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DISSOLVED COMPANIES AND THEIR FORMER DIRECTORS AND OFFICERS EXPOSED TO LIABILITY FOR COSTS TO REMEDIATE CONTAMINATED SITES UNDER THE B.C. ENVIRONMENTAL MANAGEMENT ACT

By: Ryan Shaw

Introduction

A recent decision by the BC Supreme Court in *Foster v. Tundra Turbos Inc.*, 2018 BCSC 563 ("***Foster***") has closed a loophole created by prior jurisprudence which allowed dissolved companies and their former directors to claim they were immune from liability for costs to remediate a contaminated site under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "***EMA***"). In *Foster*, the Court granted an order that retroactively and prospectively restored a dissolved company and its sole director for the purpose of allowing the applicant to seek recovery from those parties as persons responsible for costs of remediation he incurred to remediate a contaminated site under the *EMA*.

Before the *Foster* case, the decision in *Gehring v. Chevron Canada Ltd.,* 2006 BCSC 1639 ("***Gehring***"), had protected dissolved companies, and their former directors and officers, from liability for costs of remediation under the *EMA*. Based on *Gehring*, it was a widely held view in the legal profession that a person who incurred costs to remediate a contaminated site could not pursue an action to recover those costs against a company that caused the pollution, or the company's directing minds, if the company had been dissolved. *Foster* has changed the legal landscape in British Columbia to allow plaintiffs in a cost-recovery action to cast a wider net in seeking recovery from persons responsible for contamination, consistent with the "polluter-pays" philosophy of the legislation.

The decision in *Foster* is a significant development which will be of interest to those in the real estate, corporate, environmental and insurance industries in British Columbia.

Background

In December 2016, Mr. Foster commenced a cost-recovery action under the *EMA* (the "**Action**") against a numbered company, that was a former owner of a contaminated site (the "**Property**"), as well as its two directors. In the Action, Mr. Foster sought a declaration that each of the named defendants were

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"*responsible persons*" under the *EMA* and jointly and separately liable for the remediation costs incurred by him in respect of the contamination of the Property. Under the *EMA,* directors and officers of a company can be "*responsible persons*" to the extend they authorized, permitted or acquiesced in the activity which gave rise to the costs of remediation.

One of the directors of the defendant numbered company, had previously incorporated and been a director of Tundra Turbos Inc. ("**Tundra**"). Tundra owned the Property from 1987 until February 2000, when it was transferred to the defendant numbered company, which in turn sold the Property to Mr. Foster in October 2005.

Tundra was admittedly an historic polluter of the Property. From 1987 to 1993, Tundra sold gasoline and natural gas on the Property from facilities it had installed. In approximately 1996, Tundra began the process of decommissioning the Property. Tundra removed two underground storage tanks ("**USTs**"), that it had used to store gasoline, and arranged for a limited contaminated soil investigation to be conducted by an environmental consultant.

In 1999, Tundra began the process of being wound up and dissolved. In about 2008, the former director of Tundra destroyed Tundra's business records after receiving advice from the Canada Revenue Agency that they no longer had to be kept.

After purchasing the Property in 2005, Mr. Foster entered into a contract to sell the Property in 2014 to a third party. Before selling the Property, Mr. Foster retained his own environmental consultant to conduct an investigation to determine whether there was any contaminated material on the Property. That environmental investigation determined the presence of contamination on the Property which Mr. Foster subsequently remediated. Mr. Foster then commenced his Action against responsible persons to recover the costs of remediation he incurred to deal with the contamination.

The defendants in the Action asserted that all of the contamination occurred during the period when Tundra owned the Property; Tundra would be solely responsible for the costs of remediation had it not been dissolved; and, based on *Gehring,* the former director of a dissolved company could not be found to be a "*responsible person*".

Mr. Foster brought a petition under the BC *Business Corporations Act,* R.S.B.C. 2002, c. 57 (the "***BCA***") seeking orders for the retroactive and prospective restoration of Tundra for a period of two years, the reconstitution of the directorship of its former director, and the retroactive restoration of that person as a director of Tundra.

