CITATION: *Huang v. Fraser Hillary's Limited*, 2017, ONSC 1500
COURT FILE NO.: 07-CV-39359
DATE: 2017/03/06

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
EDDY HUANG	)	Michael S. Hebert and Cheryl Gerhardt McLuckie, for the Plaintiff
Plaintiff	)	
– and –	)	
FRASER HILLARY'S LIMITED and DAVID HILLARY	)	Jonathan O'Hara, for the Defendant Fraser Hillary's Limited
Defendants	)	Paul Muirhead and Jeremy Rubenstein, for the Defendant David Hillary
	)	**HEARD:** January 11-15, 18, 19 and 29, 2016 at Ottawa

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REASONS FOR DECISION

P.E. ROGER, J.

Overview

[1] The plaintiff brings this action against Fraser Hillary's Limited ("FHL") and David Hillary, seeking significant damages for remedial and related expert expenses for the tetrachloroethylene ("PCE" or "PERC") and trichloroethylene ("TCE") contamination of soils and groundwater at 1255 and 1263 Bank Street, Ottawa ("1255 Bank" and "1263 Bank", respectively).

[2] FHL is the owner of 1235 Bank Street ("1235 Bank"). That property is located on the southeast corner of Bank Street and Cameron Avenue. FHL has operated a dry cleaning business at that location since 1960. David Hillary is the president and sole director of FHL.

[3] David Hillary is also the owner of 36 Cameron Avenue ("36 Cameron"), a residential property that he purchased as a rental property in 1986. That property is adjacent to and immediately northeast of 1235 Bank. The two properties share a common driveway on the northeast side of 1235 Bank.

[4] The plaintiff is the owner of 1255 Bank and 1263 Bank. Both properties are located on the southeast side of Bank Street, beside 1235 Bank. 1235 Bank, 1255 Bank, and 1263 Bank are adjacent to one another (in that order from north to south), with 36 Cameron to the east of 1235 Bank. The south border of 36 Cameron is boarded by 1235 Bank, such that 36 Cameron does not abut any of the plaintiff's properties. Rather, the most northerly of the plaintiff's property, 1255 Bank, on its northern border abuts 1235 Bank.

[5] The plaintiff alleges five potential causes of action:

(a) Nuisance;

(b) Negligence;

(c) Liability under s. 99 of Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "EPA");

(d) Trespass; and

(e) Strict liability under the doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

[6] The plaintiff alleges that in the 1960s and 1970s, up until 1974, dry cleaning solvents used by FHL at 1235 Bank were allowed to enter the ground via dry cleaning filters and products stored at the dry cleaner and, as well, through the building's sump in the basement. He also alleges that FHL and David Hillary, since knowing about the migration of contaminant to the plaintiff's properties, have taken no meaningful steps to address it.

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[7] It is not disputed by FHL that its dry cleaning solvents contaminated the plaintiff's properties. FHL however denies liability on a number of grounds, including that the products were, at the time, not known to be hazardous; that it disposed of the products as recommended; and that the plaintiff has not established damages to or interference with his properties.

[8] David Hillary is sued only as owner of 36 Cameron. He denies liability and alleges that, as a homeowner, he is exactly in the same position as the plaintiff. Both their properties were contaminated by the dry cleaning practices of their shared neighbour, FHL, at 1235 Bank. Further, David Hillary alleges that there is nothing he could have done at 36 Cameron that could have impacted the contamination of the plaintiff's properties and that causation has not been established.

[9] The defendants called no evidence.

Background Facts

[10] The plaintiff, Eddy Huang, purchased 1263 Bank in 1972 and 1255 Bank in 1978. With some exceptions in the 1980s, these properties have been rented. However, he testified that he always wanted to develop a better project.

[11] In 2002, Mr. Huang entered into a 20-year ground lease with Tim Hortons for 1263 Bank. Tim Hortons was required to build its own building for its restaurant, which it did. This lease expires in 2022. The lease on 1255 Bank expires in 2024.

[12] Over the years, Mr. Huang had conversations with Mr. Fraser Hillary and after with David Hillary about purchasing 1235 Bank. Neither wanted to sell.

[13] Mr. Huang testified that in 2002 he contemplated developing 1255 and 1263 Bank Street. He approached his bank and, at its request, arranged for a Phase I environmental report on the recommendation of his mortgage specialist. It confirmed the likely presence of contamination.

[14] Mark D'Arcy is an associate with John D. Paterson and Associates Limited ("Paterson"). He was retained by Mr. Huang in 2002 for a Phase I and Phase II environmental site assessment

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of the plaintiff's properties. He testified that the Phase I found moderate to high likelihood of contaminants on the plaintiff's properties due to the dry cleaner directly to the northwest. As a result, a Phase II assessment was conducted. Paterson concluded that soil and groundwater have concentration of TCE that exceed Ministry of Environment and Climate Change ("MOECC" or "MOE") tables. It recommended that the soil be excavated and disposed of off-site, with remediation to be done with the FHL site or else that a barrier system be installed along the common property boundary. He recommended as well remediation of the groundwater.

[15] Mr. Huang testified that, as a result of the contamination, his bank would not advance any funds and would not renew his existing mortgage. He also testified that he is not able to develop his properties in their present condition and that, once environmental issues are addressed, he intends to procede with his development plans.

[16] Mr. Huang presented no evidence of any concrete plan to deal with his tenants in the event of any early re-development and provided only vague answers on how he would, for example, deal with Tim Hortons.

[17] The court heard technical evidence from two experts, Mr. Brian Byerley of Golder Associates Ltd. ("Golder") and Dr. David Reynolds of Geosyntec Consultants ("Geosyntec"). Both were called by the plaintiff.

[18] They explained that PCE is a chemical solvent used as a degreaser and predominantly used in the dry cleaning industry. TCE is another chemical compound that can exist independent of PCE or as a breakdown product of PCE. Dense Non-Aqueous Phase Liquid ("DNAPL" - pronounced "dean apple") is the purest form of PCE. It is denser than water. When PCE impacts the ground, it does not migrate straight down. It chooses the path of least resistance and can spread out over a large area as it breaks down and falls apart during its descent through the ground. As a result, the final resting place of DNAPL may not be where it originally impacted the ground. Since it can spread out and migrate below the ground - both horizontally and vertically, there can be a large surface area that can have traces of DNAPL. This possible area of DNAPL is known as a "Source Zone", which, again, is not necessarily where the actual PCE first

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impacted the ground. When clean groundwater passes through DNAPL it becomes contaminated and continues its migration.

[19] FHL has owned and operated a dry cleaning facility at 1235 Bank since 1960 and Mr. Hillary has been its president and sole shareholder since 1971. However, as indicated above, Mr. Hillary is not sued in relation to his role with FHL but as homeowner of 36 Cameron Avenue.

