SHUTTING THE OPEN DOOR: B.C. COURT OF APPEAL OVERTURNS CONTRACTOR'S CLAIM FOR COST RECOVERY UNDER THE EMA

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Nearly a year ago, the Supreme Court of British Columbia opened the door for contractors to pursue former owners and operators of contaminated sites to recover unpaid fees for remediation work performed by the contractor.[1] The door was opened by the contractor's novel argument that it could seek recourse under the cost-recovery provisions of the province's *Environmental Management Act* (the "***EMA***") in circumstances where the contractor had not been paid by the party it contracted with to perform the remediation work.

On June 19, 2024, the British Columbia Court of Appeal rejected the contractor's argument and overturned the lower court's decision that the *EMA*'s cost recovery provisions could apply to debt claims for contracted remediation services performed by unpaid contractors.[2] With the Court of Appeal's recent decision, there is now clearer guidance on the cost recovery provisions of the *EMA* and confirmation of the primary purpose of the legislation to: (1) require polluters to pay the cost of the clean-up of contamination from which they have benefitted in the past; and (2) encourage the timely clean-up of contaminated sites by current owners.[3]

Factual Background

In 2020, Cordy Environmental Inc., ("**Cordy**") brought a claim seeking to recover the costs of remediation work it performed after the company that hired Cordy to perform the work became insolvent.

The facts leading to Cordy's claim were as follows:

- 2015: A pipeline spill occurred involving a pipeline owned by Obsidian Energy Inc. ("**Obsidian**").
- June 2017: Obsidian sold the pipeline to Predator Oil BC Ltd. ("**Predator**").
- July 2017: The British Columbia Oil and Gas Commission (the "**Commission**") issued a general order requiring remediation by the operator and permit holder of the pipeline of the contaminate area.
- September 2017: Predator transferred its leasing rights to the pipeline to Opsmobil Energy Services Inc./Ranch Energy Corporation ("**Ranch**"). Ranch then hired Cordy to remove contaminated soil around the area of the spill in accordance with the Commission's order.

- March-April 2018: Cordy removed the contaminated soil and invoiced Ranch for its services, but Ranch did not pay Cordy's invoices.
- July 2018: Ranch was placed into receivership and Cordy was unable to collect from Ranch as an unsecured creditor.

Lower Court Decision

Cordy commenced a claim against Obsidian and brought an application for summary judgment under section 47 of the *EMA* seeking to recover its service costs on the basis that Obsidian was the owner of the site at the time of the spill and thereby had a statutory duty to remediate the contamination. In response, Obsidian sought dismissal of the claim on the grounds that the debt claim did not fall within the EMA's scope.

The lower court concluded that Cordy had a cause of action under the *EMA* and referred the matter to trial. The court found that Cordy, despite not being a party responsible for remediation under the EMA, could still claim costs under section 47(1) for the work it performed on behalf of a responsible party. This decision was significant because it potentially broadened the scope of liability under the *EMA* to include unpaid contractors, allowing them to recover losses for unpaid work from parties where there was no contractual relationship.

Appeal Decision

On appeal, the Court of Appeal dismissed the claim against Obsidian. The Appellate Court held that the *EMA's* cost recovery provisions do not apply to debt claims for contracted remediation services performed by an unpaid and unsecured creditor. As such, Cordy did not have a statutory cause of action against Obsidian under the *EMA*.

The Appeal hinged on the interpretation of who qualifies as a "responsible person" under the *EMA*. The Appellate Court's analysis focused on whether Cordy, as an unpaid independent contractor, could be considered a "responsible person" for the purposes of recovering costs under section 47(5) of the *EMA*. The Court of Appeal held that Cordy "cannot invoke the *EMA*" to recover amounts owing to it because the *EMA*'s cost recovery provisions are intended for use by "responsible persons," which include owners, operators, and those with vested interests in the contaminated site. The court of appeal further reasoned that the *EMA* is designed to impose liability on those who have a direct connection to the contamination and remediation of the site, not on third-party contractors who provide services under a contractual agreement. Lastly, the Court of Appeal observed that Cordy is in fact exempt from liability under section 46(1)(h) of the *EMA*, which protects those providing assistance in remediation from being held liable unless their work is negligent.

