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PAPER 5.1

Environmental Issues in the Purchase, Sale, and Development of Real Property

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ENVIRONMENTAL ISSUES IN THE PURCHASE, SALE, AND DEVELOPMENT OF REAL PROPERTY¹

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I. Introduction

A consideration of environmental issues is an important part of every real estate transaction. Both purchasers and vendors can benefit from a negotiated allocation of environmental risks. Memorializing that allocation in a purchase and sale agreement can be difficult. Often both purchaser and vendor have an interest in the same provision, but in some cases both the purchaser and vendor have unique interests. As a result, a lawyer acting for a purchaser or vendor must consider the purchaser's or

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vendor's interests broadly, advise as to appropriate due diligence, and negotiate and document a comprehensive and effective risk allocation.

This paper provides some background on why environmental issues must be considered, but focuses on mitigating environmental risks and the nuances involved in documenting a negotiated allocation of those risks from both the purchaser's and vendor's perspectives.

II. The Purchase of Real Property

A. Why Environmental Issues?

A consideration of environmental issues is an important part of every real estate acquisition because mere ownership imposes environmental risks, even if the owner is not the "polluter." In general, there are two risks: environmental liability for contamination of real property and limitations on development or land use. These risks are discussed in more detail below.

I. Environmental Liability Risk

a. Toxic Torts

Sometimes referred to as the toxic torts, the torts of negligence, nuisance, trespass and the action established by *Rylands v. Fletcher*² provide Common Law remedies for environmental harm. While these actions do not run with land ownership in such a way as would permit a claimant to bring an action against a purchaser merely because it now owns the land the defendant responsible for the tort used to own, the purchaser could acquire property from the vendor that is the cause of an ongoing tort. In those circumstances, the claimant would have claims against both the vendor and the purchaser.

For example, if contamination is migrating from the vendor's site onto a neighbouring property, and the presence of the contamination impacts the market value of the receiving site, the receiving site's owner will have suffered an economic loss. The receiving site's owner will have an action pursuant to one or more of the toxic torts against the vendor. If the purchaser then acquires the vendor's property, and the contamination continues to migrate onto the neighbouring property aggravating the problem and further reducing the market value, the receiving site's owner may have an action against the purchaser as well.

As a result, any person, corporation or other entity that is considering a purchase of real property must consider their willingness to step into the vendor's shoes in this way; and furthermore, consider what investigations to undertake to better understand these contingent risks, and/or what assurances should be demanded of the vendor to mitigate them.

b. Statutory Liability

In BC, the statutory liability regime for contamination issues is governed by the *Environmental Management Act*³ ("EMA") and the EMA's Contaminated Sites Regulation⁴ ("CSR"). The EMA and CSR regulate a variety of contaminants. The CSR in particular establishes standards for these

2 (1866) LR 1 Ex. 265; (1868) LR 3 HL 330.

3 *Environmental Management Act*, S.B.C. 2003, c. 53 [hereinafter EMA].

4 Contaminated Sites Regulation, BC Reg. 375/96 [hereinafter CSR].

contaminants depending on land use.⁵ Properties where contaminants are present in concentrations that exceed the applicable standard are “contaminated sites.”⁶

The *EMA* and *CSR* establish a broad list of parties that are *prima facie* responsible for contaminated sites, including current and former owners and operators of the site. Owners and operators are broadly defined in the legislation, capturing almost everyone with a legal interest in the property (at present or in the past) and anyone who possesses, occupies or controls the use of the property (at present or in the past).⁷ These responsible parties are commonly referred to as “responsible persons.” Responsible persons include every director, officer, employee and agent of a responsible person.⁸ With respect to sites that become contaminated because contamination has migrated to the site from another site, responsible persons for the receiving site include all of the responsible persons for the site where the contamination originates.⁹

A responsible person’s liability can arise in one of two ways. The responsible person can be named in regulatory orders requiring the investigation or remediation of the property.¹⁰ Responsible persons can also be named as defendants in a private cause of action established by the *EMA*, commonly referred to as a “cost recovery action.”¹¹ A cost recovery action may be brought by another “responsible person” who incurs remediation (including investigation) costs at a contaminated site. The claimant may, through the cost recovery action, seek to recover its reasonably incurred costs of remediation from all other responsible persons on a joint and several basis. That is, each responsible person is potentially liable for the entire amount claimed. A responsible person’s liability is absolute and retroactive, suggesting there is no general due diligence defence available and there are no limitation period restrictions to bringing a cost recovery action.¹²

As a result, any person, corporation or other entity that is considering a purchase of real property (or even the acquisition of a legal interest in real property less than a fee simple interest) must consider their willingness to become or risk becoming a responsible person for the property. Once title transfers (or the interest is acquired), the purchaser will be a responsible person for the property, subject only to a limited number of exemptions (some of which are discussed below).