[20] PCE and TCE were important ingredients in "PERC", the dry cleaning solvent used at 1235 Bank from 1960 to 1974. During that time, FHL was purchasing about $5,000.00 worth of PCE per month. The PCE was delivered in 45 gallon drums, which were kept in the basement of FHL at 1235 Bank.

[21] Up to the mid-70s, the adverse effects of PCE were unknown to both the industry and the environmental engineering community. It was then understood that you could dispose of PCE by pouring it onto the ground. The thinking was, apparently, that it would evaporate.

[22] From 1960 to 1974, the use of PCE/TCE at 1235 Bank resulted in spills of these chemicals onto the ground. Used PCE would be stored by FHL in cardboard boxes in the parking lot at the rear of its property at 1235 Bank and left there until the weekly garbage collection. The evidence of FHL, from read-ins of its examinations for discovery, demonstrates that before 1974, in addition to the storage practices in the rear laneway, there were also spills of PCE within 1235 Bank and that PCE contamination likely made its way into the sump.

[23] FHL's handling practices of PCE/TCE changed in 1974 when FHL purchased new dry cleaning machines. The new machines and resulting new practices significantly reduced the amount of PCE/TCE used at 1235 Bank, and virtually eliminated the potential for spills.

[24] It is clear from the evidence that those solvents entered the environment as a result of the disposal techniques for waste products used by FHL in the 1960s and 1970s — up to 1974 —(i.e. cardboard boxes stored at the rear) and that PERC losses occurred during the ongoing operations and entered the building's sump.

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[25] It is also clear that the solvents that entered the ground have resulted in a source zone, present on a portion of 1235 Bank, 36 Cameron, and 1255 Bank. That source zone is well illustrated by Dr. Reynold in his report of August 21, 2012, at Figure 2 (Exhibit 5, Tab 51). As explained quite candidly by Dr. Reynold, that figure was prepared with the data up to 2008. It shows the source zone to be primarily on 1235 Bank, slightly upon 36 Cameron, and also on 1255 Bank. Although we are missing data to more precisely define the DNAPL area, Dr. Reynold testified that if he added the 2011 data he would then include MW8-07 (monitoring well 8 of 2007 which is on 36 Cameron) into the source zone of Figure 2 (the DNAPL zone).

[26] As indicated by the experts (Byerley and Reynold), a source zone contains free phase (undissolved) PCE. As groundwater flows through a source zone, it carries with it contaminant particles, thereby spreading the contaminants. In other words, DNAPLs constitute a source zone. As DNAPL have very low solubility, they take years to dissolve in water and, as groundwater flows over DNAPLs, they (DNAPLs) feed the groundwater plume. The DNAPLs and the groundwater plumes are the problem as none of the soil data indicates DNAPL in the soil. The evidence indicates that untreated, this contamination could exist for multiple generations.

[27] Generally, the direction of groundwater flow across the site is southeast, from 1235 Bank and 36 Cameron Avenue towards the plaintiff's lands, and onwards towards the Rideau River.

[28] As indicated above, pure PCE/TCE was discovered to have accumulated in a concentrated pool of DNAPL under 1235 Bank, 1255 Bank, 36 Cameron, and some residential properties to the northeast. Less concentrated, non-DNAPL PCE/TCE also spread to portions of 1255 Bank, 1263 Bank, and 36 Cameron. The PCE/TCE moved as groundwater passed over the DNAPL pool and carried small amounts of PCE/TCE onwards.

[29] This has led to PCE/TCE levels in groundwater and soil across portions of the properties that exceed MOE standards.

[30] There is no evidence of anyone becoming ill from exposure to PCE/TCE on any of these properties. Both experts indicated that the risk of exposure to humans is small (no appreciable risk) as the top three metres of soil is clean. The risk of exposure by vapour is also small for the

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same reason. Dr. Reynold assumed, while elaborating his remedial alternatives, that the site (all properties) poses no risk to human health and ecology. However, the MOE is concerned and has ordered ongoing monitoring of any vapour to ensure the continued safety of residents.

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[31] The experts agreed that the contaminants found in the groundwater and soils of the plaintiff's lands are from the dry-cleaning solvents used by the dry-cleaning facility operated by FHL. Both Mr. Byerley and Dr. Reynold indicated, during their cross-examination, that the source of contamination is PCE and TCE; that their source is dry cleaning fluids; and that these originated from the dry cleaner at 1235 Bank — this is clear.

[32] Both experts agreed that 36 Cameron was also contaminated by the dry cleaner at 1235 Bank.

[33] As noted above, David Hillary purchased 36 Cameron in 1986 and by that time it had been over ten years since FHL had stopped disposing and spilling PERC as described above.

[34] Dr. Reynold indicated, without any hesitation, that in his opinion it is reasonable to assume that the source of the contamination is 1235 Bank as PCE is a classic dry cleaning product. In his opinion, there is no second source. He further indicated that cleaning only 36 Cameron would probably make no difference to 1255 Bank and 1263 Bank. Mr. Byerley also indicated that all properties, including 36 Cameron, were contaminated by the dry cleaner at 1235 Bank.

[35] I note that, in dealing with these issues, we have to be careful not to confuse source with source zone. Although there are a number of source zones, the evidence is clear that their source is the dry cleaner operated by FHL at 1235 Bank.

[36] There is no evidence of any second source, other than FHL, for the contaminants on these properties.

[37] Both Mr. Byerley and Dr. Reynold testified that the plaintiff's lands cannot be remediated until the source area is either removed or isolated in its entirety.

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[38] Mr. Byerley testified that the plaintiff is unable to redevelop his lands unless they are remediated.

[39] Michael Heeringa is an employee with the MOE. His involvement with these properties started in 2006. Mr. Heeringa testified that the applicable generic soil and groundwater clean-up criteria for this site are provided in the document entitled "Soils, Groundwater and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*". He reviewed Exhibit 6, Tab 73 (a memorandum from MOE dated April 8, 2013), and confirmed that the applicable standards are provided in Table 3; that the Table 3 generic standard for allowable PCE concentrations in groundwater is the same for residential land use as for commercial land use (1.6 μg/L); and that in remediating a site, the applicable standard for both groundwater and soil must be met. In the absence of a risk assessment and of site-specific standards, I accept his evidence on this point as it represents a conservative or prudent assessment.

[40] He indicated that, by April 2013, he was not receiving any further communication, report, or document from FHL and that their remedial efforts to date did not appear to have had any significant impact on contaminants. As a result, he prepared his Provincial Officer's Report dated April 15, 2013 (Exhibit 6, Tab 74) and the Provincial Officer's Order of April 15, 2013 (Exhibit 6, Tab 75). This order requires FHL to retain a qualified person and submit a detailed work plan to take appropriate measures to remedy the property.

