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ALTERNATIVE DISPUTE RESOLUTION

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# The State of Contaminated Sites Dispute Resolution in Canada

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## Introduction

A prominent feature of environmental law in Canada is civil litigation respecting contaminated sites. Hundreds, if not thousands, of civil actions are underway.

The litigation tends to be costly and time-consuming. To illustrate, assume a civil action in which a plaintiff sues a neighbouring current owner and the former operator for \$1 million of remediation work and related damages. In this relatively common scenario, the litigants' legal and expert witness fees can collectively cost \$500,000 and the case can drag on for several years before it is heard. Many cases involve higher damages, carry much higher litigation costs and can take even longer to resolve.

Critics say that such litigation is poor value.<sup>1</sup> Better to devote the funds to cleanup, they argue. Furthermore, the prospect of expensive litigation with uncertain results discourages parties from acquiring contaminated sites, and lingering liability concerns cause brownfields. Alternative dispute resolution ("ADR") is cited by critics as a missing element in contaminated sites regimes in Canada.

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\* Research for portions of this article was conducted for the province of British Columbia. The views and conclusions expressed in this article are those of the author and not necessarily those of the province.

<sup>1</sup> See, for example, "Final Report of the Minister's Advisory Panel on Contaminated Sites," Vancouver, January 2003 and National Round Table on the Environment and the Economy, "Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada," 2003.

What needs to be done to realize cost-effective and timely resolution of contaminated sites disputes? This article identifies ten questions that warrant consideration if legislators truly want to improve mechanisms for resolving contaminated sites disputes.

## The Key Questions

### 1. Can the Number of Disputes in Civil Actions Be Reduced?

That is, can dispute resolution be improved by reducing the number of disputes that can be litigated? This seemingly simplistic approach has some validity.

This is especially so with respect to technical – as opposed to liability – issues. In the course of investigating and remediating their sites, parties must rely on a high degree of professional judgement. Professional judgements – and their associated investigation and remediation costs – can differ dramatically, thus setting the stage for litigation and duelling experts. At least in British Columbia, and likely in other provinces as well, a prospective plaintiff is not required, as part of the remediation process, to identify potential disputes and resolve them with potential defendants. Nor is the Ministry of Environment in British Columbia required to consult with potentially affected parties when approving remediation.<sup>2</sup> Moreover, plaintiffs may in many cases prefer not to disclose their technical analysis to prospective defendants until cost recovery litigation is started. Defendants then, and only then, have the opportunity to argue that the remediation costs were unreasonably incurred. In short, there is often no incentive, let alone opportunity, for prospective litigants to identify and resolve issues respecting technical appropriateness of the investigations and remediation and their related costs. The courts thus become the only venue for resolving technical disputes.

The earlier (pre-civil action) identification and resolution of technical disputes will likely require some form of legislative compulsion. Legislation could, for example, compel

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<sup>2</sup> There is less reliance on mandatory approvals in any case, given the increasingly heavier reliance on "approved professionals," equivalent to "qualified professionals" and their record of site condition work in Ontario.

prospective plaintiffs to disclose, prior to civil actions, how they plan to incur the costs that ultimately become recoverable in civil actions. However, shifting technical dispute resolution to an earlier stage is not without its disadvantages. Further scrutiny would be required to evaluate whether, on balance, such earlier disclosure and attempts to resolve technical issues would unruly delay investigation and remediation efforts.

## 2. Should Civil Actions Remain as the Primary Means of Resolving Disputes?

Given the strong criticism of expensive litigation, one might reasonably expect to hear that recourse to the courts should be replaced with binding arbitration or some other means of dispute resolution. But few such proposals are advanced.

One exception to this rule is a 2003 report prepared for British Columbia's Minister of the Environment. The Minister's Advisory Panel on Contaminated Sites stated:

Similar to the dispute settlement provisions in numerous commercial agreements, mediation could be required as the first step (unless the parties opted to go directly to arbitration). If the parties failed to resolve the dispute through mediation within a defined period of time, the dispute would proceed to binding arbitration. Parties would be required to participate in any arbitration that is requested.<sup>3</sup>

The report went on to suggest that disputes should be handled by a private arbitration body that commonly handles commercial disputes.

