
CANADA / JUDGMENT

J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.

2014 BCSC 1619

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1619 J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.,

2014 BCSC 1619

Date: 20140825

Docket: S091912

Registry: Vancouver

Between:

J.I. Properties Inc.

Plaintiff

And

PPG Architectural Coatings Canada Inc. / PPG Revetements Architecturaux Canada Inc. (formerly ICI Canada Inc.)

Defendant

And

Pacific Parkland Properties Inc., restored as 0344633 B.C. Ltd.

Third Parties

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

March 24-28 & 31, 2014

April 1-4, 7-11, 2014

June 16-20, 23, 25-27, 2014

Place and Date of Judgment:

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Introduction

- [1] James Island is located between the Saanich Peninsula and Sidney Island, British Columbia.
- [2] The plaintiff, J.I. Properties Inc ("JIP") is the current registered owner of James Island. It was purchased in an arms-length transaction from Pacific Parkland Properties Inc. ("Pacific Parkland") on August 29, 1994.
- [3] JIP says between 2004 and 2006 it spent approximately \$5.3 million to clean up contamination on the island. JIP now seeks to recover that amount from the defendant in this action, ICI Canada Inc. ("ICI").
- [4] Section 47(5) of the Environmental Management Act, S.B.C. 2003, c. 53 ("the EMA") bestows upon JIP a statutory cause of action against "responsible persons", as defined in the EMA, to recover "the reasonably incurred costs of remediation" in accordance with the principles of liability set out in the Act.
- [5] Section 45(1) of the EMA includes as responsible persons:
- (a) a previous owner or operator of the contaminated site;
- and
- (c) a person who
 - (i) produces a substance, and
 - (ii) causes [it] to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site .
- [6] Pursuant to s. 47(1) of the EMA, such responsible persons are:
- 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.

- [7] ICI was incorporated, albeit by another name, on February 10, 1954. The incorporation resulted from certain Compromise and Arrangement proceedings in the US Federal Court, involving an entity then known as Canadian Industries Limited ("CIL") and its shareholders. Those proceedings gave rise to a court-approved transfer of CIL assets to ICI, one of which was James Island and the industrial enterprises on that island.
- [8] ICI recently changed its name to PPG Architectural Coatings Canada Inc. and a consent order was issued during the trial amending the style of cause accordingly. The defendant was referred to as ICI throughout the trial and will be referred to as such in these reasons.
- [9] CIL and, in turn, ICI were by succession the owners and operators of explosive manufacturing and storage operations on James Island which were first commenced in approximately 1913. Following its creation and the transfer to it of James Island in 1954, ICI manufactured and stored explosives on the island until at least 1985. ICI owned the island until 1988, except for a brief period between July 1972 and March 1977 during which time it retained ownership of all buildings and improvements on the island and leased the land.
- [10] The contamination on the island arose from the explosives manufacturing and storage operations conducted from 1913 through to 1985. ICI was the owner, tenant and/or operator of the island and the industrial facilities for over 30 years. As such, it is a "responsible person" within the meaning of the EMA and therefore vulnerable to JIP's claim for "reasonably incurred costs" of remediating the contamination on the island.
- [11] ICI does not dispute the historical facts respecting ownership, use and, indeed, contamination of the island, but takes issue with JIP's entitlement to recovery. ICI raises various arguments and challenges under the EMA, some of which have not yet received judicial consideration. Among other things, ICI asserts:
1. the Action is barred by s. 3(2)(a) of the Limitation Act, R.S.B.C. 1996, c. 266;
 2. before selling the island in 1988 ICI had remediated the property to standards expressly agreed by the ministry of environment at the time, which should immunize ICI from any exposure to the statutory cause of action subsequently created by the EMA;
 3. the plaintiff is itself a "responsible person", one that does not qualify for the "innocent acquisition" exception in the Act, and it should therefore be liable for at least a share of the costs of remediation;
 4. JIP purchased the property with full knowledge of its history and contamination and the increase in value of the property following remediation should be "off-set" against the plaintiff's claim to prevent "unjust enrichment" in the circumstances; and
 5. a substantial portion of the plaintiff's remediation costs were not "reasonably incurred" because the plaintiff voluntarily and unnecessarily remediated to the most stringent numerical standards, did not consider alternate and less costly remediation measures such as "risk assessment", and did not employ more cost-effective methodologies readily

available.

The Parties and the Witnesses

[12] The following witnesses were called on behalf of the plaintiff:

- a. Howard Trott - Vice President of JIP charged with the management of James Island and the ultimate decision-maker respecting the remediation of the property between 2004-2006. He provided evidence respecting the plaintiff's development plans for the island as well as his interaction with, and the cost of, the environmental consultants and the contractors involved in the remediation project;
- b. Dennis Weibling - the plaintiff's representative from, and president of, Eagle River Inc., the company that negotiated the purchase of James Island in 1994. He testified regarding the circumstances of the purchase including the due diligence process undertaken in that regard;
- c. Dr. James Malick - the plaintiff's environmental consultant qualified as an expert witness on contaminated sites under the EMA including identifying and delineating the presence, source and cause of contaminants and conducting site investigations and remediations under the EMA. Dr. Malick led the Seacor team which conducted the investigation and remediation of the southern part of James Island in 2004-2006 and which issued the Seacor Report in support of a December 4, 2006 "Certificate of Compliance";
- d. Tara Siemens-Kennedy - an environmental toxicologist and project manager employed by Seacor primarily charged with Seacor's on-site investigation and remediation activities on James Island in 2004-2006;
- e. Brian Scriven - owner and operator of Leader Mercantile Ltd., the prime contractor responsible for the implementation and coordination of the remediation work on the island including consultation and coordination of the various consultants and subcontractors involved in the project. Mr. Scriven has Parkinson's disease and gave trial evidence by way of video deposition recorded in late February and early March 2014;
- f. Peter McBride - an employee and on-site representative of Western Grater, a Victoria blasting company employed to conduct blasting work on the former industrial site and TNT trench on the island.

[13] The defendant called twelve witnesses to testify on its behalf including:

- a. Dr. Ian Morrison - head of ICI's environmental program during the 1980s who was in charge of the remediation of James Island between 1986 and 1988 including coordination between its environmental consultant (Golder) and the Ministry of Environment ("MOE");
- b. John Doyle - a "legacy consultant" for ICI who gave evidence as to ICI's corporate policy on remediation and described the company's remediation of other explosive manufacturing facilities in Ontario and Québec;

- c. Lyndon Hanson - a former Golder Associates employee involved in the remediation on James Island in the 1980s and the preparation of the Golder reports submitted to the MOE at the time;
- d. Richard Guiton - lead hydrogeologist for Golder Associates during its remedial work on James Island in the 1980s, who provided evidence respecting the work undertaken, the preparation of the Golder reports and the interaction at the time between Golder, ICI and the MOE.
- e. Guy Patrick - a principal and senior contamination hydrogeologist with Golder Associates who was qualified to express expert opinion in the field of environmental and contaminant hydrogeology as well as the assessment and remediation of contaminated sites under the EMA. Mr. Patrick expressed opinions on the remediation techniques employed by the plaintiff during its remediation between 2004-2006 and alternative remediation techniques available.
- f. John Smith - a civil and structural engineering technologist employed by Golder Construction Inc. who was qualified to express expert opinion respecting marine construction, including marine-based remediation of environmental contamination. Based on soil volume estimates and assumptions provided by Mr. Patrick, Mr. Smith provided alternate cost estimates for the remediation work carried out by the plaintiff as well as cost estimates for alternative risk-assessment and marine-based remediation techniques;
- g. Kevin Hachmeister - an engineer and project manager with Golder Associates Ltd. experienced in blast design, vibration monitoring and detonation systems who was qualified to express expert opinion in the field of blasting and explosives. Mr. Hachmeister provided opinion evidence on the nature and explosive properties of different types of explosives as well as techniques and procedures for blasting;
- h. Evan Cox - Vice President and principal remediation scientist with Geosyntec Consultants Inc. who was qualified to provide expert opinion in the field of investigation and remediation of energetic materials, munitions constituents, metals and chlorinated solvents in soil, sediment, ground water, and surface water. Mr. Cox gave opinion evidence respecting the chemical and explosive properties of certain energetic materials as well as remediation techniques for explosives;
- i. Peter Reid - an engineer and contaminated sites Approved Professional who was qualified to provide expert opinion respecting historical review, site assessment, and remediation design and management of contaminated sites under the EMA. He provided opinion evidence respecting the nature and extent of Golder's remediation work on James Island during the 1980s;
- j. Michael McFarlane - Director of Land Remediation at the MOE who gave evidence as to the Ministry's policies with respect to risk assessment and the MOE remediation standards during the years 2004-2006;

- k. Barry Patten - former Environmental Safety Protection Officer with the MOE at the time of the defendants' remediation of James Island in the 1980s. He gave evidence as to the dialogue and interaction between Golder, ICI and the MOE at that time; and
 - l. John Finnie - former head of the Municipal Section of the Environmental Safety Program and a Designated Manager with the MOE during the defendants' remediation of James Island in the 1980s. He provided evidence regarding the dialogue and interaction between ICI, Golder and the Ministry at the time as well as the correspondence forming the basis for ICI's current claim for immunity.
- [14] Very helpfully I have been supplied with transcripts of the evidence of each witness, as well as the other proceedings before the court.
- [15] In addition to the oral testimony a substantial number of documents were admitted into evidence during the course of the trial. This material included six volumes of "Common Documents" admitted pursuant to a "document agreement" made between the parties as to authenticity, creation, dating and transmission. Except with respect to the data compilation provided in any Environmental Report, the truth of the contents of the documents included in the Common Book was not admitted and was subject to the requisite proof being tendered. Many of the documents were not actually referred to in the oral testimony of the witnesses.
- [16] In addition to the six-volume Common Book of Documents comprising 334 tabs of material, 40 other documents were marked as separate exhibits including a wide variety of expert and other reports. In all the materials comprise several thousand pages.
- [17] As indicated, JIP is the current owner of James Island and ICI is the former owner. ICI, now PPG Architectural Coatings Canada Inc., issued third-party proceedings against two other former owners, Oxford Properties Group Inc. and Pacific Parkland Properties Inc. (restored as 0344633 B.C. Ltd.). ICI sought to have the third parties declared "responsible persons" pursuant to the EMA, and held liable for remediation costs incurred as well as contribution towards and indemnity against any liability ICI might have to the plaintiff.
- [18] I am advised that the third-party proceedings against Oxford Properties Group Inc. were dismissed by consent. Pacific Parkland did not respond to the third-party proceedings and they technically remained in issue at the trial. However, at the close of the trial counsel for ICI advised the court that his client was no longer pursuing the third-party claim against Pacific Parkland and so that aspect of the claim is not addressed in these reasons for judgment.

Factual Background

- [19] By way of a "Joint Statement of Facts", the parties have helpfully made admissions of fact which frame the background of the claim. Those admissions, which I find as facts in this case, are as follows:

James Island

2. James Island currently consists of 5 legal parcels of land, being Sections 1 to 5, James Island, Cowichan District.

Plaintiff JI Properties, Inc.

3. The plaintiff JI Properties, Inc. ("JI Properties") is a company duly incorporated on August 12, 1994 pursuant to the laws of the State of Washington, United States of America, and is extra-provincially registered in British Columbia.
4. JI Properties is the current registered owner of James Island. It purchased James Island in an arms-length transaction from Pacific Parkland Properties Inc. ("Pacific Parkland") on August 29, 1994.

Defendant ICI Canada Inc.

