Citation: Simpson & Yan v. Chapman & Drummond
2009 BCPC 0028

Date: 20090123
File No: 07-18051
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

DR. KIRBY SIMPSON
& CHRISTIE MENG YAN

CLAIMANTS

AND:

LAURA MAE CHAPMAN
& ANNE EVELYN DRUMMOND

DEFENDANTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE ROSS TWEEDALE

Counsel for the Claimants:	Mr. Harvey Oreck & Mr. David Goldberg, Articled Student
Counsel for the Defendants:	Mr. D. Laurence Armstrong
Place of Hearing:	Vancouver, B.C.
Dates of Hearing:	October 29, 2008 & January 16, 2009
Date of Judgment:	January 23, 2009

The Claim

[1] This is a cost recovery action under section 47(5) of the ***Environmental Management Act (EMA)*** and the Contaminated Sites Regulation (Regulation). **Endnote 1.** The claimants seek to recover approximately $ 15,000 from the defendants for remediation costs associated with discovery and removal of an underground oil storage tank from residential property. [See Appendix A for excerpts from the EMA and Regulation.]

Background

[2] In June 2003, Dr. Chapman and Dr. Drummond, the defendants, agreed to buy a house at 165 East 59th Street, Vancouver from the home owner, Ronald Yoshida. The offer was subject to an inspection report (buyer's expense) and contained this subject clause:

Seller agrees to permit buyer's inspector to enter the property to check for the existence of oil tank. If such oil tank exists, the seller will remove at seller's expenses before completion.

[3] In part, this condition was prompted by Mr. Yoshida's uncertainty about the existence of an underground oil storage tank – the Property Disclosure Statement form in use at the time had a check box for DO NOT KNOW which he had checked as applicable.

[4] Mr. Yoshida also agreed to remove debris that had accumulated under a deck and in the yard prior to the property inspection.

[5] The defendants hired Wayne DeJong of Pillar to Post Inc. to carry out an inspection of the house and property. On June 25, Mr. DeJong inspected the property and prepared a written report (exhibit 8). Dr. Drummond accompanied Mr. DeJong and testified about the thoroughness of his inspection. No signs of an underground oil storage tank were found. The defendants removed the subject clause and the sale completed.

[6] In early 2006, both defendants had accepted new work positions in the Victoria area and placed their home on the market. Sales were brisk in Metro Vancouver at the time. The claimants made an offer above the asking price. The Property Disclosure form had been revised since 2003. For the question: Are you aware of any underground oil storage tank(s) on the property ? the seller was required to check either YES or NO. (DO NOT KNOW had been removed from the form). The defendants checked NO as applicable and provided Mr. DeJong's June 2003 report to the claimants.

[7] The claimants relied on the report and did not require that another inspection be carried out. The sale completed at the end of May, 2006.

[8] In the spring of 2007, Dr. Simpson decided to plant bamboo in the yard. As he dug in the earth he smelled an unusual odour and noticed the soil changing colour. He then dug in another area and found a half inch copper pipe. After discussing the matter with his father, he contacted an environmental company whose representative used a metal detector and concluded there was a buried oil tank. Dr. Simpson did some further investigation by digging himself.

[9] Concerned about oil possibly escaping from the tank into his yard and his neighbour's, he hired a company to pump out about 2500 litres of oily water from the tank. He then hired Advantage Waste Specialties Inc. to remove the oil tank. In part, relying on what he was told by the Advantage Waste Specialties representatives, Dr. Simpson concluded that the soil was contaminated with oil and required remediation. He hired Advantage to carry out the work.

[10] Advantage hired ALARA Environmental Health and Safety Ltd. in order to determine if the soil was contaminated. Steven Seewald, a registered Applied Science Technologist employed by ALARA performed tests and concluded the soil was contaminated according to ***EMA*** and Regulation.

[11] After remediating the soil, Dr. Simpson contacted the defendants requesting a contribution to the costs. After an exchange of email and both sides receiving legal advice, the claim and reply were filed.

The threshold question: Was the property a contaminated site?

[12] The presence of an underground oil tank and oily soil does not necessarily lead to the conclusion that the site meets the legal definition of contaminated site.

[13] The claimants relied on a report prepared by Mr. Seewald He analyzed soil samples using US EPA Method 9074. This method employs an EPH (extractable petroleum hydrocarbons) standard as the analytical method in determining whether the site was contaminated. At trial, he was questioned about a May 23, 2003 Ministry of Environment release (exhibit 2). The release makes clear that the standards set by the British Columbia ***EMA*** and Regulation are based on LEPH (light extractable petroleum hydrocarbons) or HEPH (heavy extractable petroleum hydrocarbons).

