DEFENDING A COST RECOVERY ACTION

by

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1. Introduction

When a statement of claim with a cost recovery claim arrives on a defence counsel's desk, a number of questions arise: what defences are available; are there other responsible persons that should be named; is the plaintiff a "responsible person"; and where to find the necessary information to answer these questions and establish defences or prove claims against others.

The objective of this paper is to provide an overview of the various information sources, including the use of experts, review available defences, in particular, the limitation defence, and canvass some of the considerations for naming third parties or filing counterclaims. The paper is written with a private corporation or individual defendant in mind, and does not address defences exclusively available for government defendants. Also, sureties, secured creditors, trustees and receivers are only mentioned in passing.[1] While the focus of the paper is on a cost recovery action under section 27(4) of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "Act"), due to its importance, the discussion on limitation periods includes both a section 27(4) action and common law claims.

2. What information do you need and where can you find it?

In addition to interviewing the client and reviewing client documents, a number of searches should be conducted to determine the existence of possible defences, counterclaims or third party actions. Even if it appears that the plaintiff's solicitor has done his or her due diligence and has named every conceivable party in the statement of claim, a closer review may disclose that the plaintiff has chosen not to name a number of potential "responsible persons" for strategic or business reasons. Such unnamed parties may include the plaintiff corporation's parent company, and its directors and officers. Also, the plaintiff may have made the strategic decision of not naming its principal business partner or the municipality where it has a re-development application pending.

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[1] Secured creditors, receivers and trustees are discussed in a paper by Geoffrey Thompson, prepared for a CLE on *Contaminated Sites: 1997 Legislation* (1997).

In reviewing the available sources, it is important to consider not only the subject site but all properties within close vicinity to the subject property. Both present and historical uses of both the subject and adjacent sites should be addressed.

(a) Your client

The client is usually the quickest source for information regarding present and historical uses of the subject site, adjacent properties and other parties whose activities may have led to contamination on the site. The client may also be able to assist in searching local archives, insurance records, local maps and aerial photographs to obtain evidence of historic uses of the area.

An important information source in the possession of your client are insurance policies. The client should be alerted of the possibility of insurance coverage, and due to the generally short notice requirements and limitation periods, all insurance policies should be immediately reviewed to determine the possibility of involving an insurer in the action.

The client is also your best source for any contract documents that may exist (purchase and sale agreements, lease and licencing agreements, etc.), which should be reviewed for representations, warranties and indemnities. Contract documents may also provide information of the existence of other “responsible persons”.

(b) Site Registry

The Site Registry contains information on sites which have been investigated or cleaned up since approximately 1989. A detailed listing of information required in the Site Registry is contained in the Act and Part 3 of the CSR. Of particular interest to a defendant are the site profiles, which are partially available on-line. Sections IV to IX will show up in an on-line search with information about petroleum and other spills, discarded barrels, drums or tanks, fill materials, waste disposal, and underground tanks. The Registry also lists the people and/ or organizations that have been involved with the site and their roles (lessees, environmental consultants, etc.), as well as any environmental reports prepared on the site.

The Site Registry search should be conducted not only on the subject site but also on the adjacent properties to determine any potential sources of migration.

(c) The Ministry

To supplement a Site Registry search, a request for further information may be made directly to the regional office of the Ministry of Environment, Lands & Parks ("MELP") that is responsible for the subject property. A list of regional offices together with telephone numbers and addresses is available on the MELP web-site at www.elp.gov.bc.ca/main/prsg/regions/htm. It should be noted that access to documents and reports with the Ministry is governed by the *Freedom of Information and Protection of Privacy Act*.

The MELP files are limited to information since approximately 1989. Therefore, existence or absence of a contaminates site file provides no assurance that the property is or is not contaminated.

A good general source of information is a MELP publication entitled *"How to obtain BC Environment information on contaminated sites"* (revised March 6, 2001) which may be found at www.elp.gov.bc.ca/epd/epdpa/contam_sites/updates.

(d) Municipalities

Some municipalities impose work orders under local bylaws or provincial laws with respect to certain environmental concerns. The department that deals with these matters varies, but is generally called the Building Department or Permits Department. Some municipalities also have an industrial waste or environmental department.[2] If you want to find out when underground storage tanks were put it, building permits are usually required. In addition, if there is evidence that a development permit was applied for, municipalities may have records which indicate whether concerns were brought to the attention of owner or developers regarding the existence of contamination. This may be relevant when advancing a limitations defence as discussed below.

Another useful source is the local fire commissioner, who may have information regarding reported spills, violations of regulations regarding storage, handling and use of flammable and combustible materials. This is one way to determine present or historical existence of under- and aboveground storage tanks.

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[2] For example, the City of Vancouver has an environmental protection office.

If air emissions may be an issue, an inquiry should be directed to the Greater Vancouver Regional District if the subject property is located in Lower Mainland. Air emissions for other areas of the province are dealt with by the regional MELP offices.

(e) WCB

WBC is an useful source for reported infractions regarding chemicals and hazardous products stored, maintained or used in "employee areas" or other work areas.

(f) Environment Canada

Information requests relating to federal lands and federal matters may be made to the local office of Environment Canada at 224 West Esplanade, North Vancouver.

(g) Company searches

Company searches are useful in identifying officers and directors, who may be sued as "responsible persons" in a cost recovery action. If the plaintiff is potentially a “responsible person”, the defendant should consider naming the plaintiff company's directors and officers in the action.

In some cases, it may also be desirable to restore dissolved companies for the purpose of naming them in a cost recovery action. This may be desirable in cases where the company in question may have critical information about the case which would not otherwise be available. Another possible reason for restoring a dissolved company is that it may provide recourse against any insurance that the company may have had during its involvement with the site.

Company searches will also provide information about receivers and trustees who, in limited circumstances, may also become "responsible persons".

(h) Department of Fisheries and Oceans

Information requests can be directed to the Vancouver office of the Fisheries Habitat and Enhancement Branch of the Department of Fisheries and Oceans. They will advise of existence of any habitat remediation orders with regard to the sites and what permits have been obtained.

(i) Land Title Office

Land Title Office searches provide information of past and present owners of the site and adjacent properties. The land title search will also provide information of secured lenders, who, in some limited circumstances, may become "responsible persons".

