IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *I4PG Hastings Street Inc. v. Burnaby Dry Cleaners Ltd.,* 2023 BCSC 242

Date: 20230217
Docket: S178572
Registry: Vancouver

Between:

I4PG Hastings Street Inc.

Plaintiff

And

Burnaby Dry Cleaners Ltd., Gladys Napora, Jaeyong Moon dba Mr. N's Fine Dry Cleaners, Kwontae Kim, Ogseon Kim, Triple A Fresh Produce Inc., Yong Hong Chen, Chang Suk Soh, Choon Ja Soh and YMD88 Holdings Ltd.

Defendants

Before: The Honourable Mr. Justice Veenstra

On appeal from: A decision of a Master of the Supreme Court of British Columbia, dated July 18, 2022 (*I4PG Hastings Street Inc. v. Burnaby Dry Cleaners Ltd.*, 2022 BCSC 1350, Vancouver Docket No. S178572).

Reasons for Judgment

Counsel for the Plaintiff:	A. Moore
Counsel for the Defendants, Burnaby Dry Cleaners Ltd. and Gladys Napora:	R. Gage
Counsel for the Attendee, 1350132 B.C. Ltd.:	J.S. Malik
Place and Date of Hearing:	Vancouver, B.C. August 25, 2022
Place and Date of Judgment:	Vancouver, B.C. February 17, 2023

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[1] This an appeal from the judgment of a Master, refusing leave to add 1350132 B.C. Ltd. (“135”) as a defendant to this action and to file an Amended Notice of Civil Claim reflecting that addition. The reasons for judgment of the Master are indexed at 2022 BCSC 1350.

Background Facts

[2] The plaintiff is the owner of property at 4451 Hastings Street in Burnaby (the “Plaintiff’s Property”). The plaintiff alleges the Plaintiff’s Property is a contaminated site within the meaning of the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*], and that the contamination is a result of dry-cleaning chemicals flowing underground from the property at 4429 Hastings Street (“4429”) or from another property at 4362 Hastings Street.

[3] The claim is brought pursuant to a statutory cause of action created by the *EMA*. The plaintiff asserts that, as the owner of a contaminated site, it is entitled to claim against the various defendants on the basis that they are responsible persons pursuant to the *EMA* and thus liable for the costs of investigation and remediation of the Plaintiff’s Property.

[4] Whether the contamination in fact flowed from 4429 is a disputed fact that will have to be resolved at trial.

[5] The first-named defendant, Burnaby Dry Cleaners Ltd. (“Burnaby”), was the registered owner of 4429 until May 11, 2022. The second-named defendant, Ms. Napora, is the sole director of Burnaby. Burnaby operated a dry-cleaning business at the site from about 1967 to 1997. The other defendants either operated dry-cleaning businesses from 4429 after 1997, or are similarly connected to the property at 4362 Hastings Street.

Ownership of 4429

[6] Burnaby was registered owner of 4429 from about 1967 and continued to own it at the time this action was commenced in 2017.

[7] In about April 2022, Burnaby sold 4429 to 135. The title search shows that the Form A transfer of title was submitted to the land title office on April 22, 2022, and was entered in the registry shortly thereafter.

[8] On April 19, 2022, prior to the completion of purchase and sale of 4429, Burnaby and 135 entered into an indemnity agreement in writing. The recitals include the following:

> WHEREAS [the Plaintiff] has filed a civil suit against [Burnaby] and [Napora] and some others claiming damages for contaminating their property.
>
> THAT [135] has entered into an agreement to purchase the property owned by Burnaby and Burnaby warrants, represents and claims that neither Burnaby itself nor through its servant or agents has contaminated the property and is thus not liable to pay any damages for any remediation work on the property. If at all it is held by the court that Burnaby is any liable to pay any damages and it comes on the property in any manner, Burnaby agrees to indemnify company as follows:

[9] The key operative paragraph of the agreement states:

> Burnaby shall fully defend, indemnify and hold harmless company from any and all claims, lawsuits, demands, causes of action, liability, loss, damage and or injury of any kind whatsoever whether brought by an individual or other entity, or imposed by a court of law or by administrative action of any acts, omissions, negligence or wilful misconduct on the part of Burnaby, its officers, owners, personal, employees, agents, contractors, invitees or volunteers. This indemnification applies to and includes without limitation, the payment of all penalties, fines, judgments, unpaid taxes, awards, decrees, attorneys fees and related costs or expenses and any reimbursements to Lee for all legal fees, expenses and costs incurred by it. That Burnaby would be though personally be responsible for any or all the deeds resulting in contamination and as decided by Court in Civil Claim No. S178572, Supreme Court of British Columbia, Vancouver Registry.

Course of the Litigation

[10] The plaintiff commenced this proceeding in September 2017. Parties were previously added in July 2019. It has been set for trial twice: in November 2020, and in October 2022. Neither trial proceeded.

[11] The materials before the Master indicated that there had been examinations for discovery and expert reports exchanged between the existing parties in advance of the original trial date.

[12] The plaintiff filed its notice of application, seeking an order to add 135 and amend the pleadings accordingly, on June 22, 2022. At the time, the trial was scheduled for 14 days in October 2022.

[13] The proposed defendant, 135, filed response materials on July 12, 2022, opposing the application. Burnaby and Ms. Napora also filed an application response opposing the application. None of the other parties took any position with respect to the application. 135, in its response, indicated that it had been unable to find an appropriate counsel with availability for 14 days in October 2022.

[14] The application was heard by the Master on July 15, 2022, and dismissed by way of oral reasons for judgment ("Reasons") given on July 18, 2022.

[15] At the time the appeal from the order of the Master was heard on August 25, 2022, the trial had been adjourned generally. It appears from the file that a new trial date has now been set for the spring of 2024. Thus, by the time of trial, 135 will have been the owner of 4429 for just under two years.

Reasons for Judgment of the Master

[16] After briefly summarizing the underlying facts, the Master noted at paras. 7-8 of his Reasons, the provisions of ss. 45(2) and 47 of the *EMA*, as well as the definitions in s. 39. He then canvassed the plaintiff's position in some detail at paras. 9-16, referring in passing to various judgments with respect to liability under the *EMA*, including: *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129, *First National Properties Ltd. v. Northland Road Services Ltd.*, 2008 BCSC 569, *Gehring v. Chevron Canada Limited*, 2006 BCSC 1639 and *Seaspan ULC v. British Columbia (Director, Environmental Management Act*, [2014] B.C.W.L.D. 6741 (Environmental Appeal Board).