The provincial government has not acted on this proposal. This is not surprising, given that litigators would likely strongly favour the retention of civil actions as a primary means of dispute resolution. Superior court proceedings – with the high degree of scrutiny allowed by the Supreme Court Rules – ensure the careful consideration of complex issues. Moreover, abolishing access to the courts would still need to satisfy section 96 of the *Constitution Act, 1867*, which would likely require the new forum to use adjudicative hallmarks of a superior court, and for reasons of redundancy may be found to be less attractive.

<sup>3</sup> Supra note 1 at 118.

In spite of widespread criticism of expensive contaminated sites litigation, no U.S. jurisdiction has gone so far as to preclude access to the courts. Nor does there appear to be any such law reform initiative. U.S. literature on contaminated sites ADR suggests that a necessary condition of successful contaminated sites dispute resolution is that parties must have the flexibility to apply mechanisms which are capable of producing results that meet the particular interests of the participants.<sup>4</sup> In some cases, the courts may be the preferred means of resolving the particular disputes, whereas other disputes are better addressed through ADR, or a combination of judicial resolution and ADR. A feature of U.S. contaminated site dispute resolution is that all options – whether adjudicative or ADR – are available. No U.S. jurisdiction imposes a rigid or single template for resolving contaminated sites disputes.<sup>5</sup>

## 3. Is the CCME ADR Principle a Precedent?

In 1993, the Canadian Council of Ministers of the Environment (“CCME”) adopted thirteen principles for Canadian contaminated sites legislation.<sup>6</sup> One of these principles calls for a four-step ADR process:

- Step 1 – Voluntary allocation – Upon designation of a contaminated site, and designation of responsible persons, the affected persons should be given a reasonable time-bound opportunity to allocate the cost of cleanup among themselves.
- Step 2 – Mediated Allocation – Failing Step 1, the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.

<sup>4</sup> Jon Niermann, “Alternative Dispute Resolution in CERCLA Settlement,” *Journal of Environmental Law and Litigation*, University of Oregon (Fall, 2002), and “Chapter 8: Resolving Superfund Cost Recovery Disputes Outside the Courtroom” by Robert P. Dahlquist, Ann L. MacNaughton, and Raymond G. Schaefer.

<sup>5</sup> “An Analysis of State Superfund Programs: 50-State Study, 2001 Update,” Environmental Law Institute, 2002.

<sup>6</sup> Core Group on Contaminated Site Liability, Canadian Council of Ministers of the Environment, “Contaminated Site Liability Report: Recommend Principles for a Consistent Approach Across Canada,” March 25, 1993.

- Step 3 – Directed Allocation – Failing Step 2, the persons will be required to enter into an allocation process whereby an independent person or body will make an arbitrated apportionment of liability based upon its findings.
- Step 4 – Failing Steps 1, 2 and 3, liability will default to joint and several liability among all responsible persons.

It is clear that the CCME favours alternative means – not the courts – “to resolve issues of liability for contaminated sites.” What is less clear, however, is the scope of the four-step process. Does it pertain only to disputes between the regulator and a private party or does it extend to private liability disputes? If it is the latter, the CCME report is silent on if and how, in Step 2, “the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.” It is similarly silent on how persons can, failing Step 2, be required to enter into binding arbitration (i.e., will such a person be barred from having the matter heard in court?). In short, the CCME principle, of itself, seems to raise more questions than it answers.

The potential value of the CCME ADR principle can be assessed in two provinces – Manitoba and Nova Scotia – that have attempted to apply it. Both provinces limit the CCME principle to the context of regulatory actions, not civil actions. Legislation in both provinces directs the regulator to refrain from issuing remediation orders with joint and several liability to “responsible persons” if these persons collectively enter into mediation or binding arbitration to allocate liability. Few orders are issued in these provinces, however. For example, in Manitoba, the regulator has in the past decade apparently only issued seven “contaminated sites” designations (a precursor to the issuance of an order), and only one of these involved multiple parties. In this one case, the multiple parties declined to use the legislative mediation/arbitration system.<sup>7</sup> The CCME-type mediation/arbitration models therefore appear to have little effect in the contaminated civil actions underway in those provinces.

