

THREE OBSTACLES TO A SUCCESSFUL COST RECOVERY ACTION IN RESIDENTIAL OIL TANK CASES

By Gib van Ert*

The environmental hazard posed by disused oil storage tanks buried in residential properties throughout the Lower Mainland (and beyond) is increasingly well known. These tanks were formerly used to store residential heating oil. Being large and unsightly, they were often buried in homeowners' back gardens. As people began switching to electric, natural gas and propane heating in the 1970s, these underground tanks were frequently abandoned or forgotten—sometimes with heating oil still in them. Over time the tanks have begun to corrode, leaking their hydrocarbon contents into the surrounding soil. This contaminant may travel beyond the immediate vicinity of the tank itself, known as the tank's "nest", in a plume of oil-soaked soil that can reach throughout the owner's property and into the neighbour's land. In response to this risk, the standard-form residential property disclosure statement current in B.C. today asks sellers whether they are aware of any past or present underground oil storage tanks on the premises. Homebuyers are well advised to make their offers subject to a satisfactory oil tank inspection.

While the environmental risk posed by underground oil tanks is familiar enough, the legal risks to owners of contaminated residential properties—and the lawyers assisting them—can be as subterranean as the tanks themselves. Part 4 of the *Environmental Management Act*¹ creates a cause of action by which owners of contaminated sites may recover their reasonably incurred costs of remediation from previous owners and others. Section 47(1) of the Act makes a "person who is responsible for remediation of a contaminated site ... absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site". This remarkable statutory cause of

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action appears to have been created with the remediation of industrial sites in mind, yet it has been successfully invoked in one residential oil tank case² and unsuccessfully in another.³

There are three important practical obstacles to running a cost-recovery action in an oil tank case. These obstacles can prevent homeowners from exercising their statutory right to seek recovery of remediation costs even in clear cases of contamination. Lawyers need to be aware of these obstacles from the very outset of a possible claim under the Act. Policy-makers should consider legislative and regulatory amendments to remove these obstacles and facilitate the Act's application to ordinary homeowners confronted with oil tank contamination.

PROVING THE LAND IS CONTAMINATED

The first obstacle to any claim under the *Environmental Management Act* is the need to prove that the claimant's land is in fact contaminated. Contamination is defined in the Act to mean the presence in soil, sediment, water or groundwater of a hazardous waste or prescribed substance in excessive quantities or concentrations. The *Contaminated Sites Regulation*⁴ sets out the maximum permissible amounts in micrograms per gram ($\mu\text{g/g}$). To prove that his or her site is contaminated for the purposes of the Act, the homeowner must have soil samples taken and analyzed in a laboratory to determine whether they demonstrate excessive quantities of contaminants. The contaminants chiefly at issue in oil tank cases are light and heavy extractable petroleum hydrocarbons, known as LEPHs and HEPHs. The soil samples must therefore be taken and measured to determine the quantities of these contaminants. The resulting laboratory reports will serve as the homeowner's proof of soil contamination in any subsequent remediation claim under the Act.

The difficulty with this for homeowners is that environmental consultants in the Lower Mainland often do not conduct LEPH/HEPH tests. Instead, they tend to use a non-approved analytical method known as EPH (extractable petroleum hydrocarbons). The chief reason appears to be cost: EPH tests are less expensive than LEPH and HEPH tests by about a third. In residential oil tank cases, cost is a major consideration. The homeowner is almost always contending with an unforeseen and hard-to-quantify expense. Frequently the oil tank and its associated contamination and cost are discovered in the course of a sale of the land by its owner, who may also be buying another property at the same time. In such circumstances, the cost savings of EPH tests (however minor in the grand scheme of things) is understandably attractive. Furthermore, the Lower Mainland oil tank busi-

ness is extremely competitive, and the initial quote tends to be given by the excavation contractor (whose interest is in bidding low) rather than the environmental consultant (who comes in later and may have trouble persuading the homeowner to spend more than was quoted on environmental testing). The irony is that EPH results are acknowledged by the Ministry of Environment as equivalent to LEPH and HEPH results;⁵ the ministry has described EPH as “a valuable screening tool in a site investigation, for example, to assist in initial location and delineation of petroleum hydrocarbon contamination”.⁶ Yet EPH results will not suffice to prove contamination under the Act and regulation.

