contamination to prevent it from causing further environmental degradation. In the case at bar, the application of both principles favours an interpretation of section 18 that authorizes the Director to impose both preventive and remedial measures to address off-site contamination originating from the Appellants' property in order to prevent it from spreading further into the natural environment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 16, 2018

Joseph F. Castrilli

Ramani Nadarajah

Lawyers for the Intervenors
Canadian Environmental Law Association
and Lake Ontario Waterkeeper

IV. SCHEDULE “A” – LIST OF AUTHORITIES

Tab

1. Paul Muldoon et al, *An Introduction to Environmental Law and Policy in Canada* 2d ed. (Toronto: Emond, 2015) at 8.
2. *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1327.
3. *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para 16.
4. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014) at 424, 428, 430, 567, 569.
5. *Swamy v. Tham Demolition Ltd.*, 2000 BCSC 1253 (B.C.S.C.) at paras 34-36, 39-41.
6. *Dolinsky v. Wingfield*, 2015 BCSC 238 (B.C.S.C.) at para 58.
7. *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639 (B.C.S.C.) at para 133.
8. *Zamani v. Ma*, 2015 CarswellBC 3783, 2015 BCPC 366, [2016] B.C.W.L.D., 1700, 262 A.C.W.S. (3d) 386 at paras 33, 39-40.
9. *Superior Fine Papers Inc. v. Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No. 22, 59 C.E.L.R. (3d) 179 at para 137.
10. *Re Hopkinson*, [1993] O.E.A.B. No. 38 at paras 84-**103**.
11. *Re Gas Plus Inc.*, [2011] A.E.A.B.D. No. 12 (Alberta Environmental Appeals Board) at paras 70-74, 78-79, 82.
12. *Re Gas Plus Inc.*, [2011] A.E.A.B.D. No. 22 (Alberta Environmental Appeals Board) at para 84.
13. *Re Gas Plus Inc.*, [2012] A.E.A.B.D. No. 13 (Alberta Environmental Appeals Board) at para 31.
14. *IMP Group International Inc. v. Nova Scotia (Attorney General)* 2014 NSSC 191 (N.S.S.C.) at paras 20-25, 51-52.
15. Priscilla Schwartz, “The Polluter-Pays Principle”, chapter 12 in *Research Handbook on International Environmental Law*, Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds (United Kingdom: Edward Elgar, 2014) at 247-248.

Tab

16. European Commission, “The Preventive and Precautionary Principles” in *Workshop on EU Environmental Legislation: Principles of EU Environmental Law* (Brussels: EC, 2012) Slide 13.
17. Nicolas de Sadeleer, “The Principles of Prevention and Precaution in International Law: Two Heads of the Same Coin?”, chapter 9 in *Research Handbook on International Environmental Law*, Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds (United Kingdom: Edward Elgar, 2014) at 182, 184.
18. Marco Martuzzi, “The Precautionary Principle: In Action for Public Health” (2007) 64 *Journal of Occupational and Environmental Medicine* (2007) 569.
19. European Environment Agency, *Late Lessons from Early Warnings: The Precautionary Principle 1896-2000* (Copenhagen: EEA, 2002) at 13, 15.
20. *114957 Canada Ltee. (Spraytech, Societe d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at paras 30-32.

V. SCHEDULE “B” – LIST OF STATUTES

Statute	Page
<i>Environmental Management Act, S.B.C. 2003, c. 53, Parts 4 (ss. 39-64) and 7 (s. 83)</i>	23
<i>Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, ss. 1(b), (t), (tt), (hhh), (mmm), 2(a),(d),(i), 107, 112, 113, 123, 125, 129</i>	54
<i>Environment Act, S.N.S. 1994-95, c. 1, ss. 2, 3(c), (k), (l), (r), (ak), (al), (aq), (ar), (au), 71, 85, 87, 89, 125, 129</i>	62

1. *Environmental Management Act, S.B.C. 2003, c. 53, Parts 4 (ss. 39-64) and 7 (s. 83):*

...

**Part 4 – Contaminated Site Remediation
Division 1 – Interpretation**

Definitions and interpretation

39 (1) In this Part and Part 5 [Remediation of Mineral Exploration Sites and Mines]:

“allocation panel” means an allocation panel appointed under section 49 (2) [*allocation panel*];

“approval in principle” means an approval in principle under section 53 [*approvals in principle and certificates of compliance*];

“approved professional” means a person who is named on a roster established under section 42 (2) [*approved professionals*];

“approving officer” means an approving officer as defined in the *Land Title Act*;

“certificate of compliance” means a certificate of compliance under section 53 [*approvals in principle and certificates of compliance*];

“commission” has the same meaning as in the *Oil and Gas Activities Act*;

“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 prescribed substance in quantities or concentrations exceeding prescribed risk based or numerical

(a) criteria,

- (b) standards, or
- (c) conditions;

“contaminated soil relocation agreement” means a contaminated soil relocation agreement under section 55 [*contaminated soil relocation*];

“contamination” means the presence in soil, sediment, water or groundwater of a substance prescribed for the purposes of the definition of “contaminated site” in quantities or concentrations exceeding the risk based or numerical

- (a) criteria,
- (b) standards, or
- (c) conditions

also prescribed for the purposes of the definition of “contaminated site”;

“detailed site investigation” means a detailed site investigation and report under section 41 [*site investigations*] that complies with the regulations;

“government body” means a federal, provincial, municipal or treaty first nation body, including an agency or ministry of the Crown in right of Canada or British Columbia and an agency of a municipality or treaty first nation;

“high risk orphan site” means an orphan site determined under section 58 [*orphan sites*] to be a high risk orphan site;

“minor contributor” means a responsible person determined under section 50 [*minor contributors*] to be a minor contributor;

“municipality” means a municipality as defined in section 1 but including the Islands Trust and not including an improvement district or the Greater Vancouver Sewerage and Drainage District;

“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 the secured creditor is described in section 45 (3) [*persons responsible for remediation of contaminated sites*];

“orphan site” means a contaminated site determined under section 58 [*orphan sites*] to be an orphan site;

“owner” means a person who

- (a) is in possession,
- (b) has the right of control, or
- (c) occupies or controls the use

of real property, and includes, without limitation, a person who has an estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the

secured creditor is described in section 45 (3) [*persons responsible for remediation of contaminated sites*];

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

“preliminary site investigation” means a preliminary site investigation and report under section 41 [*site investigations*] that complies with the regulations;

“protocol” means a protocol established by a director under section 64 [*director's protocols*];

“registrar” means the registrar appointed under section 43 [*site registry*];

“remediation order” means a remediation order under section 48 [*remediation orders*];

“remediation standards” means numerical standards relating to concentrations of substances and standards relating to risk assessment, as prescribed in the regulations;

“responsible person” means a person described in section 45 [*persons responsible for remediation of contaminated sites*];

“secured creditor” means a person who holds a mortgage, charge, debenture, hypothecation or other security interest in property at a contaminated site, and includes an agent for that person;

“site investigation” means a detailed or preliminary site investigation referred to in section 41 [*site investigations*];

“site profile” means a site profile referred to in section 40 [*site profiles*];

“site registry” means the site registry established under section 43 [*site registry*];

“subdivision” means

- (a) a subdivision as defined in the *Land Title Act*, or
- (b) a subdivision under the *Strata Property Act*;

“summary of site condition” means a document that complies with subsection (3);

“voluntary remediation agreement” means a voluntary remediation agreement referred to in section 51 [*voluntary remediation agreements*].

- (2) A government body is not an operator only as a result of
- (a) exercising regulatory authority with respect to a contaminated site,
 - (b) carrying out remediation of a contaminated site, or
 - (c) providing advice or information with respect to a contaminated site or an activity that took place on the contaminated site.

- (3) A summary of site condition must be
- (a) prepared
 - (i) by an approved professional,
 - (ii) in the form established in a protocol, and
 - (iii) in accordance with the requirements prescribed by the minister, and
 - (b) signed by the approved professional.

