Citation: Import City Inc v Clean Environment Commission et al, 2023 MBCA 87
Date: 20231010
Docket: AI23-30-09916

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

	)	***J. D. Kendall*** *and*
	)	***B. E. Roach***
	)	*for the Applicant*
	)	
IMPORT CITY INC.	)	***J. D. Stefaniuk***
	)	*for the Respondents*
	)	*Husky Oil Operations*
	)	*Limited and*
Applicant	)	*Canhusk Real Estate ULC*
	)	
	)	***A. W. Challis*** *and*
	)	***M. F. Payment***
- and -	)	*for the Respondents*
	)	*Parkland Fuel Corporation,*
	)	*Actton Petroleum Sales Ltd.*
	)	*and Fas Gas Realty Ltd.*
CLEAN ENVIRONMENT COMMISSION,	)	
THE PROVINCE OF MANITOBA	)	***L. W. Bowles***
(DIRECTOR, CONTAMINATED SITES	)	*on a watching brief*
REMEDIATION ACT), HUSKY OIL	)	*for the Respondent*
OPERATIONS LIMITED, CANHUSK REAL	)	*Clean Environment*
ESTATE ULC, ACTTON PETROLEUM	)	*Commission*
SALES LTD., PARKLAND FUEL	)	
CORPORATION and FAS GAS REALTY	)	***T. D. Edkins***
LTD.	)	*on a watching brief*
	)	*for the Respondent*
	)	*Province of Manitoba*
	)	
Respondents	)	*Chambers motion heard:*
	)	***July 6, 2023***
	)	
	)	*Decision pronounced:*
	)	***October 10, 2023***

CAMERON JA

[1] This is a motion for leave to appeal an order of the Manitoba Clean Environment Commission (the CEC) made pursuant to *The Contaminated Sites Remediation Act*, CCSM c C205 (the *Act*), apportioning 100% responsibility for the costs of remediation of 302 Archibald Street, Winnipeg, Manitoba (the site) to its current owner, the applicant, Import City Inc.

[2] For the reasons that follow, I would deny the application, with costs.

Facts

[3] The facts are comprehensively reviewed in the CEC's Order No. CEC2023-1. Below is a brief review of the facts.

[4] On March 17, 2020, the site was designated by the Director (the director) of Manitoba Environment, Climate and Parks (the department) as "impacted" pursuant to section 7.1(1) of the *Act*.

[5] The director made a reference pursuant to sections 23(1) and 23(2) of the *Act* to the CEC to apportion responsibility for costs associated with remediating the site. The potentially responsible persons (PRPs) named by the director were Actton Petroleum Services (Actton), Husky Oil Limited and Canhusk Real Estate ULC (together, Husky), and Parkland Fuel Corporation and Fas Gas (together, Parkland) (collectively, the respondents) and the applicant.

[6] Between 1929 and 2004, the site had been used for the storage and sale of hydrocarbons (i.e., petroleum products) through a succession of

companies. The PRPs used the site for such purposes during the following timeframes:

- January 1966 to November 1985—Husky;
- June 1987 to April 1997—Actton;
- April 1997 to February 1998—Parkland; and
- February 1998 to 2004—Husky.

[7] After Husky stopped using the site for the storage and sale of hydrocarbons in 2004, it remediated the site to the satisfaction of the department, subject to any change in its intended use. While there is a letter that was issued by a member of the department regarding the remediation (the July 2009 letter), there is no evidence that Husky obtained a certificate of compliance from the director pursuant to section 19 of the *Act*.

[8] The applicant acquired the site in December 2018 from a previous owner (the third party) who is not a party to these proceedings.

[9] In its reasons, the CEC describes the history of the storage of the hydrocarbons and the vessels they were contained in. It also describes the documented history of the contamination of the site, which I summarize as follows:

- A 1959 map indicated that there were three above-ground petroleum tanks in the southeast portion of the site. That map also indicated that there were four underground storage tanks (USTs) in the centre of the site. When Husky owned the

property, it installed three USTs. These USTs had been removed and three new ones installed by the time Actton purchased the site in 1987. Parkland continued to use these USTs while it owned the site.

