CONTAMINATED SOILS LITIGATION:

COST RECOVERY ACTIONS UNDER THE *ENVIRONMENTAL MANAGEMENT ACT* AND THE COMMON LAW

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A. Introduction

People typically associate environmental contamination with industrial polluters, particularly in the resource development and manufacturing sectors. While these players certainly have a role, contaminated sites can stem from the activities of families and can even occur naturally. Contaminated sites are found in industrial areas, rural communities and even urban residential neighborhoods. With contaminated sites turning up all over the province it is an important risk management tool to understand how contaminated sites litigation works, who can be held responsible, and how parties can recover costs to remediate these sites.

The objective of this paper is to outline the way in which a statutory remediation cost recovery action in British Columbia operates and the associated common law claims that may be advanced at the same time.

In discussing contaminated sites litigation, this paper will first provide an overview of the statutory cost recovery procedures in the *Environmental Management Act*[1] ("EMA"). It will then highlight some preliminary concerns and sources of information that all parties in an action should review early in the process.

Only a few dozen cases have considered the cost recovery sections of the EMA since the Act came into effect in 1997. This paper will discuss in detail the facts of the leading case, *Gehring v. Chevron*, 2006 BCSC 1639. The Court in *Gehring* comprehensively applied the apportionment of liability provisions of the EMA and the case remains the dominant statement of law in this area. *Gehring* touched on all of the key components of the EMA's cost recovery process and will be referred to throughout this paper.

This paper will also detail the key components of the EMA's cost recovery provisions, discuss the case law in those areas, review the applicable common law actions and consider the issue of limitation periods.

B. Statutory Cost Recovery Actions

The EMA provides a cause of action for parties to recover their reasonably incurred costs of remediation, in cleaning up a contaminated site, from "responsible persons". Section 47(5) of the EMA states:

> …any person… 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…

[1] *Environmental Management Act*, SBC 2003 c. 53 ("EMA")

This subsection contains four critical features: 1) the costs must be incurred; 2) the costs must relate to a contaminated site; 3) the costs must be reasonable; and 4) the costs are only recoverable from "responsible persons".

Section 45 of the EMA sets out categories of persons who are responsible for remediation of a contaminated site. It provides that, subject to section 46, the following categories of persons are responsible for remediating a contaminated site: current or previous owners or operators of the site; persons who transported the contaminants; and in limited circumstances secured creditors and producers of the contaminants.

If a party is found to be a "responsible person", he or she is jointly and separately liable for the total cost of remediation.[2] Therefore, it is important as a preliminary matter to identify and locate all potential responsible persons.

C. Preliminary Considerations

Regardless of whether a party is pursuing a cost recovery action or defending a claim, it is important to consider a few issues before proceeding. Making sure that you have all the information before proceeding can save time and money.

1. Information Sources and Selection of Parties

The first source of information is your client and his or her documents. You must also look to other sources to identify additional defendants, possible defences, counterclaims and third party actions. In reviewing the available sources, it is important to consider not only the subject site but also all properties in the vicinity, as these adjacent sites may be a source of contamination that migrated onto the subject site. Both present and historical uses of the subject and adjacent sites should be reviewed.

If you act for a defendant, make sure that the plaintiff named every conceivable party in the notice of civil claim who may be potential "responsible persons". For example, a plaintiff may have chosen not to name a party for strategic or business reasons. Such unnamed parties may include the plaintiff corporation's parent company, its directors and officers, its principle business partner or the municipality in which the plaintiff has a pending re-development application.

(i) Your client

The client is usually the quickest source for information regarding present and historical uses of the subject site and adjacent properties. He or she may also know of other parties whose activities may have led to contamination on or around the site. Your client can also assist in searching local archives, insurance policies and records, local maps and aerial photographs to obtain evidence of historic uses of the area. A historical land

[2] EMA, supra at section 47(1)

title search will identify all previous owners, mortgagees and lessees who were registered on title.

The client is also your best source for any contractual documents (purchase and sale agreements, lease and licencing agreements, etc.). These contracts should be reviewed for representations, warranties and indemnities. Contract documents may also provide information of the existence of other "responsible persons".

(ii) Site Registry

Section 43 of the EMA requires the minister to establish a site registry that contains information on sites that have been investigated or cleaned up since about 1989. Of particular interest to litigants are the site profiles, which are partially available online. These profiles provide information on petroleum and other spills, discarded barrels, drums or tanks, fill materials, waste disposal, and underground tanks ("UST"). The site registry also lists the people and/or organizations that have been involved with the site and their roles (lessees, environmental consultants, etc.), as well as any environmental reports prepared on the site.

A site registry search should be conducted not only on the subject site but also on the adjacent properties to determine potential sources of contamination migration.

(iii) BC Ministry of the Environment, Environment Canada and Fisheries and Oceans

Make a request for further information directly to the regional office of the Ministry of Environment ("MOE") that is responsible for the subject property. A list of regional offices and their telephone numbers and addresses is available on the MOE website.

The MOE's files are limited to information since approximately 1989. Therefore, the existence or absence of a contaminated site file will not provide assurance that the property is or is not contaminated.