[41] Subsequently, he prepared another Provincial Officer's Report dated July 23, 2014 (Exhibit 6, Tab 78). He noted that the MOECC had observed less and less communication from FHL and therefore took steps to formalize their requests. As a result, he made another Provincial Officer's Order dated July 23, 2014 (Exhibit 6, Tab 79). Mr. Huang was served to ensure access to his property.

[42] The order of July 23, 2014 seeks implementation of the work plan and has a compliance date of August 31, 2015. The MOECC was to receive a report by that date addressing the interpretation of soil vapour monitoring results, interpretation of groundwater and soil monitoring results, and identification of the proposed measures for ongoing assessment and

remediation. Mr. Heeringa testified that the MOECC has not received anything further from FHL, and that FHL has complied with none of the July 2014 order. As a result, he explained that the order has been referred to their non-compliance section and that enforcement proceedings under the *EPA* have been initiated against FHL.

[43] Mr. Heeringa was a credible witness who occasionally seemed to conflate the role of Mr. Hillary as homeowner of 36 Cameron with that of shareholder or principal of FHL. Nonetheless, he gave honest and straightforward answers. He explained, quite clearly, that the Ministry was experiencing decreased communication from FHL and their experts, Conestoga Rovers & Associates ("CRA"). In 2014, the Ministry wanted to better understand the risk of vapour and wanted a probe put in at 36 Cameron, as they viewed 36 Cameron as a reasonable place to do this investigation. Mr. Hillary was ordered or included in the order as owner of 36 Cameron and as owner of FHL as the Ministry wanted it done. Mr. Heeringa explained that they included David Hillary personally to make certain that either he did it (had it done) or that he took steps to have FHL do the ordered work. They wanted vapour data and ongoing assessment of the contamination to understand the big picture. By the time of trial, they had received none of it.

[44] Mr. Heeringa testified that the MOECC would be unlikely to approve a risk assessment for a site which has free phase products present.

[45] Ronald Juteau, a real estate appraiser, provided his opinion on the highest and best use of the plaintiff's properties. In his opinion, the highest and best use of the plaintiff's properties would be a mid-density mixed-use development with a retail ground floor and residential units above in a four- to six-storey building. Although he opined on the market value of the plaintiff's properties for various scenarios, he did not opine on the impact of contamination on their market value.

[46] Lloyd Phillips, an expert on land use, confirmed that current zoning allows five storeys and that a four-storey mixed-use development would have a very high chance of approval (six storeys would have a moderate to high chance of approval), with the outcome uncertain as there are no six-storey buildings in that immediate area on Bank Street.

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[47] Read-ins from the examinations for discovery of FHL and David Hillary established, amongst others, that Mr. Hillary and FHL first became aware of a contamination issue on the dry cleaner property (1235 Bank) when Mr. Huang informed him that there was a problem with the land on his property in about 2001. They establish further that when Mr. Hillary purchased 36 Cameron in 1986, he was not aware of any contamination and only became aware of contamination at 36 Cameron following the investigation by the experts hired by FHL, Conestoga Rovers & Associates (CRA). Mr. Hillary admits that contaminants are still on his land, are still escaping from his land to adjacent land, and that he was informed by CRA that he will have to clean up his land.

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<u>Issues, Law, and Analysis</u>

[48] I will firstly analyse the five causes of action raised by the plaintiff and will thereafter address damages.

Trespass

[49] The essential characteristics of a trespass to land are as follows:

> 1. Any direct and physical intrusion onto land that is in the possession of the plaintiff;
>
> 2. The defendant's act need not be intentional, but it must be voluntary;
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> 3. Trespass is actionable without proof of damage; and
>
> 4. While some form of physical entry onto, or contact with, the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto, the plaintiff's land.
>
> (see *Smith v. Inco Ltd.*, 2010 ONSC 3790, 52 C.E.L.R. (3d) 74, at para. 37, rev'd on other grounds, 2011 ONCA 628, 107 O.R. (3d) 321.)

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[50] Trespass requires a direct intrusion onto the plaintiff's land. As indicated in *Smith v. Inco,* at paras. 40–42, examples of indirect intrusions that do not satisfy the requirements of a trespass claim include:

- a tank on the defendant's property leaking onto the plaintiff's property;
- oil discharged into the sea that washes onto the plaintiff's lands; or
- nickel particles emitted into the air by the defendant settling on the plaintiff's property.

[51] The plaintiff argues that, by having knowledge of the contamination and the presence of the source area of their lands, by allowing the continued migration of contaminant onto the plaintiff's lands from that source area, and by taking no steps to prevent that migration, the defendants have committed an actionable trespass. The plaintiff argues that the contamination is a voluntary, direct, and physical intrusion, and that the plaintiff has free product on his lands as a result.

[52] I disagree with the arguments raised by the plaintiff on this issue. According to the evidence, none of FHL's actions, including the occasional spills of PCE/TCE between 1960 and 1974, resulted in a direct intrusion of PCE/TCE onto the plaintiff's properties.

[53] According to Mr. Byerley's evidence, spilled DNAPL of PCE/TCE would have sunk into the ground of 1235 Bank. As DNAPL of PCE/TCE is heavy, it would have gradually sunk into the ground, and slowly moved along the most permeable route in the soil. The DNAPL of PCE/TCE would have pooled when it hit a relatively impermeable barrier, such as bedrock.

[54] Once the DNAPL of PCE/TCE collected in a pool, groundwater would have flowed across the DNAPL, gradually carrying small amounts of PCE/TCE onward (including to 1255 Bank and 1263 Bank) and into the soil. Mr. Byerley also explained how the PCE/TCE would have spread by diffusion, moving from areas of higher concentrations to lower concentrations, gradually spreading from 1235 Bank onward.

[55] These mechanisms by which the PCE/TCE entered the plaintiff's properties are indirect, rather than direct, intrusions onto the plaintiff's properties. The first required element of trespass is therefore not met.

[56] Consequently, the plaintiff's claim for trespass is dismissed.

Strict Liability: The Rule in Rylands v. Fletcher

[57] The plaintiff also claims against FHL in strict liability, under the rule in *Rylands v. Fletcher*.

[58] The plaintiff alleges that the use of its land by FHL is a non-natural use. Mr. Huang argues that a dry cleaning facility inherently constitutes a non-natural use of land, given its use of solvents and degreasers such as PCE and TCE. He alleges further that the manner in which the spent PCE, filters, and sludge were disposed of on the land also constitutes a non-natural use. He states that the solvent was likely to do mischief if it escaped and it did, in fact, escape and cause considerable damage in the form of contamination in excess of MOECC standards, meeting he alleges the requisites of strict liability.