5. The defendant ICI Canada Inc. ("ICI") is a company duly incorporated pursuant to the provisions of Part I of the Companies Act of Canada by Letters Patent dated February 10, 1954 under the name Canadian Industries (1954) Limited ("CIL 1954"). .
6. CIL 1954 was created pursuant to a February 12 1954 court-approved Compromise or Arrangement between Canadian Industries Limited ("CIL") and its shareholders. In 1951, the U.S. federal court required CIL's shareholders to submit a plan for ending their joint interest in CIL. In response, the Compromise or Arrangement was submitted to and later approved by the US court.
7. In the court-approved Compromise or Arrangement. CIL's assets and liabilities were divided between two newly formed companies, CIL 1954 and Du Pont of Canada Limited ("Du Pont Canada"). In exchange for this transfer, CIL's shareholders received shares in the newly formed CIL 1954 and Du Pont Canada. As part of the arrangement, CIL 1954 acquired the assets associated with CIL's explosive and ammunition departments, which included James Island.
8. ICI manufactured and stored explosives on James Island from at least 1954 to 1985. ICI also owned James Island from 1954 to 1988, except between July 17, 1972 and March 15, 1977 during which time it retained ownership of all buildings and improvements on the island and leased the land.

9 As a result of corporate transactions, ICI's corporate successor is now PPG Architectural Coatings Canada Inc.

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Explosives Manufacturing on James Island

11. In about 1913, Canadian Explosives Ltd (incorporated November 18, 1910) purchased and commenced explosive manufacturing and storage operations on James Island. This activity was the island's first industrial use. Explosives manufacturing continued on the island until 1985.
12. Canadian Explosives Ltd. and its successors (including CIL), owned and operated the explosives manufacturing on James Island from at least 1913 to 1927 and 1930 to 1954.
13. The majority of the explosives manufacturing on James Island occurred in the southern part of the island. The northern part of the island was used as a residential area for employees and their families from about 1914 to 1962, and also contained a small manufacturing facility for the production of black powder. The northern part of the island was not subject to the remedial works and commensurate costs that are the subject of this action. JI Properties obtained a Preliminary Determination under the EMA that this northern part was not contaminated in 2002.
14. The nature of the explosives manufacturing on the James Island may be summarized as follows:
 - (a) TNT manufactured on James Island from 1914 to 1918 (with approximately 35 million pounds of TNT provided to the Allies during WWI);
 - (b) Nitric acid and sodium sulphate produced on James Island from 1914 to 1918, as a by-product of TNT manufacturing;
 - (c) Black powder manufactured in the northern part of the island from 1918 to 1948;
 - (d) Dynamite and gelatins manufactured on James Island from 1918 to 1962;
 - (e) Nitroglycerine manufactured on James Island from 1918 to 1978;
 - (f) DNT manufactured on James Island from 1963 to 1978; nitroglycerine was brought to James Island in gelatin dough form for use in the manufacturing process in this same period;
 - (g) Nitro-carbo-nitrates manufactured on James Island from early 1960s to 1985 (ie. AMEX and AN/FO, which are combinations of ammonia nitrate fertilizer and fuel oil, typically diesel).
15. The facilities identified as "HISTORICAL FACILITY/FEATURE" on a drawing of James Island titled "Historic Facilities", which is attached hereto as Appendix C [Appendix "A" to these reasons for judgment], accurately depicts the location of explosives manufacturing facilities and features in the southern part of James Island from at least 1954 to decommissioning of these facilities, which began in about 1979.

ICI Remediates Part of James Island

16. In the mid-1980s, ICI retained Golder Associates Ltd. ("Golder") to investigate soil, ground and surface water contamination, and to remediate certain portions of James Island. This remediation project occurred principally between 1986 and 1988.
17. At the time of the remediation project, between 1986-1988, ICI had in place a written environmental policy.
18. As part of this work, ICI proposed certain criteria that would apply to its remediation of lead, mercury, TNT and DNT in soil to the BC Ministry of Environment and Parks (the "Ministry"). No legislated standard existed in BC for contaminants at the time. Ultimately, ICI and the Ministry agreed on the applicable criteria to be used in the remediation of lead, mercury, TNT and DNT in soil.
19. In a letter dated August 25, 1987, the Ministry indicated to ICI that:

"the agreed-to clean-up criteria are applicable to a specified land-use, i.e. airport, golf course or similar activity. Provided the use of the land remains as such, the designated clean-up criteria will not change. I see no reason at this time for us to impose different or more restrictive criteria on [ICI] to accommodate future changes to the special waste legislation or the adoption of provincial clean-up criteria.

If, however, the proposed land-use changes (either under [ICI] or another land owner) then different and/or more restrictive criteria might apply. It would be the responsibility of the land owner at the time to meet the designated clean-up criteria."

20. On behalf of ICI, Golder identified 29 areas of potential concern in the southern section of James Island. Based on its preliminary investigations of these 29 areas, Golder undertook detailed soil sampling in 12 of these areas. ICI subsequently remediated six areas for four contaminants (lead, mercury, TNT and DNT) using restricted-land use criteria that ICI had established with the Ministry.
21. On July 10, 1987, John Finnie, Head, Municipal Section, Waste Management of the Ministry wrote to ICI with regards to ICI's James Island rehabilitation program. Inter alia, he stated:

We advise that the Deed of Title to the island should identify historic use of the land and restrictions on the type of development so as to be compatible with the agreed to clean-up criteria. In this regard, a covenant should be drawn up, which would be attached to the land title, and would clearly outline to the exiting owner and any prospective and future owners or developers, what the previous land use was and what the development restrictions on the land area in question are.

22. As part of the remediation process, ICI and Golder submitted the following reports to the Ministry:
 - (a) "Report to C.I.L. Inc. on Preliminary Water Supply Assessment," June, 1986;

- (b) "Report to C.I.L. Inc. on a Preliminary Investigation of Soil, Ground Water and Surface Water Contamination at the James Island Facility," December, 1986;
- (c) "Factual Report to C.I.L. Inc. on a Detailed Soil Investigation," December, 1986;
- (d) "Report to C.I.L. Inc. on a Detailed Water Supply Investigation," December, 1986; and
- (e) "Report to C-I-L Inc. on a Confirmatory Clean-Up Program at the James Island Facility," June 1988.

(collectively, the "Golder Reports")

23. On or about July 18, 1988, John Finnie of the Ministry provided a letter to Dr. Ian Morrison, Manager of Environmental Affairs at ICI with respect to ICI's rehabilitation program on James Island, which, inter alia, stated:

"clean-up criteria was based on the proposed restricted use of this rehabilitated industrial area. We note that the restricted covenant on the property identifies areas and restricted land use. Accordingly, we do not perceive any further environmental concerns."

24. In June 1988, a restrictive covenant (the "Restrictive Covenant") under s. 215 of the Land Title Act was registered on title to a portion of James Island.
25. In September 1988, ICI sold James Island for CAD\$5 million to a predecessor of Pacific Parkland.
26. The Restrictive Covenant formed Schedule "A" to the Offer to Purchase between ICI and Pacific Parkland.

The Restrictive Covenant

27. The Restrictive Covenant was filed in the Land Title Office under plan number EB090681, on September 19, 1988.
28. The Restrictive Covenant, inter alia, states:

"B. The Lands [Sections 1 to 5 inclusive, James Island, Cowichan District] were previously utilized for manufacturing explosives and batching chemicals and materials and, as a result of such activities, dispite [sic] the rehabilitation measures conducted by C-I-L Inc. in the industrial Areas (as hereinafter defined), some of the soils comprised in the Lands may be contaminated by chemicals including but not limited to, lead, mercury, TNT and DNT;

C. The Grantor desires to give notice to all subsequent successors in title to the lands of the possibility of the soils being contaminated by chemicals;...

3. No residential premises and no buildings which contain residential suites of any kind shall be erected, built, constructed or placed on the portions of the Lands which were previously used for industrial purposes ...

4. Buildings which do not contain residential suites shall not be constructed or placed on the Industrial Areas without the prior written consent of Her Majesty and the Industrial Areas shall only be used for a golf course, parklike land and open space without such prior consent....
6. The Lands shall not be used in any way or for any purpose which permits or enables persons, animals or plant life of any kind to come into contact with or use ground water or surface water situate in or on the Lands, except as follows:
 - (a) the Lands may be used in a way which enables, grass, plants, shrubs and trees to be irrigated by such water provided that no part of the grass, plants, shrubs or trees are normally edible by persons and provided that no part thereof is intended to be edible by persons or domestic animals; and
 - (b) the Lands may be used in a way which enables persons to come into contact with lakes situate on the Lands provided that all persons who come, or may come, near to such lakes and the land surrounding them are informed of the potential hazards of the water therein by signage or such other method as is approved in writing by Her Majesty."

Jl Properties Purchases James Island

29. In 1994, Pacific Parkland sold James Island to Jl Properties for approximately CAD\$26 million. Pacific Parkland originally contracted through an "Offer to Purchase and Purchase and Sale Agreement" ("Purchase Agreement") to sell James Island to Eagle River Inc. ("Eagle River").

30. The Purchase Agreement mentions the presence of the Restrictive Covenant on James Island. The Purchase Agreement also includes, among others, the following condition precedent:

5.1 Purchaser's Condition Precedent. The obligation of the Purchaser to complete the purchase of the Purchased Property on the Completion Date is subject to the following conditions precedent being in effect or satisfied on or before the date which is 35 days after the Acceptance Date:

- (b) The Purchaser will have satisfied itself in its sole discretion as to the feasibility of acquiring, developing and utilizing the Purchased Property for the intended use of the Purchaser, including satisfying itself as to the results of any studies, tests and investigations of the Purchased Property carried out by or on behalf of the Purchaser, including a review of the environmental conditions within and in respect of the Purchased Property and any governmental or other regulatory requirements in respect thereof.

5.2 Waiver by Purchaser. All of the conditions precedent set forth in section 5.1 are for the Purchaser's sole benefit and each may be waived, unilaterally, by the Purchaser, at the Purchaser's election...

31. On August 8, 1994, Eagle River executed a Notice of Subject Removal, which waived the Condition Precedent.
32. On August 23, 1994, Eagle River assigned all of its right, title and interest in and to the Purchase Agreement to JI Properties. JI Properties and Eagle River have the same owner, Islands Investors Trust Limited Partnership, which is beneficially owned by Craig McCaw.
33. Prior to the closing of the agreement of purchase and sale between Pacific Parkland and JI Properties, JI Properties reviewed, inter alia, the following documents:
 - (a) a letter from James Judson of Davis Wright Tremaine Law Offices, dated August 4, 1994;
 - (b) a memorandum from Adrian Michielsen of SRK Robinson Inc., an environmental consultant, dated August 3, 1994, which in turn indicates that SRK Robinson Inc. had reviewed, among other things, at least part of the Restrictive Covenant and 4 of the 5 Golder Reports on behalf of JI Properties;

JI Properties Investigates and Remediates James Island

36. In 2002, JI Properties obtained a Preliminary Determination under the Environmental Management Act that the northern section of James Island was not contaminated. That portion of the island had a legal description as follows: Section 4 and Northern Portion of Section 3, James Island, Cowichan Land District (PID: 009-014-501 and 009-014- 497). This Preliminary Determination was issued by the Ministry after receiving submissions and information from JI Properties about the state of the northern part of the island, which it collected between about 1998 and 2002.
37. Between July 2004 and September 2006, SEACOR Environmental Inc. ("SEACOR"), on behalf of JI Properties, conducted a Stage 1 Preliminary Site Investigation update, a Detailed Site Investigation and remediated contamination in the southern portion of James Island, more particularly known and described as:

Sections 1, 2 and 5, James Island, Cowichan District together with all that part of Section 3, James Island, Cowichan District, lying to the southeast of a straight line and its productions drawn parallel to and perpendicularly distant 505 metres northwesterly from the southeasterly boundary of the said Section 3.

