Province of British Columbia

Environmental Appeal Board

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APPEAL NO. 98-WAS-O1(b)

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

BETWEEN:	Beazer East, Inc. Atlantic Industries Ltd.	**APPELLANTS**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
AND:	Canadian National Railway Company	**THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board

Toby Vigod	Chair
Dr. Robert Cameron	Member
Marilyn Kansky	Member

DATE: August 10-14, 17-21, November 30-December 4, December 14-17, 1998, March 29-April 1, and June 7-9, 1999

PLACE: Vancouver, B.C.

APPEARING:

For the Appellants:	
Beazer East, Inc.	Leonard T. Doust, Q.C., Counsel Nicholas R. Hughes, Counsel
Atlantic Industries Ltd.	David H. Searle, Q.C., Counsel James M. Sullivan, Counsel Michelle B. Pockey, Counsel
For the Respondent:	Joyce Thayer, Counsel Waldemar Braul, Counsel
For the Third Party:	John R. Singleton, Q.C., Counsel Richard E. Bereti, Counsel

APPEALS

These are appeals brought by Beazer East, Inc. (“Beazer”) and Atlantic Industries Ltd. (“Atlantic”) of a December 19, 1997 decision by Douglas T. Pope, Assistant Regional Waste Manager (the “Assistant Manager”) to issue a Remediation Order OS-15343 (the “Order”) in relation to the property at 8335 Meadow Avenue, Burnaby, British Columbia (the “Site”).

The Board has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 44 of the *Waste Management Act* (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 Assistant Manager, send the matter back to him with directions, or make any decision that the Assistant Manager could have made, and that the Board considers appropriate in the circumstances.

Beazer and Atlantic are each seeking an order rescinding the Order against them. In the alternative, Atlantic seeks a stay of the Order.

The two appeals were heard together.

BACKGROUND

It is important to set out the history of the Site and the corporate entities that have been involved. At the outset, it should be noted that there is no dispute that the Site is contaminated as a result of a wood treatment operation that took place at the Site from 1931 to 1982. The Assistant Manager also made a determination in the Order that the Site is contaminated.

During the entire time that wood preserving operations were carried out, Canadian National Railway Company ("CNR") was the legal owner of the Site. In 1930, CNR leased the Site to Timber Preservers Ltd. ("Timber Preservers"), a company which would ultimately amalgamate with Atlantic. CNR owned the Site until May of 1984.

In 1931, Timber Preservers commenced wood preserving operations at the Site using a single creosote retort (cylinder). That retort remained in operation until 1982. In 1950, concrete sumps were installed at the retort. An original tank farm without a concrete pad was in operation from 1931 to approximately 1967, and a new one was in operation from approximately 1967 to 1982. Three dip tanks were in operation from 1931 to 1959, 1947 to 1966 and 1952 to 1966, respectively.

In 1948, Swanson Lumber Co. Ltd. ("Swanson") acquired a controlling interest in the shares of Timber Preservers. In 1954, Koppers Company Inc. ("Koppers"), now Beazer, licensed Timber Preservers to use a Koppers wood treatment process at the Site employing "Wolman Salts" containing copper chromium arsenate ("CCA").

In 1957, Timber Preservers entered into a second business at the Site, the glue laminated business, which it closed in 1979. In 1966, Timber Preservers added pentachlorophenol ("PCP") treatment to the wood treatment process.

In 1967, Timber Preservers changed its corporate name to TPL Industries Ltd. ("TPL").

On February 16, 1969, Koppers acquired the shares of Swanson and TPL became a subsidiary of Koppers. Mallory Smith became President of TPL on September 15, 1969, and remained in that position until 1982. During that period, he mainly reported to Burnett Bartley. Mr. Bartley was the head of Koppers' Forest Products Division from 1969 to 1972; Group Vice-President of the Metal Products and Forest

Products Division from 1972 to 1978; and a Deputy Chairman of Koppers from 1978 until at least 1983. Mr. Bartley retired from Koppers in 1988.

Mr. Bartley was also the Chairman of TPL from 1969 to 1973, and a member of the Board of Directors of TPL and its successors during most of the period from 1969 to June 16, 1988.

On December 19, 1973, TPL changed its name to Koppers International (Canada) Ltd. ("KICL"). In 1974, KICL became an operating division of Koppers.

In April 1979, George Gough, Head, Environmental Section, Waste Management Branch, Ministry of Environment, went to the Site to conduct soil and water sampling after the Fraser River Task Force initiated an investigation at the Site. He observed the soils at the Site to be very heavily stained with a black oil-like material leaking out of the retort. He also observed water with an oily sheen discharging from a wood stave culvert into the Fraser River.

On April 2, 1980, the Ministry wrote to KICL indicating that the unauthorized discharge of oily wastes to the Fraser River must be stopped. It issued an order to KICL, pursuant to the *Pollution Control Act*, requiring KICL to clean up the oily contaminants, both on the surface of the water and on the bottom sediments along the river-bank.

On June 12, 1980, KICL was charged under the (Canada) *Fisheries Act* and the British Columbia *Pollution Control Act* in connection with a discharge of oily wastes into the Fraser River from a wood stave culvert. The charge under the *Fisheries Act* was withdrawn, and KICL plead guilty to one charge under the *Pollution Control Act*. On April 13, 1981, KICL was fined $7,500.

On June 18, 1980, Mr. Hamilton, Regional Manager, Ministry of Environment, issued an order pursuant to the *Pollution Control Act*, requiring KICL to undertake a detailed assessment of the Site and to submit reports: (1) on soil conditions and other relevant information that will identify the potential for transport of deleterious materials to the Fraser River and means of controlling this transport, and (2) outlining methods to clean up and dispose of the residual contaminants adhering to the dock and sediments in the Fraser River. He also ordered KICL to clean up the residual contaminants in a manner approved by the Regional Manager.

From April 1980 until May 1982, KICL retained Golder and Associates Ltd. ("Golder"), EVS Consultants Ltd. ("EVS") and Stanley Associates Engineering Ltd. ("Stanley"), which analyzed the contamination at the Site and in the Fraser River. During this period, these consultants prepared and submitted numerous reports and remediation proposals to the Ministry.

On August 17, 1981, Koppers transferred its shares in KICL from Swanson to a numbered company owned by Koppers. On August 18, 1981, Koppers transferred its shares in Swanson to Canadian Forest Products Ltd. ("Canfor").

In November 1981, there was a spill of PCP into the Fraser River and further charges were laid against KICL pursuant to the (Canada) *Fisheries Act*. KICL plead

guilty to one charge and the Crown dropped the other charge. KICL was fined $6,000 on October 21, 1982.

On January 12, 1982, a pollution abatement order was issued to KICL by D.W. Miller, Ministry of the Environment, pursuant to the *Pollution Control Act*. This order set out requirements for the submission of plans for dredging the foreshore and for shore reclamation.

In March 1982, KICL sold the wood treatment assets at the Site to Domtar Ltd. for $1.8 million (plus the cost of inventory and accounts receivable). Domtar carried out wood treatment operations at the Site for several months before the operations were permanently closed in September/October 1982.

After KICL had agreed to sell its wood treatment assets to Domtar, the President of KICL, Mallory Smith, became unhappy with KICL's consultants' inability to finalize an appropriate remediation program for the Site. As a result, he went to Pittsburgh, Pennsylvania, seeking Koppers' help. Following a meeting held on April 5, 1982, in Pittsburgh, it was agreed that Al Quagliotti and Dr. Andrew Middleton, of Koppers Environmental Resources Department, would carry out additional investigations and help develop a remediation strategy acceptable to the Ministry of Environment and Environment Canada.

Effective May 1, 1982, Robert Cruise became President and Chief Operating Officer of KICL. Burnett Bartley became Chairman and Chief Executive Officer of KICL as of the same date. Mallory Smith's active employment in KICL ended in August 1982. Mr. Bartley resigned from the Board of KICL on June 16, 1988.

In October 1982, Mr. Quagliotti and Stanley presented reports, the latter outlining a number of possible remediation options for the Site. After reviewing these reports, the Ministry of Environment and Environment Canada requested KICL to carry out additional investigations of the PCP and CCA areas, including the drilling of additional boreholes and the taking of continuous soil samples.

The remediation which was ultimately carried out included:

1. excavating and transporting PCP and CCA contaminated soils, along with material that had been previously dredged from the river, to Arlington, Oregon;

2. excavating the soils most highly contaminated with creosote and placing this material in concrete sumps on the Site;

3. draining the pond [located on the north side of the Site], excavating the oily pond sediments and transporting the most contaminated sediments off the Site;

4. capping the concrete sumps with clay; and

5. capping the plant site with asphalt and a large warehouse.

Most of the work was completed by the spring of 1983.

On March 22, 1983, KICL terminated its lease of the Site, thereby returning possession of the Site to CNR.

On April 28, 1983, Mr. Gough wrote to R. A. MacDonald, CNR, acknowledging that once KICL has removed the most contaminated soils from the Site, and once the Site is paved, precipitation induced groundwater contamination should be greatly reduced. He noted that he would expect that deeper inaccessible contaminants in the CCA and creosote areas would continue to contaminate the groundwater, albeit to a diminishing degree, in the future.

On May 17, 1983, Mr. Gough wrote to KICL advising that once the stored contaminated soils are transported off site, KICL will have fulfilled the terms of the cleanup agreement [January 12, 1982 pollution abatement order] subject to well monitoring which was to continue.

On June 20, 1983, Mr. Gough wrote to KICL advising that the stored contaminated soils had been removed from the Site and that it was cleaned to the Ministry's satisfaction.

In May 1984, CNR sold the Site to B.U.K. Investments Ltd. ("BUK") for $1,006,250. BUK constructed a warehouse on the Site. On November 1, 1984, BUK leased the Site to Schenker of Canada Limited. On January 25, 1985, BUK sold the Site to Lehndorff Investors Services Limited ("Lehndorff"). On June 3, 1985, Lehndorff sold the Site to Yburg Holdings Ltd. and eight other companies.

On January 10, 1985, Mr. Gough wrote to Grant MacDonald, Lehndorff, advising that the Site is not expected to require additional pollution control measures in the foreseeable future providing that the surface cover and underlying soils are left undisturbed, and providing that the results of groundwater monitoring tests being conducted by KICL are acceptable.

From 1982 to December 1986, Mr. Quagliotti and his staff carried out the monitoring required by the Ministry (subject to an approximately one-year hiatus resulting from construction at the Site that destroyed some of the wells and required the drilling of replacement wells).

After a number of requests from Mr. Cruise, then president of KICL, to relieve KICL from its monitoring obligations, the Ministry agreed to review the monitoring requirements and decided to take a series of its own samples from the wells to verify KICL's results.

By December 1986, the monitoring results indicated that the recent values had "generally declined below the federal and provincial drinking water standards with the exception of phenol and chlorophenol levels" in one of the wells.

On January 26, 1987, Mr. Gough wrote a memorandum to H.Y. Wong, Regional Manager, Waste Management, advising him that for all intents and purposes the requirements of the 1982 pollution abatement order had been met. Mr. Gough

indicated that KICL continued to co-operate with the Ministry in carrying out the requirements of a groundwater monitoring plan. He noted that: "I have made a point in the past to advise the permittee that although we are satisfied with the cleanup and monitoring actions to date, we cannot provide complete assurance that future cleanup measures will not be required."

On January 29, 1987, Mr. Wong wrote to R.A.N. McLean, Domtar, noting that while, for all intents and purposes, the requirements of the January 12, 1982 pollution abatement order have been met, the status of the Site has undergone a number of changes and, therefore, the original order cannot be met precisely to the letter. Mr. Wong states that results from the groundwater monitoring program, and other future monitoring programs at the Site, might indicate that further cleanup measures are necessary. He notes that, in this event, the company might be required to undertake additional works to abate pollution at the Site.

In January 1987, the Ministry analyzed further samples from the wells. On January 30, 1987, J.C. Foweraker, Head, Groundwater Section, Water Management Branch, Ministry of Environment, wrote to Mr. Gough, attaching a report written by Al Kohut, Senior Geological Engineer, Water Management Branch, with the results of the sampling done at the Site. The report noted free product (creosote) in two of the wells. KICL was not notified of these results.

On March 6, 1987, Domtar notified Koppers and KICL that KICL had not done all the work required under the pollution abatement order and that, therefore, Koppers and KICL were in default of the remediation of the Site pursuant to the Agreement of Purchase and Sale between Koppers, KICL and Domtar, dated March 10, 1982.

Mr. Gough left the Ministry in April 1987. On April 14, 1987, M.C. Gow, Acting Head, Environmental Section, wrote to Doug Wilson, Senior Program Officer, Hugh Liebscher, Ground Water Hydrologist, Environment Canada, and Mr. Kohut, noting that two of the monitoring wells are contaminated with creosote and recommending that creosote be added to the monitoring program. Mr. Gow asked for a response to his recommendation so that KICL could be advised of the change in plans and have them resume their monitoring activities. Mr. Wilson concurred with Mr. Gow's recommendations in a letter dated May 6, 1987.

In late April 1987, a Ministry Environmental Impact Assessment biologist, Brent Moore, conducted a sediment and water sampling program in the Fraser River adjacent to the Site. All of the sediment samples indicated that creosote was below the detection level. The water samples were not tested for creosote. Mr. Moore testified that, based on the available evidence, he did not feel there was any evidence of a significant impact on the river.

On October 31, 1987, Bill Wotherspoon, who was acting as a liaison between KICL and the Ministry, wrote to Mr. Cruise, indicating that he had no further communication from the Ministry and was therefore assuming that there were no additional monitoring requirements.

In August 1988, Mallory Smith was approached by John Wilson, then President of Atlantic, indicating that Border Enterprises Limited ("Border'), the parent of

Atlantic, was considering a bid for KICL. Mr. Wilson indicated that, if the bid was successful, he would like to retain Mr. Smith to help in organizing the combination of Atlantic and KICL. Mr. Smith attended a teleconference meeting of Atlantic's Board of Directors on September 28, 1988.

On November 15, 1988, all of the shares of KICL were sold to Border for $11,150,000. On November 16, 1988, KICL amalgamated with Koppers Culvert Inc. and 164509 Canada Ltd. under the *Canada Business Corporations Act*, and continued under the name KICL. On October 19, 1989, KICL changed its name to Atlantic Industries (Canada) Limited.

On January 26, 1989, Koppers changed its corporate name to Beazer Materials & Services Inc. and, on March 26, 1990, Beazer Materials & Services Inc. changed its corporate name to Beazer East, Inc., which has already been defined in this decision as "Beazer."

Mallory Smith became a member of the Board of Directors of Atlantic in June 1989 and sat on the Board until June 1991. He was invited to rejoin the Board in 1992 and has been on the Board of Atlantic ever since.

In January 1993, Swanson amalgamated with Canfor.

On April 1, 1993, Atlantic Industries (Canada) Limited amalgamated with Atlantic Industries Ltd. under the New Brunswick *Business Corporations Act*, and continued under the name Atlantic Industries Ltd., which has already been defined in this decision as "Atlantic".

In 1995, the possibility of problems relating to the Site was brought to the attention of Mr. Pope, then Assistant Regional Manager of Pollution Prevention. Sampling had been conducted at two wells between the warehouse and the Fraser River. Test results indicated that free product was floating in the wells. Mr. Pope characterized these results as indicating "gross creosote contamination." The sampling results indicated that contaminants of concern might be emanating from the Site and discharging into the Fraser River.

On July 10, 1997 and August 1, 1997, the Assistant Manager wrote to Beazer, Atlantic, CNR, and the present owners, advising them that he was considering issuing a remediation order for the Site and asking for submissions on who should be required to remediate the Site.

On December 19, 1997, after considering the submissions, the Assistant Manager issued the Order pursuant to the provisions of Part 4 of the *Act*. The Assistant Manager indicated that "contaminants originating from industrial activities at the Site are likely causing pollution of the environment including the Fraser River." He stated that:

> In accordance with section 27.1(4)(b) of the Act I am satisfied that the following persons are responsible persons and have contributed most substantially to the site becoming a contaminated site….

The Assistant Manager went on to find Atlantic to be the "Corporate successor to KICL" and, therefore, responsible pursuant to section 26.5(1)(b) of the *Act*. The Assistant Manager then found that Beazer was a responsible person pursuant to section 26.5(1)(b) and (c) of the *Act* because "Koppers Company Inc. ("KCI"), a predecessor of Beazer East, Inc., had significant control over operations at the site." He notes "KICL appears to have been operated as a division of KCI."

The Order also named CNR as a responsible person under section 26.5(1)(b) as it was the landowner during the period of wood preserving operations.

The Order required all three parties to complete, by specified dates, an investigation of the Site; to prepare any necessary supplemental investigation reports, including risk assessments; and to prepare a detailed remediation plan for consideration by the Regional Waste Manager.

Golder has been jointly retained by Beazer, Atlantic and CNR to undertake the work required by the Order. The timelines set out in the Order have been extended several times to allow Golder to complete the investigatory stage of the work.

Both Atlantic and Beazer filed an appeal against the Order. CNR has not appealed the Order. Beazer and Atlantic each maintain that while they are not responsible persons, their co-Appellant is properly named in the Order as a responsible person.

Beazer argues that it is not a responsible person as defined in section 26.5(1)(b) [previous owner or operator] or 26.5(1)(c) [producer] of the *Act*, and, if it is, it falls within one of the exemptions under the *Act*. Alternatively, Beazer submits that if it is a responsible person, it did not contribute "most substantially" to the contamination of the Site as set out in section 27.1(4) of the *Act*. Therefore, Beazer argues that the Assistant Manager had no jurisdiction to name it.

Atlantic submits that it is not an "owner" or "operator" and therefore is not a "responsible person" as defined in the *Act*. In the alternative, Atlantic argues that if it is a responsible person, the innocent acquisition exemption under section 26.6(1)(d) of the *Act* should apply. Alternatively, Atlantic argues that it should not be named in the Order, having regard to section 27.1(4) of the *Act* and taking into account equitable and other factors.

In the further alternative, Atlantic argues that the Order should be vacated or permanently stayed against it on the grounds of abuse of process by the Ministry. Finally, Atlantic argues that, if the Board determines that it is a responsible person, the Order should be stayed against it pending the determination of its lawsuit to recover costs from other parties.

CNR is a Third Party to these proceedings and takes the position that both Beazer and Atlantic are properly named as responsible persons in the Order. The Respondent also takes this position.

It should also be noted that Canfor, Domtar and the current owners accepted third party status in the appeals but did not participate in the hearing.

ISSUES

The following are the issues that the Panel must determine:

1. Whether Beazer can be named as a responsible person in the Order pursuant to section 26.5(1)(b) and (c) of the *Act*.

2. If Beazer is a responsible person, whether it is subject to an exemption under section 26.6(1)(h) of the *Act*.

3. Whether the Assistant Manager properly exercised his discretion in naming Beazer to the Order and whether the Board should vary the Order against Beazer.

4. Whether Atlantic can be named as a responsible person in the Order pursuant to section 26.5(1)(b) of the *Act* as a previous owner or operator of the Site.

5. Whether Atlantic is exempt under section 26.6(1)(d) of the *Act*.

Whether Atlantic ought to be relieved from liability on the basis of a private agreement, pursuant to section 27.1(4)(a) of the *Act*.

7. Whether the Assistant Manager properly exercised his discretion in naming Atlantic to the Order, and whether the Board should vary the Order against Atlantic.

8. Whether the Order should be vacated against Atlantic on the basis of abuse of process.

9. Whether the Order should be stayed against Atlantic pending the resolution of its lawsuit to recover costs from other parties.

RELEVANT LEGISLATION

There are numerous sections of the *Act* and the *Contaminated Sites Regulation*, B.C. Reg. 375/96 ("*CSR*") that are relevant to these appeals. Some of the most often cited sections are reproduced below. Others will be set out in the text of the decision as needed.

The Assistant Manager issued the Order pursuant to Part 4 of the *Act* – Contaminated Site Remediation. Section 27.1 of that Part states that:

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

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

(a) undertake remediation;

...

(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.

Section 26(1) defines a "responsible person" as "a person described in section 26.5."

Section 26.5 reads as follows:

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

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

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

(c) a person who

(i) produced a substance, and

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

(d) a person who

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

(ii) by contract 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.