Division 2 – Identification of Contaminated Sites

Site profiles

- 40 (1) A person must provide a site profile in accordance with the regulations
- (a) to the approving officer when the person applies for or otherwise seeks approval for a subdivision of land that the person knows or reasonably should know is or was used for industrial or commercial activity, and
 - (b) to the applicable municipality when the person applies for or otherwise seeks approval for
 - (i) zoning of land that the person knows or reasonably should know is or was used for industrial or commercial activity,
 - (ii) a development permit or a development variance permit for land that the person knows or reasonably should know is or was used for industrial or commercial activity,
 - (iii) removal of soil from property that the person knows or reasonably should know is or was used for industrial or commercial activity,
 - (iv) a demolition permit respecting a structure that the person knows or reasonably should know is or was used for industrial or commercial activity, or
 - (v) a prescribed activity.
- (2) Subject to the regulations, an owner of real property must provide a site profile to the director if the owner
- (a) owns real property that is used or has been used for activities specified in the regulations,
 - (b) dismantles a building or structure, or otherwise decommissions a type of site, specified in the regulations,
 - (c) applies for, or otherwise seeks, approval for any other activity specified in the regulations, or
 - (d) undertakes activities or receives information prescribed in the regulations.
- (3) Subject to the regulations, a permit holder under the *Oil and Gas Activities Act* must provide a site profile to the commission if the permit holder applies for a certificate of restoration respecting an oil and gas activity in accordance with section 41 of that Act.
- (4) A municipality, an approving officer or the commission, as applicable, must
- (a) assess a site profile received under subsection (1), (2) or (3) in accordance with the regulations,

- (b) if the assessment of the site profile under paragraph (a) indicates that a director should review the site profile to determine if a site investigation is required, forward a copy of the site profile to a director, and
 - (c) forward a copy of the site profile to any other person specified in the regulations.
- (5) A municipality, an approving officer and the commission may impose reasonable fees for an assessment under subsection (4) (a).
- (6) A vendor of real property who knows or reasonably should know that real property has been used for
- (a) a prescribed industrial or commercial purpose, or
 - (b) a prescribed purpose or activity,
- must provide a site profile to a prospective purchaser of the real property and a director in accordance with the regulations.
- (7) A trustee, receiver and liquidator or a person commencing foreclosure proceedings, who takes possession or control of real property for the benefit of one or more creditors, must provide a site profile to a director immediately on taking possession or control if the real property has been used for
- (a) an industrial or commercial purpose prescribed for the purpose of subsection (6) (a), or
 - (b) a purpose or activity prescribed for the purpose of subsection (6) (b).
- (8) A director may order a person to prepare and provide to the director a site profile if that person
- (a) owns or occupies land that, in the opinion of the director, may be a contaminated site on account of any past or current use on that or other land, or
 - (b) is a person referred to in subsections (1) to (7) and fails to provide a satisfactorily completed site profile.
- (9) If the director orders the preparation of a site profile respecting land that is subsequently determined not to be a contaminated site, the director is not liable for any costs incurred by a person in preparing the site profile.
- (10) Except for the duty of a vendor to provide a site profile to a prospective purchaser under subsection (6), the duty to provide a site profile does not apply if a person
- (a) has been ordered to undertake a site investigation under section 41 [*site investigations*],
 - (b) seeks and obtains a determination that the site is a contaminated site under section 44 (3) [*determination of contaminated sites*] if before the determination the affected person notifies in writing the applicable municipality or approving officer or the commission, as applicable, of his or her request for a determination, or
 - (c) has already provided a site profile for the site under subsection (1).

Site investigations

41 (1) A director may order an owner or operator of a site, at the owner's or operator's own expense, to undertake a preliminary site investigation or a detailed site investigation and to prepare a report of the investigation in accordance with the regulations and any applicable protocol if the director reasonably suspects on the basis of a site profile, or any other information, that the site

- (a) may be a contaminated site, or
- (b) contains substances that may cause or threaten to cause adverse effects on human health or the environment.

(2) If a director orders a preliminary site investigation or a detailed site investigation respecting a site that is subsequently determined not to be a contaminated site, the director is not liable for any costs incurred by a person for completing the investigation and the related report.

(3) On receipt of a report of a preliminary site investigation or a detailed site investigation submitted under this section, the director

- (a) must determine whether the report and investigation comply with any applicable regulations and orders,
- (b) must give notice to the owner or operator of the site of the determination under paragraph (a), and
- (c) may require the additional investigation and reporting the director considers necessary for the report and investigation to comply with any applicable regulations or orders.

(4) The duty to undertake a preliminary site investigation or a detailed site investigation and to prepare a report of the investigation under this section does not apply if a person seeks and obtains a determination that a site is a contaminated site under section 44 (3) [*determination of contaminated sites*].

Approved professionals

42 (1) A director may designate classes of persons who are qualified to perform classes of activities, prepare classes of reports and other documents or make classes of recommendations that under this Act may be or are required to be performed, prepared or made by an approved professional.

(2) The director may establish a roster of persons who are in a class designated under subsection (1).

(3) A director may

- (a) make changes to the roster that are necessitated by the removal of a designation, and
- (b) add and remove names from the roster.

(4) If a qualified professional has performed activities in a manner that a director has reasonable grounds to believe does not satisfy the applicable protocol established under

section 64 [*director's protocols*], the director may suspend the qualified professional from the roster on terms and conditions.

Site registry

43 (1) The minister must

- (a) establish a site registry, and
- (b) appoint a registrar to manage the site registry.

(2) A director must provide to the registrar, in a form suitable for inclusion in the site registry, information respecting

- (a) all site profiles, preliminary site investigations and detailed site investigations that the director receives,
- (b) all orders, approvals, voluntary remediation agreements and decisions, including determinations under section 44 (3) [*determination of contaminated sites*], made by the director under this Part,
- (c) pollution abatement orders under section 83 [*pollution abatement orders*] that impose a requirement for remediation,
- (d) notifications under section 54 [*independent remediation procedures*] respecting independent remediation,
- (e) declarations and orders made by the minister under section 58 [*orphan sites*], and
- (f) other information required by the regulations.

(3) A director may request the registrar to enter in the site registry information that

- (a) is already available to the director, and
- (b) would normally be obtained through a site profile or site investigation, if, before requesting the registrar to do so, the director provides
- (c) notice to the owners or operators of the site, if known to the director, of the intention to make the request, and
- (d) an opportunity for those owners or operators to show cause to the director why the information contained in the request should not be entered into the site registry.

(4) The registrar must enter by notation into the site registry information referred to in subsections (2) and (3) and decisions of the appeal board.

(5) In accordance with the regulations, the registrar must provide for reasonable public access to information in the site registry.

Determination of contaminated sites

44 (1) A director may determine whether a site is a contaminated site and, if the site is a contaminated site, the director may determine the boundaries of the contaminated site.

(2) Subject to subsection (3), in determining whether a site is a contaminated site, the director must do all of the following:

- (a) make a preliminary determination of whether or not a site is a contaminated site, on the basis of a site profile, a preliminary site investigation, a detailed site investigation or other available information;
 - (b) give notice in writing of the preliminary determination to
 - (i) the person who submitted the site profile, preliminary site investigation or detailed site investigation for the site,
 - (ii) any of a municipality, an approving officer or the commission that has received and forwarded to the director a site profile for the site to which the preliminary determination pertains,
 - (iii) any person with a registered interest in the site as shown in the records of the land title office or a land registry office of a treaty first nation at the time the director searches the land title records, and
 - (iv) any person known to the director who may be a responsible person under section 45 [*persons responsible for remediation of contaminated sites*] if the site is finally determined to be a contaminated site;
 - (c) provide an opportunity for any person to comment on the preliminary determination;
 - (d) make a final determination of whether or not a site is a contaminated site;
 - (e) give notice in writing of the final determination to
 - (i) the person who submitted the site profile, preliminary site investigation or detailed site investigation for the site,
 - (ii) any of a municipality, an approving officer or the commission that received, assessed and forwarded to the director a site profile for the site to which the final determination pertains,
 - (iii) any person with a registered interest in the site as shown in the records of the land title office or a land registry office of a treaty first nation at the time of the final determination,
 - (iv) any person known to the director who may be a responsible person under section 45 [*persons responsible for remediation of contaminated sites*], and
 - (v) any person who has commented under paragraph (c);
 - (f) carry out any other procedures specified in the regulations.
- (3) A director, on request by any person, may omit the procedures set out in subsection (2) (a) to (c) and make a final determination that a site is a contaminated site if the person
- (a) provides reasonably sufficient information to determine that the site is a contaminated site, and
 - (b) agrees to be a responsible person for the contaminated site.
- (4) The lack of a determination under subsection (2) or (3) does not mean that a site is not a contaminated site.
- (5) In addition to a site in respect of which a director makes a determination under subsection (1), a site is considered to be or to have been a contaminated site if a director has done any of the following:

- (a) appointed an allocation panel with respect to the site under section 49 [*allocation panel*];
 - (b) determined that a responsible person is a minor contributor with respect to the site under section 50 [*minor contributors*];
 - (c) entered into a voluntary remediation agreement with respect to the site under section 51 [*voluntary remediation agreements*];
 - (d) issued an approval in principle with respect to a proposed remediation plan for the site under section 53 (1) [*approvals in principle and certificates of compliance*];
 - (e) issued a certificate of compliance with respect to remediation of the site under section 53 (3) [*approvals in principle and certificates of compliance*].
- (6) A final determination made under this section is a decision that may be appealed under Division 2 [*Appeals from Decisions under this Act*] of Part 8.

Division 3 – Liability for Remediation

Persons responsible for remediation of contaminated sites

45 (1) Subject to section 46 [*persons not responsible for remediation*], the following persons are responsible for remediation of 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.
- (2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of 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.

