

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Attorney General (Nova Scotia) v. Marriott, 2008 NSSC 160

**Date:** 20080528

**Docket:** S.H No. 166025

**Registry:** Halifax

**Between:**

The Attorney General of Nova Scotia  
representing Her Majesty the Queen in Right of the Province of Nova Scotia

Plaintiff

and

Richard Marriott, Brett LeDrew and Earl Laybolt

Defendants

**Judge:** The Honourable Justice Duncan R. Beveridge

**Heard:** March 25, 2008, in Halifax, Nova Scotia

**Counsel:** Catherine J. Lunn and Sarah Gordon A/C for the Plaintiff  
Richard Marriott, self represented

**By the Court:**

**INTRODUCTION**

[1] On Friday March 26<sup>th</sup>, 1999 a chemical fire erupted in a commercial dumpster with a forceful explosion that literally lifted the dumpster four feet off the ground. The dumpster was located at 41 Station Road, St. Margaret's Bay. Clouds of toxic gas resulted. Fire, police and emergency personnel from the Department of Environment responded.

[2] The occupants of 41 Station Road, two elementary schools and ten area homes were evacuated. The Department of Environment personnel, perceived an inability by the owner to adequately and promptly deal with the dumpster, and its contents after the chemical fire was under control. The department hired experts to provide advice and to carry out the removal and safe disposal of the contents of the dumpster.

[3] This action is a claim by the Province to recover from the owner of 41 Station Road, Richard Marriott, the costs incurred by the Minister of the Environment in the handling and safe disposal of the contents of the dumpster.

**FACTS**

[4] The basic facts are not much in dispute. The defendant, Richard Marriott, is a mechanic. He bought two parcels of land. In 1995 he combined them into one lot. The civic address became known as 41 Station Road.

[5] He erected his home and premises to carry on his business. The driveway to his shop is some 800 metres long.

[6] On Thursday March 25, 1999 Mr. Marriott was in the process of clearing trees to widen his driveway. A friend of his, Brett LeDrew, was helping him. Mr. LeDrew found some 18 to 20 aluminum canisters along the side of Mr. Marriott's driveway. Mr. Marriott examined the canisters. It is obvious they had been exposed to the elements for some period of time. Each canister appeared identical. They were the size of old glass milk bottles, but were made out of solid aluminum with a threaded octagonal cap. The paper labels on them were faded and difficult to read.

[7] Mr. Marriott was able to make out that the contents were some form of pesticide. He screwed off the top of them and smelled it. He said it did not smell good. The canister contained pellets. It looked like rabbit food. Mr. Marriott was also able to read that it was some kind of pesticide for grain. Mr. LeDrew requested permission to take them so that he could recycle the aluminum canisters. Mr. Marriott told Mr. LeDrew to dump the contents into the dumpster.

[8] On Friday, Mr. Marriott went into the city to pick up car parts. Mr. LeDrew opened some, but not all of the canisters, and dumped their contents into the dumpster. The canisters that he could not get the lid off he simply threw into the dumpster.

[9] When Mr. Marriott returned from Halifax he went to start working in his garage, but there was an awful stink coming from the dumpster. He hooked a chain to the dumpster and dragged it 100 -200 feet away from his garage. The winds still blew the fumes in his direction. It was bothersome enough that Mr. Marriott was spurred to action.

[10] He had Mr. LeDrew retrieve a canister. He contemplated calling somebody with a little more knowledge, but did not. When he re-examined the label it looked like it said "dilute with water". Mr. Marriott instructed Mr. LeDrew to take a couple of buckets of water and dump it into the dumpster to dilute the contents. Mr. LeDrew fetched two 20 litre pails of water. Mr. Marriott stood by while he dumped the first one in the dumpster. When Mr. LeDrew dumped the second one in, the dumpster exploded. It started spewing. It made a fog around the property.

[11] Mr. Marriott immediately called the operator and asked to speak with someone with respect to an environmental emergency. Mr. Marriott expressed some frustration in not being able to talk to the most appropriate agency. Mr. Marriott then called 911. The Black Point Fire Department was the first to respond. The Halifax Regional Municipal Fire Department, the RCMP and Department of Environment personnel also responded.

