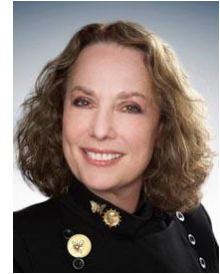


Burst Asbestos Bubble – Say That Five Times Fast!

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The Ontario Court of Appeal recently dismissed a contractor's appeal for damages due to exposure to asbestos. The contractor's employees were exposed to asbestos on a worksite. Despite confirming the existence of a statutory cause of action, the contractor was unable to prove any damages.

Historically, environmental civil litigation has been grounded in the common law torts of trespass, nuisance, negligence and the doctrine of strict liability. As more information has become available about environmental contamination and its effects on humans and the natural environment, the provincial legislature has responded by creating statutory causes of action to hold those responsible liable.

We recently discussed the application of one such statutory cause of action for loss or damage resulting from a spill in *Midwest Properties Ltd v Thordarson*.¹ Click [here](#) to read the article. Another example of an environmental statutory cause of action was recently considered by the Ontario Court of Appeal in *Curoc Construction Ltd v Ottawa (City)*.²

The City of Ottawa hired Curoc Construction Ltd. to replace flooring at a City-owned office building. After completing most of the work, Curoc discovered asbestos in the flooring. Both sides agreed to cease work until the City completed asbestos removal and clean-up. Once the asbestos containing material was removed, Curoc completed the remainder of the work.

¹ 2015 ONCA 819.

² 2015 ONCA 693.

Curoc brought an action against the City under the *Occupational Health and Safety Act*.³ Section 30 of the Act states:

(1) Before beginning a project, the owner shall determine whether any designated substances are present at the project site and shall prepare a list of all designated substances that are present at the site.⁴

...

(5) An owner who fails to comply with this section is liable to the constructor and every contractor and subcontractor who suffers any loss or damages as the result of the subsequent discovery on the project of a designated substance that the owner ought reasonably to have known of but that was not on the list prepared under subsection (1).⁵

Asbestos is a designated substance.⁶ Other designated substances include: acrylonitrile, arsenic, benzene, coke oven emissions, ethylene oxide, isocyanates, lead, mercury, silica and vinyl chloride.⁷

Curoc alleged that the City did not inform it of the asbestos, as required by law. Curoc alleged damages for administrative and legal costs arising from the incident. Curoc also sought declaratory relief that the City admit liability and indemnify Curoc for any future claims.

The City moved for summary dismissal. The motions judge granted the City's motion and summarily dismissed Curoc's claim.⁸ The Ontario Court of Appeal upheld the summary dismissal.

Both Courts focused on Curoc's inability to prove its damages.

- ♦ Curoc's claim for administrative costs sought reimbursement of its president's time to deal with the incident. The Court of Appeal found that the list of hours spent and the tasks undertaken by the president were vague and lacked particulars. There was no evidence that the president received any additional compensation or that there was any actual loss to Curoc.⁹
- ♦ Curoc's claim for legal costs sought reimbursement for a sample bill from a law firm used to determine how to properly respond to the incident. The Court of Appeal found that there was no evidence the bill was ever rendered or paid. Further, the bill may have reflected time spent on the litigation and not in response to the incident.¹⁰

³ RSO 1990, c O.1.

⁴ *Ibid*, s 30(1).

⁵ *Ibid*, s 30(5).

⁶ O Reg 490/09, s 2.

⁷ *Ibid*.

⁸ Unreported.

⁹ 2015 ONCA 693 at para 20.

¹⁰ *Ibid* at para 25.

While Curoc's claim failed, the Ontario Court of Appeal acknowledged that section 30(5) of the *Occupational Health and Safety Act* does create a cause of action in certain circumstances.¹¹

Owners of buildings should ensure they determine whether any designated substances are present at the project site and prepare a list of all designated substances. Similarly, constructors, contractors and subcontractors should be aware of this cause of action if they are unknowingly exposed to a designated substance.

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¹¹ *Ibid* at para 13.