- (3) A secured creditor is responsible for remediation of a contaminated site if
- (a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or
 - (b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site.
- (4) A secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor
- (a) participates only in purely financial matters related to the site,
 - (b) has the capacity or ability to influence any operation at the contaminated site in a manner that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a manner as to cause or increase contamination,
 - (c) imposes requirements on any person, if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or
 - (d) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

Persons not responsible for remediation

- 46 (1) The following persons are not responsible for remediation of a contaminated site:
- (a) a person who would become a responsible person only because of an act of God that occurred before April 1, 1997, if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
 - (b) a person who would become a responsible person only because of an act of war if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
 - (c) a person who would become a responsible person only because of an act or omission of a third party, other than
 - (i) an employee,
 - (ii) an agent, or
 - (iii) a party with whom the person has a contractual relationship,
 if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
 - (d) 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;
- (e) an owner or operator who
 - (i) owned or occupied a site that at the time of acquisition was not a contaminated site, and
 - (ii) during the ownership or operation, did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;
- (f) a person described in section 45 (1) (c) or (d) or (2) (c) or (d) [*persons responsible for remediation of contaminated sites*] who
 - (i) transported or arranged to transport the substance to the site, if the owner or operator of the site was authorized under an Act to accept the substance at the time of its deposit, and
 - (ii) received permission from the owner or operator described in subparagraph (i) to deposit the substance;
- (g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;
- (g.1) a government body that takes possession of or acquires an ownership interest in the contaminated site under an order of the court under section 5, 8 (3) or 14 of the *Civil Forfeiture Act* or a delegate under section 21 (2) of that Act who is exercising powers or performing functions and duties of the director, as defined in that Act, in relation to the contaminated site;
- (h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion;
- (i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent;
- (j) 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;
- (k) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;
- (l) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewerage or waterworks on a contaminated site, to the extent of the possession, ownership or operation;
- (m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to

- (i) change the use of the contaminated site, and
 - (ii) provide additional remediation;
- (n) a person who is in a class designated in the regulations as not responsible for remediation.

(2) Subsection (1) (l) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewerage or waterworks by the government body that possesses, owns or operates the roadway, highway or right of way for sewerage or waterworks.

(2.1) Subsection (1) (g.1) does not apply with respect to contamination if the government body or delegate referred to in that provision caused or contributed to the contamination of the site.

(3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

General principles of liability for remediation

47 (1) A person who is responsible for remediation of a contaminated site 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.

(2) Subsection (1) must not be construed as prohibiting the apportionment of a share of liability to one or more responsible persons by the court in an action or proceeding under subsection (5) or by a director in an order under section 48 [*remediation orders*].

(3) For the purpose of this section, “costs of remediation” means all costs of remediation and includes, without limitation,

- (a) costs of preparing a site profile,
- (b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 [*determination of contaminated sites*] as to whether or not the site is a contaminated site,
- (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
- (d) fees imposed by a director, a municipality, an approving officer or the commission under this Part.

(4) Liability under this Part applies

- (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
- (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

(5) Subject to section 50 (3) [*minor contributors*], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

(6) Subject to subsections (7) and (8), a person is not required to obtain, as a condition of an action or proceeding under subsection (5) being heard by a court,

(a) a decision, determination, opinion or apportionment of liability for remediation from a director, or

(b) an opinion respecting liability from an allocation panel.

(7) In all cases, the site that is the subject of an action or proceeding must be determined or considered under section 44 [*determination of contaminated sites*] to be or to have been a contaminated site before the court can hear the matter.

(8) Despite subsection (7), if independent remediation has been carried out at a site and the site has not been determined or considered under section 44 [*determination of contaminated sites*] to be or to have been a contaminated site, the court must determine whether the site is or was a contaminated site.

(9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:

(a) whether a person is responsible for remediation of a contaminated site;

(b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

(c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;

(d) such other determinations as are necessary to a fair and just disposition of these matters.

Remediation orders

48 (1) A director may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards the costs of another person who has reasonably incurred costs of remediation;

(c) give security, which may include real and personal property, in the amount and form the director specifies.

(3) For the purpose of deciding whether to require a person to undertake remediation under subsection (2), a director may consider whether remediation should begin promptly, and must consider each of the following:

- (a) adverse effects on human health or pollution of the environment caused by contamination at the site;
- (b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;
- (c) the likelihood of the responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;
- (d) in consultation with the chief inspector appointed under the *Mines Act*, the requirements of a reclamation permit issued under section 10 of that Act;
- (e) in consultation with the commission, the adequacy of remediation being undertaken under section 41 of the *Oil and Gas Activities Act*;
- (e.1) the actions being undertaken or to be undertaken under a recovery plan approved under section 91.2 (5) [responsible persons — spill response];
- (f) other factors prescribed in the regulations.

(4) For the purpose of deciding who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a director, to the extent feasible without jeopardizing remediation requirements, must

- (a) take into account private agreements between or among responsible persons respecting liability for remediation, if those agreements are known to the director, and
- (b) on the basis of information known to the director, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account such factors as
 - (i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and
 - (ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify a right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including, but not limited to, damages for injury or loss resulting from a release or threatened release of a contaminating substance.

(6) If a remediation order, or a pollution abatement order under section 83 [*pollution abatement orders*] that imposes a requirement for remediation, is issued in respect of a site, and the director has not yet determined under section 44 [*determination of contaminated sites*] whether the site is a contaminated site, as soon as reasonably possible after the issuance of the order, the director must determine

- (a) whether the site is a contaminated site, in accordance with section 44 [*determination of contaminated sites*], and
- (b) whether the person named in the order is a responsible person under section 45 [*persons responsible for remediation of contaminated sites*].

(7) If a person named in an order referred to in subsection (6) is determined not to be a responsible person, the government must compensate the person, in accordance with the regulations, for any costs directly incurred by the person in complying with the order.

(8) A person who receives a remediation order under subsection (1) or notice of a remediation order under subsection (13) must not, without the consent of the director, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and if the person does so, the director despite any other remedy sought, may commence an action against the person to recover the amount of the diminishment or reduction.

(9) The director may provide in a remediation order that a responsible person is not required to begin remediation of a contaminated site for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to

- (a) human health, given current and anticipated human exposure, or
- (b) the environment.

(10) A person who has submitted a site profile under section 40 (7) [*site profiles of trustee, receiver, etc.*] must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation, by

- (a) disposing of real or personal assets, or
- (b) subdividing land

unless he or she first requests and obtains written notice from a director that the director does not intend to issue a remediation order.

(11) If a director issues or gives notice of the intention to issue a remediation order to a person referred to in subsection (10), subsection (8) applies.

(12) A director may amend or cancel a remediation order.

(13) A director, on making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest in the contaminated site if the interest is registered in the land title office or a land registry office of a treaty first nation at the time of issuing the order.

(14) A remediation order may authorize, subject to the terms and conditions a director considers necessary and reasonable, any person designated by the director to enter specified land for the purpose of ensuring that the remediation order is carried out according to its terms.

(15) If a remediation order authorizes a person to enter specified land, the person who owns or occupies the land must allow the authorized person to enter in accordance with the authorization.

(16) Subsections (14) and (15) do not authorize any person to enter any structure or part of a structure that is used solely as a private residence.

Allocation panel

49 (1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.

(2) A director, on request by any person, may appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to any or all of the following:

- (a) whether the person is a responsible person;
- (b) whether a responsible person is a minor contributor;
- (c) the responsible person's contribution to the contamination and, if the costs of remediation are known or reasonably ascertainable, the share of those costs attributable to that contamination.

(3) For the purpose of providing an opinion under subsection (2) (b) and (c), the allocation panel must, to the extent of available information, consider the following:

- (a) the information available to identify a person's relative contribution to the contamination;
- (b) the nature and quantity of substances causing the contamination;
- (c) the degree of toxicity of the substances causing the contamination;
- (d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the contamination;
- (e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the generation, transportation, treatment, storage or disposal of the substances causing contamination, taking into account the characteristics of the substances;
- (f) the degree of cooperation by the responsible person with government officials to prevent harm to human health or the environment;
- (g) in the case of a minor contributor, factors set out in section 50 (1) (a) and (b) [*minor contributors*];
- (h) other factors considered by the panel to be relevant to apportioning liability.

(4) A director may require, as a condition of entering a voluntary remediation agreement with a responsible person, that the responsible person, at his or her own expense, seek and provide to the director the opinion of an allocation panel under subsection (2).

(5) If a director appoints an allocation panel with respect to a site, the site is considered to be a contaminated site at the time the allocation panel is appointed, despite the absence of a determination under section 44 (1) [*determination of contaminated sites*].

(6) A director may consider, but is not bound by, the opinion of an allocation panel.

(7) Work performed by the allocation panel must be paid for by the person who requests the opinion.

Minor contributors

50 (1) A director may determine that a responsible person is a minor contributor if the person demonstrates that

- (a) only a minor portion of the contamination present at the site can be attributed to the person,
- (b) either
 - (i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or
 - (ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and
- (c) in all circumstances the application of joint and separate liability to the person would be unduly harsh.

(2) If a director makes a determination under subsection (1) that a responsible person is a minor contributor, the director must determine the amount or portion of remediation costs attributable to the responsible person.

