

**Civil Litigation**

# Lawyers should distinguish between remediation and litigation legal costs: B.C. Court of Appeal

By **Ian Burns**

(April 12, 2021, 1:51 PM EDT) -- The B.C. Court of Appeal has issued a ruling in a case involving a dispute over the cleanup of a former gas station that lawyers are saying helps to clear up some of the confusion in the law about how legal costs are apportioned in environmental remediation cases, but could lead to more issues down the road.

The dispute in *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.* 2021 BCCA 129 dates back to 2011, when Abbotsford-based Jansen Ltd. brought an action against the owner of a former gas station located across the street from two parcels of land they owned, saying they had been contaminated by years of pollution from the station. The contamination of both sides was exacerbated by the failure of Victory Motors to remove buried gasoline storage tanks after the gas station closed in 1994.

In 2012, Jansen bought all the shares in Victory Motors, giving them indirect control over both sites. Victory then began action against the previous operators of the gas station and contracted an engineering company to remediate the sites, which cost them nearly \$400,000. Certificates of compliance under the provincial *Environmental Management Act* (EMA) were obtained for both sites in 2018, which permitted all contaminated soil on the sites to remain in place.

Jansen then settled its claims against two previous operators of the gas station, Chevron and Shell, but the action against Actton Super-Save made its way to trial. Victory and Jansen sought recovery of the remediation costs and the legal fees associated with them, and Victory sought the costs of removing the remaining underground gasoline storage tanks on its site, damages for the loss of rental income for a period of three years while remediation was undertaken and costs that it may incur in the future as a result of related litigation.

At trial, B.C. Supreme Court Justice Robert Sewell granted only the remediation engineering costs, allocating a higher percentage of those costs to Victory Motors because it benefited from remediation of the land. He wrote that the circumstances under which the Jansen family obtained ownership of Victory should be considered (*Jansen Industries 2010 Ltd. v. Victory Motors (Abbotsford) Ltd.* 2019 BCSC 1621).

"While I have rejected the argument that the Victory Motors site was acquired for a nominal consideration and Victory Motors received a 'windfall' profit from it, I do consider it relevant that Victory Motors is receiving the benefit of the remediation costs while being a significant contributor to the contamination," he wrote. "In the context of Victory Motors' failure to act responsibly I also do not consider it to be fair for it to obtain the benefit of the certificate of compliance without bearing a substantial portion of the costs of obtaining it."

But Chief Justice Robert Bauman, writing for a unanimous Court of Appeal, held that decision was in error and sent the issue of allocating costs back to the lower court.

"Such an adjustment could discourage an owner who was also a 'responsible person' from remediating its lands in a timely way," he wrote. "It surely cannot be within the contemplation of the legislature given the objectives of the legislation."

Chief Justice Bauman also waded into the cost issue, writing a distinction must be drawn between the two sets of legal costs — remediation costs and litigation costs. He held the "costs of remediation" under the EMA includes remediation legal costs, but a party's litigation legal costs must be assessed

in the usual way under the rules of court.

“Parties would be advised to do so by setting up distinct files and time-keeping protocols to maintain the distinction,” he wrote. “A totally separate treatment of legal costs incurred in remediation rather than the litigation avoids the conundrum respecting waiver of solicitor/client privilege in respect of the latter.”

Fasken’s Bridget Gilbride, who represented Jansen and Victory Motors, said the court’s decision clears up a lot of confusing case law on how to deal with legal costs under the EMA.

“Most litigation on contaminated sites settle, so this clarity in the law is important when you get to mediation and settlement,” she said. “One area of confusion was whether innocent owners were entitled to the same legal costs as responsible persons — there was some case law out there which indicated that responsible persons could receive legal costs that innocent owners didn’t have access to, based on the wording of the legislation, and he has now put that to bed.”



Malcolm Funt of Bojm, Funt & Gibbons LLP

Malcolm Funt of Bojm, Funt & Gibbons LLP, who represented Super-Save, agreed the decision offered clarification on how the legal costs of environmental remediation should be dealt with, but said he was concerned the decision may lead companies to set up corporations as a way of alleviating some of their responsibility under the EMA. Throughout the case, he had argued it was necessary for the judge to consider the benefit Victory had received from the remediation of the lands.

“On the question of a betterment or windfall situation, I think the decision clarifies what happens when a company buys shares as opposed to the property itself,” he said. “But it is yet to be seen whether or not there can a betterment or windfall argument can be made in a circumstance where someone just buys a property and doesn’t buy the shares in the company which owns that property.”

But Gilbride said she was concerned there may not be as much as a “bright line” between remediation and litigation legal costs as the ruling suggests.

“You often have litigation commenced as soon as the contamination is found, so it is simultaneous with all other remediation efforts,” she said. “And where you have two parties which are just fundamentally in very different positions it is hard to see what legal costs are remediation legal costs, so I wonder if this will add some uncertainty in practice if we find there isn’t this bright line in place.”

*If you have any information, story ideas or news tips for The Lawyer’s Daily please contact Ian Burns at [Ian.Burns@lexisnexis.ca](mailto:Ian.Burns@lexisnexis.ca) or call 905-415-5906.*