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<sup>7</sup> Personal communication with Manitoba environmental lawyer, John Stefaniuk.

#### 4. Are Fast Track Trials the Answer?

If the courts are to be a part of the dispute resolution system, can their procedures be amended to effect timely and less costly dispositions? Such amendments have been made in many provinces in the form of generic “fast track” rules. Examples include Rules 66 and 68 in British Columbia and Rules 76 and 77 in Ontario. These rules are aimed at relatively simple cases which can be determined fairly with abridged discovery, stricter timelines, and limitations on damages.

But fast track trials have not been uniformly successful for contaminated sites litigation. Here are some pros and cons of existing fast track provisions in Ontario and British Columbia:

- A particularly beneficial part of Ontario’s Rule 77 is that it places the onus on counsel at an early stage, with judicial direction if necessary, to directly address the question of whether the case will raise relatively straightforward legal and technical issues (and thus be suitable for the fast track). That is, Rule 77 calls for an early sorting of cases.
- A downside of Rule 77’s sorting out process is that there may be time-consuming disputes as to whether a case is suitable for the fast track. Defendants can be expected to argue that the case should not be subject to the fast track (preferring instead a full trial which may test the resolve and resources of the plaintiff).
- Rule 77’s binding litigation timetable has the potential of creating a reasonably predictable schedule, which can prove advantageous for plaintiffs seeking a timely answer on potential contribution from defendants for remediation costs.
- Mandatory limits to examinations for discovery and trial time (two hours and two days in British Columbia’s Rule 66) are considered to be too limited and rigid. Parties may seek judicial approval for extending these limits, but these steps tend to increase costs.
- Certain fast track rules impose, at least for contaminated sites cases, low monetary damages (\$50,000 under Ontario’s Rule 76, \$100,00 under British Columbia’s

Rule 68). These limits mean that they will rarely, if ever, be used for contaminated sites cases. Even relatively simple contaminated sites cases are too complex and damages are too high to make these fast track trials a practical option.

### 5. Can Party-driven Mediation Instigate Settlements?

Many contaminated sites cases settle informally through private negotiations. This begs the question of whether a higher rate of settlement could be realized through formal mediation requirements and whether such settlements could be achieved earlier than is otherwise the case. British Columbia's "party-driven" mediation is instructive. Under this system, any party in a civil action may issue a Notice to Mediate to the other parties, and assuming cooperation, can retain a mediator to conduct a mediation.<sup>8</sup> There is a risk to not cooperating: failure to do so could be punished with an adverse court cost ruling.

The vast majority of contaminated sites matters that go to mediation after a Notice to Mediate reach settlement. Even recalcitrant parties will mediate (and often reach settlement) once they consider the risk of not cooperating.<sup>9</sup> A common criticism of British Columbia's system is that the Notice is often issued only after substantial litigation costs have been incurred.

### 6. Is Mandatory Mediation Even Better?

If "party-driven" mediation has demonstrable positive results, would mandatory mediation, with its even higher degree of compulsion, produce settlements earlier and at a higher rate?

Mandatory mediation does not appear to be the answer, at least not in the context of contaminated sites disputes. Some important lessons are evident in Ontario. Ontario's Rule 24.1 requires mandatory mediation in a wide range of civil cases, and has generally produced earlier and higher rates of settlement.

This may not be true for contaminated sites cases, however. Specifically, we found that environmental litigators in Ontario view mandatory mediation as too blunt – both sides of a dispute often conclude that the matter is not ready for mediation as early as called for by Ontario's mandatory schedule, but the rules nonetheless require attendance or other administrative steps to confirm the obvious. That is, the mandatory schedules cannot take into account the state of readiness of the parties to conduct meaningful mediations. Similar criticisms of mandatory mediation generally were noted in a recent review of Ontario's Rule 24.1.<sup>10</sup>

One possible positive aspect of mandatory mediation is that it could at least have the effect of forcing counsel to consider the issues from a settlement, not merely adjudicative, perspective.