The *EMA* and the *CSR* provide for a limited number of exemptions for responsible persons. In every case, however, the onus is on the responsible person to prove on a balance of probabilities that the exemption applies. The most common exemptions that should be considered by purchasers are:

- “Innocent Acquisition”—The innocent acquisition exemption, as it is commonly called, provides an exemption to a purchaser of real property where: (i) at the time the purchaser became an owner the site was contaminated, but the purchaser had no knowledge or reason to know or suspect the site was contaminated despite having undertaken all appropriate inquiries into the previous ownership and uses of the site and despite having undertaken all other investigations, consistent with good commercial or customary practice at that time; (ii) while the purchaser was

5 *CSR*, Schedules 4-6.

6 *EMA*, s. 39.

7 Parties with certain lesser interests in land such as statutory rights of way are exempt in certain circumstances. See s. 22 of the *CSR*.

8 *EMA*, s. 39.

9 *EMA*, s. 45(2).

10 *EMA*, s. 48(1).

11 *EMA*, s. 47(1).

12 There remains a possibility that the ultimate 30 year limitation period under the *Limitation Act*, R.S.B.C. 1996, C. 266, may apply as of the 30th anniversary of the date the cost recovery action was introduced (i.e., April 1, 2027). See *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 40 B.C.L.R. (4th) 382.

an owner of the site, the purchaser did not transfer any interest in the site without first disclosing any known contamination to the transferee; and (iii) the purchaser did not, by any act or omission, cause or contribute to the contamination of the site.

While the second and third conditions are considerations for the purchaser after acquisition, the first condition is completely dependent on the due diligence undertaken by the purchaser. Appropriate due diligence into the previous ownership and uses of the site, and all other investigations consistent with good commercial or customary practice before acquisition is a prerequisite if the purchaser has any hope of falling within this exemption. The nature and extent of appropriate due diligence will vary from transaction to transaction. Due diligence is discussed in more detail in Section II(B)(1) below.

- “Receiving Site”—The receiving site exemption affords relief to those parties who are responsible persons for a site that is a contaminated site only because contamination is migrating to the site from another site owned or operated by someone else.¹³ This exemption, however, often provides false comfort. While the purchaser of the receiving site may be exempt from liability as a responsible person, it is still the owner of a contaminated site and remains subject to the development/land use risks discussed below. Effectively, the purchaser has bought a site that may need to be remediated at the purchaser’s cost in the first instance. Then, in order to recover those costs, the purchaser must initiate a cost recovery action against the responsible persons for the site where the contamination originates, the success of which will, among other things, depend on whether any of those responsible persons have the financial ability to satisfy the claim. Further, recent case law suggests that to the extent that the owner or operator of a “receiving site” allows the migrating contamination to migrate further to another neighbouring site, liability may attract.¹⁴

So an exemption from liability is not enough, in and of itself, to eliminate the risks faced by a purchaser of real property. The practical impacts of contamination, and the limits that it may impose on the development and use of the site must also be examined. These issues are discussed in more detail below.

2. Development/Land Use Risk

a. Development Freeze

A Site Profile is a self-disclosure form prescribed by the CSR. A person must provide a Site Profile to the approving officer when the person applies for a subdivision of land that the person knows or reasonably should know is or was used for certain industrial or commercial purposes.¹⁵ A person must also provide a Site Profile to the applicable municipality when the person applies for rezoning of, a development permit, development variance permit or demolition permit in respect of, or a permit authorizing the removal of soil from, land that the person knows or reasonably should know is or was used for certain industrial or commercial purposes. The list of prescribed commercial and industrial activities is attached as a Schedule 2 to the CSR.

An approving officer or municipality receiving a Site Profile must assess it,¹⁶ and if any question is answered in the affirmative, must forward the Site Profile to a Ministry of Environment Director of Waste Management.¹⁷ The Director must then consider whether or not to require or order a

13 *EMA*, s. 46(1)(j).

14 *Gehring et al v. Chevron Canada Limited et al.*, 2006 BCSC 1639.

15 *EMA*, s. 40(1)(a).

