Citation: O'Connor v. Fleck
2000 BCSC 1147

Date: 20000726
Docket: C923892
Registry: Vancouver

# IN THE SUPREME COURT OF BRITISH COLUMBIA



BETWEEN:

**GERALD T. O'CONNOR**

PLAINTIFF

AND:

**RUBEN W. FLECK, GREGORY PATTON
and FOURWAY FOUNDRY LTD., formerly known as
Fourway Brass And Aluminium Foundry Ltd.**

DEFENDANTS

# REASONS FOR JUDGMENT

# OF THE

# HONOURABLE MADAM JUSTICE LYNN SMITH

Counsel for the Plaintiff: H.S. MacDonald

Counsel for the Defendants: D. Robinson, Q.C.

Date and Place of Hearing/Trial: Vancouver, BC
March 8-12, 15-19, 1999
June 21-25, 1999
and June 16, 2000

***INTRODUCTION***

[1] The dispute in this case is about the state in which the defendants left the premises they leased from the plaintiff when they terminated their 26-year occupation and moved to new premises across the street.

[2] The defendant tenants carried on a brass and aluminium foundry business in the plaintiff landlord's building at the corner of Raymur Avenue and East Cordova Street in Vancouver under a series of leases beginning July 1, 1964 and ending on June 30, 1990. Gradually over the years the defendants took more and more space, and made a number of changes to the building in order to accommodate their equipment and operations. As well, the brass and aluminium foundry created a substantial quantity of dust and debris. Although the defendants did some cleaning and repairs before they left, these were not to the satisfaction of the plaintiff, who has sued them for breaches of covenants under the lease. In addition he has claimed costs of remediation from them due to their alleged failure to comply with the ***Waste Management Act***, R.S.B.C. 1996, c. 482.

***EVIDENCE AND FINDINGS OF FACT***

[3] Gerald O'Connor, the plaintiff, has owned the building at Raymur and Cordova in Vancouver since 1960. The area is zoned M2, for heavy industrial use. It is somewhat inaccurate to describe it as "a building" because it was constructed in different stages over a period of years. It has the appearance of being at least two buildings side-by-side. There is not a ceiling or crawlspace area which is common to the entire structure. The interior of the building

was described by one witness as a "warren". It is currently being rented to a variety of tenants, the previous Fourway space having been subdivided.

[4] The lease upon which the plaintiff relies was between himself as lessor and the three defendants as lessees for a ten-year term commencing July 1, 1980, and included all of the following portions of the building:

> Units 101, 102 and 103 - 1055 East Cordova Street;
> Unit 101 and the loading and access area adjacent thereto, 1019 East Cordova Street;
> Unit 203 - 260 Raymur Avenue; and
> 258 Raymur Avenue.

[5] Previous leases were signed by Ruben Fleck (and his three brothers Henry, Daniel, and Sam Fleck) carrying on business as Fourway Foundry in 1964 and 1966, by Ruben, Daniel and Sam Fleck and Fourway Brass & Aluminium Foundry Ltd. in 1971, and by Ruben Fleck, Lloyd Patton and Fourway Brass & Aluminium Foundry Ltd. in 1976. As the years progressed the foundry operation required more space, and occupied more of the building. Under the 1980 lease the lessees occupied approximately two-thirds of the main floor. Over the period of time from the first lease in 1964 when the defendants leased about 1,587 square feet, to the final lease in 1980 when they took 8,641 square feet, their leased premises increased to about 43% of the total leasable space in the building.

[6] During the 26 years the tenants, at various times, dug out the concrete floor to install three below ground pit furnaces, made openings in the roof and walls including a large opening in the roof to enable a sand conveyor system to

be installed, placed a large structure on the roof to protect the sand conveyor system from weather, removed a washroom and office in order to install a large piece of equipment called a "shaker" (which also required a floor opening), put up five sheds or outbuildings on the east side of the building in the parking area, set up a "heat treatment" area near the east wall of the building, built a mezzanine or gantry in a portion of the premises, and modified the sprinkler system. Some of these changes were with the permission of the plaintiff; the plaintiff's position is that some others were without his permission. The defendants' position is that they sought and obtained permission for all significant changes.

[7] Mr. O'Connor's evidence was that there were numerous discussions beginning in 1964 with the first tenancy, in which the defendants (usually through Mr. Ruben Fleck) would seek permission to alter the structure and Mr. O'Connor would give such permission on condition that the building would be restored to its original condition when the tenants moved out. Mr. O'Connor testified to such discussions with respect to all of the significant changes already described, with the exception of the mezzanine and the large structure on the roof. With respect to those, he says he did not give permission in advance but did not, on the other hand, demand that they be removed once he learned of them as *faits accomplis*. In the case of the structure on the roof, his evidence was that he agreed with the installation of the sand conveyor system but did not understand from the information provided to him by the defendants that there would be a large structure on the roof to cover it. He called the structure "the chicken coop" and indicated in his evidence that he did not pursue the matter at the time because he knew the

defendants needed the equipment to carry on their business and because his health was not good at the time.

[8] Mr. Ruben Fleck's evidence, on the other hand, was that they did not make significant changes to the building without permission. However, he testified, it was only in the cases of openings in the floor, walls or ceiling, and the installation of the pit furnaces, that there was a discussion about the defendants having to remove things later. He said that it was understood that if they attached something to the building they would have to leave it. Mr. Ron Zaleschuk, who is Mr. Fleck's son-in-law and now a 50% shareholder in the company, assumed responsibility for management of the foundry operation at a certain point and was involved in some of the later discussions with Mr. O'Connor. He denied that the shed on the roof was built without permission. He denied being involved in any discussions about reinstating the building until those that took place at the end of the tenancy. He agreed that he understood that things attached to the building would have to be left.

[9] After so many years it is not surprising that memories differ as to what was said. I have reviewed the evidence of Mr. O'Connor, Mr. Fleck and Mr. Zaleschuk, and have concluded that Mr. O'Connor's recollection is the more accurate. I have come to this conclusion for these reasons. First, it is implausible that Mr. O'Connor would have agreed to the kinds of major changes Fourway was making without an understanding or an expectation that the building would be reinstated when they left. This applies not only to the pit furnaces and openings in walls, roof, or floor (the areas which Mr. Fleck conceded in cross-examination at trial) but also to others of similar magnitude. There was no basis in

the evidence to conclude that the tenants could reasonably have assumed that, so long as Mr. O'Connor gave permission in advance for what they wanted to do to the building, he would waive the reinstatement provisions of the lease when it ended. Second, Mr. O'Connor's memory seemed excellent and detailed. Clearly, he has spent a good deal of time keeping track of the building, and his recollections seemed authentic. Third, Mr. O'Connor's manner of testifying seemed straightforward. On the other hand, the manner in which Mr. Fleck answered and the discrepancy between his evidence at trial and on discovery (at his examination for discovery he denied any agreement to reinstate anything) suggested to me that there was likely a wider area of agreement between himself and Mr. O'Connor about what would be reinstated than he was prepared to admit, and that it did include the areas Mr. O'Connor described.

[10] Therefore, in general I accept Mr. O'Connor's evidence and find as fact that the defendants did agree, when they were seeking permission to make significant changes to the building, that they would reinstate it when they moved out. I also accept his evidence that he reminded the defendants of this commitment on numerous occasions, particularly when the lease was being renewed.

[11] The foundry operations generated dust and waste. The dust found its way into the ceilings, walls and floor cavities. It has proved to contain metallic components, and the plaintiff's position is that it is “waste” or “special waste” within the meaning of the ***Waste Management Act***.

[12] As each of the first four leases ended and a new one began, Fourway carried on its business without taking steps to restore, clean or reinstate the premises.

[13] On June 24, 1980, the same day they signed the 1980 lease, the parties signed another document (the “Surrender Agreement”) in which the lessees surrendered the remaining portion of the 1976 lease (which was to run until 1983). Paragraph 3 of the Surrender Agreement provides:

> The Lessor hereby releases the Lessee from all liability, claims and demands in respect of all breaches of any of the covenants contained or otherwise arising under the said lease.

[14] The 1980 lease itself provides that the demised premises "are to be used for the purpose of a BRASS AND ALUMINUM FOUNDRY, and for no other purpose without the consent of the Lessor in writing". It contains the following covenants by the lessee:

> TO repair (reasonable wear and tear and damage by lightning, and earthquake excepted)
>
> …
>
> AND the Lessor may enter and view state of repair and the Lessee will repair according to notice (reasonable wear and tear, and damage by lightning, and earthquake excepted)
>
> AND the Lessee will leave the premises clean and free of industrial waste and in good repair, (reasonable wear and tear and damage by lightning and earthquake excepted)
>
> …
>
> AND THE LESSEE SHALL:
>
> Not make any alterations in the structure, plan or partitioning of the premises, nor install any plumbing, piping, wiring, venting or heating apparatus, or appliances, without the permission of the Lessor or his Agent first had and obtained, and at the end or sooner determination of the said term will, after consultation with the Lessor, and at the

Lessor's explicit direction, and at the Lessee's expense, restore the premises, including the roofs thereof, so far as the Lessor shall require, to the existing condition prior to the occupancy and alterations by the Lessee, but otherwise all repairs, alterations, installations and additions made by the Lessee upon the premises and movable business fixtures, shall be the property of the Lessor and shall be considered in all respects as part of the premises.

…

ERECT, place, use or keep in or upon the premises only such shades, window blinds, awnings, projections, signs, advertisements, lettering, devices, notices, paintings or decorations as are first approved in writing by the Lessor, and upon the expiration or determination of this Lease will remove the same if required to do so by the Lessor.

…

NOT bring into or upon the premises any safe, motor, machinery or other heavy articles or equipment without the consent of the Lessor in writing first had and received, and will immediately make good any damage done to any part of the building or premises by bringing in or taking away the same, ….

AND the Lessee will comply with all regulations of Civic, Municipal, Pollution Control Boards or other governmental agencies insofar as these regulations might be directed against the building or property known as 1055 East Cordova Street, in the City of Vancouver, in the Province of British Columbia, and that all compliances with regulations now or in the future will be at the Lessee's own cost and expense.

PROVIDED that after the term herein or any renewal thereof, the building must be reinstated to the condition existing at the time of original occupancy by the Lessee, at the Lessee's cost, where the Lessor at his option so directs and including but not limiting the foregoing, the Lessee will remove and/or repair all openings made in the roof or any internal or external walls of the demised premises

> and will repair the concrete and the floor where pit furnaces or other machinery has been installed.

[15] The 1980 lease also provides:

> THAT the whole contract and agreement between the parties hereto is set forth herein, that the Lessee has leased the premises after examining the same, that no representations, warranties or conditions have been made other than those expressed or implied herein and that no agreement collateral hereto shall be binding upon the Lessor unless it be made in writing and signed by the Lessor.

[16] It became clear to Mr. O'Connor in the spring of 1990 that there would be no new lease with Fourway and the other Lessees. They had bought property across the street from the premises and would be moving their operations there. Mr. O'Connor inspected the premises and took a number of photographs. He wrote a letter to Fourway on May 15, 1990 setting out a list of requirements for cleaning and restoring the premises. The plaintiff's position is that the defendants did not meet these requirements, and that the requirements flowed from the covenants under the lease. The defendants' position is that they left the premises in an appropriate condition for industrial use and that the plaintiff was seeking to upgrade and improve the premises rather than simply have them restored. The defendants' position also is that the effect of the Surrender Agreement in 1980 was that only changes made since that date needed to be restored by the defendants.

[17] Mr. O'Connor had the building partially cleaned and restored and proceeded to rent it to a number of new tenants.

[18] In July, 1990 after the tenants had vacated the building the plaintiff retained Gordon Spratt, P.Eng., to inspect a structural column which had significantly degraded.

[19] The writ was issued on June 19, 1992.

[20] In June, 1995, the defendants retained William Gaherty, an environmental engineer specializing in contaminant fate, environmental chemistry, and cleanup. He provided a report with recommendations as to how to handle contaminated material beneath the floor and above the ceiling of the building. He recommended a management plan for the dust to ensure that renovation workers are not inadvertently exposed, but opined that removal was not necessary. He recommended that removal of the debris in the crawlspace would be prudent and could be done at modest cost, assuming that the defendants could undertake the work themselves.

[21] In June 1998, the plaintiff retained Tom Cotton, environmental engineer specializing in environmental/occupational health and safety, to conduct an investigation of the premises regarding the possible presence of contaminated materials. The investigation did disclose the presence of such materials in the crawlspace, in the ceiling and wall cavities, and in the concrete capped pits. Mr. Cotton proposed certain remediation and management steps, including removal of the materials from the crawlspace and from the ceiling and wall cavities.

[22] In January 1999, Mr. Gaherty again reviewed the matter and reported that in his opinion sources of contamination in addition to the activities of the defendants had contributed to the site and building contamination, that the three pits with debris in them did not present an

environmental hazard, were not regulated and did not need to be addressed until demolition, that dust in the wall and ceiling cavities was not regulated and had no significant potential to enter the environment in its current state, and that the crawlspace debris was not an environmental hazard in its current setting and could be addressed when the building is demolished (contrary to his view stated in 1995 that removal then would be prudent.)

[23] The plaintiff followed Mr. Cotton's recommendations and in January 1999 had a substantial amount (about 6.1 metric tonnes) of material removed from the crawlspace below the defendants' former premises, and from one of the three below-ground, concrete-capped pits where the tenants' furnaces had been. However, similar material still remains in a portion of the crawlspace and in the wall and ceiling cavities, and there is still foundry waste in the two other concrete-capped, below-ground pits.

[24] The plaintiff agreed on cross-examination that he had not received orders or directions from any level of government requiring him to clean up the property or to take the steps he had taken.

[25] I will review the expert evidence regarding how best to deal with the remaining waste in the building later in the discussion of the issues under the ***Waste Management Act***.

[26] This is an appropriate point, however, at which to review the evidence bearing on the identity of those responsible for the presence of the metallic dust. That issue is relevant both to the plaintiff’s claim under the lease and under the ***Waste Management Act***. With respect to the former, the question is simply whether the plaintiff has proved

breaches of the lease. The evidence is overwhelming that the defendants were at a minimum largely responsible for the material that was left behind and therefore the contribution of others is of much less significance. With respect to the latter, the question is, if the material is a “contaminated site”, who are the “responsible persons” under the legislation? If there are parties other than the defendants who share responsibility, the court may apportion a share of liability for remediation costs to them if it is justified by the available evidence, pursuant to the ***Contaminated Sites Regulation***, B.C. Reg. 375/96.

[27] The structure dates from about 1945. The evidence showed that prior to 1964, when the tenancy of Ruben Fleck and Fourway began, tenants included Ed’s Body Shop (an automobile body shop where there would have been sanding, grinding and painting of auto bodies), Drake’s Universal Sales and Service (which sold and serviced electric motors) and Claude Neon Signs (which handled neon lights.) Between approximately 1970 – 1975 Jade Queen/New World Jade rented part of the space later taken up by Fourway when it expanded. There were many other tenants, from the vinegar plant which seems to have been the first occupant to the Vancouver Opera Association which stored stage equipment there for a time, but none of these others was identified as a likely candidate for having deposited metallic dust.

[28] Mr. Cotton of Levelton Engineering Ltd., who was retained by the plaintiff, proceeded on the assumption that the foundry was the source of the dust. Mr. Gaherty, retained by the defendant, questioned that assumption. He wrote, "While it is reasonable to infer based on the substantial content of copper and zinc that Fourway contributed

significantly (especially to the debris), other building users were present that would generate dust and debris containing high concentrations of metals including copper and zinc..." He referred to old business directories and insurance maps which showed certain tenants in the building at earlier times, and identified the auto body shop, the operation that sold and serviced electric motors, a garage and service station, a neon sign company, a jade extracting and polishing operation, a diesel electric company, and automobile and garage supplies operations as ones which could have produced the dust or the metallic debris.

[29] Mr. Gaherty commented that the dust contains at least five regulated metals at concentrations significantly higher than brass and aluminium alloys and fumes from their heating, including mercury, arsenic, cadmium, silver and molybdenum, and stated that even assuming some of those materials were present at Fourway he observed concentrations of them in the dust that would support the existence of multiple sources of contamination.

[30] He agreed on cross-examination that he did not have any information about previous tenancies except what he obtained from old business directories and that he did not have any evidence that there ever was a garage and service station. (There was no evidence at the trial to this effect.) With respect to the body shop, it was in the 1964 directory only and was said to occupy "1055 rear". Drake's Universal Sales and Service was said to be at 1007 Cordova Street. He agreed that aside from those two and the jade operation, no other previous tenants of which he was aware appear to have been significant sources of the contamination. Mr. Gaherty did not take or analyze samples from the part of the building

where Drake’s electric engine operation had been. With respect to the auto body shop, he stated that he was unaware that there was no crawlspace under 1055 East Cordova where the body shop appeared to have been, and that he was not aware that in that part of the building the ceiling and walls are open and exposed, with no cavities.

[31] Mr. Gaherty's opinion was that the auto body shop was possibly more than a minimal contributor because in the early 1960's understanding of the occupational risks in materials such as lead auto body fillers and paint was limited. Thus, even a one-year tenancy could result in deposition of that kind of material. Mr. Gaherty did not know what portion of the building the jade operation was in. He testified that there would be no obvious problems from the jade, except for the copper it sometimes contains. However, some of the finish polishes tend to have a variety of different metals, including chromium and mercury or mercuric oxide compounds. He did not know whether such polishes were used in the operation in the subject building. He agreed that the neon company appeared to be in the building only for one year and only in 1007 East Cordova, and stated that he would not put it in the same category as the auto body shop. He said if someone had dumped over a whole case of fluorescent lights that might be significant, but there was no reason to think that had happened.

[32] Mr. Gaherty agreed on cross-examination that most of the high metals concentrations in the ceiling samples almost certainly originated from the foundry use, and that the foundry was the likely source of the copper material in the crawlspace samples.

[33] I note that Mr. Gaherty's qualifications as an environmental engineer were accepted by counsel for the plaintiff, with a caveat about matters of metallurgy or metallurgical engineering.

