

# Beware of Environmental Liability!

By Brian Madigan



Recently a restaurant proprietor wanted to determine his liability for payment of a tax bill to the City. Two previous tenants had operated restaurants out of the premises.

So, here's what happened. The first tenant undertook some renovations to install the additional washrooms

required for a restaurant. The Landlord who was the owner of the plaza agreed. There was, however, a small error made by the plumbing installer. The sanitary drain was connected by mistake to the storm sewer system. This resulted in waste products being discharged into a local creek. This situation went unnoticed for several years until there was a complaint by a neighbour. The City investigated, rectified the damage and sent a bill for the cleanup to the owner of the plaza. I should tell you this wasn't cheap. The bill for the cleanup was over \$ 40,000.00.

The applicable law in this situation is the *Environmental Protection Act*. In Ontario, this is a strict liability statute. It doesn't matter whether it's your fault, you may still be responsible. The Act imposes liability upon a "person responsible" who is defined to be the owner or the person having charge, management or control of a source of a contaminant. In this case, the noxious waste products were initially under the control of the restaurant proprietor and flowed from his plumbing system into the common system for the plaza before they entered the City's storm sewage system.

The Act imposes liability upon the owner of the plaza as well as the restaurant proprietor. So far, so good! That seems to make some sense. But, there are a few complications. The present owner of the plaza received the bill, but the contamination took place before he owned the plaza. The same was true for the tenant. The first tenant undertook the faulty work, sold the business to the second tenant (when the contamination occurred), who sold it to the present restaurateur.

However, under the Act, there may very well be liability imposed upon each of these individuals. The incidence of the liability can be shifted to another by contract, but it cannot be avoided. So, if the owner receives the cleanup bill and fails to pay it can be added to the municipal taxes. And, of course, most leases shift taxes to the tenant.

In this case, the present tenant is obligated to bear the loss and is left with a right to recover funds from others. That's not the City's problem.

So, be careful about the risk of environmental liability and have the issue properly addressed in all leases and sale agreements.

### **Strict Liability under the EPA**

While it is sometimes difficult to imagine under our common law system, there is a place for strict liability.

Just a quick digression. There are two areas of the common law contract and tort. In contract, two parties will have entered an agreement. A Court will assess damages for breach of contract. In tort, there is no contractual relationship between the parties. They are strangers, but nevertheless one has been injured as a result of the wrongdoing of another. Here, Courts will impose liability for damages in tort. An automobile accident is a good example, and so is a "trip and fall".

Under the law of torts, liability is imposed where the tortfeasor has done something wrong, that is, has been negligent, has caused a nuisance or has trespassed. But, in all such cases, the tortfeasor has done something wrong and the Courts seek to have the tortfeasor change his behaviour in some way, so as to prevent such recurrences in the future.

The concept of strict liability arose in the case of *Rylands and Fletcher*. The owner of a tiger was held responsible for the damage caused by the tiger when it escaped, even though he was not personally negligent. The Court held that the tiger was an "inherently dangerous animal" and the owner should be strictly liable for any damage it caused, no matter what.

That doctrine now brings us to Ontario's *Environmental Protection Act* (EPA). This is a strict liability statute. Liability is imposed regardless of fault. It should be mentioned that this is not the case in every jurisdiction.

And, in some jurisdictions which do utilize the strict liability approach, there is a special exemption for “innocent landowners”. You may wish to see the U.S. Comprehensive *Environmental Response, Compensation and Liability Act*, or the “innocent purchaser” exemption under the British Columbia *Waste Management Act*.

The EPA provides that no “person responsible” for a source of contamination shall permit the discharge into the natural environment of any contaminant in an amount in excess of that which is prescribed by regulation. A “person responsible” is specifically defined in the EPA to mean:

- 1) the owner, or
- 2) the person having the charge, management or control,

of a source of contaminant.

So, the owner does not need to be negligent, nor does the person having charge, management or control. They both have a positive obligation to prevent the contamination. If they fail to do so, then, they are responsible. It may not be their fault, but it is their responsibility and they are liable for the damages caused. It’s just like owning the tiger!

## **Ministry of the Environment**

The Ministry of the Environment (MOE) may issue an Order under the Environmental Protection Act (EPA) that calls for certain work to be done. Those served with the Order are required to comply. It may require to party to undertake some work or cease a particular activity. The powers of the MOE are rather broad reaching.

