

?Polluter Pays? Principle Results in Liability for \$4 Million in Remediation Costs



One of the foundations of environmental law in Canada is the so-called 'polluter pays principle,' which holds that polluters should be responsible for the costs related to the pollution they cause, including the costs of cleaning it up. For example, the preamble to the federal *CEPA*, says 'Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the 'polluter pays' principle.' The application of this principle can have long-ranging and costly consequences for companies that cause or are responsible for pollution. Here's a look at a recent case from BC that reinforces the application of the polluter pays principle'and resulted in a company being held liable for more than \$4 million in remediation costs.

THE CASE

What Happened: A company bought an island and then spent about two years and \$5.3 million cleaning it up. The island's owner then sued a company that formerly owned and operated an explosives manufacturing and storage facility on the island for reimbursement of the cleanup costs. The owner claimed that the company's operations were responsible for the contamination and so under BC's *Environmental Management Act* (EMA) it was a 'responsible person' liable for reasonably incurred remediation costs.

What the Court Decided: A BC Supreme Court ruled that the company was liable for the remediation costs, ordering it to pay the owner \$4,750,000.

The Court's Reasoning: The court noted that when the company closed the operations and decided to sell the island, there were no laws in BC on contaminated sites. The company did remediate contamination on the island in collaboration with the Ministry of Environment (MOE). But additional contamination remained, which the owner then remediated. The company argued that the owner voluntarily conducted this remediation based on residential and parkland standards to make the island more valuable. But the court said the EMA is intended 'to ensure that the person who pollutes the land pays for the cost of its restoration. This is the so-called 'polluter pays' principle that

animates the regime.' So the owner's motivation for cleaning up the island were largely irrelevant.

The court found that it was reasonable for the island's current owner to undertake whatever remediation was necessary to get a certificate of compliance from the MOE, remove the restrictive covenant on title and seek approval for any steps necessary to permit or facilitate residential development. The 'polluter pays' principle imposes absolute liability on any person who causes a site to be contaminated and, in the circumstances of this particular case, it was 'fair and just' to require the company to reimburse the owner for reasonably incurred remediation costs in the amount of \$4,750,000 [*J.I. Properties Inc. v. Architectural Coatings Canada Inc.*, [2014] BCSC 1619 (CanLII), Aug. 25, 2014].

ANALYSIS

The *J.I. Properties* case reinforces the importance of the polluter pays principle, especially when it comes to allocating costs of remediation. Although the court rejected the owner's argument that it was shielded from any responsibility for cleaning up the contamination by the 'innocent acquisition' exemption under the EMA, the court did find that the owner was an innocent party in one key respect: it didn't contribute at all to the contamination of the island. And there was no evidence that it paid a discounted price for the island because of the possibility of contamination on it. So in the end, the company'i.e., the polluter'was held responsible for *all* of the reasonable remediation costs even though both it and the owner were technically 'responsible parties' under the EMA.

Bottom line: The importance of the polluter pays principle in Canadian environmental law can't be underestimated. So if your company wants to be protected from liability for remediation costs, which may not be incurred until years and years after the contamination occurs, it should focus on not causing any pollution at all in the first place.