Province of British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
**Telephone:** (250) 387-3464
**Facsimile:** (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

## DECISION NO. 1999-WAS-046(a)

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

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| **BETWEEN:** | Canadian Pacific Railway Company | **APPELLANT** |
| **AND:** | Deputy Director of Waste Management | **RESPONDENT** |
| **AND:** | British Columbia Hydro and Power Authority<br>General Chemical Canada Ltd.<br>North Fraser Port Authority<br>BC Lands (now the Ministry of Agriculture and Lands)<br>CGC Inc.<br>GN Industries Inc. and Thomas Lawson<br>Hal Industries Inc.<br>Lehigh Portland Cement Limited and Ocean Construction Supplies Ltd.<br>Norelco Dames and Moore<br>Zeal Industries (1974) Ltd. | **THIRD PARTIES** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATES:** | May 9 & 10, 2006 | |
| **PLACE:** | Vancouver, B.C. | |
| **APPEARING:** | For the Appellant: Craig Dennis, Counsel<br>For the Third Parties:<br>BC Hydro & Power Authority: David Perry, Counsel<br>General Chemical Canada Ltd.: David Jones, Counsel<br>Randy Aliment, Counsel<br>North Fraser Port Authority: Michael Carroll, Counsel<br>Arsen Krakovic, Articled Student | |

### APPEAL

On December 15, 1999, Canadian Pacific Railway Company ("CPR") appealed Reasons Statement - III (the "Decision"), issued on November 16, 1999, by Ron Driedger, Deputy Director of Waste Management (the "Deputy Director"), Ministry of Environment, Lands and Parks (now the Ministry of Environment) (the

"Ministry"). In the Decision, the Deputy Director set out, among other things, his reasons for naming CPR as a responsible person in a remediation order regarding a contaminated site located adjacent to the Fraser River in Vancouver, B.C. He based this decision on CPR being a "past owner" of rail spurs (or sidings) on a portion of the contaminated site.

It was agreed during a teleconference that CPR's appeal would be heard in two stages. First, the Board would decide a question of law regarding the proper interpretation and application of the definition of "owner" under the *Waste Management Act*, R.S.B.C. 1996, c. 482, as amended (the "*Act*"). CPR submits that it is not an "owner" within the meaning of the *Act*. Specifically, it states that an owner of personal property (e.g., railway sidings) situated on someone else's real property, is not an "owner" under the *Act*. If the Board agrees, this may end the matter for CPR as it should not be named to the remediation order on the basis of being an "owner".

If the Board disagrees with CPR, its appeal may then proceed to a hearing of the remaining issues in its appeal.

## BACKGROUND

This appeal pertains to a contaminated site that consists of five properties: part of the north arm of the Fraser River; the filled foreshore located between the north arm of the Fraser River and 9250 Oak Street; 9250 Oak Street; a railway right-of-way which is owned by CPR and is located adjacent to and east of 9250 Oak Street; and, property which is owned by CBR Cement Canada Ltd. and is located adjacent to and east of the CPR right-of-way. The site is contaminated with various toxic chemicals, and the primary contaminants are coal tar and related chemicals. Remediation of the site is currently underway.

This Oak Street Property has had a long and complex history, which has been set out in previous decisions by the Board (see for example *Thomas Lawson v. Deputy Director of Waste Management,* Appeal Nos. 98-WAS-014(c), 030(a), 034(a) and 99-WAS-015(a), September 19, 2001)). For the purposes of this decision, a shortened version of the site history is warranted.

For much of the earlier part of the 20th century, 9250 Oak Street was the site of a plant that manufactured roofing materials. Predecessors of General Chemical Canada Ltd. ("GCC") owned and operated the manufacturing facility. Beginning in or about 1923, one of those predecessors, the Barrett Company Limited ("Barrett"), entered into an agreement with B.C. Electric[1] (a predecessor of the British Columbia Hydro and Power Authority ("BC Hydro")), whereby the latter supplied coal tar to the site from its gas plant in Vancouver.

B.C. Electric Railway Company Limited ("BC Electric Railway"), whose operations were eventually merged into those of B.C. Electric, operated three railway spurs on 9250 Oak Street. The three spurs connected to CPR's main railway line located on the CPR right-of-way lands. The first spur (the "Barrett Spur") was constructed in

[1] B.C. Electric was known as B.C. Electric Power and Gas Company until 1946.

1919 under an agreement with CPR, and was used for transporting coal tar to the Oak Street property. The Barrett Spur ran east-west directly adjacent to coal tar storage tanks where the coal tar was unloaded. This spur is the most relevant to CPR's appeal since the Deputy Director found that spills inevitably would have occurred during unloading coal tar from freight cars on the Barrett Spur.

