

Key Takeaways from One of Canada's Largest Subrogation Trial Judgments

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Background

On July 17, 2007, a pipeline leak was discovered by ISH Energy Ltd. ("ISH"). The leak occurred at ISH's Desan Field, located in Northern B.C. The ensuing investigation revealed several leaks on three different pipelines. The leaks caused a substantial amount of damages, consisting of environmental clean-up costs and pipeline repairs. ISH had contracted with Weber Contract Services Inc. ("Weber"), to operate and maintain the Desan field. ISH determined that the leaks had been caused by Weber's failure to properly maintain the pipelines, and by causing an over-pressurizing of the field. ISH and its subrogating insurer commenced an action in Alberta against Weber for their losses arising from the leaks. The trial for this matter was heard in early 2018. On March 28, 2019, the Honourable Justice Gillian D. Marriott released her trial decision and found in favour of ISH. Weber was found fully liable for the leaks, and ISH was awarded approximately \$24M in damages. This represents one of the largest subrogation trial awards in Canadian history, and hence would be of considerable interest to the insurance industry. [Raj Datt](#) of WeirFoulds was counsel for ISH during the course of the action, and was also lead counsel at the trial.

The Trial

At trial, ISH advanced two principal liability arguments against Weber. Firstly, ISH alleged that Weber failed to properly maintain the pipelines. The second argument was that Weber's workers had pinched or closed an inlet valve at the plant, which then caused an over-pressurization of the lines. Mike Hylton, P. Eng, was called as an expert by ISH to provide an opinion on the cause of the leaks. Mr. Hylton testified that the leaks were an instantaneous event, and was caused by a combination of internal corrosion and an over-pressure occurrence. He conducted a failure analysis on the subject pipelines, and found that even with the presence of severe corrosion, the pipes would not fail unless subjected to pressure in excess of the maximum operating pressure of the lines. Mr. Hylton opined that the most rational explanation for the over-pressure was a fully or partially closed inlet valve at the plant. ISH also called as an expert witness an Acuren materials engineer named Eric Dowdle. Mr. Dowdle examined the failed sections of the pipeline, and concluded that there was internal corrosion that was most likely the result of microbiologically influenced corrosion.

In regards to the maintenance of the pipelines, ISH argued that Weber was required to apply corrosion inhibitor chemicals, and to regularly pig the lines. The trial judge rejected Weber's assertion that ISH did not require the consistent use of corrosion inhibitors. ISH called as a witness a former representative of their chemical supplier, Enerchem. The Enerchem representative would attend at the Desan Field on a monthly basis from 2000-2003. He delivered drums of corrosion inhibitor to the Field, and testified that the Weber workers were very young, inexperienced, and very nonchalant in terms of their use of the supplied chemicals. With respect to pigging, ISH reviewed the Plant log books for the years prior to the leaks. This review revealed that each year, only 1-4 instances of pigging were recorded for the main line (the requirement was that this be done 24 times per year). The trial judge found that Weber failed to pig the lines in accordance with the pigging schedule mandated by ISH, and also failed to properly apply corrosion inhibitors. These failures were held to have caused or contributed to the development of significant internal corrosion in the pipelines.

ISH presented evidence at trial that after the leaks, witnesses observed that the leaked oil was fresh, and that the surrounding vegetation was green and unstressed. Further, the leaks on the main line were discovered only metres away from a service road which was travelled by Weber workers several times per day. As well, witnesses observed several instances of trapped, high pressure in the lines shortly after the leaks were discovered. ISH also relied on a chart recorder, located at the plant, which showed several instances where emulsion from the main line abruptly reached zero a day before the leaks were discovered. ISH argued that the chart recorder demonstrated that the inlet valve had been closed by Weber. In addition, ISH's evidence was that there was an established practice amongst Weber's workers that it was permissible to pinch or close the inlet valve at the plant. Ultimately, the trial judge accepted Mr. Hylton's opinion that the leaks were caused by a high pressure event, occurred simultaneously, and were caused or contributed to by Weber employees closing the inlet valve and failing to properly maintain the pipelines.

The trial judge rejected a number of legal arguments advanced by Weber. Firstly, Weber asserted that ISH was guilty of spoliation. The pipe samples examined by Acuren had been inadvertently destroyed while in Acuren's possession. With the exception of one case, ISH had expressly instructed Acuren to maintain the samples. Hence, the trial judge found that spoliation did not apply, as there was no evidence that ISH intentionally destroyed, or intentionally instructed others to destroy, the pipeline samples. Secondly, ISH presented evidence at trial which demonstrated that there was an established practice amongst the Weber operators regarding the closing of the inlet valve. Weber argued that this evidence should be disallowed on the basis that it constitutes similar fact evidence. ISH successfully argued that the probative value of this evidence outweighed any prejudicial effect. Thirdly, Weber argued that ISH's claim should fail because there was no expert evidence on the effectiveness of ISH's maintenance program. This defence was rejected since ISH had provided instructions to Weber in regards to the required frequency of pigging and the use of corrosion inhibitors. The contract between ISH and Weber established the required standard of care, and Weber had failed to abide by its contractual obligations. Finally, Weber maintained that ISH was contributorily negligent in regards to the maintenance of the pipelines. The trial judge also dismissed this argument, as Weber had lead very little evidence in support of their allegations, and did not even refer to this argument in their written submissions.

Key Takeaways

ISH's argument regarding the closing of the inlet valve relied in large part on circumstantial evidence. Weber sought to defeat this aspect of ISH's claim based on the testimony of one of their plant operators. The plant operator flatly denied ever closing the inlet valve during the relevant time period. However, it is critical to assess the credibility and reliability of such witness testimony (the trial judge found that the operator was not entirely reliable). As well, in determining causation, the Court will look at all of the relevant evidence. If such witness testimony is at considerable odds with common sense, forensic evidence, and the circumstances surrounding the loss, then your reliance on such evidence could cause great peril to your claim or defence.

ISH succeeded in convincing the trial judge that Weber had not properly maintained the pipelines. Weber's defence to this claim rested almost exclusively on witness testimony from field operators who testified that they recalled adhering to the maintenance schedule. However, the evidence of these witnesses did not square with the Desan Field plant books, which in contrast demonstrated a very poor frequency of maintenance activities by Weber. Hence, the importance of proper record keeping cannot be over emphasized, and can play a decisive role in the Court's assessment of the evidence and arguments submitted by the parties. In analyzing such evidence, one should keep in mind a proverb which states that "the faintest ink is more powerful than the strongest memory".

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The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific

situations, the reader should seek professional advice.

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