Environmental Appeal Board

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DECISION NOS. 1998-WAS-018(c) & 1998-WAS-031(a)

In the matter of two appeals under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	Halme's Auto Service Ltd.	**APPELLANT / THIRD PARTY**
AND:	Petro Canada Limited, now known as Suncor Energy Inc.	**APPELLANT / THIRD PARTY**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	Chardale Enterprises Ltd.	**THIRD PARTY**
AND:	Attorney General of British Columbia	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 21, 2013	

APPEARING:	For the Appellant:	
	Halme's Auto Service Ltd.	Robert M. Lonergan, Counsel
	Petro Canada Ltd. (Suncor)	Sharon M. Urquhart, Counsel
	For the Respondent:	Dennis Doyle, Counsel
	For the Third Party:	
	Chardale Enterprises Ltd.	Maureen Abraham, Counsel
	Attorney General of BC	Bryant Mackey, Counsel

APPEALS

[1] Halme's Auto Service Ltd. ("Halme's") and Petro Canada Limited ("Petro Canada"), now known as Suncor Energy Inc. ("Suncor") filed separate appeals against a remediation order (the "Order") issued on June 10, 1998, by D.F. Brown, the Regional Waste Manager (the "Regional Manager"), Vancouver Island Region, Ministry of Environment (the "Ministry"). The Order was issued to Halme's, Petro Canada, and Chardale Enterprises Ltd. ("Chardale"), and requires the remediation of gasoline contamination on a parcel of land located at 9793 Chemainus Road, Chemainus, British Columbia (the "Site").

[2] In addition, Halme's and Suncor filed separate appeals against a determination of minor contributor status (the "Determination") issued on October

30, 1998, by the Regional Manager. The Regional Manager determined that Chardale was a minor contributor in respect of the contamination at the Site.

[3] When the appeals were filed, the Environmental Appeal Board had the authority to hear the appeals under the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the *"Act*"). Although the *Act* was repealed and replaced by the *Environmental Management Act*, S.B.C. 2003, c. 53, in 2004, these appeals must be decided based on the provisions of the *Act* in effect when the appeals were filed. Section 47 of the *Act* gives the Board the power to: confirm, reverse or vary the decision being appealed; send the matter back to the person who made the decision, with directions; or, make any decision the person whose decision is appealed could have made, and that the Board considers appropriate in the circumstances.

[4] It should be noted that the Regional Manager's powers under the *Act* in relation to the Order and the Determination are now exercised by a Director under the *Environmental Management Act*.

[5] Halme's requests that the Board:

- set aside the Order as against Halme's;
- set aside the Determination in its entirety; and
- declare section 27.3 of the *Act* to have been of no force or effect.

[6] Suncor requests that the Board:

- vary or amend the Order to remove Suncor as a party named in it;
- alternatively, send the Order back to the Director with directions for proper reconsideration;
- declare the Determination to be null and void, and of no force and effect;
- alternatively, set aside the Determination or send it back to the Director with directions for proper reconsideration; and
- make an order of costs in favour of Suncor.

[7] Halme's was offered, and accepted, Third Party status in Suncor's appeals, and vice versa.

[8] In addition, the Board offered Third Party status in all of the appeals to Chardale, Chemainus Fuels Ltd. ("Chemainus Fuels"), the Attorney General of British Columbia (the "Attorney General"), and the Attorney General of Canada.

[9] The Attorney General of Canada declined Third Party status, and did not participate in the hearing of the appeals.

[10] Chemainus Fuels accepted Third Party status in the appeal of the Order, but did not participate in the appeal hearing.

[11] Chardale and the Attorney General accepted Third Party status, and participated in the appeal hearing. The Attorney General's participation arises because the appeals of the Determination raise a constitutional question regarding the Province's jurisdiction to enact section 27.3 of the *Act*.

[12] These appeals were heard jointly, by way of written submissions.

BACKGROUND

The History of the Site and the Contamination

[13] The Site was the location of a retail gasoline station from approximately 1954 to 2004. An automotive repair business also operated on the Site since the 1950's, and still operated on the Site when these appeals were heard.

[14] In November 1957, British American Oil Company Ltd., a corporate predecessor to Gulf Oil Canada Ltd. ("Gulf Oil"), leased the Site from Beggs Brothers Contracting Ltd., which owned the Site at that time.

[15] In or about 1958, two underground storage tanks were installed at the Site. Gasoline was stored in the underground storage tanks and sold to retail customers.

[16] In 1969, Bill and Bert Holdings Ltd. acquired the Site, and leased the Site to Gulf Oil, a corporate predecessor to Petro Canada.

[17] Halme's and/or its principal, David Halme, operated the gas station and automotive repair business on the Site from 1964 to 1993. Subsequently, Mr. Halme and another person, and/or a company owned by them, subleased the automotive service bays and operated the automotive repair business on the Site. That arrangement continued when these appeals were heard.

[18] In September 1972, Halme's and Gulf Oil entered into a Retail Dealer Sales Agreement, as amended by a Retail Dealer Amendment Agreement. Under the Retail Dealer Sales Agreement, Halme's agreed to allow Gulf Oil to store gasoline in storage tanks on the Site, and the gasoline remained the property of Gulf Oil until it was sold to Halme's "at the pumps." Property in the gasoline passed to Halme's "when the gasoline passes through the gasoline pumps connected to said storage tanks."

[19] In 1974, Halme's leased the Site from Bill & Bert Holdings Ltd.

[20] In May 1979, Halme's purchased the Site from Bill & Bert Holdings Ltd. From approximately September 1979 to May 31, 1984, Halme's leased the Site to Gulf Oil, which sub-leased it back to Halme's.

[21] In March 1980, a gasoline leak from one of the underground storage tanks was discovered. In response, Gulf Oil made arrangements to replace the two existing underground tanks, and to purchase and install two new underground tanks. The Board was provided with a copy of a March 10, 1980 document from Gulf Oil titled "Authority for Expenditure", which states, in part, as follows:

> 1. One of the existing 2000 gallon tanks is leaking and both tanks must be replaced immediately—the local Fire chief has agreed to give us a short period of grace.
> 2. Replace the existing tanks with 2 X 5000 tanks to alleviate delivery problem which now exists.
>
> ...

[22] The Authority for Expenditure document then lists the estimated cost to purchase and install two 5000 gallon underground tanks. Under the heading

"terms", the document states that Halme's was "to be responsible for the payment of the tanks only." Related documents show that Halme's agreed to pay Gulf Oil for the new tanks by way of monthly installments over a three-year period.

[23] The parties dispute whether, or to what degree, any gasoline contamination and/or contaminated soil at the Site was removed or remediated at that time.

[24] Sometime after March 1980 but before June 1984, Petro Canada acquired Gulf Oil. Halme's asserts, and Suncor does not dispute, that Petro Canada acquired Gulf Oil's liabilities when it acquired Gulf Oil.

[25] From June 1, 1984 to May 31, 1989, Halme's leased the Site to Petro Canada, which sub-leased it back to Halme's.

[26] On June 1, 1989, Halme's entered into a five-year agreement to lease the Site to Petro Canada. Concurrently, Petro Canada sub-leased the site back to Halme's.

[27] In 1989, a third underground storage tank was installed at the Site.

[28] In January 1993, Halme's and Chardale entered into an asset purchase agreement. Under the asset purchase agreement, Halme's agreed to sell the Site and business thereon to Chardale, and Halme's took back a mortgage on the Site. Also at that time, pursuant to a cross-lease assignment agreement, Halme's assigned the 1989 lease and sublease agreements to Chardale, with Petro Canada's consent.

[29] Chardale still owned the Site when these appeals were heard.

[30] In 1995, Chardale hired EBA Engineering Consultants Ltd. ("EBA") to conduct a preliminary environmental assessment at the Site. In late April 1995, EBA drilled ten bore holes, including three monitoring wells, in the vicinity of the existing underground storage tanks and the pump island. EBA collected groundwater samples from the three monitoring wells, and collected soil samples from the monitoring wells and four bore holes. A summary of the field observations is provided in the May 1995 Phase II Environmental Site Assessment Report by EBA (the "EBA Report"). According to the summary of the field observations, hydrocarbon odours and trace hydrocarbon staining were noted in boreholes and monitoring wells in the area of the tank nest under the car wash bays (the tank added in 1989 was in a separate nest), and in the native sand and clay till as well as the overlying fill material near the pump island.

[31] In its executive summary, the EBA Report states that, based on soil samples, "there is indication of significant weathered gasoline contamination of the subsoils in the tanks nest located within the car wash bays." The soil samples showed "hydrocarbon contamination above BC MoE [Ministry] Level C [commercial land use] criteria in the vicinity of the USTs located beneath the existing car wash bays for ethylbenzene, total xylenes and light hydrocarbons." Soil samples from two locations near the tank nests beneath the car wash bays even exceeded the prescribed Special Waste criteria for total xylenes, meaning that the soil was especially environmentally hazardous and would require special treatment. In addition, based on the groundwater samples, the EBA Report states that "there is an indication of hydrocarbon contamination of the groundwater near both the tank

nests and down gradient from the pump island." The EBA Report also states that "soil near the pump island… may contain concentrations of BTEX [benzene, toluene, ethylbenzene and total xylenes] exceeding CMCS [the Ministry's Criteria for Managing Contaminated Sites] Level C [commercial land use] criteria" based on an elevated soil hydrocarbon vapour reading at that location.

[32] In June 1995, Chardale subleased the automotive service bays to David Halme and another person, or a company owned by them. This arrangement continued when these appeals were heard.

[33] In April 1996, the three existing underground storage tanks on the Site (i.e., the two installed in 1980 and the one installed in 1989) and associated distribution lines were removed. New tanks were installed in a new tank nest location on the Site. Seacor Environmental Engineering Ltd. ("Seacor") was retained by Gordon "Chuck" Ballard, the principal of Chardale, to conduct drilling investigations and environmental monitoring at the Site. Seacor recorded observations of the condition of the underground storage tanks that were removed. During April, June, and July 1996, Seacor drilled 14 boreholes, and took 19 soil samples and six groundwater samples for laboratory testing.

[34] By a letter dated May 10, 1996, the Ministry advised Mr. Ballard that it approved a remediation plan "in principal" subject to certain conditions, including submission of a treatment system design and monitoring proposal to track the progress of soil and groundwater remediation, a description of the new underground storage tank installation, and the results from soil investigations in the vicinity of the new underground storage tank nest. According to the Ministry's letter, the investigations by EBA and Seacor only related to the southern half of the Site.

[35] On October 18, 1996, Seacor issued a report (the "Seacor Report") to Mr. Ballard, which describes Seacor's field observations, and the results of the investigations and analysis of the soil and groundwater samples from the Site. At page six, the Seacor report states as follows regarding the storage tanks and distribution lines that were removed in April 1996:

> The three 22 500 litre UST's [underground storage tanks] were observed to be in "good" condition with very little surface rusting evident. However, the associated distribution piping was heavily rusted and pitted. The tank nest backfill soils were heavily stained and had heavy hydrocarbon odours.

[36] Regarding the results from soil samples, the Seacor Report states that a soil sample taken from borehole 15 drilled near the former tank nest exceeded the Special Waste criteria (in the *Regulation*) for xylenes, exceeded the Commercial Land Use criteria for light hydrocarbons, and exceeded the Residential Land Use criteria for ethylbenzene. Hydrocarbon sheens were observed in borehole 15, monitoring well 1 located in the area of the former tank nests, and monitoring well 3 located near the pump island. A soil sample taken from borehole 17 drilled inside the service bay area exceeded the Commercial Land Use criteria for xylenes, and exceeded the Residential Land Use criteria for xylene, light hydrocarbons, and ethylbenzene. Soil samples from several other locations on the Site exceeded the Residential Land Use criteria for xylene, light hydrocarbons, and/or ethylbenzene.

[37] Regarding the groundwater samples, the Seacor Report states that dissolved benzene concentrations exceeded the Aquatic Life criteria at borehole 15 and monitoring well 1, while monitoring well 3 exceeded the Drinking Water criteria. Dissolved ethylbenzene concentrations exceeded the Aquatic Life criteria at monitoring wells 1 and 3, and exceeded the Drinking Water criteria at borehole 15. Toluene concentrations exceeded the Aquatic Life criteria at borehole 15, and exceeded the Drinking Water criteria at monitoring wells 1 and 3. Xylene concentrations exceeded the Drinking Water criteria at borehole 15 and monitoring wells 1 and 3.

[38] On December 20, 1996, Chardale (and Chemainus Auto Service Ltd., a company associated with Chardale) leased the Site to a numbered BC company, later known as Chemainus Fuels Ltd., for five years. Under the 1996 lease agreement, Chardale agreed to remediate the Site, and Chemainus Fuels had an option to purchase the Site for $15,000 once certain conditions were met, including the issuance of a certificate of compliance from the Ministry; i.e., once the Ministry was satisfied that the Site had been remediated in accordance with the applicable standards and requirements in the legislation. However, Chardale did not commence remediation of the Site.

[39] In August 1997, Chemainus Fuels notified Chardale that it intended to commence remediation at the Site, and would set off its remediation costs against rents and other monies payable to Chardale pursuant to the 1996 lease. Chardale objected.

[40] In or about September 1997, at Chardale's request, the Regional Manager appointed an allocation panel (the "Allocation Panel") pursuant to section 27.2 of the *Act*. The Allocation Panel proceedings are discussed below.

[41] On February 13, 1998, Chemainus Fuels commenced civil proceedings against Chardale in the BC Supreme Court. Chemainus Fuels sought an order that it was entitled to undertake the remediation that Chardale had agreed to do under the 1996 lease, and that Chemainus Fuels was entitled to set off all reasonable remediation costs against rents and other monies payable to Chardale under the 1996 lease.

Overview of the Legislative Scheme

[42] Part 4 of the *Act* (now Part 4 of the *Environmental Management Act*) addresses the identification of contaminated sites, liability for remediation of contaminated sites, implementation of remediation, and related matters such as the recovery of remediation costs by any person, including a responsible person or a regional manager, who incurs costs in remediating a contaminated site. If contamination is found on a property in excess of the applicable standards, a person may remediate the contamination under a voluntary remediation agreement with a regional manager (section 27.4) or independently on notification to a regional manager (section 28), or the Ministry may require a site to be remediated by issuing a remediation order to "responsible persons" (section 27.1).

[43] Section 26 of the *Act* defines a "responsible person" as "a person described in section 26.5." Section 26.5 states, in part, as follows:

26.5(1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

[44] Section 27(1) of the *Act* provides the general principles of liability, and states that a responsible person "is absolutely, retroactively and jointly and severally 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."

[45] However, section 26.6 of the *Act* provides that certain persons are not responsible persons.

[46] Also, under section 27.3, a regional manager may determine that a responsible person is a minor contributor to the contamination at a site. Section 27.3 of the *Act* states:

27.3 (1)A manager 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 contamination of 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 several liability would be unduly harsh.

[47] Section 27.2(2) authorizes a manager to appoint an allocation panel to provide an opinion on whether a person is a responsible person, whether a responsible person is a minor contributor, and the responsible person's contribution to the contamination and the share of the remediation costs attributable to this contamination. Section 27.2(5) states that a manager "may consider, but is not bound by, any allocation panel opinion."

[48] Additional requirements are found in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*"), which came into force on April 1, 1997. Schedules 4 and 5 of the *Regulation*, as it was when it came into force in 1997, set out numerical standards for contaminant levels in soils and water. The soil standards are based on land use categories (agricultural, urban park, residential, commercial, or industrial), and the water standards are based on water use categories (aquatic life, irrigation, livestock, or drinking water).

[49] In addition, section 38 of the *Regulation* is relevant to the appeals of the Determination. Section 38 requires that a person applying for minor contributor status must provide certain information to a manager, "to the extent that information is reasonably ascertainable," regarding matters such as the condition of the contaminated site when the applicant became an owner or operator at the site, the nature and quantity of contamination at the site attributable to the applicant, all measures taken by the applicant to prevent or remediate the contamination, the contamination on the site or released from the site that is attributable to the applicant and other persons at the site, and all measures taken by the applicant to exercise due diligence with respect to any substance that caused the site to become a contaminated site.

The Allocation Panel

[50] As noted above, the Regional Manager appointed an Allocation Panel in or about September 1997 at Chardale's request, to provide an opinion on: whether Chardale was a person responsible for remediating the Site; whether Chardale was a minor contributor to the contamination at the Site; and; Chardale's contribution to the contamination and its share of the remediation costs attributable to this contamination. Halme's, Petro Canada (now Suncor), Chemainus Fuels, David Halme, and some other potential responsible persons were notified that an allocation panel had been appointed.

[51] In December 1997, Petro Canada also requested an opinion from the Allocation Panel on whether, and to what extent, Petro Canada was a person responsible for remediating the Site, and to determine Petro Canada's contribution to the contamination and its share of the remediation costs.

[52] Halme's declined to participate in the Allocation Panel process, on the basis that it did not request the Allocation Panel and was not obligated under the *Act* to pay for the work performed by the Allocation Panel. According to Halme's, the Allocation Panel told Halme's that it would have to contribute to the cost of the Allocation Panel if it wanted to participate in the Allocation Panel process.

[53] In January 1998, Chardale and Petro Canada participated in a hearing before the Allocation Panel. Halme's and the other potential responsible persons were notified of the hearing, but did not participate in the hearing.

[54] On February 25, 1998, the Allocation Panel issued its opinion. The opinion provides that the panel considered the EBA report and the Seacor report. At pages 3 to 4, the Allocation Panel stated as follows regarding the cause of the contamination at the Site:

> There was no evidence submitted to suggest that any of the operators of the facilities after the tank pull in 1980 conducted themselves in a manner which would have resulted in the release of petroleum products. Indeed, reconciliation of volumes delivered versus volumes sold during the time period when Chardale operated the site was agreed by all parties to be very good. The panel considers that this reconciliation method would ordinarily provide the first indication of a significant leak of the underground storage tanks.
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> …
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> The panel finds that the most probable event which led to the release of petroleum products to the soil and groundwater at the site, was the leaking USTs that were installed in 1958 and discovered to be leaking in 1980. The releases occurred over an undefined period prior to 1980. … Apparently, Gulf Oil and Halme did not remove the contaminated soil that likely existed around the tanks in 1980. …

[55] The Allocation Panel's opinion includes several pages of discussion about the lease and sublease agreements involving Halme's, Chardale, Gulf Oil, and Petro Canada. At pages 20 and 21, the Allocation Panel rejected Petro Canada's submission that the terms of its lease and sublease agreements with Halme's, which were later assigned to Chardale, meant that Petro Canada's share of the remediation costs should be minor or nil:

> … Indeed, Petro Canada admits… that the fact that the lands were contaminated did not constitute a breach of Halme's covenant in the 1984 Head Lease… or the 1989 Sub Lease…. In fact, "contamination of the lands per se was not a breach by Halme's of its covenant to '…keep the demised premises and equipment in good and tenantable repair including structural repairs and wear and tear….' The leasing arrangements were entered into prior to the introduction of the sweeping environmental legislation now in force." (para. 115, PCI Supplemental Submission)
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> Since these lease provisions relating to the requirement placed on the dealer to maintain the premises are similar to those in place between Gulf Oil and Halme at the time the contamination was discovered, the panel is left with a serious question as to the strength of these various lease provisions in terms of shifting liability from Gulf Oil and Petro Canada unto [sic] the shoulders of Halme and Chardale. Also, taking into account the lack of agreement between the parties on the proper interpretation of these clauses, including the scope of the indemnification provisions, the panel is unable to rely on these private agreements as a means of determining that Petro Canada is

> only liable for a minor portion of the remediation costs at the site. The key consideration for the panel is the fact that Gulf Oil appears to have retained title to the petroleum product that is the source of the contamination present on the site, and the fact that Petro Canada appears to have acquired from Gulf Oil the environmental liability associated with the impact of this leaked product on the site in question. The question of whether the dealer cross lease arrangements are sufficient to shift the liability for the costs of remediation of the petroleum product found [i]n the soils and groundwater of the site is a question best left to the courts to determine.
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> ...
>
> In conclusion, the panel is not persuaded that only a minor portion of the costs of remediation are attributable to Petro Canada. The private agreements are not sufficiently free of interpretive difficulties to be useful to the panel's deliberation in this matter. The final allocation of liability for the costs of redemption [sic] between Petro Canada and Halme and Chardale may very well be a matter for the courts to determine based on the private agreements between the parties.
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> [underlining added]

[56] In regard to liability, the Allocation Panel concluded that Chardale was a responsible person, but was a minor contributor under section 27.3 of the *Act*, and was responsible for 4.5% of the costs of remediating the Site. In addition, the Allocation Panel concluded that Petro Canada was a responsible person, was not a minor contributor, and was responsible for 35% of the costs of remediating the Site. At pages 23 to 24, the Allocation Panel stated as follows regarding the respective shares of liability attributable to Chardale and Petro Canada:

> The legislation does not prescribe a prescriptive approach for specifying the share of the contamination attributable to two or more responsible persons. The panel considered, however, that a purpose of the Act is to distribute the liability of responsible persons according to three main factors:
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> > **Activities** which contributed to the contamination;
> > **Duration** of fee simple ownership and control at the site;
> > **Product ownership**, i.e. ownership of the contaminating substance.
>
> The panel also considers that the first of these three factors – contaminating activities – should be weighted more heavily when assigning liability shares, given the legislation's clear "polluter-pay" intent.
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> In the case at hand, the panel is of the view that the fair application of the three above-noted factors is as follows:
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> - Responsible persons who are primarily responsible for activities which contributed to the contamination should collectively incur 50% of the total remediation costs. ... In turn, the allocation of liability amongst responsible persons in this category would logically be done on the basis of comparative degree of harm.

- Responsible persons who can best be described as being fee simple owners of the site (irrespective of whether their activities contributed to the contamination) should collectively incur 25% of the liability.
- Responsible persons who can best be described as being owners of the contaminating substances (irrespective of whether they directed the contaminating activities) should collectively incur 25% of the liability.

Applying this approach to the two requests before us, the results are as follows:

Chardale – Chardale's primary responsibility derives from its role as a fee simple owner at the site. These owners, as noted above, should collectively incur 25% of the total liability. The most reasonable approach to determine Chardale's share of the 25% is to use a pro rata fraction based on time at the site. The site became a contaminated site sometime during the period of 1958 and 1980 (i.e., between the initial installation and the discovery of contamination). Although it is difficult to determine precisely when this occurred, it is reasonable, based on the information provided in the hearing, to conclude that a tank of that time had a life span of 15 years, and thus the panel will assume that the site became a contaminated site at about 1970. The site was a contaminated site for some 27 years (1970 to 1997). Chardale's length of tenure was from early 1993 to the end of 1997, approximately 5 years. Chardale should therefore incur a 5/27 share (or 19%) of the 25% assigned to the owners and operators collectively. In terms of the global amount for the entire site, Chardale's share would be 4.5% (i.e., 19% of 25%).

Petro Canada – Petro Canada's responsibility, the panel concludes, is derived primarily from the fact that it has acquired the environmental liability associated with Gulf Oil's ownership of the contaminating substance. As noted above, responsible persons who own the contaminating substance will incur, collectively, 25% of the total site remediation. And, as also noted above, the panel concludes that Petro Canada is the corporate successor with ownership of the contaminating substance. Accordingly, Petro Canada should incur 25% of the entire remediation costs at the site.

