IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cordy Environmental Inc. v. Obsidian Energy Ltd.,* 2023 BCSC 1198

Date: 20230713
Docket: S24755
Registry: Fort St. John

Between:

Cordy Environmental Inc.

Plaintiff

And

Obsidian Energy Ltd. (formerly known as Penn West Petroleum Ltd.), Predator Oil BC Ltd, Opsmobil Energy Services Inc., Ranch Energy Corporation, Tidewater Midstream and Infrastructure Ltd., Erickson National Energy Inc. and The BC Oil and Gas Commission

Defendants

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

In Chambers

Counsel for plaintiff:	S.B. Cody
Counsel for defendant Obsidian Energy Ltd. (formerly known as Penn West Petroleum Ltd.:	C.O. Alcock
Place and Date of Hearing:	Fort St. John, B.C. January 26, 2023
Place and Date of Judgment:	Fort St. John, B.C. July 13, 2023

[1] The plaintiff Cordy Environmental Inc. (“Cordy”) pursuant to a notice of application filed August 5, 2022 seeks an order granting summary judgment in favour of Cordy against the defendant Obsidian Energy Ltd. (formerly known as Penn West Petroleum Ltd.) (“Obsidian”).

[2] Obsidian, pursuant to a notice of application filed September 20, 2022, seeks an order for summary judgment to dismiss Cordy’s amended notice of civil claim as against Obsidian.

Background

[3] In June 2015 there was a forest fire near a pipeline in northeastern British Columbia near Fort St. John described as B-025-F/094-P-14, Pipeline Project 13923, segment 1 (the “Pipeline”).

[4] On October 5, 2015 it was discovered that a deadleg of the Pipeline was burning as a result of the June 2015 forest fire and that a spill had occurred. A deadleg is a section of a pipeline that is no longer active.

[5] On or about October 5, 2015, a pipeline spill was reported at the Pipeline (the “Spill”)

[6] Obsidian formerly held the lease rights and right of way to the Pipeline.

[7] The Pipeline was deactivated on May 3, 2016, and abandoned on May 9, 2016.

[8] Obsidian sold the Pipeline to Predator Oil BC Ltd. (“Predator”) pursuant to an agreement for purchase and sale dated December 15, 2016. The Pipeline was transferred and assigned to Predator on June 1, 2017.

[9] On July 14, 2017, the British Columbia Oil and Gas Commission (the “Commission”) issued a general order that the area contaminated by the Spill needed to be remediated by the operator and permit holder of the Pipeline by March 15, 2018.

[10] In September 2017, Predator transferred its leasing rights to the Pipeline to Opsmobil Energy Services Inc./Ranch Energy Corporation (“Opsmobil/Ranch”).

[11] Opsmobil/Ranch hired Cordy to remove contaminated soil from the area around the Spill. Cordy provided its services in March and April 2018. Cordy alleges that it has been unpaid for its services in the amount of $729,152.

[12] On July 19, 2018, Opsmobil/Ranch was placed in receivership by order of the Alberta Court of Queen’s Bench (as it then was).

[13] After the receivership of Opsmobil/Ranch, Erickson National Energy Inc. (“Erickson”) purchased the Pipeline by order of the Alberta Court of Queen’s Bench. Erickson specifically undertook responsibility for any environmental liabilities or reclamation obligations.

Position of the Parties

Cordy

[14] Cordy seeks summary judgment against Obsidian.

[15] Cordy says that the issue in this application is whether or not it can advance a claim under the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*].

[16] Cordy argues that it is the party that incurred the costs for the remediation of the Pipeline even though it was not a past operator or current operator of the Pipeline.

[17] Opsmobil/Ranch has not incurred any costs as it has not paid Cordy for its work.

[18] Section 47 of the *EMA* reads:

> (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

…

[19] Cordy argues that Obsidian has a statutory duty to remediate the Spill pursuant to ss. 43 and 44 of the *EMA*. Cordy says that Obsidian admits that it was the owner of the Pipeline at the time of the Spill and no parties have disputed that Cordy did the work of removing contaminated soil.

[20] Cordy argues that the contractual agreement between Predator and Obsidian to remediate the Spill does not extinguish the remedies that Cordy has pursuant to the *EMA*.

[21] Cordy argues that there is no evidence that any agency of the British Columbia government said that remedies under the *EMA* were suspended or extinguished because of the agreement between Obsidian and Predator.

[22] Cordy argues that Obsidian is the responsible party for the contamination from the Spill, that it was directed to remediate the lands affected by the Spill and Cordy reasonably incurred costs in doing that remediation.