The claimants in *Simpson v. Chapman* learned this the hard way.⁷ Their claim to recover oil-tank-related remediation expenses from the land's previous owner failed because the only proof they had of contamination was EPH test results. The court had no choice but to find that contamination was unproven. The decision is right as a matter of law but points to a frailty in the statutory scheme. The claimants must have walked away from the courthouse amazed that they had lost the case on such a technicality.

Lawyers advising homeowners about oil tanks should immediately warn them that they will be unable to bring a cost-recovery claim under the Act without proof of contamination in the form of approved analytical methods, notably LEPH and HEPH test results. That advice can easily come too late. By the time the homeowner sees a lawyer, the environmental testing may have already been done, the resulting samples destroyed and the rest of the contaminated soil hauled away for off-site remediation—making proof of contamination impossible and cost recovery under the Act unavailable.⁸

PROVING THE EXTENT OF CONTAMINATION

The second obstacle to an *Environmental Management Act* claim based on oil tank contamination is the requirement to prove the extent to which the site is contaminated. This requirement is not expressly stated in the Act, but has been inferred to give effect to the Act's policy of permitting recovery only for “reasonably incurred costs of remediation”. In principle the requirement is unobjectionable, for how can it be reasonable to incur costs “remediating” soil that is not proven to be contaminated?

In practice, however, proving the extent of contamination is another potential obstacle to cost recovery due to environmental consultants' practice of identifying the extent of oil contamination through a combination of test results and sensory observations. While testing is clearly necessary at the suspected edges of the contaminated area, it may be of little practical value at the centre of the plume or elsewhere. At high concentrations, usu-

ally no laboratory testing will be needed (by anyone other than a lawyer or judge) to know that soil is contaminated with leaked heating oil: it is discoloured, greasy to the touch and smelly. If, however, the homeowner intends to sue the previous owners or other responsible persons for recovery of remediation costs, the homeowner will need to be able to show that the costs he or she incurred were reasonable, meaning that the work done was not excessive or unnecessary. This is, regrettably, very much a live issue in British Columbia, where oil-tank-related excavation services are entirely unregulated. Stories of excavation companies digging up much more soil than necessary, and generating huge bills for homeowners in the process, are regrettably common. Defendants will be understandably anxious to ensure that they are not being asked to foot unreasonable bills.

Given both the practice of environmental consultants of relying partly on sensory observations and the potential for over-excavation by incautious or unscrupulous contractors, lawyers assisting potential claimants under the *Environmental Management Act* should consider from the outset what evidence will be needed to prove the extent of oil contamination on the property. If it is not too late—that is, if the lawyer is consulted before the remediation work has begun or while it is still in progress—he or she should recommend that soil samples from several places be taken for laboratory analysis with a view to delineating the limits of contamination. The court in *Aldred v. Colbeck* was quite strict on this point, insisting that “visual inspection is not sufficient to prove contamination. The limits or boundaries of a contaminated site must be determined by testing and the reasonable delineation of the site as derived from the test results”.⁹ More recently, however, the court in *A Speedy Solutions Oil Tank Removal Inc. v. Horvath Estate* allowed that “[w]hile sight and smell is not determinative, it is evidence that can be used in conjunction with laboratory samples to determine that a property is contaminated”,¹⁰ noting the cost of sampling and the time pressure under which remediation work takes place. This more practical approach is to be welcomed in residential cases but does not free claimants and their advisers from the need to obtain a sufficient number of laboratory results. Lawyers advising potential claimants should also gather other evidence of the extent of contamination such as sketches prepared by the claimants’ consultants and photographs of the affected areas.

KEEPING COSTS IN CHECK

The third obstacle to running a successful cost-recovery action in an oil tank case is keeping the costs of the action proportionate to the potential recovery. Affected homeowners frequently incur remediation costs of \$25,000 to

\$50,000—above the upper limit of Small Claims jurisdiction but below an amount that can easily bear a Supreme Court claim with the assistance of counsel. Even in cases where the losses are much higher, legal fees and other litigation costs can quickly outpace the hoped-for damages award.

There is no easy solution to this problem. Lawyers advising would-be claimants must start by breaking the bad news that their statutory right to recover reasonable remediation costs may be practically worthless when weighed against the likely costs of exercising it. That need not always be so, however. There are steps that claimants and their lawyers can take to run a successful and cost-efficient cost-recovery claim. Most of the following tips are as applicable to other forms of litigation as they are to cost-recovery claims under the Act, but they are particularly important here.

