

CONTAMINATED SITES LITIGATION

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OVERVIEW

Causes of action for contamination



Damages



Potential obstacles



Role of professionals

CAUSES OF ACTION

Trespass

Nuisance

Negligence

Strict Liability

Statutory



TRESPASS

Must prove
contamination
of lands is:

1. A direct interference
2. Intentional or negligent
3. A physical interference

Passively allowing contaminants to escape property is not sufficient

NUISANCE

- Substantial and unreasonable interference with use or enjoyment of property
- Need causation between defendant's action or inaction and plaintiff's damages.
- E.g., high/dangerous concentrations of contaminants; significant remediation costs



NEGLIGENCE

Must prove:

- A duty of care
 - *Landowners have duty to avoid acts/omissions that could cause harm to neighbors*
- Breach of the duty
- Damages caused by the breach



STRICT LIABILITY

Rylands v. Fletcher

- Strict liability for damages caused to a plaintiff's property by the escape from the defendant's property of a substance "likely to cause mischief"
- Four key elements:
 - (1) non-natural or special use of property
 - (2) a substance on the land likely to do mischief if escaped
 - (3) escape of substance
 - (4) damages resulting from escape.

STATUTORY LIABILITY

Environmental Management and Protection Act, 2010, s. 2

- “Environmentally impacted site”
 - an area of land or water that contains a substance that may cause or is causing an adverse effect



RESPONSIBILITY

- “Responsible Persons” include (EMPA, 2010, s. 12(2)):
 - Persons who caused/contributed to contamination;
 - Persons who controlled the contaminating substance;
 - Land owners (including subsequent owners);
 - Land occupants (person or tenant in actual possession of the land);
 - Persons transporting the substance (where discharge occurred in the course of transportation);
 - Directors of corporations who directly or indirectly contributed to contamination caused by a corporation or who prevented mitigation; and
 - Persons liable under contract for the contamination.

RIGHT OF ACTION

- A responsible person who remediates an environmentally contaminated site has a right of action against other responsible persons for reasonable costs of remediation
- A responsible person can also recover costs of carrying out a site assessment or preparing/carrying out a corrective action plan

FACTORS FOR ALLOCATING REMEDIATION COSTS

- Any reduction in purchase price for the property as a result of contamination or potential contamination
- Relative due diligence of each responsible person involved
- Amount of contamination attributable to each responsible person
- Any remediation measures implemented and paid for by each responsible person