38. As part of SEACOR's work on the southern part of the island, SEACOR prepared a report titled "Stage 1 Preliminary Site Investigation Update, Detailed Site Investigation and Remediation Completion Report" (the "Stage 1 Report").
39. The analysis of strong acid dissociable cyanide ("SAD cyanide") performed by Maxxam Laboratory, as reported in SEACOR's Stage 1 Report, provides composite levels of SAD cyanide plus thiocyanate. A second laboratory, ALS, also performed test results on cyanide, as recorded in the Stage 1 Report.

40. [Following further remediation in the period 2004-2006] JI Properties applied for and the BC Ministry of Environment issued a Certificate of Compliance pursuant to the Environmental Management Act for the southern portion of James Island on December 4, 2006.
41. The Writ of Summons and Notice of Claim in this action were filed March 12, 2009.

Current Status of James Island

42. James Island is currently listed for sale by JI Properties through Sotheby's International Realty Canada for CAD\$75 million. The listing commenced on March 30, 2012.

[20] The remediation which is the subject matter of this claim took place in three fairly discrete areas of the Island, namely:

- the "West Beach Berm" located at sea level at the foot of a steep cliff, where ICI stored fuel used in the explosive manufacturing process;
- the manufacturing and storage areas sitting on top of the cliff formerly occupied by various buildings and facilities such as a smelter, a manufacturing plant, chemical handling and storage buildings, and the like ("the manufacturing area"); and
- the "TNT trench", a buried clay discharge pipe running north from the manufacturing facilities, which was discovered during the investigation and remediation which took place in 2004-2006.

[21] Although Golder Associates in 1986 had identified the West Beach Berm as a potential area of environmental concern, sampling in the area did not identify any petroleum hydrocarbon contamination and remediation was not carried out at that location at that time. The TNT trench had not been identified in any of the Golder investigations and hence was not a potential area of environmental concern at that time. Rather, Golder's investigations and subsequent remediation activity took place primarily in the manufacturing area.

[22] Before the Golder remediation, ICI had already decommissioned and destroyed or removed the buildings and other physical structures which had housed the industrial operations over the years.

[23] The explosives and related chemicals manufactured or used on James Island included trinitrotoluene ("TNT"), dynamite, nitroglycerine, and dinitrotoluene ("DNT").

[24] At the time of the Golder remediation in the mid-1980s, the regulation of environmental contamination and associated remediation was in its infancy. There were no established criteria or standards at that time for the remediation of lead, mercury, DNT or TNT in soil or ground water. Rather, ICI and the Ministry of Environment agreed upon, and remediation was thereafter undertaken to meet, the following standards:

Total Lead:

600-1,000 ppm

Total Mercury:

10 ppm

DNT

200 ppm

TNT

500 ppm

- [25] By July 2004, some 17 years after the initial remediation of James Island, the regulatory regime respecting the remediation of contamination had changed radically. By that time, the Contaminated Sites Regulation prescribed detailed numeric soil and water standards applicable to the identification and remediation of contamination. These standards addressed not only the four substances which had been the subject matter of the 1987 dialogue between ICI and the Ministry, but also other contaminants such as light extractable petroleum hydrocarbons ("LEPH"), heavy extractable petroleum hydrocarbons ("HEPH"), polycyclic aromatic hydrocarbons ("PAH"), nitroglycerin, and cyanide.
- [26] The preliminary and detailed site investigations conducted by Seacor in 2004-2006 identified exceedances of what they considered to be the applicable standards for contaminants not only in certain parts of the industrial area that had been the subject of the Golder remediation in the mid-1980s, but also in the West Beach Berm area and the TNT trench area. The contaminants Seacor identified were not common to all areas but included LEPH, HEPH, lead, arsenic, TNT, nitroglycerin, and cyanide.
- [27] The remediation project undertaken by JIP was a group effort involving Howard Trott, the vice president of JIP charged with the management of James Island, Seacor personnel including Dr. James Malick and Ms. Tara Siemens-Kennedy, and Brian Scriven who was the principal of Leader Mercantile, the contractor primarily responsible for the implementation and coordination of the work.
- [28] The work included blasting and detonation in certain areas of concern and the excavation and removal of contaminated soils at various locations. Approximately 6,700 m³ of explosives contaminated soil, 2,300 m³ of cyanide contaminated soil, 1,200 m³ of metals contaminated soil, and 2,000 m³ of petroleum hydrocarbon and PAH contaminated soil were removed from the island.
- [29] ICI does not really dispute the analytical data contained in the October 4, 2006 "Preliminary Site Investigation Update, Detailed Site Investigation and Remediation Completion Report" prepared by Seacor Environmental Inc. However, ICI challenges the propriety of the contamination standards used as the benchmark for the remediation, and the remediation methodology employed by or on behalf of JIP. ICI says alternative approaches to remediation could have been employed in the circumstances, and would have substantially reduced the costs incurred by JIP and sought to be recovered in this action. I will address the

factual underpinnings for both of these issues in greater detail later in these reasons for judgment.

- [30] The balance of these reasons will first address certain liability issues and thereafter the quantum, reasonableness and allocation of the Plaintiff's remediation costs.

Liability Issues

- [31] The first question to be addressed is the limitation period applicable to EMA cost recovery claims and whether, in particular, JIP's claim is statute-barred by the effluxion of time.

- [32] The second liability issue to be addressed relates to the concept of "responsible persons" as defined in the EMA and in particular:

- whether ICI's remediation of the property in the mid-1980s to standards approved by the Ministry of Environment at the time immunizes ICI from any exposure to the statutory cause of action which now exists under the EMA; and
- whether JIP qualifies for the "innocent acquisition" exemption to the definition of "responsible person" in the EMA and how that impacts the allocation of the costs associated with the 2004-2006 remediation of the property.

Limitation Period

- [33] In *Workers' Compensation Board of British Columbia v. Genstar Corp.* (1986), 24 B.C.L.R. (2d) 157 (C.A.), speaking for a five-member panel of the Court of Appeal, McLachlin J.A. referred to "the unfortunate ambiguities which remain in the Limitation Act, notwithstanding recent attempts to clarify its provisions". Such ambiguity continues to exist respecting the limitation period applicable to the statutory cause of action bestowed by s. 47(5) of the EMA under both the Limitation Act, R.S.B.C. 1996, c. 266 ("1996 Limitation Act") and also the more recent Limitation Act, S.B.C. 2012, c. 13 ("2012 Limitation Act").
- [34] Regrettably, the EMA does not establish any limitation period for cost recovery actions. Section 36 of the 2012 Limitation Act would amend the EMA to provide that such actions "may be brought at any time"; however, s. 36 of the 2012 Limitation Act has yet to be brought into force.
- [35] While the 2012 Limitation Act establishes a basic limitation period of two years following "discovery" of a claim, the provisions respecting when a claim is "discovered" do not readily apply to EMA cost recovery actions. Indeed, if such an action is considered to be a "claim for contribution or indemnity", then s. 16(b) of the 2012 Limitation Act might impose a very short limitation period.

[36] The remediation was carried out in the period 2004-2006 and this action was first issued on March 12, 2009. Hence, the limitation period applicable to the action was and remains governed by the 1996 Limitation Act. The question, then, is whether the action is governed by s. 3(2)(a) or 3(5) of the 1996 Limitation Act which provided as follows:

3(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

- (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

...

- (5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

[Emphasis added.]

[37] There are two separate questions to be answered with respect to the 1996 Limitation Act, namely,

1. When did the plaintiff's right to bring an EMA cost recovery action arise? and,
2. What type of action is it (i.e. is it a s. 3(2)(a) action or another type of action not specifically provided for in the Act as in s. 3(5))?

When Does the Cause of Action Arise?

[38] The cause of action under s. 47(5) of the EMA is bestowed upon any person "who incurs costs" (present tense) in carrying out remediation, and the recovery is in respect of all costs "reasonably incurred" whether on or off the contaminated site.

[39] Potentially recoverable costs include the costs of initial site investigation, consultant costs, the cost of contractors and suppliers involved in the removal and disposal of the contaminants, as well as costs relating to containing, controlling and monitoring any substances which remain on-site. Remediation of a contaminated site can take many years and, particularly when a risk-based assessment approach is employed, may entail ongoing costs of containment and monitoring of contamination for decades.

[40] So when, then, did JIP's cause of action arise in this case? Does the EMA create separate and multiple causes of action every time any particular remediation cost is incurred? Is aggregation permitted such that the cause of action does not arise (in the sense of being perfected) until all aspects of the remediation have been completed and all costs actually paid?

- [41] These fine distinctions are not just semantics. In the present case, if the EMA only permits recovery of costs incurred in the 2-year period before commencement of the action, almost all of the costs incurred by the plaintiff would be excluded from recovery. If, on the other hand, the recovery action is subject to a two-year limitation period but recovery is permitted for not just the costs incurred in the two years before the action was commenced but also for all costs incurred in the years before that date, then complete recovery can be effected.
- [42] The evidence in this case clearly establishes, and I find as a fact, that part of the "costs of remediation" sought to be recovered include amounts paid for services rendered by contractors, consultants and legal counsel after March 12, 2007. This includes concrete crushing work performed by the lead contractor, Leader Mercantile Ltd., and various services provided by the plaintiff's consultant, Seacor Environmental Inc.
- [43] The plaintiff invokes extracts from *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56, and *First National Properties Ltd. v. Northland Road Services Ltd.*, 2008 BCSC 569 in support of the proposition that so long as some of the remediation costs were incurred within the limitation period (whether it be two years or six years before the action was instituted), all of the remediation costs can be aggregated and recovered regardless of when they were actually incurred. Both cases discuss the nature of the statutory cause of action under the legislation, but neither addresses the narrow point under consideration here.
- [44] In *First National*, the court held:
- 54 Huddart J.A. in *Workshop* noted at para. 26, "[] a court's interpretation and application of any statutory scheme should advance not hobble the integrity of the scheme []"
- 55 Section 47 creates a new statutory cause of action that is status based, not fault based. The object of the legislation is to encourage prompt remediation of contaminated sites. It does not impose a statutory obligation to remediate a contaminated site but rather provides a right to recover reasonable remediation costs from a "responsible person"
- 56 The cause of action is absolute, retroactive, and imposes separate liability on all "responsible persons" that are very broadly defined. It does not limit its retroactive (i.e., retrospective) application to actions where a plaintiff's knowledge of the material facts arose within the limitation periods provided by ss. 3(2) or 3(5) of the Limitation Act and that would have been statute-barred on April 1, 1997. *Workshop* confirms the Court cannot make an order for the recovery of remediation costs until those costs are known (see para. 26 and 27).
- 57 Section 47(5) authorizes the recovery of reasonably incurred costs [of] remediation from responsible persons. This quantum of the remediation costs is a material fact to the cause of action and was not known until 2006. In these circumstances it matters not whether s. 3(2) or s. 3(5) of the Limitation Act applies as the time did not begin to run until the latter part of 2006, well after the action was commenced.