16 *EMA*, s. 40(4).

17 *CSR*, s. 6(1)(c).

preliminary site investigation or detailed site investigation of the property.¹⁸ Unless the Director provides the approving officer or municipality with notice that an investigation is not required, the approving officer and municipality are precluded from issuing the subdivision approval, rezoning approval or permit until the approving officer or municipality receives further confirmation through Ministry of Environment action or proceeding that the site is clean, does not present a material risk or has been remediated.¹⁹

The effect is a “development freeze” where the property owner is unable to proceed with plans for development or redevelopment until the Ministry of Environment’s environmental concerns are satisfied. This is an undesirable result because it imposes a delay of unknown duration on the land owner. As a result, a purchaser’s intentions with respect to the use of the subject property are important. If the purchaser intends to pursue actions that trigger one of these requirements to deliver a Site Profile, and no exemptions apply,²⁰ consideration should be given to whether that Site Profile will trigger a development freeze.

b. Wildlife

The presence of protected wildlife on a site can significantly impact development plans. Fauna is protected both by Provincial legislation, such as BC’s *Wildlife Act*,²¹ and by federal legislation, such as the *Species at Risk Act*²² (“SARA”). While the latter may only apply to federal lands, the federal government has indicated that it may seek to impose it on provincial lands where a Province has not enacted similar legislation.²³ BC has legislation to this effect on its books—the *Wildlife Amendment Act, 2004*²⁴—but it is not yet in force. SARA also protects flora. The federal *Migratory Birds Convention Act, 1994*²⁵ and *Fisheries Act, R.S.C. 1985, c. F-14* (“*Fisheries Act*”) fall within federal jurisdiction and apply across the Province.

In general all of these acts protect named species, or the species’ habitat or habitat on which the species depend. The impacts of the legislation can therefore range from the protection of a single eagle’s nest and the tree it is located in, to the complete sterilization of a development site. In undeveloped areas, a wildlife survey may be an important part of a purchaser’s due diligence.

c. Water

The presence of water on a site, whether a river, seasonal stream or drainage ditch should also be considered carefully. Many of these water features qualify as fish habitat²⁶ under the *Fisheries Act*, and cannot be harmfully altered, disrupted or destroyed without a permit.²⁷ The permit generally requires a federal environmental assessment under the *Canadian Environmental Assessment Act, S.C. 1992, c. 37*. As a result, development and redevelopment plans must be carefully considered when these kinds of water bodies are present on the target property.

18 CSR, s. 7(1).

19 *Local Government Act, R.S.B.C. 1996 c. 323, s. 946.3; Land Title Act, R.S.B.C. 1996, c. 250, s. 85.1.*

20 Some limited exemptions apply. See CSR, s. 4.

21 R.S.B.C. 1996, c. 488.

22 S.C. 2002, c. 29 [hereinafter SARA].

23 SARA, s. 34(2)-(4).

24 S.B.C. 2004, c. 56.

25 S.C. 1994, c. 22.

26 *Fisheries Act, R.S.C. 1985, c. F-14, s. 34(1)* [hereinafter *Fisheries Act*]. See also *R. v. Zuber*, [2004] O.J. No. 2989 (O.S.C.J.); *R. v. British Columbia (Fraser River Harbour Commission)*, [1983] B.C.J. No. 156 (Co.Ct.) (accepted by the B.C.C.A. at [1985] B.C.J. No. 2264); *R. v. Golden Eagle Ranch Inc.*, 2003 B.C.P.C. 205; *R. v. MacMillan Bloedel Ltd.* (1984), 11 C.C.C. (3d) 143.

27 *Fisheries Act, s. 35(1).*

B. Mitigating the Risks

I. Due Diligence

One obvious way to mitigate the risks discussed above is to take steps to investigate whether those risks exist, essentially to reduce the uncertainty surrounding the risks so that the buyer and seller can better allocate what risks there are between them. There is a cost associated with these investigations, however, and so the benefit of the reduced uncertainty must be balanced with the costs of achieving it. If the risks are too great or cannot be adequately mitigated or allocated, the purchaser can simply not pursue the transaction.

The lawyer should be able to set out the risks faced by the purchaser, and available means and costs of mitigating those risks through due diligence, in order to obtain instructions from the purchaser as to the scope of the due diligence to be undertaken. What environmental due diligence should be conducted, or whether any should be conducted, will be a function of the type of property, the nature of the transaction, the due diligence options available and their costs, and importantly, the client's risk tolerance. As a result, it is critical for the lawyer to document his or her advice as to the environmental risks and mitigation options, and the client's instructions.