The other two spur lines were completed in 1954 and 1962. The second spur ran north-south and ended at a warehouse just west of the asphalt processing area. The third spur also ran north-south, between the warehouse and the tank farm, as far south as a tar still.

It is CPR's ownership of these spurs that led to its inclusion in the Decision now under appeal.

The Deputy Director's decisions

On May 20, 1998, the Deputy Director issued Remediation Order OS-15602 (the "Order") pursuant to Part 4 of the *Act*. He found that the five properties described above were polluted with "serious, extensive and highly coal tar-related contamination" and that the properties were "among the most severely contaminated sites in British Columbia." The Order requires the responsible persons named in the Order to undertake certain remediation activities, which are described therein.

Also on May 20, 1998, the Deputy Director issued a statement of reasons ("Reasons Statement I") regarding the persons responsible for remediation. In that decision, he found that five companies and one individual were "responsible persons" as defined in the *Act*[2]. The Deputy Director held that CPR was not a responsible person, and should not be named in the remediation order. Although he concluded that CPR was an "owner" of the right-of-way on which its main railway line was located, he found that CPR was entitled to an exemption from liability under the *Act* because the right-of-way was not contaminated in 1902 when CPR acquired it, and during its ownership CPR did not dispose of, handle or treat a substance in a manner that caused the site to become contaminated. The Deputy Director found that BC Electric Railway leased and operated the right-of-way for the entire period of the manufacturing activities on the site, and there was no evidence that CPR was responsible for site maintenance.

On November 16, 1999, the Deputy Director issued the Decision, which resulted in an amendment of the Order. The Decision addresses three issues, including his reconsideration of whether CPR should be named in the Order as a responsible person. He found as follows regarding CPR:

> Based on the information now before me, CPR not only owned the right of way adjacent to 9250 Oak Street, but also the spur lines that were built on the 9250 Oak Street property for the express purpose of

[2] The "responsible persons" named are as follows: GCC, CGC Inc., GN Industries Ltd., North Fraser Harbour Commission (now North Fraser Port Authority), Her Majesty the Queen in Right of the Province as represented by B.C. Lands (now the Ministry of Agriculture and Lands), and Thomas Lawson.

> moving coal tar to and from the site. Under the *Act*, ownership over a portion of a site still makes a person an owner of that part of the site.
>
> …
>
> The new evidence before me confirms that CPR owned these rail spurs. The 1909 agreement [between CPR and BC Electric Railway]… makes clear that BC Electric was to operate the track of the CPR and that "Nothing herein shall have the effect to transfer the ownership of the said railway, or any portion thereof, or any property, real or personal, owned or controlled by the Pacific Railway or the Island Company": cl. 2. The agreement contemplated the construction of spurs (cl. 14) and made clear that such spurs were considered on the same basis as other parts of the railway. The 1930 Agreement makes clear that the railway includes "spurs", including those which may be constructed: cl. 1, 15.
>
> There is no evidence before me regarding whether these spurs on 9250 Oak Street were registered rights of way or easements under the land title system. For present purposes, however, there is no question that under the relevant definition of the *Act*, CPR had legal rights to control activities on those spurs, and hence the real property on which they sat, under the general provisions of its agreements with BC Electric [Railway]. For example, the 1909 agreement between CPR and BC Electric [Railway] gave CPR the right to enter and inspect the railway and to require defects to be remedied. The 1930 agreement is even stronger. It specifically says that BC Electric [Railway] is performing its services "for and behalf of" CPR. It also specifically states as follows (cl. 11):
>
> > Employees of the Electric Company whi[l]st employed in the handling or movement of freight traffic shall be deemed to perform the service for and behalf of the Pacific Company and shall be subject to the control and direction of the Pacific Company in regard to the routing, billing and movement of traffic generally.
>
> I find that CPR is a past owner of the rail spurs under the *Act*.
>
> …
>
> In my opinion, CPR is a past "owner" of a portion of the 9250 Oak Street [property]. Because of the nature and use of the spur line, the activities that took place there, the fact that BC Electric [Railway] employees (at least since 1930) undertook their activities "on behalf of CPR" and the fact that CPR benefited financially from the movement of freight traffic on its rail line on the 9250 Oak Street property, I have concluded that… it is appropriate to add CPR to Part 2 of the Order…
>
> [underlining added]

As noted above, these spurs were constructed under various agreements. The Board understands that there was no evidence before the Deputy Director

regarding the wording of the agreements that governed the construction and operation of the Barrett Spur specifically.