- [45] First National does not state when the plaintiff in that case first incurred remediation costs. The action was started in December 2002. The defendant had vacated the property in October 1997. In 1996 and 1997 and again in 2001 the parties exchanged letters alleging, and denying, liability for remediation of salt contamination on, and adjacent to, the property. The plaintiff property owner, First National, completed remediation of the site in 2006, well after the action was commenced. The court did hold, however, that any limitation period under the Limitation Act "did not begin to run until the latter part of 2006", presumably referencing the date of completion.
- [46] Section 8 of the Interpretation Act, R.S.B.C. 1996, c. 238 provides:
- Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
- [47] Any interpretation and application of the statutory liability imposed by the EMA "should advance not hobble the integrity" of that regime. The EMA expressly adopts as "general principles of liability for remediation" an exposure to liability that is both "absolute" and "retroactive" (s. 47(1)). Further, ss. 47(1), (3), and (5) combine to ensure liability is for all costs of remediation reasonably incurred, which by the very nature of the exercise can include costs incurred over many years.
- [48] In light of the above considerations, I do not think JIP's right to bring this cost recovery action arose until after March 12, 2007. JIP continued to incur remediation costs after that date, which is two years before it initiated its claim. I also hold that remediation all costs reasonably incurred before that date can be recoverable, regardless of the date they were actually incurred.
- [49] This holding will not, if applied in other EMA cost recovery cases, result in "indeterminate liability" on the part of "responsible persons" as suggested by ICI. Such persons can immunize themselves against liability for future remediation costs through the certificate of compliance regime contemplated by the Act. Exposure in the meantime for all reasonable remediation costs regardless of when they were incurred, is consonant with the "polluter pays" and retroactivity principles that are the primary drivers behind the cost recovery regime set out in the Act.
- [50] JIP commenced its action on March 12, 2009, and it had incurred remediation costs less than two years before that date. Therefore, as in the First National case, having made this finding, it is no longer necessary for me to decide whether the limitation period applicable to the cost recovery action is the two year period contemplated by s. 3(2) of the 1996 Limitation Act, or the six year period contemplated by s. 3(5) of that Act. However, should I be incorrect in my determination as to when JIP's right to bring this action arose, I will also express my opinion on which limitation period applies.

Section 3(2)(a) or Section 3(5) of the 1996 Limitation Act?

- [51] For the reasons that follow I conclude that the limitation period applicable to the present case is the six-year limitation period set out in s. 3(5) of the 1996 Limitation Act.
- [52] The primary ground on which I find s. 3(2)(a) inapplicable is that the cost recovery action is not based on contract, tort, or statutory duty. The plaintiff's cause of action is framed in its amended statement of claim as a remediation costs recovery action under s. 47 of the EMA. There is no claim, nor could there be, for third party property damage liability in tort, whether in nuisance, trespass or the like, nor for liability in contract.
- [53] There is no contract between the parties. ICI has not committed any actionable tort against JIP. One is not liable in tort to a successor in property title, whether in nuisance, trespass or even negligence, for depositing substances on the property that are later found to exceed minimum standards prescribed by a regulation.
- [54] Similarly, there was no statutory duty imposed upon ICI to not deposit the substances in question or indeed even to remediate the property once it qualified as a "contaminated site" under subsequent legislation. As noted in *First National*:

55 Section 47 creates a new statutory cause of action that is status based, not fault based. The object of the legislation is to encourage prompt remediation of contaminated sites. It does not impose a statutory obligation to remediate a contaminated site but rather provides a right to recover reasonable remediation costs from a "responsible person", if ordered to do so by a government official or by the Court pursuant to s. 47(5). Under the Act it is not an offence to contaminate a site, only to fail to remediate if ordered to do so.

- [55] I recognize that events resulting in contamination of land or water might amount to "injury to property" in some circumstances. Given the ambiguities in s. 3 of the 1996 Limitation Act, courts have long held that "injury to property" in s. 3(2)(a) of the 1996 Limitation Act "refers to a situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for a damage occasioned by defects in the property itself": *Workers' Compensation Board of British Columbia v. Genstar Corp.* at para. 16. An oil tanker that overturns on the highway and spills oil on the road as well as neighbouring land likely entails property damage caused by an extrinsic act. So too do the circumstances described in *Low v. Petro-Canada Inc.*, 2001 BCSC 251, where a cost recovery action under the Waste Management Act in respect of the leakage or spillage of gasoline by the tenant on the commercial property owned by the plaintiff was subject to the two year limitation set out in s. 3(2)(a) of the 1996 Limitation Act. However, this case does not involve acts or omissions by third parties which caused physical damage to James Island during JIP's ownership of the property.
- [56] I am also not satisfied that JIP's cost recovery claim is an action for damages. In *Hall Brothers Steamship Co. v. Young*, [1939] 1 KB 748 at 756, [1939] 1 All E.R. 809 (C.A.), Greene M.R. said the word damages, in a legal sense, "conveys a sufficiently precise meaning". He went on to define damages as follows:

sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or legislation.

- [57] This definition is similar to the language of s. 3(2)(a) of the 1996 Limitation Act and I think it is appropriate to rely on it in interpreting the Act.
- [58] Immediately after stating the ordinary meaning of damages in *Hall Brothers*, Greene M.R. also said "certain classes of liability to make pecuniary payments clearly fall outside the word 'damages'". He cited two examples of such payments, compensation paid under the *Lands Clauses Act* and worker's compensation payments, and of the latter said emphatically, "the foundation of that class of liability is something entirely different from the foundation of the liability which gives rise to a claim for damages".
- [59] The reasoning in *Hall Brothers* applies to JIP's EMA cost recovery action. ICI's liability, if any, does not arise by reason of some breach of duty or obligation and JIP need not prove any such breach in order to recover its remediation costs. JIP need only establish that ICI is a responsible person as defined by the EMA.
- [60] The EMA is a complete code for dealing with contaminated sites (*Workshop*, at para. 70). Part 4 of the EMA, particularly s. 47, establishes a foundation for liability for the costs of remediating contaminated sites that is not predicated on a breach of a common law or statutory duty. Such cost recovery actions are not claims for "damages" within the meaning of s. 3(2)(a) of the 1996 Limitation Act.

Are JIP and ICI "Responsible Persons"?

- [61] The statutory cause of action created by s. 47(5) of the EMA allows any person who incurs remediation costs to recover those costs "from one or more responsible persons".
- [62] Section 45 of the EMA, makes both current and previous owners of a contaminated site responsible for remediation. Hence, JIP and ICI are *prima facie* "responsible persons"..
- [63] However, s. 46 of the EMA exempts from liability certain categories of otherwise responsible persons by defining "persons not responsible for remediation". In that regard, ICI claims the benefit of s. 46(1)(m) (the "certificate of compliance exemption") and JIP claims the benefit of s. 46(1)(d) (the "innocent acquisition exemption").
- [64] If the certificate of compliance exemption applies to ICI, it will have no liability to JIP and this action must be dismissed. If the exemption does not apply, then ICI is "absolutely, retroactively and jointly and separately liable" to JIP for all reasonably incurred costs of remediation.

- [65] Section 47(9) of the EMA allows the court to apportion the reasonably incurred costs of remediation of a contaminated site, but only among "one or more responsible persons". Section 35(2) of the Contaminated Sites Regulation mandates factors that must be considered to determine whether the costs of remediation were "reasonably incurred", and what might be a "fair and just" allocation of such costs among the persons responsible for same.
- [66] If JIP is not a responsible person by virtue of the innocent acquisition exemption in s. 46(1) (d) of the EMA, then it cannot be liable for any remediation costs. In such circumstances, if ICI is a responsible person, its only defence is to reduce their exposure by challenging whether the remediation costs were reasonably incurred. ICI has done precisely that and those issues are addressed later in these reasons for judgment.
- [67] One of the first steps in the liability analysis is therefore for the court to determine whether ICI and JIP are responsible persons under the EMA or, to put it another way, whether either party is entitled to the exemption it claims.

Is ICI Entitled to the Certificate of Compliance Exemption?

[68] Section 46(1)(m) of the EMA provides as follows:

Persons not responsible for remediation

46(1) The following persons are not responsible for remediation of a contaminated site:

- (m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to
 - (i) change the use of the contaminated site, and
 - (ii) provide additional remediation;

[69] Section 39(1) defines "certificate of compliance" to mean a certificate of compliance under s. 53 of the Act. Section 53 of the EMA provides in part as follows:

Approvals in principle and certificates of compliance

53

- (3) A director, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if
 - (a) the contaminated site has been remediated in accordance with
 - (i) the numerical or risk based standards prescribed for the purposes of the definition of "contaminated site",
 - (ii) any orders under this Act,

- (iii) any remediation plan approved by the director, and
- (iv) any requirements imposed by the director,
- (b) [Repealed 2004-18-8.]
- (c) a plan has been prepared for the purposes of containing, controlling and monitoring any substances remaining on the site and, if required by the director, works have been installed to implement the plan,
- (d) any security in relation to the management of contamination, which security may include real and personal property in the amount and form and subject to the conditions specified by the director, has been provided in accordance with the minister's regulations, and
- (e) the responsible person, if required by the director in prescribed circumstances or for prescribed purposes, has prepared and provided to the director proof of registration of a restrictive covenant under section 219 of the Land Title Act acceptable to the director.
- (4) For the purpose of subsection (3) if a director has issued a certificate of compliance with respect to remediation of a site, the site is considered to have been a contaminated site at the time remediation of the site began, despite the absence of a determination under section 44 (1) [determination of contaminated sites].
- (5) A director may withhold or rescind an approval in principle or a certificate of compliance if
 - (a) conditions imposed on the approval or certificate are not complied with, or
 - (b) any fees payable under this Part or the regulations are outstanding.
- (6) A director may issue an approval in principle or a certificate of compliance for a part of a contaminated site.
- [70] The term "contaminated site" as it appears in the above provision is defined pursuant to s. 39(1) of the EMA as follows:

"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) a hazardous waste, or
- (b) another prescribed substance

in quantities or concentrations exceeding prescribed risk based or numerical criteria or standards or conditions.

- [71] Neither the EMA nor the Regulation prescribes the form of a certificate of compliance.

- [72] In the mid-1980s when ICI decommissioned the industrial facilities and decided to sell James Island, no legislation in B.C. required remediation of any contamination on the property. This province's contaminated sites regime dates back to a 1990 amendment to the Waste Management Act which first defined the term "contaminated site" and also provided for a certificate of compliance following remediation of any such site: Waste Management Amendment Act, 1990, S.B.C. 1990, c. 74.
- [73] The more fulsome contaminated sites regime was enacted in 1993 by a further amendment to the Waste Management Act, but did not come into force until April 1, 1997: Waste Management Amendment Act, 1993, S.B.C. 1993, c. 25.
- [74] In para. 18 of these reasons for judgment, I have set out the admissions of fact made by the parties which I have adopted as findings of fact in this case. Paragraphs 16-29 of those admissions describe the remediation project undertaken by ICI in the mid-1980s prior to the sale of the island, including some of the discussions with the Ministry of Environment at that time.
- [75] In addition, ICI adduced evidence from a variety of witnesses who described in detail the remediation program undertaken by ICI, the collaboration with the Ministry of Environment, the registration of a restrictive covenant on title respecting land use and notice of possible contamination, and the letters issued to ICI by the Ministry. The witnesses giving this evidence included Dr. Morrison from ICI, Lyndon Hanson and Richard Guiton from Golder Associates, who performed the remediation and prepared the reports related to same, and former Ministry employees Barry Patten and John Finnie, the individuals who were in dialogue with ICI and, in the case of Mr. Finnie, who authored the correspondence forming the basis of ICI's current claim for immunity.
- [76] The evidence of these witnesses as to what occurred at the time is largely uncontroversial and I accept it in its entirety.
- [77] By a letter of August 5, 1987, Mr. Patten on behalf of the Ministry confirmed that with respect to ICI's "James Island rehabilitation program":
- the clean-up criteria was based upon restricted land use;
 - a restrictive covenant would be filed against title restricting future land use on the island;
 - mutually acceptable numerical criteria respecting the presence of lead, mercury, DNT and TNT were established and removal of contaminants from the areas designated in the Golder Reports would be undertaken to meet those criteria;
 - the contaminants from the designated areas would be disposed of; and,
 - the Ministry would issue a letter stating that the clean-up had met the established criteria.
- [78] The August 5, 1987 letter then provided:

Following discussion amongst Ministry of Environment and Parks personnel, we conclude that we do not have the authority to waive future liability on CIL's behalf based on successful clean-up to established criteria. We can only state that clean-up to established criteria will minimize the risk of any future liability. If the question of liability does arise in the future, for any reason, we expect that it would have to be resolved in the courts. Any documentation of the site clean-up would presumably be used as evidence in CIL's favour at that time.

