



The Environmental Management Act and The Gehring Decision: Clear As Mud?

The 2006 B.C. Supreme Court (BCSC) decision in *Gehring v. Chevron Canada Ltd.*¹ (“*Gehring*”), provides the most recent and comprehensive illustration of the approach the Courts take in a typical fact pattern giving rise to a claim for cost recovery under the Environmental Management Act (EMA). An appeal of the 2006 BCSC decision was abandoned in 2008.

The *Gehring* decision resulted from gasoline contamination at a site which had been operated as a gas station and dealership for a period of about 38 years: 1940 to 1978. The plaintiffs (current owners) undertook remediation of the property. They subsequently brought an action against seven defendants claiming the defendants were ‘responsible persons’ under the EMA and seeking that the remediation costs be allocated amongst them.

The named defendants were categorized by the Court into four groups²:

- the Shiskin Group, consisting of Shiskin Motors, a company that sold gasoline from the contaminated site to retail customers for a period of 14.5 years (1949-1963), but that, at the time of trial, had been dissolved for a number of years, as well as Mr. Shiskin, the company’s past director;
- the Filiatrault Group, consisting of L & L Motors, an unincorporated business that sold gasoline to retail customers from the site for a period of 14.5 years (1963-1978), as well as its past director, Mr. Filiatrault and current director, Ms. Filiatrault;
- Chevron Canada Ltd. (“Chevron”), supplier of gasoline to the property for two years (1976-1978), but acquired the assets of Standard Oil Company of British Columbia (“SOBC”), which supplied gasoline to the site for a period of 36 years (1940-1976); and,
- the Fireside Group, consisting of Fireside Electric Ltd. (“Fireside”), a past owner of the site for a period of 13.5 years (1978-1992), and its director, Mr. Thomson.

In *Gehring*, the Court added significant - and sometimes controversial - clarity to the following areas of the EMA:

‘Responsible Person’ Status

- **Current and previous owners:** In *Gehring*, Mr. Filiatrault, Fireside and the plaintiffs were considered responsible persons based on the fact that they had, at one time, owned the property in question as legal title holders.
- **Current and Previous Operators:** L & L Motors operated a business, which included the retail sale of gasoline, from the property for a period of 13.5 years. On this basis, the Court in *Gehring* held that L & L Motors was a former ‘operator’ of the site and therefore a responsible person.

Fireside was an operator of the site solely on the basis that it leased the site to commercial tenants throughout the period from 1978 to 1992, when it owned the property. This is in addition to its status as owner. The act of leasing the property was held to constitute ‘any operation’ on a contaminated site.

¹ 2006 BCSC 2880

² *Gehring*, paras. 4-5.

Chevron and its predecessor, SOBC, long-term suppliers of gasoline to the site, were not considered 'operators' of the site. The basis for the Court's conclusion respecting Chevron was its view that an 'operation' as referred to in the EMA did not contemplate dividing a single operating business, or operation in the normal sense of the word, into various components, such as marketing, sales, and repair functions.³ This left Chevron free to establish its position as operator of only a few discreet aspects of the operation as a whole. The EMA's reference to 'any' operation at a contaminated site contained in the definition of operator, appears at odds with this finding; Chevron held control over the operation to some degree. Given the common nature of such relationships in the retail sale of gasoline, this issue is sure to be re-litigated soon.

- **Directors and officers:** The Court in *Gehring* considered all of the defendant directors 'responsible persons', with the exception of Mr. Shiskin. Mr. Shiskin was able to avoid responsibility solely by virtue of the fact that the company, of which he was historically a director, no longer existed.⁴ Otherwise, he apparently would have been caught by the definition of person as his company would have been responsible as a former owner.

Allocation of Remediation Costs Between Parties

The Court determined the key factors to be: 1. Involvement in contaminating the site and; 2. Relative due diligence of each party, bearing in mind the increasing public awareness of environmental concerns over time.⁵

- **The Polluters:** Both L & L Motors and Mr. Filiatrault (past director) were responsible for the introduction of about 66% of the contamination into the site as a result of an inadequate leak detection system.⁶
 - L & L Motors and Mr. Filiatrault were held jointly liable for 50% of the total remediation costs;
 - Ms. Filiatrault was held separately responsible as a 'minor contributor' for 5 % of the total remediation costs, but her contribution was ordered to reduce the responsibility of L & L Motors and Mr. Filiatrault;
- **The Passive Owners:** Although none of the contamination occurred during the plaintiffs' or Fireside's ownership of the property, the Court held that the flow of contamination during the period of their ownership had made it more costly to remediate than had the contamination been contained by them, to a smaller area, during their tenure.⁷ Mr. Thompson, Fireside's director, was found to have known that the property had been used for the retail sale of gasoline and that there had been gasoline odours emanating from the property upon removal of the underground storage tanks and piping. Despite this knowledge, he did not take steps to investigate or remediate contamination during his tenure.⁸ The court found that allowing expansion of contamination caused one to be treated as a polluter, to a proportional degree, when it comes time to allocate liability.
 - Fireside and Mr. Thompson were held jointly responsible for 25% of the total remediation costs; and,
 - the plaintiffs were held jointly responsible for 25% of the total remediation costs.⁹

³ *Gehring*, para. 68.

⁴ *Gehring*, paras. 54-55, 76.

⁵ *Gehring*, para. 121.

⁶ *Gehring*, para. 129.

⁷ *Gehring*, para. 98.

⁸ *Gehring*, para. 131.

⁹ *Gehring*, para. 134.

Minor Contributors

A 'responsible person' may attempt to show that he or she is a 'minor contributor' to the contamination of a site, which may result in the court apportioning a lesser share of the costs of remediation to that person. A minor contributor's contribution must be minimal, immaterial or insignificant.¹⁰ Minor contributors are not jointly and severally liable, so the designation will be particularly attractive to some otherwise responsible persons.

For example, in *Gehring Ms. Filiatrault* was held by the Court to be a 'minor contributor' under section 50(1), EMA, because her contribution to contamination was minimal.¹¹ Minimal in her case left her with a 5% allocation, despite having had little or nothing to do with the contamination of the site.

Legal Fees Associated with Remediation

In *Gehring*, the plaintiffs succeeded in their cost recovery action against all but two defendants.

In separate reasons, the Court considered whether the plaintiffs' costs against the unsuccessful defendants should be assessed on the basis of special costs, which were more likely to indemnify the plaintiffs for the actual amount of legal fees incurred in pursuing the cost recovery action. The Court decided against awarding special costs, even though the plaintiffs were responsible persons seeking contribution from other responsible persons as apparently contemplated under section 47(3) of the EMA.¹²

Following *Gehring*, a plaintiff can, arguably, seek recovery of "legal consultant" costs incurred in coordinating and performing the remediation, but not legal costs incurred in bringing the cost recovery action against other responsible persons, where costs will likely be dealt with under the Rules of Court, at least until this issue is again dealt with by the courts on the basis of the specific reference to legal costs as costs of remediation under section 47(3) of the EMA.

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¹⁰ *Gehring*, paras. 102-106.

¹¹ *Gehring*, paras. 102-106.

¹² *Gehring v. Chevron Canada Ltd.*, 2007 BCSC 468, paras. 36-37.