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PAPER 3.1

A Landlord's Liability and Remedies Against the Tenant Who Contaminates

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A LANDLORD'S LIABILITY AND REMEDIES AGAINST THE TENANT WHO CONTAMINATES[1]

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1 This paper provides an updated version of M. Pockey's paper as presented at CLE's Commercial Leasing Course held on May 10, 2007, and focuses primarily on the interests of landlords.

I. Introduction and Purpose

Not long ago, standard commercial lease agreements, for the most part, were extremely light on provisions designed to limit or allocate environmental risks, liabilities and obligations as between the parties, likely because the law imposing potential liability was not as robust or strict as it is today. However, as a result of the enactment in 1997 of Part 4 of the *Waste Management Act*[2] and the Contaminated Sites Regulation thereto[3] (the "*WMA*"), which in 2003 was repealed and replaced by Part 4 of the *Environmental Management Act*[4] (the "*EMA*") and the Contaminated Sites Regulation[5] thereto (the "CSR"), landlords and other occupiers of real property are now exposed to far greater risk of attracting environmental liability, and the scope of this potential liability has been significantly expanded. It is critical for those contemplating and engaging in commercial leasing arrangements to undertake appropriate due diligence in relation to environmental matters and to seek to allocate and/or limit environmental risks, liabilities and obligations as much as possible, both within the four corners of the written lease agreement and through other risk mitigation measures.

The purpose of this paper is to provide an outline of the key sources and scope of potential environmental liability, obligations and risk to which landlords and other occupiers of commercial property may be exposed under current laws, and to offer some suggestions for avoiding or limiting liability and responsibility, with particular direction to landlords.

II. Sources and Scope of Potential Liability

A. Statutory Liability

Before the enactment of the *WMA*, landlords, tenants and other occupiers of land could not be held civilly liable for contamination existing in or migrating from soil, groundwater or the substrate of real property or responsible to remediate contaminated land unless such liability arose as a matter of contract or common law (discussed in detail below).[6] However, in 1997, the British Columbia legislature, through the enactment of the *WMA*, created a new civil cause of action respecting contamination of real property and thus broadened the scope of potential liability and created new obligations for those involved with real property. Although the *WMA* has been repealed and replaced with the contaminated sites provisions of the *EMA*, the basic principles establishing the basis for and scope of this new civil liability have not been materially altered.

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2 R.S.B.C. 1996, c. 482.

3 BC Reg. 375/96.

4 R.S.B.C. 2003, c. 53.

5 BC Reg. 375/96, O.C. 1480/96.

6 However, they could be held liable and penalized for polluting the environment and for failing to comply with pollution permit requirements under such legislation, for example, as the federal *Fisheries Act*, the *Canadian Environmental Protection Act* and the former BC *Pollution Control Act* and as is discussed below they remain exposed to such regulatory liability under such enactments.

1. Scheme and Scope of Potential Liability Under the Environmental Management Act and Contaminated Sites Regulation

The *EMA* establishes a statutory scheme whereby a "contaminated site"[7] may be required by the BC provincial government[8] to be cleaned up (i.e., remediated) pursuant to a remediation order, or, alternatively whereby the contamination may be remediated voluntarily without a government requirement to do so.[9] In either case, where a person incurs "costs of remediation" in relation to a contaminated site, that person, through a statutory civil cause of action established under the *EMA*,[10] may seek to recover his or her "reasonably incurred costs of remediation" from persons who, under the *EMA*, are liable to pay such costs. Such persons are known as "responsible persons" and this statutory cause of action is known as the "cost recovery action."

Whether remediation costs are incurred as a result of a government issued remediation order or because someone voluntarily remediates, and regardless of whether such costs are incurred in relation to contaminants on or that have migrated to neighbouring properties, "responsible persons" may be held "absolutely, retroactively and jointly and separately liable" for the costs of remediating the contaminants.[11] This means that a person who falls within the definition of a "responsible person" under the *EMA*, may be held liable even though that person is not directly culpable for the contamination and even though the person never held or no longer holds any interest in the real property that has become contaminated. It also means that where more than one "responsible person" may be identified in relation to the contamination for which remediation costs have been incurred, one of them could ultimately be held liable not only for his or her share of the costs and clean up obligations, but also for all or part of any share that may be attributed or allocated to all other responsible persons.[12]

Pursuant to s. 45(2) of the *EMA*, "responsible persons" may be held liable and responsible not only to remediate and pay costs of remediating a contaminated site at which contaminants were originally deposited, but they may also be responsible and liable to pay such costs and undertake remediation at neighbouring properties that have become a contaminated site through the migration of contaminants.

"Costs of remediation" is a defined term in the *EMA* and includes but is not limited to costs of preparing a site profile, of carrying out a site investigation and preparing a report, legal and consultant costs associated with seeking contributions from other responsible persons, and fees imposed by the provincial government and certain local government authorities.[13]

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7 Defined in s. 39 of the *EMA* as "an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains (a) a hazardous waste, or (b) another prescribed substance, in quantities or concentrations exceeding prescribed risk based or numerical criteria or standards or conditions. The CSR contains specific prescribed risk based and numerical criteria and standards." Through legislative change and provincial government policy, these may become more stringent or may be relaxed in the future.

8 Sections 48, 81 and 83 of the *EMA* (remediation, pollution prevention and pollution abatement orders).

9 Sections 51 and 54 of the *EMA* (Voluntary and Independent remediation procedures).

10 Section 47(5) of the *EMA*.

11 Section 47(1) of the *EMA*.

12 This may occur where more than one responsible person is identified but where only one of them has the status of a legal person or where only one of them has the financial means to pay the costs, for example, where other responsible persons identified are corporations that have been dissolved or where they are corporations or individuals who have become bankrupt or hold no assets of value or upon which execution proceedings may be taken.

13 Section 47(3) of the *EMA*.

The BC Supreme Court in *Canadian National Railway Company et al. v. ABC Recycling Ltd.*[14] and *Workshop Holdings Limited v. CAE Machinery Ltd.*,[15] considered the scope of "legal costs" that are recoverable under the *EMA*. In the former case, the Court held that a responsible party is entitled to receive full indemnification (i.e., actual legal expenses incurred) of the costs incurred to remediate the site, and not merely the legal expenses associated with litigating the claim. In the latter case, the plaintiff pursued its claim against the defendant under a contingency fee arrangement with its lawyer that provided that the law firm would receive 1/3 of any award to the plaintiff. Upon the plaintiff's success, plaintiff's counsel asserted that it had provided legal services that were far greater in value than what the contingency fee agreement ad provided for, and that the plaintiff (and thus its lawyer) should be entitled to full remuneration of the greater amount. The Court held that "legal costs incurred," for the purposes of the *EMA*, includes the fees paid by the plaintiff to its counsel before entering into the contingency fee agreement, the fees to which the lawyer was entitled under the contingency fee agreement, and all reasonable disbursements and any other reasonable legal costs that were *actually* incurred. However, the Court made it clear that to ignore the contingency fee agreement would be contrary to the intention and purpose of the cost recovery provisions of the *EMA* which expressly allow for compensation for actual costs reasonably incurred.

That the contamination or activities causing the contamination were permitted or authorized by legislation or by regulatory authorities is irrelevant to a person's potential liability for remediation costs.[16] And, even though a person may remediate a contaminated site today so that concentrations or amounts of the contaminants on it are within the limits currently prescribed by law, if laws regarding standards for remediation or allowable limits of contaminants change in the future, that person can remain liable for the contamination to the extent of any new standards or limits.[17]

2. Landlords, Tenants and Occupiers as "Responsible Persons"

Section 45(1) of the *EMA* provides that the following persons are responsible for remediation of contaminants at a contaminated site.[18]

- "a current or previous owner" or "operator" of the site or a site from which a contaminating substance has migrated; and
- a "producer" or "transporter" of a substance that has caused the site to become contaminated.

While landlords and tenants may be considered a "producer" or "transporter" if they engage in the activities that define these particular categories of person, it is more likely that they will attract liability for contaminated land by falling within the meaning of "owner" and/or "operator."

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14 *Canadian National Railway Co. v. A.B.C. Recycling Ltd*., [2005] B.C.J. No. 982 (S.C.), [2005] B.C.J. No. 2398, [2006] B.C.J. No. 2186.

15 *Workshop Holdings Ltd. v. CAE Machinery Ltd*., [2006] B.C.J. No. 512 (S.C.).