Section 26(1) defines "person" to include "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" as follows: "'person' includes a corporation, partnership or party, and the personal or other legal representatives to whom the context can apply according to law."

Section 26.6(1) of the *Act* sets out a number of exemptions to an owner or operator being responsible for remediation at a contaminated site. It states:

Persons not responsible for remediation

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

...

(d) an owner or operator who establishes that

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

(A) the site was a contaminated site,

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

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

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

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

...

(h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion;

Section 28 of the *CSR* provides:

Persons not responsible-clarification of innocent acquisition exemption

28 When judging whether an owner or operator has, under section 26.6(1)(d)(i)(C) of the Act, undertaken all appropriate inquiries into the previous ownership and uses of a site and undertaken other investigations consistent with good commercial or customary practice at the time of acquisition of the property, consideration must be given to all of the following:

(a) any personal knowledge or experience of the owner or operator respecting contamination at the time of the acquisition;

(b) the relationship of the actual purchase price to the value of the property if it was uncontaminated;

(c) commonly known or reasonably ascertainable information about the property at the time of the acquisition;

(d) any obvious presence of contamination or indicators of contamination or the feasibility of detecting such contamination by appropriate inspection at the time of the acquisition.

Also relevant is section 27 of the *Act*. It provides as follows:

General principles of liability for remediation

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

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

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,

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

(d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.

(3) Liability under this Part applies

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

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

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

Section 35(5) of the *CSR* has also been addressed by the parties.

> In an action under section 27(4) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

DISCUSSION AND ANALYSIS

1. Whether Beazer can be named as a responsible person in the Order pursuant to section 26.5(1)(b) and (c) of the *Act*.

In the Order, the Assistant Manager found that Beazer was a responsible person pursuant to section 26.5(1)(b) and (c) of the *Act*. Section 26.5(1)(b) provides that a previous owner or operator of the site is "responsible for remediation at a contaminated site"; subsection (c) makes a person who produced a substance liable in certain circumstances.

Beazer submits that it is not an "operator," "owner" or "producer" as defined under the *Act*. The Panel will address each of these arguments in turn.

Operator Liability (section 26(1) and 26.5(1)(b))

In the Order, the Assistant Manager states that Beazer is a responsible person because "Koppers Company Inc. (KCI), a predecessor of Beazer East, Inc., had significant control over operations at the site. KICL appears to have been operated as a division of KCI."

An "operator" is defined in section 26(1) of the *Act* as

> a person *who is or was in control of or responsible for any operation* located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3). [emphasis added]

The words "in control of" and "responsible for" are not defined in the *Act* and the parties to the appeals attributed different meanings to them. To determine whether Beazer (Koppers) had the requisite control or responsibility, the first issue to be addressed is what these words mean in the context of this legislation. Once this is determined, the Panel can assess whether, on the facts, Beazer was a "previous operator" of the Site.

The meaning of "in control of" and "responsible for"

Beazer submits that "control of an operation" means actual control of an operation at the Site, not merely an ability to control or legal control that goes unexercised. Beazer submits that it is not enough for a parent corporation to have control over its subsidiary, it must have control over the subsidiary's operation at a contaminated site. Beazer says that all parent corporations have legal control over limited aspects of their subsidiaries, including the right to elect and remove directors and the power to enact bylaws. However, Beazer submits that it is trite law that a parent corporation has no legal control over its subsidiary's assets and activities, including its day-to-day operations. Beazer argues that the "operator" definition does not impose liability on a parent merely because of its legal relationship with its subsidiary.

In support of this argument, Beazer submits that it is a general principle of statutory interpretation that a statute should not be interpreted so as to abrogate fundamental legal principles in the absence of clear legislative intent. If legal control over limited aspects of a subsidiary by virtue of share ownership, as opposed to control of the subsidiary's operation, were the correct standard for the imposition of "operator" liability, then every majority shareholder, including every parent corporation, would face automatic liability under the *Act*.

Similarly, if the parent corporation's mere ability to control, or the kind of *de facto* control which parent corporations commonly exercise over their subsidiaries (including activities such as influencing the appointment of officers and exerting some degree of control over the subsidiary's financial affairs), were sufficient to make a parent an "operator," virtually all parent corporations would be liable as operators. Beazer submits that such a fundamental change to corporate law cannot have been the intent of the Legislature because it is not clearly expressed in the language of the *Act*. Beazer cites *Driedger on the Construction of Statutes* (3rd edition by Ruth Sullivan), at page 368:

It is presumed that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada* v*. T. Eaton Co*., [1956] S.C.R. 610, Fauteux J. wrote:

> … a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

Beazer argues that "operator" should not be interpreted to include either the authority to control or the ability to control in the absence of an *affirmative* act of

control. Beazer uses the phrase "authority to control" to mean the legal right to control, whereas it submits that "ability to control" may exist whether or not one has the legal right to control. It says that, if the framers of the *Act* had intended to impose liability in this manner, it would have been included in the definition of operator.

Beazer notes that the definition of "owner" under the *Act* includes the phrase "right of control" which it says expressly expands liability to include liability based on authority or ability to control. Beazer says that, as the definition of "operator" contains no modifier to the term control, it must be assumed that the definition was not intended to include either authority or ability to control.

In summary, Beazer submits that a parent corporation will only be liable as an "operator" if it exercised, through affirmative acts, *de facto* control over the subsidiary's particular operation carried on at a contaminated site.

In reaching this conclusion, Beazer refers to the recent decision of the United States Supreme Court in *United States* v. *Bestfoods,* 118 S. Ct. 1876 (1998). The U.S. Supreme Court determined that the question of whether a parent corporation has sufficient control to be liable as an operator "is not whether the parent operates the subsidiary, but rather whether the parent operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary."

Beazer submits that the Court in *Bestfoods* made it clear that a parent corporation's involvement in a subsidiary's affairs, such as appointing directors, monitoring the subsidiary's performance, supervising finance and capital budget decisions, and setting out general policies and procedures does not support a finding that the parent controlled the subsidiary's "facility" and should not give rise to direct liability. Beazer notes that, while this case is not binding on the Board, it should be persuasive.

Beazer also refers to the decision of the United States Court of Appeals (6th Cir.) in *United States* v. *Township of Brighton*, 153 F. 3d 307 (6th Cir. 1998) which held that:

> Before one can be considered an operator for CERCLA [*Comprehensive Environmental Response, Compensation and Liability Act*] purposes, one must perform affirmative acts.

Accordingly, to determine whether Beazer is an "operator," Beazer says that the questions that need to be answered include whether Koppers directly involved itself in the operation of the wood treatment facilities such that it could be said to have carried out an operation on the Site, imposed operational decisions on KICL, countermanded operational decisions at KICL, or actively supervised or managed KICL's operations or operational staff.

The Respondent submits that a parent corporation who owns 100% of the shares of a subsidiary is an operator. It argues that the parent's ultimate control over the subsidiary brings it within the definition of operator. The Respondent argues that

the drafters of Part 4 of the *Act* explicitly rejected the concept of a participation control test of the type adopted in *Bestfoods*. It also submits that while, in *Bestfoods*, the U.S. government conceded that a control test was appropriate, the Respondent makes no such concession in these proceedings.

The Respondent submits that the basic principles of corporate law which allow a parent corporation to structure its affairs to avoid liability for the acts of its subsidiaries are varied in Part 4 of the *Act*. It argues that the definitions of owner and operator include parent corporations who can profit from the operations that contributed to the contamination at a site. The Respondent says that if parent corporations are not caught by the definitions of owners and operators, a viable parent corporation who benefited from the past actions of a subsidiary, which may have divested itself of all assets, will be able to escape liability.

In the alternative, the Respondent submits that, if the Board finds that the definition of operator requires evidence of participation by the parent at the Site, the evidence shows that Koppers managed, directed and conducted operations "specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous wastes, or decisions about compliance and environmental regulations" (*Bestfoods* at pp. 2, 12).

CNR submits that the fundamental principle explicit in the definition of "operator" is that of control, and that to constitute a previous operator one must have been in "control of or responsible for" the operations at a contaminated site. CNR says that Beazer's "conduct" model is contrary to the express language of the definition and ignores the terms "responsible for" in the definition. CNR submits that one need not personally dump pollutants on the ground or take personal action on a contaminated site to be "responsible for" the operation carried out thereon. Further, CNR submits that, if parents were explicitly named in the definitions, lawyers would quickly find a corporate structure that could not be defined as parent/subsidiary.

CNR also takes issue with Beazer's argument that the definition of operator does not include either authority or ability to control. CNR submits that an operator is one with control or responsibility for an operation, and that "control" is defined in the *Collins English Dictionary*, 2d. ed. (Harper Collins, 1994) as the "power to direct something," and "responsible" is defined as "having control or authority over."

CNR argues that Beazer's submissions that the questions to be addressed are whether Koppers got "directly involved", "imposed" or "countermanded" decisions, or "actively supervised or managed" the operations at the Site are erroneous, even though CNR says that examples of this level of control do exist in this case. Second, CNR says that imposing or countermanding decisions is a creation of Beazer without any foundation. It says that the plain and dictionary meanings of "control" and "responsible" reflect none of the active intervention suggested by Beazer to be the test for an operator. CNR says that active supervision or management of site operations is completely inconsistent with the terms control and responsibility.

CNR states that it is not proposing "to erase" the principle set out in *Salomon* v. *Salomon & Co*., [1897] A.C. 22, that a corporation is a legal entity distinct from its shareholders. It says that the corporate veil need not be pierced, rather the key is the definition of operator set out in the *Act*. CNR submits that the determination of who may or may not be a previous operator is a factual one.

CNR also submits that the American case law referenced by Beazer is based on a statute with significant differences from the British Columbia legislation. The *Comprehensive Environmental Response, Compensation and Liability Act* ("*CERCLA*"),-42 U.S.C.A. 9601, predates the *Act* and was available to the drafters of the *Act*. CNR submits that the definitions of owner and operator in the *Act* are broader than the definition set out in section 9601(20)(A) of *CERCLA,* which is circular and reads as follows:

> The term "owner or operator" means, in the case of an onshore facility, any person owning or operating such facility.

CNR submits that this circular definition caused the conceptual struggle in *Bestfoods*, where the Court acknowledged the complete lack of legislative guidance as follows:

> The phrase "owner or operator" is defined only by tautology, however, as "any person owning or operating" a facility, 9601 (20)(A)(ii), and it is this bit of circularity that prompts our review (p. 6).

Atlantic agrees. It also submits that the decision of the U.S. Supreme Court in *Bestfoods* does not apply in British Columbia and cannot be considered determinative of the issue of a parent's liability for the conduct of its subsidiaries in this jurisdiction.

CNR also submits that, rather than apply U.S. caselaw which deals with a statute with different language than British Columbia's legislation, the Board should have regard to the Ontario Environmental Appeal Board's ("Ontario EAB") decision in *Hopkinson, Sky Harbour et al.* v*. Director (Ministry of Environment and Energy)*, No. 38, June 10, 1993. This case addresses the meaning of control as it appears in section 18 of Ontario's *Environmental Protection Act* ("*EPA*"), in which a "preventive measures" order may be issued against "… a person who owns or owned or who has or had management or control of an undertaking or property." CNR points out that the Ontario EAB held that: "The kind of control that is relevant to these proceedings is not so much the control over the day-to-day operations of the company, but control of the purse strings, that is, executive control." CNR notes that the decision was made in the context of director and officer liability, but submits that it is relevant to the issue of what is meant by control.

The parties also made lengthy submissions on the relevance of section 35(5) of the *CSR*. Section 35(5) of the *CSR* provides:

> In an action under section 27(4) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation

> authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

Section 27(4) of the *Act* states:

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

Beazer says that section 35(5) of the *CSR* has no application in the remediation process, and has no application in the determination of whether a parent qualifies as a "responsible person." It argues that the remediation process involves three discrete stages: (1) the identification of a contaminated site; (2) the identification of responsible persons; and (3) the determination of which responsible persons will be named in a remediation order.

In the identification of responsible persons, the manager must look to the definition of owner, operator, producer and transporter. Beazer says that, in this exercise, resort to section 35(5) of the *CSR* is not contemplated. Beazer says that in the cost recovery process, section 27(4) of the *Act* authorizes "any person, responsible or otherwise, to bring a cost recovery action against any responsible person," regardless of whether such person was named in a remediation order. Beazer says that it is only in the cost recovery process that section 35(5) of the *CSR* has any applicability. At that stage, Beazer submits that section 35(5) provides a parent corporation with an additional defence that is not available to it in the remediation process. It is only liable to a plaintiff in such an action if it "authorized, permitted, or acquiesced" in the specific contaminating activity of its subsidiary.

Beazer argues that the *Act* creates two separate and distinct processes: (a) remediation and (b) cost recovery. It says that the remediation process is summary in nature and is designed to allow the manager to ensure that contaminated sites are cleaned up in an expeditious fashion. In this process, the manager has to determine whether a person is a "responsible person," and then determine whether to name the person in an order by reference to the factors set out in section 27.1 of the *Act*. This process is not designed to determine ultimate responsibility or apportionment of liability. In contrast, Beazer says that the cost recovery process is not summary in nature, and is designed to determine ultimate responsibility for remediation and to apportion liability. Beazer submits that, given that it is in this process that liability is finally determined, the *Act* provides for a civil action with all the procedural safeguards available. Beazer says that section 35(5) of the *CSR* has no application in the remediation process, and has no application in the determination of whether a parent qualifies as a "responsible person."

Beazer argues that the opening clause of section 35(5), "*in an action* …" clearly indicates that this provision is applicable only in the cost recovery process. Beazer

says the reference to "*plaintiff*" in the provision further points to this section having no application to a manager's decision to name a parent in a remediation order.

Beazer says that confining the applicability of section 35(5) to a cost recovery action promotes the objectives of the remediation process, i.e., ensuring that contamination is dealt with promptly by allowing a manager to issue an order without the need to establish the additional element that the parent corporation "authorized, permitted or acquiesced" in the precise activity that resulted in the contamination.

Conversely, both Atlantic and CNR submit that section 35(5) of the *CSR* is relevant in addressing the responsibility of a parent corporation for the actions of its subsidiary. Atlantic submits that, while this section speaks to the test to be applied in a civil action to determine responsibility for remediation of a contaminated site, it would be contrary to the principles of statutory interpretation if this test were not equally applicable to the determination of a parent's responsibility for the actions of its subsidiaries in administrative proceedings.

Atlantic says that Beazer does not want section 35(5) applied because there is no doubt, and Beazer has not denied, that Koppers authorized, permitted and acquiesced in KICL's activities at the Site which gave rise to the costs of remediation.

CNR says that one can not disregard section 35(5) of the *CSR* in trying to decide whether a party is a responsible party. Rather section 35(5) must be viewed as a particularized requirement of the definition of responsible person as it applies to parent corporations.

CNR submits that the cost recovery provision in subsection 27(4) of the *Act* expressly allows recovery only against "responsible persons." Because a remediation order can only be issued against a responsible person, it makes no sense to state that section 35(5) has no application at the remediation stage or is not clearly instructive. CNR argues that section 35(5) of the *CSR* must be interpreted as setting out a prescription for establishing a parent corporation's status as a "responsible person," or liability could not attach under the clear language of section 27(4). Accordingly, CNR argues that the tests for a parent corporation to be named in a remediation order and in a cost recovery action should be the same: one cannot be a responsible person as a parent corporation unless it can be shown that the parent corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation. It says that Beazer's argument is tantamount to saying that the definition of responsible person under the remediation process would be different than that under the cost recovery provisions.

The Respondent takes the position that section 35(5) of the *CSR* indicates that, first, the Legislature specifically contemplated that parent corporations would be responsible parties and, second, that the tests under the definition section (section 26(1) of the *Act*) for owner and operator are *broader* than that set out in section 35(5) of the *CSR*. The Respondent agrees with Beazer that section 35(5) provides

an additional defence for a parent corporation named as a defendant in a cost recovery action, but it does not apply to a remediation order. If it were found to apply to a remediation order, the Respondent submits that the manager's ability to get people to remediate contaminated sites quickly would be reduced.

The Respondent says that it is clear that the government contemplated that parent companies would be responsible parties and that it provided them with the same defence provided to officers, directors, agents or employees in cost-recovery actions (see section 35(4)). It argues that the definitions of owner and operator are very broad and that the manager does not have to look at section 35(5) of the *CSR* in his determination of who is a responsible party for the purposes of a remediation order under the *Act*.

Beazer has taken the position with which the Respondent agrees, that if one takes the defence found in section 35(5) (cost recovery) and brings it into the remediation order process, one will reduce the ability of the manager to get people to remediate contaminated sites quickly. Beazer says that in respect of who is named in a remediation order and who pays today, it makes no difference whether a responsible person permitted, acquiesced in or authorized the conduct. However, this will be a factor in determining who ultimately pays for the costs of remediation. Where Beazer and Respondent disagree is the scope of the definition of owner and operator in section 26(1).

Findings

Although Beazer placed considerable emphasis on the *Bestfoods* case, the Panel agrees with the other parties that there are considerable differences in both the scheme, and the wording of *CERCLA* and the *Act*. Unlike the scheme set out in *CERCLA*, in the *Act* direct governmental action is a remedy of last, not first instance. In contrast to *CERCLA*, the *Act* creates a scheme that imposes an obligation to fund the cleanup of a site on one or more statutorily defined responsible parties. The definitions of owner and operator in *CERCLA* created a tautology which the Supreme Court was forced to address. Under the *Act*, there is a specific definition for both owner and operator. Accordingly, the Panel finds that *Bestfoods* is not determinative in relation to the definition of operator.

The Panel does not find that section 35(5) of the *CSR* is the test for determining whether a parent corporation is "in control of" or "responsible for" its subsidiary's operations.

The Panel finds that section 35(5) of the *CSR* is only applicable to the cost recovery process due to the clear reference to "an action under section 27(4)" and the use of the term "plaintiff." While the Panel finds that section 35(5) is of interest, in that it demonstrates that Cabinet considered that a parent corporation could be a "responsible person" and liable for the costs of remediation arising from the actions of a subsidiary corporation, the Panel finds that the language used in that section is not an additional test for defining a "responsible person."

All parties agree that, while a cost recovery action can only be brought against a responsible person, that responsible person does not have to be named in a remediation order to be subject to an action. However, the term "responsible person" is a common thread. In this regard, the Panel finds that the key section in determining whether someone is a responsible person as an operator for the purposes of a remediation order, and the cost recovery action, is section 26(1) of the *Act* that contains the definition of operator. If a person meets the definition of operator then it is *prima facie* a responsible person. A person meets the definition if he or she either was in control of **or** was responsible for *any* operation at the contaminated site [emphasis added]. If a parent corporation is found to be an operator, and thus a responsible person, it can then be named in a remediation order or be a party in a cost recovery action.

In the Panel's view, the wording used to define operator in section 26(1) does not support a finding that the Legislature intended to "pierce the corporate veil," i.e., liability for remediation as an operator does not occur simply because of the *legal* relationship between a company and its owners (shareholders). The Panel agrees with Beazer that, if the Legislature had intended to create such liability, it would be a departure of the existing statute law on limited liability and the common law as set out in *Salomon* v. *Salomon & Co*. As stated in Driedger, to depart from these well-established principles, the Legislature would have to do so "with irresistible clearness, failing which the law remains undisturbed." Consequently, the Panel does not agree with the Respondent that any parent owning 100% of its subsidiary's shares can, on that fact alone, be said to have "control of," or be "responsible for" an operation on the Site. Therefore, the Panel must examine the meaning of these terms.

The Panel finds that the use of the phrases "in control of" and "responsible for" are broad concepts and are intended to mean different things in the context of this section. According to Driedger, "it is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." (p. 159)

Blacks Law Dictionary, 6th edition, 1992, defines responsible as "legally accountable or answerable" and "responsibility" as "the obligation to answer for an act done." It defines "control" as:

> to exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern.

The Panel finds that the words "in control of" in this section relate to factual control of "any operation" on the contaminated site whereas "responsible for" refers more to legal authority over and obligations with respect to an operation. The Panel finds that, in relation to "control," there must be some indicia of factual involvement in relation to an operation at the site – some factual indicia of control. However, the Panel does not accept the narrow definition offered by Beazer that "actual control" of day to day operations needs to be shown. The Panel agrees with CNR that one

need not take personal action on a contaminated site to be responsible for the operations carried out on the site, nor does one need to personally dump pollutants on the ground to "control" operations.