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The Decision

In her analysis, Madam Justice Warren confirmed that applications to the court for restoration of a dissolved company under s. 360 of the *BCA* are discretionary and a restoration order will only be granted if the court is satisfied that the order is "*appropriate*" in the circumstances. After reviewing the limited case authorities dealing with the circumstances in which it was appropriate to grant a restoration order, Justice Warren granted Mr. Foster the relief he sought in order to facilitate the imposition of liability on Tundra and its former director for remediation costs pursuant to the *EMA*.

The Court considered whether any factors weighed against the restoration of Tundra and the directorship of its former sole director, focussing on Tundra's submissions that it would be "*unfair*" in the circumstances to expose Tundra and/or its former director to potential liability for Tundra's historic conduct. Tundra submitted that s. 360 (7) of the *BCA* amounted to a statutory presumption that existing rights may not be prejudiced by the restoration of a company. That section provided in material part that "*unless the court orders otherwise, an order [restoring a company] is without prejudice to the rights acquired by persons before the restoration*". Tundra argued that if the company was restored and the directorship of its former sole director was reconstituted, they would be unable to rely on the defence recognized in *Gehring*, which would amount to the loss of a substantive right and constitute prejudice to the former director contrary to s. 360 (7). Justice Warren rejected this argument, holding that the purpose of s.360 (7) of the *BCA* was to preserve "*legitimate claims of third parties*" that may have arisen during the period when the company was struck. The Court found that Tundra and its former director were attempting to rely on a tactical advantage from the dissolution, rather than a legitimate claim. At paragraph 66 of her decision, she states:

[66] Similarly, it is my view that the right of a company and it [sic] directors to avoid liabilities for which they would have been exposed but for the dissolution of the company is not the kind of right protected by s. 360 (7). As explained, it is apparent that a legitimate purpose of restoring a company is to facilitate the imposition of such liabilities. Gehring holds that the statutory liability imposed by the E.M.A. does not extend to corporations that have been dissolved; simply put, as in Aujla, Blackwater, and Husky Oil Ltd., a restoration application is required. The fact that a restoration application is required to impose liability is not a reason for dismissing the application. As in Doig, I find that the 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 Court further held that the passage of time, and the destruction of Tundra's business records, did not result in any real prejudice to Tundra and its former director. Rather, the Court found the lack of documentary evidence would likely be more prejudicial to Mr. Foster since he had the burden of establishing in the Action that Tundra's former director had "*authorized, permitted or acquiesced in the activity which*

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gave rise to the cost of remediation", under s. 35 (4) of the *Contaminated Sites Regulation,* B.C. Reg 375/96. Finally, the Court accepted Mr. Foster's submission that the potential use of dissolution as a means of escaping liability for remediation costs ran contrary to the polluter-pays principle behind the environmental legislation and weighed in favour of restoring Tundra and reconstituting the directorship of its former director.

Practical Considerations

Prior to the decision in *Foster*, it was common for legal counsel to advise corporate clients that dissolution of a company could protect the company and its directors and officers from exposure to liability in a cost-recovery action under the *EMA.* Lawyers advised clients that it made sense to use a single purpose company to own, operate a business on, or lease a property that may be or may become contaminated. Upon sale of the property or termination of a lease, simply wind-up the company, and according to *Gehring*, no liability could flow to the company or its directors, officers or senior employees. *Foster* has changed the legal landscape and will serve as an important precedent for those involved in a cost-recovery action or contemplating bringing one. A company and its directors can no longer hide behind the shield of protection previously afforded by dissolution of the company.

The decision is also potentially significant for liability insurers who may become exposed to third party claims involving property damage which occurred many years ago, at a time when Commercial General Liability insurance policies did not contain the comprehensive pollution liability exclusion clauses which we see in liability policies today.

Should you have any questions about this article or the cases presented, please contact me at rshaw@rbs.ca, or on my direct line at 604-909-9312.

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