However, Petro Canada's responsibility also derives from that fact that Gulf Oil engaged in "activities" associated with the property that directly contributed to the contamination currently found at the site. In particular, the failure of Gulf Oil to remove the contaminated soil in 1980 while it was engaged in the replacement of the leaking USTs for Halme is the source of a further share of liability. …the panel is mindful of the fact that Gulf Oil did not own the leaking USTs, nor did it appear to be contractually responsible for the maintenance of these USTs. In all circumstances, the comparative degree of harm in the activities of ownership and maintenance of the USTs as opposed to the procedures used in the removal of the USTs in 1980 is weighted on the side of tank maintenance. If the tanks had been replaced before they

> were allowed to leak, the issue of contamination at this site would not have arisen. On the other hand, the failure to remove the resulting contamination in 1980 is an aggravating factor, and Petro Canada should therefore incur a 20% share of the 50% assigned to activities which contributed to contamination at the site – this translates into 10% of the global costs of remediation.
>
> In total, Petro Canada's share would be 25% on account of product ownership and 10% on account of activities associated with the site, for a total of 35% of the entire remediation cost at the site.

The panel emphasizes that these estimates were not derived with particular attention about the shares of other parties at the site, e.g. whether they are responsible persons and what their respective shares might be.

Based on our review of the evidence provided, and particularly the technical reports by EBA and Seacor, as well as the responses by [the Ministry], it is our opinion that a final determination of the remediation costs cannot be made with any degree of accuracy at this time. The reason for this opinion follows:

1. There still remains some confusion as [to] the lateral and vertical extent of contamination in EBA versus Seacor reports. …
2. We would agree with… Seacor's closure statement that this "is not a comprehensive hydrological or chemical characterization of the site"…
3. Furthermore, [the Ministry's] response to a request for an Approval-in-principle requires: "1. More precise delineation of the horizontal extent of the contamination zone(s) prior to or during the installation of the treatment system, including additional investigation for the source of the groundwater contamination at MW303 [monitoring well]."

…

For these reasons, selection of a final remediation cost would be difficult without attaching significant contingency allowance for future uncertainties.

[underlining added]

The Remediation Order

[57] On April 24, 1998, the Regional Manager issued a draft remediation order to Chardale, Halme's and Petro Canada. The draft remediation order required Halme's to remediate the Site, and required Petro Canada and Chardale, respectively, to contribute 35% and 4.5% of the total costs of remediating the Site. The Regional Manager provided Halme's, Petro Canada, and Chardale with an opportunity to comment on the draft remediation order.

[58] By a letter dated May 13, 1998, Petro Canada advised that it had no objections to the draft remediation order, subject to one comment with respect to

the requirement that Petro Canada post a security bond for 35% of the estimated cost to remediate the Site.

[59] By a letter dated May 29, 1998, Halme's objected to the draft remediation order. Halme's submitted that the remediation order should be issued to Petro Canada because it was the responsible person "that is most closely associated with the contamination and in the best position to respond and effect a cleanup in a timely manner." In addition, Halme's argued that the Allocation Panel's opinion should not be relied on, that Gulf Oil (then Petro Canada) contributed most substantially to the contamination, and that the draft remediation order was inconsistent with private agreements between the parties. Specifically, regarding private agreements, Halme's submitted as follows:

> The Draft Order is inconsistent with the private agreements between HAS Ltd. [Halme's], Petrocan and Chardale. Petrocan undertook the cleanup work in 1980. Apparently it was not successful. However, the agreement made at h the time between HAS Ltd. (then the dealer) and Petrocan (the supplier), allocated full responsibility for the clean up of all damage caused by the leak to Petrocan. It is feasible to take that agreements [sic] into consideration. As a practical matter, in doing so, remediation efforts would be enhanced rather than jeopardized.

[60] On June 10, 1998, the Manager issued the Order. Chardale, Halme's and Petro Canada are named to the Order. The Order states, in part, as follows:

> **Whereas** the… [Site]… is contaminated with gasoline or gasoline byproducts.
>
> **Whereas** Section 27 (1) of the *Waste Management Act* provides that a person who is responsible for remediation at a contaminated site is absolutely, retroactively, jointly, and severally 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.
>
> **Whereas** an Allocation Panel established under Section 27.2 of the *Waste Management Act* has released its decision on responsible parties and has recommended a relative apportionment of the remediation cost for two of the responsible parties.
>
> **Whereas** Section 27.1(3) of the *Waste Management Act* provides reasons for commencing remediation promptly and Section 27.1(3)(c) reads "the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation".
>
> **Therefore**, pursuant to Section 27.1(1) of the *Waste Management Act*, I am satisfied that the remediation of the site will not commence promptly, you are ordered to do the following…

[61] Unlike the draft remediation order, the Order directs all of the named persons to remediate the Site, and does not allocate any portion of the remediation costs to any specific person. The Order requires the named persons to engage a qualified professional to develop a remediation plan, including a time frame and cost estimate for completing the remediation. The Order requires the named persons to submit the plan, within 90 days of the date of the Order, to the Regional

Manager for approval in principle. The Order requires the named persons to implement the remediation plan, once the Regional Manager issued his approval in principle. Finally, the Order directs that upon completion of the remediation of the Site, "information to support the issuance of a Certificate of Compliance or a conditional Certificate of Compliance must be requested" and "[t]he request for a certificate must be accompanied by the fee established in the *Contaminated Sites Regulation*."

Appeals of the Order and Applications for a Stay of the Order (Appeal No. 1998-WAS-018)

[62] On June 30, 1998, Halme's appealed the Order, and requested a stay of the Order pending the Board's decision on the merits of the appeal. Halme's appealed on the grounds that the Regional Manager erred in naming Halme's in the Order:

- in the absence of finding that it had contributed most substantially to the contamination of the Site;
- without regard to private agreements respecting liability for remediation between the parties to the Order; and
- without regard to the diligence exercised by various parties with respect to the contamination.

[63] In particular, Halme's submitted in its Notice of Appeal that:

- the contamination on the Site dated from the gasoline leak detected in 1980;
- the gasoline that caused the contamination was the property of Gulf Oil;
- in 1980, Halme's and Gulf Oil entered into an agreement whereby Gulf Oil undertook to clean up the contamination, but Gulf Oil was unsuccessful in doing so;
- Petro Canada assumed the liabilities of Gulf Oil, and was the party with the resources and expertise to remediate the Site;
- when Halme's sold the Site to Chardale, it disclosed to Chardale the 1980 leak, but Chardale failed to exercise due diligence in investigating the Site; and
- Halme's has limited financial resources, and Chardale ceased payments in January 1998 on the mortgage that Halme's held.

[64] On July 10, 1998, Petro Canada appealed the Order. Petro Canada appealed on several grounds, including that:

- the Regional Manager erred in naming Petro Canada on the Order by failing to take into account private agreements respecting liability for remediation between or among responsible persons;
- the Regional Manager erred in failing to give sufficient, or any, reasons for the Order;
- alternatively, the Regional Manager erred in failing to identify the principal remediator;

- in the further alternative, the Regional Manager erred in failing to identify the respective degrees of responsibility of the responsible persons; and
- in the further alternative, the Regional Manager erred in failing to follow and adopt the opinion of the Allocation Panel.

[65] Also, Petro Canada advised that it did not oppose Halme's request for a stay of the Order.

[66] On August 28, 1998, the Board denied Halme's application for a stay of the Order (Decision No. 98-WAS-018(a)). The Board found that contamination at the Site dated back many years, and it was unlikely that remediation would proceed unless the Order was in effect. At page 11 of its decision, the Board concluded:

> Clearly, in any weighing of balance of convenience, the public interest in dealing with this contamination as quickly as possible carries considerable weight. In this case, the public interest does not favour granting HAS [Halme's] a stay.
>
> [underlining added]

[67] Meanwhile, on August 25, 1998, the BC Supreme Court decided the civil case that Chemainus Fuels had initiated against Chardale (Vancouver Registry No. C980769). Among other things, the Court ordered that Chemainus Fuels was entitled to undertake the remediation work that Chardale had agreed to do under the lease, and Chemainus Fuels was entitled to set off all reasonable remediation costs against rents and other monies payable to Chardale under the lease.

[68] On September 1, 1998, Petro Canada asked the Board to reconsider its refusal to grant a stay of the Order. Petro Canada argued that new information shifted the balance of convenience in favour of granting a stay of the Order. Specifically, Petro Canada pointed to the Court order in favour of Chemainus Fuels, and an August 27, 1998 letter from Chemainus Fuels to the Regional Manager and the Board indicating that Chemainus Fuels intended to promptly commence remediation of the Site, and sought a stay of the Order. Petro Canada submitted that Chemainus Fuels had the most direct, immediate and vested interest in having the remediation work done, and that the Order presented barriers to the remediation being done quickly because it did not allocate financial responsibility for the remediation and did not identify the party primarily responsible for supervising the remediation.

[69] By a letter dated September 21, 1998, Chemainus Fuels notified Chardale that it intended to retain Levelton Engineering Ltd. ("Levelton") to determine the feasibility of alternative methods for remediating the Site; to provide a cost analysis for all available remediation techniques; and, to carry out any further on-site investigations necessary to properly address the feasibility of remediation options.

[70] On October 9, 1998, the Board again refused to grant a stay of the Order (Decision No. 98-WAS-018(b)). The Board found that the new information did not shift the balance of convenience in favour of a stay. In particular, the Board held that Chemainus Fuels' desire and ability to remediate the Site promptly did not favour granting a stay of the Order pending a decision on the merits of the appeals. The Board noted that the issue under appeal in respect of the Order was the

Appellants' liability, not the terms of the Order. At pages 7 and 8 of its decision, the Board stated as follows:

> One of the main goals of the contaminated sites legislation is the prompt and effective remediation of a contaminated site. The Remediation Order has now been in effect since June 10, 1998. According to the Ministry, a remediation plan has been approved in accordance with the Order. There is no indication however, that the plan is being implemented by the parties subject to the Order. It appears from Chardale's submissions that HAS [Halme's] and Petro Canada have been reluctant to participate financially, which has apparently resulted in delays in the clean-up. However, Chardale itself appears reluctant to proceed any further as it has paid for most, if not all the work to date, and is seeking minor contributor status. There appears to be a great deal of finger pointing by the parties named in the Remediation Order and very little forward momentum.
>
> In light of this situation, it might appear at first glance that a stay should be allowed to enable Chemainus to remediate the site. The new information indicates that Chemainus is willing and able to undertake clean-up of the site, albeit at the sole expense of Chardale. Chemainus has taken steps to retain Levelton and has given notice to Chardale of its plans to prepare for remediation.
>
> However, as noted by the Ministry, there is some dispute between Chemainus and Chardale regarding Chemainus' proposal. If this is not sorted out, there may be further litigation or arbitration in accordance with the Court Order. Chemainus wishes to perform new studies and possibly use a different method of remediation than the one approved by the Ministry in the plan. Chardale objects on the basis that this will increase costs and result in further delays. This situation between Chemainus and Chardale leads to considerable uncertainty in terms of the timing and method of remediation. Therefore, it is not clear that the objectives of the legislation will be met any faster or more efficiently if a stay of the Remediation Order is granted. In fact, it may create additional delays and problems.
>
> In its original stay decision the Board found that the applicant, HAS, would not suffer irreparable harm if a stay was not granted. It is now Chemainus, a party not named in the Order, which is claiming harm. Chemainus is concerned that its remediation efforts will be interrupted or interfered with by the named parties and cause financial damage to its business. However, as it is clear that the main remediation efforts will be organized between Chardale and Chemainus as a result of the Court Order, it would appear that Chemainus' fears are relatively unlikely to materialize.
>
> In the circumstances, the Board finds that the new information regarding Chemainus' willingness to remediate does not shift the balance in favour of a stay. There is no greater likelihood that the site will be remediated more quickly or efficiently in an independent remediation by Chemainus than will occur under the Order. A remediation plan has been prepared in accordance with the Order and if the remediation does not proceed within the approved time frame, the Ministry has enforcement tools available under the *Act* to

> compel compliance. The Board also notes that the Appellants, HAS and Petro Canada, have not appealed the terms of the Order *per se*. The primary issues raised deal with liability.
>
> If the Order is stayed and Chemainus proceeds with its independent remediation, by its own admission, there is a strong possibility that its remediation efforts will conflict with the Order as it wants to pursue alternate methods. If the Order is stayed and Chemainus is allowed to proceed, the Ministry has no power to enforce the remediation except by issuing another remediation order. While it can inspect and impose reasonable requirements on a person performing an independent remediation, if that person should stop, the Regional Waste Manager is correct that a remediation order is the main enforcement tool available.
>
> [underlining added]

The Determination of Minor Contributor Status

[71] Meanwhile, on June 26, 1998 (approximately two weeks after the Order was issued, and a few days before Halme's appealed the Order), Chardale requested that the Regional Manager make a determination under section 27.3 of the *Act* that Chardale is a minor contributor to the contamination at the Site, and that 4.5% of the remediation costs are attributable to Chardale.

[72] The Regional Manager provided Halme's and Petro Canada with an opportunity to provide comments on Chardale's application. Both Halme's and Petro Canada provided submissions to the Regional Manager stating their opposition to Chardale's application.

[73] On October 30, 1998, the Regional Manager issued the Determination. It states, in part, as follows:

> It is my decision that Chardale has provided the information to satisfy the requirements of Section 38 of the *Contaminated Sites Regulation*.
>
> ...
>
> I have read all information provided to me by the legal counsels for Chardale, Petro Canada and HAS [Halme's]. I have also read the "Opinion of the Allocation Panel". I agree with the opinion of the Panel with respect to Chardale being a responsible party and a minor contributor. In addition, I agree with the logic used by the Panel to establish Chardale's share of the cleanup cost; therefore, I am able to determine the portion of the remediation costs attributable to Chardale. Therefore, in accordance with Section 27.3 of the *Waste Management Act*, I find that Chardale is a minor contributor and, in accordance with Section 27.3 of the *Waste Management Act*, I attribute 4.5% of the total site remediation cost to Chardale, towards resolving the contaminated sites issues on the property. It is my decision that the application of joint and several liability to Chardale would be unduly harsh.

Appeals of the Determination of Minor Contributor Status (Appeal No. 1998-WAS-031)

[74] On November 25, 1998, Halme's appealed the Determination. Halme's appeals on the grounds that the Regional Manager:

- erred in purporting to make the Determination under section 27.3 of the *Act*, which trenches on the exclusive jurisdiction of a judge appointed by the Governor General in Council pursuant to section 96 of the *Constitution Act, 1867*, by purporting to authorize a designate of the Minister to adjudicate essential elements of actions, and consequently, is of no force and effect;
- erred in making the Determination in the absence of any evidence that the application of joint and several liability to Chardale would be unduly harsh;
- erred in holding that Chardale provided, as required, the reasonably ascertainable information respecting the matters set out in section 38(f) of the *Contaminated Sites Regulation*;
- erred in considering the opinion of the Allocation Panel, in view of the defective procedure used by the Allocation Panel;
- erred in adopting the reasons set out in the Allocation Panel's opinion, including the "activities, duration and ownership" and the "50:25:25" tests set out therein; and
- erred in improperly exercising his discretion in making the Determination.

[75] On December 4, 1998, Petro Canada appealed the Determination on the grounds that the Regional Manager:

- exceeded his jurisdiction by making the Determination, because any final determination as to Chardale's liability for remediation costs is within the exclusive jurisdiction of a judge of the Supreme Court of BC;
- erred in finding that Chardale had complied with the requirements of section 38 of the *Regulation*;
- erred in determining that Chardale is a minor contributor in spite of evidence that Chardale was not duly diligent with respect to the contamination on the Site in its purchase of the Site from Halme's;
- erred in determining that Chardale is a minor contributor in the face of evidence that the contamination is caused by two factors:

    (i) the spillage of petroleum products in the area of the pump island while those products were dispensed into motor vehicles; and

    (ii) the failure of the integrity of underground storage tanks on the Site,

    both of which were under the primary, if not exclusive, control of Chardale for the period commencing with its purchase of the Site in 1993;
- erred in failing to give sufficient, or any, reasons for the Determination;

- alternatively, erred in determining the amount or portion of remediation costs attributable to Chardale by relying on the Allocation Panel opinion, which was fundamentally flawed because:

    (i) the Allocation Panel failed to consider the factors enumerated under section 27.2(3) of the *Act* in determining whether Chardale is a minor contributor; and,

    (ii) the Allocation Panel used a formula for determining relative shares of the costs of remediation that has no basis in the *Act* or *Regulation*, or at law or in equity.

[76] Petro Canada also requested that the appeals of the Determination be heard together with the appeals of the Order.

[77] In response, the Board directed that the appeals of the Order and the Determination would he heard jointly.

Subsequent Activities related to Chemainus Fuels

[78] In November 1998, Chemainus Fuels retained Levelton to review the existing environmental work that had been done on the Site, and to conduct further investigations and develop a remediation plan. Chemainus Fuels intended to build a convenience store on the Site.

[79] On March 6, 2000, the Regional Manager issued an approval in principle ("AIP") to Chemainus Fuels, pursuant to section 27.6 of the *Act*. The AIP confirms that the Regional Manager authorized the implementation of a remediation plan (as revised by correspondence dated November 19, 1999) that was submitted by Levelton on behalf of Chemainus Fuels, subject to a number of conditions. One of those conditions was a requirement to submit a revised detailed site investigation report.

[80] On December 19, 2000, Levelton issued a detailed site investigation and historical review report regarding the Site (the "2000 Levelton Report"). The 2000 Levelton Report identified two separate areas of contamination: a larger area of soil and groundwater contamination encompassing much of the east portion of the Site, and a smaller area of soil and groundwater adjacent to the pump island. Groundwater results indicated off-site migration extending from the larger area of contamination to the adjacent property, on which an apartment building is located.

[81] On March 26, 2004, Levelton provided a status report to the Ministry summarizing the work that Levelton had done up to that date, which included:

- May 2000 - additional soil and groundwater investigations, which detected hydrocarbons off-site in groundwater to the north;
- September 2000 - excavation of the abandoned tank nest in the east corner of the Site, removal and disposal of approximately 1500 cubic metres of contaminated soil, and removal of an underground heating oil tank;
- January 2001 – installation of oxygen release compounds into three monitoring wells in an attempt to remediate soil and groundwater below the

automotive shop floor, as the soil could not be excavated without removing the building;

- April 2002 – excavating the pump island area on the west side of the Site, removing approximately 700 cubic metres of contaminated soil, and placing that soil into a biocell on the Site (the soil was taken to an appropriate facility between November 2002 and June 2003); and
- February 2004 – issuing a notice of off-site contamination to the owner of the adjacent apartment building.

[82] On March 30 and 31, 2004, Levelton had eleven new boreholes drilled inside and outside of the existing building on the Site. Ten soil samples and 16 groundwater samples were taken from those boreholes and sent for analysis.

[83] On May 19, 2004, Levelton issued a detailed site investigation report (the "2004 Levelton Report"). Among other things, it concluded as follows:

> Based on the results of this investigation, it appears there is hydrocarbon contaminated soil, consisting of volatile petroleum hydrocarbons (VPH), remaining below the southeast half of the building at a depth of approximately 2m to 5m below grade. The volume of contaminated soil is estimated to be approximately 700m^3, and is in a zone of silty sand and silty clay of low permeability. …There also appears to be a plume of contaminated groundwater associated with the zone of contaminated soil, which is migrating off-site towards the northeast. The extent of the contaminated groundwater plume could not be delineated during this investigation, although, [it] appears to extend well beyond the site boundary. It appears that groundwater flowing through the zone of contaminated soil is dissolving hydrocarbons from the soil and becoming contaminated. The linear flow velocity of the groundwater is estimated to be less than approximately 1 m/yr through the silty clay material to over 30 m/yr through the silty sand layer. It is expected that remediation of the contaminated soil would also eliminate the source of the groundwater contamination.
>
> Based on the biological activity reduction testing conducted on the contaminated soil samples, it appears that the current biological activity in the contaminated soil is negligible and <u>not</u> significantly degrading the zone of contaminated soil.
>
> [underlining in original]

[84] The 2004 Levelton Report also recommended a number of options for remediation and/or mitigation of the contaminated soil and groundwater on the Site and to address the off-site migration of contaminated groundwater.

[85] On May 31, 2004, Petro Canada's lease arrangements with respect to the Site ended.

[86] On August 4, 2004, the Ministry issued a letter to Levelton setting out the Ministry's expectations regarding the next steps required for remediation of the Site. However, it appears that no further remediation work has been done at the Site since 2004.

[87] In March 2011, a Ministry employee acting in the capacity of a Director, *Environmental Management Act*, sent a letter to counsel for Chemainus Fuels summarizing the status of the Site, and requiring Chemainus Fuels to submit certain information to the Ministry. That letter states, in part, as follows:

> The requirements of the Approval in Principal issued March 2000 and amended July 2000 and the minister's letter of August 4, 2004 have not been met. Chemainus Fuels Ltd. is hereby required to submit the following information to the ministry for review:
>
> - A remediation status report….
> - Technical reports… where reports have not been prepared.
> - Site Risk Classification reports for the service station property and for affected offsite properties….
> - A plan and schedule for further investigation and remediation not yet completed to address regulatory expectations outlined in the ministry's letter of August 4, 2004. The investigation and remediation plan must address current legal standards and procedures as outlined in the *Environmental Management Act*, Contaminated Sites Regulation and ministry protocols, guidance and procedures.

[88] By a letter dated May 11, 2013, the former counsel for Chemainus Fuels advised the Board that Chemainus Fuels was dissolved in late 2012 or early 2013 for failure to file annual reports. Given that it appears that Chemainus Fuels is no longer a legal entity, the Board issued a letter advising the parties that Chemainus Fuels' interest in the appeals as a Third Party was suspended, and it would not be included in the exchange of written submissions on the hearing of the merits of the appeals.

Parties' Positions on the Appeals

[89] The appeals were held in abeyance until early 2013.

[90] On March 14, 2013, Halme's asked the Board to reactivate the appeals. Shortly thereafter, Suncor (formerly Petro Canada) also asked that the appeals be reactivated.

[91] The respective positions of Halme's and Suncor are summarized above, where the Panel described the grounds for their appeals.

[92] It should be noted that the appeals of the Determination raise a constitutional question within the meaning of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. In summary, the Appellants submit that section 27.3(3) of the *Act* (now section 50(3) of the *Environmental Management Act*) encroaches on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*, and is invalid and of no force or effect because it is beyond the legislative power, jurisdiction, and authority of the Province.

[93] As required by section 8(2) of the *Constitutional Question Act*, each of the Appellants served notice of the constitutional question on the Attorney General of British Columbia and the Attorney General of Canada, but only the former accepted Third Party status and participated in the appeal hearing.

Halme's

[94] In terms of remedies, Halme's requests that the Board:

- set aside the Order as against Halme's;
- set aside the Determination in its entirety; and
- declare section 27.3 of the *Act* to have been of no force or effect.

Suncor (formerly Petro Canada)

[95] In terms of remedies, Suncor requests that the Board:

- vary or amend the Order to remove Suncor as a party named in it;
- alternatively, send the Order back to the Director with directions for proper reconsideration;
- declare the Determination to be null and void, and of no force and effect;
- alternatively, set aside the Determination or send it back to the Director with directions for proper reconsideration; and
- make an order of costs in favour of Suncor.

The Regional Manager

[96] The Regional Manager submits that the appeals of the Order should be dismissed. In particular, the Regional Manager submits that he considered the private agreements between the responsible parties. He submits that the draft Order apportioned responsibility based on private agreements and the allocation panel's opinion, but following submissions from the named parties on the allocation issue, the Order excluded any allocation of responsibility. The Regional Manager submits that this sequence of events confirms that he was not prepared to let the complexities and uncertainty of the private agreements forestall the issuance of the Order. Further, the Director submits that naming Petro Canada and Halme's in the Order is consistent with the principles enunciated in *Beazer East Inc. v. Environmental Appeal Board et al*, 2000 BCSC 1698 ["*Beazer*"].

[97] Regarding the appeals of the Determination, the Regional Manager takes no position on the merits but submits that, with the passage of time, there have been significant changes to the criteria applied in making such determinations.

[98] Regarding the constitutional question, the Regional Manager adopts the submissions of the Attorney General.