[79] On August 25, 1987 Mr. Finnie from the Ministry issued a letter to ICI as follows:

Further to our letter on August 5, 1987 and subsequent telephone conversation of August 11, 1987, this will confirm that the agreed-to clean-up criteria are applicable to a specified land-use i.e. airport, golf course or similar activity. Provided the use of the land remains as such, the designated clean-up criteria will not change. I see no reason at this time for us to impose different or more restrictive criteria on CIL to accommodate future changes to the special waste legislation or the adoption of provincial clean-up criteria.

If, however, the proposed land-use changes (either under CIL or another landowner) then different and/or more restrictive criteria may apply. It would be the responsibility of the landowner at that time to meet the designated clean-up criteria.

[80] On July 18, 1988, Mr. Finnie from the Ministry issued a letter to ICI as follows:

Re James Island Rehabilitation Program

We have reviewed the report by Golder Associates entitled "Confirmatory Clean-up Program at James Island Facility", dated June 1988.

The report provides a thorough documentation of contaminated soil removal and confirmation of soil clean-up to established criteria. Based on this report and our final site inspection on December 10, 1987, we concur that the clean-up has been undertaken to meet the established criteria for total lead, total mercury, dinitrotoluene and trinitrotoluene.

Clean-up criteria was based on the proposed restricted use of this rehabilitated industrial area. We note that the restrictive covenant on the property identifies areas and restricted land use. Accordingly, we do not perceive any further environmental concerns.

[81] ICI argues that the July 18, 1988 "comfort letter" from the Ministry is "equivalent to a Certificate of Compliance" under the new regime and should trigger the exemption from liability contemplated by s. 46(1)(m) of the current EMA. It argued such comfort letters were part of the historical regime in the Province and should therefore be grandfathered to enforce the benefits they were intended to confer.

[82] As indicated above, the concept of a "certificate of compliance" first appeared in 1990 pursuant to an amendment to the Waste Management Act. The terms was not defined.

[83] However, the Contaminated Sites Fees Regulation came into force in 1995 (B.C. Reg. 269/95) providing for fees for such certificates which were defined in the regulation as follows:

"certificate of compliance" means a written statement issued by a manager that remediation has been carried out to the satisfaction of the manager and includes any conditions the manager considers necessary to maintain the validity of the certificate of compliance.

[84] ICI argues, probably correctly, that the "comfort letter" issued to ICI by the Ministry in 1988 meets this definition.

[85] The problem with ICI's submission, however, is twofold. First, the comfort letter cannot and does not meet the current definition of "certificate of compliance" in the Act. The site was not in fact remediated in accordance with currently prescribed standards. Second, perhaps more importantly, if the legislature intended to exempt persons who had "cleaned up" industrial pollution before the current regime was implemented, then it could have expressly provided for such immunity or "grandfathering" in the legislation. It did not do so.

[86] This latter point is particularly telling because (1) the principles of liability under the Act are said to be "absolute" and "retroactive" (s. 47(1)) and (2) the earlier legislation did in fact provide for some form of grandfathering but this was later repealed.

[87] The transition provisions referred to above were found in s. 64 of the Contaminated Sites Regulation, B.C. Reg. 375/96, which provided:

6 Certificates for remediation before April 1, 1997

64(1) The manager may issue a certificate of compliance or a conditional certificate of compliance to a person who, before April 1, 1997, undertook remediation, but only if the requirements of section 20.71 Act are otherwise satisfied.

[88] This transitional provision was repealed in 2004 when the contaminated sites regime was overhauled and moved to the Environmental Management Act (see B.C. Reg. 322/2004 and B.C. Reg. 324/2004).

[89] In the result, it cannot be said that the legislature intended to bestow immunity upon historical polluters such as ICI, even though such persons may have attempted to clean up the property in good faith and with input and approval from the relevant Ministry officials at the time.

[90] For these reasons I conclude that ICI does not qualify for the exemption set out in s. 46(1)(m) of the EMA and that, by virtue of its previous ownership and industrial activity on the land, it remains responsible for the remediation of the contamination on James Island.

Is JIP Entitled to the Innocent Acquisition Exemption?

[91] As the current owner of James Island, JIP is deemed by s. 45(1)(a) of the EMA to be a person responsible for remediation of the island. However, JIP claims the benefit of the "innocent acquisition exemption" set forth as follows in s. 46(1)(d) of the EMA:

Persons not responsible for remediation

46(1) The following persons are not responsible for remediation of a contaminated site:

- (d) an owner or operator who establishes that
 - (i) at the time the person became an owner or operator of the site,
 - (A) the site was a contaminated site,
 - (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
 - (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
 - (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;

[92] The admissions of fact set out in para. 18 of these reasons for judgment provide some background to JIP's purchase of the island in 1994. Mr. Dennis Weibling, who negotiated the purchase of James Island in his capacity as president of Eagle River Inc. , provided more detailed evidence about the transaction. The key points of his testimony, which I accept in its entirety, are as follows.

- Mr. Weibling is trained as a lawyer and an accountant and is a sophisticated businessman with substantial experience in property acquisition and the due diligence process associated with same;
- his understanding was that the owners of James Island had accumulated substantial debt on the property and the transaction might even be properly labeled as a "distress sale";
- his usual procedure would be a letter of intent, followed by due diligence, and thereafter a binding contract of purchase and sale; however, in this particular case it was considered the most attractive way to approach the vendor would be to structure the transaction as a purchase and sale with a 45-day due diligence as a contingency (condition precedent to closing);
- the purchase was not driven by any specific plan respecting future use or development but rather was viewed as a "solid value" and "opportunity proposition" such that the purchaser might buy and simply keep options open;
- he was well aware of the restrictive covenant on title and although he cannot remember the particulars of the discussion, he is confident he would have discussed it with his legal advisors;

- he was well aware of the notice in the restrictive covenant respecting possible contamination on the island; this is why environmental consultants were retained to review the available information (including the Golder reports);
- he received and reviewed an August 3, 1994 letter from their consultants, SRK-Robinson Inc., respecting their "Review of files and reports relating to the outstanding soil and groundwater environmental issues pertinent to the proposed purchase by Eagle River Inc. of James Island";
- the review suggested "there is overall a low likelihood that significant contamination exists because of the remediation program undertaken in the late-1980s", however the report also noted the remediation criteria used in the 1980s were higher than the current standard and that (1) "some contamination may exist above the current levels" and (2) "there is a broader range of potential contaminants that could exist than those that were previously tested";
- his lawyers, Davis Wright Tremaine of Seattle Washington, discussed issues with SRK-Robinson and prepared a letter dated August 4, 1994 summarizing the contamination issues in detail, and Mr. Weibling read that letter and was aware of its contents;
- the conclusion was that there was little contamination likely on the site, certainly no indication of "hypercritical" contaminants, there was no requirement for any further remediation absent significant development activities and that there was no liability in purchasing the property "only a question of increased development cost".

[93] Mr. Weibling concluded there were no significant environmental issues and he was comfortable moving forward with the purchase transaction. He understood the environmental legislation in the province was evolving, but considered the purchase to be a "minor calculated risk" in that regard.

[94] The legal technicalities respecting the purchase of the island were described in the November 2, 1994 McCarthy Tetraault reporting letter to Mr. Weibling which was put into evidence. While the offer to purchase and the purchase and sale agreement was actually made between the vendor and Eagle River Inc., the purchase contract was assigned to J.I. Properties Inc., which was incorporated in Washington State on August 12, 1994 as a single-purpose vehicle to hold title to James Island in its capacity as the general partner of Island Investors Limited Partnership.

[95] For the purposes of determining whether the innocent acquisition exemption applies to JIP, the parties agree that the actions and knowledge of Eagle River Inc., including Mr. Weibling, can and should be attributed to JIP.

[96] The use of a defined term, "contaminated site", in s. 46(1)(d) of the EMA makes it awkward to apply. The definition is as follows:

Persons not responsible for remediation

46(1) The following persons are not responsible for remediation of a contaminated site:

- (d) an owner or operator who establishes that
 - (i) at the time the person became an owner or operator of the site,
 - (A) the site was a contaminated site,
 - (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
 - (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
 - (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;

[97] At the time JIP purchased James Island in 1994 the current contaminated sites regulation did not exist. There were no "prescribed risk based or numerical criteria or standards or conditions" in respect of which any "prescribed substance" might exceed permissible quantities or concentrations.

[98] JIP clearly had reason to suspect the existence of contamination on James Island. The restrictive covenant contains an express notice that the land had been previously used for manufacturing explosives and batching chemicals and materials, as a result of which, "despite the rehabilitation measures conducted by CIL Inc. some of the soils comprised in the lands may be contaminated by chemicals including but not limited to, lead, mercury, TNT and DNT". The imposition of land use restrictions emphasized the point.

[99] Furthermore, Mr. Weibling's consultant, SRK-Robinson Inc., had advised him that "some contamination may exist above the current levels" (Level B current recreational and residential criteria) and that "a broader range of potential contaminants could exist other than those previously tested".

[100] JIP contends that "innocent acquisition" occurs when the purchaser neither knew nor suspected that, as a matter of fact, the site contained substances of a sort and in an amount that later became proscribed. This, they say, is the only way to give practical sense to the use of the defined term "contaminated site" in s. 46(1)(d) of the EMA. JIP argues it neither knew nor had reason to suspect the existence of such substances in such amounts.

[101] I cannot accept JIP's argument. It was alerted to the possibility of ongoing contamination. Its own consultants advised that some contamination may exist above the criteria specified by the legislation as it existed in 1994. JIP took a calculated business risk, that such might be the case and, indeed, that other contaminants might exist quite apart from those that were previously remediated.

[102] In these circumstances, I conclude that JIP does not meet the requirements specified in s. 46(1)(d)(i)(B) of the EMA, and therefore does not benefit from the innocent acquisition exemption. Accordingly, by virtue of its non-exempt status as a current owner of the land that was a contaminated site, JIP becomes a "person responsible" for the reasonably incurred costs of remediating that site.

[103] Having determined that both JIP and ICI are "responsible persons" within the meaning of the EMA, the next step is to determine the "reasonably incurred" costs of remediation and decide how, in accordance with the principles of liability set out in the Act, those costs should be apportioned between JIP and ICI.

Quantum, Reasonableness and Allocation of Remediation Costs

[104] Section 47(5) of the EMA permits recovery of "reasonably incurred costs of remediation". Section 47(9)(b) provides:

- (9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:
- (b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

[105] "Reasonableness" informs both whether JIP acted reasonably with respect to the remediation of the contamination and also whether the associated costs are themselves objectively reasonable: *Canadian National Railway Co. v. A.B.C. Recycling Ltd.*, 2005 BCSC 647 at para. 103.

[106] In addition, s. 35(2) of the CSR mandates certain factors that must be considered "when determining the reasonably incurred costs of remediation":

- (a) the price paid for the property by the person seeking cost recovery;
- (b) the relative due diligence of the responsible persons involved in the action;
- (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
- (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
- (e) any remediation measures implemented and paid for by each of the persons in the action;
- (f) other factors relevant to a fair and just allocation.

[107] I note the s. 35(2) factors referred to above seem more appropriate to allocation issues as between responsible persons rather than whether costs of remediation were "reasonably incurred".

[108] When assessing the reasonableness of remediation costs, the mandatory provisions of s. 56(1) of the EMA are also noteworthy. That section provides:

Selection of remediation options

56(1) A person conducting or otherwise providing for remediation of a site must give preference to remediation alternatives that provide permanent solutions to the maximum extent practicable, taking into account the following factors:

- (a) any potential for adverse effects on human health or for pollution of the environment;
 - (b) the technical feasibility and risks associated with alternative remediation options;
 - (c) remediation costs associated with alternative remediation options and the potential economic benefits, costs and effects of the remediation options;
 - (d) other prescribed factors.
- (2) When issuing an approval in principle or a certificate of compliance, a director must consider whether permanent solutions have been given preference to the maximum extent practicable as determined in accordance with any guidelines set out in the regulations.