16 Section 47(4) of the *EMA*. See *Canadian National Railway Co. v. A.B.C. Recycling Ltd*., 2005 BCSC 647 reversed on appeal with respect to the issue of legal costs 2006 BCCA 429.

17 Section 60 of the *EMA*.

18 "Contaminated Site" is defined in s. 39(1) of the *EMA* to mean "an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains (a) a hazardous waste, or (b) another prescribed substance, in quantities or concentrations exceeding prescribed risk based or numerical criteria or standards or conditions." Similarly, "contamination" is defined to mean the presence in soil, sediment, water or groundwater of (a) a hazardous waste, or (b) a substance prescribed for the purposes of paragraph (b) of the definition of "contaminated site," in quantities or concentrations exceeding the criteria, standards or conditions prescribed for the purposes of the definition of "contaminated site." Applicable risk based criteria and numerical standards are prescribed in the CSR.

Accordingly, this paper focuses on the potential for liability to attract to landlords, tenants and occupiers of property as an "owner" or "operator."

In s. 39(1) of the *EMA*, "owner" is defined very broadly to mean:

> a person who
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> (a) is in possession,
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> (b) has the *right of control*, or
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> (c) occupies or *controls the use*
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> *of real property*, and includes, without limitation, a person who has an estate or interest, legal or equitable, in the real property. (emphasis added)

"Operator" is also defined very broadly to mean "a person who is or was *in control of or responsible for any operation located at a contaminated site*..." (emphasis added)

"Person" is defined broadly to include individuals acting in their personal capacity as well as directors, officers and employees.

Therefore, depending on how the phrases "right of control," "control" and "responsible for any operation" might be interpreted and might apply in the particular circumstances of a commercial tenancy or sub-tenancy arrangement, these definitions could expose landlords, tenants and other occupiers of real property to liability and risk arising from the contamination of real property and regardless of whether or not they directly deposit contaminants on or at the site and whether or not they are an individual person or a corporate legal entity. Because s. 45 of the *EMA* makes it clear that "previous" owners and operators may also be considered "responsible persons," the fact that a person might have acted as a landlord or might have occupied real property as a tenant in the distant past, but no longer holds any interest in the property, does not exempt him or her from potential responsibility and liability for contamination of the property.

a. "Owner" Liability

What is meant by the words "right of control" and "controls the use of" "real property" in the definition of "owner" was first considered and determined by the Environmental Appeal Board ("EAB") in *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands & Parks)*,[19] by the Supreme Court of BC following a judicial review of the EAB's decision.[20]

In *Beazer*, a remediation order for a contaminated site naming Beazer East, Inc. ("Beazer"), Atlantic Industries Limited ("AIL") and Canadian National Railway ("CNR") as responsible persons was issued against them. The site had become contaminated as a result of the operation of a wood preserving facility from approximately 1930 to 1982. As the landowner during the period of the wood treatment operations, CNR was named as a responsible person. AIL purchased the shares of a company called "KICL" who had leased the property from CNR and caused contamination of the property through its wood treatment operations there from approximately 1969 to 1982. AIL purchased the shares of KICL from KICL's parent company, Beazer, and then amalgamated with KICL in 1993, well after KICL had decommissioned its operations at and abandoned the site and before the enactment of the *WMA*. Thus, when AIL purchased KICL and amalgamated with it, the law that now exists by which liability is imposed retroactively for contaminated sites did not then exist. Beazer appealed the remediation order on the basis that it did not cause or contribute to the contamination and, rather, its subsidiary, KICL (now AIL) and others who operated at the site prior to KICL did so. AIL appealed the order, in part, on the basis that it was not culpable for the contamination because it had nothing to do with the site at the time of the contamination and could not have anticipated the potential liability

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19 *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands & Parks)*, [2000] B.C.E.A. No. 15.

20 *Beazer East Inc. v. British Columbia (Environmental Appeal Board)*, [2000] B.C.J. No. 2358, 2000 BCSC 1698 [*Beazer*].

for the contamination at the site at the time of its purchase of AIL because of the state of the law and as a result of the reasonable due diligence it conducted, or, in the alternative, AIL should be considered exempt from liability under the *EMA* (specific available exemptions are discussed below). Both Beazer and AIL were unsuccessful in their appeals.

In an effort to ensure that Beazer remained a party to the remediation order, CNR and AIL asserted that Beazer had a "right of control over" the real property that became contaminated and was thus an "owner" of the site because, as KICL's parent corporation, it made the ultimate decision about whether or not to approve the lease of the site by KICL. In interpreting and applying the meaning of "owner" to Beazer, the BC Supreme Court disagreed with this assertion and held that "right of control" means a right recognized by law and not merely an ability to control. Because the EAB did not determine whether the evidence demonstrated that Beazer "controlled the use of" the property (also contained in the definition of "owner"), the BC Supreme Court added that the question of whether Beazer "controlled the use of" the site and whether it was an "owner" on this basis could be referred back to the EAB for determination on the facts. The matter was not revisited by the EAB, however, because the Court went on to determine that Beazer was an "operator" of the site on the basis that Beazer had been "in control of" an operation on the site and this was enough to keep Beazer on the remediation order.

The more recent decision of the EAB in *Canadian Pacific Railway Company v. British Columbia (Ministry of Environment)*[21] also considered the scope of who may be an "owner" under the *EMA*. The EAB concluded that the definition of "owner" is much broader than the common law concept of real property ownership.[22] In this case, CPR was named as a responsible person in a remediation order on the basis that CPR was a past owner of *personal property* located on a portion of the site. The property owned by CPR in this case was rail spurs. The EAB dismissed the appeal holding that an owner of personal property located on another person's real property could be considered an "owner" of the real property for the purposes of the *WMA* (now the *EMA*).

From these decisions it is apparent that a person may be considered an "owner" for the purposes of the *EMA* if the person: (a) is in possession of real property; (b) has the right of control of real property; (c) occupies real property; or (d) controls the use of real property. Applying these judicial interpretations of these phrases to typical commercial leasing situations, it is clear that each of these components of the definition could apply.

First, while tenants may not take title to the real property in issue, mere possession of the property could result in exposure for remediation and to pay remediation costs in relation to the property or contaminants migrating from it. Second, because the finding of a "right of control" of real property requires only the existence of a right recognized by law and not necessarily a practical ability to control23 the property, both a landlord and a tenant could be exposed to liability as an "owner" on this basis, depending on the rights conferred on them by any instruments conveying an interest in the property and by any agreements as between them concerning such rights and interests. Third, the use of the word "occupies" suggests that merely taking up space on the real property could expose a person, such as a tenant, sub-tenant or other occupier to potential liability.[24] Finally, "control[ling] the use of" real property could expose a person to liability. According to the EAB, "control the use of"

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21 *Canadian Pacific Railway Company v. British Columbia (Ministry of Environment)*, [2006] B.C.E.A. No. 16 [*CPR*]. Although the decision was decided under the *WMA* the principles are still applicable as the definition of "owner" has not been changed under the *EMA*.

22 *Ibid* at para. 60.

23 *Beazer*, *supra* at para. 95

24 *CPR*, *supra* at para 72.

real property means to "have power over" the use of real property, or to "exercise restraining or directing influence over" the use of real property."[25] Both landlord and tenant could *de facto* find themselves having such status regardless of what a commercial tenancy agreement might provide.

b. "Operator" Liability

In *Beazer*, the EAB and the BC Supreme Court also considered and determined the meaning of the words "control of" and "responsibility for" "any operation located at a contaminated site" for the purposes of applying the definition of "operator." The Court agreed with the EAB that the determination of a party's status as "operator" requires evidence of the party's actual control of "any operation" on a contaminated site. This does not necessarily require evidence of actual control of the day-to-day operations at the site, but a demonstration of some factual indicia that the person had authority to make decisions respecting any operation at the site.[26] Specifically, the court states that the Legislature's intention as expressed through the definition of "operator" was to include persons

> ... who made decisions or had the authority to make decisions with respect to any operation on the site. These are the persons who are potentially culpable because they were the ones who made or could have made decisions in relation to operations on the site, which may have included operations that caused or contributed to the contamination. A person who makes the decisions with respect to an operation is "in control" of the operation and a person who has the authority to make the decisions with respect to an operation is "responsible" for the operation. In my opinion, a person who is responsible for an operation is one who is accountable for the operation but the accountability is not necessarily legally enforceable.
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> ... in using the word "responsible," the Legislature intended to include persons who brought about an operation in the sense of causing the operation to be carried on or carried out. Such a person would be responsible for the operation because, but for the actions or decision of that person, the operation would not have been carried on or carried out.[27]

The EAB cited the following evidence as indicia of Beazer's control and responsibility for operations at the site: Beazer's extensive financial control over KICL and its operations at the site; Beazer's control and authority over KICL's lease of the site; Beazer's involvement in environmental affairs on the site; and the organizational and decision-making structure as among Beazer and KICL which resulted in Beazer serving as a "watch dog" over KICL's operation of its wood treatment business. These factors all supported a finding that Beazer was generally in control of the wood treatment operation, and was therefore an "operator."