[17] With respect to the legal test applicable to an application to add a party, the Master referenced the judgment in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, which he summarized at paras. 17-19 as reflecting:

> [17] … two requirements an applicant must demonstrate to add a party. First, the applicant must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy or subject matter of proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous or that the plaintiff has a possible cause of action against the proposed party.
>
> [18] If the first requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, but that discretion is fettered to the extent that it must be exercised judicially in accord with the evidence adduced and the guidelines established in the authorities.
>
> [19] Not necessarily in order of priority, some of the factors to be considered include, parties should be added where that party's participation is necessary for the proper determination of a case. The discretion of adding a party should be generously exercised so as to enable effective adjudication upon all matters. The court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party to be joined.

[18] The Master then went on to consider at paras. 20-29 the arguments made by 135. He then briefly canvassed the submissions of Burnaby at paras. 30-32.

[19] The Master's conclusions are set out at paras. 33-35:

> [33] For the reasons set out in my review of 135's submissions, I am prepared to accede to their argument that 135 should not be added as a party. I do not see them having anything of substance to add to the trial. Furthermore, under the circumstances, it seems highly unlikely they would be found liable to contribute to the remediation as they only recently purchased the property, and in that unlikely event, their liability would be imposed on Burnaby.
>
> [34] I conclude that all of the possible responsible persons are currently before the court, and the court can make its determination at the trial as to how the remediation costs can be apportioned amongst the parties in the event the plaintiff is successful in recovering its costs of remediation.
>
> [35] If I had been required to determine if 135 should not be added as a party as their counsel is unavailable for the current the trial dates, I would have found against them as they were aware of this litigation when they bought the property. Therefore, it would be incumbent upon them to find counsel available for those trial dates. However, I do not have to make that decision for the reasons I have just indicated.

[20] Given that the Master appears to have adopted the submissions of 135 as summarized by him in their entirety, I set out his summary at this point:

[20] 135 submits that they should not be added as a party for the following reasons. Participation of 135 is not required for the proper determination of the case. 135 purchased the site on May 11, 2022, long after the alleged contamination occurred. 135 did not cause or contribute to the alleged contamination of 4415. 135 has no necessary relevant information to provide to enable effective litigation of these proceedings.

[21] 135 further submits at the time of purchasing the site, 135 executed an indemnity agreement with the vendor of 4429, namely Burnaby, and therefore is not required for the litigation of this proceeding. Nor would 135 be liable for any damages. The imminence of the trial is inherently prejudicial to 135. The trial is only three months away and 135's counsel is unavailable on the scheduled trial dates.

[22] They also argue that the plaintiff provides affidavit evidence that their reason to add 135 is to safeguard against the possibility of Burnaby dissipating the funds it received from the sale of the site. They argue the plaintiff can take other measures to ensure the sale proceeds are not dissipated, such as seeking an order for security or an injunction.

[23] They further argue that the *EMA* provides that an owner is not responsible for remediation of a contaminated site if the owner establishes that they did not by any act or omission cause or contribute to the contamination of the site. They further argue that s. 50 of the *EMA* allows for a declaration that a responsible person was a minor contributor and fix the amount of their contribution to the remediation costs on the basis that it be unjustly harsh to apply the principle of joint and several liability.

[24] Lastly, they argue s. 48 of the *EMA* provides that the director may designate as responsible persons those who contributed to the contamination of a site taking into account the degree of involvement of each person. 135 would logically not be named by a director as a responsible person because 135 had no degree of involvement in the site being contaminated.

[25] 135 refers to the case of *Gehring v. Chevron Canada Limited*, 2006 BCSC 1639. They note in that case several parties fell within the definition of "responsible persons" under the *EMA*. They note that several defendants argued that if they were responsible persons, they should be designated as minor contributors. The significance of that designation arises from s. 47 and 50 of the *EMA*. Both sections provide that all responsible persons, other than minor contributors, are jointly and severally liable for the remediation costs. A minor contributor is responsible only for the remediation of costs attributed to them.

[26] 135 submits that the legislative scheme was relied upon in the *Gehring* case to determine liability of the owners. In other words, the court may be guided by s. 48 of the Act. In *Gehring*, one of the responsible persons was found liable for 5% of the remediation costs as that party's operation of the business was for only about one year. They refer to portions of the *Gehring* decision, which states the following:

> [121] The primary factors for allocating responsibility here are the degree of involvement in the conduct which contributed to the Property becoming contaminated, and the relative due diligence of the responsible

> persons, bearing in mind the increasing public awareness of environmental concerns over time.
>
> [27] The purpose of the *EMA* is to distribute the liability of responsible persons according to three main factors: activities which contributed to the contamination; duration of fee simple ownership over control of the site; and product ownership.
>
> [28] 135 submits that applying those factors, it is unlikely the court would find them to be a responsible person. If the duration of ownership applied, their percentage would be practically non-existent given the allegation is that the contamination may cover a period of 55 years and they only recently became owners.
>
> [29] Furthermore, s. 48 provides that for the purposes of deciding who will be ordered to contribute to remediation, the director may take into account private agreements with respect to liability between various responsible owners. Such an agreement exists between 135 and Burnaby, so any liability of 135 can be assigned to Burnaby.

Positions of the Parties

The Plaintiff

[21] The plaintiff accepts that the applicable standard of review is whether the decision of the Master is clearly wrong, citing *311165 B.C. Ltd. v. Derewenko*, 2015 BCSC 1594 (dealing with amendment of pleadings), *Strother v. Darc*, 2017 BCSC 348 (dealing with a refusal to permit addition of a party) and *Sohal v. Lezama*, 2019 BCSC 1709, aff'd 2021 BCCA 40 (dealing with leave to issue a third-party notice).

[22] The plaintiff says that the Master erred by failing to apply the correct test with respect to Rule 6-2(7)(c) of the *Supreme Court Civil Rules* [*SCCR*]. He made no explicit finding regarding whether it would be just and convenient to add the proposed defendant, he did not conduct any sort of balancing of the prejudice to be suffered by parties in the event the application was granted or dismissed, and he does not appear to have considered the fact that no limitation period had expired. Rather, he appears to have accepted arguments that:

a) 135 is unlikely to be found a responsible person due to the short duration of its ownership of 4429; and

b) The indemnity agreement, to which the plaintiff is not a party, impacts on any liability of 135 to the plaintiff.