3. Defence Strategy - What Defences are Available Under the Act?

Pursuant to section 27(1) of the Act, liability under the Act is absolute, retroactive and joint and several. These principles, however, only apply to persons who do not qualify to an exemption, and who do not obtain "minor contributor" status or enter into a voluntary remediation agreement.

(a) Exemptions

Although liability is “absolute”, there are a number of exemptions in section 26 of the Act and Part 7 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (as amended) (the “CSR”) available for a creative defendant. However, since the plaintiff need only show a *prima facie* case that a defendant is a responsible person, the defendant seeking to rely on an exemption has the burden of proving all elements of the exemption on a balance of probabilities (s. 26.6(3) of the Act). The following introduces the exemptions available to a private corporate or individual defendants. Exemptions applicable to government organizations, sureties, insurers, trustees and secured creditors are not addressed in this paper.[3]

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[3] Secured creditors, receivers and trustees are discussed in a paper by Geoffrey Thompson, prepared for CLE on *Contaminated Sites: 1997 Legislation* (1997)

(i) ***Act of God or Act of War (ss.26.6(1)(a), (b))***

The "Act of God" exemption covers the usual events or catastrophes (earthquakes, hurricanes) provided that the act occurred before the coming into force of the section and the potential responsible person exercised due diligence. Also, s. 26.6(1)(b) provides that a person is not a "responsible person" when the cause of the contamination is an act of war.

(ii) ***Act of Third Party (s 26.6(1)(c))***

This exemption covers the "midnight dumper" scenario but applies only if the person relying on it exercised due diligence. Further, the exemption is not available when the third party is related to the responsible person as an employee, an agent, or anyone with whom the party has a contractual relationship (such as a tenant).

(iii) ***Innocent Purchaser (s.26.6(1)(d))***

The innocent purchaser exemption applies if a purchaser can establish that it had no knowledge of or reason to suspect contamination at the time of the purchase; that it undertook all "appropriate inquiries" and reasonable steps to inform itself as to the condition of the property in accordance with "good commercial or the customary practice at that time"; and that it did not cause or contribute to the contamination of the site after the purchase. Essentially, to qualify as an innocent purchase, the buyer must show that it followed proper due diligence and did not increase contamination. Further, any transfers to third parties (sales, leases) must have been done with full disclosure.

"All appropriate inquiries" are further defined in s. 28 of the CSR, which requires, among other things, that the purchaser has considered the relationship of the actual purchase price to the value of the property if it was uncontaminated, and has done its due diligence on the property. Since a Site Registry search and environmental investigations, which have become standard practice, are likely to disclose any recent contamination, the usefulness of this exemption is limited to those persons who acquired their property prior to the 1980's when the current environmental investigations and searches were not readily available.

(iv) ***Innocent Owner or Operator (s.26.6(1)(e))***

An owner or operator, who acquires an uncontaminated site and then does not dispose of, handle, or treat a substance which caused the site to become a contaminated site, can rely on an exemption provided that he or she can establish that the site was uncontaminated at the time of acquisition. This would apply to

situations where the contamination is caused by a tenant or a licensee, provided, however, that if the owner knew or "had a reasonable basis for knowing" that the third party's intended use of the property would cause contamination, the exemption is not available (s. 29 of the CSR).

(v) ***Authorized Dump Site (s. 26.6(1)(f))***

A transporter to an authorized waste disposal facility or site is exempt. The exemption also applies to persons arranging for such transportation.

"Authorized" is defined as "authorized by or under statute to accept the substance ...", and would seem to include permits and waste management plans under the Act and authorizations under s. 42 of the CSR.

(vi) ***Remediation Consultants and Contractors (s. 26.6(1)(h), (m) of the Act; s. 24 of the CSR)***

Environmental consultants who provide assistance or advice concerning remediation are exempted. The exemption is not available if the consultant's assistance or advice "was carried out in a negligent fashion". The Act itself and the CSR provide some standards the consultant is required to meet, such as ss. 58-60 of the CSR. Since the section refers to “assistance or advice respecting remediation work at a contaminated site in accordance with this Act”, the exemption may only be available in "new remediations" and would not apply to remediation carried out prior to the existence of the Act.

Section 24 of the CSR exempts persons who provided contracting or consulting services relating to the construction of buildings and facilities at a contaminated site. Curiously, the exemption does not have the usual limitation of “causing or contributing to the contamination on the site”. It would appear, however, that a contractor or a consultant who contributes to the contamination falls under the definition of an “operator” for being “responsible for” the contaminating activity.

(vii) ***Contamination by Migration (26.6(1)(j))***

If the only reason for contamination of a property is off-site migration, the owner or operator of the receiving site is exempt.[4]

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[4] Pursuant to s. 33 of the CSR, a similar exemption applies to owners and operators in areas where a wide area remediation plan is in place.

(viii) *Naturally Occurring Contamination (s. 26.6(1)(j))*

If a substance is present as "natural occurrence" on the property, the owner or occupier is not a "responsible person". "Natural occurrence" is not defined in the Act, but the CSR contains sections that provide guidance.[5]

(ix) *Minor Interest Holders (s. 22 of the CSR)*

Certain current and former holders of minor interests, such as easements and restrictive covenants, are exempted provided that the holder of such interest has not caused contamination.

(x) *Innocent Producers or Transporters (ss. 19 and 23 of the CSR)*

A producer or transporter of a contaminated substance is not held to be a "responsible person" where the producer or transporter "did not control" the disposal, handling or treatment of the substance. Also, section 23 of the CSR provides an exemption for persons who arrange for the transportation of substances where the person can establish that he transferred the substance to a transporter who intended at the time to transfer the substance to a legal site and the transporter spilled or discharged the substance following pick-up but prior to delivery.

(xi) *Transporters of Contaminated Soil (s 32 of the CSR)*

A transporter of contaminated soil who acted in good faith, without negligence and in compliance with the Act and the CSR is not liable for remediation resulting from the contaminated soil if there has been either a misrepresentation by the person who arranged for the transportation about the quality or degree of the soil's contamination, or misrepresentation by the person who receives the contaminated soil as to suitability of the site for disposal.

(b) Minor contributors

Section 27.3 of the Act provides for a possibility to seek "minor contributor" status from the manager. Since “minor contributors" are only liable in a cost recovery action up to the amount or portion specified by the Manager,[6] seeking the

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5 See, for example, section 11 of the CSR on contaminated site definition.

