

No, Third Party Creditors Don't Have A Cause Of Action Under British Columbia's Environmental Management Act



On June 19, 2024, the British Columbia Court of Appeal (the “**Court**”) issued its decision in *Obsidian Energy Ltd. v. Cordy Environmental Inc.*, 2024 BCCA 226. The case deals with interpreting British Columbia’s *Environmental Management Act* (“**EMA**”), and whether a third party contractor providing environmental remediation can bring a claim for costs of remediation under s. 47 of the EMA. This case provides clarification on who can base a claim under s. 47 of the EMA.

Facts of the Case

In October 2015, a disused portion of a pipeline owned by Obsidian Energy Ltd. (“**Obsidian**”) was damaged in a forest fire and a spill was reported. The site was initially remediated over the following few months.

In December 2016, Obsidian sold the pipeline to Predator Oil BC Ltd. (“**Predator**”), who assumed responsibility for all environmental liabilities associated with the pipeline.

In July 2017, the BC Oil and Gas Commission ordered Predator to remediate the area of the pipeline affected by the spill. Two months later, Predator’s rights in the pipeline and the

affected site were assigned to OpsMobil Energy Services Inc./Ranch Energy Corporation ("**OpsMobil**").

OpsMobil eventually contracted with Cordy Environmental Inc. ("**Cordy**") to supervise and transport excavated materials from the affected site. Invoices from Cordy to OpsMobil for work done in March and April 2018 were not paid by OpsMobil. In July 2018, OpsMobil was placed into receivership and Cordy asked to be added to a list of unsecured creditors.

In February 2020, Cordy filed a notice of civil claim in British Columbia against multiple parties, including Obsidian, for unpaid remediation services performed at the request of OpsMobil.

Decision of the summary trial judge: Cordy was a person who incurred reasonable costs under the EMA

Obsidian and Cordy cross applied for summary judgment. Cordy relied exclusively on s. 47 of the EMA, which states at s. 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.

Obsidian argued that Cordy did not have a cause of action because Cordy was not a person who incurred costs in carrying out a remediation of a contaminated site within the meaning of s. 47(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.

Obsidian also argued that it was OpsMobil that carried out the remediation and incurred costs, and Cordy's proper route should have been through insolvency proceedings.

The chambers judge disagreed, finding that Obsidian was a previous owner/operator of the pipeline and affected site and thus was a person responsible for remediation. This meant that Obsidian could be sued under s. 47(5) of the EMA. While the chambers judge found that Cordy was not a person responsible for remediation of a contaminated site, it could bring a claim as a "person who has incurred reasonable costs".

The chambers judge then referred the matter to the British Columbia Supreme Court trial list to determine the reasonableness of Cordy's costs and Obsidian's defences. Both parties appealed the decision.

Court of Appeal overturns the chambers judge's decision: Cordy cannot claim costs of remediation under the EMA

The Court focused its decision on the statutory interpretation of s. 47(5) of the EMA. Obsidian argued that Cordy had no proprietary interest in the contaminated site. Cordy was neither in possession nor control of the site, nor was it an entity that was responsible to remediate the site. Obsidian argued that Cordy was not a "responsible person" under the EMA and could not seek recovery from previous owners or operators to recover remediation costs.

Cordy's position was that it was entitled to make a claim under s. 47(5) of the EMA as an independent contractor who

engaged in remediation services at OpsMobil's request.

The Court agreed with Obsidian's interpretation, finding that s. 47(5) does not include an "...unpaid and unsecured independent contractor whose only connection to a contaminated site is that they were retained by the current owner or operator to perform remediation-related work." The Court closely examined the terminology used in multiple sections of the EMA to come to this determination.

The Court looked to s. 1 of the EMA, which defines the term "remediation". Under the EMA, the Court determined that actions related to remediation are ones that would typically be undertaken by the owner or someone with a vested interest in the affected property. "Owner" is defined in s. 39 of the EMA as 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.

The Court further stated that the focus of s. 40 of the EMA is on people or entities with ownership of an affected property (or who have possession, control, or a vested interest in that property). Section 41 of the EMA allows a director of waste management to order an "owner or operator of a site" to undertake investigations and prepare a report if the director reasonably suspects the site may be contaminated. Likewise, s. 44 focuses on people or entities who have possession, control, or a registered interest of an affected site to provide notice or disclosure to certain parties.

The Court determined that the language of the EMA focuses on ownership, possession, operational authority, as well as a vested proprietary interest and/or a causal relationship when dealing with the fact of contamination. This affects how s. 47(5) of the EMA is to be interpreted. Both ss. 47(1) and (5) need to be read harmoniously with other provisions of the EMA.

The costs of remediation listed in s. 47(3), therefore, are typically borne by “responsible persons”—being an owner or operator of the affected property, someone with a vested proprietary interest, or someone with the authority to direct, manage, or otherwise control the activities that occur at a contaminated site. Importantly, Cordy’s contract with OpsMobil expressly disavowed agency status.

The Court ultimately held that Cordy’s claim did not arise out of a responsibility to undertake remediation as someone with ownership, possession, control, directive authority or a proprietary interest in the affected site. Instead, Cordy sought payment from Obsidian that was “squarely and exclusively” grounded in its contract with OpsMobil.

Takeaways

The Court’s decision clarifies that a contractor cannot advance a claim against prior owners/operators for unpaid remediation work under s. 47 of British Columbia’s EMA. When the original application decision was released, several commentators noted that the decision could create a new avenue for creditors to recover environmental remediation costs when faced with a debtor’s insolvency. This was particularly so because s. 47 of the EMA is broadly worded.

The Court’s decision, however, blocked this avenue. The focus of the ‘polluter pays’ principle under s. 47 of the EMA is to provide current owners (or those with a proprietary interest in the affected site) the ability to recover remediation costs for past contamination. A claim for debt by a creditor that is derived from a contract with an owner of a contaminated site cannot be brought under s. 47 of the EMA.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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