[23] The plaintiff argues the Master was clearly wrong in concluding that "all possible responsible persons are currently before the Court", and that his focus on whether 135 would have "anything of substance to add" is an irrelevant consideration.

[24] The plaintiff further argues that the Master appears to have accepted a submission of 135 that it might claim to be a minor contributor and that as a result, it would not be a responsible person. The plaintiff says that under the *EMA*, responsibility and liability are distinct concepts. The plaintiff argues that, whether or not 135 is later found to be a minor contributor under s. 50, the evidence is undisputed that it is an owner and therefore a responsible person. The plaintiff identifies this as an error of law.

[25] The plaintiff says that the Master erred in relying on the indemnity agreement in the absence of any evidence as to the financial ability of Burnaby to make good any liability that may arise. The plaintiff also argues that private agreements as between defendants should not affect a plaintiff's right to seek relief against a proper defendant.

[26] More generally, the plaintiff says the Master erred by inappropriately engaging in a detailed assessment of the merits of the plaintiff's case, rather than applying the test he stated – whether there is a question or issue that relates to the relief, remedy or subject matter of the proceedings, for which the threshold is low.

[27] With respect to the "just and convenient" factor, the plaintiff argues the Master failed to consider the fact that the plaintiff's claim against 135, having arisen only a few months before the hearing when 135 obtained the status of owner, was not time-barred and could be brought in any event by way of a separate proceeding. The Master thus failed to consider the prejudice that would arise were he to dismiss the application, likely giving rise to the need for a parallel proceeding.

135

[28] It is135's position that the Master correctly stated the test applicable to Rule 6-2(7)(c), and thus did not misapprehend the applicable law. 135 argues that the submissions it made, as summarized by the Master at paras. 20-29 of the Reasons, all set out valid considerations on the question of whether its addition as a defendant is just and convenient.

[29] 135 submits as follows:

> The proposed pleadings do not allege any particular act or omission on the part of 135. The allegation is that simply by way of its status as registered owner of real property, 135 may be liable to the plaintiff. It is implicit that the Master's reasoning is that he found that litigation of any issue the [plaintiff] has as against [135] would be a waste of court time and public resources and litigation of that issue would serve no useful purpose.

[30] 135 argues that the Master properly concluded that the effect of the indemnity agreement is that it could not be held liable to the plaintiff.

[31] 135 references its position as set out in the Application Response that was before the Master, and says that:

a) It was not responsible pursuant to s. 46(1)(d)(iii), on the basis that it did not, by any act or omission, cause or contribute to the contamination of the site,

b) In the alternative, it was a minor contributor pursuant to s. 50(1), and

c) In any event, the court should "take into account" pursuant to s. 48(4) its private agreement with Burnaby (i.e., the indemnity agreement), resulting in there being no liability.

[32] 135 argues that if it was found to be a minor contributor, then its responsibility would be "a paltry sum". It submits that the court would inevitably allocate liability to it based on the portion of time it had owned the property, in the context of over 54 years of flow of contaminants. 135 argued that, in essence, the Master found that

the plaintiff's proposed claim against 135 was frivolous and that the record supported such a conclusion.

[33] Finally, 135 argues that it was appropriate for the Master to consider the advanced stage of the litigation, with an impending trial date, and that the proposed new defendant would be put to great expense to join the litigation at that late stage (citing with respect to this point *MacMillan Bloedel Ltd. v. Binstead* (1981), 58 B.C.L.R. 173, 1984 CanLII 351 (C.A.)).

[34] With respect to the suggestion that the Master was clearly mistaken in law when he commented that "all of the possible responsible persons are currently before the court", or that 135 was "highly unlikely" to have to contribute to the remediation, 135 argues that the Master meant to say that all "necessary" persons are before the Court (with reference to the test under *SCCR* 6-2(7)(b)). Alternatively, 135 argues that the remainder of the Master's comments indicated he did in fact understand the nature of the *EMA*'s regime of status-based liability. Finally, 135 says there were sufficient other reasons for the Master to have dismissed the application based on the second branch of *SCCR* 6-2(7)(c).

[35] 135 says the proper course is for the plaintiff to bring a separate action against 135. They say the plaintiff could then apply to have the two actions heard together, although 135 also says it would apply instead to have that separate action summarily dismissed based on its theories as set out above.

Burnaby

[36] Burnaby argues it is unnecessary to have every potential responsible person as part of an action under the *EMA*. Rather, the statutory regime allows a claimant go after any one or more responsible persons. Section 47(5) then gives the defendant a right to claim over against any other parties. In this case, Burnaby has already made its own contractual arrangement with 135, which eliminates the need for it to claim over against 135.

[37] Burnaby says that all of the issues required to be canvassed in this action can be canvassed without 135 being part of the action. It says that adding 135 will add complexity to the case, as the court will be required to determine whether 135 is a minor contributor and, if so, allocate a specific amount to it.

[38] Burnaby says that the plaintiff will be able to recover any amount attributable to 135 from it. It says that there is no evidence that it has dissipated any assets, and thus no basis to conclude that it will not be in a position to cover any such liability.

Legal Principles

Standard of Review

[39] The test on an appeal from a Master's order was described by Justice Macdonald in *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188, 1990 CanLII 1352 (S.C.):

> An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the Master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the Master.

[40] There does not appear to be any dispute among the parties that the applicable standard of review on this appeal is the "clearly wrong" standard applicable to a purely interlocutory decision.

[41] The plaintiff suggests that a Master can be said to be clearly wrong where the Master:

a) Exercises their decision under a mistake of law;

b) Errs in law or principle;

c) Misdirects themselves on the evidence;

d) Disregards a principle;

e) Misapprehends facts or takes into account irrelevant factors; or

f) Makes an order that would result in an injustice.

[42] These factors are said to arise from *Sohal* at para. 25. I note that the list is contained in a quotation from the submission of the appellant in that case. It is not clear that Justice Kent adopted or approved the list. Rather, he noted that in the case before him, the respondent accepted the appellant's submission regarding the standard of review. Justice Kent went on to conclude that what was in issue before him was a specific question of law, and that as a result the appeal before him was to be a re-hearing on the merits.

[43] The plaintiff's submissions include arguments that the Master erred in law. The plaintiff appears to consider this an aspect of the "clearly wrong" standard. I note, however, that there is a separate line of authorities dealing with errors of law inherent in a Master's judgment.