Information requests relating to federal lands and federal matters may be made to the local office of Environment Canada or the Department of Fisheries and Oceans.

(iv) Municipalities

Regional and municipal governments can pass bylaws in respect of certain environmental concerns. Most municipalities will have either a building or permits department, and larger municipalities may have an industrial waste or environmental department. USTs typically require a building permit, so checking with one of those departments may yield when and where it was installed. In addition, if there was an application for a development permit, the municipality may have records that indicate whether concerns were brought to the attention of the owner or developer regarding the

existence of contamination. This may be relevant when advancing a limitation period defence.

Another useful source is the local fire commissioner who may have information regarding reported spills, violations of regulations regarding storage, and handling and use of flammable and combustible materials. This is one way to determine present or historical existence of USTs and above ground storage tanks.

(v) Workers' Compensation Board of BC ("WorkSafe BC")

WorkSafe BC is a useful source for reported infractions regarding chemicals and hazardous products that were stored, maintained or used in employee or other work areas.

(vi) Company searches

Company searches can identify officers and directors who may be "responsible persons" in a cost recovery action. If the plaintiff company is potentially a "responsible person", a defendant should consider naming the plaintiff's directors and officers in the action.

In some cases, it may be desirable to restore dissolved companies for the purpose of naming them in a cost recovery action. For example, the dissolved company may have critical information about the case that would not otherwise be available. Restoring the company may also provide recourse against an insurance policy that the company may have had during its involvement with the site.

A company search will also provide information about receivers and trustees who, in limited circumstances, may also be "responsible persons".

(vii) Land Title Office

Land Title Office searches provide information on previous and current owners of the subject and adjacent sites. A land title search will also provide information on secured lenders, who, in some limited circumstances, may be "responsible persons".

2. Insurance Coverage and Limitation Periods

Be sure to consider whether the claim is barred by a limitation period, or if the deadline is approaching and you need to file immediately. Limitation periods are reviewed in more detail later.

For defendants, the more urgent concern is likely insurance coverage. Insurance policies typically have strict notice requirements and specific limitation periods. Any policies should be reviewed immediately to determine the possibility of involving an insurer in the action.

D. *Gehring*

Given the importance of identifying “responsible persons” in the cost recovery process, it is essential to discuss *Gehring*. This case is the first thorough judicial discussion of “responsible persons” and the allocation of the costs of remediation among “responsible persons” under the EMA. *Gehring* interprets the definitions of “owner” and “operator”, expanding both well beyond their meaning in common parlance. It also clarifies how corporate directors can be held liable, and ways they can escape liability.

Gehring also provides a comprehensive look at the statutory cost recovery process under the EMA. A review of the facts of the case may be instructive before a more thorough discussion of the elements of the action.

In *Gehring*, the property in question operated as a gas station from 1940 - 1978 under the Chevron brand, but was owned by various parties during that time. Of those owners, two groups were named as defendants in the action. The first was Mr. Shiskin, who operated the now dissolved Shiskin Motors. The second was L&L Motors along with its directors Mr. and Mrs. Filiatrault. Though not an owner, Chevron was also named as a defendant for supplying gasoline to the site.

In 1978, the property was sold to Fireside Electric who shut down the gas station and removed the USTs. The property was renovated and converted into a commercial rental space. After the conversion, the site operated in various capacities including as a restaurant and a custom framing business. Fireside Electric and its director Mr. Thompson were also added as defendants.

The plaintiffs purchased the property in 1992 and continued to operate it as a commercial rental site. In 2001, the plaintiffs sought to expand the building but were told that it required environmental approval. To obtain this approval, the plaintiffs commissioned environmental reports. The reports determined that the site had hydrocarbon contaminants that exceeded the provincial standard.

The plaintiffs cleaned up the site by removing the contaminated soil and replacing it with clean soil at a cost of $120,000 plus a 15% supervision fee paid to a consultant. The Court would set the remediation costs for the site at $120,000, citing the 15% supervision fee as unreasonable.

In determining how liability would be allocated, the Court found that most of the contamination was due to a slow leak between 1940 and 1978, and a sudden leak under L&L Motors ownership. As such, the Court held that 10% of the contamination occurred under the ownership of non-parties, 24% under Shiskin Motors and 66% under L&L Motors.

In terms of actual liability, the Court apportioned damages as follows: 50% to L&L Motors and Mr. Filiatrault jointly, 5% to Ms. Filiatrault as a minor contributor (her portion reduced that of L&L Motors and Mr. Filiatrault), 25% to Fireside Electric and Mr. Thompson jointly, and 25% to the plaintiffs. Both Chevron and Mr. Shiskin were deemed not to be "responsible persons". The 25% allocation to the plaintiffs was surprising since they acquired the site after it became contaminated.

E. Statutory Cost Recovery

With the facts of *Gehring* in mind, we now turn to the EMA. As stated above, section 47(5) of the EMA provides a cause of action for parties to recover their incurred costs in carrying out remediation of a contaminated site.

There are four elements to a statutory cost recovery action under the EMA:

(1) the person must have carried out remediation;
(2) the remediation activity must be related to a "contaminated site";
(3) the remediation costs must be reasonable; and
(4) the defendant must be a "responsible person".

