PRELIMINARY SUBMISSIONS ON THE CCME BROWNFIELDS ISSUES AND OPTIONS PAPER

CELA Publication #485
ISBN #1-897043-20-1

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November 8, 2004

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PRELIMINARY SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON THE CCME BROWNFIELDS ISSUES AND OPTIONS PAPER

CELA appreciates the opportunity to comment on the CCME Issues and Options Paper, dated October 14, 2004. We wish to express our general support for the need to develop a principle concerning liability for brownfields and contaminated sites. We agree that the ultimate goal of restoring the environment may be furthered by building more certainty into the liability regime, so as to generate renewed interest in such sites among developers. However, we are concerned that responsible parties may be released from liability despite the need for future clean-up measures and for continuing civil accountability. We also anticipate that a number of the proposed changes could have a detrimental impact on the public purse.

This document should be considered as our preliminary submission on the issue of brownfield liability, a topic with which CELA hopes to have further involvement as work progresses. CELA has previously provided various submissions on the subject of land use in general, and contaminated soils in particular. Our policy concerns include: ensuring the return to productive use of contaminated sites, taking advantage of existing serviced lands, avoiding the unnecessary development of greenfields, and ensuring the protection of public health and safety.

INTRODUCTION

Liability disputes over brownfields sites are unfortunate and unavoidable by-products of living in an industrialized society. Before examining different methods of dealing with the end-product pollution, it is important to note that, whenever possible, emphasis should be placed on preventing such contamination from the outset. No brownfields strategy is complete without a consideration of preventative measures and economic disincentives to creating future pollution.

The allocation of liability today necessarily impacts the decisions made by potential polluters in the future. If a liability scheme were to ignore this reality, an opportunity would be lost to further bolster pollution prevention efforts. The CCME is ideally situated to be at the forefront of such policy discussions by developing a specific principle respecting the prevention of contaminated sites. Such a principle could guide the continual development of new, more rigorous and more comprehensive environmental protection laws as our understanding of the scientific issues deepens. Specifically, the principle could help ingrain the precautionary principle into environmental practices across Canada.

Several of the prevention proposals outlined in the CCME Issues and Options Paper have merit; certainly, stronger monitoring and enforcement mechanisms will increase certainty for proponents, governments, purchasers, vendors, and lending institutions alike. By solidifying our information about industrial and commercial sites, we will be better able to limit contamination and to gauge the severity of problems when they do arise. Increased scrutiny of problem sites will also make it more difficult for polluters to conceal or dismiss the impacts of their activities. To this end, stronger disclosure requirements, mandatory characterization studies and rehabilitation plans, and more extensive use of the land registry system are all useful suggestions.

Improved tracking and monitoring of contaminated sites would also allow for the imposition of stronger sanctions upon existing owners. Since government would have a fuller understanding of the condition of sites across the country, it would be better able to impose clean-up orders on existing owners, where appropriate, regardless of redevelopment opportunities. Such measures could forestall contamination of neighbouring lands and injury to the local environment. Additionally, owners are often reluctant to sell brownfield sites because

of the high cost of cleaning the land for redevelopment; however, the motivation to sell would be higher if it was made more onerous for these owners to retain such land in the first place. In order to effectively apply stronger regulatory clean-up requirements on brownfield sites, governments must have a mechanism by which they can better track potentially contaminated lands.

- **RECOMMENDATION #1: Preventative measures should be emphasized and integrated in any brownfields strategy.**

ALLOCATION OF LIABILITY: THE POLLUTER PAYS PRINCIPLE

The polluter pays principle, currently espoused in CCME Principle #1, should provide the framework for any liability allocation scheme. Although there may be instances when the polluter is able to extricate itself from liability through contractual arrangements, the default position of polluter pays acts as an important motivator. Not only will it prompt polluters to ensure that contaminated sites are cleaned thoroughly, it should also ideally motivate potential polluters to avoid creating such sites in the future.

The polluter pays principle is consistent with the principle of fairness, in that past polluters typically benefited by externalizing the environmental costs of their activities. This holds true regardless of whether or not the polluting activity was in compliance with environmental standards of the day. The cost of the pollution was instead borne by taxpayers as well as those members of the public living in close vicinity to the site. Therefore, it seems only just to require that polluters bear the cost of remediation rather than further burdening the public purse. Additionally, it is doubtful whether the responsible ministries could realistically afford the cost of remediating hundreds of sites across the country.

