Environmental Lawsuits – "But, I'm Not the Polluter, Just the Landlord Next Door…"

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Consider a straightforward hypothetical: Party A undertakes an activity at its property that causes pollution to migrate to an adjacent property. The adjacent property owner sues Party A on the basis of Party A's action or inaction.

Now, consider a wrinkle to the hypothetical: Party A is a tenant. Party A undertakes an activity at the property at which it operates that causes pollution to migrate to an adjacent property. The adjacent property owner sues Party A and also sues Party A's landlord.

What exposure does Party A's landlord have to environmental civil liability? The Ontario Superior Court of Justice and the Ontario Court of Appeal recently considered this question in *Sorbam Investments Ltd v Litwack.*

Between 1970 and 2007, Moses Litwack and his brother Samuel Litwack owned and acted as landlords of a commercial property in Ottawa ("Litwack Property"). The Litwacks leased the Litwack Property for a period of time to an on-site dry cleaner.

Sorbam Investments Ltd. ("Sorbam") owned the adjacent, neighbouring property ("Sorbam Property").[1] Sorbam discovered perchloroethylene at the Sorbam Property ("PCE"). PCE is a common dry cleaning solvent. Sorbam brought a lawsuit against, *inter alia*, the Litwacks alleging that the Litwack Property was the source of PCE at the Sorbam Property.[2]

The Litwacks responded by bringing a Motion for Summary Judgment. The Litwacks argued that even if the Court accepts that contamination at the Sorbam Property originated from the Litwack Property, the neighbour's lawsuit against the Litwacks should be dismissed.[3]

The Litwacks argued that as a property owner and landlord of a former drycleaner, the Litwacks never used PCE, never authorized the use of PCE, did not know anything about the use of PCE and did not know anything about alleged migration of contamination from the Litwack Property to the Sorbam Property.

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1 *Ibid* at para 2.
2 2017 ONSC 706 at para 3.
3 *Ibid* at para 6.

The Ontario Superior Court of Justice made the following findings of fact based on the evidentiary record before the Court on the Motion for Summary Judgment:

- the Litwacks did not know that their dry cleaning tenant was emitting contaminants during its tenancy
- the Litwacks had no reason to inquire about or make any investigation of their dry cleaning tenant to determine or verify whether their dry cleaning tenant was emitting contaminants at the Litwack Property
- at no time did the Litwacks notice any actual contamination by the dry cleaning tenant, and
- any contamination of the Sorbam Property existed on or before the Litwacks knew or ought to have known that the Litwack Property was also contaminated.[4]

Based on these findings of fact on the Motion for Summary Judgment, the Ontario Superior Court of Justice held that:

- the Litwacks could not be held liable in nuisance for their tenant's action as the PCE contamination was neither foreseen nor foreseeable as inherently part of the activity to be undertaken by their tenant
- the Litwacks did not owe a duty of care to Sorbam while they were landlords to their dry cleaning tenant
- the Litwacks were not the "owner of the pollutant" or the "person having control of the pollutant" where there has been a "spill" in order to establish liability under Ontario's *Environmental Protection Act*, section 99, and
- the Litwacks cannot be found liable under the strict liability doctrine of *Rylands v Fletcher* as there is no evidence that the Litwacks brought the contaminants onto the Litwack Property.

Sorbam appealed the Motion Court decision to the Ontario Court of Appeal.

On November 6, 2017, the Ontario Court of Appeal issued a two page decision dismissing Sorbam's appeal and affirming the motion judge's decision.[5] The Court of Appeal held that it saw no error on the part of the motion judge dismissing the neighbour's claim against the former property owners and landlords next door.[6]

So, what does *Sorbam* mean for environmental lawsuits brought by a neighbour against a next door property owner and landlord who leased or leases to a polluter?

In practice, plaintiffs seek recovery from as many sources as possible and typically name all potentially responsible parties in a lawsuit. This often includes current tenants, former tenants,

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4 *Ibid* at para 24.
5 2017 ONCA 850.
6 *Ibid* at para 1.

current property owners and/or former property owners. In light of *Sorbam*, plaintiffs should carefully consider whether all usually named defendants are responsible in law for the plaintiff's losses and which defendants may not be. Pursuing a meritless claim against a subset of defendants may give rise to a summary judgment motion and cost consequences.

Defendants in an environmental lawsuit should consider what, if any, analogies they may be able to draw between their action(s) and the Litwacks' lack of involvement with PCE at the Litwack Property. If a defendant is not the party that undertook the alleged contaminating activity, that defendant may have arguments in its defence.

But, *Sorbam* may be distinguishable from the next case given that the Litwacks were former owners and landlords, and the Court held that the Litwacks knew very little about the tenant's dry cleaning operations and contamination. How or will *Sorbam* apply to a current owner and landlord? Or, to a former owner and landlord that monitors, oversees, inspects and/or supervises its tenant's activities? Potentially quite differently.

Moreover, the alleged source of contamination in *Sorbam* was not a current commercial tenant's ongoing activity, but rather an activity of a former tenant. The dry cleaning operation had not been a tenant at the Litwack Property since the 1990s and at that time only for a short duration. Conversely, *Sorbam* does not answer how a Court may view the liability of the landlord of a current polluting tenant.

Sorbam also highlights the evolution of commercial landlords' sophistication about environmental issues. In *Sorbam*, there was no lease produced in the litigation and no evidence that a lease was ever entered into by the Litwacks and the dry cleaning tenant. Accordingly, there was no information available about the environmental condition of the leased premises, use of chemicals, and the prospect of harm to the leased premises and beyond. Many and certainly more current commercial leases more often include environmental clauses that allocate environmental responsibility between commercial landlords and commercial tenants. An owner and landlord with a lease containing environmental provisions may be unsuccessful in arguing that contamination was unforeseen. Today and in recent years, landlords leasing to dry cleaning operators will be expected to have greater awareness about the prospect of environmental harm arising from dry cleaning operations. This greater awareness may well be reflected in environmental lease terms and the argument that the landlord turned its mind to environmental issues.

Although the Litwacks were successful in their Motion for Summary Judgment, the case does not mean that every former or current landlord with former or current polluting tenants will be able to establish lack of foreseeability of harm. *Sorbam* should not be read to exonerate from liability every former or current landlord from a neighbour's lawsuit.

Every case requires a fact-specific legal analysis to assess the degree of exposure to liability for neighbouring landowners who lease or leased to a polluter.

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