[34] The defendants also called Dr. Robert Lockhart of B.C. Research Inc., who holds a Ph.D. in organic chemistry and professional certifications in industrial and occupational hygiene. He agreed that he had no academic background in metallurgy and that he is not an engineer. However, he testified to having had extensive experience in site evaluations and worker safety issues related to volatile metals including mercury, as well as lead and arsenic. He reviewed the information in the Gaherty report and the data from test samples, assessing where the highest concentrations of the metals were. Counsel for the plaintiff objected that his opinion evidence could not be accepted on matters of metallurgy, but I have considered his opinion and have taken the objection into account in assessing its weight.

[35] The summary of his conclusion on this point is stated as follows:

> The highest concentrations for most of the metals of concern are in dusts found in the ceiling and wall cavities. This demonstrates that the contamination likely originated with operations occurring in the adjacent work spaces. While most of the metals detected can be associated with past foundry operations, several (mercury, arsenic, cadmium and silver) are not associated with alloys used by Fourway Foundry or with normal foundry products. As such, there is evidence that some contamination may have originated with operations in certain areas of the building prior to occupancy by Fourway Foundry Ltd.

[36] In his testimony Dr. Lockhart said that he had identified a number of metal contaminants not closely associated with foundry operations. He said he had been given assay information from the manager of Fourway about the alloys currently used and had been assured that these were representative of alloys used on the former site. In cross-examination he agreed that he did not know if Fourway used scrap metal. He also agreed that he did no independent research about previous uses of the site. His assertion that mercury is not a metal associated with this kind of foundry operation was based upon a review of the literature, in which he did not find reference to mercury as a metal of concern with respect to the health of brass and aluminium foundry workers. He had only twice previously been in a foundry (a copper foundry) and that was in the 1980's. He agreed that trace impurities are not indicated in assays and that volatile metals such as cadmium and arsenic can be trace impurities in alloys. However, he said, mercury is volatile at room temperature and would not survive the process leading to the preparation of the alloys. He also agreed that environmental regulations have changed significantly since 1964 and that there are higher and more stringent standards today, although he said he did not know whether this general statement applied to the presence of trace impurities in alloys.

[37] In a reply report, tendered by the plaintiff, Robert Charlton, a specialist in metallurgical and materials engineering, commented on the Lockhart and Gaherty reports. He has had considerable experience with foundry operations. He was accepted as an expert in physical metallurgy (the physical and mechanical properties of metals as affected by composition, mechanical working and heat treatment), the

changes in alloys and metals caused by heat, and foundry operations. His opinion was that the metallic composition of the deposits in the ceiling and wall cavities is consistent with aluminium alloy and copper-based alloy foundry operations. He strongly disagreed with the Gaherty report's conclusions suggesting that certain of the metals found were more likely to be associated with other users and cannot be attributed to foundry operations. He also disagreed with a number of specific points in the Lockhart and Gaherty reports, for example, he disagreed that mercury would all disappear in the process of creating an alloy. In reaching his opinion he took into account that:

(1) the major contaminants (copper, zinc, aluminium and lead) are as would be expected in a foundry operation;

(2) fine metal dust and volatile metal fumes would be produced in the melting and casting operations, and such volatile metals can be either alloying additions such as lead and zinc or trace impurities such as mercury, cadmium, antimony, arsenic;

(3) the concentrations of volatile metals would be expected to be higher in the ceiling and walls than in the crawlspace because the material would become diluted in the crawlspace;

(4) cutting, grinding and polishing dust would also tend to collect in the ceiling and wall cavities;

(5) the Lockhart report reviewed data on alloys and products apparently used for current compositions;

(6) it is extremely unlikely that the foundry has used the same casting alloys, scrap and processing products for the entire time period from approximately 1964;

(7) environmental regulations have changed significantly since 1964 and what may have been allowed previously is in many cases no longer acceptable, so that the level of trace impurities in current products does not indicate what was there previously;

(8) improved refining techniques have reduced the level of impurities in casting alloys;

(9) named elements in the alloys studies do not account for 100% of the metal; the 1% or more of unaccounted material would include the trace metals;

(10) composition of scrap metals used by foundries can vary significantly, for example hard lead, which contains antimony and arsenic, can be used to add lead to copper alloys;

(11) silver and chromium are named alloying elements for copper alloys and silver is also a residual element in copper alloys but with improved refining techniques, the level has decreased over the years;

(12) the use of scrap containing chromium-plated components could result in elevated chromium levels and chromium could also occur from abrasives in cutting wheels, grinding discs, etc.;

(13) copper slag is a common blasting abrasive which could contain relatively high levels of molybdenum; and

(14) selenium is an intentional alloying element added to copper alloys and is a volatile metal which would be expected to be deposited in the ceiling and walls.

[38] In his testimony he discussed the nature of the operations of the three previous tenants suspected of having contributed to the deposit of the material. With respect to the rebuilding of electric motors, he said the copper used in the wires would be high-conductivity copper, with very low impurities. There would be no lead or mercury normally present. With respect to the auto body shop, he said that epoxy fillers were much more prevalent than the lead-based ones but if they did use lead solders there would be some contamination. In paints lead, titanium, and cadmium might be used. Jade, he testified, is a family of minerals that are silicates: sodium magnesium silicate (jadeite) and silicate of calcium and magnesium (nephrite). It does not normally include copper or lead. The major materials he would expect to see in jade would be sodium, aluminium, calcium or magnesium. As for the polishing compounds used with jade, he said that they typically are silicates or iron hydroxide powder (jeweller’s rouge). He testified that the toxic metals

found in the plaintiff's building are not normally associated with jade.

[39] On cross-examination he agreed that the toxic metals could be trace impurities in jade, and that he had not seen an analysis down to the parts per million level. However, he pointed out that jade polishing is a wet, cold process while casting brass and aluminium is a high temperature process. He also agreed that you do not normally associate magnesium with a brass and aluminium foundry and that it was possible the jade operation caused the magnesium levels found in the samples.

[40] He agreed that an auto body paint shop and a jade polishing operation might be the source of some traces of metals such as mercury, cadmium and magnesium.

[41] The evidence persuades me that responsibility for the metallic dust and debris in the premises cannot be attributed, to any but a trivial degree, to occupiers other than the defendants.

[42] First, there is no evidence that the plaintiff himself was a contributor. (It is a different question whether he is a "responsible person" under the ***Waste Management Act***; that issue will be discussed below.)

[43] Second, although some of the tenants in the building after Mr. O'Connor purchased it in 1960 might have contributed through their operations, that contribution, I find, was minimal. The tenancies were short-lived in comparison with the defendants' tenancy of 26 years. The part of the building occupied by the auto body operation was not the part of the building where the lead was found, and at the time there was a

solid wall between the auto body shop and the area where the wall and ceiling samples were later taken. The electrical motor operation was in 260 Raymur and 1007-1009 East Cordova, essentially a separate building which does not share a common ceiling or crawlspace with the areas known to be contaminated. The jade operation involved grinding and polishing with the use of water, and it seems highly unlikely that it would have contributed to the deposit of material in the ceiling and walls, although it may have done so in the crawlspace. I accept the opinion of Mr. Charlton that the composition of the dust is consistent with what would be expected from the foundry operation. I am satisfied that it was the defendants' operations that created the dust in the ceiling and wall cavities, and in the crawlspace, aside from possibly a minimal contribution from previous tenants.

[44] The plaintiff has prepared a detailed summary of his claims under the lease in a "Scott Schedule". He seeks $65,463.70 in cleanup, repair and restoration costs, and $129,124.44 in environmental investigation, removal and management costs. In addition, the plaintiff seeks compensation for diminution of the value of the property if the materials are not removed from the crawlspace and the wall and ceiling cavities. He seeks compensation for management fees, rental loss, additional leasing costs and tenant inducements, the cost of borrowing to do the work to date, re-financing costs and legal expenses.

[45] With respect to the plaintiff's claims in the alternative under the ***Waste Management Act***, he seeks costs of remediation, costs of site investigation and report, and legal and consultant costs.

[46] I will review particular aspects of the evidence in more detail as I analyze the issues and will state further findings of fact where necessary.

***ISSUES***

[47] The issues I must determine are:

***I. ISSUES UNDER THE LEASE***

A. What is the extent of the defendants' express covenants to repair, restore, reinstate and clean?

1. Obligation to repair and clean

2. Reasonable wear and tear exception

3. Obligation to restore and reinstate

4. Effect on previous obligations of the 1980 Surrender Agreement.

B. Are the defendants in breach of their express covenants to repair, restore, reinstate and clean?

1. Installation of pit furnaces

2. Roof and wall openings

3. Shaker installation, removal of washroom and office

4. Sheds and outbuildings

5. East wall

6. Sand conveyor system

7. Mezzanine

8. Modifications to sprinkler system

9. Shipping scale

10. Heating system

11. Electrical fixtures

12. Other miscellaneous repairs and removal of defendant's equipment

13. Painting

14. Waste and debris

C. Is it an implied term of the lease that, upon its expiry, the defendants would return the property and premises uncontaminated?

## *II. ISSUES UNDER THE WASTE MANAGEMENT ACT*

A. Is the site a "contaminated site" under the ***Waste Management Act***?

1. Statutory requirements and submissions of counsel

2. Expert evidence

3. Conclusion on "contaminated site" issue

B. If there is a contaminated site, who are the responsible persons under the ***Waste Management Act***?

## *III. DAMAGES*

A. If the defendants are in breach of their express covenants to repair, restore, reinstate and clean, or an implied covenant to return the premises uncontaminated, then what is the

measure of damages or a fair assessment of the loss?

1. Cost of repair/ discount for betterment
2. Set off for improvement to the premises
3. Environmental investigation, removal and management costs
4. Diminished property value
5. Consequential damages/ loss of rent
6. Additional leasing costs and tenant inducements
7. Management fees
8. Interest expense and refinancing costs
9. Legal expenses

B. What amounts are recoverable from the defendants or others under the ***Waste Management Act***?

1. Costs of remediation
2. Costs of site investigation and report
3. Legal and consultant costs

***ANALYSIS***

***I. ISSUES UNDER THE LEASE***

***A. What is the extent of the defendants' express covenants to repair, restore, reinstate and clean?***

*1. Obligation to repair and clean*

[48] The law does not hold a tenant who has entered into a covenant to repair to a standard of perfection: ***Homestar***

***Holdings Ltd. v. Old Country Inn Ltd.*** (1986), 8 B.C.L.R. (2d) 211 (S.C.) at 226, quoting ***Royal Trust Co. v. R.***, [1924] Ex. C.R. 121 at 125; nor is a tenant required to return improved premises to the landlord at the end of the term: ***Manchester v. Dixie Cup Company (Canada) Ltd.***, [1952] 1 D.L.R. 19 at 31 (Ont. C.A.) or to eliminate mere signs of age: ***Vicro Investments Ltd. v. Adams Brands Ltd.*** (1965), 40 D.L.R. (2d) 523 at 536-8 (Ont. H.C.). It is clear from the decided cases that a covenant to repair requires a tenant to put the building into a state of repair similar to that existing when the tenancy began.

[49] The defendants argue that here the building, and various parts of it, were not in new and perfect condition when they took possession and the covenant is limited accordingly. They also argue, as discussed below, that the reasonable wear and tear exception means that the obligation to repair is to be construed in the light of the intended use of the building – here, as a brass and aluminium foundry.

[50] The defendants argue that a covenant to clean also is dependent on the use of the building. In ***Norbury Sudbury Ltd. v. Noront Steel (1981) Ltd.*** (1984), 11 D.L.R. (4$^{th}$) 686 at 699-700 (Ont. H.C.J.) the court said "The standard of cleanliness for a building intended to be used as, say a medical clinic is surely different from that for a building intended to be used as a steel-fabricating plant."

[51] Counsel for the plaintiff agrees that the obligation to clean does not require the defendants to achieve a higher standard of cleanliness than the premises were in at the beginning of the lease, but emphasizes that it does require that they return the premises to their pre-lease condition.

The plaintiff also agrees that the standard of cleanliness will be qualified by the use of the building.

[52] However, the plaintiff argues that the covenants to clean and repair are distinct, and emphasizes the specific wording in the lease:

> AND the Lessee will leave the premises clean and free of industrial waste and in good repair (reasonable wear and tear and damage by lightning and earthquake excepted)

[53] There appears to be no dispute that the material left behind is industrial waste.

[54] It is notable that the clauses discussed in the ***Norbury Sudbury*** case are different from those in this lease. There was no reference there to leaving the premises "free of industrial waste" but only to keeping them "generally in repair, reasonable wear and tear and damage … only excepted, and will keep the premises clean" and to leaving them "clean and in good repair and condition".

[55] Before reaching a conclusion about the extent of the defendants' obligations arising from their covenant in the lease, I will consider the effect of the "reasonable wear and tear" exception.

*2. Reasonable wear and tear exception*

[56] The plaintiff acknowledges that the covenant to repair during the term of the lease and the covenant to leave the premises in good repair at the end of the lease are both qualified by the reasonable wear and tear exception, referring to ***Kreeft v. Pioneer Steel Ltd.*** (1978), 8 B.C.L.R. 138 at 139

(Co. Ct.) and ***Homestar Holdings***, ***supra***. However, the plaintiff's position is that the defendants have, in addition, clearly agreed to leave the premises free of industrial waste at the end of the term, and that the reasonable wear and tear exception does not qualify that obligation of the defendants.

[57] In support of that position the plaintiff refers to various definitions of “wear and tear”, such as this from the ***Shorter Oxford English Dictionary***, (3rd Ed.) (Clarendon Press: Oxford, 1973):

> [W]earing or damage due to ordinary usage; deterioration in the condition of a thing through constant use or service.

[58] The plaintiff also refers to definitions of “wear”, such as this from the same dictionary:

> The process or condition of being worn or gradually reduced in bulk or impaired in quality by friction, exposure, etc.; loss or diminution of substance or deterioration of quality due to these causes.

[59] The plaintiff argues that “wear and tear” refers to the ordinary and natural deterioration in the condition of a thing over time, for example, the gradual effects on a door and its frame of the simple movement of people and goods through that door. Thus, the plaintiff submits, the notion of “wear and tear” has nothing to do with an obligation to leave premises free from industrial waste, although it would apply to a different type of claim – for example, if the plaintiff sought to make the defendants responsible to repair the floor where the metallic debris has scratched the floor boards over time.

[60] Counsel for the defendants argues that the meaning of "reasonable wear and tear" depends upon the use to which the premises were to be put during the term of the lease, citing ***Kreeft v. Pioneer Steel Ltd., supra*** and ***Norbury Sudbury, supra*** at 698. Counsel for the defendants points to the provision in the lease confirming that the parties intended that the premises were to be used for the purpose of a brass and aluminium foundry. Mr. Robinson argues that any damage to the premises was a natural result of the use of the premises for that acknowledged purpose, and of the aging of the building.

[61] Aside from the “free from industrial waste” issue, on the general question of what constitutes “reasonable wear and tear”, counsel for the plaintiff argues that the exception does not absolve a tenant from the obligation to protect against and repair damage arising as a consequence of such wear and tear, citing ***Regis Property Co. Ltd. v. Dudley***, [1959] A.C. 370 (H.L.) at 410 and ***Homestar Holdings, supra,*** at 226. Lord Denning in ***Regis Property*** accepted the reasoning of Talbot J. in ***Haskell v. Marlow***, [1928] 2 K.B. 45 at 59 (C.A.):

> Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from

> wear and tear from producing others which wear and tear would not directly produce.

[62] Lord Denning summarized in ***Regis Property*** at 410:

> I have never understood that in an ordinary house a 'fair wear and tear' exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are necessary to stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for this slate coming off but he ought to put in another one to prevent further damage.

[63] This was a lease of industrial premises built in about 1945 over 26 years for use as a brass and aluminium foundry. The meaning of the covenant to clean and repair with the exception for "reasonable wear and tear" must be construed in the light of those facts. The exception does apply to the agreement to maintain the premises in repair and return them in good repair. The agreement to return the premises “clean” at the end of the lease is to return them in the same standard of cleanliness in which they were at the commencement of the tenancy, taking into account the fact that they were used for a foundry operation.

[64] However, I conclude, for the reasons advanced by the plaintiff, that the exception for reasonable wear and tear does not apply to the agreement to return the premises free of industrial waste. The deposit of waste in the building is not “wear and tear”. It is the very thing the covenant about industrial waste is aimed at. The fact the deposits are not

visible in ordinary circumstances does not change their character. The defendants as lessees, knowing the nature of their own operation, agreed to return the premises free of industrial waste. I conclude that they are obliged to do so.

### *3. Obligation to restore and reinstate*

[65] Dictionary definitions of "restore" and "reinstate" indicate that the terms mean more or less the same thing: to bring premises back to the state in which they were at some earlier time. "Restore" in the ***Shorter Oxford English Dictionary, supra*** is defined to mean "3. To build up again; to re-erect or reconstruct. Now *spec.* to repair and alter (a building) so as to bring it as nearly as possible to its original form." "Reinstate" has as one of its meanings "2. To restore to its proper or original state; to instate afresh."

[66] There is no dispute about the intention of the parties in entering into that covenant; the dispute is about the date to which the restoration and reinstatement provisions speak, and that date depends upon the resolution of the next issue, the effect of the Surrender Agreement in 1980.

### *4. Effect on previous obligations of the 1980 Surrender Agreement*

[67] The defendants' position is that under the terms of the Surrender Agreement the plaintiff released the defendants from all pre-1980 breaches. Mr. Robinson for the defendants argued that lease obligations must be strictly construed against the landlord whose solicitor prepared the surrender of the earlier lease and the new lease. He pointed out that the covenants in the 1980 lease to repair and to leave the

premises clean and free of industrial waste and in good repair make no reference to the date of original occupancy. With respect to the covenants to restore and reinstate, he points out that there are two clauses. The first states that the tenant:

> … at the end or sooner determination of the said term will, after consultation with the Lessor, and at the Lessor's explicit direction, and at the Lessee's expense, restore the premises, including the roofs thereof, so far as the Lessor shall require, to the existing condition prior to the **occupancy** and alterations by the Lessee ….
>
> [emphasis added]

[68] It is only the second provision, near the end of the lease, that refers to the condition existing at the time of original occupancy, as follows:

> PROVIDED that after the term herein or any renewal thereof, the building must be reinstated to the condition existing at the time of **original occupancy** by the Lessee, at the Lessee's cost, where the Lessor at his option so directs and including but not limiting the foregoing, the Lessee will remove and/or repair all openings made in the roof or any internal or external walls of the demised premises and will repair the concrete and the floor where pit furnaces or other machinery has been installed.
>
> [emphasis added]

[69] Mr. Robinson argues that these provisions are ambiguous and should be construed against the landlord under the *contra proferentem* rule.