The Panel finds that the words "control" and "responsible for" are left purposely undefined so that the issue of whether sufficient indicia of factual control or responsibility for any operation exists, can be determined by the manager on a case by case basis.

Contrary to the arguments of Atlantic and CNR, this does not mean that the definition of "responsible person" is different in a cost recovery action than in the remediation order process. Rather, it means that a responsible parent corporation who can be named in a remediation order may ultimately not be liable for the costs of remediation arising from the actions of a subsidiary corporation if the plaintiff, in a cost recovery action, cannot prove that that the parent authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation. This again reflects that the purpose of the legislation is to remediate first, and then allocate.

The Panel now turns to consider whether, on the facts, Beazer was in control of or responsible for any operation at the Site.

Application of facts to the definition of Operator

Only Beazer argues that, on the facts, it does not meet the definition of operator. CNR, Atlantic and the Respondent all argue that Beazer is a responsible person under this heading.

CNR argues that the evidence clearly showed that Koppers held sufficient control over the Site and operations to bring it well within the definition of operator under the *Act*. It submits that Koppers had significant control over the Site and operations following its take-over of TPL (later KICL) in 1969. CNR contends that, according to the evidence, Koppers held and exerted partial or total control over every aspect of KICL's operations, including its assets such as the leased Site.

Mr. Pope testified that, in determining that Beazer fell within the definition of operator, he considered the general corporate control of Koppers for the operation of the Site, along with the benefits that Koppers got from the wood treating operation. He also took into consideration the licensing agreement involving the use of "Wolman Salts" and Koppers' involvement in the cleanup of the Site in the 1980's.

The Respondent submits that the evidence of ultimate control exercised by Koppers is clear. It says that Koppers decided to wind up the operations at the Site when the profits generated at the Site did not meet its target. The Respondent submits that when the Site was decommissioned, all share capital and the proceeds from the sale of the assets to Domtar were transferred back into the coffers of the parent corporation.

Conversely, Beazer claims that, throughout the period that Koppers was KICL's parent, KICL operated as an independent, autonomous subsidiary responsible for, and in control of its own operations. Beazer says that the evidence regarding the officers and directors of KICL, the budgeting requirements imposed on KICL by Koppers, its general policies applicable to all its subsidiaries, divisions and departments, the centralized banking system imposed by Koppers on its Canadian subsidiaries and its employee incentive program, are not germane to the question of whether Koppers controlled KICL's operations at the Site. It says that this evidence shows only how Koppers oversaw its investments by exerting some measure of control over the financial aspects of its subsidiaries.

Beazer relies on the following evidence and argument:

Management and organizational structure

- When it purchased the shares of Swanson in 1969, Koppers' stated intention was to leave existing management in place. With the exception of replacing a departing president with Mallory Smith, Beazer says that is what happened.

- The only additions to KICL's staff from Koppers were Mallory Smith (President), Bill Pixler (Comptroller and Assistant Treasurer), and later, Bill McDuffie (Vice-President of Marketing). Beazer says neither Mr. Pixler nor Mr. McDuffie were imposed on KICL by Koppers, but resulted from requests from Mr. Smith for experienced people from within Koppers who would make positive additions to KICL's staff.

- Within KICL, Mallory Smith was the only person who reported to the parent corporation. Mr. Smith reported directly to a senior executive within Koppers (Burnett Bartley for the most part, except for a short period in which Mr. Smith reported to Dick Spatz).

- Mallory Smith, who had little knowledge or expertise in wood treating, delegated full responsibility for all operations at the Burnaby Site to Glen Drummond. Mr. Drummond delegated responsibility for the wood treating operations to Roman Demaniuk, who was later replaced by Bill McNaughton, who was called as a witness by Beazer. All of the foregoing managers were pre-existing KICL employees.

- Mr. Bartley testified that, by the time Koppers purchased Swanson in 1969, it was Koppers' practice to leave an acquired corporation's existing management in place and to let that management continue to operate the business as an independent subsidiary without integrating the subsidiary into Koppers. Beazer submits that the decentralized model Koppers utilized reflected Koppers' management philosophy that decision-making responsibility should be delegated to as low a level as possible so that those responsible for an operation could be held accountable for their decisions.

- Beazer submits that there is not one example of an operational decision at the Site being imposed on KICL by Koppers. Mallory Smith was ultimately responsible for these decisions, and Koppers held him accountable.

- Beazer says that the only examples of KICL coming up against Mallory Smith's limits of authority were (a) selling logs to Cuba; (b) Mallory Smith's desire to transfer a large sum of money to the U.S., and (c) Mallory Smith's desire to set up a U.S. subsidiary.

Plant visits by Mr. Campbell and Mr. Blankenbeker

In 1970, Jim Campbell visited the Site in relation to personnel issues. Mr. Campbell was in the operating department of Koppers. Dick Blankenbeker visited the Site in 1972 and 1973 in relation to production or operational matters. Mr. Blankenbeker was the plant manager at Koppers' Feather River plant in Marysville, California.

Beazer points out that these visits were at the request of Mallory Smith, and were to provide him with a review of KICL's operations and make recommendations on ways to improve operations at the plant. Beazer says that Mr. Campbell and Mr. Blankenbeker were to provide advice and recommendations to KICL on how the plant and its operations could be improved.

Beazer submits that the visits by Mr. Campbell and Mr. Blankenbeker, and their subsequent reports, are not evidence that Koppers controlled the operations at the Site. Beazer says that they did not direct KICL to do anything, nor did they have the authority to do so.

CNR submits that Mr. Blankenbeker's recommendations related to contamination at the Site. CNR notes that Mr. Bartley, under cross-examination, testified:

> Q. No, but I take it you'll agree with me that they're providing recommendations and advice to Mr. Smith with regards to the day-to-day operations of the Burnaby treatment plant? A. Yes, sir.

CNR also submits that Mr. Bartley did not have an adequate explanation for Mr. Blankenbeker's recommendation that prior contamination should be covered up. In his memorandum to Mallory Smith dated July 18, 1973, Mr. Blankenbeker writes:

> The containment work which was done on the CCA cylinders is extremely important and should be expanded to include any areas where possible spills could occur. There are areas around the Penta cylinder that should, at least, be rerocked and possibly paved. *This is a practice that does not correct prior contamination but prevents further investigation should a complaint be lodged*. [emphasis added]

CNR argues that this memorandum illustrates the high level of sophistication possessed by Koppers and its personnel in dealing with contamination. It says in 1973, Koppers was thinking "cover-up, not clean up."

Annual programs and appropriation requests

Each year, Mallory Smith was obligated to generate an annual program for KICL, which included budgets for capital expenditures, predictions on sales, salaries and expenses. These programs were generated by the various department heads within

KICL and were then put together by Mallory Smith, with the assistance of Bill Pixler. The annual programs were reviewed and approved by Koppers. KICL was obligated to obtain approvals for capital expenditures in excess of $100,000, later revised to $200,000. Koppers' Appropriation Committee reviewed the material and had the final say over these expenditures. KICL was free to make capital expenditures below these limits if the expenditures were in KICL's approved program. KICL was then, after the fact, required to report these expenditures to Koppers for ratification.

Beazer argues that the evidence of Mallory Smith was that he could not remember a single incident in which Mr. Bartley countermanded any of his decisions. The most he could recall were two "suggestions" that Mr. Bartley made in relation to directors' fees and regarding whether KICL should continue carrying two peripheral product lines. Beazer also submits that KICL had a great deal of autonomy to spend money on environmental improvements and to set its own financial priorities.

Division

Much time was spent at the hearing on Koppers' 1974 decision to designate KICL as a division of Koppers. Beazer submits that this designation had no legal effect as KICL was, both prior to and after the designation, a Canadian subsidiary corporation.

Beazer says that the designation of KICL as a division of Koppers, in and of itself, is not determinative of any of the issues in this appeal. Beazer says that the word "division," as used by Koppers to label KICL, was not used as a term of art to describe KICL as a true corporate division. Such a division would not be a separate corporation, would not have had its own board of directors, would not own assets, and would not have liabilities separate from Koppers. Beazer said nothing changed in respect to KICL's legal status. The only change was that Mallory Smith and Fred Pinnell, his counterpart at Swanson, were required to attend monthly management meetings in Pittsburgh.

Beazer says that Mallory Smith's continuous reference at the hearing to KICL as a division, and himself as a division manager, were attempts to create an artificial impression of control. Beazer says that Mallory Smith never referred to KICL as a division in all the years that he was President of KICL.

CNR submits that the announcement made by Douglas Grymes, President of Koppers, that "effective August 1, 1974, KICL and Swanson Lumber Co., both wholly owned subsidiaries and formerly departments of the forest products division, have become operating divisions of the company" is consistent with the extensive corporate and practical controls exerted by Koppers over KICL.

Suasion

Beazer claims that KICL carried out its operations at the Site without interference from Koppers. Beazer says that CNR, Atlantic and the Respondent are attempting to attach liability to Beazer (Koppers), not on the basis that it actually controlled KICL's operations at the Site, but rather on the basis that Koppers had the ability to

control KICL's operations, or that Koppers controlled that operation through some form of suasion. Beazer says that if the framers of the *Act* had intended to impose liability on the basis of some non-directive suasion language to the effect that control may be "direct or indirect," it would have been included in the definition of operator.

Beazer argues that by limiting the test to whether the parent corporation actually exerted control over its subsidiary's operations, the decision maker can render a decision based on oral and documentary evidence of what actually happened, rather than having to rely on speculative statements regarding what people thought about other people's intentions or what they believe would have happened in some hypothetical set of circumstances.

Beazer says that Mallory Smith attempted to mislead the Board on the issue of control by mischaracterizing the purpose of Mr. Blankenbeker's visit. Mr. Smith said: "And Blankenbeker came twice. Once to tell us what to do and the second time to see if we'd done it." Beazer claims that the sole purpose of these visits was to provide Mallory Smith with a review of his operations and recommendations, not to tell KICL what to do.

While Beazer does not suggest that the Board reject Mallory Smith's evidence in its entirety, because much of his evidence is true, it argues that the Board should scrutinize his evidence carefully, especially where he attempted to leave the false impression of control.

CNR says that Beazer asserts that the legislator ought to have used the term "indirect" in the definition of operator if "suasion" were to constitute sufficient control to capture a parent company. CNR submits that section 27.1(4)(b) of the *Act* specifically confers the authority to name indirect contributors and that this provision is determinative.

Corporate Norms

Beazer submits that the *Act* does not abrogate the fundamental principle of corporate law that parent corporations are not liable for the acts of their subsidiaries. It says that, for a parent corporation to be liable as an operator, the parent corporation's control of its subsidiary must exceed what one would expect in a normal parent/subsidiary relationship. Issues such as whether a parent and its subsidiary shared common directors and officers is wholly irrelevant to the issue of whether a parent corporation controlled its subsidiary's operations.

Beazer refers to the testimony of its witness, Morley Koffman, a corporate lawyer who gave evidence regarding the relationships between parent and subsidiary companies. Mr. Koffman described the degree of control exercised by a parent company over its subsidiary as existing along a "spectrum of control." He set out three categories: "passive subsidiary," "managed subsidiary" and "independent subsidiary." He concluded that the nature and degree of control exercised by Koppers over KICL placed KICL within a category he called "independent subsidiary."

Atlantic submits that the Board should not accept Mr. Koffman's evidence for the following reasons:

- The "independent subsidiary" category and the "continuum of control" to which Mr. Koffman testified are concepts which he devised solely for the purposes of this hearing, without conducting any independent research into the issue of parental control. His work in this regard has not been published or peer reviewed.

- In cross-examination, Mr. Koffman admitted that there are not any real demarcation lines between the various categories that he devised in his continuum of control.

- Mr. Koffman admitted that he did not comment as to whether Koppers had control over any operation at the Site. Atlantic says that the *Act* requires the Board to consider whether Koppers had control over the "operations" at the Site in order for operator liability to attach to Beazer.

- Mr. Koffman admitted that he did not analyze the provisions of the *Act* to determine whether Koppers would be liable for the acts of its subsidiaries.

- Mr. Koffman admitted that no matter where a parent sits on the continuum of control that he devised, the parent can take total control of its wholly owned subsidiaries if it wants.

In summary, Atlantic says that it is up to the Board, having regard to the facts of this case and the language, purpose and principles of the *Act*, to determine whether there are factual indicia of control which would render Beazer liable for the activities of KICL which give rise to the costs of remediation. It says that Mr. Koffman's evidence is not helpful in this regard.

The Panel finds that Mr. Koffman's evidence is not helpful in determining whether Beazer meets the definition of operator. Mr. Koffman testified that the parent-subsidiary relationship is along a "spectrum of control" or continuum and that there were no clear demarcation lines between the categories of "passive", "managed" and "independent" subsidiary. The Panel notes that Mr. Koffman's categories were devised solely for the purposes of this hearing and were not subject to peer review. Further, Mr. Koffman did not address the provisions of the *Act* or consider whether Koppers had control or was responsible for any operation at the Site. As noted earlier in the decision, the Panel finds that the question of whether a parent corporation meets the definition of operator will turn on the facts of each case.

Operational Decision-Making

Beazer submits that, other than the site visits by Mr. Campbell and Mr. Blankenbeker requested by Mallory Smith, no one else from Koppers had any involvement in operational matters at the Site. While Mr. Bartley travelled to Vancouver on a number of occasions for board meetings, he did not involve himself in operational decisions at the Site, but left them to Mallory Smith and KICL's

management. Mallory Smith could only remember one visit to the Site where Mr. Bartley gave a "pep talk" to staff.

Beazer also refers to evidence that shows that it was Mallory Smith and KICL's management that were in control of KICL's operations, rather than Beazer.

- Starting in the early 1970s, KICL was required to obtain permits for all of its emissions from the plant. Beazer says that all discussions with the Ministry, and all effluent monitoring were carried out by, and under the direction of, KICL's managers.

- It was Mallory Smith's idea to change the corporation's name from TPL to KICL.

- From 1980 to the spring of 1982, KICL's management dealt with the charges it faced and all aspects of complying with the cleanup orders, including engaging lawyers and consultants to assist it.

- The sale to Domtar of KICL's wood treating assets was Mallory Smith's idea and was approved by KICL's directors and Koppers based on Mallory Smith's recommendations.

- Mr. Pinnell, the president of Swanson and a director of KICL, testified that the relationship between Koppers and KICL was no different than the relationship between Koppers and Swanson. Mr. Pinnell also testified that he controlled the day-to-day operations of Swanson from 1969-1981 and that, in his opinion, Mallory Smith was definitely in control of KICL.

CNR submits that the history of control at the Site began with Burnett Bartley, the Koppers person who was placed in charge of Mallory Smith and KICL after Koppers' acquisition of TPL in 1969. CNR refers to the January 13, 1969 Minutes of a Koppers Appropriation Committee meeting, which it says sets out the nature of the intended relationship between Koppers and KICL:

> Mr. Grymes insisted that there must be a Koppers "watchdog" on an investment of this size. Mr. Cochran felt we owe it to our stockholders to maintain good *control* and know what is happening.
>
> Mr. Bartley said *control* will be exercised by the president [M. Smith] reporting to him. [CNR's emphasis]

CNR notes that, in 1969, many of the old members of the TPL Board of Directors were removed and replaced by Mr. Bartley, Mr. Grymes, Mr. Capone and Mr. Cochran. CNR submits that the Board of KICL was controlled by a majority of Koppers insiders from 1969-1973. In 1973, the make-up of the Board was changed to include some Canadian directors in order to comply with new Canadian legislation, although Koppers' personnel continued to represent a majority of the Board. The new Board included four Koppers insiders and three outsiders.

Atlantic submits that:

- Mallory Smith was a "Koppers man" and not a person who could be considered to have come to KICL from outside the corporate culture of Koppers. By placing Mr. Smith at the helm of KICL and by exerting pressure on him, through Burnett Bartley, to meet Koppers' required return on investment, Koppers controlled the operation at the Site.

- Mr. Smith's salary was determined directly by Mr. Bartley and not by an independent Board of Directors of KICL. He was provided with a deferred compensation package in the form of phantom shares in Koppers. Mr. Smith travelled to Pittsburgh for monthly meetings where he was required by Koppers to provide both an oral and written report on the activities and financial health of KICL.

- Mr. Bartley testified that, when he installed Mallory Smith as president of TPL, he was doing so in order to fill the Koppers' Appropriation Committee's requirement that a Koppers "watchdog" be put into place at KICL. Mallory Smith had been with Koppers for 12 years at that time.

- By placing Koppers personnel such as Mallory Smith, Bill Pixler (Assistant Treasurer and Comptroller), and Bill McDuffie (Vice-President of Marketing), in senior positions in KICL, and through its total financial control of KICL, Koppers was in control of the operation located at the Site. Glen Drummond, who Beazer acknowledges had direct control over production facilities at the Site, also worked for and was trained by Koppers. He had joined TPL as a production trainee in 1960. Shortly after the purchase of TPL by Koppers, he was transferred to become the manager of a Koppers' plant in Morrisville, North Carolina. In May 1972, he was transferred back to TPL, and in January 1973, he was promoted to Production Manager.

In summary, Atlantic argues that Koppers had, within KICL, the President and the Heads of Finance, Production and Marketing, all of whom were directly connected to and trained by Koppers. Atlantic submits that Beazer erroneously claimed that Koppers' intention was to leave existing management in place. It argues that this statement is incorrect, both with regard to the intentions of Koppers when it purchased the shares of Swanson, and with regard to what actually occurred.

CNR also points out that Mallory Smith testified that he was in contact with Mr. Bartley "a minimum of once a week, but sometimes it would be much more than that depending on the issue."

CNR points out that KICL's cash went into a concentration account controlled by Koppers. Mr. Bartley agreed that "Koppers determined where the money went."

CNR says that Mallory Smith's testimony was consistent with that of Mr. Bartley, in that Koppers controlled the "purse strings" of KICL. CNR argues that one particular ramification of this control was the fact that Koppers required a certain return on

investment, and expenditures could be made by KICL only where they would not interfere with Koppers' profits.

CNR refers to Koppers' "Manual of Policy Orders and Executive Communications – Part I, Capital Expenditures and Leases, Limits of Authority." CNR argues that, among all the significant controls exerted by Koppers over KICL, control over property leases regarding a contaminated site goes to the heart of an operation's existence. According to Mr. Bartley, KICL required approval from Koppers' Appropriation Committee to execute the lease of the Site with CNR.

CNR also refers to Mr. Bartley's testimony where he agreed with the accuracy of the Judge's statement in his Reasons for Decision of April 13, 1981, in relation to the charges laid against KICL in June 1980:

> Koppers is a subsidiary of an international corporation with head office in Pittsburgh and with a department that sets environmental policy for Koppers Company and its subsidiaries …
>
> CNR says that it was definitely Koppers who kept the pressure on to keep cleanup costs down. In an internal memorandum from Mr. Cruise to Mr. Bartley dated October 22, 1982, Mr. Cruise states:
>
> Andy [Middleton] and Al [Quagliotti] did an excellent job of presenting our case to do nothing. The Government Officials, as expected, made no decision and requested two or three weeks to analyze the data. I feel that, fortunately, we met with competent, understanding civil servants who feel, perhaps, to justify their existence that they must insist on some remedial measures. The amount of work required by K.I.C.L. is still negotiable. At this point in time I would guess our involvement to be considerably less than the $300,000.00 we have reserved.

CNR submits that, according to Mallory Smith, Koppers' management plan designated KICL as a "target for correction," which meant he had to either find a way to make the wood products business make money in the future, or get out of the business. CNR points to Mallory Smith's testimony that one of the problems that developed with the wood treatment business was that, eventually, its return on investment did not warrant seeking and obtaining funds from Koppers to improve "very old equipment" at the Site.

CNR argues that Mr. Bartley made the ultimate admission regarding control over the Site. He could have stopped the contamination altogether by getting out of the wood treatment business. Instead, CNR says that Mr. Bartley pushed KICL to produce and sell more treated lumber.

