

***“Freeze and Release”* –
A Practical Approach to Navigating
the Site Profile Process**

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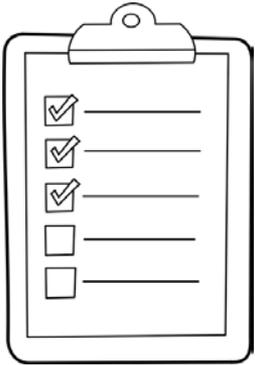
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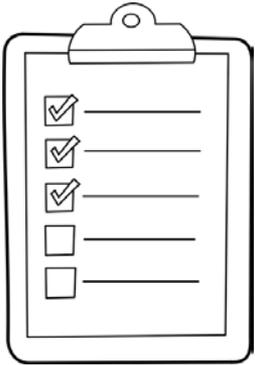
Introduction

1. Purpose of the Site Profile Process
2. The Trigger
3. The Freeze
4. Forwarding the Site Profile to the Director
5. Site Investigation Required
6. Obtaining a Release
7. Role/authority of local governments as part of release process



The Site Profile Process

- ▶ **Purpose:** to create a uniform process for the screening of potentially contaminated sites based on past uses/operations (industrial/commercial use)
- ▶ Not a perfect system
- ▶ Intended to identify and encourage remediation of contaminated sites before redevelopment
- ▶ Intersection/overlap of responsibilities between the Ministry and local governments
- ▶ Potentially significant consequences for land owners planning redevelopment/development of a site (delay costs)

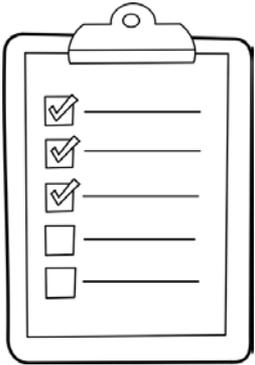


The Trigger – s. 40, EMA

When is a Site Profile Required?

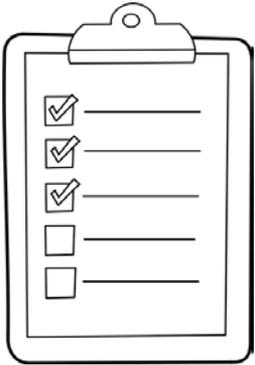
1. subdivision of land (to the approving officer);
2. municipal approval (to the applicable municipality) for:
 1. zoning permit;
 2. development or development variance permit;
 3. permit for the removal of soil;
 4. demolition permit for structure on the land,

where the person knows or reasonably should know the land *is or was used for* “industrial or commercial activity”



The Trigger – s. 40, EMA

- ▶ Part 2, Contaminated Sites Regulation (“**CSR**”), definition of “*industrial or commercial activity*”
- ▶ Refers to Schedule 2, CSR – list of prescribed industrial/commercial activities (“Schedule 2 Activities”)
- ▶ Includes sites which have been or likely have been contaminated by substances migrating from other properties – victims of migration are captured!
 - ▶ Notice of Migration likely sufficient to trigger
 - ▶ something less?



The Trigger – s. 40, EMA

- ▶ **Test** = knows or reasonably should know
 - ▶ imparts a subjective and objective element
 - ▶ subjective = what the owner actually knows
 - ▶ objective = what the owner reasonably should know (based on the history of the site and other surrounding circumstances)
- ▶ **Key** = Site profile sometimes completed by consultant for the owner
- ▶ Person completing form must do so accurately and to “best of knowledge”
- ▶ How much due diligence is required on the part of a consultant? *Err on the side of caution*
- ▶ If completed by consultant, required to set out how much access to information had to complete the form

Exemptions to Trigger – s. 4 CSR

1. Municipality has opted-out (s.4(4), CSR; Factsheet 6)
 - ▶ may have own requirements, however
2. Activity for which the permit is sought does not involve any “*disturbance or excavation of soil*” (s.4(7), CSR)
 - ▶ ambiguous – no clear definition.
 - ▶ likely that most construction will meet definition such that exception does not apply

Residual discretion... (s.2(2), CSR)



The Freeze

- ▶ Once the obligation to provide a Site Profile is triggered under s. 40 of the EMA, the approving officer or municipality is **prohibited** from (“**must not**”) approving/issuing the permit requested until a “release” is obtained
- ▶ No discretion
- ▶ Owner must be advised of this by consultant if completing the Site Profile form – avoid surprises!
- ▶ Even if think release can be obtained quickly – some delays are inevitable
- ▶ Timing is often critical for owner planning redevelopment