[23] In *Dolinsky v. Wingfield*, 2015 BCSC 238, Mr. Justice Wong in discussing the cost recovery provisions of the *EMA* stated the following:

> (42) Pursuant to these provisions, a cost recovery action will proceed through the following process. First, the onus is on the plaintiff to establish that:
>
> i. her property is a “contaminated site” within the meaning of the *EMA*;
>
> ii. the defendants are “responsible persons” under s. 45 of the *EMA*; and
>
> iii. she has incurred “costs of remediation” as defined in s. 47(3) of the *EMA*.
>
> (43) If, the plaintiff succeeds in establishing these facts, the onus shifts to the defendants. Liability will be imposed on the defendants unless they can prove that they meet all elements of any s. 46 exemption on which they seek to rely (s. 46(3) of the *EMA*).

[24] Cordy argues that it would invite mischief and defeat the purpose of the *EMA* if liability can be avoided simply by altering the status of a corporate polluter.

[25] Cordy argues that Opsmobil/Ranch is in receivership and not bankruptcy. There are no orders in the action in Alberta that prevent Cordy from advancing a claim against Obsidian.

Obsidian

[26] Obsidian seeks an order for summary judgment to dismiss Cordy's claim as against it.

[27] Obsidian argues that the alleged remediation costs were not incurred by Cordy for the purposes of a cost recovery claim under the *EMA* but rather by Opsmobil/Ranch. Cordy is merely an unsecured creditor of Opsmobil/Ranch with a claim provable in bankruptcy.

[28] Further, Obsidian argues that because Cordy has a claim provable in bankruptcy against Opsmobil/Ranch it is bound by the orders of the Alberta Court of Queen's Bench.

[29] Obsidian argues that Cordy's work was limited to trucking soil from one point to another and it did not excavate the contaminated soil.

[30] Section 39(1) of the *EMA* defines contaminated site:

> …means an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains a prescribed substance in quantities or concentrations exceeding prescribed risk based or numerical
>
> a) criteria,
>
> b) standards, or
>
> c) conditions;

[31] Obsidian argues that there is no first-hand evidence as to whether or not the soil that Cordy trucked contained substances in quantities that exceeded prescribed risk-based or numerical criteria.

[32] Obsidian argues that there is no evidence that the excavated materials consisted of any contamination or if there was contamination, to what degree.

[33] Obsidian argues that it is not a "responsible person" because it is a former owner of the Pipeline that was sold to Predator who was assigned all of its liabilities.

[34] Obsidian argues that if the Spill caused the site around the Pipeline to be contaminated it became that way as an act of God because of the forest fire.

[35] Section 22 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 [*Regulation*] reads:

> 1) Subject to subsection (2), for the purposes of section 46 (1) (n) of the Act, a person is designated not responsible for remediation of a contaminated site if, with respect to the contaminated site, the person is a current or previous owner of
>
> a) an easement,
>
> b) a right of way,
>
> c) a restrictive covenant,
>
> d) a covenant under section 219 of the *Land Title Act*,
>
> e) a lien,
>
> f) a judgment,
>
> g) a reservation in a Crown grant, or
>
> h) an interest in real property which deals exclusively with subsurface rights including such a tenure under the *Geothermal Resources Act*, the *Mineral Tenure Act* or the *Petroleum and Natural Gas Act*.
>
> 2) Subsection (1) does not apply unless the person can establish that there has been no use or exercise of any right of the interest specified in paragraphs (a) to (h) of that subsection in a manner that, in whole or in part, caused the site to become a contaminated site.

[36] Obsidian argues that Cordy has no ownership or other interest in the Pipeline right-of-way and it was not ordered to remediate the site. Obsidian says that Cordy

was there to do a job for its customer and its expectation was that Cordy would be paid for its invoices.

[37] Obsidian says it is trite law that there must be a nexus between the defendant's breach of a duty and the plaintiff's loss to justify ordering the defendant to compensate the plaintiff.

[38] Obsidian argues that Cordy's claim as an unsecured creditor of the owner of the Pipeline qualifies it as "any person" for the purposes of s. 47 of the *EMA* is a novel proposition. All of the decisions with regard to cost recovery actions decided under the *EMA* were commenced by owners of contaminated properties or owners of neighbouring properties that contamination migrated to.

[39] Obsidian further argues that the *EMA* defines categories of persons who are not responsible to remediate a contaminated site. Section 46(1)(h) of the *EMA* reads:

> 1) The following persons are not responsible for remediation of a contaminated site:
>
> …
>
> (h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion;
>
> …

[40] Obsidian argues that Cordy would never be issued a remediation order for the Pipeline. It is not a party to which the *EMA* applies and has no interest in the remediated property.