The Attorney General

[99] The Attorney General's submissions are limited to the question of the constitutional validity of section 27.3(3) of the *Act* (now section 50(3) of the *Environmental Management Act*). The Attorney General submits that section 27.3(3) of the *Act* is constitutionally valid and does not trench on the power of a

judge appointed under section 96 of the *Constitution Act, 1867*, because the power it confers on a regional manager is novel and not one that was exercised by superior courts at the time of Confederation.

[100] Alternatively, the Attorney General submits that if the section 27.3 power was exercised by superior courts at Confederation, its grant upon a regional manager is constitutional because it is not judicial, is necessarily incidental to the social policy scheme of the *Act*, is not within the core jurisdiction of superior courts, and does not interfere with the principle of judicial independence.

[101] Finally, in terms of remedies, the Attorney General argues that the Board has no jurisdiction to grant a declaration of constitutional invalidity.

Chardale

[102] Chardale submits that the relief sought by each of the Appellants should be denied. It submits that the Order and the Determination are reasonable in all of the circumstances on a review of the evidence. In particular, Chardale submits that when the contamination was discovered, it had owned the Site for approximately two years, whereas Halme's owned the Site from 1979 until 1993, and was previously a tenant on the Site. Further, Chardale submits that it was not in possession of the property from 1998 to 2011, but it made reasonable efforts to determine the status of the contamination and outstanding remediation. Chardale also submits that the inordinate delay by Halme's and Suncor in remediating the Site underlies the necessity for the Board to uphold the Order against them. Additionally, Chardale submits that Suncor, which assumed the liability of Gulf Oil, owns the gasoline that remains as a contaminant on the Site, and if Suncor is removed from the Order, there may be no party with the resources to complete the remediation, as Chardale has exhausted its financial resources and Halme's has little or no financial resources.

ISSUES

[103] The primary issues before the Board are:

1. Whether the Order should be reversed or varied such that Halme's and/or Petro Canada (now Suncor) should be removed from the Order.
2. Whether the Determination is invalid because section 27.3(3) of the *Act* (now section 50(3) of the *Environmental Management Act*) encroaches on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*, and therefore, is invalid and of no force or effect as it is beyond the legislative power of the Province.
3. If section 27.3(3) of the *Act* is valid on a constitutional basis, whether the Determination should be reversed based on errors by the Regional Manager, or changed circumstances after the Determination was issued.

[104] In deciding those issues, the Panel addressed a number of sub-issues. Those sub-issues are set out later in this decision, under each respective primary issue.

RELEVANT LEGISLATION

[105] The Regional Manager issued the Order and the Determination pursuant to Part Four of the *Act*. Some of the relevant provisions in Part Four are set out below, and others are set out in the text of this decision for greater convenience.

Definitions and interpretation

26 (1) In this Part:

...

"operator" means, subject to subsection (2) [exempting government bodies in certain circumstances], a person who is or was in control of or responsible for any operation located person at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3).

...

"owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 26.5(3).

Persons responsible for remediation at contaminated sites

26.5(1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract or agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

...

General principles of liability for remediation

27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally 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) 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 26.4 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 manager, a municipality, an approving officer, a division head or a district inspector under this Part.

...

(4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

Remediation orders

27.1(1) A manager may issue a remediation order to any responsible person.

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

(a) undertake remediation;

(b) contribute, in cash or in kind; towards another person who has reasonably incurred costs of remediation;

(c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.

(3) When considering whether a person should be required to undertake remediation under subsection (2), a manager may determine whether remediation should begin promptly, and must particularly consider the following:

(a) adverse effects on human health or pollution of the environment caused by contamination at the site;

(b) potential for adverse effects on human health or pollution of the environment arising from contamination at the site;

(c) the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

...

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such 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.

...

Allocation panel

27.2 (2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:

(a) whether the person is a responsible person;

(b) whether a responsible person is a minor contributor;

(c) the responsible person's contribution to the contamination and the share of the remediation costs attributable to this contamination if the costs of remediation are known or reasonably ascertainable.

(3) When providing an opinion under subsection (2) (b) and (c), the allocation panel must, to the extent of available information, have regard to the following:

(a) the information available to identify a person's relative contribution to the contamination;

(b) the amount of substances causing the contamination;

(c) the degree of toxicity of the substances causing contamination;

(d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;

(f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;

(g) in the case of a minor contributor, factors set out in section 27.3 (1) (a) and (b);

(h) other factors considered relevant by the panel to apportioning liability.

...

(5) A manager may consider, but is not bound by, any allocation panel opinion.

(6) Work performed by the allocation panel must be paid for by the person who requests the opinion.

Minor contributors

27.3 (1) A manager 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 contamination of 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 several liability would be unduly harsh.

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

(3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

DISCUSSION AND ANALYSIS

1. Whether the Order should be reversed or varied such that Halme's and/or Petro Canada (now Suncor) should be removed from the Order.

Halmes' Submissions

[106] Halme's argues that it should not be named in the Order because it did not contribute most substantially to the contamination at the Site, and section 27.1(4)(b) of the *Act* requires a regional manager to name persons whose activities contributed most substantially to the site becoming contaminated. Halme's submits that the Regional Manager failed to determine whether any of the parties named in the Order, including Halme's, contributed most substantially to the Site becoming a contaminated site.

[107] Halme's acknowledges that, under section 27.2(5) of the *Act*, a regional manager may also consider an allocation panel opinion, but Halme's argues that this does not relieve a regional manager of the obligation to take into account the mandatory requirements of section 27.1(4).

[108] Moreover, Halme's argues that, if the Regional Manager had considered who contributed most substantially to the contamination, the information available to him would have demonstrated that:

- Gulf Oil owned the gasoline that caused the contamination;
- Gulf Oil took charge of, but failed in, its efforts to clean up the Site in 1980, and that spill remains the source of the contamination that remains today; and
- when the Order was issued, Petro Canada was the successor in obligation to Gulf Oil.

[109] Further, Halme's submits that the Regional Manager was required by section 27.1(4)(b)(ii) of the *Act* to take into account "the diligence exercised by persons with respect to the contamination" but he failed to do so. Halme's argues that the evidence before the Regional Manager demonstrated that:

- Halme's and Gulf Oil exercised diligence in responding to the spill in 1980 and replacing the underground tanks;

- Gulf Oil owned the gasoline that spilled and the tanks that leaked, and failed to fully remediate the Site in 1980; and

- Chardale purchased the Site in 1993 and either knew or ought to have known about the leak in 1980, as the price that Chardale paid either reflected the risk of existing contamination or Chardale failed to exercise due diligence in purchasing the Site, but in either scenario Chardale is a more substantial contributor than Halme's.

[110] Halme's argues that it would have been feasible to require only Petro Canada to remediate the Site, as Petro Canada had (and Suncor has) the resources and expertise to do so.

[111] Alternatively, Halme's suggests that the Regional Manager could have rescinded the Order when Chemainus Fuels obtained a court order allowing it to conduct remediation. The Regional Manager also could have issued a new remediation order against Chemainus Fuels.

[112] In summary, with regard to section 27.1(4)(b) of the *Act*, Halme's submits that the Regional Manager failed to meet his obligation to take into consideration the person(s) who contributed most substantially to the Site becoming a contaminated site, despite the fact that it was feasible to do so without jeopardizing the remediation.

[113] In regard to section 27.1(4)(a) of the *Act*, Halme's submits that the Regional Manager was required to take into account private agreements respecting liability for remediation between responsible persons, but he failed to do so, despite the fact that two such agreements were brought to his attention.

[114] Specifically, Halme's submits that it made an agreement with Gulf Oil in 1980 to deal with the gasoline contamination. Halme's maintains that, under that agreement, its obligations were limited to paying for the new tanks that were installed, and by necessary implication, giving Gulf Oil access to the Site to do remediation work. In addition, Halme's submits that the asset purchase agreement between Halme's and Chardale required Chardale to remediate the Site, and Chardale knew or ought to have known of the contamination that occurred in 1980, and the risks of existing contamination, when it purchased the Site.

[115] Halme's submits that, if those two agreements were taken into account, Halme's could not be considered a person that contributed most substantially to the contamination.

[116] Finally, Halme's submits that the Order is unworkably vague, because it provides no guidance as to how the three named persons are to arrange matters among themselves, which undermines the objective of timely and successful remediation

[117] In its reply submissions, Halme's argues that Gulf Oil had control of the Site when the leak occurred in 1980, and for decades before that, because Halme's operated the businesses on the Site as a tenant of Gulf Oil pursuant to lease and sublease agreements. Halme's argues that Gulf Oil's control of the Site is consistent with the fact that, on discovery of the leak, Gulf Oil took actual control of the excavation and removal of the tanks and the installation of new tanks. In support of that submission, Halme's refers to a Gulf Oil "Authority for Expenditure" dated March 10, 1980, which addresses the purchase and installation of two new underground storage tanks. Under "Remarks", the document states, in part, "One of the existing 2000 gallon tanks is leaking and both tanks must be replaced immediately…." Under the heading "Terms", the document states, in part, "Dealer to be responsible for the payment of the tanks only." Halme's also refers to a Gulf Oil "Authority for Expenditure" dated May 30, 1979, which relates to Halme's lease of the Site to Gulf Oil. Attached to that document is a page with the heading "Additional Information to Support A.F.E. [Authority for Expenditure]", which states, in part, as follows:

> 2. We have had control of this outlet since it was first built in 1954 by way of LRD contracts….
>
> …
>
> 4. Purchase of this outlet by Halme's Auto Service Ltd. has now been completed effective June 1, 1979.
>
> 5. Dave Halme has been our lessee-dealer in this location since 1964….

[118] In further reply, Halme's disputes Suncor's interpretation of the indemnity provisions in the sub-lease dated June 1, 1989. Essentially, Halme's submits that Suncor is asserting that Halme's should have to indemnify Suncor for liability arising from Suncor's own conduct, given that its corporate predecessor owned the gasoline, had control of the Site, and conducted the failed remediation in 1980. Halme's submits that the indemnity clause in the 1989 sub-lease does not require Halme's to indemnify for losses arising from conduct before June 1, 1989, and in any event, the indemnity clause expressly excludes any obligation for Halme's to indemnify Suncor for its own negligence. The relevant clauses of the 1989 sublease are set out below in the summary of Suncor's submissions.

Suncor's Submissions

[119] Suncor submits that, contrary to section 27.1(4)(a) of the *Act*, the Regional Manager failed to consider or give sufficient weight to private agreements between Petro Canada and Halme's, and later Chardale, in which the owners and operators of the Site agreed to indemnify and save Petro Canada (now Suncor) harmless against loss, damage or expense, including damage to the environment, in relation to the Site. Specifically, Suncor refers to the 1989 lease agreement and sub-lease agreement between Halme's and Petro Canada. Suncor notes that section 15.01 of the 1989 lease states, in part, that Halme's agreed to indemnify and save harmless Petro Canada "from all claims for compensation or damages in respect of any such injury and all losses, costs, damages and expenses suffered, sustained or incurred by PCI [Petro Canada] … including any damage to the environment…." Similarly,

section 12.01 of the 1989 sublease states that Halme's would indemnify and save Petro Canada harmless from liabilities "as a result of any matter arising out of the occupation and use of the Demised Premises [defined in the sublease as the Site together with the buildings and improvements thereon or hereafter acquired or placed thereon]…."

[120] Suncor submits that the terms of the 1989 lease and sublease were later assumed by Chardale pursuant to the 1993 cross-lease assignment agreement between Halme's, Chardale and Petro Canada.

[121] Suncor submits that these agreements, and particularly their indemnity provisions, are precisely the types of private agreements that are contemplated in section 27.1(4)(a) of the *Act*, and therefore, must be considered when deciding to issue a remediation order.

[122] Moreover, Suncor submits that its predecessors never had possession of the site, and never had day-to-day control of the Site and the service station thereon. Rather, Halme's, and later Chardale, owned the Site and operated the service station, and agreed to assume all liability for their operations.

[123] In support of its submissions that the 1989 lease and sublease are private agreements that must be considered under section 27.1(4)(a) of the *Act*, Suncor cites the BC Supreme Court's decision in *Beazer*, as well as the Board's decisions in: *Canadian Occidental Petroleum Ltd. v. Director of Waste Management* (Decision No. 1999-WAS-41(c), issued March 20, 2001), at page 19; and, *British Columbia Railway v. Director of Waste Management* (Decision No. 2000-WAS-018(b), issued March 4, 2004), at page 39.

[124] In addition, Suncor acknowledges that section 27.1(4) contains qualifying language, and that the Regional Manager must only consider private agreements "to the extent feasible without jeopardizing remediation requirements." However, Suncor submits that removing it (Petro Canada) from the Order will not jeopardize remediation. Suncor argues that neither it nor Petro Canada have had any involvement with the Site since 2004, and that it has no right of access to the Site. Further, remediation was to be undertaken by Chemainus Fuels pursuant to the BC Supreme Court order granted on August 25, 1998, and an approval in principle was issued by the Regional Manager to Chemainus Fuels on March 6, 2000.

[125] Regarding section 27.1(4)(b) of the *Act*, and whether Petro Canada contributed most substantially to the Site becoming contaminated, Suncor submits that there is no evidence that Petro Canada (or its predecessors) contributed at all. In regard to the contamination in the area of the former underground storage tank nests, Suncor submits that Petro Canada had no involvement with the Site or the business thereon during the period of the 1980 leak, and that a heating oil tank was located in the same area until September 2000. Suncor submits that the heating oil tank was entirely within the care and control of Halme's, and later, Chardale. In regard to the contamination in the area of the pump island, Suncor submits that it appears to have been caused by leaking fuel dispensing lines or spillage at the pump island while filling automobiles, all of which were in the control of Halme's, and later, Chardale.

[126] In summary, Suncor submits that Petro Canada was a supplier of fuel, and it did not own the tanks or operate the service station or the automotive repair shop on the Site. The day-to-day control and operation of the business on the Site was with the operators, and that is why the 1989 lease and sublease agreements contained indemnities in favour of Petro Canada. Had the Regional Manager fully considered the private agreements, of which he was aware, he would have concluded that Petro Canada had no liability for remediation costs in connection with the Site, and he had no basis for naming Petro Canada in the Order. Further, some remediation has occurred outside of the Order, and therefore, applying the private agreements in this case would not have jeopardized any remediation requirements.

[127] In reply, Suncor submits that it is not clear that the contamination on the Site is a result of the leak that occurred in 1980 (or any prior leak), as the evidence shows at least two possible sources of contamination: (1) the tank nest, which may or may not have been caused by the leak in 1980 (or prior); and (2) the area around the pump island. Suncor submits that a Seacor memo dated August 23, 1996, indicates that the presence of leaded gasoline residues could not be confirmed in the subsurface soils and groundwater at the Site. Suncor submits that one would expect to see evidence of leaded gasoline if the 1980 leak was the source of the contamination. Further, Suncor refers to the removal of an above-ground heating oil tank from the area of the former tank nest by Levelton in September 2000.

[128] In reply to Halme's submission that the May 30, 1979 "Authority for Expenditure" states that Gulf Oil "had control of this outlet since it was first built in 1954", Suncor submits that this is an internal memorandum, not a legal document, and it refers to the branding of the gas station rather than legal control of the Site. Suncor notes that Gulf Oil never held legal title to the Site. Also, in reply to Halme's submissions regarding the March 10, 1980 "Authority for Expenditure", Suncor argues that there is no evidence that Gulf Oil agreed to remediate the Site in 1980, made arrangements to excavate or remove soil, or paid for such excavation or removal. Rather, the March 10, 1980 "Authority for Expenditure" indicates that Gulf Oil agreed to purchase and install new tanks, and the cost of those new tanks would be paid by Halme's in installments. Further, Suncor submits that Halme's was the operator of the Site, and it is difficult to see why Gulf Oil would have taken responsibility for cleaning up something that resulted from operations that were not under Gulf Oil's care and control. In addition, Suncor submits that there is no evidence that Gulf Oil owned the underground storage tanks up to May 30, 1979.

[129] In conclusion, Suncor submits that the Order was issued over 15 years ago, and the Ministry has taken no steps to enforce the Order. Furthermore, significant remediation was done after the Order was issued, the Ministry has had no active concerns with the Site since 2004 or 2005, and there is no indication of any significant remaining risk to human health or the environment. Suncor argues, therefore, that there is no public interest in confirming the Order or issuing a new one. Alternatively, the Board should send the Order back to the Regional Manager (now Director) for reconsideration. However, if the Order is to stand, Suncor submits that the requirement in the Order to obtain a certificate of compliance

should be deleted, because nothing in the *Act* provides authority for the Regional Manager to impose such a requirement in a remediation order.

Regional Manager's Submissions

[130] In regard to section 27.1(4)(a) of the *Act*, the Regional Manager submits that he considered the private agreements in this case, as is evidenced by the correspondence which was exchanged in response to the April 24, 1998 draft remediation order, as well as the Allocation Panel's opinion which was referenced in the draft remediation order. The Regional Manager submits that he was not prepared to allow the private agreements' complexity and uncertainty detract from his mandate to protect the environment by issuing the Order without apportioning liability. He further submits that his position in that regard is supported by the wording of the Order, which cites the *Act*'s objectives in commencing remediation promptly, and expresses concern that the parties are not likely to act expeditiously or satisfactorily in implementing remediation without the Order.

[131] In regard to section 27.1(4)(b) of the *Act*, the Regional Manager submits that the most substantial contributor provisions do not circumscribe the scope of the Regional Manager's discretion in naming persons to a remediation order. He argues that the qualifying words in section 27.1 do not preclude naming persons to an order even if they are not the most responsible persons: *Beazer*, at paras. 144, 149.

[132] Further, in regard to Halme's specifically, the Regional Manager submits that Halme's was extensively involved with the Site over a substantial period of time, both as an owner of the Site and an operator of the businesses on the Site.

[133] In regard to Petro Canada specifically, the Regional Manager submits that it was appropriate to name Petro Canada in the Order, both because of its lengthy history as a lessor and supplier of gasoline to the Site, and on the basis that failing to name it could jeopardize the remediation requirements. He submits that the parties' submissions in response to the draft remediation order included information indicating the neither Halme's nor Chardale had the resources to remediate the Site, and their submissions on these appeals reiterate that they still do not have the financial resources to do so. The Regional Manager argues that persons with the financial resources to effect remediation should be named in a remediation order even where they might be absolved of responsibility under private agreements: *Beazer* at paras. 140, 141, and 168. The Regional Manager submits that naming Petro Canada in the Order is consistent with the principles enunciated in *Beazer*, and reflects the environmental protection objectives of the legislation.

[134] In regard to the requirement in the Order to seek a certificate of compliance, the Regional Manager submits that it was well within his authority to do so, given that the definition of "remediation" in section 1 of the *Act* was expanded in 1993 by adding subsection (e), to include "monitoring, verification and confirmation of whether the remediation complies with the remediation plan, applicable standards and requirements imposed by the manager".

[135] In addition, the Regional Manager submits that the Order contains adequate reasons. He argues that the Site contains significant contamination, the extent of

which was, and still is, unknown. He stated in the Order that there was a need for timely remediation, and that he was "satisfied that remediation of the site will not commence promptly" without the imposition of the Order. Subsequent to the issuance of the Order, the 2004 Levelton Report was provided to the Ministry, and it advised that natural attenuation was ineffective for remediation, as biological activity in the soil was negligible and was not significantly degrading the gasoline contamination in the soil. The Regional Manager submits that the Order is not vague, and the relevant provisions of the *Act* and the *Regulation* provide ample guidance to the persons named in the Order. If, in the future, further investigation of the Site reveals conditions that were not anticipated when the Order was made, the parties may seek further direction from the responsible Ministry decision-maker (now the Director).

[136] Finally, in regard to the history of the Ministry's enforcement of the Order, the Regional Manager submits that, while the Site was being voluntarily remediated by Chemainus Fuels pursuant to the 1998 BC Supreme Court order, the Ministry was obligated to avoid enforcing the Order in a way that could conflict with the Court's order. Further, the Regional Manager argues that, despite the remediation efforts of Chemainus Fuels, there continues to be no basis to cancel the Order. In particular, the Regional Manager submits that a lack of response by the persons named in the Order should not be condoned by cancelling the Order, and the 2004 Levelton Report indicates that the earlier attempts to remediate the Site have not been successful. Contaminated soil remaining on the Site appears to be leaching hydrocarbons to the groundwater and migrating off-site to an adjacent property to the northeast. The 2004 Levelton Report recommended that the plume of contaminated groundwater should be delineated and a new remediation plan should be implemented. The Regional Manager submits that dismissing the appeals would remove a potential obstacle to enforcement of the Order.

Chardale's Submissions

[137] Chardale submits that the appeals should be dismissed. It submits that the delay in remediating the Site underlies the necessity to enforce the Order against Halme's and Petro Canada (now Suncor), to ensure the Site's remediation.

[138] In particular, Chardale submits that Halme's has submitted no sworn evidence to support its assertion that it has exhausted its financial resources. Chardale also points out that Halme's owned and operated the Site for many years, whereas Chardale owned the site for only two years before the contamination was discovered. Moreover, Chardale submits that Halme's had full knowledge of, and oversight over, the leak and its purported remediation in 1980.

[139] In regard to private agreements, Chardale submits that the existence and terms of those agreements were, and are, at issue. Specifically, with respect to the indemnification provisions which Suncor asserts absolve it from liability, Chardale submits that those provisions exclude losses arising from the negligence of Suncor (then Petro Canada). Moreover, Chardale submits that it was appropriate for the Allocation Panel (and subsequently the Regional Manager) to defer to the courts as to the legal effects of the private agreements (if there is a cost recovery action).

[140] Finally, Chardale submits that it does not have the financial resources to complete the investigation and remediation of the Site, or to pursue a cost recovery action against Suncor. In support of those submissions, Chardale provided an affidavit sworn by Mr. Ballard, the principal of Chardale, who states that he and Chardale have expended approximately $833,000 on the remediation of the Site, and Chardale's only asset and income are the Site and the income derived from the tenancy of the automotive repair business operating on the Site. He also attests that he ceased payment on the mortgage on the Site, as a set-off against Halme's failure to contribute to the remediation expenses. In addition, he states that, between August 1998 and November 2011, he had no possession or control over the Site, and since regaining possession, he has ceased the gasoline retail operations and convenience store operations on the Site.

The Panel's Findings

[141] The parties' submissions raise a number of sub-issues, which the Board has addressed below.

[142] Before turning to those sub-issues, it is important to consider the purposes of the *Act*, and Part 4 in particular. Those purposes are described in *Beazer* at paras. 56 and 57:

> The purposes of the *Act* are the prevention of pollution and the identification and remediation of contaminated sites: see *Howe Sound Pulp & Paper Ltd.* (at p. 231), *Swamy* (at para. 36) and *British Columbia (Minister of Environment, Land & Parks) v. Alpha Manufacturing Inc.* (1996), 132 D.L.R. (4th) 688 (B.C.S.C.) at p. 693. It is the latter purpose which is the focus of Part 4 of the *Act*.
>
> …
>
> Similarly, the purpose of remediation under the *Act* encompasses the need for expeditious action. The *Act* empowers a manager to issue a remediation order as required and anyone named as a responsible person has a right of appeal to the Board. …
>
> [underlining added]

[143] In addition, the Court noted in para. 168 of *Beazer* that Part 4 of the *Act* casts a wide net in terms of who may be liable for remediation:

> I agree with the position of the Manager that in order to ensure timely remediation, the Legislature has implemented a scheme which casts a wide net over responsible parties who are jointly and severally liable for the costs of remediation and who may be required to undertake prompt remediation. In this regard, the Legislature has chosen to leave the requirement to deal with issues of culpability and fair allocations to an allocation panel under s. 27.2 of the *Act* (if requested) and to the courts in cost recovery/allocation proceedings under s. 27(4) of the *Act* and s. 35 of the *Regulation*. ...