6 Section 27.3(3) of the Act.

designation may be attractive to those "responsible persons" who contributed little to the contamination, but who have been named in the action due to their "deep pockets".

Since neither the Act nor the CSR defines “minor”, there is a great deal of uncertainty as to who would qualify as a “minor contributor”. Consequently, the costs for making an application for minor contributor designation need to be carefully weighed against the value of such designation.

(c) Voluntary remediation agreements

Section 26.6(1)(l) provides that a person who is a responsible person for a contaminated site for which a certificate of compliance has been issued is not liable for any further costs of remediation in the circumstances where another person, such as a new owner of the site, subsequently proposes to change the use of the site thereby necessitating more stringent environmental standards. Arguably, this exemption extends to cost recovery actions. However, the certificate is not a bar to a common law action.

4. Limitation Defence

Although liability under the Act is "retroactive", section 34 of the CSR expressly preserves the defendant's right to assert "all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law." Arguably then, the *Limitation Act*, R.S.B.C. 1996, c. 266 applies to cost recovery actions.[7]

In any limitation claim, the two key issues that need to be determined are:

(a) Which limitation period applies?

(b) When does the time limit under the limitation period begin to run?

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[7] The reader should also be aware of the six month limitation period applicable to muncipalities under s. 285 of the *Local Government Act*. The applicability of this section was reviewed by the B.C. Court of Appeal in *Gringmuth v. North Vancouver*, 2002 BCCA 61.

In answering these two questions, it is useful to keep in mind the purposes underlying limitation legislation, as set out by Madam Justice McLachlin (as she then was) in *Novak v. Bond*:[8]

> 1. define a time at which potential defendants may be free of ancient obligations;
>
> 2. prevent the bringing of claims where the evidence may have been lost to the passage of time;
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> 3. provide an incentive for plaintiffs to bring suits in a timely fashion; and
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> 4. count for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time.

(a) Which limitation period applies?

In most cost recovery actions, the defendant is sued under section 27(4) of the Act and also in tort and/ or contract, with arguably different limitation periods. The two possible limitation periods that are likely to apply under the *Limitation Act* are:

> s. 3(2)(a) "After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action ... for damages in respect of injury to ... property, including economic loss arising from the injury, whether based on a contract, tort or statutory duty ...."
>
> s. 3(5) "Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of six years after the date on which the right to do so arose."

In a recent British Columbia Supreme Court decision of *Low v. Petro-Canada Inc.*,[9] the Court held that contamination was "direct damage to property" and subject to the two-year limitation period under s. 3(2)(a) of the *Limitation Act*. In *Low*, the Plaintiff sued Petro-Canada in contract, negligence, trespass, nuisance and under the Act

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8 [1999] 1 S.C.R. 808.

9 [2001] B.C.J. No. 318.

for damages and remediation costs arising out of gasoline contamination in the Plaintiff's lands. In 1985, Petro-Canada had entered into a lease with the previous owner for the purpose of operating a gas bar on the lands. In 1986, the Plaintiff bought the lands and took an assignment of the lease, which was subsequently terminated in 1996.

Petro-Canada brought an 18A application seeking dismissal of the action under s. 3(2) of the *Limitation Act*. The Court dismissed the application after finding that Petro-Canada had confirmed the cause of action though correspondence with the Plaintiff. Although not necessary for the disposition of the application, the Court addressed the applicable limitation period. The Plaintiff argued that her claims were for "indirect property damage" and subject to the six year limitation period under s. 3(5). The Court rejected the plaintiff's argument and found that since the damage was "direct", the two year limitation period was applicable. In its reasoning, the Court cited Madam Justice McLachlin in *WCB v. Genstar Corp.*,[10] where she held that "injury to property" is confined to claims for property damage caused by an "identifiable external event" because of the following policy consideration:

> [a] short limitation period is appropriate where the claim is based on an event which causes direct injury to property. Such a short limitation period may not be appropriate for a claim based on defects in the property which may not manifest themselves clearly for some time ....

Notably, in *Low*, the Court did not distinguish between the common law claims and section 27(4) cost recovery claim. Arguably, section 27(4) action is distinguishable from tort actions in that, unlike tort claims where the "gist"[11] of the action is damage to property, section 27(4) provides for reimbursement or contribution for remediation costs incurred by the plaintiff. Viewed in this manner, the claim arises from "remediation", not from injury to property. Arguably then, as the cause of action arises from incurrence of remediation costs rather than from damage to property, section 3(2)(a) would not apply.

It may also be possible to construct section 27(4) as a provision for a statutory indemnity which would be covered by the six-year limitation period under section

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10 [1986] B.C.J. No. 443.

11 In categorizing a cause of action one must examine the substance of the claim being advanced, as opposed to considering what actually caused the damage complained of, or look for the "gist" of the action. See, for example, J.C. Morton, *Limitation of Actions*, at page 22, footnote 28; *Seibold Holdings Ltd. v.Wilson*, [1990] B.C.J. No. 1000 (S.C.).

3(5) of the *Limitation Act*. In *Bramalea-Pritzker Associates v. Cannell*,[12] our Court of Appeal held that the word "damages" does not refer to an indemnity and therefore section 3(5) applies to a claim for indemnity. The Court quoted from K.P. McGuinness, *The Law of Guarantee* (1986) which distinguished a right to damages and a right of indemnity as follows:

> A right to recover damages is a legal right in favour of the plaintiff to be compensated by a defendant for injuries recognized at law, which were suffered by the plaintiff as a result of the wrongful conduct of the defendant. A right of indemnity may exist where the plaintiff has suffered no injury at the hands of the person who is obliged to indemnify, and even where the wrong giving rise to the claim for indemnity was committed by some third party, or where no wrong has been committed by any person but the indemnifier is nonetheless obliged to make good a loss which has been suffered by the claimant. (emphasis added).

The Court then noted, at paragraph 21, that:

> [i]n the context of s. 3(1)(a) [now 3(2)(a)]damages refers to the remedy given an injured party for a breach of contract or for an actionable injury suffered as a result of the tortious act of another. In our view it does not refer to the enforcement of an indemnity which ... may arise in a variety of ways [including statutory indemnities].

(b) When Does the Limitation Period Begin to Run?