[12] Someone made the determination that the material that was in the aluminum canisters was aluminum phosphide. It is the main ingredient in a pesticide commonly known as phostoxin. For reasons that will be detailed later, immediate

evacuation of 41 Station Road and all surrounding inhabitants was called for. Emergency personnel donned survival gear.

[13] Mr. Marriott cooperated with all of the authorities, giving statements to multiple agencies. Later in the day he asked if there was any reason for him to stay. He was told there was not. He left his contact numbers and left for the weekend. When he returned Sunday evening the dumpster was gone.

[14] Paul Currie is presently a Contaminated Site Specialist in the Halifax head office of the Department of Environment. In March 1999 he was located in the Bedford office as an Environmental Inspector. He went to 41 Station Road on March 26, 1999. In conjunction with other departmental officials, a decision was quickly made to retain Philip Services to oversee the containment, deactivation and disposal of the aluminum phosphide. The total cost incurred by the Department came to \$12,121.28. The Department requested Mr. Marriott to pay this amount. He refused.

## **PROCEDURAL HISTORY**

[15] The Province commenced an action by filing an Originating Notice and Statement of Claim, dated September 14, 2000 against Richard Marriott, Brett LeDrew and Earl Laybolt. The Province claimed that all defendants were persons responsible pursuant to ss.69 and 71 of the *Environment Act* S.N.S. 1994-95, c.1. The Province also advanced claims of negligence and nuisance.

[16] Mr. Marriott filed a defence on November 2, 2000. In essence, his defence is one of a denial of liability and an assertion that he acted reasonably in the circumstances.

[17] This matter was eventually set for trial on March 25 - 26, 2008. Service of the Originating Notice and Statement of Claim was never effected on Messrs LeDrew and Laybolt. At trial the plaintiff relied solely on the provisions of the *Environment Act* to seek recovery of the expenditures resulting from the chemical fire at 41 Station Road, Head of St. Margaret's Bay.

[18] The principal provision of the *Environment Act* relied upon by the plaintiff is s.169. As of March 26, 1999, it provided:

169 The costs of carrying out emergency measures are recoverable by the Minister, either by an action in debt or by a method prescribed in this Act or in the regulations, against the person who is responsible for the need to take the emergency measures.

[19] Although the trial was set to last two days it was considerably shortened by Mr. Marriott making a number of admissions. Part way through the evidence of Paul Currie, Mr. Marriott, like most good advocates, narrowed the issues by agreeing to a number of things. He agreed:

Emergency crews had to come and assume control.

The costs incurred by the Province were reasonable. In other words he has no dispute with the amount of the charges that were incurred.

Mr. Marriott admits he is the owner of 41 Station Road, the property on which the incident occurred.

The report prepared by Don McCarthy can be admitted without calling the author.

The incident on March 26, 1999 created an “adverse effect” within the meaning of the *Environment Act*.

[20] The sole issue Mr. Marriott contests is his liability for the costs that were incurred by the Province in controlling, dissipating, and safely disposing of the contents of the dumpster.

## **ISSUES**

[21] Is Mr. Marriott the person responsible for the need to take emergency measures within the meaning of the *Environment Act* and *Regulations*?

## **DISCUSSION**

[22] The position of the defendant is that he is not the person responsible. He had nothing to do with purchasing the aluminum phosphide. He did not acquire it

for any commercial purpose, nor engage in any commercial purpose in dumping it and disposing of it in his dumpster. He says he acted reasonably in all of the circumstances and should not, as a taxpayer, be held liable.

[23] Through his own investigation, Mr. Marriott gathered information that a former pest control officer abandoned a considerable quantity of canisters containing aluminum phosphide. Apparently local teenagers came across them and put them in their vehicle. When their vehicle became stuck on Mr. Marriott's road, either before or after he purchased the property, they threw them out of their vehicle, where they remained until he found them.

[24] From the evidence before me it is obvious that aluminum phosphide is a highly dangerous and toxic compound. The primary use of it is fumigation. When exposed to water, aluminum phosphide releases phosphine gas, or hydrogen phosphide. Phosphine gas is highly toxic to insects, burrowing pests, but also to humans and other animals. In addition to its toxic properties, the gas will corrode certain metals and will ignite spontaneously in air at certain concentrations.