Applying the polluter pays principle is far from simplistic, particularly with respect to i) the initial determination of who constitutes a "polluter", and ii) the end goal of having the site remediated and not simply abandoned due to liability concerns.

The definition of "polluter" must be broad enough to ensure that the taxpayer is left to pay the price of remediation only if all other avenues have been exhausted. A broad definition can be reconciled with the polluter pays principle by holding accountable not only those who caused the pollution, but also those who were in a position to exercise influence and control over the polluting activity, those who profited indirectly at the time, and those who stand to gain from the site's eventual clean-up.

This broad application of the principle is in keeping with CCME Principle #4, which states that the "principle of 'beneficiary pays' should be supported in contaminated site remediation policy and legislation, based on the view that there should be no 'unfair enrichment'"; as well as CCME Principle #6, which says "there should be a broad net cast for the determination of potential responsible persons...".

- **RECOMMENDATION #2: The polluter pays principle should provide the framework for all aspects of a brownfields policy.**

JOINT AND SEVERAL LIABILITY

Although "polluter pays" should remain the guiding principle behind any liability distribution scheme, it is necessary to use joint and several liability as the backdrop to any such scheme so that appropriate compensation can also be sought from those who did not pollute the site themselves but nonetheless have a causal connection with the pollution. There may be instances where the polluter(s) cannot be located, or have insufficient funds to cover the

remediation expense. In the absence of joint and several liability, the ultimate goal of restoring the environment would be compromised. For this reason, it is important to bring all potentially responsible persons into the "liability net" before authorizing any releases from liability. Certain parties, on a case-by-case basis, could then be allowed to argue their disconnect from the issue as a defence, rather than an automatic exemption from the outset.

Joint and several liability saves government from the onerous, often impossible, task of precisely allocating liability among the various parties based on their proportionate responsibility. Rather, under a joint and several liability scheme, the parties are motivated to negotiate a fair allocation amongst themselves and can turn to mediators or arbitrators to aid them in this pursuit. As a last resort, the parties can seek indemnification from each other in the courts. Variations on the joint and several liability theme may work well when dealing with the particular problem of brownfields remediation. For instance, resort to joint and several liability could be limited to those parties who refuse to cooperate in a mediated or arbitrated allocation of liability.[1] This approach is consistent with CCME Principle #8 which recommends the use of joint and several liability as a fallback to a tiered ADR allocation process.

- **RECOMMENDATION #3: Joint and several liability should remain as the backdrop to any liability distribution scheme, and all potentially responsible persons should be initially included in the "liability net".**

DRAFT PRINCIPLE

The draft principle which was presented on October 25th, 2004 read as follows:

[1] Pg. 9 of the CCME Issues and Options Paper (Oct. 14, 2004) sets out two such examples. First, in Manitoba "any share in the remediation costs unassigned (or uncollected) due to their collective non-participation could be jointly and severally assigned to them". Second, in California, cooperating parties may "sue non-cooperating parties for three times the share of the clean-up costs".

> The liability for remediation of a contaminated site should be transferable, by agreement, between parties. The agreement should be recognized by government in the event of the need for liability apportionment.[2]

The theory behind this principle is sound; allowing parties to transfer liability contractually heightens certainty, thereby improving the economic feasibility of redeveloping brownfield sites. It is also in keeping with the polluter pays principle, in that the vendor will still presumably pay a price in the form of a reduced sale price as a consequence of the liability transfer. However, in order for the principle to work well in practice, several important qualifiers need to be attached and further clarifications made.

First, the language of the principle needs to be tightened. It should be made explicit that liability may only be transferred pursuant to a commitment by one of the parties to remediate the property to a specified standard. Also, if the parties are intended to be arm's length, this should be clarified. The type of liability to be transferred (ie. regulatory vs. civil) needs to be identified; if civil liability is also transferable, it is not sufficient to say that the agreement will be recognized by government alone. Finally, this principle should be tied to CCME Principle #8 so that it is clear that, in the absence of a negotiated agreement, the default position is still joint and several liability. Pursuant to this, it should be stipulated that, in a negotiated agreement between a purchaser and a vendor, it is only the vendor's portion of the full liability for the site which is transferred; the liability held by other contributors (who are not party to the agreement) would not be altered.

