

TAB 14

ENVIRONMENTAL MANAGEMENT ACT
[SBC 2003] CHAPTER 53

Persons not responsible for remediation

46 (1) The following persons are not responsible for remediation of a contaminated site:

(a) a person who would become a responsible person only because of an act of God that occurred before April 1, 1997, if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(b) a person who would become a responsible person only because of an act of war if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(c) a person who would become a responsible person only because of an act or omission of a third party, other than

(i) an employee,

(ii) an agent, or

(iii) a party with whom the person has a contractual relationship,

if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(d) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

(ii) if the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and

(iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

(e) an owner or operator who

- (i) owned or occupied a site that at the time of acquisition was not a contaminated site, and
 - (ii) during the ownership or operation, 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;
- (f) a person described in section 45 (1) (c) or (d) or (2) (c) or (d) *[persons responsible for remediation of contaminated sites]* who
 - (i) transported or arranged to transport the substance to the site, if the owner or operator of the site was authorized under an Act to accept the substance at the time of its deposit, and
 - (ii) received permission from the owner or operator described in subparagraph (i) to deposit the substance;
- (g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;
- (g.1) a government body that takes possession of or acquires an ownership interest in the contaminated site under an order of the court under section 5, 8 (3) or 14 of the *Civil Forfeiture Act* or a delegate under section 21 (2) of that Act who is exercising powers or performing functions and duties of the director, as defined in that Act, in relation to the contaminated site;
- (h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion;
- (i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent;
- (j) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;
- (k) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;
- (l) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewerage or waterworks on a contaminated site, to the extent of the possession, ownership or operation;
- (m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to
 - (i) change the use of the contaminated site, and

(ii) provide additional remediation;

(n) a person who is in a class designated in the regulations as not responsible for remediation.

(2) Subsection (1) (l) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewerage or waterworks by the government body that possesses, owns or operates the roadway, highway or right of way for sewerage or waterworks.

(2.1) Subsection (1) (g.1) does not apply with respect to contamination if the government body or delegate referred to in that provision caused or contributed to the contamination of the site.

(3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

General principles of liability for remediation

47 (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

(2) Subsection (1) must not be construed as prohibiting the apportionment of a share of liability to one or more responsible persons by the court in an action or proceeding under subsection (5) or by a director in an order under section 48 [*remediation orders*].

(3) For the purpose of this section, "**costs of remediation**" means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 [*determination of contaminated sites*] as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a director, a municipality, an approving officer or the commission under this Part.

(4) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

(5) Subject to section 50 (3) [*minor contributors*], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

(6) Subject to subsections (7) and (8), a person is not required to obtain, as a condition of an action or proceeding under subsection (5) being heard by a court,

(a) a decision, determination, opinion or apportionment of liability for remediation from a director, or

(b) an opinion respecting liability from an allocation panel.

(7) In all cases, the site that is the subject of an action or proceeding must be determined or considered under section 44 [*determination of contaminated sites*] to be or to have been a contaminated site before the court can hear the matter.

(8) Despite subsection (7), if independent remediation has been carried out at a site and the site has not been determined or considered under section 44 [*determination of contaminated sites*] to be or to have been a contaminated site, the court must determine whether the site is or was a contaminated site.

(9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:

(a) whether a person is responsible for remediation of a contaminated site;

(b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

(c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;

(d) such other determinations as are necessary to a fair and just disposition of these matters.

Remediation orders

48 (1) A director may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:

- (a) undertake remediation;
- (b) contribute, in cash or in kind, towards the costs of another person who has reasonably incurred costs of remediation;
- (c) give security, which may include real and personal property, in the amount and form the director specifies.

(3) For the purpose of deciding whether to require a person to undertake remediation under subsection (2), a director may consider whether remediation should begin promptly, and must consider each of the following:

- (a) adverse effects on human health or pollution of the environment caused by contamination at the site;
- (b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;
- (c) the likelihood of the responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;
- (d) in consultation with the chief inspector appointed under the *Mines Act*, the requirements of a reclamation permit issued under section 10 of that Act;
- (e) in consultation with the commission, the adequacy of remediation being undertaken under section 84 of the *Petroleum and Natural Gas Act*;
- (f) other factors prescribed in the regulations.

(4) For the purpose of deciding who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a director, to the extent feasible without jeopardizing remediation requirements, must

- (a) take into account private agreements between or among responsible persons respecting liability for remediation, if those agreements are known to the director, and
- (b) on the basis of information known to the director, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account such factors as
 - (i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and
 - (ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify a right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common

law, including, but not limited to, damages for injury or loss resulting from a release or threatened release of a contaminating substance.

(6) If a remediation order, or a pollution abatement order under section 83 *[pollution abatement orders]* that imposes a requirement for remediation, is issued in respect of a site, and the director has not yet determined under section 44 *[determination of contaminated sites]* whether the site is a contaminated site, as soon as reasonably possible after the issuance of the order, the director must determine

(a) whether the site is a contaminated site, in accordance with section 44 *[determination of contaminated sites]*, and

(b) whether the person named in the order is a responsible person under section 45 *[persons responsible for remediation of contaminated sites]*.