Because one's status as an owner or operator depends largely on the nature or degree of one's "control" or "responsibility" and not necessarily on one's legal relationship to the real property or the corporate governance structure of a particular party, all types of corporate entities may be exposed to potential contamination liability and traditional "corporate veil" principles and limited liability constructs will offer little if any protection from liability under the *EMA*.[28] For instance, parent companies may be liable for the acts of their subsidiaries or agents. Companies who have merged or amalgamated with other entities who have attracted such liability for their historic activities may, through such associations, themselves attract "responsible person" status. Therefore corporate entities that control other entities involved in commercial leasing arrangements are additionally exposed to contaminated sites liability, despite that they may not hold legal title to the property or to the assets through which contamination of the property is caused, as is demonstrated in the *Beazer* case.

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25 *CPR*, *supra* at para. 69

26 *Beazer*, *supra* at para. 108.

27 *Beazer*, *supra* at paras. 110-111.

28 *Beazer*, *supra* at para. 90.

The decision in *Beazer* and other more recent cases offer authority for the proposition that landlords and tenants can most definitely attract contaminated sites liability as a result of the acts of their tenants.

In *British Columbia Railway Co. v. British Columbia (Ministry of Water, Land and Air Protection)*,[29] the EAB summarizes the reasoning behind holding landlords responsible for the acts of their tenant succinctly as follows:

> [201] ... A landlord, who leases property to an industrial tenant, should not be allowed to "turn a blind eye" to activities of its tenant that cause the leased property and surrounding environment to become contaminated. The landlord should do more that rely on the regulators or its tenant to deal with environmental problems. The benefits derived from leasing property should go hand in hand with some degree of responsibility for the property and activities occurring on it with the landlord's knowledge or consent. BC Rail and BCR Properties have derived a financial benefit in terms of rent received from leasing the Plant Site to its tenants. It matters not that the revenue was below the landlord's initial expectations or the market rate. Landlords continue to have responsibility for property leased to others. Accordingly, the Panel can find no reason to remove BC Rail and BCR Properties [the landlords] from the Order. ...

For all of these reasons, landlords should be especially mindful, before and after transacting with a tenant, of his or her relationship and potential relationship to the real property in issue, to persons conducting activities on or near the real property, and of the activities conducted on the property, whether past, present or likely in the future. Landlords should strive to limit their potential liability for contamination as much as possible both through their conduct and in contracting as to their respective relationships, obligations and rights in relation to the property. Specific considerations are discussed below.

3. Exemptions from Liability

While the net of potential liability is broad, the *EMA* and CSR do offer specific exemptions from responsibility and liability to certain "responsible persons," some of which could apply to those who engage in commercial leasing arrangements, depending upon the particular circumstances.

a. Third Party Polluter

Section 46(1)(c) of the *EMA* exempts 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, but only 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." While this would not likely exempt a landlord from responsibility for the acts of a tenant, it might exempt a landlord from responsibility for contamination of the property by a sub-tenant with whom the landlord has no contractual arrangement, or whose presence as an occupier of or trespasser to the site was unauthorized by the landlord. This provision may also exempt a tenant from liability for contamination of the property where contamination was caused by another tenant in a multiple tenancy situation. Again, however, in order for this exemption to apply, the responsible person claiming it must prove on a balance of probabilities that he or she "exercised due diligence with respect to the contaminating substance."[30]

Neither the *EMA* nor the CSR prescribe what is meant by "exercising due diligence," nor do any provisions exist from which the meaning might be extrapolated. However, it is generally accepted in

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29 *British Columbia Railway Co. v. British Columbia (Ministry of Water, Land and Air Protection)*, [2004] B.C.E.A. No. 6 [*British Columbia Railway Co*].

30 Section 46(3) of the *EMA*.

the context of environmental pollution and contamination cases that due diligence means "taking all reasonable care" to prevent the happening of the event giving rise to the risk or liability.[31]

For landlords wishing to claim this exemption, due diligence would likely involve some or all of the following and could involve other measures as well:

- Making reasonable efforts before entering into tenancy arrangements to ascertain whether the prospective tenant is likely to or might cause contamination at the site and whether the tenant is likely to allow subtenants or other occupiers who might cause or contribute to contamination to use the site;
- Undertaking and imposing sufficient security measures both physically at the site and by means of the lease agreement with tenants and subtenants to ensure that their activities do not cause or contribute to the site becoming contaminated and to ensure that third parties will not have access to the site and/or make unauthorized use of the site;
- Taking reasonable measures, perhaps both through the lease agreement and independently, to keep abreast of the ongoing environmental condition of the site during the use of the site by tenants and others, and maintaining the ability to control the use of the site so as to prevent and/or ensure the timely remediation by the tenant of contamination that may occur or has occurred.

b. Innocent Purchaser

Section 46(1)(d) exempts "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. This is known as the "innocent purchaser exemption."

Mere knowledge that a site was previously used for an industrial or commercial purpose does not *prima facie* establish knowledge that the site was a contaminated site. The innocent purchaser exemption is a fact driven process to be determined on a case-by-case basis.[32]

In *Workshop Holdings Ltd.*, a previous owner of the site was able to avail itself of the innocent purchaser exemption because there was no evidence that the copper and zinc contamination would have been obvious at the time of purchase. The mere fact that the previous owner had used the contaminated soil as fill, possibly diffusing the contamination, did not "cause or contribute" to the contamination of the property within the meaning of s. 26.6 (now s. 46(1). However, in *Beazer*, the EAB did not accept AIL's assertion that it was an innocent purchaser.[33]

Section 28 of the CSR clarifies the factors to consider in determining whether the person undertook all appropriate inquiries into the previous ownership and uses of the site. The factors include any personal knowledge or experience of the owner or operator respecting contamination at the time of

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31 *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; see also *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639 the Court noted that the concept of due diligence is to be determined bearing in mind the increasing public awareness of environmental concerns over time at para. 121.

32 *Workshop Holdings Ltd. V. CAE Machinery Ltd.*, [2005] B.C.J. No. 940, 2005 BCSC 631.

33 *Beazer*, *supra* at paras. 334 -335.

the acquisition; the relationship of the actual purchase price to the value of the property if it was uncontaminated; commonly known or reasonably ascertainable information about the property at the time of the acquisition; any obvious presence of contamination or indicators of contamination or the feasibility of detecting such contamination by appropriate inspection at the time of the acquisition.

c. Innocent Owner/Operator

Pursuant to s. 46(1)(e), if an owner or operator can show that at the time of acquisition, the site was not a contaminated site, that he or she did not cause the site to become contaminated in whole or in part as a result of the disposal, handling or treatment of the substance, then the owner or operator is exempt from responsible person liability.

Even if an owner/operator can satisfy the criteria in s. 46(1)(e), he or she may nonetheless be considered a "responsible person" by virtue of s. 29 of the CSR which reads as follows:

> 29 Subject to section 30, an owner of real property at a contaminated site is exempt from section 46(1)(e) of the Act if
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> (a) the owner voluntarily leased, rented or otherwise allowed use of the real property by another person,
>
> (b) the owner knew or had a reasonable basis for knowing that the other person described in paragraph (a) planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site, and
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> (c) the person described in paragraph (a) used the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.[34]

Section 29 of the CSR was considered in the case of *O'Connor v. Fleck*.[35] In *O'Connor*, the Court found a landlord, as a previous owner, to be a "responsible person" for the tenant's contamination of the site. The tenant operated a brass and aluminium foundry in the plaintiff landlord's building for 26 years. After the tenant vacated the building, the landlord undertook an environmental assessment of the property that confirmed it was contaminated. The landlord remediated the site and sued the tenant for remediation costs incurred after the tenant had vacated. The BC Supreme Court held that there was no doubt that the tenant was a responsible person under s. 26.5(1) of the *WMA* (now s. 45(1)(c) of the *EMA*) as a person who had produced a substance that caused the site to become a contaminated site. The plaintiff landlord, as a previous owner of the site, was also *prima facie* a "responsible person." The Court considered whether the landlord was exempt from liability under s. 26.6(1)(e) of the *WMA* (now s. 45(1)(e)). The Court accepted that the site was not contaminated when the landlord purchased it and that he did not contribute to the contamination through his own activities. However, s. 29 of the CSR disqualified the landlord from the exemption because there was abundant evidence of the landlord's knowledge of the defendant's operation and it could not be said that the landlord had no reasonable basis for knowing that the operations would cause the site to become contaminated. The evidence included the fact that he came to the building frequently, knew generally the operations of the defendant tenant, and had received complaints from other tenants of dust and smoke from the operations.[36]

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34 Section 30 provides that in certain circumstances lessors who enter into a surface lease agreement to provide surface access for subsurface use may be designated persons not responsible for remediation.