To succeed in a cost recovery action, the plaintiff must prove each of these elements.

1. The person must have carried out the remediation

In order for a plaintiff to seek compensation under the EMA, the plaintiff must have already incurred the remediation costs. Section 47(5) of the EMA specifically states the cost recovery action is for any person who "incurs costs". In *O'Connor v. Fleck*, 2000 BCSC 1147, the equivalent provision from the EMA's predecessor legislation, the *Waste Management Act*[3] ("WMA"), was interpreted to mean that future costs were not compensable under the WMA. This interpretation of the WMA was supported in *Swamy v. Tham Demolition*, 2001 BCSC 551.

Although this provision changed slightly in the transition from the WMA to the EMA, the Court in *Gehring* confirmed that future costs are not compensable under the current statute.[4] This interpretation is consistent with the purposes of the EMA, one of which is to ensure contaminated sites are remediated. Unlike tort actions, where parties can do as they please with their award, it appears the legislature's motive in restricting recovery actions this way is to prevent parties from taking the money and not remediating. However, once an apportionment is completed by the Court, it would be a simple matter to apportion liability for all future costs of remediation at any future proceeding according

[3] *Waste Management Act*, RSBC 1996 c. 482, repealed
[4] *Gehring v. Chevron*, 2006 BCSC 1639 at para. 146

to the formula established by the Court. This is what the Court contemplated in *Gehring* at paragraph 147:

> As a result, the Court cannot make an order regarding offsite contamination which may be discovered at some future time. Of course, if offsite contamination is discovered and determined to result solely from the same contamination which gave rise to the remediation costs here, the cost of remediation would likely be allocated among the parties to this lawsuit in the same way as set out in these reasons for judgment.

For potential plaintiffs, the prospect of spending thousands of dollars to clean up a mess they did not create is not appealing. This is especially true where the plaintiffs cannot afford to pay the cost up front. To make matters worse, it is entirely possible to spend tens of thousands of dollars to remediate a site and then not be able to recover the cost from "responsible persons" who cannot be found or are impecunious.

However, any former owner or operator, regardless of whether he or she caused the site to become contaminated, is a "responsible person". As such, even if you cannot find the party that contaminated the property, your client may still have remedies against former owners, especially owners who knew about the contamination and undertook little or no remediation.

2. The remediation activity must be related to a "contaminated site"

To make a claim under section 47 of the EMA, subsections (7) and (8) require that the property in question be a "contaminated site" as determined by section 44. Further information on the procedure is found at section 15 of the Contaminated Sites Regulation ("CSR"). Under the old regime, there was some question as to who could make that determination. Was it limited to the statutorily empowered director, or could the Court make the same determination?

In 2003, both the Court and the legislature answered this question. In interpreting the WMA, the British Columbia Court of Appeal clarified that if a determination is not made by a director under the statute, the Court can make the determination in its place.[5] That same year, the legislature enacted the EMA which contains new provisions providing clear authority to the Court to make a determination that a site is contaminated.

As such, plaintiffs now have two paths to obtain a determination that a property is a "contaminated site". Section 47(7) of the EMA says that 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

[5] *No. 158 Seabright Holdings Ltd v. Imperial Oil Ltd.*, 2003 BCCA 57; *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56

the Court can hear the matter. Section 47(8) states that, 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, the Court must determine whether the site is or was a contaminated site. This means that a plaintiff can get an administrative determination by the MOE prior to trial, or ask the Court for a determination at trial.

Despite the Court's authority to determine if the site was a "contaminated site", it is prudent to obtain a determination from the MOE prior to trial. This was exactly the issue in *Simpson v. Chapman* [6], where the plaintiff's case fell apart when it failed to advance appropriate evidence that the site was in fact a "contaminated site".

Another benefit of getting an advanced determination is that it can reduce uncertainty. It may also reduce legal costs, if the issue does not need to be argued in Court. For example, the plaintiffs in *Gehring* obtained a determination under the WMA prior to trial.[7] This meant that a determination regarding contamination was a non-issue at trial.

3. The remediation costs must be reasonable

Section 47(3) of the EMA provides that the "costs of remediation" means all costs of remediation and includes, without limitation, costs of preparing a site profile; costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 as to whether or not the site is a contaminated site; legal and consultants' costs associated with seeking contributions from other responsible persons; and fees imposed by a director, a municipality, an approving officer or the commission.

Section 47(3) of the EMA uses the words "includes" and "without limitation" which suggests that this is not an exhaustive list.

Most cases do not specifically provide a breakdown of remediation costs. However, the Court in *O'Connor* deemed the following as reasonable remediation costs: consultant fees, contractor fees, site investigations, and various small reports.[8] It should also be noted that the burden rests on the plaintiff to prove costs and that they are reasonable.[9]

The case law has also identified some items deemed not to be reasonable remediation costs. In *Gehring*, the plaintiffs hired a consultant to supervise the remediation process. This consultant was paid on a cost plus basis and was to receive a payment of 15% of the actual costs of remediation. At trial, the plaintiffs argued that the consultant added to the efficiency of the process and reduced the total cost to remediate the site. In holding

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[6] 2009 BCPC 28
[7] *Gehring*, supra note 4 at para 36 and 246
[8] *O'Connor v. Fleck*, 2000 BCSC 1147 at 286 and 287
[9] *Canadian National Railway v. A.B.C. Recycling Ltd*., 2005 BCSC 647 at para 81

that the supervision fee was not reasonable, the Court stated that plaintiff put forward no evidence that the fee actually reduced the remediation costs in any definitive way.[10]

Another item that is not a reasonable cost of remediation is legal fees, notwithstanding subsection 47(3)(c) which states that "costs of remediation" means all costs of remediation and includes, without limitation, "legal and consultant costs associated with seeking contributions from other responsible persons…".