[70] Mr. MacDonald for the plaintiff argues that the clear meaning of the words "original occupancy" in the reinstatement clause is to refer to the date when the defendants took original occupancy of each portion of the

premises. He adds that if there is any doubt it is removed by the examples of specific items included in the clause, such as repairs to the concrete and the floor where pit furnaces were installed, since the pit furnaces date back to the original 1964 occupancy: none were installed in the period between 1980 and 1990. Further, Mr. MacDonald argues, the words "original occupancy" first appeared in the 1971 lease and were used by the parties to make it clear that the reference was back in time to 1964 and not simply to the commencement date of the particular lease. He urges that there is no reason at law why a lease cannot create obligations in respect of a period before the execution of the lease.

[71] The plaintiff's evidence was that when the successive new leases were made, he had discussions with the defendant, Ruben Fleck, at which time it was agreed that the defendants' obligations to repair, restore, reinstate and clean their premises would be deferred until the defendants moved out of the building. Mr. MacDonald for the plaintiff argues the defendants are therefore estopped from relying on the Surrender of Lease provision waiving previous breaches of covenant. He urges that each of the elements of estoppel has been established on the evidence:

(1) Ruben Fleck assured the plaintiff that the items would be dealt with when the tenants left the building;

(2) his promise or assurance was intended to affect the legal relations between the parties so as not to require the plaintiff to enforce the tenants' obligations to repair, restore,

reinstate and clean the premises at the end of each lease term;

(3) the plaintiff acted upon those promises or assurances by not enforcing the tenants' obligations at the end of each lease term; and

(4) it would now be inequitable to allow the tenants to revert to the strict legal relations as if no such promise or assurance had been given.



[72] The defendants deny that they agreed to defer these obligations, although Mr. Fleck agreed in his evidence that nothing was done to clean up or reinstate between leases, and that each lease did contain cleaning, repair and reinstatement provisions. Further, Mr. Robinson points to the provision in the 1980 lease that it is the whole contract between the parties and no other representations, warranties or conditions have been made other than those expressed in it. He refers to the parol evidence rule and argues that no statement made prior to entering into the Surrender Agreement can be used to vary or contradict it.

[73] In addition, Mr. Robinson argues that the doctrine of estoppel cannot be invoked by the plaintiff in the circumstances of this case because it would be to use it as a sword and not as a shield, attempting to revive rights the plaintiff contractually surrendered. He argues that since estoppel can only be used to modify or discharge an existing contract, the alleged representations (said to have been made well before the Surrender Agreement was executed) can have no effect on it because the plaintiff has provided no evidence

that the defendants represented they would not rely on their strict legal rights granted under the Surrender Agreement.

[74] In his reply, Mr. MacDonald urges that to accept the defendants' argument would be to render meaningless the express wording of the reinstatement clause with its reference to "the condition existing at the time of original occupancy" and that there is no ambiguity in the lease. Further, the Surrender Agreement dealt only with the 1976 lease, and did not affect the covenant made in the 1980 lease (or, for that matter, those made in the 1964, 1966 and 1971 leases.)

[75] As for the argument about the parol evidence rule, Mr. MacDonald replies that the oral representations alleged are consistent with the 1980 lease wording, and that oral representations deferring the tenants' obligations under the 1964, 1966 and 1971 leases cannot be affected by a 1980 Surrender Agreement which dealt only with the unfinished portion of the term of the 1976 lease. He argues that the parol evidence rule does not extend to cases where the document may not embody all the terms of the agreement, and that the Surrender Agreement was not intended by the parties to constitute the whole agreement.

[76] Finally, in reply to the argument about estoppel Mr. MacDonald argues that the plaintiff does seek to use it as a "shield" – against the defendants' attempt to rely upon the Surrender Agreement.

[77] Thus, there are two questions here:

(1) What was the effect of the Surrender Agreement?

(2) Did the defendants make representations to the plaintiff such that they are estopped from

> denying an obligation to restore the premises in their original state?

[78] On the first issue, the effect of the Surrender Agreement was to release the defendants from "all liability, claims and demands in respect of all breaches of any of the covenants contained or otherwise arising under" the 1976 lease. Thus, the plaintiff could not, after signing the Surrender Agreement, bring an action against the defendants based upon breaches of the covenants in that 1976 lease.

[79] The defendants, however, had made covenants both in previous leases, and in the final (1980) lease. The plaintiff sues only on the covenants in that final lease, including the covenant that at the end of the term:

> … the building must be reinstated to the condition existing at the time of original occupancy by the Lessee at the Lessee's cost, where the Lessor at his option so directs and including but not limiting the foregoing, the Lessee will remove and/or repair all openings made in the roof or any internal or external walls of the demised premises and will repair the concrete and the floor where pit furnaces or other machinery has been installed.

[80] Each side refers to legal authority in support of its position.

[81] The plaintiff relies on ***Bradshaw v. Pawley***, [1979] 3 All E.R. 273 at 274 (Ch. D.) where the Vice-Chancellor Sir Robert Megarry said that the question before him was "whether on the grant of a new lease to an existing lessee a covenant to pay rent at a certain rate from a date anterior to the date when the lease was executed can make the lessee liable for rent at that rate from that anterior date or only from the

date when the lease was executed." The Court held that there was no reason a lease could not embody an agreement relating to past periods or impose on one of the parties some liability for things past. It all depended on the wording of the lease. The plaintiff also cites ***Darmac Credit Corp. v. Great Western Containers Inc.*** (1994), 163 A.R. 10 (Q.B.) and ***Progressive Enterprises Ltd. v. Cascade Lead Products Ltd.***, [1996] B.C.J. No. 2473 (Q.L.), (December 4, 1996) Vancouver C950537 (S.C.) as examples of cases where courts found tenants to be obliged to clean or restore the premises to the date of the initial occupation despite a series of lease renewals. Finally, counsel for the plaintiff referred to ***Giouroukos v. Cadillac Fairview Corporation Ltd.*** (1983), 29 R.P.R. 224 (Ont. C.A.) which held that where there was a series of leases but continuous possession by the tenant, and thus a series of surrenders of lease by operation of law, any notional possession momentarily acquired by the landlord between the surrender of the first lease and the grant under the second lease was a "legal fiction" not sufficient to constitute a starting point for the running of a limitation period against the landlord.

[82] The defendants point to the fact the plaintiff's solicitor prepared both the Surrender Agreement and the 1980 lease and argue any ambiguity should be resolved against the plaintiff. They point to ***Vicro Investments, supra***, at 531-533 as an example of the application of this principle. Counsel for the defendants says the ***Giouroukos*** case is distinguishable because here the parties entered into an express surrender agreement, and that the ***Darmac Credit*** and ***Progressive Enterprises*** cases are distinguishable because in neither of

those cases had the parties entered into an express agreement that the lessee would not be responsible for prior breaches.

[83] However, it is not quite accurate to say that the parties agreed the lessees would not be responsible for prior breaches. What the parties did agree is that the lessees would be released from claims arising from breaches **of the 1976 lease**. They did not agree the lessees would be released from claims arising from breaches of the 1980 lease. The 1980 lease requires the defendants to reinstate the premises to the condition at the time of their original occupancy (which was in 1964). There is no doubt as to the date intended by the term "original occupancy" because of the reference to the installation of the pit furnaces, which took place during the term of the first lease.

[84] Thus, with respect to the obligations flowing from the 1980 lease, including the obligation to reinstate, the Surrender Agreement has no effect. Further, it does not itself wipe out obligations arising from earlier leases, although the ***Limitation Act***, R.S.B.C. 1996, c. 266, may do so. In fact, the plaintiff does not plead breaches of any lease other than the 1980 one. He does argue that, insofar as he may need to rely on provisions of the 1980 lease other than the final reinstatement clause, he should not be limited to claims for cleaning and repairing only with respect to the defendants' activities in the final ten-year period. That is where the ***Darmac Credit*** and ***Progressive Enterprises*** cases are relevant. In both of those cases it seems to have been assumed that the defendants' responsibility did not come in discrete chunks of time measured by the term of each lease, but rather stretched over the tenancy as a whole. In ***Darmac Credit***, as the defendants point out, there was a reference

back to the physical condition existing at the commencement date, and no evidence of any Surrender Agreements. However this does not serve to completely differentiate the cases because the Surrender Agreement relates only to obligations flowing from the 1976 lease.

[85] The plaintiff argues that as each of the 1964, 1966, 1971 and 1976 leases came to an end, the defendants were faced with numerous obligations to repair, restore, reinstate and clean their premises. To require them to comply with those obligations at the same time they were entering into a new lease, continuing in possession and continuing their foundry operations was completely impractical. The plaintiff says that in his discussions with Ruben Fleck it was agreed that those obligations would be deferred until the defendants moved out of the building. I have found as a matter of fact that those discussions did take place and that the defendants did agree that they would, in effect, treat their years of occupation of the premises as a whole in the context of their obligations to rehabilitate the premises.

[86] Insofar as the wording of the final reinstatement covenant in the 1980 lease does not cover repairs, restoration and cleaning, and insofar as the condition of the premises calling for repair, restoration or cleaning stems from pre-1980 activities, are the defendants excused from that portion of the repair, restoration and cleaning that would otherwise be required? I conclude that they are not.

[87] First, the notional possession of the landlord at the moment between the end of one lease and the beginning of the next (for example, at midnight on June 30, 1975) is no

more than a legal fiction in this context, as it was held to be in the ***Giouroukos*** case.

[88] Second, I find that the elements necessary to create an estoppel (as set out by the Supreme Court of Canada in ***John Burrows Ltd. v. Subsurface Surveys Ltd.*** (1968), 68 D.L.R. (2d) 354 (S.C.C.)) have been established on the evidence. There was a promise or assurance by the defendants to the plaintiff that the repair, restoration, reinstatement and cleaning obligations under the leases would be dealt with when the defendants left the building; the promise or assurance was intended to affect the legal relations between the parties (*i.e.*, removing the legal requirement for the plaintiff to enforce the repair, restoration, reinstatement and cleaning obligations at the end of each lease term); the plaintiff acted upon the promise or assurance by not enforcing those obligations at the end of each lease term; and it would now be inequitable to permit the defendants to revert to the strict legal relations between the parties as if no such promise or assurance had been given.

[89] The defendants argue that the parol evidence rule prevents the court from considering evidence which contradicts or varies the parties' written Surrender Agreement. However, I find the evidence does not contradict or vary the Surrender Agreement, which relates only to obligations flowing from the covenants in the 1976 lease. The evidence is that there was an understanding between the parties, as they moved from one lease to the next over a 26-year period, that the plaintiff would not insist upon a repair and cleanup at the end of each term and the defendants would do those things when they left the building. Although the defendants also argue that the plaintiff is attempting to use estoppel as a sword and not as

a shield, in other words to revive rights that he contractually surrendered in the Surrender Agreement, I do not find the Surrender Agreement contractually surrendered the plaintiff's rights except in a specific and limited way. At most, it provides for a four-year hiatus (between 1976 and 1980) with respect to the defendants' obligations to repair, clean and restore (but not reinstate, because of the final reinstatement clause in the 1980 lease.)

[90] Therefore, in conclusion on this point, I find that the defendants did make promises and assurances to the plaintiff that led him not to enforce the repair, restoration, cleaning and reinstatement clauses at the end of each lease; that the Surrender Agreement in 1980 is with respect only to the covenants under the 1976 lease; and that in the 1980 lease the parties agreed that the defendants would reinstate the premises to their condition at the time of original occupancy in 1964. I find that the defendants are estopped from arguing that because the plaintiff failed to require them to repair, restore, clean and reinstate at the end of each lease other than the 1976 lease (which was specifically dealt with in the Surrender Agreement) he is now prevented from so requiring them.

### *B. Are the defendants in breach of their express covenants to repair, restore, reinstate and clean?*

[91] For convenience, I will combine the discussion of liability and damages in many of the claims that are reviewed below. I have accepted that the defendants should not be responsible for repairs and other work that amount to “betterment” of the property, for reasons discussed in the review of damages under the heading III.A.1. below.

*1. Installation of pit furnaces*

[92] The defendants agree that they did commit to remove their three pit furnaces and replace the concrete floor where the furnaces and air circulation trough had been, and say they have fulfilled those commitments.

[93] The plaintiff does not deny that the furnaces have been removed and the floor replaced, but asserts that, when the defendants installed the furnaces in 1964 they cut through the drainage system and changed the roof drainage system by installing eaves troughs on the exterior of the building. Counsel for the plaintiff argues that the defendants are in breach of the lease provision that the defendants "will repair the concrete and the floor where pit furnaces or other machinery has been installed" as well as the covenants to repair, to restore the premises to the condition existing prior to the defendants' alterations, and to "make good any damage done to any part of the building or premises by bringing in or taking away" any machinery, heavy articles or equipment.

[94] The evidence as to whether the defendants cut through the drainage system is disputed. Mr. O'Connor says that two interior drainpipes were cut in order to accommodate the pit furnace and the drainage system was changed on the understanding it would be reinstated at the end of the lease; Mr. Ruben Fleck testified that he could not remember hitting a pipe when the furnace pit was dug and could not remember the conversation alleged by Mr. O'Connor.

[95] Because there is evidence that the drainpipes in the area where the defendants installed their pit furnaces have been cut and the drainage system changed, and because I found

Mr. O'Connor's evidence believable, I find as fact that the defendants did alter the drainage system on the understanding that they would reinstate it at the end of the lease, and that they have failed to reinstate it. The defendants' position is that the plaintiff has led no evidence to show that there were drainage problems at any time, but the plaintiff's position is that the interior drainage system was to be replaced whether or not the exterior system was working. I find for the plaintiff on this point. The defendants were in breach.

[96] The plaintiff's claim under this heading (p. 6, Plaintiff’s Scott Schedule) is for a total of $1,340.10 and I award the plaintiff that amount.

*2. Roof and wall openings*

[97] The major issue here is about the openings in the roof made by the defendants in order to install smoke stacks and their sand conveyor system. The plaintiff's position is that the repairs the defendants made to the roof when they vacated in 1990 simply consisted of closing off the openings with plywood but failing to repair the roof itself. The plaintiff says the defendants also failed to replace the wooden joists which had been cut away under the roof to make the openings. Finally, the plaintiff's position is that there were also some internal and external wall openings that the defendant failed to reinstate. Counsel for the plaintiff points to the lease provision that the defendants will "remove and/or repair all openings made in the roof or any internal or external walls of the demised premises" and to the covenant to repair and to restore.

[98] The defendants' position is that the plaintiff is attempting to have the defendants pay for a new roof which

needed to be replaced in any event. They say it is an upgrade necessitated by the age and condition of the building and the plaintiff's failure to maintain and repair the roof for 30 years. They say that they did hire a roofing contractor who made repairs although the condition and age of the roof indicated those repairs may have been futile.

[99] On the evidence as a whole I find that the roof was old and not in good repair. Roof maintenance was not the defendants' responsibility. They were responsible only to repair the openings they had made. There was uncontradicted evidence, however, that the roof leaked and that the defendants effected repairs on it themselves from time to time over the years.

[100] I find that the defendants were in breach but the assessment of damages flowing from the breach should take into account the age and condition of the roof. The plaintiff has produced an estimate dated September 18, 1990 from T. Woodward Roofing & Sheet Metal Co. of what it would have cost to repair the roof in those areas. The estimate was $4,400. The plaintiff's evidence was that he has had a new roof put on the whole building above the pouring area at a cost of $10,600 but is seeking only $4,400 in damages because that reflects the cost of repairs.

[101] I find that the plaintiff should receive $3,400 with respect to roof repairs. I have deducted $1,000 to reflect the fact that the evidence showed the plaintiff had not maintained the roof in a good state of repair and would have been required to do some work on those parts of the roof in any event.

*3. Shaker installation, removal of washroom and office*

[102] The plaintiff's evidence was that during the tenancy the defendants removed a washroom and office from part of the premises in order to install a piece of equipment called a "shaker". Mr. O'Connor testified that he gave permission for the removal of the washroom and office on condition that the defendants would replace them when they vacated. His evidence was that he reiterated this expectation several times over the years, and pointed out the location of the former washroom on the sketch attached to the lease in later years. The plaintiff relies on the covenant to restore the premises at the end of the term and the covenant to reinstate the building "to the condition existing at the time of original occupancy".

[103] The evidence of Ruben Fleck and of Ron Zaleschuk was that there was no agreement to replace the washroom, and that the plaintiff had not mentioned it until 1990 when the defendants were moving out. The defendants' position is that they have already put in a washroom, in a different part of the premises, superior in quality to the quite basic one that was removed.

[104] I accept the plaintiff's evidence that the washroom and office were removed on the understanding they would be reinstated, and that this expectation was reiterated over the years. Because the premises are extensively subdivided, it is not an answer to the plaintiff's claim for replacement of the washroom in #103 - 1055 Cordova Street that the defendants put a new washroom into different premises.

[105] The defendants were in breach. The plaintiff's claim under this item (p. 5, Plaintiff’s Scott Schedule) is for a total of $12,313.77. He will receive 75% of this

amount, being $9,235.33, reflecting the fact that it appears he has put in an improved facility.

*4. Sheds and outbuildings*

[106] During their time in the building, the defendants created openings in the exterior east wall and put up five sheds or outbuildings. The plaintiff said this was with his permission but on the understanding they would remove the sheds and repair the openings when they left. Only one of the sheds was removed, namely the "heat treatment" shed that had been put up in 1983. The defendants' position is that they have complied with the lease, on the premise that it requires them only to restore the building to its condition prior to occupancy under that lease, which began in 1980.

