COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Gehring v. Chevron Canada Limited,***
2007 BCCA 557

Date: 20071119
Docket: CA034609

Between:

Fritz Gehring and Peter George Robertson

Appellants
(Plaintiffs)

And

Chevron Canada Limited, Lawrence Filiatrault, Jerald Bruce Thompson, Fireside Electric Ltd., Michael Shiskin, L & L Motors Ltd. and Margaret Helen Filiatrault

Respondents
(Defendants)

And

Attorney General of British Columbia and Canadian EarthCare Society

Intervenors

Before: The Honourable Madam Justice Rowles
(In Chambers)

M. Underhill	Counsel for the Appellants
G.C. Weatherill and A. Nathanson	Counsel for the Respondent, Chevron Canada Limited
R. Bereti	Counsel for the Respondents, L & L Motors Ltd., Lawrence Filiatrault and Margaret Helen Filiatrault
E. Rowbotham	Counsel for the Intervenor, Attorney General of British Columbia
W. Andrews	Counsel for the Intervenor, Canadian EarthCare Society
Place and Date of Hearing:	Vancouver, British Columbia 8 November 2007
Place and Date of Judgment:	Vancouver, British Columbia 19 November 2007

Reasons for Judgment of the Honourable Madam Justice Rowles:

[1] The Attorney General of British Columbia and the Canadian EarthCare Society (“EarthCare”) have each applied for leave to intervene in an appeal from a judgment in a cost recovery action brought under Part 4 of the ***Environmental Management Act***, S.B.C. 2003, c. 53 (the “***Act***”). The reasons of the trial judge may be found at ***Gehring v. Chevron Canada Ltd.***, 2006 BCSC 1639, 25 C.E.L.R. (3d) 167 and 2007 BCSC 468, 27 C.E.L.R. (3d) 161.

[2] The issues on which leave to intervene are sought are matters of statutory interpretation. Both applicants claim they can bring a broader perspective to the interpretation of the legislation than the appellants and that it would be useful for the court to have the benefit of their submissions.

[3] The applications are opposed by the respondent, Chevron Canada Limited ("Chevron"), in part on the ground that the applicants would simply be advancing the same arguments as the appellants in relation to a fact-specific civil action.

[4] For the reasons which follow, I am of the view that both applications for leave to intervene ought to be granted.

The principles that are applied on applications for leave to intervene

[5] Applications for leave to intervene are brought under Rule 36 of the ***Court Rules Act***, B.C. Reg. 297/2001, O.C. 1075/2001. The legislation underpinning Rule 36 is s. 10(2)(a) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77.

[6] In ***EGALE Canada Inc. v. Canada (Attorney General)***, 2002 BCCA 396, 170 B.C.A.C. 2004, I gave a brief summary of the principles that are generally considered on an application for leave to intervene:

> [6] The principles to be applied on applications for intervenor status have been considered by this Court in a number of cases including *Guadagni v. British Columbia (Workers' Compensation Board)* (1988), 30 B.C.L.R. (2d) 259 (C.A.) (Locke J.A. in chambers); *Canada (Attorney General) v. Aluminium Co. of Canada Ltd.* (1987), 10 B.C.L.R. (2d) 371, 15 C.P.C. (2d) 289 (C.A.); *MacMillan Bloedel Ltd. v. Mullin* (1985), 66 B.C.L.R. 207 (C.A.) (Esson J.A. in chambers); *Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)* (1996), 82 B.C.A.C. 260 (Williams J.A. in chambers); *Hobbs v. Robertson*, [2002] B.C.J. No. 454 (Q.L.), 2002 BCCA 168 (Esson J.A. in chambers); and *Ward v. Clark*, [2001] B.C.J. No. 901 (Q.L.), 2001 BCCA 264.
>
> [7] Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.