- In 1997, Parkland commissioned BOVAR Environmental to conduct a subsurface investigation which indicated hydrocarbon impacts in the southeast portion of the site (the BOVAR report). As a result of the BOVAR report, the site was first registered in the department's database and was listed on its website. For a nominal fee, the public could access whatever information the department had about the site.

- In 2022, Actton and Parkland commissioned a second report (the Samson report). The CEC stated that "[t]he Samson Report relied in part on the Bovar Report commissioned by Parkland, which confirmed the integrity of the three USTs and associated lines and concluded that the Level II hydrocarbon contamination found in borehole samples 'extended beyond the UST and pump island operations,' implying that this contamination was not attributable to Actton's operations."

- Prior to Parkland's sale of the site to Husky, an inspection report by the department indicated that, "inventory was ok and no issues were identified."

- As earlier indicated, when Husky ceased its use of the site, it remediated it in accordance with the provisions of the *Act*. It

commissioned a report (the Geokwan report) which noted that residual contamination remained at the outer boundaries of the remediated area.

[10] In response to the Geokwan report, the department sent the July 2009 letter, indicating that no further remediation was required at that time, that the site was not considered to be a contaminated site pursuant to the *Act*, but "should the subject property change its intended land use in the future, the responsible party will be directed by this department to initiate any remedial measures."

[11] Husky, through Canhusk, sold the site to the third party. Importantly, the purchase and sale agreement included a number of provisions regarding the site including: (a) an acknowledgment that the site had been remediated, was being sold as is and all obligations to remediate had been fulfilled; and (b) that the buyer not use the site contrary to the remediation work and use restrictions as set out in schedule C of the agreement and take commercially reasonable steps to ensure that any subsequent purchaser of the site be bound by the use restrictions.

[12] The third party disclosed the July 2009 letter and schedule C when it sold the still vacant site to the applicant, who wished to use it as a commercial automotive business, which would include public access. The applicant commissioned a report (the Wood report) which found that the petroleum hydrocarbon levels in the soil and water exceeded provincial guidelines.

[13] After reviewing the Wood report, the department required the applicant to develop a remediation plan. Pursuant to this requirement, the

applicant submitted the Wood remediation plan which addressed the southeast portion of the site where the applicant proposed to construct a building and a parking lot. It was approved by the department.

The Decision of the CEC

[14] In its reasons, the CEC reproduced parts of section 21 of the *Act*, which states the factors to be considered in the determination of the apportionment of costs of remediation of contaminated property. Section 21 is lengthy and is affixed as an Appendix to these reasons.

[15] The CEC explained its application of section 21 regarding each of the parties. In apportioning 100% responsibility for remediation to the applicant, the CEC stated that the applicant knew or ought to have known of the contaminated site in the course of acquiring title, including the July 2019 letter that stated that remedial measures would be required should the use of the site change and that schedule C specifically referred to restrictions on "subsurface development" which is what the applicant intended for the site.

[16] Regarding Parkland, the CEC relied on the BOVAR report in finding that the USTs used by it did not contribute to the contamination of the site and the location of its operations were located in the area that was remediated by Husky. The CEC concluded that these parties "did not materially contribute to the contamination at the location of [the applicant's] development".

[17] Finally, the CEC found that, when Husky owned the site from 1998 to 2017, it "was operating a relatively modern regime, and any contamination of the site it contributed during that period was remediated to the satisfaction

of the department." The CEC acknowledged that the historical record was not complete, nonetheless, it found that there was no evidence that Husky's operations from 1966 to 1985 "contributed to the current levels of contamination, and that the location and nature of [its] operations during its earlier period of ownership did not contribute to the contamination now being remediated on the footprint of the [applicant's] development."

The Test for Leave to Appeal

[18] Section 48(1)(a) of the *Act* provides that an apportionment order made by the CEC may be appealed by the director or a party to the hearing who participated in the apportionment hearing. Section 48(2) provides that an appeal may be taken only (a) on a question of jurisdiction or law, and (b) with leave obtained from a judge of this Court.

[19] The traditional criteria for leave to appeal are well known. They are:

> (1) Does the case raise a true question of jurisdiction or law (as opposed to factual issues or the application of facts to the law)?
>
> (2) Is the question of sufficient merit to warrant consideration by the province's highest court?
>
> (3) Does the question have arguable merit, in that it has a reasonable prospect of success?