Remediation efforts at the Site

Atlantic, CNR and the Respondent submit that the involvement of Dr. Middleton and Mr. Quagliotti, employees of Koppers, in the investigation, remediation, planning and subsequent monitoring of the Site is evidence that Koppers controlled an

operation at the Site and is an "operator" pursuant to the definition set out in the *Act*.

Beazer argues that Dr. Middleton and Mr. Quagliotti were retained by KICL to act as KICL's consultants regarding the environmental investigation at the Site. Beazer refers to the minutes of the April 5, 1982 meeting in Pittsburgh where Dr. Middleton said, "we act as your [KICL] consultants," and to documents drafted by Mallory Smith where he refers to them as the "Pittsburgh consultants."

CNR submits that, after the April 5, 1982 meeting in Pittsburgh, at which time Mallory Smith asked the Koppers' Environmental Resources Department for help in carrying out the cleanup, Koppers, through Dr. Middleton and Mr. Quagliotti, guided and controlled the failed remediation in 1982. CNR submits that Mallory Smith did not play an active role in the cleanup process after that meeting, as he was "phasing out" of KICL. Mr. Cruise was named president on May 1, 1982, and KICL's head office was moved from Richmond, British Columbia to Cambridge, Ontario.

CNR submits that the Vancouver consultants were instructed to report and provide copies of all documents directly to Dr. Middleton and Mr. Quagliotti, thereby giving Koppers direct contact with all of the consultants on the Site. On May 13, 1982, EVS wrote to Mr. Miller at the Ministry and indicated that: "Dr. Andy Middleton and Mr. Al Quagliotti of Koppers (Pittsburgh) will provide senior technical input, advice and direction for the engineering solutions and soil and groundwater studies." On October 5, 1982, Mr. Quagliotti wrote to Mr. Gough at the Ministry, "Koppers will be prepared to discuss the environmental conditions at the former Koppers International Ltd. Canada site." CNR refers to Mr. Quagliotti's testimony in which he made no distinction between Koppers and KICL when speaking with Mr. Gough of the Ministry.

CNR also refers to the fact that Dr. Middleton directly retained Stanley on behalf of Koppers. Stanley's invoice was to be sent to Mr. Quagliotti. CNR refers to Mr. Quagliotti's testimony that: "we were told to take control of the consultants at the site and I would maintain to you that this is what we were doing."

CNR also notes that Mr. Quagliotti testified that, with respect to his role within Koppers' Environmental Department, he was the "manager of groundwater for the environmental department and got involved in just about all the environmental issues that dealt with groundwater."

CNR says that Mr. Quagliotti's responsibility for the co-ordination or monitoring at the Site is confirmed in a June 6, 1983 letter from Mr. Cruise to Mr. Gough, which states that Mr. Quagliotti "will be co-ordinating and conducting the monitoring at the Burnaby site."

CNR submits that Koppers is responsible for the present state of contamination at the Site due to its involvement in providing direction and control over the decommissioning and attempted cleanup of the Site in 1982 as an operator. CNR submits that Koppers' failed cleanup allowed contaminants to continue to migrate for an additional 17 years through the soils and groundwater beneath the Site and,

ultimately, to the sediments and water of the Fraser River. CNR argues that the Site, and the *operations* surrounding the failed cleanup, were controlled by Koppers. CNR says that the fact that KICL co-operated with Koppers in carrying out the failed cleanup in no way displaces Koppers' responsibility.

In summary, CNR argues that Koppers' involvement and control over the Site and operations during the cleanup period, and the monitoring period which followed, places Koppers squarely within the definition of operator.

Beazer argues that "any operation" in the definition of operator refers to some activity such as an industrial, agricultural or commercial activity, and does not include carrying out a hydrogeological assessment or soil-sampling program on a property. Beazer says that the term "operation" must mean an activity that causes pollution and not an activity designed to remediate pollution.

Atlantic contends that Beazer is mistaken in its assertion that remediation activities do not fall within the ambit of the word operation as used in the definition of operator under the *Act*. Atlantic says that the word operation is not defined anywhere in the *Act* or the *CSR*. It refers to the *Concise Oxford Dictionary*, which defines operation broadly to mean "working, action … active process, activity, performance, discharge of function … strategic movement." *Black's Law Dictionary* defines operation to mean "exertion of power, the process of operating or mode of action, an effect brought about in accordance with a definite plan, action, activity." Atlantic says that Mr. Quagliotti and Dr. Middleton were engaged in an action, activity, active process or strategic movement at the Site and they were discharging a function on the Site.

CNR argues that Beazer has offered its own definition of operation and then asserts that cleanup operations do not fit within that definition. CNR submits that "any operation located at a contaminated site," if control or responsibility are present, can lead to liability.

The Respondent also argues that the Court in *Bestfoods*, which Beazer has relied on, looked at operations or activities related to environmental activity at a site in determining whether control was exercised. The Court found that there was "some evidence," in the lower court's decision, that an agent of the parent company (Mr. Williams), "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant." The Court noted that Mr. Williams was not an employee, officer or director of the subsidiary, and therefore his actions were of necessity taken only on behalf of the parent. The Court states that these findings were "enough to raise an issue" of the parent's operation of the facility through Mr. William's actions, but declined to draw an ultimate conclusion as it sent the case back to the District Court. The Respondent argues that Dr. Middleton and Mr. Quagliotti were involved with environmental issues on the Site and this constitutes an operation.

"Responsible for" any operation

Atlantic also submits that Beazer has ignored the words "responsible for" in the definition of operator. It says that, whether or not the Board accepts that Koppers controlled the operations located at the Site, it is clear that Koppers was responsible for such operations. Atlantic says that Koppers has accepted responsibility for the Site and for all undisclosed liabilities of KICL. Koppers was directly involved in the negotiations of the sale of KICL's assets to Domtar, and the release of the lease by CNR. Ultimately, Koppers provided indemnities to both Domtar and to CNR in respect of the potential environmental liabilities at the Site.

In regard to the lease, Atlantic and CNR refer to the Indemnity Agreement dated March 18, 1982, signed by Mr. Bartley, in which Koppers offers CNR further assurances respecting remediation at the Site.

> Koppers hereby agrees to indemnify and save harmless the CN from and against any and all liability, loss, damage, costs, and expenses which CN may suffer or incur as a result of the contamination of or emanating from the Burnaby Site as a result of wood preserving and treating operations carried on by KICL since 1969 and to be carried on by Domtar Inc. from March 22, 1982, it being understood that the onus of establishing that any contamination of or emanating from the Burnaby Site with respect to which a claim is made against CN is not as the result of wood preserving and treating operations carried on by KICL since 1969 and to be carried on by Domtar Inc. from March 22, 1982, shall rest upon Koppers.

CNR says this indemnity is evidence that Koppers has, in the past, purported to take *responsibility* for contamination at the Site. It also notes Koppers' agreement to assume the onus of proving pre-1969 versus post-1969 contamination.

CNR argues that, in the context of the purchase and sale of the Burnaby treatment plant assets involving Koppers, KICL and Domtar, Koppers provided contractual assurances that it would guarantee that the Site was properly remediated. In his letter of February 1, 1982, to William Davidson, Domtar, Mr. Bartley states:

> It is not our intention to pass off our responsibilities to others with regard to environmental matters in Canada, the U.S., or elsewhere around the world and our corporate reputation attests to this.

CNR submits that this letter is intended to convince Domtar that Koppers is aware of its environmental responsibilities at the Site and is prepared to accept them. It says that it is an admission of responsibility.

Ultimately, there was an Agreement for Purchase and Sale between Domtar, KICL and Koppers on March 10, 1982, in which Koppers absolutely and unconditionally guaranteed to Domtar the performance of KICL in the cleanup of the Site to an aggregate monetary limit of $2,000,000. Atlantic argues that Koppers took full responsibility for the environmental liabilities at the Site. Atlantic submits that by now appealing the Order and asserting that it is not a "responsible person," Beazer

is attempting to "pass off its responsibilities to others with regard to environmental matters in Canada" and is behaving in a manner contrary to the conduct by which it professed to operate at the time of its February 1, 1982 letter to Domtar.

Findings

Considering all of the evidence presented in relation to this issue, the Panel finds that the evidence of extensive financial control over KICL, the organizational and decision-making structures that were in place, the control over the lease with CNR, the signing of the indemnification agreements with CNR and Domtar, and the involvement in the environmental affairs of KICL, including the Campbell and Blackenbeker visits and monitoring the charges laid by the Ministry in 1980 and 1981 by its legal department, all provide indicia that Koppers had both control and responsibility for operations at the contaminated Site.

The Panel notes that right from the time of the acquisition of TPL in 1969, the members of Koppers Appropriation Committee insisted that there must be a Koppers "watchdog" over TPL and that they needed to maintain control over an investment of this size. Mallory Smith, who did not know the wood treatment business when he was hired as president of TPL, testified that he talked to Mr. Bartley, especially in the first few years, a minimum of once a week, but sometimes it would be much more than that depending on the issue.

In the case of Mr. Campbell's visit, the Panel notes that he sent his reporting memorandum to W. F. Klug, who was head of wood preserving production at Koppers and reported in a direct line to Mr. Bartley. A carbon copy was sent to Mallory Smith. Mr. Campbell writes to Mr. Klug as follows: "I feel *our* long range plan for supervision should be as follows." [emphasis added] The Panel finds it reasonable to conclude that Mr. Blankenbeker made his second visit to KICL to see if his recommendations from his first visit and report were being followed up on.

The Panel notes that the Vancouver lawyer, who represented KICL in relation to the charges, corresponded with and sent his reporting letters to Templeton Smith, a member of Koppers' law department. Templeton Smith played an active role in monitoring the conduct of the case and, on March 13, 1981, wrote to KICL's counsel indicating that: "I heartily concur that the settlement you have negotiated with the Crown on the subject case is a favourable one for us and much preferable to litigation on the subject."

From the time of the share purchase in 1969, Koppers took an active role in the affairs of KICL, including operations at the Site. While the fact that KICL was made a division in 1974 is not determinative of this issue, it is another indicia of the close ties between Koppers and its subsidiary. Mallory Smith, as was the case of all other division heads, had to travel to Koppers' head office in Pittsburgh to attend monthly management meetings. Mr. Bartley was fully aware of the operations of KICL at the Site and approved of them. He acknowledged that Koppers required KICL to obtain authorization from Koppers' Appropriations Committee for KICL's capital expenditures over $100,000 and then, in later years, over $200,000. The Panel notes that KICL had to report expenditures under these amounts to Koppers for

ratification. Koppers' financial decisions had an impact on the operations at the Site and led to steps being taken to minimize the costs of cleanup.

Mr. Bartley also played an active hands-on role in the managing of KICL's operations. In a memorandum dated November 4, 1981, to Mallory Smith, Mr. Bartley sets out some comments which he wants Mr. Smith to consider "prior to the two of us getting together and deciding exactly the kind of company we want KICL to be and our strategy and time frame for accomplishing it." He goes on to tell Mr. Smith to stop spending money on four different items. Finally, Mr. Bartley indicates that: "*we* need to decide on the organizational structure … so we can see what kind of a business *we* are going to be running." [emphasis added]

As well, the definition of operator in section 26(1) is very broad in that it covers "*any* operation" [emphasis added] located at a contaminated site. In this case, the Panel also finds that the investigations, remediation and monitoring that Dr. Middleton and Mr. Quagliotti carried out at the Site fall within the meaning of "any operation" pursuant to section 26(1) of the *Act*. The Panel notes that section 26.6(1)(h), which provides that a person who provides assistance or advice respecting remediation work at a contaminated site may be exempt from being a responsible person, is included in the list of exemptions because, if it were not there, the person would otherwise, *prima facie* be caught by the definition of operator under section 26(1) of the *Act*.

The Panel finds that Mr. Quagliotti's and Dr. Middleton's involvement in the investigation, remediation and monitoring work from 1980 to 1986 provides additional indicia that Koppers meets the definition of operator and was in control of and responsible for an operation located at a contaminated site.

While none of the indicia or facts are determinative in and of themselves, the Panel finds that the totality of the evidence shows that Koppers had the requisite "control of" and "responsibility for" "any operation" located at the Site. The Panel, further, finds that the Assistant Manager did not err when he named Beazer as an operator in the Order.

Owner Liability (section 26(1) and 26.5(1)(b))

Section 26.5(1)(b) provides that a "previous owner" of a contaminated site may be responsible for remediation at the site. Section 26(1) defines owner as follows:

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

Atlantic, CNR and the Respondent all claim that Beazer meets the definition of "owner" under the *Act* and is, therefore, a responsible person that can be named in a remediation order. Beazer submits that it does not meet the definition of owner.

Beazer submits that this head of liability is not applicable to Beazer for the simple reason that, as KICL's parent, Koppers had no interest in, or right of control of, the Site.

Beazer submits that "owner" liability in this *Act* is largely determined by the person's status in relation to the real property and not the person's conduct. Beazer submits that "owner" liability is intended to impose liability upon a class of persons who *possess legally recognized rights or interests in real property*, who may benefit from polluting operations on the property, or who may benefit by being unjustly enriched by remediation efforts undertaken by others on the property.

Beazer argues that the "owner" category has no application to a parent corporation, unless the circumstances warrant piercing the "corporate veil." Beazer submits that this is the case because:

(1) the ordinary meaning of the word "owner" implies proprietorship and includes those with rights to and interests in real property;

(2) a parent corporation has no proprietary interest in its subsidiary's assets. Rather, the parent's proprietary interest is in the shares of its subsidiary; and

(3) it is a general principle of statutory interpretation that a statute should not be interpreted so as to abrogate fundamental common law principles absent clear legislative intent.

Beazer argues that, although a parent corporation has some legal rights in respect of its subsidiary, it neither owns, nor does it have legal control over the assets of its subsidiary. Thus, Beazer submits that parent corporations should not be treated as "owners" of real property belonging to their subsidiaries in the absence of clear language to that effect.

Atlantic submits that Beazer's argument that Koppers was not an "owner" because it did not have the "right of control" over the Site, is premised on the assertion that "right of control" refers only to a legal right to or interest in the contaminated property, and that such a right is "status" based and not "conduct" based. Atlantic submits that Beazer's interpretation is overly narrow and does not accord with the purpose of the *Act* or the evidence.

Atlantic says that the evidence clearly demonstrates that Koppers had the "right of control" over the Site because it, in its own right and not through KICL, controlled the lease of the Site, and determined whether KICL could continue to operate on the Site when CNR proposed to raise the rents in respect of the Site. Atlantic refers to the evidence of Mr. Bartley. When asked whether there was a policy in Koppers with respect to the approval of leases, Mr. Bartley states:

> Yes, Koppers had I think excellent financial controls and you know leases fell under that. And the two areas where staff people were involved were the legal department and the finance department. These people provided services for our subsidiaries. They had no responsibility or authority to direct Mr. Smith to do anything, but in his

> position it was important that he have the leases—you know, if you have a far-flung company like Koppers with leases being signed in Bogum, Germany and in Australia and in Canada, that this be centralized. So we had a Real Estate Department in Pittsburgh headed up by a man named Louis Hazlewood, and the same went for all the cash. All the cash was managed by Koppers treasury department.

In a letter dated April 15, 1977, from Mallory Smith to CNR, Mr. Smith states:

> As mentioned to you at our meetings, the size and duration of this lease means that it will have to have approval from those of greater authorities than my own, but I believe your acceptance of my recommendation for these authorities should be sufficient.

Atlantic says this confirms Koppers' right of control, which it says is both "status-based" and "conduct-based."

CNR submits that the definition of owner is not restricted to persons with a legal or equitable interest in real property. It argues that perhaps the most significant aspect of the definition of owner is the fact that a person need only have the "right of control" of real property to qualify as an owner, whether or not such right is exercised. CNR submits that legal ownership is not the focus of the definition.

CNR also submits that the definition of owner is not "status-based," nor is the owner definition based on "proprietorship" as asserted by Beazer. An owner includes one with "control" or the "right of control" over real property. The definition then goes on to include, *without limitation*, a person with a legal or equitable interest in the land. CNR argues that the term "without limitation" is precisely intended to ensure that it is impossible to interpret the definition of owner as simply one of status. Rather, the definition is specifically centred on the concept of "control," whether exerted or simply held as a "right of control." CNR says that Beazer ignores the fact that a "legal" interest in a contaminated site is a secondary part of the definition of owner, with control constituting the primary part of the definition. CNR argues that a right of control over the use of the Site is all that it takes for liability to attract.

CNR refers to a document entitled "Koppers Manual of Policy Orders and Executive Communications. Part I Capital Expenditure and Leases, Limits of Authority," which contains the limits of authority for capital expenditure and leases for all parts of Koppers, including KICL. According to Mr. Bartley, KICL required approval from Koppers' Appropriation Committee to execute the lease of the Site with CNR. CNR says that such control constitutes control of real property, causing Koppers to fall squarely within the definition of owner.

In reply, while Beazer does not dispute that KICL obtained the approval of the Appropriation Committee in respect of the lease, Beazer submits that Koppers' approval does not constitute a "right of control of … real property." Beazer notes that the lease was from CNR to KICL, not Koppers. Beazer submits that it was KICL alone that obtained rights in relation to the Site and that, through the lease, KICL controlled the use of real property. Beazer says that approving the lease was a

matter of routine investor oversight – Koppers was simply approving a decision made by KICL to enter into a significant, long-term financial commitment. Beazer submits that, as with the sale of the treating assets, KICL made the initial decision and sought Koppers' approval.

The Panel, first of all, notes that Beazer agrees with the other parties that the definition of "owner" is not restricted to persons with legal or equitable interests in real property. It is also clear that nothing in the *Act* nor the definitions of "owner" and "operator" precludes a finding that a person is both an owner and an operator, or an owner and not an operator, and vice versa.

The Legislature employed a broad definition of "owner" in section 26(1) of the *Act*, which includes those persons with a legal interest in the property, as well as those with factual, and/or legal control.

The Panel finds that the Legislature rejected a narrow approach to the definition of owner by including the words "right to control … the use of real property." If it wanted to employ narrower corporate principles, it would not have used such broad language. In this case, Koppers, by requiring that KICL have its property leases approved by Koppers' Appropriation Committee had the right to "control the use of" the real property.

The Panel finds that Beazer is an "owner" and therefore, a responsible person pursuant to section 26(1) and 26.5(1)(b) of the *Act*.

Producer Liability (section 26.5(1)(c))

In the Order, the Assistant Manager found that Beazer was also a responsible person under section 26.5(1)(c) of the *Act*. Section 26.5(1)(c) provides that "producers" of substances will be responsible persons liable for remediation of a contaminated site in certain circumstances. The section provides that a person is responsible for remediation at a contaminated site 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

While, Mr. Pope did not give any specific reason for finding that Beazer was a producer in the Order, at the hearing he testified that the 1954 Licensing Agreement allowing Timber Preservers to use Wolman Salts at the Site (a Koppers wood treatment process), was an indication that Koppers was a producer. The Respondent argues that Beazer has not discharged the burden of showing that the Assistant Manager erred in making this finding.

Both CNR and Atlantic submit that Beazer is a producer because Koppers "produced" substances (creosote, PCP, CCA and Non-Com) and, by contract or agreement, caused those substances to be handled and treated in a manner that, in whole or in part, caused the Site to become a contaminated site.

Atlantic refers to the following facts which, it says, demonstrate that Koppers produced the substances which caused the contamination at the Site, and that Koppers had control over the use of these substances:

- February 1, 1974 President's Report by Mallory Smith indicates "The Organic Materials Division of Koppers Company Inc., Portland, Oregon furnishes creosote oil, the Wood Treating Chemicals Department of Koppers in St. Louis, Missouri – pentachlorophenol and Koppers – Hickson Canada – Wolman FCAP and Wolman CCA dry salts …."

- Mallory Smith's 1980 President's Report indicates that the "average return on investment before interest expense and income taxes for this plant over the last nine years has been 17.9% and the plant does provide our parent, Koppers Co. Inc., with highly profitable business in creosote and salt sales."

CNR submits that from 1975 to 1982, Koppers supplied a significant amount of creosote to the Site.

CNR submits that the 1954 Licensing Agreement regarding Wolman Salts required that timber be "incised," and that, according to Mr. McNaughton, the incising process contributed to the extent to which contaminants would leak from the timber after treatment. CNR argues that such incising caused contamination, bringing Koppers within the definition of producer.