(i) *In Section 27(4) Actions*

According to the *Limitation Act*, the starting date for a limitation period is the date on which the right to bring an action arose (subject to the postponement provided in section 6 of the *Limitation Act* discussed below). The "right to bring an action" has been interpreted by the British Columbia courts as the date upon which all of the elements of the cause of action have come into existence, whether the plaintiff is aware of them at the time or not.[13]

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12 [1992] B.C.J. No. 2570 (C.A.).

13 *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.).

According to *Contaminated Sites Handbook*,[14] the elements of a cost recovery action under s. 27(4) are the following:

(i) the person must have carried out "remediation";

(ii) the remediation activity must be related to a "contaminated site";

(iii) the person's remediation costs must be reasonable;

(iv) the defendant is a "responsible person".

While there may be good policy reasons for starting the clock at the point the plaintiff finds out about the contamination, since carrying out remediation seems to be an essential element of the cause of action, it would appear difficult to argue that the cause of action accrues before any remediation measures have been undertaken. Since "costs of remediation" under s. 27(2) include the costs of carrying out a site investigation and preparing a report, it would appear reasonable that the limitation period would be triggered on the receipt of an investigation report.

A further difficulty arises from the fact that section 27 of the Act only came into force on April 1, 1997. It was held in *Bank of Montreal v. Kim*,[15] that the expression "right to bring an action" differs in meaning from the expression "when the cause of action arose" and it is possible for all elements of a cause of action to be present but there be no right to bring the action. In *Kim*, the plaintiff was seeking to enforce a foreign judgment some six and a half years after obtaining the judgment in Ontario. The Court held that the limitation period started to run only when the plaintiff became resident of British Columbia as it was only then that the matter became within jurisdiction of British Columbia courts.

Consequently, as there was no right to bring a cost recovery action under s. 27(4) prior to the proclamation of section 27, it appears that the limitation period cannot have commenced before April 1, 1997. In *North Fraser Harbour Commission v. British Columbia*,[16] the Environmental Appeal Board held that due to the retroactivity of s. 27, the plaintiff can recover remediation costs even where these costs have been incurred prior to the enactment of section 27(1). It would seem, however, that the limitation period for such costs starts running from the date of proclamation of section 27.

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14 Huestis - Gillam (1997), at 3-50.

15 [1990] B.C.J. No. 625 (C.A.).

16 [1999] B.C.E.A. No. 57 (Appeal Board).

(ii) *In Common Law Actions*

Torts in which proof of actual damage is an essential requirement of the cause of action, such as negligence, are not actionable unless and until the defendant's act resulted in damage to the plaintiff. In other words, the cause of action does not accrue at the time of the culpable conduct but at the time of the injurious consequences.

There does not appear to be any easy answer to the question as to when the "injurious consequence" of contamination occurred. Basically, the issue is factual and requires determination of when there was sufficient contamination to make the injurious consequences, i.e. contamination, more than nominal or a "real concern".[17]

In the case of torts which are actionable *per se*, that is, without proof of damage, the accrual of the cause of action typically coincides with the wrongful act which forms the basis of the claim. Similarly, a breach of contract is actionable as soon as the breach occurs.[18]

The courts have held that where the "injurious consequences" of a tort are "continuing", a new limitation period is triggered for every day the tort continues. Continuing trespass and nuisance were found in *Roberts v. City of Portage La Prairie*[19] where the defendant allowed polluted water from a sewage lagoon to escape from its sewage disposal system onto the plaintiff's lands. Mr. Justice Maitland stated the following (at 728):

> The present action in one for nuisance. The construction of the lagoon, in itself, was lawful, being within the respondent's statutory powers. A cause of action did not arise until damage occurred. Furthermore, the nuisance continued. The respondent operated and maintained the lagoon over a period of time, causing continuing damage. The wrong complained of was not one which was complete, once and for all, once the lagoon was constructed.
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> I adopt the proposition of law stated in *Salmond on Torts*, 15th ed., at p. 791, as follows:

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17 *New Brunswick Telephone Co. v. John Maryan International Ltd.* (1982), 24 C.C.L.T. 142, aff'd 141 D.L.R. (3d) 193 (C.A.).

18 Klar, *Remedies in Tort*. Vol. 4, at 27-195.

19 (1971), 17 D.L.R. (3d) 722 (S.C.C.).

> When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a section action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the by the defendant to remain upon his land; and a trespass continues so long as the defendant remains upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance ... (emphasis added).

The limitation period comes into play, however, in limiting the damages recoverable. For example, if the appropriate limitation period is two years, the plaintiff can only recover those damages which accrued in the two-year period prior to the commencement of the proceedings.[20]

(iii) *Postponement of the Limitation Period*

Section 6 of the *Limitation Act* provides for postponement of the limitation period for property damage. The relevant sections are:

> 6(3) The running of time with respect to the limitation periods set by this Act ...
>
> (b) for damage to property ...
>
> 6(4) Time does not begin to run against a plaintiff ... until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
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> (ii) the person whose mans of knowledge is in question ought, in his own interest and taking his circumstances into account, to be able to bring an action.

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[20] *Tobacca v. Island Ready Mix Ltd.* (1978), 8 B.C.L.R. 86 (Co. Ct.).

6(5) (a) "appropriate advice" in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) "facts" include

(i) the existence of a duty owed to the plaintiff by the defendant; and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff ....

6(6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of postponement.

In summary, section 6(3) is concerned with two issues: whether the plaintiff is aware of his right to sue, and whether it is in his interest to do so. The running of limitation period is postponed until:

A. the identity of the defendant is known to the plaintiff;

B. a reasonable person would decide that:

(i) an action has a reasonable prospect of success; and

(ii) the plaintiff, given her interests and circumstances, ought to be able to sue.

The reasonable person must reach these conclusions on the facts within the actual plaintiff's "means of knowledge", supplemented by technical and legal advice if a reasonable person would have sought such counsel.

As a matter of analysis, section 6 requires looking backwards from the date of issue of the writ. Thus, the question is whether, at the timer the 2 years is over, it would have been unreasonable for a reasonable person to conclude that the plaintiffs had a reasonable prospect of success in pursuing an action against the defendant.[21]

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[21] *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58 (C.A.).