[7] In ***R. v. Watson,*** 2006 BCCA 234, 70 W.C.B. (2d) 995, Newbury J.A. (in Chambers), after making reference to some of the case authorities, made the following helpful observations about what must be considered when the applicant does not have a direct interest in the litigation:

> [3] I believe all the parties are agreed on the applicable law, which in this province has been expounded in such cases as *MacMillan Bloedel Ltd. v. Mullin* (1985), 66 B.C.L.R. 207 (B.C.C.A.[In Chambers]), *Canada (Attorney General) v. Aluminum Co. of Canada* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.), and *Ward v. Clark,* [2001] B.C.. No. 901 (B.C.C.A.), all decisions of this court. (See also the helpful summary of the applicable principles provided by Pitfield J. in *International Forest*

> *Products Ltd. v. Kern* (2000), 46 C.P.C. (4th) 266 (B.C.S.C.) at para. 20). From these it is clear that where the applicant does not have a 'direct' interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark,* the proposed intervenor is likely to 'take the litigation away from those directly affected by it.' (Para. 6.) …

The appellants' cost recovery action, the trial judgment and the grounds of appeal

[8] In 1992, the appellants became the registered owners of property in Salmon Arm, British Columbia. The property had been used for the sale of gasoline between 1940 and 1978. Starting in 2002, the appellants incurred costs to remediate petroleum hydrocarbon contamination on the property. In 2004, the property was declared a contaminated site and was assessed at $1.00.

[9] The appellants brought a cost recovery action under Part 4 of the ***Act*** to recover the costs they had expended on remediation. The action raised issues concerning the statutory basis for the allocation of remediation costs of a contaminated site. The trial judge held, among other things, the following: (1) Chevron was not a "responsible person" under the ***Act***; (2) the appellants were 25% liable for the remediation costs they had incurred; (3) the appellants could only recover their legal costs on a party-and-party basis; and (4) the appellants were not entitled to recover remediation project management fees paid to the management company of one of the appellants.

[10] In their factum, the appellants submit that all of these findings are inconsistent with a purposive interpretation and application of the provisions of the ***Act*** and, in particular, with the foundational "polluter pays" principle, which underlies Part 4 of the ***Act***. The appellants will argue that, having purchased the property in 1992, they did not contribute to or cause any of the contamination on the property and are properly "minor contributors" under the ***Act***. The appellants will contend that the respondent Chevron is a responsible person by virtue of the fact that it was an operator, producer, transporter and secured creditor in respect of the sale of gasoline, the only operation which led to the contamination of the property. The appellants will also argue that Chevron's responsibility extends over the entire period from 1940 to 1978 because Chevron assumed the liabilities of the Standard Oil Company of British Columbia, which had, among other things, supplied gas for retail sale on the property.

The applicants and the issues on which they seek leave to intervene

[11] The Attorney General seeks leave to intervene and to make submissions on two matters: (1) the meaning of "operator" found in s. 39 of Part 4 of the ***Act*** and (2) the extent to which the contaminated site provisions of Part 4 of the ***Act*** are to be given retroactive or retrospective effect.

[12] Part 4 of the ***Act*** governs the remediation of contaminated sites. The Ministry of the Environment is the regulatory decision-maker. The interpretation of the ***Act*** is obviously of interest to the statutory regulator, Her Majesty the Queen in right of the Province of British Columbia, who is represented by the Attorney General. If judicial

review proceedings are commenced in relation to an administrative decision made under Part 4 of the ***Act***, the Attorney General is joined as a party. In this case, the appeal is brought from a judgment in a cost recovery action. However, the fact that the action in this case is between private parties does not diminish the importance of consistency in the interpretation and application of various aspects of the legislation. The Attorney General's interest in ensuring that the provisions in Part 4 of the ***Act*** are interpreted consistently is an important consideration in its application for leave to intervene in this case. Regardless of whether the issues on which the Attorney General seeks leave to intervene have arisen in litigation between private parties, a decision by the court on those issues may affect the legal rights of Her Majesty the Queen in right of the Province in the exercise of her statutory powers.