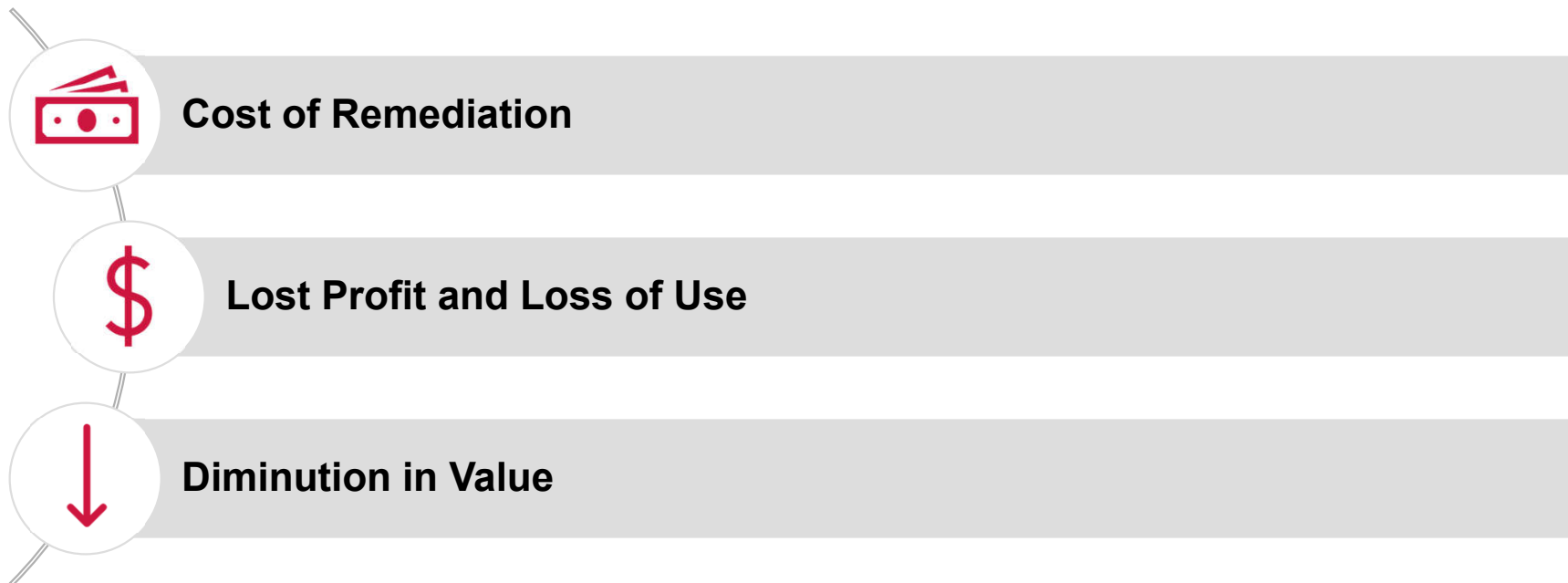
DAMAGES

Compensatory Damages – intended to put the plaintiff in the position they would be in if no contamination occurred

- Trespass: actionable without proof of damage (only nominal damages if no actual damage)
- Nuisance, negligence and strict liability: need proof of actual damages

Duty to mitigate

HEADS OF DAMAGE



CASES

Sorbam Investments Ltd. v. Litwack, **2021 ONSC 5226, aff'd 2022 ONCA 551**

- Issue was whether property owner who was not original spiller was liable for contamination
- Defendant was subsequent purchaser of property where dry cleaning business was operated for 30 years; plaintiff was neighbouring property owner
- Contaminants migrated to plaintiff's property through permeable material in soil
- Evidence:
 - *Groundwater flow was from defendant's property to plaintiff's property*
 - *Behavior of contaminant plume on plaintiff's property consistent with migration from defendant's property to plaintiff's property*



CASES

Sorbam Investments Ltd. v. Litwack, cont'd

- Defendant failed to take steps to address problem after notice of contamination
- Liable in nuisance – substantial and unreasonable interference
 - *physical damage to property*
 - *prolonged sale process*
 - *decreased property value*
- Liable in negligence
 - *landowner has duty of care to avoid actions that would cause harm to neighbor*
 - *defendant ignored Ministry's request to investigate contamination – not consistent with standard of care*
- Damages
 - \$1,200,000 for loss of market value
 - \$92,307.31 for engineering expenses (risk assessment and record of site condition)

CASES

MTD v. 1361821 & Sandal, 2022 ONSC 2995

- Neighbouring landowners
- Defendant was aware of contamination (from chlorinated solvents) when took possession of property
- Defendant undertook environmental clean up, which was not done
- Liable in nuisance, negligence and trespass
 - *Defendant had knowledge of contaminants and failed to address problem*
- Remedies
 - *Defendant ordered to remediate property*
 - *Plaintiff awarded damages of \$1,809,908.80 – decrease in market value of the lands, cost of environment and professional advice to investigate and assess contamination, and cost of remedial measures*

CASES

Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd., 2013 NSSC 9, aff'd 2014 NSCA 54

- Excavated fill from construction site (Garden Crest) delivered to a residential construction site (United Gulf) – soil was contaminated with PHC, heavy metals and construction debris
- Contractor who excavated Garden Crest site and delivered fill to United Gulf site liable in negligence
 - *Geotechnical report completed before excavation indicated possible hydrocarbon contamination*
 - *Reasonable and prudent contractor would be on the “lookout” for hydrocarbon odor*
- Court awarded damages of \$487,295.53 based on cost of remediation
 - Total cost of remediation was \$525,797
 - Less \$38,501.47 for failing to mitigate (cost of excavating and removing soil placed around foundations after United Gulf should have known about contamination)



