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

APPEAL NO. 2000-WAS-018(b)

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

BETWEEN:	British Columbia Railway Company, BC Rail Ltd., BCR Properties Ltd., and BC Rail Partnership	**APPELLANTS**
AND:	Director of Waste Management	**RESPONDENT**
AND:	Nexen Inc. (formerly Canadian Occidental Petroleum Ltd.)	**THIRD PARTY**
AND:	International Forest Products Ltd.	**THIRD PARTY**
AND:	District of Squamish	**THIRD PARTY**
AND:	FMC Chemicals Ltd., FMC Corporation, FMC of Canada Ltd. – FMC Canada Limitee, and Mid-Atlantic Investments Ltd.	**THIRD PARTY**
AND:	Squamish Nation	**THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair
Dr. Robert Cameron, Member
Margaret Eriksson, Member

DATE: April 9 to 12, 17 to 20, 23 to 27, May 23 to 25, 28 to 30, 2001

PLACE: Vancouver, B.C.

APPEARING:	For the Appellants:	Ross Switzer, Counsel Deborah Overholt, Counsel G. Walker, Counsel K. Tyler, Counsel
	For the Respondent:	Joyce Thayer, Counsel
	For the Third Party:	
	Nexen Inc.	Gary A. Letcher, Counsel J. McLean, Counsel A. Akeleitas, Counsel R.J. Ward, Counsel
	FMC Group	Michelle Pockey, Counsel
	International Forest Products Ltd.	Patricia Houlihan, Counsel
	Squamish Nation	Mathew Englander, Counsel

MAJORITY DECISION OF PANEL MEMBERS ALAN ANDISON AND DR. ROBERT CAMERON

APPEAL

This is an appeal brought by British Columbia Railway Company ("BCRC"), BC Rail Ltd. ("BC Rail"), BCR Properties Ltd. ("BCR Properties") and the BC Rail Partnership ("BCR Partnership") (collectively referred to as the "BCR Group"). The BCR Group appeals the July 4, 2000 decision of Richard H. Roberts, Director of Waste Management, Lower Mainland Region (the "Director"), to add the BCR Group as a person responsible for remediation on Remediation Order OS-16149, as amended (the "Order").

The BCR Group is the owner and landlord of a property that is the former site of a chlor-alkali plant (the "Plant") located at the foot of Galbraith Street in Squamish, B.C. (the "Plant Site"). The Plant was built and operated between 1964 and 1991 by tenants of the BCR Group. The Plant's operations caused the Plant Site and some of the surrounding lands and adjacent water bodies to become contaminated with mercury.

The Order concerns remediation of the Plant Site as well as nearby off-site lands and water bodies (collectively the "Site"), and addresses mercury contamination. The Order was initially issued on October 8, 1999 to the current tenant of the Plant Site, Canadian Occidental Petroleum Ltd. ("COPL"), now known as Nexen Inc. ("Nexen"). The Director decided to add the BCR Group to the Order in his "Findings Regarding Responsible Persons – Reasons for Decision II" dated July 4, 2000. The Director named all entities of the BCR Group as responsible persons on the Order. However, the Director advised the Parties by letter on April 23, 2001 that he had not intended to add the BCR Partnership to the Order.

The initial tenant of the Plant Site was FMC Chemicals Ltd. On March 20, 2001, Mid-Atlantic Investments Ltd. ("Mid-Atlantic"), formerly known as FMC of Canada Limited – FMC Canada Limitee which took over the lease from FMC Chemicals Ltd. (collectively "FMC Group"), was added to the Order as a person responsible for remediation as a result of the decision of the Environmental Appeal Board (the "Board") in a previous appeal *(Canadian Occidental Petroleum Ltd. v. Director of Waste Management*, Appeal No. 99-WAS-41(c), [2001] B.C.E.A. No. 9 (Q.L.) (hereinafter *COPL v. Director of Waste Management*).

In this appeal, the BCR Group seeks an order that BCRC, BC Rail and BCR Properties be removed from the Order. The Director and the Third Parties Nexen, FMC Group and the Squamish Nation maintain that BCRC, BC Rail and BCR Properties should remain on the Order. Nexen also asks that the BCR Partnership be added to the Order if it is not properly on the Order. Mid-Atlantic took no independent position on most of the issues in this appeal. International Forest Products Ltd. and the District of Squamish made no submissions.

The Board has the authority to hear this appeal under section 11 of the *Environment Management Act*, R.S.B.C. 1996, c. 118 and section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482, as amended (the "*Act*"). The Board, or any panel of it, may, after hearing all the evidence, decide to confirm, reverse or vary the decision of the Director, send the matter back to him with directions, or make any decision that the Director could have made, and that the Board considers appropriate in the circumstances.

BACKGROUND

The history of the BCR Group, the Plant Site and surrounding properties, and the leases of the Plant Site were the subject of much evidence in this hearing. As this background is both complex and important to the issues in this appeal, it is briefly summarized under the following headings:

1. Corporate History of the BCR Group;
2. History and Ownership of the Plant Site;
3. Leasing History of the Plant Site;
4. Mercury Contamination; and
5. The Appeal.

1. Corporate History of the BCR Group

BCRC was incorporated in 1912 as the Pacific Great Eastern Railway Company (the "PGE"). The PGE's promoters held its shares, and the Province of British Columbia guaranteed its bonds. After the PGE defaulted on bond obligations, the Province took over in 1918, becoming the PGE's sole owner and shareholder. Included in the PGE's assets in 1918 was District Lot 4271, which forms part of the current Plant Site.

On March 30, 1972, the Province changed PGE's name to British Columbia Railway Corporation (see S.B.C. 1972, c. 8).

In 1977, when BCRC was facing a debt load of approximately $700 million, mostly borrowed from public pension funds, a Royal Commission was appointed to review its operations. The Royal Commission released its report in 1978 recommending debt restructuring, more independence and that the railway function as a private entity, rather than as a government department. The large debt load and other problems came about because the railway had been used throughout its history by the Provincial Government as a tool in the economic development of parts of the Province, rather than as a private enterprise. Its Board of Directors had been largely controlled by politicians, with several Provincial cabinet ministers serving on the Board of Directors and former Premiers, W.A.C. Bennett and Dave Barrett, also serving as President during their respective tenures as Premier.

(a) 1984 Corporation Reorganization

Until 1984, BCRC owned and operated the railway. In 1984, the railway assets and operations as a going concern were divided between two subsidiaries: BCR Properties and BC Rail. BCR Properties was incorporated on May 18, 1984 with BCRC as its sole shareholder. BC Rail, originally known as S.C. Holdings Ltd., was a pre-existing shelf company created in 1969 with no active business. On May 22, 1984, BCRC and BCR Properties acquired the shares of S.C. Holdings Ltd., whose name was changed on May 28, 1984, to BC Rail. BCRC held 25% of the voting shares in BC Rail; BCR Properties held the remaining 75%.

On June 12, 1984, all of BCRC's railway-related assets were transferred to BC Rail. Thereafter, the railway was owned and operated by BC Rail. Also on June 12, 1984, all of BCRC's real estate assets not directly needed for construction and operation of rail lines, appurtenant facilities and works, were transferred to BCR Properties.

Following these transactions, preferred shares in BC Rail were all issued to the public in order to raise funds. All publicly held shares were subsequently redeemed by BC Rail.

The common shares in BC Rail continue to be held 25% by BCRC and 75% by BCR Properties.

(b) 1997 Corporate Reorganization

For financial reasons, there was a further restructuring of the railway on December 5, 1997, when BC Rail, BCR Properties and BCRC entered into a partnership agreement creating BCR Partnership. BC Rail transferred to BCR Partnership "substantially all of the railway related assets of BC Rail as a going concern." In return, BCR Partnership assumed certain liabilities of BC Rail and provided BC Rail with a 90% interest in BCR Partnership. (BCRC and BCR Properties each hold a 5% interest in BCR Partnership.) In addition, all real property held by BC Rail was also transferred to BCR Partnership, although the title continues to be registered in the name of BC Rail, but as a bare trustee for BCR Partnership.

2. History and Ownership of Plant Site

The Plant Site is currently made up of two legal parcels of land:

(a) P.I.D. 008-606-153, Block B, District Lots 4618, 5717, 6042 and 7134, Plan 13542 ("Block B"); and

(b) P.I.D. 007-774-010, Lot G, District Lots 486, 4271, 5717, 6042, 7134, Plan 14953 ("Lot G").

The Plant Site is situated on a spit of land extending into Howe Sound. The spit is bounded by Cattermole Creek to the west and Mamquam Blind Channel to the east. The off-site lands and water bodies that are subject to the Order include areas of Howe Sound, Cattermole Creek, and Mamquam Blind Channel that are in the vicinity of the Plant Site and contain or were suspected to contain mercury in excess of allowable levels.

The Plant Site has been owned by one or more members of the BCR Group at all material times, although the boundaries of the site changed and various portions were acquired or subdivided over the years. The legal title to Lot G is currently held by BCR Properties and the legal title to Block B is currently held by BC Rail in trust for BCR Partnership.

3. Leasing History of the Plant Site

The Plant, itself, was constructed, owned and operated by tenants of the BCR Group. On October 30, 1964, the PGE leased much of the area that is now the Plant Site to FMC Chemicals Ltd. FMC Chemicals Ltd. constructed the Plant, which opened on Christmas day in 1965. FMC Chemicals Ltd., and its corporate successors within the FMC Group, operated the Plant between 1965 and late 1986. On December 22, 1986, the FMC Group sold the Plant and assigned the lease to COPL, then known as CanadianOxy Metal Finishing Ltd. COPL and its successors operated the Plant until it was shut down in 1991. Nexen continues to lease the Plant Site. More specific details of the agreements between the BCR Group and its tenants are discussed below.

(a) 1964 Lease

On October 30, 1964, the PGE leased an area, including most of the Site, to FMC Chemicals Ltd. for a 65-year term beginning on November 1, 1964, and ending on October 31, 2029, for use for industrial and chemical manufacturing and related operations (the "1964 Lease"). The 1964 Lease gave the tenant an option to extend the 1964 Lease for two further 15-year terms ending October 31, 2059.

The 1964 Lease also required the PGE to do all things and execute all documents required to secure registration of the lease. The 1964 Lease was not in a registrable form because the demised area included portions of several legal parcels. Registration could not be achieved until the demised area was subdivided into complete legal parcels rather than portions of legal parcels. In addition, between 1964 and 1969 the parties negotiated changes to the demised area. A 12-acre piece of land was removed and several pieces of land, totaling approximately 11 acres, were added to the demised area.

(b) 1969 Lease

After the demised area had been agreed upon and subdivided as required for registration, FMC Chemicals Ltd. and the PGE entered into a lease with an effective date of November 1, 1969 (the "1969 Lease"). The 1969 Lease was actually signed, however, around December 11, 1970, and later registered in 1971.

There were a few wording differences between the 1964 Lease and the 1969 Lease. The legal description and footprint constituting the demised area were different. The 1969 Lease was for a 60-year rather than a 65-year period (recognizing that FMC Chemicals Ltd. had already occupied the property for 5 years). However, the 2029 expiry date and the two 15-year optional renewal periods remained the same.

On December 1, 1972, FMC Chemicals Ltd. assigned all of its interest under the 1969 Lease to FMC of Canada Limited, which, in April 1974, changed its name to FMC of Canada Limited - FMC Canada Limitee. Also on December 1, 1972, the 1969 Lease was amended, as the demised area had changed with the addition of 3.852 acres and the deletion of 3.436 acres. In January 1988, FMC of Canada Limited - FMC Canada Limitee changed its name to Mid-Atlantic Investments Ltd.

(c) 1986 Assignment of Lease to CanOxy/Nexen Group

On December 22, 1986, FMC of Canada Limited - FMC Canada Limitee assigned the Lease to CanadianOxy Metal Finishing Ltd., which, on April 1, 1987, assigned the Lease to CanadianOxy Chemicals Ltd. On November 1, 1988, CanadianOxy Chemicals Ltd. issued a declaration that it held the 1969 Lease in trust for CanadianOxy Industrial Chemicals Limited Partnership. On January 31, 1995, CanadianOxy Industrial Chemicals Limited Partnership transferred its interest in the Plant Site to COPL.

(d) 1995 Lease Assumption Agreement

On January 21, 1995, CanadianOxy Industrial Chemicals Limited Partnership, COPL and CanadianOxy Chemicals Ltd. entered into an assumption agreement (the "1995 Assumption Agreement") with BCR Properties and BC Rail, who had been the legal owners of the demised area since 1984. Under the assumption agreement, COPL agreed to assume the tenant's obligations under the Lease.

4. Mercury Contamination

The Plant used a mercury cell process to produce chlorine and caustic soda, which were primarily sold to the pulp and paper industry. Mercury was one of the raw materials used in the production process.

From the time the Plant opened in 1965 until April 1970, effluents from the Plant were discharged into a settling lagoon ("Old Lagoon") on the Plant Site and then out into Howe Sound, pursuant to a Pollution Control Permit that authorized the discharge of chemical wastes and cooling waters. The initial Permit did not mention mercury, since, prior to 1970, the discharge of mercury into the environment was not regulated.

Early in 1970, many organisms in Howe Sound were found to contain high mercury levels. In April 1970, the federal Department of Fisheries and Oceans closed the upper Howe Sound fishery for shellfish, crustaceans and all species of fish except salmon, trout and herring. The Plant was identified as the source of the mercury contamination. Shortly after the fisheries closure, FMC installed a new dyke, disposal pond and outfall to Howe Sound, substantially reducing the discharge of mercury containing effluent into Howe Sound. In the years following the 1970 fisheries closure, air emissions were also substantially reduced. While the majority of the mercury was discharged into the environment prior to the fisheries closure, the Panel heard evidence that mercury losses at the Plant continued to occur until it was closed in 1991.