[59] The rule in *Rylands v. Fletcher* has been formulated to require four prerequisites:

i) the defendant made a "non-natural" or "special" use of his land;

ii) the defendant brought on to his land something that was likely to do mischief if it escaped;

iii) the substance in question in fact escaped; and

iv) damage was caused to the plaintiff's property as a result of the escape.

(see *Smith v. Inco Ltd.*, 2011 ONCA 628, at para. 71)

[60] When applying the above formulation of the rule in *Rylands v. Fletcher* to the facts of this case, I conclude that it does not apply. Here are my reasons.

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[61] Similarly to the situation in *Windsor v. Canadian Pacific Railway Ltd.*, 2014 ABCA 108, 371 D.L.R. (4th) 399, when I consider the place where the use was made, the time when the use was made and the manner of the use, I conclude that the use of these products (PCE/TCE) was not a "non-natural" or "special" use of this land. There is no evidence that the dry-cleaning operations on the property were a non-natural or special use of the land nor is there evidence that the use made, at the time and in this business, of PCE/TCE was a non-natural or special use. There is simply no evidence to support these allegations of the plaintiff, which are essentially contradicted by his own experts.

[62] In addition, if the requirement that the substance was "likely to do mischief if it escaped" envisions some element of foreseeability (as seems to be suggested by *Inco,* at paras. 108–10 and more specifically suggested in *Windsor,* at paras. 20–21), then the second requirement of the rule is as well not met as, on the evidence, very little was known about any harmful effect of PCE/TCE prior to 1974. In fact, as indicated above, it was then believed that PCE/TCE could be dumped on the ground. Therefore, it could not have been considered that that the substance was "likely to do mischief if it escaped".

[63] Consequently, the plaintiff's claim under strict liability (or under the rule in *Rylands v. Fletcher*) is dismissed.

[64] As an aside, I wish to point out that comments have been made in a number of cases questioning whether liability under this principle should, in such circumstances, be exceptional (as strict liability does not require a finding of negligence or of other fault): see *Windsor*, at para. 17; *Smith v. Inco Ltd.*, 2011 ONCA 628, at paras. 84, 90, 93–94. Indeed, as indicated by the Court of Appeal in *Smith v. Inco*, at, amongst others, para. 94: "Having concluded there is no common law rule imposing strict liability on those whose activities are said to be 'ultra-hazardous'", and, at para. 112, that this "paradigm involves an unnatural use of the defendant's property and some kind of mishap or accident that result in damage[,] [t]he application of *Rylands v. Fletcher* to consequences that are the intended result of the activity undertaken by the defendant has been doubted".

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Section 99 of the Environmental Protection Act, R.S.O. 1990, c. E.19

[65] At paragraph 8 of the Amended Statement of Claim, the plaintiff pleads that FHL and Mr. Hillary had management and control of the chemicals and dry-cleaning wastes which caused the contamination of the plaintiff's properties and, at paragraph 29, pleads and relies upon the provisions of the *Environmental Protection Act* ("*EPA*"), including section 99.

[66] The plaintiff argues that FHL is an "owner of the pollutant" and a "person having control of the pollutant", and that it was both the party that owned the PCE and the party in the charge, management, and control of the PCE before it was first discharged. Thus, it argues that FHL is under a duty under s. 93 of the *EPA* to take steps, which it has failed to, and that it is in violation of an order of the MOECC, with resulting liability to the plaintiff under s. 99(2)(a)(iii) of the *EPA*.

[67] The plaintiff argues that David Hillary is also an "owner of the pollutant" and a "person having control of the pollutant" on the basis, he alleges, that the evidence establishes that a source area is located on 36 Cameron and that contaminants are migrating from that source zone onto the plaintiff's properties.

[68] Both defendants argue that section 99 of the *EPA* is not applicable. FHL argues that s. 99(2) does not apply retrospectively and Mr. Hillary argues that, as a homeowner of 36 Cameron, he was not the owner or person having charge or control of the pollutant before the first discharge.

[69] Section 99 of the *EPA* provides for a civil cause of action between private parties, irrespective of fault or negligence.

[70] Section 99(2) of the *EPA* provides as follows:

> Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (i) the spill of a pollutant that causes or is likely to cause an adverse effect,

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(ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

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[71] The term “spill” is defined in s. 91(1) and refers to a discharge of a pollutant into the natural environment “from or out of a structure, vehicle or other container” that is abnormal in quality or quantity. More precisely, it provides:

“spill”, when used with reference to a pollutant, means a discharge,

(a) into the natural environment,

(b) from or out of a structure, vehicle or other container, and

(c) that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning.

[72] The “owner of the pollutant” is defined at s. 91(1) to mean “the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not…”.

[73] The “person having control of a pollutant” is defined at s. 91(1) to mean “the person and the person’s employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not…”.

[74] “Discharge” is defined at s. 1(1), when used as a verb, to include add, deposit, leak or emit and, when used as a noun, to include addition, deposit, emission or leak.

[75] Based on the undisputed evidence presented by the plaintiff from the read-ins of the examinations for discovery of the defendants, and based on the definition of “spill” in the *EPA*,

the spills of PCE/TCE occurred between 1960, when Hillary's opened at 1235 Bank, and 1974, when new machines were installed.

[76] These acts between 1960 and 1974 are the ones that could meet the definition of "spills" under the *EPA,* as PCE/TCE moved from a structure or container, into the natural environment. There is no evidence of "spills" of PCE/TCE after 1974.

[77] The flow of PCE/TCE underneath 1235 Bank onto neighbouring properties is not a "spill" as defined by the *EPA* because the PCE/TCE was already in the natural environment, it did not discharge from or out a structure, vehicle or other container.

[78] At the time the spills were happening, there was no statutory right to compensation for private individuals (see *Environmental Protection Act, 1971*, S.O. 1971, c. 86, as amended up to January 1, 1975. See also *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819, 128 O.R. (3d) 81, at para. 44, which provides an excellent history of this part of the *EPA*. As indicated by the Court of Appeal in *Midwest Properties*, this part of the *EPA* was introduced in 1979 and proclaimed into force on November 29, 1985). The right to compensation provided by s. 99(2) of the *EPA* was therefore enacted after the spills had stopped.

[79] Consequently, FHL argues that legislation is presumed not to have retrospective effect and relies upon *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, 66 D.L.R. (3d) 449, at para. 11:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

[80] FHL also argues that the language of the *EPA* does not expressly or implicitly provide that it operates retrospectively and relies upon subsections 3(2) and 3(3) of the *EPA* (emphasis added):

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> (2) No action taken under this Act is invalid by reason only that the action was taken for the purpose of the protection, conservation or management of the environment outside Ontario's borders.
>
> (3) Subsection (2) applies even if the action was taken before the coming into force of that subsection.