[144] Those findings were subsequently endorsed in *Gehring v. Chevron Canada, Ltd.*, 2006 BCSC 1639 [*Gehring*], at paras. 31 and 32, regarding the purposes of

the *Environmental Management Act*. At para. 133 of *Gehring*, the Court made the following comments regarding the scheme of the *Environmental Management Act*, which are equally applicable to the *Act*:

> The scheme of the *EMA*, like environmental statutes in many jurisdictions, removes the burden of proving causation or fault-based conduct. It takes the practical approach that the contamination exists, and must be remediated. The legislation imposes responsibility even though a party may have acted consistently with the standards which existed at the time the contamination occurred or spread.
>
> [underlining added]

[145] Similarly, the Court of Appeal stated as follows at para. 46 of *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56 [*Workshop Holdings*]:

> The concepts of absolute and joint and several liability facilitate actions against alleged polluters, make recovery of damages from multiple defendants more likely, and remove the burden of proving causation or fault-based conduct.
>
> [underlining added]

[146] Together, these judicial decisions indicate that the key purpose of Part 4 of the *Act* (now Part of the *Environmental Management Act*) is to ensure the timely remediation of contaminated sites, and this purpose is achieved by casting a wide net over responsible persons who are liable for remediation, and by removing the burden on a regional manager (now director) to prove causation or fault-based conduct before she or he may exercise the powers aimed at achieving remediation, such as ordering persons to conduct a site investigation, issuing an approval in principle for a remediation plan, or ordering persons to conduct remediation. Issues of culpability and the fair allocation of liability for remediation costs are dealt with in other processes under the scheme of the *Act*, such as an allocation panel process under section 27.2 of the *Act* (if requested), and the court process in a cost recovery action under section 27(4) of the *Act*. The Board has kept those principles in mind when making its findings on the sub-issues below.

(i) Whether Halme's or Petro Canada (Suncor) should be removed from the Order because they did not contribute most substantially to the Site becoming a contaminated site (section 27.1(4)(b))

[147] Turning to the first sub-issue, the Board finds that *Beazer* is instructive regarding the proper interpretation and application of section 27.1(4) of the *Act*. At paras. 138 and 139 of *Beazer*, the Court examined the relationship between section 27.1(4) and the authority to issue a remediation order under section 27.1(1):

> … Subsection (1) provides that a manager may issue a remediation order to *any* responsible person. Subsection (1) does not state that it is subject to subsection (4) or any other provision of the *Act*. …
>
> Is this interpretation of subsection (1) affected by subsection (4)? The introductory words of subsection (4) make reference to the situation of the

> manager considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2). Therefore, subsection (4) does come into play in determining whether appropriate persons have been named to the remediation order.
>
> [underlining added]

[148] At para. 140, the Court found that the requirements of subsection (4) are subject to a qualifying phrase:

> Subsection (4) states that the manager *must* do two things in deciding who to name in a remediation order. The use of the word "must" indicates that these two things are mandatory requirements. In brief, these two things are:
>
> > (a) to take into account private agreements respecting liability for remediation;
> >
> > (b) to name one or more persons who contributed most substantially to the site becoming contaminated.
>
> Both of these clauses are qualified by the phrase "to the extent feasible without jeopardizing remediation requirements".

[149] Turning to section 27.1(4)(b), the Court found at paras. 141 to 149 that a regional manager is obligated to name in a remediation order the person(s) who contributed most substantially to the site becoming a contaminated site, as long as remediation requirements would not be jeopardized by naming such person(s) to the order. The Court summarized its findings in that regard at para. 149:

> … clause (b) provides that certain persons must be named in the order. It does not state, either expressly or by necessary implication, that certain persons must not or should not be named in the order. The discretion of the manager under subsection (1) to issue a remediation order to any responsible person is not limited by clause (b) of subsection (4). The only thing limited by clause (b) of subsection (4) is the manager's discretion not to name in a remediation order the person or persons who contributed most substantially to the site becoming contaminated (as long as remediation requirements would be jeopardized by naming such person or persons in the order).
>
> [underlining added]

[150] Thus, *Beazer* indicates that section 27.1(4)(b) of the *Act* does not preclude naming any responsible person, such as Halme's or Petro Canada (Suncor), to a remediation order, even if that person is not the most substantial contributor. Section 27.1(4)(b) only limits the discretion not to name in a remediation order the person(s) who contributed most substantially to the site becoming contaminated, but even that requirement is qualified: the person(s) who contributed most substantially to the site becoming contaminated need not be named to the order if doing so would jeopardize the remediation of the site.

[151] In the present case, the Order names Halme's, Petro Canada (now Suncor), and Chardale as responsible persons. The Appellants dispute which person was the most substantial contributor to the Site becoming a contaminated site, and each Appellant argues that they themselves were not the most substantial contributor. In that regard, they dispute the source(s) of the contamination at the Site, and who had control over the activities that contributed to the Site becoming a contaminated site. However, none of the persons named in the Order dispute that they are "responsible persons" within the meaning of Part 4 of the *Act*, and none of them claim an exemption from liability under section 26.6 of the *Act*. As such, Halme's and Petro Canada (Suncor) were, and remain, responsible persons who may be named to the Order under section 27.1(1) of the *Act* (now section 48 of the *Environmental Management Act*), regardless of who contributed most substantially to the Site becoming a contaminated site.

[152] In the Order, the Regional Manager did not specify which person(s) contributed most substantially to the Site becoming a contaminated site. Although Halme's submits that this amounts to an error by the Regional Manager, the Board finds that, based on the principles in *Beazer*, section 27.1(4) of the *Act* imposes no requirement to make a specific determination in this regard, either prior to, or as a part of, issuing a remediation order. Section 27.1(4)(b) simply requires a regional manager to "name [in a remediation order] one or more persons whose activities… contributed most substantially", subject to the qualifying phrase discussed above. Thus, if such person(s) are named in the remediation order, the requirement has been met. For example, if either Halme's or Petro Canada contributed most substantially to the Site becoming a contaminated site, the requirement would be met because they are named in the Order. It would not matter that the Regional Manager did not specify which named person(s) contributed most substantially.

[153] In any case, the requirement to name such person(s) in a remediation order is subject to the qualifying phrase: "to the extent feasible without jeopardizing the remediation requirements." At paras. 146 and 147 of *Beazer*, the Court described two examples of situations where, as a result of jeopardy to remediation requirements, a remediation order could be issued without naming the person(s) who contributed most substantially to the site becoming contaminated: (1) where it is important that the remediation begin immediately, and the person who contributed most substantially has limited financial means but there is another responsible person with substantial means; and (2) when, on the information known to the regional manager, he or she cannot ascertain which person(s) contributed most substantially to the site becoming a contaminated site, and the remediation requirements would be jeopardized by the delay associated with taking the time to make the appropriate investigations to determine who contributed most substantially. At para. 148 of *Beazer*, the Court stated that these examples were not exhaustive, and there could be other such situations.

[154] The Board finds that the first example given in *Beazer* applies in the present case. The Board finds that there was information before the Regional Manager that Halme's contributed substantially, and perhaps most substantially, to the contamination through its activities as a long-time operator of the Site, as discussed further below. There was also information before the Regional Manager that Halme's had limited financial means to effect remediation, whereas another

responsible person - Petro Canada (Suncor) – had substantial means. In response to the April 24, 1998 draft remediation order, which ordered Halme's to conduct the remediation (and required Petro Canada and Chardale to only contribute cash towards the cost of remediation), Halme's provided a May 29, 1998 submission to the Regional Manager which asserted that Halme's lacked the financial resources to clean up the Site, because its only significant asset was a mortgage in favour of Chardale for $225,000, of which $182,403 remained outstanding, and Chardale had ceased payments on that mortgage after January 1998. Given what was known about the contamination at the Site when the Order was issued, the Board finds that it was reasonably foreseeable that the cost of remediating the Site would exceed the value of Halme's assets, which were relatively limited compared to Petro Canada's (Suncor's) financial resources. According to Petro Canada's May 13, 1998 submission to the Regional Manager in response to the draft remediation order, there was "no question as to the solvency of Petro Canada."

[155] In addition, there was information before the Regional Manager, in the EBA Report and the Seacor Report, which pointed to the need for expeditious remediation of the Site. Those reports indicated that soil samples from the original tank nests under the car wash bays exceeded the *Regulation*'s Commercial Land Use criteria for light hydrocarbons and xylenes, and some of those samples even exceeded the Special Waste criteria (i.e., the prescribed numerical standard at which the soil was considered to be special waste, now known as hazardous waste, requiring special treatment) for xylenes. Also, the concentrations of benzene, ethylbenzene, and/or toluene in several groundwater samples exceeded the Aquatic Life criteria. Based on that information, it was apparent that the contamination at the Site exceeded the prescribed level for the commercial activity on the Site, and could be harmful to the environment and human health.

[156] Further, it is apparent from the Order that the Regional Manager had determined that it was important for the remediation to begin quickly. The Order states that the Regional Manager considered section 27.1(3)(c) of the *Act*, which requires a regional manager to consider the likelihood of persons "not acting expeditiously or satisfactorily in implementing remediation." The Order also states that he was "satisfied that the remediation of the site will not commence promptly" unless the responsible persons were ordered to do so. Additionally, the Order sets out relatively short time lines for the responsible persons to notify the Regional Manager of the name of the consultant they retained to develop a remediation plan (within 21 days of the date of the Order), and to submit a remediation plan for the Regional Manager's approval (within 90 days of the date of the Order).

[157] Together, these considerations bring the present case within the ambit of the first scenario described in para. 146 of *Beazer*. Due to the nature of the contamination at the Site, it was important that the remediation begin promptly, and although Halme's may have contributed most substantially to the contamination at the Site, it had limited financial means and another responsible person, Petro Canada, had substantial means.

[158] In addition, the Board finds that the second example given in *Beazer* may also apply in this case. The information available to the Regional Manager pointed to both Halme's and Petro Canada as contributors to the contamination, but it was

unclear which of them contributed most substantially. Although the Order refers to the Allocation Panel opinion, which contained a detailed review of the considerations relating to Petro Canada's and Chardale's share of the liability for remediation, the opinion did not address Halme's share of the liability for remediation, nor did the opinion address which responsible person(s) contributed most substantially to the Site becoming contaminated. Indeed, the opinion states that the percentages of liability assigned to Petro Canada and Chardale "were not derived with particular attention about the shares of other parties" such as Halme's. Thus, the Allocation Panel opinion did not assess the relative degrees of responsibility between the responsible persons named in the Order, and it could not be relied on for the purpose of determining which person(s) contributed most substantially to the Site becoming a contaminated site.

[159] The Board has already found that the Regional Manager had determined that it was important to begin the remediation promptly. The Board also finds that delaying issuing the Order, so the Regional Manager could obtain more information to determine which person(s) contributed most substantially, would have jeopardized the prompt remediation of the Site, and would have been contrary to the *Act*'s purpose of ensuring expeditious remediation, without requiring regional managers to first determine issues of causation and responsibility. Those circumstances are consistent with the second example given at para. 147 of *Beazer*. In other words, based on the information known to the Regional Manager, he may have been unable to ascertain which person(s) contributed most substantially to the Site becoming a contaminated site, and the remediation requirements would have been jeopardized by the delay associated with making further investigations to determine who contributed most substantially.

[160] For all of those reasons, the Board finds that the Regional Manager complied with the requirements in section 27.1(4)(b). However, that is not necessarily the end of the inquiry, as the Board has the jurisdiction under section 46(2) of the *Act* (now section 102(2) of the *Environmental Management Act*) to conduct these appeals as a new hearing of the matter, and to consider evidence that was not before the Regional Manager. Moreover, the Board has the authority under section 47(c) of the *Act* (now section 103(c) of the *Environmental Management Act*) to make any decision that the Regional Manager could have made, and that the Board considers appropriate in the circumstances. Given that the Order was issued over 15 years ago, and that new information has become available since then, it may be helpful to the parties for the Board to offer its own assessment regarding the person(s) "whose activities, directly or indirectly, contributed most substantially" to the Site becoming a contaminated site.

[161] Although Suncor argues that the Order is no longer necessary, the Board finds that neither the named persons' failure to carry out remediation, nor the Ministry's failure to enforce the Order, means that the Order is unnecessary. Despite Chemainus Fuels' voluntary remediation efforts, the most recent information available about the Site shows that significant contamination remains on the Site, continues to migrate off-site, and poses a risk to the environment and human health. According to the 2004 Levelton Report, approximately 700 cubic metres of contaminated soil was left underneath a building on the Site during the remediation by Chemainus Fuels, because the soil could not be removed without

damaging or destroying the building. That contaminated soil was causing groundwater contamination, and the contaminated groundwater was migrating off-site towards an adjacent property occupied by a residential apartment building. At page seven, the 2004 Levelton Report states that four of the ten soil samples taken in March 2004 exceeded the *Regulation*'s Commercial Land Use standard for hydrocarbons. At page eight, the 2004 Levelton Report states that, of the 16 groundwater samples taken in April 2004, 12 exceeded the Aquatic Life standard for extractable petroleum hydrocarbons, nine exceeded the Aquatic Life standard for volatile petroleum hydrocarbons, three exceeded the Aquatic Life standard for volatile hydrocarbons, and two exceeded the Aquatic Life standard for ethylbenzene. The 2004 Levelton Report recommended that further investigations be completed to fully delineate the plume of contaminated groundwater, and that a new remediation should plan be implemented. None of those recommendations were carried out.

[162] Moreover, at page 9, the 2004 Levelton Report states that "the current biological activity in the contaminated soil is negligible and not significantly degrading the zone of contamination" [underlining in the original document]. Based on this information, the Board finds that, despite the passage of time, it is unlikely that the remaining contamination has been attenuated by *in situ* biological activity. It is likely that approximately 700 cubic metres of contaminated soil remains on the Site, and continues to contaminate groundwater that migrates toward the adjacent property used for residential purposes. In these circumstances, the Board finds that there remains a need for further remediation of the Site to address the ongoing risks to the environment and human health.

[163] Turning to the question of the person(s) whose activities contributed most substantially to the Site becoming a contaminated site, there is no dispute that Halme's was a fee simple owner of the Site from May 1979 to early 1993. This brings Halme's within the definition of "owner" in section 26(1) of the *Act*, and section 26.5(1)(b) provides that a "previous owner" of a contaminated site may be responsible for remediation at the site.

[164] Although Suncor's predecessors were never fee simple owners of the Site, they were party to leases and/or sub-leases over the Site from approximately the mid-1950's until May 31, 2004. A lease conveys a legally enforceable right to occupy and use property. In Part 4 of the *Act*, "owner" is defined as a person who "is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property," except a secured creditor [underlining added]. Indeed, a May 22, 1979 certificate of title for the Site lists Gulf Oil's lease and Gulf Oil's "right of first refusal to purchase" as registered interests on the title. The 1984 lease contained clauses giving Petro Canada a right of first refusal to purchase the Site, and an option to renew the lease for a further five years. Similarly, the 1989 lease contained clauses giving Petro Canada a right of first refusal to purchase the Site, and an option to renew the lease for two further five year terms. The Board was not provided with copies of earlier leases or subleases, but Gulf Oil's May 30, 1979 Authority for Expenditure states that the "Outlet had been Gulf Oil identified since it was built in 1954" and "We have had control of this outlet since it was first built in 1954 by way of LRD contracts, the original LRD was

mortgage write-off with two successive five year renewals…." Together, this evidence may bring Suncor's predecessors within the definition of "owner" for the purposes of Part 4 of the *Act*.

[165] Being an "owner" makes a person a "responsible person" under the *Act*. However, being an "owner" in itself does not necessarily establish that Halme's or Suncor's predecessors were involved in activities that, directly or indirectly, contributed most substantially to the Site becoming a contaminated site.

[166] To determine which responsible person(s) contributed most substantially to the Site becoming a contaminated site, the Board has considered the factors listed in section 27.1(4)(b). Subsection (b) focuses on the "activities" that contributed most substantially, "directly or indirectly," to the Site becoming a contaminated site. Specifically, the Board has considered: (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.

[167] There is no dispute that Halme's was a long-time retailer of gasoline products at the Site, from approximately 1964 until 1993. There is also no dispute that Suncor's predecessors delivered and stored gasoline at the Site from the mid-1950's until 2004. In addition, the evidence is that, from at least September 1972 (and likely since the mid-1950's) until November 1994, Suncor's predecessors owned the gasoline that was stored on the Site. According to the 1972 Retail Dealer Sales Agreement with Halme's, which is discussed below, the gasoline did not become the property of Halme's until it passed through the pumps immediately before sale to a retail customer. According to Suncor's submissions, this arrangement remained in place until November 1994, when Petro Canada changed its dealer purchase arrangements. Thus, until November 1994, any gasoline on the Site that leaked from a tank or the distribution lines, before reaching the pumps, was the property of Suncor's predecessors.

[168] In terms of who was responsible for the inspection, maintenance and repair of the storage tanks and other equipment on the Site that was used to store, handle, and dispense gasoline, the evidence shows that those responsibilities shifted over time. According to the terms of the 1972 Retail Dealer Sales Agreement, Gulf Oil took responsibility for the inspection and operation of the storage tanks and dispensing equipment on the Site. The relevant portions of that agreement state:

> (a) The Dealer [Halme's] agrees to allow the Company [Gulf Oil] to place and store adequate supplies of gasoline in storage tanks available on the Dealer's premises. <u>The Dealer is not responsible to the Company for the gasoline in storage tanks.</u> The said gasoline is always to remain property of the Company until it is removed by the Company or until such time as it is disposed of by sale to the Dealer at the pumps as hereinafter provided.
>
> (b) Delivery of gasoline to the Dealer shall take place and <u>property in the gasoline shall pass to the Dealer when gasoline passes through the</u>

> gasoline pumps connected to the said storage tanks. Sales to him of these products shall be calculated entirely from totalizer readings on the pumps and Dealer will pay the Company for such gasoline on such basis and not by reference to disappearance from storage tanks or volumes delivered into storage.
>
> (c) ...
>
> (d) The Company or its nominee shall at all times have the right to enter into or upon any premises where such products may be stored or kept for the purpose of inspection or for the purpose of taking possession of any and all remaining product in storage and removing same.
>
> (e) The Company may seal storage tanks and totalizer mechanisms at [the] Dealer's premises and [the] Dealer agrees that only duly authorized representatives of the Company shall have access to storage tanks and totalizer mechanisms.
>
> [underlining added]

[169] Together, those clauses indicate that, at that time, Halme's had no responsibility for the gasoline in the storage tanks, and only gained ownership of the gasoline after it passed through the pumps. Also, Halme's was not obligated to pay for volumes of gasoline based on "disappearance from storage tanks." Further, Halme's had no access to the storage tanks, or the totalizer mechanisms that were the basis for calculating how much gasoline had passed through the pumps. In contrast, Gulf Oil had a right to enter the premises where the gasoline was stored for the purpose of inspection, and only Gulf Oil's authorized representatives had access to the storage tanks and the totalizer mechanisms. As such, Halme's could not have been responsible for inspecting, maintaining or repairing the storage tanks or the mechanisms that measured how much gasoline had passed through the pumps. Consequently, the Board finds that Halme's could not have been responsible for reconciling the volume of gasoline delivered to the Site against the volume of gasoline sold at the pumps, which could have been a way to detect leaks. Similarly, Halme' could not have been responsible for dipping the storage tanks to check for leaks, since it had no access to the storage tanks.

[170] This arrangement may have changed somewhat according to the June 1979 lease and sublease, which were signed after Halme's purchased the Site. Under those agreements, Gulf Oil agreed to paint the exterior of the buildings on the Site, whereas Halme's agreed to "repair and maintain and keep the premises and everything appurtenant thereto and all chattels, fixtures and equipment thereon in good repair, fair wear and tear excepted." This conflicts somewhat with the terms of the 1972 Retail Dealer Sales Agreement (which has no fixed expiry date). Thus, on the face of those agreements, it is unclear whether Halme's or Gulf Oil, or both, were responsible for inspecting, maintaining and repairing the storage tanks and dispensing equipment as of June 1979.

[171] Not surprisingly, the Appellants dispute who owned the tank that was found to be leaking in March 1980. However, there is no dispute that the leaking tank was installed in the 1950's, when Suncor's predecessor supplied and stored gasoline at the Site, and long before Halme's began operations on the Site or

became owner of the Site. Based on the documents discussed above, the earliest that Halme's may have had any access to or control over the tanks would be after it purchased the Site in 1979.

[172] Moreover, the document evidence shows that Gulf Oil took responsibility for removing and replacing the leaking tank. In particular, Gulf Oil's March 10, 1980 Authority for Expenditure indicates that Gulf Oil sought to address the leak "immediately," and took action by removing two existing underground storage tanks (including the leaking tank), purchasing two new tanks, and having them delivered and installed at the Site. Moreover, the document states that Halme's was "to be responsible for the payment of the tanks only." Associated documents show that Halme's later paid Gulf Oil for the cost of the new tanks, by way of monthly installments over a period of three years. Together, this evidence shows that Gulf Oil took responsibility for dealing with the leaking tank, and Halme's took responsibility for reimbursing Gulf Oil for the cost of the new tanks.

[173] Under the June 1984 lease and sublease, responsibility for the inspection, maintenance, and repair of facilities and equipment on the Site appears to have been shared by Halme's and Petro Canada. The maintenance clause in the 1984 sublease states as follows:

> The Lessee [Halme's] will at all times during the continuance of this Sublease keep the demised premises [the Site] and the equipment in good and tenable repair including structural repairs and wear and tear and PCI [Petro Canada] may by itself or its agents enter upon the demised premises from time to time to view the state of repair thereof. If PCI detects that the Lessee has failed to carry out any repairs required to be carried out by the Lessee under this Sublease, PCI shall notify the Lessee who shall carry out the necessary repairs as soon as practicably possible.
>
> [underlining added]

[174] In the 1984 sublease, "demised premises" is defined as the lands that constitute the Site "together with the buildings and improvements thereon or hereafter acquired or placed thereon", and "equipment" is defined as "all service station equipment located on the demised premises."

[175] In the 1984 lease, the first sentence in the maintenance clause is identical to that in the 1984 sublease, but the remainder is different and states:

> … If the Lessor [Halme's] should fail to carry out any repairs required to be carried out by the Lessor under this Head Lease, then PCI, after giving 10 days' written notice to the Lessor, may make such repairs and may deduct the cost thereof from any rent or other monies that may then or thereafter be payable by PCI to the Lessor.
>
> PCI shall be responsible for the maintenance and repairs of all loaned equipment specified in the Loaned Equipment Schedule…
>
> [underlining added]

[176] Another clause in the lease stated that the loaned equipment "shall remain the property of PCI [Petro Canada]". The loaned equipment identified in the

Loaned Equipment Schedule included "2 – Tokheim Electronic duo [electronic counters installed on fuel dispensing equipment], 1 product pump".

[177] The 1989 lease and sublease are slightly different from the 1984 lease and sublease, but also show a shared responsibility for maintenance and repair. Under the 1989 lease, Petro Canada agreed to make certain improvements on the Site, including to "supply and install" a 5000 gallon underground storage tank, and to install a new dual (two product) pump. In regard to maintenance, the 1989 lease states as follows (the 1989 sublease contains a very similar clause):

> Lessor will, at all times during the continuance of this Lease, keep the Demised Premises and Equipment including PCI [Petro Canada] Equipment in good and tenable repair including structural repairs and wear and tear. PCI may by itself or by its agents enter upon the Demised Premises from time to time to view the state of repair thereof. If Lessor should fail to carry out any repairs required to be carried out by Lessor under this Lease, PCI, after giving Fifteen (15) days' written notice to Lessor, may make such repairs and may deduct the cost thereof pursuant to its rights of set-off. Notwithstanding the foregoing, PCI shall maintain the product dispensers except the hoses and nozzles thereof, which shall be maintained by Lessor.