Second, there must be a mechanism by which government can ensure that the agreement is both enforced and enforceable. The most obvious evasion approach would be the creation of a

[2] Pg. 3 of the CCME Issues and Options Paper (Oct. 14, 2004).

related shell corporation for the specific purpose of receiving liability; it is for this reason that the transfer of liability should be restricted to arm's length parties. Equally problematic would be the scenario whereby a *bona fide* purchaser became insolvent or bankrupt prior to completing the clean-up, liability for which was transferred to it by a wealthy vendor. Similarly, the ultimate goal of brownfield remediation would not be furthered by a purchaser who makes a vague commitment to clean-up a site, but then delays such measures indefinitely.

There are two options which may be utilized to avoid these pitfalls. First, the transfer agreement could contain stringent, mandatory terms which would provide government with solid assurances that the work would, in fact, be completed as promised. These terms should include, at a minimum, the requirement for full and complete disclosure by all parties to the agreement, the posting of financial security sufficient to cover the costs of clean-up, and time limits for the completion of the remediation. This raises the question of what recourse government would have if the purchaser nonetheless failed to meet its obligations. Ideally, the size of the security taken would be substantial enough to fund any shortcomings in the clean-up attempt. If not, would liability revert to the previous owner? On the one hand, this would resemble the current state of affairs and similarly discourage landowners from selling brownfield sites in the first place. On the other hand, it is important for landowners to sell to purchasers in whom they have confidence. It may be possible to frame the transfer agreement in such a way as to require the purchaser to compensate the vendor for any liability which reverts back as a result of an insufficient clean-up. Additionally, there could be an industry-financed insurance fund created to address these shortfalls; the purchaser should be required to pay its premiums up front to ensure that it receives coverage.

The second option sidesteps this problem by postponing the transfer of liability until the completion of the clean-up. If the vendor was unwilling to wait for the purchaser to complete the clean-up, the vendor could conduct the remediation itself and increase the sale price accordingly. The financial risk element would be minimized using the second option, or at least internalized to the parties themselves. For this reason, it is recommended that the second option be adopted in the majority of cases, and resort to the first option only be taken in rare cases which are incompatible with the second approach, such as sites requiring ongoing or long-term remediation efforts. Alternatively, the two approaches could be used in conjunction with one another, by proceeding with the second option for the first "x" years of clean-up, after which time the first option (complete with all the corresponding disclosure and security requirements) would be triggered. Government involvement is required with both options, to the extent that remediation plans should be approved, timelines enforced, and completion signed-off on. In any scenario, government must ultimately have the power to reject a negotiated agreement.

This discussion is premised on the assumption that one of the parties has conducted an in-depth assessment of the site itself in order to determine what contamination exists and how extensive the clean-up operation is expected to be. The quality of this initial examination should be carefully scrutinized by government to ensure that problems are not being deliberately bypassed in an exercise of wilful blindness. The initial findings will be critical in determining what price tag should be attached to the transfer of liability, how much security should be taken by government to ensure the necessary work is completed, and how long the remediation is expected to take. A thorough initial investigation would further benefit the parties to the agreement by providing more certainty with respect to the liability being assumed and by focussing clean-up efforts.

- **RECOMMENDATION #4: Allow binding contractual allocations of liability between parties, subject to strong assurances that the remediation will be, or has been, completed as promised.**

- **RECOMMENDATION #5: Ensure government has the power to reject any such proposed contractual allocations.**

- **RECOMMENDATION #6: Whenever possible, postpone the transfer of liability until after the clean-up has been completed.**

CERTIFICATES OF COMPLIANCE

The use of certificates of compliance to further waive liability for brownfield remediation is extremely troubling, particularly when such certificates are irreversible and when they apply equally to all parties, in both the regulatory and civil liability contexts. First, if the certificate is unable to be reopened upon the discovery of further contamination, there will be a disincentive for the developer to exercise due diligence from the outset. The threat of future liability can provide a strong motivation for conducting a thorough remediation. Furthermore, a one-time write-off on the site's condition negates the fact that certain brownfields require long-term monitoring and maintenance. Some contamination may be impossible to reverse or fully remedy and will necessarily require ongoing liability in order to ensure that it is adequately dealt with over time. Similarly, the risk assessment approach typically used to determine appropriate levels of remediation involves many inherent uncertainties. Thus, the effectiveness of the clean up itself will necessarily be subject to this margin of error, further increasing the probability of future problems arising. Finally, if developers are no longer liable for the remediation of yet-undiscovered contamination, it will presumably be left to government and the taxpayer dollar to remedy further problems should they arise. Not only does this externalize the cost of clean up and create a strain on the public purse, but it raises the question of whether government will be as rigorous in applying environmental standards against itself as it would have been as against the developer?