The Freeze – Municipal Legislation

- ▶ *Vancouver Charter*, section 571B
- ▶ *Islands Trust Act*, s.34.1
- ▶ *Land Title Act*, s.85.1
- ▶ *Local Government Act*, s.946.2

Effect = Ability to issue approval sought is suspended until release obtained once the obligation to provide a Site Profile is triggered

Site Profile – Municipal Obligations

Two-Step Process

- ▶ The approving officer/municipality is required to assess the Site Profile to, initially, determine whether the Site Profile is satisfactorily completed (s. 40(3)(a), EMA)
 - ▶ everything properly filled out?
- ▶ The approving officer or municipality must then assess the Site Profile and determine whether it should be forwarded to the director because a site investigation may be required (s. 40(3)(b)(c), EMA)
 - ▶ must do within 15 days of receiving the Site Profile

Site Profile – Municipal Obligations (s. 6, CSR)

When will the approving officer or municipality forward the Site Profile to the Director?

- ▶ If person answers “**YES**” to any of the questions in Part IV to IX of the Site Profile (s.6(c)(i), CSR)
- ▶ e.g., contamination resulting from migration of substances from other properties, Government orders or other notifications pertaining to environmental conditions or quality of soil, water, groundwater or other environmental media.
- ▶ No discretion, municipality must forward

Site Profile – Municipal Obligations

- ▶ If approving officer or municipality is **not** required to forward a copy of the Site Profile to the Ministry (i.e., no “YES” answer in the Site Profile), the approving officer or municipality is able to approve the permit (a “release” is obtained)
- ▶ This is the easiest way to obtain a “release”
- ▶ **But**, municipality has residual discretion to forward a copy of the Site Profile to the Ministry if information in the Site Profile is inconsistent with that possessed by the municipality
 - ▶ must given opportunity for the owner to respond before exercise this residual discretion

Site Profile – Municipal Obligations

If the approving officer or the municipality is required to forward the Site Profile to the Ministry under section 6 of the CSR, then...

The Director's Decision – Investigation Required?

- ▶ Section 7, CSR – Whether PSI or DSI required under s. 41 of the EMA
- ▶ 15 days – can extend to 30 days
- ▶ **General Rule** = If past industrial/commercial activity identified, site investigation will typically be ordered (Administrative Guidance 6)
- ▶ Exceptions:
 - ▶ previous investigation already completed
 - ▶ defer or delay investigation with no impact on human health or environment



The Director's Decision – Investigation Required?

- ▶ If Director determines that a site investigation is not required under s. 41 of the EMA, then approving officer or the municipality is permitted to approve the permit requested – i.e., a “release is obtained”
- ▶ Another quick way to obtain a release

The Director – Investigation Required?

- ▶ Appealable decision to the Environmental Appeal Board under s. 99 of the EMA

- ▶ **Procedural Duties:**
 - ▶ processing time (s. 7, CSR)
 - ▶ keeping the owner informed

- ▶ **Substantive Duties:**
 - ▶ was the decision reasonable/was there a proper foundation to require a site investigation (s. 41, EMA)

The Director – Section 41, EMA

Substantive Duty:

When is site investigation required?

... if the director reasonably suspects on the basis of a site profile, *or any other information*, that the site:

- (a) may be a contaminated site, or
- (b) contains substances that may cause or threaten to cause adverse effects on human health or the environment.



A Cautionary Tale... *CNT Holdings v. BC (Ministry of Environment)*, 2009 BCEA No. 9

The Facts

- ▶ Appeal of director's decision to require DSI
- ▶ CNT (owner) seeking to subdivide lots and change the land use for some of the lots to residential
- ▶ Previous gas bar on site
- ▶ Registry status – “inactive – no further action”
- ▶ Previous owner did some remediation pursuant to a pollution abatement order
- ▶ CNT aware of past use when purchased land
- ▶ CNT applied for rezoning and subdivision – material forwarded to various ministries (including MOE) with no response
- ▶ CNT obtained reports and submitted a site profile to the approving officer, which then forwarded it to the MOE → resulting freeze
- ▶ MOE determined that it required further work/investigation before releasing the permit

CNT Holdings v. BC (Ministry of Environment), cont'd

- ▶ CNT argued:
 - ▶ Director did not exercise discretion reasonably
 - ▶ Director should be estopped from now forcing DSI
 - ▶ Fairness argument - unfair to require it to do DSI for all six lots when past owner (and polluter) not required to



CNT Holdings v. BC (Ministry of Environment), cont'd

Board's Decision

- ▶ Allowed appeal (in part) – technical grounds – DSI ought to be limited to two of the lots because of evidence that groundwater had not been addressed on these lots.

