

Is 10 Years Too Long for Remediation of a Contaminated Site?



SITUATION

A city agrees to buy land that had been used for a sawmill and was heavily contaminated by pollutants. The city says it'll clean the land up itself, withholding part of the purchase price to pay for the remediation costs. When the remediation is done, the city will pay the sawmill the rest of the purchase price minus the cleanup costs plus interest. The city develops a remediation plan, assesses the arsenic contamination at the site, removes the contaminated soil and begins work on the contaminated groundwater. But the work is delayed by construction of a sewer overflow project, changes in environmental regulations and other issues. After 10 years, the remediation still isn't finished. So the sawmill sues the city for the rest of the purchase price, arguing that the city hasn't been diligent in its effort to clean up the property. The sawmill points out that the contract requires the city to take reasonable efforts to complete the remediation diligently and in a timely fashion and says it originally expected the work to take six months.

QUESTION

Should the city have to pay the sawmill the rest of the

purchase price now'

- A) No, because the remediation isn't finished.
- B) No, because it has been diligently trying to finish the remediation and isn't required to do the work as fast as possible.
- C) Yes, because it's unreasonable for the work to have taken more than 10 years.
- D) Yes, because the sawmill expected the remediation to be done within six months.

ANSWER

B. The city wasn't required to do the remediation as quickly as possible and it has been diligently trying to get it done.

EXPLANATION

This hypothetical is based on a case from BC in which a city bought contaminated land for \$4.8 million. It paid \$2.4 million at the closing and agreed to pay the balance minus the costs of cleaning up the contamination once the remediation was complete. When the remediation was still only partially done after 10 years, the seller sued for the balance, claiming that the city hadn't diligently pursued remediation of the land.

The court noted that the contract didn't put any time limit on when the remediation must be completed or provide that the seller would only be responsible for the remediation costs up to a certain date. The contract simply required the city to take reasonable efforts to complete the remediation 'diligently and in a timely fashion.' So the issue was whether the city performed its obligations in a reasonable and timely way, explained the court. The city developed a remediation plan that addressed remediating the contaminated soil, contaminated groundwater and any residual contamination. It

also had an arsenic assessment study done. A contractor removed the contaminated soil but addressing the polluted groundwater was more complex. Some of the work was delayed because of construction of a sewer overflow project and consideration of the type of development that would go on part of the land. So although some of the work could've been done more quickly, the city had been working diligently to get the remediation work done. And because the contract didn't require it to get the work done as quickly as possible, the city wasn't in violation of the contract, ruled the court.

WHY WRONG ANSWERS ARE WRONG

A is wrong because a court could order the city to pay the balance of the purchase price even though the remediation isn't done yet. The agreement requires the city to pay the balance of the purchase price only when the cleanup is done. But it also requires the city to take reasonable efforts to complete the remediation diligently and in a timely fashion. If a court concludes that the city is dragging its heels on getting the cleanup done, it could rule that the city violated the agreement, thus entitling the sawmill to the balance of the purchase price now. However, if the city *isn't* in violation of the contract, the sawmill will have to wait until the work is done to get the money it's owed.

C is wrong because, although 10 years is a long time, it's not necessarily unreasonable for the remediation to take this long. After all, the site had been used for industrial purposes and both its soil and groundwater were heavily contaminated with toxic substances such as arsenic.

D is wrong because the sawmill's expectation of how long it would take for the remediation to be finished is irrelevant. It may have expected that work to be done within six months. But the contract didn't require the city to clean up the site within six months—it required it to take reasonable efforts to finish the remediation diligently and in a timely manner. And

the city has been making reasonable efforts to get the work done.

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[*Western Forest Products Inc. v. New Westminster \(City\)*](#), [2013] BCSC 1001 (CanLII), June 6, 2013