CASES

***10565 Nfld Inc. v. Canada (Attorney General)*, 2917 NLTD(G) 84**

- Government of Canada assumed responsibility for an air force base in 1989 and was aware of hydrocarbons migrating off-site
- Canada was aware in 2001 of potential contamination but delayed giving notice to adjacent property owners
- Plaintiff company purchased two neighbouring lots in 2001 and 2004 and constructed a hotel
- In 2005, a consulting firm informed plaintiff of contamination
- Plaintiff claimed in negligence, nuisance, trespass, and strict liability



10565 NFLD INC. CONT'D.

Claim

- Canada liable in negligence for breach of duty to warn and investigate
- Claims in nuisance, trespass and strict liability failed

Damages

- Plaintiff claimed loss of income, full remediation and/or diminished property value
- Court awarded \$885,985.90 for diminished property value and environmental consultant fees
- Court declined to award loss of income or cost of full remediation
 - no evidence that plaintiff would have expanded hotel but for the contamination
 - court did not have jurisdiction to award remediation costs as regulator was in the middle of deciding whether and how the base would be closed

CASES

Huang v. Fraser Hillary's Limited, 2017 ONSC 1500, aff'd 2018 ONCA 527

- Huang discovered contamination on property in 2002 and brought an action against the neighbouring dry cleaner
- Dry cleaning company liable in nuisance
 - *Contaminants exceeded generic standards for any type of property use*
 - *Migration of contaminants would continue until source area removed or isolated in entirety*

HUANG CONT'D.

Remediation

- 8 different remediation strategies were presented by experts on behalf of Huang
- Trial judge eliminated strategies that required remediation of the entire source zone
- Expert evidence supported remediation to residential standards

Damages

- \$1,632,500 to cover cost of a “reasonable alternate remedial approach”
- \$201,726.71 for engineering costs

CASES

Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd., 2014 ONSC 288

- Huron Concrete operated a fuel outlet from the 1950s to 2012
- Canadian Tire purchased a neighbouring property in 1995
 - *Discovered free product gasoline in monitoring wells in 2007*
- Canadian Tire put forward an environmental engineer with a specialty in remediation as expert witness
 - *Estimated remediation of soil and groundwater, and for collection and treatment of impacted groundwater at \$3.6 million*
 - *Huron did not dispute the expert witness evidence*

CANADIAN TIRE CONT'D.

“In my view, considering the **nature of the damage** to the Canadian Tire Property, its potential for **serious harm to public health and safety**, the fact that **MOE guidelines exist and must be complied with**, and that **Canadian Tire has been proactive since the contamination was first discovered**, I am satisfied that Canadian Tire is entitled to an award of damages sufficient to allow it to be in the same position that it was in before the release of contaminants onto its property.”

Damages awarded: \$3.6 million + \$1,115,693.97 for out-of-pocket expenses

CASES

Petrobank Energy & Resources Ltd. v. Safety Boss Ltd., 2012 ABQB 161

- Petrobank contracted with Safety Boss to control a blown out gas well
- Petrobank spent over \$10.6M on environmental clean up costs
 - Removed contaminated soil and dumped it in another location
- Petrobank sued Safety Boss for \$9.6M (\$3.2M for well control costs and \$6.4 million for investigation and remediation), including for excessive well control costs, environmental investigation and remediation
 - Argued that their costs were higher than necessary because of breaches of contract and negligence by Safety Boss

PETROBANK CONT'D.