Some of the common elements of environmental due diligence are discussed below. For complete information on environmental due diligence, see CLE's *Due Diligence Deskbook*, Chapters 13-15.

a. Site Profile

Every vendor of real property that is being used for or was in the past used for certain prescribed commercial or industrial activities must provide a completed Site Profile to the purchaser of the property at least 30 days before closing.²⁸ The list of prescribed commercial and industrial activities is attached as a Schedule 2 to the CSR. The requirement to provide a Site Profile may be waived by the purchaser.²⁹

A Site Profile can often be a useful first tool in assessing what additional environmental due diligence should be conducted in respect of a site. However, the delivery timing prescribed by the CSR is often unworkable, as often due diligence must be conducted or completed more than 30 days before closing. If a purchaser wants the benefit of a Site Profile to assess the scope of additional environmental due diligence, the purchaser's lawyer should consider requiring the delivery of the Site Profile earlier in the transaction.

Sometimes Site Profiles can provide little help. A negative response on the form means the person completing the form is not aware that the subject site suffers from the environmental issue in question, but that does not mean the issue does not exist. The comfort provided by the answer is tempered by the limit of the responder's knowledge. As a result, Site Profiles with no positive answers should not be construed as indicating a property with no environmental issues, but merely a property with no environmental issues known to the person completing the form. For this reason, it is relatively common for additional due diligence to be completed. In many material transactions, the purchaser just waives the Site Profile requirement because the purchaser has already decided to conduct environmental due diligence in respect of the property that will provide better and more reliable results than a Site Profile.

28 CSR, s. 3(7).

29 CSR, s. 4(13)

b. Site Information Request Application

Commonly referred to as the “paper search,” the Site Information Request Application is an application to the Ministry of Environment for a search of their paper files in respect of the property in question.

c. Site Registry

The Site Registry is a registry the Ministry of Environment is required to maintain pursuant to the *EMA*. The Site Registry is a searchable online database available through BC OnLine that contains information about contaminated and remediated sites known to the Ministry of Environment.

The database is searchable in one of three ways: numeric (by PID, Crown Land Identification Number or Site Identification Number), civic address (by specific address or by street), area-based (by latitude and longitude coordinates of the property, and on a one-half kilometre basis or a five-kilometre basis). Often numeric (by PID) and civic address searches are conducted but an area-based search is not conducted, typically because latitude and longitude coordinates are not available or because the value of the search is misunderstood. Simply put, most contamination moves.

Contamination can be carried by rainwater down to the water table, and then carried by groundwater across property lines. In commercial and industrial areas, or even residential areas with nearby commercial zones, an area-based Site Registry search can often be very valuable in identifying possible contamination risks posed by neighbouring or nearby sites.

It is important to keep in mind that the Site Registry is not complete. It does not contain all information on every contaminated or remediated site. It only contains information known to the Ministry of Environment. As a result, a nil search result from the Site Registry is often less helpful than a search with results. A nil search result merely indicates that the Ministry has no information on the site—possibly because the site is clean, but also possibly because the site has not yet been investigated, or because it has been investigated and is contaminated but the results were not provided to the Ministry.³⁰

d. Environmental Investigation

As noted above, the story available from a Site Profile and public record searches through a Site Information Request Application and the Site Registry is limited. More often than not, these documents and searches are only helpful when they do return information, because nil search results are a long way from a reliable indication that the site is clean.

Where the results from these documents and searches are incomplete, or there are no results, and especially where the subject site or a nearby property is being used for or has been used for a CSR prescribed commercial or industrial purpose (see Appendix B), a lawyer should discuss the option of engaging an environmental consultant to conduct an environmental investigation with the purchaser. These environmental investigations typically are staged in two phases—a Phase I investigation (referred to as a Stage I Preliminary Site Investigation for purposes of the CSR) does not involve any physical investigation of the subject site, but includes a historical record search for the site and neighbouring sites in order to determine whether any areas of potential environmental concern exist. The Phase I record search is far more comprehensive than the public registries typically searched by lawyers as part of their environmental due diligence investigations, and typically includes searches of fire department maps, archived aerial photographs, phone book records and the like. Generally, the purpose of the Phase I is to identify whether the subject site or nearby sites are being used or were used for purposes that may have resulted in contamination of the subject site.