There was also evidence that at least some PGE employees became aware that mercury from the Plant had caused the upper Howe Sound fisheries closure, because the closure was widely reported by the media. In addition, it is also reasonable to assume that at least some of PGE's Directors – who included the Minister of Lands, Forests and Water Resources, whose Department had issued the Pollution Control Permit – knew that the fisheries closure was due to mercury used at the Plant. The Permit was amended in November 1970 and introduced a 0.008 parts per million ("ppm") discharge limit for mercury. The Pollution Control Permit controlled discharges of effluent from the Plant. No evidence was presented as to whether there was also an air pollution control permit.

5. The Appeal

As noted above, the Order was initially issued to COPL on October 8, 1999. That Order was appealed by the BCR Group on November 8, 1999, and amended on December 1, 1999, on the grounds that the Order was too vague (Appeal No. 1999-WAS-042). That appeal was held in abeyance by the Board, at the request of the BCR Group.

Subsequently, there were a number of amendments to the Order. Most importantly, on July 4, 2000, the Director amended the Order by adding the BCR Group. The BCR Group appealed the amended Order on August 3, 2000. The BCR Group's grounds for appeal are as follows:

The Director erred in finding that any member of the BCR Group is a responsible person to undertake remediation at the Plant Site and the Off-Site Lands and Waterbodies.

ISSUES

The issues before the Board in this appeal are as follows:

1. Whether an appeal under the *Act* is a "trial de novo" or merely an appeal on the record of the administrative decision maker below.
2. Whether all members of the BCR Group are "responsible persons" under section 26.5(1) of the *Act*.
3. Whether those members of the BCR Group that are responsible persons are entitled to the exemption from liability under section 26.6(1)(e) of the *Act*.
4. Whether section 29 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*") should be "read down" so as to be inapplicable in this case; is section 29 *intra* or *ultra vires* the *Act*?
5. Whether section 29 of the *Regulation* nullifies an exemption that the BCR Group, or any of its member companies, could assert under section 26.6(1)(e) of the *Act*.

6. Whether there is a private agreement respecting liability for remediation that should be taken into account under section 27.1(4)(a) of the *Act*.

7. Whether the Board should exercise its discretion to remove the BCR Group or any of its member companies from the Order, and to refuse to name BCR Partnership in the Order as a responsible person.

RELEVANT LEGISLATION

Legislation Relevant to Issue 1

The *Act*, as amended, establishes a system whereby a person aggrieved by a decision of those exercising decision-making powers under the *Act* may appeal to the Board. Section 44(1) of the *Act* provides:

44 (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

(2) Nothing in this section is to be construed as applying in respect of a decision made by the minister under this Act or by the Lieutenant Governor in Council.

Section 47 states:

47 On an appeal, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

Legislation Relevant to Issues 2 to 7

There are numerous provisions of the *Act* and the *Regulation* relevant to this appeal. Those most relevant are reproduced below. Other provisions will be discussed as needed within the text of the decision.

The Director issued the Order under section 27.1 of the *Act*, which provides:

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

...

(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.

Subsection 1(4) of the *Act* confers all powers given to a manager under the *Act* or its regulations also on a director.

Subsection 26(1) of the *Act* defines a "responsible person" as "a person described in section 26.5." Section 26.5 provides:

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.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation at a contaminated site that was contaminated by migration of a substance to the contaminated site:

(a) a current owner or operator of the site from which the substance migrated;

(b) a previous owner or operator of the site from which the substance migrated; …

The terms "operator" and "owner" and "person" are defined in subsection 26(1) of the *Act* as follows:

"**operator**" means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a contaminated site…

"**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…

"**person**" includes a government body and any director, officer, employee or agent of a person or government body;

Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 further expands the definition of "person" to include "a corporation, partnership or party, and the personal or other legal representatives to whom the context can apply according to law."

Section 26.6 of the *Act* defines persons who are not responsible for remediation. Subsection 26.6(1)(e) is relevant to this appeal.

26.6 (1) The following persons are not responsible for remediation at a contaminated site:

...

(e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that in whole or in part, caused the site to become a contaminated site;

Section 29 of the *Regulation* modifies subsection 26.6(1)(e). Section 29 provides:

29 Subject to section 30, section 26.6(1)(e) of the Act does not apply to an owner of real property at a contaminated site if

(a) the owner voluntarily leased, rented or otherwise allowed use of the real property by any person,

(b) the owner knew or had a reasonable basis for knowing that the other person described in paragraph (a) planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site, and

(c) the person described in paragraph (a) used the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

DISCUSSION AND ANALYSIS

1. Whether an appeal under the *Act* is a "trial *de novo*" or merely an appeal on the record of the administrative decision maker below.

Position of the Director

The Director raises a preliminary issue regarding the nature and scope of the Board's jurisdiction on an appeal under section 44 of the *Act.* The Director argues that the Board's jurisdiction is restricted to an examination of the record below to determine whether the decision was correct or patently unreasonable. The Director maintains that the *Act* does not provide the Board with jurisdiction to re-examine the merits of the case or conduct a new hearing of the issues.

The Director submits that the Board has two discrete types of powers: (i) substantive jurisdictional powers found in section 44; and (ii) remedial powers derived from sections 44 and 47 of the *Act*. Furthermore, the Board should exercise its power to "make any decision that the person whose decision is appealed could have made" under section 47(c) of the *Act* as a remedial power only after the Board has used its powers of review under section 44(1). The Director relies on *Newfoundland (Workers*

Compensation Commission) v. *Breen* (1997), 149 Nfld. & P.E.I.R. 335 (Nfld. C.A.), (hereinafter *Newfoundland v. Breen*) where Green J.A. states at paragraph 29:

> [A] distinction had to be drawn between the jurisdiction of a review commission and the powers conferred upon him to enable him to carry out his duties within that jurisdiction.

In addition, the Director maintains that even where the statute mandates that an appeal be conducted by way of a rehearing and confers all of the powers and jurisdiction of the original decision maker on the appellate body, decisions which require the application of expertise should not be set aside unless there is compelling evidence that the decision was wrong or should be varied. The Director asserts that the Board should be conducting a "true appeal" in the nature of judicial review rather than a trial *de novo,* as *de novo* powers do not recognize the broad discretionary powers given to a manager or director under the *Act*. The Director also argues that section 46(2) does not confer on the Board "hearing *de novo*" powers, since the term "new hearing" is used rather than "hearing *de novo.*"

Position of the BCR Group

The BCR Group maintains that sections 46 and 47 of the *Act* and the additional powers in the *Environment Management Act*, confer on the Board full original jurisdiction and hearing *de novo* powers on appeals filed pursuant to section 44 of the *Act*. The legislation makes it clear that the Board is entitled to review any evidence that may be presented during the course of this appeal, which at the Board's option may be conducted as a hearing *de novo*. In addition, it may draw its own conclusions from that evidence and exercise its own discretion in reaching its decision on the issues before the Panel. In addition, section 47(c) of the *Act* specifically provides that, on appeal, the Board may "make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances." The BCR Group maintains that curial deference is not generally applied where the Legislature specifically intends for the appellate body to examine the evidence anew and make findings of fact where necessary. Sections 46(2) and 47 of the *Act* provide clear evidence that the Legislature intended to give the Board jurisdiction to hear an appeal as a hearing *de novo*. The Legislature's use of the term "new hearing" rather than the Latin "hearing *de novo*" is not significant, since the former is the modern English equivalent of the Latin phrase.

The BCR Group relies on the Supreme Court of Canada case of *R.* v. *Consolidated Maybrun Mines Ltd.*, [1998] S.C.R. 706, where the Court discussed the jurisdiction of the Ontario Environmental Appeal Board ("Ontario EAB") on appeals filed under the Ontario *Environmental Protection Act*. The BCR Group notes that the powers and jurisdiction of the Ontario EAB under its enabling statute are similar to those conferred on the Board by the *Act*. In *Consolidated Maybrun Mines* the Supreme Court of Canada found that an appeal to the Ontario EAB was a *de novo* trial. The BCR Group maintains that the appeal structure under the *Act* recognizes and protects the same interests as the Ontario *Environmental Protection Act* and that the Legislature clearly intended to give the Board *de novo* powers.

Finally, the BCR Group submits that, in instances where courts have applied the principle of curial deference, the appeal has been from an expert tribunal to a court that does not have special expertise in the matter. Those cases are distinguishable from the present case, since the Board is a tribunal with special expertise.

Position of the Third Parties

Nexen asserts that, if the Panel is in agreement with the Director's decision, then the issue of the Board's jurisdiction to conduct a hearing *de novo* need not be addressed. If, however, the Panel disagrees with the Director's decision, then the standard of review the Panel should use is reasonableness – that is, was the Director's decision reasonable in the circumstances?

The Squamish Nation maintains that the Panel should decline to decide the issue of jurisdiction. It takes no position regarding when the Board should substitute its decision for that of the Director and argues that this issue need only be addressed when the Director has exercised his discretion in an improper manner and the Panel chooses to do something else.

Panel Findings

In general, the nature of an appeal to a tribunal is to be determined by interpreting the relevant provisions of the tribunal's enabling statute. The Panel finds that the relevant provisions of the *Act* clearly demonstrate the Legislature's intention to give the Board flexibility in how it handles appeals. The provisions allow the Board to hear new evidence or to consider the findings of the decision-maker below, thus allowing it to effectively conduct a new hearing of the matter if it considers it appropriate to do so. The Board's hearing *de novo* powers are confirmed by the express language of subsection 46(2) of the *Act*, which states: "The appeal board may conduct an appeal by way of a new hearing."

The flexibility regarding how the Board chooses to handle an appeal is clear from the language of section 47 of the *Act*:

47 On appeal, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

Subsections 46(2) and 47(c) permit the Board to conduct a new hearing of the entire case both on questions of fact and issues of law. In addition, subsections 11(11) to (14) of the *Environmental Management Act* provide:

(11) The board, a panel and each member have all the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

(12) In an appeal, the board or a panel

(a) may hear any person, including a person the board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body,

whose decision is the subject of the appeal or review, must give that person or body full party status.

(13) A person or body that is given full party status under subsection (12) may

(a) be represented by counsel,

(b) present evidence,

(c) where there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(14) A person who gives oral evidence may be questioned by the board, a panel or the parties to the appeal.

There is no practical purpose in giving the Board the power to hear fresh evidence, hear legal submissions, and to summons, call and hear witnesses, if the Board's role is limited, as proposed by the Director, to examining the record below and determining whether the Director's decision was in error.

In short, subsections 46(2) and 47(c) of the *Act* and subsections 11(11) to (14) of the *Environmental Management Act* clearly bestow powers on the Board that are normally indicative of *de novo* jurisdiction.

On the other hand, subsections 47(a) and (b) of the *Act* – which permit the Board to "send the matter back to the person who made the decision, with directions" or "confirm, reverse or vary the decision being appealed" – are powers more akin to that of a "true appeal" that a court would perform on judicial review. Essentially, therefore, the Legislature has given the Board hybrid powers. The Board may, in its discretion, choose to conduct a narrower review of the decision below, or, alternatively, it may opt to conduct a hearing *de novo* and take a fresh look at what it considers to be the relevant issues and evidence.

In *Newfoundland* v*. Breen,* the Newfoundland Worker's Compensation Commission challenged the jurisdiction of the review commissioner acting pursuant to the Newfoundland *Workers' Compensation Act.* The Newfoundland Court of Appeal drew a distinction between the jurisdictional and procedural powers conferred on the review commissioner. The legislation at issue referred to a "review" mechanism rather than an "appeal." The Court found the use of the term "review," rather than "appeal," limited the powers of the review commissioner to substituting his decision only when the Workers' Compensation Commission had contravened the relevant Act, regulations or policy. The Panel finds that there are considerable differences in the wording of the Newfoundland *Workers' Compensation Act* and the *Act*, and does not find this case persuasive regarding the powers or jurisdiction granted to the Board under the *Act*.

The Director also relied on the decision in *Nelson v. Rouilles,* [1998] B.C.J. No. 1292 (B.C.S.C.). In that case, Romilly J. found that while the *Family Relations Act* permitted

him to admit and consider new evidence on appeal and make a final determination of the case, he did not have jurisdiction to conduct a trial *de novo*. In the Panel's view, there are considerable differences in the wording of the *Family Relations Act* and the *Act*. The *Family Relations Act* does not expressly give the Supreme Court of British Columbia jurisdiction to conduct a new hearing, whereas subsection 46(2) of the *Act* clearly states that the Board may conduct a new hearing.

The Supreme Court of Canada's decision in *R. v. Consolidated Maybrun Mines Ltd.*, however, is instructive regarding the nature of the Board's jurisdiction and powers, as the powers and jurisdiction of the Ontario EAB under the Ontario *Environmental Protection Act* are similar to those granted to the Board under the *Act*. Subsection 144(1) of the Ontario *Environmental Protection Act* provides:

> **144** (1) A hearing by the Tribunal shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

Subsection 144(1) of the Ontario *Environmental Protection Act* essentially rolls the same powers given to the Board by subsections 46(2) and 47(a) to (c) of the *Act* into one provision rather than two.