[13] The Attorney General's brief on the application for leave to intervene may be summarized as follows. The contaminated site provisions of the ***Act*** embody the "polluter pays" principle. Briefly stated, if a site is a contaminated site, it may require remediation. A "responsible person", as defined by the legislation, may be responsible for conducting the remediation. A person who incurs costs of remediation may recover those costs from other responsible persons in a civil action. The ***Act*** broadly defines who is a responsible person and then prescribes limited exceptions. If a person falls within the definition of responsible person and is unable to meet any of the criteria necessary to take advantage of the exemptions, then that person will be "absolutely, retroactively, and jointly and severally liable" for the costs of remediating the contamination. Persons who fall within the definition of a

responsible person include “past and previous owners and operators” of a contaminated site.

[14] If granted leave to intervene, the Attorney General will submit that the definition of “operator” ought to be broadly interpreted and that such an interpretation would be consistent with the purpose and intent of the legislation, the "polluter pays" principle, the "beneficiary pays" principle and the ***Interpretation Act***, R.S.B.C. 1996, c. 238, s. 8.

[15] The Attorney General’s submission on the interpretation of the term “operator” would be similar to that of the appellants; however, I am persuaded that the Attorney General could bring a broader perspective to that interpretative task than could the appellants.

[16] I turn now to the other issue which has prompted the Attorney General to seek leave to intervene. As part of its consideration of the meaning of the terms “owner” and “operator”, the court may need to determine whether Chevron is responsible for the acts of its predecessor, Standard Oil of British Columbia. In doing so, the court will need to consider whether the contaminated site provisions operate retroactively or retrospectively.

[17] The retroactive or retrospective operation of the contaminated site provisions have not been dealt with directly by the appellants in their factum.

[18] If granted leave to intervene, the Attorney General will submit that the contaminated site provisions operate retroactively to the extent necessary and will

submit that such operation is consistent with the purpose and intention of the legislative scheme, the polluter pay principle and the ***Interpretation Act***, s. 8.

[19] The Attorney General will also submit that retroactive operation, as provided for by s. 47(1) of the ***Act*** is not limited in application to that section but is also necessary for the effective operation of the other contaminated site provisions, including the definition of “contaminated site”, the application of the Innocent Purchaser and Innocent Owner exemptions, and the allocation of remediation costs amongst responsible persons.

[20] I am persuaded that the Attorney General will be able to provide a broader perspective than the appellants on this issue and that it will be of assistance to the court to have the benefit of those submissions.

[21] I would grant the Attorney General leave to intervene on the issues specified.

[22] EarthCare is a non-profit environmental organization which was founded in 1982 and incorporated in 1985. EarthCare is engaged in a range of environmental issues and has been actively involved in issues such as toxic contamination of soil and groundwater. In the 1980s and early 1990s, EarthCare was one of the leading environmental organizations in British Columbia advocating the establishment of a legal regime for identifying and cleaning up soil and groundwater contamination, allocating liability for cleanup costs and preventing future contamination. EarthCare actively participated in government consultations that led to Bill 26, the ***Waste Management Amendment Act***, ***1993***, S.B.C. 1993, c. 25 and to the ***Contaminated Sites Regulation***, B.C. Reg. 375/96, O.C. 1480/96 (the "***Regulation***"). That Bill,

now incorporated in the ***Act***, provides the statutory basis for the remediation cost allocation lawsuit that resulted in the orders under appeal.

[23] EarthCare submits that the issues on appeal will have important consequences for the principles governing the allocation of liability for contaminated site cleanup in British Columbia. EarthCare seeks to provide the court with a public interest environmental perspective on certain legal issues in the appeal.

[24] Specifically, if granted leave to intervene, EarthCare would make submissions on two issues: (1) the meaning of the term “control” in the definition of operator as a category of legal persons responsible for remediation of a contaminated site and (2) the meaning of “producer” in the ***Act*** in conjunction with the limited defence available to producers set out in s. 19 of the ***Regulation***.

[25] On the first issue, EarthCare will argue that the court below took too narrow a view of the definition of “operator” by failing to take into account the remedial purpose of the contaminated sites portion of the ***Act***. The trial judge found that the respondent Chevron was not an “operator” within the meaning of the ***Act***. The court found:

> [68] Chevron’s requirement that the retail vendor of gasoline maintain certain standards of cleanliness and brand display do not amount to control of operations. The businesses operating on the Property were independent in setting their own budgets and making their own business decisions.