35 *O'Connor v. Fleck*, [2000] B.C.J. No. 1546, 2000 BCSC 1147.

36 In *British Columbia Railway Co.*, the Environmental Appeal Board held that s. 29 of the CSR was inconsistent with s. 26.6(1)(e) (now s. 45(1)(e) of the *EMA*). The EBA held that there was no express regulation making power to allow that section to be validly enacted. Therefore, although the EBA did not have authority to declare the provision invalid the panel concluded that s. 29 would not be considered for the purposes of the case before it.

d. Limitation of Liability Where a Certificate of Compliance is Issued

Where a director is satisfied that a site has been satisfactorily remediated, he or she may issue a "Certificate of Compliance" ("COC") for the site. A COC is a written document by which the BC Ministry of Environment may certify that a contaminated property has been remediated so that it meets applicable standards of the day for the contaminants that were present on the property. Once a COC has been issued, any person who was deemed a responsible person is protected from future liability if another person subsequently proposes or undertakes to (i) change the use of the contaminated site, and (ii) provide additional remediation[37] or causes new contamination to be deposited at the site thereafter.

e. Part 7 CSR Exemptions

Part 7 of the CSR provides additional exemptions from "responsible person" liability. Section 22 of the CSR contains an exemption that might be of importance to parties involved in commercial leasing arrangements in that it exempts certain owners from liability for remediation of a contaminated site if the person is a current or previous owner of an easement, a right of way, a restrictive covenant, a covenant under s. 219 of the *Land Title Act*, a lien, a judgement, a reservation in a Crown grant, or an interest in real property which deals exclusively with subsurface rights including such a tenure under the *Geothermal Resources Act*, the *Mineral Tenure Act* or the *Petroleum and Natural Gas Act*. However, the person seeking exemption under s. 22 must establish that their interest in the site (for example, a lien) has not caused, in whole or in part, the site to become a contaminated site. To date, there has been no judicial consideration of this exemption or of any circumstances in which a person has claimed it and so it remains to be seen how easy or difficult this exemption may prove to advance successfully. However, this exemption does suggest that where environmental risks posed for a prospective tenant appear particularly high, the use of an alternative instrument to a lease in order to convey rights in property to the prospective tenant might be worth some consideration.

Generally speaking, it has been difficult for responsible persons to avail themselves successfully of these exemptions. For this reason, landlords, tenants, and sub-tenants ought to be particularly aware of the expanded scope of liability created by the *EMA* and CSR and ensure through pre-contractual due diligence efforts that they identify as best as is reasonably possible all existing environmental concerns and potential environmental risks and that they limit potential liability for these risks as much as possible through the commercial lease agreement. Documenting due diligence efforts is just as important as undertaking them so that in the event that a particular risk should materialize later, parties have the best possible chance to take advantage of an applicable exemption from liability. In part 3 of this paper, due diligence measures are discussed specifically.

4. Liability Under Other Environmental Statutes

A host of federal, provincial, and local government enactments can give rise to regulatory or penal liability for environmental matters. For instance, the federal *Fisheries Act*[38] prohibits, for example, the deposit into fish bearing waters of "deleterious substances." Under that Act, a landlord may be held liable and thus subject to fines and other penalties if the landlord "permits" a tenant to make such a deposit. Similarly, the *Canadian Environmental Protection Act, 1999*,[39] which prohibits the release of certain substances, renders liable those persons who have the "charge, management and control" of the substance and allow its release, and imposes on them specific obligations in the event of a release (reporting and abatement obligations, for example).[40] In addition to creating the above noted statutory

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37 Section 46(1)(m).

38 R.S., 1985, c. F-14.

39 1999, c. 33.

40 See, for example, s. 95 of the *Canadian Environmental Protection Act, 1999*.

cause of action for contamination, the *EMA* establishes a regulatory scheme by which "the introduction of waste" into the environment is prohibited and can give rise to penal liability. Under the *EMA*, persons who permit or allow prohibited activities or events to occur, such as the introduction of waste into the environment, can be liable. Accordingly, landlords may be exposed to liability where they allow tenants to commit them and fail to take appropriate steps to prevent tenants from violating environmental laws. In *R. v. Rivtow Straits Ltd.*,[41] a landlord was held liable when a sub-tenant on its property contravened a provision of the *Fisheries Act* on the basis that the landlord failed to exercise control over the property and the activities of the sub-tenant.

B. Common Law Liability

In addition to exposure to statutory liability under the *EMA* and CSR, landlords, tenants and other occupiers of real property may be exposed to potential liability for contamination of land pursuant to the following four common law principles: nuisance, the rule in *Rylands v. Fletcher*, trespass, and negligence. Often, a plaintiff in a cost recovery action will, in addition to seeking recovery of "costs of remediation" under the *EMA*, plead one or more of these common law causes of action with a view to obtaining traditional tort damages to cover that loss that does not fall within the definition of "costs of remediation" and would therefore not be recoverable under the *EMA*.

Anmore Development Corp v. The City of Burnaby et al.[42] and *The City of Burnaby v. Thandi et al.*[43] are companion cases that make clear the alarming point that a landlord can be held liable pursuant to common law principles for damages arising from contaminating activities of a tenant. The circumstances of *Anmore* and *Thandi* are that the Thandi family (the "Thandis"), Anmore Development Corporation ("Anmore") and the City of Burnaby owned adjacent properties to each other. The Thandis leased a portion of his property to Ech-Tech Recycling Ltd. ("Ech-Tech") as tenant for a construction waste recycling operation. The property was not properly zoned for the Ech-Tech's operations and the City became concerned about a large pile of construction waste that was accumulating. The Thandis and Ech-Tech entered into a number of agreements aimed at bringing the operations into compliance with the zoning regulations, including an agreement that the Thandis would construct a building to house the operations. While construction was being undertaken, a large pile of construction material was dumped on the neighbouring properties owned by Anmore and the City.

The Thandis subsequently shut down the Ech-Tech's operations for failing to pay rent. Although the Thandis removed the waste from their property, they refused to remove the waste from the neighbouring properties. Anmore and the City consequently commenced actions against the Thandis founded in nuisance, trespass and negligence to recover damages for clean-up costs.

1. Nuisance

The tort of nuisance is the most frequently advanced common law claim in respect of environmental damage. The fundamental issue is whether there has been an unreasonable interference with the use and enjoyment of land resulting in damage to the claimant. In order to succeed in a nuisance claim, the plaintiff must establish a substantial interference with the use and enjoyment of property that would not be endured by an ordinary occupier. The test for nuisance is objective and requires a repeated or continuous interference.[44] In assessing whether the interference is unreasonable, the Court will consider a number of factors including the type of interference, the severity, the duration, the

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41 (1993), 87 B.C.L.R. (2d) 346 (C.A.).

42 *Anmore Development Corp v. The City of Burnaby et al.*, 2005 BCSC 1477.

43 *The City of Burnaby v. Thandi et al.*, 2005 BCSC 1478 [*Thandi*].

