

BC CONTAMINATED SITES 101 & CONSULTANT LIABILITY

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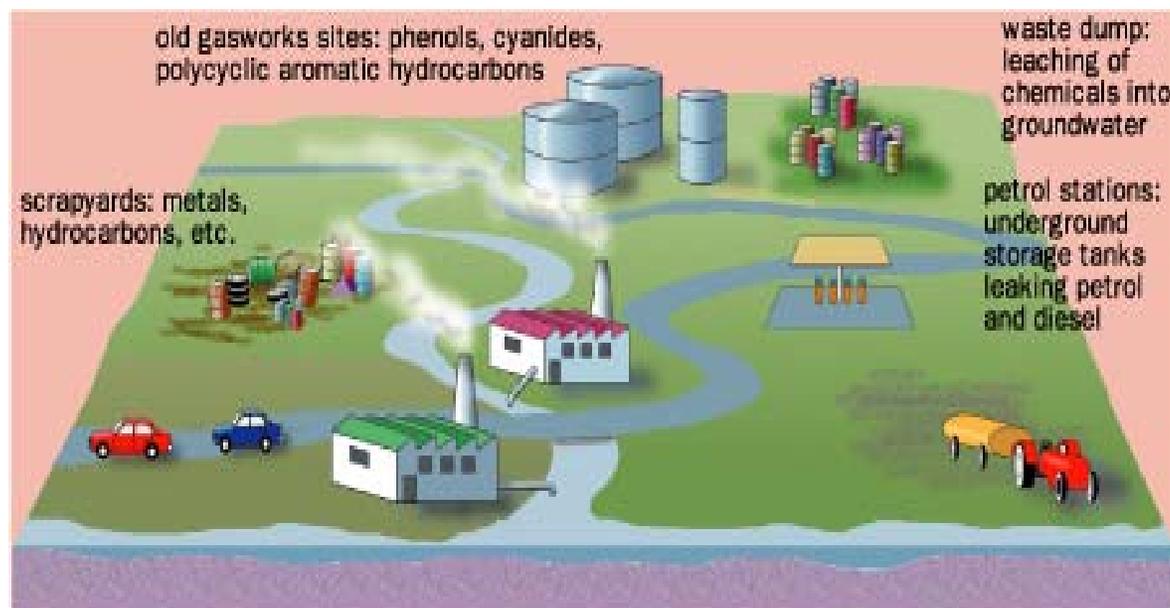
AGENDA

Canadian Contaminated Sites Regulation

- BC
- Federal

Liability of Consultants

A CONTAMINATION SCENARIO



cars: contamination of land by lead emissions from exhaust

heavy industry: deposition of airborne pollutants on land: cadmium, lead, zinc, fluorine

sewage sludge spread on land: may contain heavy metals



WHAT ARE THE CONTAMINATED SITE RISKS?

- Contractual risk
- Development risk
- Operational risk
- Liability (regulatory, civil, criminal) risk
- Financial risk
- Litigation risk



LIABILITY RISK - ENVIRONMENTAL REGIME

- Provincial
 - *Environmental Management Act*
 - *Contaminated Sites Regulation*
- Federal
 - *Fisheries Act*



LIABILITY REGIME OVERVIEW

- Regulatory
 - Remediation order (*EMA*)
 - Inspector's direction (*Fisheries Act*)
- Civil
 - Cost recovery action (*EMA*)
 - Common law claims (negligence, nuisance, etc)
 - Contractual (retainer agreement)
- Criminal
 - Pollution/ spills (*EMA*)
 - *Fisheries Act* charges (“deleterious substances”/ s35)

BC CONTAMINATED SITES REGIME

- 1997: New contaminated sites regime came into operation in BC under the Waste Management Act
- Later changed to Environmental Management Act
- Regime based on U.S. CERCLA/ Superfund

BC REGIME – SOME KEY TERMS/ CONCEPTS

- Identification of sites
 - site profile
 - Notice to neighbours of migrating contamination
- Investigation of sites
 - Site investigation
 - Remediation order
 - PSI (stage 1, 2), DSI
- Remediation
 - Numeric or risk based
 - No obligation to remediate unless ordered to do so
- Certificate of compliance
 - Approved professional
 - Govt sign off but limited protection
 - conditions