[107] The defendants have not proved that the remaining outbuildings were put up between 1976 and 1980 such that they would be included in the waiver of breaches in the Surrender Agreement. Since I have concluded that the defendants are required under the lease to restore the premises to their original condition as opposed to their condition in 1980, the plaintiff succeeds on this claim.

[108] The plaintiff seeks $4,283.00 (p. 4 and p. 11, Scott Schedule). He will receive that amount.

*5. East wall*

[109] The plaintiff claims that the defendants' operations caused dry rot and sagging in one of the large wooden posts in the premises. Gordon Spratt, P.Eng., gave his opinion that the structural column was extremely desiccated and was exposed to additional weight and loads for which it was not designed.

These additional loads flowed from the manner in which one of the sheds was framed onto the existing building structure. The plaintiff's position is that the post was close to the defendants' quench tank, which operated at very high temperatures and created steam. The defendants, however, point to evidence that the post was showing rot before the heat treatment area went in, and argue that their operations were not the cause. Mr. Zaleschuk's evidence was that the exterior temperature of the tank was 90–100 degrees, that it was used for a 5–20 minute portion of the heat treatment cycle, and that it was used approximately 100 times per year. Mr. Spratt did not have an opportunity to observe the defendants' operations and based his opinion on what the plaintiff described to him about those operations.

[110] I have concluded that the plaintiff has failed to establish that the rot in the post was caused by the defendants' operations and accordingly the plaintiff will receive no damages with respect to the post.

[111] The plaintiff also seeks compensation for re-doing the defendants' repairs to the east wall, and for replacing a wall and reinstating a door and window on the east exterior wall of the building where the defendants had removed doors and fencing and opened a wall to access its sheds. He also seeks the costs of replacing the fencing. These claims (pp. 7-8, Plaintiff’s Scott Schedule) total $4,677.64. I find the defendants were in breach. The plaintiff will receive $3,500.00 reflecting a deduction for the work related to replacing the post.

*6. Sand conveyor system*

[112] At the beginning of the 1980 lease term, the defendants sought permission to install a sand conveyor system which required an opening in the roof and a cover on the roof for the equipment. There was conflicting evidence as to the height of the equipment and the size of the roof covering that Mr. O'Connor approved but there is no dispute that the roof covering (which Mr. O'Connor called the "chicken coop") was not removed at the end of the tenancy. The defendants were in breach.

[113] The plaintiff claims $1,993.50 (p.11, Plaintiff's Scott Schedule) in addition to the demolition costs, which are already included in the item under "sheds and outbuildings" above and the roofing costs, which are already included in "roof repairs" above. He will receive that amount.

*7. Mezzanine*

[114] In the 258 Raymur portion of their premises, the defendants built a mezzanine or gantry in the 1980's and used it for storage. There was no evidence that the plaintiff gave permission, but he did not require it to be removed when he saw it. The plaintiff's position is that it was necessary to incur expense to do further work on the mezzanine in order to bring it up to current Vancouver building by-law requirements.

[115] The defendants' position is that the plaintiff only upgraded the mezzanine in order to make it appropriate for rental as a residential loft, and there is no evidence that it did not meet building code requirements when built for the purpose of storage or that the small mezzanine originally built by the plaintiff had itself been up to code. Their

position is that the plaintiff already received a betterment to his premises as a result of the defendants' work and that he is not entitled to compensation from the defendants for further work on the structure.

[116] The plaintiff seeks compensation for various costs including the cost of a report from an engineer, Gordon Spratt, as to what would be necessary to bring the mezzanine into compliance with city by-laws. In his evidence, Mr. Spratt testified that it was difficult to sort out the work that was done in order to bring about by-law compliance from the work that was done to meet the plaintiff's requirements. He said that it would still have been necessary to hire an engineer but the use of steel framing as opposed to wood framing would not have been required.

[117] The plaintiff claims a total of $4,209.49 (Plaintiff’s Scott Schedule, pp. 18-19). The defendants were in breach and the plaintiff will receive that sum, less some deductions. The cost of the structural "I" beam was $773.59 and will be deducted, as will be 25% of the item for installation of required stair supports, steel beam, structural posts, etc. (thus $472.73) and 25% of the cost of the engineer's report (thus $312.03). These deductions are made to reflect the fact that the plaintiff is receiving improved and upgraded premises. In total, the plaintiff will receive $2,651.14.

*8. Modifications to sprinkler system*

[118] The defendants did not dispute the plaintiff's claim for the cost of correcting changes that the defendants had

made to the sprinkler system, in the sum of $4,980.68. The plaintiff will receive that amount.

*9. Shipping Scale*

[119] The plaintiff claims for the cost of repair and refurbishing of a venerable shipping scale. He says the defendants agreed to look after it and re-install it when they left. The evidence is that the scale was inoperative when the defendants occupied the premises. The defendants deny that they made any commitment to take care of, or re-install, the scale.

[120] Although the point was not argued, it is not clear on the evidence that the scale formed a part of the premises rather than being the plaintiff's chattel. If it formed part of the premises the defendants' covenants would apply to it; otherwise, I would think not. I am also not persuaded by the plaintiff's evidence that the defendants made a specific agreement with respect to this item. I do not find the plaintiff has established a breach of the defendants' covenants.

*10. Heating system*

[121] The plaintiff claims for the cost of replacing a gas heater which was damaged by the defendants beyond repair. The defendants say that this heating system was installed by themselves in response to the plaintiff telling them he would no longer supply heat (as he was no longer required to do after 1976 under the leases.)

[122] The plaintiff does not contradict that evidence, but if the heater was a fixture and not a chattel it became part

of the premises when installed and would fall under the covenants to repair, restore and reinstate. However, it would also fall under the reasonable wear and tear exception. I have concluded that the plaintiff has not established this claim.



*11. Electrical fixtures*

[123] The plaintiff seeks the cost of replacing broken electrical fixtures with working fixtures. The defendants' position is that even if they have an obligation to restore and reinstate to the pre-1980 condition despite the Surrender Agreement (which they deny), the electrical fixtures were not working properly when they first occupied some of the premises, the defendants themselves installed many of the electrical fixtures, and in addition their obligation is subject to the reasonable wear and tear exception.

[124] I have concluded that the plaintiff should receive $1,500 of the total $3,360 which is claimed under this head, to take into account that the fixtures were not in perfect order at the outset, and the wear and tear they would have experienced over the years.

*12. Other miscellaneous repairs and removal of defendants' equipment*

[125] The plaintiff also incurred expenses for a number of other items in which he was required to repair the premises from the state in which the defendants left them, or to remove equipment left by the defendants. I find the following represent breaches by the defendants for which the plaintiff should be compensated:

| No. | Description | Amount |
|---|---|---|
| (1) | Remove foundry compressed air distribution pipes | $331.50 |
| (2) | Remove tracks and repair holes in wall | $200.00 |
| (3) | Rear lane wall – repair holes and door opening | $247.50 |
| (4) | Replace door installed by defendants at rear for truck loading | $1,472.82 |
| (5) | Repair holes in wall between pouring and front areas | $132.00 |
| (6) | Re-stucco walls, once repaired | $3,932.00 |
| (7) | Repair penetrations in fire wall between pouring area and 258 Raymur | $581.00 |
| (8) | Remove wall the defendants closed in the wrong place | $48.00 |
| (9) | Re-route pipes near the entrance to the electrical to meet ***Code*** | $159.97 |
| (10) | Repair damaged security screens | $80.25 |
| (11) | Paint and re-install security screens | $90.36 |
| (12) | Restore interior partition walls | $182.00 |
| (13) | Remove defendants' partitions | $1,723.00 |
| (14) | Repair glass in windows | $68.83 |
| (15) | Remove metal floor plates | $66.00 |
| (16) | Repair and clean coffee bar area | $100.00 |
| (17) | Repairs to shipping area | $64.00 |
| (18) | Remove metal racks and repair walls | $44.00 |
| (19) | Repairs to entry and fire door to #203 – 260 Raymur | $429.76 |
| (20) | Reinstate entries to #101 – 1019 East Cordova (hallway) and 1021 East Cordova | $63.00 |
| (21) | Repair walls in foundry area | $126.00 |
| (22) | Reinstate cover for electrical wires | $21.00 |
| (23) | Electrical meter and telephone area repairs and reinstatement | $600.48 |
| (24) | Repair and reinstate south wall area | $1,296.86 |
| (25) | Repair washroom area | $790.87 |
| (26) | Restore 258 Raymur | $1,130.70 |
| (27) | Repair plywood floors | $507.50 |
| | **TOTAL** | $14,489.40 |

[126] Because some of these items relate to matters of ordinary wear and tear, although the majority do not, and in some cases the plaintiff will have obtained improved or upgraded premises, I will deduct 15% from the total. The plaintiff will therefore receive $12,315.99.

*13. Painting*

[127] The plaintiff concedes that normally the cost of repainting premises at the end of a tenancy is not recoverable by the landlord from the tenant; the need to paint is seen as a consequence of “reasonable wear and tear”. However, the plaintiff argues that in this case, cleaning and vacuuming did not suffice to stop the dust, which continued to escape from the walls and ceilings. He says that painting was the only way to seal the dust and stop it from drifting around the premises. He claims about $9,000 as the cost of the painting.

[128] The defendants’ position is that during their very long tenancy there is no evidence that the plaintiff ever painted the leased premises. They argue that the painting would have had to take place in any event as a regular part of the lessor’s maintenance of his building and did not have to be done for reasons attributable to them. They point to evidence that the plaintiff was obliged to paint in a particular manner to satisfy the requirement of one incoming tenant, and to evidence that the kind of painting done was to a level far beyond what might have been needed to contain dust. They argue that the claim serves as a good example of the plaintiff’s efforts to improve his building and have the defendants pay for those improvements.

[129] In order to re-lease the premises, the plaintiff would have had to paint in any event. I am not persuaded that I should depart in this case from the usual rule that a landlord cannot recover for the cost of painting from a departing tenant. The plaintiff fails on this claim.

*14. Waste and debris*

[130] While many of the items reviewed above involve relatively small amounts of money, the cost of removing waste and debris left on the premises is significant and the extent of the defendants' obligation is very much contested.

[131] The total damages claimed are $129,124.44 related to the investigation, removal and disposal of allegedly contaminated waste in the wall and ceiling cavities and in the concrete capped pits where the furnaces were. The plaintiff bases his claim on three alternative grounds: (1) the covenant under the lease to "leave the premises clean and free of industrial waste"; (2) an alleged implied term of the lease that the defendants would return the premises uncontaminated; and (3) section 27 of the ***Waste Management Act***, which provides that a person who is responsible for remediation at a contaminated site is liable to any person for reasonably incurred costs of remediation at that site.

[132] At this juncture I will consider only the plaintiff's claim under the express covenant in the lease.

[133] Photographs taken of the premises after the defendants moved out show a thick layer of dust in many areas, up to 30 cm. in places. The plaintiff hired a contractor (Best Cleaners and Contractors Ltd.) to vacuum the premises in July, 1990. In 1995 further investigations were undertaken and in 1999 $29,444.58 was spent to have material removed from the crawlspace under 1055 East Cordova Street and $1,500 to remove material from one of the concrete capped pits, called "Pit #2". Levelton Engineering Ltd. has recommended further remediation work which will cost an estimated $50,000.

[134] It is apparent from the evidence that the defendants left the premises, in many areas at least, swept up and relatively clean on the surface. The plaintiff then did work in July 1990 to further clean up the premises. The industrial waste that remained there after that time was, by and large, out of sight. It was hidden in the wall and ceiling cavities, the crawlspaces and the concrete capped pits. It was, however, not out of mind and the plaintiff became increasingly concerned about its potential impact on his ability to lease the premises to tenants who might be concerned about it, and on the market value of the building should he wish to sell it.

[135] The defendants' position is that the plaintiff leased the building for use "as a brass and aluminium foundry" and that the plaintiff, from his own observations and as a result of complaints from other tenants, well knew that the foundry generated metallic dust. The plaintiff nevertheless continued to increase the amount of space leased to the defendants for their foundry operations. Although this is not spelled out in the defendants' argument, presumably their position with respect to the express covenant in the lease to "leave the premises clean and free of industrial waste" is that (a) it encompasses only material that accumulated between 1980 and 1990; and (b) it is modified by the exception for reasonable wear and tear and imposes a reasonable, not a perfect standard of cleanliness and freedom from industrial waste.

[136] I have found against the defendants on the first point. At most, the Surrender Agreement would exonerate them for responsibility for breaches for the four-year period between 1976 and 1980, and no-one has suggested a way that

principle could be applied to a 26-year accumulation of foundry dust.

[137] As for the second point, I have concluded that the deposit of metallic dust does not constitute “wear and tear” so as to fall within the “reasonable wear and tear” exception. At the same time, I cannot conclude that the parties intended that the defendants would remove every microscopic particle of industrial waste. They must have intended, instead, that the defendants take all reasonable steps to remove such waste.

[138] The question is whether the defendants have taken all reasonable steps to remove the dust and waste that found its way into the walls, ceilings and crawlspaces and the debris left in the concrete capped pits?

[139] Counsel referred me to authorities in which similar issues have been considered, although there is none directly on point.

[140] In ***Manchester v. Dixie Cup Co., supra***, the plaintiffs claimed a breach of the covenants to repair by the defendants, who manufactured paper drinking-cups and other containers. These containers were sprayed with hot wax as part of the process, and the wax, despite measures designed to carry wax-laden vapour out of the building, eventually covered the walls, ceiling, pillars, pipes and fixtures and penetrated the pores of the brick walls. With respect to several areas the evidence was that the condition was no worse at the end of the lease than it had been in the beginning, since the same kinds of operations had been carried on in the premises before the lease began. The court held the covenant did not extend to requiring the defendants to put in good repair that which had not been in that state when they assumed possession.

(That is a significant distinguishing feature from this case, where the evidence does not indicate any previous operations comparable to the defendants' in terms of dust generation.) However, with respect to one area the defendants were held responsible for the removal of wax that had built up on the walls and ceilings.

[141] Another example is in ***Norbury Sudbury, supra***, where the defendant lessee had been carrying on its steel fabrication operations in the premises prior to the term of the lease in question (as the previous owner of the building). The defendant was held in breach of its covenants to repair, to clean and to surrender the premises in a clean and good state of repair. The court held that the meaning of those covenants depended upon a comparison of the condition of the premises at the beginning and the end of the term, the character of the building and the intended use, while the exception for reasonable wear and tear was limited to what was directly due to wear and tear and did not encompass other damages which resulted from the wear and tear. The defendant was not responsible for expenses the plaintiff incurred to prepare the premises according to the needs and specifications of a new tenant. However, it was required to pay for painting the office part of the premises despite the evidence that in the business in question one lived with dirty walls. The court said, "…in the light of the tenant's covenant to leave the premises in a clean state upon yielding up possession at the end of the term of the lease, one is obliged to remove the dirt one has lived with." It was also required to pay for doors, and for new floors in one area. The evidence was that the nature of the work done in that area had caused the

incrustation on the floor of a residue and the only reasonable method of removal was the replacement of the floor.

[142] In ***Bachechi Bros. Realty Inc. v. Aslchem International Inc.***, [1995] B.C.J. No. 1421 (Q.L.) (S.C.), (27 June 1995), Vancouver, A933013, the tenant had carried on the business of storing and repackaging chemicals. The court found that chemical dust escaping into the air and made damp by natural air moisture had caused considerable corrosion in the galvanized ceiling. Noting that what is reasonable wear and tear must be judged "bearing in mind the purposes for which the premises were leased and the nature of the business" (***Kreeft, supra***), the court held that some corrosion might be expected from the use of the warehouse as a chemical storage facility, but not as much as occurred. Therefore the tenant was entitled to some reduction in the cost of restoring the ceiling to its pre-lease state because of the reasonable wear and tear exception in the lease.

[143] ***Kreeft*** itself concerned the rental of premises to be used for the storage of steel. The court held that the cracking of the concrete floor was a natural result of the use to which the premises were put and that the "reasonable wear and tear" exception covered it.

[144] It was not suggested, and I do not think it could be suggested, that because the dust and debris was hidden in the wall and ceiling cavities and in the crawlspace, it did not amount to industrial waste left behind by the defendant. The words in the lease are not “clean and free of all ***visible*** industrial waste”. However one question is whether it was predictable, and expected by the parties when they agreed on the lease for a foundry business, that foundry dust would be

left behind. A second question is whether the defendants achieved a reasonable standard of cleanliness and freedom from industrial waste when they left the premises relatively clean on the surface but with large amounts of industrial waste hidden in the walls and above the ceilings and below the floors.

[145] With respect to the first question there was evidence that well before the parties signed the 1980 lease the plaintiff landlord was aware that dust was a by-product of this tenant's operations. Creation of dust was contemplated; it must also have been contemplated that some dust would be left behind.

[146] However, the defendant left considerable quantities of dust and debris behind. The March 2, 1999 report from Levelton Engineering estimates that approximately 6.1 metric tonnes of foundry debris was removed from the site. The defendants' expert, Mr. Gaherty, agreed that removal of at least 3 metric tonnes would have been reasonable. This material came from the crawlspace under 1055 Cordova Street and from one of the furnace pits (pit #2, 260 Raymur Ave.) The earlier (August 10, 1998) report of Levelton Engineering describes the material that was found upon inspection. In the crawlspaces there was a good deal of reddish-brown sand which likely was foundry sand fallen through the cracks in the floor. As well in the crawlspaces was a dark deposit ranging from a gritty sand to a fine powder. In the wall and ceiling cavities was dust and grit. In the concrete capped pits was a mixture of factory waste, sand and gravel.

[147] There will be no need to go beneath the concrete floor again until the building is demolished. The concrete

pits are not clean nor free of industrial waste, but it would be to impose an unreasonably high standard to require the defendants to unseal the concrete and remove what is buried beneath the floor.