[25] Aluminum phosphide is usually mixed with other compounds such as ammonium carbamate and other inert ingredients. These formulations, on exposure to the atmosphere, produce ammonia gas and carbon dioxide, presumably to reduce the potential fire hazard posed by the release of phosphine gas. In addition, phosphine gas is odourless. However, the gas produced by the commercial compounds has odour added to it that is sometimes described as similar to garlic or decaying fish.

[26] When used as a fumigant or pesticide in controlling insects in grain, atmospheric moisture causes a slow reaction and consequent controlled release of phosphine gas. The reaction gradually accelerates and then tapers off.

[27] Water is the absolute worse thing to dump on aluminum phosphide. There can be no doubt that the dumping of water on the aluminum phosphide released copious amounts of phosphine gas which spontaneously ignited. It is indeed fortunate that no one suffered any ill effects from the release of this highly toxic and dangerous gas.

[28] There are a number of provisions of the *Act* and *Regulations* that are of significance to the determination of the issue of Mr. Marriott's liability. They are:

3 In this Act,

...

(c) "adverse effect" means an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property;

...

(k) "contaminant" means, unless otherwise defined in the regulations, a substance that causes or may cause an adverse effect;

...

(ak) "person responsible" means

(i) the owner of the substance or thing,

(ii) the owner or occupier of land on which an adverse effect has occurred or may occur,

(iii) a previous owner of the substance or thing,

(iv) a person who has or has had care, management or control, including care, management and control during the generation, manufacture, treatment, sale, handling, distribution, use, storage, disposal, transportation, display or method of application of the substance or thing,

(v) a successor, assignee, executor, administrator, receiver, receiver manager or trustee of a person referred to in subclauses (i) to (iv),  
or

(vi) a person who acts as the principal or agent of a person referred to in subclauses (i) to (v);

### **Prohibition**

67 (1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a

rate of release that causes, or may cause a significant adverse effect, unless authorized by an approval or the regulations.

67 (2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect, unless authorized by an approval or the regulations.

### **Duty to take remedial measures**

71 Any person responsible for the release of a substance under this Part shall, at that person's own cost, and as soon as that person knows or ought to have known of the release of a substance into the environment that has caused, is causing or may cause an adverse effect,

- (a) take all reasonable measures to
  - (i) prevent, reduce and remedy the adverse effects of the substance, and
  - (ii) remove or otherwise dispose of the substance in such a manner as to minimize adverse effects;
- (b) take any other measures required by an inspector or an administrator; and
- (c) rehabilitate the environment to a standard prescribed or adopted by the Department. 1994-95, c. 1, s. 71.

### **Emergency measures**

72 (1) Where an inspector or an administrator is of the opinion that

- (a) a release of a substance into the environment may occur, is occurring or has occurred; and
- (b) the release may cause, is causing or has caused an environmental emergency,

the inspector or administrator may take such emergency measures prescribed in the regulations that the inspector or administrator considers necessary to prevent, reduce and remedy the adverse effects.

(2) Subsection (1) applies whether or not the release of the substance into the environment is or was expressly authorized by, and is or was in compliance with, an approval or the regulations. 1994-95, c. 1, s. 72.

[29] There can be no doubt that the release of the phosphine gas created an “adverse effect” within the meaning of the *Act*. Furthermore, I accept the evidence of Mr. Currie that there was an environmental emergency. Although the fire was under control, he was concerned that action needed to be taken to safely dispose of the contents of the dumpster. In particular, the concern was that rain could re-trigger a further release of phosphine gas.

[30] I have earlier set out s.169 of the *Environment Act*. For ease of reference it is convenient to reproduce it again:

169 The costs of carrying out emergency measures are recoverable by the Minister, either by an action in debt or by a method prescribed in this Act or in the regulations, against the person who is responsible for the need to take the emergency measures.

[31] A number of amendments were made to the *Environment Act* by S.N.S. 2006, c.30. Section 169 was repealed and substituted by the following:

169 All costs, expenses or charges incurred in the carrying out of emergency measures including, without limiting the generality of the foregoing, any management or remediation measures, are recoverable by the Minister or a municipality, either by an action in debt or by a method prescribed in this Act or the regulations, against the person responsible for the need to take the emergency measures.

