

EMA ANNUAL LEGAL UPDATE

Case Law Update

Presented By

Luke Dineley, Partner
Tim Pritchard, Associate

January 17, 2019

BLG
Borden Ladner Gervais

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2017 BCSC 2397

Cleaning one suit and defending another

- Will a commercial insurer be required to defend an insured in an action for spill-related damages?



West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2017 BCSC 2397

- Contamination from a drycleaner migrated and entered the soils and groundwater of an adjacent lot
- Drycleaner sued by the owner of the adjacent lot
- Drycleaner seeks to rely on its commercial general insurance policy which requires the insurer to compensate the drycleaner for any property damage arising out of an “occurrence”
- The policy also stipulates that the insurers, at their own cost, will defend the drycleaner in any civil action brought against them from said damage
- Drycleaner seeks a judicial declaration that the insurers are obligated to defend the drycleaner in the lawsuit

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2017 BCSC 2397

○ **The Exclusion**

- The policy included an “Environmental Liability” exclusion, which removed the insurers from the scope of coverage for any liability arising out of a release of dry cleaning chemicals from the drycleaner’s property

○ **The Duty to Defend**

- Arises where the facts alleged in the pleadings, if proven, would require the insurer to indemnify the insured
- The “mere possibility” of coverage is sufficient to trigger the duty

○ **So was there a possibility the insurers would be required to provide coverage notwithstanding the exclusion?**

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2017 BCSC 2397

○ **Court: yes**

- Onus on insurers to show coverage is “clearly and unambiguously” precluded in the case of all claims against the drycleaner
- Here, the exclusion clause does *not* preclude coverage for remediation costs arising from pollutants created by a predecessor property owner, but for which the drycleaner is liable as current owner under the *Environmental Management Act*
- The policy had a general exclusion for damage arising from pollution, with specific instances listed. The policy was silent as to whether the drycleaner would be covered for damages arising from a previous owner’s pollutants. The Court held this silence resulted in ambiguity and the possibility that the insurers would cover the loss

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2017 BCSC 2397

- **Courts will interpret insurance contracts against the insurer where ambiguous**
- **Insurance policies should include express reference to claims under the *EMA* and other legislation if insurers wish to deny coverage for these claims**
- **Duty to defend arises even if the probability of coverage is weak**

Imperial Metals Corporation v. Knight Piesold Ltd., 2018 BCSC 1191

Suing the Government for Environmental Incidents

Can government be sued for failure to adequately regulate a project?



Imperial Metals Corporation v. Knight Piesold Ltd., 2018 BCSC 1191

- Owner sought over \$100 million in damages from two engineering firms for negligent design
- Defendants claimed against government for alleged negligence in providing advice and conducting inspections
- Application by the Province to strike the third party claim as having no basis to succeed.

Issue: Did the regulator owe the mine owner a duty of care?

1. Design Advice

- Numerous meetings between owners and government representatives
- Thoroughly reviewed plans and recommended many modifications which were incorporated in final application and mine design

2. Periodic Inspections

- Inspector has a mandatory duty to order remedial action if there is a dangerous hazard (s. 15(5))
- The inspector's remaining inspection and enforcement powers are discretionary in nature.

Imperial Metals Corporation v. Knight Piesold Ltd., 2018 BCSC 1191

Court: No duty when administering and enforcing the statutory scheme unless regulator acted outside of its role or fails to exercise a mandatory duty

“If there were a general duty to avoid negligence of regulatory powers, there is a real risk that this could transform the Province into the insurer of all mining projects in British Columbia”

- Most of the allegations against government were struck on this basis...
- **However:**
 - The inspector’s mandatory duty to order immediate remedial action if there is a dangerous hazard
 - Regulators involvement in the design of the mine

Imperial Metals Corporation v. Knight Piesold Ltd., 2018 BCSC 1191

- Potential chilling effect on regulatory advice
 - Potentially avoid with agreement containing clear language avoiding liability
- Whether there in fact is a duty in this case remains to be determined

Raising the Dead (Corporation)

- Can liability be imposed on former directors of a dissolved corporation?



Foster v. Tundra Turbos Inc., 2018 BCSC 563

- **1987-1996**: Property used by Tundra as natural gas storage and sale facility
- **1996**: Tundra begins decommissioning the property
- **1999**: Tundra wound up and dissolved and assets transfer to numbered company; Mr. Clarke only director at the time
- **2008**: Tundra's corporate records are destroyed based on advice from CRA
- **2014**: Mr. Foster (the plaintiff) purchases the property; subsequent investigations reveal petroleum hydrocarbons exceeding standards
- **2015**: Mr. Foster begins remediation at a total cost of \$225,682
- **2016**: Mr. Foster commences cost recovery action against Tundra and Mr. Clarke

Foster v. Tundra Turbos Inc., 2018 BCSC 563

- **The Problem:** *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639
 - Dissolved corporations (and their directors) are not “responsible persons” under the EMA
 - “The definition of ‘owner’ refers to the definition of ‘person’. Neither definition refers to entities that have ceased to exist”
- **The Solution:** Section 360 of the *Business Corporations Act*
 - Allows a person to apply to restore a company and restore previous positions “as if the company had not been dissolved”
 - Test is discretionary: court may order restoration “if [the court] is satisfied that it is appropriate”

Foster v. Tundra Turbos Inc., 2018 BCSC 563

- “[T]he respondents are relying on a tactical advantage arising from Tundra’s dissolution rather than a legitimate claim that is protected by s. 360(7)”
- The destruction of documents was more likely to prejudice Mr. Foster than Mr. Clarke/Tundra
 - *Mr. Foster must prove that the former director “authorized, permitted or acquiesced in the activity that gave rise to the costs of remediation”*
- “It is unnecessary for me to say much about the potential existence of an insurance policy, which may respond to claims made against Tundra in the underlying action. The possibility of the existence of such a policy militates in favour of granting the relief Mr. Foster seeks although, on the evidence before me, it appears that the possibility is a slim one”

Foster v. Tundra Turbos Inc., 2018 BCSC 563

- *Gehring* effectively overruled
- Possibility of insurance coverage for directors of dissolved corporations
- Additional options for Plaintiffs in cost recovery actions



Questions?

Thank You

For more information, contact:

Luke Dineley

Partner

604.640.4219

ldineley@blg.com

Tim Pritchard

Associate

604.640.4215

tpritchard@blg.com

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this presentation. No part of this presentation may be reproduced without prior written permission of Borden Ladner Gervais LLP.

© 2018 Borden Ladner Gervais LLP. Borden Ladner Gervais is an Ontario Limited Liability Partnership.