(3) A responsible person determined to be a minor contributor under subsection (1) is liable for remediation costs in an action or proceeding brought by another person or the government under section 47 [*general principles of liability for remediation*] only up to the amount or portion specified by the director in the determination under subsection (2).

(4) If a director has determined that a responsible person is a minor contributor for a site, the site is considered to be a contaminated site at the time of that determination, despite the absence of a determination under section 44 (1) [*determination of contaminated sites*].

Division 4 – Implementation of Remediation

Voluntary remediation agreements

51 (1) On the request of a responsible person, including a minor contributor, a director may enter into a voluntary remediation agreement in accordance with the regulations, consisting of

- (a) provisions for financial or other contributions by the responsible person,
- (b) a certification by the responsible person that the person has fully and accurately disclosed all information in the person's possession or control regarding site conditions and the person's activities respecting that site,
- (c) security, which may include real and personal property, in the amount and form, and subject to the conditions the director specifies,
- (d) a schedule of remediation acceptable to the director, and
- (e) requirements that the director considers to be reasonably necessary to achieve remediation.

(2) If a responsible person enters into and performs a voluntary remediation agreement according to its terms,

- (a) the responsible person is discharged from further liability,
- (b) other responsible persons not named in the voluntary remediation agreement are not discharged from liability,
- (c) the total potential liability of other responsible persons is reduced by any amount specified in the voluntary remediation agreement,
- (d) the right of any person to seek or obtain relief under other legislation or under the common law, including, but not limited to, damages for injury or loss resulting from contamination, is not affected or modified in any way, and
- (e) the director is not prevented from entering into another voluntary remediation agreement in respect of the same site.

(3) A director may stipulate in a voluntary remediation agreement that a responsible person is not required to begin remediation of a contaminated site for a specified period of time if the responsible person demonstrates that the contaminated site does not present an imminent and significant threat or risk to

- (a) human health, given current and anticipated human exposure, or
- (b) the environment.

(4) If a director has entered into a voluntary remediation agreement for a site, the site is considered to be a contaminated site at the time the agreement was made, despite the absence of a determination under section 44 (1) [*determination of contaminated sites*].

Public consultation and review

52 (1) A director may order that a responsible person, at the person's own expense, provide, in accordance with any regulations, for public consultation on a proposed remediation or a public review of remediation activities.

(2) For the purpose of deciding whether to make an order under subsection (1), the director may take into account any factors the director considers relevant, including without limitation, the following:

- (a) the size and location of the contaminated site;
- (b) the nature of contamination at the contaminated site;
- (c) the potential for human exposure to contamination;
- (d) the impact on the environment of the contamination;
- (e) migration of contamination off the site;
- (f) the remediation methods proposed to be used and the potential for long term health, environmental or financial impacts;
- (g) opportunities for public involvement provided by any municipal development approval process;
- (h) whether consultation with the public would improve the quality of information in a site investigation;
- (i) whether consultation with the public would enable a well informed choice on the preferred remediation alternative;
- (j) the extent to which public consultation has already taken place.

Approvals in principle and certificates of compliance

53 (1) For the purposes of exercising powers and performing duties under this section, a director may rely on any information the director considers sufficient for the purpose, including, but not limited to, a preliminary site investigation, a detailed site investigation, a risk assessment, a remediation plan or a summary of site condition.

(1.1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

- (a) has been reviewed by the director,
- (b) has been approved by the director, and
- (c) may be implemented in accordance with conditions specified by the director.

(2) For the purpose of subsection (1.1), if a director has issued an approval in principle with respect to a proposed remediation plan for a site, the site is considered to be a contaminated site at the time the approval in principle was issued, despite the absence of a determination under section 44 (1) [*determination of contaminated sites*].

(3) A director, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if

- (a) the contaminated site has been remediated in accordance with
 - (i) the numerical or risk based standards prescribed for the purposes of the definition of “contaminated site”,
 - (ii) any orders under this Act,
 - (iii) any remediation plan approved by the director, and
 - (iv) any requirements imposed by the director,

(b) [Repealed 2004-18-8.]

(c) a plan has been prepared for the purposes of containing, controlling and monitoring any substances remaining on the site and, if required by the director, works have been installed to implement the plan,

(d) any security in relation to the management of contamination, which security may include real and personal property in the amount and form and subject to the conditions specified by the director, has been provided in accordance with the minister's regulations, and

(e) the responsible person, if required by the director in prescribed circumstances or for prescribed purposes, has prepared and provided to the director proof of registration of a restrictive covenant under section 219 of the *Land Title Act* acceptable to the director.

(4) For the purpose of subsection (3) if a director has issued a certificate of compliance with respect to remediation of a site, the site is considered to have been a contaminated site at the time remediation of the site began, despite the absence of a determination under section 44 (1) [*determination of contaminated sites*].

(5) A director may withhold or rescind an approval in principle or a certificate of compliance if

- (a) conditions imposed on the approval or certificate are not complied with, or
- (b) any fees payable under this Part or the regulations are outstanding.

(6) A director may issue an approval in principle or a certificate of compliance for a part of a contaminated site.

Independent remediation procedures

54 (1) A responsible person may carry out independent remediation in accordance with the minister's regulations whether or not

- (a) a determination has been made as to whether the site is a contaminated site,
- (b) a remediation order has been issued with respect to the site, or
- (c) a voluntary remediation agreement with respect to the site has been entered into.

(2) Any person undertaking independent remediation of a contaminated site must

- (a) notify a director in writing promptly on initiating remediation, and
- (b) notify the director in writing within 90 days of completing remediation.

(3) A director may at any time during independent remediation by any person

- (a) inspect and monitor any aspect of the remediation to determine compliance with the regulations,
- (b) issue a remediation order as appropriate,
- (c) order public consultation and review under section 52 [*public consultation and review*], or
- (d) impose requirements that the director considers are reasonably necessary to achieve remediation.

(4) On request of a person carrying out independent remediation and on receiving adequate information respecting the independent remediation, a director may

- (a) review the remediation in accordance with the regulations and any requirements imposed under subsection (3) (d), and
- (b) issue an approval in principle or a certificate of compliance under section 53 [*approvals in principle and certificates of compliance*].

(5) The director may assess against a person, in accordance with the regulations, the prescribed fees for carrying out the actions referred to in subsection (4).

Contaminated soil relocation

55 (1) Subject to subsection (5), a person must not relocate contaminated soil from a contaminated site unless

- (a) the person enters into a contaminated soil relocation agreement, and
- (b) complies with terms and conditions of the contaminated soil relocation agreement.

- (2) If, in the opinion of a director, after giving consideration to
- (a) the suitability of the receiving site,
 - (b) the quality of the contaminated soil to be relocated, and
 - (c) the existing and future uses of the receiving site,
- the relocation of the contaminated soil will not cause a significant potential for adverse effects on human health or for pollution of the environment, the director may enter into a contaminated soil relocation agreement with
- (d) the owner or operator of the site proposed to receive contaminated soil, and
 - (e) a responsible person for the contaminated site from which the contaminated soil is proposed to be removed.
- (3) The contaminated soil relocation agreement must provide that prescribed standards and procedures apply in respect of the relocation and deposit and that
- (a) the quality of the soil at the receiving site is suitable for the use intended based on prescribed standards, or
 - (b) the conditions at the receiving site are suitable for the use intended as documented by a risk assessment conducted in accordance with the regulations and to the satisfaction of the director.
- (4) A director may require, as a condition of entering into a contaminated soil relocation agreement, that the person requesting the agreement provide
- (a) information pertaining to the source site, the receiving site and the quantity and quality of material being relocated, and any other prescribed information, and
 - (b) security, which may include real and personal property, in the amount and form and subject to conditions the director specifies.
- (5) Nothing in this Part prevents a person from depositing soil from a contaminated site at another site if the deposit is authorized by
- (a) a valid and subsisting permit or approval,
 - (b) an order,
 - (c) a waste management plan approved by the minister, and its associated operational certificate, or
 - (d) the regulations.
- (6) A municipality or treaty first nation, including its employees or members of its governing body, does not incur any liability and must not be considered a responsible person under this Act as a result of any bylaw, law, permit, licence, approval or other document adopted or issued under the *Community Charter*, the *Islands Trust Act*, the *Local Government Act*, the *Vancouver Charter* or a law of a treaty first nation that authorizes the removal or deposit of contaminated soil in the municipality or treaty lands.
- (7) Despite section 37 (5) [conflicts between this Act and bylaws, permits, etc. issued by a municipality], subsection (6) of this section does not apply if
- (a) a bylaw of a municipality or law of a treaty first nation, or
 - (b) a permit, licence, approval or other document issued under the authority of a municipal bylaw or law of a treaty first nation

establishes standards or procedures for testing, excavating, storing, removing, relocating or depositing contaminated soil that conflict with this Act, the regulations, a permit, approval, order, contaminated soil relocation agreement or an approved waste management plan.

(8) Subsection (6) does not give immunity to any municipality or treaty first nation from obligations the municipality or treaty first nation may have under this Act with respect to

- (a) a contaminated site owned by the municipality or treaty first nation,
- (b) contaminated soil that originated from property owned by the municipality or treaty first nation, or
- (c) activities of the municipality or treaty first nation, other than regulatory activities, that caused or contributed to property becoming a contaminated site.