### 7. Should the Regulator Contribute to More Cost-effective and Timely Resolution of Civil Actions?

Civil actions, by their nature, seek to assign and allocate liability amongst private parties. But this is not to suggest that these civil actions are devoid of public interest issues. Timely resolution of contaminated sites disputes is important for two public interest reasons:

- protection of the environment – cost-effective recovery of costs creates incentives for parties to acquire and remediate sites, and thus prevent further migration of and exposure to contaminants; and
- optimal land use – with enhanced abilities to forecast how liability will be allocated, developers can more readily assess the economics of remediating a site and bring that site to a higher use consistent with community planning goals. Indefinite delay makes it difficult or impossible to test the feasibility of acquiring and remediating a contaminated site, and may ultimately lead to "brownfields," or sites

<sup>8</sup> Authority for the Notice to Mediate (General) Regulation is found in section 68 of the *Law and Equity Act*. The Regulation came into force on February 15, 2001.

<sup>9</sup> As one mediator advised in an interview, "in 10% of the time, recalcitrant parties will threaten the process, but this is only 10%."

<sup>10</sup> See *Report of Case Management Implementation Review Committee*, (Ad hoc committee established by the Toronto Regional Senior Justice as a subcommittee of the Toronto Case Management Steering Committee), February 2004, available on line at <http://www.ontariocourts.on.ca/scj.htm>.

too encumbered by liability concerns to be attractive for redevelopment.<sup>11</sup>

Government regulators have potential clout which, if exercised strategically, can reduce the cost and delay of litigation. Consider, for example, how a remediation order power could be exercised in a scenario where a plume of contamination is migrating from a gas station to neighbouring properties. Absent a regulatory order or requirement or a court judgement, the gas station owner refuses to remediate or otherwise address the neighbours' damaged properties. In theory, the affected neighbours could sue to try to recover remediation costs and other damages, but this could take millions of dollars and several years of litigation. Many property owners do not have such resources, and some will simply endure lost real estate value and allow the contamination to remain. Yet, the regulator has considerable influence in this scenario to achieve timely remediation, prevent further migration, and avoid heavy litigation costs. The mere fact that the regulator is contemplating a remediation order could encourage the gas station owner and neighbours to collaborate and allocate responsibilities amongst themselves rather than be subject to an order.<sup>12</sup>

But in this era of budget cutbacks, environmental ministries are reluctant to take such steps. They characterize these disputes as private matters, placing an inordinate faith that the civil litigation remedies, together with rising property values, will eventually be used to produce the needed remediation.

U.S. regulators appear to be more proactive. A common approach there is that the regulator expresses a willingness to give effect to the results of ADR and will be prepared to apply legislative tools to confer immunity to cooperative parties.<sup>13</sup> The ultimate incentive available to the U.S. Environmental Protection

Agency ("EPA"), according to the U.S. literature, is the implied threat that it will use its strong cleanup and cost recovery powers in the event that "potentially responsible parties" do not undertake sufficient litigation and remediation work. EPA investigations and remediations, the literature suggests, tend to be considerably more expensive than if conducted by the parties directly.

### **8. Is There a Role for Truly Independent Experts?**

As noted earlier, contaminated sites disputes often boil down to battles of hired gun experts. U.S. experience attempts to avoid the syndrome of duelling hired guns. For example, some U.S. contaminated sites legislation allows regulators to retain truly independent experts and issue draft remediation plans and allocations of liability. Also, certain federal contaminated sites legislation allows the U.S. EPA, upon conducting an expert evaluation, to issue a "non-binding allocation of responsibility" to the disputing parties, covering both the allocation of cost and work that should be undertaken at a site.<sup>14</sup> This and similar forms of evaluation appear to have considerable influence in instigating settlements.