[178] Thus, under the 1984 and 1989 leases and subleases, it appears that Petro Canada was responsible for maintaining and repairing certain gasoline dispensing equipment. Otherwise, for general maintenance and repair, the initial responsibility was with Halme's, but Petro Canada retained a supervisory type of role, in that it had a right to inspect the premises, and to undertake repairs if Halme's failed to do so.

[179] In addition, the 1989 sublease contains a clause requiring Halme's to comply with "PCI [Petro Canada] rules and safety guidelines and all reasonable procedures relating to the handling of gasoline." Related to that, another clause in the 1989 sublease required Halme's to "dip all gasoline and diesel storage tanks daily and keep records satisfactory to PCI to check for underground leakage, and notify PCI immediately of any known or suspected leakage." It also required Halme's to "check for water in gasoline or diesel storage tanks… and if water exceeds three centimeters it must be pumped out… ." These clauses indicate that, at that time, Petro Canada had some standard procedures or guidelines with respect to the handling of gasoline, that it had developed and expected its dealers to follow. In other words, Petro Canada developed the standard procedures, and Halme's was expected to carry them out. Again, this indicates a shared responsibility or control over activities that may have contributed to the contamination at the Site. The procedures for dipping the tanks and checking for water, if carried out, would have warned of a leaking underground tank, but would not necessarily have indicated leaks from the distribution lines between the tanks and the pumps.

[180] In January 1993, Halme's, Petro Canada, and Chardale signed a cross-lease assignment agreement whereby the 1989 lease and sublease were assigned to Chardale. In June 1995, Petro Canada and Chardale signed their own lease agreement.

[181] Based on the evidence, the Board finds that Suncor's predecessors: (1) owned the gasoline that was stored on the Site from the mid-1950s until 2004; (2) had sole responsibility for the inspection, maintenance and repair of the storage tanks and dispensing equipment until about 1979; (3) shared the responsibility with Halme's (and later Chardale and/or Chemainus Fuels) for general inspection, maintenance and repair of the after about 1979, but were responsible for maintaining and repairing certain gasoline dispensing equipment from 1984; and (4) had or took responsibility for removing and replacing the 1950's vintage tank that was found to be leaking in 1980. Based on those findings, the Board concludes that Suncor's predecessors are "operators" of the Site for the purposes of section 26(1) of the *Act*, because they were "a person who is or was in control of or responsible for any operation located at a contaminated site."

[182] Also, based on the evidence, the Board finds that Halme's is an "operator" of the Site. In addition to the findings above regarding Halme's shared responsibility for general inspection, maintenance, and repair, the Board finds that Halme's carried out the day-to-day activities of dispensing gasoline at the Site for decades.

[183] However, the Board finds that during almost the entire period from when the original underground tanks were installed in the 1950's, to when the leaking tank was discovered in March 1980, Suncor's predecessors had sole responsibility for the inspection, maintenance and repair of the tanks and the dispensing equipment. Halme's only became responsible for repair and maintenance of the "chattels, fixtures and equipment" on the Site a few months before the leak was detected. Given that the leaking tank was one of the original tanks installed in the 1950's, corrosion is the most likely cause of the leak, and it is logical to assume that the tank was leaking for some time, perhaps years, before the leak was detected.

[184] Suncor argues that the 1980 leak is not a source of the contamination on the Site, because Seacor's investigations in 1996 could not confirm the presence of leaded gasoline on the Site. Seacor's August 23, 1996 memo addresses three groundwater samples that were analyzed based on the "hydrocarbon sheen" observed in those samples. The memo states as follows:

> The results of these analyses indicated that the three samples were below the laboratory detection limit [of 50 parts per billion] for tetraethyl lead, and as such, it cannot be established whether residues of leaded gasoline exist in the subsurface soils and groundwater.
>
> [underlining added]

[185] Thus, the Board finds that the Seacor memo does not state that leaded gasoline was not a source of the contamination on the Site. Rather, it indicates that the results from those three samples were below the laboratory detection limit. Suncor provided no submissions regarding when leaded gasoline ceased to be sold at the Site, or the rate at which lead compounds in gasoline would be expected to break down in the soil or groundwater. Given that the samples were taken 16 years after the leak was discovered in 1980, this information would have been relevant. Consequently, the Board finds that there is insufficient information to support a conclusion that leaks or spills of leaded gasoline, in 1980 or at any other time, are not a source of contamination at the Site.

[186] While Suncor points to an underground heating oil tank that was removed from the Site in 2000 as a possible source of contamination, none of the reports or other evidence before the Board state that heating oil is, or was suspected to be, a contaminant on the Site. The evidence is that the Site is contaminated by gasoline, weathered gasoline, and/or gasoline byproducts. Even if future investigations were to reveal that heating oil is a contaminant at the Site, it would only mean the Suncor's predecessors were not responsible for that portion of the contamination, assuming that they did not supply heating oil to the Site. The activities of Suncor's predecessors in relation to the gasoline on the Site would still make Suncor a responsible person who could be named in the Order.

[187] As for possible leaks from the distribution lines that led from the tanks to the pumps, which may have been occurring for years before the corroded lines were excavated in 1996, the responsibility for maintenance and repair of that equipment may have been shared to some degree. During the time when Halme's was an operator (but not yet an owner) of the Site, the evidence indicates that Suncor's predecessors had sole responsibility for the dispensing equipment. After Halme's purchased the Site, that responsibility may have shifted partially to Halme's, but from 1984 Petro Canada was responsible for the inspection, maintenance and repair of specified dispensing equipment.

[188] The Board rejects Halme's submission that Chardale is a more substantial contributor than Halme's. Even if Chardale knew or ought to have known, when it purchased the Site in 1993, about the leak in 1980 and the risk of existing contamination, this does not mean Chardale "contributed most substantially to the site becoming a contaminated site," or failed to exercise "diligence" within the meaning of section 27.1(4)(b). Section 27.1(4)(b) does not direct a regional manager to take into account the diligence exercised by the person with respect to their purchase a contaminated site. Rather, it requires consideration of "the diligence exercised by the persons with respect to the contamination," along with the person's degree of involvement in activities that contributed to the site becoming contaminated.

[189] Moreover, the Board finds that Halme's had a greater degree of involvement than Chardale in the activities that contributed to the Site becoming contaminated. There is no evidence of leaks from the underground tanks that were in place when Chardale purchased the Site; i.e., the two tanks replaced in 1980 and the third tank added in 1989. The Seacor Report stated that those tanks were in good condition with very little surface rusting when they were unearthed in 1996. However, there is evidence that the distribution lines running from the tanks to the pumps may have leaked between the time when Chardale purchased the Site in January 1993 and when they were unearthed in 1996. According to the Seacor Report, the distribution lines were "heavily rusted and pitted" when they were unearthed. Given their condition, the distribution lines may have been leaking for some time, even before Chardale purchased the Site from Halme's. In any event, while leaking distribution lines are a possible source of the contamination around the pump island, they do not appear to be the source of the "weathered gasoline" (as described in the EBA Report) that was found in a separate area of contamination around the former tank nests. Obviously the contamination in the former tank nests was there sometime before it was discovered in 1995. Given that the two

tanks replaced in 1980 and the tank added in 1989 were in good condition in 1996, then the most likely source of that contamination is the leaking tank that was discovered in 1980. For these reasons, the Board finds that, as between Halme's and Chardale, Halme's was a more substantial contributor.

[190] In regard to the diligence exercised with respect to the contamination, there is no evidence that Gulf Oil or Halme's took any steps to address the contamination that resulted from the leak. Given that Gulf Oil's Authority for Expenditure states that the tank needed to be replaced "immediately" and the local Fire Chief was willing to grant "a short period of grace" to deal with the problem, it appears that the leak was significant enough to present a hazard, and be a matter of some urgency. It is surprising that none of the parties have provided any evidence of anyone cleaning up spilled gasoline or contaminated soil at that time. Thus, while there is some evidence of Gulf Oil being diligent in removing and replacing the leaking tank, there is no evidence of diligence being exercised by Gulf Oil or Halme's with respect to cleaning up the leaked gasoline or any soil that was contaminated by the leak.

[191] Regardless of whether a leaking underground gasoline storage tank was the primary source of contamination at the Site, or whether significant contamination was also caused by leaking distribution lines and/or dispensing spills near the pump island, the Board finds that there is no evidence of diligence by Halme's or Suncor's predecessors with respect to preventing leaks or spills from those potential sources. For example, neither of the Appellants provided any information regarding the procedures that they may have actually used to prevent or check for leaks and/or spills. For example, there is no information as to whether routine dipping of the tanks was carried out, or whether an inventory control system was used to reconcile the amount of gasoline that was sold with the amount that was delivered.

[192] The Board has already found that significant contamination remains on the Site despite partial remediation by another party, and there continues to be a need for timely remediation due to the risks posed to the environment and human health. The need for remediation of the Site remains, despite the passage of time. The failure of the named persons to comply with the Order does not indicate that there is no need for the Order. Rather, the failure of any of the named parties to voluntarily engage in remediation shows that there continues to be a need for a remediation order.

[193] In the present appeals, Halme's has provided documents showing that it held a mortgage for $225,000 on the Site pursuant to the asset purchase agreement with Chardale, but Chardale ceased payments in February 1998, and the balance owing as of January 11, 1998, was $182,403.84. Halme's submits that its only other asset was approximately $20,000 worth of Petro Canada shares. There is also evidence before the Board that Chardale and/or its principal has already spent $833,000 on remediating the Site, Chardale's assets are limited to the Site (which is still subject to a significant mortgage), and Chardale's income is limited to rent from the remaining tenant on the Site. Given that contamination is still on the Site and is migrating off-site, the Board finds that the cost of remediating the Site will likely exceed the financial resources of Halme's and Chardale, which are relatively limited compared to Suncor's financial resources.

[194] In the circumstances, the Board finds that neither Halme's nor Petro Canada (Suncor) should be removed from the Order based on section 27.1(4)(b) of the *Act*. The Board finds that both Halme's and Suncor's predecessors were involved in the activities that, directly or indirectly, contributed most substantially to the Site becoming a contaminated site. Even if the Board had found that Halme's alone contributed most substantially to the Site becoming contaminated, the Board finds that it would still be appropriate to name Petro Canada (Suncor) to the Order (subject to private agreements, which are discussed below) pursuant to section 27.1(4)(b) of the *Act*, because there is information before the Board that not naming Petro Canada (Suncor) in the Order may jeopardize the remediation requirements. Alternatively, if Suncor's predecessors contributed most substantially to the Site becoming a contaminated site, then Petro Canada (Suncor) should be named to the Order pursuant to section 27.1(4)(b) of the *Act*. However, under those circumstances and for the reasons noted above, it is also appropriate under sections 27.1(1) and (4) of the *Act* to name Halme's to the Order as a responsible person.

(ii) Whether the Regional Manager failed to take into account private agreements respecting remediation, and if so, whether the terms of those private agreements determine that Halme's or Petro Canada (Suncor) should not be named in the Order (section 27.1(4)(a))

[195] Section 27.1(4)(a) of the *Act* requires a regional manager to take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the regional manager. However, that requirement is subject to the qualifying phrase: "to the extent feasible without jeopardizing remediation requirements". In para. 141 of *Beazer*, the Court considered the meaning of the qualifying phrase in the context of section 27.1(4)(a):

> The intention of the qualifying phrase is clear with respect to the first matter. If there is a private agreement between responsible persons in which one party assumes responsibility for all of the contamination and the other "responsible" person is absolved from responsibility, the manager can only name the first party in the remediation order and cannot name the absolved party in the order; subject, however, to the qualification that the remediation requirements must not be jeopardized by the absence of the absolved party in the order. If the remediation requirements would be jeopardized by the absence of the absolved party in the order, the manager may then ignore the private agreement and name the absolved party in the order (although that party may be absolved from liability under the private agreement, they would still be a responsible person under s. 26.5(1)). An example of a situation where the absence of the absolved party in the order would jeopardize the remediation requirements is where the other responsible person does not have the financial capability to carry out all of the remediation work. If the absolved party was then named in the remediation order and incurred remediation costs, it could still rely on the

> private agreement in the cost recovery/allocation proceedings authorized by s.27(4) to seek reimbursement from the other party to the agreement.
>
> [underlining added]

[196] Thus, the Court held that, although section 27.1(4)(a) requires a regional manager to take into account private agreements respecting liability for remediation, a regional manager could ignore a private agreement, and name the absolved party in a remediation order, if the remediation requirements would be jeopardized by not naming the absolved party to the order.

[197] Suncor does not rely on any agreement prior to 1989 in regard to the application of section 27.1(4)(a) of the *Act*. However, Halme's relies on earlier agreements, or alleged agreements, as absolving it from liability for remediation of the Site. In regard to Halme's, the Board finds that the 1979 lease and sublease contain no provisions regarding liability for remediation of spills or leaks, or environmental liability in general. The 1979 lease contains a general insurance and indemnity clause, but it does not contemplate environmental matters. The 1979 sublease contains an insurance clause in relation to the value of the buildings and improvements, but no indemnity clause. The Board finds that these private agreements are not agreements "respecting liability for remediation between or among responsible persons" for the purposes of section 27.1(4)(a) of the *Act*.

[198] In regard to the alleged agreement between Halme's and Gulf Oil respecting liability for remediation of the leak that was discovered in 1980, Halme's acknowledges in its reply submissions that "There is no single written agreement countersigned by two parties." Although Halme's points to Gulf Oil's March 10, 1980 "Authority for Expenditure" as evidence of an agreement to remediate, the Board finds that it is an internal Gulf Oil document, and not a contract or agreement between Gulf Oil and Halme's. Moreover, it contains no language indicating that Gulf Oil agreed to remediate the Site. It does not mention Gulf Oil removing any leaked gasoline or contaminated soil from the Site, or paying for such removal. The Board finds that Gulf Oil's actions in regard to removing and replacing the leaking tank do not imply an agreement between Gulf Oil and Halme's respecting liability for remediation of the Site. Furthermore, although clause 4.1(k)(aa) of the 1993 asset purchase agreement states that "Gulf Oil assumed full responsibility for the clean up of all damage caused by the leak", that clause is only a representation by Halme's. Suncor's predecessors were not a party to the 1993 asset purchase agreement, and the fact that Halme's made such a representation does not mean that Gulf Oil made such an agreement. There is simply no evidence of any agreement, either written or oral, between Halme's and Gulf Oil, regarding liability for remediation of any contamination on the Site arising from the leak discovered in 1980.

[199] The 1984 lease and sublease between Petro Canada and Halme's include an indemnity clause, but that clause does not mention environmental liabilities or responsibility for remediation. It states that Petro Canada was not liable "in respect of any personal injury or any damaged suffered by" Halme's "or to any other person whomsoever" and that Halme's would indemnify Petro Canada for claims for "compensation or damages in respect of such injury…." This language does not

appear to contemplate liability for remediation, environmental matters, or the costs thereof.

[200] The 1989 lease was the first private agreement between Petro Canada and Halme's containing an indemnity clause that addresses liability for "damage to the environment". Section 15.01 of the 1989 lease states:

> PCI [Petro-Canada Inc.] shall not be liable, either directly or indirectly, in respect of any personal injury to or any damage suffered by the Lessor [Halme's], Lessor's servants or agents or to any person whomsoever, arising out of the use of the Demised Premises [defined in the lease as the Site together with the buildings and improvements thereon], and [the] Lessor will indemnify and save harmless PCI from all claims for compensation or damages in respect of any such injury and all losses, costs, damages and expenses suffered, sustained or incurred by PCI in connection therewith including any damage to the environment, except any loss, damages or injuries which occur or are caused by the negligence of PCI, its agents, servants or employees.
>
> [underlining added]

[201] Section 12.01 of the 1989 sublease does not refer to environmental matters, but is otherwise similar to the above clause from the 1989 lease. Section 12.01 of the 1989 sublease states:

> Lessee [Halme's] shall:
>
> a. be liable to PCI [Petro Canada], its employees and agents for all losses, costs, damages, expenses and liabilities whatsoever that PCI, its employees and agents may sustain, pay, or incur; and, in addition,
>
> b. indemnify and save PCI, its employees and agents completely harmless against all actions, proceedings, claims, demands, debts, losses, costs, damages, expenses and liabilities which may be brought against or suffered, sustained, paid or incurred by PCI, its employees and agents,
>
> as a result of any matter arising out of the occupation and use of the Demised Premises [defined in the sublease as the Site together with the buildings and improvements thereon or hereafter acquired or placed thereon], or in the performance, purported performance or non-performance of this Sublease, except any losses, damages or injuries which occur or are caused by the negligence of PCI, its employees or agents.
>
> [underlining added]

[202] The 1989 lease and sublease were later assumed by Chardale pursuant to the 1993 cross-lease assignment agreement.

[203] The Board finds that the 1989 lease, and particularly the indemnity clause in it, is the type of private agreement that is contemplated in section 27.1(4)(a) of the *Act*, and therefore, must be considered when deciding to issue a remediation order.

[204] Based on the evidence, the Board finds that the Regional Manager took into account the private agreements between Suncor's predecessors, Halme's, and

Chardale that may have addressed liability for remediation, and were known to the Regional Manager. The Board finds that Halme's May 29, 1998 submission to the Regional Manager in response to the draft remediation order addresses those private agreements. In particular, Halme's submission to the Regional Manager discusses the indemnity clauses in the 1979, 1984, and 1989 leases/subleases, the alleged agreement between Halme's and Gulf Oil regarding the leak discovered in 1980 (Suncor argues there was no such agreement), and two relevant clauses in the 1993 asset purchase agreement between Halme's and Chardale. Halme's submission to the Regional Manager also discusses the Allocation Panel's findings regarding those agreements. The Regional Manager refers to the Allocation Panel's opinion in the Order itself. Although the Order does not discuss the private agreements or their effects with respect to liability, section 27.1(4)(a) only requires the Regional Manager to "take into account" private agreements respecting liability for remediation between responsible persons. The *Act* does not require the Regional Manager, in issuing the Order, to set out or explain his interpretation of those private agreements. The evidence establishes that the Regional Manager considered the relevant private agreements, and then he decided to name Halme's, Petro Canada, and Chardale to the Order.

[205] The Board notes that, even if one of the private agreements known to the Regional Manager, such as the 1989 lease, absolved one of the responsible persons from liability, the Regional Manager was entitled to ignore the private agreement and name the absolved person to the Order, if the remediation of the Site would have been jeopardized by the absence of the absolved person from the Order. As stated in *Beazer*, an example of a situation where the absence of the absolved party in the order would jeopardize the remediation requirements is where other responsible persons do not have the financial capability to carry out all of the remediation work. The Board has already found that there was information before the Regional Manager indicating that the remediation should begin promptly, and that Halme's did not have the financial resources to carry out the remediation work, but Petro Canada had the resources to carry out the remediation. For those reasons, the Regional Manager may have chosen to ignore any private agreement between Petro Canada/Gulf Oil and Halme's that may have absolved Petro Canada/Gulf Oil from liability for remediation of the Site.

[206] The Board has reviewed the liability/indemnity provisions in the 1989 lease, and finds that they indicate that Halme's (and later Chardale) agreed to indemnify Petro Canada for any losses, costs, damages and expenses that Petro Canada suffered in connection with "any damage to the environment", <u>except</u> for "any loss, damages or injuries which occur or are caused by the negligence of [Petro Canada], its agents, servants or employees." However, under both the 1989 lease and sublease, Halme's (and later Chardale) was <u>not</u> obligated to indemnify Petro Canada for loss, damages or injuries that Petro Canada suffered as a result of negligence by Petro Canada or its own employees or agents. Given this exception to the liability/indemnity clause in the 1989 lease and sublease, and given the Board's findings under sub-issue 1(i) that the activities of Halme's, Suncor's predecessors, and to some degree Chardale, all contributed to the Site becoming a contaminated site, the Board finds that Suncor's predecessors are not necessarily

absolved from liability for "any damage to the environment," or remediation of the Site, by virtue of the 1989 private agreements.

[207] In any case, the Board has already found that Halme's and Chardale have insufficient financial resources to remediate the Site, whereas Suncor has the financial and technical resources to effect the remediation. Petro Canada (Suncor) should, therefore, be named in the Order even if it may be absolved of responsibility under a private agreement with Halme's or Chardale. The Board finds that naming Petro Canada (Suncor) to the Order is consistent with the objectives of the legislation, and the principles enunciated in *Beazer* and subsequent judicial decisions. If Suncor incurs remediation costs, it may still rely on any relevant private agreements with Halme's and/or Chardale to seek reimbursement from the other party in a cost recovery action.

[208] In summary, the Board finds that, in the circumstances, section 27.1(4)(a) of the *Act* provides no basis to remove Halme's or Petro Canada (Suncor) from the Order.

(iii) Whether the Order contains inadequate reasons or is unworkably vague

[209] The Board finds that the Order contains adequate reasons to understand the basis for the Regional Manager's decision to issue the Order. In particular, the Order provides that the Regional Manager considered the broad scheme of liability for remediation in section 27(1) of the *Act*, the Allocation Panel's opinion, the need for prompt remediation of the Site, the reasons in section 27.1(3) of the *Act* for commencing remediation promptly, and the likelihood that persons would not act expeditiously or satisfactorily in implementing remediation. The Order also states that the Regional Manager was "satisfied that the remediation of the site will not commence promptly" in the absence of an order, and therefore, he ordered the responsible persons to take specific steps to remediate the Site.

[210] For the reasons that follow, the Board also finds that the Order is not unworkably vague. Although Halme's argues that the Order provides no guidance as to how the named persons are to arrange matters among themselves, the Board finds that the Order sets out specific steps that the named persons were required to complete. In particular, the Order requires the named persons to engage a suitably qualified professional to develop a remediation plan for the Site. The Order requires that the remediation plan include a detailed time frame to complete the remediation, and a cost estimate for each stage of the remediation process. The Order directs the named persons to notify the Regional Manager of the name of the consultant within 21 days of the date of the Order. The Order also requires that the remediation plan be submitted, within 90 days of the date of the Order, to the Regional Manager for approval in principle. Next, the Order requires the named persons to implement the remediation plan in accordance with the approved time frame, once the Regional Manager issues his approval in principle. Finally, the Order directs that upon completion of the remediation of the Site, "information to support the issuance of a Certificate of Compliance or a conditional Certificate of Compliance must be requested" and "[t]he request for a certificate must be accompanied by the fee established in the *Contaminated Sites Regulation*."

[211] Together, those provisions in the Order provide sufficient direction to the named persons for them to know what they needed to do, and what they needed to submit to the Regional Manager, within specified time frames, to comply with the Order. The fact that the named persons have not complied with the Order does not mean that the Order was too vague for them to do so.

[212] Moreover, that fact that the Order does not allocate the remediation costs among the named persons does not mean that the Order is unworkably vague. Under the scheme of the *Act*, the issue of cost allocation amongst responsible persons is to be determined through other processes. As the Court stated at para. 168 of *Beazer*, "the Legislature has chosen to leave the requirement to deal with issues of culpability and fair allocations to an allocation panel under s. 27.2 of the *Act* (if requested) and to the courts in cost recovery/allocation proceedings under s. 27(4) of the *Act* and s. 35 of the *Regulation*."

[213] For all of these reasons, the Board finds that this ground for appeal fails.

(iv) Whether the requirement in the Order that the responsible persons must seek a certificate of compliance should be removed for lack of jurisdiction

[214] The Board finds that the requirement in the Order for the named persons to apply for a certificate of compliance is within the Regional Manager's jurisdiction. Section 27.1(1) of the *Act* authorizes a regional manager to issue a remediation order, and section 27.1(2)(a) provides that a remediation order may require a person to "undertake remediation". When the Order was issued, "remediation" was defined in section 1 of the *Act* to mean, among other things, "monitoring, verification and confirmation of whether the remediation complies with the remediation plan, applicable standards and requirements imposed by the manager" [underlining added]. Under section 27.6(2) of the *Act*, a regional manager may issue a certificate of compliance "with respect to remediation of a contaminated site if" certain requirements are met, including whether the site has been remediated in accordance with: prescribed numerical standards, any orders issued under the *Act*, any remediation plan approved by a regional manager, and any requirements imposed by a regional manager.