Second, the certificate should be able to be reopened upon the development of more stringent standards. There is little environmental rationale for exempting developers from the imposition of new standards in the future. Industries of all kinds have to contend with this eventuality; indeed, the prospect of stricter standards often motivates proponents to exceed the bare minimum in terms of environmental performance and develop innovative new methods of achieving ongoing compliance.

Third, the use of certificates of compliance becomes problematic once changes in land use are proposed, either by the current owner or a prospective purchaser. If the certificate is not made conditional on the type of land use, will government be left to pay the price for further clean-up whenever a new use is proposed? However, if the certificate is made conditional on the type of land use, this discourages eventual users from developing the land to its highest and best use.

All three of these initial concerns would be addressed if the site were required to be remediated to background levels before a certificate of compliance could be issued. If the nature of the site was such that this level of clean-up was infeasible, the owners would be ineligible for a certificate due to the ongoing nature of the work which would need to be performed. However, if a clean up to background levels was completed, the site would likely meet future environmental standards and would be appropriate for all types of land use.

A fourth concern involves the proposition that the release should extend to civil, in addition to regulatory, liability. Many of the same concerns apply here as in the regulatory liability context; however, the involvement of third parties raises the spectre of additional pitfalls

when dealing with civil liability. The National Round Table on the Environment and the Economy suggests a system whereby civil liability would expire fifteen years after a clean up is performed and approved by government. Any claims arising after the fifteen year cut-off would be referred to an insurance fund. This approach has the advantage of coinciding with the fifteen year trigger for many insurance policies, as well as reassuring developers with the provision of a finite liability period. However, the drawback is that it fails to account for the discoverability principle; that is, the proposed "limitation period" would begin to run irrespective of whether or not the potential problem had been discovered. Typically, civil limitation periods are triggered by the discovery of an event. Although the Ontario *Limitations Act, 2002* does contain an additional "ultimate" limitation period of fifteen years from the day the event took place,[3] environmental claims are explicitly excluded from this provision.[4] The likely rationale for this exception is that, by its nature, environmental damage often exists for many years before becoming manifest. Contamination may gradually accumulate over time until reaching critical levels, or health impacts may materialize decades after the initial exposure took place.

As a result of these concerns regarding certificates of compliance, the use of such instruments should be limited to the most exceptional of circumstances. If used too liberally, certificates of compliance could undermine a government's brownfields strategy as a whole by weakening the polluter pays principle, hindering efforts to develop land to its highest and best use, discouraging the exercise of due diligence, and further burdening the public purse. It should be recalled that developers of brownfield sites will have already been compensated for their assumption of liability through the discounted price they paid for the land. As a result,

[3] S. 15(1) and 15(2) of the *Limitations Act, 2002.*
[4] S. 17 of the *Limitations Act, 2002.*

certificates of compliance essentially provide them with another opportunity to externalize the costs of clean-up.

In order to ensure that environmental quality is not compromised, it is recommended that such certificates be issued, if at all, to only those sites which have been restored to background levels, and extend only to regulatory liability. Alternatively, governments could consider issuing limited certificates of compliance for discrete elements of the remediation, as opposed to site-wide waivers. This limited certificate could certify that particular steps had taken place at particular locations upon a brownfields site. In this way, the problem of undiscovered contamination would be minimized, since the waiver would only apply to those areas of the site which had been thoroughly assessed and remediated. However, the certificate would still need to be conditional upon new standards and changes in land use, and restricted to regulatory liability. Finally, it is suggested that applicants should be required to pay a fee to receive certificates of compliance, in order to compensate government for its administrative costs.

- **RECOMMENDATION #7: Do not allow the use of certificates of compliance, except in rare circumstances where sites have been fully restored to background levels. In these instances, certificates of compliance should only extend to regulatory liability.**
- **RECOMMENDATION #8: As an alternative, consideration could be given to the use of limited certificates of compliance for discrete elements of the remediation, conditional upon new standards and changes in land use. Again, these certificates of compliance should only extend to regulatory liability.**

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November 8, 2004

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