CNR also submits that Koppers provided direction as to how the contaminants were to be employed at the Site, and, according to Mr. Bartley, inspected the Site and operations in order to make sure that the required procedures were being followed. CNR submits that Koppers provision of chemicals to the Site caused the Site to be contaminated, and that this along with the control held and exerted over the operation brings it into the realm of producer.

Beazer submits that responsibility does not attach to a producer who merely sells a useful substance to an industrial user whose site becomes contaminated. Beazer submits that "producer" liability will not attach unless there is a causal nexus between the actions of the "producer" and the resulting contamination. Specifically, Beazer argues that the producer must "cause" the substance to be "disposed of, handled or treated" in a "manner" that "caused" the contamination. If there is no causal nexus, there is no responsibility. Beazer argues that the reach of section 26.5(1)(c) is further limited by section 19 of the *CSR*, which specifically exempts a producer from responsibility if the producer did not "control" the manner in which the substance was disposed of, handled or treated. Beazer says that, unlike the definition of "owner," which applies to persons with a "right of control" over real property, section 26.5(1)(c) and section 19, taken together, make it clear that to be responsible, a producer must exert "actual control" over the method of disposal, handling or treatment of the substance, and that the exercise of such control must cause contamination.

In respect of the 1954 Wolman Licence Agreement, Beazer first submits that CCA is not a contaminant driving the current remediation efforts at the Site. Beazer says that the Site is now contaminated with creosote and creosote constituents, not CCA. Steven Larson, a hydrologist called by Beazer, testified that neither CCA nor PCP are contaminants of concern at the Site. According to Dr. Feenstra, a hydrogeologist called by the Respondent, the CCA and PCP contamination appears to have been adequately cleaned up in the 1983 remediation. Consequently, the remediation efforts currently underway at the Site are focused on creosote contamination.

Second, Beazer notes that, pursuant to the Licence Agreement, it licensed the trademarks "Wolman" and "Wolmanized" to KICL for use on its CCA treated lumber. By the terms of the Agreement, KICL was required to comply with certain specifications regarding the application of CCA to lumber. The sole purpose of these specifications was to ensure quality control in relation to the finished product. The Agreement authorized Koppers to inspect the plant and any treated products to ensure that treatments were being properly conducted, and that the treated products met the specifications attached to the Licence Agreement. The specifications simply required wood treated by KICL to attain wood penetration levels consistent with Wolman quality standards. Beazer submits that it did not require CCA to be "disposed of, handled or treated" in a manner that "caused" the contamination of the Site.

Beazer also notes that if KICL had failed to apply CCA in accordance with Koppers' specifications, Koppers sole recourse would have been to terminate the Licence Agreement. The only effect of such termination would have been that KICL was no longer authorized to stamp its wood with the "Wolman" trademark. Beazer argues that there was nothing in the Licence Agreement that purports to control the manner in which KICL "disposed of" CCA. Koppers sold the CCA to KICL solely for wood treatment. The Agreement did not address the issue of disposal.

Beazer also submits that the CCA treating processes do not generate process waste water and any unused CCA preservative solution remaining after the treatment of a charge was collected, recycled and reused in fresh batches of treating solution. Dr. Warren Thompson, an expert in the history of the wood treating industry and the handling of wood treatment wastes, called as a witness by Beazer, testified that, unlike PCP and the creosote processes, there was no generation of a waste product that was discharged from the CCA treatment process.

Accordingly, Beazer says that there is no causal nexus between the specifications set out in the Licence Agreement and the contamination of the Site. It says that the specification addressed issues such as: retention rates for CCA; equipment maintenance; temperature and duration of treatment and similar matters. Beazer says that none of these requirements caused contamination at the Site. It says Koppers had no involvement in the CCA treating operations, other than simply selling CCA to KICL, and requiring KICL to apply CCA in accordance with specifications designed to protect Koppers' trademark. Beazer says that any historical CCA contamination at the Site must have occurred as a result of sloppy

handling by KICL employees, improperly maintained equipment or the failure to take prudent safety measures.

In respect of creosote and PCP, Beazer submits that Koppers was a mere vendor in the ordinary course of its business. It says that the *Act* cannot have been intended to impose liability on a person that sold a useful product, together with specifications as to its proper use, to an industrial user.

In response, CNR submits that a producer is a responsible person if it "caused" contaminants to be "handled" in a *manner* that, *in whole or in part*, caused a site to become contaminated. CNR says the language "in whole or in part" is critical as it prevents a producer from arguing degrees of contamination as a defence. CNR submits that *any* control exerted by a producer over the receiver as to how potentially contaminating material is to be handled on a site brings such a producer within the definition. CNR argues that controlling the *manner* of handling, treatment or disposal is far different than controlling the *act* of handling, treatment of disposal. CNR says that it is not a "hands-on" type of control.

The Panel finds that while CCA and PCP may have been chemicals of concern in the past, and were chemicals of concern during the clean up that took place in the early 1980s, the evidence of Dr. Feenstra and others was that CCA and PCP had been sufficiently remediated, and are not presently chemicals of concern. The present concern at the Site, and in the Fraser River, is creosote contamination. The Panel, therefore, finds that it need not analyze the terms of the Wolman Salts Agreement nor determine whether the terms of that Agreement caused the substance to be disposed of, handled or treated in a manner that caused the Site to become a contaminated site. If this was the Assistant Manager's sole reason for naming Beazer as a "producer," while it may have been a reasonable conclusion at the time the Order was made, the evidence at the hearing that CCA is not presently a chemical of concern, leads the Panel to find that Beazer cannot be found to be a producer based on the Wolman Salts Agreement.

The Panel notes that Beazer argues that if a user, on its own, fails to take adequate precautions to prevent the product from causing contamination, then it is the user and not the producer who will be held responsible. On the other hand, Beazer says that if the producer describes a manner of handling or treating a product which itself caused contamination, then that producer would be responsible. In the case of creosote, the Panel did not hear specific evidence of any terms or conditions in any agreement between Koppers (or any other producer) and KICL regarding the use of creosote in a wood treatment operation.

The Panel finds that this section is intended to apply to people who may not be owners and operators, but who produce a substance and then by contract, agreement or otherwise, cause the substance to be handled, treated or disposed of in a manner which causes the site to become contaminated. The Panel finds that producer liability generally addresses a situation where the producer's "instructions" regarding disposal, handling or treatment of the substance itself caused, in whole or in part, the site to become contaminated.

The Panel finds that there is insufficient evidence that Koppers was a "producer," as set out in section 26.5(1) of the *Act,* in relation to the creosote contamination of the Site. The Panel has no evidence of a contract, agreement or otherwise that suggests that Koppers', in its role as a producer of creosote, provided instructions which caused creosote to be disposed of, handled, or treated in a manner that caused the Site to become contaminated. CNR has argued that Koppers held and exerted control over the handling of such chemicals, thereby causing contamination at the Site. It says that if Beazer is found to have been an owner or operator of the Site from 1969 forward, then it provided chemicals to its own operation, and is naturally a producer. The Panel finds that there is no doubt that the way the operation was carried out caused the contamination of the Site and the Fraser River. The evidence has shown that the primary sources of contamination include the creosote retort area, the drip track, the placement of creosote treated wood in the Fraser River, and discharge through the wood stave culvert.

The Panel has already found that Beazer is an owner and operator and, therefore, a responsible person that can be named to a remediation order. Under section 26.5(1)(c), two conditions must be met in order for a person to be responsible for remediation as a "producer." The first condition is that the person must be a producer of a substance. In this case, there is no dispute that Koppers is a producer of creosote. The second condition, which the Panel finds must be linked to its role as a producer of a substance, is to by contract, agreement or otherwise have "caused the substance to be disposed of, handled or treated in a manner that … caused the site to become a contaminated site." Due to the lack of evidence of any instructions from Koppers as a producer of creosote, there is no link to the contamination from Koppers' role as a producer of creosote as opposed to Koppers' role as an owner and operator.

Therefore, on the evidence before it, the Panel finds that there are insufficient grounds to name Beazer to the Order pursuant to section 26.5(1)(c) of the *Act*.

2. If Beazer is a responsible person, whether it is subject to an exemption under section 26.6(1)(h) of the *Act*.

Having found that Beazer is a "responsible person" within the meaning of the *Act*, the next question is whether it is entitled to any of the statutory exemptions. In its initial written submissions in final argument, Beazer addressed what it entitled the "environmental consultant exemption" found in section 26.6(1)(h) of the *Act*. That section provides:

> **26.6(1**) The following persons are not responsible for remediation at a contaminated site:
>
> …
>
> (h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion.

Beazer contends that: it is exempt from liability pursuant to section 26.6(1)(h) of the *Act*, as Dr. Middleton and Mr. Quagliotti "provided assistance or advice respecting remediation work" at the Site and were not negligent in relation to the cleanup carried out at the Site in the 1980's.

Beazer submits that the Legislature has provided consultants with an express exemption from liability to clarify that the *Act* is not intended to apply to activities designed to remediate pollution, unless such consultants contribute to the contamination. Beazer submits that if this exemption were unavailable, environmental consultants would be unwilling to participate in remediation, to the detriment of the environment. Beazer argues that once a person has established that his or her role in relation to a site was "to provide assistance or advice in respect of remediation work," that person is *prima facie* entitled to the benefit of the exemption. Entitlement to the exemption is only rebutted if it is established that the person was negligent.

Atlantic, CNR and the Respondent submit that Beazer is liable for the conduct of its employees, Dr. Middleton and Mr. Quagliotti, and cannot take advantage of the exemption which is contained in section 26.6 of the *Act*. These parties do not accept that Koppers provided these services as a consultant, but rather in its capacity as parent of KICL, and its capacity as one with control and responsibility for operations at the Site. They note that *only* if Koppers is found to have acted in the capacity of an independent consultant can it attempt to bring itself within the exemption.

Atlantic and CNR argue that, in the alternative, Koppers provided cleanup operations through Mr. Quagliotti and others in a negligent fashion. The Respondent, while agreeing with Atlantic and CNR that Beazer is an "operator" and not a "consultant" that can take advantage of the section 26.6(1)(h) exemption, does not take the position that Dr. Middleton and Mr. Quagliotti were negligent in relation to the cleanup carried out at the Site in the 1980's.

The Respondent submits that section 26.6(1)(h) of the *Act* was designed to assure arms length third party consultants such as Golder, retained to conduct site investigations and prepare and oversee the implementation of remedial workplans, would not become responsible persons, if, at some future date, further remedial work was necessary at a site where they previously provided their services. The Respondent argues that section 26.6(1)(h) limits the potential liability of third party professional consultants, it does not limit the liability of those *prima facie* responsible parties who use in-house resources in the course of fulfilling their obligations to remediate a site.

The Respondent says that the interpretation put forward by Beazer is untenable. It submits that section 26.6(1)(h) was not enacted to allow owners and operators to argue that, since their employees were directly involved in providing assistance or advice respecting the remedial work at first instance, they are immunized from any requirement to undertake any further remedial work if required pursuant to section 28.7 of the *Act*. The Respondent also says that every owner and operator will have, in its employ, individuals who provide advice and assistance respecting

remedial work, and that such individuals clearly do not fall within the ambit of section 26.6(1)(h). It submits that Beazer's interpretation would allow every responsible party to escape liability for future remedial actions, contrary to the intent of Part 4 of the *Act*.

In its final written reply, Beazer adopts a slightly different approach. It entitles its discussion "remediation exemption" and notes that the language of the exemption makes no reference to "consultants." It submits that the exemption is available to any person and not just a "pure consultant." Beazer argues that the involvement of Dr. Middleton and Mr. Quagliotti at the Site was strictly limited to providing "assistance or advice respecting remediation work" and that, therefore, Beazer is entitled to the benefit of this exemption.

The Panel notes that neither Dr. Middleton nor Mr. Quagliotti were named in the Order, so the only issue before the Panel is whether Beazer is entitled to rely on this exemption.

A number of commentators writing on this legislation, have called this the "environmental consultant exemption." For example, the authors of *Contaminated Sites Handbook*, British Columbia, L. Huestis and A. Gillam (Carswell) 1997, cited by the parties, say that section 26.6(1)(h) addresses scenarios where an environmental consultant renders advice and assistance in the remediation of a contaminated site. The authors note that this exemption would extend to situations where the consultant would otherwise be found to be an operator by virtue of his/her control of the site during the remediation.

The Panel finds that environmental consultants are included in the types of individuals or companies that are to be afforded the protection of this exemption. The Panel notes that the language of this section refers to "assistance or advice," which implies that it is generally an independent person who is giving that advice or assistance respecting remediation work to, for example, the owner or another responsible person. The Panel finds that the public policy reason for the exemption is to ensure that arms length third party consultants and others whose primary role is providing assistance and advice respecting remediation work, are not held to be responsible persons unless they are negligent.

In this case, the Panel finds that Koppers was not solely or primarily involved in the Site "providing assistance or advice respecting remediation work at a contaminated site in accordance with the *Act*." It was otherwise an owner and operator at the Site. The Panel finds that an owner or operator cannot escape liability if its employees are also involved in remediation operations at a site. The Panel agrees with the Respondent that if Beazer's interpretation is adopted, every owner or operator could escape liability for future remediation if they had employees involved in providing advice and assistance respecting remediation work. Such an interpretation would undermine the foundation of the *Act*.

The Panel, therefore, finds that Beazer cannot rely on the activities of its employees, Dr. Middleton and Mr. Quagliotti to exempt it from being found to be a responsible person as an owner and operator under the *Act*. Because of this

finding, the Panel need not make any determination on whether Dr. Middleton and Mr. Quagliotti carried out their work in a negligent fashion.

3. Whether the Assistant Manager properly exercised his discretion in naming Beazer to the Order and whether the Board should vary the Order against Beazer.

Beazer submits that even if the Panel finds that Beazer is a "responsible person," it did not "contribute most substantially" to the contamination as required by section 27.1 of the *Act*. Therefore, Beazer contends that it should not have been named in the Order.

For convenience, section 27.1 of the *Act* is reproduced below.

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) ...

(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.

[emphasis added]

Beazer acknowledges that section 27.1(1) of the *Act* provides the manager with the discretion to name a responsible person in a remediation order. However, Beazer says that section 27.1(4) circumscribes this discretion. The crux of Beazer's argument is that if the manager is able to ascertain which party or parties "contributed most substantially" to the contamination, the manager *must* limit the parties named in the order to those that so contributed, unless doing so would "jeopardize remediation requirements."

Beazer says that the initial burden of remediation falls upon primary contributors and then enables them to bring statutory cost recovery actions against non-primary contributors.

Beazer takes the position that section 27.1(4) prohibits the manager from naming non-primary contributors to an order unless omitting them would "jeopardize remediation requirements." Beazer says that, in other words, non-primary contributors may only be included in a remediation order where, due to the impecuniosity of one or more primary contributors, remediation would otherwise be jeopardized or where, owing to the complex, multi-causal nature of the contamination, it would not be "feasible" for the manager to determine who contributed most substantially to the contamination.

Beazer says that, if the manager could always issue a remediation order to every responsible person, the phrase "to the extent feasible without jeopardizing remediation requirements" would serve no purpose. Beazer says that if, however, the primary contributor is readily ascertainable, and financially able to pay for remediation, *only* that party may be named in a remediation order.

In final argument, Beazer took the position that, under its interpretation of this section, neither Beazer nor CNR should have been named in the Order. Beazer argued that it was Atlantic that "contributed most substantially" to the contamination, and that only Atlantic should be named in the Order.

Beazer submits that while section 27.1(4) does not define the phrase "contributed most substantially," it is clear that a high level contribution to contamination is necessary, and that Beazer, on the facts, does not meet that threshold.

The Respondent submits that section 27.1 is drafted so that the official issuing a remediation order has sufficient flexibility to ensure that one or more responsible persons, with the resources to fund the work, undertake the work necessary to remediate the site. Mr. Pope testified that he determined that he would limit the named parties on the Order to CNR, Beazer and Atlantic. He indicated that "once I had a group that I felt substantially contributed, that they were viable companies that could deal with the pollution problem there, I didn't think there was a reason to go on and look at those other parties."

The Respondent submits that the *Act* only requires that, in naming parties to an order, the manager must, to the extent feasible without jeopardizing remediation requirements, name one or more parties who *collectively* contributed most substantially to the contamination at the Site. It submits that in making this determination, there is no requirement that the manager be satisfied that each of the persons identified as being most substantially responsible, satisfy this criterion individually.

Atlantic argues that Beazer is wrong in asserting that *only* those who have contributed most substantially to the contamination of the Site may be named in the Order. It submits that Beazer ignores section 27.1(1) of the *Act* and interprets section 27.1(4), and other relevant sections of the *Act*, too narrowly.

CNR submits that the manager is only required to name those who contributed most substantially to the contamination of a site, given that the manager's knowledge of the relevant facts will be limited. It says that the *Act* contemplates

the manager's limitations, as evidenced by terms such as "to the extent feasible" and "on the basis of information known to the manager." CNR argues that this language acknowledges that a manager is not expected to have the investigative tools available in the civil court process. CNR submits that the question for the Board is essentially whether the Assistant Manager's decision is reasonable for the purpose of ensuring the timely cleanup of the Site, pending the outcome of the various cost recovery actions under subsection 27(4) of the *Act*.

In considering the proper interpretation of this section, it is important to consider the general scheme, or underlying purpose of Part 4 of the *Act*.

Beazer submits that Part 4 of the *Act* dealing with contaminated site remediation is designed to achieve two fundamental purposes. The first is to provide a means to ensure that remediation is undertaken expeditiously. Beazer says that the statute provides a summary procedure to permit prompt action. The summary procedure involves the manager making a remediation order based on the facts known to him at the time he makes an order. A remediation order compels the parties to assess and remediate the contamination problem without any delay. Beazer submits that this summary procedure is a reflection of the Legislature's determination that the public interest demands that a cleanup must proceed expeditiously and not be delayed by the litigation process. The remediation process does not supplant the normal litigation process, which would ultimately permit the parties to have a court determine their ultimate rights and responsibilities. The latter is addressed in the cost recovery process established in section 27(4) of the *Act*.

The Respondent also submits that the goal of ensuring a timely response to the environmental and health risks is achieved by a regulatory scheme which requires that remediation take place prior to the resolution of all issues related to allocation in a cost recovery action.

The Respondent says that this *Act* is not about fault or culpability but rather it is designed to deal with the unintentional fallout from legitimate, industrial activities. The Respondent says that it is important that the summary remediation process not be hampered by an interpretation that requires complex inquiries. Part 4 creates a summary process that can be simply described – remediate then allocate.

The Panel agrees with the submissions that the *Act* provides for a manager to proceed quickly to name responsible persons to a remediation order and that any person, including a responsible person, may pursue the reasonably incurred costs of remediation from one or more responsible persons at a later date through a cost recovery action.

In deciding who will be named to a remediation order, section 27.1(1) clearly states that a manager may issue a remediation order to *any* responsible person. However, there can be any number of "responsible persons" that have been involved with a contaminated site over the history of the site – from various transporters and producers, to various owners and operators. If a manager was required to name *all* responsible persons to an order and require their participation in remediation at this stage, remediation might well be delayed.

The Panel does not agree with Beazer's argument that once *the* person who most substantially contributed to the Site becoming contaminated is named, no one else can be named unless remediation requirements would be jeopardized. Beazer's submissions confuse the mandatory requirement to name one or more persons who contributed most substantially with an exclusive requirement. The section clearly provides first, that more than one person who contributed most substantially can be named to the order and, second, that while the manager must endeavour to name the parties that have contributed most substantially to the site becoming contaminated, it in no way precludes the manager from naming other responsible persons to the order.

The Panel finds that the requirement that the most substantial contributors "must" be named (and then only if feasible) does not mean these are the *only* persons who may be lawfully named to a remediation order. To the contrary, section 27.1(1) clearly states that a manager may issue a remediation order to any responsible person. The Panel, therefore, finds that sections 27.1(1) and 27.1(4), together, provide a manager with the discretion to name any responsible person to a remediation order while, in this process, directing him to ensure that, to the extent feasible based on the information before him, he names the persons who contributed most substantially to the contamination.