In *Canadian National Railway v. A.B.C. Recycling Ltd.*, 2006 BCCA 429, the British Columbia Court of Appeal was asked to interpret this section and decide whether a successful plaintiff was entitled to special costs in a cost recovery action. The Court decided that there is nothing in the EMA that entitles a plaintiff to anything other than party-and-party costs.[11] The Court held that the legal costs referred to in the EMA are when one responsible person is forced to sue another for contribution.[12]

Parties should also be alive to prompt payment discounts.[13] If a discount is available to a remediating party for paying on time or early, the Court will deem it reasonable for them to pursue such a discount. As such, defendants should make inquiries of the plaintiff's contractors to see if such discounts were available and taken advantage of.

Section 35(2) of the CSR sets out a list of factors the Court must consider when determining the reasonably incurred costs of remediation. Section 47(3) of the EMA defines "costs of remediation". Section 47(9)(b) states that the Court may determine whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation. The statutes are worded broadly[14] and leave the door open to include other factors and items not specifically listed. In *Gehring*, the defendants conceded that the general amount of damages was reasonable,[15] so the Court did not need to review and interpret section 35(2) of the CSR. This has left the door open for counsel to argue whether certain costs are reasonable.

4. The defendant must be a "responsible person"

The primary battleground in a cost recovery action revolves around who are "responsible persons" and how liability will be apportioned amongst them. As discussed, section 45 of the EMA sets out who is a "responsible person", subject to exemptions in

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[10] *Gehring*, supra note 4 at para 141
[11] *Canadian National Railway v. A.B.C. Recycling Ltd.*, 2006 BCCA 429 at para 11
[12] *Canadian National Railway*, supra note 10 at para 5
[13] *Canadian National Railway*, supra note 8 at para 106
[14] The EMA and CSR both provide an opportunity to include various costs that are not specifically enumerated. The general wording of s. 47(3) of the EMA has already been discussed, but other parts of the EMA including s. 47(9)(d) and s. 35(2)(f) of the CSR provide parties with the ability to argue for including items not listed as recoverable remediation costs.
[15] *Gehring*, supra note 4 at para 10

section 46. As stated earlier, “responsible persons” includes current and previous owners or operators of the site; persons who transported the contaminants; and in limited circumstances secured creditors and producers of the contaminants. In addition, the CSR states at section 31 that municipalities may become “responsible persons” if they acquire ownership of a contaminated site through expansion of their municipal boundaries.

In discussing responsible persons it is important to note the retroactive nature of the EMA. Although the statute is less than a decade old, the EMA can pose significant financial liability on persons who have not had anything to do with the site since long before the EMA was enacted.

(a) Owners and Operators

The first category of responsible persons is owners and operators. Section 45(1) of the EMA states that, subject to an exemption, current and previous owners are responsible for remediation of contaminated sites. “Owner”, “operator”, and “person” are defined at section 39(1). “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. “Operator” means a person who is or was in control of or responsible for any operation located at a contaminated site. “Person” includes a government body and any director, officer, employee or agent of a person or government body.

In *Gehring*, the definition of “owner” is expanded even further. The Court held that when the sections of the EMA are read in conjunction with section 35(4) of the CSR, the definition of owner for purposes of a cost recovery action includes:

> …not only a current or previous registered owner, but also a director and employee of a current or previous registered owner, so long as such an individual authorized, permitted, or acquiesced in the activity which gave rise to the cost of remediation.[16]

Section 35(4) of the CSR has the same impact on the liability of operators and their directors. Considering these expanded definitions, directors of companies that hold an interest in land of a contaminated site, or who operated on a contaminated site, could be held personally liable for remediation costs.

(b) Producers

Section 45(1)(c) of the EMA states that, subject to section 46, a person who (i) produced a substance, and (ii) caused that substance to be handled in a way that caused the site

[16] *Gehring*, supra note 4 at para. 51

to be a contaminated site, is responsible for remediation of the site. Unlike owners and operators, who are responsible persons simply due to their link to the contaminated site, producers are only liable where there is a causal link between producing the substance and causing the contamination.

In *Gehring*, Chevron produced the contaminant, gasoline. The plaintiffs alleged that Chevron is a "responsible person" because of possible ground spillage when filling the station's tanks. The Court found that the causes of the contamination were faulty USTs and piping, and that if spillage had occurred during filling it was so minor as to not be a factor. Because Chevron did not cause the contamination, it was not a "responsible person" as a producer of the contaminant.[17]

(c) Transporters

Section 45(1)(d) of the EMA states that, subject to section 46, a person who transported or arranged for transport of a substance, and 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, is responsible for remediation of the site. Like producers, transporters are also only responsible if they cause the site to become contaminated.

