

LEGAL ISSUES RELATED TO BROWNFIELD REDEVELOPMENT

IMPEDIMENTS AND OPPORTUNITIES



McINNES COOPER

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IMPEDIMENTS

**THE LAW (both common law and statute law)
HAS BECOME AN IMPEDIMENT TO THE
REMEDICATION AND REUSE OF
BROWNFIELD SITES**

**IS THIS A PUBLIC POLICY OBJECTIVE
WE WANT TO ACHIEVE OR AN
UNINTENDED CONSEQUENCE OF
OTHER POLICIES?**



THE FALLACY OF THE “POLLUTER PAYS” PRINCIPLE IN ACTION / THE NOVA SCOTIA EXAMPLE

ENVIRONMENT ACT – PURPOSE

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

- Taking remedial action and providing for rehabilitation to restore an adversely affected area to a beneficial use.
- The polluter pays principle confirming the responsibility of anyone who creates an adverse effect on the environment to take remedial action and pay for the costs of that action.”



THE DEFINITION OF “POLLUTER”?

Nova Scotia

“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 are, 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);



Nova Scotia

“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);



NEW BRUNSWICK

THE DEFINITION OF “POLLUTER”?

“THE PERSON
TO WHOM
AN ORDER
IS DIRECTED.”

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COMMON LAW

- **WHAT IS IT?**
- **NUISANCE**
- **NEGLIGENCE**
- **RYLANDS V. FLETCHER – STRICT LIABILITY**

LIMITATION OF ACTIONS

- **6 YEARS FROM WHEN THE CAUSE OF ACTION AROSE**
- **PROBLEM – WHEN DO YOU START THE CLOCK?**

THE GUIDELINES FOR THE MANAGEMENT OF CONTAMINATED SITES

- **MANY BENEFITS**

- **CERTAIN THINGS THEY WERE NEVER INTENDED TO DO:**
 - 1) **Guidelines do not have “force of law”**
 - 2) **Guidelines do not contemplate regulatory approval of remediation**
 - 3) **Guidelines do not address civil liability (Tridan)**



CONTRACTUAL ALLOCATION OF LIABILITY

- **AS IS CLAUSES;**
- **INDEMNITIES;**
- **WARRANTIES.**

LIMITATIONS OF CONTRACTUAL ALLOCATION

- **PRIVITY OF CONTRACT**
- **NOT BINDING ON REGULATORS OR
“STRANGERS” TO THE CONTRACT**



OPPORTUNITIES

NATIONAL BROWNFIELD REDEVELOPMENT STRATEGY FOR CANADA

National Roundtable on the
Environment and Economy

KEY RECOMMENDATIONS REGARDING CIVIL & REGULATORY LIABILITY

- Allow binding contractual allocation of liability
- Provide for termination of regulatory liability after remediation
- Provide for termination of civil liability after a limitation period
- Create Insurance Fund for post-liability termination claims
- Apply site specific assessment and approvals regime
- Provide for regulatory approval of remediation



THE END