³⁰ For detailed information on how to interpret search results, consult the Site Registry User’s Guide, online: https://www.bconline.gov.bc.ca/pdf/site_reg.pdf.

If the possibility of contamination exists, the Phase I investigation concludes with a recommendation that a more detailed Phase II investigation (referred to as a Stage II Preliminary Site Investigation in the CSR)—a physical investigation of the site—should be undertaken. In a Phase II investigation, the consultant maps out and implements a plan informed by the Phase I investigation to investigate those areas of potential environmental concern identified in the Phase I investigation. Generally, this includes taking soil and groundwater samples from the site and conducting chemical analyses of those samples to determine whether contamination is present.

In most cases it is beneficial for the purchaser's lawyer and environmental consultant to communicate directly. It reduces the risk of duplication of work, where both the lawyer and consultant complete the same public registry searches as part of their work for the purchaser. More importantly, however, it is important for the environmental consultant and lawyer to have a complete picture of the property and the purchaser's intended use of it in mind. For example, there is little benefit to the purchaser if the environmental consultant completes an investigation that determines the site meets applicable standards if the purchaser's plans are to complete a change in use of the property that will result in different standards being applicable to the site.

In some situations, the vendor may already have conducted Phase I and/or Phase II investigations of the subject site, and may be willing to make the results of those investigations available to the purchaser in an effort to convince the purchaser that closing can be expedited because the purchaser already has the benefit of the vendor's investigations for purposes of the purchaser's due diligence. There are many dangers to this approach. First, the currency of the vendor's investigations must be considered. Land uses, particularly of nearby properties, may have changed since the vendor conducted its investigations of the site. The scope of the investigations must also be considered. The scope of an environmental investigation is often more of an art than a science, and is often a function of a number of factors including available budget, time available and time of year. For example, investigations conducted during some periods may provide results indicating a much lower water table or dry wells, whereas one conducted at a different time of year may provide different results. For all of these reasons, blind reliance on the vendor's investigations is often folly. However, there is no sense in reinventing the wheel if the work has already been done. At the very least the vendor's reports should be reviewed by an environmental consultant engaged by the purchaser with a view to determining whether they are sufficiently complete. If after that analysis the purchaser is prepared to accept the vendor's investigations, it will require a letter from the vendor's consultant "opening up" those reports to the purchaser so that the purchaser can rely on their conclusions.

2. The Purchase Agreement

Another obvious way for the purchaser to mitigate the risks discussed in Section II above is by contract. The purchaser and vendor have a number of contractual provisions available to them, and a broad spectrum of risk allocation methodologies, in order to adequately allocate the environmental risks associated with a property between them. The available provisions include representations and warranties, covenants and indemnities, and the available spectrum of risk allocation methodologies stretches from an "as is where is" transaction where the purchaser is to bear all of the risk to a transaction with "full blown" indemnities where the vendor is to bear all of the risk. A discussion of some of these provisions, and practice tips and pitfalls, follows.

One important consideration in the preparation of the Purchase Agreement, or in conditions precedent for the benefit of the purchaser, are the results or expected results of the purchaser's due diligence investigations. Ideally the purchase agreement should be settled only after the results of the purchaser's due diligence investigations are known, so that the results of those investigations can be factored in to the risk allocation provisions of the agreement, or the price. If the agreement must be executed beforehand, appropriate conditions precedent are critical to ensure the purchaser need not complete if it is not satisfied with the results of its due diligence investigations.

Often a termination right is not the purchaser's ideal solution to unexpected due diligence results, since the purchaser may have to terminate the agreement to purchase, take the risk of losing the property, and negotiate a new deal with the vendor, merely to reopen the environmental risk allocation provisions. Provisions which reallocate environmental risk depending on the results of the purchaser's due diligence investigations, without requiring a complete termination and renegotiation of the transaction, may be preferable but are often difficult for the vendor to accept.