In *Consolidated Maybrun Mines*, the Supreme Court of Canada commented on the nature of the Ontario EAB's jurisdiction in the following context. The appellant was issued an order to clean up and take corrective action by a Regional Director. Rather than appeal the order to the Ontario EAB, the appellant chose to ignore it and later was charged with failing to comply with the order. At trial in the Ontario Provincial Court, the appellant attacked the validity of the order. The trial judge agreed that part of the order was invalid. The Supreme Court of Canada held that the trial judge had no jurisdiction to hear a collateral attack of an order when the Ontario *Environmental Protection Act* had established an internal appeal mechanism.

The Supreme Court of Canada examined the enabling statute and the underlying purpose of giving a director a broad range of order powers and also the purpose of establishing and conferring broad *de novo* and appeal powers on the Ontario EAB. Madame Justice L'Heureux-Dubé, writing for the Court, states:

> **56 However, a person affected by a decision of the Director is not without recourse under the Act. On the contrary, ss. 120 *et seq.* of the Act provide for the creation of an Environmental Appeal Board, whose sole function is to hear appeals from decisions of the Director. In particular, s. 122 authorizes a person to whom an order is directed to appeal to the Board within 15 days after service of the order. Sitting as a panel of three, the Board has full power to review the Director's decision and take any action it deems necessary and may substitute its own opinion for that of the Director (s. 123). It is, therefore, a *de novo* process whose purpose is to permit the Director's decision to be reviewed in light of submissions by the affected party. Furthermore, should this party not be satisfied with the outcome, he or she has a right of appeal to the Divisional Court on a question of law, and a right of appeal to the Minister on any other matter.**

> 57 In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. **The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination, and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection.**
>
> 59 … It is clear from a review of the *Environmental Protection Act* that its purpose is not simply to repair damage to the environment resulting from human activity, even if we assume that repairs will always be possible, but primarily to prevent contamination of the province's environment. **Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal procedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible.**
>
> [emphasis added]

The Panel finds that Madame Justice L'Heureux-Dubé's comments are important, as the appeal structure in the *Act* is likewise designed to strike a balance between

(i) the powers given to a director or manager to issue orders to prevent, protect or repair damage to the environment in an efficient, expert and effective manner, and

(ii) the counterbalance provided by establishing a specialized tribunal, the Board, with full *de novo* powers so that affected individuals have an opportunity to present evidence, define issues, present legal argument and otherwise assert their rights.

The Board is not limited to a narrow review of the record below to determine whether a director or manager was correct or in error.

Finally, the Panel will address the Director's argument that a director or manager should be accorded curial deference by the Board. Generally, curial deference is given on an appeal from a decision made by an individual or tribunal with special expertise to a decision-maker, such as a Supreme Court Justice, who is not a specialist in the matter at issue. This situation is different from the one at hand where the appeal is to a tribunal with special expertise. The Supreme Court of British Columbia recognized the expertise of the Board in *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board)* [1996] B.C.J. No. 1531. Justice Romilly states at paragraph 53 of the decision:

> The Board's role is limited to dealing with environmental matters. Through continuous exposure to environmental matters the members of the Board develop considerable expertise in the area. Further, the establishment of

> the Board to deal with environmental matters allows for consistency, and administrative efficiency.

Moreover, the principle of curial deference is not applied where the Legislature clearly intended the appellate tribunal to examine the evidence anew and, if it deems appropriate, to make its own findings of fact. The Board may also bring a broader view of a matter since it hears appeals from decisions of managers or directors exercising powers in various regions of the Province. It also hears appeals from several other provincial environmental statutes. The Panel notes that the three-person Panel hearing the present case has over 65 years of cumulative experience dealing with environmental issues, including contaminated sites, from a multi-disciplinary background of environmental engineering, law and policy in the public, private and consulting sectors.

For the reasons provided above, the Panel finds that the Board has jurisdiction to conduct a hearing *de novo*, and is not bound to show any curial deference to the Director.

2. Whether all members of the BCR Group are "responsible persons" under section 26.5(1) of the *Act*.

It is undisputed that BCRC, BC Rail, BCR Properties and BCR Partnership are all, *prima facie*, persons responsible for remediation at a contaminated site under subsections 26.5(1)(a) or (b) of the *Act*, since all are current or previous owners of the Plant Site, which is a contaminated site.

BCRC was the legal owner of the Plant Site at all material times until June 1984, when it transferred ownership of Block B to BC Rail and Lot G to BCR Properties. Accordingly, BC Rail and BCR Properties are the current owners of the Plant Site. In addition, as of December 5, 1997, BC Rail transferred its equitable interest in Block B to BCR Partnership, such that BC Rail continues to hold the legal title but as a bare trustee for BCR Partnership.

The term "owner" is defined in section 26:

> "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…

Since "any estate or interest, legal or equitable, in real property" is enough to make one an "owner" for the purpose of Part IV of the *Act*, BCR Partnership's beneficial interest in Block B also makes BCR Partnership an "owner" of the Plant Site.

The Panel is satisfied that all members of the BCR Group meet the definition of a current or previous "owner" and *prima facie* qualify as persons responsible for remediation of a contaminated site under subsections 26.5(1)(a) and (b).

The Panel finds that there was no evidence from which the Panel could conclude that members of the BCR Groups were also "operators" under of subsections 26.5(1)(a) and (b), or "transporters" under subsection 26.5(d) of the *Act*. There was no evidence that BCRC carried out any dredging of mercury contaminated soils or that the dredging activities that were carried out led the areas receiving dredged materials to become contaminated with sufficient concentrations of mercury such that they would be considered a "contaminated site" for the relevant land use categories identified in the *Regulation*. There was no evidence that port development on adjacent lands involved mercury. Nor was there actual evidence that BCRC transported mercury or mercury

containing wastes to or from the Site. Nor was there any evidence that materials shipped through the Plant Site prior to 1965 in any way caused or contributed to it becoming contaminated with mercury. On the contrary, all evidence before the Panel leads to the conclusion that the Plant itself was the source of the mercury contamination.

In conclusion, the Panel finds that all members of the BCR Group are *prima facie* "responsible persons" with regard to remediation of the Site, by virtue of their status as current or previous "owners" of the Plant Site.

3. Whether those members of the BCR Group that are responsible persons are entitled to the exemption from liability under section 26.6(1)(e) of the *Act*.

Position of the BCR Group

Although the BCR Group acknowledges that each of its members is a current or previous "owner" of the Plant Site, it maintains that each member is also exempt from responsible party status due to subsection 26.6(1)(e) of the *Act*. Subsection 26.6(1)(e) provides the following exemption from liability for remediation:

> **26.6** (1) The following persons are not responsible for remediation at a contaminated site:
>
> ...
>
> (e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;

The BCR Group's argument can be broken into three basic parts. First, when BCRC acquired the Plant Site it was not contaminated. It acquired the majority of the Plant Site at various times between 1916 and 1964. The last portion of the land now making up the Plant Site, District Lot 7134, Group 1 New Westminster District, was acquired by Crown Grant to the PGE on June 18, 1965, with the title being issued to the PGE on October 12, 1965. Acquisition of the land making up the Plant Site therefore predated the Christmas Day 1965, opening of the Plant.

Second, the BCR Group maintains that, on the evidence before the Panel, the sole source of contamination of the Site is the Plant. There is no evidence that any operations or activity by the BCR Group contributed to the Site becoming contaminated. Prior to the Plant being built, other than the railway, there was nothing else on the Plant Site. Consequently, the BCR Group argues that BCRC meets both parts of the exemption under section 26.6(1)(e).

Third, the BCR Group asserts that BC Rail, BCR Properties and BCR Partnership should also qualify for the exemption even though they became "owners" of the Plant Site after it was a contaminated site, because BC Rail, BCR Properties and BCR Partnership are merely the corporate successors of BCRC. Although BC Rail and BCR Properties acquired ownership in the Plant Site in 1984, and BCR Partnership acquired its equitable interest in 1997, the BCR Group argues that its members should not lose the benefit of the exemption merely because of inter-related corporate transfers that took place as part of a corporate reorganization, that was designed to refinance the railway's debt and acquire certain tax advantages. The reorganization had no practical effect on the

operation, the nature of the business or the contaminated site itself. The ultimate shareholder, the Province of British Columbia, remained the same before and after the transfer. The same business was carried on by BC Rail and BCR Properties as had been carried on by BCRC before the transfer. Several members of the Boards of Directors, as well as the corporate officers, of the BCR Group companies were the same. They had the same workforce and the same head office. The lease of the Plant Site remained the same. In short, as a practical matter, nothing changed as a result of the reorganization. Consequently, BC Rail, BCR Properties and BCR Partnership should be regarded as corporate successors to BCRC. As such, they should be in no worse position than BCRC simply because of an internal corporate reorganization, which had no practical effect on the operation, the nature of the business or the contaminated site itself. No additional liabilities should be incurred because of the corporate reorganization.

The BCR Group argues that, under the terms of the June 1984 corporate reorganization agreements, BC Rail and BCR Properties not only assumed BCRC's assets as a going concern, but also its liabilities and responsibilities, including its employees. In assuming the liabilities and responsibilities of BCRC, it should also be entitled to assume BCRC's exemptions from liability, and any rights and benefits that were applicable to BCRC at the time. BCR Partnership should also be exempt for similar reasons, when, in 1997, it became the beneficial owner of all of the assets of BC Rail as a going concern.

The BCR Group refers to a number of Canadian and U.S. authorities in support of its argument that successorship principles should apply in this case, including the following statement of the Supreme Court of Canada in *National Trust Company v. Mead,* [1990] 2 S.C.R. 410 at 469:

> Turning to s. 40(2) of the Act, if a corporation waives its protection, that waiver binds all successors and assigns 'notwithstanding anything in this Act'. When used in reference to corporations, **a 'successor' generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation.** In terms of s. 40(2) of the Act, it is understandable that a new corporation should be bound by the waiver of the old one since the new one is essentially supplanting the old one in all respects. [emphasis added by Panel]

The BCR Group asserts that this case affirms two principles: (1) an entity can be a successor to another entity by means other than a merger or amalgamation; and (2) a successor takes on not only the liabilities but also the rights of the first corporation. The BCR Group also claims that section 100(4) of the *Company Act*, R.S.B.C. 1996, c. 62 recognizes that a corporate entity may be a successor to another entity in circumstances short of a merger or an amalgamation, as this provision is not necessary to ensure that a contract is binding on an amalgamated or merged entity.[1]

The BCR Group relies on *Xerox Canada Inc. v. J. W. Harbord Co.,* [1987] B.C.J. No. 242 at 2 (B.C.S.C.), (hereinafter *Xerox Canada*), which refers to the following definition of "successor" in *Blacks Law Dictionary*:

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[1] Section 100(4) provides: "Every contract made according to this section is effectual in law, and shall bind the company and its successors and all other parties to it."

> One that succeeds or follows; one who takes the place that another has left, and sustains the like part or character. One who takes the place of another by succession.
>
> Terms with reference to corporations, generally means another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.

The BCR Group relies on *Xerox Canada* for the proposition that successorship may arise in situations other than an amalgamation, including an asset purchase situation.

Although the *Act* does not expressly provide for successor liability, the BCR Group urges the Panel to interpret Part 4 of the *Act* to include successors. Otherwise, it would be easy for a corporation to avoid liability by incorporating another company and transferring all of its clean assets to the new company leaving only the contaminated assets behind. Consequently, the word "persons" in the definitions of "owner" and "operator" should include successor corporations.

The BCR Group also cited a number of U.S. cases concerning successor liability for contaminated sites under the *Comprehensive Environmental Response, Compensation and Liability Act* ("CERCLA"), a regulatory regime addressing contaminated sites that is similar to Part 4 of the *Act*. In *United States v. Carolina Transformer Company et al.* 978 F. 2d. 832 (4th Cir. 1992), (hereinafter *Carolina Transformer*), the Court found that successor corporations may be liable under CERCLA even though CERCLA is silent on the issue of successorship. On page 4 of the decision, it discusses when a company will be considered the corporate successor of the company from which it purchased assets:

> The settled rule is that a corporation which acquires the assets of another corporation does not take the liabilities of the predecessor corporation from which the assets are acquired unless **one of four generally recognized exceptions are met: (1) the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a de facto merger; (3) the successor may be considered a 'mere continuation' of the predecessor; or (4) the transaction is fraudulent… The traditional rule with regard to the 'mere continuation' exception is that a corporation is not to be considered the continuation of a predecessor unless, after the transfer of assets, one corporation remains, and there is an identity of stock, stockholders, and directors between the two corporations.** In the case at hand FayTranCo would be considered liable as a successor corporation under the traditional approach because there was no overlap of stock ownership between Carolina Transformer and FayTranCo. [emphasis added by Panel]

The Court in *Carolina Transformer* also discusses the "continuity of enterprise" or "substantial continuity" theory of successorship. Under this theory, the Court considers whether there are a sufficient number of the following factors indicating that one corporation is a successor to another:

(1) retention of the same employees;

(2) retention of the same supervisory personnel;

(3) retention of the same production facilities in the same location;

(4) production of the same product;

(5) retention of the same name;

(6) continuity of assets;

(7) continuity of general business operations; and

(8) whether the successor holds itself out as the continuation of the previous enterprise.

The BCR Group also relies on other CERCLA decisions including *B.F. Goodrich v. John Betkoski* 99 F. 3d 505 (2d. Cir. 1996), *Gould Inc. v. A & M Battery Tire Service* 950 F. Supp. 653 (M.D. Pa, 1997) and *United S*tates *v. Mexico Feed and Seed Company Inc.* 980 F. 2d 478 (8th Cir. 1992) where the "continuity of enterprise" test was applied.