However, the Deputy Director did have evidence of railway agreements between CPR and BC Electric Railway that governed the use of CPR's main railway line, and those agreements referred to spurs that may be constructed to connect to the main line. The 1909 agreement referenced by the Deputy Director was between CPR, BC Electric Railway, the Vancouver and Lulu Island Railway Company ("Island Railway"), and two trustees (the "1909 Agreement"). It provided for the construction of branches or extensions of an electric railway service at the expense of BC Electric Railway and by agreement between BC Electric Railway and CPR, and for such branches to be operated by BC Electric Railway in accordance with all other terms in the 1909 Agreement. The railway lines covered by the 1909 Agreement were either owned by CPR, or leased by CPR from the Island Railway.

The 1909 Agreement expired in 1930 and was replaced by a further agreement (the "1930 Agreement"), which applied to the railway lines that were the subject of the 1909 Agreement as well as "all tracks, sidings, spurs, bridges, station buildings, and appurtenances that are used by or may be acquired for use in connection therewith, including any additions or extensions constructed under the provisions of Clause 15 hereof". The 1930 Agreement was renewed in 1947 for a term of 21 years.

The appeal and preliminary question of law

On December 13, 1999, CPR filed a Notice of Appeal with the Board against the Decision. In its Notice of Appeal, CPR lists a number of grounds for appeal. One of the grounds is relevant to this preliminary matter:

> The Deputy Director erred in concluding that CPR is an owner, within the meaning of the [*Act*], of the private siding on 9250 Oak Street.

In December of 2005, the Board agreed to divide the hearing of CPR's appeal into two parts. The first part is to address a question of law that was restated by the parties as follows:

> Does the ownership of personal property situated on someone else's real property make the owner of the personal property an owner of the real property under the *Waste Management Act*?

CPR submits that the preliminary question should be answered in the negative.

The Deputy Director made no submissions on this preliminary question.

BC Hydro supports CPR's submissions.

The Third Parties, GCC and North Fraser Port Authority ("NFPA"), submit that the preliminary question should be answered in the affirmative.

The other Third Parties, CGC Inc., GN Industries Inc. and Thomas Lawson, BC Lands, Hal Industries Inc., Lehigh Portland Cement Limited and Ocean Construction Supplies Ltd., Norelco Dames and Moore, and Zeal Industries (1974) Ltd., did not appear or provide submissions on this issue.

## ISSUE

Does the ownership of personal property situated on someone else's real property make the owner of the personal property an owner of the real property under the *Waste Management Act*?

## RELEVANT LEGISLATION

The Deputy Director issued his Decision in November 1999, and the appeal was filed in December 1999. Therefore, although the *Act* was repealed and replaced by the *Environmental Management Act*, S.B.C. 2003, c. 53, effective July 8, 2004, the *Act* and its regulations (as they were when the Decision was issued) are the applicable legislation in these appeals.

The following sections of the *Act* and the *Regulation* are relevant to these appeals. For convenience, other relevant legislation is set out in the text of the decision.

### *Waste Management Act*

CPR was named to the Order as a responsible person pursuant to Part 4 (Contaminated Site Remediation), section 26.5(1) of the *Act* which states:

**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;

...

The definition of "owner" is set out in section 26 of the *Act* which provides as follows:

**Definitions and Interpretation**

**26** (1) In this Part [Part 4]:

**"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);

## DISCUSSION AND ANALYSIS

### 1. Does the ownership of personal property situated on someone else's real property make the owner of the personal property an owner of the real property under the *Waste Management Act*?

*Submissions of CPR*

For the purposes of this hearing, CPR does not challenge the Deputy Director's factual findings. CPR submits that the Deputy Director erred when he proceeded, from his finding that CPR is a past owner of three railway spurs (which CPR refers to as railway sidings) on 9250 Oak Street, to his conclusion that CPR is a past owner of a part of 9250 Oak Street, without considering what the sidings were as a matter of law, and what, if any, were the consequences of CPR's ownership of the sidings under the *Act*. It submits that the Deputy Director confused the ownership of personal property with the ownership of real property.

In its submissions, CPR highlights the distinction in property law between chattels and fixtures. The relevance of this distinction is that fixtures form part of the real property but chattels do not.

CPR notes that various Canadian and American judicial decisions characterize railway sidings placed on land not owned by the railway company as *prima facie* chattels, especially when the railway lines are placed on that land to benefit a business carried out on the land, rather than to provide a permanent benefit to the land. Therefore, they are not part of the land. (See, for example, *Helena & Livingston S. &. R. Co. v. Northern Pac. Ry. Co.* (1922) 205 P. 224 (Mo. S.C.) at 229.)

