

Court of Appeal Rules on Latest Contaminated Lands Case: Huang v Fraser Hillary's Limited

By [Charles J. Birchall](#), Partner and Certified Environmental Law Specialist, [Giselle Davidian](#), Associate, [Victoria Chai](#), Associate with the assistance of Erin Garbett, Student-at-Law.
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On June 8, 2018, the Ontario Court of Appeal released its latest decision dealing with liability for contaminated lands: *Huang v. Fraser Hillary's Limited*.¹ This decision pits an owner of contaminated property, Mr. Huang, against a dry cleaner business who contaminated Mr. Huang's property, Fraser Hillary's Limited (FHL).

Mr. Huang owns two commercial properties in Ottawa at 1255 Bank Street and 1263 Bank Street that are directly south of FHL's property at 1235 Bank Street. From 1960 onwards, FHL operated a dry cleaning business at 1235 Bank Street. Mr. Hillary, the president and sole director of FHL, owns a residence at 36 Cameron Avenue, adjacent to 1235 Bank Street.²

Spills of dry cleaning solvents containing tetrachloroethylene (PCE) and trichloroethylene (TCE) were known to have occurred between 1960 and 1974 at FHL's dry cleaning operation. In 1974, FHL bought new equipment and used new practices that eliminated the potential for subsequent spills.³

In 2002, Mr. Huang discovered TCE at his properties and claimed against FHL and Mr. Hillary.⁴ Mr. Huang sued under five separate causes of action: nuisance, s. 99(2) liability under the *Environmental Protection Act* (EPA),⁵ negligence, trespass, and strict liability.⁶

Trial Decision

At trial, the Ontario Superior Court of Justice (ONSC) held FHL liable in nuisance and under EPA, s. 99(2). The ONSC awarded Mr. Huang over \$1.8 million in damages for the cost to remediate Mr. Huang's properties.⁷ The ONSC did not find Mr. Hillary liable as homeowner of 36 Cameron.

Nuisance – The ONSC found that FHL had caused an interference with Mr. Huang's use or enjoyment of land that was both substantial and non-trivial.⁸ In making this determination, the Court considered factors including:

¹ *Huang v Fraser Hillary's Limited*, 2018 ONCA 527 [*Huang ONCA*].

² *Huang v Fraser Hillary's Limited*, 2017 ONSC 1500 at para 1-4 [*Huang ONSC*].

³ *Huang ONCA* at para 7.

⁴ The claim against Mr. Hillary was in his capacity as the owner of 36 Cameron and not as an officer and director of FHL.

⁵ RSO 1990, c E 19.

⁶ *Huang ONSC* at para 5.

⁷ *Huang ONCA*.

⁸ *Huang ONSC* at para 125.

- ◆ the contamination was present above MOECC standards and continued to migrate
- ◆ the contaminants had the potential to cause adverse effects
- ◆ Mr. Huang was unable to redevelop his properties until they were remediated, and
- ◆ the cost of remediation was significant.⁹

The ONSC did not find Mr. Hillary personally liable under nuisance because he did not own land abutting 1255 Bank or 1263 Bank. Additionally, Mr. Hillary was not liable for permitting a nuisance to continue as Mr. Hillary did not know about the contamination until after Mr. Huang's properties were already contaminated.¹⁰

EPA, s. 99 – In finding FHL liable under EPA, s. 99, the ONSC rejected FHL's arguments that EPA, s. 99 could not be applied retrospectively. FHL had argued that the spills occurred from 1960 to 1974, well before the section of the EPA came into force in 1985.¹¹ Further, FHL argued that "the language of the EPA does not expressly or implicitly provide that it operates retrospectively."¹²

The ONSC found that applying EPA, s. 99(2) did not constitute a retrospective application but rather a prospective application as 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."¹³ The ONSC further noted that "the intent of the legislature is to afford compensation now for spills, which would obviously include earlier spills."¹⁴

The ONSC found that Mr. Hillary was not liable under EPA, s. 99 in his capacity as homeowner of 36 Cameron. This was because Mr. Hillary was not the owner or person having charge, management or control of the pollutant before the first discharge.¹⁵

Negligence – The ONSC found that while both FHL and Mr. Hillary owed Mr. Huang a duty of care, neither defendant breached its standard of care until about 2013. Mr. Huang had not demonstrated any additional harm or loss suffered as a result of the defendants' inaction post 2013.

Trespass – The ONSC dismissed Mr. Huang's claim under trespass, finding that the PCE and TCE had entered Mr. Huang's property indirectly.¹⁶

Strict Liability – The ONSC held that the use of PCE and TCE was not a "non-natural" or "special" use of FHL's property. Accordingly, Mr. Huang's claim under strict liability was unfounded.

