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Ontario Courts continue to clarify the scope and power of section 99 of the Environmental Protection Act

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In this Update

We analyze the court's guidance in *Huang v Fraser Hillary's Limited*, 2017 ONSC 1500 *(Huang)* on the following:

- how the application of section 99 of the *Environmental Protection Act* (EPA) may provide, in certain circumstances, a powerful tool for those that have suffered damages as a result of spills;
- the possible reach and limitations of the so-called "spill action" legislation;
- the definition of "spills" under subsection 91(1) of the EPA;
- damages in nuisance cases; and
- limits that the legislature has placed on section 99 causes of action

In *Huang v Fraser Hillary's Limited*, 2017 ONSC 1500 (*Huang*), the Ontario Superior Court of Justice (ONSC) confirmed that plaintiffs can rely on section 99 of the *Environmental Protection Act*, R.S.O. 1990, c. E19 (EPA) – a section enacted in 1985 – to claim damages for spills which occurred before section 99 was enacted. The Court's discussion in this case provides helpful guidance on the possible reach and limitations of the so-called "spill action" legislation.

Background

The plaintiff, Eddy Huang (Huang), brought an action against both Fraser Hillary's Limited (FHL) and an individual defendant, David Hillary (Hillary), for remedial and expert expenses in relation to tetrachloroethylene (PCE) and trichloroethylene (TCE) contamination on Huang's properties at 1255 and 1263 Bank Street, Ottawa (1255 and 1263 Bank). The alleged source of the contamination was 1235 Bank street (1235 Bank), an adjacent property owned by FHL where a dry cleaning facility had been operating (and was still operating) since 1960. The individual defendant, Hillary, was the homeowner of a flow-through property adjacent to Huang's property. While Hillary was also the sole shareholder, director and officer of FHL, he was not sued in this capacity. The claims targeted the years between 1960 and 1974 when spills of PCE/TCE were known to have occurred at FHL's source property at 1235 Bank, and which pre-dated the installation of a new dry-cleaning system which essentially eliminated the possibility of further spills.

The evidence established that Huang had approached his bank in 2002 with a view to redeveloping both 1255 and 1263 Bank. At that time, Huang's mortgage specialist recommended that he arrange for a Phase 1 environmental site assessment (ESA) to evaluate

the environmental condition of the property. The Phase I ESA confirmed the likely presence of site contamination. Huang then commissioned a Phase II ESA which established that both of Huang's properties did, in fact, contain levels of TCE higher than allowed by Ministry of Environment and Climate Change (MOECC) standards. As a result of the contamination, Huang's bank refused to advance any funds on or renew his existing mortgage. Moreover, testimony from an MOECC witness suggested that Huang would be unable to obtain a building permit to develop his properties while free phase contaminants remained present.

Huang based his claims against FHL and Hillary under five separate heads of liability: (i) trespass; (ii) strict liability, under the rule in *Rylands v Fletcher*; (iii) section 99(2) of the EPA; (iv) nuisance; and (v) negligence. The defendants did not dispute the fact that dry cleaning solvents were the source of contamination, but argued that during the years of 1960-1974 the solvents were not known to be hazardous and, in any event, were disposed of as recommended. Furthermore, the defendants argued that Huang had not properly established damages to or interference with his properties.

Ultimately, in his decision on March 6, 2017, Justice Roger allowed the claims against FHL pursuant to section 99(2) of the EPA and in nuisance, while dismissing the claims for trespass, strict liability, and negligence. Justice Roger dismissed all claims against Hillary.

Section 99(2) of the EPA

Section 99 of the EPA was passed by the Ontario legislature in 1985 in response to the perceived inadequacy of the common law to compensate landowners for the interference with their lands by the action (or inaction) of a polluter. For private parties, subsection 99(2) can be a particularly powerful tool as it provides for a separate, distinct statutory right to compensation in favour of a landowner whose property has been impacted by the spill, irrespective of the polluter's fault or negligence.

Specifically, section 99(2) provides for a right to compensation "for loss or damage incurred as a direct result of spills of a pollutant that causes or is likely to cause an adverse effect," thereby entitling a plaintiff to recover damages "from the owner of a pollutant and the person having control of the pollutant," defined as the person who had such control at the time of the "first discharge." "Spills" are defined under subsection 91(1) of the EPA as a "discharge, (a) into the natural environment, (b) from or out of a structure, vehicle or other container, and (c) that is abnormal in quality or quantity in light of all the circumstances of the discharge." "

In applying subsection 99(2) to the facts in *Huang*, Justice Roger held that there was no debate that the "spills" emanated from FHL's dry cleaning operations at 1235 Bank. Accordingly, FHL— as owner of 1235 Bank and the operator of the dry cleaning business thereon — was the "owner" and "the person having control" of the pollutant. However, FHL challenged the applicability of the legislation in the circumstances, arguing that the spills had occurred before section 99 of the EPA was enacted in 1985. The defendants emphasized that legislation is presumed not to operate retroactively and, since the EPA did not expressly refute this presumption, subsection 99(2) of the EPA was inapplicable.

