



## An Environmental Lawyer's Take on *Ménard v. Parsons: Disclosure of Environmental Matters*

By [Donna S. K. Shier](#), Partner and Certified Environmental Law Specialist, with the assistance of Julia Paillé, Student-at-Law.  
© Willms & Shier Environmental Lawyers LLP

November 13, 2015

*Vendor's disclosure of environmental issues that could be characterized as latent defects should best be made by disclosure of original material such as an environmental report in the sale agreement. Our view is that vendors with environmental issues to disclose should avoid the use of the Seller Property Information Statement ("SPIS").*

In *Ménard v. Parsons* ("*Ménard*"),<sup>1</sup> the Ontario Superior Court found that Seller failed to adequately disclose former landfilling at the property. The bulk of the decision hung on to Seller's answers to two questions in the SPIS under the section title "Environmental".

- 1 "Are you aware of possible environmental problems or soil contamination of any kind on the property or in the immediate area? E.g. radon gas, toxic waste, underground gasoline or fuel tanks etc."<sup>2</sup> Seller answered "unknown" to this question.
- 2 "Are there any existing or proposed waste dumps, disposal sites or landfills in the immediate area?"<sup>3</sup> Seller answered "yes" to this question.

### Background

Seller acquired the property from his father in 1996-1997. The property consisted of two large lots,<sup>4</sup> one of which included a discontinued landfill site.<sup>5</sup> In 1996, Seller's father commissioned an environmental assessment report to identify the location of the waste materials and to evaluate the property's potential for residential development.<sup>6</sup> The report concluded that "some of the parameters on the south half of the property tested above the set guidelines for residential development", and that the north half of the property could be developed for residential use if certain precautionary measures were taken including installation of a clay barrier to prevent the migration of contaminants from the south half of the property.

In 1996, Seller's father applied to the land division committee to sever the property into two lots. The committee granted the approval subject to two conditions:

- 1 the installation of the clay barrier, and
- 2 Seller's father register a notice on title that the south lot was constructed on top of a discontinued landfill site.<sup>7</sup>

<sup>1</sup> *Ménard v. Parsons*, 2015 ONSC 4123.

<sup>2</sup> *Ibid* at para 9, page 5.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid* at para 9, page 3.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* at para 9, page 4.

Prior to the construction of the house at the property Seller and his father installed the clay barrier as recommended by the report.<sup>8</sup> It is not clear from the decision whether the notice about the existence of the landfill site was never registered on title.<sup>9</sup>

Seller did not disclose the pre-existing landfill site in the agreement of purchase and sale. However, Seller did complete an SPIS as a condition to the agreement.

Less than one month before the deal was scheduled to close, the purchasers' real estate lawyer found out about the discontinued landfill at the property and told the Buyers. Buyers terminated the transaction, refusing to close.

### **Disclosure gone wrong in *Ménard v. Parsons***

The Court faulted Seller for not elaborating on his answers in the SPIS, saying Seller knew or ought to have known the statements in the environmental section of the SPIS were incorrect or misleading, to the point of misrepresentation.<sup>10</sup>

Our view is that the questions in the SPIS are not very clear and, more importantly, that the SPIS is not an effective way to satisfy Seller's environmental disclosure obligations.

Question 1 asks too many things, making the question unclear with the potential for competing answers. Question 1 would be better if it was broken down into several questions. That said, we agree that Seller's answer to Question 1 in *Ménard* should have been "yes".

Our view is that there was nothing wrong with Seller's answer of "yes" to "Are there any existing or proposed waste dumps, disposal sites or landfills in the immediate area?" Where the fault lies with Question 2 is the failure to ask, "if yes, please explain".

The Court found Seller's answer "yes" to Question 2 was insufficient in the circumstances and misleading to the point of misrepresentation.

Perhaps Seller's answer "yes" to Question 2 is what prompted the purchasers' real estate lawyer to conduct further inquiries and led him to become aware of the pre-existing landfill site at the property.

### **Environmental Lawyers' Take on the Disclosure of Latent Defects**

As environmental lawyers, we would have assumed that the decision would rest on Seller's failure to disclose a latent defect, rather than on misrepresentation.

Vendors have a duty to disclose latent defects known to them that a reasonable person would agree are material in the circumstances. These include defects that render the property dangerous or potentially dangerous to the occupants, or render the property unfit for the purpose which the purchaser is acquiring it.<sup>11</sup>

Vendors should be wary of relying on the vague language in SPIS forms to discharge their environmental disclosure obligations. We prefer that vendors make disclosure of environmental matters that can be characterized as latent defects through disclosure of the original materials in the sale agreement.

---

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at para 27.

<sup>10</sup> *Ibid* at para 25.

<sup>11</sup> *Krawchuk v. Scherbak*, 2011 ONCA 352; *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 Ont. C.A.

[Donna Shier](#), is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and is certified as a Specialist in Environmental Law by The Law Society of Upper Canada. She can be reached at 416-862-4822 or by e-mail at [dshier@willmsshier.com](mailto:dshier@willmsshier.com).

*The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.*