

Completely Innocent Parties Can Be Ordered to Clean-Up Contamination, Says Recent Ontario Court Decision

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Ontario's Divisional Court ruled recently that even if you are completely blameless you may still be ordered by the Ministry of the Environment to clean up contamination. Contamination problems in your general vicinity which touch on your property will now be your business even if you had nothing to do with how they came about.

In the case involving the City of Kawartha Lakes, a clean-up order under the *Environmental Protection Act* was issued by the Ministry of the Environment against the City requiring it to clean up and prevent further discharges of furnace oil which had affected City property. The oil originated in the basement of a house and entered the storm sewer system and culverts and reached a nearby lake.

While there was no issue that the City bore absolutely no responsibility for the release of the fuel oil or for its migration from the house, the Court upheld the order against the City. One thing that the City of Kawartha Lakes was not able to do was act early to stem the migration and prevent further harm to the environment (ignoring whose fault the problem had been). Had they done so, the outcome may well have been different.

This case should be of particular concern to municipalities whose lands very often are incidentally affected by migrating contamination. In light of the decision, municipalities should gear up to keep close tabs on known contamination issues in lands within their boundaries as well as on ongoing Ministry activity in the area, particularly in cases where there is some question as to the financial means of the polluting party.

This decision certainly appears to go counter to the "polluter pays" principle, endorsed by the highest court in the land. The difference here is that the section of the *Environmental Protection Act* under which the order was made (section 157.1, which allows for preventive measures

orders at the discretion of the Ministry depending on individual circumstances to be issued against the person with control of the property) is really an “owner pays” mechanism. As such, the Court ruled, the Ministry can issue an order under this section to anyone involved with contamination without regard to who caused it. Fortunately for innocent property owners, fairness is not altogether out of the picture although it will now be entirely up to the Ministry to decide whether fairness considerations will be a factor when issuing orders of this type.

This case makes it imperative that property owners consider putting in place specific insurance coverage against contamination impacts on their lands from adjacent or nearby properties and that potential buyers of any kind of real estate conduct their due diligence with this expanded regulatory risk very much in mind.