A. The identity of the defendant is known to the plaintiff

With respect to the identity of the defendant, the test was set out by our Court of Appeal in *Krusel v. Firth* as follows:[22]

> I find that it is not sufficient that a plaintiff does not in fact know the identity of a potential defendant in order to delay running of time under section 6(3), but necessary that the plaintiff could not with reasonable diligence have been expected to discover that person's identity.

B. A reasonable person would have sued

(1) *The plaintiff's means of knowledge*

In *Levitt v. Carr*, the Court of Appeal stated that "the facts falling within [a] plaintiff's means of knowledge are, firstly, those actually known, and secondly, those which would become known if he took such steps as would have been reasonable for him to take in his circumstances". In other words, the court will inquire whether the plaintiff should have been aware of material facts which indicated they had an action with a reasonable prospect of success.

A plaintiff's actions are measured against facts reasonably known at the time. Consequently, public awareness of a problem may be relevant. In *Privest v. Foundation Company of Canada*, for example, the Court decided that early public knowledge of the asbestos hazard could be imputed to the building owner, and commence the running of the limitation period.[23] Arguably, then, the public awareness of environmental issues generally and waste management in particular could be imputed to the plaintiff, particularly where the plaintiff is a sophisticated corporation with legal services on its disposal.

(2) *Appropriate advice*

The Act assumes the plaintiff sought appropriate advice. In leaky condo cases, expert evidence is generally required to trigger the commencement of a limitation period. For example, in *355022 BC Ltd. v. CCS Properties Ltd.*,[24] our Court of Appeal considered a claim by an owner whose building was damaged by blasting

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22 [1991] 6 W.W.R. 651.

23 [1995] B.C.J. No. 2001.

24 [1995] B.C.J. No. 2217.

across the street. The owner first noticed cracks in April 1990 and hired an engineer who advised on December 20, 1990 that the blasting damaged the building. The Court held that limitation period began to run on the date of the advice.

By analogy, it is possible that the court will not expect the plaintiff to have the requisite knowledge without an expert report. Judging from the leaky condo cases, the limitation period should start running, at the latest, from the plaintiff receiving an environmental report that suggests a possible problem.

The courts have held that while receiving advice may commence the running of time, a plaintiff cannot postpone a limitation period simply by neglecting or refusing to seek advice as section 6(4) refers to the plaintiff having the advice a "reasonable person would seek". In *Millstream Enterprises Ltd. v. New Westminster*,[25] the plaintiff argued he was unaware of a possible breach of duty by the City, which failed to inspect his building fire system. In support, he noted his failure to consult a lawyer. The court decided that the circumstances made it unreasonable for him not to make further inquiries. The court then reviewed the law at the relevant time and concluded a competent lawyer would have advised the owner he had a legal claim with a reasonable prospect of success.

(3) *Litigation is in the plaintiff's interest*

For a limitation period to commence, litigation must be in the plaintiff's interest. In *Bond v. Novak*, the plaintiff claimed her doctor failed to diagnose breast cancer. The plaintiff decided not to sue while the cancer was in remission, in order to focus her energies on remaining healthy. She filed her lawsuit six years from the mis-diagnosis, when her cancer recurred. Since the limitation period for medical malpractice is only two years, the plaintiff argued her claim had been postponed.

The Supreme Court of Canada agreed, finding that the plaintiff's reasons for deferring legal action to be "serious, significant and compelling". The Court found it not to be in the plaintiff's interest to sue where "the costs and strain of litigation would be overwhelming to him or her, or other personal circumstances combine to make it unfeasible to initiate an action".[26] The Court emphasized, however, that other types of disincentives, such as trivial or tactical considerations, will not establish postponement. It would appear logical that postponing remediation due to a pending re-development application or business deal a tactical reason and would not entitle the plaintiff to postponement.

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25 (1993), 87 B.C.L.R. (2d) 303 (C.A.).

26 [1999] 1 S.C.R. 808, para. 85.

5. SWAMY Defence

At present time, a defendant can and should raise the recent Supreme Court of British Columbia decision *Swamy* v. *Tham Demolition Ltd.*,[27] as a defence in any cost recovery action where the Manager has not made the "contaminated site" determination.

In *Swamy*, the plaintiff owned a farm in Richmond. In 1998, she bought excavation material from the defendants and had the soil delivered to her farm. The soil turned out to be contaminated and the Waste Management Branch prohibited the Plaintiff from growing anything on a portion of her lands and required her to get a permit to move soil from the farm. Rather than appealing the Branch's findings, the plaintiff brought an action against the owner of the lands from where the soil was excavated and the contractors and subcontractors responsible for removing and transporting the contaminated soil for breach of contract, various torts and for conduct in contravention of the Act.

At issue was whether the plaintiff could pursue a claim in court in addition or instead of the administrative procedures set out in the Act. The plaintiff alleged that the Act gave her a new cause of action allowing her to commence court proceedings for the purpose of determining whether the site was contaminated, who was responsible party and how the remediation costs should be allocated.

In its reasons, the Court notes that while the Act does provide for a new cause of action, this action is only for reimbursement of monies expanded to remedy the contamination problem. The determination as to whether the site is "contaminated" for the purposes of the Act is made by the administrative tribunals, to whom the courts are required to give deference. Consequently, a cost recovery action is only available once the administrative determination has been made. After noting that the plaintiff has various administrative avenues available under the Act, the Court dismissed the plaintiff's claim under the Act, and concluded by noting that the judgment "does not of course prevent the plaintiff from pursuing a claim for judgment for remedial costs ... after appropriate findings by administrators under the [Act]".

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[27] [2000] B.C.J. No. 1734.

6. Damages Defences

While the list of "remediation costs" in s. 27(2) is not exhaustive, it appears clear that recovery under the Act does not extend to damages, such as economic losses arising from remediation or from diminution of property value. Personal injury and property damage expenses seem to be excluded as well. These may, however, be claimable in a tort action. Further, *O'Connor v. Fleck*[28] held that "remediation costs" for the purposes of the Act, include only costs already incurred. Consequently, future remediation costs do not appear to be recoverable.

It is also open to the defendant to argue that the costs are excessive, duplicated, or caused by improperly performed remediation work. Both lack of mitigation and betterment arguments should be made where appropriate.

While diminution of property value or "stigma" may be recoverable under common law actions, the defendant should argue that any savings in property taxes must be taken into consideration in making the calculation.