[44] In *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2d) 124, 1992 CanLII 2360 (S.C.), Justice Fraser stated:

> The authorities reviewed by Macdonald J. deal with the appellate role in reviewing a discretion exercised by a Master. There is a different procedural dynamic in a judgment involving the exercise of discretion than there is in a decision on a point of law, such as the one appealed from here. A decision involving an exercise of discretion always involves consideration of the facts and rarely has implications for the general law. The "clearly wrong" standard recognizes this and is based on practical considerations having to do with the proper allocation of court time. A decision on a point of law, by contrast, has implications for other cases and other litigants. To adopt the "clearly wrong" standard on an appeal from a decision on a point of law would mean that an incorrect (but not clearly wrong) interpretation by a Master of a point of law would stand —— and presumably be binding on other Masters —— but would remain vulnerable to a different interpretation by a judge, in a later case. Why, the defendants ask, should the correct interpretation await a later case? I find no answer to this question.
>
> The policy concerns which call for limited judicial review of the decisions of Masters do not apply to decisions of pure law. I conclude that a judge of this court sitting in appeal on a point of law from a Master has a conventional

> appeal jurisdiction, in which the legal issue may be argued and decided on the merits.

[45] In that case, the order under appeal assessed the amount of conduct money to be paid to a professional witness who was to be examined for discovery as a former agent of the plaintiff. While the question was clearly interlocutory in nature, its determination depended on a point of law – whether the court had discretion to order a daily witness fee beyond the $20.00 amount provided in an appendix to the Rules of Court. Justice Fraser allowed the appeal on the basis that the Master had erred with respect to that point of law. He concluded that a Master cannot exercise a discretion that does not exist, and the existence of a discretion is a question of law reviewed on a correctness standard.

[46] In *Joubarne v. Sandes*, 2009 BCSC 1413, the Master had declined to order production of documents from an earlier proceeding in which the plaintiff in the present personal injury case had claimed against a former employer for wrongful dismissal. Justice Williams concluded that the Master had erred in concluding that production was barred by the implied undertaking rule. In dealing with the standard of review, he noted the test as outlined in *Abermin*, and that the parties before him disagreed on whether the order that had been made was "vital to the final issue in the case". At paras. 13-14, he described the approach he would take as follows:

> [13] In this case, I have concluded that the matter of the characterization is not vital to the adjudication of the appeal. I will assume, without deciding, that the decision is interlocutory and not final in nature. If it were final, I would proceed as a re-hearing and would be permitted to substitute my own view for that of the master. However, I decline to deal with the matter in that fashion for the reasons I have indicated.
>
> [14] Nevertheless, even though I will treat the decision as interlocutory in character, this Court is not necessarily obliged to defer to the master's conclusion. If the decision is one of straightforward discretion, then, certainly, substantial deference is required. However, if the decision of the master involves a question of law, the standard of review must be correctness even though the matter involves an interlocutory issue such as the production of documents.

He noted that this approach was supported by the words of Fraser J. in *Northland Properties* (as quoted above), and concluded at para. 16:

> [16] In the present case, the master made his decision based upon an interpretation of the law as set out in the decision of the Supreme Court of Canada in *Juman*. In my view, it follows that this Court, sitting on appeal, should exercise a conventional appellate jurisdiction in which the legal issues may be considered and decided on their merits.

[47] In *Maedou Consulting Inc. v. 0887455 B.C. Ltd.*, 2016 BCSC 2246, Justice Pearlman dismissed an appeal from an order of a Master which concluded that the plaintiff had not waived privilege by filing an affidavit of its lawyer. At paras. 21-22, Pearlman J. helpfully distinguished the applicable standard when errors of law are alleged on such an appeal:

> [21] Failure to apply the correct legal test for waiver of privilege, or reliance on irrelevant considerations would constitute an error of law, which is reviewable on a standard of correctness: *Cliff v. Dahl*, 2010 BCSC 1998 at para. 21.
>
> [22] The question of whether the Master misapplied the correct test for determining whether there was an implied waiver of privilege is a question of mixed fact and law, reviewable on a standard of palpable and overriding error: *Mayer v. Mayer*, 2012 BCCA 77 at para. 188. On this question of mixed fact and law, the appellant bears the onus of establishing the Master's decision was "clearly wrong".

[48] The plaintiff referenced *Strother*, as establishing the standard of review on an appeal from a refusal to add a party to an action. In that case, Russell J. expressed concern about determining the appeal standard based on the result of the order appealed from, rather than the nature of the application:

> [19] …an asymmetry would emerge in the law: a Master's decision which added a party would be a purely interlocutory order, while a Master's decision which refused to add a party would be a final order. It is my view that any standard of review analysis should be based on the nature of the question before a Master, rather than the Master's answer to that question. I find that it would be inappropriate to introduce such an asymmetry into the law.

[49] Interestingly, the learned authors of Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. looseleaf (Markham: LexisNexis, 2007) at §55.4 (Appeals from Masters and Registrars), note at footnote 13 (in the context of the applicable test on appeal from an order of a Master) that:

> The general principles to be applied in determining whether an order is interlocutory or final were set out in *Burlington Northern Railroad Co. v.*

> *Canadian National Railway Co.*, [1994] B.C.J. No. 2485, 10 B.C.L.R. (3d) 302 (B.C.C.A.).

[50] In the *Burlington Northern* case, Justice Donald took the opposite approach from that adopted in *Strother*, albeit in the context of determining whether leave to appeal was required under the Court of Appeal Rules of the day. He noted the comments of the learned authors of Sopinka & Gelowitz, *The Conduct of An Appeal* (Toronto: Butterworths, 1993) at p. 15 that:

> As is evident from the foregoing, a particular order may be final if granted and interlocutory if refused, and vice versa – depending on the nature of the order and its effect on the status of the litigation between the parties.

Justice Donald concluded at paras. 11-12 that the court should focus on examining the effect of the order granted on the status of litigation.

[51] Justice Burnyeat adopted that approach, albeit in *obiter*, in *Isman v. New Westminster (City)*, 2012 BCSC 774, at para. 6, in which he was dealing with an appeal from an order of a Master adding a party:

> [6] The Order was an interlocutory order and not a final order. A final order in this context would have been a refusal to join Her Majesty, in which case the Plaintiff would have been the Appellant. If that was the effect of the Order, there would have been a rehearing on the merits. Because it was an interlocutory order, I must determine that the Learned Master erred in law or principle, or that the result was so plainly wrong on the facts as to work an injustice.