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[81] I disagree with the arguments of FHL on this issue. Firstly, I am not convinced that applying s. 99(2) to the circumstances of this case constitutes a retrospective application. Secondly, or alternatively, I am of opinion that the presumption against retrospective application is inapplicable given that the provision is designed to protect the public. Lastly, and in any event, if the presumption against retroactivity applies, it is rebutted by the clear intent of the legislator.

[82] In *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617, a statute concerning the practice of law by solicitors was amended to enable an order disqualifying a person from acting as a solicitor's clerk if such person had been convicted of larceny, embezzlement or fraudulent conversion of property. A clerk who had been convicted of one of those offenses before the coming into effect of the new law, contested his disqualification on the basis that the law was given a retrospective effect. The Court of Queen's Bench dismissed these arguments. Lord Goddard C.J. found that there was no retrospective effect since the real aim of the law was prospective and aimed at protecting the public. He wrote at p. 619:

> In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

[83] The above bears some similarity to the facts of this case. Section 99(2) does not seek to make anything void or voidable or to impose a penalty for having acted in this or that way before it came into force. Rather, it creates a right to compensation to "ensure that parties that suffer

damage through the discharge of pollutants are compensated by establishing a statutory right to recover from parties that owned and controlled the pollutant" (*Midwest Properties*, at para. 45).

[84] Consequently, applying s. 99(2) to the circumstances of this case, even when the spills occurred before the section came into force (which is not dissimilar to the situation of being disqualified now for a prior conviction as in *Re A Solicitor's Clerk*), is 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. Allowing, at this time, a right to compensation for spills that occurred before the section came into force does not change anything done in the past. Rather, it protects the public by creating a right to compensation and, as such, does not constitute a retrospective application.

[85] Alternatively, if I am wrong that applying s. 99(2) to the facts of this case is not in truth retrospective, then I am of opinion that the presumption against retrospective application relied upon by FHL is inapplicable, as s. 99(2) is intended as protection for the public rather than as a punishment for a prior event.

[86] In *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, the facts involve the imposition of a remedy, the application of which was based upon the conduct of the appellant prior to the enactment of the relevant provisions. As noted by the Supreme Court, the remedy was not designed as a punishment but rather to protect the public. Consequently, it was held that the presumption against a retrospective application had been rebutted.

[87] Justice L'Heureux-Dubé, writing for the Court, canvassed the law surrounding the presumption against retroactivity, and held, at para. 50, as follows:

> The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, Construction of Statutes, 2nd ed. (1983), explains at p. 198:
>
> > ... there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are

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> those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.

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[88] L'Heureux-Dubé J. then delineated a subcategory of the third type of statute: "enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public" (at para. 51). If the intent is to punish, the presumption applies; if the punishment is intended to protect to public, the presumption does not apply.

[89] Shortly thereafter, the Federal Court of Appeal was faced with deciding whether parts of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, were retrospective, allowing the RCMP Public Complaints Commission to entertain complaints about the conduct of Force members based upon facts occurring before the coming into force of the various provisions.

[90] In *Re Royal Canadian Mounted Police Act (Canada)*, [1991] 1 F.C. 529 (C.A.) ("*Re RCMP*"), leave to appeal to SCC refused, [1991] S.C.C.A. No. 57, Justice MacGuigan rejected the idea that the "protection of the public" exception against retroactivity had been broadened:

> Whether there is a general category broader than the sub-category, it must at least be recognized that there cannot be any public-interest or public-protection exception, writ large, to the presumption against retrospectivity, for the simple reason that every statute, whatever its content, can be said to be in the public interest or for the public protection….
>
> If there is a public-interest exception at all, therefore, it must in my opinion be reducible to a matter of legislative intent, that is, whether parliament intended prospectivity or retrospectivity (at paras. 34–35).

[91] To MacGuigan J.A., the exception to the presumption against retrospectivity is much more narrow and only applies where there is "(1) a statutory disqualification, (2) based on past conduct, (3) which demonstrates a continuing unfitness for the privilege in question" (at para. 32).

[92] Then, in *Thow v. British Columbia (Securities Commission)*, 2009 BCCA 46, 307 D.L.R. (4th) 121, the British Columbia Court of Appeal allowed Mr. Thow's appeal from the decision of the British Columbia Securities Commission to impose on him an administrative penalty of $6 million. It was agreed that Mr. Thow's contraventions of the *Securities Act*, R.S.B.C. 1996, c. 418, pre-dated the amendments that increased the maximum administrative penalty from $250,000 to the $6 million he was fined.

[93] In reducing his penalty to the pre-2006 maximum of $250,000, the Court of Appeal held that the Securities Commission erred in finding that the presumption against retroactivity was inapplicable. Groberman J.A., writing for the Court, found that the Federal Court of Appeal's analysis in *Re RCMP* to be "overly restrictive in suggesting that the presumption against retroactivity extends only to statutory disqualifications, *per se*" (at para. 45).

[94] To Groberman J.A., the presumption may be extended to apply more broadly — the exception operating "only where a prejudicial sanction is imposed, not for penal purposes, but as a prophylactic measure to protect society against future wrongdoing by that person" (at para. 46).

[95] The Court held that the Securities Commission's imposition of the fine was not merely a prophylactic measure to limit or eliminate the risk that Mr. Thow might pose in the future; instead, it was "punitive" in the broad sense of the word, designed to penalize him and to deter others from similar conduct.

[96] In the case at bar, s. 3(1) of the *EPA* provides that the purpose of the *EPA* is to "provide for the protection and conservation of the natural environment." This must be borne in mind when interpreting the *EPA* and its reach should be wide and deep (see *Midwest Properties*, at para. 51, citing *R. v. Consolidated Maybrun Mines Ltd*., [1998] 1 S.C.R. 706, at para. 54).

[97] Clearly, the purpose of the *EPA* and of s. 99(2) is the protection of the public. The intent of the legislator, by enacting s. 99(2), is that innocent parties be entitled to compensation directly from the polluter. This is achieved by granting to any person a new and powerful tool to seek compensation from the owner of the pollutant and the persons having control of the pollutant without any requirement of intent, fault, duty of care, or foreseeability (see *Midwest Properties*,

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at paras. 70, 73). Further, this right to compensation clearly applies now for loss or damage incurred as a direct result of the spill of a pollutant, the exercise of some authority, or the neglect or default in carrying out a duty. Consequently, the presumption against retrospective application does not apply or is rebutted.