The BCR Group submits that, if the Panel applied the continuity of enterprise successorship test set out in the U.S. cases above, BC Rail and BCR Properties would clearly be considered the successors of BCRC. The 1984 transaction was essentially a financial restructuring of the company being split into BC Rail and BCR Properties. BC Rail had the same employees as BCRC and carried out the same jobs. There was a continuity of supervisors and management. BC Rail and BCR Properties collectively carried on the business previously carried on by BCRC with the same facilities and at the same locations. The head office of all three companies was located on Esplanade Avenue in North Vancouver. All three companies had the same address and phone numbers. BC Rail had the same customers as BCRC. All three companies were generally referred to as "BCR."

For similar reasons, the BCR Group submits that BCR Partnership would also be considered a successor to Rail (and thus of BCRC) under the continuity of enterprise test. After the December 1997 transaction involving the corporate reorganization and the creation of BCR Partnership, BCR Partnership carried on the same business that was previously carried on by BC Rail, by the same employees, in the same facilities, in the same locations. There was no change in customer base. The business was commonly referred to as BCR or BC Rail both before and after the 1997 transaction. The 1997 transaction had no effect on BCRC as one of the partners in BCR Partnership. BCRC was a holding company with no employees either before or after the 1997 transactions. The 1997 transaction changed nothing at, or with respect to, the Squamish site. No new lease was entered into.

Although the BCR Group acknowledges that the "continuity of enterprise" test of successorship has not been applied in Canada outside the labour and employment law contexts, it urges to the Panel to adopt it in this case and find that BC Rail, BCR Properties and BCR Partnership are the successors to BCRC and thus entitled to the exemption in section 26.6(1)(e).

Position of the Director, Nexen and the Squamish Nation

The Director and the Third Parties, Nexen and the Squamish Nation, argued that no member of the BCR Group qualifies for the section 26.6(1)(e) exemption. While they agree that BCRC initially meets the conditions of section 26.6(1)(e), they argue that it loses the exemption for three independent reasons.

First, they submit that although BCRC's legal ownership of the Plant Site ended in June 1984, it reacquired an "equitable" interest in the Plant Site in December 1997 when BCR Partnership became the beneficial owner of the Plant Site. BCRC has a 5% beneficial interest in BCR Partnership. Consequently, it should be regarded as a current "owner" due to its 5% beneficial interest in BCR Partnership's beneficial interest in

Block B. At the time when BCR Partnership acquired its equitable interest in Block B, the Plant Site was clearly a "contaminated site" under Part 4 of the *Act*, which came into force in April 1997.

Second, in October 1972, BCRC acquired District Lot 3220 ("D.L. 3220"), a triangular water lot which is part of the off-site lands or waterbodies defined as part of the "Site" in the Order. When BCRC acquired D.L. 3220 in 1972, most of the mercury had already been released from the Plant Site. It was probably a "contaminated site" in 1972 (using the current *Act* definition of "contaminated site" as there was no legislation defining or regulating contaminated sites in 1972).

Third, the application of section 29 of the *Regulation* disqualifies BCRC from the exemption. Section 29 states:

> **29** Subject to section 30, section 26.6(1)(e) of the Act does not apply to an owner of real property at a contaminated site if
>
> (a) the owner voluntarily leased, rented or otherwise allowed use of the real property by any person,
>
> (b) the owner knew or had a reasonable basis for knowing that the other person described in paragraph (a) planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site, and
>
> (c) the person described in paragraph (a) used the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

BCRC, then known as PGE, leased the land to FMC. The Director and the Third Parties submit that, during the 1964 Lease period, PGE had at least some knowledge that FMC would be using mercury in its operations on the Plant Site, since one of the plans submitted by FMC for PGE's approval included a plan entitled "Mercury Trap and Miscellaneous Details." From this document, PGE ought to have known that FMC was handling mercury on the Plant Site. Furthermore, if there was a need for a "mercury trap," PGE ought to have known that there was a risk that mercury could escape into the environment. The 1969 Lease was signed on December 11, 1970, after the upper Howe Sound fisheries closure. They argue that, at this time, PGE clearly was aware of the mercury problems at the FMC Site.

Further, the 1969 Lease was a new lease not just an extension or rewritten form of the 1964 Lease. The demised area and some of the other provisions were somewhat different from those in the 1964 Lease. Moreover, they argue that the 1964 Lease was *void ab initio* since it violated section 83 of the *Land Registry Act*. Section 83 of the *Land Registry Act* (currently section 73 of the *Land Title Act*) provides:

> No person shall subdivide land for the purpose of conveying the same, or leasing the same for life or for a longer term than three years, in smaller parcels than that of which he is the registered owner, except upon compliance with the provisions contained in this Part.

The 1964 Lease covered portions of five legal parcels. As such, it subdivided land into smaller parcels than those owned by PGE. The 1964 Lease also had a term of 65 years, which is greater than the 3-year period allowed by section 83. Since the 1964 Lease was invalid and unenforceable from the beginning, only the 1969 Lease should be considered for the purpose of section 29. This issue is discussed in greater detail below

under Issue 6 – is there a private agreement respecting liability for remediation that should be taken into account under section 27.1(4)(a) of the *Act*?

Finally, on the issue of successorship, the Director and the Third Parties argue that successorship principles should not provide BC Rail and BCR Properties with the subsection 26.6(1)(e) exemption. BC Rail and BCR Properties are distinct legal entities from BCRC. The BCR Group's joint 1994 Annual Report provides that although BC Rail and BCR Properties are wholly-owned subsidiaries of BCRC, they "function as separate companies, independently directed and managed." By undertaking a corporate restructuring for financial or tax reasons, the BCR Group should not then be able to argue for other purposes that the restructuring never took place.

The Director and the Third Parties also maintain that there is no theory in Canadian law under which the separate corporate existence can be ignored: the continuation of enterprise successorship theory relied on by the BCR Group is not the law in Canada. It is not even the law in the U.S., where it has been applied merely to expand the range of persons who may be liable, not applied to expand the range of persons who can avoid responsibility or liability. Nexen relies on the Supreme Court of Canada decision in *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] S.C.J. No. 2 (QL) (hereinafter *Kosmopoulos*) at paragraph 13, which states:

> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, supra at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.

Further, it is only through amalgamation and other limited processes of law that result in the loss of a corporation's separate and distinct corporate identity. An asset transfer between corporations does not cause a fusion of corporate identities. Nexen cites several cases in support of this proposition: *R. v. Black & Decker Manufacturing Co. Ltd.* (1975), 43 D.L.R. (3d) 393 at pages 399 to 400; *COPL v. Director of Waste Management* at paragraphs 17, 18 and 24; *Cominco Ltd. v. Westinghouse Canada Ltd.* (1981), 127 D.L.R. (3d) 544 at page 567 (B.C.S.C.).

Furthermore, in all of the cases cited by BCR Group, there are no cases where the successorship test has been used to exonerate a person from responsibility, rather than to extend liability. Even in the labour context, successorship principles are well established. Labour cases apply these principles to extend liability to prevent harm to employees or other third parties. Finally, section 100(4) of the *Company Act* does not create a general concept of successorship in the case of an asset purchase transaction.

The Director and the Third Parties argue that it was through transfers of assets that BC Rail and BCR Properties became the legal owners of their respective portions of the Plant Site, and BCR Properties became the legal owner of D.L. 3220. BC Rail and BCR Properties are seeking to avoid rather than extend responsibility. Accordingly, the principles of successorship cannot apply to assist BC Rail and BCR Properties in this case.

Finally, the Third Parties maintain that BCR Partnership was aware that Block B was a contaminated site when it became the beneficial owner of this property. As such, there is no basis to apply the exemption in section 26.6(1)(e) to BCR Partnership. Nor, for the arguments discussed above, should successorship principles apply to BCR Partnership. BCR Partnership is a separate entity established for separate business purposes. It is treated as a separate entity by the members of the BCR Group, since it is required to maintain separate books of account and records of all transactions.

Panel Findings

(i) Are BC Rail, BCR Properties and BCR Partnership corporate successors to BCRC? Are they entitled to the exemption in subsection 26.6(1)(e) of the Act?

The Panel finds the argument that BC Rail, BCR Properties and BCR Partnership should be in no worse position than BCRC because of the 1984 and 1997 corporate reorganizations somewhat compelling. The nature of the business, its employees, location, common business name, operations at the Squamish site and all other aspects of the business were the same before and after these transactions.

However, no Canadian case law was presented to the Panel that allows successorship principles to be used to pierce the corporate veil in situations other than those where third parties would suffer an injustice. In this regard, the Panel adopts the Supreme Court of Canada's statement in *Kosmopolous:*

> those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice.

BC Rail, BCR Properties and BCR Partnership have not asked the Panel to apply successorship principles to prevent an injustice to third parties. They, therefore, must be treated as distinct corporate entities.

As BC Rail, BCR Properties and BCR Partnership each became an owner after the Plant Site had already been contaminated, none of them meet the conditions for claiming the subsection 26.6(1)(e) exemption.

(ii) Is BCRC entitled to the exemption in subsection 26.6(1)(e) of the Act with respect to the Plant Site?

The Panel is satisfied that BCRC acquired the Plant Site prior to it becoming a contaminated site. On all of the evidence before the Panel, the source of the mercury contamination is the Plant. Furthermore, the majority of the mercury contamination occurred between Christmas Day 1965 (when the Plant opened), and dates following the closure of the upper Howe Sound fishery, when improvements were made to reduce the amount of mercury discharged from the Plant.

The Panel also finds that BCRC did not dispose of, handle or treat a substance in a manner that in whole or in part caused the Site to become a contaminated site. Mercury is the sole substance of concern in the Order under appeal. On all of the evidence before the Panel, the Site has been contaminated with mercury because of the operations of the Plant. There was no evidence that the mercury contamination on the Site was caused by an activity of anyone other than the operators of the Plant. Accordingly, with respect to the Site, BCRC is *prima facie* entitled to the subsection 26.6(1)(e) exemption.

The Panel does not consider BCRC's 5 % beneficial interest in BCR Partnership's beneficial interest in Block B acquired as part of the 1997 corporate reorganization, to be sufficient to invalidate the exemption.

(iii) If BCRC is entitled to an exemption under section 26.6(1)(e) for the Site, can BCRC nevertheless be regarded as a person responsible for remediation because BCRC is a prior owner of D.L. 3220?

BCRC owned the triangular water lot D.L. 3220 between 1972 and 1984. There was no independent source of contamination on D.L. 3220. Rather it was contaminated by mercury migrating from the Plant Site.

In order for BCRC to a be considered a person responsible for the remediation costs associated with D.L. 3220 under subsection 26.5(1)(b) of the *Act*, D.L. 3220 must be a "contaminated site" as that term is defined in subsection 26(1) of the *Act*:

> "**contaminated site**" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains
>
> (a) a special waste, or
>
> (b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions.

The evidence presented to the Panel regarding the estimated levels of mercury contamination in D.L. 3220 is as follows. In 1997, Nexen's consultants Stearns & Conrad Engineering took five surface sediments samples from D.L. 3220 for mercury analysis. No sub-surface samples were taken from D.L. 3220. In addition, Stearns & Conrad took several other samples outside of, but near D.L. 3220. All five of the samples from D.L. 3220 were below the 0.13 µg/g Threshold Effect Level ("TEL"). The TEL is the concentration below which adverse biological effects are expected to occur only very rarely. A sub-surface sample from the middle of D.L. 5717 (a nearby water lot), showed a mercury contamination of greater than 2.7 µg/g (the Polychaete Tissue Response Value level ("TRV")). Stearns & Conrad used computer modeling to extrapolate that subsurface mercury contamination exceeding the 2.7 µg/g level may be found in one corner of D.L. 3220, with lower levels of subsurface mercury concentrations occurring in other parts of D.L. 3220. Accordingly, there is some evidence upon which the Panel can conclude that there may be some level of mercury contamination within the subsurface sediments of D.L. 3220.

However, in order to be a "contaminated site" as this term is defined in Part 4 of the *Act*, the levels of contamination must either qualify as special waste or they must exceed "prescribed criteria, standards or conditions." The Director, Ministry of Water, Air and Land Protection (the "Ministry") called Michael MacFarlane, a regulatory toxicologist with the Ministry, to explain the Ministry's standards for determining whether these levels of mercury would be considered either special waste or in excess of "prescribed criteria, standards or conditions."

Mr. MacFarlane confirmed that the mercury levels currently estimated to be within the subsurface sediments of D.L. 3220 do not qualify as "special waste." Mr. MacFarlane also explained that the Ministry does not yet have any "prescribed criteria, standards or conditions" in place for contaminants (including mercury) in sediment, although the Ministry is working on them. The *Regulation* contains the current legal standards defining quantities and concentrations of substances that make a property a contaminated site in respect of five land use categories and four water use categories. The *Regulation*, however, does not yet have standards for mercury or other substances

found in sediment (i.e. sediments in a water body). The Ministry, however, has a draft of "*Criteria for Managing Contaminated Sediment in British Columbia*" which has not yet been adopted. Since there are no standards or criteria in place defining acceptable and non-acceptable levels of contaminated sediment, the Ministry currently requires all sediments to be remediated using a "risk based approach." When the hearing concluded, the Ministry had not yet decided what the appropriate risk-based standard should be for mercury in the sediments.

