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PUBLICATION

New Guidance from Ontario Court of Appeal on Landlord Liability for Historical Contamination

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The Ontario Court of Appeal has provided new guidance on when a landlord may or may not be held liable for historical contamination rooted in a tenant's acts and omissions in business operations known to use hazardous solvents, such as a dry-cleaning business.

The Court's conclusions are briefly set out in its decision in *Sorbam Investments Ltd v Litwack* 2017 ONCA 850, which affirms the decision and analysis by the motion judge in 2017 ONSC 706. The case involves property owners who had rented their premises to a dry cleaning business in the early-to-mid 1990s.

Prior to *Sorbam*, it was at least arguable that dry-cleaning operations constituted a foreseeable risk of contamination to the leased lands and, in turn, neighbouring properties. This is because it is well known in the environmental industry that a high number of environmental contamination claims arise from the improper handling and spills of solvents by dry-cleaning businesses and their employees. Some of these contaminants remain in the soil and groundwater for decades, often migrating through the groundwater to neighbouring properties, before being discovered.

What is unique about *Sorbam* is that the Court confirms that the act of operating a dry-cleaning business, alone, is not sufficient to prove, on a balance of probabilities, that there are chemicals or hazardous materials stored on site, or that there is a risk that such materials are not handled and disposed of in accordance with applicable regulations.

In *Sorbam*, the plaintiff discovered that the groundwater on its propertywas contaminated with perchloroethylene (also known as PCE or PERC), which was believed to have originated from the abutting defendants' property, which was also contaminated with PCE.

The former owners of the abutting property had owned it from 1970 to 2007 and had leased the lands to commercial tenants, including one who had operated a dry-cleaning business in the early to mid-1990's and who the plaintiff alleged was the source of the PCE contamination.

By the time the contamination on the plaintiff property was discovered and the plaintiff commenced its claim, the dry-cleaner business was closed and its principal no longer resided in Canada. As a result, the plaintiff only sued the former owners (the landlord) and the current owner of the property for damages arising from the contamination on its property.

The landlord brought a summary judgment motion to dismiss the claim in its entirety on the basis that it should not be held liable for the acts of their dry-cleaning tenant.

Importantly, the Court, in making its decision, accepted that the PCE on the plaintiff property had been discharged by the dry-cleaning tenant when the landlord owned the property, but that the landlord had no knowledge of the dry-cleaner using or possibly spilling contaminants during its operations on the source property and had no reason to inquire or investigate the tenant.

It was not until the landlord conducted environmental investigations for the purpose of the sale of the property to the current owner in 2006 that it discovered that the source property was contaminated with PCE. However, the landlord's environmental consultant could not identify the source of the contaminants or whether the contaminants had migrated off site.

The question before the motion judge hearing the landlord's summary judgment motion was whether the plaintiff would be able to hold the former owners liable for the wrongful acts of their dry-cleaning tenant under the torts of strict liability, nuisance and negligence in addition to statutory liability under section 99 of the *Environmental Protection Act*. In this case, the motion judge and ultimately the Court of Appeal answered this question in the negative.

However, the outcome in *Sorbam* does not mean that a landlord who denies knowledge of its tenant's polluting activities will never be found liable to its neighbour.

In fact, the Divisional Court decision in *Durling v Sunrise Propane Energy Group* provides an example of when a landlord *will* owe a duty of care to an abutting landowner.

In that case, the landlord leased its property to a tenant who operated a propane handling facility. The tenant routinely contravened a safety order concerning the transfer of propane and failed to enforce a no-smoking policy at the facility. These acts and omissions ultimately led to an explosion causing property damage and contamination to nearby residents' properties.

The circumstances in *Durling* were out of the ordinary because the landlord was alleged to have known of the inherently dangerous, unsafe and illegal conduct of tenant over an extended period of time. This amounted to foreseeability of the catastrophic harm that eventually occurred and the landlord was found liable in negligence as a result.

It is important to bear in mind that the factual findings in *Sorbam* are unique in that they set the perfect stage for the landlord's summary judgment motion being the lack of knowledge of the

use or spilling of any contaminants by its tenant. The facts in future landlord liability cases will likely not be so advantageous to the moving party and will instead fall somewhere on the spectrum between the known highly dangerous business of the propane handling facility in *Durling* and the facts in *Sorbam*.

While *Sorbam* does not change the law of landlord liability in historical contamination cases, the case does provide a clear set of facts where a court may find a landlord not liable for contamination to a neighbouring property caused by its tenant operating a dry-cleaning business or other business that habitually uses potentially hazardous solvents in its operations.

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