[98] In any event, or if I am wrong regarding any of the above — i.e. if the intent of s. 99(2) of the *EPA* is "punitive" in the broad sense, designed to punish polluters for their wrongdoing (which I believe it is not), or if this stature is one that attaches prejudicial consequences to a prior event as mentioned by Justice L'Heureux-Dubé in *Brosseau* — then in my opinion the presumption is rebutted by the clear intent of the legislation.

[99] Equivalent language to that found in s. 3(2) of the *EPA* (which is stated to apply even if the action was taken before the coming into force of that subsection) is not required for s. 99(2), as the right to compensation provided by this section is a present right and not a right to prospectively adjust some earlier action or earlier compensation (as is the case for s. 3(2) of the *EPA*). The intent of the legislator seems clear as well from the definition of "spill", which is not limited to discharges occurring after the coming into force of Part X of the *EPA*. Subsection 93(2) of the *EPA* reinforces this interpretation. Furthermore, when one reads the *EPA*, the intent of the legislature is to afford compensation now for spills, which would obviously include earlier spills. Otherwise, the legislators would have provided that this remedy is limited to spills occurring henceforth.

[100] Therefore, any presumption against a retrospective application is inapplicable by virtue of the purpose of the statute and, in any event, is rebutted by the intent of the legislator.

[101] Consequently, the plaintiff is entitled to compensation against FHL under s. 99(2) of the *EPA* as, on the evidence, FHL was both the owner of the pollutant and the person having control of the pollutant immediately before the first discharge of the pollutant, as these terms are defined in the *EPA*.

[102] However, for the following reasons, no such remedy is available against David Hillary.

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[103] The "owner of the pollutant" is defined as "the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not…". The owner of the PCE/TCE immediately before the first discharge was FHL. There is no evidence that it was ever Mr. Hillary.

[104] The "person having control of a pollutant" is defined as "the person and the person's employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not…".

[105] The evidence at trial is that Mr. Hillary was president, director, and officer of FHL since 1971. However, there is no evidence that Mr. Hillary was ever employed by FHL at this location at any time prior to 1974 or that he, personally, ever acted as agent for FHL at this location. Similarly, there is no evidence as to who were any of the employees or agents who had the charge, management or control of the PCE/TCE immediately before its first discharge in the years leading up to and including 1974.

[106] As indicated in *Midwest Properties,* at para. 88, the factual circumstances of each case will determine whether or not personal liability attaches under the provisions of s. 99 of the *EPA*. Unlike the facts in *Midwest Properties*, the evidence is in this case is that Mr. Hillary was never the owner of the pollutant or the person having control of the pollutant, as these terms are defined. Similarly, there is no evidence that he ever personally owned the pollutant immediately before the first discharge or that he ever was, at any time up to 1974, either an employee or an agent of FHL having the charge, management or control of a pollutant immediately before the first discharge.

[107] Moreover, there is no evidence that Mr. Hillary, as owner of 36 Cameron, ever owned the pollutant immediately before the first discharge or ever had the he charge, management or control of the pollutant immediately before the first discharge, as these terms are defined in the *EPA*. As the homeowner of 36 Cameron, this is clear from the fact that David Hillary did not purchase 36 Cameron until 1986, at least 12 years after the pollutants entered the ground from FHL.

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[108] The established principle that a corporation has a separate legal personality is applicable and the actions or inactions of FHL (by extension those actions or inactions of David Hillary as its president) are not those of David Hillary as the owner of 36 Cameron Avenue.

[109] The plaintiff's claim against David Hillary under s. 99(2) of the *EPA* is therefore dismissed.

Nuisance

[110] The plaintiff argues that a consideration of the appropriate factors leads to a conclusion that the interference caused by the migration of contaminant from the defendants' lands is unreasonable and that the interference is severe and the harm grave. He alleges that it is incompatible with the character of the neighbourhood for the plaintiff's lands to be impacted by contaminants and that his use and enjoyment of his property has been interfered with, as he has been unable to redevelop the lands or even refinance them. He argues, as well, that it is further unreasonable for the Defendants to take no steps to prevent or abate the nuisance, which has been continuing for years. The plaintiff argues also that similarly to *Midwest Properties*, the costs to remediate the plaintiff's lands are significant and that there is a risk to human health, as demonstrated by the MOECC's order to install vapour probes and its requests that air quality testing be performed.

[111] The plaintiff argues that once a defendant becomes aware of a nuisance emanating from his property, he or she has a duty to abate it, even where the defendant did not create the nuisance. He makes reference to *Schoeni et al. v. King* et al., [1943] O.R. 478 (S.C.), at p. 490:

> The occupant of property will be liable for a nuisance not created by him, and even though it has arisen without his own act or default, if he omits to remedy it within a reasonable time after he knows of its existence, or ought to have become aware of it.

[112] Consequently, the plaintiffs argues that both FHL and David Hillary are liable to the plaintiff in nuisance as neither has taken any steps to abate it despite knowing of the nuisance emanating from their respective property since 2003 (for FHL) and since 2007 (for David Hillary).

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[113] FHL argues that it is not liable under private nuisance because the plaintiff has not established either physical damage to the property or interference with the enjoyment of the land.

[114] It relies on *Smith v. Inco Ltd.*, 2011 ONCA 628, to the effect that something more than a change to the soil is required to satisfy the "physical damage" requirement of nuisance and that the evidence must show more than "potential health risks" to show physical damage to the property. FHL points out that the experts called by the plaintiff confirmed that they are unaware of anyone becoming ill from exposure to PCE/TCE on the plaintiff's properties and that there is no real risk from vapours at these properties. FHL argues as well that there is no evidence that the value of 1255 Bank or 1263 Bank had decreased, which they say is quite different from the situation in *Midwest Properties*. Finally, FHL argues that unreasonable interference has not been demonstrated, as they allege that the evidence does not support the plaintiff's contention that his properties cannot be developed as a result of the contamination and that the evidence does not show that the MOE would not accept the risk assessment for elevated PCE/TCE.

[115] For his part, David Hillary argues that a causal link between the alleged action or inaction and the damage suffered by the plaintiff is a prerequisite to a finding of nuisance against an individual. In support of this proposition, he relies upon *Murray v. Langley (Township)*, 2010 BCSC 102, at para. 36; *Kay v. Caverson*, 2011 ONSC 4528, 5 C.L.R. (4th) 17, at paras. 195–98; and *Alfarano v. Regina*, 2010 ONSC 1538, 91 C.L.R. (3d) 165, at paras. 99–100, which involved a claim under negligence and nuisance.