[20] In addition, even where the above criteria are not met, the court may grant leave where to not do so would result in an injustice. See *Neufeld et al v The Manitoba Securities Commission*, 2017 MBCA 107 at para 9; *Winnipeg*

Airports Authority Inc v EllisDon Corp, 2011 MBCA 51 at para 12; and *Rolling River School Division v Rolling River Teachers' Association of the Manitoba Teachers' Society et al*, 2009 MBCA 38 at paras 11-13.

The Issues Raised and Positions of the Parties

[21] The applicant argues that the CEC failed to apply section 21(a) of the *Act* which provides, in part:

> **Factors re responsibility for remediation**
> **21** In determining whether to approve a proposed apportionment agreement, in mediating the negotiations toward an apportionment agreement or in apportioning the responsibility for the costs of remediation of a contaminated site among the potentially responsible persons in respect of the site, the director, the mediator or the commission, as the case may be, shall
>
> (a) apply the principle that the primary responsibility for the remediation of a contaminated site lies with the person or persons who contaminated it and that they should bear the responsibility for the remediation in proportion to their contributions to the contamination . . .
>
> [emphasis added]

[22] The above is known as the "polluter pays principle". The applicant maintains that this principle is central to the *Act* as is evidenced, in part, by the principal purpose of the *Act* (at section 1(1)(c)(i)):

> **Purpose**
> **1(1)** The principal purpose of this Act is to provide for the remediation of contaminated sites and impacted sites, in accordance with the principles of sustainable development, in order to reduce or mitigate the risks of further damage to human health or the environment and, where practicable, to restore such sites to useful purposes, and to this end to provide

> (c) a fair and efficient process for apportioning responsibility for the remediation of contaminated sites that
>
> (i) applies the "polluter pays principle" as set out in clause 21(a) and takes into account various other factors set out in this Act, including factors that would not be relevant in determining civil liability for damages occasioned by contamination . . .

[23] In support of its argument that the CEC failed to apply this mandatory principle, the applicant notes that the CEC only stated that it "should" consider the applicable considerations in section 21, as opposed to the mandatory language used in section 21(a). Further, the applicant submits that CEC's failure to apply section 21(a) is evidenced by the fact that it apportioned 100% of the responsibility for the remediation of the site to the applicant, even though it did not find that it had polluted the site. The applicant submits that the failure to determine which PRP(s) actually polluted the site constituted a failure by the CEC to exercise its jurisdiction.

[24] In addition, the applicant argues that the CEC misapplied section 21(b) of the *Act*. In this regard, it argues that, in its reasons specifically related to the apportionment of costs to the applicant, the CEC found the applicant 100% responsible for the remediation based only on applying sections 21(b)(i)–21(b)(ii) of the *Act*. Those sections provide that the CEC shall:

> **Factors re responsibility for remediation**
> **21** . . .
>
> (b) take into account all other relevant factors, which shall include when the site became contaminated and might include, in respect of any potentially responsible person,
>
> (i) where the person is a current or previous owner or occupier of the site,

> (A) whether the site was contaminated when the person acquired an interest in it, and
>
> (B) if the site was contaminated when the person acquired an interest in it, whether the person knew or, by making reasonable inquiries, ought to have known of the contamination, and whether the presence of contaminants at the site was reflected in the value of the consideration paid or payable by the person for the interest,
>
> (ii) where the person is a current owner or occupier of the site, the effect of remediation under this Act on the fair market value or the permitted uses of the site;
>
> . . .

[25] Section 21(b) contains a number of other factors to consider which the applicant says the CEC did not consider, including 21(b)(xi) of the *Act* which refers to the degree to which the person contributed to the contamination in relation to the contributions made by others.

[26] The applicant argues that the above constitute questions involving the interpretation and application of legislation and thus, questions of law that meet the requirements for the test for leave to appeal.

[27] Husky argues that the issues raised by the applicant do not constitute questions of law alone. Rather, they involve questions of mixed fact and law. It argues that the CEC made a number of findings of fact based on the evidence and applied section 21 to those facts (see *Housen v Nikolaisen*, 2002 SCC 33 at para 27).