44 *Pyke v. Tri Gro Enterprises Ltd.*, [1999] O.J. No. 3217 at para. 204.

character of the neighbourhood, and the sensitivity of the plaintiff's use of the lands.[45] These considerations must then be balanced against the value of the defendant's use of the lands to the public. Liability in nuisance is strict and proof of negligence is not an element of the tort. The absence of negligence is therefore no defence to a claim in nuisance.[46]

A landlord must be careful not to turn a blind eye to any possible nuisances that are caused or could be caused by a tenant. Although the general rule is that a landlord owner is not liable for the nuisance committed by his tenant, where the nuisance arises from acts, which the landlord contemplated that the tenant would engage in, the landlord may be held liable.[47] Additionally, a landlord could be liable for a tenant's nuisance where the landlord becomes aware of the nuisance and permits the nuisance to continue.[48]

In *Thandi*, there was no question that the waste was a nuisance for which the tenant, Ech-Tech, was liable. The landlord was also liable for the tenant's nuisance for a number of other reasons including the fact that the landlord had agreed to the storage of 30,000 cubic yards of construction debris, even though he knew that 7,000 cubic yards posed a potential problem. The landlord was aware the debris had encroached on the neighbouring property and had the authority under the lease agreement with the tenant to put a stop to the nuisance, but instead did nothing.

In addition to a landlord's potential exposure to liability for nuisance caused by the contamination of a neighbouring property, the tort of nuisance may also provide a landlord with a basis for commencing an action against a tenant where the tenant has contaminated the leased premises. In *Tompkins Mews Inc. v. 1332334 Ontario Inc*,[49] the plaintiff was the owner of a commercial shopping plaza. The plaintiff sued a tenant of the plaza for contamination caused by the tenant's dry cleaning operations. The original lease was executed in 1985 and was subsequently assigned in 1988. Although some of the contamination might have occurred as early as 1985 the court held that the contamination continued after the assignment of the lease and the operations were continued by the assignee. It did not matter that some of the contamination may have commenced under the original tenant's tenancy, the nuisance continued under the assignee's tenancy and therefore they may be jointly and severally liable along with the assignor. The landlord was not required to choose which tenant to sue since both were jointly and severally liable.[50]

2. Trespass

In *The Law of Torts in Canada*, Professor Fridman defines trespass to land as follows:

> Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so. Such interference must be direct rather than consequential. To constitute trespass the defendant must in some direct way interfere with the land possessed by the plaintiff. The requirement of directness differentiates trespass from nuisance, which is committed when the defendant makes a use of his land indirectly affects the land of the plaintiff.[51]

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45 *Ibid* at para. 205.

46 *Tompkins Mews Inc. v. 1332334 Ontario Invc.*, [2006] O.J. No. 5100 at para. 36 citing *Hatch v. Pye and Laybolt*, [1983] N.S.J. No. 471.

47 *Thandi*, *supra* at para. 132; *Kenny v. Schuster Real Estate Co.*, [1990] B.C.J. No. 1420 at 10.

48 *Thandi* at para. 135.

49 [2006] O.J. No. 5100.

50 *Ibid* at para. 37.

51 G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed., (Toronto: Carswell, 2002), at 37-38. Definition endorsed in *Burnaby (City) v. Thandi*, [2005] B.C.J. No. 2284 at para. 113.

Defences to a trespass include consent of the owner, lawful authorization, necessity, and lack of intention in the commission of the tort of trespass.

A landlord may be held liable for the trespass of his or her tenant where there is a common design or joint operation between the tenant and the landlord. In those circumstances the landlord can be responsible for joint liability of the tenant's trespass. In his text Professor Fridman offers the following definition of joint tortfeasors:

> For two or more persons to be considered to be joint tortfeasors, the tort in question must be committed by one of them on behalf of or in concert with another. The acts must be performed in the furtherance of a common design.[52]

In *Thandi*, Bennett J. found the landlord jointly liable for the trespass of his tenant because although he was not in charge of the day-to-day operations of the tenant's business, he was involved as a shareholder, investor, and by agreeing to build the tenant a building for the recycling operations. Further, he was aware of the continuous trespass of the tenant and was "present as a conspirator" despite not being directly involved in moving the debris to the plaintiff's property.[53] The Court also noted that without the landlord's assistance, the tenant would have been required to cease operations well before the trespass occurred. As a result of this case landlords should be cautious of doing anything that could be seen as assisting their tenants in committing a trespass.

3. Negligence

Where a duty of care arises, the tort of negligence can also provide a remedy for environmental harm. In order to succeed in such a claim a plaintiff must establish 1) a duty of care existed between the parties; 2) the defendant breached the standard of care; the breach of the duty caused the plaintiff damage or loss that was not too remote a consequence of the breach.

In *Thandi*, the Court held that the landlord owed a duty of care to his neighbours. The standard of care imposed on a landlord is to conduct itself and its business in a reasonable manner. The Court held that in all the circumstances the Thandis had failed in their duty and that the damage to the neighbouring property was caused by the negligence of the landlord. Bennett J. noted that the Thandis took no steps, other than within the four corners of the lease agreement with Ech-Tech, to ensure that the pile of construction waste did not spill over onto the adjoining properties. Further, the accumulation of debris on the neighbouring properties was foreseeable since the Thandis were aware of Ech-Tech's practices.

4. The Rule in Rylands v. Fletcher

The common law cause of action for strict liability as articulated in the Rule in *Rylands v. Fletcher*[54] is often considered to be an extension of the law of nuisance. The rule in is stated as follows:

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

This rule may form the basis for a claim for environmental contamination where the contamination is caused by a single escape. Where contamination results from an ongoing leak or continuous nuisance, the rule will not apply and the action is properly brought under common nuisance.[55]

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52 *Ibid* at 888.

53 *Thandi, supra* at para. 22.

54 (1868), L.R. 3 H.L. 330.

55 *Thandi*, *supra* at para. 149.

C. Contractual Liability

In addition to statutory and common law sources of liability, liability arising from contamination and other environmental concerns can attract as matter of contract or private agreement between parties; for example, pursuant to a valid and enforceable lease agreement. Where parties engaged in commercial leasing arrangements fail to address environmental risks and liability within the four corners of the lease or some other form of binding agreement, they may be left to sort out their respective liabilities and environmental responsibility as between them only on the basis of the statutory or common law remedies that may be available to them; that is, assuming the lease does not otherwise preclude the pursuit of such remedies. A lease may also be used by a party to a commercial lease to increase the scope of his or her recourse against the other, well beyond the remedies afforded by common law or statute. For example, a landlord by means of a lease agreement may impose clean up obligations that are more stringent than those which the *EMA* and CSR or the common law would require in the circumstances or transfer its responsibility and liability for remediation under the *EMA* to the tenant. Similarly, the lease may serve as a vehicle for a tenant to limit the recourse to the statutory and common law remedies a landlord might otherwise have against the tenant under the *EMA*.

The following section of this paper addresses specific considerations for landlords in mitigating environmental obligations, liability, and risk before entering into and through the lease agreement.

III. Risk Mitigation for the Landlord

A. Before Entering Into a Lease Agreement

1. Environmental Due Diligence

One ought never to assume that a particular commercial property offers no or negligible environmental risk - no matter how new the building or development or how environmentally benign the activities undertaken on the property might appear. The lease of any commercial property should cause prospective landlords (and prospective tenants for that matter) to make inquiries about environmental matters and to document well the results of such inquiries. The failure to do so can result in one's exposure to significant unknown risks and can limit one's ability to avail oneself of the *EMA* exemptions from liability as discussed above and which require proof of due diligence.

Due diligence from the perspective of a party seeking to assume a lease as landlord is usually best done by retaining an environmental consultant and legal counsel to assist in gathering and analysing relevant information about the property and the potential liabilities posed. Due diligence may include:

- Undertaking a site investigation (at least a Phase I environmental assessment which involves such things as reviewing publicly available records, including through the Contaminated Site Registry, respecting the historical uses, activities, contamination and remediation events on the lands, the history of site ownership, the proximity of the lands to sensitive receiving environments and to adjacent properties from which contaminants of concern might migrate or might have migrated; interviews with neighbouring business and property owners as to historical activities on and around the site; a review of the files of governmental authorities as to the occurrence of any pollution events on or in proximity to the lands and any environmental non-compliances on the part of the landlord or previous owners).
- If the Phase I investigation reveals any significant concerns, it may be prudent, if possible, to seek to undertake a Phase II investigation which would involve the more invasive approach of sampling and testing soils and possibly groundwater at various points on the lands.
- Whether or not a Phase II site assessment is done, one should seek to and review any previous environmental assessment reports in relation to the lands.

- Inquiries into and verification of the financial means of the other party to address environmental concerns.
- Inquiries as to the history of the other party's compliance and that of its directors and officers with environmental laws.
- What activities and operations are likely to be conducted on the property.
- Whether a sub-lease or improvements to or alter the lands are likely, and any particulars of the same.

This list is not exhaustive and, depending on the circumstances, more or less may be required or considered prudent.