Mr. MacFarlane explained that the *Regulation*, which came into force on April 1, 1997, replaced an earlier July 1995 Ministry policy known as the "*Criteria for Managing Contaminated Sites in British Columbia*," that did have levels for sediment contamination which were established by the Canadian Council of Ministers of the Environment ("CCME") in the "*Interim Sediment Quality Assessment Values*." The Ministry's "*Criteria for Managing Contaminated Sites in British Columbia*" had, in turn, replaced the policy of the Ministry to apply CCME's "*Interim Canadian Environmental Quality Criteria for Contaminated Sites*," (see also the Ministry's "*Criteria for Managing Contaminated Sites in British Columbia*" section 1.0 – Introduction).

The Director and the Third Parties urge the Panel to "read in" the sediment levels from these earlier policies to conclude that D.L. 3220 is currently a "contaminated site." The Panel finds, however, that the scheme established by Part 4 of the *Act* does not grant either the Director or the Panel the discretion to "read in" sediment contaminant levels that were part of earlier Ministry policies that were superseded when the *Regulation* was enacted. The language of the July 1995 Ministry policy "*Criteria for Managing Contaminated Sites in British Columbia*" expressly states that the policy document applies "until cancelled or until regulations under the *Waste Management Act* establish legal standards for contaminated sites." The July 1995 "*Criteria for Managing Contaminated Sites in British Columbia*" was clearly replaced and superseded on April 1, 1997, when the *Regulation* was enacted. The Panel cannot ignore the express language of the policy itself and choose to keep parts of the policy after it has been superseded by a regulation. In order to establish sediment standards, the Ministry must either finalize and sign off on its draft "*Criteria for Managing Contaminated Sediment in British Columbia*" or amend the *Regulation* to include legally binding sediment standards.

As a result, the Panel is unable to conclude that D.L. 3220 is a "contaminated site." Accordingly, at this time, the Panel is unable to find that BCRC should be regarded as a person responsible for remediation of the Site solely because it was a prior owner of D.L. 3220 in 1972, when the majority of mercury contamination from the Plant had occurred.

Conclusion

In conclusion, the Panel finds that BC Rail, BCR Properties, and BCR Partnership are separate corporate entities that each became owners of the Plant Site after it had become contaminated. Therefore, they are not eligible for the exemption from liability for remediation which is provided under section 26.6(1)(e) of the *Act*.

The Panel also finds that BCRC is entitled to the exemption from liability under section 26.6(1)(e) of the *Act*. Further, BCRC is not a person responsible because it is a prior owner of D.L. 3220 as that area is not a contaminated site under the *Regulation*.

4. Whether section 29 of the *Regulation* should be "read down" so as to be inapplicable in this case; is section 29 *intra* or *ultra vires* the *Act*?

Position of the BCR Group

The BCR Group maintains that section 29 of the *Regulation* is not authorized by the *Act*, and should thus be "read down" and ruled inapplicable to these proceedings. It submits that the Lieutenant Governor in Council has no authority to override laws enacted by the Legislature. It cannot, in this specific case, impose liabilities upon persons whom the Legislature has expressly exempted from liability by statute, since the Legislature has not delegated this regulation making authority to the Lieutenant Governor in Council. The BCR Group's argument is as follows.

Section 26.5 of the *Act* describes classes of persons who are *prima facie* considered "responsible persons" under Part 4 of the *Act*. Section 26 defines "responsible person" for the purpose of Part 4 of the *Act* as "a person described in section 26.5." Subsection 26.5(1) provides:

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

The categories of responsible persons identified in section 26.5 are subject to the exemptions established in section 26.6. Subsection 26.6(1) provides: "The following persons are not responsible for remediation at a contaminated site" followed by various exemptions, including subsection 26.6(1)(e) which has been discussed above.

The *Act* also gives the Lieutenant Governor in Council the authority to make regulations adding categories of responsible persons or exempt persons. It may also, by regulation, make modifications, interpretative guidelines or procedures for the exemptions in section 26.6. Subsection 58(1)(g) to (i) of the *Act* provides:

> **58** (1) Without limiting section 57, the Lieutenant Governor in Council may make regulations as follows:
>
> ...
>
> (g) designating classes of persons as responsible persons in addition to those referred to in section 26.5;
>
> (h) designating classes of person who are not responsible persons in addition to those referred to in section 26.6;
>
> (i) respecting modifications, interpretative guidelines and procedures for any exemptions set out in section 26.6.

Clauses (g) and (h) refer to the *persons* against whom remediation orders might be made. Clause (i) refers to the *exemptions* themselves. Subsection 57(3)(k) also empowers the Lieutenant Governor in Council to make regulations

> (k) exempting any operation, activity, industry, waste or works or any class of person, operation, activity, industry, waste or works from any or all of the provisions of this Act or the regulations in circumstances and on conditions the Lieutenant Governor in Council prescribes.

By virtue of subsection 57(1) of the *Act*, the Lieutenant Governor in Council has additional regulation making powers derived from section 41 of the *Interpretation Act.* Subsection 41(1)(a) states:

41 (1) If an enactment provides that the Lieutenant Governor in Council… may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council… for the purpose of carrying out the enactment according to its intent, to

(a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it.

Using the regulation making authority delegated to it, the Lieutenant Governor in Council enacted section 29 of the *Regulation*, which provides:

29 Subject to section 30, section 26.6(1)(e) of the Act does not apply to an owner of real property at a contaminated site if

(a) the owner voluntarily leased, rented or otherwise allowed use of the real property by any person,

(b) the owner knew or had a reasonable basis for knowing that the other person described in paragraph (a) planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site, and

(c) the person described in paragraph (a) used the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

The BCR Group maintains that section 29 of the *Regulation* is not authorized by the *Act* provisions delegating regulation-making authority to the Lieutenant Governor in Council. The effect of section 29 is to prevent the exemption in subsection 26.6(1)(e) of the *Act* from applying to a certain class of persons, who would otherwise be entitled to the exemption because they meet the conditions of subsection 26.6(1)(e). It carves out a subset of persons that the Legislature has already declared exempt from responsible party status in the *Act*, and makes them responsible persons.

Subsection 58(1)(i) of the *Act*, authorizes regulations that allow modifications to the section 26.6 exemptions. However, the BCR Group maintains that section 29 of the *Regulation* does not modify the exemption. Instead, *it dispenses with the* subsection 26.6(1)(e) *exemption altogether for a particular class of persons.* Subsection 58(1)(i) does not authorize the Lieutenant Governor in Council to create a regulation that altogether dispenses with or effectively repeals an exemption established by the Legislature in statute. Whatever interpretation the word "modification" is given, it is not consistent with the principles of statutory interpretation or subordinate legislation to interpret "modification" to mean "dispense with."

The BCR Group referred to the decision of *R. v. Catagas* (1977), 81 D.L.R. (3d) 396 (Man. C.A.) involving the first prosecution of a native Indian for hunting contrary to the *Migratory Birds Conservation Act*. In that case, the accused claimed he had been hunting out of season relying upon the Government's policy not to enforce the law against Indians. Chief Justice Freedman for the Manitoba Court of Appeal recognized that what the Government had done by its "no prosecution" policy was to assert an authority to dispense with the law for an entire class of persons. In reviewing the history of the dispensing power in the context of the British Constitution, he found that the authority of the Executive to dispense with the laws had been clearly repudiated and displaced by the *Bill of Rights* in 1688. While the Executive retained the ability to exercise prosecutorial discretion regarding how charges in individual cases would be handled based upon their particular facts, it had no power to adopt broad rules

concerning to whom the laws passed by Parliament would apply, or to whom they would not. Chief Justice Freedman states on page 401:

> Today the dispensing power may be exercised in favour of Indians. Tomorrow it may be exercised in favour of Protestants, and the next day in favour of Jews. Our laws cannot be so treated. The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.

The BCR Group submits that although the present case does not concern a law dispensed with for racial or religious reasons, it involves a situation where the Legislature enacted a statute stating that certain persons shall not be held responsible for costs of remediation. However, by enacting section 29 of the *Regulation*, the Lieutenant Governor in Council has determined that, notwithstanding what the Legislature has provided, some of those people whom the Legislature has exempted shall nevertheless be held responsible. The BCR Group submits that unless the power to override a particular statutory provision has been expressly delegated to the Lieutenant Governor in Council, a provision that dispenses with the law for a particular class of persons is invalid.

The BCR Group also asserts that subsection 58(1)(g) – which allows regulations that designate classes of persons as responsible persons *in addition to* those referred to in section 26.5 – cannot be the valid basis for section 29. Subsection 58(1)(g) allows the Lieutenant Governor in Council to expand the classes of person expressly, not by modifying a class of persons to put back in a subset of persons already expressly exempted by the Legislature. Finally, the BCR Group maintains that none of the other regulation-making authorities referred to may be the valid basis for section 29 of the *Regulation*. In short, in order for the Lieutenant Governor in Council to validly override the provisions of subsection 26.6(1)(e), it must be expressly given the power to do so. No such power has been delegated to the Lieutenant Governor in Council.

Position of the Director, Nexen and the Squamish Nation

The Director and the Third Parties, Nexen and the Squamish Nation, maintain that section 29 of the *Regulation* is validly enacted.

They submit that the Legislature authorized the Lieutenant Governor in Council to pass subordinate legislation that alters the substance of the governing statute. As Mr. Justice Lysyk states in *Waddell v. Governor in Council and Foothills Pipe Lines (Yukon) Ltd et al.*, [1984] 1 W.W.R. 307 at 325 (B.C.S.C.):

> … parliament may, as a matter of law, if it clearly expresses its intention to do so, delegate authority to repeal or supersede statutory provisions by means of subordinate legislation. The legal effectiveness of such a clause was established in England and in Canada in the context of sweeping powers granted to the executive in time of war.

The Legislature can authorize the Lieutenant Governor in Council to legislate, whether by adding to, repealing or amending provisions of a statute. "Modification" means change. In this case, Nexen maintains that the Panel must determine whether section 29 has the effect of either designating classes of persons as responsible, or modifying exemptions to classes of persons responsible, and if such a designation or modification is authorized.

They further submit that section 29 of the *Regulation* is authorized by the *Act* as it is entirely consistent with the overriding intent of the statute, which is to ensure that contaminated sites are remediated by those who are responsible. The Lieutenant Governor in Council's rationale for enacting section 29 is to say that a landlord, who acquires land, should not be able to avoid responsibility under a remediation order, if the landlord knew of potential contaminating activities by its tenant. Section 29, in effect, closes a loophole by modifying the class of exempt parties in such a way as to carve out from the exemption those owners who knew or ought to have known that, by their permissiveness, the site would become contaminated. Section 29 is therefore entirely consistent with the overall spirit and intent of the *Act*. It does no more than modify the exemption available in subsection 26.6(1)(e) by adding a condition to ensure that those landowners who know or should have known that a tenant would contaminate the site cannot later claim to be innocent. The Lieutenant Governor in Council has merely added some conditions to the subsection 26.6(1)(e) exemption. This is a "modification" of the exemption not a "dispensation" with the law granting the exemption.

Panel Findings

The authority to enact laws rests with the Legislature. The Lieutenant Governor in Council has no independent law making authority. The Legislature, by express provisions in a statute may, however, authorize the Lieutenant Governor in Council to enact subordinate legislation. Any regulations enacted by the Lieutenant Governor in Council must be derived from, and be consistent with, the governing statute. In addition, the regulations are controlled by and are subordinate to the provisions of the governing statute.

In order for section 29 of the *Regulation* to be valid, it must have been enacted pursuant to one or more provisions in sections 57 and 58 of the *Act*. Subsection 41(1)(a) of the *Interpretation Act* is not an independent or broader source of regulation making authority; it is an aid for interpreting the regulation making authority granted under another statute: *Brown* v. *British Columbia (Attorney General)*, [1998] 5 W.W.R. 312 (B.C.S.C.). A provision granting regulation making authority must be construed to allow the Lieutenant Governor in Council, for the purpose of carrying out the enactment's intent, to make regulations that are necessary and advisable; are ancillary to, but are not inconsistent with, the enactment. "Ancillary" means aiding, auxiliary, subservient or subordinate: *British Columbia (Assessor of Area #10) v. SCI Canada Ltd.,* [2000] B.C.J. no. 622 (B.C.C.A.).

Subsection 26.6(1)(e) is very clear. It grants an exemption from responsible party status to an owner or operator who acquires a site before it became contaminated and while owning or operating it, "*the owner or operator did not dispose of, handle or treat a substance in a manner that in whole or in part, caused the site to become a contaminated site*." Section 29 of the *Regulation*, however, carves out a class of persons who would otherwise be entitled to the exemption and makes them responsible persons.

There are over six pages of specific provisions under sections 57 and 58 of the *Act* granting the Lieutenant Governor in Council regulation making authority. Each provision grants specific authority for a specific purpose. Subsections 58(1)(g), (h) and (i) are no exception. In order for section 29 to be valid, there must be specific regulation making authority allowing it to be enacted. As argued by the BCR Group,

subsections 58(1)(g), (h) and (i) do not expressly authorize the Lieutenant Governor in Council to dispense with an exemption granted by the governing statute.

Subsection 58(1)(i) authorizes regulations to be made "respecting modifications, interpretative guidelines and procedures for any exemptions set out in section 26.6," and seems to be the most relevant provision given its heading "*Persons not responsible – modification of lessor liability under section 26.6(1)(e) of the Act.*" (The Panel acknowledges, however, that headings are for convenience only and are not part of an enactment.) The Panel has asked itself two questions. First, how has subsection 58(1)(i) of the *Act* been used in other instances in the *Regulation*? Second, is it consistent with the concept of "modifying an exemption" for the Lieutenant Governor to dispense with the law for a class of persons the Legislature has deemed to be exempt from responsibility for remediation of a contaminated site?

