THE POLLUTER DOES NOT ALWAYS PAY: ENVIRONMENTAL LIABILITY OF PROPERTY OWNERS

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Environmental contamination is a multi-faceted and complex issue with different bases of liability, particularly against the landowner. Leaving aside regulatory liability,[1] civil claims against landowners for remediation or compensation arising from environmental damage may be brought by tenants, neighbours or future owners. Multiple legal bases are available to recover such losses, including negligence, nuisance, trespass, strict liability,[2] and under the Ontario *Environmental Protection Act*.[3] Due to the fact-dependent nature of these claims and the limited case law available as guidance, these situations can be especially difficult to navigate while the cost consequences can be significant.

In this Bulletin, we explore the three primary situations in which a landowner can be held civilly liable for contamination on or sourced in its property: (1) where the landowner is the occupier of the property; (2) where the landowner has purchased polluted property; and (3) where a tenant caused contamination of the property. We then discuss strategies and best practices for landowners to reduce their environmental risk.

Scenario 1: Landowner-Occupier is the Polluter

Where landowners who are also the occupiers of the land cause or are responsible for the contamination at their property, they are obligated to take proactive and mitigative steps to prevent the contamination from causing an adverse effect to the environment (e.g., entering watercourses, impacting drinking water wells, entering into the building on site through indoor air, etc.) or migrating off-site to abutting or downstream lands.[4]

Where such contamination has migrated off-site, the landowner will be exposed to the broadest range of liability. In these circumstances, the landowner can be required to pay significant damages, including for the costs of remediating the neighbouring properties to their pre-contamination condition, preventing or mitigating the continuing migration of contaminants off-site (which often includes remediation of the source property), the loss in value of the impacted parties' properties/assets, as well as the legal costs of the impacted party bringing the lawsuit against the landowner. Given the complexity and limitations of environmental remediation strategies and technologies, the level of public awareness with respect to the protection of the

environment, and the potential long-term harm caused by polluting events, damages awarded in these cases can quickly reach several millions of dollars.[5]

In *Canadian Tire v. Huron Concrete* ("***Canadian Tire***"),[6] Huron Concrete operated a private fuel outlet on its property and failed to adequately test and monitor the underground gasoline storage tanks for potential leaks or spills (as required by provincial regulations). Consequently, the stored gasoline leaked into the property and migrated onto neighbouring lands. Huron Concrete was ordered to pay its impacted neighbour just over $4.8 million in damages plus legal costs.[7]

Similarly, in *Midwest Properties Ltd. v. Thordarson* ("***Midwest***"),[8] the defendant company improperly stored petroleum hydrocarbons on its property for nearly 40 years without appropriate approvals and in excess of permitted amounts. It also ignored various orders issued against it by the Ministry of Environment and Climate Change to store waste properly, limit waste volumes, and to retain a qualified person to prepare and complete an environmental subsurface investigation and restoration program. While the defendant company had taken some of the ordered actions, these were conducted outside of the specified timeframes and did not include remediation of the plaintiff's property, as had been ordered. As a result, the company and its owner were required to pay over $1.3 million in damages to the impacted neighbouring property, jointly and severally. An additional $50,000 in punitive damages was also awarded against each of the defendants.[9] Had the defendants in this case and in *Canadian Tire* taken proper steps to prevent and/or clean-up the contamination they caused, they may have significantly reduced the financial costs awarded against them.

Given the significant environmental and financial consequences of these issues, it is imperative that landowners act responsibly and diligently and take proactive steps to reduce the likelihood of such incidents occurring. This can also help reduce the extent of damage caused to the environment and neighbouring properties.