[41] Obsidian says that the injury caused to Cordy is the non-payment of a debt by Opsmobil/Ranch. Obsidian argues that Cordy did not incur any costs but rather Opsmobil/Ranch did.

[42] Obsidian argues that the *EMA* does not empower an unsecured creditor of an owner/operator to advance a claim against it. Obsidian says that Cordy has no standing to bring this case against it.

Decision

Rule 9-6 Applications and the Law

[43] Rule 9-6 of the *Supreme Court Civil Rules* governs the procedure for summary judgment applications.

[44] Rule 9-6 reads:

> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d)may make any other order it considers will further the object of the Supreme Court Civil Rules.

[45] In *Balfour v. Tarasenko*, 2016 BCCA 438, the British Columbia Court of Appeal in discussing summary judgment applications stated:

> [42] On a summary judgment application brought against a defendant, the essential question is whether the defendant is bound to lose. If so, summary judgment should be granted to avoid unnecessary waste of time and expense. Where the defendant relies upon an asserted defence to resist the application, that defence must be *bona fide* in nature. This means that the proposition of law upon which the defendant relies must have a *bona fide* foundation in fact: *North Vancouver (District) v. Babyeats Ltd*., 2014 BCSC 890 at paras. 44 and 46; *Bank of Montréal v. Yow* (1986), B.C.L.R. (2d) 249 at 253-255 (C.A.).
>
> [43] Each party must "put its best foot forward" when presenting or resisting a summary judgment application: *Lameman* at para. 11. Accordingly, under Rule 9-6, to the extent reasonably possible, each must provide evidence that the other's claim is factually without merit, in whole or in part. Where the evidence presented conflicts, summary judgment is unlikely because the court's role is not to weigh evidence and make factual determinations. It is to determine whether there is a *bona fide* triable issue. However, uncorroborated "bald assertions" of fact will likely not prevent summary judgment, unless the facts in question are not within the asserting party's knowledge or control and there is a real possibility that they will be discoverable as the trial proceeds: *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at

> paras. 9, 12-15; *Southeast Toyota Distributors Inc. v. Branch*, [1997] B.C.J. No. 1426 at para. 62 (S.C), aff'd (1998), 47 B.C.L.R. (3d) 1 (C.A.).

[46] Cordy simply states that it is entitled to judgment against Obsidian because it is a person who has incurred reasonable costs of remediation of the Spill and Obsidian is the responsible person because it was a previous owner or operator of the Pipeline.

[47] Obsidian says that Cordy's amended notice of civil claim as against it should be dismissed.

[48] In *Willow v. Chong*, 2013 BCSC 1083, Madam Justice Fisher (as she then was) in discussing whether or not an action should be dismissed on a summary judgment application stated the following:

> (25) The test to be applied for summary judgment is whether there is a *bona fide* triable issue to be determined: see *Pitt v. Holt*, 2007 BCSC 1555 at para. 10, citing *Serup v. Board of School Trustees* (1989), 54 BCLR (2d) 258 (CA), and *Skybridge Investments Ltd. v. Metro Motors Ltd*., 2006 BCCA 500. The court must be satisfied that it is "plain and obvious" or "beyond a doubt" the action will not succeed: *Saxton v. Credit Union Deposit Guarantee Corporation*, 2006 ABCA 175. The application should be dismissed if the court is left in doubt as to whether there is a triable issue: *Progressive Construction Ltd. v. Newton* (1980), 25 BCLR 330 (SC).

Law on Statutory Interpretation

[49] Cordy's action is brought pursuant to the *EMA*. The Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, 1998 CanLII 837, in discussing statutory interpretation stated the following:

> (21) Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Drieger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously in the scheme of the Act, the object of the Act, and the intention of Parliament.

Is Obsidian a Person Responsible?

[50] Section 45 of the *EMA* defines persons responsible for remediation of contaminated sites which includes “a previous owner or operator of the site”. In my view on a reading of s. 45 of the *EMA* in its grammatical and ordinary sense and considering the entirety of the *EMA* this section would clearly include Obsidian as a previous owner or operator of the Pipeline.

[51] Obsidian may very well have a claim for indemnity as against Predator however that does not absolve it of its responsibilities pursuant to the *EMA*.