For comprehensive environmental provisions for purchase and sale agreements, see CLE's *Collected Real Estate Precedents*, FP 1-16.

a. Definitions

Common environmental-related definitions in purchase agreements include:

- “Contaminants” (or some variation)—The definition should be broad enough to include regulated substances that may be present above-ground or in improvements or equipment such as asbestos and PCBs.
- “Environmental Laws”—The definition should include the Common Law and the law of equity. Consider whether the definition should include guidelines, rules or other policies of a governmental authority that may not have the force of law.
- “Release”—The definition should be broad enough to include discharges to air, and not just discharges to ground or water.

b. Representations and Warranties

Common environmental-related representations and warranties in purchase agreements include:

- A representation that the property is free of Contaminants—In most cases, the vendor will seek to qualify this kind of representation with a limitation excepting Contaminants present in concentrations or amounts that do not exceed applicable standards under Environmental Laws or stored in compliance with Environmental Laws. Without it, the effect of the representation is that the property is completely free of contaminants, even trace amounts and contaminants that are being stored on site in compliance with Environmental Laws. In most cases, the qualification is reasonable because few, if any, properties are completely free of contaminants. At times, when the allocation of liability between the parties is such that the vendor is to remain liable for all contaminants, the qualification is eliminated as a means of imposing liability on the vendor for the presence of any contaminants. However, this result is better achieved through the use of a covenant or indemnity, rather than a representation that is likely a misrepresentation from the outset. Consider carefully what standards the qualification relies on. The standard applicable to a site is based on a number of factors, including surrounding land and groundwater use that may not be immediately apparent from the current land use of the site itself. In circumstances where the purchaser intends on changing the site's land use, the purchaser may want to consider asking for the qualification to refer to the standards applicable to the purchaser's intended use of the property.
- A representation, especially where the “free of Contaminants” representation discussed above accepts Contaminants stored in compliance with Environmental Laws, that the vendor has disclosed the location of all such stored Contaminants or storage devices whether in use or abandoned, usually in a disclosure schedule to the purchase agreement. In this way, the purchaser is aware of the location of those Contaminants and devices. This would capture, for example, the location of underground storage tanks.
- A representation that Contaminants are not migrating to or from the property—In some cases the vendor will seek to qualify this representation in the same fashion as the “free of Contaminants” representation with a limitation excepting Contaminants in concentrations or amounts that do not exceed applicable standards. In respect of migrating Contaminants, the

reasonableness of this qualification is less certain. The impacts of migrating contamination, especially contamination migrating from the site onto another site, are rarely known to the vendor. Similarly the use, or planned use of neighbouring properties, may mean different standards apply or will apply than those applicable to the vendor's property. As a result, even small amounts of migrating Contaminants, well below applicable standards for the vendor's property, may have more significant impacts offsite. For all these reasons, full disclosure (usually in a disclosure schedule) of migrating Contaminants is preferable, leaving it to the purchaser to assess the risk of the migrating Contaminants.

- A representation that the vendor and the property are not the subject of any litigation—The Purchaser should be sure that this representation is broad enough to include any regulatory or other action commenced by a governmental authority, including any order issued by or investigation commenced by any governmental authority.
- A representation that the vendor has disclosed all environmental investigations or audits of the site, and has disclosed all related reports, correspondence with governmental authorities or other similar related documents. This representation is often qualified by limiting its scope to the vendor's knowledge. This representation is sometimes omitted in "as is where is" transactions where the purchaser is to bear all environmental risks because the vendor believes the disclosure is not required or is not prepared to disclose all of the information. But in failing to disclose this information in some form the vendor may be failing to comply with the second condition of the innocent purchaser exemption discussed above and may in doing so eliminate its ability to rely on the innocent acquisition exemption in the future. In most cases, then, it is in the interests of both parties to retain the representation. It need not change the risk allocation in an "as is where is" transaction as the purchaser can still agree to bear the risk of all environmental issues, including those that are disclosed. But it will reduce the uncertainty of those risks for the purchaser, and it will maintain the vendor's eligibility for the innocent acquisition exemption.

c. **Covenants**

Common environmental-related covenants in purchase agreements include:

- A covenant for the vendor to deliver a completed Site Profile to the purchaser if required by Environmental Laws, or alternatively a provision where the purchaser waives such requirement. If the purchaser is entitled to and wants to receive a Site Profile as part of its due diligence investigations, it should be sure to require the delivery of the Site Profile early enough so that it can inform subsequent due diligence investigations, and at the very least the delivery date should come before the applicable subject removal date.
- A covenant for the vendor to complete certain remediation before closing and, sometimes, to deliver a Certificate of Compliance to the purchaser in respect of that remediation. Where the parties are aware that the subject site is a Contaminated Site, remediation covenants are often considered, particularly where the purchaser's intended use of the site would require the remediation in any event. In those circumstances it is often beneficial for the vendor to complete the remediation. The vendor can manage the process and the remediation costs before it loses control of the site. The vendor no longer needs to accept a discounted purchase price because of the uncertainty associated with the remediation. And the purchaser receives a remediated site. The purchaser, however, must be careful of the flexibility it provides to the vendor to remediate. There are many ways to remediate a site, including risk based remediation where Contaminants can remain onsite so long as their pathway to the environment is somehow limited or blocked. Often this requires certain conditions be placed on the use of the land (for example, that no excavation onsite below a specific depth can be undertaken or that certain ongoing monitoring must be conducted for several years following the remediation to ensure the assumptions used in the risk assessment remain true). These conditions are often written into the Certificate of Compliance obtained by the vendor from the Ministry of Environment on completion of the remediation work. The purchaser needs to ensure the remediated site the