[148] However, the crawlspaces and wall and ceiling cavities are a different matter. The plaintiff testified that he needs to access them from time to time when new tenants' improvements are being made or when services are being installed. The defendants attempted to show that the need to go into the crawlspaces or cavities would be rare. The evidence indicated that access to the wall and ceiling cavities will not be that unusual. There are about 16 tenancies and moderately high turnover in those tenancies. However, even if it were rare for tenants to need access, the areas are not sealed off as are the pits, and form part of the premises in a way the pits do not. The material left behind is substantial in quantity. Further, it has proved to contain (in the case of the wall and ceiling cavities) prescribed substances at unacceptable levels and (in the case of the crawlspace) special waste within the meaning of the ***Waste Management Act*** and its Regulations.

[149] I have concluded that the defendants breached their agreement to leave the premises clean and free of industrial waste. They did not meet a reasonable standard when they cleaned the premises before leaving. They should have been aware of the industrial waste left behind, and taken steps to remove it from the wall and ceiling cavities and the crawl space.

[150] I will review the assessment of damages for this breach below in Part III of these Reasons.

### *C. Is it an implied term of the lease that, upon its expiry, the defendants would return the property and premises uncontaminated?*

[151] In arguing that it was an implied term of the lease that the defendants would return the property and premises uncontaminated at the end of the term, the plaintiff relies on two cases, ***Darmac Credit, supra*** and ***Progressive Enterprises, supra***. In ***Progressive Enterprises*** the court at para. 32 quoted with approval from ***Darmac Credit*** as follows:

> In my view, in today's commercial world, unless a lease provides otherwise, it is implied within a lease that lands are to be returned uncontaminated. Contaminated lands are not saleable lands. Perhaps, when this particular lease was entered, environmental concerns were minimal, but they have become prominent in recent years. Although environmental damage was not directly addressed when this lease was entered, the tenants are responsible for any contamination they cause.

[152] The court in ***Progressive Enterprises*** found there was an implied term in a commercial lease stipulating that, on the termination of the lease, the tenant would return the lands uncontaminated. In her decision Madam Justice Loo found that lands could be “contaminated” even in the absence of applicable environmental criteria or legislation to set standards. Mr. MacDonald for the plaintiff noted that the most recent amendments to the ***Waste Management Act*** (providing for statutory cost recovery) came into effect after 1997 when the ***Progressive Enterprises*** case was decided.

[153] The defendants' position, on the other hand, is that a term should not be implied into the lease because this case does not fall within the well-established principles of contract law regarding implied terms. The defendants rely on

***Luxor (Eastbourne) Ltd. v. Cooper***, [1941] A.C. 108, [1941] 1 All E.R. 33 (H.L.) In that case, Lord Wright stated (at All E.R. 52-53):

> … There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they have intended should govern their agreement, whether oral or in writing. It is well-recognized, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicted that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The intention must arise inevitably to give effect to the intention of the parties.

[154] The above passage has been cited with approval by the British Columbia Court of Appeal in ***Olympic Industries Inc. v. McNeill*** (1993), 86 B.C.L.R. (2d) 273 (C.A.) and ***Snarpen Contracting Ltd. v. Arbutus Bay Estates Ltd.*** (1996), 75 B.C.A.C. 161. In ***Lyford v. Cargill Co. of Canada Ltd.***, [1944] 1 W.W.R. 273 (B.C.C.A.) the court referred to the principle that:

> … the Court cannot rewrite a contract by finding that terms should be implied which should have been reasonably incorporated into the contract, and the Court can only imply terms in a contract (a) when it is obvious that it was the intention of the parties to include as part of the contract a certain term, or (b) where business efficacy demands that such a term should be implied.

[155] Counsel for the defendants argues that the ***Progressive Enterprises*** case need not be followed, under the second exception cited in ***Re Hansard Spruce Mills Limited*** (1954), 13 W.W.R. (N.S.) 285 (B.C.S.C.), a case in which Wilson C.J.S.C. stated the three exceptional circumstances in which a judge of this court might depart from a previous decision of this court: (a) if subsequent decisions have affected the validity of that judgment; or (b) if some binding authority in case law or statute was not considered in that judgment; (c) if the judgment was unconsidered and was given in circumstances that required an immediate decision without the opportunity to fully consult authority. Mr. Robinson argues that the ***Luxor*** case and those following it were not considered by the court, and that the decision to imply a term into the lease was therefore incongruent with the law in British Columbia.

[156] Counsel for the plaintiff argues that the ***Progressive Enterprises*** case does not fall within the second exception, since it (and the ***Darmac Credit*** case) effectively apply the same "business efficacy" test. Mr. MacDonald argues that if someone had said to the parties when the leases were being negotiated, "What will happen if the defendants contaminate the premises?", they both would have replied, "Of course, the defendants will have to return the premises uncontaminated at the end of the term." Thus, the plaintiff sees the ***Progressive Enterprises*** case as within the existing principles according to which terms may be implied.

[157] Accepting those principles are as set out in the cases cited by the defendants, the question is whether a term that the premises would be returned uncontaminated is necessary to give business efficacy to the contract, such that

it would go without saying and is inevitably necessary to give effect to the intentions of the parties.

[158] In considering this question, I bear in mind that the parties did agree that the defendants would reinstate the premises to their original condition and would (subject to the exception for reasonable wear and tear) return the premises clean and free of industrial waste and in good repair. The existence of an explicit reference to industrial waste can point in either direction. It could be argued that it shows that the parties turned their mind to this general subject and said what they had to say about it: if they had wished to specify that the premises were to be returned uncontaminated, they would have said so. On the other hand, it could be argued that if the parties intended that the premises were to be returned free of industrial waste, they obviously meant to include contaminated substances in that general category: if asked, they would have said "Yes, of course contaminated material is included." Given those agreements and all of the other circumstances (including that both parties were aware that the defendants were carrying on work that conceivably could leave the premises in a contaminated state) does it go without saying that when the parties signed the 1980 lease they intended the premises would be returned uncontaminated? I conclude it does and that such a term arises by implication.

[159] What is meant by "contaminated"? The plaintiff and defendants agreed that in this context the word should be given its ordinary meaning. The meaning of “contaminate” is, according to the ***Shorter Oxford English Dictionary, supra***:

> To render impure by contact or mixture; to corrupt, defile, pollute, sully, taint, infect.

[160] Applying that definition to the facts of this case, I find that the defendants were in breach of the implied term of the lease that they would return the premises in an uncontaminated state. Metallic dust and debris, pervasively deposited in parts of the wall and ceiling cavities and in the crawlspace, can be fairly said to defile, pollute, taint, or sully these premises.

[161] The damages flowing from this breach would be the same as for breach of the covenant to leave the premises free from industrial waste, discussed in Part III below.

## *III. ISSUES UNDER THE WASTE MANAGEMENT ACT*

### *A. Is the site a "contaminated site" under the* Waste Management Act*?*

#### *1. Statutory requirements and submissions of counsel*

[162] Before I review the evidence relevant to this question I will set out the pertinent statutory provisions and the arguments counsel have made about their impact.

[163] Part 4 of the ***Waste Management Act*** creates a statutory cost recovery action against "responsible persons" who cause a site to become a "contaminated site". Section 27 (1) provides:

> 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.

[164] The term "contaminated site" is defined in s. 26(1) of the ***Act***:

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

[165] In the same section, "contamination" is defined:

> "contamination" means the presence, in soil, sediment or groundwater, of special waste or another substance in quantities or concentrations exceeding prescribed criteria, standards or conditions.

[166] "Land" is defined in s. 1:

> "land" means the solid part of the earth's surface and includes the foreshore and land covered by water.

[167] "Special waste" is defined in s. 1 of the ***Act***:

> "special waste" means
>
> (a) a substance that is prescribed as a special waste by the Lieutenant Governor in Council, and
>
> (b) if the Lieutenant Governor in Council prescribes circumstances in which a substance is a special waste, a substance that is present in those circumstances.

[168] "Waste” is defined in the same section:

> "waste" includes
>
> (a) air contaminants,

> (b) litter,
>
> (c) effluent,
>
> (d) refuse,
>
> (e) biomedical waste,
>
> (f) special wastes, and
>
> (g) any other substance designated by the Lieutenant Governor in Council,
>
> whether or not the type of waste referred to in paragraphs (a) to (f) or designated under paragraph (g) has any commercial value or is capable of being used for a useful purpose.

[169] As for the definition of “responsible person”, it is found in s. 26.5(1):

> 26.5(1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:
>
> (a) a current owner or operator of the site;
>
> (b) a previous owner or operator of the site;
>
> (c) a person who
>
> (i) produced a substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
>
> (d) a person who
>
> (i) transported or arranged for transport of a substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner

> that, in whole or in part, caused the site to become a contaminated site;
>
> (e) a person who is in a class designated in the regulations as responsible for remediation.

[170] The ***Special Waste Regulation***, B.C. Reg. 63/88, s. 1(1) stipulates that "special waste" means, among other things, "leachable toxic waste".

[171] Counsel for the plaintiff argues that materials left in the crawlspace by the defendants fall within the definition of "special waste". The argument is as follows.

(1) Both parties' experts gave evidence that samples of the material from the crawlspace, when subjected to leachate extraction procedures known as Special Waste Extraction Procedures or "SWEP" tests, failed the test criteria because of the presence of lead.

(2) If a substance fails the SWEP test it is a leachable toxic waste.

(3) A leachable toxic waste is a "special waste".

(4) In addition, the substance falls within the definition of "waste" in s. 1 of the ***Waste Management Act*** which is an inclusive but not an exhaustive definition. Not only is it "refuse", which is part of the definition, but also it is "waste matter, … the useless by-products of any industrial process" (part of the ***Shorter Oxford English Dictionary*** definition of "waste".)

(5) Therefore, the material is a "special waste" which means that the site is a "contaminated site" within the meaning of s. 26(1) of the ***Waste Management Act***.

(6) In addition, the crawlspace contains a "prescribed substance" in excessive quantities and the site is therefore a "contaminated site" under the second branch of the definition in s. 26(1) of the ***Waste Management Act***.

[172] On the other hand, counsel for the defendants advanced this argument:

(1) The contamination must relate to soil, groundwater, water or underlying sediment given the definitions of "contaminated site" and "contamination".

(2) Although the crawlspace does relate to soil, and to the "solid part of the earth's surface", none of the other areas (the ceilings and walls and the concrete capped pits) do. Although the evidence was that the concrete lining of one of the pits was broken, the material contained in the pit was not in contact with water or soil.

(3) A "SWEP" test is only one of the tests used to determine whether a material is classified as a special waste and is not determinative of whether a substance is a special waste before it is collected.

(4) As for the claim based on samples exceeding the prescribed criteria, the standards relied upon by the plaintiff's experts only contemplate analysis of contaminants in the natural environment, namely soil and water, by virtue of the ***Contaminated Sites Regulation*** which provides in s. 11(2):

> 11(2) A site is not a contaminated site with respect to a substance if the concentration of the substance in soil, surface water or ground water at the site does not exceed the applicable site specific numeric standard.

(5) The analysis by the plaintiff's experts was not an analysis of contaminants found in soil, surface water or groundwater and therefore the evidence cannot be used to show that the site is a "contaminated site".

(6) Mr. Robinson for the defendants conceded that if the crawlspace material is special waste, then the site is a contaminated site. However, he urged, I should bear in mind that it was only one sample in fourteen that failed the “SWEP” test.

[173] The reply submissions on behalf of the plaintiff took the position that there is nothing in the definition of "contaminated site" under the ***Waste Management Act*** to suggest that a distinction should be made between different portions of a single site. Mr. MacDonald argued that because special waste and substances exceeding the prescribed criteria were

found in the soil of the crawlspace, the site as a whole is a contaminated site.

*2. Expert Evidence*

**Tom Cotton's Evidence**

[174] The plaintiff tendered evidence from Tom Cotton of Levelton Engineering Ltd. He is a Professional Engineer with considerable experience in contaminated site assessments and remediation. He was accepted as an expert witness on the subjects of indoor air quality in workplace environments, environmental assessments, and contaminated site assessments. His report deals with three distinct areas: the wall and ceiling cavities, the crawlspace debris and the concrete-capped pits.

(a) The wall and ceiling cavities

[175] Mr. Cotton stated that a substantial deposition of a material ranging from fine powder to a more gritty dust was present in various wall and ceiling spaces within the northern portion of the premises. Eleven samples were taken, eight from the ceilings and three from the walls. All eleven samples were found to contain at least one heavy metal at concentrations above the Industrial Land Use Criteria specified by the ***Contaminated Sites Regulation***. Mr. Cotton stated on cross-examination that the dust is likely to be a special waste; however it would be exempted from the ***Special Waste Regulation*** if present in less than five kilograms. In most cases the contamination exceeded that found in the crawlspace samples. Arsenic and mercury were also found to be present at non-compliant levels.

[176] Mr. Cotton's opinion was that:

> The dust materials within the wall and ceiling cavities are certainly to be considered hazardous materials based on the total and leachable heavy metal analyses. These are only partially enclosed with a number of exposed ceiling openings evident throughout the area of concern. Here again, the materials will have to be remediated at the end of the building's lifetime at which time, assuming the same regulatory framework, a special waste will be generated. The materials could be managed in place until then, ensuring that maintenance workers and tenants are not exposed to unacceptable airborne concentrations of heavy metals during activities that require access into the spaces.

[177] He stated that management in place would require a number of steps including sealing all openings, cracks and holes in the existing ceiling, vacuuming surfaces and openings beneath it, preparing a written management plan, conducting any maintenance activity in the wall or ceiling cavities with protective clothing and respirators, and training tenants and maintenance workers in the management plan. Mr. Cotton concluded that those requirements were so onerous that there would be little likelihood of adherence by contractors and tenants, and recommended abatement in the near term. Further, he testified, if there were a management program it would still be necessary to remove the materials prior to demolition at the end of the building's life, and the materials would have to be handled as “special waste” at that time.

[178] The abatement would involve removing the material from the total area affected, estimated at 4000 square feet, using speciality contractors and at an estimated probable cost of $50,000. The costs of relocating tenants during the process was not included in the estimate, but it did include the cost of consulting, design and testing services.

[179] In his testimony Mr. Cotton recommended that when there are tenant improvements or changes in tenancies to consider doing the removal at that time, and in the meantime to have a management program implemented.

(b) The crawlspace

[180] Mr. Cotton's report sets out that a non-native solid material is present within the various crawlspaces which are six long narrow cells separated by foundation walls. The material sits on an earthern floor and covers about 2000 square feet of surface area in depths normally ranging up to six inches. Samples were taken from the materials in various parts of the crawlspaces and analyzed. Ten samples were found to exceed the industrial Land Use Criteria specified by Schedules 4 and 5 of the ***Contaminated Sites Regulation*** for at least one heavy metal element. Eight different elements were found to be present in the samples at non-complying levels, listed in order of frequency as: zinc, copper, lead, nickel, antimony, chromium, silver and molybdenum. Three samples were analysed for leachates. The results indicated non-compliance with Special Waste criteria in the case of one sample because of its lead content. Otherwise the results indicated elevated levels of lead, zinc and cadmium, but levels that were compliant with the special waste criteria. If material is classified as a special waste there are special handling, disposal and storage requirements.

[181] Mr. Cotton's opinion was that the deposits in the crawlspace probably do not presently constitute an off-site impact to neighbouring properties but do represent an environmental impact to the subject site and a hazardous condition if the space is entered by unprotected persons. He

recommended that the contaminated crawlspace surface material be removed and disposed of, then all surfaces in the crawlspace be vacuumed to remove any significant dust from ledges, floor joists, cross members and other horizontal surfaces. The estimated cost for the remediation was $30,000, including the cost for removal and disposal of the contaminated soils, project management and testing services. He rejected the option of management of the contaminants on site because the material is in contact with the native soils and the current area of contamination can become extended. Further, the necessity to remediate would simply be deferred because when the building is demolished at the end of its lifetime, the material would have to be removed from the site. In the meantime, he stated, persons entering the crawlspace for any reason would have to wear protective clothing and respiratory equipment due to Workers' Compensation Board regulations, and because the crawlspace would be deemed a hazardous area it would be necessary to provide some education to the building tenants. He stated the opinion in his testimony, based in part upon some conversations with environment Ministry personnel, that they would not be happy if the materials were left in place.

(c) The concrete pits

[182] Samples were taken from the three pit areas. One area showed no problem, but samples from the other two were non-compliant with the ***Contaminated Sites Regulation*** Industrial Land Use criteria for nickel and zinc. The heavy metal concentrations were lesser than those in the crawlspaces or the ceilings and wall cavities, probably because of dilution with sand and gravel. Mr. Cotton's opinion was as follows:

> Assuming the present criteria remain in effect and are not relaxed, the materials will require remediation if and when the building is demolished and the site is redeveloped. However, we would note that the materials are restricted in volume and contained in specific and completely isolated locations. Accordingly, these materials can be adequately managed in place. This would require delineating the groundwater regime in the area and possibly monitoring heavy metal concentrations in the groundwater to determine whether off-site impacts are occurring. The estimated probable cost of this program is $5,000 plus $1,000.00 per year in monitoring costs (based on a semi-annual test schedule). The former includes the initial costs for the program set-up and the latter includes the price of the analysis of three water samples and their reporting…. The incremental cost for removal and disposal of the waste at the time of demolition is expected to be $5,000.00.

He estimated that the alternative approach of removing the materials immediately would cost about $25,000, not including the cost of restoring some new construction over the area, lost revenue or tenant relocation.

(d) The remediation work

[183] In January, 1999 Levelton Engineering was retained to carry out some of the remediation work it had recommended. In a report dated March 2, 1999 Mr. Cotton and a colleague, Dennis LeDuc, who had been the project co-ordinator, reported on that work. They removed about 6.1 metric tonnes of debris from two areas: the concrete-capped pits, and the crawlspace beneath 1055 Cordova Street. Air and soil testing was done. All occupation and ambient air sample analyses were below the applicable exposure levels as established by the Workers' Compensation Board. Soil testing of the soil in the crawlspace after the removal of the foundry debris showed zinc above the Industrial Land Use standard in all but two samples.

Chromium was found above the Industrial Land Use standard within one sample. The concrete pit was found to have a metal base, which did not appear to have any perforations. After inspection the pit was back filled with 3/4 " gravel, compacted to specifications and recapped with concrete to match the existing floor grade. The 6.1 metric tonnes of debris was transferred off-site and stabilized at Western Soil Services by combining the debris with Portland cement. It was then to be transferred to the BFI Calgary landfill for disposal.