The purpose of the due diligence from the landlord's perspective is twofold: first, to assess the degree of risk posed to the property and the landlord by the prospective tenant; and second, so as to be able to make an informed decision about whether to agree to the tenancy and/or what environmental requirements to impose on the tenant through the lease or otherwise.

The purpose from the tenant's perspective is to obtain as complete an understanding of the environmental condition of the proposed leased lands and premises as is reasonably possible, to be able to fairly assess the degree of risk posed by such condition, and to determine the degree of risk the tenant is willing to assume relative to the potential benefits of leasing the lands.

2. Environmental Insurance

Following the expansion of the scope of potential environmental liability through the enactment of polluter pays legislation, many facing broader exposure to environmental risks began to look to insurance coverage as a way of mitigating risk, and insurers began to respond by offering specific policies of environmental insurance to address such risks. Initially the cost of such insurance proved for many to be prohibitive. Today, insurers appear to be more willing to tailor policies to meet specific needs, and the cost of insurance premiums seems generally to have become more reasonable. Environmental insurance can be used in addition to traditional representations, warrantees, covenants, and indemnities to provide additional protection from environmental risk. It can also be used to address risk that is not covered at all or sufficiently through the lease agreement. Insurance may also offer comfort to lenders who may be reluctant to lend against properties or businesses where material environmental risks are identified. For this reason, landlords and tenants facing potential environmental liabilities may wish to consider obtaining an appropriate policy of insurance. Landlords who may become subject to contamination liability as a result of the activities of a tenant may wish to require that tenant, by means of the commercial lease agreement, to obtain environmental insurance for the benefit of the landlord. Tenants who are exposed to risk through the tenancy agreement may wish to obtain such coverage for their own benefit.

Commercial general liability ("CGL") insurance policies do not typically cover environmental risks including those arising in relation to contaminated sites and so these should not be relied upon as adequate insurance protection. In fact, most CGL policies specifically exclude losses arising from pollution or contamination unless the contrary is expressly indicated in the terms of the policy or unless a specific rider covering such risk has been purchased. Instead, where a landlord or tenant faces environmental risks for which insurance coverage might be desirable, they should consider specific policies such as "pollution liability" (aka "pollution legal liability") policies, or "clean-up costs cap" or "stop loss" policies. "Pollution liability" policies can be specifically tailored to address particular risks identified at a particular site and respects liability arising from unanticipated pre-existing or new contamination. They can cover third party claims, personal injury or property damage, business interruption costs and other losses. They can, for example, be purchased for the benefit of a landlord who could be held responsible for contamination caused by a tenant.

"Clean-up costs cap" or "stop loss" policies typically provide coverage where there is known or contamination at the site, or where contamination is likely to exist and where remediation of the property is required or likely to be required. Such policies provide coverage in the event that remediation costs exceed those estimated by a reputable environmental consultant. This can occur, for instance, when during the course of a remediation, contamination is discovered in amounts or concentrations exceeding those that were originally anticipated, contaminants are discovered in locations that were unanticipated and prove to be more costly to remediate, new contaminants are discovered that could not have been anticipated before the remediation process was commenced and require remediation, or regulatory officials require additional remedial work to be undertaken that was unexpected. Some insurers offer other types of coverage for environmental matters in addition to these two common types.

While insurance can be effective in providing coverage for certain risks and more underwriters are now offering it, this type of insurance is usually limited to claims arising within a certain period or term and claims arising outside that period will not be covered. In addition, because policies of environmental insurance tend to be limited to specific risks and limited to a particular period in which the loss to be covered must arise, they ought not be sought in lieu of conducting appropriate due diligence and incorporating risk mitigation strategies into the commercial lease agreement where possible.

B. The Lease Agreement

1. Representations and Warranties

Please note that the following is intended only to highlight some of the critical drafting concepts. It is not intended to serve as precedent for the specific language to be included in an agreement, nor does it provide an exhaustive list of all environmental provisions or issues that could or should be addressed.

a. Environmental Condition of Lands and Premises

Tenants will typically want to seek a representation from the landlord that the land and premises are free from "Contaminants" or "Hazardous Substances," with a view to defining these terms broadly and non-exhaustively so as to include any substance or condition that might give rise to liability, including those that are not regulated under the *EMA* such as biological organisms, fungi, mould and spores and irritants such as odours and smoke.

Landlords should seek to narrow the scope of any such representation they make as much as possible or, even better, to avoid making this representation in favour of requiring the tenant to acknowledge and agree that the Landlord has made no representation as to the environmental condition of the lands or premises and is leasing them to the tenant on an "as is where is" basis. If the landlord will not represent that the property is free of contaminants, then it will be in the tenant's interest to seek a representation from the landlord as to the specific known contaminants together with a representation that no others exist on the site or are migrating to or from the site. In this case, any representation as to environmental condition of the property should be limited to the best of the landlord's knowledge as at the time of the execution of the agreement, so that the discovery of unanticipated contaminants on the site at some later date does not trigger a breach for which default remedies may be pursued.

Because the term "contaminated site" is defined under the *EMA* in relation to specific concentrations of prescribed contaminants in soil and groundwater and specific risk based standards, the inclusion merely of a representation that the lands and premises are not a "contaminated site" may offer a tenant only limited protection from liability. Regulated standards often change and what may be considered a "contaminated site" on the execution of the lease may prove to be more or less stringent at a later date.

b. Compliance with Laws

The landlord should seek a representation that the tenant in compliance with all applicable Environmental Laws and that the tenant is not and has never been subject to any charge, conviction, ticket, penalty, pollution abatement order, pollution prevention order or remediation order, direction, notice of defect or non-compliance under any Environmental Laws except as expressly disclosed in the lease. The requirement for such a representation may offer some assurance as to the seriousness with which the tenant takes environmental matters (especially where it is operating a business that is subject to environmental laws). And, where several non-compliances are disclosed in the agreement or a tenant refuses to provide such a representation, this may be telling of the likely future conduct of the tenant in relation to environmental matters at the site, of the degree of risk to which the landlord may be exposed and, at the very least, should prompt further due diligence or more stringent contractual requirements and protections.

There are some circumstances under the *EMA* and CSR that require a landlord to provide an environmental condition disclosure document called a "Site Profile" to a prospective tenant.[56] This document is a vehicle through which a landowner or operator must disclose known or anticipated environmental concerns and his or her knowledge of historic activities on real property that could give rise to environmental concerns. A tenant, through the lease agreement, may waive the requirement for the landlord to provide this document.[57] Depending on the particular circumstances, it may be prudent practice for landlords to seek an express waiver of this requirement and for tenants to insist on disclosure of it.

c. Certificates of Compliance

If a COC or another regulatory instrument respecting environmental condition exists for the lands, the landlord may wish for the tenant to warrant (and/or covenant) that it will exercise all reasonable care so as not to invalidate or compromise the validity of the COC.

Conversely, the tenant may seek a representation from the Landlord that any terms of that instrument have been complied with or are being complied with, and the instrument is valid and in good standing. This may provide the tenant with some certainty that the environmental condition of the site, at least at the time of the execution of the agreement, poses no concern for governmental authorities and, subject to the fulfillment of any conditions specified in it, currently meets applicable regulatory standards. The COC taken together with such a representation, may offer evidence of a baseline or benchmark for both parties to rely upon as to the environmental condition of the site as at the time of the commencement of the tenancy against which future environmental assessments of the lands and premises might be measured. In addition, this type of representation may provide comfort to any lenders from whom the tenant and landlord may be seeking financing.

d. General

The landlord should seek a provision stipulating that if any of the tenant's representations prove to be untrue, such misrepresentation constitutes a material default and will trigger the general remedies for default expressly set out in the lease or such other remedies that may be more specific and appropriate to address such misrepresentations as may be set out specifically in that section of the lease to do with environmental matters (for example, remedies involving the requirement to investigate the site, to remediate or pay costs of remediation).

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56 Section 40 *EMA* and Part 2, s. 3 of the CSR.

57 Section 4(13)(a) of the CSR.

2. Access to the Lands, Environmental Investigation and Remediation During the Term

Because of the exposure landlords face arising from the acts or omissions of their tenants as discussed above, the landlord should incorporate a provision in the lease that requires the tenant to take all reasonable care to prevent any releases of contaminants at the lands and premises, including but not limited to undertaking regular and frequent environmental audits in relation to the tenant's compliance with Environmental Laws[58] and its activities at the lands and premises as well and site assessments and investigations as the landlord may specify. The landlord should also require the tenant to keep written records of such audits, assessments and investigations and make such records available for the landlord's review as may be required by the landlord. Landlords should also incorporate an express right to enter onto the property and to undertake investigations, inspections and inquiries as may be reasonable (or as may be desirable in the landlord's sole discretion) with respect to environmental matters and the activities of the tenant on the lands.