In rejecting the defendants' arguments, Justice Roger held that applying subsection 99(2) did not constitute a retrospective application of the law. Rather, Justice Roger characterized the application of subsection 99(2) as prospective, since "it enables such a right to compensation at this time or in the future for loss or damage incurred as a direct result of such spills." In any event, he concluded that the presumption against retroactivity did not apply in these circumstances since the intent of the legislative scheme was the protection of the public and not punishment for a prior event. In support of this conclusion, Justice Roger noted that

section 3(1) of the EPA makes it clear that the purpose of the statute is to "provide for the preservation of the natural environment." Further still, even if the presumption against retroactivity was applicable, Justice Roger held that the presumption was rebutted by clear language in the EPA which provides that section 99(2) "applies even if the action was taken before the coming into force of that subsection." In the result, Justice Roger held that Huang was entitled to compensation from FHL under subsection 99(2).

It is worth noting, however, that Hillary was not found liable in his personal capacity for the contamination. Justice Roger held that the evidence established that Hillary, both in his capacity as sole shareholder, director and officer of FHL and in his capacity as an adjacent homeowner, was never the owner of the pollutant or the person having control of the pollutant at the time of its first discharge, as these terms are defined in the EPA.

A note on nuisance

Justice Roger also found FHL liable in nuisance, holding that the interference with Huang's use or enjoyment of 1255 and 1263 Bank was both substantial and unreasonable. The interference was substantial since the contamination exceeded MOECC standards, was ongoing, and had the potential to further contaminate adjacent properties. Moreover, the seriousness of the interference was magnified in the circumstances since Huang was unable to redevelop his properties unless they were remediated. The interference was unreasonable since — in addition to the reasons outlined above — MOECC testimony established that ongoing contamination would likely prevent Huang from obtaining a risk assessment for both 1255 and 1263 Bank. Furthermore, FHL's response to the contamination was itself unreasonable since the company failed to conduct remediation work on the properties, despite repeated requests from the MOECC to do so.

Damages awarded

With respect to damages, Justice Roger noted, that in environmental cases, courts are entitled to order an award (i) for diminution in value or (ii) based on restoration costs. Although the overall purpose of putting the plaintiff in the position he or she would have been in had the harm not occurred is the same, the Court emphasized that a damage award based on restoration of the affected lands "might, in some circumstances, be superior" as such an award can better fund clean-ups. However, the Court noted that the damages award "must nonetheless be bound by reasonableness considering the facts of each case."

In *Huang*, the Court ordered a total of $1,834,226.71 to be paid by FHL in favour of Huang—$1,632,500 for the costs of remediation and $201,726.71 in respect of expert expenses that had, to date, been incurred by Huang.

Discussion

Since the Court of Appeal's decision on section 99 in *Midwest* (see our previous Osler Update here), both plaintiffs and defendants have pondered whether the courts would apply section 99 to historical spill events that occurred prior to section 99's enactment. The Court's decision in *Huang* is the first time an Ontario Court has confirmed that a cause of action based on section 99 of the EPA does indeed exist for spills which occurred prior to 1985. This finding, and the Court's award of damages against the corporate defendant, underscores the fact that section 99 of the EPA may provide a powerful tool for those that have suffered damages as a result of spills.

However, *Huang* also illustrates the importance of some of the limits that the legislature has placed on section 99 causes of action. That is, the definition of a “spill” and the definition of “owner of the pollutant” or “person having control of the pollutant” are crucial elements to a section 99 cause of action. In this case, the Court held that the flow of contamination underneath the source property at 1235 Bank onto neighbouring properties was not a “spill” because the contamination was “already in the natural environment” and “it did not discharge from or out of a structure, vehicle or other container.” Additionally, the fact that the plaintiff could not establish that Hillary was the “owner of the pollutant” or a “person having control of the pollutant” at the time of first discharge meant a section 99 claim could not succeed against Hillary.

One wonders the extent to which the Court's recent decision in *Huang* will be compared or pitted against the now 16-year-old decision by Justice Nordheimer in *Pearson v. Inco*, [2001] O.J. No. 4950, in which Justice Nordheimer had held that section 99, along with other statutes then under consideration in that case and without an individual analysis of section 99 and the EPA, could not be applied retroactively. Given the direction of the courts' more recent expansive interpretation of the EPA, it will be interesting to see if courts find the *Huang* decision to be more in line with today's jurisprudence.