Consultant Liability: Are Environmental Consultants Really "Exempt" from Liability when Working on Contaminated Sites?

By Richard E. Bereti and Jonathan Corbett of Harper Grey Easton

Introduction

Environmental consultants are front-line players in the clean-up of contaminated sites in British Columbia. Consulting firms and their individual consultants are hired to carry out investigations and remediation for the benefit of landowners, on-site operators, and governments, as well as for the community and the environment. As a result of this key role in the fight against environmental degradation, the provincial government has extended protections to consultants in order to reduce their potential liability for clean-up activities on contaminated sites.

Unfortunately, the so-called consultant "exemption" - which is contained in the *Environmental Management Act* (*EMA*) - is not an absolute exemption from liability. The exemption is qualified and, when coupled with a decision of the Environmental Appeal Board, places environmental consulting firms and their individual partners, directors, officers, and employees at risk of facing liability far in excess of that which a negligent professional might normally face. The problem with the exemption is that it does not apply if the consultant is negligent in carrying out a clean-up. Consultants could thus face liability as "operators" under the *EMA*, and find themselves exposed to the same potential liability as the actual polluter of the site.

The Language of the Consultant Exemption

Responsibility for the clean-up of a contaminated site lies with what the *EMA* terms "responsible persons." Current and previous owners and operators of a contaminated site are responsible persons, unless they can avail themselves of an exemption. The consultant exemption, found at section 46 (1)(h) of the *EMA*, is designed to exempt an environmental consultant from responsible person status. The section states that among those *not* responsible are:

> (persons) who provide assistance respecting remediation work at a contaminated site, <u>unless the assistance or advice was carried out in a negligent fashion</u>; [emphasis added]

The consultant exemption is necessary because, absent the exemption, the activities of environmental consultants at a contaminated site could bring them within the broad-sweeping definition of "operator" found in section 39(1) of the *EMA*. That section states that:

> **"operator"** means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a contaminated site…

As an "operator," the consultant would be a "responsible person", and thus be potentially liable for the total cost of cleaning up the site. The consultant exemption would never have been included in the *EMA* if the legislature did not recognize that activities carried out at a contaminated site by environmental consultants could very likely bring those consultants within the definition of operator.

Any person seeking to rely on an exemption is required under the *EMA* to prove every element of that exemption on the balance of probabilities (section 46 (3)). Therefore, if the Director of Waste Management (the "Director") considers an environmental consultant to fall within the definition of operator and proposes to name that consultant in a remediation order, the onus is on the consultant to prove (1) that its only role at the site was to provide assistance respecting remediation work, and that (2) the assistance or advice was *not* carried out in a negligent fashion. Establishing the first element of the exemption is relatively straightforward. However, it may be difficult to establish that one was *not* negligent in carrying out consulting duties on a contaminated site. This is particularly so given that there will already be a contamination problem at the site. Where consultants cannot prove the negative (i.e. that they were not negligent), they lose the exemption altogether.

Once the "Consultant Exemption" is Lost

In the event that a consultant is negligent while working on a contaminated site, the consultant faces three primary challenges. First, the consultant may be sued for damages in negligence. Second, the consultant may be named a "responsible person" by the Director in a remediation order requiring participation in the clean-up of the site. Such an order may be issued days, years, or decades after the consultant has completed work at a site. Third, the negligent consultant may face joint, several, absolute, and retroactive liability for the whole of the site's contamination, regardless of his or her role on site, if found to be a responsible person in a cost recovery action (a lawsuit under the *EMA*). The allegation would be that the consultant, as a result of his or her negligence, is an operator on the site and, therefore, a responsible person. Only responsible persons can be successfully sued under the *EMA*, which makes the loss of the consultant exemption due to negligence so serious. Such lawsuits can be complex, lengthy and very costly to defend, so being named by the Director and/or sued in a cost recovery action can have a serious impact on consultants regardless of their ultimate portion of liability.

The Good News: Added Protection at Trial

At the point where remediation has been completed and a cost recovery action has made its way to trial, the *EMA* and the Contaminated Sites Regulation (CSR) provide added protection to the environmental consultant, even where that consultant was negligent and is therefore alleged to be a responsible person. It can be considered an "added" protection because it does not protect a party from being ordered to participate in the clean-up of a site by the director or the Environmental Appeal Board. The protection only applies to a cost recovery action under the *EMA*. It is found in section 35(2) of the CSR, which reads as follows:

> 35(2) <u>In an action</u> between 2 or more responsible persons under section 47(5) of the Act, the following factors <u>must</u> be considered when determining the reasonably incurred costs of remediation:
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> (a) the price paid for the property by the person seeking cost recovery;
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> (b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) any remediation measure implemented and paid for by each of the persons in the action;

(f) other factors relevant to a fair and just allocation.

[emphasis added]

Section 35(2) provides the court in a cost recovery action with leeway as to how it applies the language of the *EMA* in determining who ought to pay what proportion of the costs of remediation. Together, subsections (b) (due diligence), (d) (degree of involvement) and (f) (other factors relevant to a fair and just allocation of the costs of remediation) are of particular benefit to consultants. Joint and several liability is thereby tempered by the court's freedom to seek a fair and just result, which result may even include the virtual absolution of a relatively innocent, albeit technically negligent, environmental consultant. The consultant who significantly exacerbates the contamination on the site will naturally shoulder greater liability.