First, lawyers should warn their clients that the rates, experience and outlook of B.C. oil tank remediation contractors may vary wildly. Since the Act only permits claimants to recover their reasonably incurred remediation costs, defendants can be expected to challenge the reasonableness of contractors' bills. To keep their own costs down and to improve their chances of recovery in an eventual claim, homeowners should shop around before hiring remediation contractors.

Second, clients should keep track of the documents as they go. Residential remediation jobs generate a lot of paperwork in a short time, most of which will likely be evidence for the claimant or otherwise subject to disclosure. In "paperwork" I include, of course, every manner of digital document, especially photos, e-mails and text messages. The better organized the client is, the less time his or her lawyer will spend on discovery. Documents of particular importance will be the laboratory test results evidencing contamination, the contractor records showing how much soil was removed from the property and at what cost, and other contractor expense records.

Third, counsel should consider whether his or her client's case requires opinion evidence. Experts, like lawyers, are expensive. Adding the fees of another professional adviser to the lawyer's own may be more than the claim, and the client, can bear. The plaintiff in *Aldred v. Colbeck* was able to prove her claim without opinion evidence despite the defendants' contention that an expert was required. Pitfield J. observed:

In this case there is more than the presence of a tank and the detection of oily soil to support the finding of contamination on part of the Mathers property. There is evidence regarding the locations from which soil samples were taken, evidence from a qualified soil analyst regarding the tests that were performed, and uncontradicted evidence of the test results indicating the presence of substances at levels which constitute contamination within the meaning of the EMA and the Regulation at the locations from which some of the samples were taken. With respect, in

the face of the test results, expert evidence is not required to inform the court of the meaning of the legislation.¹¹

In making this point I do not mean to say that an expert report will always be unnecessary. Much will depend on the facts of the claim. If an expert is to be retained, counsel should be aware of the Director of Waste Management's "Roster of Approved Professionals",¹² though it is not clear that only such persons may be qualified as experts by a court.

Finally, counsel should bear in mind that the Act creates a cause of action not just against the immediately previous owner of the contaminated site, but against all previous owners and other responsible persons. Suing parties against whom no plausible claim exists will not, of course, help anyone. But if there is more than one possible responsible person from whom your client is entitled to seek cost recovery under the Act, additional defendants may increase the prospects of an early settlement, thus avoiding trial costs.

REMOVING THE OBSTACLES

The suggestions made above will, I hope, make some of the obstacles to oil tank claims under the *Environmental Management Act* easier to overcome. But there is only so much lawyers can do; legislative and regulatory reform could do much more. Two seemingly straightforward reforms would be to reconsider the bar on EPH testing as a means of proving contamination (at least in residential cases) and to double the Small Claims monetary jurisdiction from \$25,000 to \$50,000. Both these changes would bring down the costs to claimants and simplify their claims. A more involved reform would be to introduce specific statutory or regulatory provisions for residential oil tank claims, a sort of fast-track procedure within the Act for these small-scale, but increasingly common, environmental proceedings. An even more ambitious reform—and perhaps the most urgently needed—would be to introduce training and accreditation requirements on contractors offering oil-tank and contaminated-soil removal services to the British Columbia public.

ENDNOTES

1. SBC 2003, c 53.
2. *Aldred v Colbeck*, 2010 BCSC 57.
3. *Simpson v Chapman*, 2009 BCPC 28.
4. *Contaminated Sites Regulation*, BC Reg 375/96.
5. See BC Ministry of Environment, "Extension of Time Period for EPH Equivalency to LEPH/HEPH" (23 June 2010), CS e-Link online: <<http://www.env.gov.bc.ca/epd/remediation/cselink/archives/2010.htm>>.
6. BC Ministry of Environment, "Update on Contaminated Sites: Clarification on Hydrocarbon Analytical Methods and Standards" (23 May 2003), online: <http://www.env.gov.bc.ca/epd/remediation/updates/pdf/hydro_analy_meth_update030523.pdf>.
7. 2009 BCPC 28.
8. I am informed by Ms. Fogarty (see acknowledgments on p. 503) that if the samples analyzed for EPH are still available, it is possible to add LEPH/HEPH testing to them within 40 days of the extraction date.
9. *Supra* note 2 at para 62.
10. 2012 BCSC 787 at para 102.
11. *Supra* note 2 at para 59.
12. Online: <http://www.env.gov.bc.ca/epd/remediation/roster/roster_of_experts.htm>. See also the Society of Contaminated Sites Approved Professionals of British Columbia, online: <<http://csapsociety.bc.ca>>.