(9) If a director enters into a contaminated soil relocation agreement, the director must provide notice of the agreement to the municipality from which the soil is removed and to the municipality in which the receiving site is located.

Selection of remediation options

56 (1) A person conducting or otherwise providing for remediation of a site must give preference to remediation alternatives that provide permanent solutions to the maximum extent practicable, taking into account the following factors:

- (a) any potential for adverse effects on human health or for pollution of the environment;
- (b) the technical feasibility and risks associated with alternative remediation options;
- (c) remediation costs associated with alternative remediation options and the potential economic benefits, costs and effects of the remediation options;
- (d) other prescribed factors.

(2) When issuing an approval in principle or a certificate of compliance, a director must consider whether permanent solutions have been given preference to the maximum extent practicable as determined in accordance with any guidelines set out in the regulations.

Division 5 – Delegation

Delegation of responsibilities to municipalities or other ministries

57 (1) The minister and a municipality may enter into an agreement authorizing the municipality to exercise powers and perform functions described in subsection (3), except in relation to a contaminated site that is owned by a municipality or for which a municipality is a responsible person.

(2) For the purpose of enhancing coordination of Provincial regulatory activities, the minister and any other minister of the government may enter into an arrangement enabling officials of the ministry of the other minister to exercise or perform one or more powers and functions described in this Part, except in relation to a contaminated site that is owned by that ministry or for which that ministry is a responsible person.

(3) If an agreement or arrangement under subsection (1) or (2) has been entered into, a director may delegate to one or more officials of a municipality or another ministry the powers and functions of a director respecting any or all of the following:

- (a) site profiles;
- (b) site investigations;
- (c) remediation orders;
- (d) voluntary remediation agreements;
- (e) public consultations or reviews;
- (f) approvals in principle;
- (g) certificates of compliance;
- (h) contaminated soil relocation agreements.

(4) A director may not delegate under subsection (3) any of the powers or functions with respect to the following:

- (a) determining whether a site is a contaminated site;
- (b) determining whether a responsible person is a minor contributor.

(5) If a power or function is delegated to a municipality or another ministry under this section, the municipality or other minister may assess the fees prescribed in the regulations with respect to that power or function.

(6) If a power or function has been delegated to an official of a municipality or a ministry, a decision of the official is a decision that may be appealed to the appeal board under Division 2 [*Appeals of Decisions under this Act*] of Part 8.

Division 6 - Ministry Authority

Orphan sites

58 (1) A director may determine in accordance with the regulations whether

- (a) a contaminated site is an orphan site, and
- (b) an orphan site is a high risk orphan site.

(2) The minister may declare, in writing, that it is necessary for the protection of human health or the environment for the government to undertake remediation of

- (a) a contaminated site that is not otherwise being adequately remediated, or
- (b) a high risk orphan site.

(3) If the minister has made a declaration under subsection (2), the minister may carry out remediation and recover the reasonably incurred costs of the remediation and the minister, or an officer authorized in writing by the minister, may, even though the ordered action interferes with or abrogates property rights, order any person to

- (a) provide labour, services, material, equipment or facilities, or
- (b) allow the use of land for the purpose of undertaking the remediation.

(4) If the minister has made a declaration under subsection (2), a director, an officer or any person directed to do so by the officer, may enter property and carry out remediation, even though the entry or remediation interferes with or abrogates property rights.

(5) A person affected by an order made under subsection (3) must comply with the order despite any other enactment.

(6) If the minister certifies that money is required to undertake remediation under this section, the amount the minister certifies to be required may be paid out of the consolidated revenue fund.

(7) A certificate signed by the minister and showing an amount of money spent by the government under this section is conclusive proof of the amount spent.

(8) If the minister makes a declaration under subsection (2) or an order under subsection (3), the registrar must make a notation of the declaration or order on the site registry.

Cost recovery if minister carries out remediation

59 (1) A director may recover all or a portion of the cost of remediation by

- (a) taking steps to identify and recover costs from responsible persons during or after remediation,
- (b) arranging to sell or selling any property comprising all or part of the site, or
- (c) seeking contributions from available cost sharing agreements with government bodies or other persons.

(2) The amount shown on the certificate under section 58 (7) [*orphan sites*] is a debt due to the government and, subject to subsection (3) of this section, is recoverable

- (a) from any responsible person, by action in the Supreme Court, or
- (b) by order of the minister directing a person who is purchasing or otherwise acquiring an interest in land that is subject to remediation under section 58 [*orphan sites*] to pay to the minister, in respect of the amounts spent in remediation, instead of to the vendor, an amount not exceeding the amount owing to the vendor, and the purchaser is discharged in the amount paid to the minister from the obligation to pay the vendor.

(3) If the Supreme Court is satisfied that the expenditure incurred by the government under section 58 [*orphan sites*] is either

- (a) excessive, taking into consideration the requirements of the regulations governing remediation, or
- (b) unnecessary, taking into consideration the regulations governing remediation, the Supreme Court may reduce or extinguish the amount of the judgment that it would otherwise have ordered to be entered against the person against whom the action has been brought.

(4) The minister may register a lien at the land title office against a contaminated site for the costs of remediation incurred by the government at the contaminated site that has been remediated under section 58 [*orphan sites*].

(5) A lien under subsection (4) is payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the site or proceeds of the site, except for liens for wages due to workers by their employer and liens under section 52 of the *Workers Compensation Act*.

(6) The exception in subsection (5) does not apply in respect of a lien for wages that is, by section 87 (5) of the *Employment Standards Act*, postponed to a mortgage or debenture.

(7) If the minister makes an order under subsection (2) (b), the registrar must make a notation of the order on the site registry.

Government retains right to take future action

60 A director may exercise any of a director's powers or functions under this Part, even though they have been previously exercised and despite any voluntary remediation agreement, if

- (a) additional information relevant to establishing liability for remediation becomes available, including information that indicates that a responsible person does not meet the requirements of a minor contributor,
- (b) activities occur on a site that may change its condition or use,
- (c) information becomes available about a site or a contaminating substance at the site that leads to a reasonable inference that the site poses a threat to human health or the environment,
- (d) a responsible person fails to exercise due care with respect to any contamination at the site, or
- (e) a responsible person directly or indirectly contributes to contamination at the site after previous action.

Division 7 – General Provision Respecting Contaminated Sites

Immunity in relation to contaminated sites

61 (1) In this section, “protected person” means

- (a) the government,
- (b) the minister,
- (c) a municipality,
- (d) a current or former approving officer,
- (e) a current or former employee or agent of the government,
- (f) a current or former elected official of the government,
- (g) a current or former “local public officer” as defined in section 738 (1) [*immunity for individual local public officers*] of the *Local Government Act*, and

(h) a current or former “civic public officer” as defined in section 294 (4) of the *Vancouver Charter*.

(2) Subject to subsection (3), no action lies and no proceedings may be brought against a protected person because of

(a) any

- (i) act, advice, including pre-application advice, or recommendation, or
- (ii) failure to act, failure to provide advice, including pre-application advice, or failure to make recommendations

in relation to this Part, regulations under this Part, section 85.1 of the *Land Title Act*, section 556 or 557 of the *Local Government Act*, section 571B of the *Vancouver Charter* or section 34.1 of the *Islands Trust Act*, or

(b) any

- (i) purported exercise or performance of powers, duties or functions, or
- (ii) failure to exercise or perform any powers, duties or functions

arising under this Part, regulations under this Part, section 85.1 of the *Land Title Act*, section 556 or 557 of the *Local Government Act*, section 571B of the *Vancouver Charter* or section 34.1 of the *Islands Trust Act*.

(3) Subsection (2) does not provide a defence if, in relation to the subject matter of the action or proceedings,

(a) the protected person is a responsible person, or

(b) the conduct of the protected person was dishonest, malicious or wilful misconduct.

(4) Without limiting subsection (2), if a municipality, or its approving officer, employees, officers or elected officials, relies honestly and without malice or wilful misconduct on the contents of

(a) a preliminary determination or final determination,

(b) a certificate of compliance, or

(c) an approval in principle,

those protected persons are not liable for damages arising from reliance on the determination, approval or certificate.

(5) Without limiting subsection (2), if a municipality enters into an agreement under section 57 [*delegation of responsibilities to municipalities or other ministries*] enabling the municipality to issue an approval in principle or a certificate of compliance, the municipality, its approving officer, employees, officers and elected officials are not liable for damages if they rely on an approval in principle or a certificate of compliance where the contents of the approval in principle or the certificate of compliance have been prepared honestly and without malice or wilful misconduct.