[28] Further, Husky argues that the CEC was not required to explicitly abide by the "polluter pays principle". In this regard, it relies on section 26(2) of the *Act*. That section provides that, when making an apportionment order

for the costs of remediation, the CEC "may assign all or any share of the responsibility to any party to the hearing . . . and may leave all or any share of the responsibility unassigned to any party."

[29] Husky submits that the issues raised by the applicant regarding section 21(b) involve the application of a legal standard to facts and do not constitute questions of law.

[30] If a question of law is raised, Husky argues that the issues do not warrant the attention of this Court as the decisions the CEC renders are highly fact-and-context dependent and not applicable to other cases. Finally, it submits that there is no arguable merit to the issues raised by the applicant.

[31] Parkland's submissions are similar to those of Husky. In addition, it argues that the CEC applied section 21(a) of the *Act* by finding that none of the PRPs materially contributed to the contamination of the site. It submits that, while the "polluter pays principle" may be the paramount factor in assessing apportionment, it is not the only relevant factor.

[32] Regarding the argument that the CEC only took into account sections 21(b)(i) and 21(b)(ii), it points to other factors in section 21(b) that the CEC considered.

Discussion and Decision

[33] A review of the reasons of the CEC lead to the conclusion that it was aware of all of the provisions in sections 21(a) and 21(b) and applied them to the facts. The more pertinent facts that it found were:

- The site has been used for almost a century to store and market petroleum products.

- The BOVAR report prepared in 1997 indicated hydrocarbon impacts in the southeast portion of the site.

- Actton, Husky and Parkland used the west and northwest quadrants of the site.

- The remediation completed by Husky in 2005 included the location where Actton's operations would have affected the site. As well, the BOVAR report confirmed the integrity of the USTs used by Actton and other contamination on the site was not attributable to Actton's operations.

- The department was aware of other contamination on the site beyond that which was remediated by Husky, but was satisfied with Husky's remediation. Further, the department felt that the remaining contamination could be "safely left in place on this vacant site until an exposure concern developed or a change in land use disturbed the site."

- The applicant "knew or ought to have known of the contaminated status of the site in the course of acquiring title" and that further remediation would be required should the use of the site change.

- The subsurface development that the applicant proposed was on the east and southeast portions of the site and not on the west

and northwest locations where Actton, Husky and Parkland had conducted operations.

[34] In reaching its factual determinations, the CEC relied on expert reports, although it acknowledged that there were some historical gaps.

[35] It then applied section 21 to the facts. In applying section 21(a), it found that Actton, Husky and Parkland did not materially contribute to the contamination. While it may be a negative finding, in my view, it is still a finding regarding the "person or persons who contaminated" the site.

[36] Although the CEC may have weighed the factors listed in section 21(b) differently than the applicant would have liked, it did consider factors other than sections 21(b)(i) and 21(b)(ii). Two examples (among others) are that, it considered section 21(b)(vi) when recounting Husky's compliance with applicable environmental laws and section 21(b)(viii) in considering the steps Husky took to limit the contamination of the site.

[37] Furthermore, the scheme of the *Act* evidences that the "polluter pays principle" is not absolute. A related purpose of the scheme is also to encourage current owners to clean up contaminated sites as is evidenced by the factors listed in section 21. This is also achieved through the regulation of the development of contaminated sites (see *JI Properties Inc v PPG Architectural Coatings Canada Ltd*, 2015 BCCA 472).

[38] In my view, the arguments raised by the applicant are questions of the application of the law to the facts and not those of law alone. Even if a point of law has been identified, where it is "'inextricably interwoven with questions of fact' . . . so that the court must involve itself in or is required to

reconsider factual issues, leave to appeal will be refused" (*Assessor for the City of Winnipeg (the) v Norwood Hotel Co ltd*, 1999 CanLll 4118 at para 2 (MBCA)). While that case concerned different legislation, the test for leave to appeal was the same and, in my view, applies here. In this case, the application of sections 21(a)–21(b) would be impossible to rule on without the Court reweighing or reconsidering factual issues (see *3391397 Manitoba Ltd v Winnipeg City Assessor*, 1998 CanLII 5005 at para 5 (MBCA)).