[26] It will be EarthCare’s submission that the legislature intended the phrase “in control of or responsible for any operation located at a contaminated site” to embody

an objective concept that includes matters over which the putative operator ought reasonably to have had responsibility and control. EarthCare wishes to argue that the proper question was not whether Chevron chose to limit its maintenance of cleanliness standards to the above-ground aspects of the gas station. Instead, the proper question ought to have been whether Chevron had control of, and responsibility for, the maintenance of cleanliness standards regarding the under-ground aspects of the gas station even if Chevron chose not to exercise such control and accept such responsibility.

[27] On the second issue, EarthCare will make submissions concerning s. 45(1) of the ***Act***, and s. 19 of the ***Regulation***. Section 45(1) provides, in part:

> 45(1) Subject to section 46 [*persons not responsible for remediation*], the following persons are responsible for remediation of a contaminated site: ...
> (c) a person who
>
> (i) produced a substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be ... handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

[28] Section 19 of the ***Regulation*** provides:

> ... a person described in sections 45(1)(c) or (d)... of the Act is designated not responsible for remediation of a contaminated site in relation to a substance if the person
> (a) did not control the ... handling or treatment of the substance, or
> (b) by contract, agreement or otherwise merely required
> (i) adoption of standards of design, construction or operation of works at the site which were intended to prevent contamination, or

> (ii) compliance with environmental laws, standards, policies or codes of practice of government which applied at the time of producing, transporting or arranging for transport of the substance.

[29] The trial judge found that Chevron "produced" gasoline that was delivered to the property, thereby satisfying s. 45(1)(c)(i), but held that Chevron did not "cause" the site to be contaminated with that substance. The trial judge found:

> [80] Although Chevron produced the petroleum, it did not cause it to be handled or treated in a manner that caused the Property to become a contaminated site. The evidence did not show that surface spills of gasoline during UST filling were significant enough to be material, as discussed earlier under the heading "what caused the contamination". The contamination resulted from leaks in valves and piping and USTs. Chevron did not cause the operators to use leaky USTs or valves and piping, and so Chevron did not cause the petroleum to be used in a way which resulted in the contamination, as required under s. 45(1)(c)(ii).

[30] EarthCare will argue that the legislature intended a broad interpretation of s. 45(1)(c)(ii). EarthCare will also argue that s. 45(1)(c)(ii) has to be interpreted, *inter alia*, in conjunction with s. 19 of the ***Regulation***, which puts the onus on the producer of the contaminating substance to show that it, the producer, took reasonable steps to prevent the substance from causing contamination.

[31] EarthCare does not have a direct interest in the outcome of the appeal but it does have a public interest perspective on two of the important legal issues on this appeal. EarthCare's experience in making representations to government on legislation designed to clean up contaminated sites and Earthcare's knowledge of the principles which promote necessary remediation of contaminated sites will

enable EarthCare to bring a broader perspective to the issues than the parties will likely be able to bring in this case.

[32] I would grant leave to EarthCare to intervene on the appeal on the two issues it has stipulated.

[33] Rule 36(3) requires that in any order granting leave to intervene, the justice granting leave must specify the date by which the factums of the intervenors must be filed and may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention. Rules 36(4) and (5) provide:

> (4) An intervenor must file a factum in Form 10 on or before the date referred to in subrule (3) (a).
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> (5) Unless a justice otherwise orders, an intervenor
>
> > (a) must not file a factum that exceeds 20 pages,
> >
> > (b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and
> >
> > (c) is not to present oral argument.

[34] The Attorney General and EarthCare are to file their factums, not exceeding 20 pages in length, on or before November 30, 2007. The factums must contain only those submissions that address the issues on which the Attorney General and EarthCare respectively are granted leave to intervene. No costs are to be sought by either of the intervenors and each is to pay for any additional disbursements the

appellants or the respondents may incur as a result of the intervention. Whether oral submissions are to be permitted is to be determined by the division hearing the appeal.

"The Honourable Madam Justice Rowles"