But the Board...

- ▶ Rejected CNT's argument that unfair to require non-polluter to perform the DSI as part of permit application
- ▶ Rejected CNT's argument that unfair to order DSI when MOE failed to respond to earlier info – no acquiescence/estoppel
- ▶ Remedy for the owner – pursue previous owner for the costs of remediation – EMA structured in this way

CNT Holdings v. BC (Ministry of Environment) cont'd

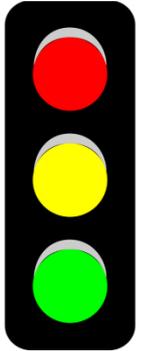
“The law and legislation governing contaminated sites is complex and the obligations that can be imposed under the legislation, as the Appellant has found out, can be onerous and expensive.”
(para. 34)

“In general, owners and developers of commercial/contaminated sites are assumed to have purchased them with knowledge of the potential obligations that may arise as a result of rezoning and subdividing. Determining such matters in advance of the expenditure of funds is the responsibility of a prudent developer.”
(at para. 37)



CNT Holdings v. BC (Ministry of Environment) – Key Takeaways

- ▶ Director has broad discretion to require further investigation prior to redevelopment of a site
- ▶ Likely a hard decision to appeal on grounds of unfairness/reasonableness, but still can be appealed (must be the right case)
- ▶ Owner must be aware of risks – remediation costs and delays



Obtaining a “Release”

- ▶ Already discussed two of them:
 1. Where approving officer/municipality is not required to forward the Site Profile to the Ministry;
 2. Where Director determines that no site investigation is required after being forwarded a copy of the Site Profile.

Five other circumstances to obtain a release:

1. Notice that final determination has been made that the site is not a contaminated site;
2. Notice from the Director that can approve because the site is not a significant threat or risk if application were approved;
3. Notice from the Director that it has approved/accepted a notice of independent remediation;
4. Notice from the Director that it has entered into a voluntary remediation agreement;
5. Notice from the Director of a valid and subsisting AiP or CoC obtained;

Land Title Act, s. 85.1; Islands Trust Act, s. 85.1; Local Government Act, s. 557; Vancouver Charter, s. 571B.

Obtaining a Release – Cost Recovery Claim under the *EMA*

- ▶ Innocent victim of migration may be required to incur costs of remediation in obtaining a release from the Ministry to proceed with redevelopment/development
- ▶ Cause of action against the previous owners/operators under the *EMA* for costs incurred
- ▶ Likely that most of the “hard” costs incurred will be “cost of remediation”
- ▶ But, costs must be reasonable to be recoverable
- ▶ Owner must be advised of this potential claim at early stage – ensure best chance of success at later date if litigation commenced
- ▶ Also, preserve limitation period

Obtaining a Release

- ▶ EMA/CSR do not specify any legislative time requirements to processing applications for release (exception – decision to forward and decision on whether site investigation required)
- ▶ Conditions likely to be imposed as part of the release
- ▶ *Secret v. British Columbia (Director, Environmental Management Act)*, 2008-EMA-008(a):
 - ▶ decision by the Director issuing a notice to the municipality releasing the freeze and allowing municipality to issue a development permit is not an “appealable” decision under the EMA
 - ▶ Director’s “notice” made under different legislation - not appealable

Obtaining a Release – Role of the Municipality - Issues

- ▶ What conditions can be imposed by the municipality when issuing a permit even if a release is obtained?
- ▶ How broad is the jurisdiction conferred on the municipality?
- ▶ Can the municipality force remediation as a condition of providing a permit to a property owner/developer?

Obtaining a Release – Role of the Municipality

- ▶ Jurisdiction is broad, but does contain some limits
- ▶ Jurisdiction is determined through the interpretation of the statute conferring its powers
 - ▶ must look to the enabling legislation (i.e., *Local Government Act*, *Vancouver Charter*, *Community Charter*, etc.) to determine authority
- ▶ Courts will interpret “broadly and purposively” (*Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13)
- ▶ Legislation is often long/complicated
- ▶ Can’t impose conditions beyond those provided for in the statute
 - ▶ but, statutory grounds are often vague/ambiguous

Obtaining a Release – Role of the Municipality

- ▶ The application must be considered in light of the relevant development permit objectives and guidelines in the official community plan as well as applicable bylaws (zoning etc.)
- ▶ If the local government considers irrelevant factors or acts in a discriminatory fashion, the court may order it to reconsider the application on the relevant grounds
- ▶ Decision of the local government is subject to judicial review (60 days)