**William Gaherty's Evidence**

[184] The defendants retained William Gaherty, Professional Engineer, in 1995, in the words of his report of June 20, 1995, "to summarize how we feel contaminated material beneath the floor and above the ceiling is best handled." Mr. Gaherty was accepted as an expert in the establishment and implementation of control, management and remediation of contaminated waste; environmental risk assessment; and the recognition, nature and sources of contaminants and waste. His firm tested samples of dust from above the ceiling and the debris from beneath the floor and "found that the dust and two of three debris samples contained metals concentrations consistent with the foundry being a significant contributor." I will quote from Mr. Gaherty's letter report which summarizes concisely his observations and recommendations:

> **Dust Above Ceiling**
>
> The dust, because of its metal content, could readily exceed the workplace criteria of the Industrial Health and Safety Regulation for copper, zinc and lead, if breathed. Urban dust frequently contains high metals concentration and so has

potential to exceed these standards too, but the ceiling dust can more easily exceed the criteria because the concentrations of some metals, copper especially, are higher than in generic urban dust.

Removal does not however seem to be an appropriate response because it appears to be both unnecessary and impractical. Removal is unnecessary because the potential for release of accumulated dust from the ceiling space is negligible in ordinary circumstances, isolated as it is from the occupied space by drywall, vapour barrier and decking, penetrated only by a few ventilation stacks (i.e. at the bathroom). Complete removal of this dust is also impractical. The available methods to remove the dust from inside the building are likely only to increase exposure of building occupants without any reasonable potential for complete removal, because of access difficulties. The only method that we see as having any practical merit might be during the normal course of roof replacement if the deck is removed. In that case, the dust could be removed by vacuuming from above. This method would limit exposure of removal workers, the main risk, and be capable of reasonable coverage without major cost.

Rather than removal, our recommended approach is to manage this material in place, and deal with the dust when it is disturbed. Management in place would involve ensuring that contractors or tenants that disturbed potentially contaminated materials were appropriately protected. Exposure to dust disturbed in the course of minor renovation could be controlled by use of light water spray and possibly a respirator if the exposure is indoors. Major renovations that involved removal of the decking from the underside of the joists might require more sophisticated application of the same methods or alternate methods. If handled sensitively, we believe this would not unduly alarm or inconvenience tenants.

**Crawlspace Material (Debris)**

Some of the debris under the floor is high in metals and leachable, but is not a regulatory problem because the quantity is too small. Nonetheless we consider it prudent to remove it. We believe that

> labourers equipped with respirators (probably not required, but a prudent precaution) could remove this material safely with a few days work. Their activity would be aided by cutting one or two new holes in the floor that could be repaired when work was complete. We understand that Fourway is prepared to undertake the removal, and that should be within their capabilities. We assume that Fourway has methods for dealing with material with these characteristics once it is removed, as they must deal with similar material day-to-day.
>
> …
>
> **CONCLUSIONS**
>
> Materials with high metals concentration that almost certainly originate with the previous foundry use of the building are still present, in the form of dust above the ceiling and debris under the floor.
>
> For the dust, no action is required for regulatory or health and environmental protection aside from a management plan to ensure that renovation workers are not inadvertently exposed. Action now on the debris can be easily undertaken at modest cost. If this work is undertaken, a consultant should collect confirmation samples and provide a letter confirming that remediation is complete. PGL is prepared to do this if you require.

[185] Mr. Gaherty prepared a second report dated January 14, 1999. In it he addressed the sources of contamination, which I have already reviewed, and three other issues:

> (a) environmental and regulatory significance of the dust;
>
> (b) environmental and regulatory significance of the crawlspace debris and costs to remove it; and
>
> (c) environmental and regulatory significance of the pits and costs to dispose of their contents at demolition;

(a) The wall and ceiling cavities

[186] Mr. Gaherty stated that he knows of no B.C. requirement or expectation to manage material such as the dust in the wall and ceiling cavities; it is not regulated on site by the ***Contaminated Sites Regulation*** and the ***Special Waste Regulation***. He said, however:

> In my experience, collecting metal-containing dust from closed walls and ceilings cavities would be unusual and cautious, but is not irrational. If the material were collected, it would likely be categorized as Special Waste based on leachability but is unlikely to reach a Registerable Quantity (one tonne or 1000 kg is the Registerable Quantity as identified in Schedule 6 of the Special Waste Regulation for leachable toxic wastes, the category this dust would fall into.)

Mr. Gaherty said in cross-examination that the dust would not fall under the ***Contaminated Sites Regulation*** although he agreed that the material was a contaminant. He agreed that if collected at the time of demolition it would likely be categorized as a special waste. However, he felt there was doubt about its status prior to collection because of incomplete or unclear legislative definitions. The example used was lead-based paint on a wall: is it a waste at all (and therefore possibly a special waste) before it is removed from the wall? His opinion was that upon demolition the dust could be ignored and it would not be a problem from the regulatory perspective. He testified that a bag of the dust if collected and sitting on the loading dock would be a special waste, but it would not be a normal demolition process in a building such as this to collect that waste.

(b) The crawlspace

[187] Mr. Gaherty reports that in his opinion it is reasonable to consider that the ***Contaminated Sites Regulation*** applies to the crawlspace debris (because it sits on a slightly damp, earthen surface), but that the debris is not an environmental hazard in its current setting. This is because the water table in the area is not ever likely to reach the ground surface, and the debris is protected by the building from precipitation. Thus, the contamination in the crawlspace will not migrate. He added:

> Only at demolition (or in the event of a pipe leak, which would almost certainly be short-term and therefore insignificant) would exposure of the debris lead to environmental release of the contaminant. It is my informed opinion that BCE [presumably, British Columbia Environment] would agree that the material is acceptably contained and need only be dealt with at demolition.

[188] His estimate for the costs of removal at demolition was $5,000, agreeing with that aspect of the Levelton report. In testimony he was firm in his opinion, based upon his experience, that the Ministry would accept management of the material in place. He had not spoken to anyone at the Ministry.

[189] Mr. Gaherty agreed that the testing carried out by Mr. Cotton on the site was necessary.

[190] Mr. Gaherty commented on the applicability of the ***Special Waste Regulation***, stating that it is not clear-cut. He said the status of the material (whether a special waste or not) would have to be settled by environmental authorities if the owner applied for rezoning, subdivision, or a development

permit and his belief was that management of the material in place would be accepted if the building were not demolished.

[191] Mr. Gaherty agreed on cross-examination that there is no doubt that if one collected the material in the crawlspace, it would be characterized as special waste. He agreed that the material in the crawlspace does require management since it is covered by the ***Contaminated Sites Regulation*** due to its sitting on the earthen floor. He also agreed that the owner would be required to provide a site profile to prospective purchasers before dismantling the building. It would also become publicly available. He agreed that when a site is found to be a contaminated site, it is necessary to satisfy the Ministry in order to get rezoning, a development permit, a building permit, and the like, and that financing is also an issue. He agreed that designation as a contaminated site also affects the price and perhaps the marketability of the property. The effect on the price is attributable to the remedial cost plus some risk premium.

[192] Mr. Gaherty agreed on cross-examination that if the material was to be removed prior to demolition, removing about 3,000 kg was appropriate. He estimated that removal of 4,000 kg would have cost $10,000 less than the removal that did take place (of over 6,000 kg). He explained that his statement in 1995 that removal would be "prudent" had to be understood in context. The context was an assumption in 1995 that the defendants would remove the material and deal with it through their disposal avenues. In the context in which the work was actually done in 1999 and the high costs experienced, the cost/benefit analysis, he said, would cause him to change the word to "cautious".

[193] Mr. Gaherty on re-examination testified that the regulatory scheme when he did his initial report was different from what it is today and that he had been provided a quote from Envirovac for removal of the hazardous materials at $5,000. He had also assumed that the materials could be disposed of by Fourway through their usual avenues, which involved some reprocessing.

(c) The concrete pits

[194] Mr. Gaherty related his understanding of the contents of the pits: broken concrete, used foundry sand, incidental floor sweepings and small amounts of difficult-to-remove hard metal, navvy jack (a sand and gravel mixture brought in to fill them), metal mesh or rebar and concrete flush with the floor. He concluded that the pits are not an environmental hazard, nor do they violate any B.C. environmental regulation. This is because they are all entirely contained, with no potential for exposure to the environment or building occupants while capped, and with no potential for environmental mobility. Although the bottom of one pit is broken, in no case are the contents in direct contact with the soil. He stated the opinion that neither the ***Contaminated Sites Regulation*** nor the ***Special Waste Regulation*** applies, based on his experience and commonly understood definitions of the word "soil". Thus, it was his belief that disposal of the pit material unsegregated as demolition debris would comply with current regulations and policies. He estimated that if the foundry sand were segregated out from the broken concrete and navvy jack, using the pit volumes estimated in the Cotton report it would cost about $1,000 to $4,000 to dispose of them, slightly less if the work were part of building demolition. He agreed on cross-examination that

the costs would be significantly higher if the contents were a “special waste”.

**Robert Lockhart’s Evidence**

[195] The defendants as well provided a report from Robert Lockhart, Ph.D., who is the director of the Occupational and Environmental Risk Management Group at BC Research Inc. and is a certified industrial hygienist. He was accepted as an expert in the areas of recognition, evaluation and control, and risk assessment of worker and workplace health and safety issues; and establishment, costing and implementation of controls, including remediation where necessary, of contaminated sites. Like Mr. Gaherty, Dr. Lockhart had reviewed the Levelton report by Tom Cotton, but from the perspective of actual and likely exposures of persons in the building to industrial contaminants.

[196] His findings were as follows:

1. Certain areas within the building and associated crawlspace are contaminated with metals (and probably with crystalline forms of silica).

2. When the building is demolished the ***Contaminated Sites Act*** and ***Regulations*** will mandate collection and safe disposal of the contaminants from the crawl space and ceiling and wall cavities.

3. Levelton failed to conduct an adequate assessment of risks of exposures for tenants and building services workers. The applicable

Regulation of the Workers' Compensation Board of B.C. does not require removal of a contaminant simply because it is present in an industrial location. The question is what potential for exposure exists and what control can be achieved through administrative or engineering controls, use of personal protective equipment, isolation, removal or replacement with a less hazardous agent, or any suitable combination of those options.

4. Physical evidence demonstrates that significant contamination has not and is not entering the occupied spaces of the building. There is very little opportunity for tenants to be exposed to the metals or other contaminants. (This conclusion was reached on the basis of inspection of the building -- there is a minimal number of access points into the ceiling, for example -- and discussion with the owner as to the need to access areas such as the ceiling and crawlspace, which he stated to be infrequent. He also stated that maintenance is conducted under the direction of the building owner and tenants have no need to access the crawl space, etc.)

5. Exposures to contaminants can be easily and cost-effectively controlled by ongoing management rather than complete remediation of specified areas.

6. Without dismantling the building, it would not be possible to remediate to the extent that no future exposure to contaminants could be guaranteed to an unprotected worker working in a previously contaminated area. Future exposure of workers can best be controlled by a combination of ongoing management and localized remediation on an as-needed basis.

(a) The wall and ceiling cavities

[197] Dr. Lockhart questioned whether the contaminants extend into the ceiling and wall cavities of #101 – 1019 East Cordova and #203 – 260 Raymur since there was no evidence of it in the Levelton report and the Fourway information was that the spaces were used for storage and other non-foundry work.

[198] Further, Dr. Lockhart noted that contaminants found within the walls and ceiling spaces are almost fully contained. The walls are drywall over clapboard, and the ceiling is shiplap decking covered with vapour barrier and then drywall. He stated the opinion that the Levelton recommendation that the areas be fully remediated at this time far exceeds the needs for this location for operation of an industrial facility. Rather, he stated, worker exposure to contaminants can readily be controlled by management steps common to industrial operations. These would include the restriction of tenant entries into the wall cavities and ceiling spaces, consultation with a qualified occupational hygienist if access is undertaken, and entry to the space by a qualified contractor to carry out localized cleaning prior to allowing access. He was of the opinion, however, that in the long term, and prior to the demolition of the building, it

will be necessary to undertake remediation of these areas. It could best be done at the time of demolition, at which time costs can be controlled. He stated that the criteria for cleaning at that time would be substantially less stringent, and that even with thorough cleaning there may be no guarantee that workers will not experience some exposure to airborne contamination. The cost to establish a management plan for protection of tenants and service workers was $1,500, and the cost of occupational hygiene consulting and monitoring for each entry, and localized cleaning, would approximate $2,500.

[199] He estimated the long term cost to remediate the wall and ceiling cavities prior to building demolition at $20,000 - $30,000, although the actual cost will depend on the extent of contamination if it does exist in the 203 – 260 Raymur and #101 – 1019 East Cordova premises.

(b) The crawlspace

[200] With respect to the crawlspace, while Dr. Lockhart agreed with the Levelton report that some degree of control is necessary to limit worker exposures to the contaminants he disagreed with the recommendation to remove the material and vacuum the floor joists and beams. He disagreed because, he said, management of potential exposures is very viable and may in the long term provide the best control, and because soil removal and vacuuming will not guarantee no future exposures. Therefore, he recommended that the best approach is to install simplified engineering controls, such as a combined layer of polyethylene sheeting covered with a layer of "rip stop" plastic sheeting covering the underlying floor, along with ongoing management of workers entering the space. The estimated cost for modifications to the space to allow

unprotected workers to enter and do routine maintenance work was $5,000. He stated that special protective equipment would not be required for routine work on water supply and sewerage piping in the crawlspace so long as normal coveralls and handwashing were used. Major work involving vigorous physical disturbance of structural components would require review by a qualified occupational hygienist before being undertaken -- but this would be needed whether or not the floor is remediated and surfaces vacuum cleaned.



(c) The concrete pits

[201] Dr. Lockhart's opinion was that because there is no apparent need for any tenant or service worker to enter these areas, they pose no occupational health or safety issue to any tenant or worker at the site.

**Reply Evidence of Tom Cotton**

[202] The plaintiff filed two reports in reply. In the first, of March 4, 1999, Mr. Cotton responded to the defendants' experts. He stated the following:

**Responding to the May 1 Pottinger Gaherty Report**

(1) Assuming no changes to current environmental policies, when the property is redeveloped or rezoned a Site Profile and a Preliminary Site Investigation will have to be completed.

(2) The material in the crawlspace is special waste as defined by the ***Regulations***, and the dust in the wall and ceiling space will likely be classified as special waste. Assuming the material in the pits is foundry sand and floor

sweepings, there is no reason to suspect it will be any different than that found in the crawlspace.

(3) There are more than a few penetrations into the ceiling space. Ceiling and wall cavity dust also includes dust that was found lying inside electrical conduits, on top of wiring and inside surface cracks in timber beams, all of which are located below the ceiling in the occupied part of the building.

(4) There may be a significant exposure to building occupants when work requires ceiling/wall space egress. A proper risk assessment is required to assess the potential hazard if the material is removed and if the material is left in place.

(5) The material removed from the crawlspace was registered as special waste.

**Response to the June 20, 1995 report of Pottinger Gaherty**

(6) The Special Waste materials in the crawlspace do not fall within the exemption of s. 2(6) of the ***Special Waste Regulation***.

**Response to the January 14, 1999 report of Pottinger Gaherty**

(7) The material in the pits would be classified as special waste, and therefore Mr. Gaherty's estimates of disposal costs are inaccurate . If the pit material is special waste dilution

with navvy jack or other inert waste would be a practice prohibited by s. 36 of the ***Special Waste Regulation***. Disposing of foundry sand with municipal garbage would be in contravention of s. 39 of the ***Special Waste Regulation***.

(8) Depending on the quantity and leachability characteristics of the wall and ceiling dust, the owner may be a generator of special waste and therefore subject to the Regulations. If this dust is left in place, a risk assessment will be required as will some form of management program in order to comply with the WCB ***Occupational Health and Safety Regulation***.

(9) The material in the wall and ceiling cavities must be handled as special waste if it exceeds 5 kg. Some of the substances noted have special WCB designation and exposure of workers to them must be kept As Low As Reasonably Achievable.

(10) In Mr. Cotton’s opinion, the ***Special Waste Regulation*** does apply to the crawlspace debris, and that application is not dependent on the presence of lead.

(11) The Ministry might accept a management approach for the material in the crawlspace, assuming that the building will not be demolished for some time. The practicality of such an approach is questionable because the material would have to be stored in a suitably contained

and secure area, which is not the present situation.

**Response to the BC Research Inc. report**

(12) The absence of visible dust does not necessarily mean that the breathing atmosphere is free of contaminants originating from the crawlspace "debris" at unacceptable levels. Further, bulk amounts of the Special Waste material can be transported from the space on hands or clothing, and ingested or inhaled later.

(13) The space remediated in January 1999 is free of Special Waste and extraordinary precautions are not necessary.

(14) The Lockhart recommendation to place a sheet capping over the special waste material underestimates the associated costs and potential for future incremental costs. In Mr. Cotton's opinion, the suggested procedure will not be acceptable to the Ministry.

(15) The estimated cost for developing and implementing the management plan for the wall and ceiling cavities is insufficient.

[203] The plaintiff also filed a report and led evidence from Robert Charlton, whose opinion related to the sources of contamination and has been reviewed above.

[204] The expert witnesses' disagreement is essentially about whether it is necessary and cost-effective to remove the

materials now from the wall and ceiling cavities and the crawl space, or whether the materials can be left in place and managed until demolition without infringing the law and without putting tenants or persons working on the building at risk. There is no real dispute that the materials can safely be left in the concrete pits until demolition.

[205] Because I have concluded that the defendants are in breach of the express covenant in the lease that they will leave the premises free of industrial waste, and of the implied term that they will leave the premises uncontaminated, the question is whether they have taken all reasonable steps to comply with those obligations. Should they have attempted to remove everything, or should they have put in place the more conservative measures described by Mr. Gaherty and Dr. Lockhart?