SOME KEY TERMS/CONCEPTS

- Remediation order
- Cost recovery action
- Allocation of liability – s35 of CSR

WHO CAN BE CAUGHT? RESPONSIBLE PERSONS

- Owner
- Operator/ Tenant
- Officers & directors
- Employees
- Shareholders/ Parent companies



RESPONSIBLE PERSONS – “OWNERS”

"owner" means a person who

- (a) is in **possession**,
- (b) has the **right of control**, or
- (c) **occupies or controls the use**

of real property, and includes, without limitation, a person who has an estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 45 (3) [*persons responsible for remediation of contaminated sites*];

RESPONSIBLE PERSONS – “OPERATOR”

"operator" means, subject to subsection (2), a person who is or was **in control of or responsible for any operation located at a contaminated site**, but does not include a secured creditor unless the secured creditor is described in section 45 (3) [*persons responsible for remediation of contaminated sites*];

DIRECTORS, OFFICERS, EMPLOYEES

- Can be responsible as they are defined as “persons”
- But must prove that “the director, officer, employee or agent authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation” (s.35(4) of CSR)
- “acquiescence” = failing to take steps when contamination continuing; taking steps to remove USTs and lines is action that avoids liability (*Gehring*)
- A director etc of a company that has ceased to exist is not responsible (*Gehring*)

(SOME) EXEMPTIONS

- Innocent acquisition
 - Due diligence did not reveal contamination, even though there was contamination
- Innocent operator
 - At the time became an operator, it was not a contaminated site, & did not cause contamination
- Lenders (secured creditors)
- Migration
- [minor contributor]



INNOCENT ACQUISITION

46 (1) The following persons are not responsible for remediation of a contaminated site:

...

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

“ALL APPROPRIATE INQUIRIES” – 4 CRITERIA

Persons not responsible — clarification of innocent acquisition exemption

28 When judging whether an owner or operator has, under section 46 (1) (d) (i) (C) of the Act, undertaken all appropriate inquiries into the previous ownership and uses of a site and undertaken other investigations consistent with good commercial or customary practice at the time of acquisition of the property, consideration must be given to all of the following:

- (a) any personal knowledge or experience of the owner or operator respecting contamination at the time of the acquisition;
- (b) the relationship of the actual purchase price to the value of the property if it was uncontaminated;
- (c) commonly known or reasonably ascertainable information about the property at the time of the acquisition;
- (d) any obvious presence of contamination or indicators of contamination or the feasibility of detecting such contamination by appropriate inspection at the time of the acquisition.

INNOCENT ACQUISITION

Workshop Holdings case

1924 -1940s: site used as a brass foundry

1960: site purchased

Purchaser not responsible - innocent acquisition exemption:

- no evidence to suggest that copper & zinc particles in the soil would have been obvious to the purchaser in 1960; not discovered until phase 2 assessment

Lesson: standard will change over time as there is more knowledge of environmental issues

LIABILITY PRINCIPLES

- **Clean up** first - then allocate responsibility (*Beazer East, Swamy, Gehring*)
- Can be responsible even if not the polluter
- May be exempt if you can establish a specific exemption: otherwise **absolute** liability
- **Joint & separate** liability – liable for 100% of the costs even though didn't cause it all
- **Retroactive** – liable for past contamination

THRESHOLD QUESTION: IS IT A CONTAMINATED SITE?

- *Simpson & Yan v. Chapman & Drummond*
 - Remediation cost recovery action brought against vendor of residential property by purchaser.
 - Plaintiff unable to demonstrate it was a “contaminated site”.
 - Method used to test the soil was not a Ministry approved analytical tool.
 - There was therefore no documented and readily available evidence of soil contamination exceeding Ministry standards.