(7) If a person named in an order referred to in subsection (6) is determined not to be a responsible person, the government must compensate the person, in accordance with the regulations, for any costs directly incurred by the person in complying with the order.

(8) A person who receives a remediation order under subsection (1) or notice of a remediation order under subsection (13) must not, without the consent of the director, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and if the person does so, the director despite any other remedy sought, may commence an action against the person to recover the amount of the diminishment or reduction.

(9) The director may provide in a remediation order that a responsible person is not required to begin remediation of a contaminated site for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to

(a) human health, given current and anticipated human exposure, or

(b) the environment.

(10) A person who has submitted a site profile under section 40 (7) *[site profiles of trustee, receiver, etc.]* must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation, by

(a) disposing of real or personal assets, or

(b) subdividing land

unless he or she first requests and obtains written notice from a director that the director does not intend to issue a remediation order.

(11) If a director issues or gives notice of the intention to issue a remediation order to a person referred to in subsection (10), subsection (8) applies.

(12) A director may amend or cancel a remediation order.

(13) A director, on making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest in the contaminated site if the interest is registered in the land title office or a land registry office of a treaty first nation at the time of issuing the order.

(14) A remediation order may authorize, subject to the terms and conditions a director considers necessary and reasonable, any person designated by the director to enter specified land for the purpose of ensuring that the remediation order is carried out according to its terms.

(15) If a remediation order authorizes a person to enter specified land, the person who owns or occupies the land must allow the authorized person to enter in accordance with the authorization.

(16) Subsections (14) and (15) do not authorize any person to enter any structure or part of a structure that is used solely as a private residence.

Minor contributors

50 (1) A director may determine that a responsible person is a minor contributor if the person demonstrates that

(a) only a minor portion of the contamination present at the site can be attributed to the person,

(b) either

(i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or

(ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and

(c) in all circumstances the application of joint and separate liability to the person would be unduly harsh.

(2) If a director makes a determination under subsection (1) that a responsible person is a minor contributor, the director must determine the amount or portion of remediation costs attributable to the responsible person.

(3) A responsible person determined to be a minor contributor under subsection (1) is liable for remediation costs in an action or proceeding brought by another person or the government under section 47 [*general principles of liability for remediation*] only up to the amount or portion specified by the director in the determination under subsection (2).

(4) If a director has determined that a responsible person is a minor contributor for a site, the site is considered to be a contaminated site at the time of that determination, despite the absence of a determination under section 44 (1) [*determination of contaminated sites*].

Orphan sites

- 58 (1) A director may determine in accordance with the regulations whether
- (a) a contaminated site is an orphan site, and
 - (b) an orphan site is a high risk orphan site.
- (2) The minister may declare, in writing, that it is necessary for the protection of human health or the environment for the government to undertake remediation of
- (a) a contaminated site that is not otherwise being adequately remediated, or
 - (b) a high risk orphan site.
- (3) If the minister has made a declaration under subsection (2), the minister may carry out remediation and recover the reasonably incurred costs of the remediation and the minister, or an officer authorized in writing by the minister, may, even though the ordered action interferes with or abrogates property rights, order any person to
- (a) provide labour, services, material, equipment or facilities, or
 - (b) allow the use of land for the purpose of undertaking the remediation.
- (4) If the minister has made a declaration under subsection (2), a director, an officer or any person directed to do so by the officer, may enter property and carry out remediation, even though the entry or remediation interferes with or abrogates property rights.
- (5) A person affected by an order made under subsection (3) must comply with the order despite any other enactment.
- (6) If the minister certifies that money is required to undertake remediation under this section, the amount the minister certifies to be required may be paid out of the consolidated revenue fund.
- (7) A certificate signed by the minister and showing an amount of money spent by the government under this section is conclusive proof of the amount spent.
- (8) If the minister makes a declaration under subsection (2) or an order under subsection (3), the registrar must make a notation of the declaration or order on the site registry.

Pollution abatement orders

- 83 (1) If a director is satisfied on reasonable grounds that a substance is causing pollution, the director may order any of the following persons to do any of the things referred to in subsection (2):
- (a) a person who had possession, charge or control of the substance at the time it was introduced or escaped into the environment;

(b) a person who owns or occupies the land on which the substance is located or on which the substance was located immediately before it was introduced into the environment;

(c) a person who caused or authorized the pollution.

(2) An order under subsection (1) must be served on the person to whom it applies and may require that person, at his or her own expense, to do one or more of the following:

(a) provide to the director information that the director requests relating to the pollution;

(b) undertake investigations, tests, surveys and any other action the director considers necessary to determine the extent and effects of the pollution and to report the results to the director;

(c) acquire, construct or carry out any works or measures that are reasonably necessary to control, abate or stop the pollution;

(d) adjust, repair or alter any works to the extent reasonably necessary to control, abate or stop the pollution;

(e) abate the pollution;

(f) carry out remediation in accordance with any criteria established by the director.

(3) An order under subsection (1) may authorize any persons designated by the director to enter land for the purpose of controlling, abating or stopping the pollution or to carry out remediation.

(4) A director may amend or cancel an order made under this section.

(5) The powers given by this section may be exercised even though the introduction of the substance into the environment is not prohibited under this Act or is authorized under this Act.

(6) For the purposes of this section, "**person**" does not include a municipality.