[39] The one possible question of law advanced by the applicant is essentially whether section 21(a) of the *Act* requires the CEC to name a party responsible for the contamination of the site. The applicant says it does, and the respondents say it does not. In doing so, the respondents rely, in part, on section 26 of the *Act*, which provides:

> **Decision regarding apportionment**
> **26(1)** The commission shall, within 60 days after an apportionment hearing in respect of a contaminated site,
>
> (a) by written order, establish which of the parties to the hearing are responsible for the costs of remediation and the share of those costs for which each of them is responsible;
>
> . . .
>
> **Assigning responsibility**
> **26(2)** Subject to section 21, in making an order under clause (1)(a), the commission may assign all or any share of the responsibility to any party to the hearing, including any party who neglects or refuses to participate in the hearing, and may leave all or any share of the responsibility unassigned to any party.
> . . .

[40] I agree with the respondents that the *Act* itself does not require the CEC to determine which PRP(s) contaminated the site. Such an absolute would be almost impossible to practically apply given the vast number of

situations to which the *Act* applies as well as the often historic nature of the contamination in cases such as these.

[41] The reasons of the CEC must be read as a whole. The fact that it made specific findings with respect to each party must be considered in light of the entirety of its reasons. The facts found by the CEC were based on the reports that were considered, the history of the site and the legal transactions surrounding it. The decisions made by the department supported the conclusion that the respondents did not materially contribute to the contamination of the site that required remediation in order for the applicants to develop it in the manner they wished.

[42] In my view, the submission that the CEC erred by not considering the "polluter pays principle" by failing to identify the polluter(s) on the facts in this case does not have a reasonable prospect of success (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74) and does not merit the attention of this Court.

[43] In the result, I would dismiss the application for leave to appeal with costs.

JA

APPENDIX

I. Section 21 of the *The Contaminated Sites Remediation Act*, CCSM c C205 provides:

> **Factors re responsibility for remediation**
> **21** In determining whether to approve a proposed apportionment agreement, in mediating the negotiations toward an apportionment agreement or in apportioning the responsibility for the costs of remediation of a contaminated site among the potentially responsible persons in respect of the site, the director, the mediator or the commission, as the case may be, shall
>
> (a) apply the principle that the primary responsibility for the remediation of a contaminated site lies with the person or persons who contaminated it and that they should bear the responsibility for the remediation in proportion to their contributions to the contamination; and
>
> (b) take into account all other relevant factors, which shall include when the site became contaminated and might include, in respect of any potentially responsible person,
>
> (i) where the person is a current or previous owner or occupier of the site,
>
> (A) whether the site was contaminated when the person acquired an interest in it, and
>
> (B) if the site was contaminated when the person acquired an interest in it, whether the person knew or, by making reasonable inquiries, ought to have known of the contamination, and whether the presence of contaminants at the site was reflected in the value of the consideration paid or payable by the person for the interest,

(ii) where the person is a current owner or occupier of the site, the effect of remediation under this Act on the fair market value or the permitted uses of the site;

(iii) whether the person disposed of an interest in the site knowing or suspecting it to be contaminated without disclosing to the acquirer of the interest the existence or suspected existence of the contaminants at the site,

(iv) whether the person took reasonable steps to prevent the contamination of the site,

(v) where the person handled the contaminant, whether he or she followed the commonly accepted industry standards and practices at the time of the release of the contaminant,

(vi) whether the person complied with all applicable environmental laws, orders, licences or permits in respect of the site,

(vii) whether the person, after becoming aware of the presence of a contaminant at the site, contaminated the site,

(viii) actions taken by the person upon becoming aware of the presence of a contaminant at the site, including

(A) steps taken to prevent or limit the contamination of the site and surrounding areas, and

(B) notification of the applicable regulatory authorities,

(ix) the value of any economic benefit derived by the person from activities that resulted in the contamination of the site or in the course of which the contamination occurred;

(x) where the person is an employee, the degree of influence or control exercised over him or her by any other person,

(xi) the degree to which the person contributed to the contamination of the site in relation to the contributions made by others,

(xii) the quantity and toxicity of any contaminant released into the environment, and

(xiii) if the contamination of the site resulted from an act of God, war, terrorism or sabotage, whether the person took all reasonable steps after the act to prevent, contain or minimize the contamination.