[52] In *Thom v. Laird Custom Homes Ltd*., 2017 BCSC 1577, Justice Williams cited *Isman* in concluding (at para. 16) that the appeal he was dealing with, from an order of a Master refusing to add a party, was a final order and as such the proper course was for the court to re-hear the application on its merits.

[53] Thus, there is conflicting authority on whether an appeal from a Master's refusal to add a party to an action should proceed on the basis that the underlying order is purely interlocutory or final.

[54] Given that the parties argued the case on the basis that the "clearly wrong" standard applied, I will consider it on that basis.

Addition of Parties / Amendment of Pleadings

[55] *SCCR* 6-2(7)(b) and (c) provides that:

> At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> …
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[56] The principles governing an application to add a party to an action were conveniently summarized by Justice Dley in *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16:

> 1) A party should be added where that party's participation is necessary for the proper determination of the case;
>
> 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters;
>
> 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined;
>
> 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties;
>
> 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action;
>
> 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried.
>
> [Citations omitted.]

[57] *Madadi v. Nichols*, 2021 BCCA 10, dealt with the appropriateness of adding parties against whom the claims were otherwise statute-barred. Justice Fisher, writing for the Court, commented at para. 21:

> [21] Rule 6-2(7)(b) has been interpreted narrowly, as being concerned with remedying defects in the proceedings. A plaintiff applicant must establish either that the proposed defendant "ought to have been joined as a party" or that their "participation in the proceeding is necessary": *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16–17; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15; and *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 at para. 36.

[58] In this case, while the plaintiff's original application recited both (b) and (c), the plaintiff on appeal focused its submissions on Rule 6-2(7)(c). With respect to that rule, Fisher J.A. commented at paras. 22-24 that:

> [22] Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45 [*Neilson Architects*]; *Strata Plan LMS 1816 v. Acastina Investments Ltd.,* 2004 BCCA 578 [*Acastina*]; and *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.) [*Binstead*]. I would define a frivolous issue as an issue that does not go to establishing the cause of action, does not advance a claim known to law, or serves no useful purpose and would be a waste of the court's time and public resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-5(1)(b): see, for example, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65, citing in *Willow v. Chong*, 2013 BCSC 1083 at para. 20.
>
> [23] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the proposed defendants. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendants: *Neilson Architects* at paras. 60, 62, and 75.

> [24] If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. In *Letvad*, this court adopted a list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A), a decision that addressed the amendment of pleadings after the expiry of a limitation period. These factors include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed new cause of action: *Teal Cedar* at para. 67; *Letvad* at para. 29; see also *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 21. In the context of adding parties, the last *Letvad* factor may be more accurately described as the extent of the connection, if any, between the existing claim and the parties to be added.

[59] Dealing specifically with the merits threshold, Fisher J.A. noted at para. 45:

> [45] I will begin by stating that I consider the appellants' reference to a "merits" threshold to create some confusion as to what is required in an application to add parties under Rule 6-2(7)(c). As discussed above, the threshold question is as described in *Neilson Architects* at para. 45: the plaintiff must establish that there is a real issue between the parties that is not frivolous, or a possible cause of action against the proposed defendants. This does not involve any assessment of the merits of the claim, other than to ensure that the pleading raises a legal issue in relation to the proposed defendant that is supported by sufficient material facts.

[60] At para. 46, Fisher J.A. went on to describe the existence of a limitation defence as an "important factor", referring to the *Neilson Architects* case at para. 47. Given that there is no limitation defence in this case, I provide here the full para. 47 from *Neilson Architects*:

> [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the *Limitation Act* is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.,* 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
>
> 1. <u>If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application</u>.

2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.

3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the *Limitation Act*.

[Emphasis added.]

Civil Claims Under the *EMA*

[61] The statutory liability which founds the plaintiff's claim in this matter is set out at s. 47 of the *EMA*, which provides:

> (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.
>
> …
>
> (5) Subject to section 50 (3) [minor contributors], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.
>
> …
>
> (9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:
>
> (a) whether a person is responsible for remediation of a contaminated site;
>
> (b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;
>
> (c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;
>
> (d) such other determinations as are necessary to a fair and just disposition of these matters.

[62] The question of who is a "responsible person" is set out in s. 45. For purposes of this action, the relevant portion is s. 45(2):

> … the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:
>
> (a) a current owner or operator of the site from which the substance migrated;
>
> (b) a previous owner or operator of the site from which the substance migrated;
>
> (c) a person who
>
> (i) produced the substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;
>
> (d) a person who
>
> (i) transported or arranged for transport of the substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.

[63] The word owner is defined in s. 39 to include "without limitation, a person who has an estate or interest, legal or equitable, in the real property".

[64] Section 35(2) of the *Contaminated Sites Regulation*, B.C. Reg 375/96, as amended, provides that:

> In an action between 2 or more responsible persons under section 47 (5) of the [*EMA*], the following factors 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.

[65] Section 46 of the *EMA* provides that certain persons who would otherwise be considered responsible persons are not responsible for remediation under specific circumstances. Only one provision of s. 46 was referenced in any of the materials before the Master or on appeal. This was s. 46(1)(d), which provides:

> 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;

[66] In its Application Response, 135 stated that:

> The *EMA* provides at section 46(1)(d)(iii) that an owner is not responsible for remediation of a contaminated site if the owner establishes that they did not, by any act or omission, cause or contribute to the contamination of the site.

[67] This assertion is clearly incomplete. The use of the conjunctive “and” between (i)(A), (B) and (C), and (i), (ii) and (iii) clearly indicates that <u>all</u> parts of this subsection must be met in order for it to apply. An owner who wishes to be “not responsible” pursuant to this provision must not only establish that they did not contribute to any contamination, they must also establish that at the time they became an owner, they had “no knowledge or reason to know or suspect that the site was a contaminated site”. In this case, the indemnity agreement, signed before 135 became an owner, clearly acknowledges its awareness of the ongoing litigation about site contamination.