Tenants typically seek to restrict such rights to ensure that the landlord will act reasonably in undertaking its review or investigations, and that the landlord will maintain the confidentiality of any reports or records respecting the tenant's activities and operations, business and environmental conduct, and that the landlord will not disclose to any others the contents of any records of audits, assessments or investigations or any information disclosed by the tenant to the landlord in the absence of the tenant's prior consent (except to the landlord's advisors on a confidential basis and except as may be required by law). The tenant also typically seeks to ensure that to the extent that the landlord's own investigation or inspection of the lands or premises interrupts the tenant's business or causes harm or loss to the tenant, the landlord will be responsible and liable to the tenant in relation to such harm or loss. In this case, the type of harm that could be caused by the landlord should be anticipated and specifically provided for in the lease (i.e. damage to the tenant's assets, business interruption loss, loss arising from personal injury" & etc.). The tenant may wish this to be a non-exhaustive list; however, the landlord should seek to restrict the scope of this additional liability as much as possible.

The landlord may wish to impose an obligation on the tenant to remediate any deficiencies, non-compliances or contamination on or migrating from the lands and premises discovered as a result of the landlord's investigations, or as may be required by government authorities, or at any time as may be requested by the landlord. And, in the event of the tenant's failure or refusal to do so, the landlord should have an express right to enter onto the property and conduct such remedial activities as the landlord may see fit, all of which shall be at the sole expense of the tenant. The failure of the tenant to meet remediation requirements may be tied to the general default remedies in the lease. In the absence of such provisions in the lease, the landlord may not be protected sufficiently because traditional remedies may not provide the landlord with the requisite control over operations at the lands or over the lands and premises themselves as may be required to defend regulatory charges, cost recovery claims or a remediation order issued by a Director under the *EMA*.

Tenants will want to ensure that any remediation obligations are reasonably limited and that the landlord, in exercising these rights, does so reasonably. They will also want to ensure that the landlord, in exercising these rights, does so reasonably and that such requirements are not able to be construed so broadly as to require the tenant to remediate contamination or pollution that is not caused or contributed to by the tenant. The tenant will also want to ensure that the landlord has not imposed a standard of remediation that exceeds that which would be required under the *EMA* and CSR for the current use being made of the property by the tenant. If a landlord wishes to re-develop the property upon the expiry of the tenancy so that the future use is one for which more stringent remediation standards would apply, then the landlord should specify that the tenant is to remediate to the more stringent standard within the terms of the lease.

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58 This term should be broadly defined.

3. Security

To guard against the possibility that sub-tenants or trespassers might expose the landlord to liability, depending upon the location and accessibility of the property to the general public and the nature of the activities being undertaken there, the landlord may wish to require the tenant to implement certain security measures to restrict unauthorized access to the lands and premises and require the tenant to obtain prior consent from the landlord before sub-leasing or assigning any of the tenant's rights or obligations under the lease. Access and security provisions are particularly important in situations where activities of a tenant involve the use, handling, transport, storage or other dealings with regulated contaminants. The restriction on the tenant to assign or sub-lease provides the landlord with an opportunity to undertake due diligence with respect to any assignees and sub-tenants and to ensure that they are contractually bound by the same obligations as is the tenant in relation to environmental matters. The failure to properly vet and monitor assignments and sub-tenancies can expose the landlord to the types of risks discussed above.

Similarly, there may be certain circumstances in which the tenant wishes to require the landlord to take certain security measures or to impose them on others where the tenant could be exposed to risk as a result of the acts or omissions of a third party. This may be particularly relevant in the circumstances of a multiple tenancy and agreeing to such requirements, depending upon the scope and cost, may also be to the landlord's benefit for the purpose of limiting potential claims from other tenants who may sue the landlord for cost recovery or under the common law causes of action where contaminants escape from one tenant's premises to the premises of another.

4. Notification Requirements

While several environmental enactments require notification to be given to certain government authorities on the happening of an environmental event or non-compliance, they may not necessarily be construed as requiring a tenant to provide similar notice to a landlord. If an environmental event or non-compliance occurs at the lands or premises during a tenant's occupation of property, the landlord should be notified and kept abreast of the event so that it can ensure that the appropriate measures are being taken to address the event appropriately. Accordingly, such requirements should be imposed on tenants. Notice requirements under environmental laws are often not triggered, for example, unless a certain volume or amount of a substance is released or unless the substance is released to a particular place (i.e. into fish bearing waters or places where the substance might enter fish bearing waters). Landlords may wish to ensure that notice of "any release" and of "any non-compliance of any degree or nature" is required to be provided by the tenant and to broaden the notice requirements from that which the law would otherwise impose. Tenants may wish to limit this requirement to that which the law would require and/or ensure that the specifics of the notice obligations (i.e., timing and form of notice) are not overly onerous as regards releases or non-compliances that are relatively minor in nature.

A landlord should also ensure that the tenant provides it with prompt notice of any allegation by government authorities of non-compliance (i.e. by way of a clean up or pollution abatement order, direction, violation notice, ticket, notice of investigation) and by any non-governmental third party, and with copies of any documentation received by the tenant in relation to such allegations.

5. Condition of Lands and Premises on Expiry or Earlier Termination

In addition to imposing an obligation on the tenant to remediate contaminants during the term of the lease as discussed above, the landlord should consider requiring the tenant to investigate and, if desired by the landlord, remediate the lands and premises on the termination or earlier expiry of the lease. This will ensure that before the lands and premises are surrendered by the tenant they are returned to the condition in which they existed (or, depending on how this lease provision is worded, perhaps to

an even better condition) than as at the commencement date of the lease.[59] Traditional general lease provisions requiring the tenant to leave the premises in "good condition" and to remedy any deficiencies may or may not be construed so as to impose an obligation to remediate contaminants, so it is better for the landlord to expressly and clearly provide for this in the lease in order to minimize the likelihood of a dispute about this requirement later. That said, there are several cases in which generally worded provisions respecting the condition in which the tenant should leave the property following the tenancy have been construed so as to impose a clean-up obligation on a tenant. For instance, in *O'Connor*, the lease obligated the tenant to leave the premises clean and free of industrial waste and in good repair. The Court held that the tenant was in breach of the lease for failing to remediate contaminants at the lands because it was an implied term of the lease that the lands were to be uncontaminated upon surrender of them.

The landlord should, in any such provision, specify the required standards of remediation and require that all contaminants existing on the lands and premises in excess of such standards must be remediated to such standards. Typically the costs of any such remediation (including any investigation costs) are solely for the tenant's account and the tenant should be obligated to provide the landlord with copies of any reports of the results of any investigations and remedial work. Landlords may go further and require a tenant to obtain a COC or other appropriate regulatory instrument following completion of any remediation.

The tenant will have a strong interest in seeking to limit these obligations so that it must remediate only to the least stringent standards or criteria and so that it must remediate only those contaminants that were caused to be released as a result of the tenant acts or omissions on the lands. Where specific remedial standards or criteria are not circumscribed by the lease, the courts have implied a standard of reasonableness, which in some circumstances may be a risk- based standard (i.e., a situation where contaminants may be left in the ground or groundwater in areas where they do not pose an immediate or serious risk to human health or the environment, and are required only to be monitored to ensure that they continue to pose no such risk or that they attenuate over time (i.e., self remediate through dilution or biodegradation).[60] However, aid, there have also been circumstances in which the courts have imposed a standard of pristine cleanliness, but typically in circumstances where there is sufficient proof that the property was uncontaminated before the tenancy.[61]

6. Other Covenants

a. Use of Lands and Premises During Term

Landlords should restrict the tenant's use of the property as much as possible to prohibit activities that could cause or contribute to contamination of the lands and premises or that could result in the migration of contaminants to neighbouring properties or into the "Environment" (a term that should be broadly defined). Given the potential environmental exposure of a landlord in its capacity to "control" or exercise "responsibility for" operations at a site, the landlord may wish to require the tenant to covenant that it will not commence or undertake certain activities without the prior written consent of the landlord. Such activities might include, for example, any installations, demolition, soil removal, drilling, investigations, sale, generation, disposal, treatment, use, transport, storage, handling or other act by the tenant that could cause or contribute to the lands or premises or neighbouring property becoming contaminated. The requirement for such consent provides an opportunity for the landlord to be continually apprised of the tenant's activities on the property and to exercise some control over them for the purpose of minimizing activities that result in contamination or pollution. If such activities are to be conducted, they should be required to be conducted in compliance with Environmental Laws.

