

Municipalities and Contamination: What are you going to do when homeowners come for you?

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Municipalities continue to grapple with environmental liability. A recent lawsuit in Montreal shows what can happen when municipalities knowingly allow residential development on contaminated lands. Municipalities will want to keep an eye on this case to understand the circumstances that can give rise to municipal liability.

The Lawsuit in Montreal

Property owners in Montreal are suing the City after discovering that their properties were built on the site of a former garbage dump. The land contains biogas contamination generated by the former landfill. The property owners are claiming that Montreal failed to inform them about the contamination and the historic use.

The history of the properties follows:

- ♦ 1907 to 1924: the area was used by Montreal as a landfill for municipal waste.
- ♦ 1994: Montreal discovered biogas and became aware of potential health concerns. Montreal had a plan to disclose the information, but did not do so.
- ♦ 2006: the Quebec Minister of Sustainable Development, Environment, Wildlife, and Parks issued a warning to stop using a local community garden due to lead contamination concerns. It is unclear if the lead contamination arises from the former landfill use.
- ♦ The property owners bought their homes from a variety of individuals (including builders and private owners) over a time period ranging from 1982 to 2013. It is unknown when the homes were originally constructed.

The property owners are claiming damages for the diminution of property values, costs for remediation and restoration, additional costs to sell the land and inconvenience. The property owners are claiming that:

- ♦ Montreal should not have issued building permits without disclosing the contamination. Montreal should not have allowed development or renovation knowing that there is contamination.
- ♦ Montreal failed to warn the property owners at various points in time; for instance, following the 1994 investigation, following the discovery of lead contamination in 2006, when Montreal issued construction or renovation permits after 1994 to the property owners or their condo boards, and when Montreal assessed properties for tax purposes.

- ♦ Montreal breached the *Environment Quality Act* by allowing the development to occur without the approval of the Quebec Ministry of Sustainable Development, Environment, Wildlife, and Parks.

The current lawsuit against Montreal is interesting because it involves a landfill used by the municipality for many years. Montreal was not only an approving authority for the development, but also the party that caused the contamination. No other party is available for the property owners to claim against.

Should Montreal be worried?

This isn't the first time the issue of municipal liability has arisen in the context of contaminated land:

- ♦ In the early 2000s, Calgary residents discovered contamination in an area where the municipality had approved a residential development on a former Imperial Oil site.¹ In response to residents' concerns, Alberta Environment issued an Order against Imperial Oil to remediate. Imperial Oil claimed that the City of Calgary should have been named in the Order because the municipality granted the planning approvals. Calgary argued that it was not liable under the Alberta *Environmental Protection and Enhancement Act*, as Calgary was not in "charge, management or control" of the contamination. Luckily for Calgary, the polluter, Imperial Oil, was available, named in the Ministry Order, and able to take steps to address the contamination.
- ♦ In 2004, a homeowner purchased property in Chatham-Kent that, unbeknownst to it, had been used as a municipal waste disposal site.² After discovering contamination and proceeding to develop, the homeowner sued. At trial, the municipality was held to be negligent. The Court found that the municipality owed a duty to the homeowner in the municipality's capacity as prior owner and vendor, as well as for the municipality's responsibility for the building permits. The Ontario Court of Appeal overturned the trial decision on the issue of damages but declined to comment on the municipal liability in negligence aspect.³
- ♦ In 1994, homeowners sued the developer, the City of Lévis, and the Ministry after discovering contamination on their lands.⁴ The developer had ceased operations and had no assets. The Ministry ordered the polluter, Imperial Oil, to settle the civil claim and remediate. Lévis argued that Imperial should be required to comply with the Order. The Supreme Court of Canada held that Imperial Oil must remediate because it caused the pollution. Lévis was fortunate that the polluter was available and had funds to comply with the Order.

¹ *Imperial Oil Ltd. v. Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)*, 2002 CarswellAlta 1016, [2002] AWLD 440.

² *Biskey v Chatham-Kent (Municipality)*, 2011 ONSC 413, [2011] OJ No 557.

³ *Biskey v Chatham-Kent (Municipality)*, 2012 ONCA 802, [2012] OJ No 5448: The ONCA held that the municipality was not liable for damages for their alleged negligence, because the homeowner knew the property was a former waste disposal site before building their home, and they had the opportunity to sell it before incurring damages.

⁴ *Cie pétrolière Impériale ltée c. Québec (Tribunal administratif)*, 2003 SCC 58, 2 SCR 624.

Municipalities are faced with a dilemma

Municipalities need to keep in mind their constituents' view that local governments have an obligation to protect their residents.

Where contaminated land is developed for homes, homeowners have claimed and will continue to claim against municipalities. When the polluter or developer is not available or is impecunious there will be great pressure on the municipality to resolve the problems.

Municipalities should avoid issuing planning approvals and permits where contamination in excess of applicable standards is known to be present.

Municipalities have to be extremely careful where the municipality suspects contamination. Where contamination is only suspected, the conundrum for municipalities is that if the municipality raises the issue publically, property value may be affected, giving rise to the municipality liability. If the municipality fails or declines to raise the issue, it could find itself in the same situation as the City of Montreal.

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