The Panel finds that this is a common sense approach that ensures that, where feasible, the most substantial contributors are named, but which also recognizes that there will be situations where other responsible persons should be named. Again, it must be stressed that the legislation provides for a manager to issue a remediation order promptly to protect the environment, without necessarily having to be concerned with degrees of responsibility. In creating this contribution scheme, the Panel agrees with the Respondent that a manager is not required to individually assess contributions such that he must determine which party contributed the most, then the next, and so on. The assessment is a *relative* evaluation of the "collective" of responsible persons. This is not an exact science, particularly at this point in the process where the objective is to have a relatively quick summary process to ensure a speedy cleanup. More complicated issues of allocation are dealt with in the cost recovery process.

The Panel, therefore, finds that the manager has a wide discretion conferred upon him pursuant to section 27.1 of the *Act*. The Panel agrees that the only restriction on the manager's discretion is that, when the manager is aware of one or more responsible persons who contributed most substantially, he must name them to an order, unless remediation requirements would be jeopardized whereby the manager may decide not to name that party.

Finally, the Panel notes that the manager does have the power to allocate responsibility in the context of issuing a remediation order pursuant to section 34(1) of the *CSR* and also has the power to make a minor contributor determination. These powers would not make sense if the manager could only name responsible persons who contributed most substantially to the contamination.

Given the findings above, the Panel finds that the next issue to be dealt with is whether Beazer must be named as a "most substantial contributor." If not, the issue is whether the Assistant Manager properly exercised his discretion to name "any responsible person," by naming Beazer to the Order.

On the facts, Beazer submits that it did not contribute "most substantially" to the contamination at the Site because: (a) the contamination was largely in place by 1969 when Koppers became KICL's parent; and (b) as KICL's parent, Koppers had no involvement or connection with the activities of KICL that resulted in the contamination.

Pre-1969 and Post-1969 contamination

Beazer has first argued that its subsidiary KICL contributed little, if any, to the Site's contamination during the period from 1969 to 1982.

Beazer relies on the following evidence in regard to pre-1969 and post-1969 contamination:

- The plant operated for 39 years prior to 1969 and 13 years after that date.
- Surface contamination with creosote was most pronounced in the period prior to 1969 as evidenced by dark staining visible in aerial photographs.
- Significant changes occurred during the life of the operations, which reduced discharges of preservative chemicals to the environment. For instance:
    - Around 1950, concrete sumps were added as door pits at both ends of the creosote retort. Prior to the addition of the sumps, there had been no containment system at the retort doors. Discharge from the ends of the retort flowed onto the ground and down the river-bank toward the river. Prior to the addition of the sumps this area would have received significant spillage of creosote almost daily. Dr. Feenstra agreed that the creosote retort cylinder is one of the most likely sources of soil contamination.
    - Prior to 1967, the tanks at the tank farm sat directly on sand bases on the soil of the Site. In approximately 1967, a new tank farm compound was constructed with a concrete slab and retaining walls approximately four feet in height. Beazer says that the old tank farm area would have been a significant source of contamination. Beazer says that the new tank farm was not associated with any significant DNAPL (dense non-aqueous phase liquid) contamination.
    - By 1964, butt-dipping operations had ceased at the Site. These operations were also located within the most highly contaminated area of the Site and were a significant source of drips and spills of creosote.
    - Over the years, portions of the Site were progressively paved which further inhibited subsurface contamination.

Beazer also submits that, prior to 1973, untreated process wastewater containing creosote NAPLs (non-aqueous phase liquids) had been discharged, during periods of high rainfall, directly into the river in the vicinity of the wood stave culvert. Beazer submits that this practice likely started in 1931 and continued up until 1973, when KICL modified its process water handling system to ensure that no process wastewater was discharged to the river. It says that by installing the new system, the plant achieved zero discharge in relation to its wastewater.

Beazer says that the Respondent's witness, Dr. Feenstra, agreed that there had been a significant reduction in the sources of contamination at the Site by 1969. Beazer cites Dr. Feenstra's conclusions in his report submitted to this Panel:

> In summary, releases of creosote to the subsurface occurred principally in the areas of the creosote retort cylinder and drip track, former dip tank and early chemical storage tank area. Releases around the retort cylinder were reduced prior to 1969 by provision of concrete containment pits at the ends of the cylinder. The early storage tank area was replaced by a storage tank farm with concrete base and containment berm. Dip tank operations ceased prior to 1969. These measures would have reduced the potential for releases of chemicals from these operations. From 1969 to 1982, the drip track area to the east of the creosote retort cylinder continued to be a source of release of creosote to the subsurface. The discharge of chemicals to the river via the wood stave culvert may have begun before 1969 and occurred, continuously or periodically, until 1981. Overall, although the release of chemicals to the subsurface may have been greatest in the period from 1931 to 1969, releases of creosote from the drip track area and discharges from the wood stave culvert would have contributed also to contamination of the Site after 1969.

Beazer submits that even Dr. Feenstra believes that post-1969 contamination was not as significant as that which occurred prior to 1969. Beazer says that the sources of contamination remaining after 1969 were the drip track area east of the creosote retort and the wood stave culvert. Beazer concedes that there would have been some contribution to the contamination after 1969, resulting from the drippage from the charges from the creosote retort. Beazer submits that such contribution is minor in comparison to the contamination that would have resulted from the discharges at the cylinder doors prior to the construction of the concrete sumps.

Beazer also acknowledges that there was a spill that resulted in creosote contaminated residues emanating from the wood stave culvert. This discharge resulted in KICL being charged and convicted under the *Pollution Control Act* in 1981. Beazer submits that while this discharge may have contributed to some of the contamination of the Site, the contamination from this one-time event was largely dredged from the river in 1982. Beazer also argues that Dr. Feenstra did not have full information when he made the statement that the discharge from the culvert "may have begun before 1969 and occurred continuously or periodically, until 1981." Beazer says that during periods of high rainfall prior to 1973, KICL

discharged process wastewater tainted with creosote NAPLs directly into the river in the vicinity of the wood stave culvert. Beazer submits that when this fact was put to Dr. Feenstra, he agreed that this could have been a significant source of contamination in the river sediments and agreed that if the wood stave culvert discharge had been a one-time incident, then the contamination from the discharged process wastewater could have been far more substantial.

Beazer says that the evidence of Mr. McNaughton, who was on the Site at the time, was that the discharge was caused by a settling tank overflow, which resulted in process wastewater getting into a box culvert drain which was connected to the wood stave culvert.

CNR argues that, while it is very difficult to quantify the contaminants introduced into the environment from 1969 -1982, there is no doubt that such releases were significant. It also refers to the evidence of Dr. Feenstra who indicated the following:

- It was difficult to distinguish between the retort cylinders and the drip track, and the dip tank and the early tank farm because they are all in quite close proximity to one another and creosote contaminated soil is found in that whole general area. The area in which the deepest penetration of creosote DNAPL seems to be apparent is in the area south of the retort cylinders and the drip track.

- The sumps installed at the ends of the creosote cylinder, while reducing the leakage of creosote into the subsurface, would not eliminate leakage.

CNR submits that the evidence confirms that the drip track and cylinders were under heavy constant use until the Site was decommissioned in 1982, and that the drip track was a primary source of contamination in close proximity to the river.

Mallory Smith indicated that both Koppers and KICL knew that creosote was dripping into the drip track and wharf area of the Site.

EVS Consultants wrote to KICL's solicitors on October 14, 1980, recommending that further contamination from existing operational activities be prevented which would include the "preparation of a concrete pad to collect dragout along the tracks after a charge." The problem of drippage is also acknowledged in a letter dated October 30, 1980 from KICL's solicitors to the Ministry. CNR submits that these documents address contamination problems that continued to exist in the early 1980's.

In 1972, KICL was ordered by the Ministry of Environment to apply for permits to discharge effluent (process wastewater and sanitary sewage) into the Fraser River. That same year, the Ministry and Environment Canada advised KICL that they were concerned about untreated wastewater which was being discharged periodically into the Fraser River during periods of high rainfall. The Ministry noted the storage of treated lumber close to the shoreline raised concerns that rainwater could transport oils from the lumber into the river.

CNR points to Environment Canada and Ministry memorandums from 1972 and 1973 outlining environmental contamination problems. In one memorandum dated August 9, 1973, the Ministry notes:

> Inspection of the shoreline indicated significant oil floating on the water, contained by a log boom. Most of the oil was seen coming from a boom of creosote-treated pilings stored in the water near shore.

A letter dated April 2, 1980, from the Ministry to KICL states that "the unauthorized discharge of oily wastes to the Fraser River must be stopped." The letter goes on to require the company to "take immediate steps to clean up the oily contaminants, both on the surface of the water and on the bottom sediments along the river-bank."

CNR submits that the most compelling evidence respecting the release of contaminants into the environment came from Mr. McNaughton. Mr. McNaughton was at the Site from 1949 to 1982, and between 1975 and 1982 was the production manager in the wood treatment division.

Mr. McNaughton explained that, in the late 1950s, the length of the creosote treatment cylinder was extended in order to increase production of treated material. Mr. McNaughton identified areas of expansion in the log storage yard and in timber storage that occurred in the early and mid-1970s. He confirmed that there was a large increase in the work that was being done by the wood treatment plant from 1963 to 1973. Mr. McNaughton also confirmed that the steel trams and treated product would drip onto the ground and wharf after every creosote "charge" or treatment. When the length of creosote cylinder number one was increased from 115 feet to 165 feet, it allowed approximately 20 tram-loads of timber to be treated with each charge. CNR argues that many thousands of board feet of timber were treated and drained each day for the 13-year period between 1969 to 1982.

CNR points out that Mr. McNaughton testified that no event or change in attitude occurred in or about 1969 which suggests that the reduction of environmental contamination at the Site began to receive a higher priority than in previous years. CNR points out that Mr. McNaughton indicated that the first time he considered that creosote represented a hazard to the Fraser River was in approximately 1980, when the Ministry became involved.

Mr. McNaughton also testified that the two spills which occurred at the Site in 1980 and 1981, were brought to KICL's attention by government regulators, and that additional spills may have occurred and gone undetected. In a memorandum dated April 11, 1980, Mr. Wong, Ministry of Environment, notes that bubbles of creosote were surfacing about 10 feet from the river-bank in the shallow water of the Fraser River.

Mr. McNaughton testified that, prior to April 1981, KICL stored brailed creosote material in the water adjacent to the dock from time to time. He also stated that consultants were retained when KICL realized that the problem related to the discharge at the outfall was not "a single happening."

In addition to requiring KICL to clean up spills and eliminate their source, the Ministry proceeded to have KICL charged with allowing contaminants to be introduced into the Fraser River. On June 18, 1980, KICL was ordered by the Ministry to investigate and clean up the Site.

On August 25, 1980, EVS identified the principle sources of contamination at the Site as infiltration from the ovens [cylinders] to the wood stave pipe discharging under the dock, and groundwater contamination from runoff from the paved yard area.

In October 1980, EVS advised counsel for KICL that there were two problems relating to contamination at the Site: the first being old pollution problems originating from contaminated fill and old historical activities at the Site, and the second being pollution related to existing operations. To deal with the contamination relating to ongoing operations, KICL advised the Ministry that they would be implementing two further measures to reduce the release of contaminants into the Fraser River: the installation of a system to collect and treat surface drainage, and the construction of a concrete railway bed apron to capture and redirect contaminants dripping from treated wood products transported on the railway. The Respondent submits that neither of these measures was implemented prior to the decommissioning of the plant in 1982.

By letter dated March 3, 1981, KICL advised the Ministry that it had identified three sources of riverbed contamination: accidental overflow from the holding tank, contamination in and around the wood stave culvert and creosote drippings from treated logs carried over the railway tracks onto the ground. The wood stave culvert was plugged with sandbags on April 7, 1980, but this was not sufficient to prevent the continued discharge of contaminants from the culvert area into the Fraser River. A final remedial solution to prevent this discharge was not effected until the culvert was plugged with concrete in January 1981.

On October 30, 1980, KICL's solicitor wrote to the Ministry indicating:

> The first problem identified is that logs stored on railroad cars at the site, and freshly treated with preservative materials have a potential to drip the preservative materials onto the ground and that the preservative materials in turn have the potential to transport themselves into the Fraser River.

At the hearing, Mr. McNaughton agreed with that characterization. He also testified that it was the practice of KICL to store and deliver treated material in the water of the Fraser River until he terminated the practice in April 1981. CNR submits that Beazer has made no effort to quantify the effects of river storage and delivery of freshly treated logs, ties and pilings.

CNR submits that leaching, surface drainage, spills, constant drippage, system failure and similar problems and events plagued the Site in a sustained manner from 1969 to 1982 and that, according to Mr. McNaughton, these problems continued just as they had in proceeding years. CNR refers to a memorandum

written by Mr. Kevin Johnston, of the Ministry, dated November 24, 1982 describing a visit to the Site during the decommissioning process:

> The dredged river sediment was being stored under cover because the sides of the building were open, the entire pile of sediment was still susceptible to weathering and leaching onto the adjacent areas. The large treatment tanks had been removed. The area in front of the retort room showed large quantities of pooled oils … seepages of contaminated oils were emanating from the building.

CNR says that there was evidence that the inventory of contaminants increased from 1969 through 1982. CNR says that Mr. Quagliotti explained that the more inventory, the more saturation, and that the more saturation, the easier it is for heavy non-aqueous phase liquids to migrate, in this case toward the river. Dr. Feenstra also confirmed that migration of creosote in the subsurface environment might increase due to the "cumulative volume released over the years."

CNR says that Beazer's contention that post-1969 contamination either did not occur, or did not have an affect on the environment, has been shown to be wholly untenable. There is direct evidence of a variety of contaminating practices that continued and even increased at the Site after 1969. Further, CNR submits that there is no reliable evidence before the Board that establishes that such contamination ought not to be considered to have had a detrimental effect on the soil, sub-soil, groundwater, and sediments and water of the Fraser River.

There is no dispute that KICL controlled and was responsible for the wood treatment operations at the Site during its entire operating life from 1931 to 1982, and was involved in the subsequent remediation and monitoring operations, and the Panel finds that it clearly contributed most substantially to the contamination at the Site.

However, the Panel also finds that Koppers was also involved as an owner and operator of the wood treatment operations from 1969 to 1982, a period of 13 years. Koppers was also involved in the subsequent remediation and monitoring operations at the Site until 1986. While certain activities such as the butt-dipping process, which contributed to the contamination, ceased and the tank farm was rebuilt and improved prior to 1969, there was a considerable amount of evidence which indicated that the wood treatment processes carried out in the last 13 years of the Site's operations also continued to contribute to the contamination. These are substantial activities. All parties acknowledge that the concerns about wastewater did not get resolved until approximately 1974. Further, there is no real dispute that the drip track and treated logs on the wharf area continued to be sources of contamination.

It is also clear that production increased during this time period, which led to the potential for more contaminants, including creosote, to be released into the ground. Mallory Smith testified that production rose significantly from 1971 to 1974 and then stabilized. Mr. McNaughton indicated that from 1969 to 1975 there was a significant increase in the amount of timber stored on the Site.

The Panel also notes that the trial Judge in his Reasons for Judgment dated April 13, 1981, commented on the operation at the Site at the time the charges were laid in June 1980. He said:

> What it boiled down to is that the operation was slapdash and not closely monitored as it should have been being such an environmentally delicate operation, and being close to the Fraser River. All anyone had to do was take a look over the edge of the dock. That person could have easily seen the effects of the contaminants. It is astounding that nobody looked over the side of the dock, or went under to see the appalling mess shown in the photographs. The operation of the plant was careless to the extent that creosoted logs were placed directly into the Fraser River.

While KICL clearly contributed "most substantially" to the Site becoming contaminated as it was an owner and operator during the entire life of the Site's wood treatment operations, the Panel finds that it was appropriate for the Assistant Manager to name Beazer in the Order due to its involvement as an owner and operator (i.e. "responsible person") from the period 1969 to 1982 and its subsequent involvement in the remediation and monitoring operations at the Site.

On the issue of whether Beazer contributed most substantially to the Site becoming contaminated, the Panel finds that Beazer's involvement from 1969 to 1982, during which time production increased and contamination continued, demonstrates that Beazer was also a person whose activities contributed most substantially to the Site becoming contaminated.

The Panel therefore, finds that the Assistant Manager properly exercised his discretion in naming Beazer to the Order and the Panel finds no reason to come to a different conclusion.

4. Whether Atlantic can be named as a responsible person in the Order pursuant to section 26.5(1)(b) of the *Act* as a previous owner or operator of the Site.

There is no dispute that KICL meets the definitions of previous owner and operator under the *Act*. It operated the wood treatment plant at the Site from 1931-1982, and its operations led to the contamination of the Site. It also entered into the lease with CNR and clearly meets the definition of owner, as it was in possession of and occupied the Site for over 50 years. KICL, as a separate entity, does not exist today. The issue before the Board is whether Atlantic, which amalgamated with KICL[1] on April 1, 1993, is properly named as a responsible person in the Order.

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[1] As noted on page 7 of the decision, on October 19, 1989, KICL changed its name to Atlantic Industries (Canada) Limited. For the purposes of this discussion, Atlantic Industries (Canada) Limited will be referred to as KICL. Atlantic Industries Ltd. is referred to as Atlantic throughout the entire decision.

Atlantic argues that it is not a previous owner or operator and, therefore, not a responsible person. It submits that it is not a previous "owner'' because it was never in possession of, nor did it have the right of control of, or occupy or control the use of the Site, and it did not have any estate or interest, legal or equitable, in the Site. Atlantic submits that it is not a previous "operator" because it is not "a person who is or was in control of or responsible for any operation located at" the Site. Atlantic says that it was not involved in KICL until its parent company, Border, purchased KICL in 1988, long after all the contamination had occurred, and after the Site was decommissioned and returned to CNR. Atlantic says it was unaware of any potential liability for the Site until it was approached by the Ministry in 1996 to remediate the Site.

In the Order, the Assistant Manager found that Atlantic was the "corporate successor to KICL" and, therefore, a responsible person under section 26.5(1)(b) of the *Act*.

Mr. Pope testified that, in determining that Atlantic was a previous owner and operator, he was satisfied that Atlantic was KICL, at law, as a result of the share purchase and amalgamation, and that it did not fall within any of the exemptions in the *Act* or in the *CSR*.

Beazer and CNR agree with the Respondent. CNR argues that Atlantic's predecessors *operated* the treatment facilities at the Site from 1931-1982. CNR contends that, notwithstanding that KICL's parent company (and Beazer's predecessor) Koppers, owned and exerted control over KICL from 1969 onward, KICL clearly carried out activities which introduced contaminants into the environment and, therefore, is an operator.

CNR submits that Atlantic itself acknowledged, in its Statement of Points, that it represents "the corporate vehicle through which the pollution of the Site historically occurred from 1930 to 1982."

CNR also argues that Atlantic and Koppers remained as operators of the Site throughout the period of remediation and monitoring, which began in or about 1980 when the first spills were discovered. CNR also argues that Atlantic's liability, therefore, arises also from its role in the "operations" associated with the failed cleanup.

In relation to "owner," CNR and Beazer contend that Atlantic's predecessor, KICL, entered into the lease with CNR and obtained the rights to possess, occupy, and to control the use of the real property. CNR submits that, through its predecessor, Atlantic held a significant level of "control" over the Site for many decades. CNR submits that the definition is very clear that ownership is not restricted to legal titleholders. Nor is there anything in the definition which prevents more than one party from being an owner of a contaminated site.

CNR and Beazer submit that the law on amalgamation is very clear. They argue that, on an amalgamation, the amalgamating corporations are combined or fused together and continue as one corporation, together with all of the assets, liabilities,

obligations and disabilities of the amalgamating corporations. No "new" corporation is created, and no "old" corporation is extinguished. The two amalgamating corporations continue to exist in the amalgamated corporation. Accordingly, Atlantic's predecessors, by way of amalgamation, exist to this day within Atlantic: the polluters are subsumed in Atlantic and Atlantic is the polluter. CNR argues that, to relieve Atlantic of liability would be to relieve the actual polluters of the Site.