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59 See the comments in the above section about requirements as to standard of remediation.

60 See *Westfair Properties Ltd. v. Domo Gasoline Corp*. (1999), 23 R.P.R. (3d) 128 (Man Q.B.).

61 See *Progressive Enterprises Ltd. v. Cascade lead Products Ltd*., [1996] B.C.J. No. 2473 (S.C.).

b. Ongoing Compliance with Environmental Laws

The Landlord should require the tenant to comply strictly at all times during the term of the lease with all Environmental Laws and to cause any person for whom the tenant is responsible in law to so comply. This will provide the landlord with assurance that the tenant will be obliged to ensure environmental compliance of any subtenants or guests on the property.

The landlord may also require the tenant to provide blanket authorization for the landlord to make inquiries of any governmental authority regarding the tenant's compliance with environmental laws. The tenant, on the other hand, may wish to negotiate for the less onerous obligation of providing such authorization as may be reasonably required from time to time by the landlord. This would ensure that the tenant is aware of the occasions on which the landlord is making such inquiries and such knowledge may prove to be useful to the tenant.

7. Indemnities

It is important for a landlord to seek indemnities from the tenant in relation to liabilities and claims arising in relation to environmental matters. It is in the landlord's interest to structure the indemnity as broadly as possible so that the indemnity covers, for example, every manner of claim or liability arising in connection with the tenant's use of and occupation of the lands and premises or that of its agents or those for whom at law the tenant is responsible. The indemnity should cover such items as the full amount of consultant's fees, legal fees and expenses on a solicitor and own client basis, costs of investigation and remediation of contaminants both on and off the lands and premises, and the costs and fees associated with defending regulatory and administrative proceedings under Environmental Laws.

The tenant's interest will be to limit the scope of this indemnity as much as possible by restricting it only to liabilities and losses arising as a result of the tenant's own acts or omissions that caused contamination or pollution. The tenant may also seek to limit such liability by seeking to limit the landlord's right to bring a claim for indemnity within a certain period of time (for instance, within five years of the date of expiry or earlier termination of the lease), and by putting a cap on the amount of the liability for which the tenant will be held responsible (i.e., not to exceed the total amount of rents paid under the lease, or some other sum certain).

The tenant may also seek a similar indemnity from the landlord in respect of claims made or liabilities alleged against the tenant where such claims and liabilities arise as a result of or in relation to acts or omissions on the part of the landlord or to any contaminants that existed on the lands or in the premises before the commencement date of the lease. The reality, however, is that often it is difficult to persuade a sophisticated landlord to provide such an indemnity. Further, the tenant will be in a position to take advantage of the indemnity respecting pre-existing contaminants only where the tenant has the benefit of a baseline environmental assessment done before the commencement date and where the baseline assessment plus any further assessments prove that the contaminants of concern are pre-existing and were not caused or contributed to by the tenant.

Both landlords and tenants should ensure that any indemnities for their benefit also cover their directors, officers, shareholders, employees, agents, successors, and assigns.

8. "Private agreements respecting remediation"

The *EMA*, in addition to creating a civil scheme for recovering costs of remediation incurred, also establishes a regulatory scheme that empowers a Director under the *EMA* to issue remediation orders by which responsible persons may, among other things, be required to clean up a contaminated site and pay costs of remediation (see discussion above). In issuing such an order, the Director must "take into account private agreements respecting remediation between or among responsible persons."

Accordingly, if a landlord and tenant have made a private agreement between them, for example a lease agreement, that allocates remediation obligations and liability for payment of remediation costs, such an agreement may serve to relieve one or the other of them from obligations to remediate that may be imposed by this type of governmental order.

The issue of whether an indemnity in an agreement between responsible persons constitutes a "private agreement respecting remediation" has been raised in several court cases and a number of them have resulted in decisions holding that they do not. For instance, in *Beazer*, the BC Supreme Court held that the Manager (known under the *EMA* as the "Director") did not have to take into account an indemnity agreement that limited liability for the tenant/operator of the contaminated site that had expired in considering whether to name the tenant to the remediation order. Accordingly, while liability and responsibility under the *EMA* may be retroactive and retrospective, the arrangements made between responsible persons in the past to allocate liability are not necessarily required to be considered retroactively or retrospectively in determining who to name as a responsible person in a remediation order.

In her paper entitled "Doing Business in the New Contaminated Site Regime,"[62] author Mary Jo Campbell, cites two further cases in which indemnities did not amount to a "private agreement respecting remediation." In one of the cases, *South Pacific Development Ltd. and Imperial Oil Limited v. Assistant Regional Waste Manager*,[63] the purchaser of property agreed "...to pay for the clean-up cost of the Property and any remediation which may be required by the Ministry of Environment" and "the Buyer will release the seller from any liability or obligation relating to (same)." The EAB determined that this clause did not address liability for off-site contamination and therefore the Manager in issuing a remediation order respecting off-site contamination was not required to take into account this agreement. In another case, where a remediation order was issued in relation to a former Chlor-Alkali Plant in Squamish, the Manager determined that a general indemnity contained in a lease agreement in favour of the landlord that was not specific as to liability for remediation is not sufficient for the landlord to avoid being named on a remediation order. Ms. Campbell, at 20 of her paper, articulates several helpful points to keep in mind when drafting indemnities and which take into account the results of these cases. Some of the more critical points she discussed and which arise from these cases are as follows:

- An indemnity specific to environmental matters should be included separate and apart from any other indemnities in the agreement;
- The indemnity should extend both to on-site contamination and any contamination migrating anywhere off the site;
- Parties in intending for the indemnities and/or other provisions in the agreement to constitute a "private agreement respecting remediation" should say so expressly within the four corners of the agreement.

9. Survival of Environmental Obligations

Liability in relation to pollution or contamination can arise and follow landlords and tenants well after they have terminated their contractual relationship and well after they have divested their interests in and vacated the lands. For this reason, landlords should seek to ensure that indemnities and remediation obligations for their benefit survive the expiry or earlier termination of the agreement. Another reason for ensuring that such provisions subsist is to avoid or minimize the possibility of being named as a responsible person on a remediation order. An indemnity that remains enforceable and that constitutes a "private agreement respecting remediation," as discussed above, may be used as a shield to a remediation order issued by the Director.

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62 Prepared for Insight Conference, December 4-5, 2003, Mary Jo Campbell, Partner, Borden Ladner Gervais LLP, at 15, 20.

63 Appeal No. 2002WAS-010 and 2002WAS-011(b).

10. Security for Environmental Obligations

Landlords may wish to consider whether to seek to impose a lease obligation on a tenant to post security for potential environmental liabilities. Security might take the form of a letter of credit, the posting of a bond, a guarantee from another party; the contribution of funds to an environmental trust account for the benefit of the landlord that may be jointly or otherwise managed pursuant to a specific agreement, or a requirement to obtain environmental insurance (as discussed above) for the benefit of the landlord. It will likely be difficult to persuade a tenant to do so where the tenant's intended activities on the property pose little environmental risk. However, tenants operating larger industrial businesses or who undertake environmentally risky activities may not be opposed to this idea.

11. Covenants Not to Sue

In addition to seeking an indemnity for environmental liabilities and claims that may arise, parties to a commercial lease agreement may wish to consider seeking a covenant from the other not to sue in relation to environmental matters. Such a covenant could be broadly drafted or could be limited to particular claims or for a particular period (long enough, for instance, to allow applicable limitation periods to expire) or as consideration for agreeing to undertake remediation on the expiry of the lease, for example.

IV. Conclusion

As a result of the enactment of the *EMA* and CSR, engaging in commercial tenancy relationships can produce a minefield of environmental risks. Landlords and tenants are now held to a far greater standard of prudence and pre-contractual diligence than was expected of them before the enactment of this legislation. The failure to conduct appropriate diligence as to environmental matters before executing a lease and the failure to allocate environmental risk within the express language of a lease agreement can be potentially devastating to the parties should such risks materialize. Careful attention must be paid to environmental matters in the negotiation and drafting of any commercial lease agreement.