- Safety Boss liable in negligence and breach of contract
- Fell below degree of skill of average well-control specialist by prematurely dismissed use of a diverter system and failing to make meaningful recommendations to control well
- In assessing environmental damages, Court took into account that Petrobank failed to explore viable alternatives risk assessment and monitoring
Damages:
 - \$753,552 for operational damages as a result of 2 days of delay in well control
 - \$855,949 for 2 days' worth of environmental damages



RECENT CASES CONT'D.

Strand Theatre Ltd v. City of Prince Albert, 2014 SKCA 85

- Strand Theatre claimed that leachate forming at City's decommissioned landfill was being carried by groundwater to its property
- Strand Theatre claimed contamination interfered with its use and enjoyment of the property by negatively impacting its ability to sell
 - Sale in 2000 fell through after a Phase II assessment was conducted that identified environmental concerns

CASES

Strand Theatre Ltd v. City of Prince Albert, 2014 SKCA 85

- Various other reports requisitioned by Strand Theatre were discredited by expert witnesses for the City – no consistent and persuasive evidence of off-site migration from the City's landfills
- Court dismissed the claim in nuisance

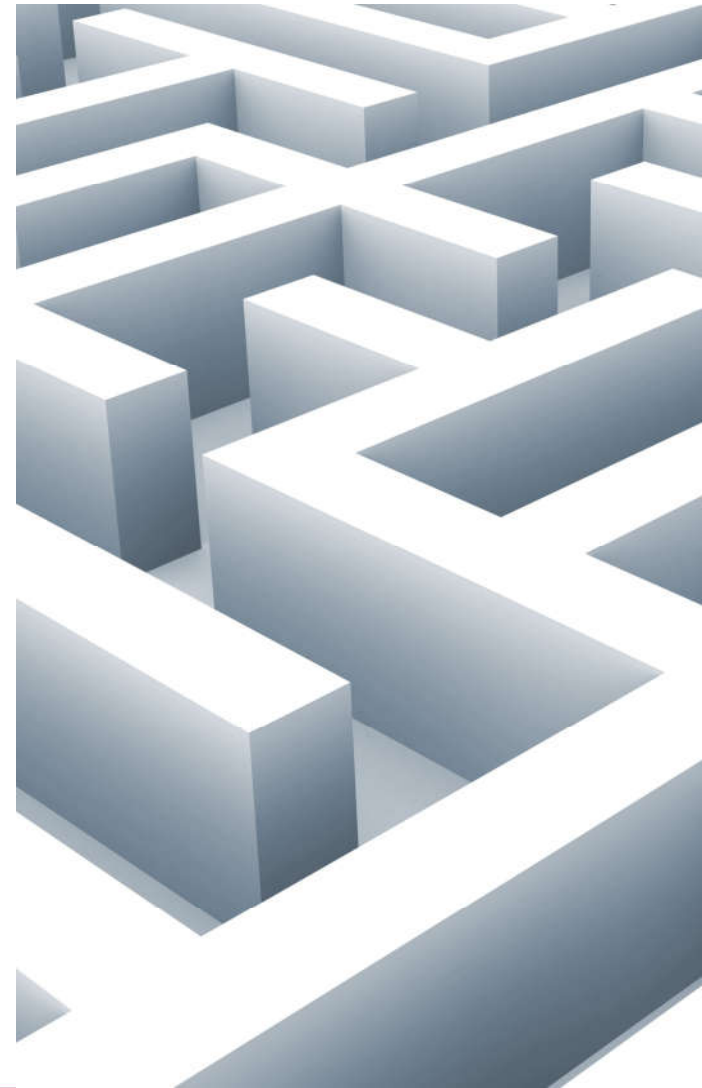


POTENTIAL OBSTACLES

Six-year limitation period on cost-recovery claims under EMPA, 2010

Determining cause of contamination

- Delineation
- Tracing historical ownership
- Can often have multiple potential sources of contamination



ROLE OF PROFESSIONALS

Delineation

Site
Assessments

Corrective
Action /
Remediation
Plans

Expert reports
and testimony

- Causation
- Damages



Q & A

THANK YOU

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