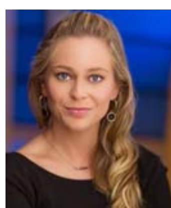
Case Study: Cost Recovery under the Environmental Management Act - J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.



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SMART Remediation
Vancouver, BC
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Case Study: Cost Recovery under the *Environmental Management Act* ("EMA")

J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.

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SMART Remediation Seminar Series
January 27, 2015

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- BC Supreme Court decision rendered on August 25, 2014
- Remediation of James Island by the plaintiff, JI Properties

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- Cost recovery claim brought by JI Properties against the Defendant, former owner, pursuant to the EMA
- Plaintiff awarded $4,750,000

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- Nuts and bolts of statutory cost recovery claim (s. 47, EMA):
  - Contaminated site (s. 39, EMA)
  - Costs of remediation incurred (s. 47, EMA)
  - Costs reasonable (s. 47, EMA)
  - Responsible persons ("RPs") / exemptions (s. 45 and s. 46, EMA)
  - Absolute / retroactive / and joint and separate liability (s. 47, EMA and s. 35(2), CSR)
  - Allocation (s. 35(2), CSR)

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JI Properties v. PPG – Case study

- Facts:
  - James Island located between the Saanich Peninsula and Sidney Island, BC
  - Plaintiff, JI Properties (current owner) bought island from Pacific Parkland Properties Inc. on August 29, 1994
  - July 2004 – September 2006 – Plaintiff remediated contamination on the island (southern part)
  - Dec 4, 2006 – Certificate of Compliance (“CoC”) issued
  - Spent appx. 5.3 Million

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- Facts (cont’d):
  - Defendant and its predecessor companies owned the island from 1913 to 1988 (except for a brief period of time in the 1970s)
  - Operated explosive manufacturing and storage operations until 1985 – caused contamination (first industrial activity)
  - 1988 – Defendant sold the island to Pacific Parkland (who sold it to Plaintiff in 1994)
  - Defendant did not dispute it was a former owner and operator of the island – RP (unless exempt)

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- Defences presented:
  - Action is barred by the *Limitation Act* (passage of time)
  - Defendant remediated the island prior to selling it in 1988 to standards agreed by the Ministry at that time → Defendant exempt from RP status
  - Plaintiff also RP → some of the costs should be allocated to the Plaintiff
  - Substantial portion of Plaintiff's costs not reasonable
  - Plaintiff purchased island with full knowledge of contamination / benefited from remediation (property increased in value) → benefit should be offset against costs

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- Limitation Defence:
  - Remediation done – Sep 2006
  - CoC obtained – December 2006
  - Claim commenced – March 2009

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- Limitation Defence (cont'd):
  - No limitation period in the EMA for cost recovery claims
  - New *Limitation Act* (2012) came into force in June 2013
  - Applies to claims discovered before June 1, 2013
  - This claim arose / discovered prior to June 1, 2013
    - Old (1996) *Limitation Act* applied

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- Limitation Defence (cont'd):
  - Old *Limitation Act*:
    - 2 years to sue for damages in respect of injury to property
    - any other action not covered in the LA – 6 years to sue

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- Limitation Defence (cont'd):
  - When did the cause of action arise (cost recovery under the EMA)?
    - When all costs incurred?
    - When first set of costs incurred?
    - Aggregation permitted?
  - Key if LP 2 years

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- Limitation Defence (cont'd):
  - Key finding: Part of the "costs of remediation" included amounts paid for services rendered by contractors, consultants and legal counsel after March 12, 2007
  - Costs to be aggregated – cause of action completed once all costs incurred
  - All costs incurred after March 2007
  - Claim brought less than two years after that date
  - Not statute barred even if 2 year LP
  - In any event, 6 year LP under the old Act

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- Limitation Defence – FAILED
- JI Properties' claim not statute barred

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- Exemption Defence:
  - On its face, both Plaintiff and Defendant RPs – current and former owner/operator respectively
  - Both argued exemptions from RP status

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- Exemption Defence – Defendant:
  - CoC Exemption – s. 46(1)(m), EMA
  - Not responsible:
    - a person who was an RP for a contaminated site for which a CoC was issued and for which another person then undertakes to change the use of the site and provide additional remediation
  - CoC is defined in s. 39, CSR specifically as an instrument issued under s. 53, EMA
  - Form of CoC not prescribed by the EMA / CSR

