Environmental Law

Environmental Liability Risk Faced by Directors of Dissolved Companies

Getting around the *Gehring* Defence

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Once upon a time, you were a director of a company that owned a parcel of land in the Greater Vancouver area. A dry-cleaner and an auto-repair shop operated on the property, but you were not too concerned about environmental liability. This was the 80s after all and the rent was good! Your tenants caused some environmental contamination, which you addressed when your company sold the site in 1990. You dissolved your company a year later and forgot all about it.

The property is now owned by a developer who is seeking to build a residential tower on the property. To do so, the developer is required to investigate and remediate contamination that remained on the property after your company sold it. Standards have changed and the limited remediation your company did years ago no longer meets the applicable standards. Your old tenants (both sole proprietorships) are long gone and the developer is seeking to hold you personally liable for the costs of remediation. You did not personally operate on or own the property, so are you really at risk? A recent BC Supreme Court case says you are. Here we explain how and why.

Directors of existing corporations are "responsible persons"

Under BC's *Environmental Management Act*[1], a director or officer of a company that owns or operates on, or has historically owned or operated on, a contaminated site is a "person responsible for remediation" of that site simply by virtue of their position with the company[2]. Such directors and officers can be liable to pay reasonable costs of remediation incurred by anyone in respect of

1 S.B.C. 2003, c. 53 ("EMA")

2 EMA, ss. 39(1), 45

the site owned or operated on by their company, if they authorized, permitted or acquiesced to the activity that gave rise to the cost of remediation[3].

Directors of dissolved corporations are not "responsible persons"

Although the language establishing the categories of "responsible persons" under BC law is very broad, it is not without limit. For example, it does not include "persons" who have ceased to exist, such as dissolved corporations. This was made clear by the BC Supreme Court in a seminal decision called *Gehring*[4]. The case has undoubtedly motivated many corporate dissolutions by directors and officers seeking to shield themselves from personal liability for contaminated sites owned or operated on by the companies they served.

Dissolved companies can be restored – then what?

However, in the recent decision of the BC Supreme Court in *Foster v. Tundra Turbos Inc.*[5], a director of a long-dissolved corporation that owned and operated on contaminated land faced exposure in an action to recover environmental remediation costs by virtue of an application to restore the company to the corporate registry. The company in question, Tundra Turbos Inc., was incorporated in 1978, and was dissolved in 2000. Prior to its dissolution, it had a single director, one Mr. Clarke. The Plaintiff sought to hold Mr. Clarke liable for the costs of remediation incurred in respect of the property, some 17 years after Tundra had dissolved. The question before the court was whether it was appropriate to restore Tundra and reconstitute Mr. Clarke's directorship to make it possible for Tundra and Mr. Clarke to be liable for the costs incurred by the Plaintiff in remediating the property owned by Tundra in the late 1980s and early 1990s. Tundra and Mr. Clarke presented several arguments against the restoration, including that Mr. Clarke would lose the *Gehring* defence, a substantive right, and that Tundra's records pertaining to its operations at the property were destroyed, given the length of time involved. The court rejected these arguments and ordered the restoration.

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In the court's view, there was nothing inherently unfair in the fact that companies and directors may be exposed to liability under BC's environmental legislation many years after their association with a contaminated property ended. Further, the right of a company and its directors to avoid liabilities for which they would have been exposed but for the dissolution is not the kind of right protected by legislation. In fact, a legitimate purpose of restoring a company is to facilitate the imposition of such liabilities. While destruction of the dissolved company's records may, in certain circumstances, result in the court rejecting an application to restore, in Tundra's case there was no prejudice arising from the loss of records because it was clear, on the facts, that had Tundra not been dissolved, it would have been responsible for the costs of remediation. If anything, the lost records caused more prejudice to the Plaintiff than Tundra's director, Mr. Clarke, who had personal knowledge of Tundra's activities on the site.

In addition, the fact that Mr. Clarke could potentially face personal liability even without Tundra being restored (on the basis that he personally had the right to control, was in control of or responsible for any operation on the site in question) did not have a bearing on the restoration application. The court recognized that it was easier to hold Mr. Clarke liable if he was responsible solely by virtue of his status as director, which could only be done if the company was restored.

3 EMA, ss. 47(5); Contaminated Sites Regulation, s. 35(4)

4 Gehring v. Chevron Canada Ltd., 2006 BCSC 1639, para. 55

5 Foster v. Tundra Turbos Inc., 2018 BCSC 563

Implications of the Tundra Decision

The *Tundra* case is an important example of creative counsel work to get around the *Gehring* defence. However, notwithstanding the outcome in that case, there are arguments to be made in future cases to avoid the restoration and, ultimately, responsible persons status for the director in question. Existence of a limitation defence and loss of evidence that would assist in the defence of the director in question, or unreasonable delay of the Plaintiff in bringing the restoration application, may well result in the application being denied.

For lawyers advancing cost recovery claims, the *Tundra* case is a good reminder of the need to look at dissolved corporations and their directors and officers, and the need to apply for restoration, in a timely fashion. For those defending these claims, and restoration applications, finding prejudice, beyond the mere loss of the *Gehring* defence, will be key.

This article was first published by the British Columbia Environmental Industry Association (BCEIA) in their April 2019 Newsletter. Learn more about BCEIA here.

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