In *Gehring*, the plaintiffs alleged that Chevron was responsible as a transporter. The Court disagreed for the same reason it was not liable as a producer, namely, lack of causation.[18]

(d) Apportionment of Liability

Section 47(9)(c) of the EMA is the guiding statement on apportioning liability. It states that the Court may determine 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 Part 4 of the EMA. When preparing arguments regarding apportionment of liability one should review section 47 of the EMA titled "general principles of liability for remediation" as well as section 35 of the CSR, which relates to section 47 of the EMA.

In *Gehring*, the Court held that, pursuant to section 47(9)(c) of the EMA, liability should be distributed according to the following three primary factors: activities that contributed to the contamination, duration of ownership and control of the site, and ownership of the contaminating substance. Although liability under the statute is not specifically fault based, the Court held that the contaminating activities should receive the heaviest weight.[19]

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[17] *Gehring*, supra note 4 at para 80
[18] *Gehring*, supra note 4 at para 86
[19] *Gehring*, supra note 4 at para 124 and 125

Perhaps the most important aspect of liability is that responsible persons are all jointly and separately liable for the remediation costs.[20] This is a main driver behind plaintiffs seeking to add large corporate entities as "responsible persons" and therefore as defendants. Using *Gehring* as an example, if the Court had found that Chevron was even 1% liable, the plaintiffs could have collected the entire damages award from Chevron. It would then fall to Chevron to seek contribution from the other parties, some of which may have been impecunious. This is an attractive option for plaintiffs where it may be difficult to recover court-ordered damages, as one wealthy defendant increases the likelihood of successfully recovering 100% of remediation costs.

(e) Minor Contributors

Defendants in a cost recovery action can argue that their liability should be limited because they only minimally contributed to the contamination. Section 50 of the EMA outlines the process for responsible persons to seek "minor contributor" status from the director. Minor contributors are only liable in a cost recovery action up to the amount or portion specified by the director. "Responsible persons" who contributed nominally to the contamination, but who were named in the action due to their "deep pockets", often seek this designation.

To qualify as a minor contributor, the "responsible person" must meet the following three criteria. First, he or she must demonstrate that only a minor portion of the contamination present at the site can be attributed to the person. Second, either no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation. In *Gehring*, the Court acknowledged that there is no definition of "minor" in the statute but suggests that it implies something "relatively insignificant or immaterial".[21]

Finally, the person must demonstrate that the application of joint and separate liability would be unduly harsh. Of the several defendants in *Gehring*, the Court determined that Ms. Filiatrault was the only party who met the minor contributor test. Even though she was a director of one of the businesses that operated the gas station, in the opinion of the Court, Ms. Filiatrault's limited time in that position, only one year, warranted granting her this minor contributor status.[22]

It is curious to note that in *Gehring*, a director of a company that operated the contamination-causing gas station was granted minor contributor status, while former owners of the site who did not know that the property formerly operated as a service

[20] *Environmental Management Act*, SBC 2003 c. 253 s. 47(1)
[21] Gehring, supra note 4 at para 102
[22] Gehring, supra note 4 at para 108-110

station were not. This suggests that length of ownership may be a weightier factor than contributing to the contamination.

(f) Exemptions

Section 46 of the EMA and Part 7 of the CSR discuss parties who are not responsible for remediation of a contaminated site. A defendant seeking to rely on an exemption has the burden of proving all elements of the exemption on a balance of probabilities pursuant to section 46(3) of the EMA. The following exemptions are available to private corporate or individual defendants and are addressed below:

(i) act of God or act of war;

(ii) act of a third party;

(iii) innocent purchaser;

(iv) innocent “owner” or “operator”;

(v) authorized dump site;

(vi) remediation consultants or contractors;

(vii) contamination by migration;

(viii) naturally occurring contamination;

(ix) minor interest holders;

(x) innocent “producers” or “transporters”;

(xi) transporters of contaminated soil, if there has been any misrepresentation to the transporter; and

(xii) directors of dissolved companies.

Exemptions applicable to government organizations, sureties, insurers, trustees and secured creditors are not addressed in this paper.

(i) Act of God or Act of War (sections 46(1)(a) & (b))

A person who would otherwise become a “responsible person” because of an act of God (such as an earthquake or hurricane) that occurred before April 1, 1997, or because of an act of war, is not responsible for remediation of a contaminated site, 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.

(ii) Act of Third Party (section 46(1)(c))

This exemption covers the “midnight dumper” scenario. A person who would otherwise become a “responsible person” only because of an act or omission of a third party, other than the person’s employee, agent, or a party with whom the person has a contractual relationship (such as a tenant). This exemption only applies 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.

(iii) Innocent Purchaser (section 46(1)(d))

This exemption applies if an owner or operator establishes that, at the time the person became an owner or operator: (1) the site was already a contaminated site; (2) the person had no knowledge or reason to know or suspect that the site was a contaminated site; (3) the person undertook all “appropriate inquiries” into the previous ownership and uses of the site and undertook other reasonable steps and investigations, consistent with “good commercial or customary practice at that time”; and (4) the person did not, by any act or omission, cause or contribute to the contamination. The innocent owner must also establish that it did not transfer any interest in the site (such as a sale or a lease) without first disclosing any known contamination to the transferee.