[32] The provisions of S.N.S. 2006, c.30 were not proclaimed in force until December 8, 2006 (see N.S. Reg.221/2006). It is obvious that if Mr. Marriott is to face any liability it must be pursuant to the provisions that were in force as of the date the Province claims that the Minister incurred expenses or charges in the carrying out of emergency measures. Although there may be situations where the impact of the amendments to s.169 are significant, in my opinion in the case at bar, they are not. There is no claim by a municipality. The Province does not advance a claim for management or remediation expenses. Furthermore, as noted earlier,

Mr. Marriott does not dispute that the Inspector needed to take emergency measures to deal with the release of the contaminant.

[33] The relevant provisions of the *Emergency Spill Regulations* (April 11, 1995; N.S. Reg. 59/95) are as follows:

2 (g) "environmental emergency" means an emergency situation in which there is a release or an impending release of a contaminant in such quantities that mitigation of the release is beyond the capability of the person responsible because the person responsible lacks the resources, is unknown, or is otherwise unwilling or unable to control and manage the release;

4(1) These regulations apply to an environmental emergency, an unauthorized release or an impending unauthorized release of a contaminant including an environmental emergency, an unauthorized release or impending unauthorized release on lands owned or claimed by her Majesty in the Right of Canada.

10(1) Pursuant to Section 72 of the Act, during an environmental emergency an emergency responder may do the following:

...

(f) take such action the emergency responder considers necessary to contain, control, and manage the release, including the construction of any works.

13 (1) Pursuant to Section 169 of the Act, the Minister may recover any reasonable costs, expenses, or charges supported by proper receipts that are incurred by the Minister, the Administrator or emergency responders while acting under the Act or these regulations

(a) by issuing an order against the person responsible for the environmental emergency, the unauthorized release or the impending unauthorized release for a claim less than \$5000; or

(b) by taking an action against the person responsible for the environmental emergency, the unauthorized release or the impending unauthorized release in a court of competent jurisdiction for a claim greater than \$5000.

(2) If the person described in clause (1)(a) fails to pay, the Minister or the Administrator may file the order with the prothonotary of the Supreme Court and it shall have the same effect as an order filed under subsection 132(7) of the Act.

[34] There appear to be three ways, under the *Act*, by which liability can be affixed on a person for acts or omissions that impair or damage the environment. First of all, where a person is convicted of an offence under the *Act* the court may, in addition to imposing a fine and other requirements, order the person to compensate the minister the cost of any remedial or preventative action (s.166(1)(g)) and to provide at least partial compensation to a third party (s.168(1)).

[35] Secondly, the Minister has broad powers under Part XIII of that *Act* to order any person, at his expense, to take remedial actions. To issue the order the Minister only needs reasonable and probable grounds to believe that the person has contravened or will contravene the *Act* (s.125). This discretion is not unfettered. The Minister is to be guided by factors set out in s.129 of the *Act*. If a person does not comply with a Minister's order, the Minister may take whatever action he considers necessary to carry out the terms of the order. Reasonable costs, expenses or charges incurred are recoverable from that person. (s.132). A person aggrieved by a decision of the Minister can Appeal to a Judge of the Supreme Court.

[36] Lastly, the *Act* provides that any person responsible for the release of a substance shall, at his own cost, take all reasonable measures to prevent, reduce and remedy the adverse effects of a substance that was released (s.71). Where an inspector or administrator forms the opinion that a release of a substance into the environment has occurred, and has caused an environmental emergency, he may take such emergency measures, prescribed in the regulations, he considers necessary to prevent, reduce and remedy the adverse effects s(s.72).

[37] In my opinion, the overall intent of the legislature is to enact legislation to protect the environment by empowering inspectors and the Minister to take immediate steps to prevent, alleviate and remediate potential and actual adverse environmental effects without waiting for the results of perhaps lengthy litigation to determine who, and to what degree, various parties may ultimately be responsible.

[38] A secondary, but nonetheless vital intention, is to apply the polluter-pay principle. Indeed this principle is specifically set out in s.2(c) of the *Act*. It provides as follows:

2 The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:

(a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;

...