[68] Section 50 provides another limitation on the broad joint and several liability imposed by s. 45. It limits the financial contribution that can be required of a person who meets the definition of a "minor contributor" – such person is only liable to contribute on a several basis, and only up to an amount or portion of remediation costs attributable to that person. The key provisions of s. 50 are:

> (1) A director may determine that a responsible person is a minor contributor if the person demonstrates that
>
> (a) only a minor portion of the contamination present at the site can be attributed to the person,
>
> (b) either
>
> (i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or
>
> (ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and
>
> (c) in all circumstances the application of joint and separate liability to the person would be unduly harsh.
>
> (2) If a director makes a determination under subsection (1) that a responsible person is a minor contributor, the director must determine the amount or portion of remediation costs attributable to the responsible person.
>
> (3) A responsible person determined to be a minor contributor under subsection (1) is liable for remediation costs in an action or proceeding brought by another person or the government under section 47 *[general principles of liability for remediation]* only up to the amount or portion specified by the director in the determination under subsection (2).

[69] A director is defined in s. 1 of the *EMA* as:

> a person employed by the government and designated in writing by the minister as a director of waste management or as an acting, deputy or assistant director of waste management

[70] The parties were agreed that, in applying these provisions to a civil action for recovery of remediation costs, it would be the court (and not the director) who would determine whether a party is a minor contributor.

[71] Two judgments of this court demonstrate the application of s. 50.

[72] In *Gehring*, a property that had been used as a gasoline station from 1940 to 1978 was subject to an order for remediation in 2004. The present owners, who

purchased the property in 1992, claimed against former owners and operators of the gas stations. They included a company, L&L, that sold gasoline from the site from 1963 to 1978, as well as two former directors. Ms. Filiatrault was a director of the company from 1977 onward.

[73] Justice Gray noted at para. 73 that Ms. Filiatrault was a director for a period of one year during which L&L carried on the retail sale of gasoline, and thus fell within the definition of “operator”, commenting at paras. 109-110:

> [109] About 66% of the contamination occurred during the 14.5-year period of operation by L. & L. Motors. Mr. Filiatrault was director throughout that period. Ms. Filiatrault was a director only for the last year, during which roughly 5% of the contamination occurred.
>
> [110] In the context of this lawsuit, with "responsible persons" representing about 38 years of ownership and 14.5 years of operation of a contaminating activity, only a minor portion of the contamination at the Property can be attributed to Ms. Filiatrault. The cost of remediation attributable to her would be only a minor portion of the total cost of the required remediation. In these circumstances, it would be unduly harsh to apply joint and separate liability to her. As a result, she has satisfied all the requirements of s. 50(1) and is a "minor contributor".

[74] With respect to allocation of responsibility, Gray J. concluded at para. 134:

> [134] There is no precise formula for allocating responsibility among the "responsible persons". All except Ms. Filiatrault are jointly and separately responsible for the entire cost of remediation. Weighing all the factors discussed earlier, responsibility should be allocated among "responsible persons" as follows:
>
> (a) L. & L. Motors and Mr. Filiatrault are jointly responsible for 50% of the total remediation costs;
>
> (b) Ms. Filiatrault is separately responsible for 5% of the total remediation costs, but her contribution will reduce the responsibility of the other members of the Filiatrault Group; …

[75] In *Dolinsky v. Wingfield*, 2015 BCSC 238, the plaintiff’s residential property was contaminated by oil migrating from her neighbour’s adjacent property in which an underground oil tank, purportedly decommissioned in 1981, had corroded and become perforated. Justice Wong found two previous owners of the neighbour’s property jointly and severally liable for remediation cost recovery to the extent of 50% and 35% respectively. He found the current owners of the source property, who

had acquired the property only two years before trial, to be minor contributors for which they were liable severally at 15%.

[76] Finally, I note s. 48, which gives the director authority to order that a responsible person remediate a site. It provides that:

> (1) A director may issue a remediation order to any responsible person.
>
> (2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:
>
> (a) undertake remediation;
>
> (b) contribute, in cash or in kind, towards the costs of another person who has reasonably incurred costs of remediation;
>
> (c) give security, which may include real and personal property, in the amount and form the director specifies.
>
> (3) For the purpose of deciding whether to require a person to undertake remediation under subsection (2), a director may consider whether remediation should begin promptly, and must consider each of the following:
>
> (a) adverse effects on human health or pollution of the environment caused by contamination at the site;
>
> (b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;
>
> (c) the likelihood of the responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;
>
> …
>
> (4) For the purpose of deciding who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a director, to the extent feasible without jeopardizing remediation requirements, must
>
> (a) take into account private agreements between or among responsible persons respecting liability for remediation, if those agreements are known to the director, and
>
> (b) on the basis of information known to the director, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account such factors as
>
> (i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and
>
> (ii) the diligence exercised by persons with respect to the contamination.

[77] The policy underlying the above series of provisions was described by Chief Justice Bauman in *Victory Motors*. He noted at para. 129 that even an innocent purchaser without notice can be the subject of an order made under s. 48. He went on to note at paras. 134-136:

> [134] In practice, the *EMA* appears to be administered in a manner consistent with a “remediate first, allocate liability later” approach that separates regulatory and financial considerations.
>
> [135] In *Seaspan ULC v. British Columbia (Director, Environmental Management Act)*, [2014] B.C.W.L.D. 6741, the British Columbia Environmental Appeal Board (“EAB”) wrote:
>
> > [8] The cleanup of contaminated sites in BC is governed by Part 4 of the EMA which is administered by the Ministry of Environment (the "Ministry"). The legislation provides the Director with broad powers to deal with contamination, including the authority to issue orders to any one or more persons responsible for the remediation of a contaminated site.
> >
> > [9] The Ministry encourages voluntary remediation, particularly when dealing with sophisticated parties in respect to a complex site. The overarching goal of the EMA is to encourage and, if necessary, require responsible persons to remediate the contamination in a timely and effective manner and to take steps to protect the environment from further degradation. A remediation order is usually issued as "a last resort" when efforts by the Ministry to persuade responsible persons to undertake voluntary remediation have failed.
> >
> > [10] The EMA imposes joint and several liability on all responsible persons, subject to some exceptions or limitations. It contemplates that disputes among responsible persons with respect to liability, and the allocation of cleanup costs will, ultimately, be resolved in a cost recovery action in the BC Supreme Court. The EMA encourages responsible persons to deal with environmental contamination and damage resulting therefrom quickly, and to determine the monetary issues later.
> >
> > [Emphasis added.]
>
> [136] Of course, there has been some criticism that the imposition of the initial financial burden of remediation is unduly harsh where there are other “more responsible” responsible persons. Justice D. Smith addressed these concerns in *First National Properties Ltd. v. Northland Road Services Ltd*., 2008 BCSC 569:
>
> > [54] However, the legislature has spoken. As Huddart J.A. in *Workshop* noted at [para.] 26, "that a court's interpretation and application of any statutory scheme should advance not hobble the integrity of the scheme and that a legislature's intention as to who should decide what is to be respected." The Act authorizes governmental officials to issue remediation orders against those who, in their view, are responsible person(s) for the cleanup of contaminated lands, and permits owners or operators of contaminated sites to voluntarily clean up their