“All appropriate inquiries” is defined in section 28 of the CSR. It requires a consideration of, among other things, the relationship of the actual purchase price to the value of the property if it was uncontaminated, and whether the parties did their due diligence to obtain known or reasonably ascertainable information about the property at the time of the acquisition. Another factor is 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.

Nowadays, a Site Registry search and an environmental investigation are standard practice and are likely to disclose any recent contamination. Therefore, the usefulness of this exemption is likely limited to those persons who acquired a contaminated site prior to the 1980’s when the current environmental investigations and searches were not readily available.

(iv) Innocent Owner or Operator (section 46(1)(e))

An owner or operator who acquired an uncontaminated site and did not dispose of, handle, or treat a substance in a manner that caused the site to become a contaminated site, can rely on this exemption provided that the person can establish that the site was uncontaminated at the time of acquisition. This would apply to situations where the contamination is caused by a third party, such as tenant or a licensee, unless the owner or operator “knew or had a reasonable basis for knowing” that the third party’s intended use of the property would cause the contamination (section 29 of the CSR).

(v) Authorized Dump Site (section 46(1)(f))

A “transporter” who transported or arranged the transport of a substance to an authorized waste disposal facility or site is exempt, provided the owner or operator of the site was authorized by statute to accept the substance at the time of its deposit, and the “transporter” received permission to deposit the substance.

Owners and operators of sites that are “authorized” to accept the substance includes permits and waste management plans under the EMA and authorizations under section 42 of the CSR.

(vi) Remediation Consultants & Contractors (EMA section 46(1)(h) & (i); CSR section 24)

A person who provides assistance or advice respecting remediation is exempted, unless the assistance or advice was carried out negligently. The CSR provide some guidance on the standards the remediation consultant is required to meet at sections 58-60.1.

Section 24 of the CSR states that a person is designated not responsible for remediation of a contaminated site if the person provided only contracting or consulting services related to the construction of buildings and facilities at the contaminated site. Curiously, the exemption does not have the usual limitation of ‘causing or contributing to the contamination on the site’. However, a contractor or consultant who causes or contributes to contamination would likely fall under the definition of an “operator” and would therefore be a “responsible party”.

(vii) Contamination by Migration (section 46(1)(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 is not responsible for remediation of a contaminated site.[23]

(viii) Naturally Occurring Contamination (section 46(1)(k))

If a substance is present only as a “natural occurrence” on the site, the owner or operator is not responsible for remediation. “Natural occurrence” is not defined in the EMA, but the CSR contains sections that provide guidance.[24]

(ix) Minor Interest Holders (section 22 of the CSR)

[23] Pursuant to s. 33 of the CSR, a similar exemption applies to owners and operators if the site is contaminated only by substances being managed in a wide area remediation plan, unless the person caused the contamination which is the subject of the remediation plan in place.

[24] See, for example, s. 11 of the CSR.

Current and former holders of certain minor interests, such as easements and restrictive covenants, are exempted provided that the holder of such interest can establish that he or she has not used the site in a manner that caused the site to become contaminated.

(x) Innocent Producers or Transporters (sections 19 and 23 of the CSR)

A producer or transporter of a contaminated substance is not responsible for remediation where the producer or transporter "did not control the disposal, handling or treatment of the substance". Persons who transferred ownership of a substance and responsibility for managing the substance to a transporter are also exempt where they intended at the time to transport the substance to a legal site and the transporter spilled or discharged the substance following pick-up but prior to delivery.

(xi) Transporters of Contaminated Soil (section 32 of the CSR)

A transporter of contaminated soil who acted in good faith, without negligence and in compliance with the EMA and the CSR is not responsible for remediation of a site which becomes contaminated by disposal or deposit of contaminated soil if there has been any misrepresentation to the transporter by a person who arranged for the transportation about either the quality or degree of the soil's contamination, or by a person who received the contaminated soil as to the suitability of the site for disposal.

(xii) Directors of Dissolved Corporations

In *Gehring*, the Court held that directors of dissolved companies are not "responsible persons". This was based on an interpretation of the definitions of "owner", "operator" and "person". As stated above, "person" includes a government body and any director, officer, employee or agent of a person or government body; it does not include former persons. The Court determined that, because Shiskin Motors was a dissolved corporation, it was no longer a person, but a former person. Liability did not attract to former directors because Shiskin Motors did not meet the definition of "owner" or "operator". [25]

While this appears to be a creative piece of legal engineering, it likely will not withstand scrutiny. Section 8 of the *Interpretation Act*, RSBC 1996, c. 238 states:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The British Columbia Court of Appeal has stated that the object of the cost recovery sections of the EMA is to expedite the remediation of contaminated sites. If the interpretation in *Gehring* is correct, and directors of former companies are not

[25] *Gehring*, supra note 4 at para 53-55

responsible persons, there is nothing to prevent a company from establishing a shell corporation and then dissolving it when the company sells the site to avoid liability. This would not further the legislative intent and the purposes of the EMA, because not only would contaminated sites not be remediated expeditiously, they may not be remediated at all.

