Did Landlord Have a Duty to Warn Tenant It Was Polluting?

A landlord agrees to buy commercial property and assume an existing lease to a company engaged in chrome plating on the land. The lease puts all environmental duties, including compliance with the environmental laws, on the tenant. Still, the landlord's bank requires an environmental audit of the property before it'll agree to finance the purchase. The audit finds the presence of chrome, lead and nickel in the property's soil but within regulatory limits. The audit report is sent to the bank, which approves the loan. The landlord never sees the report. Three years later, the landlord decides to sell the property. It gets a second environmental audit done, which reveals chromium levels that now exceed the acceptable limit. The contamination was caused by leaks from the tenant's chroming tank and surface spills. The landlord reports the situation to the province's environmental regulator. A few months later, the tenant pleads guilty to environmental violations and is penalized $300,000. The landlord then sues it for the costs of remediating the contamination.

QUESTION

Should the tenant have to pay the landlord for the remediation costs'

A. No, because the landlord violated its duty to warn the tenant that it was polluting.
B. No, because the landlord has a duty to remediate property it owns.
C. Yes, because it contaminated the landlord's property.
D. Yes, but only if the court ordered the tenant to do so as part of its guilty plea.

ANSWER

C. The tenant should have to reimburse the landlord for the costs of cleaning up the pollution.

EXPLANATION

This hypothetical is inspired by a case from Alberta in which the court rejected the tenant's argument that it shouldn't have to pay the landlord because the landlord had a duty to warn it that it was polluting the property. The court

noted that there was no such duty under the law. In addition, the lease specifically put all environmental obligations on the tenant's shoulders'not the landlord's. And imposing a duty to warn would essentially override the lease's terms. Lastly, the tenant was a 'sophisticated business' that had been using hazardous substances for years and knew that special safety precautions were required, observed the court. In short, the tenant agreed in the lease to abide by the environmental laws and so is responsible for any environmental and related damages that it caused, concluded the court.

WHY WRONG ANSWERS ARE WRONG

A is wrong because there is no such duty. Neither the environmental laws nor common law require landlords to warn or notify their tenants of any pollution or environmental harm the tenants may be causing. But it may be in a landlord's best interests to notify a tenant about such contamination anyway so it can take appropriate steps to stop whatever is causing the environmental harm and clean up the damage already done. Here, the landlord *did* notify the tenant about the pollution when it became aware of it'after the *second audit* was conducted. Because the landlord never saw the first audit report required by its bank, it didn't know that the tenant had, in fact, been polluting the property for several years.

B is wrong because current property owners are often excluded from responsibility for remediating contamination on their property, especially if the land was polluted *before* they owned it. Most environmental laws spell out who's considered 'responsible parties' that can be liable for cleaning up contamination. But these laws usually exclude current property owners from such liability under certain conditions. And the preference under these laws is for polluters to be held responsible for the costs related to the pollution they cause, such as the costs of remediating any damage to the environment. Here, the contamination of the property owned by the landlord began before it bought it and apparently continued afterwards. But the landlord didn't become aware of the contamination until several years after it bought the land. Also, the tenant caused the contamination. So under the 'polluter pays principle,' it should be held responsible for cleaning up the contaminated soil.

D is wrong because although a court could order a party to pay for remediation of pollution it created as part of its sentence for an environmental violation, such an order isn't necessary for a third party to pursue reimbursement for cleaning up such contamination. When a defendant is convicted of or pleads guilty to an environmental offence, the court has various sentencing options. For example, it can fine the defendant and/or order it to clean up any pollution resulting from the violation. But if another party has already cleaned up the contamination, that party can sue the defendant independently and without the need for a prior court order. Here, the facts don't indicate that the court ordered the tenant to pay for the remediation of the contamination it caused. However, the landlord may still pursue reimbursement for the remediation costs despite the lack of a court order.

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***National Courier Services Ltd. v. RHK Hydraulic Cylinder Services Inc.*, [2005] ABQB 856 (CanLII), Nov. 18, 2005**