Sections 28 and 31 of the *Regulation* each appear to be enacted pursuant to subsection 58(1)(i) of the *Act*. Section 28 describes the factors that should be considered when determining whether an owner or operator has made all appropriate inquiries and investigations into the previous site ownership and use under section 26.6(1)(d)(i)(C) of the *Act*. Section 31 provides two examples of what might constitute "government restructuring" for the purposes of the exemption in section 26.6(1)(g) of the *Act*. Neither section 28 nor section 31 dispenses with something the Legislature has expressly set out in the provision granting the exemption. Nor are they modifications to the class of persons deemed exempt, rather than a modification of, or interpretative aid to, the exemption itself.

With respect to the second question the Panel takes guidance from the statement of Madame Justice McLachlin Co. Ct. J., as she then was, in *Bay Travel Centre Ltd. v. Registrar of Travel Services* (1981), 126 D.L.R. (3d) 685 (B.C. Co. Ct.) at 693-4:

> **It is well established that Regulations may neither exceed nor be inconsistent with the statutory provisions under which they are made. If they do, they constitute attempts to legislate by adding to or amending the statute, and will be held to be *ultra vires*:** *Belanger v. The King* (1916), 34 D.L.R. 221, 54 S.C.R. 265, 20 C.R.C. 343. **The delegated authority must be exercised strictly and in accordance with the enabling statute; regulations may neither enlarge nor abridge the scope or substance of the delegated power**: The *King* v*. National Fish Co., Ltd.,* [1931] Ex. C.R. 75. The proper method of construction is to read the enabling statute together with the Regulations, so that any excess power assumed by the body entrusted with the duty of making the Regulations is revealed: *King* .v *National Fish Co. Ltd.,* supra. [emphasis added by Panel]

The Panel finds that there is no express provision in the *Act* that allows the Lieutenant Governor in Council to enact a regulation that dispenses with the exemption in subsection 26.6(1)(e) for an entire class of persons. The Panel finds that section 29 of the *Regulation* is not consistent with subsection 26.6(1)(e) of the *Act*. Although there may be good policy reasons for enacting section 29 of the *Regulation*, at present there is no express regulation making power to allow it to be validly enacted. The Panel finds that section 29 of the *Regulation* is an invalid attempt to legislate by adding to or amending the *Act*.

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.

Given the Panel's finding with respect to section 29 of the *Regulation* it is unnecessary to address Issue 5 – Does section 29 of the *Regulation* nullify any exemption the BCR Group or any of its member companies could assert under section 26.6(1)(e).

6. Whether there is a private agreement respecting liability for remediation that should be taken into account under section 27.1(4)(a) of the *Act*.

Position of the BCR Group

The BCR Group maintains that the Director failed to take into account three "private agreements" when he named the BCR Group to the Order, contrary to the requirements of paragraph 27.1(4)(a) of the *Act*. A manager – and, by virtue of subsection 1(4) of the *Act*, the Director – is given the discretion to issue a remediation order to any responsible person under section 27.1. Subsection 27.1(4) sets out the factors that must be considered when deciding which responsible persons to name in a remediation order, including paragraph 27.1(4)(a) which provides:

> **27.1** (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…

The "private agreements" that the BCR Group claims to be the beneficiary of include both sections 6 and 7 of the 1964 and 1969 Leases between PGE and FMC Chemicals Ltd., as well as paragraph 1 of the 1995 Assumption Agreement between COPL and BC Rail. The language of sections 6 and 7 is identical in the 1964 and 1969 Leases.

Section 6 provides:

> THAT the Lessee will do, observe and perform all of its obligations and all matters and things necessary or expedient to be done, observed or performed by it **by virtue of any law, statute, by-law, ordinance, regulation or lawful requirements of any governmental authority** or any public utility or railway company lawfully acting under statutory powers and **in any degree affecting the exercise or fulfillment in any manner of any right or obligation arising under or as a result of these presents and affecting the demised lands and the use thereof by the Lessee, and all demands and notices in pursuance of same whether made or served upon the Lessor or upon the Lessee**.
>
> In the event of the service of **any statutory notice lawfully requiring the execution of works by reason of anything done, omitted or permitted by the Lessee on the demised lands during the term hereby granted**, the following provision shall (notwithstanding anything hereinbefore contained) have effect:
>
> (a) if such notice is served upon the Lessee, the Lessee shall forthwith forward the same or a copy thereof to the Lessor and shall (unless a certificate of exemption be obtained) forthwith, at its own expense

> execute to the satisfaction of the Lessor such works as it may approve in order to comply with the requirements of the said notice;
>
> (b) **if such notice is served upon the Lessor, the Lessor shall notify the Lessee and thereupon the Lessee shall at its own expense forthwith execute to the satisfaction of the Lessor such works as are required to comply with such notice**. [emphasis added by Panel]

The BCR Group claims that section 6 imposes an obligation on the tenant, rather than the landlord, to comply with any orders issued by a governmental authority, including remediation orders, that arose due to the tenant's activities or use of the demised premises. *Black's Law Dictionary* defines "order" as a "command or direction authoritatively given."

An order (including a remediation order) is a form of "statutory notice" that falls within the phrase "statutory notice lawfully requiring execution of works." A remediation order is a statutory notice requiring remediation work to be done to address contamination. In this case, the contamination (and thus the necessity of performing the work) arose because of the tenant's activities on or use (the operation of a chlor-alkali plant) of the Plant Site. Section 6 of the Lease demonstrates the Parties' clear intention that all statutory notices, including remediation orders, arising because of the tenant's activities or use of the site would be the tenant's obligation. Accordingly, the BCR Group asserts that under section 6, the tenant is responsible for all remediation orders issued to either the tenant or the landlord as a result of the tenant's activities.

Paragraph 7(b), of the 1964 and 1969 versions of the lease, is a broad indemnity provision requiring the tenant to indemnify the landlord in the following circumstances:

> and that the Lessee shall indemnify and save harmless the Lessor from and against **any and all manner of actions or causes of action, damages, costs or expenses which the Lessor may sustain, incur or be put to by reason of or arising out** of the negligence, illegal act or omission of the Lessee, or **from the use or occupation of the demised land in whole or in part** and, without limiting the generality of the foregoing, from the non-observance or non-performance by the Lessee, its servants or agents, of any of the obligations imposed under the provisions of any laws, ordinances, regulations or requirements of any and all federal, provincial, municipal or other authorities… [emphasis added by Panel]

Paragraph 7(b) requires the tenant to indemnify the landlord for any manner of actions, causes of action, damages, costs or expenses which the landlord incurs or is put to by reason of the tenant's use and occupation of the leased premises. The purpose of paragraph 7(b) is to allocate liability so the landlord would not suffer any liability as a result of the tenant's activities.

Concepts such as "remediation" or specific liability for environmental contamination are not expressly referred to in the 1964 or 1969 versions of the Lease. The BCR Group asserts, however, that paragraph 7(b) is broad enough to include any kind of liability, claims, responsibility or action directed by a governmental authority arising within a period covered by this long term lease.

The BCR Group maintains that it is not reasonable to ask a landlord to foresee all possible types of liabilities, including those arising under future statutes and

regulations, that might emerge during a 65-year, or at the tenant's option 95-year period and specifically provide for each in the lease.

The BCR Group notes the vast regulatory changes that have taken place since 1964 and 1969. The BCR Group's expert, Mr. Chmelauskas, was one of four environmental regulators for British Columbia during this period. He testified that neither the legislation nor the regulators considered the impact of land contamination. Land was considered a "forgiving medium." Environmental law and regulatory permits during this period were directed solely at water and air pollution. It was over two decades later that BC environmental legislation first started to use the term "remediation" and introduced regulatory powers to order people to clean-up contaminated land.

The BCR Group submits that as a landlord it lacks the ability to predict future regulatory action. Therefore, the only way it can protect itself from liability arising from a tenant's activities in a long-term lease is to use very general language. The BCR Group submits that section 6 and paragraph 7(b) of the Leases, through the use of very broad language, clearly assign liability to the tenant for anything arising due to the tenant's activities on the demised premises. Although subsection 27.1(4)(a) of the *Act* refers to an agreement respecting liability for remediation, the wording of clause 7(b) is broad enough to include liability for remediation, which is a specific category of liability relating to the tenant's activities on the leased premises. The BCR Group, therefore, submits that paragraph 7(b) qualifies as a private agreement respecting liability for remediation under subsection 27.1(4)(a).

The BCR Group relies on the following cases to assert that the meaning of the paragraph 7(b) indemnity provision should be ascertained from the plain, ordinary meaning of the provision, the context of the agreement as a whole, and the objective factual matrix in place at the time the agreement was made: *Highway Properties Ltd. v. Kelly Douglas and Co Ltd.* (1971), 17 D.L.R. (3d) 710 (S.C.C.); *Black Swan Gold Mines Ltd. v. Gold Belt Resources Ltd.*, [1997] 1 W.W.R. 605 (B.C.S.C.); *ACLI Limited v. Cominco Ltd.* (1985), 61 B.C.L.R. 177 (B.C.C.A.); *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49 (S.C.C.). The indemnity was drafted using the widest possible terms. There is no reason for attributing to the parties any intention of restricting the natural meaning of the words: *Grand Trunk Pacific Coast Steamship Co. v. Victoria-Vancouver Stevedoring Co.* (1918), 17 D.L.R. (3d) 710 (S.C.C.).

The BCR Group also refers to U.S. court decisions concerning CERCLA which concluded that broadly worded indemnities – even those drafted prior to the introduction of CERCLA and having no specific reference to CERCLA liability or to environmental liability at all – could include liability arising because of the provisions of CERCLA: *Aluminum Company of America v. Beazer East Inc.* 124 F. 3d 551 (3d Cir. 1997) (hereinafter *Aluminum Company of America*); *Olin Corporation v. Consolidated Aluminum Corporation* 5 F. 3d. 10 (201 Cir. 1993); *Smithkline Beecham Corporation v. Rohm & Haas Co.* 89 F. 3d 154 (3d Cir. 1996); *United States v. Hardage* 985 F. 2d 1427 (10th Cir. 1993) (hereinafter *United States v. Hardage*); *Re Hemingway Transport Inc. v. Hebert C. Kahn* 126 B.R. 650 aff'd by *In Re Hemmingway Transport Inc.* 954 F. 2d 1 (1st Cir. 1992) (hereinafter *Re Hemingway Transport*); *Joslyn Manufacturing Co. v. Koppers Company Inc.* 40 F. 3d 750 (5th Cir. 1994) (hereinafter *Joslyn*).

In *Aluminum Company of America*, the Court considered whether the following provision in a 1954 agreement was broad enough to cover CERCLA liability, which arose following the passage of CERCLA in 1980 and the Superfund amendments in 1986:

> [Beazer], for itself, its successors and assigns, fully intending to become legally bound thereby, does hereby assume all of the liabilities and obligations of [ALT] of whatsoever nature, and does hereby agree to indemnify and hold harmless [ALT], its officers and directors, from and against any liability, loss, cost and damage in any way arising out of the said liquidation of [ALT], including, without in any way limiting the generality of the foregoing, all liability, loss, cost and damage in any way arising out of the transfer of the property and assets of [ALT] pursuant to the provisions [of this liquidation agreement]…[page 13]

The 3rd Circuit Court concluded that, under this clause, Beazer clearly assumed all of the liability and obligations of ALT. The indemnity provision was sufficiently broad to encompass the assumption of CERCLA liabilities.

The following indemnity was at issue in *Re Hemingway Transport Inc.*:

> Tenant will indemnify and save harmless Landlord against and from all liabilities, obligations, damages, penalties, claims, costs, charges and expenses, including reasonable architects' and attorneys' fees, which may be imposed upon, incurred by or asserted against Landlord by reason of any of the following occurring during the term of this Lease:
>
> (a) any work or thing done in, on or about the Demised Premises or any part thereof;...
>
> (b) any failure on the part of Tenant to perform or comply with any of the covenants, agreements, terms or conditions contained in the Lease on its part to be performed or complied with….

The Court concluded that although the lease did not contain any specific reference to environmentally based liability, the broad language of the indemnity provision clearly demonstrated the parties' intent to transfer all liability to the tenant.

Similarly, in *Joslyn* the 5th Circuit Court considered the following indemnity provisions in a 1942 lease and a 1949 lease:

> Lessee forever shall defend, indemnify as an insurer, and save harmless Carrier from, for and against any and all liability, judgments, outlays and expenses (1) consequent on any injury, death, damage, loss or destruction (a) suffered or caused by or to any person or property incident to or while being engaged or being used in the doing of whatsoever Lessee attempts hereunder, or while on Premises for any reason whatsoever; … or (2) consequent on any sole or concurring, wrongful or negligent act of Lessee or of any of Lessee's officers, agents, employees, servants or contractors… [1942 lease]
>
> The Lessee agrees to indemnify the Railway Company and save it harmless from any and all claims and expenses that may arise or that may be made for death, injury, loss or damage, resulting to the Railway Company's employees or property… arising from or happening in connection with or during the occupancy or use of said premises by the Lessee… and resulting from fire or any other cause. [1949 lease]

The Court held in *Joslyn* that these indemnity provisions were intended to cover all forms of liability, including CERCLA or other environmental liability, even though such

liability was not contemplated at the time the parties entered into the leases. It states at page 4:

> The Seventh Circuit recently recognized that a party may contract to indemnify another for environmental liability even though CERCLA was not in existence at the time of contracting… The broad language of the indemnification agreements at issue herein evince a strong intent by the lessee to indemnify L & A for all liability arising in connection with the occupancy or use of the land. We hold that the indemnification agreements were intended to cover all forms of liability, including liability under CERCLA and LEQA, even though environmental liability under these statutes was not specifically contemplated at the time of contracting.