⁹ *Huang ONSC* at para 125.

¹⁰ *Ibid* at para 149.

¹¹ *Ibid* at paras 78-79.

¹² *Ibid* at para 80.

¹³ *Ibid* at para 84.

¹⁴ *Ibid* at para 99.

¹⁵ *Ibid* at para 103.

¹⁶ *Ibid* at paras 52-55.

Damage Award – The ONSC awarded damages for the cost to remediate Mr. Huang’s properties. The ONSC preferred the remediation strategies that were most likely to put the plaintiff back in its original position had the tort not occurred.¹⁷

Appeal – FHL appealed the ONSC judgment on the grounds that the ONSC erred in finding FHL liable for damages under EPA, s. 99(2) and in nuisance. Mr. Huang cross appealed on the grounds that the ONSC erred in finding the defendants not liable in trespass, strict liability, and negligence, and in dismissing the claim against Mr. Hillary.

Court of Appeal Decision

The Court of Appeal (ONCA) dismissed both appeals from the trial judgment.¹⁸

The ONCA agreed with the ONSC that FHL should be liable in nuisance. In doing so, the ONCA dismissed FHL’s argument that foreseeability of harm is a required element of nuisance that the trial judge had failed to consider. The ONCA based its finding on the lack of any binding Canadian authority requiring foreseeability as a constituent element of nuisance.¹⁹

The ONCA also upheld the ONSC’s finding that Mr. Hillary was not liable in nuisance since his residential property at 36 Cameron was not the source of the contaminant.²⁰

The ONCA rejected FHL’s arguments about the retrospective application of the EPA, Part X. The ONCA held that the trial judge did not retrospectively apply the EPA, and that there was an “ongoing obligation under s. 93 of the EPA to remediate the damage.”²¹ Even though the spills occurred before Part X of the EPA came into force, the ONCA noted that FHL’s obligations under the legislation are ongoing.²²

The ONCA upheld the ONSC’s assessment and award for damages based on the cost to remediate Mr. Huang’s properties.²³

Key Takeaways

The ONCA decision confirms that foreseeability is not a constituent element of the tort of nuisance. In making this finding, the ONCA conducted a review of Canadian and international jurisprudence on nuisance.

The ONCA applied EPA, s. 93 and s. 99 to a spill that occurred before Part X was proclaimed into force. This is an important application of Part X in the developing body of jurisprudence on s. 99, on the heels of ONCA’s groundbreaking decision in *Midwest Properties Ltd. v.*

¹⁷ *Huang ONCA* at para 42.

¹⁸ *Huang ONCA*.

¹⁹ *Ibid* at para 22.

²⁰ *Ibid* at para 28.

²¹ *Ibid* at para 31.

²² *Ibid*.

²³ *Ibid* at para 42.

Thordarson.²⁴ The ONCA confirmed that EPA, s. 93 triggers an ongoing obligation to remediate damage, even though the spills occurred before the enactment of Part X of the EPA.

The ONCA's decision to award damages for the cost to remediate continues a line of decisions on damages to compensate for environmental harm. The ONCA accepted the trial judge's selection of remediation strategies that were most likely to restore Mr. Huang to the position he would have been in had the contamination not occurred.²⁵ Courts are trending towards awarding restoration costs as the appropriate measure of damages rather than diminution in value of property. In doing so, courts are sending a message about the importance of fully compensating plaintiffs and restoring them to their original positions – a fundamental principle of tort damages.²⁶

Finally, Mr. Hillary was only sued in his capacity as an owner of 36 Cameron and not as an officer and director of FHL. It would have been interesting to see whether the courts would have found liability against Mr. Hillary had he been sued in his capacity as an officer and director.

[Charles Birchall](#), is a partner at Willms & Shier Environmental Lawyers LLP in Ottawa and certified as a Specialist in Environmental Law by the Law Society of Ontario. Charles may be reached at 613-761-2424 or by e-mail at cbirchall@willmsshier.com.

[Giselle Davidian](#) is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Giselle may be reached at 416-646-4894 or by e-mail at [gdavidian@willmsshier.com](mailto:g davidian@willmsshier.com).

[Victoria Chai](#) is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Victoria may be reached at 416-862-4843 or by e-mail at vchai@willmsshier.com.

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²⁴ *Midwest Properties Ltd. v Thordarson*, 2015 ONCA 819.

²⁵ *Ibid* at para 42.

²⁶ *Athey v Leonati* [1996] 3 SCR 458, [1996] SCJ No 102.