F. Common Law Actions

Plaintiffs can pursue both a statutory action under the EMA and a common law action simultaneously to recover remediation. This principle was established in *L-2176 Holdings Ltd. v. 273925 B.C. Ltd.*, 2002 BCSC 993. In that case, the defendant asked the Court to stay the plaintiff's action until the plaintiff had exhausted its administrative remedies under the EMA. The Court denied the defendant's application, stating that it was not the defendant's place to shape how the plaintiff proceeded with its action.

Plaintiffs should therefore consider bringing the following common law actions to recover the cost of remediation.

1. Breach of Contract

There are many types of contracts that could play a role in recovering the costs of remediation of a contaminated site; probably the most common is a lease agreement. Many leases contain clauses requiring the tenant to restore the land to either its original condition prior to the lease or to some set standard.

In *O'Connor*, the plaintiff landlord commenced an action against its former industrial tenant for breaches of covenants under the lease agreement to restore the premises to its original condition. The landlord claimed that when the tenant moved out he left all kinds of dust, debris and environmental issues including contaminants in the walls and crawl spaces. The Court found for the landlord, granting him an award for both breach of contract and for recovery of costs under the WMA.[26]

Although contractual terms are typically laid out well in advance, it is advisable to thoroughly review all contracts with suppliers, tenants, lessees, and any other parties affiliated with the property if a cost recovery action has been commenced or is contemplated.

2. Nuisance

Although an action for nuisance regarding a contaminated site has not yet been successful in British Columbia, plaintiffs should consider pleading nuisance in a common law cost recovery action.

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[26] *O'Connor*, supra note 7 at para 289-290

Typically, where a claim of nuisance has been advanced, the plaintiff has already been successful in some other regard, such as the statutory cost recovery process under the EMA, or it has encountered another procedural problem. For example, the plaintiffs in *Gehring* originally commenced a statutory cause of action as well as a common law action where they plead nuisance and other torts. At trial, they only proceeded under the EMA which was sufficient to win the case.

In *ML Plaza Holdings Ltd. v. Imperial Oil Ltd.*, 2006 BCCA 564, the plaintiff proceeded in nuisance but was defeated on a procedural issue, a limitation period defence. *ML Plaza* is discussed later in this paper in the context of limitation periods.

3. Negligence

Negligence is another option for parties seeking to recover costs for remediating a contaminated site. However, like the other non-statutory causes of actions discussed, it has its own limitations. A critical element of the negligence test is that the harm must have been reasonably foreseeable. Although the risks of environmental harm are currently well known, that has not always been the case; the harm associated with environmental contamination has only really been understood in the past 30 years or so.

This presented a problem for the plaintiffs in *Berendsen v. Ontario*, 2009 ONCA 845. In the mid-1960s, the Ontario Ministry of Transportation deposited asphalt and concrete waste from a highway reconstruction project on a nearby dairy farm. It did so with the farm owner's consent. In 1981, the Berendsen family purchased the dairy farm. Soon after their purchase, the Berendsens' cows began to suffer serious health problems and to produce an unusually low quantity of milk. The immediate cause of these health and poor production problems was the cows' unwillingness to drink enough water. However, the Berendsens claimed that the root cause was Ontario's deposit of waste material on their farm. They alleged that harmful chemicals in the waste material migrated to the wells on their property, thereby contaminating the well water and making it unpalatable and unfit for their cows. In 1994, the Berendsens sued Ontario in negligence for depositing the waste and then failing to remove the contamination.

The Ontario Court of Appeal held that reasonable foreseeability is determined as at the time the impugned action occurred. In the facts of this case, the Court concluded that the harm was not reasonably foreseeable when Ontario deposited waste material on the dairy farm, so the Berendsens' negligence action must fail. The Court of Appeal stated:

> … Although this result may seem harsh in the light of what we now know about the environment, it is inappropriate to use our current knowledge to measure conduct occurring more than 30 years ago.[27]

[27] *Berendsen v. Ontario*, 2009 ONCA 845 at para 72

As such, in considering a negligence action, all parties should consider whether the harm was reasonably foreseeable at the time of the impugned act or omission.

4. Rylands v. Fletcher

The rule in *Rylands v. Fletcher* states that if a person keeps a substance on his or her property, and that substance could cause harm if it escapes, that person is responsible for the consequences of its escape. Because this rule deals with substances that escape from one property to another, it is only useful where the contamination has migrated or spread to an adjacent site. *Rylands* does, however, provide an advantage over other actions like negligence in that it is a strict liability action, so proving fault is not required.

5. Stigma

A recent trend in contaminated sites litigation is that plaintiffs are also claiming damages for the stigma of owning a contaminated site. The basis for a stigma claim is that there has been a diminution in the value of the property due to its contaminated status. There is some merit to this argument in that a purchaser choosing between two identical properties, one that is or was contaminated and one that is pristine, it is reasonable that the purchaser would choose the latter.