### **9. Can ADR Be Encouraged With Liability Limitation "Carrots"?**

Another key lesson from the U.S. is that ADR off-ramps from litigation must include incentives. At least in some jurisdictions, U.S. regulators signal to litigants that they will accept (within reason) the results of ADR and allocate and limit liability accordingly. Two things work in concert in the U.S.: legislation contemplates limits to liability through agreement and regulatory policy (e.g., EPA Region 1) actively promotes ADR for the purposes of reaching agreement.<sup>15</sup> There does not seem to be a similar approach in Canada.

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<sup>11</sup> The recoverability of remediation costs can often be a very significant component of a business strategy to purchase and redevelop a contaminated site.

<sup>12</sup> Moreover, it may make little rational environmental sense to apply a patchwork approach where only some neighbours – those with deep pockets – remediate their sites and others do not.

<sup>13</sup> O'Leart, Yandle, and Moore, "The State of the States in Environmental Dispute Resolution," 14 *Ohio St. J. on Disp. Resol.* 515 (1998-1999).

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<sup>14</sup> Ann L. MacNaughton and Jay G. Martin, *Environmental Dispute Resolution, An Anthology of Practical Solutions* (Section of Environment, Energy, and Resources – American Bar Association), Chapter 8: Resolving Superfund Cost Recovery Disputes Outside the Courtroom.

<sup>15</sup> *Supra* note 5.

## 10. Should Legislation Prescribe Allocation Criteria?

The U.S. experience also suggests that the prospects of successful dispute resolution, whether by adjudicative or ADR means, are enhanced by pragmatic allocation criteria. As one writer stated, “ADR operates in the shadow of the law.”<sup>16</sup> That is, the greater the predictability of allocation rules, the greater the incentive to resolve allocation prior to costly trials.

U.S. federal contaminated sites does not prescribe liability allocation criteria. Rather, the courts are directed to assign liability “equitably.” In doing so, the courts have identified various allocation criteria (some two dozen, according to recent surveys).<sup>17</sup> Advocates of law reform commonly favour embedding the criteria directly into legislation (as opposed to leaving the matter to the courts).

Liability allocation criteria are not a prominent feature of Canadian contaminated sites statutes. To the extent that they exist (e.g., in British Columbia and Alberta), allocation criteria are limited in number and are stated in general terms. If the U.S. critics are right, practical legislative allocation criteria in Canadian contaminated sites legislation may serve to enhance the abilities of parties to settle their differences.

### Conclusions

There are undeniably high costs and delay associated with contaminated sites litigation. In spite of well-grounded criticisms of this litigation over the past decade or two, little progress has been made, at least in Canada. Without necessarily recommending any particular approach used in the U.S., efforts there warrant further consideration. A key finding of the U.S. experience is that there is no single fix – reducing cost and delay will likely require a series of measures, ranging from changing court rules to more formal encouragement of ADR to providing liability limitation incentives.

<sup>16</sup> Niermann, *supra* note 4 at 414.

<sup>17</sup> See Niermann and Dahlquist articles, *supra* note 4.

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## ENVIRONMENTAL ASSESSMENTS

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# Matters of Significance: American and Canadian Approaches to Environmental Assessment

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### Introduction

In January 2000, the Canadian Environmental Assessment Agency commenced a statutorily required five-year review of the *Canadian Environmental Assessment Act* (the “CEAA”). There were extensive consultations and in March 2001, the government tabled Bill C-19, *An Act to Amend the Canadian Environmental Assessment Act*, which was later tabled again as Bill C-9. On December 4, 2001, the House of Commons Standing Committee on Environment and Sustainable Development (the “Committee”) began its study of the Bill. Following months of testimony and review, the Committee tabled its amendments to Bill C-9. In addition, it took the unusual step of filing a report in June 2003 entitled “*Sustainable Development and Environmental Assessment: Beyond Bill C-9.*”

The Committee was deeply concerned that the five-year review had failed to examine the “core structures and features” of federal environmental assessment. The Committee believed that:

Parliament and the Government of Canada would welcome a report on what is needed to ensure that projects, policies and programs are environmentally sustainable and protect the integrity of ecosystems, and by reflection, the health and well-being of Canadians.<sup>1</sup>

<sup>1</sup> (Ottawa: Parliament of Canada, June 2003), at 4.