Contaminated site regulations

62 (1) Without limiting section 138 (1) [*general authority to make regulations*], the Lieutenant Governor in Council may make regulations as follows:

- (a) requiring disclosures by persons not specified in section 40 [*site profiles*], including, without limitation, disclosures by lessors and lessees;
- (b) prescribing fees for the purposes of this Part and Part 5 [*Remediation of Mineral Exploration Sites and Mines*] including, without limitation, fees for assessing or reviewing site profiles, site investigation reports and remediation plans and reports, whether or not prepared under a remediation order;
- (c) governing the content of the site registry and the management of and procedures relating to the site registry, including requirements for public access to the registry and for persons to submit information to the registrar;
- (d) prescribing the information required for the purposes of section 43 (2) (f) [*site registry*];
- (e) designating classes of persons as responsible persons in addition to those referred to in section 45 [*persons responsible for remediation of contaminated sites*];
- (f) designating classes of persons who are not responsible persons in addition to those referred to in section 46 [*persons not responsible for remediation*];
- (g) prescribing purposes or activities for the purposes of section 40 (6) (b) [*site profiles*] and requirements respecting the obligation of a vendor to provide a site profile under section 40 (6);
- (h) respecting allocation panels, including, without limitation,
 - (i) governing the procedures and deliberations of an allocation panel, and
 - (ii) establishing the fees payable to allocation panel members;
- (i) prescribing the information that must be provided to, and the procedures to be followed by, a director making a determination under section 50 [*minor contributors*];
- (j) establishing requirements for the purposes of section 52 [*public consultation and review*], including without limitation, requirements that consultations in respect of prescribed classes of remediation be facilitated by a medical health officer;
- (k) requiring a person who moves soil from a contaminated site to another location to provide to the ministry prescribed information in a format suitable for inclusion in the site registry;
- (l) establishing transitional requirements for remediation that began before April 1, 1997;
- (m) authorizing a director to require a report of a qualified professional and specify the requirements of the report before exercising the director's authority under this Part;
- (n) prescribing factors that must be considered in determining reasonable costs of remediation, circumstances in which costs of remediation are considered reasonable and evidentiary matters for the purposes of an apportionment of remediation costs by a court under section 47 [*general principles of liability for remediation*] or by the director in a remediation order under section 48 [*remediation orders*];
- (o) respecting compensation payable by the government under section 48 (7) [*remediation orders*];

- (p) prescribing procedures that must be followed and criteria that must be considered by a director under section 58 (1) [*orphan sites*];
- (q) exempting any person from any requirement under this Part in circumstances and on conditions that the Lieutenant Governor in Council may prescribe;
- (r) respecting modifications, interpretive guidelines and procedures for any exemptions set out in section 46 [*persons not responsible for remediation*].

(2) Section 139 [*regulations — general rules*] applies for the purpose of making regulations under this section.

Minister's regulations — contaminated sites

63 (1) The minister may make regulations in relation to contaminated site remediation as follows:

- (a) prescribing other activities for the purpose of the definition of "remediation" in section 1 (1), including but not limited to routine procedures applicable to remediation of contamination associated with underground storage tanks;
- (b) respecting site profiles, including, without limitation,
 - (i) prescribing the information that must be provided in a site profile,
 - (ii) prescribing circumstances in which a specified person must provide a site profile to another specified person,
 - (iii) prescribing procedures for providing a site profile,
 - (iv) prescribing procedures for assessing a site profile, and
 - (v) prescribing when a site profile must be provided by a specified person;
- (c) and (d) [Repealed 2004-18-14.]
- (e) prescribing procedures for undertaking, and the content of, a site investigation and a site investigation report;
- (f) [Repealed 2004-18-14.]
- (f.1) respecting summaries of site conditions, including, without limitation,
 - (i) prescribing the information that must be provided in a summary of site condition,
 - (ii) prescribing circumstances in which a specified person must provide a summary of site condition to another specified person,
 - (iii) prescribing circumstances in which a director may order a person to provide to the director or another person a summary of site condition,
 - (iv) prescribing procedures for providing a summary of site condition, and
 - (v) prescribing when a summary of site condition must be provided by a specified person;
- (g) and (h) [Repealed 2004-18-14.]
- (i) respecting a determination under section 44 [*determination of contaminated sites*], including, without limitation,
 - (i) prescribing procedures for making a determination,
 - (ii) prescribing the persons to whom a director must give notice of a determination under section 44 [*determinations of contaminated sites*],
 - (iii) prescribing circumstances in which a director may make a determination that a site is contaminated without following the procedures prescribed under subparagraph (i), and

- (iv) prescribing circumstances in which a site is considered to be a contaminated site without a determination under section 44 (1);
- (j) prescribing factors for the purposes of section 48 (3) (f) [*remediation orders*];
- (k) prescribing procedures for entering into a voluntary remediation agreement and requirements of voluntary remediation agreements;
- (l) prescribing factors for the purposes of section 56 (1) (d) [*selection of remediation options*] and guidelines for the purposes of section 56 (2);
- (m) governing the issuance of approvals in principle and certificates of compliance under section 53 [*approvals in principle and certificates of compliance*], including, without limitation
 - (i) prescribing requirements for the purposes of section 53 (3) (d),
 - (ii) prescribing circumstances in which and purposes for which a director may require a covenant under section 53 (3) (e), and
 - (iii) prescribing circumstances in which a covenant under section 53 (3) (e) must be discharged;
- (n) prescribing substances and risk based or numerical criteria, standards and conditions for the purposes of the definition of "contaminated site" in section 39 [*definitions and interpretation*];
- (o) prescribing standards and procedures for the purpose of section 55 (3) [*contaminated soil relocation*];
- (p) prescribing matters for the purposes of section 64 (2) (p) [*director's protocols*];
- (q) exempting any person from any requirement under this Part in circumstances and on conditions that the minister may prescribe;
- (r) prescribing the manner of publication for the purposes of section 64 (2).

(2) Section 139 [*regulations – general rules*] applies for the purposes of making regulations under this section.

Director's interim standards

63.1 (1) A director may make regulations prescribing substances and risk based or numerical criteria, standards and conditions for the purpose of the definition of "contaminated site" in section 39 [*definitions and interpretation*] if the director considers it necessary in the public interest.

(2) In the event of a conflict between a regulation under this section and a regulation under section 63 (1) (n), the regulation under this section prevails.

(3) A regulation under subsection (1) ceases to have effect one year after the date it was made.

Director's protocols

64 (1) A director may establish protocols, consistent with this Act and the regulations, in relation to any of the following:

- (a) providing procedures of an allocation panel established under section 49 [*allocation panel*];

- (b) specifying information required in support of a public community based consultation process facilitated by the local medical health officer under section 52 [*public consultation and review*];
 - (c) specifying requirements for any investigation, analysis and interpretation, assessment, preparation of a remediation plan or any other activity included in the definition of “remediation” in section 1 (1);
 - (d) establishing substantive and procedural requirements for persons planning, conducting or reporting on the remediation of a contaminated site, which may be different for sites contaminated with particular types of contamination;
 - (e) establishing procedures in respect of requiring, and establishing conditions for, security.
- (2) For the purposes of protocols established under subsection (1), a director may establish protocols in respect of the following:
- (a) choosing the substances for which field or laboratory analyses are required;
 - (b) sampling soil, water and other media;
 - (c) testing or analyzing soil, water and other media, including tests to estimate the bioavailability of substances to plants and animals;
 - (d) carrying out statistical designs, analyses and evaluations of data;
 - (e) carrying out risk assessment consisting of various steps and processes;
 - (f) modelling physical, chemical or biological processes;
 - (g) evaluating site conditions;
 - (h) setting requirements relating to assessment and control of environmental impacts, including monitoring;
 - (i) classifying sites as low, moderate, medium, intermediate or high risk sites based on an evaluation of risk to human health and the environment;
 - (j) endorsing certain remediation approaches as the preferred alternatives for a certain type of site;
 - (k) providing procedures for determining the timing, nature and extent of public consultation or review of remediation;
 - (l) providing procedures for establishing the local background concentration of substances at a site, class of sites or geographical area;
 - (m) establishing formats for summaries of site investigations and remediation plans for the purposes of their entry into the site registry;
 - (n) developing soil, sediment and water numerical standards;
 - (o) establishing standards for qualified professionals in relation to
 - (i) the performance of activities under this Act, and
 - (ii) conflict of interest;
 - (o.1) summarizing or specifying activities, including the preparation of specified reports or documents, that may or must be performed by an approved professional;
 - (p) a matter prescribed by the minister.
- (3) Section 41 of the *Interpretation Act* and the *Regulations Act* do not apply in relation to a protocol under this section.

(4) On and after the date that a protocol under this section is published in accordance with the minister's regulations, a director may refuse to accept anything governed by the protocol that is not in compliance with it.

...

Part 7 – Powers in Relation to Managing the Environment

Division 1 – Pollution Assessment, Prevention and Abatement

...

Pollution abatement orders

83 (1) If a director is satisfied on reasonable grounds that a substance is causing pollution, the director may order any of the following persons to do any of the things referred to in subsection (2):

- (a) a person who had possession, charge or control of the substance at the time it was introduced or escaped into the environment;
- (b) a person who owns or occupies the land on which the substance is located or on which the substance was located immediately before it was introduced into the environment;
- (c) a person who caused or authorized the pollution.