Section 35(2) of the CSR provides that in "an action between 2 or more responsible persons under s. 27(4)" a list of factors must be considered when determining "the reasonably incurred costs of remediation". The list consists of the following:

(a) the price paid for the property by the person seeking cost recovery;

(b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of the contaminating substances and the toxicity attributed to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage and disposal of the substances that caused the site to become contaminated;

(e) any remediation measures implemented and paid for by each of the persons in the action; and

(f) other factors relevant to fair and just allocation.

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[28] [2000] B.C.J. No. 1546 (S.C.).

The wording of the section suggests that the considerations are not limited to a contribution action between a defendant and third parties, but that the defendant can rely on these factors in its defence against the plaintiff where it is arguable that the plaintiff is also a responsible person. Paragraph (f) in particular seems to bring in fairness considerations, opening the door for creative defence arguments.

A plaintiff will argue that it should be awarded costs to clean up the property to a "pristine" or uncontaminated standard. Depending on the extent and nature of the contamination, this will increase the clean up costs considerably. The defendant will seek to argue that the remediation costs should be limited to the standards applicable to the use of the property. In BC this is usually to commercial or residential standards depending on the land use and relevant municipal land use zoning. In *O'Connor, supra*, the court found the following clause in the lease was enough to imply a term into the lease agreement which obligated the defendant to return the property uncontaminated:

> AND the Lessee will leave the premises clean and free of industrial waste and in good repair (reasonable wear and tear and damage by lighting and earthquake excepted) ....

The *O'Connor* decision should be contrasted with *Westfair Properties Ltd. v. Domo Gasoline Corp.*[29] This case involved dispute between a landlord and tenant concerning whether the tenant, who used the property as a gas station, had to return the property to "pristine conditions". Both the trial judge and the Manitoba Court of Appeal rejected that claim and decided that cleaning the property to the equivalent of commercial standards was acceptable.[30]

7. Naming Others and Allocation of Remediation Costs

Section 34 of the CSR states that "nothing in s. 27(1) of the Act shall be construed as prohibiting the apportionment of a share of liability to one or more responsible persons ... in an action or judgment under s. 27(4) of the Act", provided that apportionment is justified by evidence.

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29 [1999] M.J. No. 1, aff'd [1999] M.J. No. 532 (C.A.).

30 Note the reference at page 4 of the Court of Appeal decision to the 1991 decision of *McGeek Enterprises Ltd. v. Shell Canada Ltd.* (1991), 6 O.R. (3d) 216. See also *862590 Ontario Ltd. v. Petro Canada Inc.*, [2000] O.J. No. 984.

The section suggests that the principle of joint and several liability expressed in s. 27(1) prevails only when there is no evidence of divisibility of the harm. Arguably then, a defendant in a cost recovery action can raise divisibility of harm as a defence against the plaintiff. If the harm can be divided, it would be apportioned to each "responsible person" who then become severally liable for remediation costs of their apportioned shares. A successful defendant could thereby limit its liability to that portion of the costs that the plaintiff is not responsible for. This defence was made in *O'Connor v. Fleck* where the Court found the plaintiff to be a "responsible person" due to his knowledge of the defendant's (tenant) operations.[31] The Court referred to s. 1 of the *Negligence Act* and s. 34 of the CSR, but found that apportionment was not justified due to lack of evidence.

Apart from those rare occasions where the defendant can adduce sufficient evidence of divisibility of harm,[32] liability is joint and several, and any responsible person "who incurs costs in carrying out remediation" may seek recovery from other responsible persons under s. 27(4) of the Act. Section 35(3) of the CSR provides that for the purposes of s. 27, any compensation payable by a defendant in a cost recovery action:

> is a reasonably incurred cost of remediation for that person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the *Negligence Act*.

This section entitles a defendant in a cost recovery action to treat its liability as a remediation cost and, in turn, seek contribution from other responsible persons in accordance with s. 4 of the *Negligence Act* which provides for joint and several liability and the right to contribution.

In order to succeed with a contribution claim, the defendant must be able to show the following:

(a) it has incurred or will be liable under s. 27(4) for remediation costs;

(b) the third parties are also responsible persons.

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31 [2000] B.C.J. No. 1546.

32 Apportionment would appear to be possible only in relatively simple circumstances, such as a succession of owners and operators, each of whom discharged the same substance to the site. In such a case, liability could be apportioned according to the volume of discharge.

Procedurally, a defendant can plead apportionment in its statement of defence in accordance with Supreme Court Rule 22(15). Rule 22(14) provides that a contribution claim should be made by way of a third party notice under Rule 22(1)(a) to other responsible persons, whether a co-defendant or a new party to the action. The court determines the degree of fault of each person who then, absent a contract, are liable to make contribution to and indemnify each other in the degree in which they are respectively found at fault.

In considering the allocation of liability between responsible persons, section 35(2) provides a list of factors that the court must consider in considering "reasonably incurred costs of remediation":

(a) the price paid for the property by the person seeking cost recovery;

(b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of the contaminating substances and the toxicity attributed to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage and disposal of the substances that caused the site to become contaminated;

(e) any remediation measures implemented and paid for by each of the persons in the action; and

(f) other factors relevant to fair and just allocation.

"Other factors relevant to a fair and just allocation" under paragraph (f) could include co-operation with the remediating party and government officials in the remediation of the site, or the financial benefit gained by other responsible parties from the contaminating operation.

Apart from seeking contribution under the Act, remediation costs may also be recoverable under indemnification or other agreements (including insurance) and through common law proceedings.

In considering contribution claims, it is important not to trust the plaintiff's choice of "responsible persons". The searches reviewed above should be carried out to determine all possible parties, including the plaintiff's directors, officers and

employees in circumstances where the plaintiff may itself be a responsible person. Since s. 35(3) of the CSR provides that in an action against a director, officer, employee or agent of a company, the plaintiff must prove that such person "authorized, permitted or acquiesced in the activity that gave rise to the cost of remediation", the defendant must be able to adduce some evidence of the person's personal involvement or control over the activities on the site. Naming directors may be good strategy when the corporation itself is wound up or insolvent, at least for the purpose of gaining access to the corporation's documents and other evidence.

Another possibility is to name the parent company (with deeper pockets) in a third party claim. Given that the cost of remediation is often high, it is not unusual that the assets of the corporation responsible for remediation may not be sufficient to meet the cost of the clean-up bill.

