WINNERS & LOSERS: How Do You Prove a Location Is a ‘Contaminated Site’ under Environmental Law?



Many environmental laws address the issue of who must pay for remediation of a contaminated site. But what qualifies as a ‘contaminated site’ under these laws’ For example, is the mere presence of *some* pollution at a location enough’ And what kind of evidence is needed to prove that a site is contaminated’ Here are two cases that dealt with these issues under BC’s *Environmental Management Act*, which defines ‘contaminated site’ as means an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains a prescribed substance in quantities or concentrations exceeding prescribed risk based or numerical criteria, standards, or conditions. However, similar issues can arise under the environmental laws of other jurisdictions.

LOCATION ‘ CONTAMINATED SITE

FACTS

Two doctors wanting to buy a house hired an inspector, who concluded that there wasn’t an underground oil tank on the property. So they bought the house. Three years later, they decided to sell the property. They told the buyer there wasn’t an underground tank on the property and provided the

inspection report. The buyer bought the house. But when he dug into the soil in the yard, he smelled a unusual odour and saw the soil changing colour. He hired an environmental company, which found an underground oil tank filled with 2,500 litres of oily water. He had the tank removed. And after an environmental expert concluded that the soil was contaminated with oil, he had the soil remediated. The buyer then sued the doctors under the BC *Environmental Management Act* for reimbursement of the remediation costs.

DECISION

The BC Provincial Court ruled that the location wasn't a contaminated site under the law.

EXPLANATION

Although there was oily soil and a tank containing oily water on the property, the court explained, 'The presence of an underground oil tank and oily soil does not necessarily lead to the conclusion that the site meets the legal definition of contaminated site.' The buyer's environmental expert concluded that the soil was contaminated under the *Environmental Management Act* and related regulation by testing samples using US EPA Method 9074. But the BC Ministry of Environment had issued a release stating that this method *can't* be used to demonstrate compliance with the law's petroleum hydrocarbon standards. Thus, it stands to reason the method also can't be used to prove non-compliance. And because there was no acceptable proof that the soil samples exceeded the contaminated site parameters, the buyer failed to prove that the property was a contaminated site under the law, concluded the court.

Simpson v. Chapman, [2009] BCPC 28 (CanLII), Jan. 23, 2009

LOCATION = CONTAMINATED SITE

FACTS

When a woman agreed to buy a house, the sellers told her that there wasn't an underground oil tank on the property, although there had been one previously. She bought the property but, six years later, decided to sell it. She had an inspection done, which revealed the presence of an underground oil tank containing water, oil and sludge. As required by the terms of the sale contract with the buyer, the woman had the tank removed and the surrounding soil remediated. *The total cost:* over $200,000. The woman then sued the sellers from whom she bought the property for, among other things, reimbursement for the remediation costs under the *Environmental Management Act*.

DECISION

The BC Supreme Court ruled that the location *was* a contaminated site under the law.

EXPLANATION

Citing the *Simpson* case discussed above, the court noted that there was more than the mere presence of a tank and oily soil to support the conclusion that the property in this case was a contaminated site under the law. A qualified soil analyst had performed the legally required tests on six samples from the property. The test results indicated the presence of light and heavy extractable petroleum hydrocarbons and naphthalene at levels that constitute contamination within the meaning of the *Environmental Management Act* and related regulation. Thus, there was sufficient proof that this property fit the law's definition of a contaminated site.

Aldred v. Colbeck, [2010] BCSC 57 (CanLII), Jan. 20, 2010

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