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- Exemption Defence – Defendant (cont'd):
  - CoC Exemption
    - Based on Defendant's 1988 remediation
      - Clean-up criteria agreed upon by the Ministry for certain parameters
        - Lead, mercury, DNT and TNT addressed
        - Based on restricted land use / filing of restrictive covenant
    - July 19, 1988 "Comfort Letter" issued by the MoE confirming remediation

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- Exemption Defence – Defendant (cont'd):
  - Court rejects argument that July 1988 Comfort Letter is equivalent to a CoC
  - Cannot form basis for an exemption under current regime (s. 46(1)(m), EMA)
  - No grandfathering in the legislation
  - Defendant not exempt and remains an RP

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- Exemption Defence – Plaintiff:
  - Innocent acquisition exemption – s. 46(1)(d), EMA
  - Applies to an owner or operator who can establish that at the time they became an owner or operator:
    - Site was a contaminated site
    - Person had no knowledge / reason to suspect that the site was a contaminated site
    - Person undertook all appropriate inquiries into previous ownership / uses
    - Person did not transfer any interest in the site w/out first disclosing known contamination
    - Person did not cause or contribute to the contamination

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- Exemption Defence – Plaintiff (cont'd):
  - Innocent acquisition exemption not established
  - Plaintiff had reason to suspect there was contamination on the site even if it did not know that a site was a contaminated site at the time of purchase
  - Sufficient to lose exemption
  - Plaintiff also an RP – at risk of having some costs allocated to it

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- Reasonableness of costs
  - Defendant's position – Plaintiff's costs not reasonably incurred because
    - Plaintiff voluntarily and unnecessarily remediated to the most stringent numerical standards
    - Plaintiff did not consider alternate and less costly measures (i.e., risk assessment)
    - Plaintiff did not employ more cost-effective methodologies

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- Reasonableness of costs – Court:
  - Two parts to the analysis:
    - Reasonableness of the methodology / approach
    - Whether costs objectively reasonable
  - S. 56, EMA– Selection of remedial options – Considerations:
    - preference for permanent solutions
    - technical feasibility and risk associated with alternative remediation measures
    - costs, etc.

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- Reasonableness of costs (cont'd) – Voluntary remediation - Court:
  - Voluntary remediation in pursuit of a profit / to make property more valuable not unreasonable
  - Strong reliance on "polluter pays" principle animating the entire regime
  - Subsequent landowners' motives largely irrelevant

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- Reasonableness of costs (cont'd) – Standards:
  - Plaintiff applied most stringent standards
  - Defendant argued commercial / industrial standards should have applied
  - Court disagreed – Plaintiff entitled to rely on their expert re: Selection of standard
  - Reasonable potential future use includes residential development – Plaintiff was entitled to pursue it
  - No remaining CL / IL uses on the once pristine island

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- Reasonableness of costs – Methodology:
  - Defendant challenged (among other things) Plaintiff's numeric remediation – argued that risk-assessment could have been used (more cost effective)
  - Court's view – Reasonableness does not mandate the most cost-effective or cheapest option
  - Reasonableness requires consideration of all circumstances + reliance on advice / recommendations of qualified experts
  - Battle of the experts re: Use of risk assessment – Court accepted the Plaintiff's expert's view that numeric remediation reasonable / preferred approach

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- Reasonableness of costs – Methodology (cont'd):
  - Defendant challenged remediation by detonation employed in one area
  - Used on discovery of high concentration of TNT and unexploded dynamite
  - Was not necessary
  - Lack of reliance on experts – not reasonable
  - Even though the detonation approach worked

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- Reasonableness of costs – Quantum:
  - Court accepted Defendant's evidence that excavation w/out detonation would have saved appx. $800,000
  - In addition, there were arithmetic errors / inclusion of costs not related to remediation – "grey areas" / no forensic analysis
  - Court applied a discount to account for this also
- Ultimately, court decided reasonable costs of remediation were in the amount of $4.75M (not appx. $5.3M sought)

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- Allocation
  - 100 percent to the Defendant
  - Betterment argument not successful
  - No evidence that remediation directly caused a corresponding increase in value
  - Polluter pays → KEY

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Questions?

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