The Voluntary Nature of the Remediation

[109] ICI argues that JIP did not need to remediate the property but rather chose to do so in order to "make the property more valuable through development or resale". It argues the voluntary nature of the exercise in pursuit of possible profit renders both the remediation and the associated costs unreasonable.

[110] I do not accept this proposition. ICI and its corporate predecessor contaminated an otherwise pristine island. Even though some cleanup was carried out, contamination remained and the island was burdened with a restrictive covenant on title affecting its use.

[111] The whole purpose of the EMA regime is to ensure that the person who pollutes the land pays for the cost of its restoration. This is the so-called "polluter pays" principle that animates the regime. The subsequent land-owners' motives for remediation are largely irrelevant. So long as the remediation methodology and the associated costs are reasonable, the polluter can held liable for those costs.

[112] In *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2005 BCSC 631, the plaintiff landowner was incorporated for the very purpose of redeveloping the land in question into a commercial strata project and conducted an independent, voluntary remediation of the site. The court expressly rejected the defendant's argument that voluntary development of the site precluded recovery of the remediation costs incurred:

68 CAE argued that it should not be responsible for the costs incurred by Workshop because remediation was only necessary as a result of Workshop's decision to redevelop the property and, in doing so, to construct an underground garage requiring excavation of the site. As such, the costs were not "reasonably incurred". In particular, CAE pointed to the PG report, which disclosed that the highly-contaminated fill was localized to a relatively thin layer near the surface, and there was no mechanism for the contamination to leach to the soils below or to the deep groundwater. Thus, had Workshop not developed the property for strata units, remediation would have been unnecessary.

69 That argument, in my view, misapprehends the thrust of the legislation. The identification of many, if not most, contaminated sites occurs where an owner or operator of property seeks to subdivide, rezone or develop property that was previously used for industrial or commercial activity. That is the purpose of s. 26 of the Act. In the present case, it is axiomatic that Workshop would not have incurred the costs of remediation but for its desire to redevelop the property. Part 4 of the Act is designed to ensure that persons responsible for polluting property in the course of industrial or commercial use must pay the costs of remediation when the property is subsequently redeveloped for other uses.

The Standard for the Remediation

[113] The EMA defines a "contaminated site" to be one in which is present certain substances "in quantities or concentrations exceeding prescribed risk based or numerical criteria or standards or conditions". The relevant "substances" and "criteria" are prescribed by the CSR.

[114] The CSR contemplates the director specifying a "primary use" of land, water or sediment for the purposes of the regulatory standards to be applied. With respect to primary land use, s. 12(3) of the CSR contemplates,

- (a) agricultural land use;
- (b) commercial land use;
- (c) industrial land use;
- (d) urban park land use;
- (e) residential land use; [or]
- (f) wildlands land use.

[115] Section 12(5) of the CSR requires the director when specifying the "primary use" to take into account:

current and reasonable potential future land, water and sediment uses based on the following factors:

- (a) current and proposed zoning for the site;

- (b) land use and planning policies of the government or the municipality or municipalities in which the site and neighbouring sites are situated;
- (c) current site activities;
- (d) proposed site activities;
- (e) current and proposed uses for surface water and groundwater on the site;
- (f) current and proposed land use, and surface water and groundwater uses of neighbouring sites;
- (g) current nearby uses of other surface water and groundwater;
- (h) the potential for surface water and groundwater to cause pollution;
- (h.1) current and proposed uses for sediment at neighbouring sites;
- (h.2) potential for surface water, groundwater and sediment to cause pollution on neighbouring sites;
- (i) other factors that a director considers appropriate in the circumstances.

[116] In the investigation and remediation of James Island in 2004-2006, JIP's consultant, Seacor, applied the following standards:

- (1) residential and urban park standards for soil (the applicable criteria under both is actually the same for the contaminants in issue in the claim);
- (2) aquatic life, irrigation and drinking water standards for groundwater; and
- (3) sensitive standards for sediment.

[117] Using these standards, Seacor determined the following areas to be contaminated:

- (a) at the West Beach Berm, LEPH, HEPH and phenanthrene contamination was found in soil, LEPH and benzo(a)pyrene contamination was found in groundwater, and chrysene and pyrene contamination was found in sediments, in addition to the presence of NAPL/free product in the soil and sediments ;
- (b) in the non-explosives burning pit, arsenic, barium copper, lead and zinc contamination was found in soil ;
- (c) in the denitrification area, lead contamination was found in soil ;
- (d) in the denitrification area, nitrate finishing house, and the WWI manufacturing area (including the TNT Trench and the western area), TNT contamination was found in soil, and TNT and DNT contamination in groundwater Cyanide SAD contamination was also found in soil in the TNT Trench .

- [118] JIP points out that commercial and industrial exceedances were also found in all of these locations, except for the TNT trench. With respect to the latter JIP claims "safety concerns" prevented testing prior to detonation (an issue more fully discussed below).
- [119] ICI challenges the use of residential and parkland standards for the remediation, particularly in the West Beach Berm area where there was no potential for residential development. It suggests that commercial/industrial standards would have been more appropriate and that, indeed, a containment risk assessment approach should have been employed for the West Beach Berm (all of which would, they argue, significantly have reduced costs).
- [120] I do not accept the ICI arguments on these points.
- [121] First, it is entirely reasonable for a landowner in the position of JIP to rely upon a highly qualified expert consultant such as Seacor to assist with the difficult technical issues and thereafter to follow that consultant's determinations and recommendations respecting the presence and remediation of contaminants. The use of such a consultant will not necessarily immunize a landowner from appropriate criticism respecting methodology or cost, particularly if the expert is guilty of egregious error, but the selection and use of an appropriately qualified expert is a factor which bestows reasonableness upon the ensuing approach to remediation and the costs associated with same.
- [122] The "reasonable potential future use" of James Island when JIP acquired it included residential development. JIP was entitled to pursue that type of development if it wished. Subdivision, development and building permits cannot be granted in B.C. unless the Ministry of Environment is satisfied a site is not contaminated, or has been adequately remediated [EMA, s. 40(1); CSR, s. 4(1)(b); Land Title Act, R.S.B.C. 1996, c. 250, s. 85.1; Local Government Act, R.S.B.C. 1996, c. 323, s. 946.2; Island Trust Act, R.S.B.C. 1996, c. 239, s. 34.1]. It was therefore reasonable for JIP to undertake whatever remediation was necessary to secure a certificate of compliance from the Ministry, remove the restrictive covenant on title, and seek approval for any subdivision or rezoning of the land necessary to permit or facilitate residential development.
- [123] In any event, when JIP purchased James Island and thereafter, the southern half of the island was already zoned for residential and recreational use and the specific areas identified as being contaminated were zoned as either greenbelt (TNT areas) or park (West Beach Berm). Commercial and industrial uses were no longer existing and all of the property owners, including ICI, contemplated the southern part of the island to be used for residential and outdoor recreational purposes.
- [124] All of these factors militate in favour of a residential and urban parkland "primary use" determination and the corresponding standards being used for remediation purposes. I find the use of those standards to have been reasonable in the circumstances of this case.

West Beach Berm

[125] As indicated above, between July 2004 and September 2006 Seacor conducted a Stage 1 Preliminary Site Investigation update and a Detailed Site Investigation, and was the project consultant for the remediation of James Island. The work occurred between January 2005 and September 2006. It involved a combination of excavation and detonation procedures in the upland industrial area, including the TNT trench, and excavation and removal of contaminated soil in the West Beach Berm area.

[126] The process at the West Beach Berm included the following steps:

- installation of a pipe pile retaining wall along the east side of the berm to prevent slope failure;
- installation of a dewatering system which was put into operation on October 4, 2005;
- excavation and removal of the top 1.8 metres of material from the berm, which were then transported up the slope using a conveyor system and stockpiled on a polyethylene sheet;
- excavation and removal of soil in 2.5 m² sections to a depth of approximately 4.6 metres, using 2.5 m² concrete caissons placed side-by-side as matters progressed;
- dewatering of each caisson with a sump pump and backfilling of same with clean material - the water was pumped into a lined lagoon and then drawn through to activated carbon chambers for filtration. The water was then discharged under permit into the ocean on the east side of the island;
- removal of the soil from the berm area proved difficult because of saturation, instability and the presence of large rock. Conventional circular caissons were attempted but did not prove successful, hence the modified methodology of rectangular concrete sleeves so that each cell could be excavated followed by replacement with clean soil;
- temporary pipe pile supports for the concrete wall were installed when it started to fail during operations;
- while it was originally hoped the concrete berm wall might remain, its demolition and removal became necessary when it was determined that contamination had migrated below and beyond the wall foundation;
- an offshore temporary sheet pile wall was installed;
- the concrete wall was then demolished and removed along with its temporary pipe pile supports;
- sand backfill was imported and placed and a riprap slope was constructed from the ground atop the sand-filled concrete caissons down to the shoreline to protect the site from sea and weather impacts;
- the offshore temporary sheet pile wall was then removed; and

· the excavated soils were stockpiled and then transported off - island for treatment and disposal. Approximately 2000 m² of soil and sediment were excavated from the West Beach Berm area.

[127] This challenging remediation work was time-consuming and expensive. The total cost is estimated to be approximately \$3 million of the total \$5.3 million claimed.

[128] The retaining wall for the slope proved particularly problematic. Before the pipe pile retaining wall was finally installed, unsuccessful alternatives were attempted with a sheet pile wall, a tangent pile wall, soil anchors and round caissons. ICI says, with some justification, "the fact that the Plaintiff tried some methods that ultimately were not successful is not in and of itself unreasonable, but ICI should not have to pay for the failures". This is discussed below in the context of the amount of costs being claimed and awarded.

[129] ICI challenges the methodology (and related costs) employed at the West Beach Berm on two bases, namely:

- a risk-assessment approach to remediation could and should have been employed; and
- a marine-based approach based on local site tides and bathymetry would have eliminated the requirement for any conveyor system and the double-handling of material.

[130] Before addressing each of these issues, a couple of observations are in order.

[131] First, as in the Canadian National Railway case, supra, at para. 151, the plaintiff had no reason to be profligate or spend-thrifty in incurring expenses for the purposes of obtaining a certificate of compliance. It simply makes no commercial sense for the plaintiff to knowingly choose to spend \$5 million on a remediation that could have been accomplished at half that amount.

[132] Second, the concept of reasonableness does not mandate the most cost-effective or cheapest option for remediation. Reasonableness requires consideration of all the circumstances of the case including reliance on the advice and recommendations of qualified experts.

[133] In this case the debate respecting the availability of a risk-assessment approach to remediation for the West Beach Berm is crystallized by the diametrically opposed opinions of two very experienced and highly qualified experts in the field of environmental remediation, Mr. Malick from Seacor and Mr. Patrick from Golder.

[134] Mr. Malick has obtained certificates of compliance for roughly 100 sites and made approximately 70 submissions to the Ministry of Environment as an approved professional under the EMA since 2001. He was of the opinion that because there was "free product" (migratory petroleum hydrocarbons) present in the berm soil, Ministry policy precluded a risk-assessment approach to remediation. Further, in his opinion other factors militated against a risk- assessment approach:

- because risk-assessment involves some contamination remaining at the site, complex and long-term containment management and monitoring programs would be required and any certificate of compliance issued by the Ministry would likely have contained a condition to that effect;
- the close proximity of a marine environment posed risk of migration into the water of deleterious substances contrary to the Fisheries Act, R.S.C. 1985, c. F-14; and;
- the legislation stated a preference for "permanent solutions to the maximum extent practicable" (s. 56)(1) of the EMA) - excavation and removal of contaminants was such a permanent solution.