Scenario 2: Landowner Purchases Polluted Property

Landowners who purchase contaminated property can also be found liable for the impacts resulting from the contamination on their property *despite* not having caused the contamination. In particular, where a landowner knows or ought to have known of the contamination and its migration but fails to address it, liability will arise. In these circumstances, the "polluter pays" principle does not prevail because it would otherwise leave affected parties without a remedy when the landowner refuses to take steps to address the impacts originating from their property.[10]

In *MTD v. 1361821 & Sandal*,[11] the defendant company was notified of contamination migrating from its land to the neighbouring properties but failed to take any remedial steps for 20 years. As a result, the court required the defendants to pay $1.8 million in damages, to indemnify its impacted neighbour for all legal, investigatory,

remedial and preventative measures associated with the remaining remediation of the neighbour's property, to remediate its own property and, if such remediation and indemnification were not performed, to pay an additional $2.8 million to the plaintiff.[12] Similar to the *Midwest* case, the court in this case pierced the corporate veil, holding the director personally liable along with the company.[13] This demonstrates the court's willingness in the environmental context to hold key individuals at a company personally liable and highlights the need for these individuals to assume an elevated level of care.

Where property has been contaminated by a past tenant or landowner, plaintiffs also frequently bring suit against previous owners and occupiers of the property.[14] Therefore, even if a landowner has sold its contaminated property, it is not immune from liability. The extent of liability of previous owners will be fact-dependent. Since environmental contamination can go unnoticed for several years, there are exceptions to the standard 15 year ultimate limitation period for undiscovered environmental claims. These exceptions allow impacted parties to bring environmental claims sometimes decades after the polluting incident occurred. For more on this topic, please read our Bulletin: *Just the Facts Please! A Discussion of Limitation Periods for Environmental Claims*.

While landowners who purchase polluted property may be able to recover their losses from the seller or other prior owners or occupiers of the property, the availability of this remedy is dependent on the specific factual circumstances of the landowner's acquisition of the property, its conduct post-acquisition, the knowledge of the landowner and other parties implicated, as well as the terms of any agreements between them.

Scenario 3: Contamination Caused by a Tenant

Generally, mere ownership of property does not establish a relationship close enough to hold landowners liable for the actions of their tenants that affect neighbouring lands.[15] Moreover, property owners do not have a general duty to monitor the activities of their tenants or ensure their legal compliance.[16] However, if the contamination complained of is contemplated by the lease or is foreseeable to or known by the landowner, the landowner can be held responsible for the resulting environmental harm, alongside the tenant.[17]

Thus, if a landlord and a tenant provide in their lease that contamination is "inherently part of the activity to be undertaken on the property," the landowner may be held liable for environmental harm caused by the tenant.[18] Landowners must therefore carefully consider the land uses that they will permit tenants to undertake on their land. Where certain activities necessarily entail a high risk of contamination (e.g., storage of chemicals or fuels), it may be appropriate to contractually prohibit or limit such uses, or take other precautions to monitor the risk of potential spills.

Landowners can also be held liable if they are aware of hazardous activities at their property and fail to intervene to stop or correct the conduct. In *Durling v. Sunrise Propane Energy Group Inc.*,[19] the court held

that the landowners were not immune from liability for a propane explosion caused by their tenants. This is because the landowners had knowledge of prolonged unsafe and illegal conduct of the tenant. Furthermore, the court reasoned that as the landowners they had an ability to control, manage or reduce the risk of such explosion.[20]

In these cases, landowner liability can be reduced by taking adequate precautions and investigating the circumstances of potential contamination or hazardous activities. For example, the landowners in *Sorbam Investments Ltd. v. Litwack Estate*[21] were not liable for contamination caused by their tenant because they had no knowledge of the contamination or any reason to suspect it and, when they finally did discover the issue, they retained a qualified expert to investigate the contamination and then acted on the expert's recommendations.[22] An important takeaway from this case is therefore that where a landlord has knowledge of a potential environmental issue this will often trigger a *positive* obligation to investigate to confirm whether the issue in fact exists and, if so, to take the necessary steps to address or correct it.

Key Takeaways & Best Practices

As a landowner, it is critical to understand the environmental risks arising from the activities carried out at your property and to take proactive steps to investigate and remediate any potential concerns identified. This is particularly important given that officers and directors are also at risk of liability – even when the responsible company is also liable (and solvent). Prudent landowners not only react and remedy contamination once found, but they also take proactive steps to prevent contamination that may spread to neighbouring lands or adversely impact the environment.