(2) An order under subsection (1) must be served on the person to whom it applies and may require that person, at his or her own expense, to do one or more of the following:

- (a) provide to the director information that the director requests relating to the pollution;
- (b) undertake investigations, tests, surveys and any other action the director considers necessary to determine the extent and effects of the pollution and to report the results to the director;
- (c) acquire, construct or carry out any works or measures that are reasonably necessary to control, abate or stop the pollution;
- (d) adjust, repair or alter any works to the extent reasonably necessary to control, abate or stop the pollution;
- (e) abate the pollution;
- (f) carry out remediation in accordance with any criteria established by the director.

(3) An order under subsection (1) may authorize any persons designated by the director to enter land for the purpose of controlling, abating or stopping the pollution or to carry out remediation.

(4) A director may amend or cancel an order made under this section.

(5) The powers given by this section may be exercised even though the introduction of the substance into the environment is not prohibited under this Act or is authorized under this Act.

(6) For the purposes of this section, “person” does not include a municipality.

...

2. *Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, ss. 1(b), (t), (tt), (hhh), (mmm), 2(a),(d),(i), 107, 112, 113, 123, 125, 129:*

Definitions

1 In this Act,

...

(b) “adverse effect” means impairment of or damage to the environment, human health or safety or property.

...

(t) “environment” means the components of the earth and includes

(i) air, land and water,

(ii) all layers of the atmosphere,

(iii) all organic and inorganic matter and living organisms, and

(iv) the interacting natural systems that include components referred to in subclauses (i) to (iii);

...

(tt) “person responsible”, when used with reference to a substance or a thing containing a substance, means

(i) the owner and a previous owner of the substance or thing;

(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),

but does not include

(v) a municipality in respect of

(A) a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the *Municipal Government Act* or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or

(B) a parcel of land acquired by it by dedication or gift of an environmental reserve, municipal reserve, or school reserve, road, or utility lot or right of way under Part 17 of the *Municipal Government Act*, unless after the date on which the land is acquired the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel,

(vi) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or

(vii) the Minister responsible for the *Unclaimed Personal Property and Vested Property Act*, with respect to a parcel of land to which the Act applies, unless after the date on which the Minister takes possession of the parcel of land the actions of the Minister or persons under the control of the Minister release on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel;

...

(hhh) “release” includes to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust;

...

(mmm) “substance” means

(i) any matter that

(A) is capable of becoming dispersed in the environment, or

(B) is capable of becoming transformed in the environment into matter referred to in paragraph (A),

(ii) any sound, vibration, heat, radiation or other form of energy, and

(iii) any combination of things referred to in subclauses (i) and (ii);

...

Purpose of Act

2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

...

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;

...

(i) the responsibility of polluters to pay for the costs of their actions;

...

Part 5 Release of Substances

Interpretation and application

107(1) In this Part

(a) “owner of a substance” means the owner of the substance immediately before or during the release of the substance;

(b) “person having control of a substance” means the person having charge, management or control of the substance;

(c) “person responsible for the contaminated site” means

(i) a person responsible for the substance that is in, on or under the contaminated site,

(ii) any other person who the Director considers caused or contributed to the release of the substance into the environment,

(iii) the owner of the contaminated site,

- (iv) any previous owner of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site,
- (v) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (ii) to (iv), and
- (vi) a person who acts as the principal or agent of a person referred to in any of subclauses (ii) to (v)

but does not include

- (vii) a municipality in respect of a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the *Municipal Government Act* or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or
- (viii) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel.

(2) Sections 110 to 112 apply only to releases of substances that are not authorized by an approval or the regulations. 1992, c.E-13.3; 1994, c. 15, s. 36; 1996, c. 30, s. 69.

Division 1 **Releases of Substances Generally**

...

Duty to take remedial measures

112(1) Where a substance that may cause, is causing or has caused an adverse effect is released into the environment, the person responsible for the substance shall, as soon as that person becomes aware of or ought to have become aware of the release,

(a) take all reasonable measures to

- (i) repair, remedy and confine the effects of the substance, and

- (ii) remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect, and

(b) restore the environment to a condition satisfactory to the Director.

(2) Where

(a) a substance was released into the environment before September 1, 1993, and

(b) the activity that resulted in the release was permanently discontinued before that date,

the person responsible for the substance shall as soon as that person is aware that the substance may cause, is causing or has caused an adverse effect, take the action specified in subsection (1). RSA 2000, c. E-12, s. 112; 2006, c. 15, s. 12.

Environmental protection order for release

113(1) Subject to subsection (2), where the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an adverse effect,

the Director may issue an environmental protection order to the person responsible for the substance.

(2) Where the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval, code of practice or registration or the regulations, the Director may not issue an environmental protection order under subsection (1) unless in the Director's opinion the adverse effect was not reasonably foreseeable at the time the approval or registration was issued, the code of practice was adopted or the regulations were made, as the case may be.

(3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the release;

(c) measure the rate of release or the ambient concentration, or both, of the substance;

- (d) minimize or remedy the effects of the substance on the environment;
 - (e) restore the area affected by the release to a condition satisfactory to the Director;
 - (f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;
 - (g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
 - (h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
 - (i) report on any matter ordered to be done in accordance with directions set out in the order.
- (4) An environmental protection order may be issued under this section in respect of a substance released before, on or after September 1, 1993.

(5) Where

- (a) a substance was released into the environment before September 1, 1993, and
- (b) the activity that resulted in the release was permanently discontinued before that date,

the Director may issue an environmental protection order to the person responsible for the substance only if an adverse effect has occurred or is occurring. RSA 2000, c. E-12, s. 113; 2003, c. 37, s. 18; 2006, c. 15, s. 13.

...

Division 2 Contaminated Sites

Application

123 This Division applies regardless of when a substance became present in, on or under the contaminated site. 1992, c. E-13.3, s. 108.

...

Designation of contaminated sites

125(1) Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site.

(2) Subsection (1) applies notwithstanding that any or all of the following may apply:

- (a) a reclamation certificate or remediation certificate has been issued in respect of the contaminated site;
- (b) an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site;
- (c) the substance was released in accordance with this Act or any other law;
- (d) the release of the substance was not prohibited under this Act;
- (e) the substance originated from a source other than the contaminated site.

(3) The Director may cancel a designation of a contaminated site. 1992, c. E-13.3, s. 110; 1996, c. 17, s. 31.

...

Environmental protection order re contaminated site

129(1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.

(2) In deciding whether to issue an environmental protection order under subsection (1) to a particular person responsible for the contaminated site, the Director shall give consideration to the following, where the information is available:

- (a) when the substance became present in, on or under the site;
- (b) in the case of an owner or previous owner of the site,
 - (i) whether the substance was present in, on or under the site at the time that person became an owner;
 - (ii) whether the person knew or ought reasonably to have known that the substance was present in, on or under the site at the time the person became an owner;
 - (iii) whether the presence of the substance in, on or under the site ought to have been discovered by the owner had the owner exercised due diligence in ascertaining the presence of the substance before the

owner became an owner, and whether the owner exercised due diligence;

(iv) whether the presence of the substance in, on or under the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship;

(v) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present in, on or under it;

(c) in the case of a previous owner, whether that owner disposed of the owner's interest in the site without disclosing the presence of the substance in, on or under the site to the person who acquired the interest;

(d) whether the person took all reasonable care to prevent the presence of the substance in, on or under the site;

(e) whether a person dealing with the substance followed accepted industry standards and practice in effect at the time or complied with the requirements of applicable enactments in effect at the time;

(f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance in, on or under the site;

(g) what steps the person took to deal with the site on becoming aware of the presence of the substance in, on or under the site;

(h) any other criteria the Director considers to be relevant.

(3) In issuing an environmental protection order under subsection (1), the Director shall give consideration to whether the Government has assumed responsibility for part of the costs of restoring and securing the contaminated site and the environment affected by the contaminated site pursuant to a program or other measure under section 124.

(4) An environmental protection order made under subsection (1) may

(a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 113,

(b) contain provisions providing for the apportionment of the cost of doing any of the work or carrying out any of the measures referred to in clause (a), and

- (c) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site. 1992, c. E-13-3, s. 114; 1994, c. 15, s. 41.

...

3. *Environment Act, S.N.S. 1994-95, c. 1, ss. 2, 3(c), (k), (l), (r), (ak), (al), (aq), (ar), (au), 71, 85, 87, 89, 125, 129:*

PART I

Introduction

Purpose

2 The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:

- (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
- (b) maintaining the principles of sustainable development, including

...

- (ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation,

...

- (c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment that is not de minimis to take remedial action and pay for the costs of that action;

- (d) taking remedial action and providing for rehabilitation to restore an adversely affected area to a beneficial use;

...

Interpretation

3 In this Act,

...

- (c) “adverse effect” means an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.

...