> properties and thereafter recover their reasonable remediation costs from other responsible persons.
>
> [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.
>
> [Emphasis added.]
>
> The status based, rather than fault based, approach is relevant to Part 4 of the *EMA* in its entirety. If a party falls into the ambit of s. 45, they fulfill the status requirements of a responsible person for the purposes of participating in any number of regulatory mechanisms, such as being subject to a remediation order (s. 48), seeking an approval in principle for a remediation plan (s. 53), and carrying out an independent remediation (s. 54). The s. 46 exemptions are only applicable if established before a decision maker on a balance of probabilities. The harshness of the scheme, in this respect, is mitigated in the cost-recovery process. It is not perfect, but as Justice Smith remarked, “the legislature has spoken.”

Analysis

[78] The plaintiff on appeal focused their submission on the test under *SCCR* 6-2(7)(c), which is sensible given the comments of Fisher J.A. that it is “broader and more commonly relied on”. This then requires consideration of whether:

a) There may exist a question or issue between the plaintiff and 135 relating to or connected with the relief claimed or the subject matter of the existing proceeding; and

b) iI would be just and convenient to determine that question or issue in this proceeding.

A Question or Issue Relating to or Connected With

[79] The Master began para. 33 of his Reasons with the words “for the reasons set out in my review of 135’s submissions”. I infer from this that in seeking to understand the basis for the conclusions set out in paras. 33-34, the reader must look to the summary of the submissions made by 135, set out at paras. 20-29.

[80] At paras. 33-34 of the Master's Reasons, he concluded that:

a) All of the possible responsible persons are currently before the Court, and it seems highly unlikely that 135 would be found liable to contribute to the remediation, as they only recently purchased the property, and

b) In any event, any liability of 135 "would be imposed on Burnaby".

[81] I will begin with the first of these two conclusions. It seems to be implicit in these assertions of the Master that he concluded that there is no way that 135 could be found to be a responsible person.

[82] 135 is the current registered owner of 4429. Thus, it *prima facie* falls within the language of s. 45(2)(a), and would therefore be a responsible person.

[83] Statements in the Master's summary of the submissions of 135 that might relate to the Master's conclusion to the contrary include:

a) That 135 did not cause or contribute to the alleged contamination of 4451 (para. 20), and that the *EMA* provides that an owner is not responsible for remediation of a contaminated site if the owner establishes that they did not by any act or omission cause or contribute to the contamination of the site (para. 23);

b) That, in connection with the indemnity agreement, 135 would not be liable for any damages (para. 21); and

c) That because s. 48 allows the director to designate as responsible persons those who contributed to the contamination, and to take into account the degree of involvement of each such person, 135 "would not logically be named by a director as a responsible person" (para. 24 & 29).

[84] In addition, various statements in the summary reflect suggestions that 135 might be deemed to be a minor contributor pursuant to s. 50 of the *EMA* (para. 23). The Master stated that a minor contributor is responsible only for the remediation of

costs attributed to them (para. 25), and noted that in *Gehring*, the company that operated the contaminated site for only one year was found to be a minor contributor responsible only for 5% of the remediation costs (para. 26). The Master noted at para. 28 the submission of 135 that "[i]f the duration of ownership applied, the percentage would be practically non-existent".

[85] Finally, with respect to the indemnity agreement, the Master notes at para. 21 the submission of 135 that because of the indemnity agreement, 135 "is not required for the litigation of this proceeding".

[86] In my view, the Master was clearly wrong when he concluded that "all of the possible responsible persons are currently before the court". It appears to me that he was led into this error by the partial recitation by 135 in its Application Response of s. 46(1)(d)(iii). The parallels between the language used in the paragraph in the Application Response (which I have quoted above at para. 66), and what the Master said in para. 23 of his Reasons, are striking.

[87] 135 is the current owner of the site and is a responsible person pursuant to s. 45(2)(a). As noted above at para. 67, the indemnity agreement makes clear that 135 was aware of this action before becoming an owner. Thus, s. 46(1)(d) does not appear to be available to it. No other exclusions in s. 46 were raised by the parties, and none appear to be of any application.

[88] If the Master is suggesting that s. 48 allows a court in an action like the present to deem a current owner not to be a responsible person, that interpretation is incorrect. Section 48, on its face, deals with the ability of the director to issue remediation orders. In issuing such an order, the director may choose to focus its order on any one or more of the available responsible persons. Section 48 clearly distinguishes between a responsible person and a person who may be required to undertake a remediation. The fact that the director might choose in any particular case to focus on one but not all of the available responsible persons for purposes of a remediation order does not mean that the others cease to be responsible persons. Nor does it exclude them from a subsequent civil claim for contribution to the costs

of remediation. Section 48(4) provides guidance to the director in determining which responsible person should be ordered to undertake the remediation, but it does not release other responsible persons from liability. See the discussion of this issue in *Victory Motors* at paras. 131-140.

[89] I now turn to the indemnity agreement. It is a private arrangement between two parties who appear, on the facts of this case, to both be responsible persons. The plaintiff is not a party to it. As a general rule, an agreement between two parties liable with respect to a particular cause of action does not affect the ability of the party holding that cause of action to claim against all those who are liable.

[90] In the indemnity agreement, Burnaby agrees to indemnify 135 against any liability it may be found to have to the plaintiff. Burnaby does not agree to indemnify the plaintiff against any liability that might have been attributable to 135 had it been a party. That means that if the plaintiff is not able to bring a claim against 135, preventing it from obtaining a judgment against 135, then there would be no liability for the indemnity agreement to attach to.

[91] The scheme of the *EMA* allows a party seeking contribution for remediation costs to bring that claim against all responsible persons. There is nothing inappropriate with a plaintiff seeking to include all persons who appear to be responsible persons as defendants. Its decision to do so may be motivated in part by wanting to ensure that the defendants it obtains relief from have sufficient assets to satisfy the judgment debt.