CPR submits that the Deputy Director's reasoning ignores the fact that the sidings in this case were chattels consisting of rails, spikes, fastenings, and switching materials situated on 9250 Oak Street. CPR maintains that its ownership of those chattels was not, in itself, sufficient to make it an "owner" under the *Act*, nor was it sufficient to give CPR an interest in the real property at 9250 Oak Street. In particular, CPR submits that the *Act*'s definition of "owner" requires ownership of "real property". Ownership of chattels that are, at a particular time, sitting on the real property of another does not entail a legal right of control of the other's real property, so as to bring the chattel's owner within the definition of "owner" under the *Act*.

CPR maintains that there is nothing to indicate that CPR had any legal right to control:

- who could or could not access 9250 Oak Street;
- what could or could not occur at 9250 Oak Street;
- what substances could or could not be brought onto 9250 Oak Street;
- how such substances could or could not be used at 9250 Oak Street; or

- what use, if any, the owner of 9250 Oak Street made of CPR's rails, fastenings, spikes, and switching materials that were situated at 9250 Oak Street.

Nor is there anything in its agreements relating to the railway tracks that conferred any right of control by CPR over the real property at 9250 Oak Street.

CPR also argues that certain findings in the Decision support a finding that the sidings were chattels. For instance:

- the Deputy Director found that CPR continued to own the sidings, despite changes in the fee simple ownership of 9250 Oak Street; and
- the Deputy Director found that the Barrett Spur was built for the benefit of Barrett, and that the sidings were built "for the express purpose of moving coal tar to and from the site," rather than to permanently improve the land.

Turning to the definition of "owner" in the *Act*, CPR submits that the Legislature intended the words in the definition to be given their ordinary meaning. Specifically, CPR submits that the Legislature intended the meaning of "owner" to capture persons possessing established incidents of ownership of real property at common law, as indicated by the phrase "right of control of real property". CPR maintains that the common denominator for the different words in the definition of "owner" is that the person must have an interest in or power over real property, rather than a more fleeting relationship with real property. A mere capacity or ability to control real property is insufficient to bring a person within the meaning of "owner" in the *Act*. CPR argues that it would be absurd to suggest that a person who merely physically occupies land at a given point in time is an "owner" of real property for the purposes of the *Act*. Moreover, CPR argues that its rights to enter and inspect the sidings, and to route traffic over the railway line, do not engage traditional incidents of ownership of real property, and did not confer on CPR the legal ability to control what the fee simple owner of 9250 Oak Street did with its property.

Finally, CPR submits that it is unnecessary to strain the meaning of "owner" to impose liability for remediation. It notes that the *Act* provides other categories of responsible persons, such as an "operator" of a contaminated site or a person who transports or arranges for the transport of a substance and thereby causes contamination. CPR acknowledges that those categories may overlap with "owner", but it submits that no category can be interpreted in a manner that subsumes the others. CPR submits that the Deputy Director's reasoning renders the definitions of "operator" and "transport" largely redundant.

In support of those submissions, CPR cites several judicial decisions including *Beazer East Inc. v. B.C. (Environmental Appeal Board*) (2001), 84 B.C.L.R. (3d) 88 (S.C.) (hereinafter *Beazer*); and *Orchardson Forest Products Ltd. v. British Columbia (Assessor of Area 14- Surrey/White Rock),* [1987] B.C.J. no. 1372 (B.C.C.A.) (hereinafter *Orchardson Forest Products*). CPR also cites the "associated words" principle of statutory interpretation set out in *Sullivan and Driedger on the Construction of Statutes* (R. Sullivan, 2002), at page 173, and the definitions of "owner" and "ownership" found in *Black's Law Dictionary*.

*Submissions of BC Hydro*

BC Hydro generally supports CPR's submissions. It submits that the railway sidings were not owned by CPR in such a way as to make CPR an "owner" under the *Act*. BC Hydro maintains that "owner" is distinguished from other types of responsible persons under the *Act* because:

- "possession",
- "right of control",
- "occupation", or
- "control of the use"

all relate to "real property", which is defined in *Black's Law Dictionary* (7th ed.) as "Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." BC Hydro argues that ownership of the rail lines in this case was not ownership of the real property underlying them, unless the rail lines were affixed and became part of the land. While the use of rail lines could constitute an "operation" as defined under the *Act*, it submits that the use of the rail lines do not constitute ownership of the land.

BC Hydro submits that, in the Decision, the Deputy Director confused "possession of the rail line" with "possession of the land underlying it". It notes that the siding agreements created a form of chattel lease, whereby BC Electric Railway would have continued to own the materials used to construct the spurs and had a right to remove them. Barrett would have entered into a lease for the right to connect the spur to the main railway line, and for the use of the materials that made up the spur. Barrett would then pay BC Electric Railway for the services provided under the lease.