[206] Having considered the experts' reports and their testimony, I have reached the conclusion that remediation now is the appropriate course of action. I found Mr. Cotton's evidence to be cogent and convincing. While I accept the defendants' experts' qualifications and experience, and found their evidence useful, I do not accept some key assumptions in their reasoning. First, I do not accept that the wall and ceiling cavity materials can realistically be managed in place at significantly lower cost than removal. (This area is discussed in more detail in Part III.A.1 below.) Second, with respect to the crawlspace, where there is special waste, I accept Mr. Cotton's opinion that although the Ministry of the Environment might accept a management approach for the material, its practicality is questionable. There will have to be at least a few entries into the area between now and demolition in 15-20 years. The material will have to be dealt

with in any event when the building is demolished. Whether removal is described as “prudent” or as “cautious”, in Mr. Gaherty’s terms, I find it is the step that the defendants should have taken. Third, I do not accept that the defendants’ obligations to the plaintiff under the lease are necessarily co-extensive with what they would be required to do by government, although government standards are relevant in assessing what is reasonable.

*3. Conclusions on “contaminated site” issue*

[207] In determining whether or not this is a contaminated site under the ***Waste Management Act*** s. 26.1, I must ask first whether it is an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains a special waste. I asked defendants’ counsel whether the defendants’ position is that even if the material in the crawlspace is a special waste, and even if the material in the wall and ceiling cavities will become a special waste when it is collected upon remediation or at demolition, the site is nevertheless not a contaminated site within the meaning of the legislation and regulations? Mr. Robinson’s response was that I should bear in mind that only one sample in fourteen showed special waste characteristics but that if the crawlspace material is a special waste, that makes the site a contaminated site.

[208] The second question is whether the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions. In that regard, the report from Mr. Cotton shows

prescribed substances (including copper, lead, silver and zinc) at levels well above ***Contaminated Sites*** criteria.

[209] On the basis of the evidence regarding the crawlspace samples, I conclude that the site is a contaminated site both because of the presence of a special waste (a leachable toxic waste, namely, lead) and because of the presence of prescribed substances that are non-compliant with the specific land use criteria under the ***Contaminated Sites Regulation***.

### *B. If there is a contaminated site, who are the responsible persons under the Waste Management Act?*

[210] In s. 26.5(1) of the ***Waste Management Act***, “responsible person” includes current and previous owners of the site and (in s. 26.5(1)(c)):

> (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

[211] There is no doubt that the defendants are "responsible persons" under s. 26.5(1). All of the experts who addressed the subject agreed that the foundry operations were at the least a significant contributor to the presence of the material in the premises.

[212] Further, as a previous owner, Mr. O'Connor is responsible for remediation, but may displace that responsibility pursuant to s. 26.6(1)(d)(iii) or (e):

> 26.6 (1)The following persons are not responsible for remediation at a contaminated site:
>
> …
>
> (d)an owner or operator who establishes that
>
> …
>
> (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;
>
> (e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;…

[213] Nevertheless, even if he does so, he may still be a "responsible person" by virtue of s. 29 of the ***Contaminated Sites Regulation***, which states:

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

> (a) the owner voluntarily leased, rented or otherwise allowed use of the real property by another person,
>
> (b) the owner knew or had a reasonable basis for knowing that the other person described in paragraph (a) planned or intended to use the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, would cause the site to become a contaminated site, and
>
> (c) the person described in paragraph (a) used the real property to dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

[214] Counsel for the defendants argues that the plaintiff has not met the burden upon him to establish that he falls within either of s. 26.6(1)(d) or (e).

[215] Mr. O'Connor's evidence on the subject was that when he purchased the property to his knowledge it was not contaminated; he inspected it himself. He also testified that from the time of purchase in 1960 he did not dispose of, handle or treat a substance that to his knowledge caused the site to become contaminated. When he became the owner, the only occupant was a vinegar manufacturer, which had owned the building. It moved out and was never a tenant of Mr. O'Connor's. He carried on two businesses in the building, O'Connor Parts and Equipment Services and B.C. Garage Supplies. They handled metallic materials, for example, motor vehicle tail pipes. Mr. Gaherty suggested that they could possibly have contributed to the contamination but that he would need more information to know if that had occurred.

[216] The defendants emphasize that the plaintiff has brought no evidence to show that the site was not a

contaminated site in 1960 when he acquired it, that he has not conclusively shown that he did not “in whole or in part” cause the site to become a contaminated site and that, in any event, the plaintiff falls squarely within s. 29 of the ***Contaminated Sites Regulation***: he well knew what the defendants and other tenants were doing on his site. They say it is wholly unreasonable of him to claim now that he had no way of knowing that these activities (which, I add, include the 26-year operation of an active brass and aluminium foundry) could cause contamination of the site.

[217] I agree with the defendants on this point. Although I am satisfied on the balance of probabilities that the site was not contaminated when Mr. O’Connor purchased it and that he did not contribute to the contamination through his own activities on the site, there is abundant evidence of Mr. O’Connor’s knowledge of the defendants’ operations. He came to the building frequently. He was able to testify in some detail about where their equipment was and in general what their operations consisted of. He had received complaints from other tenants about smoke and dust and knew that the defendants had installed venting and cooling systems. I do not accept that he had no reasonable basis for knowing that the defendants’ operations would cause the site to become a contaminated site.

[218] Counsel for the plaintiff argues that, because s. 34 of the ***Contaminated Sites Regulation*** only permits the court to apportion liability among responsible persons “if it is justified by available evidence”, I should look at the evidence as a whole, and conclude that the site was uncontaminated when the plaintiff acquired it. He seems to suggest that I should give s. 26.6(1) a purposive reading

(claiming its purpose is to set parameters around the number of potential responsible persons) and, in effect, ignore the effect of s. 29 of the ***Contaminated Sites Regulation***. I do not accept that argument.

[219] Therefore, I find that the plaintiff is a "responsible person" under the ***Waste Management Act***, as are the defendants.

[220] Are there other "responsible persons"? As I have already found, the evidence shows that previous tenants in the space occupied by the defendants may have contributed, but only to a very minor extent, given the nature of their activities, the configuration of the space, and the short duration of their tenancies.

[221] I conclude that the evidence has not established the existence of persons other than the defendants who produced the substances and caused them to be disposed of, handled or treated in a manner that caused the site to become a contaminated site.

[222] The ***Negligence Act***, R.S.B.C. 1996, c. 333, s. 1 states:

> 1. (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[223] Thus, where a plaintiff is found to have been partially responsible for the damage or loss, the degree to which he or she was at fault must be assessed and liability allocated accordingly. Section 34 of the ***Contaminated Sites Regulation*** specifies that there may be apportionment of a share of liability to one or more responsible persons in an action or judgement, but that apportionment may be made only if it is justified by available evidence.

[224] The defendants argued that if the plaintiff is found to be a responsible person, he is responsible for remediation costs to the extent of any contamination that existed prior to the defendants' tenancy. I have not found any evidence of contamination prior to the defendants' tenancy and accordingly do not apportion any share of liability to the plaintiff.

## *III. DAMAGES*

### *A. If the defendants are in breach of their express covenants to repair, restore, reinstate and clean, or an implied covenant to return the premises uncontaminated, then what is the measure of damages or a fair assessment of the loss?*

#### *1. Cost of repair/discount for betterment*

[225] The plaintiff submits that the measure of damages for breach of a covenant to restore leased premises to their original condition on the determination of a lease is the cost necessary to put the premises into the state of repair in which they should have been left, citing ***Buscombe v. Stark***, [1917] 1 W.W.R. 205 (B.C.C.A.) at p. 206 and ***Norbury Sudbury, supra*** at p. 698.

[226] The plaintiff concedes that where the effect of the repairs is to put the premises into better condition than they were at the commencement of the lease term, there may be a discount from the full cost of the repairs. However, the plaintiff adds, where the repairs do not improve the condition of the premises but put them back into the condition they were at the beginning of the term, there should be no global discount, citing ***Buscombe v. Stark***, ***supra***, and any discount should apply only to repair items and not to demolition or clean up items.

[227] The defendants say that the measure of damages for breach of a covenant to keep in good repair is the cost of putting the premises back into the state of repair required by the covenant, reasonable wear and tear excepted.

[228] The defendants emphasize that where repairs supply all new materials and the premises were not in new condition at the inception of the lease, the cost of repairs should be significantly discounted to reflect the fact that the work constitutes betterment and not merely repair. The defendants also emphasize that as the premises were leased for an brass and aluminium foundry, the degree of wear and tear excepted must be calibrated accordingly, citing ***Homestar Holdings Ltd.***, ***supra***, and ***Kreeft***, ***supra***. They argue that even where the cumulative effect of ordinary wear and tear over time is to require the outright replacement of certain items, this may come within the exception for reasonable wear and tear. They point to the plaintiff's replacement of the heating system as an example.

[229] The defendants point to the evidence, which I accept, that the premises were built in 1945, and were not

significantly updated between then and the termination of the lease. They were “clean industrial space”. Some of the renovations effected by the plaintiff did represent a betterment of the property, as he has converted it from a building in which close to half of the space was used by a heavy industrial foundry to a building in which live-in tenancies are permitted, and it may now be characterized overall as a multi-unit light commercial property. The defendants argue that they should not be wholly responsible for the cost of the betterment, and that they should have no responsibility for the costs of the conversion. I accept that argument and have accounted for the “betterment” factor in my review of specific claims under the heading I.B. above.

*2. Set off for improvement to the premises*

[230] The defendants claim a set-off for the cost of the improvements which they made to the premises, of which the plaintiff has had the benefit. There is no dispute that the items added by the defendants and left behind (including work done in upgrading the showroom areas, installation of overhead heaters, the mezzanine, electrical wiring, lights and crane track) were fixtures and formed part of the land. The defendants refer to ***Coba Industries Ltd. v. Millie’s Holdings (Canada) Ltd.*** (1985), 65 B.C.L.R. 31 (C.A.) and to ***Norbury Sudbury***, ***supra***.

[231] In ***Coba Industries*** at 38 the Court of Appeal, in the context of a case not involving facts similar to those before me, set out the principles applicable to claims of equitable set-off:

(1) The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.

(2) The equitable ground must go to the very root of the plaintiff's claim.

(3) A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.

(4) The plaintiff's claim and the cross-claim need not arise out of the same contract.

(5) Unliquidated claims are on the same footing as liquidated claims.

[232] In ***Norbury Sudbury***, in the context of a claim by the former landlord for breach of covenants to repair, and to leave the premises clean and in good repair, the court found that the defendant was entitled to an equitable set-off of the cost of certain structural improvements it had made to the leased premises. It is probably safe to assume that these improvements constituted fixtures within the meaning of that term in property law. Nevertheless the court found that the defence of set-off was available. The judgment does not mention whether there was a term in the lease stating that improvements became the property of the landlord at the end of the lease. Defendants' counsel, I think accurately, characterizes the case as being based on the inequity of compensating the landlord for damages incurred during the tenancy while allowing the landlord to retain the benefits of

the improvements undertaken by the tenant at the tenant's own expense, and as holding that the net effect of damages and improvements was the true loss to the landlord.

[233] In the lease between the parties here, is the following provision:

> AND THE LESSEE SHALL:
>
> Not make any alterations in the structure, plan or partitioning of the premises, nor install any plumbing, piping, wiring, venting or heating apparatus, or appliances, without the permission of the Lessor or his Agent first had and obtained, and at the end or sooner determination of the said term will, after consultation with the Lessor, and at the Lessor's explicit direction, and at the Lessee's expense, restore the premises, including the roofs thereof, so far as the Lessor shall require, to the existing condition prior to the occupancy and alterations by the Lessee, but otherwise all repairs, alterations, installations and additions made by the Lessee upon the premises and movable business fixtures, shall be the property of the Lessor and shall be considered in all respects as part of the premises.

[234] The plaintiff's position is that the lease makes it clear that any improvements left behind by the defendants became the property of the plaintiff at the end of the lease in 1990. Further, the plaintiff argues, no improvements of any value were left behind, with the possible exception of the mezzanine built by the defendants, and even that mezzanine required upgrading because it failed to comply with Vancouver building by-law standards. Finally, the plaintiff points out that the defendants have not provided evidence that the improvements left behind were of any value, another distinguishing feature from the ***Norbury Sudbury*** case.

[235] The common law principle reflected in cases such as ***Stack v. T. Eaton Co.*** (1902), 4 O.L.R. 335 at 338 (Div. Ct.), applied in ***La Salle Recreations Ltd. v. Canadian Camdex*** (1969), 68 W.W.R. 339 (B.C.C.A.) and ***Homestar Holdings***, ***supra***, is that improvements, including fixtures (aside from "tenant's fixtures") form part of the land, and become the lessor's property at the end of the lease. The statement in ***Stack v. T. Eaton Co.***, adopted as a correct statement of the law by the British Columbia Court of Appeal in ***La Salle Recreations*** at 344-45, is:

> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
>
> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
>
> (3) That the circumstances necessary to be shewn to alter the *prima facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

[236] In ***Homestar Holdings*** the court discussed the meaning of "tenant's fixtures" and observed (at 218-221) that tenants are generally allowed to remove "trade fixtures" and "articles of ornament", but that, until severed, a trade fixture is not, strictly speaking, the property of the tenant.

[237] The defendants argue that, because this is the underlying principle, ***Norbury Sudbury*** cannot be distinguished merely on the basis that the lease there does not appear to have included a clause explicitly providing that the fixtures added by the tenant became the landlord's property.

[238] I am inclined toward another view, and that is that the court in ***Norbury Sudbury*** was addressing particular facts arising in the context of a long-term relationship between the parties before it (in which the tenant was the original owner of the property, and the landlord and tenant, both being corporations, had previously been under the same control). Further, it seems fair to assume that there was no express clause in the lease regarding improvements because otherwise it would have been referred to. As well, the court in that case may not have considered the impact of the common law regarding fixtures.

[239] I have not found any case in British Columbia which has recognized an equitable set-off in circumstances comparable to those before me. It is difficult to reconcile the availability of such a set-off with the common-law principle that items added to the land form part of the land. Should a tenant be able to do what he or she wishes with respect to the property, whether or not the landlord knows of it or agrees, and then set off the expenditures against the landlord's claim for repairs after the end of the tenancy? In many circumstances that will be a less than equitable result for the landlord. ***A fortiori***, should a tenant be able to make improvements and then set them off in the face of explicit provisions in the lease addressing the treatment of improvements?

[240] I am not prepared to find that equitable set-off is available here, given the clear principle that fixtures form part of the land, and the express statement in this lease confirming that all repairs, alterations, installations and additions, as well as all movable business fixtures, became the property of the landlord. In any event, there was no evidence that the improvements made by the tenant added to the value of the premises.

### 3. *Environmental investigation, removal and management costs*

[241] For the reasons I have already addressed above (under I.A.), the defendants' obligation to leave the premises "clean and free of industrial waste and in good repair (reasonable wear and tear and damage by lightning and earthquake excepted)" is to leave the premises in a comparable state of cleanliness to that in which they were at the beginning of the tenancy ("clean industrial space"), although there is some latitude given that they were leased for the purpose of a foundry operation. It is also to leave the premises in the state of freedom from industrial waste in which they were at the beginning of the tenancy. The exception for reasonable wear and tear means that the standard of cleanliness is not that of an immaculate new building, but of an older industrial building. That exception also means that, insofar as industrial waste may have acted on the building, it could constitute reasonable wear and tear. However, the presence of the industrial waste itself is not "wear and tear," and the industrial waste should have been removed at the end of the tenancy, in accordance with the covenant in the lease.

[242] The plaintiff argues that the measure of damages is what would be necessary to put him in the position he would have been in if in 1990 the building had been left free of industrial waste and uncontaminated. Thus, Mr. MacDonald argues that the plaintiff is entitled to compensation for the cost required to clean up and remove the waste and leave the premises uncontaminated and that he is not required to manage the contaminated materials in place and remediate at a later date.

[243] The amounts sought by the plaintiff for environmental investigation, removal and management costs are: $5,750 spent in July, 1990, on a cleaning contract to vacuum and remove industrial waste from the former foundry area; investigation costs made necessary by the discovery of industrial waste in the crawlspace, ceiling and wall cavities and the below-ground pits (totalling $10,620.86); and the costs identified by Levelton Engineering to remediate the crawlspace and the wall and ceiling cavities now, and to manage and then remove the materials from the pits at the time of demolition. These latter costs total $94,690.61 and break down as follows:

| | |
|---|---|
| Actual expenditures to date on removal and disposal of material in crawlspace | |
| Consultant's fee | $ 7,539.01 |
| Contractor | 25,444.60 |
| Estimated cost of further work | |
| Crawlspace under washroom | 3,672 |
| Wall and ceiling cavities | |
| Consulting and contracting | 50,000 |
| Tenants' relocation | 5,000 |
| Pits – removal at demolition | 3,035 |

[244] The plaintiff is, as may be seen, conceding that the material in the pits can be left to be dealt with at demolition but contends that the other work should be done now. The defendants take issue with the need to do any further work now, and argue that the reasonable costs to manage on site and handle the material at demolition total $67,210, broken down as follows:

| | |
|---|---|
| Crawlspace | |
| Management | |
| Set-up costs | $ 5,000 |
| Access and entry costs | 5,000 |
| Removal at demolition | 3,035 |
| Wall and Ceiling Cavities | |
| Management set-up | 1,500 |
| Access & entry | 37,500 |
| Removal at demolition | 15,175 |

[245] The defendants' estimate is based upon one entry into the wall and ceiling per year over 15 years at the cost of $2,500 per entry. The plaintiff argued that entries may have to be more frequent than that since the building is extensively subdivided into tenancies that change fairly often.

[246] Mr. MacDonald for the plaintiff performed a calculation of the costs of management on site with remediation after 20 years, based upon the defendants' witnesses' evidence but making the assumption that it would be necessary to enter the wall and ceiling cavities once with each new tenancy (pursuant to Mr. O'Connor's evidence) with 16 tenancies and an average lease term or entry of once every 2.3 years. If seven new tenancies, and entries, per year are assumed, at $2,500 per entry that is $17,500 per year. Over

20 years, discounted to present value, that cost comes to $253,050.00. When the costs related to management of the crawlspace, and related to remediation at the time of demolition (discounted to present value) were added in, the total was $280,740.00.