(c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment that is not *de minimis* to take remedial action and pay for the costs of that action;

[39] Nova Scotia is far from being the only jurisdiction to enact legislation adopting the polluter-pay principle. Lebel J. in *Imperial Oil v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 referred to this principle as being firmly entrenched in environmental law in Canada. He wrote:

23 Section 31.42 EQA, which was enacted in 1990 (S.Q. 1990, c. 26, s. 4), applies what is called the polluter-pay principle, which has now been incorporated into Quebec's environmental legislation. In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation, as may be seen: *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33; *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, ss. 6, 7; *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42; *Waste Management Act*, R.S.B.C. 1996, c. 482, ss. 26.5(1), 27(1), 27.1, 28.2, 28.5; *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3); *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(i), 112, 113(1), 114(1), 116; *Environmental Management and Protection Act*, 2002, S.S. 2002, c. E-10.21, ss. 7, 9, 12, 14, 15, 46; *Contaminated Sites Remediation Act*, S.M. 1996, c. 40, ss. 1(1)(c)(i), 9(1), 15(1), 17(1), 21(a); *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 8, 43, 93, 97, 99, 150, 190(1); *Pesticides Act*, R.S.O. 1990, c. P.11, ss. 29, 30; *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, ss. 16.1, 32, 84, 91; *Crown Forest Sustainability Act*, 1994, S.O. 1994, c. 25, s. 56(1); *Environment Act*, S.N.S. 1994-95, c. 1, ss. 2(c), 69, 71, 78(2), 88, 89, 90; *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 8(1), 9, 28, 29, Part XIII; *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, ss. 7, 7.1, 21; *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, ss. 4(2), 5.1, 6, 7, 16. (See R. Daigneault, "La portée de la nouvelle loi dite 'du pollueur-payeur'" (1991), 36 *McGill L.J.* 1027.) That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth

principle of *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).

24 To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

[40] The Province contends that the dumping of the aluminium phosphide alone, or in combination with water was an unauthorized release of a substance that caused a significant adverse effect within the meaning of s.67(2) of the *Act* and therefore triggered under a duty under s.71 of the *Act* to respond. It further claims that Mr. Marriott was the person responsible within the meaning of s.169 of the *Act* and s.13(1)(b) of the *Emergency Spill Regulations*. It refers to the definition of a “person responsible” set out in s.3(ak)(ii) of the *Act*.

[41] In my opinion, there can be no doubt that Mr. Marriott is a “person responsible” within s. 3(ak) of the *Act*. He was the owner of the land in which an adverse effect occurred. Furthermore, the canisters containing aluminum phosphide were found on his land. Whether he liked it or not, he acquired a formidable title to these items. He exercised control over what was to happen with the canisters. He was the one that permitted Brett LeDrew to recycle them. Mr. Marriott was the one who told Mr. LeDrew to dump the contents of the canisters into his commercial dumpster.

[42] Furthermore Mr. Marriott was the one who had the management and control of the aluminum phosphide when it was being disposed of.

[43] However, in my opinion being “a person responsible” does not automatically lead to liability under s.169 of the *Act*. This section does not create a right of recovery by the Minister or a Municipality against “a person responsible” or “any person responsible” but rather it is specifically directed to be a right of recovery against “the person responsible **for the need to take the emergency measures**”. I do not suggest that the right of recovery under s.169 is limited to just one person. More than one person may indeed be responsible for the need to take emergency measures.

[44] However, it is my opinion that the ability to advance a claim “against the person responsible” is qualified by the requirement that that person or persons are the ones responsible “for the need to take the emergency measures”. There may well be circumstances where the owner or previous owner of the substance, or of the land, had no role in the act or omission that lead to the need for the Minister to take emergency measures.

[45] I have already referred to the three broad ways that a person may find themselves liable pursuant to the provisions of the *Environment Act*. If they are charged and convicted the Court can order the person to compensate the Minister for the costs associated with taking remedial action. The Minister can order a person to take remedial action. If they fail to do so, the Minister can act and then take action to recover his costs. These avenues are not relied upon by the Province in seeking recovery of costs from Mr. Marriott.

