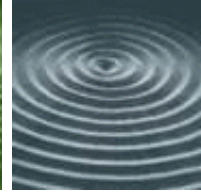


600, 60 Columbia Way
Markham, Ontario
Canada L3R 0C9
Tel. 905.415.6700
Fax. 415.415.6777
www.millerthomson.com



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Litigating Claims Concerning Contaminated Land

by John Tidball
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Special Issues in Claims Related to Contaminated Land

John Tidball
Miller Thomson LLP

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Issues

- Who is responsible?
- How do I prove responsibility?
- Is the responsible party insured?
- What are the potential causes of action?
- Is the claim statute-barred?
- Are there any potential third parties?

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Issues

- Does *caveat emptor* apply?
- How clean is clean?
- What are the potential damages?
- What if there are multiple sources of contamination?
- What if the plaintiff is partially responsible?

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Who is Responsible?

- Potentially responsible parties include:
 - current owners or occupants of land in the vicinity
 - previous owners or occupants of land in the vicinity
 - previous owners or occupants of the contaminated land
 - someone who caused or permitted a spill onto the contaminated land or nearby lands

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Who is Responsible?

- contractors or consultants who caused the spread of contaminants
- consultants who provided incorrect advice when the property was acquired
- government regulators
- the person looking for other responsible parties

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How Do I Prove Responsibility?

- Look first to available information
 - MOE
 - TSSA
 - municipality
 - title searches
 - leases
 - various databases
 - existing consultant reports
 - [Environmental Site Registry]

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How Do I Prove Responsibility?

- Hire consultants to carry out subsurface investigations
- Ask neighbouring landowners for information, the right to conduct investigations on their property, or ask them to conduct their own investigations

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Is the Responsible Party Insured?

- May not be worth pursuing if deeper pockets not in play
- Claims-made policies vs. occurrence-based policies
- Insurer notification requirements are critical for claims-made policies
- Environmental impairment exclusions very common

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What are the Potential Causes of Action?

- Breach of contract
- Nuisance
- Trespass
- Negligence
- Rylands vs. Fletcher
- *Environmental Protection Act, s. 99*

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Is the Claim Statute-Barred?

- Limitation periods may be two or six years
- Don't forget insurance notification requirements - action against insurer must be commenced within one year after loss or damage occurs
- Clock starts to run from date of actual knowledge or when you ought reasonably to have known

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Is the Claim Statute-Barred?

- **EPA s. 99 - no liability unless action is commenced within two years from the date when person knew or ought to have known of the loss or damage resulting from a spill**

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Are There Potential Third Parties?

- **It may be impossible to get at a potentially responsible party directly**
 - e.g. a consultant or contractor who was negligent in undertaking remediation for another party
 - e.g. a tenant of a nearby property
- **Consider most efficient means to bring them into the litigation**

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Does *Caveat Emptor* Apply?

- Patent vs. latent defects
- Can only have application in favour of a previous owner of the contaminated land
- Cannot apply where no privity of contract between plaintiff and defendant

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How Clean is Clean?

- Standard for clean-up where the contamination is from off-site, is "pre-existing" or "pristine" - *Tridan* simply confirms pre-existing common law
- Guideline criteria should only apply where contamination was caused by a previous owner and cause of action is in contract

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How Clean is Clean?

- Guideline should never be utilized to allow persons responsible for a fresh spill to undertake a partial clean-up

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What are the Potential Damages?

- Cost of remediation
- Value of property may be the effective cap on damages
- Stigma damages still possible, post-*Tridan*, if there is residual contamination - tied to reduction in property value
- Appraisals need to factor out contamination

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What if there are Multiple Sources of Contamination?

- Different issues depending on whether contamination is co-mingled
- All responsible parties potentially jointly liable if co-mingled

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What if Plaintiff is Partially Responsible?

- May have contributed contamination to site
- May have some responsibility for contamination
- Expect claim over for contributory negligence

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