Further, ownership of, or permission to use, a chattel is distinct from ownership or control of the land underlying the chattel. BC Hydro maintains, therefore, that CPR through its association with BC Electric Railway was not in possession of the land underlying the rail bed nor did it have a right to control, occupy or control the use of the land underlying the rail bed. Rather, BC Electric Railway had a limited contractual right to control the rail lines, and that right did not run with the land. If Barrett sold the property, BC Electric Railway could lose any rights under a siding agreement to access the spur line.

BC Hydro provided examples of contracts that *may* be the same or substantially similar to the missing agreement governing the construction of the Barrett Spur. These agreements are, according to BC Hydro, in the form of personal property security agreements and do not provide any support for the proposition that CPR was an owner of the Barrett land or other lands covered by such agreements.

Finally, BC Hydro submits that, by including "owners" in this Part of the *Act*, the Legislature was attempting to capture those owners who have the capacity or the opportunity to affect whether a site becomes contaminated. This is illustrated by section 22 of the *Contaminated Sites Regulation*, B.C. Reg. 76/2005 which limits the exemption in section 46(1)(n) of the *Act*, so that owners of interests in land,

such as easements and rights-of-way, are not considered responsible persons if they can establish that there was no use or exercise of any right of the interest in a manner that caused the site to become contaminated. As such, if an owner of a rail line does not have the capacity or opportunity to affect whether a site becomes contaminated, on the facts, and in law, that person is not meant to be an "owner" under the *Act*.

In summary, BC Hydro submits that, absent the ability to influence events at 9250 Oak Street, and absent common law ownership of the real property at 9250 Oak Street, neither BC Electric Railway nor CPR can be considered "owners" of that real property.

*Submissions of GCC and NFPA*

Both of these parties disagree with CPR and BC Hydro. They submit that the definition of "owner" under the *Act* is much broader than the common law meaning of "owner," and that actual legal ownership of real property (a registered or legal interest) is not required under the *Act*. Rather, GCC notes that the statutory definition imposes liability as an "owner" on any person who merely possesses, occupies or controls the use of, or who has the right of control of the property. In addition, the *Act* establishes that, without limitation, an "owner" may be a person who has only an equitable interest in real property.

Both GCC and NFPA point out that the purpose of the *Act* is to effect remediation of contaminated sites, and that all persons with sufficient relationship to a site are liable for remediation of the site – the purpose of the *Act* is to cast a broad net of liability to ensure that those persons responsible for polluting a site pay for the remediation of the site. They submit that "owner" is broadly defined in the *Act*, consistent with the purpose and intent of the *Act*.

With this in mind, they maintain that the focus in this case should be on the nature and extent of CPR's relationship to the land. NFPA maintains that the Deputy Director's decision that CPR is a past "owner" of 9250 Oak Street had nothing to do with whether CPR had the right to remove the railways from the property, and had everything to do with CPR's activities on and in relation to the property.

GCC submits that CPR owned significant fixed structures on 9250 Oak Street, namely, the sidings, and those sidings remained on the land for many years for the purpose of transporting coal tar and other substances necessary to manufacture roofing products at 9250 Oak Street. CPR had specific contractual rights and responsibilities associated with the use and control of the sidings, and it is undisputed that the use of the sidings resulted in significant spills of coal tar in the loading and unloading process.

It points out that CPR does not contest the following factual findings of the Deputy Director:

- CPR owned the right-of-way;

- CPR owned the three sidings on 9250 Oak Street;
- CPR, by contract, directed BC Electric Railway to operate the sidings on CPR's behalf;
- an agency relationship existed between CPR and BC Electric Railway for the operation of the right-of-way and the sidings;
- BC Electric Railway employees, while employed in the handling or movement of freight traffic, were deemed to perform the service for and on behalf of CPR, as clearly indicated in the 1930 Agreement;
- the coal tar was freight traffic;
- BC Electric Railway employees were subject to the control and direction of CPR in regard to the routing, billing and movement of freight traffic;
- CPR retained the right to enter the real property on which the sidings were located; and
- CPR had legal rights to control activities on the sidings, and hence the real property on which they sat.

GCC submits that the agreements between CPR and BC Electric Railway establish that CPR controlled all material aspects of the rail transport of substances to and from 9250 Oak Street, including substances that are the subject of the Order. GCC argues that CPR's rights of control associated with the sidings and their use gave CPR control of the use of that portion of 9250 Oak Street, sufficient to bring CPR within the definition of "owner" in the *Act*.