[14] "The Ministry acknowledges that EPH can be used as a valuable screening tool in a site investigation for example, to assist in initial location and delineation of petroleum hydrocarbon contamination. However EPH results cannot be used where it is necessary to demonstrate legal compliance with the regulation's petroleum hydrocarbon standards."

[15] Mr. Seewald also acknowledges this in his report under the **Statement of Limitations,** at page 10 :

"Nothing is the report is intended to express any legal opinion upon environmental liabilities relating to the site or whether operations legally conformed to relevant legislative requirements."

[16] Any doubt on the threshold issue is eliminated by the Defendant's experts' report prepared by John DeCesare and Colin Dunwoody of SNC Lavalin Environment Inc. (Both have been appointed to the Roster of Approved Professionals by the Director of Waste Management, BC Ministry of Environment.)

[17] Their opinion confirms that:

1. the method used by Mr. Seewald is not an approved Ministry analytical method for analysis of soil samples for LEPHs and HEPHs

2. the method he used is a screening tool only, "…to evaluate relative gross hydrocarbon concentrations in order to identify samples for further quantitative analysis using MoE approved analytical methods."

[18] They concluded there was "no documented exceeding of a Contaminated Sites parameter in any soil samples collected and analyzed from the site."

[19] The claimants having failed to prove their property was a contaminated site under BC environmental management legislation, their claim must be dismissed.

Liability between the sellers and buyers if the claimants had proven their property was a contaminated site

[20] Although unnecessary for me to do so, because considerable evidence was given by Dr. Simpson and Dr. Chapman and Dr. Drummond on the issue of responsibility for remediation, I make the following comments.

[21] As the current owners and previous owners, the claimants and defendants are persons responsible for remediation of a contaminated site under section 45 of the ***EMA***.

[22] But the ***EMA*** and Regulation do not establish a scheme of absolute civil liability. Section 46 permits a person who is otherwise responsible to claim exemption from liability. All elements of the exemption must be proved on a balance of probabilities (section 46(3)). Mr. Armstrong, lawyer for the defendants, relied particularly on section 46(1)(d)(i). He referred to section 28 of the Contaminated Sites Regulation which must be considered.

[23] Section 35 of the Regulation also applies.

[24] Simplified and summarized, to rely on this exemption, a person responsible for remediation must prove they took all appropriate reasonable steps to investigate whether the site was contaminated.

[25] In my view the defendants did what a reasonable person should have done. When they considered buying the house from Mr. Yoshida in 2003 they made the purchase subject to an inspection. Market conditions at the time were such that Mr. Yoshida agreed to pay for the cost of underground oil tank removal if one was found.

[26] There is no evidence that in the three years the defendants owned the property there was any sign of the existence of an underground oil storage tank or contamination, specifically, oil.

[27] As for the position of the tank, Mr. Seewald observed in his report that the top of the tank was located approximately 3 feet below the original grade and the bottom of the tank approximately 7-8 feet (exhibit 1, page 5).

[28] In addition to the results of visual inspection of the property, the June 2003 inspection report of Mr. DeJong contained circumstantial evidence that there was no underground oil tank. He noted that the gas furnace was reaching the end of its useful life, indicating a long time use of gas as the energy source. No oil furnace – no need for an oil storage tank.

[29] The claimant, Dr. Simpson, testified he was aware of the furnace being very old (he said 1954) and that it was the next thing he was planning to replace.

[30] It was implied by the Claimants' lawyer that because underground storage tanks are common in Vancouver, prudent sellers should routinely hire someone to have the subject property investigated with a metal detector – that this has become the customary practice and because the defendants didn't do this, they cannot claim the exemption.

[31] Mr. Seewald testified that underground oil storage tanks are "very common" in Vancouver. Except for this brief mention there is a lack of evidence of the number of tanks, which parts of the city one would expect to find them and their general notoriety.

[32] Second, there is an absence of evidence that it is common practice for sellers to carry out a metal detection test for storage tanks before listing a house for sale in Vancouver.

[33] A final answer to the claimants' argument is: what about them as buyers ?

