Environmental Update – Case Law and Tribunal Decisions

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October 2, 2013

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Overview

1. Contaminated Sites Legislation and Common Law Actions
2. Case Law and Tribunal Decisions - Update

Contaminated Sites Legislation

- *Environmental Management Act* ("*EMA*")
  - Contaminated Sites Regulation ("*CSR*")

  - *47(1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately 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.*

Common Law Claims

- Breach of Contract
- Negligence/Intentional Misrepresentation
- Trespass
- Nuisance
- *Rylands v. Fletcher* – strict liability - nature of the action vs. intention

  "the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape"

Allocation: *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639

- “Cost recovery" and "cost allocation" lawsuit.
- 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.

Gehring v. Chevron Canada Ltd., 2006 BCSC 1639

- 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."*

Gehring v. Chevron Canada Ltd., 2006 BCSC 1639

- Directors of dissolved companies are not liable under the EMA
  - Defunct companies may be restored
  - Historical Insurance policies may not contain pollution exclusions!

Case Law Update: Beyond *Gehring*

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Threshold Question: Is it a Contaminated Site?

- *Simpson & Yan v. Chapman & Drummond*, 2009 BCPC 28
  - 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.

Threshold Question: Is it a Contaminated Site?

- *Terrim Properties Ltd. v. Sorprop Holdings Ltd.*, 2012 BCSC 985
  - Action brought by former owner against neighbouring property owner from which contamination migrated, seeking an order compelling remediation, and damages.
  - Action dismissed – no previous finding by Director that it was a contaminated site, and no independent remediation.
    - Assessments had been conducted.
    - But to recover remediation costs, the proper procedures under the EMA must be followed.

Delineation

- *Aldred v. Colbeck*, 2010 BCSC 57
  - 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*, 2012 BCSC 787
  - 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.

Standard of Remediation

- *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 OR (3d) 503
  - 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.

Director Liability

- *Gehring v. Chevron Canada Ltd*., 2006 BCSC 1639
  - Court held that directors of dissolved companies are not “responsible persons”

Director Liability

- *Re Northstar Aerospace, Inc., 2013 ONSC 1780*
  - Directors not protected from personal liability by CCAA “directors’ charge”
- *Re Northstar Aerospace, Inc., 2013 ONSC 2719*
  - MOE claims against directors to be adjudicated by ERT outside the CCAA process (but compromise of ultimate claim potentially available under CCAA)

Director Liability

- *Currie v. Ontario (Director, Ministry of the Environment)*, 2011 Carswell Ont 5580 (Ont. Env. Rev. Tribunal)
  - Directors of a **former corporate owner** of a contaminated site were ordered to remediate the site, notwithstanding that a new party had subsequently purchased the property.
  - Decision reminds us of liability extended to corporate directors whose company has in the past exercised ownership or control over a contaminated site.

Continued…

- *Currie v. Ontario (Director, Ministry of the Environment)*, 2011 Carswell Ont 5580 (Ont. Env. Rev. Tribunal)
  - The Tribunal found that for corporate directors to avoid liability, they must present a “very convincing case” to rebut the presumption created by “registered documents” that they had management and control.

Appeals to the Environmental Appeal Board

- Appeal of a Director's decision, *Environmental Management Act,* Ministry of Environment
- The Environmental Appeal Board has the authority to hear appeals under s. 100(1) of the Act, which provides that a "person aggrieved" by a "decision" of a director or district director may appeal the decision to the Board.
- s. 103 of the Act gives the Board the power to confirm, reverse or vary the decision being appealed, send the matter back to the person that made the decision, or make any decision the person whose decision is appealed could have made and that the Board considers appropriate in the circumstances.

Limitation on powers of the Regulator

- *455161 B.C. Ltd. v. British Columbia (Ministry of Environment)*, [2011] B.C.E.A. No. 11 (Environmental Appeal Board)
  - A person aggrieved by a decision of a director or a district director may appeal the decision to the Board
  - Appellant sought to order the Director to issue a CoC without any requirement to remediate the neighboring properties
  - COC can be issued under s. 53(6) <u>for part of a contaminated site</u>

Limitation on powers of the Regulator

- **The Director cannot force investigation/remediation by refusing to issue COC.**
- The Board sends the matter back to the Director with directions to issue a COC for the Property once the Appellant provides the notices required under the Regulation (potential migrating of contamination from the Property to neighboring properties)
- Other options available to the Director to address concerns including:
  - Discretion to issue a site investigation to determine contamination (s. 41)
  - The power to issue a remediation order (s. 44)
  - If the Property became re-contaminated from off-site migration, but a COC had been issued for Property as part of a site, the Director retains the right to exercise any power or function under Part 4 of the Act if “certain information becomes available or activities occur on a site that may change its condition or use” (s. 60)