[46] In essence, the Province relies on the provisions of Part VI of the *Act*. Section 67 prohibits any person from knowingly, or otherwise releasing or permitting the release into the environment of a substance that causes or may cause an adverse effect.<sup>1</sup> Any person responsible for the release of a substance shall, at that person’s own cost take all reasonable measures to prevent, reduce and remedy the adverse effects, including an obligation to remove or otherwise dispose of the substance to minimize adverse effects (s.71). Where an inspector or an administrator forms the opinion that a release of a substance into the environment may, or is occurring or has occurred, take emergency measures that he considers necessary to prevent, reduce and remedy the adverse effects.

[47] Mr. Marriott may well not have appreciated that he had in his possession a highly toxic and dangerous substance. As he said, if these canisters had been abandoned elsewhere and a group of children had found them, opened one of them and dropped it into a puddle, the consequences would have been dire.

[48] Mr. Marriott points out that mere paper labels on such canisters are inadequate. Neither he nor emergency crews who came on scene could readily determine what they were dealing with.

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<sup>1</sup> Prior to December 8, 2006 the adverse effect must have been “significant”.

[49] Mr. Marriott may well have been a victim of an irresponsible dumping of canisters onto his property. Clear permanent labels on the canisters may have prevented the environmental emergency. Nonetheless Mr. Marriott is “the person responsible” within the meaning of the *Environment Act*.

[50] Mr. Marriott was plainly in control of what was to happen to the canisters of aluminum phosphide.

[51] There were several things that alerted Mr. Marriott of the need for caution. First of all from what he could read on the label was that the canister contained a pesticide. He acknowledged he could make out on the canister the word "poison". Furthermore after the canisters were emptied into the dumpster, and it was dragged away, Mr. Marriott described the smell as still overpowering. At that time he knew it was unhealthy.

[52] Mr. Marriott not only approved, but directed Brett LeDrew to dump water in an effort to alleviate the foul stench being emitted from the dumpster.

[53] Mr. Marriott had a far more direct role than anyone in causing the release of phosphine gas resulting in the explosion, chemical fire and obvious environmental emergency.

[54] I accept Mr. Marriott’s evidence that the resulting adverse effect on the environment was entirely unintentional. However, intention has nothing to do with civil liability under the *Environmental Act* for costs incurred by the Minister in taking emergency measures.

[55] As far as the parties were aware this is a case of first instance. The plaintiff did refer to *Nova Scotia (Minister of the Environment and Labour) v. Pracz*, [2004] N.S.J. No. 107, 2004 NSSC 61. Mr. and Mrs. Pracz purchased a new home. A new oil tank was installed on a foundation concrete block on top of sand. The oil tank was filled. A few days later heavy rains caused the sand to subside and the tank tipped over. Mr. and Mrs. Pracz notified their contractor, insurer and lawyer. The contractor and subcontractor denied liability. Inspectors from the Department of Environment attended the site. Mr. and Mrs. Pracz were unwilling to take any action to remediate the site claiming it was their contractor’s responsibility not theirs. An inspector from the Department of the Environment issued orders and when the Praczs failed to comply, the Department retained a contractor who carried

out the work. The Minister then issued an order requiring the Praczs to pay for remediating the oil spill. They appealed.

[56] Pickup J. heard the appeal. The Praczs argued that the Minister was required under the *Act* to determine issues of causation and civil liability. They complained they had no opportunity to make representations. They argued they should not be held responsible as the spill was caused by an act or omission of an independent third party and they took all reasonable care to prevent the spill. These arguments were rejected by Pickup J. In the course of dismissing the appeal, Pickup J. wrote:

[46] Again, the issue is not who is responsible for the spill. This can be determined by civil action. The Minister's decision is a discretionary one. The Praczes were "persons responsible" within Section 3 (ak) of the Act as owners of the property. The Minister has not made any legal determination as to who is ultimately responsible in negligence for the spill. The Minister has determined that the Praczes as "owners of the property" must take steps to remediate the environmental damage caused by the oil spill.

[57] I respectfully agree with the reasoning of Pickup J. The definition of a "person responsible" in s.3(ak) is not for the purpose of assigning ultimate civil responsibility for the damage caused to the environment, but to assign first line responsibility for government officials to turn to to either prevent or remediate an adverse effect on the environment.