[247] It was not established on the evidence that seven entries into the wall and ceiling cavities per year will be necessary. The plaintiff's calculations as above must be taken as a maximum figure. However, they do illustrate that the costs of management in place and remediation upon demolition are non-trivial and could easily exceed the costs of dealing with the materials now.

[248] The defendant does not really dispute the plaintiff's contention that, if there is a breach of the covenant in the lease, the measure of damages is what is necessary to put the plaintiff in the position as if the breach had not occurred, and that in this case that position would be to have resumed possession in 1990 of a building that did not contain a considerable quantity of industrial waste. To put it another way, as I have set out above, the defendants were obliged to take reasonable steps to remove the waste at the end of their lease, and the evidence satisfies me that leaving it in place to be managed on site was not reasonable.

[249] I accept the plaintiff's argument that he should be compensated for the costs of immediate remediation. He will receive the total $111,061.47 that he seeks.

*4. Diminished property value*

[250] The plaintiff claimed, in the alternative, for compensation for diminished value in his property. Since I

have concluded that he is entitled to compensation for the costs of immediate removal of most of the industrial waste, it is unnecessary to discuss this claim in detail. However, I will do so briefly in case I am wrong in my conclusion about the damages for breach of covenant.

[251] It was common ground that the value of the property at the date of trial was about $1,600,000.00. It was also common ground that the property is not currently suffering in terms of its occupancy rate. It was estimated by Douglas Mendel, an expert real estate appraiser called by the defendants, that it produces a net income stream of about $112,000 per year. It appeared to be common ground that, if the materials were removed, there would not be a diminution in the value of the property – any stigma would dissipate within two or three years. However, the parties disagreed whether there would be diminution in value if the materials were left in place.

[252] The plaintiff called evidence from Geoffrey Burgess, who was accepted as an expert in real estate appraisal. He provided a report and testified that prospective purchasers of this property with the metallic dust still in place would attempt to obtain a discount of at least the remediation costs with an additional margin for the risk and aggravation of the cleanup. He did not do an actual appraisal of the property but took its value to be between $1,350,000 and $1,400,000 based on the present net leasable area and income. He did not disagree with the appraised value of $1,600,000 that Mr. Mendel found the property to have. On cross-examination Mr. Burgess agreed that he had proceeded on the basis of what was set out in the plaintiff’s expert reports (from Levelton)

and that he had no information to support his assumption that there would be Workers Compensation Board concerns.

[253] Douglas Mendel is a qualified real estate appraiser who has had considerable experience dealing with properties, such as closed gasoline service stations and the Vancouver Expo site, with contamination issues. He produced a detailed, formal appraisal of the property using the cost approach, the income approach and the direct comparison approach, to conclude that the value at trial was $1,600,000. He reviewed the various reports and concluded that the option most likely to be acceptable to prospective purchasers is containment on site for which he estimated the costs at $18,000. His assumption was that the B.C. Research report (Dr. Lockhart) most accurately represented the way a prospective purchaser would look at the property and assess its value. He thought there would not be a “risk premium” or “stigma” since $18,000 represents less than 1% of the market value of the property. His opinion, in short, was that the existence of the identified contamination would not significantly affect the property’s value. As he put it in his direct examination, if you were a prospective purchaser and attempted to discount the property because of this factor, you would not be successful in acquiring this property because others would outbid you.

[254] Mr. Burgess in a reply report stuck to his opinion that a purchaser would likely negotiate a significant discount (in the range of 10 – 20%) given that leaving the contamination in place would require the expenditure of management time and costs, removal costs if necessitated by tenant improvements, and possibly W.C.B. requirements.

[255] I conclude that if the materials are left in place prospective purchasers will expect to be compensated at least for the likely costs of removal or of management in place, and in addition for some nuisance factor, and that if the materials are left in place the bargaining power of the owner will be reduced. Taking into account both opinions, I conclude the market value of the property would be diminished by at least $50,000.

*5. Consequential damages/ loss of rent*

[256] The plaintiff claims a total of $20,033.13 in compensation for rent he did not receive between June and December 1990 as a result, he says, of the defendants' breaches of their obligations to clean, repair and restore the premises. His position is that, in order to lease the premises as soon as possible, he divided them into separate, smaller units and as each one was cleaned up and restored, he rented it immediately to a new tenant.

[257] The plaintiff takes as the base point the rental rate he quoted to the defendants in early 1990, which would have produced a monthly rental value for the premises of $5,868.68. Subtracting the rent actually received in each month, he comes to the total loss claimed of $20,033.13.

[258] Counsel for the plaintiff refers to William and Rhodes, ***Canadian Law of Landlord and Tenant***, 6th ed. (Carswell: Toronto, 1988) at 11-50, for the proposition that where a tenant fails to deliver up the premises in good repair at the end of the term, in breach of a covenant, the landlord is entitled not only to the cost of putting them in repair, but also to compensation for non-use or loss of rent during the repair period, if the premises could have been rented during

that period. He also refers to ***Duckworth Investments Limited v. Newfoundland Telephone Company Limited*** (1983), 43 Nfld. & P.E.I.R. 341 (Nfld. S.C.) at 348 and to ***Darmac Credit***, ***supra***, at 24. The proposition of law he relies upon is clear and is not disputed.

[259] However, the defendants point out that for a landlord to receive damages for loss of rental income, he must demonstrate that, as a direct result of the tenant's breach, he has actually lost such income. Mr. Robinson for the defendants argues that the plaintiff has not met that burden and has not shown that, absent any breach, he would have been able to fully lease the premises in the six-month period between July and December, 1990. Further, he argues, in this case the plaintiff elected to restore and subdivide the premises and convert them from industrial to commercial use. This conversion took about six months and the loss in rental income during that period is not a result of any breach by the defendants but rather is a result of the plaintiff's choice.

[260] I find the position of each side has some merit. If the premises had been properly cleaned up and restored by the defendants, the plaintiff may have been able to re-rent them immediately, at the rent he was hoping to receive from the defendants if they renewed their lease. However, he did not provide any evidence that he would necessarily have been able to do so. Further, the partitioning and subdivision achieved two objectives: enabling the plaintiff to rent parts as other parts were being cleaned up and restored, and enabling the plaintiff to move away from heavy industrial use. The first objective was clearly related to the defendants' breach, but the second was not. For those reasons I do not find the plaintiff entitled to recover the full amount that he seeks.

However, I am satisfied that the state in which the defendants left the premises, described in testimony and documented in photographs, caused the plaintiff some delay in being able to rent them.

[261] I conclude that the plaintiff should receive one-half of the amount claimed, namely $10,016.66, under this head.

*6. Additional leasing costs and tenant inducements*

[262] The plaintiff also seeks to be compensated for the expense of additional leasing costs and tenant inducements that he incurred in order to minimize the rental loss caused by the delay in the premises being ready after the defendants vacated. His position is that he had to create two new smaller tenancies to which access had to be obtained from the south side of the building, in order to stop the rental loss from growing any higher. He claims $4,050.56, being the cost of building a demising wall between two new tenancies and building new entrances and doors.

[263] The defendants' position is that in order to succeed the plaintiff must show that the expenses were incurred as a direct result of the breach of the covenant to leave in repair: ***Homestar Holdings***, ***supra***. However, the defendants say, the plaintiff has failed to adduce any evidence that he attempted to lease the premises as an existing industrial property, nor any evidence that he would have been able to lease it during the period July – December 1990, but for the defendants' alleged breach. The defendants argue that any inducements the plaintiff gave to his new tenants cannot be causally linked to the defendants' alleged breach. They further argue that the plaintiff made a decision to subdivide

the premises and convert them to commercial use. Thus, any inducements or additional leasing costs are related to that decision and are unrelated to the defendants.

[264] I find that the plaintiff fails on this point. There was no evidence that the plaintiff tried to rent the space as a whole. I am not satisfied that the expenses he incurred in creating the new tenancies were caused by the defendants' breach of covenant. It seems more likely that they were caused by the plaintiff's decision to convert the space into smaller units.

*7. Management Fees*

[265] The plaintiff claims compensation for management fees incurred in connection with the rehabilitation and restoration of the property. He paid these fees to Realtrust Real Estate Corporation, a property management company which he owns. He paid a management fee of 10% based upon the initial value of the costs, pursuant to a contract between himself and Realtrust. Those costs were later adjusted downward and he claims 10% of the reduced amount, that is, $7,004.61.

[266] The defendants' position is that the plaintiff has not shown that this expense was necessary, nor that it was directly related to the defendants' alleged breaches. Further, the lease was between the defendants and the plaintiff in his personal capacity, and the management of the property was carried out by the plaintiff in his personal capacity. There was no term in the lease here providing for an "administration fee" based on a percentage of the repair costs, as there was in ***Darmac Credit, supra***.

[267] I find against the plaintiff with respect to this claim, for the reasons urged by the defendants.

*8. Interest expense and refinancing costs*

[268] The lease provides:

> THAT if the Lessor shall suffer or incur any damage, loss or expense or be obliged to make any payment for which the Lessee is liable hereunder by reason of any failure of the Lessee to observe and comply with any of the covenants of the lease herein contained, then the Lessor shall have the right to add the cost or amount of any such damage, loss, expense or payment to the rent hereby reserved, and any such amount shall thereupon immediately be due and payable as rent and recoverable in the manner provided by law for the recovery of rent in arrears.

[269] The plaintiff gave evidence that he had to borrow money to pay for the cleanup, repair and restoration costs. He relies upon the preceding provision in the lease and claims that the defendants should compensate him for the costs of borrowing, including interest, a commitment fee to the lender, and legal fees associated with the financing. The basis for calculation that he suggests is that once the court has determined the cleanup, repair and restoration costs that are recoverable from the defendants, then the interest expenses on that amount can be calculated based on the rates and periods of time. The commitment fee and legal fees claimed are $1,250.00 and $1,941.31 respectively.

[270] In ***Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*** (1971), 17 D.L.R. (3d) 710 (S.C.C.) the court held that a lease is a contract which may give rise to claims for damages, if it is breached. Counsel for the plaintiff urges that the plaintiff here is entitled to recover the amounts claimed as

damages directly and naturally flowing from the defendants' breach of contract.

[271] The plaintiff relies on ***Simkin v. Osburn*** (1998), 40 C.L.R. (2d)119 (B.C.S.C.). That case involved somewhat unique facts, in which the owner of property recovered damages from the providers of architectural services who had incurred significant cost over-runs in connection with the building of a retirement home for the plaintiff. The damages were based in negligence, not breach of contract, and were held to include financing charges on the mortgage the plaintiff had been required to take out to complete the project.

[272] The defendants' position is that the clause in the lease upon which the plaintiff relies is aimed at allowing the lessor to add expenses he incurs as a result of the tenant's breach of covenants to the rent; it does not define the extent of compensation owing as a result of such a breach, nor does it entitle the plaintiff to compensation for the cost of borrowing to pay for repairs.

[273] Further, counsel for the defendants argues, the plaintiff is seeking double recovery given that he is also seeking pre-judgment interest pursuant to the ***Court Order Interest Act***, R.S.B.C. 1996; c. 79. He argues that the purpose of an award of pre-judgment interest is to compensate the plaintiff for the delay in receiving recompense, whether the plaintiff has borrowed money and incurred financing costs or simply foregone the use of money. Mr. Robinson distinguishes the ***Simkin v. Osburn*** case, I think correctly, on the basis that the measure of damages there was chosen in order to prevent the plaintiff from receiving a windfall due to the increased value of the house she owned.

[274] The plaintiff's position is that he is not seeking double recovery since he is claiming for the actual cost of borrowing between October 5, 1990 to April 1, 1998 as an item of damages and his claim for interest under the ***Court Order Interest Act*** is limited to the period following April 1, 1998.

[275] I am persuaded by the plaintiff's submissions that his entitlement to recover damages should include the cost of borrowing money to finance the repairs and reinstatement of the premises made necessary by the defendants' breach. I am satisfied that if the defendants had not breached the agreement the plaintiff would not have incurred this expense. He is not claiming under the ***Court Order Interest Act*** with respect to the same period. However, the damages should not include the costs of borrowing from the plaintiff's own company, Realtrust Real Estate Corporation. Therefore, the defendants will compensate the plaintiff for interest charges on the proportion of the money the plaintiff borrowed from Montreal Trust Company between March 12, 1991 and April 1, 1998 attributable to the total of cleanup, repair and restoration costs awarded at this trial, and for the commitment fee and legal fee.

*9. Legal expenses*

[276] The plaintiff claims that he is entitled to be compensated for his actual legal expenses paid or payable to enforce the defendants' obligations under the lease, based on the following provision of the lease (repeated here for convenience):

> THAT if the Lessor shall suffer or incur any damage, loss or expense or be obliged to make any payment for which the Lessee is liable hereunder by reason of any failure of the Lessee to observe and comply

> with any of the covenants of the lease herein contained, then the Lessor shall have the right to add the cost or amount of any such damage, loss, expense or payment to the rent hereby reserved, and any such amount shall thereupon immediately be due and payable as rent and recoverable in the manner provided by law for the recovery of rent in arrears.

[277] Mr. MacDonald for the plaintiff cites ***Penvern Investment Ltd. v. Whispering Creek Cattle Ranches Ltd.*** (1979), 9 B.C.L.R. 252 (C.A.) as authority that costs on a solicitor and client basis are recoverable in contract, in the absence of special circumstances.

[278] Mr. Robinson for the defendants points out that there is nothing in the lease that permits the lessor to recover legal expenses in general although there is one particular provision that may contemplate it, in the context of the lessee's non-compliance with laws, ordinances, regulations and the like. He points to the word "hereunder" in the provision relied upon by the plaintiff, and says there is no basis for the claim that the defendants are liable for legal expenses under the lease.

[279] Counsel for the defendants refers to a case from the Court of Appeal subsequent to ***Penvern***, namely ***P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*** (1995), 3 B.C.L.R. (3d) 309 at 313 (C.A.) in which the Court held that where a lease expressly provides for legal costs to be paid on a solicitor-client basis, the landlord should submit a bill of costs to the tenant and sue on the amount if the bill is not paid. Alternatively, the landlord can seek an order for ordinary costs at trial.

[280] I agree with the defendants that there is no basis in the authorities for this aspect of the plaintiff's claim in

the absence of an express provision in the lease. The plaintiff may make submissions as to the costs of this action under the ***Supreme Court Rules*** but he is not entitled to claim solicitor-client costs as a head of damages.



### *B. What amounts can the plaintiff recover from the defendants under the Waste Management Act?*

[281] The ***Waste Management Act*** states:

> 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.

*1. Costs of remediation*

[282] The plaintiff argues that he is entitled to the costs of remediation of the crawlspace and the wall and ceiling cavities now, rather than at the time of demolition. The defendants submit, however, that only reasonable costs are recoverable and that remediation now is unreasonable. The defendants also submit that only costs actually incurred are recoverable by the plaintiff, because of the wording of s. 27(1) and 27(4) of the ***Waste Management Act***, which speak of liability for "reasonably ***incurred*** costs". The plaintiff responds that s. 27(2) makes it clear that "costs of remediation" means "all costs of remediation and includes, without limitation…".

[283] On whether remediation now is reasonable, the expert opinion evidence was divided, with Mr. Cotton who was called by the plaintiff concluding that management now and remediation later was neither a practical nor cost effective option, while the two experts called by the defendants (Mr. Gaherty and Dr. Lockhart) both concluded that remediation now is unnecessary (although Mr. Gaherty initially thought it

would be “prudent”, at least if the defendants were able to do it at low cost) and that there were protocols for managing human exposure and barriers that could be installed at reasonable expense.

[284] For the same reasons I have given above in the context of the claim for damages for breaches of the lease, I find that the reasonable course is remediation now of the crawlspace and the wall and ceiling cavities, and management *in situ* with remediation at the time of demolition of the concrete pits.

[285] As for the defendants’ argument that only costs already incurred can be recovered, I agree with their point. The words in the statute suggest that what is contemplated is the recovery of expenses which an owner has paid. The statute does not provide a right of recovery for costs to be incurred as well as costs incurred. It may be that the legislature wished to ensure that remediation steps are actually taken. In any event, I find that the statutory recovery is limited in the manner urged by the defendants.

[286] The costs already incurred by the plaintiff include $7,539.01 on consultant fees and $25,444.60 on contractors’ fees and expenses.

*2. Costs of site investigation and report*

[287] The plaintiff seeks to recover $10,431.78 for the site investigation and report of Levelton Engineering Ltd., as well as $250 plus $189.08 for other small reports. He should recover those amounts from the defendants.

*3. Legal and consultant costs*

[288] The plaintiff seeks “legal and consultant costs associated with seeking contribution from other responsible persons” under s. 27(1)(c) of the ***Waste Management Act***. The portion of the plaintiff’s costs attributable to seeking contribution from the defendants under the ***Act***, as opposed to his claims under the lease, have not been sorted out. If necessary, this question will be referred to the registrar for an assessment.

***CONCLUSION***

[289] With respect to the defendants’ breaches of their express covenants in the lease to repair, restore, reinstate and clean the premises, the plaintiff is entitled to a total of $45,199.74, excluding the costs of environmental investigation, removal and management relating to industrial waste. With respect to the latter, the plaintiff is entitled to $111,061.47. For other consequential damage (lost rent, and the commitment fee and legal fee in connection with the loan to make repairs) he will receive $13,207.97. The plaintiff is also entitled to compensation for the interest charges on the money borrowed from Montreal Trust Company between March 12, 1991 and April 1, 1998 attributable to the total of cleanup, repair and restoration costs awarded at this trial. Counsel may make submissions as to the appropriate amount if they cannot agree.

[290] In the alternative, pursuant to the ***Waste Management Act***, the plaintiff is entitled to a total of $43,854.47, in addition to any legal and consultant costs assessed by the registrar as attributable to claims under the ***Act***.

[291] The parties may make submissions as to costs at a date agreeable to them at 9:00 a.m. in Vancouver, or, if they agree, they may make submissions as to costs in writing.

"Lynn Smith, J."
The Honourable Madam Justice Lynn Smith