[116] Mr. Hillary also makes reference to a discussion in Klar, *Tort Law*, 3d ed. (Toronto: Carswell, 2003) as instructive on the issue, which he describes as this: in what circumstances may the innocent neighbour be held liable for a failure to act upon a nuisance caused by an up-gradient perpetrator? He points out that the author addresses, at pp. 656–57, the subject of "Continuing or Adopting a Nuisance":

> However, unlike the situation of an individual who deliberately engages in an activity which constitutes a nuisance, the law's treatment of an occupier who in some way inherits a nuisance is considerably more sympathetic. The liability of a person who occupies property on which a nuisance, or potential

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> nuisance, which was created by a previous owner, a trespasser, an act of nature or a latent defect in a property, is discovered, is essentially a matter not of strict liability, but of negligence law. In a series of English decisions, it was determined that an occupier of land has a duty only to take reasonable steps to abate a nuisance, or a potential nuisance, discovered on the occupied land, where the occupier did not create the nuisance or continue it by use. Liability is predicated on actual or constructive knowledge of hazardous condition and the occupier's lack of reasonable care in responding to it. In view of the fact that the hazardous condition was thrust upon an innocent occupier, a more lenient duty of care than that ordinarily imposed by negligence law has been laid down. The Defendant's particular circumstances, including the financial and physical capacity to abate the nuisance will be considered.

[117] Finally, Mr. Hillary argues that Professor Klar's text on this issue of nuisance and the property owner who had not originally created the nuisance was cited in the British Columbia case of *Kraps v. Paradise Canyon Holding Ltd*, 1998 CanLII 6650 (B.C.S.C.). He argues that in that case, the Court agreed that liability for nuisance should not be so strictly applied in a case where a party did not take positive steps to create the nuisance. In such circumstances, he argues the Court must consider what reasonably could be done by the individual to eliminate or abate the nuisance and relies upon *Kraps* for that proposition. Mr. Hillary also relies upon *Yates v. Fedirchuk*, 2011 ONSC 5549, 343 D.L.R. (4th) 171, at paras. 30, 67–70, to the effect that a homeowner cannot be liable for an unknown nuisance cause by a third party until such time that they discover the nuisance.

Analysis – FHL

[118] It is well established that the tort of nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable (see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, at paras. 18–2, 51; *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1, 40 R.P.R. (5th) 171, at paras. 13–15; and *Midwest Properties*, *supra*, at para. 106).

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[119] A substantial interference with property is an interference or an injury to the complainant's property interest that is non-trivial or that is more than a slight annoyance or trifling interference. If this threshold is met (i.e. the claimant showed harm that is substantial), then the analysis proceeds to an inquiry into whether the interference is unreasonable, regardless of the type of harm involved — whether the non-trivial interference is also unreasonable in all of the circumstances (see *Antrim*, *supra*, at paras. 19–23, 51).

[120] The reasonableness of the interference must be assessed in light of all the relevant circumstances. Under the reasonableness inquiry, the Court assesses whether the interference is unreasonable by balancing the gravity of the harm and the nature and utility of the defendant's conduct. As explained by the Supreme Court in *Antrim* (at paras. 28–29, 51–53), although the focus of the reasonableness analysis is on the character and the extent of the interference with the claimant's land (as the burden is on the claimant to show that the interference is substantial and unreasonable), the nature of the defendant's conduct is not irrelevant to that assessment. Whether the conduct is malicious or careless or whether the conduct is reasonable are relevant factors for the court to consider when assessing whether the interference is unreasonable.

[121] The Court of Appeal also describes this assessment in *Smith v. Inco Ltd.,* 2011 ONCA 628, at para. 40:

> The reasonableness inquiry focuses on the effect of the defendants conduct on the property rights of the plaintiff. Nuisance, unlike negligence, does not focus on or characterize the defendant's conduct. The defendant's conduct may be reasonable and yet result in an unreasonable interference with the plaintiff's property rights. The characterization of the defendant's conduct is relevant only to the extent that it impacts on the proper characterization of the nature of the interference with the plaintiff's property rights.

[122] In assessing unreasonableness, Cromwell J., at paras. 26–29 of *Antrim*, reminds us that courts are not bound to a prescribed list of factors, but should "consider the substance of the balancing exercise in light of the factors relevant in the particular case." In *Antrim*, the Supreme Court makes it clear that the balancing that is inherent in the reasonableness analysis is at the heart of the tort of private nuisance and that, where there is significant and permanent harm caused by an interference, the reasonableness analysis may be very brief. It states further that this

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analysis is required in all cases of private nuisance irrespective of whether the case involves physical harm or interferences that involve a loss of amenities, thereby minimizing the usefulness of trying to classify such distinctions (see paras. 50–51).

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[123] These principles were subsequently applied by the Court of Appeal in *TMS Lighting*, *supra*, and in *Midwest Properties*, *supra*. In *Midwest Properties*, the Court of Appeal applied *Antrim* and found the defendant liable in nuisance. In so doing, the Court considered the cost to remediate the plaintiff's lands as part of its reasonableness analysis. As stated by Hourigan J.A., at para. 107:

> The invasion of PHC [petroleum hydrocarbons] onto Midwest's property, to the point that the product is of such a concentration that it can no longer dissolve in groundwater and is found to pose a risk to human health, cannot be classified as trivial, insubstantial, or reasonable. The interference becomes all the more unreasonable when the significant cost to Midwest to remediate the contamination and undo the damage to soil and groundwater on its property is considered. This is not the kind of interference with the use or enjoyment of property that society, through the law of nuisance, expects a property owner such as Midwest to bear in the name of being a good neighbour.

[124] Considering the evidence presented and the above principles, I find that the damage or interference with the plaintiff's land is substantial or non-trivial. I find further that the interference with the plaintiff's use or enjoyment of land is unreasonable. Here is my analysis.

[125] Firstly, in determining whether there is an interference with the plaintiff's land that is substantial or not trivial, I note the following which to me are not at all trivial annoyances that should be accepted as part of the normal give and take between neighbours:

- The groundwater and soil of the plaintiff's properties are impacted by PCE/TCE contamination and concentrations of PCE/TCE in the groundwater and of PCE in the soil of the Plaintiff's properties currently exceed generic standard for any type of property use as set out in the MOECC standards for maximum allowable concentrations.

- The migration of contaminants, originating from 1235 Bank, onto the plaintiff's lands continues to this day and will continue until the source area is removed or isolated in its entirety.
- Contaminants remain at the source property (1235 Bank) and, according to the MOE, may have the potential to cause adverse effect to adjacent properties, including obviously the plaintiff's properties.
- The MOE requested significant additional information from the defendants in 2014 in order to better assess potential adverse effects, including effects on surrounding properties, in the event of construction, and from soil vapour intrusion into buildings overlying contaminated area — none of which has been provided by the defendants.
- The MOE order of July 23, 2014 orders the plaintiff, Mr. Huang, to provide access to the defendants for purposes of FHL carrying out additional delineation investigation and studies.
- The plaintiff is unable to redevelop his lands unless they are remediated.
- The cost of remediation of the plaintiff's properties, irrespective of which option is considered, is significant.

