

# Contaminated Sites Case Law Update

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## *Terrim Properties Ltd. v. Sorprop Holdings Ltd. (BCSC – July 6, 2012)*

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- ▶ Cost recovery action pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 (“EMA”)



***Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)***

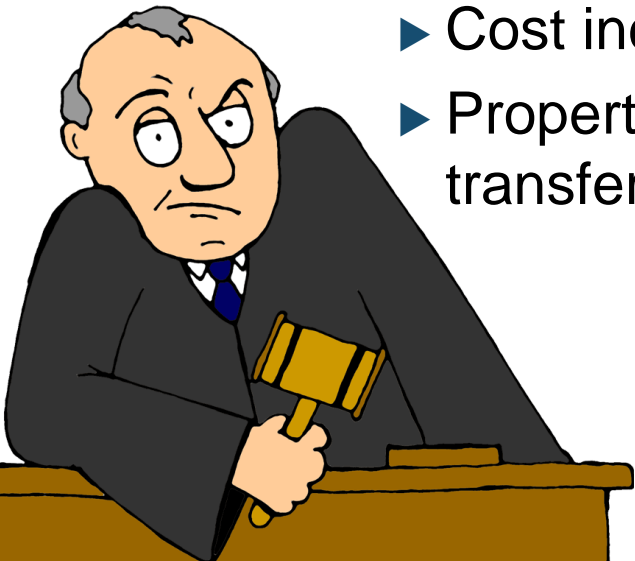
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- ▶ Commercial property in Castelgar owned by Terrim
- ▶ Groundwater contamination discovered December 2008
- ▶ Two environmental assessments performed (Terrim incurred costs)
- ▶ Terrim claimed contamination caused by migration from adjoining properties owned by defendants - commenced action November 2010
- ▶ Terrim transferred ownership of property without remediating

## *Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)*

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- ▶ Issue for the Court:
  - ▶ Does the court have jurisdiction to hear the cost recovery action?
    - ▶ No determination by director
    - ▶ Cost incurred in environmental assessments
    - ▶ Property not remediated by Terrim before transfer



## *Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)*

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▶ *EMA* – prerequisites for cost recovery action

1. Costs of remediation incurred

AND

2. Property “determined or considered” to be a “contaminated site” by the director (s. 47(7))

OR

“Independent remediation” - court must determine whether property is a contaminated site (s. 47(8))

## *Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)*

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- ▶ *EMA* – costs of remediation include:
  - ▶ (b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 as to whether or not the site is a contaminated site



## *Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)*

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- ▶ *EMA* – prerequisites for cost recovery action
  - ▶ Terrim’s costs for environmental assessments and Phase 1/Phase 2 reports are “costs of remediation”
  - ▶ But no determination by director
- ▶ So...
  - ▶ Does the Court have jurisdiction based on “independent remediation” exception?

***Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)***

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- ▶ Court finds:
  - ▶ No independent remediation on the property
  - ▶ So... independent remediation exception doesn't apply and Court has no jurisdiction to hear Terrim's claim



***Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)***

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- ▶ What does this mean???
- ▶ “independent remediation” means something different than “costs of remediation”?
  - ▶ Then: need to get a determination by the director OR remediate the property before cost recovery action
  - ▶ So can't recover investigation/assessment costs without a determination?

OR...

## *Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)*

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- ▶ What does this mean???
- ▶ “costs of remediation” only engage court’s jurisdiction to consider “independent remediation” if notice of independent remediation is given to the director (under s. 54 of the *EMA*)
  - ▶ Then: need to file notice of independent remediation
  - ▶ But: have to file “on initiating remediation”
  - ▶ Not clear if you could file notice after investigation if no intention to remediate further

***Terrim Properties Ltd. v. Sorprop Holdings Ltd. (cont'd)***

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- ▶ To take away:
  - ▶ Ability to bring cost recovery action without a determination by the director may require completion of actual remediation of the site and/or notice of independent remediation
  - ▶ Only way to bring cost recovery action for investigation costs (where no remediation) may be to get a determination by the director that the site is contaminated

## *First Capital Realty Inc. v. Imperial Oil Limited (BCSC - June 15, 2012)*

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- ▶ Cost recovery action pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 (“EMA”)



## ***First Capital v. IOL (cont'd)***

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- ▶ Commercial property in Nanaimo, BC
- ▶ 1958 – 1993 – IOL owns the property / gas station operation
- ▶ 1993 – property sold to a third party, numbered company / no active operation
- ▶ August 2007 – First Capital (FC) buys the property – development purpose

## *First Capital v. IOL (cont'd)*

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- ▶ Purchase by FC (plaintiff)
  - ▶ With knowledge of hydrocarbon contamination – investigation undertaken prior to closing
  - ▶ With specific intent to redevelop
  - ▶ Paid more than fair market value (part of greater development plans)
  - ▶ No discount for contamination