[34] Dr. Simpson and Ms. Yan were content to rely on Mr. DeJong's report provided to them by the defendants and prepared about three years before. The claimants were certainly entitled to ask that an inspector of their own choosing conduct an inspection of the property – with or without a metal detector component. It is no answer to say that the real estate market was overheated at the time and requesting this condition might have led the claimants to losing the chance to buy the house.

[35] Had the claimants proven their property was a contaminated site, for the forgoing reasons, I would have concluded the Defendants had proven they were exempt from liability under 46(1)(d)(i).

Costs

[36] The defendants are entitled to the usual filing and service fees and reasonable transportation, accommodation and meal expenses associated with the two days of trial, payable by the claimants.

Endnote 1

In *Gehring v Chevron Canada Ltd.* 2006 BCSC 1639, Justice Victoria Gray considered the EMA and Regulation in a cost recovery action where a Chevron gas station had operated for 38 years before ceasing in 1978. (Appeal and cross-appeal to BCCA abandoned April, 2008.)

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Ross Tweedale

Provincial Court Judge

APPENDIX A

Environmental Management Act

(Act current to January 7, 2009)

[SBC 2003] CHAPTER 53

Part 4 — Contaminated Site Remediation

Division 1 — Interpretation

Definitions and Interpretation

39 (1) In this Part and Part 5 [Remediation of Mineral Exploration Sites and Mines]:

"allocation panel" means an allocation panel appointed under section 49 (2) [allocation panel];

"approval in principle" means an approval in principle under section 53 [approvals in principle and certificates of compliance];

"approved professional" means a person who is named on a roster established under section 42 (2) [approved professionals];

"approving officer" means an approving officer as defined in the Land Title Act;

"certificate of compliance" means a certificate of compliance under section 53 [approvals in principle and certificates of compliance];

"commission" has the same meaning as in the Petroleum and Natural Gas Act;

"contaminated site" means an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

(a) a hazardous waste, or

(b) another prescribed substance

in quantities or concentrations exceeding prescribed risk based or

"detailed site investigation" means a detailed site investigation and report under section 41 [site investigations] that complies with the regulations;

"government body" means a federal, provincial or municipal body, including an agency or ministry of the Crown in right of Canada or British Columbia or an agency of a municipality;

"high risk orphan site" means an orphan site determined under section 58 [orphan sites] to be a high risk orphan site ;

"minor contributor" means a responsible person determined under section 50 [minor contributors] to be a minor contributor;

"municipality" means a municipality as defined in section 1 but including the Islands Trust and not including an improvement district or the Greater Vancouver Sewerage and Drainage District;

"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];

"orphan site" means a contaminated site determined under section 58 [orphan sites] to be an orphan site;

"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];

"person" includes a government body and any director, officer, employee or agent of a person or government body;

"preliminary site investigation" means a preliminary site investigation and report under section 41 [site investigations] that complies with the regulations;

"protocol" means a protocol established by a director under section 64 [director's protocols];

"registrar" means the registrar appointed under section 43 [site registry];

"remediation order" means a remediation order under section 48 [remediation orders];

"remediation standards" means numerical standards relating to concentrations of substances and standards relating to risk assessment, as prescribed in the regulations;

"responsible person" means a person described in section 45 [persons responsible for remediation of contaminated sites];

"secured creditor" means a person who holds a mortgage, charge, debenture, hypothecation or other security interest in property at a contaminated site, and includes an agent for that person;

"site investigation" means a detailed or preliminary site investigation referred to in section 41 [site investigations];

"site profile" means a site profile referred to in section 40 [site profiles];

"site registry" means the site registry established under section 43 [site registry];

"subdivision" means

(a) a subdivision as defined in the Land Title Act, or

(b) a subdivision under the Strata Property Act;

"summary of site condition" means a document that complies with subsection (3);

"voluntary remediation agreement" means a voluntary remediation agreement referred to in section 51 [voluntary remediation agreements].

(2) A government body is not an operator only as a result of

(a) exercising regulatory authority with respect to a contaminated site,

(b) carrying out remediation of a contaminated site, or

(c) providing advice or information with respect to a contaminated site or an activity that took place on the contaminated site.

(3) A summary of site condition must be

(a) prepared

(i) by an approved professional,

(ii) in the form established in a protocol, and

(iii) in accordance with the requirements prescribed by the minister, and

(b) signed by the approved professional.