vendor delivers on closing is in fact a site that the purchaser can use for the purchaser's intended purpose. The costs of any continuing obligations, like monitoring costs, should also be addressed.

- A covenant for the vendor to grant access to the purchaser for its environmental due diligence. This is particularly important when the purchaser intends on completing or is not sure whether it will require a Phase I or Phase II environmental investigation of the subject site. For sites where commercial or industrial operations are being carried on, the covenant should require the vendor to make relevant personnel available to the purchaser's environmental consultants for interviews or other information gathering.

d. Indemnities

Environmental-related indemnities vary from agreement to agreement depending on the negotiated allocation of risk. In many respects indemnities are the most common and most effective means of allocating environmental risk between the parties. It is important to remember, however, that an indemnity is only as good as the strength of the indemnitor's covenant. The indemnity is worthless if the indemnitor does not have the means to satisfy a claim. In some cases where this is a concern, environmental insurance can be used to provide the required comfort.

In "as is where is" transactions, the indemnity is generally granted by the purchaser in favour of the vendor in respect of all environmental liabilities that may arise in connection with the property. There are also transactions at the other end of the spectrum, most often when the property is clean, where the vendor agrees to indemnify the purchaser for all environmental liability on the basis that there are none and the purchaser is paying for a clean site.

There are also a number of variations in between. One common variation that can be problematic involves cross-indemnities where the vendor indemnifies the purchaser for liability that arises in relation to contamination that predates the purchaser's ownership of the property and the purchaser indemnifies the vendor for liability that arises in relation to contamination that occurs after the vendor's disposition of the property. Often this allocation of risk is agreed to without the benefit of any site investigation that documents the state of the property as of closing. This can be problematic because it is sometimes difficult to distinguish between contamination that predated the transaction and contamination that only arose after the transaction, especially where the purchaser continues to carry on the same operation or kinds of activities at the site as the vendor carried on before the transaction. Contamination can become co-mingled and virtually impossible to attribute to one party or the other. Generally this arrangement favours the vendor since the purchaser is left with the contaminated property and the onus to prove on a balance of probabilities that some or all of the contamination predates its acquisition of the site. If this is the risk allocation agreed to between purchaser and vendor, it should be accompanied by provisions providing for a baseline environmental investigation of the property to establish the environmental condition of the property as of closing. Contamination identified in the report is attributable to the vendor and contamination not identified in the report becomes the responsibility of the purchaser. The purchaser should ensure the scope of the investigation is adequate since it will be bearing the risk for any contamination the investigation fails to uncover.

III. The Sale of Real Property

A. Why Environmental Issues?

A vendor must also be concerned with environmental issues because the risk of environmental liabilities does not disappear on the disposition of real property. Environmental liabilities can follow the vendor for a time after disposition, even indefinitely.

Contamination liability under the *EMA* is absolute, retroactive, and joint and several. The retroactive nature of the liability means the vendor's liability for the property as a responsible person does not terminate when the vendor disposes of its interest in the property. Even if the property becomes contaminated after the vendor has disposed of its interest, the broad liability net of the *EMA* and *CSR* considers the vendor a responsible person as a former owner or operator of the site. In order to limit its exposure to ongoing contingent liabilities, a vendor must take active steps to mitigate these risks.

B. Mitigating Risks

I. Remediation/Baseline Studies

One sure way to mitigate ongoing environmental risk is to remediate a contaminated site before disposition and/or to document that the site is clean at the time of disposition.

In respect of a clean site, a vendor could seek to rely on the "Clean Use" exemption afforded by the *EMA*. The "Clean Use" exemption affords relief to those parties that acquire a site that is not a contaminated site at the time of acquisition, and who during their ownership of or operation on the site did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.³¹ Given the onus is on the party seeking to claim the exemption, it is important for the party seeking the exemption to have some evidence that demonstrates that site was clean at the time of acquisition and that the party did not cause the site to be a contaminated site. The second prong of the test is often difficult to establish. Practically, the evidence commonly sought to satisfy the second prong of the test is evidence that the site was clean at the time of disposition.