The issue of shareholder liability under the Act was addressed in the recent judicial review in *Beazer v. British Columbia*.[33] The decision confirms that in order to be "an operator" for the purposes of the Act, the parent company's actual involvement in day to day operations on the site is not required, but "factual control" is sufficient. In *Beazer*, such "factual control" consisted of the parent company's approval of subsidiary's budget and capital expenditure over a certain limit; active "hands-on" involvement of the parent company's officer in the management of the subsidiary; parent company's approval of the lease of the site; and the parent company's active involvement in site visits, and remediation and investigations of the site.

It is often sound practice to for a defendant to plead that another party, not necessarily named as a defendant in the action, contributed to the contamination and was therefore at fault. Provided a defendant can prove the plaintiff contributorily negligent under the *Negligence Act*, this serves to limit or reduce a defendant's percentage liability to that portion of the liability found against that defendant. Courts can and do assign fault to non-parties.[34]

In *Sassy Investments Ltd. v. Minovich* the installer of an underground storage tank that leaked hydrocarbons, who was not a party to the action, was found to be at fault and apportioned 10 percent of the liability.[35] This argument was advanced by a defendant oil company and the court found the installer at fault for failing to pack or

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33 [2000] B.C.J. No. 2358 (S.C.).

34 *Wells v. McBrine* (1988), 33 B.C.L.R. (2d) 86 (C.A.), leave to appeal dismissed (1989), 49 C.C.L.T. xxxi; *Reekie v. Messervey* (1989), 48 C.C.L.T. 217 (B.C.C.A.).

35 [1996] B.C.J. No. 1745 (S.C.).

cover the steel storage tanks and lines in non-organic material that would have prevented premature corrosion of the tanks and line.

8. Using Experts

In most cases, the plaintiff has obtained Stage 1 and Stage 2 preliminary site investigations to confirm the existence of contamination on the site. In addition to obtaining a copy of the plaintiff's reports, the defendant should retain its own environmental consultant to investigate the property, including areas not previously tested, as such further investigation may disclose unsuspected areas of contamination that may lead to adding new parties or provide evidence of the plaintiff's contribution to the contamination.

The expert should be retained early in the proceedings and certainly before discoveries to advise you on all the technical aspects of the plaintiff's claim. The expert can assist defence counsel in the following areas:

1. Identification of the nature, cause and extent of contamination;

2. Analysis and critique to the plaintiffs environmental and expert reports;

3. Theories and evidence to support allegation that other parties or non-parties were responsible for the contamination;

4. Identification all of responsible persons;

5. Reasonableness of remediation options chosen by the plaintiff;

6. Reasonableness of the remediation costs claimed by the plaintiff; and

7. Reasonable steps a plaintiff should have taken prior to acquiring the contaminated property.

It is imperative that experts be given advance notice of trial dates and "drop dead" dates for delivering expert reports. Experts should be advised to avoid commenting on the liability of a party and confine their reports to setting out what the standards of the particular industry were at the relevant time. In other words, the expert should avoid applying the stated standard of care to the facts of a given case.

9. Precedent for a Statement of Defence

Attached as a schedule to this paper is a Statement of Defence in a case involving a leaking underground storage tank. This precedent should be used with caution as it may not contain all the defences applicable or available to a defendant in any given case. The Statement of Defence should be evaluated after discoveries to ensure that you properly plead all your defences. In addition, where appropriate you should consider third party claims.

No. A11111
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PLAINTIFF LTD.

PLAINTIFF

AND:

DEFENDANT LTD. and CO-DEFENDANT LTD.

DEFENDANTS

STATEMENT OF DEFENCE OF DEFENDANT LTD.

1. Defendant Ltd. admits paragraphs * of the Statement of Claim.

2. Defendant Ltd. denies each and every other allegation of fact contained in the Statement of Claim and requires the Plaintiff to prove those facts.

3. In answer to the whole Statement of Claim, Defendant Ltd. pleads and relies upon the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266, and says that the Plaintiff's claim against it is statute barred by reason of the provisions of the *Limitation Act*.

4. In answer to the whole Statement of Claim, Defendant Ltd. says that from approximately * to * it owned the lands and premises located at Smith Street, Vancouver, British Columbia, legally described as:

Lot *
Block *
District Lot *
Group *
New Westminster District
Plan *

("the Property") and operated the Property as a service station.

5. In * the Defendant Ltd. sold the Property to Purchaser Ltd. Purchaser Ltd.

operated a service station on the Property. In * Purchaser Ltd. sold the Property to Co-defendant Ltd.. In * the Co-defendant Ltd. sold the Property to the Plaintiff.

6. In *, Defendant Ltd. entered into an agreement with Co-defendant Ltd. (the " Dealership Agreement") whereby Co-defendant Ltd. agreed, for a period of 10 years, to purchase gasoline from Defendant Ltd. and operate the Property as a service station in association with Defendant Ltd.'s trade-marks. It was an express or implied term of the Agreement that Co-Defendant Ltd. would operate the service station in manner consistent with good commercial practice and industry standards to detect and prevent leaks of gasoline and oil products ("Product") from the distribution system at the Property.

7. It was a further term of the Dealership Agreement that Defendant Ltd. agreed to loan to Co-defendant Ltd. two gasoline pumps (the "Pumps") and * gallon underground storage tanks (the "Tanks") for a period of * years, and in return Co-defendant Ltd. agreed to indemnify Defendant Ltd. against any and all claims and liability for damage to the Property caused by the use of the Pumps or Tanks.

8. Defendant Ltd. and Co-defendant Ltd. entered into a further agreement entitled "Business and Management Agreement" dated * ("Management Agreement"). Pursuant to the terms of Management Agreement Co-defendant Ltd. agreed, among other things, to do the following:

a. comply with the all laws and regulations relating to the use of the Pumps and Tanks, and by implication, the provisions of the *British Columbia Fire Code* related to the monitoring of the Tanks;

b. take daily dips of the Tanks located on the Property using approved water finding paste and keep accurate records of measurements and meter readings;

c. promptly correct and/or report to Defendant Ltd.any suspected product loss owing to faulty Tanks or Pumps supported by records of daily measurements and meter readings.

