WINNERS & LOSERS: When Are You Liable for Pollution that Migrates to Another Property?

Property can become contaminated in any number of ways. For example, workers can spill a hazardous substance onto the property and not immediately clean it up or a contaminant can migrate from one piece of property to an adjacent property, especially if there's a watercourse that flows through both. So when are you liable for pollution that migrates from your property to another' Here are two cases that address liability for migrating contamination.

NOT LIABLE FOR MIGRATING POLLUTION

FACTS

A contracting company used its property to store petroleum hydrocarbon waste. Some contaminants entered the soil and groundwater and migrated into an adjacent property. Another company bought that property after having only a Phase I Environmental Site Assessment done. After contamination was discovered on the adjacent property, the MOE ordered the contracting company to remediate the pollution. But the property owner sued the contracting company for damages anyway.

DECISION

The Ontario Superior Court dismissed the lawsuit.

EXPLANATION

The property owner claimed that an escape of hydrocarbons from the contracting company's property contaminated its soil and water. But the contracting company argued that all or at least a significant portion of the contamination occurred *before* the owner bought the property. And although the owner had had an environmental assessment of the property done, it didn't test the soil or groundwater. The court noted that there was no evidence of the environmental state of the property when the owner bought it. And if the owner *had* acquired property that was already contaminated, then, for its nuisance claim to succeed, it would have to show that the contamination levels i*ncreased* after it purchased the contaminated property *and* that the contracting company caused that additional contamination. But the property owner failed to prove either of those elements, concluded the court.

Midwest v. Thordarson, [2013] ONSC 775 (CanLII), Feb. 28, 2013

LIABLE FOR MIGRATING POLLUTION

FACTS

A family leased part of its land to a company that planned to drill a sour gas well on the land. The lease site was adjacent to property on which the family lived and where its water well was located. Soon after drilling started, the family noticed changes in its water, including cloudiness and changes to the water's small, taste and colour. Family members also reported various medical conditions they attributed to water contamination, such as diarrhea, mouth sores, bladder infections and skin rashes. The family sued the drilling company, claiming that material migrated from the lease site to their property and contaminated their drinking water.

DECISION

The Alberta Court of Queen's Bench ruled that the drilling company was liable.

EXPLANATION

The court noted that the family had been using the water from the well for over 15 years without any issues. Pits were dug on the lease site on fractured bedrock with no liner. The pits held drilling mud and drilling cuttings, which would be mixed with chemical drilling fluids and 'clearly could be a source of contamination for water,' said the court. And the lease site was uphill from the water well's location. Based on all of the evidence and the expert opinions, the court concluded that it wasn't a coincidence that the water well started producing a deteriorating water supply that had increased levels of chemicals *at exactly the same time* that the drilling company was storing drilling mud and drill cuttings with drilling fluids in the uphill pits. It ruled that the family had proven on the balance of probabilities that there was seepage from the pits and lease site, which indirectly contaminated the water in the family's well. So the court ordered the drilling company to pay the family $41,000 in damages.

Blatz v. Impact Energy Inc., [2009] ABQB 506 (CanLII), Sept. 10, 2009