[135] In summary on this issue, Mr. Malick opines:

The potential delay in the issuance of a Certificate of Compliance, the cost of additional investigation to demonstrate stability of any contaminant plume or to provide adequate information for a risk assessment, the cost of performing a risk assessment and deriving risk-based remediation targets that would have to be agreed to by MOE along with the probable monitoring program would make it difficult to conclude that there would have been any cost savings from the use of risk assessment for the berm area. Further, it is likely that risk assessment of the contamination remaining in place may not have been successful requiring complex, long-term management of remaining groundwater within the berm.

[136] Mr. Patrick is highly critical of both Seacor and Mr. Malick. His opinion, some of which unfortunately underwent significant revision at the instance of defendant's counsel, criticizes Seacor for failing to undertake a "feasibility study" of the various alternative remediation options at the outset, something which he considers mandatory by virtue of s. 56(1)(b) of the Act. Such a study, in Mr. Patrick's opinion would have militated in favor of a much less costly risk assessment approach to remediation.

[137] Mr. Patrick dismissed Seacor's conclusion that free/mobile hydrocarbon product, as properly defined, was present on the site. He seemed unaware that Seacor's on-site representative, Ms. Siemens-Kennedy, is now one of the very few risk-based approved professionals under this Province's EMA regime. During the remediation she had not acquired that status but had previous experience dealing with free product and NAPL at contaminated sites. Ms. Siemens-Kennedy was an intelligent, articulate and knowledgeable witness and, unlike Mr. Patrick, I treat her on-site observations with respect.

[138] Ms. Siemens-Kennedy, and other witnesses including Messrs. Scriven and Trott testified as to the presence of oil sheens on the water and black malodorous oily substances rising to the surface during vibration or being present in the pits at the berm.

[139] It is not necessary to resolve any academic difference of opinion between Messrs. Malick and Patrick, and particularly on the question of whether any substances found at the berm site met the technical definition of "free product". It is enough that the remediation strategy was reasonable in all the circumstances. In my opinion, the evidence amply supports the conclusion that Seacor was reasonable in advocating the more immediate and permanent

solution of excavating and removing the contaminated soil at the West Beach Berm. More importantly, it was also reasonable for JIP to accept and act upon Seacor's opinions and expertise in adopting that approach.

- [140] Possibly more problematic is the question whether the plaintiff adequately investigated a marine-based option for remediation of the West Beach Berm. The defendant's expert, Mr. Smith, has very impressive experience and qualifications in the area of marine-based remediation of environmental contamination. He has designed and undertaken a variety of creative remediation projects in very challenging circumstances.
- [141] Mr. Smith thought the West Beach Berm could have been "safely and economically accessed" using barges and related equipment during the local "tide windows". If he had been designing the project at the berm, he would have used "an optimized marine-based approach and sequence with offshore sediment removal using the caisson dredge method". In his opinion this method would have been effective, economical and would not have caused any damage to the local marine environment. Using soil volume estimates and other assumption provided by Mr. Patrick, Mr. Smith estimated his alternate methodology would have cost approximately \$1.55 million, a little more than half the approximately \$3 million incurred by JIP in that regard.
- [142] While Mr. Smith's accomplishments are formidable, he was not of course present during the remediation project and was not privy to the day-to-day issues and obstacles that arose. He did not conduct a forensic analysis of the actual costs incurred by JIP with respect to the berm remediation but rather used estimating software to calculate costs for an alternative model. Whether those costs would ultimately have turned out to be accurate having regard to on-site dynamics is difficult to establish.
- [143] The evidence also establishes that a marine-based approach to the West Beach Berm remediation was in fact considered and ultimately dismissed as unlikely to be workable. JIP involved a fisheries biologist expert, Mr. Rob Waters, who had experience dealing with the Department of Fisheries and Oceans Canada. The water was shallow, and included a habitat (eelgrass) which was protected under the Fisheries Act. As well there was a prohibition against any permanent structures such as dolphins or piles that might be required. In the circumstances, in consultation with the other team members, JIP (Mr. Trott) concluded that marine access was not a viable option and so decided to use a conveyor belt to transport soils from the berm to the uplands portion of the island.
- [144] A marine-based methodology might have worked at James Island. No testimony was provided by any witness from the Department of Fisheries whether a marine-based option for remediation at the berm would have been acceptable to them. Mr. Smith thinks approval would have been possible, but that is simply conjecture on his part. In any event the evidence establishes and I find as a fact that the plaintiff investigated the option, reasonably concluded it was not viable and used the land-based conveyor system instead. In the circumstances, it was not unreasonable for JIP to take this approach.

The TNT Manufacturing Area and Trench

- [145] After completing the remediation of James Island, Seacor prepared a "PSI, DSI and Remediation Completion Report" dated October 4, 2006. This report, which is contained in five 3-ring binders, was part of the documentation submitted to the Ministry in order to obtain the certificate of compliance for the island. The Ministry issued that certificate, which was based on Dr. Malick's recommendations in his capacity as an "approved professional", on December 4, 2006.
- [146] The Seacor report describes the remediation work undertaken on the island. It includes a detailed description of the physical activities involved as well as the soil and water sampling undertaken and an analysis of the resulting data.
- [147] The upland portion of the island which had housed ICI's industrial operations included various discrete areas each of which, along with the work carried out in those areas, was separately described in the Seacor report including:
1. the non-explosives burning pit;
 2. the nitrate finishing house; and
 3. the TNT manufacturing area.
- [148] The TNT manufacturing area was broken down into sub-areas for the purposes of the report including the following:
- (a) an area north of the road;
 - (b) the TNT manufacturing area;
 - (c) the TNT trench; and
 - (d) the Western TNT area.
- [149] The dates of the various remediation activities are set out in the report along with a description of the quantities of the soil that was excavated, stockpiled and ultimately removed from the island.
- [150] The defendant does not contest the details of the work actually done in the uplands area as described in the Seacor report. Rather, ICI criticizes the necessity of some of the work, the methodology employed for some of the remediation (particularly the detonation procedures used), and the costs associated with the impugned procedures.
- [151] I need not recite in these reasons the details of all the work carried out between January 26, 2005 and September 2006. The report accurately described the physical work carried out and I find as a fact that the described activities did indeed occur.

- [152] In the course of undertaking the work, a buried clay pipe line that ran approximately 560 metres to the northeast from the TNT manufacturing facilities to a point of discharge on the eastern shore of James Island was discovered. This discharge pipe was excavated and removed in two phases in July and November 2005 respectively. Twenty-three catch basins were located approximately every 22 metres along the length of the pipe. These basins were 1.8 m³ in dimension and constructed out of wood. Each contained a gray heavy paste substance which was not actually tested or formally identified. This pipeline area has come to be described in both the Seacor report and in this litigation as the "TNT trench".
- [153] In both the TNT manufacturing area and along the TNT trench the plaintiff adopted a process of blasting (detonation), excavation, stockpiling, and backfilling followed by confirmatory sampling.
- [154] The defendant makes two challenges to the remediation activities (and associated costs) in the TNT manufacturing area and trench, namely:
1. (more costly) remediation to a residential standard was not necessary; and
 2. the whole "remediation by detonation" approach was neither scientifically sound nor necessary.
- [155] For the reasons stated earlier in this judgment, I do not accept ICI's arguments with respect to the appropriate remediation standard. I have already concluded that remediation to residential and urban park standards was reasonable.
- [156] However, the criticism regarding the "remediation by detonation" approach is more substantial and has merit.
- [157] The Seacor witnesses readily acknowledged that they had no previous experience with respect to the remediation of a site contaminated by "energetic material" (explosives). They acknowledged input from an appropriately experienced and qualified expert would be appropriate.
- [158] One such expert is Mr. Evan Cox, a remediation scientist with Geosyntec Consultants in Waterloo, Ontario. Mr. Cox was called as an expert witness on behalf of ICI and his February 10, 2014 report was marked as an exhibit at trial.
- [159] Mr. Cox, whose opinion I accept, said the whole "remediation by detonation" approach adopted by the plaintiff was wrongheaded:

In my experience remediating soil and groundwater at more than 20 different sites contaminated with energetic materials, I have not once encountered or heard of the use of in situ detonation as a means to reduce safety risk or to partially or fully remediate soils impacted by secondary explosives. None of the mainstream literature regarding investigation and remediation of soils impacted by secondary explosives identifies or promotes the use of in situ detonation as a means to reduce safety risks to personnel during subsequent investigation, excavation or remediation activities, or to partially or fully remediate the impacted soils.

Remediation of TNT-impacted soil has been undertaken for more than three decades. By far the most common methods of remediation for TNT-impacted soil are excavation and either incineration or bioremediation by composting, windrows and similar techniques.

[160] Mr. Cox also notes:

It is common practice in the environmental remediation industry to contract specialized experts to discriminate and segregate energetic materials, including raw product, munitions and explosives of concern, materials potentially presenting an explosive hazard, munitions debris, and unexploded ordinance. It is common during environmental remediation activities where these materials are present, that a technician with the requisite expertise is present during all invasive activities to ensure project safety.

[161] The evidence is quite clear how the process of extensive detonation came to be employed on James Island and I find as the fact that the following occurred:

- the original plan was to remediate by way of excavation, stockpiling, and then removal of contaminated soils (as per a plan forwarded by Ms. Siemens from Seacor to Mr. Scriven at Leader Mercantile on May 5, 2005);
- during the excavation a building foundation, stove piping and yellow crystals in the soil became apparent;
- these crystals were sent for analysis by Ms. Siemens and the results indicated a very high concentration of TNT (approximately 500,000 MG/KG);
- a case of unexploded dynamite was also unearthed;
- Ms. Siemens shared the information with Seacor's health and safety coordinator who became very concerned about the safety issues arising from the discovery of the substances in question;
- Ms. Siemens contacted a firm called Xtech Explosive Decontamination Inc. in Alberta, whom she understood was a specialist in unexploded ordnance; Xtech advised Ms. Siemens that this type of situation was typical of these types of facilities and that the practice of draining materials into settling beds could make the latter "very dangerous". It also advised that the crystallized material was "highly unstable" and should not be disturbed under any circumstances;
- in the meantime Ms. Siemens had come across an article on the Internet describing how a South Dakota field in which munitions had been buried was cleaned up by setting off explosives in excavated trenches which in turn resulted in secondary explosions of the buried munitions;
- on June 9, 2005 Xtech provided a quote (\$10,180) for a team to visit the site, provide an assessment of risk associated with the remediation process, recommend a remediation approach, and to provide quality assurance procedures for that remediation process;
- all of this information was passed on to Mr. Trott from JIP and Mr. Scriven at Leader Mercantile;

- Mr. Scriven then had a telephone conversation with Xtech and concluded that they were "sort of bogus" and were overstating the risks. In his opinion the material was basically just fertilizer and a nitroglycerin base. "I took a kind of high-horse attitude with this guy, and he didn't like me and I didn't like him, and that was the end of that";
- Mr. Trott and Mr. Scriven then decided to deal with the problem themselves and, likely based on the article provided by Ms. Siemens, came up with the concept of detonating all of the TNT areas;
- Mr. Scriven then hired Western Grater, who were already working elsewhere on the island, to carry out the detonations in question. While Western Grater have no experience with the detonation of energetic material, they had many years' experience with blasting generally;
- as the blasting proceeded, all of Messrs. Trott, Scriven and McBride (from Western Grater) believed that "secondary detonations" occurred and were successful in making the TNT areas in question safe;
- the whole process entailed approximately 50 days of blasting with multiple blasts each day.

[162] It is apparent that Seacor became very alarmed by the discovery of explosive material in the ground and decided to vacate the site until the safety issue was resolved. While Seacor had arranged for an explosives decontamination expert to attend the island to assess the situation, Messrs. Trott and Scriven decided to abort that process and take care of matters themselves. The resulting blasting program ensued.