Section 47 of the Waste Management Act

9. In answer to the Statement of Claim, Defendant Ltd. denies that it is a person responsible for the remediation of the Property ("Responsible Person") within the definitions or meaning of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (as amended) (the "*Act*") and the *Contaminated Site Regulation*, B.C. Reg. 375/96 (as amended) (the *"Regulation"*) relating to any contamination at the Property. In particular, Defendant Ltd. says that it is not responsible person as it did not own the Product nor control the disposal, handling or treatment of the Product, and Defendant Ltd. pleads

and relies on section 19 of the *Regulation*.

10. In further answer to the Statement of Claim, Defendant Ltd. says that even if Defendant Ltd. is a "responsible person" within the definition or meaning of the *Act* or the *Regulation*, which is not admitted but denied, such status does not automatically make it responsible at law for remediation of contamination on the Property and does not give rise to a cause of action against Defendant Ltd. on the part of the Plaintiff.

11. In the alternative, if Defendant Ltd. is found to be a "responsible person" within the definition or meaning of the *Act* and the *Regulation*, which is denied, Defendant Ltd. says that it is a "minor contributor" within the definition or meaning of the *Act* and the *Regulation*, and accordingly, its liability for any remediation costs is limited pursuant to section 47 of the *Act*.

12. In further answer to the Statement of Claim, Defendant Ltd. says that upon consideration of Part 4 of the *Act* and the *Regulation*, together with common law and equitable considerations, it should not be obliged to contribute to any remediation costs due to, *inter alia*, the following considerations:

a. at the time the Plaintiff purchased the Property, it was or it should have been aware that the Property had been used by the Defendant Ltd. and the Co-defendant Ltd. as a gasoline service station and that storage and dispensing of fuel and oil and servicing of automobiles and other related activities had taken place on the Property;

b. no government body has directed the Property to be remediated; and

c. all benefits from remediation of the Property will accrue to the Plaintiff.

13. In the alternative, if Defendant Ltd. is a "responsible person" within the definition or meaning of the *Act* and the *Regulation*, which is denied, Defendant Ltd. pleads and relies upon the *Act,* section 35 of the *Regulation* and *Negligence Act*, R.S.B.C. 1996, c. 33, and says that the Plaintiff, Co-defendant Ltd. and Purchaser Ltd. are also "responsible persons" as former or present owners and operators of the Property, and therefore liability for the contamination at the Property should be reapportioned among all the Responsible Persons.

Negligence

14. In further answer to the Statement of Claim, Defendant Ltd. denies that:

a. it owed the Plaintiff a duty of care; or

b. it or its servants or agents were negligent.

15. If Defendant Ltd. was negligent, which is denied, then Defendant Ltd. says that, at all material times, it complied with oil industry standards and/or used good commercial practices prevalent in the Province of British Columbia from time to time relating to:

a. delivery of Product to the Property;

b. the care and maintenance of the Tanks and Pumps;

c. supervising its dealers to ensure they complied with good commercial practice and/or all laws and regulations related to the monitoring of underground storage tanks.

16. Defendant Ltd. says that if the Property was contaminated by reason if its negligence, which is denied, then the contamination was also caused or contributed by the negligence of the Plaintiff, the Co-defendant Ltd. and Purchaser Ltd., and Defendant Ltd. pleads and relies on the *Negligence Act*. Particulars of the negligence alleged are as follows:

A. Negligence of the Plaintiff:

(i) failing to make all reasonable inquiries or conduct any environmental investigation or assessment of the Property consistent with good commercial or customary practice prior to purchasing the Property, when the Plaintiff knew, or reasonably should have known, that the Property was potentially contaminated with Product;

(ii) failing to contact the Ministry of the Environment to determine what remedial action or work needed to be done at the Property;

(iii) purchasing the Property knowing the Property was contaminated with Product;

(iv) knowing that the Property was used as a service station, electing to proceed with the purchase of the Property knowing or reasonably apprehending that the Property was or could be contaminated;

(v) failing to negotiate adequate or any indemnities regarding the condition and/or the recovery of costs from the vendor(s) should it be discovered that the Property was contaminated;

B. Negligence of Co-defendant Ltd.:

(i) failing to carry out the statutory or contractual obligations outlined in paragraphs 8 of this Statement of Defence;

(ii) failing to take all reasonable steps to ensure that leaks in the Tanks were detected and fixed in a timely fashion;

(iii) failing to protect the Pumps and Tanks through cathodic protection;

(iv) failing to advise Defendant Ltd. in a timely fashion that the Tanks and/or Pumps were leaking, showed product losses or showed product loss trends;

(v) failing to advise the Plaintiff of the contamination of the Property or the extent of the contamination;

(vi) failing to clean up or remediate the Property prior to selling the Property to the Plaintiff.

C. Negligence of Purchaser Ltd.:

(i) failing to make all reasonable inquiries or conduct any environmental investigation or assessment of the Property consistent with good commercial or customary practice prior to purchasing the Property, when the Plaintiff knew, or reasonably should have known, that the Property was potentially contaminated with Product;

(ii) failing to contact the Ministry of the Environment to determine what remedial action or work needed to be done at the Property;

(iii) failing to advise the Co-defendant Ltd. of the contamination of the Property or the extent of the contamination;

(vi) failing to clean up or remediate the Property prior to selling the Property to the Co-defendant Ltd.

D. Negligence of Non-party Tank Manufacturer or installer:

(i) failing to fabricate the underground storage tanks and lines pursuant to prevailing standards of care in 19** regarding tank fabrication and acceptable leak tolerances; and

(ii) failing to properly install and backfill the underground storage tanks and lines causing them to corrode and leak prematurely.

16. In further answer to the Statement of Claim, Defendant Ltd. says that the Property had been previously used for commercial or industrial purposes and was already contaminated and the remediation of the Property alleged by the Plaintiff would constitute substantial betterment to the benefit of the Plaintiff to which it is not legally entitled.

17. In further answer to paragraph 18 of the Statement of Claim, the Defendant Ltd. says that the Plaintiff has suffered no loss or damage.

18. In the alternative, if the Plaintiff has suffered loss or damage, which is denied, the Plaintiff failed to take any steps or any reasonable steps to mitigate its damage or loss.

WHEREFORE the Defendant Ltd. requests that this Honourable Court dismiss the Plaintiff's claims with costs.

Dated this * day of * 200*.

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Counsel for Defendant Ltd.