Where a party is considering purchasing real estate, environmental due diligence is key to ensuring that the purchaser understands the environmental condition of the property and its associated risks. These investigations can disclose potential off-site or subsurface contamination, indoor air impacts, and limitations or additional costs associated with renovation or development of the property, all of which may reduce property value and the purchase price. While many experienced purchasers are comfortable owning contaminated real estate, this pre-transaction due diligence allows a party to understand the true value and liability risks (or lack thereof) associated with a property before the transaction is completed.

Some additional best practices we recommend to help reduce environmental liability as a landowner include:

- Know what environmental regulations and permitting requirements apply to the facilities and activities on the property.
- Implement a comprehensive Environmental Management System including appropriate procedures and policies to ensure:
    - compliance with environmental regulations;

  - regular inspections of hazardous materials and waste stored and used at the property;
  - good record-keeping and housekeeping practices; and
  - appropriate training for company personnel.
- When leasing property, confirm the intended use and risks associated with the tenant's proposed activities and business, investigate potential environmental issues at the leased premises when discovered, incorporate provisions in the lease dealing with environmental issues and their allocation, and conduct entry and exit environmental investigations to be able to confirm whether the tenant caused or contributed to any contamination at the property during the lease term.
- When an environmental issue does arise, retain a qualified environmental consultant and environmental lawyer to assist with the investigation, spill response and risk management.
- Where a spill, leak, release or discharge of contaminants to the environment (which can include indoors) occurs, respond quickly and take necessary steps to mitigate or prevent environmental impacts, including calling your experts (the environmental consultant and lawyer).

[1] Environmental matters in Canada are regulated at the federal, provincial and municipal levels of government. Regulatory liability and enforcement actions for non-compliance with environmental laws and regulations, including, orders, directions, prosecutions and penalties/fines, can arise separately or concurrently with civil environmental liability.
[2]*Rylands v. Fletcher*, [1868] UKHL 1, L.R. 3 H.L. 330 (U.K. H.L.).
[3] *Environmental Protection Act,* RSO 1990, c E.19.
[4] There will also be reporting obligations to the regulator regarding any spill, release, discharge or leak incident that resulted in contamination of property.
[5] *Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd.*, 2014 ONSC 288 (CanLII).
[6] *Ibid*.
[7] *Ibid* at paras 91-94, 321 & 322.
[8] *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 (CanLII).
[9] *Ibid* at paras 12-14, 32-36 & 125.
[10] *Sorbam Investments Ltd. v. Litwack*, 2021 ONSC 5226 at paras 82 & 157 (CanLII).
[11] *MTD v. 1361821 & Sandal*, 2022 ONSC 2995 (CanLII).
[12] *Ibid* at paras 9, 160 & 188.
[13] *Ibid* at para 165, citing *Tompkins Mews Inc. v. 1332334 Ontario Inc.*, 2006 CanLII 42589 at para 32 (Sup Ct J).
[14] *Albert Bloom Limited v. London Transit Commission et al.*, 2021 ONSC 6674 (CanLII); *Sorbam Investments Ltd v Litwack*, 2017 ONCA 850 (CanLII).
[15] *Sorbam Investments Ltd. v. Litwack*, 2017 ONSC 706 (CanLII), at para 42 [*Sorbam*], citing *Durling v. Sunrise Propane Energy Group Inc.*, 2013 ONSC 5830 (CanLII), at para 93 [*Durling*].

[16] *Sorbam*, *supra* note 15 at para 59.
[17] *Durling*, *supra* note 15 at para 49.
[18] *Sorbam*, *supra* note 15 at paras 31 & 33, citing *Durling*, *supra* note 15 at paras 49 & 54.
[19] *Durling v. Teskey*, 2014 ONSC 1041 (CanLII).
[20] *Ibid* at para 13.
[21] *Sorbam*, *supra* note 15.
[22] *Ibid*, at para 65.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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