Obtaining a Release – Example – City of Vancouver

Jurisdiction (e.g., City of Vancouver):

- ▶ General welfare provisions: “*may provide for the good rule and government of the city*” (*Vancouver Charter*, s. 189)
- ▶ Authority to regulate and make bylaws in relation to land development (*Vancouver Charter*, s. 565A)
- ▶ “development” is a “change in use of any land or building, or the carrying out of any construction, engineering or other operations in, on, over or under land or land covered by water” (*Vancouver Charter*, s. 559)
- ▶ Authorized to make bylaws prohibiting any person from undertaking any development without having first obtained a development permit, which can be limited in time and **subject to conditions** (*Vancouver Charter*, s. 565A)
 - ▶ what type of conditions?



Imperial Oil Ltd. v. McAfee, 2005 **BCCA 402**

The Facts

- ▶ Former gas station owned by Imperial
- ▶ Migration of contaminants to surrounding properties, including City roads
- ▶ Imperial sought to redevelop the Site – applied to City for permits
- ▶ Already obtained AiP based on remediation plan – contemplated natural attenuation of remediation during redevelopment
- ▶ City refused to issue unless:
 - ▶ Imperial remediated off-site impacts; or
 - ▶ Imperial agreed to terms of Off-Site Soils Agreement (“OSA”)

Imperial Oil Ltd. v. McAfee, cont'd

- ▶ City relied on ss. 565A and 189 of the *Vancouver Charter*
- ▶ Conditions of the OSA:
 - ▶ recognition of responsibility by Imperial for off-site impacts
 - ▶ covenant to clean-up off-site
 - ▶ indemnification for any damages arising from the contamination
 - ▶ monetary security



Imperial Oil Ltd. v. McAfee, cont'd

- ▶ Trial Judge:
 - ▶ matter of statutory interpretation
 - ▶ City's ability to impose conditions on a development permit is limited to conditions connected to the appropriateness and impact of the development
 - ▶ s. 565A confers a power to impose conditions related only to the development in questions, and not to off-site environmental contamination and associated liability unrelated to the development for which the permit is sought
 - ▶ purposes for which the City sought to impose the clean-up condition could not be founded on the authority in s. 189 to provide "good rule and government" – i.e., general welfare provision



Imperial Oil Ltd. v. McAfee, con't

Court of Appeal affirms decision of trial judge

- ▶ City had no authority to require Imperial (who had already obtained approval from the Ministry for its remediation plan) to further remediate off-site contamination as a condition of obtaining a municipal development permit
- ▶ “conditions” in section 565A did not include ability to require remediation – authority is to regulate development, not contaminated sites
- ▶ General Welfare Provision (s. 189) does not provide authority – to interpret so broadly would make the rest of the *Vancouver Charter* redundant and superfluous

Imperial Oil Ltd. v. McAfee – Keys

- ▶ Municipality's jurisdiction is limited
- ▶ Unlikely to be able to impose off-site conditions on issuance of permits when proper release already obtained from the Ministry
- ▶ Conditions imposed must relate to the development in question (not off-site)
- ▶ A municipality cannot use a general “good government” rule as authority for imposing conditions on the issuance of a development permit that are unrelated to the development in question

Municipal Immunity – s. 61, EMA

- ▶ Immunity provided to municipality and approving officer for site profile process and freeze/release provisions
- ▶ No proceeding can be brought based on
 - ▶ act, advice, including pre-application advice, or recommendation, or
 - ▶ failure to act, failure to provide advice, including pre-application advice, or failure to make recommendations
 - ▶ purported exercise or performance of powers, duties or functions, or
 - ▶ failure to exercise or perform any powers, duties or functions
- ▶ Exception for “*dishonest, malicious or willful misconduct*”

Changes Coming...

- ▶ Site Profile process is something that the Ministry has been looking at in terms of forthcoming changes
- ▶ Discussion paper just release from the Ministry – *Site Identification Intentions Paper*

Possible changes:

- ▶ Less discretion on the part of the Director as to whether a site investigation is required
- ▶ No automatic freeze – able to continue with development at the same time as doing site investigation
- ▶ Remediation may now be required

Conclusions

- ▶ Site Profile process can have significant impact on owners – especially those planning redevelopment
- ▶ Timing is key as part of redevelopment – inevitable delays and unpredictability as part of the Site Profile process
- ▶ Owner must be fully advised of the risks involved, where delays may occur and the impact of the freeze/release provisions

Questions?

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