[92] The defendants argued in this case that it was somehow inappropriate for the plaintiff in this case to join 135, being motivated in part by concerns that Burnaby, having sold its primary asset, might not be able to fully satisfy any judgment. This is not a case where a party who has a cause of action against only one entity seeks to claim against others just for purposes of obtaining some sort of pre-judgment security for their anticipated judgment. If that was the case, then it might have been open to the Master to consider whether there was an improper collateral purpose for

such a claim. Here, the pleadings state a claim that appears on its face to fall directly within the applicable statutory provisions.

[93] I turn finally to the question of whether 135 might be successful in being characterized as a "minor contributor" – and if so, whether that makes any difference on an application to join it as a defendant.

[94] It does appear to me that 135 has a reasonable prospect of success in limiting its responsibility to that of a minor contributor. However, a minor contributor may still be found liable for some portion of the remediation costs. In both *Gehring* and *Dolinsky*, minor contributors who owned the property for only one or two years were ordered to contribute from 5% to 15% of the costs. It seems clear from those judgments that minor contributors are appropriately joined as defendants to an action like the present.

[95] I recognize that 135 may want to argue that its contribution should be even less than the 5% ordered in *Gehring*. It may or may not succeed in that position. That is something that the court at a trial of this matter may determine after hearing the evidence and full arguments on the law. As noted in *Madadi* at paras. 22-23, the role of the court at this point is to determine whether there is a real issue between the parties. As stated at para. 45:

> [45] …This does not involve any assessment of the merits of the claim, other than to ensure that the pleading raises a legal issue in relation to the proposed defendant that is supported by sufficient material facts.

[96] The fact that a party may only be responsible for 5% or 15% or perhaps less of a claim is not a basis to refuse to allow that claim to go ahead. The Master did not make a finding that the plaintiff's claim was frivolous, and in my view the fact that any potential claim may end up being for less than the full amount claimed against other parties does not make such claim frivolous.

[97] In my view, the conclusion of the Master that the plaintiff's claims against 135 could not succeed was clearly wrong.

Just and Convenient

[98] The extent to which the Master considered the "just and convenient" standard is not apparent. It may be inherent in the suggestion that 135 would not have "anything of substance to add to the trial" (para. 33), and that it has "no necessary relevant information to provide to enable effective litigation of these proceedings" (para. 20).

[99] To the extent either of these comments flow from the Master's conclusion that 135 could not be a responsible person, they are wrong for the reasons set out above. And while I agree that it would be a relevant consideration on the just and convenient issue if the only purpose for adding 135 was to provide relevant information, for the reasons set out above it is clear that is not the case.

[100] In his description of the applicable test at paras. 17-19, the Master did not list any specific factors that address the question of whether it is just and convenient to add a party under Rule 6-2(7)(c). While he referred in para. 19 to considering whether a party's participation is "necessary", I read that as a reference to Rule 6-2(7)(b).

[101] As noted in *Neilson Architects* at para. 47 (quoted above), where there is no accrued limitation defence, "the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application."

[102] The Master did not identify in his Reasons whether there was an accrued limitation defence. In submissions on appeal, it was not disputed that there could not be a limitation issue, given that 135 did not attain the status of owner until a few weeks before the application was made.

[103] The Master did not consider the fact that it was open to the plaintiff to bring a separate action against 135, or whether it would be more convenient to have one or two actions.

[104] In considering that question, the factors considered on an application to have two actions heard together become indirectly material – as recently summarized in *Callan v. Cooke*, 2020 BCSC 290 at para. 124, they include whether having actions heard together will:

1) create a saving in pre-trial procedures;
2) reduce the number of trial days taken up by the actions heard together;
3) avoid serious inconvenience to a party being required to attend a trial in which they only have a marginal interest;
4) save the time and witness fees of experts;
5) dispose of all actions at the same time due to common issues of fact or law;
6) avoid a multiplicity of proceedings; and
7) whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the party opposing consolidation;

bearing in mind:

8) the relative stages of the actions;
9) whether the trial will be delayed and prejudice one or some of the parties; and
10) whether the refusal to consolidate risks inconsistent results.

[105] In this case, having all claims dealt with in one action will avoid a multiplicity of proceedings and shorten the overall number of hearing days. The key factual issues appear to focus around whether and to what extent chemicals from 4429 have contaminated the soil under the Plaintiff's Property. Another factual issue will be the nature and extent of the remediation costs being claimed by the plaintiff. Both of those will be common issues both in respect of the plaintiff's claims against Burnaby and its claims against 135. Having all claims dealt with together will allow for one determination with respect to each of those matters, based on hearing the relevant experts testify only once. It will avoid the risk of inconsistent results.

[106] It would also be just and convenient, in a case such as the present, for one judge to consider the overall allocation of the costs of remediation amongst all of the responsible persons.

[107] The downside of having the claims tried together in this case is that 135, which may have lesser ultimate responsibility than other responsible persons, will be a participant in what is currently scheduled to be a 14-day trial in which others have a much larger stake. In my view, the existence of the indemnity agreement in this case ameliorates the impact of that factor. Given that Burnaby has agreed to "fully defend, indemnify and hold harmless" 135 with respect to this action, there is scope for 135, to the extent it requires separate counsel, to have that counsel take a limited role in the trial and address only issues that are unique to it.

[108] The only issue that is added by including 135 within the action is the question of whether it is a minor contributor. The parties did not identify any factually complex evidence that would underlie that issue. Rather, its determination will depend on a review of the general factual matrix and specific legal submissions addressing that point, which should not add any significant amount of time to the length of trial.

[109] Finally, at the time this matter was before the Master, the impact of adding a new defendant on the then-impending trial date was a relevant consideration. However, the Master concluded at para. 35 of his Reasons that he would not have considered the unavailability of trial counsel as a basis to dismiss the application.

[110] Other than the last of these matters, the Master failed to consider any of the issues that, in accordance with *Neilson Architects*, are the key focus of the just and convenient inquiry in a case in which limitation periods are not in issue. Presumably that is because he saw it as unnecessary given his conclusion on whether there was a question or issue between the plaintiff and 135 relating to or connected with the relief claimed or the subject matter of the existing proceeding.

[111] For the reasons I have set out, it seems clear to me that a review of these factors would have inevitably led to a conclusion that it was just and convenient to add 135 as a defendant.

Conclusion

[112] I would allow the appeal and grant the application of the plaintiff to add 135 as a party and to amend the notice of civil claim as proposed in its notice of application.

"Veenstra J."