

ENVIRONMENTAL LAW UPDATE



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Contaminated Sites Litigation: New Law on Recovery of Legal Costs

The BC Court of Appeal has spoken, providing fresh guidance on recovering your legal fees and remediation costs when pursuing those responsible for contamination under the *Environmental Management Act*: [*Victory Motors \(Abbotsford\) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129](#).

This case dealt with two neighbouring sites contaminated by gas that leaked from fuel storage tanks on one of the sites. The Appellant companies owned the sites, one was owned by Victory Motors and the other by Jansen Ltd. The respondent, Super-Save, was one of many historical operators of the gas station.

Victory Motors and Jansen took steps to remediate the sites and then commenced litigation against the responsible persons, including Super-Save, to recover their remediation costs and associated legal fees, pursuant to the *EMA*.

The Court of Appeal discussed, among other things, the recovery of legal costs in contaminated sites cases and determined that a distinction should be made between remediation-related legal costs and litigation-related legal costs.

The costs related to litigating a party's claim for recovery of remediation costs should be assessed in the normal way under the rules of the court. However, remediation legal costs under the *EMA* should be assessed by the

trial judge based on the extent they were "reasonably incurred".

So, what is considered reasonable? The Court of Appeal provided specific examples of legal services that could qualify as remediation related, such as:

- advising the remediating client;
- negotiating with governmental authorities;
- navigating the client through the creation of an acceptable remediation plan;
- advising on the proper execution of a remediation plan;
- obtaining final regulatory approval;
- investigating other responsible persons;
- negotiating with other responsible persons; and
- drafting and preparing agreements for joint remediation and cost sharing.

Given this distinction between types of legal costs, plaintiffs will need to provide evidence establishing whether their legal costs are remediation or litigation-related. Remediation-related costs may well be recoverable from responsible persons. The Court of Appeal recommended parties create separate files and time-keeping protocols, so claiming legal costs does not unintentionally result in the waiver of solicitor/client privilege over the plaintiff's litigation-related file.

Since litigation and remediation often occur simultaneously, counsel will need to distinguish legal costs categorized as "remediation-related" versus "litigation-related" as tasks are completed so they are properly characterized. This means, that with separate files and clear time entries, there is potential for a greater recovery of legal costs.

We hope you found this update useful.

If you would like more details about the issues covered, to provide general comments, or to suggest topics or cases of interest please email Richard Bereti at rbereti@harpergrey.com.

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