

ON Court: Even 'Innocent' Landowners Can Be Forced to Pay for Remediation



Canadian environmental law is largely driven by the 'polluter pays' principle, which essentially says that if you create pollution, you should pay all costs related to it, such as the costs of cleaning it up or any emergency measures to prevent it from spreading. But in some circumstances, the polluter can't pay these costs, say, because it's insolvent or is a company that no longer exists. In that case, who should bear these costs? In a recent case from Ontario, a court concluded that a landowner who wasn't responsible for the pollution could still be held responsible for paying for its remediation. Here's a look at this decision.

THE CASE

What Happened: Several hundred litres of furnace oil leaked from the basement of a privately owned building onto property that a city owned and from which it could adversely affect a lake. The MOE ordered the private property owners to remediate the contamination. They started remediation but their funds ran out before it was complete. So the MOE ordered the city to clean up the contamination on its property and prevent its discharge from the land. The city challenged the order before first the Environmental Review Tribunal and then a court, arguing that the order undermined the 'polluter pays' principle. Both the Tribunal and court ruled that the city had to comply with it. So the city appealed these decisions.

What the Court Decided: The Ontario Court of Appeal ruled that the city had to comply with the remediation order.

The Court's Reasoning: The city argued that the MOE should consider the polluter pays principle and general fairness when issuing remediation orders. The court noted that the order in this case was issued under Sec. 157.1 of the *Environmental Protection Act* (EPA), which says that a provincial officer 'may issue an order to any person who owns or who has management or control of an undertaking or property' requiring that person to take steps to 'prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property' or 'to prevent, decrease or eliminate an adverse effect that may result from' the contaminant's discharge or presence. (Note that other jurisdictions in Canada have similar provisions in their environmental laws.) Thus, this section permits the issuance of 'no fault' remediation orders, said the court. And because the city owned property on which a contaminant—the spilled fuel oil—was present and could negatively impact a

nearby lake, this section applied to it despite the fact that it wasn't responsible for the oil spill.

The court acknowledged that previous cases have held that the MOE *may* consider fairness factors when issuing orders under Sec. 157.1 but found that these cases didn't *require* consideration of such factors. The court agreed with the lower court and Tribunal that evidence that the pollution was someone else's fault was irrelevant as to whether the order against the city should be revoked. The issuance of the order was based not on a finding of fault, but the need to serve the EPA's main objective 'protecting the environment, concluded the court [*Kawartha Lakes (City) v. Ontario (Environment)*, [2013] ONCA 310 (CanLII), May 10, 2013].

ANALYSIS

In considering the order to the city, the Tribunal said that if remediation work was necessary, the environmental protection objection of the EPA took precedence over the polluter pays principle. So it wasn't enough for the city to simply say it was innocent without addressing how the environment would be protected if the order against it was revoked. In other words, if the city wasn't going to clean up the contamination on its land, then who was? Unfortunately for the city, the polluters didn't have any more money to pay for the cleanup. And as the owners of contaminated property and a 'deep pocket,' the city was an attractive and appropriate alternative for the MOE.

Bottom line: As important as it is to make polluters pay for the consequences of their actions, it's more important to ensure that *someone* takes steps to clean up and protect the environment. You should keep this case in mind when your company is considering buying or leasing property. Determining the condition of that property and whether it's contaminated isn't enough. You should also evaluate the environmental condition of neighbouring properties as well as any activities on those properties that could cause contaminants to migrate to the land you're considering. If your property becomes contaminated because of your neighbors and they can't afford to pay for the remediation of your land, you could end up footing the bill despite being completely blameless for the pollution.