In support of this argument, CNR and Beazer refer to the Supreme Court of Canada's decision in *R.* v. *Black & Decker Manufacturing Co. Ltd.* (1974), 43 D.L.R. 393 where Dickson, J. stated:

> The effect of the statute on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution. (p. 401)

Beazer points out that the *New Brunswick Corporations Act*, under which Atlantic and KICL were amalgamated, contains almost identical language to the *Canada Corporations Act* referred to in *Black & Decker*.

Beazer also argues that acceding to Atlantic's position would require the Board to hold that amalgamation has the legal effect of immunizing a contaminating corporation from liability under the *Act*. Beazer says that nothing in the *Act* provides a contaminating corporation with the kind of absolution that Atlantic seeks.

The Respondent adopts Beazer's and CNR's arguments on the legal force of the Atlantic amalgamation. It submits that Atlantic is, at law, the person who was the previous owner and operator of the Site during the time it became contaminated.

The Panel notes that Counsel for Atlantic has stated that Atlantic is not disagreeing that KICL contributed most substantially to the contamination at the Site, and that KICL was the operator through it, and its corporate successors, from 1931-1982.

The Panel finds that Atlantic is a previous owner and operator of the Site by virtue of the 1993 amalgamation and is, therefore, a responsible person within the meaning of the *Act*. In *Black & Decker*, the Supreme Court of Canada is very clear that, upon amalgamation, no new company is created and no old company is extinguished. As the Court stated: "The effect is that of blending and continuance as one and the self same company." (p. 397)

The Panel finds that when Atlantic amalgamated with KICL, it took on the liabilities and "sins" of KICL. To hold otherwise, would allow a non-contaminating corporation to amalgamate with a contaminating company and then claim that the corporation formed as the result of the amalgamation should be absolved from liability under the *Act* as it didn't contaminate the Site. This is not consistent with the principles of amalgamation set out in *Black & Decker* or the general principles of corporate law, and such an interpretation would defeat the purpose of the *Act*.

Accordingly, the Panel finds that Atlantic, by virtue of amalgamating with KICL, meets the definitions of owner and operator under the *Act*. Thus, the Assistant Manager was correct that Atlantic is a responsible person under section 26.5(1)(b) of the *Act*.

5. Whether Atlantic is exempt under section 26.6(1)(d) of the *Act*.

Atlantic submits that, if the Panel finds that it is a responsible person, either as an owner or operator, then it should be exempt from all liability for remediation at the Site by virtue of the "innocent acquisition" exemption under section 26.6(1)(d) of the *Act,* and section 28 of the *CSR*.

Section 26.6(1)(d) states that an owner or operator is not responsible for remediation at a contaminated site if it can establish that:

> (i) at the time the person became an owner or operator of the site,
>
> (A) the site was a contaminated site,
>
> (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
>
> (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
>
> (ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
>
> (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

Atlantic contends that it meets the key elements of this section. It argues that, for the purposes of section 26.6(1)(d)(i), the "time" it became an owner or operator was the date of the amalgamation in 1993.

In respect of subsection 26.6(1)(d)(i)(A), Atlantic notes that there is no dispute that the Site was contaminated at the time of the amalgamation. In respect of 26.6(1)(d)(i)(B), Atlantic says that it had no knowledge or reason to know or suspect that the Site was contaminated when Border purchased KICL in 1988 or when it amalgamated with KICL in 1993.

In respect of section 26.6(1)(d)(i)(C), section 28 of the *CSR* lists a number of factors to be considered. That section provides as follows:

> **28** When judging whether an owner or operator has, under section 26.6(1)(d)(i)(C) of the Act, undertaken all appropriate inquiries into the

> previous ownership and uses of a site and undertaken other investigations consistent with good commercial or customary practice at the time of acquisition of the property, consideration must be given to all of the following:
>
> ...
>
> (a) any personal knowledge or experience of the owner or operator respecting contamination at the time of the acquisition;
>
> (b) the relationship of the actual purchase price to the value of the property if it was uncontaminated;
>
> (c) commonly known or reasonably ascertainable information about the property at the time of the acquisition;
>
> (d) any obvious presence of contamination or indicators of contamination or the feasibility of detecting such contamination by appropriate inspection at the time of the acquisition.

Consistent with subsection 26.6(1)(d)(i)(C), Atlantic submits that it undertook all appropriate inquiries into the previous ownership and uses of the Site consistent with good commercial or customary practice at the time of amalgamation, in an attempt to minimize potential liability.

In regard to the additional factors listed in section 28 of the *CSR*, Atlantic submits that:

- it had no actual knowledge or experience respecting the Site at the time of the acquisition;
- the purchase of KICL may have been materially different for the purposes of the Share Purchase Agreement had Border and Atlantic known of the contamination at the Site at the time of the acquisition. Mr. Muir, who joined Atlantic in May 1988 as Vice-President of Finance and who in 1991 or 1992 became a director of Atlantic, testified that the assets of KICL, rather than its shares, would most likely have been purchased had the true circumstances of the Site been known;
- as a result of the negligence of the Ministry, KICL did not know of the potential liability of the Site at the time of the share purchase and amalgamation; and
- as a result of the Ministry's failure to advise KICL of the continuing requirements for monitoring and of the results of the sampling at the Site in 1987, the presence of contamination was not obvious to KICL, Border, or Atlantic at the time of the share purchase and amalgamation.

Finally, Atlantic contends that, in regard to section 26.6(1)(d)(iii) of the *Act*, it did not, by any act or omission, cause or contribute to the contamination of the Site

because Atlantic had not been involved with the Site prior to the 1993 amalgamation.

The Panel notes that all parties made submissions about the applicability of the exemption in relation to both the 1988 share purchase of KICL by Border, and the 1993 amalgamation of KICL with Atlantic. The Panel finds that, due to the fact that Atlantic, and not Border, is the named party in the Order, it need only address the issue of whether the section 26.6(1)(d) exemption applies to the amalgamation.

The Respondent, Beazer and CNR point out that section 26.6(3) of the *Act* provides that "a person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities." They argue that Atlantic has not discharged this burden. The three parties argue that the exemption is not available to Atlantic for a variety of reasons. They submit that Timber Preservers, TPL, KICL and Atlantic are one and the same corporate entity. They argue that Atlantic, the actual polluter, exists today as a viable corporate entity, with its predecessors existing within it. The three parties say that this fact alone prevents Atlantic from claiming protection under section 26.6(1)(d), as there is no "newcomer" or "innocent purchaser" in Atlantic.

The Panel finds that the exemption set out in section 26.6(1)(d) of the *Act* does not apply to the amalgamation of Atlantic and KICL. In this case, due to the amalgamation, Timber Preservers, TPL, KICL and Atlantic are one and the same corporate entity. Atlantic, by operation of law, takes on the liabilities of the company it is amalgamating with. The Panel finds that Atlantic cannot, therefore, meet the requirements of section 26.6(1)(d)(i)(A) as there is no evidence that the Site was contaminated in 1931 when Atlantic's predecessor, Timber Preservers, started its wood treatment operations. Further, Atlantic can not meet the requirement of section 26.6(1)(d)(iii) as there is no dispute that KICL's operations from 1931-1982 caused or contributed to the contamination at the Site.

Accordingly, the Panel finds that, as the original polluter through the amalgamation, Atlantic is unable to assert that it is an innocent third party that came upon the Site without knowledge of the contamination and, once there, did not contribute any further to the contamination.

Because Atlantic cannot avail itself of the exemption in section 26.6(1)(d), there is no need to embark upon an inquiry into Atlantic's knowledge and due diligence prior to Borders' purchase of KICL in 1988, or the amalgamation between KICL and Atlantic in 1993. Although Atlantic, in an attempt to fit within the exemption under section 26.6(1)(i)(C) of the *Act*, presented a great deal of evidence and argument on these matters, as did the other parties in response, the Panel need not consider the matter further.

6. Whether Atlantic ought to be relieved from liability on the basis of a private agreement, pursuant to section 27.1(4)(a) of the *Act*.

Atlantic submits that, in exercising the discretion to issue a remediation order, the Assistant Manager and the Board must, pursuant to section 27.1(4)(a) "take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager."

Atlantic submits that the Share Purchase Agreement, dated October 28, 1988, between Koppers (the Vendor), Border (the Purchaser) and Atlantic (the Guarantor), and the accompanying Indemnity Agreement dated November 15, 1988, between Koppers, KICL, and Koppers Culvert Ltd., are private agreements "respecting liability for remediation" that should have been considered by the Assistant Manager when he determined who to name in the Order. Atlantic refers to the representation and warranty set out in the Share Purchase Agreement which provides that

> [T]here are no outstanding liabilities against the subsidiary including without limitation any liabilities arising in connection with any business formerly carried on by the subsidiary except (1) as set out in Schedule 3.01(v).

Atlantic notes that there is no mention of the Site in Schedule 3.01(v). The Agreement provides that this representation and warranty continues for a period of two years from the Closing Date, which was November 14, 1988.

In the accompanying Indemnity Agreement, Koppers agreed to indemnify KICL and Koppers Culvert Ltd. against any potential liabilities, which had not been disclosed, for a period of two years ending November 15, 1990.

Atlantic says that the Indemnity Agreement includes environmental liabilities such as the cost of remediating the Site. It submits that Koppers breached the Agreement by concealing the liability with respect to the Site from Atlantic and by failing to indemnify Atlantic after the execution of the Indemnity Agreement, at which time it became known to Koppers that the Site remained contaminated and would pose a problem. Atlantic argues that Koppers was notified by Domtar in March 1987 and June 1989 regarding alleged deficiencies in the remediation of the Site. Atlantic submits that Koppers did not ignore this notification but, on November 2, 1989, contacted its insurer, Aetna Casualty and Surety Company. It claims that Koppers kept the potential liability for the remediation of the Site secret from Atlantic and Border during the tenure of the Indemnity Agreement.

Atlantic also argues that, had the Order been made during the life of that indemnity, it could have been enforced against Koppers. Atlantic submits that the Board ought to conclude that Koppers, by agreeing to such indemnification, has accepted the culpability and liability for the remediation of the Site.

Beazer agrees that the indemnity was given as part of the sale of the KICL shares to Border. However, Beazer says that the indemnity only applied in respect of claims made within two years of the closing of the transaction. Regarding the

Domtar letter, Beazer states that it is merely a recitation of the requirements of the early cleanup order of the Ministry, which was completely supplanted by the Ministry's later requirements for cleanup. Beazer says that the order was discharged to the Ministry's satisfaction. Beazer also says that Domtar did not seem to be aware that the earlier requirements had been supplanted and that any deficiencies no longer existed.

The Panel also notes that a copy of the March 6, 1987 letter from Domtar was sent to Mr. Cruise, President of KICL, as well as to Koppers. Mr. Muir testified that, while he did not make any inquiries of Domtar prior to the closing of the sale of KICL to Border in 1988, he found a copy of the letter when his staff eventually went through KICL's files.

In any event, Beazer argues that the indemnity expired on November 15, 1990, and was not in effect at the time the Assistant Manager made his decision to issue the Order in 1998.

Beazer further submits that, even if it had not expired in 1990, the indemnity is not the type of agreement contemplated by section 27.1(4)(a). Beazer argues that section 27.1(4)(a) is intended to cover circumstances where two or more responsible persons have agreed, as between themselves, what proportionate share of liability each will bear. It says that this section does not cover all agreements respecting liability, but only private agreements regarding liability for remediation. Beazer submits that the drafters of the *Act* could not have intended that a manager be required to consider agreements which do not specifically address the issue of liability for remediation of a contaminated site.

In this case, Beazer submits that the subject indemnity is couched in general terms, and does not refer to environmental matters or remediation, much less allocate liability for remediation. It says the scope of this indemnity will be a contentious issue between the parties in the cost recovery action.

Finally, Beazer argues that, even if the indemnity was the type of agreement contemplated by the *Act*, the fact that Border and KICL accepted a two-year term for the indemnity means that they accepted all risk regarding environmental liability after the expiry of the term. It says that if the indemnity was taken into account by the Assistant Manager, he would have had to conclude that Atlantic was the person to name in the Order.

The Panel finds that, due to the fact that the Indemnity Agreement expired in November 1990, it was not in effect at the time the Assistant Manager made his decision to issue the Order, seven years later, in 1997. Therefore, it is not an agreement that must be taken into account by the manager under section 27.1(4)(a) of the *Act*. The same reasoning applies to the Share Purchase Agreement.

The Panel, therefore, does not have to consider whether the Indemnity Agreement and the Share Purchase Agreement are the types of agreements contemplated by section 27.1(4)(a) of the *Act*.

The Panel also notes that section 27.1(5) provides that a remediation order does not affect the right of a person affected by the order to seek relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a contaminating substance. As Beazer has argued, this section specifically reserves the rights of the parties affected by a remediation order to seek relief in the court process under any agreement, not just one in relation to liability for remediation. Under this section, the scope of the representation and warranty in the Share Purchase Agreement, the scope of the Indemnity Agreement and the issue of whether Koppers concealed the liability with respect to the Site from Atlantic may be canvassed in the cost recovery action.

Therefore, the Panel finds that Atlantic ought not to be relieved from being named in the Order on the basis of the 1988 Share Purchase Agreement or Indemnity Agreement.

7. Whether the Assistant Manager properly exercised his discretion in naming Atlantic to the Order, and whether the Board should vary the Order as against Atlantic.

Atlantic submits that the Legislature has delegated a wide discretion to the manager to determine who should be named in a remediation order. It says that the words in section 27.1(4) "taking into account such factors as" provides this discretion. The section states:

> **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
>
> ...
>
> (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. [emphasis added]

Atlantic says that, while the manager must consider the factors enumerated in this section, he or she is not limited to them. Atlantic contends that the Assistant Manager and this Board have the jurisdiction to relieve a responsible person from liability for contamination on equitable grounds alone and that this is an appropriate case to do so. It submits that the *Act* is not a code, but rather a guide to be used by the manager in reaching an equitable decision concerning who should be held

responsible for the remediation of a contaminated site. Atlantic argues that it had no involvement of any kind with the Site until it was named in the Order and was required to contribute to the costs of remediation. It says it is only by reason of the amalgamation of Atlantic and KICL that it is named in the Order at all.

To prevent an injustice, Atlantic contends that the other factors that should be taken into account to relieve it from liability under this section include the following:

(1) the extent to which Atlantic benefited from the contamination of the Site in comparison to the benefits enjoyed by CNR and Beazer;

(2) the degree of influence that Atlantic could exercise in relation to environmental risks;

(3) the degree to which Atlantic was or was not in control of or managing the operations which caused the environmental concern; and

(4) the conduct of government officials with respect to Atlantic and the Site.

Atlantic notes that the first three of these factors were considered by the Ontario EAB in *Re 724597 Ontario Ltd (Re: Appletex*) (1994), 13 C.E.L.R. (N.S.) 257. Atlantic says that, in *Appletex*, the Ontario EAB held that the factors set out for allocating liability by the Canadian Council of Ministers of the Environment (the "CCME"), should also be considered in determining whether a responsible person should be relieved of liability on equitable grounds. These factors were set out in a March 1993 document entitled "Contaminated Sites Liability Report: Recommended Principles for a Consistent Approach Across Canada" (the "CCME Report"). The Ontario EAB states:

> In our view, if the legislature chooses not to legislate the kinds of principles and lists of factors described above, that is, those recommended by the CCME Core Group and those applied in past cases by this Board, the Board can create such guidelines and apply them in its own deliberations, provided that it does not fetter its discretion to decide each case on its merits. (p. 288)

Atlantic says that the Ontario EAB recognized that the CCME favoured an approach that takes into account the circumstances of each case, and looks at a variety of factors in deciding whether it is fair to impose liability in the circumstances. While Atlantic acknowledges that the *Appletex* decision is not binding on the Board, it submits that it is instructive regarding the types of factors that the Board can consider when making its decision. Atlantic maintains that an analysis of these factors should result in it being relieved of liability.

Atlantic also refers to *Hopkinson* where the Ontario EAB stressed that a finding of liability in respect of a contaminated site is directly proportional to the benefits a person has received as a result of the undertaking which has caused the contamination. It says that Beazer and CNR have received significant benefits as a

result of the operations at the Site that resulted in the contamination, and that Atlantic has received none.

In sum, Atlantic contends that the Board must look beyond the legal effect of the amalgamation and relieve it from all liability. Atlantic argues that requiring it to contribute to the costs of remediating the Site will result in the unjust enrichment of CNR and Beazer, and will compromise the purpose and intention of the legislation. It submits that the common law confers jurisdiction on a manager to consider a wide variety of equitable factors when determining responsibility and liability for contamination, in addition to the particular factors enumerated in the legislation.

Beazer and the Respondent submit that Atlantic's argument that the *Act* is a tool or guide to assist a manager in reaching an equitable decision as to who should be held responsible for the remediation of the site is erroneous. They argue that the manager is a creature of statute and only has the powers and discretion conferred by the *Act* and the *CSR*. They argue that, unless specifically incorporated into the statutory scheme, the law of equity does not apply.

Beazer submits that, in drafting the *Act*, the Legislature carefully crafted categories of responsible persons, some of which include classes of persons that could potentially benefit from contaminating activities. However, it points out that there is no reference in section 27.1(4) to "benefit," nor do the categories of responsible persons make any mention of benefit. Beazer submits that the issue is not whether someone benefited, but rather, whether they fit within the definition of "responsible person." Beazer says that benefit may become relevant in an allocation of responsibility amongst responsible persons, but this issue is not before the Board.

Beazer and the Respondent submit that Part 4 is a comprehensive code which establishes and limits the manager's powers, and specifically reserves the application of equitable principles to the allocation phase: section 35(2) of the *CSR* provides for the consideration of "other factors relevant to a fair and just allocation" in the context of a cost recovery action. The Respondent submits that this exclusion is deliberate, and is a keystone feature of the regulatory regime under Part 4 of the *Act*. The Respondent argues that the discretion conferred by section 27.1 is designed to allow a manager to ensure that expeditious remediation takes place. The Respondent argues that Atlantic is not precluded from raising the issues of equity at the allocation stage in cost recovery actions.

Beazer also argues that, when interpreting the phrase "taking into account factors such as," it is important to consider the context in which the phrase appears. Beazer says that the phrase, as found in section 27.1(4)(b), must refer to factors relevant to the issue of which person's "activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site." Beazer says that the factors relate to the degree of involvement by the person in the contamination, or the due diligence of the person in relation to the contamination. Beazer submits that an assessment of those factors requires the manager to name Atlantic in the Order because KICL, and thus Atlantic, is the corporation that "contributed most substantially" to contamination at the Site.

Regarding *Appletex* and *Hopkinson*, both Beazer and CNR submit that these Ontario decisions are inapplicable to the question of Atlantic's liability under the *Act*. Both parties argue that *Appletex* was based on provisions of the Ontario *EPA* which provided no guidance regarding the discretion by the Ontario EAB in naming those responsible for the costs of cleanup at contaminated sites. In the absence of any such guidance, the Ontario EAB adopted the recommendations of the CCME in the form of an overall fairness assessment for the purpose of deciding whether to relieve certain parties from responsibility arising from cleanup orders.

In contrast, Beazer submits that the *Act* and *CSR* establish a comprehensive regime for determining liability for contaminated site remediation in British Columbia.

Beazer says that both the *Act* and the *CSR* were brought into force after *Hopkinson*, *Appletex* and the CCME Report and the principles enunciated in these decisions, and the CCME Report, were available to the drafters of the *Act* and the *CSR* for adoption or rejection. Beazer submits that some of the factors considered in *Hopkinson*, *Appletex*, and the CCME Report have been expressly incorporated in the *Act* and the *CSR* – some as exemptions from liability, some as factors to be considered by a manager in issuing an order, and some in respect of allocation of liability. For instance:

- unlike the Ontario *EPA*, the *Act* and the *CSR* provide approximately 27 express exemptions from liability;

- the Ontario *EPA* is silent regarding the exercise of discretion in determining who to name in an order, whereas the manager's discretion under the *Act* is circumscribed by section 27.1(3) and (4); and

- unlike the Ontario *EPA*, the *Act* sets out factors that must be considered by the Supreme Court of British Columbia in allocating liability in a cost recovery action.

Beazer says that it is clear that the drafters of the *Act* determined which factors to incorporate, and the role each would play in the legislative scheme.