It is this particular Ministry which is responsible for the administration of the EPA. Generally, the first call or complaint will be made to the municipality. The City will determine whether the issue falls within its jurisdiction or the Region. It will then contact the MOE for assistance. The City has some powers, but does not have powers that are nearly as broad as the Ministry.

I should mention that there is fairly new legislation. An Environmental Enforcement Bill received Royal Assent on June 13, 2005.

Some of the provisions included:

- no-fault penalties;
- repayment to governments of expenses incurred in cleaning-up spills;
- maximum fines (and jail time) for environmental offences were increased
- new minimum fines for certain offences;
- a reversed onus of proof (obligation upon defendant to prove innocence);
- increased officers' and directors' due diligence obligations;
- reduced Judge's discretion in the imposition of fines; and
- increased power for MOE officials to issue orders and enter premises.

### **Liability among the Participants**

The interesting point here is to figure out ultimately who should bear the loss. This is not as simple as it sounds. Even though certain parties have had their liability strictly imposed under the Environmental Protection Act, does not mean that they can't recover some of their losses from others.

Remember, in this case:

Original owner – simply agreed to the work (tenant's contract)

Event occurred

Current owner – acquired plaza

As between the two owners of the plaza, they are both liable to the City for reimbursement of the cleanup costs. However, the tax bill will go to the current owner, and will stop there, unless he can recover under the terms of the agreement of purchase and sale. There are of course issues related to disclosure but that is a topic for another day. The agreement of purchase and sale governs. If the current owner has a right to recover it will be set out in that agreement.

First Restaurateur - undertook the work, hired the contractor  
- contractor sub-contracted the plumbing

Faulty hook-up took place

Second Restaurateur - some waste products entered the creek

Third Restaurateur - moved in after the fact

The actual event occurred while the second restaurant was there, So, naturally there is some liability there. However, the first tenant was the one who authorized the faulty work. So, this tenant probably has the right to recover from the first tenant. But, it will depend upon their agreement concerning the takeover of the premises.

The third restaurant gets stuck with the bill. He may be able to recover from the previous tenant (in contract) should his agreement permit him to do so. Nevertheless, he can sue the first tenant in tort (unless this right was waived).

The current owner of the plaza is directly responsible to the City for the bill. Under the terms of the lease, he simply adds it to the TMI (taxes, maintenance and insurance) assuming that the lease contains broad enough wording to permit its recovery.

He may however, have another remedy. He might be able to get the first owner to pay in accordance with the terms of the agreement of purchase and sale. The first owner no longer has a lease with anybody, so he cannot (in all likelihood) pass this along to any of the tenants. He could sue in tort, and the parties liable to him would be the second restaurateur and the first restaurateur. The first was negligent (even if vicariously) for the improper and shoddy work. The second fellow did nothing wrong, however his liability is imposed strictly under the EPA.

### **Even More Lawsuits**

If the problems yesterday about who pays what weren't bad enough, let's add a few further considerations.

No one likes to get stuck with the loss. So, the first Landlord figures that he should not have to pay the entire claim himself. In fact, he did nothing wrong. So, he gets to sue the first and second tenants for contribution. The second tenant did nothing wrong, he was a victim as well. So, he sues the first tenant. Remember that it was the first tenant that started this whole fiasco in the first place.

The first tenant sues his contractor. The contractor sues his sub-contractor. The sub-contractor sues the plumber that he hired. Now, all parties have to determine whether they were covered by insurance at the time of the loss. If so, then their respective insurance companies will be obligated to take over the defense of their claims and respond to any losses. Contractually, liability goes back up the chain starting with the plumber who got his pipes crossed. And, assuming that there is some insurance somewhere, the first plaza owner will find that he has recovered his loss.

One more little wrinkle! Just to make things a little more complicated, but this is really what happens; don't forget about the City inspector. It was the inspector who looked in the open pit saw the pipes, approved the connection and signed off on the inspection. Is there any liability here? You bet! Courts frequently will assess 50% of the liability against the city in such instances.

The problem is that the court date and the decision of the Judge was probably 4 or 5 years after the current owner paid the special tax assessment. The costs to just about everybody would be measured in the thousands.

The costs to clean up the legal fees afterwards would easily exceed the costs to clean up the noxious and deleterious waste from the toilets in the first place.

I think that there's probably a good metaphor here but I'll leave that to everyone's imagination.

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