Case Study: Domovitch V. Willows, 2016 BCSC 1068

November 23, 2016

This case involves an interesting application of the Environmental Management Act (the "EMA") and the Contaminated Site Regulation (the "CSR"). The defendant, Ms. Willows, purchased the property in 1985. She was aware that there was an underground oil storage tank (the "UST") and in fact used the tank throughout her ownership. She sold the property to the third-party, Mr. Hult, in 1991. In 1999, Mr. Hult had the UST decommissioned. Mr. Hult sold the property to the plaintiff, Mr. Domovitch, in 2004. He advised Mr. Domovitch of the presence of the UST and the fact that it had decommissioned. Mr. Domovitch insisted upon a warranty to that effect in the contract of purchase and sale.

In 2015, Mr. Domovitch sold the property. Removal of the UST was a condition precedent to the agreement. When he removed the UST, Mr. Domovitch learned that the tank had leaked and that the contamination had spread to the neighbouring property. The environmental consultant hired by Mr. Domovitch advised that the property was a "contaminated site" and provided notice to the Ministry of Environment. Mr. Domovitch spent $38,845 removing and remediating the site.

The plaintiff sued Ms. Willows pursuant to s. 47(5) of the EMA. Ms. Willows in turn filed a third-party notice against the subsequent owner, Mr. Hult. The first issue was whether or not the plaintiff was an "innocent purchaser" under s. 46(1)(d) of the EMA and s. 28 of the CSR, given that he knew there was a UST on the property when he purchased it. The Court framed the issue as follows: "whether in June 2004 the known existence of an underground storage tank on the property, which had been decommissioned five years earlier is, without more, reason to suspect that the property was contaminated."

The Court suggested that in some cases, this would be sufficient to make a purchaser a responsible person. However, the Court was satisfied that Mr. Domovitch did not have reason to suspect that the property was contaminated given that he insisted on receiving proof that the UST had been decommissioned, going so far as to make it a term in the contract. (This result is interesting given that the fact that the UST was decommissioned would not provide any information as to the contaminated status of the property; however, the Court appears to have focused on Mr. Domovitch's *subjective* assurance rather than what a reasonable person would have believed.)

Ms. Willows also claimed to be an "innocent owner" or at the very least a "minor contributor". However, the Court rejected those arguments and found that she was a responsible person, in particular due to the fact that Ms. Willows had used the UST during her ownership. Thus, because she "caused or contributed to the contamination of the property", she could not be considered an innocent owner.

The Court also rejected Ms. Willows' claim that she was at most a "minor contributor" given that the contamination likely occurred over several years while she owned the property: "ownership exceeding five years [during which contamination was taking place] is not rightly categorized as insignificant or minor."

This case illustrates two important points to keep in mind:

- It should not be assumed that merely complying with environmental standards that are widely acceptable today will provide protection when contamination is discovered in the future. It is important to be proactive in managing environmental risk in order to avoid becoming a "victim of historical practices once considered entirely acceptable but now deemed insupportable by current standards and for which a retroactive accounting is imposed by legislation", like Ms. Willows.
- It is possible – but not guaranteed – that mere knowledge of a potential source of contamination will be insufficient to generate liability, so long as reasonable steps are taken to minimize risk. However, the result in this case should be viewed with caution. It is unlikely that a court would hold a commercial enterprise to the same (low) standard of risk avoidance to which it held Mr. Domovitch in this case.

By

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