

Supreme Court of Canada Denies Leave to Appeal in the Latest Dry Cleaner Contamination Case

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On April 11, 2019, the Supreme Court of Canada denied the dry cleaner's application for [leave to appeal](#) from the Ontario Court of Appeal's decision in *Huang v Fraser Hillary's Ltd.*¹

Huang confirms that Ontario courts are inclined to measure and assess damages in contaminated land lawsuits based on the cost to remediate contamination and that the statutory cause of action in Ontario's *Environmental Protection Act* ("EPA"),² s. 99(2) is alive-and-well. *Huang* is the latest decision in what we expect will be an increasing number of claims brought pursuant to EPA, s. 99(2).

Fraser Hillary's Limited ("FHL") owns a dry cleaning business in Ottawa that has operated since 1960 near two neighbouring commercial properties owned by Eddy Huang. David Hillary is the president and sole corporate director of FHL. Mr. Hillary also owns a residential property situated near the FHL property.³

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 business. In 1974, FHL bought new equipment and deployed new practices that the trial court and Court of Appeal held virtually eliminated any possibility of spills thereafter.⁴

In 2002, Mr. Huang discovered TCE at his nearby commercial properties. He sued FHL and Mr. Hillary.⁵ Mr. Huang relied on five causes of action that plaintiffs typically plead in contaminated land lawsuits:

- ◆ liability pursuant to EPA, s. 99(2)
- ◆ nuisance
- ◆ strict liability

¹ *Huang v Fraser Hillary's Ltd*, 2018 ONCA 527, leave to appeal to SCC refused, 38282 [Huang ONCA].

² *Environmental Protection Act*, RSO 1990, c E19, s 99(2) [EPA].

³ *Huang v Fraser Hillary's Ltd*, 2017 ONSC 1500 at paras 1-4 [Huang ONSC].

⁴ *Huang ONSC* at para 23; *Huang ONCA* at para 7.

⁵ The claim against Mr. Hillary was in his personal capacity as the owner of a nearby residential property at 36 Cameron Avenue, not as a corporate director and officer of FHL; *Huang ONSC* at para 19.

- ◆ negligence
- ◆ trespass.

Trial Decision

At trial, the Ontario Superior Court of Justice found that:

- ◆ FHL was liable pursuant to *EPA*, s. 99(2) as the owner and controller of a spilled pollutant. The trial court held that *EPA*, s. 99(2) applies *prospectively* to permit compensation for spills that happened before the statutory cause of action was promulgated into law in 1985.⁶
- ◆ FHL was liable in nuisance because the TCE present at Mr. Huang's property caused an interference with Mr. Huang's use and enjoyment of land that was both substantial and non-trivial.⁷
- ◆ FHL was not liable in negligence, trespass or strict liability.
- ◆ Mr. Hillary was not liable under any cause of action.⁸

The trial court considered various clean up options in assessing and awarding damages to Mr. Huang based on the cost to remediate his commercial properties.⁹

Court of Appeal Decision

FHL appealed the trial court decision to the Ontario Court of Appeal.

Mr. Huang cross-appealed specific aspects of the trial court decision including that: (i) FHL was not liable in negligence, trespass, or strict liability, and (ii) Mr. Hillary was not liable as a nearby residential property owner.

You may click [here](#) to review our firm's previous article about the Ontario Court of Appeal's dismissal of FHL's appeal and Mr. Huang's cross-appeal from the trial decision.

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⁶ *Huang ONSC* at paras 84, 97.

⁷ *Huang ONSC* at para 124.

⁸ *Huang ONSC* at paras 52-55, 61, 103, 147, 169.

⁹ *Huang ONSC* at paras 185-93.