[52] Obsidian also seeks to rely on s. 46(1) of the *EMA* which reads:

> 1) The following persons are not responsible for remediation of a contaminated site:
>
> …
>
> (d) an owner or operator who establishes that
>
> …
>
> (ii) if the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
>
> (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

[53] Obsidian may have a defence pursuant to s. 46(1) of the *EMA*, however Jason Mevel’s evidence did not directly address these issues and I am not satisfied that I have the facts necessary based on the materials filed on these applications to determine if such a defence(s) exists.

Is Cordy a “Person” and did it “Incur” Costs?

[54] For Cordy to succeed on this application for summary judgment it must establish that it is a “person” or a “responsible person” and that it incurred costs as defined in s. 47(3) of the *EMA*.

[55] I accept the argument made by Obsidian that Cordy is not a responsible person for the purposes of the *EMA* as Cordy clearly falls into the definition of persons not responsible for remediation pursuant to s. 46(1)(h) of the *EMA*.

[56] I also accept Obsidian’s argument that in all of the case authorities provided on this application where costs are being sought in regard to remediation of contaminated sites, the applicants were owners of either the site or neighbouring properties.

[57] However, the definition of “person” in s. 39 of the *EMA* “includes a government body and any director, officer, employee or agent of a person or government body”.

[58] The term “Owner” is also defined in s. 39 of the *EMA* and reads:

> …means a person who
>
> (a) is in possession,
>
> (b) has the right of control, or
>
> (c) occupies or controls the use
>
> of real property, and includes, without limitation, a person who has an estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 45 (3) [*persons responsible for remediation of contaminated sites*];

[59] Both ss. 45 and 46 of the *EMA* in determining who are persons responsible for remediation of contaminated sites and who are not refer to the terms “person” and “owner” as separate though not necessarily exclusive categories.

[60] The definition of “person” in the *EMA* does not exclude Cordy. Cordy does not have to be an owner or operator of a contaminated site to bring an action pursuant

to s. 47 of the *EMA*; it only has to fall into the definition of a person who has incurred reasonable costs.

[61] Further, Opsmobil/Ranch would fall into the definition of a responsible person, and Cordy was either an employee or agent of Opsmobil/Ranch.

[62] Obsidian says that Cordy has not brought itself within the ambit of the *EMA* because it did not incur costs of the remediation. I do not accept this argument because clearly on the evidence of Mr. Evong Cordy was involved in the remediation of the Spill and in doing so provided equipment as well as its employees for which it has incurred costs. The fact that Opsmobil/Ranch also incurred costs does not mean that Cordy did not incur its own costs in this remediation effort.

[63] Section 47 of the *EMA* establishes that a person who is responsible for remediation of a contaminated site is jointly and separately liable. This would include Obsidian.

[64] Taking into account the entirety of the *EMA* and its purpose, in my view the *EMA* allows for a company such as Cordy to make a claim for the costs incurred in the remediation of a contaminated site against all responsible persons.

Receivership of Opsmobil/Ranch

[65] Jason Mevel, who is the manager at Obsidian, in his first affidavit made on September 22, 2022 attaches as exhibits the following:

i. Exhibit O - the July 19, 2018 receivership order made against Opsmobil/Ranch by the Alberta Court of Queen’s Bench;

ii. Exhibit P - which includes a July 20, 2018 request by Cordy that the receiver add it to the list of creditors with a claim of $765,610.60;

iii. Exhibit Q - which is a copy of the creditors list of Opsmobil/Ranch, which includes Cordy;

iv. Exhibit R - a July 29, 2019 approval and vesting order made by the Alberta Court of Queen's Bench transferring the Pipeline and other assets to Erickson; and

v. Exhibit S - an order of the Alberta Court of Queen's Bench dated April 7, 2021, which includes an order that Cordy's claim was a prefiling monetary claim and thus a claim provable in bankruptcy as defined by s. 121 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[66] Obsidian argues that there is no authority offered by Cordy to suggest an unsecured creditor's claim provable in bankruptcy against Opsmobil/Ranch can be enforced against it. I do not accept this argument because Cordy is not seeking to shift liability for its claim in bankruptcy against Opsmobil/Ranch to Obsidian but rather seeks to enforce a separate claim pursuant to s. 47 of the *EMA* against Obsidian.

[67] Obsidian also argues in the alternative that it would be unduly harsh to find it jointly and separately liable to Cordy because the environmental liabilities were accounted for in the purchase price paid by Predator when it agreed to indemnify Obsidian from claims such as this one.

[68] In my view this alternative argument is one reason why these matters must be resolved at trial when all parties are present.

Are Cordy's Costs Reasonable?

[69] In support of their application Cordy has filed the second affidavit of Darrick Evong made on June 30, 2022, who was the former Chief Executive Officer of Cordy.