Division 3 — Liability for Remediation

Persons responsible for remediation of contaminated sites

45 (1) Subject to section 46 [persons not responsible for remediation], the following persons are responsible for remediation of 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.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:

(a) a current owner or operator of the site from which the substance migrated;

(b) a previous owner or operator of the site from which the substance migrated;

(c) a person who

(i) produced the 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 substance to migrate to the contaminated site;

(d) a person who

(i) transported or arranged for transport of the 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 substance to migrate to the contaminated site.

(3) A secured creditor is responsible for remediation of a contaminated site if

(a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or

(b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site.

(4) A secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor

(a) participates only in purely financial matters related to the site,

(b) has the capacity or ability to influence any operation at the contaminated site in a manner that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a manner as to cause or increase contamination,

(c) imposes requirements on any person, if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or

(d) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

Persons not responsible for remediation

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

(a) a person who would become a responsible person only because of an act of God that occurred before April 1, 1997, if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(b) a person who would become a responsible person only because of an act of war if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(c) a person who would become a responsible person only because of an act or omission of a third party, other than

(i) an employee,

(ii) an agent, or

(iii) a party with whom the person has a contractual relationship,

if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become 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;

(e) an owner or operator who

(i) owned or occupied a site that at the time of acquisition was not a contaminated site, and

(ii) during the ownership or operation, 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;

(f) a person described in section 45 (1) (c) or (d) or (2) (c) or (d) [persons responsible for remediation of contaminated sites] who

(i) transported or arranged to transport the substance to the site, if the owner or operator of the site was authorized under an Act to accept the substance at the time of its deposit, and

(ii) received permission from the owner or operator described in subparagraph (i) to deposit the substance;

(g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;

(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;

(j) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;

(k) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;

(l) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewerage or waterworks on a contaminated site, to the extent of the possession, ownership or operation;

(m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to

(i) change the use of the contaminated site, and

(ii) provide additional remediation;

(n) a person who is in a class designated in the regulations as not responsible for remediation.

(2) Subsection (1) (l) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewerage or waterworks by the government body that possesses, owns or operates the roadway, highway or right of way for sewerage or waterworks.

(3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

General principles of liability for remediation

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.

(2) Subsection (1) must not be construed as prohibiting the apportionment of a share of liability to one or more responsible persons by the court in an action or proceeding under subsection (5) or by a director in an order under section 48 [remediation orders].

(3) 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 44 [determination of contaminated sites] 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 director, a municipality, an approving officer or the commission under this Part.

(4) 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.

(5) Subject to section 50 (3) [minor contributors], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

(6) Subject to subsections (7) and (8), a person is not required to obtain, as a condition of an action or proceeding under subsection (5) being heard by a court,

(a) a decision, determination, opinion or apportionment of liability for remediation from a director, or

(b) an opinion respecting liability from an allocation panel.

(7) In all cases, the site that is the subject of an action or proceeding must be determined or considered under section 44 [determination of contaminated sites] to be or to have been a contaminated site before the court can hear the matter.

(8) Despite subsection (7), if independent remediation has been carried out at a site and the site has not been determined or considered under section 44 [determination of contaminated sites] to be or to have been a contaminated site, the court must determine whether the site is or was a contaminated site.

(9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:

(a) whether a person is responsible for remediation of a contaminated site;

(b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

(c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;

(d) such other determinations as are necessary to a fair and just disposition of these matters.

***Environmental Management Act* Contaminated Sites Regulation**

[includes amendments up to B.C. Reg. 239/2007, July 1, 2007]

B.C. Reg. 375/96

O.C. 1480/96

Deposited December 16, 1996

effective April 1, 1997

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.

[am. B.C. Regs. 322/2004 and 324/2004, s. 29.]

Determining compensation under section 47 (5) of the *Act*

35 (1) For the purposes of determining compensation payable under section 47 (5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement,

other legislation or the common law.

(2) In an action between 2 or more responsible persons under section 47 (5) of the Act, the following factors must be considered when determining the reasonably incurred costs of remediation:

(a) the price paid for the property by the person seeking cost recovery;

(b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) any remediation measures implemented and paid for by each of the persons in the action;

(f) other factors relevant to a fair and just allocation.

(3) For the purpose of section 47 of the Act, any compensation payable by a defendant in an action under section 47 (5) of the Act is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the Negligence Act.

(4) In an action under section 47 (5) of the Act against a director, officer, employee or agent of a person or government body, the plaintiff must prove that the director, officer, employee or agent authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation.

(5) In an action under section 47 (5) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

[am. B.C. Regs. 322/2004 and 324/2004, s. 35.]