NFPA submits that even if CPR did not have the "right of control of" the rail sidings, there are three other possible bases to conclude that CPR was an "owner" under the *Act*:

- CPR was "in possession of" the real property;
- CPR "occupied" the real property; and
- CPR "controlled the use of" the real property.

NFPA argues that, at the very least, CPR is a past "owner" of 9250 Oak Street by virtue of having "occupied" the real property. NFPA notes that the word "occupier" is not defined in the *Act*, but it submits that guidance is provided by other B.C. statutes that define "occupier" broadly: see the *Assessment Act*, R.S.B.C. 1996, c. 20, section 1; and the *Community Charter*, R.S.B.C. 1996, c. 26, Schedule of definitions.

Regarding CPR's assertion that the sidings are chattels, NFPA submits that this is simply "wrong" and irrelevant to the real issue. Both NFPA and GCC submit that that the question of whether something is a chattel or a fixture is a question of fact that cannot be resolved in this hearing. GCC notes that in the *Orchardson Forest Products* case referenced by CPR, the Court held that "[w]hether machine or any other article has been so fixed and attached to the freehold as to become a parcel of it is a question of fact depending on the circumstances of each case" [emphasis by GCC], and that one of the primary factors is the "object and purpose of the

annexation, whether it was for a temporary purpose or for the permanent and substantial improvement of the inheritance."

NFPA and GCC also submit that, even if the railways were chattels, the real issue is whether CPR solely or jointly "occupied", "possessed", or "controlled the use of" 9250 Oak Street. A legal, registerable or ownership interest in the property is not required to bring CPR within the definition of "owner" under the *Act*; rather, the definition states that "any estate or interest, legal or equitable" suffices, as does mere occupation. NFPA maintains, therefore, that one person may hold legal title to a property, a second person may occupy it, and a third may control activities on it, but all three are "owners" under the *Act*.

*Panel's findings*

CPR's main argument is that, as a matter of law, a railway line consists of chattels – it is not part of the land – and its ownership of those chattels is not, in itself, sufficient to make it an "owner" under the *Act*, nor is it sufficient to give CPR an interest in the real property at 9250 Oak Street.

Whether or not CPR can be named a responsible person under the *Act* on the basis of its ownership of railway sidings, is a simple question of whether such ownership fits within one of the many categories included within the definition of "owner" in section 26(1) of the *Act*.

The Panel notes that the words and phrases within the definition of "owner", namely, "possession", "right of control", "occupies" and "controls the use of" as they relate to real property, are not defined in the *Act*. Thus, the Panel agrees with CPR that the starting point is to consider the words used in the definition based on their ordinary meaning. In addition, they must be interpreted in a manner consistent with the purposes and objectives of Part 4 of the *Act*. This approach was endorsed by Tysoe J. in *Beazer*, when dealing with the same definition. He states at paragraph 94:

> In the present case, there are no other provisions of the *Act* which suggest a legislative intent to give the words in the definition of "owner" a meaning broader than their ordinary meaning. Indeed, there are provisions which indicate that the Legislature intended to give them their ordinary meaning. Further, the legislative purpose of remedying contaminated sites will not be defeated by giving the words their ordinary meaning.

Ordinary meaning of the words in the definition of "owner"

Under sections 26.5(a) and (b) of the *Act*, both past and present "owners" may be responsible for remediation of a contaminated site, subject to the exceptions listed in section 26.6 of the *Act*. For convenience, the *Act*'s definition of "owner" is stated in part below:

> **"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 …

Breaking this down into its individual components, for the purposes of assigning liability for remediation of contaminated sites, a person is an "owner" if the person:

- is in possession of real property;
- has the right of control of real property;
- occupies real property; or
- controls the use of real property;

including, without limitation, a person who has any legal or equitable estate in the real property, or any legal or equitable interest in the real property. If a person falls into any one of those four categories, that person is an "owner" under Part 4 of the *Act*.

The Panel finds that the use of the word "or" between the words "occupies" and "controls" in the definition indicates that the four main components of the definition, as indicated by the four bulleted phrases above, stand alone. In other words, to be an "owner", a person need not have possession, *and* the right of control, *and* occupy, *and* control the use of the real property. Rather, it is sufficient to fall into any one of those categories. If the Legislature had intended for all four of those elements to be a requirement for a person to be an "owner", then the word "and" would have been used instead of the word "or."

Turning to the meaning of "possession", "right of control", "occupies" and "controls the use of" as they relate to real property, the Panel finds that the ordinary meanings of "possession", "occupy", "right of control" and "controls the use of" indicate that the definition of "owner" is much broader than the common law concept of ownership of real property. The Panel also notes that only one of these words/phrases in the definition suggest a legal, as opposed to factual, test; i.e., "right of control".