[58] However, in the case at bar, this is a civil action that does seek to affix liability on the person or persons alleged to have been responsible for the need to take emergency measures. The Province is required to prove on a balance of probabilities that Mr. Marriott is the person responsible for the need to take emergency measures. There may well be more than one person responsible. To affix liability the Province must prove that their respective actions caused or contributed, outside the *de minimus* range, for the need to take emergency measures.

[59] Mr. Marriott argues that he acted reasonably in all the circumstances. In essence he suggests that he took all reasonable care to avoid the conduct that lead to the need to take emergency measures. The defence of due diligence is highly relevant if Mr. Marriott was faced with a prosecution alleging he violated the *Act or Regulations* (s.160). Due diligence is also stipulated as being one of the factors

that the Minister or government official must consider in deciding whether to issue an order under s.125 of the *Act* (see s.129(1)(b)).

[60] However, the polluter-pay principle does not permit Mr. Marriott to escape civil liability for the costs incurred by the Province in taking emergency measures. The *Act* is very careful not to impact on the normal substantive law and practices and procedures available at common law, or by statute (see s.141). If Mr. Marriott believes that others bear responsibility for the need by the Province to take emergency measures he could have sought to have them added as parties to the litigation. It is still open to him to pursue his remedies against others.

[61] In my opinion there was an unauthorized release of a substance that caused an adverse effect on the environment. It was a significant effect. The release created an environmental emergency within the meaning of s.2(g) of the *Emergency Spill Regulations*.

[62] I find that Mr. Marriott is one of the persons responsible within the meaning of s.169 of the *Act*. The plaintiff will have judgment against Mr. Marriott in the agreed upon amount of \$12,121.28.

## **PREJUDGMENT INTEREST AND COSTS**

[63] The Plaintiff seeks an award of prejudgment interests and costs. The *Judicature Act* R.S.N.S. 1989, c.240 requires the Court, to make an award of prejudgment interest. Section 41 provides as follows:

s. 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:

(i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;

[64] However, the *Judicature Act* also confers a broad discretion on the Court to decline to award interest, or to reduce the rate of interest, or the period for which it is awarded. Section 41 (k) provides:

k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if

(i) interest is payable as of right by virtue of an agreement or otherwise by law,

(ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or

(iii) the claimant has been responsible for undue delay in the litigation.

[65] The Province first presented a claim to Mr. Marriott, with supporting invoices on December 3, 1999. The action was commenced September 14, 2000. Thereafter, Mr. Marriott appears to have been consistently of the view that there has been an inordinate and unreasonable delay in having this matter brought on to trial. I share Mr. Marriott's view. From my review of the file the claimant has been responsible for undue delay.

[66] The courts in Nova Scotia have not hesitated in reducing the rate of interest or the period for which it is awarded if there has been delay bringing a matter to trial, beyond what would ordinarily be anticipated. In *Thomas-Canning v. Juteau* (1993), 122 N.S.R. (2d) 23 the period was reduced to four years. In *McWilliams v. D.M.L.P. Holdings* (1995), 139 N.S.R. (2d) 84 the time period was reduced to three years. In *Data Business Forms v. MacIntosh* (1986), 76 N.S.R. (2d) 418 the period was reduced to two years. In *Greek and Hillier v. Ernst* (1980), 43 N.S.R. (2d) 191 the period was reduced to 14 months. In *Yeadon v. Gauthier* (1981), 47 N.S.R. (2d) 165 the period of time was reduced to two years. Similarly in *Cleveland v. Gas* (1981), 47 N.S.R. (2d) 323 Hallet J., as he then was, considered the matter could have been brought on to trial within two years and awarded interest for that period of time.

[67] No agreement has been presented with respect to a suggested prejudgment interest rate and neither party presented any evidence on this issue. Practice Memorandum No. 7 provides that in these circumstances the Court will set a rate with a view to doing reasonable justice to the parties. In these circumstances I direct that the Plaintiff will have judgment against Mr. Marriott in the amount of \$12,121.28 at a prejudgment interest rate of 5% for a period of two years. I will hear the parties if they are unable to agree on the issue of costs.

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Beveridge, J.