(k) "contaminant" means, unless otherwise defined in the regulations, a substance that causes or may cause an adverse effect;

(l) "contaminated site" means

(i) unless otherwise defined by regulation, a site with concentrations of a contaminant or contaminants that exceed standards prescribed or adopted by the Minister that has caused, is causing or may cause an adverse effect, or

(ii) a site designated as a contaminated site by the Minister pursuant to Section 87;

...

(r) "environment" means the components of the earth and includes

(i) air, land and water,

(ii) the layers of the atmosphere,

(iii) organic and inorganic matter and living organisms,

(iv) the interacting natural systems that include components referred to in subclauses (i) to (iii), and

...

(ak) "person responsible" means

(i) the owner of the substance or thing,

(ii) the owner or occupier of land on which an adverse effect has occurred or may occur,

(iii) a previous owner of the substance or thing,

(iv) a person who has or has had care, management or control, including care, management and control during the generation, manufacture, treatment, sale, handling, distribution, use, storage, disposal, transportation, display or method of application of the substance or thing,

(v) a successor, assignee, executor, administrator, receiver, receiver manager or trustee of a person referred to in subclauses (i) to (iv), or

(vi) a person who acts as the principal or agent of a person referred to in subclauses (i) to (v);

(al) "person responsible for the contaminated site" means

- (i) a person responsible for a substance that is over, in, on or under the contaminated site,
- (ii) any other person whom the Minister considers to be responsible for causing or contributing to the release of a substance into the environment,
- (iii) the owner or occupier of, or an operator on, the contaminated site,
- (iv) any previous owner, occupier or operator of the contaminated site who was the owner, occupier or operator at any time when the substance was released over, in, on or under the contaminated site,
- (v) a successor, assignee, executor, administrator, receiver, receiver manager or trustee of a person referred to in subclauses (i) to (iv), or
- (vi) a person who acts as the principal or agent of a person referred to in subclauses (i) to (v);

...

(aq) "rehabilitation" includes

- (i) the removal of equipment or a building or other structure or appurtenance,
- (ii) the conducting of an investigation to determine the presence of a substance,
- (iii) the removal of a contaminant from land or water,
- (iv) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land,
- (v) any other procedure, operation or requirement in accordance with this Act;

(ar) "release" means to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place, drain, pump or exhaust;

...

(au) “substance” means

(i) any solid, liquid or gas,

(ii) any sound, vibration, heat, radiation or another form of energy, or

(iii) any combination of any of the things referred to in subclauses (i) and (ii);

...

PART VI RELEASE OF SUBSTANCES

Duty to take remedial measures

71 Any person responsible for the release of a substance under this Part shall, at that person’s own cost, and as soon as that person knows or ought to have known of the release of a substance into the environment that has caused, is causing or may cause an adverse effect,

(a) take all reasonable measures to

(i) prevent, reduce and remedy the adverse effects of the substance, and

(ii) remove or otherwise dispose of the substance in such a manner as to minimize adverse effects;

(b) take any other measures required by an inspector or an administrator; and

(c) rehabilitate the environment to a standard prescribed or adopted by the Department. 1994-95, c. 1, s. 71.

...

PART VIII CONTAMINATED SITES

Application of Part

85 This Part applies regardless of when a substance became present over, in, on or under a contaminated site. 1994-95, c. 1, s. 85.

...

Designation of contaminated site

87(1) Where the Minister is of the opinion that a substance that may cause, is causing or has caused an adverse effect is present in an area of the environment, the Minister may designate that area of the environment as a contaminated site.

(2) The Minister shall follow standards, criteria or guidelines established or adopted by the Department before making a designation pursuant to subsection (1).

(3) Subsection (1) applies notwithstanding that

- (a) an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site;
- (b) the substance was released in accordance with this Act or any other law;
- (c) the release of the substance was not prohibited under this Act; or
- (d) the substance originated from a source other than the contaminated site.

(4) The Minister may cancel the designation of a contaminated site made pursuant to this Section. 1994-95, c. 1, s. 87.

...

Remedial action plans and agreements

89(1) A person responsible for a contaminated site may, in accordance with the regulations,

- (a) prepare for the approval of the Minister a remedial action plan in respect of the contaminated site; and
- (b) enter into a written agreement with the Minister or with other persons responsible for the contaminated site or with both the Minister and other persons responsible, providing for the remedial action to be taken in respect of the contaminated site and providing for the apportionment of the costs of taking that action.

...

(6) Where a person responsible for a contaminated site does not, within a reasonable period of time, comply with subsection (1), the Minister may make an order under Part XIII. 1994-95, c. 1, s. 89; 2011, c. 61, s. 35.

...

PART XIII ORDERS

Ministerial control order

125(1) Where the Minister believes on reasonable and probable grounds that a person has contravened or will contravene this Act, the Minister may, whether or not the person has been charged or convicted in respect of the contravention, issue an order requiring a person, at that person's own expense, to

- (a) cease the specified activity;
- (b) stop, limit, alter or control the release of any substance into the environment or part thereof in accordance with the directions set out in the order, either permanently or for a specified period;
- (c) alter the procedures to be followed in the control, reduction or elimination of the release of any substance into the environment or part thereof;
- (d) install, replace or alter any equipment or thing designed to control, reduce or eliminate the release of any substance into the environment or part thereof;
- (e) take interim measures to control, eliminate or manage the adverse effect, including the provision of potable water to affected parties;
- (f) undertake remedial action to control, reduce, eliminate or mitigate an adverse effect;
- (g) install, replace or alter a facility in order to control, reduce, eliminate or mitigate the release of any substance into or on the environment or part thereof;
- (h) carry out clean-up, site rehabilitation or management, site security and protection or other remedial actions in accordance with directions set out in the order;
- ...
- (k) where a person has...unlawfully released a contaminant into a watercourse, or where a contaminant may reach a watercourse, take immediate action to remedy the damage that person has caused;
- ...
- (o) take specified precautions with respect to the treatment or decontamination of an area affected by dangerous goods, waste dangerous goods or a pest-control product;
- (p) take specified precautions with respect to the future use of an area affected by dangerous goods, waste dangerous goods or a pest-control product;
- (q) restrict or prohibit the use of a contaminated site,...
- (r) provide security in an amount and form specified by the Department during a clean-up and afterwards for monitoring or other purposes;

- (s) do all things and take all steps necessary to comply with this Act, or to repair any injury or damage, or to control, eliminate or manage an adverse effect.

...

(3) In addition to any other requirements that may be included in an order issued pursuant to this Part, the order may contain provisions

- (a) requiring a person, at that person's own expense, to

...

- (ii) hire an expert to prepare a report for submission to the Minister or person appointed by the Minister,

- (iii) submit to the Minister or person appointed by the Minister any information, proposal or plan specified by the Minister setting out any action to be taken by the person with respect to the subject-matter of the order,

- (iv) prepare and submit a contingency plan,

- (v) undertake tests, investigations, surveys and other action and report results to the Minister,

- (vi) take any other measure that the Minister considers necessary to facilitate compliance with the order or to protect or restore the environment;

...

Factors to be considered before making order

129(1) In deciding whether to issue an order pursuant to this Part, the Minister, an administrator or an inspector shall be guided by the following considerations, if such information is available or accessible to the Minister, an administrator or an inspector:

- (a) when the substance became present over, in, on or under the site;
- (b) in the case of an owner, occupier or operator, or previous owner, occupier or operator of the site
 - (i) whether the substance was present over, in, on or under the site at the time that person became an owner, occupier or operator,
 - (ii) whether the person knew or ought reasonably to have known that the substance was present over, in, on or under the site at the time that person became an owner, occupier or operator,

- (iii) whether the presence of the substance over, in, on or under the site ought to have been discovered by the owner, occupier or operator had the owner, occupier or operator exercised due diligence in ascertaining the presence of the substance before the owner, occupier or operator became an owner, occupier or operator, and whether the owner, occupier or operator exercised such due diligence,
 - (iv) whether the presence of the substance over, in, on or under the site was caused solely by the act or omission of an independent third party,
 - (v) the economic benefits the person may have received and the relationship between that price and the fair market value of the site had the substance not been present over, in, on or under it;
 - (c) in the case of a previous owner, occupier or operator whether that person disposed of the interest in the site without disclosing the presence of the substance over, in, on or under the site to the person who acquired the interest;
 - (d) whether the person took all reasonable care to prevent the presence of the substance over, in, on or under the site;
 - (e) whether a person dealing with the substance ignored industry standards and practices in effect at the time or complied with the requirements of applicable enactments in effect at the time;
 - (f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance over, in, on or under the site;
 - (g) what steps the person took to deal with the site on becoming aware of the presence of the substance over, in, on or under the site;
 - (h) any other criteria the Minister considers to be relevant.
- (2) An order made by the Minister pursuant to this Part may
- (a) require the person to whom the order is directed to take any measures that the Minister considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site;
 - (b) provide for the apportionment of the cost of compliance with the order;
 - (c) in accordance with the guidelines or regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site. 1994-95, c. 1, s. 129; 2006, c. 30, s. 41.

...

HAMILTON BEACH BRANDS CANADA, INC. et al

v.

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Appellants

Respondent

**ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE**

FACTUM

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