Again, given the cost of getting to and completing a trial, this "extra protection" may be of little comfort. Consultants would be far better off to avoid being named as responsible persons in the first place.

Personal Liability of Consulting Firms' Directors, Officers and Employees

In the decision of *Lawson v. Deputy Director of Waste management* ("*Lawson*") the Environmental Appeal Board determined that, where a company is found to be responsible for a contaminated site, its directors, officers, and employees are *automatically* "responsible persons" simply by virtue of their position within the polluting company. The *Lawson* decision means that any director, officer, or employee of a consulting firm that has lost its exemption due to negligence can be named in a remediation order and sued in a cost recovery action, just as the firm they work for and any of the original polluters or owners of the contaminated site may be sued. While a court may overturn the *Lawson* decision at some point in the future, it today represents the view of the Environmental Appeal Board. The legislature has made no effort to contradict or modify this far-reaching interpretation of the *EMA* in recent amendments.

According to the *Lawson* decision, the definition of "person" in the *EMA* includes corporations, directors, officers, and employees. Accordingly, such individuals should automatically be responsible for the wrongs of the company for which they work. Arguably, however, the definition of "person" is simply meant to make clear that a person, and therefore a "responsible person," *may* include directors, officers, and employees, where such individuals are properly found to be responsible persons on a fair application of the definitions of owner, operator, etc.

The *Lawson* decision has potentially far-reaching impact on any individual involved with a corporate entity found to be a responsible person. An employee, for example, with absolutely no knowledge or control of his or her company's operations, could, under *Lawson,* be just as susceptible to being named a "responsible person" as the polluting company, and then ordered to fund the clean-up. Where the company itself is without assets, all directors, officers and employees would have reason to worry.

Again, there is added protection for individuals named in a cost recovery action under the *EMA*. Section 35(4) of the CSR provides directors, officers, and employees with the following protection:

> 35(4) In an action under section 47(5) of the Act against a director, officer, employee or agent of a person or government body, the plaintiff <u>must prove</u> that the director, officer, employee or agent <u>authorized, permitted or acquiesced</u> in the activity which gave rise to the cost of remediation.
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> [Emphasis added]

As a result of this provision, the innocent director, officer, or employee, who the plaintiff cannot <u>prove</u> has authorized, permitted or acquiesced in the contaminating activity, will be relieved from liability under the *EMA*. Claims in negligence, however, would not be affected. Moreover, for many directors and officers (as well as employees and agents), mere "acquiescence" may not prove particularly difficult for a Plaintiff to establish; it certainly doesn't set the bar very high.

Errors and Omissions Insurance Coverage May Only Go So Far

Errors and omissions insurance is designed to cover negligence. It may, in many cases, not be designed to cover the liability of environmental consultants as "responsible persons" even where responsible person status is achieved through negligent conduct on the part of the consultant. Such insurance is often "claims made", which means a policy may or may not respond to a claim arising many years after the consultant's activities on site have concluded. Therefore, each consultant and consulting firm should examine their relevant policies and seek professional advice as to the type of coverage that would be extended to them as "responsible persons."

Directors and officers of consulting firms should consider the same issues in order to ensure that the desired coverage is in place.

Conclusion

Environmental consultants are familiar with the prospect of being sued for negligence in carrying out their professional responsibilities; it goes with the territory. However, in the context of contaminated sites, the application of the *EMA* means that a consultant, when negligent, faces more than simply a potential claim in negligence for damages directly attributable to the conduct of that consultant. Rather, negligent consultants lose their "immunity" under the *EMA*, and are exposed to the potential liability of the full cost of cleaning up a contaminated site. As a result,

in addition to facing a claim for damages in negligence, the consultant faces all the potential liability of an "operator" and, therefore, a "responsible person." under the *EMA*.

Negligent consultants who become responsible persons carry a far greater burden than they would if their liability was limited to that of a traditional negligent professional. As responsible persons, they may be ordered by the Director to clean up all or a portion of a contaminated site or contribute money toward the clean-up carried out by someone else. Consultants as responsible persons also face joint, several, absolute and retroactive liability, which is critical when all or some of the real polluters are without assets. At the very least, consultants could be swept along in complex and costly litigation.

In addition to consulting firms, individual directors, officers, employees and agents may also be named as responsible persons. Such individuals can then be ordered to clean up a contaminated site. This same broad group of individuals may also face cost recovery lawsuits. If the Plaintiff is successful, then joint, several, retroactive and absolute liability lurk in the background until a "just" allocation of the costs of remediation is arrived at by the courts. Such costs increase for each responsible person as other responsible persons either disappear or demonstrate they have no assets with which to pay for the remediation. In this way, remediation costs allocated to the negligent environmental consultant or consulting firm could exceed significantly the damages that would be sought against them solely under a claim of negligence.

Errors and omissions insurance is designed to cover losses due to the insured consultant's negligence, and any suggestion that errors and omissions insurance will, in *all* cases, extend to cover damages resulting from a consultant's status as a "responsible person" under the *EMA* is optimistic. Coverage will depend on the specific language of the insurance policy and the origin of any judgment against the consultant, i.e., damages in negligence versus damages resulting due to a consultant's status as a "responsible person." This question should be resolved by each environmental consultant by examining the relevant insurance policy, reviewing it with the insurer, and seeking professional advice where doubt remains.