The BCR Group argues that the indemnity provision in paragraph 7(b) is similar to the indemnity in *Hemmingway* and even broader than the indemnity in *Joslyn*. It also refers to *United States v. Hardage*, where the 10th Circuit Court held that an indemnification agreement does not need to refer specifically to all circumstances to which the indemnity applies. Rather, broad, all-inclusive language in a provision sweeps all events into its coverage.

The BCR Group refers to two Canadian authorities that imply a term into a lease obliging the tenant to return the land in an uncontaminated state, unless a lease expressly provides otherwise. Tenants were held to be responsible for any contamination that they caused, although the lease may have been entered into before environmental concerns were given much attention, in: *Darmac Credit Corp. v. Great Western Containers Inc.* (1994), 163 A.R. 10 (Q.B.); *Progressive Enterprises Ltd. v. Cascade Lead Products Ltd.*, [1996] B.C.J. No. 2473 (B.C.S.C.). The BCR Group submits that if the Courts are willing to imply an obligation on the part of a tenant to remediate in absence of an express covenant to do so, surely the Panel should have no difficulty in concluding that the indemnity in paragraph 7(b) of the 1964 and 1969 Leases cover liability for remediation.

1995 Assumption Agreement

The BCR Group maintains that paragraph 1 of the 1995 Assumption Agreement is a separate and distinct private agreement between Nexen and members of the BCR Group clearly allocating liability for remediation. Paragraph 1 states:

> COPL shall perform all of the obligations of COCL [CanadianOxy Chemicals Ltd.] and the Partnership [CanadianOxy Industrial Chemicals Limited Partnership] pursuant to the Leases, and hereby assumes all of the liabilities and obligations of COCL and of the Partnership pursuant to the Leases as if COPL was the original tenant under the Leases. For greater certainty, COPL covenants and agrees with BCR Properties and BC Rail to perform any and all obligations of COCL and the Partnership which arise under the Leases or pursuant to any applicable environmental laws and related to the remediation or environmental condition of the lands leased pursuant to the Leases, all as if COPL was the original tenant under the Leases.

The Plant was shut down in 1991. In 1995, when the 1995 Assumption Agreement was entered into, the parties were aware that the Site was contaminated.

The BCR Group maintains that the 1995 Assumption Agreement confirms that the landlord and tenant understood that the tenant would be responsible for remediating the site, whether that obligation arose under the leases or separately under

environmental law. While the 1995 Assumption Agreement confirms the interpretation advanced by the BCR Group regarding the tenant's obligations in section 6 and paragraph 7(b) of the Leases, the 1995 Assumption Agreement is also a separate stand-alone agreement respecting liability for remediation.

Finally, the BCR Group asserts that the tenant's obligations in section 6 and paragraph 7(b) of the Leases are not limited to the Plant Site, but apply to any loss or damage suffered by the landlord as a result of the tenant's use of the site. If the tenant's use of the site causes damage beyond the demised premises, the tenant is responsible for those problems as well.

(b) Position of Director, Nexen and Squamish Nation

The Director and the Third Parties, Nexen and Squamish Nation, maintain that neither the 1964 Lease, the 1969 Lease, nor the 1995 Assumption Agreement are "private agreements respecting liability for remediation between or among responsible persons" of the type contemplated in paragraph 27.1(4)(a) of the *Act*. Nexen's arguments were the most comprehensive.

1964 Lease

As noted above under Issue 3, Nexen claims the 1964 Lease was *void ab initio* since it violated section 83 of the *Land Registry Act.* Section 83 of the *Land Registry Act* (now section 73 of the *Land Title Act*) provides:

> No person shall subdivide land for the purpose of conveying the same, or leasing the same for life or for a longer term than three years, in smaller parcels than that of which he is the registered owner, except upon compliance with the provisions contained in this Part.

The 1964 Lease covered portions of five legal parcels. As such, it subdivided land into smaller parcels than those owned by PGE. The 1964 Lease also had a term of 65 years, which is greater than the 3-year period allowed by section 83. The 1964 Lease was invalid and unenforceable from the beginning. Nexen refers to *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C.C.A) (hereinafter *Top Line*), which held that a lease of land for a term exceeding 3-years is void from the outset under section 73 of the *Land Title Act,* if the area demised has been subdivided into smaller parcels than those of which the person is the owner. Rights under a lease made in breach of section 73 are unenforceable and do not create personal rights. Consequently, when a lease is void from the outset, neither party has rights or remedies. The landlord cannot even claim damage for use and occupation.

The *Top Line* case was applied in *BC Rail v. Domtar Inc.* (1999), 71 B.C.L.R. (3d) 242 (B.C.S.C.) and *Master Contract Services Ltd. v. Altamar Developments Corp*., [2000] B.C.J. No. 781 (B.C.S.C.). In the *BC Rail* case, a lease not meeting the conditions of section 73 of the *Land Title Act* was found to be invalid and the landlord was able to evict the tenant.

Nexen maintains that statements by the Court of Appeal in *Top Line* – that an otherwise invalid lease may become valid if the lease contains a condition precedent (such as registration) that, once met, make the lease valid and the lease terms are not invalid but are merely in suspense until the condition is met – do not apply to section 20 of the 1964 Lease. (The BCR Group had argued that section 20 was a condition precedent that serves to save the 1964 Lease once the subdivision was completed.) Section 20 of the 1964 Lease provides in part:

> … this Indenture of Lease shall be executed and delivered by the Lessor in such form and together with such plan or plans as shall enable the Lessee to register it in the Land Registry Office…. The LESSEE AGREES that it shall not register nor apply to register said Indenture of Lease… until… a plan in form and content acceptable for filing in said Land Registry Office has been prepared by a British Columbia Land Surveyor… The failure of the Lessor to perform this covenant shall, unless the Lessee otherwise agrees, constitute a material breach of this lease by the Lessor.

Nexen asserts that the 1964 Lease was never delivered in registerable form. It was the 1969 Lease, rather than the 1964 Lease, that was ultimately registered in 1971. Nexen also maintains that the 1969 Lease is an entirely separate agreement from the 1964 Lease, rather than, as the BCR Group argues, a renewal, continuation or minor modification of the 1964 Lease. The demised area was different in 1964 than it was in 1969. Twelve acres were removed from the demised area in 1964, and 11 other acres were added to the demised area in 1969.

Since the 1964 Lease was unenforceable, Nexen maintains that no indemnity was in place for contamination that occurred prior to November 1, 1969. Without an indemnity for the period when most of the contamination occurred, there is no basis for the BCR Group argument that they should be excused from the Order because of a private agreement.

1969 Lease

In addition, Nexen submits that the 1969 Lease does not give the landlord a right that excuses it from liability for remediation, as it does not have any clauses that clearly address the issue of remediation. Therefore, the 1969 Lease should not be taken into account for the purpose of paragraph 27.1(4)(a). Nexen relies on the following statement at page 18 of the Board's decision in *COPL v. Director of Waste Management*:

> Clearly, the Legislature intended for managers to consider a narrower range of agreements under section 27.1(4)(a) than those agreements that may be considered by the courts in a cost recovery action. Thus, in order for an agreement to be taken into account by a manager under section 27.1(4)(a), it must be respecting liability for 'remediation' between or among 'responsible persons', as defined under the *Act*.
>
> … while a manager must 'take into account' the types of private agreements described in section 27.1(4)(a) when considering whom to name in a remediation order, there may be situations where it is not feasible for a manager to determine the meaning of an agreement, such as where the agreement is not clear on its face or the parties to the agreement dispute its meaning. The Panel emphasizes that the objective in issuing a remediation order is to have a 'relatively quick summary process to ensure a speedy cleanup', as was stated by the Board in *Beazer*. As such, there may be situations where it is not feasible for a manager to determine the meaning of a private agreement while still ensuring a speedy cleanup… Where it is not feasible for a manager to determine the meaning of a private agreement, the agreement may still be considered by a court for the purposes of a cost recovery action. This ensures that private parties may still seek to rely on agreements that do not fall within the scope of section 27.1(4)(a).

Nexen submits that, in order to fall within section 27.1(4)(a), an indemnity must clearly be in respect of liability for remediation. During the factual matrix when the 1969 Lease was entered into, the pollution control legislation in B.C. gave no consideration to "remediation" or to have to remove or remediate existing pollution. The environmental legislation at the time, the *Pollution Control Act,* merely regulated the discharge of pollutants into the environment through the permit process.

Paragraph 7(b)

Nexen argues, therefore, that the indemnity language in paragraph 7(b) of the Leases cannot be an agreement respecting liability for remediation. In addition, what the lessor is to be indemnified for is "actions or causes of action, damages, costs of expenses." This indemnity is limited to damages, costs or expenses arising in the context of third party claims against the lessor, typically brought by way of civil action. This clause was not intended to provide an indemnity against money spent pursuant to a remediation order issued by a governmental body. Paragraph 7(b) should have said "any and all liability." It did not. Consequently, the coverage of the indemnity should be narrowly construed. None of the terms "action," "causes of action," "damages" or "costs" is broad enough to include costs the landlord might incur due to a governmental remediation order. "Expenses" should be interpreted to mean no more than out-of-pocket expenditures in relation to a court proceeding or action, rather than any expenses incurred by the lessor in relation to the property.

Nexen asserts that it is an open question whether paragraph 7(b) would provide the BCR Group with a basis for a cost recovery action. It maintains that the CERCLA cases cited by the BCR Group were decided in the context of contribution proceedings under CERCLA, which are different than a proceeding that considers whether to issue a remediation order in the first place. Furthermore, even if a manager does not take a private agreement into account in the context of issuing a remediation order, the agreement may still be considered by a court for the purposes of a cost recovery action. The agreements considered at the remediation stage should be narrower than those considered in a cost recovery proceeding, as construction of commercial agreements is better left to the courts.

In addition, the indemnity in paragraph 7(b) is narrower than the indemnities considered in the CERCLA cases.

Finally, Nexen submits that the BCR Group was named in the Order because its members are owners or former owners of the Plant Site. Each member's responsibility turns on this *status* alone. They are not being named because of negligence, illegal act or omission of the lessee, or from the use or occupation of the demised premises by the lessee. Rather, the BCR Group is culpable in its own right because it selected a chemical company for its land in Squamish, and then turned a "blind eye" to the contamination as it occurred.

Section 6

Nexen also argues that section 6 of the Leases is not a private agreement respecting liability for remediation. Considering the factual matrix when this provision was drafted, there was no concept of remediation in 1969. Furthermore, under the second part of section 6, the lessee's responsibility only took effect "in the event of the service of any statutory notice lawfully requiring the execution of works by reason of anything done, omitted or permitted by the Lessee on the demised lands during the term…." The term "works" should be narrowly construed to mean "physical things, not services." In contrast, what is meant by "remediation" in the *Act* is much more than just physical

works. It includes, among other things, the preparation of preliminary and detailed site investigations, sampling, surveys, data evaluation, risk assessment, environmental impact assessment, evaluation of alternative methods of remediation, and preparation of remediation plans. It is wrong to interpret "execution of works" to include all of these matters.

Finally, Nexen submits that the BCR Group's liability to carry out remediation is a form of statutory liability that arises because it is an owner, and this liability is separate from the liability arising because of its tenant's activities.

1995 Assumption Agreement

Nexen also maintains that the 1995 Assumption Agreement is not an agreement making Nexen completely responsible for remediation. Rather, it was merely assuming the liabilities of two of its related entities under the 1969 Lease. Therefore, the 1995 Assumption Agreement does not qualify as a "private agreement respecting liability for remediation" under paragraph 27.1(4)(a).

Panel Findings

1964 Lease

The Panel finds, based on the decision in *Top Line*, that the 1964 Lease is void *ab initio* due to section 83 of the *Land Registry Act* (now section 73 of the *Land Title Act*). The term of the 1964 Lease exceeded 3-years and the area demised involved portions of five legal parcels, contrary to section 83. Consequently, neither party has any rights or remedies under the 1964 Lease.

There is a suggestion in *Top Line* that an otherwise invalid lease can become valid once a condition precedent in the lease is met. Although section 20 of the 1964 Lease might be considered a condition precedent, the Lease that was executed in 1969 had slightly different terms than the 1964 Lease, and the demised area covered by the 1969 Lease was somewhat different than the demised area in the 1964 Lease. It was the 1969 Lease that was registered in 1971 against the property making up the new, rather than the original, demised area. Because of the difference in the demised area, the Panel is unable to conclude that the 1969 Lease was merely executing a form of lease that would meet conditions precedent in section 20 and, thus "breathe life" into the 1964 Lease. Consequently, the Panel finds that there was no lease in place prior to November 1, 1969. Section 6 and paragraph 7(b) of the 1964 Lease cannot then be considered an agreement concerning liability for remediation.

1969 Lease

(i) Section 6

The Panel agrees with the BCR Group that section 6 of the 1969 Lease imposes an obligation on the tenant to comply with any statutory notices issued by a governmental authority that arose due to the tenant's activities on or use of the demised premises. A remediation order is a form of "statutory notice lawfully requiring execution of works." The necessity of performing the work required by the Order arose solely because of the tenant's activities on or use of (i.e. operation of a chlor-alkali plant) the Plant Site, which caused portions of the demised premises and surrounding lands and water bodies to become contaminated with mercury.