DELINEATION

- *Aldred v. Colbeck*
 - Claim by purchasers of *residential* property against sellers relating to hydrocarbon contamination from an oil tank.
 - Court held there was sufficient evidence to demonstrate a contaminated site.
 - However, the contaminated area of land must be determinable and delineated and is not determined by property boundaries.
 - Visual inspection insufficient to determine extent of contamination.

DELINEATION

- *A Speedy Solutions Oil Tank Removal Inc. v. Horvath Estate*
 - Contract dispute over remediation costs – defendant argued more soil was removed than necessary.
 - While sight and smell is not determinative, it is evidence that can be used together with laboratory samples to determine extent of contamination.
 - There are practical limits to sampling, and it is not practical to test each scoop of soil as it is removed.

ALLOCATION

- *Gehring v. Chevron Canada Ltd.*
 - Plaintiff owned real property and claimed against multiple defendants for remediation expenses incurred after the property they purchased in 1992 was determined to be a contaminated site in 2004.
 - Property operated as a gas station from 1940-1978.

ALLOCATION: *GEHRING* CONTINUED

- Mere ownership without contribution to the contamination can be sufficient for liability to be found
 - No precise formula for allocating responsibility amongst “responsible persons”.
 - *“The primary factors for allocating responsibility here are the degree of involvement in the conduct which contributed to the Property becoming contaminated, and the relative due diligence of the responsible persons, bearing in mind the increasing public awareness of environmental concerns over time.”*

INNOCENT ACQUISITION & ALLOCATION OF LIABILITY

- *Gehring*
 - 1992: purchase of a commercial property – no investigation of history of site
 - 1996: became aware of past use as a gas station
 - Court:
 - purchaser would have known about past use “if they had acted with due diligence on purchasing the property.”
 - 25% liable (implication being due to failure to be diligent)

MINOR CONTRIBUTORS

- Not an exemption but a limitation on liability
- Only a minor portion of the contamination at the site attributed to that person (s.49(3) EMA)
- “Minor” means “relatively insignificant or immaterial” (*Gehring*)
- *Gehring*: 5% contribution = minor

STANDARD OF REMEDIATION

- *Tridan Developments Ltd. v. Shell Canada Products Ltd.*
 - Contaminants on Shell's property migrated to Tridan's.
 - Ontario MoE guidelines set permissible levels of pollutants which vary depending on use.
 - Remediation to MoE standards would still leave “stigma” attaching to Tridan's property, reducing its market value, whereas remediation to “pristine” levels would not.
 - Plaintiff entitled to costs of remediation to pristine state.

CONSULTANT LIABILITY

- Consultant may be liable as an “operator”
- “a person who is or was in control of or responsible for **any operation** located at a contaminated site”

EXEMPTIONS FOR CONSULTANTS

- If the consultant was not negligent in assisting with or advising on remediation work

46(h) “a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion;

(i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent”

NEGLIGENCE

- Owe a duty of care
- Behaviour breached the standard of care
- Damage sustained
- The damage was caused by the breach of duty of care

STANDARD OF CARE

- A professional must meet the standard of care of an average professional with reasonable knowledge, competence and skill in a particular field

FEDERAL CONTAMINATED SITES REGIME

- No equivalent to BC regime
- Feds use the Fisheries Act as a pollution prevention regime and for remediation

FISHERIES ACT

36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.



GEMTEC DECISION

- Facts
 - Landfill: 1971-1972 in Moncton, NB
 - 1993: City retained Gemtec to advise on closure of landfill
 - Gemtec reported 2 options
 - Limited remediation with continuing leachate migration - \$2.3M
 - More comprehensive plan inc collection of leachate - \$5.6M
 - City decided plan A & Gemtec implemented plan

GEMTEC

Gemtec charged with s36(3) Fisheries Act offence



Photo courtesy of Fisheries and Oceans Canada

NB COURT OF APPEAL

- Gemtec “committed” the offence
 - By designing the plan with leachate depositing into the waterways. Gemtec was found to “deposit” & knowingly “permit” the deposit of leachate
- No due diligence defence
 - Gemtec at best did not know, or at worst, was “wilfully blind” as to the Fisheries Act requirements
 - Gemtec was warned by a peer review that the plan may not comply with the Act

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