Beazer argues that, if one is a responsible person that contributed most substantially, the manager must name that person in a remediation order. Beazer says that it is clear that KICL did contribute most substantially to the contamination at the Site. Beazer argues that unless Atlantic fits within one of the exemptions under the *Act* or the *CSR*, which Beazer says it does not, Atlantic is a responsible person. It submits that Atlantic is asking the Board to ignore the legal effect of the amalgamation of KICL and Atlantic, but has not provided any legal authority for doing so, or any rationale other than that it would be "in accordance with the principles of equity and fairness." However, Beazer argues that neither the manager nor the Board has any inherent or equitable jurisdiction and, as a result, they may only consider those factors specified in the *Act* prior to issuing a remediation order.

Accordingly, Beazer argues that the Assistant Manager had no jurisdiction not to name Atlantic, and this ground of appeal should be dismissed.

The Respondent alternatively argues that if equitable considerations do come into play at this stage, the evidence establishes that Atlantic inherited the responsibility for this Site through its own negligence. The Respondent submits that in equitable terms, Atlantic does not come before the Board with clean hands.

The Panel notes that it is trite law that tribunals are creatures of their enacting statutes and that they do not have inherent equitable jurisdiction. Further, while it is clear that the list of factors in section 27.1(4)(b) of the *Act* is not all-inclusive, the Panel finds that, consistent with the principles of statutory interpretation, any additional factors to be considered by the manager or the Board must relate to the factors set out therein. In the context of section 27.1(4)(b) of the *Act*, the additional factors must relate to the determination of whether the person's "activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site," and be similar in nature to the factors set out in the section, e.g., degree of involvement by the person in the contamination, or the diligence of the person in relation to the contamination. In this regard, the Panel finds that "benefit," is not an appropriate consideration – it is not in keeping with the nature of the enumerated factors.

Further, there is no mention of "benefit" in the definitions of responsible person, nor is there anything in the language of section 27.1 to indicate that a manager may consider whether a party benefited from the operations that led the site to becoming contaminated. The Panel agrees with Beazer that benefit may become relevant in the cost recovery proceedings, but does not enter into a determination of who should be named in a remediation order.

In regard to the Ontario cases, the Panel finds that the Ontario EAB was dealing with a different legislative scheme than the one before this Panel. The Panel notes that there was no guidance for the discretion set out in the Ontario statute, which was drafted many years ago. On the other hand, the Panel finds that there is a structured discretion set out in section 27.1 of the *Act* and, in addition, there are a number of significant exemptions from responsible party status.

The CCME Report was only a set of recommended principles put forward for consideration by the provinces when they drafted legislation relating to contaminated sites. The Panel finds that the *Act* and the *CSR*, which were passed after the CCME Report, incorporated some, but not all of these principles. However, it is the *Act* which governs the questions of who are responsible persons in British Columbia, who are exempt, and what factors the manager should consider in exercising his or her discretion.

The Panel also notes that, as stated earlier in the decision, the process of issuing a remediation order is a summary process to ensure that the remediation of a contaminated site can take place in an expedited fashion. Other safeguards and defences are built into the cost recovery process. Section 35(1) of the *CSR* provides that a defendant named in a cost recovery action under that section may assert "all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law." Further section 35(2) of the *CSR* lists a number of factors that must be considered when determining the reasonably

incurred costs of remediation. These include some of the factors that Atlantic is arguing should be taken into account in the remediation order process. For example, subsection (f) refers to "other factors relevant to a fair and just *allocation*." This factor does not appear in section 27.1, the remediation order section of the *Act*.

The Panel also notes that a number of the CCME factors that Atlantic is urging the Board to consider relate back to the issue of the knowledge it had at the time it amalgamated with KICL and Atlantic's contribution to contamination at the Site. The Panel finds that the *Act* provides no basis for the Board to ignore the legal effect of the amalgamation. In this case, there is no doubt and no dispute that KICL's activities contributed most substantially to the Site becoming contaminated. The Panel has already found that, due to the 1993 amalgamation, Atlantic is a responsible person under the *Act*, and one that contributed most substantially to the Site becoming contaminated.

While, in another circumstance, some of the factors suggested by Atlantic may be relevant to whether the person "contributed most substantially to the site becoming contaminated," given the amalgamation in this case, the factors are not helpful to Atlantic in the remediation order process. In any event, as stated in issue #3 above, a responsible person can be named in a remediation order even if it did not contribute most substantially to the site becoming contaminated.

In summary, the Panel finds that the Assistant Manager properly exercised his discretion in naming Atlantic to the Order, and the Panel finds no reason to come to a different conclusion.

8. Whether the Order should be vacated against Atlantic on the basis of abuse of process.

Atlantic submits that the Ministry was negligent with regard to the remediation of the Site in 1982 and the subsequent monitoring of the Site from 1983-1987, and to now include Atlantic in the Order constitutes an abuse of process by the Ministry. Atlantic argues that, as a result of the Ministry's abuse of process, the Order should be vacated against it or permanently stayed.

Atlantic notes that, in order to establish that an abuse of process has occurred, it must be demonstrated that the conduct on the part of the regulator is so oppressive, vexatious or unfair as to contravene fundamental notions of justice and thus to undermine the integrity of the judicial process. Atlantic notes that an abuse of process will be found only in the clearest of cases. It also states that a person alleging the abuse must prove it on a balance of probabilities.

On the facts, Atlantic says that the Ministry knew that KICL was seeking a "clean bill of health" when it directed KICL as to the manner in which the Site was to be remediated. Atlantic says that, once KICL had remediated the Site in accordance with the directions of the Ministry, the Ministry informed KICL that it had remediated the Site to its "satisfaction."

Atlantic argues that the Ministry was negligent as it:

(1) informed KICL that the Site had been remediated to the Ministry's satisfaction and that KICL had a "clean bill of health" when the Ministry knew that the Site remained contaminated;

(2) directed and participated in the remediation and monitoring and was negligent in that it failed to ensure that the Site was properly remediated; and

(3) conducted further testing of the Site in 1987 and failed to advise KICL and Koppers that the results of the test revealed gross contamination of the Site and that further monitoring was required.

Atlantic says that, from 1980 until the work was performed in 1983, the Ministry played a leading role in the remediation of the Site. Atlantic says that Mr. Gough and others in the Ministry, knew that the chemicals that had contaminated the soil, including creosote, were toxic chemicals. Atlantic says that they were aware that these chemicals had components within them that could leach into the groundwater from the contaminated soil, and flow into, and contaminate the Fraser River. In 1980, the Ministry and the Environmental Protection Service of Environment Canada formed a committee of members of the various regulating agencies (the "Committee"). Atlantic says that the Committee agreed that implementation of a groundwater monitoring program was essential after the remediation of the Site.

Atlantic says that KICL's goal was to obtain a clean bill of health for the Site. Atlantic says that the Site was remediated in 1983 in accordance with the remediation plan and requirements provided by the Committee to KICL. It notes that, in June 1983, Mr. Gough confirmed to KICL that the Committee was satisfied that the remediation had been carried out in accordance with the January 12, 1982 pollution abatement order. Atlantic says that the only ongoing requirement was that four wells be monitored for a period of at least one-year.

At the same time that Mr. Gough was advising KICL that the Site had been cleaned to the Ministry's satisfaction, Atlantic says that Mr. Gough advised CNR, on April 28, 1983, that: "I would expect that deeper inaccessible contaminants in the CCA and creosote areas will continue to contaminate the groundwater, albeit to a diminishing degree, in the future."

Atlantic says that the monitoring continued until December 1986. In December 1986, there was a meeting between Mr. Cruise (President of KICL after Mallory Smith) and Mr. Gough, whereby KICL sought to discontinue the monitoring at the four wells on the Site. On December 15, 1986, Mr. Cruise wrote to Mr. Gough stating:

> This letter is to confirm that we agreed it was unnecessary to continue testing at the four present locations, but, your Department, in conjunction with Koppers will continue to monitor at Location No. 8. For financial reasons, we hope this monitoring will be for a very limited period of time.

Atlantic points out that, in January 1987, the Ministry arranged for further sampling of the monitoring wells at the Site. This was co-ordinated with KICL. This sampling revealed gross creosote contamination in two of the wells. In April 1987, the results were circulated by M.C. Gow, Acting Head, Environmental Section, Waste Management Branch, to the other members of the Committee, with his recommendation that monitoring continue and that creosote be added to the chemicals being monitored in the wells at the Site. The other members of the Committee agreed with the recommendations of Mr. Gow, and confirmed that to him in writing. Mr. Gough left the employ of the Ministry in April 1987. Atlantic submits that, after this time, the monitoring became low priority. Atlantic says that the Waste Management Branch never informed KICL that there was any further monitoring required at the Site after December 1986, nor did the Ministry inform KICL that there was gross creosote contamination found in the well samples taken in January 1987.

In support of its position, Atlantic refers to the cases of *Abitibi Paper Co*. v. *R.* (1979), 24 O.R. (2d) 742 (Ont. C.A.) and *R*. v. *Repap Smithers Ltd. and D. Groot Logging Limited*, (29 Nov 1991), (B.C. Prov. Ct.) [unreported]. In *Abitibi*, a government official agreed not to lay charges against Abitibi if it complied with a pollution reduction program imposed by the Ontario government. The company complied with the program, and, despite its promise not to prosecute, the government did so. The Court stayed the proceedings as an abuse of process.

In *Repap*, the corporate accused was charged under the *Waste Management Act* for exceeding its permit. Prior to the laying of the charge, the Ministry of the Environment agreed that the company could continue to operate its non-compliant burner as long as it was working toward a long-term plan to resolve the situation. A long-term plan was delivered, and the Ministry agreed to make amendments to the permit to accommodate the plan. Shortly thereafter, the Crown laid charges against the company. The Court held that there was an abuse and that the administration of justice was best served by staying the proceeding.

Atlantic contends that the same sort of situation as in *Abitibi* and *Repap* has occurred in this case. Atlantic says that, in the 1980's, the Ministry led KICL to believe that, if it complied with the remediation program, KICL would get a clean bill of health. Atlantic argues that KICL was provided with the opinion, in writing, that it had completed the remediation of the Site to the Ministry's satisfaction in circumstances where the Ministry knew that KICL was seeking a complete sign off on the remediation, and that the Site had not been adequately remediated. Atlantic argues that, having made this misrepresentation to KICL, the Ministry is now pursuing Atlantic for the costs of remediation by naming it in the Order.

CNR submits that including Atlantic in the Order is neither unfair nor an abuse of process. CNR submits that Atlantic's desire for a clean bill of health is irrelevant. CNR claims that Atlantic did not adequately clean up the Site, and was never granted immunity. CNR further argues that Atlantic has not provided any authority which would allow a manager, or the Board, to abrogate his or her duty to see contaminated sites cleaned up on the basis of previous Ministry requirements which predate the present *Act*. CNR submits that the *Act* must be interpreted as giving a

manager the very authority and duty to fix old problems, notwithstanding previous cleanup requirements and Atlantic's wish for a clean bill of health.

CNR also argues that the cases cited by Atlantic, *Abitibi* and *Repap*, are distinguishable from the facts in this case. It submits that, in those cases, the Courts found that some form of immunity from future "charges" had been granted, and that future charges were laid despite such immunity. CNR says that these decisions have no bearing on whether a manager under the *Act* has the jurisdiction to issue a remediation order to protect the environment. In *Abitibi*, the Court cautions that a finding of abuse of process will be limited to a "most exceptional circumstance." In *Repap*, which also dealt with "charges," the Ministry's authority to take preventive and remedial steps to address the contamination emanating from the burner in question was not challenged, and the burner was shut down. CNR says that the present case does not involve "charges" or any claim to immunity therefrom. Rather, it involves the statutory requirement that the manager continue to be vigilant in cleaning up contaminated sites.

While CNR also believes that the Ministry was negligent in failing to adequately clean up the Site in the early 1980's, and in failing to adequately monitor the Site in subsequent years, it says that the Ministry's level of responsibility is immaterial to the determination of whether Atlantic has been correctly named as a responsible person. CNR submits that these facts constitute a case against the Ministry *only* in the context of the cost recovery actions that are presently underway in the civil courts.

Finally, CNR argues that there is no doubt that Atlantic contributed most substantially to the contamination of the Site, notwithstanding any failings on the part of the Ministry, or Beazer. It says that any negligence on the part of the Ministry does not exculpate Atlantic from liabilities arising from its long-standing relationship as an "owner" and "operator" of a contaminating wood treatment plant on the Site.

The Respondent submits that, while this proceeding is not a criminal proceeding, the cases provide that the extraordinary remedy of a stay will be granted by the court only in the clearest of cases, and that the onus is on Atlantic to prove that the abuse of process meets this burden on a balance of probabilities.

The Respondent submits that there is no evidence before the Board that the Assistant Manager included Atlantic in the Order for any improper purpose. It says that, the fact that a prior cleanup was conducted, does not preclude the issuance of a further remediation order. Moreover, the fact that the Site is heavily polluted by today's standards *requires* that it be remediated. The Respondent submits that, even if ministerial negligence related to the prior cleanup is proven, it would not discharge the burden on Atlantic to show that the Assistant Manager acted in bad faith in issuing the Order against Atlantic.

The Respondent also argues that there can be no abuse of process as section 28.7 of the *Act* specifically authorizes the issuance of a remediation order, regardless of

whether or not the responsible parties undertook previous remedial work at a site. Section 28.7 provides as follows:

Government retains right to take future action

28.7 A manager may exercise any of the manager's powers or functions under this Part, even though they have been previously exercised and despite any voluntary remediation agreement, if

(a) additional information relevant to establishing liability for remediation becomes available, including information that indicates that a responsible person does not meet the requirements of a minor contributor,

(b) standards under the regulations have been revised so that conditions at a site exceed or otherwise contravene the new standards,

(c) activities occur on a site that may change its conditions or use,

(d) information becomes available about a site that leads to a reasonable inference that a site poses a threat to human health or the environment,

(e) a responsible person fails to exercise due care with respect to any contamination at the site, or

(f) a responsible person directly or indirectly contributes to contamination at the site after the previous action.

Regarding Atlantic's specific allegations of negligence, the Respondent submitted as follows.

Mr. Gough testified that he never advised anybody that further remedial work would not be required at the Site. The Respondent says that Mr. Gough indicated that monitoring was required because, although reduced by the capping of the Site, there was potential for groundwater flow to continue. Mr. Gough testified that his June 20, 1983 letter stating that the remedial plan had been implemented "to the satisfaction of the Ministry" was not an unconditional sign off on the Site. He also stated that he verbally advised KICL that, although the Ministry was satisfied with the cleanup and monitoring to date, it could not provide complete assurances that future cleanups would not be necessary. Mr. Gough testified that the Ministry did not know if the remedial plan would work. The hope was that the measures implemented would result in a significant diminishment of the groundwater contamination.

Mr. Gough also testified that Mr. Cruise's December 15, 1986 letter to him did not accurately characterize his understanding of the agreement between them. He said that the Ministry was going to do sampling in early 1987 and that, after it took place, a decision would be made as to whether further sampling needed to be done.

Mr. Gough also testified that he never advised anyone from KICL that the Ministry was prepared to end the monitoring program in place at the Site. Mr. Gough left the Ministry in April 1987, and has no personal knowledge of what took place regarding the monitoring program in the spring of 1987. He indicated that fulfilment of the terms of the pollution abatement order would not equate to a clean bill of health.

Mr. Quagliotti, in an April 19, 1983 record of a conversation he had with Bill Wotherspoon, noted: "Informed Wotherspoon [that] Ministry of Environment could change their mind 5 years from now and require excavation of remaining material (under the building)."

The Panel finds that the cases relied on by Atlantic are distinguishable from the facts in this case. *Abitibi* and *Repap* involved the Ministry granting some form of immunity from future charges being laid, and then such future charges were laid despite such immunity. As CNR points out, in *Repap*, while an abuse of process was found in relation to the laying of charges, the Ministry's authority to take remedial steps to address contamination was not challenged.

In any event, the Panel finds that Atlantic's allegations of Ministry negligence in this case are not grounds for removing it from the Order. The Panel finds that there is authority for the Ministry to issue a remediation order, whether or not previous remedial work was done, to protect the environment and human health. The Panel agrees with CNR that the *Act* must be interpreted to give the manager the authority to fix up old problems, notwithstanding previous cleanup requirements.

The Panel finds that it was not an abuse of process for the Assistant Manager to have named Atlantic in the Order.

However, even if the previous cleanup had been conducted to the satisfaction of the Ministry in the 1980's, and the Ministry failed to advise the relevant parties as to the results of the 1987 monitoring, the Panel notes that the old version of the *Act* did not prohibit the Ministry from taking further action on a site that had already been "remediated." Further, the new contaminated sites provisions in Part 4 of the *Act* contains section 28.7 which specifically authorizes a manager to exercise his or her powers or functions under Part 4 "even though they have been previously exercised and despite any voluntary remediation agreement" provided certain conditions are met. One of those conditions is that "information became available about a site that leads to a reasonable inference that a site poses a threat to human health or the environment." This section reinforces a finding that protection of the environment is the ultimate goal of this legislation.

In this case, the Assistant Manager was dealing with a situation where, on the basis of information known to him, and for the protection of the environment, he had to consider naming persons to a remediation order who contributed most substantially to the Site becoming contaminated. The Panel, in this case, finds that it was not an abuse of process for the Assistant Manager to have named Atlantic in the Order. The question of whether the allegations made by Atlantic support an action against

the Ministry in negligence is a matter properly left to the Court in the allocation proceedings.

9. Whether the Order should be stayed against Atlantic pending the resolution of its lawsuit to recover costs from other parties.

Atlantic also asks for a stay of the Order against it pending the resolution of the civil proceedings that it has instituted to recover remediation costs. It is claiming that CNR, Beazer and the Ministry should be financially responsible for any damages that it suffers as a result of being found a responsible party.

Atlantic argues that the Order should be stayed for the following reasons:

(1) Atlantic received no benefit with regard to the contamination of the Site;

(2) CNR and Beazer, who obtained significant financial benefits, are responsible parties and are in a financial position to ensure the Site is remediated;

(3) the liability of Atlantic, if any, arises directly as a result of the negligence of the Ministry, which is one of the subjects covered in the outstanding civil litigation;

(4) the financial circumstances are such that the upholding of the Order naming it as a responsible party could lead to permanent financial harm that could not properly be compensated by monetary damages in the civil action; and

(5) there is no prejudice to the Ministry, the other responsible parties or the Site, as the Site will be remediated, and if Atlantic is unsuccessful in the civil litigation, they will have recourse to Atlantic for damages.

The Respondent says that the jurisdiction of the Board to grant a stay is confined to the granting of an interim stay of proceedings pending the hearing of the appeal. It says that the Board has no jurisdiction to grant a stay of proceedings that would remain in force once the appeal is decided.

The Panel agrees with the Respondent that the Board's jurisdiction is limited to the granting of a stay pending a decision on the merits of an appeal. The Board has no jurisdiction to issue a stay once it has made its determination on the issues that are before it in these appeals. If Atlantic wants the Order stayed pending determination in the civil actions, the proper procedure is to make an application to the court.

DECISION

In making this decision, the Panel has carefully considered all the evidence and testimony provided, whether or not specifically reiterated herein.

The Panel finds that Beazer is a responsible person as it meets the definition of owner and operator pursuant to section 26(1) and 26.5(1)(b) of the *Act*. The Panel does not find that Beazer is a responsible person pursuant to subsection 26.5(1)(c) of the *Act*. The Panel also finds that the Assistant Manager properly exercised his discretion in naming Beazer to the Order, and the Panel has not heard any evidence that would cause it to remove Beazer's name from the Order.

The Panel finds that Atlantic is a responsible person in the Order as it also meets the definition of owner and operator under the *Act*. The Panel finds that the Assistant Manager properly exercised his discretion in naming Atlantic to the Order, and the Panel has not heard any evidence that would cause it to remove Atlantic's name from the Order.

For the reasons given above, the Panel dismisses the appeals and upholds the Order of the Assistant Manager, with the deletion of the reference to subsection 26.5(1)(c) in relation to Beazer.

The Panel thanks the parties for their very thorough and thoughtful submissions in these proceedings.

Toby Vigod, Chair
Environmental Appeal Board

March 29, 2000