The Panel does not agree with Nexen's argument that the term "works" should be narrowly construed to mean "physical things, not services," therefore excluding the preparation of preliminary and detailed site investigations, sampling, surveys, data

evaluation, risk assessment, environmental impact assessment, evaluation of alternative methods of remediation, and the preparation of remediation plans.

The remediation work being ordered necessarily includes not just removing or confining the contamination, but also the prerequisite studies to understand the contamination's magnitude and extent, and then choose appropriate methods to address it. Testing and analysis of contaminants, considering and selecting appropriate remediation options, preparing a remediation plan, implementing an approved remediation plan and then monitoring the Site to ensure the remediation is working are all successive stages of the work that must be executed to adequately address mercury contamination caused by the tenant's Plant.

(ii) Paragraph 7(b)

The Panel finds that paragraph 7(b) of the 1969 Lease is a broad indemnity that requires the tenant to indemnify the landlord for any manner of actions, causes of action, damages, costs or expenses which the landlord incurs or is put to by reason of the tenant's use and occupation of the leased premises. The purpose of paragraph 7(b) is to allocate liability so the landlord does not suffer any liability as a result of the tenant's activities on the demised premises.

It is overly narrow to consider only those indemnities that specifically use the term "remediation" or have specific reference to liability for environmental contamination as "private agreements respecting liability for remediation between or among responsible persons" for the purpose of subsection 27.1(4)(a). Environmental liability and liability for remediating land are relatively recent concepts. Broadly worded indemnities should not be discounted, just because they do not mention the phrase "liability for remediation."

The indemnity in paragraph 7(b) of the 1969 Lease was drafted using the widest possible terms and is an example of a private agreement that, standing alone, as well as when read in concert with section 6 of the lease, clearly shows the parties' intent to allocate liability between the landlord and tenant, so that the landlord is to be indemnified and held harmless for things arising from the tenant's use or occupation of the demised land. There is no reason to attribute to the parties any intention of restricting the natural meaning of the words in a broad indemnity provision to exclude liability under the *Act*, or other forms of environmental liability, just because those forms of liability were not specifically mentioned nor were they contemplated in November 1969. But for the tenants' use or occupation of the demised premises to operate a chlor-alkali plant, the land would not be contaminated with mercury and there would be no need for a remediation order. Applying the plain meaning of the words "damage, costs and expenses," it is clear that the landlord is incurring damage, costs and expenses as a result of having been drawn into this Order because of its tenants use and operation of the demised premises. Therefore, the Panel finds that paragraph 7(b) and section 6 of the 1969 Lease, constitute a form of private agreement that must be considered under subsection 27.1(4)(a).

However, in this particular case there was no private agreement in place prior to November 1, 1969, because the 1964 Lease is void *ab initio*. Much of the mercury contamination may have occurred prior to November 1969. Consequently, the fact that there is a private agreement in place between the parties after November 1, 1969, cannot ultimately determine whether the BCR Group should be named to the Order.

1995 Assumption Agreement

Under paragraph 1 of the 1995 Assumption Agreement, COPL assumes the liabilities and obligations of two related entities under the Leases, including obligations which arise "pursuant to any applicable environmental laws and related to the remediation or environmental condition of the lands leased pursuant to the Leases" as if COPL was the original tenant under the Leases. Although this provision makes specific reference to the tenant's obligation related to remediation of the demised lands, again the obligation goes back to the Leases. Because the 1964 Lease is invalid, there is still a period of time where liability and obligations were not assigned between landlord and tenant. Consequently, the language of the 1995 Assumption Agreement is not determinative of whether the BCR Group should be named to the Order.

Conclusion

In summary, the Panel finds that the 1964 Lease is void *ab initio*. Therefore, there was no lease in place concerning the Plant Site before November 1, 1969. Given that most of the contamination of the Site occurred before November 1969, the terms of the 1969 Lease and the 1995 Assumption Agreement are not determinative of whether any of the companies in the BCR Group are not liable for the remediation of the Site.

Accordingly, the Panel has considered whether it should exercise its discretion to amend the Order.

7. Whether the Board should exercise its discretion to remove the BCR Group or any of its member companies from the Order, and to refuse to name BCR Partnership in the Order as a responsible person.

The Panel finds that three of the four members of the BCR Group should remain on the Order. The companies that comprise the BCR Group are separate legal entities and their responsibility under Part 4 of the *Act* must be assessed independently. As the current legal owners of the parcels making up the Plant Site, BC Rail and BCR Properties are responsible persons under subsection 26.5(1)(a) of the *Act*. In addition, BCR Partnership is a beneficial owner of the Plant Site by virtue of the fact that Block B is held by BC Rail in trust, for the benefit of BCR Partnership. In establishing broad classes of responsible persons under section 26.5 of the *Act* and a narrow range of exemptions to responsible person status in section 26.6, the Legislature has expressed the clear intent that landowners are responsible for remediation when their properties become contaminated, even if some other person may have caused the contamination. The policy rationale for this may be that, when landowners receive financial benefits from property that they know is being contaminated, or that they were aware was contaminated when they bought it, then they should be prepared to pay for the costs associated with remediating the property.

BC Rail, BCR Properties, and BCR Partnership became legal or beneficial owners of the Plant Site after the majority of the mercury contamination had occurred. The serious environmental problems associated with mercury contamination from this Plant became common knowledge following the Howe Sound fisheries closure in 1971. A landlord, who leases property to an industrial tenant, should not be allowed to "turn a blind eye" to activities of its tenant that cause the leased property and surrounding environment to become contaminated. The landlord should do more that rely on the regulators or its tenant to deal with environmental problems. The benefits derived from leasing property should go hand in hand with some degree of responsibility for the property and activities occurring on it with the landlord's knowledge or consent. BC Rail and BCR Properties have derived a financial benefit in terms of rent received from leasing the

Plant Site to its tenants. It matters not that the revenue was below the landlord's initial expectations or the market rate. Landlords continue to have responsibility for property leased to others. Accordingly, the Panel can find no reason to remove BC Rail and BCR Properties from the Order. The Panel also finds that BCR Partnership should be named on the Order.

Finally, the Panel finds that it is appropriate that BCRC not be named in the Order. BCRC is removed from the Order as it is entitled to the exemption under section 26.6(1)(e) of the *Act*.

DECISION

In making this decision, the Panel has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the reasons set out above, BC Rail Ltd. and BCR Properties Ltd. should remain on the Order. In addition, if it is not already on the Order, BC Rail Partnership should be added to the Order. Finally, British Columbia Railway Company is removed from the Order.

Accordingly, the appeal is dismissed, in part.

Alan Andison, Chair
Environmental Appeal Board

Dr. Robert Cameron, Member
Environmental Appeal Board

March 3, 2004

MINORITY DECISION OF PANEL MEMBER MARGARET ERIKSSON

I have reviewed the majority decision and agree with those reasons with the exception of its findings under Issue 7. Accordingly, I make the following finding respecting that issue.

7. Whether the Board should exercise its discretion to remove the BCR Group or any of its member companies from the Order, and to refuse to name BCR Partnership in the Order as a responsible person.

Subsection 27.1(1) gives a manager discretion to issue a remediation order to any responsible person. That discretion is to be exercised, however, in the context of the relevant considerations set out in subsection 27.1(4). Subsection 27.1(4) provides

> (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.

The Legislature created a hierarchy of considerations in this provision. The overriding consideration is that the remediation requirements be fulfilled. A secondary consideration is that those persons who agreed to accept liability for a contaminated site or who substantially contributed to the site contamination be the ones placed on an order.

The language of subsection 27.1(4) indicates that the Legislature did not want persons to be named to a remediation order simply due to their “status” as responsible persons under section 26.5. Instead, the contractual context and assignment of responsibility between responsible persons (paragraph (a)) and ordinary notions of legal responsibility for environmental damage (paragraph (b)) are underlying relevant considerations to be taken into account when exercising a discretionary decision regarding who should be named in a remediation order.

The paramount consideration is that the remediation requirements can be carried out. Hence, the first question the Panel must ask itself when exercising discretion under subsections 27.1(1) and (4) is, would the removal of the BCR Group from the Order jeopardize remediation requirements?

On the evidence submitted to this Panel, I find that removing the BCR Group from the Order would have no effect on the remediation requirements and whether or not they are carried out. The two parties (Nexen and Mid-Atlantic/FMC Group), which operated

the Plant that is the source of the contamination, are both named in the Order. They are sophisticated corporate entities with sufficient knowledge of the contaminants. They also have sufficient assets to retain any necessary expertise to assist them in carrying out the remediation requirements. Nexen has been studying and conducting remediation of the Site since the early 1990s. It was named to the Order in 1999. Nexen continues to be the primary party conducting the remediation and responding to the requirements of the Order and the Ministry.

There was some suggestion by the Director that the BCR Group had been added to the Order because Nexen had, at one point, been "dragging its feet." Yet the evidence before the Panel confirmed that Nexen was complying with the remediation requirements and had spent several million dollars to date on the remediation. In any event, when a party named to a remediation order is not complying with the order's requirements, there is an appropriate remedy in the *Act*. Subsection 54(20)(c) of the *Act* provides that a person who fails to comply with a remediation order issued under section 27.1 may be charged with an offence and is liable to a penalty not exceeding $200,000.00. Additional fines for any monetary benefit gained by committing the offence are also available under section 55. If the Director had a problem with compliance, he should have recommended a charge be laid under subsection 54(20)(c), rather than naming additional parties to the Order.

I move on to the two additional factors in subsection 27.1(4) that must be examined when exercising the discretion to name responsible parties to a remediation order. First, was there a contractual relationship and contractual assignment of responsibility or liability between the responsible persons? Second, whose activities, directly or indirectly, contributed most substantially to the site becoming a "contaminated site" including

> (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?

The existence of contractual agreements assigning responsibility for remediation has already been discussed under Issue 6 above. Although there is a private agreement in force after November 1, 1969, the unenforceability of the 1964 Lease means that the BCR Group is not definitively released from all responsibility. Thus, the Panel must examine the degree to which the BCR Group and the other parties named to the Order were directly or indirectly involved in the generation, transportation, treatment, storage or disposal of mercury at the Site.

On the evidence before the Panel, the Plant was the sole source of mercury contamination at the Site. The former tenant (FMC Chemicals and its corporate successors) built and operated the Plant until December 22, 1986. At that point, COPL (now known as Nexen) took over the Plant Site and operated the Plant until 1991. The current and former tenants purchased the mercury and had it shipped to the Plant Site for use in the Plant's production process. Mercury was released as part of the waste stream and also lost through Plant operations. The current and former tenants were the only ones involved in treatment, storage or disposal of mercury at the Site. These two parties directly caused and were the substantial contributors of the mercury contamination at the Site.

None of the members of the BCR Group were directly or indirectly involved in the generation, treatment or storage of mercury contaminants at the Site. Regarding

transportation or waste disposal, the Director and the Third Party Nexen suggested that the railway may have been used to ship mercury to the Plant Site or to ship waste products containing mercury from the Plant Site. However, there was simply no evidence before the Panel to support these allegations. In short, I find no evidence that any members of the BCR Group were directly or indirectly involved in the generation, transportation, treatment, storage or disposal of mercury at the Site.

When a person is given statutory authority to make a discretionary decision, he or she must exercise that discretion in good faith, keeping in mind the intent and purpose of the statute. The seminal principle of the contaminated sites provisions in Part 4 of the *Act* is the "polluter pay" principle – that is, that polluters should be responsible and pay for their activities that left behind contamination. This Legislative intent is evident in the language of subsection 27.1(4)(b). Subsection 27.1(4)(b) instructs that, so long as the remediation requirements are not jeopardized, the decision maker (originally the manager or director and now the Panel) must exercise its discretion in naming responsible persons to an order in light of their contribution to the contamination of the site. Although BC Rail, BCR Properties and BCR Partnership qualify as "responsible persons" under the broad definition of that term in subsection 26.5 of the *Act*, based on the evidence presented to the Panel, I find that the degree to which they or any of the members of the BCR Group directly or indirectly contributed to mercury contamination at the Site is at best minimal, if not negligible. In addition, I find that remediation requirements would not be jeopardized if the members of the BCR Group are removed from the Order. As such, the primary objective of ensuring a complete and expeditious clean up of the Site is not frustrated if the members of the BCR Group are removed from the Order.

The current and former tenants, who are the polluters as they were the two operators of the Plant that caused the mercury contamination, are already on the Order. To also name to the Order members of the BCR Group, who are not the polluters, merely to ensure that a third "deep pocket" is funding the remediation, is in fact a departure from the "polluter pay" principle and the legislative intent behind Part 4 of the *Act*. Naming a non-polluter to the Order shifts at least part of the responsibility and financial burden onto a non-polluter and, thus, lessens the responsibility of the polluters.

This is not to say that landlords, who did not contribute to contamination at a site, should never be named to remediation orders issued under section 27.1. Where parties who most substantially contributed to the site becoming contaminated no longer exist, or do not have sufficient resources or sophistication to ensure that remediation requirements are met, it may be appropriate and necessary to name a landlord to an order issued under section 27.1 to ensure that remediation can be carried out.

In this particular case, however, I find that BC Rail and BCR Properties should be removed from the Order. I also find that BCR Partnership should not be on the Order. The Panel has already found that BCRC is not a "responsible party" and, consequently, it is ineligible to be named to any Order issued under section 27.1.

Margaret Eriksson, Member
Environmental Appeal Board

March 3, 2004