[215] When those provisions of the *Act* are read together, they indicate that the authority to issue a remediation order requiring persons to undertake "remediation" includes the authority to require those persons to verify and confirm whether the remediation complies with any approved remediation plan, the applicable standards in the regulations, and any requirements imposed by a regional manager. The process set out in Part 4 of the *Act* for persons to verify and confirm those things is the process for seeking a certificate of compliance under section 27.6(2) of the *Act*.

[216] Accordingly, the Board rejects this ground for appeal.

Summary of the Board's findings on Issue 1

[217] For all of these reasons, the Board finds that the Regional Manager properly exercised his discretion in issuing the Order, and in naming both Halme's and Petro Canada (now Suncor) to the Order. Furthermore, based on the evidence before the

Board, the Board finds that significant contamination remains on the Site and continues to present a risk to the environment and the adjacent property used for residential purposes. There continues to be a need for the Order, and the responsible persons that were originally named to the Order should remain named to the Order. The Order is confirmed.

2. Whether the Determination is invalid because section 27.3(3) of the *Act* (now section 50(3) of the *Environmental Management Act*) encroaches on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*, and therefore, is invalid and of no force or effect as it is beyond the legislative power of the Province.

Halmes' Submissions

[218] Halme's argues that section 27.3 of the *Act* is of no force or effect, because it trenches on the exclusive jurisdiction of superior court judges appointed under section 96 of the *Constitution Act, 1867*, by purporting to authorize provincial statutory decision-makers to adjudicate essential elements of actions. Section 96 of the *Constitution Act, 1867*, provides the Governor General with the power to appoint superior court judges, as follows:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[219] Halme's submits that section 27(4) of the *Act* creates a private cause of action (adjudicated by superior court judges), whereby persons may seek to recover their reasonably incurred costs of remediation from one or more responsible persons. Section 27(4) states:

> Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part. [Part 4 of the *Act*]

[220] For convenience, section 27.3(3) is reproduced below:

> (3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

[221] Halme's submits that section 27(1) of the *Act* provides that responsible persons are "absolutely, retroactively and jointly and severally liable for the reasonably incurred costs of remediation of a contaminated site." In addition, Halme's notes that section 35(1) of the *Regulation* provides that a defendant named in a cost recovery action "may assert all legal and equitable defences,

including any right to obtain relief under an agreement other legislation or the common law."

[222] Halme's argues that, despite those provisions, subsection 27.3(3) of the *Act* purports to limit the liability, in a cost recovery action, of a person who a regional manager determines to be a minor contributor.

[223] Halme's submits that the three-part test for analyzing whether section 27.3 of the *Act* infringes section 96 of the *Constitution Act, 1867*, is set out in *Reference Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 [*Re Residential Tenancies Act*], at pages 734 to 736.

[224] Under the first branch of the *Re Residential Tenancies Act* test, the question is whether the jurisdiction granted by section 27.3 "conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation." If the power in question does not conform to one exercised by a superior, district or county courts in 1867, the inquiry ends there. Halme's submits that the adjudication of causes of action, and the determination of the liability of one private party to another and whether liability should be severed, were within the authority of those courts in 1867, and therefore, the inquiry must proceed to the next stage.

[225] Under the second branch of the *Re Residential Tenancies Act* test, the question is whether the function performed under section 27.3 of the *Act* is "judicial" in its institutional setting, in contrast to policy-making functions. In this regard, Halme's submits that the adjudication of the liability of responsible persons requires fairness, and therefore, is inherently judicial. Further, Halme's submits that the language in subsection 27.3(3) demonstrates that the power to make the Determination is expressly judicial, because a person determined to be a minor contributor "is only liable for remediation costs in an action or proceeding brought… under section 27 up to the amount or portion specified by a manager in the determination…."

[226] The third branch of the *Re Residential Tenancies Act* test involves an assessment of the "tribunal's function as a whole in order to appraise the impugned function in its entire institutional context" (at page 735). Under this branch of the test, it is permissible for administrative tribunals to exercise powers historically belonging to section 96 judges, provided that those judicial powers are "merely subsidiary or ancillary" to the general administrative functions assigned to the tribunal (at page 736). In regard to the third branch of the test, Halme's submits that the power to make a minor contributor determination in unnecessary for, and unrelated to, the power to issue a remediation order or any other power granted to a regional manager under the *Act*. Rather, the sole purpose of power to make a minor contributor determination is judicial, and it impermissibly impairs the independence of a section 96 judge. Halme's submits that, in the present case, section 27.3 deprives a judge of the ability to make findings of fact and apply legal principles to determine the liability of Chardale, and it constrains a judge's ability to make findings of fact, apply legal principles, and allocate liability among other potentially responsible persons.

[227] In its reply submissions, Halme's submits that the power to make a minor contributor determination directly interferes with the superior court's independence. Halme's argues that, in the absence of a minor contributor determination, a judge would determine whether any person is liable for remediation costs, and if so, the amount of their liability. However, if a regional manager makes a minor contributor determination, the judge is bound by that determination regarding the amount of the minor contributor's liability for remediation. This, in turn, affects the amount of liability the judge can assign to other persons in a cost recovery action, regardless of the judge's findings of fact or the principles of liability set out in Part 4 of the *Act*.

Suncor's Submissions

[228] Suncor submits that the Regional Manager exceeded his jurisdiction by making a final determination under section 27.3(3) as to Chardale's liability in any cost recovery action. Suncor submits that such a determination is within the exclusive jurisdiction of a superior court judge.

[229] Similar to Halme's submissions, Suncor cites the three-part *Re Residential Tenancies Act* test, although Suncor submits that the test was re-stated by McLachlin J. (as she was then) in *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 [*Re Residential Tenancies Act, 1996*], at para. 74, as follows:

> The test for determining whether a conferral of power on an inferior tribunal violates s. 96 of the *Constitution Act, 1867* was set out by this Court, *per* Dickson J., in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, as modified by *Attorney General of Quebec v. Grondin*, [1983] 2 S.C.R. 364, *Sobeys*, *supra*, and *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252. <u>It consists of three steps, represented by the following questions: (1) does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation? (2) if so, is it a judicial power? (3) if so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?</u> The first two steps may be seen as identifying potential violations of s. 96; the last step as setting out the circumstances in which the transfer of a s. 96 power to an inferior tribunal is "transformed" and hence constitutionalized by the administrative context in which it is exercised. The debate on this appeal focuses on the first step.
>
> [underlining added]

[230] Suncor submits that, even if the judicial function is related to a novel jurisdiction or is ancillary to the legislative scheme, that does not end the inquiry, because section 27.3 of the *Act* grants exclusive (as opposed to concurrent) jurisdiction to a regional manager in assessing the liability of minor contributors. Suncor argues, therefore, that there is a further question to be determined; namely, whether the exclusive grant of power under section 27.3 ousts part of a superior court's core jurisdiction: *MacMillan Bloedal v. Simpson*, [1995] 4 S.C.R.

725 [*MacMillan*]; *Reference Re Young Offenders Act* (P.E.I.), 1990 CanLII 19 (S.C.C.). Specifically, Suncor submits that Lamer C.J. held (for the majority) in *MacMillan* that the *Re Residential Tenancies Act* test was insufficient to assess the constitutionality of a provision in a provincial statute that attempted, by granting exclusive jurisdiction to an inferior court, to oust a superior court's jurisdiction over a matter that was within the court's core jurisdiction. At para. 38 of *MacMillan*, Lamer C.J. explained the concept of "core" jurisdiction as follows:

> The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt *ex facie* is obviously within that jurisdiction. ...

[231] Suncor also points to paras. 29 to 30 of *MacMillan*, where Lamer C.J. states that "the seminal article on the core or inherent jurisdiction of superior courts is I. H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23." At para. 30, Lamer C.J. cites portions of that article, as follows:

> Discussing the history of inherent jurisdiction, Jacob says (at p. 25):
>
> > . . . the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and . . . the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.
>
> Regarding the basis of inherent jurisdiction, Jacob states (at p. 27):
>
> > . . . the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticised as being "metaphysical" [cite omitted], but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.
>
> [Emphasis added in the reasons for judgement]

[232] Suncor submits that, having regard to these principles, even if a legislative scheme addresses a novel concern of society and, on that basis, the jurisdiction could be conferred on an inferior court, certain provisions of the legislation may be

deemed unconstitutional if they attempt to exclusively assign part of a superior court's "core jurisdiction" to an inferior court.

[233] Furthermore, Suncor submits that the principle of judicial independence has constitutional underpinnings, and superior courts must be free, and seen to be free, to perform their adjudicative role without interference, including interference from the executive and legislative branches of government: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 [*BC v. Imperial Tobacco*], at paras. 44 to 47.

[234] Turning to section 27.3 of the *Act*, Suncor submits that a minor contributor determination limits the amount that can be recovered from a minor contributor in a cost recovery action under section 27(4), and consequently, it also defines the remaining amount of liability to be shared amongst any other responsible persons in a cost recovery action. Suncor submits that this effectively ousts the BC Supreme Court's jurisdiction to review the evidence and determine the liability amongst all responsible persons in a cost recovery action, and may deprive a defendant in a cost recovery action of a defence that would otherwise be available to them under section 35 of the *Regulation*.

[235] Applying the *Re Residential Tenancies Act* test to section 27.3 of the *Act*, Suncor submits that: (1) the power conferred by it broadly conforms to a power exercised by a superior court judge at the time of Confederation; (2) a minor contributor determination amounts to the exercise of a judicial function; and (3) section 27.3 is separate from the regional manager's other powers under the *Act*, and is not merely ancillary to a regional manager's administrative role.

[236] Specifically, regarding the first branch of the *Re Residential Tenancies Act* test, Suncor argues that section 27.3 of the *Act* grants a regional manager the power to assess liability, and alter the assessment of joint and several liability proscribed by section 27(1) of the *Act*. Suncor further submits that, at the time of Confederation, the superior courts had jurisdiction over contribution and indemnity among joint or several wrongdoers in contract and negligence. To the extent that inferior courts shared similar powers, they were limited to claims for small amounts: *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238 [*Sobeys*], at pages 267 to 272. Suncor argues that the costs involved in remediating contaminated sites are often very large, and usually exceed the amounts (accounting for inflation) that were within the inferior courts' jurisdiction at the time of Confederation.

[237] With regard to the second branch of the *Re Residential Tenancies Act* test, Suncor argues that a minor contributor determination amounts to the exercise of a judicial function, because a minor contributor determination:

- is largely, if not exclusively, a dispute between private parties;
- requires a regional manager to make the determination with reference to rules set out in section 27.3(1) of the *Act*, and presumably requires a regional manager to consider the information provided by the applicant pursuant to section 38 of the *Regulation*; and
- requires a regional manager to make the determination in accordance with fairness and impartiality.

[238] Regarding the third branch of the *Re Residential Tenancies Act* test, Suncor submits that a regional manager's function under section 27.3 may be seen as "isolated from the rest of the relevant legislation," because a regional manager's powers under Part 4 of the *Act* are to identify contaminated sites and ensure that they are investigated and remediated. Suncor argues that none of the other powers under Part 4 of the *Act* are dependent on a regional manager's ability to make a minor contributor determination. In contrast, the liability of all other responsible persons is determined by a superior court. Suncor argues, therefore, that removing the power granted under section 27.3 would not jeopardize the proper administration of the *Act*, or detract from a regional manager's powers to order remediation and compel compliance with a regional manager's orders or directions. Furthermore, the power under section 27.3 is not simply ancillary, as it has a fundamental impact on the allocation of liability amongst persons in any subsequent cost recovery action.

[239] Turning to the "core jurisdiction" test in *MacMillan*, Suncor submits that even if the Board finds that the section 27.3 power relates to a novel jurisdiction or is ancillary to the legislative scheme, section 27.3 is unconstitutional because it grants exclusive (as opposed to concurrent) jurisdiction to a regional manager in assessing the liability of minor contributors, and this exclusive grant ousts the core jurisdiction of the BC Supreme Court. Suncor argues that the assessment of liability amongst all responsible persons is essential to the administration of justice, because without this power a superior court may be required to draw conclusions about liability that are not in line with the evidence before the court. Suncor submits that requiring a superior court to adhere to liability findings made by an inferior court (i.e., a regional manager) regarding a minor contributor determination, when the evidence submitted in a cost recovery action may favour a different result, is contrary to the basic tenants of the administration of justice and the rule of law. In a cost recovery action, it would effectively remove the superior court's jurisdiction to apportion liability against the minor contributor and would prohibit the operation of joint and several liability, which would affect the fairness of the cost recovery proceedings.

[240] Finally, Suncor submits that removing the superior court's jurisdiction to adjudicate the liability of all responsible persons also offends the principle of judicial independence articulated in *BC v. Imperial Tobacco*. In that case, the Supreme Court of Canada found that legislation cannot "interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence." Suncor argues that a minor contributor determination offends this principle by interfering with a superior courts ability to independently assess the evidence led to support or defend a claim, independently assign weight to the evidence, and independently determine whether the evidence supports a finding of liability.

Regional Manager's Submissions

[241] The Regional Manager adopts the Attorney General's submissions on this issue.

The Attorney General's Submissions

[242] The Attorney General summarizes her position on this issue as follows:

a. Section 27.3 of the *Act* is constitutionally valid and does not trench on the power of a section 96 judge because the power it confers on a regional manager is novel and not one that was exercised by the superior courts at the time of Confederation;

b. Alternatively, if the section 27.3 power was exercised by superior courts at Confederation, its grant upon a regional manager is constitutional because:

(i) the power is not judicial;

(ii) the power is necessarily incidental to the social policy scheme of the *Act*;

(iii) the power is not within the core jurisdiction of the superior courts; and

(iv) section 27.3 does not interfere with the principle of judicial independence.

[243] In response to Halme's request that the Board declare that section 27.3 is of no force or effect, the Attorney General submits that the Board has no jurisdiction to grant a declaration of constitutional invalidity.

[244] In general, the Attorney General submits that there is a presumption that laws passed by the Legislature are validly enacted: *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pp. 687 to 688. A party challenging the constitutionality of a law has the burden of establishing its invalidity: *Reference re Firearms Act (Can.),* 2000 SCC 31, at para. 25. Also, where a challenged law is open to more than one interpretation, the interpretation that favours the validity of the legislation is to be preferred: *A.G. (Canada) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356; *Siemens v. Manitoba*, 2003 SCC 3, at para. 33.

[245] Turning to the first part of the *Re Residential Tenancies* test, the Attorney General submits that section 27.3 confers a power that does not broadly conform with a power exercised by the superior courts at Confederation, and therefore, it is unnecessary to go to the final two steps of the three-part test. The Attorney General submits that the inquiry at this stage focuses on the nature of the dispute, rather than the type of remedy sought (*MacMillan*, at page 740), and should be based on the jurisdiction of the superior courts in the original four provinces at the time of Confederation (*Sobeys*). The Attorney General submits that the Appellants' characterizations of the section 27.3 power, and the powers exercised by superior courts at Confederation, are overbroad and imprecise, and ignore the status of the dispute at issue.

[246] Specifically, the Attorney General submits that, at Confederation, there was no general common law power to award contribution or indemnity from a joint tortfeasor: *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 [*Strata Plan LMS 1751*]. After Confederation, the common law was modified by legislation creating a statutory right to seek contribution and indemnity

– in 1924 in Ontario, and in 1936 in BC: *Giffels v. Eastern Construction*, [1978] 2 S.C.R. 1346, at 1353; *Strata Plan LMS 1751*, at para. 21.

[247] In support of those submissions, the Attorney General quotes *Strata Plan LMS* 1751, at paras. 20 and 21. For convenience, paras. 19 to 22 are reproduced below:

> The terms "contribution" and "indemnity" both refer to a restitutionary remedy rooted in unjust enrichment that provides a right of contribution toward a plaintiff's damages as between concurrent tortfeasors. A claim for indemnity seeks recovery of the entire amount that a tortfeasor has paid to the plaintiff. A claim for contribution seeks only a portion of that amount. For the sake of brevity, in these reasons I use the term "contribution" to refer to both.
>
> There was no right to contribution at common law between concurrent tortfeasors. A plaintiff could sue and collect 100 percent of her loss from any one of several concurrent tortfeasors regardless of his degree of fault. That tortfeasor had no right to then sue the others to recover the amounts attributable to their fault.
>
> In British Columbia, that unfairness was remedied by enacting a statutory right to contribution and indemnity in 1936. Presently, that right is found in s. 4 of the [*Negligence*] *Act*, which reads:
>
> ...
>
> Section 4(2) thus creates two independent statutory rights. The first is a plaintiff's right to recover the whole of her loss from any one of several concurrent tortfeasors on the basis that they are jointly and severally liable. The second is the right as between those tortfeasors to claim contribution.

[248] The Attorney General argues that the exceptions referred to by Suncor are limited to specific situations and do not encompass broad contribution and indemnity for joint tortfeasors, let alone cost recovery for environmental remediation mandated by statute.

[249] Moreover, the Attorney General submits that section 27.3 does not convey a broad power to determine contribution or indemnity in negligence or contract, or a broad power to assess liability as between wrongdoers or private parties. Rather, it is a power to determine that a person responsible for contamination is a minor contributor to that contamination, and to determine the portion or amount of their liability for the costs of remediation. In other words, the "dispute" pertains to liability for remediation of a contaminated site, as defined in the *Act*.

[250] The Attorney General argues that this power could not have existed at the time of Confederation, because there was no obligation to remediate contaminated sites in 1867. The Attorney General submits that the *Act* created a new statutory cause of action for the recovery of remediation costs: *Workshop Holdings*. The legal obligation to remediate and the right to recover remediation costs were created by the *Act*, which also establishes the principles of liability that relate to contaminated sites remediation, including creating the provision that allows liability to be limited for minor contributors. The Attorney General submits, therefore, that

the *Act* is not legislation that merely codifies existing law, unlike the legislation in *Re Residential Tenancies Act*. Indeed, the Attorney General argues that the *Act* was required, in part, because traditional common law analyses, including contract and negligence principles, were insufficient to address contaminated sites: *Workshop Holdings*, at para. 44.

[251] The Attorney General submits that this context is key; i.e., section 27.3 deals with the determination of responsibility and liability in the context of a statutorily imposed obligation to remediate contaminated sites, according to principles of liability established by the *Act*. The Attorney General argues that this obligation is not one that the courts could have imposed or imagined in 1867.

[252] Additionally, the Attorney General submits that it is well established that jurisdiction over environmental matters was not assigned to either the federal Parliament or provincial Legislatures in 1867, and the environment is a subject that touches on many different areas of constitutional responsibility; some federal, and some provincial: *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, at p. 286.

[253] Similarly, the Attorney General submits that, at Confederation, the courts had only begun to recognize that a party could be held strictly liable for damages caused by the escape of a substance in relation to the non-natural use of land, such that one private party could bring an action against another private party for damages related to harm to property: *Rylands v. Fletcher*, [1868] UKHL1, LR 3 HL 330 [*Rylands v. Fletcher*], (affirming (1866) LR 1 Ex. 265). The Attorney General maintains that an action for damages under the principles in *Rylands v. Fletcher* is distinct from a cost recovery action under section 27(4) of the *Act*. Further, the Attorney General argues that, in making a determination under section 27.3, a regional manager is not adjudicating a dispute or a cause of action between private parties; rather, he is administering part of statute that is intended to encourage speedy and effective remediation of contaminated sites, to minimize harm to the environment and the public. Moreover, the Attorney General submits that the impact of a minor contributor determination on cost recovery actions is more appropriately considered at a later stage of the analysis. In any case, even if the section 27.3 power was adjudicating a dispute between private parties, it is not a type of dispute that was within the superior courts' jurisdiction in 1867.

[254] Alternatively, if the Board accepts that the section 27.3 power was within the superior courts' jurisdiction at Confederation, the Attorney General submits that this power would have been exercised concurrently by superior and inferior courts at Confederation. With regard to Suncor's submission as to the pecuniary or financial limit on inferior courts' jurisdiction at Confederation (akin to the limits today on small claims courts' jurisdiction), the Attorney General submits that this is not necessarily a bar to finding that superior and inferior courts shared concurrent jurisdiction over such matters: *Sobeys*, at pp. 259 to 260. In any event, the Attorney General argues that neither the superior nor inferior courts had a broad power to award contribution and indemnity at Confederation.

[255] Turning to the second part of the *Re Residential Tenancies Act* test, the Attorney General submits that the tribunal's procedures are not determinative; rather, primary consideration is the nature of the question that is before the tribunal. In particular, the Attorney General submits that, while the duty of

procedural fairness applies to a regional manager in making a minor contributor determination, a regional manager is not acting "judicially" within the meaning of the section 96 constitutional jurisprudence, because he is not adjudicating a dispute between private parties through the application of legal rules. In support of those submissions, the Attorney General cites *Re Residential Tenancies Act*, at p. 735, where the Court states as follows:

> Where a tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally it is acting in a 'judicial capacity.'

[256] Furthermore, the Attorney General submits that section 27.3 provides a regional manager with powers that are similar to those of the Director of Labour Standards in *Sobeys*. In *Sobeys*, the Court found that the powers of the Director of Labour Standards were non-adjudicative, as the Director's role was inquisitorial and mediative, and he had the power to initiate investigations and make orders without hearing from all parties. Similarly, under section 27.3, a party may apply for a minor contributor determination, but the determination is not made in the context of a dispute, and there is no requirement for a regional manager to hear from other responsible persons. Also, the section 27.3 power is discretionary in terms of remedies; i.e., a regional manager "may" determine that a person is a minor contributor if certain criteria are met. In contrast, in *Sobeys* the Court found that the powers of the Labour Standards Tribunal were adjudicative because the Tribunal was required to hear from all parties, could only be accessed by appeal, and was not engaged in making policy decisions or carrying out a broad social scheme. The Attorney General submits that the section 27.3 power is exercised in the context of carrying out a broad social and environmental scheme designed to ensure the remediation of contaminated sites, while affording regional managers the discretion to limit liability for minor contributors in order to avoid unduly harsh consequences from the liability scheme.

[257] The Attorney General acknowledges that a minor contributor determination limits a minor contributor's liability in a subsequent cost recovery action under section 27(4). However, the Attorney General argues that this does not alter the nature of a regional manager's power under section 27.3. In any event, the proper focus of the inquiry at this stage is the nature of the question that a regional manager decides when making such a determination, and not the effects of the determination in a subsequent court proceeding.

[258] Turning to the third part of the *Re Residential Tenancies Act* test, the Attorney General submits that, if the section 27.3 power is found to be judicial in nature, then the next step is to review the power within its broad institutional context. The third stage of the test is met only if the power, which has been identified as judicial in the second stage of the test, is found to be the "sole or central" function of the decision-maker.

[259] The Attorney General argues that the section 27.3 power is necessarily incidental to the broader scheme of the *Act*, and particularly Part 4 of the *Act*, which is aimed at ensuring the remediation of contaminated sites: *Workshop Holdings*, at paras. 40 to 46. The Attorney General further argues that part of that

scheme is the novel cause of action that was created in section 27(4) of the *Act*, but a minor contributor determination acts as a limitation on this cause of action. In support of that proposition, the Attorney General cites *Workshop Holdings*, at para. 58:

> … cost recovery could be limited by a Manager's determination under section 27.3(1) that a responsible person is a minor contributor to the contamination and, thus, entitled to the benefit of a limitation in liability under s. 27.3(3).

[260] In summary, the Attorney General submits that Part 4 of the *Act* creates a flexible scheme in which a regional manager has considerable discretion to make orders to ensure the remediation of contaminated sites, and section 27.3 is one component of that. In the institutional setting of the *Act*, a regional manager does not function as a superior court in exercising the powers under section 27.3.