[70] Mr. Evong deposed to the following at para. 13 of his second affidavit:

> In March 2018, Cordy was hired by Ranch to perform remediation work at the Pipeline in connection with the spill. Specifically, Cordy was hired to excavate and transport the contaminated soil to the nearby treatment facility. Cordy provided their services between March 24, 2018 and April 13, 2018. Cordy's

> invoices for the remediation work totalled $755,609.60 inclusive of GST. Cordy remains unpaid in full for their services remediating the Pipeline spill. Attached as Exhibit "I" are copies of Cordy's invoices for the remediation work at the Pipeline.

[71] Exhibit I of the second affidavit of Mr. Evong consists of two separate summaries of work done for the periods of March 24–31 and April 1–13, 2018. These summaries have different headings such as "truck hours" and "travel" with references to field ticket numbers. None of these field tickets have been produced on this application.

[72] Much of Mr. Evong's second affidavit consists of hearsay based on what he was advised by his legal counsel and his opinion regarding Obsidian's knowledge about the Spill.

[73] Mr. Evong was cross-examined on his second affidavit on September 2022 and agreed to the following:

i. Mr. Evong was not familiar with how Cordy's bookkeeper did their invoicing;

ii. Mr. Evong did not supervise the preparation of the invoices;

iii. Opsmobil/Ranch was the general contractor with regard to the remediation of the Spill;

iv. Mr. Evong did not know who the excavation company was who excavated materials in the area around the Spill;

v. Cordy provided trucking services and took on some supervisory roles with regard to its equipment and subcontractors; and

vi. Cordy was not an owner and did not have any property interest in the Pipeline or the area of the Spill.

[74] Cordy's application can be disposed of with reference to s. 47 of the *EMA* which allows Cordy to hold a responsible person liable "for reasonably incurred costs of remediation of the contaminated site" (emphasis added).

[75] The evidence on Cordy's application for summary judgment falls far short of establishing that its costs of remediation were reasonable.

[76] For the purposes of this application given the order for remediation made by the Commission in July 2017 I accept that the Spill contaminated the area around the Pipeline. I am not satisfied that the evidence of Cordy on this application and in particular the evidence of Mr. Evong establishes that all of the excavated materials consisted of contaminated materials, or those contaminated to the degree required by the *EMA*.

[77] Mr. Evong demonstrated limited knowledge as to the invoicing procedure of Cordy and there is no evidence that he had any direct knowledge of the remediation work being done by Cordy. He was not aware of who was doing excavation at the site of the Spill and he was candid in saying that Cordy was not the general contractor for remediation of the Spill.

[78] The evidence does not establish what type of equipment was used, the distances that Cordy's truck hauled excavated material, whether all of the excavated material hauled was contaminated and whether the rates being charged were industry-standard.

[79] Cordy has not put "its best foot forward" on this application and its evidence falls far short of establishing whether the costs that it incurred were reasonable.

[80] I cannot say however that it is plain and obvious that Cordy's action will fail on this issue.

Conclusion

[81] In my view there is a genuine issue for trial as to whether or not Cordy's costs were reasonably incurred.

[82] In addition, Obsidian is entitled pursuant to s. 35(1) of the *Regulation* to assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law. This would include any defences pursuant to s. 46(1) of the *EMA*. I am not satisfied however that I can determine those defences on the facts before me.

[83] Further, Obsidian is entitled to seek contribution from any other responsible person for any reasonably incurred cost of remediation that it is held liable for: *Regulation*, s. 35(3).

[84] For all the above-noted reasons I order that this matter be referred to the trial list for a trial on the issue of whether or not Cordy's costs were reasonably incurred, which would include whether or not all of the excavated materials were contaminated.

[85] The trial will also be held on the issue of whether or not Obsidian has any legal or equitable defences as referred to in ss. 22 and 35 of the *Regulation* as well as any defences pursuant to s. 46(1) of the *EMA*. In my view there are likely defences discoverable at trial for Obsidian and it would be in the interests of justice for Obsidian to be able to present evidence in that regard.

Summary

[86] In summary, both parties' notices of application are referred to the trial list on the following issues:

1) Were Cordy's costs reasonably incurred, including whether or not all of the excavated material was contaminated?

2) Does Obsidian have any defences to Cordy's claim pursuant to ss. 22 and 35 of the *Regulation* and s. 46(1) of the *EMA*?

[87] The costs of these applications will be determined by the trial judge at the conclusion of the trial.

“The Honourable Mr. Justice Tindale”