New requirements over the passage of time

- Vapor testing requirements came after the COC application and therefore the COC application was to be assessed based on the standards that existed when the application was filed with the Ministry

Limitation on powers of the Regulator

- *BCR Properties v. Manager, Risk Assessment and Remediation – Environmental Appeal Board, November 5, 2011*
  - Appeal of a letter determination issued by the delegated "Manager", not a Director
  - Limits the type of "decision" that are subject to appeal, but concluded a decision was made because the determination was "imposing a requirement"
  - Ultimately the Board sent it back to the Ministry for a determination

Limitation on powers of the Regulator

- *Seaspan ULC vs. Director, Environmental Management Act, May 9, 2013* – Environmental Appeal Board
  - Seaspan and Domtar could not agree on remediation plan, so each submitted their own and the Director approved both, leaving them to decide which to use
  - Decision to approve two plans does not conflict with the EMA and was not unreasonable or incapable of implementation.
  - **The Shift: "performance-based legislation" vs. "micro-managing parties actions" through permits and approvals as a way to achieve outcomes**
  - The Directors approval of the two plans was not an *order* he has simply found that both remediation plans are acceptable at the site (para. 135)

Limitation on powers of the Regulator

- *Burquitlam Building Ltd. vs. BC (Ministry of Environment)*, [2013] B.C.E.A. No. 14 (*Environmental Appeal Board)*
  - Morguard Investments applied for CoCs for its property and a portion of the neighbouring property.
  - The Director issued draft CoCs.
  - Before the draft CoCs were finalized, the neighbour discovered isolated contamination beyond the area covered by the CoCs.
  - The Director then rejected Morguard's CoC application in its entirety and required re-submission.

Limitation on powers of the Regulator

- *Burquitlam Building Ltd. v. BC (Ministry of Environment)*, [2013] B.C.E.A. No. 14

  Director

  - Morguard failed to: (1) complete a proper DSI and submit a specific DSI report; (2) establish that contamination was fully remediated; (3) fully delineate the extent of the contamination, in light of the new data.

  Environmental Appeal Board

  - There is no specific legal requirement for a CoC applicant to complete a DSI or submit a DSI report, although Morguard effectively did both.
  - Morguard reasonably delineated the contamination in accordance with the standards in place at the time the application was made.
  - While the Director was entitled to consider the new exceedences, they were not indicative of continuing contamination, deficient delineation, deficient remediation or a migration risk.

Limitation on powers of the Regulator

- *Burquitlam Building Ltd. v. BC (Ministry of Environment)*, [2013] B.C.E.A. No. 14 (continued)

  Environmental Appeal Board – Lessons

  - Substance preferred over form in CoC applications.
  - The investigative standard is not one of perfection.
  - No unfettered discretion of Director to refuse to issue CoCs.
  - Mere fact of migrated contamination to a neighbouring site will not invalidate a CoC application if the legal and technical requirements in place at the time of application have otherwise been met.

Class Actions

- *Smith v. Inco Limited*, 2011 ONCA 628
  - Class action by property owners neighboring Inco nickel refinery ($36M awarded at trial).
    - Nuisance action succeeded at trial but overturned on appeal.
    - *Rylands v. Fletcher* action also overturned on appeal.
      - Requires the defendant to have made a non-natural use of the land and Inco operated a refinery in an industrial area, which cannot be said to be a non-natural use of the land.

Criminal & Quasi-criminal Liability: consultant liability

- *R. v. Gemtec Limited*, 2007 NBQB 199
  - Gemtec was retained by the City of Moncton to implement a plan to drain leachate via pipe into Jonathan Creek, from a landfill.
  - Gemtec and its project director convicted of violations of section 36(3) of the *Fisheries Act.*
  - Defenses of officially induced error and due diligence not accepted.
  - Result: Gemtec fined $25,000, project director $3,000.

Want of Prosecution

- *Sea Gull Leasing Ltd. v. Wildcat Enterprises Ltd.*, 2012 BCSC 417
  - Writ served in 2004, but nothing done to prosecute action as remediation costs were still being incurred.
  - Action dismissed for want of prosecution. Even though remediation costs were still accruing, once commenced the action must be pursued in accordance with the rules.
  - The Plaintiff could file a new claim.

Additional Resources

- Sarah Hansen J.D., L.L.M, “Environmental Liability in Canada” in Todd L. Archibald & Randall Scott Echlin. *Annual Review of Civil Litigation 2011* (Ont.: Carswell, 2011).
- Jonathan Hodes J.D., LL.B, “Pollution Exclusion Clauses in the CGL Policy: Current Issues in Coverage Litigation, Canadian Journal of Insurance Law, Vol. 27, No. 4”, 2009”
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