[261] Turning to the "core" jurisdiction question under the *MacMillan* test, the Attorney General submits that this need only be considered if the section 27.3 power is found to be within the superior courts' jurisdiction at Confederation and the grant of power to a regional manager is exclusive; i.e. if it ousts the superior courts' jurisdiction.

[262] Regarding the nature of the superior courts' core or inherent jurisdiction, the Attorney General submits that it has been framed narrowly by the Supreme Court of Canada, and it traditionally involved the ability to punish for contempt of court, and the power to control the court's processes: *MacMillan*, at p. 749. The Attorney General submits that the following have been recognized as the "clearly knowable" functions of the superior courts' inherent jurisdiction:

- ensuring convenience and fairness in legal proceedings;
- preventing steps being taken that would render judicial proceedings inefficacious;
- preventing abuse of process; and
- acting in aid of superior courts, and in aid or control of inferior courts and tribunals.

  [*MacMillan*, at p. 751]

[263] The Attorney General notes that the superior courts' inherent jurisdiction also includes the power to judicially review decisions of inferior courts on certain questions, such as questions of jurisdiction: *MacMillan*, at p. 753.

[264] The Attorney General further submits that the section 27.3 power does not preclude the BC Supreme Court from determining that a responsible person is a minor contributor if a cost recovery action is brought under section 27(4), which is what occurred in *Gehring*. The Attorney General argues, therefore, that the grant of power under section 27.3 is not truly exclusive, although a regional manager's minor contributor determination will be determinative in a cost recovery action unless it is overturned on judicial review. Moreover, the Attorney General submits that the power to determine responsibility in a cost recovery action does not fall within the core of the superior courts' jurisdiction, because a cost recovery action is a new cause of action that was created by section 27(4) of the *Act*. Thus, section

27.3 constrains the superior court's ability to make a determination of liability regarding a minor contributor only in the context of the specific cause of action that was created by the *Act*.

[265] The Attorney General argues that constitutional balance is achieved by allowing inferior courts and tribunals, as well as administrative decision-makers, to make some decisions that would otherwise be made by superior courts, subject to the superior courts' supervisory power of judicial review over certain questions, such as questions of jurisdiction and constitutionality. In this regard, the Attorney General notes that a minor contributor determination may (after an appeal to the Board) be subject to judicial review. Insofar as section 27.3 constrains the superior court's ability to make a determination of liability regarding a minor contributor in a cost recovery action under section 27(4), the Attorney General submits that the Legislature has made policy choices as to how liability may be allocated under the *Act*, and the purpose of the constitutional analysis is not to re-evaluate the policy choices of the Legislature.

[266] Regarding the question of whether section 27.3 offends the principle of judicial independence, as set out in *BC v. Imperial Tobacco*, the Attorney General submits that meeting the tests in *Re Residential Tenancies Act* and *MacMillan* for constitutionality make it unnecessary to enter into this inquiry. Moreover, the Attorney General submits that the mere fact that the Legislature created the cost recovery action under section 27(4) of the *Act*, and assigned it to the superior courts, does not mean that the Legislature cannot impose limits on that cause of action, including the limit imposed by a determination under section 27.3. The Attorney General submits that restraint should be exercised in assessing the adequacy of the section 27(4) cause of action, and the Legislature's policy choice should be respected as long as the legislation does not interfere, and is not reasonably seen to interfere, with the courts' adjudicative role: *BC v. Imperial Tobacco*, at paras. 49, 52, and 54; *No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.,* 2003 BCCA 57, at paras. 31 and 32.

[267] Finally, the Attorney General submits that the Board has no jurisdiction to issue a declaration of constitutional invalidity. While the Board has the power to consider questions of law under section 94(2)(d) of the *Environmental Management Act,* and therefore, the power to assess the constitutional validity of legislation it is called upon to apply, its remedial powers are limited to those powers that are provided to it by its enabling statutes, and do not include general declarations of invalidity. The Attorney General submits that, if the impugned provision is found to be constitutionally invalid, the Board should treat the provision as invalid in the matter before it: *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, at para. 31; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17.

Chardale's Submissions

[268] Chardale's submissions do not address this issue.

The Panel's Findings

[269] In deciding this issue, the Panel has addressed the following sub-issues:

Whether the power conferred on the Regional Manager under section 27.3 of the *Act* is constitutionally invalid based on the test in *Re Residential Tenancies Act*:

(i) Does the power conferred under section 27.3 "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation?

[270] First, the Board has considered the nature of the dispute that is addressed by the power conferred under section 27.3 of the *Act*. Under section 27.3(1), a regional manager may determine that a responsible person is a minor contributor if the person demonstrates that they meet the specified criteria. The criteria are generally aimed at persons who contributed to a minor portion of the contamination, or where it would be unduly harsh on the facts to hold the person liable for more than a minor portion of the remediation costs. If a regional manager makes a minor contributor determination, then the regional manager "must", under section 27.3(2), determine the amount or portion of remediation costs attributable to the minor contributor.

[271] The Board finds that section 27.3 confers a power to decide whether a person who is liable for remediation costs (since section 27.3 applies to "responsible persons" who are, by definition, liable) qualifies to have their liability limited to a "minor portion" of the remediation costs. In essence, section 27.3(1) grants the power to limit the liability of a person, who may otherwise be exposed to a greater degree of liability, for the costs to remediate a contaminated site, if the person meets the specified criteria. It is important to note that, although remediation standards are regulated by the legislation, those standards are based on the degree of harm that the contaminating substance is expected to cause when present in soil, water or vapours in certain concentrations. Also, in practical terms the remediation of contaminated sites typically involves removing, containing, and/or mitigating a harmful substance that has been discharged onto land. Thus, the aim of a minor contributor determination is to decide whether to limit a person's liability for the costs of repairing or mitigating harm caused by the discharge of a harmful substance to the land.

[272] Next, the Board has considered the nature of the superior courts' jurisdiction at the time of Confederation. Although the Attorney General submits that, at Confederation, superior courts had no power to award contribution or indemnity from a joint tortfeasor, the Board notes that the focus at this stage of the test is not a comparison of the superior courts' powers, versus the administrative decision-maker's powers, to award specific types of remedies. Rather, the focus is on the type of dispute in issue. In support of her submissions, the Attorney General cited *Strata Plan LMS 1751*, and at para. 19 of that case, the BC Court of Appeal explained that contribution and indemnity were types of common law remedies:

> The terms "contribution" and "indemnity" both refer to a restitutionary remedy rooted in unjust enrichment that provides a right of contribution

> toward a plaintiff's damages as between concurrent tortfeasors. A claim for indemnity seeks recovery of the entire amount that a tortfeasor has paid to the plaintiff. A claim for contribution seeks only a portion of that amount. …
>
> [underlining added]

[273] The question at this stage is whether the type of dispute "broadly conforms" to one which was decided exclusively or predominantly by the superior courts at the time of Confederation. As stated by MacLachlin J. (as she was then) in *Re Residential Tenancies Act, 1996*, at para. 76:

> … For the purposes of this characterization, the focus of the historical inquiry is on the type of dispute involved. The function of the s. 96 courts was and is dispute resolution. The question must therefore be whether an aspect of the dispute resolution function dominated by the superior courts has been transferred to an administrative tribunal. It follows that the inquiry must not focus on "a technical analysis of remedies" (*Sobeys, supra*, at p. 255). Nor should it evaluate the nature and goals of the legislative scheme, which fall to be considered only at the third stage should it progress that far. There is no logical nexus between the policy concerns of modern legislation and the search for the historical antecedents of a given jurisdiction. Rather, the focus must be on the "type of dispute" involved: the reviewing court must look to the "subject-matter rather than the apparatus of adjudication": *Dupont v. Inglis*, [1958] S.C.R. 535, at p. 543 *per* Rand J.; *Sobeys*, *supra*. In this case, the focus must be on residential tenancy disputes.
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> [underlining added]

[274] In any event, the Board finds that, at the time of Confederation, the courts had the discretion to award contribution and indemnity, albeit in a more limited sense than under modern legislation such as the *Negligence Act*. While the general common law rule was that there was no contribution between joint tortfeasors, there were cases where indemnity (i.e., full contribution) or even partial contribution was permitted. In this regard, Suncor cited *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* by Glanville L. Williams (London: Stevens & Sons Limited, 1951), at pp. 80 to 83, as follows:

> The general rule at common law has been taken to be settled by *Merryweather v. Nixan* (1799), namely that there is no contribution between joint tortfeasors. …
>
> Such a rule could not be maintained in its entirety, and accordingly indemnity has frequently been permitted where moral fault is regarded as being exclusively or preponderatingly on one side, or where one party acted innocently at the request of the other. … [citing *Battersey's* case (1623) Winch 49, 124 E.R. 41] … more generally an agent is entitled to indemnity if he reasonably believed that the act was one that his principal would authorize [citing *Adamson v. Jarvis* (1827) 4 Bing. 66, 130 E.R. 693; *Humphrys v. Pratt* (1831) 2 Dow & Clark 288, 6 E.R. 735 (H.L. (Ir.)); *Betts v. Gibbins* (1834) 2 Ad. & E. 57, 111 E.R. 22; *Toplis v. Crane* (1839) 5 Bing. (N.C.) 636, 132 E.R. 1245;…] …

> These cases concern the right of indemnity; but *Merryweather v. Nixan* has not prevented even contribution short of indemnity being given in some cases. Thus it has been held that where two persons jointly employ the same servant, and one is made vicariously liable for the tort of the servant, he may recover contribution from the other [citing *Wooley v. Batte* (1826) 2 Car. & P. 417, 172 E.R. 188].

[275] While the cases cited above are decisions of the English courts, the jurisdiction of the courts in the former colonies in Canada (except Quebec to some degree) was informed by the common law of Britain. Wilson J. stated at p. 267 of *Sobey's* that "[t]he inquiry is one generally into jurisdiction in 1867 and our court structure is derived from the British [common law] model." Similarly, at para. 78 of *Re Residential Tenancies Act, 1996*, McLachlin J. (as she was then) stated that "… the law of the United Kingdom, which informed the allocation of jurisdiction in the former colonies, may be considered if necessary."

[276] At Confederation, inferior courts had limited jurisdiction over disputes about liability for damages. As discussed at pp. 267 to 272 of *Sobeys*, the inferior courts of the four founding provinces dealt with contract disputes involving small amounts of damages. The maximum amounts varied somewhat from province to province, ranging from $25 to $100. According to *Sobey's*, at pp. 259 to 261, limitations on the monetary amount that could be decided by inferior courts is a relevant consideration in determining whether the type of dispute fell principally within the jurisdiction of superior courts. Consequently, the Board finds that the inferior courts' jurisdiction over damages was limited to contract disputes involving small amounts, similar to the jurisdiction of small claims courts today. The Board finds that the costs involved in remediating contaminated sites are often very large, and usually exceed the amounts (accounting for inflation) that were within the inferior courts' jurisdiction at the time of Confederation. Indeed, all of the judicial decisions on remediation cost recovery that the parties have cited were decided by the BC Supreme Court (or by a higher court, on appeal from the BC Supreme Court). Thus, the Board finds that, to the extent that inferior courts' had shared jurisdiction over contract disputes involving small amounts of damages, it was a "[m]inor concurrency in subsidiary aspects of the jurisdiction" (para. 77 of *Re Residential Tenancies Act, 1996*), and for practical purposes, contract disputes involving claims for damages fell principally within the superior courts' jurisdiction.

[277] The Board has also considered the Attorney General's submission that, at the time of Confederation, there was no obligation to remediate contaminated sites, and that a statutory scheme of liability for remediation was created under the *Act* to address the common law's limitations in addressing the remediation of contaminated sites. The Attorney General submits, on that basis, that the superior courts could not have had jurisdiction over disputes about liability for remediation at Confederation. However, the Board finds that the Attorney General's submissions in that regard rely on an overly narrow characterization of the type of dispute in issue. As stated in para. 76 of *Re Residential Tenancies Act, 1996*, this stage of the test does not involve an evaluation of "the nature and goals of the legislative scheme", which in this case means the nature and goals of Part 4 of the *Act*, as "[t]here is no logical nexus between the policy concerns of modern legislation and the search for the historical antecedents of a given jurisdiction."

[278] The Board finds that, historically, common law actions rooted in the principles of property, contract and tort law provided a means for the courts to resolve disputes involving matters that could today be characterized as disputes over liability for contamination and other forms of harm to land: *Workshop Holdings*, at para. 44. In particular, actions in negligence, nuisance, strict liability, and trespass to land could be initiated to resolve disputes that may be characterized as involving damage to interests in land. For example, the Attorney General cited *Rylands v. Fletcher*. In 1861, Fletcher brought an action in negligence against Rylands to recover damages, after a reservoir that Rylands' had constructed on its land burst and flooded Fletcher's mines. The matter was initially heard by the Assizes Court, and after several levels of appeal, was decided by the House of Lords in July 1868. In their decision, the House of Lords decided to branch out from the traditional common law principles of liability, and create a novel tort known as "strict liability". Liability is referred to as "strict" because the plaintiff need not establish that the defendant was negligent. At page 339, Lord Chancellor Cairns stated the principles for finding strict liability, as follows:

> On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, - and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of *Smith v. Kenrick* [7 C.B. 515] is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird v. Williamson* [15 C.B. (N.S.) 317], which was also cited in the argument at the Bar.

[279] While common law principles, such as the evidentiary burden on the plaintiff, present certain challenges and limitations in assigning liability for contaminated sites, actions in tort, contract and property offered a means for the superior courts to resolve disputes between private parties about liability for harm caused by contamination, long before the government enacted legislation that addresses contaminated sites. The scheme created in Part 4 of the *Act* reinforced or added to the existing common law principles and remedies, but did not replace them. Indeed, section 35 of the *Regulation* preserves the right of a defendant named in a cost recovery action to "assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law" [underlining added]. Section 27.3 of the *Act* may create a novel remedy in relation to limiting liability for contamination, but the potential for persons such as land owners or producers of a harmful substance to be liable, in whole or in part, for damage to land resulting from the discharge of a harmful substance is not novel.

[280] The Board finds that the type of dispute that is determined under section 27.3 of the *Act* "broadly conforms" to the superior courts' jurisdiction at Confederation to decide disputes involving a person's liability, and/or the allocation of liability (i.e., contribution and indemnity) amongst multiple private parties, for damage to an interest in land caused by the discharge of a harmful substance. While section 27.3 does not convey a power to determine contribution or indemnity in negligence or contract *per se*, it conveys a power to determine (and potentially limit) a person's liability based, in part, on the person's degree of fault or responsibility in relation to the contamination, insofar as section 27.3(1) requires a consideration of the portion of the contamination that can be "attributed to the person", and the person's "contribution" to the contamination. Similarly, under section 38 of the *Regulation*, the person must provide the regional manager with information that relates to the person's level of fault or responsibility for the contamination. For example, under subsection (c), the person must provide information respecting "the nature and quantity of contamination at the site attributable to the applicant". Under subsection (f), the person must provide information respecting "all measures taken by the applicant to exercise due diligence with respect to any substance that… caused the site to become a contaminated site…."

[281] Moreover, responsible persons who may seek a section 27.3 determination are typically private parties, and may be party to contractual arrangements respecting liability and indemnity for damage to the environment. Thus, a minor contributor determination may involve consideration of any relevant contractual arrangements between private parties regarding liability and indemnity. Indeed, in the present case, the Determination states that the Regional Manager agreed with the Allocation Panel opinion, which discusses the liability and indemnity provisions in private agreements between Halme's, Chardale and Suncor's predecessors. One of those agreements, the 1989 lease, contains a clause that addresses liability for "damage" to the environment.

[282] For all of these reasons, the Board concludes that an aspect of the dispute resolution function that was dominated by the superior courts at Confederation has been transferred to an administrative decision-maker under section 27.3 of the *Act*.

(ii) If so, is the power conferred under section 27.3 of the *Act* a judicial power?

[283] At p. 429 of *Massey-Ferguson v. Saskatchewan*, [1981] 2 S.C.R. 413, the Supreme Court of Canada framed the question at this stage of the *Re Residential Tenancies Act* test as follows:

> Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the question which the tribunal is called upon to decide or, to put it in other words, <u>is the tribunal concerned with a private dispute which it is called upon to adjudicate through the application of a recognized body of rules and in a manner consistent with fairness and impartiality</u>?
>
> [underlining added]

[284] At pp. of 734 to 735 of *Re Residential Tenancies Act*, the Supreme Court of Canada described the inquiry into what constitutes a "judicial function," as follows:

> Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function? In addressing the issue, it is important to keep in mind the further statement by Rand J. in *Dupont v. Inglis* that "…it is the subject-matter rather than the apparatus of adjudication that is determinative". Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'. To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of 'principle', that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of 'policy' involving competing views of the collective good of the community as a whole. (See Dworkin, *Taking Rights Seriously* (Duckworth, 1977) pp. 82-90.)
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> [underlining added]

[285] The Board finds that, in making a minor contributor determination, a regional manager is deciding the proportion of liability that should be allocated to one responsible person, for the costs of remediating a contaminated site. Although the Attorney General submits that a regional manager is not required to hear from other responsible persons when one responsible person requests a minor contributor determination, the Attorney General acknowledges that a regional manager is obliged to comply with the rules of procedural fairness in making a minor contributor determination. Given that a minor contributor determination will impact the proportional liability of any other persons who are responsible for the remediation of the site, it is difficult to imagine circumstances where a regional manager, acting in accordance with procedural fairness, would not hear from other responsible persons whose liability may be affected by the determination. Indeed, before making the Determination, the Regional Manager offered all of the affected responsible persons an opportunity to provide submissions in response to Chardale's request to be declared a minor contributor.

[286] Given these considerations, and the fact that responsible persons are typically private parties, as in the present case, the Board finds that a minor contributor determination addresses a private dispute about liability between individuals with competing interests. A minor contributor determination does not address a question of policy involving the collective good of the community, such as the public interest in remediating contaminated sites. A regional manager has other powers under Part 4 of the *Act* that support the public interest in the timely remediation of contaminated sites, such as the power to order a site investigation or to issue a remediation order.

[287] In addition, the Board finds that, although a regional manager may have inquisitorial or investigative powers under other provisions within Part 4 of the *Act*, a regional manager's role in making a minor contributor determination does not involve investigative or inquisitorial functions. Rather, the person seeking the determination has the onus under section 27.3(1) to "demonstrate" that they meet the criteria listed in section 27.3(1), and to provide the regional manager with the information required under section 38 of the *Regulation*. After reviewing the information and submissions provided by that person, and any submissions provided by other responsible persons who may be affected by the determination, the regional manager determines whether the person meets the statutory requirements for minor contributor status. Thus, the power and role of a regional manager in making a minor contributor determination is adjudicative or judicial in nature.

(iii) If so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?

[288] The effect of a minor contributor determination on a subsequent cost recovery action is addressed in section 27.3(3), which provides that a minor contributor "is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2)." Consequently, if a minor contributor determination is made, the minor contributor is no longer jointly and severally liable. If a cost recovery action is subsequently initiated in the courts, the judge will be bound by the regional manager's determination regarding the amount or portion of remediation costs attributable to the minor contributor. In other words, section 27.3(3) purports to bind a judge in any future cost recovery action involving the minor contributor. This alters the effect of the joint and several liability provisions that would otherwise apply to the minor contributor, as a responsible person, under section 27(1) of the *Act*.

[289] It is clear that the function performed by a regional manager under section 27.3 would otherwise be performed by a superior court in a cost recovery action. The next question is whether a regional manager's function under section 27.3 is divorced from a regional manager's other functions within the broader institutional framework of the *Act*.

[290] Under Issue 1, the Board reviewed the case law that discusses the purposes of Part 4 of the *Act*. Based on that case law, the Board found that the key purpose of Part 4 of the *Act* is to ensure the timely remediation of contaminated sites. The Board also found that this purpose is achieved by casting a wide net over responsible persons who are liable for remediation, and by removing the burden on a regional manager to prove causation or fault-based conduct before she or he may exercise the powers aimed at achieving remediation. Issues of culpability and the fair allocation of liability for remediation costs are dealt with in separate processes, such as an allocation panel proceeding under section 27.2 of the *Act*, or by the courts in a cost recovery proceeding under section 27(4) of the *Act*. Issues of culpability, in respect of the question of whether the liability of certain responsible

persons should be limited, may also be dealt with through a minor contributor determination under section 27.3.

[291] The Board finds that the powers of a regional manager that are aimed at achieving the timely remediation of contaminated sites are not dependent on, or affected by, a minor contributor determination. Put another way, a minor contributor determination is not a prerequisite for, and is not even tied to, the exercise of any of the powers under the *Act* that seek to achieve the timely remediation of contaminated sites. In addition, nothing in Part 4 of the *Act* necessitates that a regional manager, rather than a court, determine a minor contributor's liability. The scheme of Part 4 is structured so that disputes between responsible persons over culpability for contamination, and liability for remediation costs, can be fairly resolved by the courts after remediation is completed. Removing the power to make minor contributor determination under section 27.3 of the Act would not jeopardize the proper administration of the Act, or detract from a regional manager's powers that are aimed at ensuring the timely remediation of contaminated sites. Thus, the Board finds that section 27.3 is "isolated" from a regional manager's other powers under Part 4 of the *Act*, and section 27.3 is not ancillary to a regional manager's administrative functions under the *Act*.

[292] For all of these reasons, the Board concludes that the power to make a minor contributor determination under section 27.3 of the *Act* is not subsidiary or ancillary to a predominantly administrative function under the *Act*, and is not necessarily incidental to such a function.

[293] In summary, the Board finds that the power conferred on the Regional Manager under section 27.3 of the *Act* is constitutionally invalid based on the test in *Re Residential Tenancies Act.*

[294] Given the Board's findings above, the inquiry need not proceed further. However, in case the Board is wrong in its conclusions regarding the test in *Re Residential Tenancies Act*, the Board has addressed the tests set out in *MacMillan* and *BC v. Imperial Tobacco.*

Whether the power conferred on the Regional Manager under section 27.3 of the *Act* is constitutionally invalid based on the test set out in *MacMillan*; i.e., does it attempt, by granting exclusive jurisdiction to an inferior court, to oust the core jurisdiction of the BC Supreme Court?

[295] The Board finds that the jurisdiction to determine whether a person is a minor contributor is not wholly exclusive to a regional manager, because if a regional manager has not determined that a person is a minor contributor under section 27.3, a court may make such a determination in a cost recovery action, as occurred in *Gehring*. In other words, a regional manager's power to make minor contributor determinations is only "exclusive" vis-à-vis the courts when the power has actually been exercised by a regional manager. In this sense, the regional manager's power may be characterized as dominant, yet concurrent, in relation to the courts' jurisdiction to make the same type of determination.

[296] Consequently, it is unnecessary to consider whether section 27.3 provides an exclusive grant of power that takes away from the "core" or "inherent" jurisdiction

of the superior courts, according to the *MacMillan* test. However, for greater certainty, the Board has considered whether the grant of power to a regional manager under section 27.3 takes away from the core or inherent jurisdiction of the superior courts.

[297] The case law has characterized the superior courts' "core" or "inherent" jurisdiction somewhat narrowly. In *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at paras. 19 to 21, the Supreme Court of Canada discussed the content of superior courts' core or inherent jurisdiction as follows:

> In *MacMillan Bloedel*, a majority of this Court described the powers at the core of a superior court's jurisdiction as comprising "those powers which are essential to the administration of justice and the maintenance of the rule of law" (para. 38), which define the court's "essential character" or "immanent attribute" (para. 30). The core is "a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" (*Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56, *per* Lamer C.J.).
>
> In his 1970 article, "The Inherent Jurisdiction of the Court", 23 *Curr. Legal Probs.* 23, which has been cited by this Court on eight separate occasions, I. H. Jacob provided the following definition of inherent jurisdiction:
>
> > . . . the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [p. 51]
>
> As noted by this Court in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24:
>
> > These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28).
>
> [underlining added]

[298] At para. 22 of that decision, the Court held that the doctrine of inherent jurisdiction provides the foundation for powers such as contempt of court, the stay of proceedings and judicial review. Similarly, at pp. 751 to 753 of *MacMillan*, the Court found that the superior courts' core jurisdiction has traditionally included their ability to punish for contempt of court, and to perform a supervisory role over inferior courts in judicial reviews.