[163] In addition to the evidence of Mr. Cox, ICI adduced evidence from another explosives expert, Kevin Hachmeister. Both experts expressed the opinion, which I accept, that, contrary to what may be common perception, standard explosives and particularly TNT are relatively insensitive and not easy to detonate. Their opinion is that secondary detonations very likely did not occur (despite the on-site personnel impressions to that effect) and that remediation of the site could have occurred through excavation procedures without any blasting. In their opinion, the blasting simply diluted the concentrations of TNT in the soil rather.

[164] I have no hesitation concluding that JIP acted unreasonably in failing to consult an expert and proceeding instead with a misguided detonation program. Just as I accept the reasonableness of the West Beach Berm remediation because it was recommended by a qualified expert, I conclude it was unreasonable for JIP not to seek the input of an explosives remediation expert when unexploded ordnance and other crystalline substances were unearthed. JIP took a cavalier approach to the problem.

[165] Having said that, it must also be observed that at the end of the day any safety risks that existed did not actually materialize and any TNT contamination in the soil was in fact remediated to levels below the prescribed residential standards. In other words, the "remediation by detonation" methodology, if not strictly necessary, nonetheless worked.

- [166] Using the same estimating software referred to earlier, Mr. Smith from Golder has attempted to calculate the cost of remediating the entire TNT area to a residential standard using a basic work sequence that did not include any blasting. That sequence assumed mobilization/demobilization of equipment and materials, bulk excavation of the soil, removal and disposal of same (including the pipeline), and backfilling with salvaged or imported material. His software produced an estimated total cost of approximately \$1.17 million which stands in contrast to the approximately \$2 million incurred by JIP in that regard.
- [167] It must be noted that the alternative estimate did not include the cost of involving an explosives remediation expert such as Mr. Cox. When Mr. Cox was originally retained as an expert witness, counsel requested his opinion on the estimated cost of involving an explosives remediation expert in the remediation process at James Island. However, presumably for strategic reasons, counsel later withdrew that instruction and so no evidence in this regard was adduced from any of the witnesses. I will address this issue in the next section of these reasons for judgment.

Quantum and Allocation of the Remediation Costs

Quantum

- [168] JIP claims recovery of remediation costs in the amount of \$5,253,000. In support of the quantum it put into evidence three volumes of invoices and a summary table prepared with JIP's accounting software program. The table identifies each invoice by name of the payee, the original amount of the invoice, and the amount being claimed in the action for each of the years 2004, 2005 and 2006.
- [169] Mr. Trott testified that JIP had paid each of these invoices and that all of the payments were for services rendered in respect of the remediation work on the island.
- [170] There is no breakdown in the material between amounts paid in respect of the West Beach Berm remediation as opposed to the remediation of the upland portion of the island. Similarly, while one can readily identify the invoices rendered by Western Grater for their blasting services, one cannot readily determine what other costs were incurred solely as a result of the upland "remediation by detonation" approach.
- [171] Further, approximately \$1.3 million of the amounts claimed were derived from invoices which included charges for services rendered by the payee (notably Leader Mercantile) for other projects that were underway on the island at the same time as, and unrelated to, the remediation. With respect to these latter invoices Mr. Trott testified that he estimated the allocation of the invoice amounts applicable to the remediation work.

- [172] Working with Mr. Scriven's wife, Ruth, who was in charge of the invoicing for Leader Mercantile, a coding system was established to demarcate remediation expenses (annotated "REM") from other expenses/charges for unrelated additional work on the island (golf course, powder wharf, general maintenance, etc.).
- [173] Not surprisingly, Mr. Trott was cross-examined on the details of some of the invoices and the allocation process. Some inaccuracies and "guesstimates" were identified as a result. For example, Mr. Trott was taken to a \$41,000 invoice for land and road improvements in respect of which the plaintiff claims \$38,000 on account of remediation costs. His said this was a Western Grater invoice and therefore must have been related to the remediation. However he also agreed that road improvements had nothing to do with the remediation.
- [174] On a Leader Mercantile invoice for "services & materials on James Island June 2005", Mr. Trott was taken to the last section on the document which bulk listed materials for a total cost of \$25,218. Mr. Trott could identify only one item on this list which pertained to remediation (twelve bundles of absorbent oil booms) but was unable to estimate the cost of these booms.
- [175] At one point in his testimony Mr. Trott identified a \$70,000 charge for blasting services which he said had been inadvertently excluded from the claim. He suggested this might offset any errors in the plaintiff's overall calculation of costs, but it turns out an invoice had actually been included in the binders and the amount was in fact included in the claim.
- [176] ICI also pointed to an accounting error in Leader Mercantile's \$145,734 invoice for February 2006 ("services on James Island"). The plaintiff has included \$130,411 of this amount as part of its claim for remediation costs. Even accepting that Ms. Scriven's notations are accurate, the total for "remediation" entries on the invoice is only \$115,000, so the plaintiff appears to have "over claimed" \$15,000 in respect of this particular invoice.
- [177] ICI points to these frailties and says the plaintiff has not met its burden to prove the actual costs. Because that burden has not been met, ICI argues, the claim should simply be dismissed in its entirety.
- [178] I do not agree with this submission. I acknowledge criticisms may properly be leveled on account of arithmetical errors or inaccurate judgment calls on allocation of costs between remediation and other work on the island. None of the parties have determined the precise number for such matters, and I am neither equipped nor prepared to do so. However, much like an assessment of damages scenario, the proper way to address these matters is to apply a perhaps rough but fair discount to the total amounts claimed to account for the frailties in question.

- [179] ICI argues it is not permissible to seek recovery for supervision, handling and administrative fees, citing *Gehring v. Chevron Canada Ltd.*, 2006 BCSC 1639 at paras. 138-143 in support. However, *Gehring* does not stand for such a blanket proposition. In that case the owners paid the fee to a non-arm's-length company owned by one of the owners and the evidence did not address the extent to which any remediation cost saving was accomplished for that company's services.
- [180] The simple fact of the matter is that JIP has in fact paid all of the sums it is claiming. JIP is a sophisticated entity and had no motive for incurring costs that were not necessary nor for paying for work that was not carried out. As indicated, however, a discount to account for "gray areas" in arithmetic and allocation is warranted to ensure fairness. A further discount is also appropriate on the same basis to reflect that the "remediation by detonation" approach, whether as a "safety measure" or otherwise, was misguided.
- [181] The parties seem to agree and the court has been advised that approximately \$2 million of the amounts claimed was spent on the remediation of the upland area of the island. The computer-generated estimate of cost for an alternative excavation-based approach to remediation was \$1.166 million without including an allowance for the services of an explosives remediation expert such as Mr. Cox. The payments to Western Grater on account of its blasting services were \$213,000 but ICI has identified further amounts in the invoices related to blasting and suggests, probably correctly, there would be other Leader Mercantile expenses related to same which cannot be easily quantified (Mr. Scriven's time, equipment charges, etc.).
- [182] The difference between \$1.2 million and \$2 million is, of course, \$800,000. Doing the best I can in an attempt to be fair to both parties and to reflect the frailties identified above, I conclude an appropriate figure to recognize as a reasonable cost for the remediation of the upland portion of the island would be \$1.6 million.
- [183] I have not overlooked the possibility that some of the "gray areas" identified above apply equally to the amounts claimed with respect to the remediation of the West Beach Berm, including the issues referred to in para. 126 of these reasons. I am advised that the total Berm costs were approximately \$3 million. Fairness requires some discount to be applied to this number as well.
- [184] It was not unreasonable for JIP to explore and attempt alternatives for stabilizing the slope at the West Beach Berm. It is true there may have been a "trial and error" element to some of the efforts but they involved input from structural engineers and the costs incurred were not unreasonable.
- [185] However ICI submits, and I agree, that it was unreasonable to spend money testing out ideas that JIP knew would not work. ICI points to the evidence from Mr. Scriven respecting the involvement of Pacific Pile Driving and their method of round caissons. He testified that the Pacific Pile methodology was simply not working on other projects that he was familiar with but that, even though Mr. Trott did not like the idea either, he nonetheless authorized

three days of demonstration "just to keep the family happy". The efforts proved unsuccessful, as expected, and I find that this particular expense was not reasonably incurred.

- [186] Earlier in these reasons at para. 103 I noted how "reasonableness" informs not only the approach to remediation but also whether the associated costs were themselves objectively reasonable. Interestingly, while ICI has criticized the methodologies adopted by JIP, it has not challenged the reasonableness of the actual amounts charged by the various consultants, contractors, subcontractors and the like involved in the project. For example, a significant portion of the costs claimed in this action relate to the fees charged by consultants such as Seacor, but ICI has not challenged the reasonableness of the rates nor the total amounts charged.
- [187] It would have been preferable for the defendant to have provided me with a detailed forensic analysis and listing of all arithmetical errors, inappropriate allocation, and impugned blasting-related expenses, and other frailties in the amounts claimed. It has not done so. Hence all I can do is "rough justice" in terms of a fair discount from the total amount claimed.
- [188] The total amount claimed is \$5,253,000. In my view, a figure fairly attributable to all costs reasonably incurred by JIP with respect to the remediation of James Island would be the sum of \$4.75 million.

Allocation

- [189] As indicated above, s. 35(2) of the CSR mandates certain factors to be taken into account when determining the appropriate allocation of remediation costs including:
- (a) the price paid for the property by the person seeking cost recovery;
 - (b) the relative due diligence of the responsible persons involved in the action;
 - (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
 - (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
 - (e) any remediation measures implemented and paid for by each of the persons in the action;
 - (f) other factors relevant to a fair and just allocation.
- [190] JIP is very much an innocent party, in the sense that it made no contribution whatever to the presence of the contamination on the island. There is no evidence that JIP paid any sort of discounted price for the property on account of the possibility of contamination. Indeed, the testimony of Mr. Weibling was to the contrary. Items (b) to (e) in the above list are more

appropriate to an allocation as between persons who actually caused the contamination, all the more so given the "polluter pays" principle that animates the entire cost recovery regime.

- [191] ICI urges a broad approach to subsection (f) in the above list of factors to be taken into consideration. It particularly argues that full recovery of the remediation costs claimed in this action would result in a "windfall" for JIP. Whether labeled as "betterment" as argued or whether it simply be a matter of fairness, ICI says it is inappropriate for JIP to recover its remediation costs "while simultaneously enjoying a substantial increase in the value of the property".
- [192] I do not quarrel with ICI's argument as a matter of principle. I am inclined to agree that if the remediation generates betterment in the sense of increased utility or value of the property in an amount that exceeds the remediation costs, then a basis may exist for requiring a landowners such as JIP to bear the burden of at least some of the remediation costs, and maybe even all of those costs in an appropriate case.
- [193] The difficulty here, however, is a complete lack of proof that the value of the property has increased as a result of the remediation, let alone in an amount equal to the remediation costs.
- [194] The property has been listed for sale for \$75 million for some time but no purchasers have emerged. No appraisal evidence was put before me respecting the current market value of the property and what portion of that value, if any, might be attributed to the remediation that has taken place on the island. The assessed value of the land for property tax purposes in 2013 was approximately \$49 million which is over \$6 million less than the assessed value in 2006 and \$32 million less than the assessed value in 2010. No explanation was put in evidence respecting these fluctuations.
- [195] In the result, there is no evidentiary basis for allocating any portion of the reasonably incurred remediation costs to JIP beyond the discounts referred to above.

Conclusion

- [196] The "polluter pays" principle imposes absolute liability upon any person who causes a site to be contaminated and in the circumstances of this particular case I conclude it is fair and just to require ICI to reimburse JIP for reasonably incurred remediation costs in the amount of \$4,750,000. Judgment is awarded accordingly and absent any circumstances which should be brought to my attention respecting same, costs will follow the event.

"N. Kent J."

The Honourable Mr. Justice N. Kent

Appendix "A"

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