Implications for British Columbia and Elsewhere

The appeal decision highlights an important clarification regarding the cost recovery mechanisms of the *EMA*

and the intended purpose of the legislation. It now quite clear that the primary objective of these mechanisms is to ensure that polluters and owners of contaminated sites are held responsible for the costs associated with environmental contamination. Unpaid and unsecured independent contractors, whose only connection to a contaminated site is a contract to perform remediation work, do not fall within the scope of individuals entitled to cost recovery under s. 47(5) of the *EMA*.

While the decision may be disappointing for contractors seeking an alternative route of recovery, it underscores the importance of contractual and other statutory protections, such as insolvency legislation, for contractors involved in environmental remediation.

Furthermore, as discussed in our previous bulletin in respect of the lower court's decision, the environmental legislation in most provinces only provides the government (as opposed to private parties) with a statutory right to recover remediation costs, with British Columbia, Ontario and Saskatchewan being the exception.

For example, section 99(2)(b) of Ontario's *Environmental Protection Act* (the "***EPA***") provides that any person has the right to compensation from the owner of the pollutant and the person having control of the pollutant for all reasonable costs incurred in carrying out work related to a spill remediation order.[4] We have yet to see any cases in Ontario brought by contractors to pursue this particular avenue of relief. However, the Ontario Court of Appeal has held that the purpose of section 99(2) is to "ensure that parties that suffer damage through the discharge of pollutants are compensated by establishing a statutory right to recovery from parties that owned and controlled the pollutant."[5]

Historically, cases in Ontario have focused on claims from neighbouring landowners whose properties became contaminated by a nearby spill and claims brought by current landowners against the owners at the time of the spill, rather than claims from unpaid contractors.[6] However, the British Columbia court's decision here suggests that, if similar circumstances were to occur in Ontario, the unpaid contractor would be unlikely fall under the scope of Ontario's cost recovery regime.

Likewise, section 65(3) of the *Environmental Management and Protection Act*, (the "***EMPA***") entitles any person who carries out a site assessment or remediation work on an environmentally impacted site to recover the reasonable costs of that work from one or more responsible persons.[7] Section 12 outlines that landowners are responsible for contaminated sites even if they became an owner or occupier after the contaminant was discharged and relieves subsequent landowners of this responsibility if they could not reasonably have been expected to know about the contamination or if a notice of site condition was filed with respect to the site.[8] Therefore, while the scope of responsibility is not as definitive as in Ontario, the British Columbia court's guidance on the matter would suggest similar implications for Saskatchewan; namely, a restriction on claims by contractors under Saskatchewan's legislation. As with Ontario, we are not aware of cases in Saskatchewan

brought by contractors seeking similar relief as in *Cordy Environmental*.

Although this recent decision is not binding on other courts in Canada, the courts of Ontario and Saskatchewan may look to British Columbia for assistance in interpreting their own statutes, particularly in light of the similar language and objectives of the analogous environmental laws.

Key Takeaways

While Cordy's novel argument regarding application of the *EMA* may have temporarily opened the door in British Columbia for similar claims, the door has now been firmly shut by the British Columbia Court of Appeal. This decision reinforces the *EMA*'s focus on the polluter pays principle and its aim to promote the timely cleanup of contaminated sites by current owners. The court's interpretation aligns with the statutory objective of requiring those who have ownership, possession, control, or a vested interest in the contaminated property to bear the costs of remediation.[9] It is now quite clear, at least in British Columbia, that the cost recovery provisions under the *EMA* are not intended to provide relief for unpaid contractors but are instead designed to ensure that polluters and property owners are accountable for environmental remediation.

[1] *Cordy Environmental Inc v Obsidian Energy Ltd*, 2023 BCSC 1198 ("**Cordy Environmental**"). Our discussion of the lower court decision in Cordy Environmental is found here.
[2] *Obsidian Energy Ltd v Cordy Environmental Inc*, 2024 BCCA 226.
[3] *Ibid* at para 41.
[4] *Environmental Protection Act*, R.S.O. 1990, c. E.19, s.99(2)(b).
[5] *Midwest Properties Ltd. v. Thordarson*, 2015 ONSC 819 at para 45.
[6] See for example: *Huang v Fraser Hillary's Limited*, 2018 ONCA 527; *Gagnon & Associates Inc v Genier et al*, 2014 ONSC 3019
[7] *Environmental Management and Protection Act*, 2010, S.S. 2010, c. E-10.22, s.65(3).
[8] *Ibid*, ss. 12(2), 12(3)(d)(ii) and 12(3)(e).
[9] See – S. 39 of the *Environmental Management Act*

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.


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