## *First Capital v. IOL (cont'd)*

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- ▶ FC remediates to numeric standards
- ▶ Obtains certificate of compliance
- ▶ Total bill - \$213,000
- ▶ Claim to recover “reasonable costs of remediation” against IOL – section 47, EMA

## *First Capital v. IOL (cont'd)*

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- ▶ Agreement that property “contaminated site” prior to remediation
- ▶ Agreement that FC and IOL both “responsible persons” (“RPs”)





## *First Capital v. IOL (cont'd)*

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- ▶ Issues for the court:
  - ▶ Whether any of the remediation costs incurred by the plaintiff ought to be allocated to the defendant?
  - ▶ If so, in what amount?



## *First Capital v. IOL (cont'd)*

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- ▶ IOL's position
  - ▶ No costs to be allocated to IOL b/c FC knew of contamination before purchase
  - ▶ Assumed the risk
- ▶ Court:
  - ▶ Rejects IOL's argument – polluter pay principle
  - ▶ But, if discount in purchase price had been obtained – more inclined to accept it (allocate little or nothing to IOL)
  - ▶ Prevention of double recovery - key

## *First Capital v. IOL (cont'd)*

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- ▶ Allocation of costs of remediation -  
Expert evidence re:  
Source of contamination was key



## *First Capital v. IOL (cont'd)*

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- ▶ Experts:
  - ▶ Two zones of HC contamination:
    - ▶ Shallow – IOL's (experts agree)
    - ▶ Deep – (IOL v. coal fill)
- ▶ IOL's expert preferred – only shallow attributable to IOL
- ▶ No contamination caused by FC

## ***First Capital v. IOL (cont'd)***

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- ▶ Decision re: Allocation:
  - ▶ Cost to excavate and dispose of shallow contamination - \$30,000
  - ▶ Discounted for development related costs
  - ▶ Total liability of IOL - \$28,200.



## *First Capital v. IOL (cont'd)*

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- ▶ To take away:
  - ▶ Knowledge of contamination – not necessarily a bar to recovery under EMA
  - ▶ But – may not recover all of the costs – source of contamination important
  - ▶ Knowledge of contamination with discount in purchase price – may well be a bar to recovery

## ***Newfoundland and Labrador v. AbitibiBowater Inc. (SCC, December 2012)***

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- ▶ Deals with - How provincial remediation orders may be treated when the corporation enters creditor protection proceedings



***Newfoundland and Labrador v.  
AbitibiBowater Inc. (cont'd)***

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- ▶ The *Companies' Creditors Arrangement Act* ("CCAA" or the "CC, double A")
- ▶ Federal Act - allows financially troubled corporations the opportunity to restructure their affairs / avoid bankruptcy
- ▶ Formal plan of arrangement – creditors receive some form of payment (less than what is owed)
- ▶ Creditors' claims are stayed



## ***Newfoundland and Labrador v. AbitibiBowater Inc. (cont'd)***

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- ▶ 100 years of industrial activity by Abitibi
- ▶ Financial distress → April 2009 stay of proceedings under CCAA granted
- ▶ Contamination on 5 industrial sites – occurred prior to the CCAA proceedings
- ▶ November 2009 – 5 orders issued by Minister of Environment and Conservation under Environmental Protection Act (EPA)
- ▶ EPA orders – required submission of remedial plans for 5 industrial sites and completion of remediation
- ▶ CCAA court – cost to comply: “the mid-to-high eight figures” to “several times higher”

***Newfoundland and Labrador v.  
AbitibiBowater Inc. (cont'd)***

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- ▶ Issue for SCC – Did the stay order issued under CCAA apply to the EPA orders such that the Province could not enforce them?
- ▶ Province's position: CCAA did not apply. The EPA orders were not "claims" under the CCAA and could not be stayed.

***Newfoundland and Labrador v.  
AbitibiBowater Inc. (cont'd)***

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- ▶ Test for “claims”
  - ▶ Is there a debt, liability or an obligation to a creditor?
  - ▶ Did the debt, liability or obligation occur before the debtor becomes bankrupt?
  - ▶ Is it possible to attach a monetary value to the debt, liability or obligation?



***Newfoundland and Labrador v.  
AbitibiBowater Inc. (cont'd)***

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- ▶ Regulatory body exercised enforcement power – an “obligation” to the regulatory body (creditor) owed
- ▶ Obligation arose before insolvency
- ▶ Monetary value can be attached to the obligation – it is sufficiently certain that the orders would eventually result in a monetary claim (para. 51, 56 and 58)

***Newfoundland and Labrador v.  
AbitibiBowater Inc. (cont'd)***

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- ▶ Orders subject to a stay

# Questions?

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