*a) "in possession of" real property*

*Merriam-Webster's Collegiate Dictionary*, 10th ed., defines "possession" as follows:

> **pos-ses-sion 1 a :** the act of having or taking into control **b :** control or occupancy of property without regard to ownership **c :** ownership **d :** control of the ball or puck…

The above definition indicates that possession is consistent with ownership, but possession may also mean control or occupancy of property regardless of ownership. For example, a lessee may have possession of, but not title to, real property.

*b) "has the right of control of" real property*

This phrase was the subject of previous judicial consideration. In *Beazer*, Tysoe J. considered the meaning of the phrase "right of control" in the definition of "owner." He stated as follows, starting at paragraph 95:

> … The relevant definition of the word "right" in the *Concise Oxford Dictionary of Current English*, 9th ed. (Clarendon Press: Oxford, 1998) is: "a thing one may legally or morally claim". The word "right" in the definition of "owner" is not referring to a moral claim. Rather, it is referring to a legal claim.
>
> To be a right within the meaning of the *Act*, it is my view that it must be a right recognized by law. Put another way, it must be a legally enforceable right…

Thus, a "right of control" of real property is a legal right, as opposed to actual control or an ability to control. Such a legal right may be established by virtue of ownership or other interests that are registered on title, contractual rights, or some other legal claim.

*c) "occupies" real property*

*Merriam-Webster's Collegiate Dictionary*, 10th ed. (1995) defines "occupy" as follows:

> **oc-cu-py 1 :** to engage the attention or energies of **2 a :** to take up (a place or extent in space) <this chair is *occupied*> <the fireplace will ~ this corner of the room> **b :** to take or fill (an extent in time) <the hobby *occupies* all of my free time> **3 a :** to take or hold possession or control of <enemy troops *occupied* the ridge> **b :** to fill or perform the functions of (an office or position) **4 :** to reside in as an owner or tenant
>
> [underlining added]

The relevant portions of that definition suggest that a person who occupies real property may simply take up space on the real property. The person may also hold possession or control of the property, or may even reside on the property as a tenant or owner.

*d) "controls the use of" real property*

In its reference to "control", the definition of "owner" is not restricted to "right of control". The phrase "controls the use of" is also contained in the definition. The Panel finds that this phrase was intended to mean a person who actually controls the use of the property, as distinct from a person who has a right of control or a person who has an ability to control. These distinctions were discussed in *Beazer*, at paragraphs 99 through 101:

> It was open to the Legislature to define "owner" to include persons who had the capacity or ability to control the use of real property but it chose to confine the definition to persons who had the right of control of the use of the property (and persons who occupied the property or who actually controlled the use of the property).
>
> [underlining added]

The relevant portion of the definition of the verb "control" in the *Merriam-Webster's Collegiate Dictionary*, 10th ed., is as follows:

> **2 a :** to exercise restraining or directing influence over **:** regulate **b :** to have power over **:** rule

Thus, to "control the use of" real property means to "have power over" the use of real property, or to "exercise restraining or directing influence over" the use of real property.

CPR submits that the Legislature intended the meaning of "owner" to capture persons possessing established incidents of ownership of real property at common law, as indicated by the phrase "right of control of real property". The Panel disagrees. As is evident from the above, while some elements of the definition (i.e. possession, occupation, and control over real property) are *incidents* of "ownership" of real property at common law, in the context of the definition, there is no requirement for "ownership of real property". The definition allows someone to be in possession of, occupy, control the use of, or have the right of control of real property, without being a registered owner in fee simple, and/or without a registered interest at all in real property.

Thus, as suggested by NFPA, one person may hold legal title to a property, a second person (such as an easement holder or the holder of a head lease) may control certain activities on it, and a third person may physically occupy it.

This is evident from the inclusion of the word "occupies" in the definition. This may be the most inclusive word within the definition of "owner" as it is authority for the proposition that merely taking up space on real property is sufficient to bring a person within the definition of "owner" under the *Act* and the Panel so finds.

However, it is important to note that meeting one of the categories of "owner" does not dictate whether one will be named to a remediation order. This is simply one step in the analysis. The Panel agrees with CPR that it would be absurd to conclude that occupation of real property at a given moment in time, such as by a person standing on the property, is sufficient to assign liability for a contaminated site to that person. The Panel agrees with GCC, NFPA and BC Hydro that the purpose of the legislation is to effect remediation of contaminated sites. To do so, Part 4 of the Act casts a broad net of liability to capture those who cause or contribute to pollution and/or those who had the ability or opportunity to affect whether a site became contaminated and who may have benefited from the polluting activities of others on their property.