The concept of stigma was recently addressed in *Tridan Developments Ltd. v. Shell Canada Products Ltd.*[28] In that case, contaminants from a Shell gas station had spread onto the Tridan property. Shell had agreed to clean the site to standards set by Ontario's Ministry of the Environment but Tridan wanted the site returned to pristine condition.

Tridan succeeded in convincing the trial judge that it should be awarded damages to return the site to pristine condition and additional damages for the stigma of owning a site that used to be contaminated. On appeal, the Court held that if a site was not returned to pristine condition some stigma would remain, but if it was returned to its original condition there would be no stigma.[29] The original trial award allowed Tridan to have its cake and eat it too.

As such, if a party only succeeds in acquiring costs to restore a contaminated site to some level below pristine condition, a plaintiff may want to consider adding a stigma action to its claim.

G. Limitation Periods

Although liability under the EMA is retroactive, section 35 of the CSR expressly preserves the defendant's right to assert "all legal and equitable defences, including any

[28] 35 R.P.R. (3d) 141; 57 O.R. (3d) 503 ("Tridan")
[29] Tridan, supra at para 13

right to obtain relief under an agreement, other legislation or the common law". Arguably then, the *Limitation Act* [30] applies to cost recovery actions.

In any limitation claim, the two key issues that need to be determined are as follows:

(a) What is the limitation period?
(b) When does the time limit under the limitation period begin to run?

In answering these two questions, it is useful to keep in mind the purposes underlying limitation legislation, as set out by Madam Justice McLachlin (as she then was) in *Novak v. Bond*: [31]

1. define a time at which potential defendants may be free of ancient obligations;

2. prevent the bringing of claims where the evidence may have been lost to the passage of time;

3. provide an incentive for plaintiffs to bring suits in a timely fashion; and

4. account for the plaintiff's own circumstances, as assessed through a subjective/ objective lens, when assessing whether a claim should be barred by the passage of time.

Most plaintiffs bring both statutory and common law cost recovery actions, such as in tort, contract or nuisance. These claims may each be subject to different limitation periods. The possible limitation periods that are likely to apply under the *Limitation Act* are:

> s. 3(2)(a) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions ... for damages in respect of injury to ... property, including economic loss arising from the injury, whether based on a contract, tort or statutory duty; and
>
> s. 3(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of six years after the date on which the right to do so arose.

Several cases have been brought which address the limitation period question, although none have answered it satisfactorily. As an example, in *First National Property v. Northland Road Services Ltd.*, [32] the Court was asked which limitation period applied to the cost recovery action in the EMA. In declining to answer, the court did comment on

[30] R.S.B.C. 1996, c. 266
[31] [1999] 1 S.C.R. 808
[32] 2008 BCSC 894

when the limitation period would begin to run. Essentially the court found that two criteria were necessary. The first is that there had to be a contaminated site and second, the costs of remediation had to be known; in other words the costs had to be incurred. However, the court said whether the limitation period was two or six years was not relevant in that case because the limitation period did not begin to run until the quantum of remediation costs is known and at that point it was less than two years prior to the start of the litigation.

In *Low v. Petro Canada Inc.*, [33] the plaintiff brought both a statutory cost recovery action and several common law actions for costs associated with a gasoline leak. The defendant applied to dismiss the action as statute barred under the *Limitation Act*. The court declined the application stating that the defendant confirmed the action by writing to the plaintiff acknowledging the cause of action and admitting liability prior to expiry of the limitation period.

Already discussed in the context of a nuisance claim, *ML Plaza* is equally relevant for its commentary on limitation periods for common law claims. In this case, the defendant leased land from the plaintiff to operate a gas station. The defendant closed the gas station in 1992, removed the USTs, and began to clean up the site which had some hydrocarbon contamination.

In 1999, the plaintiff commenced an action in negligence and continuing nuisance. The defendant applied to dismiss the claim as statute-barred under the *Limitation Act*. In arguing against the application, the plaintiff submitted that as long as the contaminated soil remained on the property it constituted a continuing nuisance and the limitation clock had not yet started.

The court found against the plaintiff holding that the mere presence of the contaminated soil was insufficient to be considered a continuing nuisance. For a continuing nuisance claim, the plaintiff must show evidence of additional damage sustained within the limitation period. Because the defendant removed the USTs, the source of the contamination was gone and no additional damage could have occurred.[34]

H. Conclusion

There are many factors and issues for parties to consider and address in cost recovery actions. The EMA provides a statutory cause of action, but parties should not underestimate common law options. In the case of cost recovery actions, the most important first step is to obtain as much current and historical information about the contaminated site and to identify all parties (i.e. potential defendants) who have a connection, however tenuous, to the property. There are many sources of this

[33] 2001 BCSC 251
[34] *ML Plaza Holdings Ltd. v. Imperial Oil Ltd.*, 2006 BCCA 564

information, and spending time on the front end to obtain all of the facts could save time and money in the long term.

Parties should not overlook the obvious statutory requirements that the site must be contaminated (according to the determination of the director or the Court) and the costs of remediation must have already been incurred by the plaintiffs.

Actual and potential litigants should obtain independent legal advice to ensure they have explored all avenues and exhausted various options to ensure their rights are protected and obligations fulfilled.