[299] Given the relatively narrow nature of the superior courts' powers of inherent jurisdiction, and given that the regional manager's power under section 27.3 is subject to the superior courts' oversight through judicial review proceedings (albeit indirectly, as there must first be an appeal to this Board), the Board concludes that the grant of power under section 27.3 does not take away from the core or inherent jurisdiction of the superior courts.

Whether the power conferred on the Regional Manager under section 27.3 of the *Act* is constitutionally invalid because it breaches the principle of judicial independence as set out in *BC v. Imperial Tobacco*.

[300] At paras. 45 to 47 *BC v. Imperial Tobacco*, the Supreme Court of Canada described judicial independence as follows:

> Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice": *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper "interference from any other entity" (*Ell*, at para. 18) — i.e., that the executive and legislative branches of government not "impinge on the essential 'authority and function'. . . of the court" (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 828)... .
>
> ... The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 82-92.
>
> [underlining added]

[301] In *BC v. Imperial Tobacco*, the Court considered the constitutionality of provincial legislation creating a cause of action whereby the BC government could seek to recover, from manufacturers of tobacco products, provincial health care expenditures incurred in treating people exposed to those products. Although the legislation reversed the onus of proof in respect of some elements of a claim, and limited the compellability of individuals' health care records and related information, the Court found that the legislation's unconventional rules of civil procedure did not violate the independence of the judiciary. In that regard, the Court stated at para. 55:

> No such fundamental alteration or interference was brought about by the legislature's enactment of the Act. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, and then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the

> appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.
>
> [underlining added]

[302] The Board finds that the circumstances in the present appeals are distinguishable from those in *BC v. Imperial Tobacco*. In the present appeals, section 27.3(3) of the *Act* does not simply impose unconventional rules of civil procedure on a court, such as reversing the onus of proof for finding liability, or limiting the compellability of certain information. Rather, section 27.3(3) interferes with a superior court's adjudicative role, because it constrains the courts' ability to decide questions of liability in accordance with the evidence before the court. Specifically, a regional manager's minor contributor determination interferes with a judge's ability to independently assess the evidence led to support or defend a claim for cost recovery, to independently assign weight to the evidence, and to independently determine whether the evidence supports assigning liability to a responsible person, in an action under section 27(4) of the *Act*.

[303] The Board finds that section 27.3(3) of the *Act* constrains a judge's ability to determine the appropriate proportion of remediation costs that should be allocated not only to a minor contributor, but to any other responsible person in a cost recovery action involving a particular contaminated site. If a regional manager has not made a minor contributor determination, a judge deciding a cost recovery action has complete independence to determine each responsible person's liability based on the evidence and submissions before the judge. The judge can decide the appropriate allocation of liability to each person, based on the judge's findings of fact and law. In contrast, if a regional manager has made a minor contributor determination, section 27.3(3) provides that the minor contributor is only liable for remediation costs in an action under section 27 "up to the amount or portion specified by the manager". This purports to restrict the judge's ability to decide on the appropriate share of remediation costs to allocate to the minor contributor, regardless of whether the regional manager's minor contributor determination accords with the judge's analysis of the facts and law. This, in turn, affects the portion of remediation costs that the judge may assign to other responsible persons, regardless of the judge's findings on the evidence.

[304] The Attorney General submits that a regional manager's minor contributor determination is determinative in a cost recovery action, unless the regional manager's determination is overturned on judicial review by a superior court. However, the Board notes that judicial review proceedings only address errors of law or jurisdiction, and typically do not involve a review of the inferior tribunal's findings of fact. Consequently, even if a regional manager's minor contributor determination may be subject to judicial review, a reviewing court would not revisit the regional manager's findings of fact which form the basis of the determination.

[305] The Attorney General also submits that section 27.3 constrains the superior court's ability to make a determination of liability regarding minor contributors only in the context of the specific cause of action that was created by section 27(4) of the *Act*. While it is true that section 27.3(3) only constrains a judge's ability to

make findings of liability in a cost recovery action under section 27(4), causes of action created by provincial legislation are not exempt from the constitutional requirement not to interfere, or be seen to interfere, with judicial independence. Indeed, the cause of action that was examined in *BC v. Imperial Tobacco* was also created by modern provincial legislation, and this did not prevent the Court from considering whether the relevant statutory provisions amounted to interference, by the executive or legislative branches of government, with the courts' freedom to perform their adjudicative role.

[306] For all of these reasons, the Board finds that section 27.3(3) of the *Act* is constitutionally invalid because it is inconsistent with judicial independence, based on the test set out in *BC v. Imperial Tobacco*.

Whether the Board has the jurisdiction to issue a declaration of constitutional invalidity.

[307] In regard to the remedies that are available in an appeal under the *Act*, the Board agrees with the Attorney General that the Board has no jurisdiction to issue a declaration of constitutional invalidity. Although the Board has the power under section 11(13)(d) of the *Environment Management Act* (now section 94(2)(d) of the *Environmental Management Act*) to consider questions of law, and therefore, to assess the constitutional validity of legislation it is called upon to apply (see *Paul v. British Columbia (Forest Appeals Commission*), 2003 SCC 55), the Board's remedial powers are limited to those provided by its enabling legislation. The Board's statutory powers do not include issuing declarations of constitutional invalidity.

[308] When the Board finds that an impugned provision is constitutionally invalid, as the Board has found in regard to section 27.3 in the present appeals, the appropriate remedy is for the Board to treat the provision as invalid in the appeal(s) before it. Indeed, this is what occurred in *British Columbia Railway Company et al v. Director of Waste Management* (Decision No. 2000-WAS-018(b), issued March 3, 2004), after the Board found that section 29 of the *Regulation* was invalid because it was inconsistent with the *Act*. Regarding the appropriate remedy, the Board stated as follows at pages 29 to 30:

> As an administrative tribunal the Board, and, therefore, this Panel, does not have the authority to declare a legislative provision invalid. However, the Board and this Panel must consider the statute and the regulation according to law, which provides that the Panel may read the regulation without the inclusion of the offending provision. Accordingly, the Panel has concluded that section 29 of the *Regulation* shall not be considered for the purposes of this appeal.

[309] The Board has found that the power conferred on the Regional Manager under section 27.3 of the *Act* is constitutionally invalid based on the test in *Re Residential Tenancies Act*, and because it violates the principle of judicial independence as set out in *BC v. Imperial Tobacco.* Consequently, the Board must decide the appeals of the Determination by reading the *Act* without the inclusion of section 27.3. The result is that the Regional Manager had no statutory authority to make the Determination, and the Determination is void.

3. If section 27.3(3) of the *Act* is valid on a constitutional basis, whether the Determination should be reversed based on errors by the Regional Manager, or changed circumstances after the Determination was issued.

[310] Given the Board's findings under Issue 2, it is unnecessary to decide Issue 3. However, in the event that Board is wrong in its findings in Issue 2, the Board has decided to make findings on Issue 3.

Halmes' Submissions

[311] Halme's submits that the Regional Manager provided no reasons explaining:

- the basis on which he concluded that joint and several liability would be unduly harsh to Chardale (which relates to section 27.3(1)(c) of the *Act*);
- the measures taken by Chardale in exercising due diligence with respect to the contamination of the Site (which relates to section 38(1)(f) of the *Regulation*); and
- the basis for his finding that the contamination attributable to its activities would be 4.5% of the total costs, particularly where remediation was not, and still is not, completed and those full costs have not been incurred.

[312] In particular, Halme's submits that the terms of section 27.3 of the *Act* and section 38 of the *Regulation* are mandatory, and the opinion of the Allocation Panel cannot provide a basis on which the Regional Manager (or Chardale) could meet those requirements for the purposes of making a minor contributor determination. Section 27.2(5) of the *Act* states that a regional manager "may consider, but is not bound by" an allocation panel opinion. Halme's submits, therefore, that section 27.2(5) does not relieve a person (i.e., Chardale) of its obligation, nor does it relieve the Regional Manager of his obligation to exercise his discretion independently. In other words, Halme's argues that the Allocation Panel opinion, in and of itself, cannot provide the basis for a minor contributor determination.

[313] In addition, Halme's submits that, in the absence of any evidence from Chardale, the only possible source of information for the Regional Manager to consider for the purposes of section 27.3 of the *Act* and section 38 of the *Regulation* was the Allocation Panel's opinion. Halme's argues that the Regional Manager erred in adopting the Allocation Panel's reasons, including the "50:25:25" test set out in the panel's opinion, because both the process of the panel and the test applied by the panel were flawed. Specifically, Halme's submits that the Allocation Panel's process was flawed because the panel advised that Halme's had to pay for part of the panel's costs if it wanted to participate fully in the panel's process, despite the fact that Halme's did not request that an allocation panel provide an opinion. Halme's submits that this was contrary to section 27.2(6) of the *Act*, which states that an allocation panel "must be paid for by the person who requests the opinion." Furthermore, Halme's submits that the Allocation Panel failed to consider the matters that it was required to consider pursuant to section 27.2(3) of the *Act*; rather, it arbitrarily premised its analysis on a 50:25:25 percentage apportionment of liability based on the activities contributing to

contamination, the duration of Site ownership, and the duration of product (gasoline) ownership.

[314] Moreover, Halme's submits that it was deprived of an opportunity to fully participate in the process leading to the Determination, despite the fact that Halme's legal rights were compromised; namely, Halme's right to seek cost recovery from Chardale in an amount greater than 4.5%. Halme's acknowledges that the Regional Manager provided notice that an allocation panel had been appointed and an opportunity to be heard. However, Halme's submits that it had no notice of the case being made by Chardale in relation to the Determination, partly because the Regional Manager relied on the Allocation Panel's opinion, and Chardale provided the Regional Manager with no evidence, in regard to the Determination.

[315] Halme's also submits that the Regional Manager erred in improperly exercising his discretion in making the Determination. Specifically, Halme's submits that the Determination was issued after the Order, and therefore, the determination served no purpose except to allocate liability. In other words, the Determination did not serve the *Act*'s purposes of controlling, ameliorating or eliminating the deleterious effects of pollution on the environment, and therefore, it was issued for an improper purpose and must be set aside.

Suncor's Submissions

[316] In the event that the Board finds that section 27.3(3) is valid, Suncor raises two alternative arguments. First, Suncor submits that the Regional Manager erred in determining that Chardale is a minor contributor in spite of evidence that it was not duly diligent with respect to the contamination on the Site in its purchase of the Site and the businesses thereon from Halme's, and its continued operation of the service station and automotive repair shop (which relates to section 38(1)(f) of the *Regulation*). Second, Suncor submits that the Regional Manager erred in determining that Chardale is a minor contributor, and is liable for 4.5% of the remediation costs, by relying on the Allocation Panel's opinion which was fundamentally flawed.

[317] In regard to due diligence, Suncor submits that Chardale failed to meet its obligation, as the applicant for minor contributor status, to demonstrate the measures taken by it "to exercise due diligence with respect to any substance that… caused the site to become a contaminated site…" as required by section 38(1)(f) of the *Regulation*. Suncor further argues that, in the circumstances, it is difficult to see how Chardale demonstrated to the Regional Manager, as required by section 27.3(1)(a) of the *Act*, that "only a minor portion of the contamination present at the site can be attributed to" Chardale. In that regard, Suncor cites *Gehring* at para. 102 as authority for the proposition that the word "minor" means the contamination attributable to the applicant for minor contributor status must be "relatively insignificant or immaterial." Suncor also cites paras. 105 and 106 of *Gehring*, as follows:

> Bearing in mind the purposes of the *EMA* [*Environmental Management Act*], the significant periods of relevant ownership, and the fact that the

> contamination continued to spread through the Property during the period of ownership by these four parties, the amount of contamination at the Property to be attributed to the post-1978 owners is not minor.
>
> Similarly, the four post-1978 owners have not satisfied s. 50(1)(b) or (c) [the minor contributor provision in the *EMA*], because the cost of remediation from the spreading of the contamination during 11 and 14 years, respectively, would be material. Bearing in mind the purposes of the *EMA* and these significant periods of ownership, joint and separate liability would not be unduly harsh.
>
> [underlining in original judgement]

[318] Specifically, Suncor argues that, when Chardale acquired the Site, Chardale was fully aware of the potential contamination on the Site. The 1993 purchase agreement between Halme's and Chardale disclosed the fuel leak in 1980, and a January 6, 1993 letter from the Ministry to Chardale's legal counsel stated that "If you have any reason to suspect contamination of the subject property, you are advised to engage a consultant to carry out an historical review and site investigation." However, Chardale failed to investigate the Site before completing the purchase. Chardale did not investigate the Site until 1996, as part of the proposed sale of the Site to Chemainus Fuels. Suncor submits that Chardale's failure to investigate the Site for three years, while it continued to operate the service station, shows that Chardale took no measures to prevent or mitigate further contamination. Additionally, Suncor submits that Chardale failed to make inquiries with Gulf Oil (later Petro Canada) as to whether it had assumed any responsibility for the contamination caused by the leak in 1980, or whether the leak was cleaned up.

[319] Further, Chardale continued to operate the service station using distribution piping that was not replaced until 1996. Suncor submits that this piping was in poor condition and may have caused the contamination that was found around the pump island.

[320] Moreover, Suncor submits that Chardale's principle, Mr. Ballard, had extensive experience in the storage and handling of petroleum products, as he was involved in petroleum operations since the late 1980's, and delivered fuel to the Site on numerous occasions before Chardale purchased the Site. Suncor submits that, given Chardale's knowledge of the Site's history, there was sufficient warning to a person of Mr. Ballard's experience that further investigation was merited.

[321] In regard to section 27.3(1)(c) of the *Act*, Suncor submits that the Regional Manager gave no reasons to explain why he concluded that it would be "unduly harsh" to impose joint and several liability on Chardale. Suncor submits that section 27.3(1) is not intended to relieve a party who has been willfully blind to contamination issues, or to assist a party that has continued to operate in a manner that could be contributing to the contamination. Further, Suncor argues that this section of the *Act* was not intended to relieve responsible persons from their contractual obligations, such as Chardale's contractual obligation to indemnify Suncor for claims related to environmental contamination or costs of remediation.

[322] Turning to Suncor's argument that the Regional Manager should not have relied on the Allocation Panel's opinion, Suncor submits that, in accordance with sections 27.2(2) and (3) of the *Act*, when an allocation panel provides an opinion as to whether a person is a minor contributor and the person's share of remediation costs, the Allocation Panel "must, to the extent of available information, have regard to" the factors listed in section 27.2(3). Further, section 27.2(5) states that a regional manager "may consider, but is not bound by, any allocation panel opinion." Suncor argues, therefore, that it was incumbent upon the Regional Manager to exercise his discretion under section 27.3(1) independently, and by implication, since he decided to consider the Allocation Panel's opinion, he was obligated to ensure that the opinion was sound. However, Suncor submits that the Allocation Panel's opinion was flawed, and the Regional Manager failed to ensure that the opinion was sound.

[323] Suncor submits that the opinion was flawed because the allocation panel:

- failed to consider the factors enumerated under section 27.2(3) of the *Act* in determining whether Chardale is a minor contributor, and particularly, Chardale's lack of due diligence (Suncor's submissions on that are summarized above);
- failed to consider the 1996 Seacor Report which stated that the gasoline distribution piping was "heavily rusted and pitted," yet the panel concluded that there was "no evidence" that any operators at the Site after 1980 conducted themselves in a manner that would have resulted in a release of petroleum products;
- failed to appreciate and apply the provisions of the 1989 lease and sublease, and the assignment agreement;
- did not allow Halme's, which owned and/or operated on the Site for almost thirty years, to submit evidence or participate directly in the hearing; and,
- used a formula for allocating liability among responsible persons that was arbitrary and has no basis in the *Act*, the *Regulation*, the common law, or equity, and failed to apply the panel's own formula correctly to the facts.

[324] In regard to the condition of the distribution pipes as noted in the 1996 Seacor Report, Suncor refers to the 2000 Levelton Report. Although the 2000 Levelton Report, issued after the Allocation Panel opinion, states that the tank and lines were "tight" when tested in February 2000, Suncor notes that this Report also states that the contamination around the pump island "may be due to leaks or spills from previous filling facilities." Based on this information, Suncor submits that the Allocation Panel opinion, and thus the Determination, were based on insufficient evidence, in that there was, and remains, undefined areas of contamination on the Site that have not been fully investigated or remediated.

[325] With regard to the formula that the Allocation Panel used to allocate liability, Suncor submits that the panel gave no explanation for the percentages, and does not appear to have considered the items listed in section 27.2(3) of the *Act*. Moreover, the Allocation Panel calculated Chardale's liability based on the number of years that it had owned the Site, but this calculation no longer applies given that

Chardale has owned the Site for over 20 years. Further, Suncor submits that the Allocation Panel did not apply its own formula correctly, because its calculation failed to account for the fact that Chardale was also responsible for activities on the Site, and should have incurred liability on that basis as well as its ownership of the Site.

[326] For all of those reasons, Suncor submits that the Regional Manager should not have followed or adopted the Allocation Panel's opinion, and in any case, with the passage of time and Chardale's continued ownership of the Site, the basis on which the Determination was made is no longer valid. The remedy for Chardale is otherwise provided for in the *Act* by means of a cost recovery action.

Regional Manager's Submissions

[327] The Regional Manager submits that the Determination was based mainly on length of tenure and history of involvement at the Site. Further, the Regional Manager submits that he expressly adopted the Allocation Panel's findings in this regard, and it was open to him to do so under section 27.2(5) of the *Act* (now section 49(6) of the *Environmental Management Act*).

[328] The Regional Manager takes no further position on the merits of the Determination for the following reasons:

- the statutory criteria (in section 27.3(1) of the *Act*, now section 50(1) of the *Environmental Management Act*) for minor contributor status require a consideration of time sensitive factors such as the expected cost of remediation and a responsible person's history of involvement at the site;
- Chardale's ownership of the Site has continued for a further 14 years since the Determination was issued;
- the 2000 Levelton Report indicates that contamination continues to migrate from the Site, which Chardale still owns; and
- the criteria adopted by the Regional Manager for the Determination were based on the Allocation Panel's opinion that Chardale's primary responsibility was derived from its role as a fee simple owner of the Site.

Chardale's Submissions

[329] Chardale submits that Halme's had notice of the Allocation Panel proceedings, but unreasonably refused to participate. Further, Chardale argues that Halme's has offered no evidence that could have been placed before the Allocation Panel, but for Halme's non-participation. Thus, Chardale submits that Halme's participation would not have led the Allocation Panel to reach a different result.

[330] In addition, Chardale argues that when the contamination was discovered, it had owned the Site for two years, whereas Halme's had previously owned the Site since 1979, was a tenant on the Site before it became an owner, and had full knowledge of the leak in 1980.

[331] As for the private agreements regarding the Site, Chardale submits that it was wholly proper for the Allocation Panel to defer to the courts on their interpretation and legal effect.

The Panel's Findings

[332] Section 27.2(5) states that a regional manager "may consider, but is not bound by, any allocation panel opinion." It is trite law that the Regional Manager is obliged to exercise his discretion under section 27.3(1) independently, and without being fettered by the Allocation Panel's opinion. Page 3 of the Determination states that the Regional Manager read, and agreed with, the Allocation Panel opinion with respect to Chardale being a minor contributor. It also states that he agreed with the logic used by the panel to establish Chardale's share of the remediation costs and "therefore, I am able to determine the portion of remediation costs attributable to Chardale." The Board finds that, on the face of the Determination, the Regional Manager's only reason for determining that Chardale met the criteria in section 27.3(1), and determining Chardale's share of the remediation costs, was that he agreed with the Allocation Panel opinion on those matters. The Regional Manager did not, in the Determination or any other document, provide an analysis of the information that was provided by Chardale (or the other parties), nor did he explain why or how Chardale met the statutory requirements for minor contributor status. On the face of the Determination, it appears that the Regional Manager may have fettered his discretion.

[333] In any event, the Board has conducted these appeals as a new hearing of the matter, and all of the parties had a full opportunity to be heard and to respond to the other parties' submissions. Consequently, any procedural errors by the Regional Manager have been corrected by the Board's hearing of these appeals.

[334] Even if the Regional Manager did not fetter his discretion by adopting the Allocation Panel opinion, the Board is concerned that the Determination is based on certain findings by the Allocation Panel that are inaccurate or inappropriate in the circumstances. In particular, the Allocation Panel opinion states at pages 3 and 4 that "no evidence [was] submitted to suggest that any of the operators of the facilities after the tank pull in 1980 conducted themselves in a manner which would have resulted in a release of petroleum products", and "the most probable event which led to the release of petroleum products to the soil and groundwater at the site, was the leaking USTs that were… discovered to be leaking in 1980." However, with respect, the Board finds that those conclusions of the Allocation Panel are inconsistent with the condition of the gasoline distribution lines when they were unearthed in 1996 (as described in the Seacor Report), and the conclusion at page 13 of the 2000 Levelton Report that "The latest soil and groundwater results suggest a separate area of contamination adjacent to the pump island."

[335] In addition, the Board finds that some other considerations that formed the basis for the Allocation Panel's opinion, and thus the Regional Manager's determination, about Chardale's share of the remediation costs, have changed or are inaccurate. This may affect whether Chardale meets the criteria in section 27.3, and particularly, whether "the application of joint and several liability to Chardale would be unduly harsh" in accordance with section 27.3(1)(c). The

Regional Manager acknowledges that the statutory criteria for minor contributor status require a consideration of time sensitive factors, such as a responsible person's history of involvement at the site, and the fact that the Allocation Panel's formula for assessing Chardale's and Petro Canada's share of the remediation costs was based, in part, on the number of years that Chardale and Halme's each owned the Site. The Regional Manager submits that the criteria he adopted for the Determination were based on the Allocation Panel opinion. The Allocation Panel concluded that Chardale's "primary responsibility" derives from its role as an owner of the Site, but the Allocation Panel also determined Chardale's liability based on the number of years that the Site was a contaminated site. In that regard, the Allocation Panel stated that "the site was a contaminated site for some 27 years (from 1970 through 1997)," and that Chardale was an owner for five of those 27 years. However, the Board notes that, when these appeals were heard, the Site continued to be a contaminated site, and Chardale had owned the Site for many more years since 1998. The 2000 Levelton Report indicates that contamination continues to migrate from the Site, and the 2004 Levelton Report concludes that biological activity in the soil is not significantly degrading the contamination. Thus, by the Allocation Panel's own formula, the Site has been a contaminated from 1970 to 2014 (44 years), and Chardale has been an owner for over 20 of those years.

[336] In these circumstances, the Board finds that the 4.5% of remediation costs allocated to Chardale in the Allocation Panel opinion and the Determination may not be appropriate, and it is appropriate to reverse the Determination. Consequently, even if section 27.3(3) of the *Act* is valid on a constitutional basis, the Board finds that the Determination should be reversed.

DECISION

[337] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[338] For the reasons provided above, the Board confirms the Order. In addition, the Board finds that section 27.3 is constitutionally invalid for the purposes of deciding these appeals, and therefore, the Regional Manager had no statutory authority to make the Determination. Alternatively, if section 27.3 is constitutionally valid the Board finds that the Determination should be reversed.

[339] Accordingly, the appeals of the Order (Appeal No. 1998-WAS-018) are dismissed, and the appeals of the Determination (appeal No. 1998-WAS-031) are allowed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

March 24, 2014