Thus, there must be a link between the contamination of the site and the person in order to name the person to an order. In the context of Part 4 of the *Act*, merely taking up space (without possession, a right of control, or control over the use of real property) may be sufficient to result in a person being named to a remediation order as an "owner", if there is a sufficient connection between the person's occupancy and the contamination of the property.

This requirement of a connection to the contamination is supported by section 26.6(1)(d)(iii) of the *Act*, which states that an owner or operator is not responsible

for remediation at a contaminated site if "the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site."

At paragraphs 56 and 168 of *Beazer*, Tysoe J. discussed the purposes of the *Act*, as follows:

> The purposes of the *Act* are the prevention of pollution and the identification and remediation of contaminated sites: see *Howe Sound Pulp & Paper* (at p. 231), *Swamy* (at para. 36) and *Re the Queen in Right of British Columbia and Alpha Manufacturing Inc.* (1996), 132 D.L.R. (4th) 688 (B.C.C.A.) at p. 693. It is the latter purpose which is the focus of Part 4 of the *Act*.
>
> ...
>
> 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.
>
> [underlining added]

In *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board),* 2003 BCCA 436, Newbury J.A. stated as follows at paragraph 1 regarding the purpose of Part 4 of the *Act*:

> In general terms, Part 4 was obviously intended to strengthen and extend already existing provisions in the *Act* aimed at implementing the principle of 'polluter-pay' — the notion that a person who has contaminated or contributed to the contamination of real property should bear the costs of remedying such contamination.
>
> [underlining added]

The Panel finds that a broad interpretation of the definition of "owner" is consistent with the *Act*'s purpose of "casting a wide net" of liability over responsible persons. While CPR is correct that some people captured by the definition of "owner" may also be captured by another category of responsible person, the Panel finds that, in the context of this legislation, overlap is not a concern. To the contrary,

- the breadth of the definition of "owner",
- the inclusion of past and present owners,
- the inclusion of other broad categories of "responsible persons" (such as operators, producers of a substance, transporters, some secured creditors),
- the fact that responsible persons are absolutely, retroactively, jointly and severally liability for the costs of remediation,

indicate that the goal of this legislation was to ensure that any person that had a role to play in the pollution and/or who benefited from the polluting activities could be named to a remediation order.

Thus, given the statutory definition of owner, the focus is not on ownership of real property as it is established at common law, nor in accordance with the everyday understanding of the rights and liabilities associated with personal property and/or real property. Rather, the focus must be on the statutory definition of "owner" – it is on who possesses, occupies, has a right of control or controls the use of real property.

In the context of this case, the Panel agrees with GCC and NFPA that the focus should be on CPR's activities on and in relation to the property, rather than whether they "own" real property. Specifically, the characterization of railway sidings as chattels versus fixtures is not relevant if it is determined that a person, by virtue of his or her ownership of the personal property (e.g., sidings), was in possession of, occupied, had the right of control of, or controlled the use of real property.

For the reasons discussed above, the Panel finds that the definition of "owner" in the *Act* is broader than the common law meaning of owner, and that legal ownership of real property is not required for a person to be an "owner" under the *Act*. Furthermore, it is not the status of railway sidings as chattels or fixtures that determines whether the owner of the sidings' is an "owner" under the *Act*; rather, it is the nature and extent of that person's relationship with the real property.

Accordingly, in answer to the general question posed by CPR, it is possible that, within the context of this contaminated sites scheme, an owner of personal property situated on someone else's real property, can be an "owner" of the real property for the limited purposes of Part 4 of the *Act*.

Based on the findings above, the Panel finds that the question of law should be answered in the affirmative. If a person, by virtue of their ownership of personal property (e.g., a railway siding) situated on some else's real property:

- occupies the real property;
- is in possession of the real property;
- controls the use of the real property; or
- has the right of control of the real property,

the owner of the personal property may be an "owner" of the real property for the purposes of Part 4 of the *Act*.

Given that the question to be decided in this first stage of CPR's appeal is a pure question of law, there is no need to proceed to an application of the facts to the law. This will be the subject of the second stage of CPR's appeal. However, given the evidence presented to the Panel and to assist in expediting the matters to be decided on the merits of the appeal, it appears that CPR may be an "owner" as a result of its "right of control" and/or control of the use of the real property pursuant to the agreements, or due to its very occupation of the real property, provided that

there is a link between its activities as "owner" and the contamination of the real property.

## DECISION

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

For the reasons stated above, the Panel has answered the question of law in the affirmative. The appeal may proceed to a hearing of the remaining issues in CPR's appeal.

CPR's request to dismiss the appeal is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

October 18, 2006