

Innocent parties CAN be held responsible for environmental clean-up

Imagine having your property contaminated by your neighbour, then being ordered by the ministry to clean it up! Can it happen? Absolutely.

In the May 28, 2012 decision of *Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment*, the Divisional Court affirmed the Environmental Review Tribunal (ERT) November 2009 decision. The result is that the Ministry of the Environment (MOE) may order innocent parties who are *not* responsible for discharging pollution into the environment to clean up the contamination that has impacted their own property.

The court confirmed the obligation for remediating the contamination rested with the property owners, and they were left to seek recourse from the party responsible for the contamination by commencing a court action.

Background

This case started with the MOE issuing a provincial order against the City of Kawartha Lakes to remediate furnace oil that had impacted the city's property from a local resident's basement and to prevent further discharge. The source of the contamination was a basement of a residence adjacent to the city's roadway. The furnace oil entered the city's municipal storm sewer system and culverts, and was further discharged into a lake. It was not disputed that the city was not the source of the discharge. In fact, prior to the MOE issuing this

order against the city, the MOE issued an order against the homeowner; and, even though the homeowner had taken action to remediate the contamination, the contamination continued to spread to the city property.

On April 24, 2009, the city filed a notice of appeal with the ERT that sought to revoke the order, thereby releasing the city from the requirement to remediate the contaminated property. This appeal centred on the question of what considerations must be made when issuing a clean-up order under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the EPA) with respect to owners of contaminated land who had absolutely no responsibility for the contamination. One of the main issues that was brought up during the appeal was whether or not the director's order was "unfair, unreasonable, and contrary to the 'polluter pays' principle," which is considered one of the fundamental principles that governs orders under the Act.

The city argued that the director's order was unfair because they were an innocent party in the situation, which was a fact that was not disputed by anyone involved. The city also argued that the contamination that occurred was the result of inaction on the part of

the homeowners, who, if they had acted quickly enough, could have prevented the spill from spreading and contaminating the city's land. The city argued that the polluter pays principle should be applied, meaning the city would not be responsible for remediating the contaminated land.

ERT Decision

The tribunal found that the fundamental purpose of the Act was to protect the environment and, in this particular case, an examination of the circumstances that gave rise to the contamination would in fact undermine this very purpose. Even though holding the city accountable would mean that an innocent owner would be held responsible for the clean-up and prevention of contamination, the primary purpose of the Act would still be adhered to. This is because, when the legislature originally enacted the Act, it accepted the fact that



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1 The full ERT 2009 decision can be accessed at: <www.ert.gov.on.ca/files/ORD/09007o4.pdf>. The full Divisional Court 2012 decision can be accessed at: <<http://canlii.ca/t/fthhk>>.

there may be some unfairness to innocent owners that was justified to protect the environment and to prevent further unfairness to others that could result due to a compromised environment.

An important document considered was "The Compliance Policy." This policy was prepared by the MOE and contains specific provisions that deal with innocent owners who are affected by orders that are issued. In accordance with that policy, any current owners of contaminated property should be named in an order, whether they are innocent or not, if it would serve to improve and protect the environment. If there was no environmental purpose that would be served by naming the innocent owner, then they should not and need not be named.

In the city's appeal, they also relied upon a previous decision, which held that property owners could be relieved of liability for clean-up orders if the owners proved they did not cause the contamination. This led to what is known as the "fairness factors." Unfortunately for the city, in this case, the ERT found that any evidence brought forward by the city to prove the land-

owner was responsible for the discharge of the contamination was irrelevant.

The reasoning given was as follows:

- ▶ The application of the fairness factors would thwart the purpose of the EPA to protect and conserve the natural environment.
- ▶ Any consideration of the fairness factors must yield to the importance of responding quickly to environmental problems and furthering the purpose of the EPA.
- ▶ The fairness factors have been replaced by the MOE's Compliance Policy, which provides guidance to MOE staff when exercising their authority. The policy contemplates that orders can and should be made against victimized and innocent owners with the timing and content of the order being adjustable to reflect unusual and exceptional circumstances.
- ▶ The city has recourse in the courts to resolve the question of fault and liability.

The ERT held that the city could only be relieved from compliance with the order issued if they presented a solution that was fair to the environment

and fair to those affected by the contamination. The city has given notice that it will seek leave to appeal the Divisional Court's decision, which upheld the MOE order.¹

Implications for Innocent Landowners

This decision has important implications for innocent landowners. Landowners who have no control over the property from which contamination originates are exposed to substantial risk. Landowners, and especially municipalities, who own large amounts of land adjacent to potential contaminating sources need to be aware of the potential liability and keep informed.


If the MOE is involved with a neighbouring property, the adjacent landowner should put the MOE on notice that they are aware there is a potential for liability if the contamination goes off-site. Therefore, they should request to be informed about everything that is going on, including what the MOE is doing to make sure the contamination is contained and properly remediated. *MW*

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