In the end result, a vendor can seek to mitigate ongoing environmental risks through the clean use exemption by obtaining "baseline studies"—environmental investigations of the property—at the time of acquisition and at the time of disposition. Given the ongoing nature of the liability, it is important that these studies and other evidence the vendor will want to rely on for purposes of claiming the exemption are preserved. Occasionally document retention policies or the mere passage of time would see the studies and other evidence destroyed.

In respect of a contaminated site that a vendor elects to remediate before disposition, the vendor can apply for a Certificate of Compliance.³² The Certificate of Compliance qualifies the vendor for the "greener use" exemption which provides that a person who is a responsible person for a site for which a Certificate of Compliance has been issued is not a responsible person for purposes of the site if another person subsequently proposes or undertakes to change the use of the site and provide additional remediation.³³

Even if the vendor fails to qualify for the greener use exemption, remediation before disposition is often an attractive means of mitigating ongoing environmental risk. Once the vendor has disposed of its interest in a contaminate site, it loses control over the site. Subsequent remediation activities, especially by parties other than the purchaser with whom the vendor is unable to mitigate its risk through contract, could expose the vendor to liability for the costs of those remediation activities. Perhaps even more troubling, the vendor has no control in respect of the scope of those remediation activities. While only reasonable remediation costs are recoverable in a cost recovery action, this may provide little comfort to a vendor that must seek to limit its liability by defending the cost recovery action on the basis the claimant's remediation was unreasonable.

31 *EMA*, s. 46(1)(e).

32 *EMA*, s. 53(3).

33 *EMA*, s. 46(1)(m).

2. The Sale Agreement

A vendor is also able to mitigate ongoing environmental risks in the sale agreement, particularly where the sale is on an “as is where is” basis where the purchaser is to become responsible for all environmental liabilities associated with the subject property. However, the comfort available to the purchaser is limited in two respects. First, any liability limitations contained in the sale agreement generally only operate as between the vendor and purchaser. Given the *EMA* provides the Ministry of Environment with the authority to issue orders against the vendor, and cost recovery actions are available to anyone who carries out remediation work at the site, the sale agreement provides the vendor with little or no protection from these third party proceedings or claims. Second, even if the vendor seeks and obtains protection against third party claims through an indemnity from the purchaser, the vendor’s protection is limited by the financial ability of the purchaser to satisfy the claim.

In addition to the issues discussed in Section II(B)(2), other common environment-related provisions in a sale agreement that are of interest to a vendor include:

- A full or limited indemnity as discussed above.
- A release of claims from the purchaser. The release is commonly a general release of all environmental claims in an “as is where is” transaction, or a more limited release in other transactions where the purchaser can only advance environmental claims available under the sale agreement, but not otherwise. That precludes the purchaser from circumventing the negotiated allocation of environmental risk in the sale agreement by making use of statutory or common law actions that may be available to the purchaser.
- A covenant or indemnity limiting the vendor’s liability in the event the purchaser “invites” a third party claim or regulatory action. The provision is commonly used when contamination for which the vendor has agreed to bear some or all responsibility remains onsite as at closing. The provision seeks to protect the vendor against liabilities that may arise because the purchaser invites or cultivates the regulatory action or claim, that gives rise to the liability through the disclosure of confidential information or otherwise. Often this provision is accompanied by a confidentiality covenant.
- A sunset on any environmental liabilities that are being retained by the vendor, particularly where the purchaser will be carrying on the same or similar activities on the site as the vendor had been carrying on. It is often difficult to date contamination, but most contamination generally degrades with time. As a result, over time, contamination present on the property is less likely to have been caused by the vendor.

IV. Conclusion

A consideration of environmental issues is an important part of every real estate transaction. Risks—often unidentifiable because of the latent nature of many environmental problems—exist for both purchaser and vendors. However, with informed legal advice, the uncertainty surrounding those risks can be minimized, and the remaining risks mitigated by way of a comprehensive negotiated allocation of risk between purchaser and vendor. The issues at the margins are complex, particularly in light of the complexity of the contaminated sites regulatory regime in BC. They must be worked through in detail to ensure the risk allocation the purchaser and vendor have bargained for is in fact the risk allocation reflected in the purchase and sale agreement.