[126] These are not insubstantial concerns, or concerns of the nature described in *Smith v. Inco* — not with the MOE actively and significantly involved with the properties to the extent described by Mr. Heeringa and revealed by the MOE orders of April 15, 2013 and July 23, 2014.

[127] Secondly, when assessing whether the interference with the plaintiff's use or enjoyment of land is unreasonable, I make reference to the above, as well as to the continued involvement of the MOE and its impact on the plaintiff (see the order of July 23, 2014) and, further, to the added layers of uncertainty and added costs to the plaintiff that will, on a balance of probabilities, be incurred when his properties are developed along the lines of their recommended highest and best use. These are unreasonable interferences for a property owner to impose on his neighbour.

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[128] I note that, although a risk assessment may be approved by the MOECC to allow a site to be remediated to site specific standards, I accept the evidence of Mr. Herringa that the MOECC would be unlikely to approve a risk assessment for a site which has free phase products present.

[129] When considering the arguments advanced by FHL that it has acted reasonably, I note that the MOECC has ordered FHL and Mr. Hillary to conduct further delineation work on their lands, the plaintiff's lands, and other lands in the vicinity, none of which has to date been complied with.

[130] I disagree with FHL's arguments that the plaintiff has not established either physical damage to the property or interference with the enjoyment of the land.

[131] *Midwest Properties* applied *Antrim* and both stressed the importance of looking at all relevant circumstances in a manner that is not constrained by specific and pre-determined factors (see *Midwest Properties*, at paras. 95–99). This is precisely the approach recommended by Justice Cromwell in *Antrim*, at para. 23:

> In referring to these statements I do not mean to suggest that there are firm categories of types of interference which determine whether an interference is or is not actionable, a point I will discuss in more detail later. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Tock*, at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

[132] *Midwest Properties*, at paras. 95–99, dismisses arguments that contaminants in the soil exceeding MOE guidelines cannot be evidence of interference to the property. These paragraphs answer many of the arguments raised by FHL. Furthermore, considering the very clear pronouncements made by the Court of Appeal in *Midwest Properties*, I find that FHL's attempt to distinguish *Midwest Properties* on the basis that the Court's analysis was only for purposes of determining if any nuisance existed as a ground to award punitive damages is ineffective.

[133] *Midwest Properties* also answers an earlier debate in the case law, whether diminution in value or restorative costs is the appropriate measure of damages in cases of environmental harm.

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The Court of Appeal states that "[t]he restoration approach is superior, from an environmental perspective, to the diminution of value approach" (at para. 62; see generally paras. 60–68). Although this is not applicable to this part of the analysis, it is certainly informative of why many earlier decisions focused significantly on whether there was evidence of a diminution in value when assessing whether the interference to property was serious.

[134] I also disagree with FHL's argument that any interference with the use of the plaintiff's land is not, in light of all the surrounding circumstances, unreasonable as Bank Street is predominantly commercial such that any inability of the plaintiff to develop a mixed residential property cannot be unreasonable. This runs contrary to the evidence of Mr. Juteau and of Mr. Phillips, that zoning would allow a mixed residential and commercial use and that the City of Ottawa would approve their suggested redevelopment plans. It runs contrary to the evidence of Mr. Huang — that this is what he intends for his properties — and it also runs contrary to the evidence of Mr. Byerley, that as the plaintiff's properties do not meet the criteria for groundwater, they could not be developed for industrial or commercial use either.

[135] Moreover, as indicated above, the evidence does establish, on a balance of probabilities, that the plaintiff will be unable to redevelop 1255 Bank and 1263 Bank until the PCE contamination is remedied to the satisfaction of the MOE.

[136] Mr. D'Arcy, of Paterson, at the conclusion of the Phase I and II reports in October 2002, recommended, with regard to the plaintiff's properties, that the contaminated soil be removed to avoid any further liability and that groundwater beneath the plaintiff's properties be remedied (Exhibit 1, tab 3). He stated as well that this will have to be carried out in conjunction with the FHL site or else a permanent barrier system will be required along the property boundary.

[137] Conestoga Rovers and Associates (CRA), who were retained by FHL to further investigate the contamination at 1235 Bank and 1255 Bank, over the years and up until their involvement stopped in or about 2013, recommended to FHL and proceeded unsuccessfully with a number of remediation action plans all designed to remediate the soil and groundwater at 1235 Bank and 1255 Bank.

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[138] The MOECC has been and remains actively involved with these properties, now for over ten years, ordering the defendants to proceed with various remedial strategies, and has now started enforcement proceedings, as described earlier and in its orders.

[139] Mr. Byerley and Dr. Reynolds testified, as per their reports, that remediation of the properties should comply with MOE standards (see for example Exhibit 5, tab 45, p. 4).

[140] Mr. Byerley testified that to remediate to residential standards, or to a more sensitive residential land use, a Phase I and Phase II assessment would be required to demonstrate that the properties meet the standards of the Ministry. Otherwise, a property owner could not develop the site and a building permit or record of site conditions will not be issued. He explained that in this case, as the plaintiff's properties do not meet the commercial criteria for groundwater, they could not even be developed for industrial or commercial use in their current condition.

[141] Mr. Huang testified that following receipt of the Phase I and II reports, his bank would not lend him any additional funds for purposes of developing these properties and refused to renew his existing mortgage. He also testified that his understanding is that he cannot develop the properties in their present condition as he cannot obtain a building permit from the City — until they are remedied — and that he will proceed with his contemplated development once his properties are remedied (evidence that I admitted, not as proof of its content but as proof of what Mr. Huang believes and intends to do).

[142] The above are not interferences of a nature that should be tolerated by the ordinary occupier or neighbour. For reasons stated above, the required threshold of seriousness has been met and the plaintiff has established the tort of private nuisance against FHL.

[143] I note, as well, that the defendants called no evidence and that I may draw an adverse inference against FHL for the failure to call CRA to contradict the evidence of Mr. Byerley that the plaintiff's properties cannot be developed, even for an industrial or commercial use, until such time as they are remedied. In these circumstances, such a failure amounts to an implied admission that the evidence of CRA on this issue would be contrary to the many arguments raised by FHL or at least would not support their arguments that elevated PCE/TCE levels do not

necessarily prevent a record of site conditions from being obtained or that the MOECC might accept a risk assessment as there is low risk relating to vapours. These are interesting arguments that are contradicted by the evidence of the plaintiff and which could have been addressed by CRA, such that an adverse inference is drawn.

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Analysis – David Hillary

[144] As it relates to David Hillary, I agree with the submission of his lawyer that the required analysis, relevant to nuisance, is different.

[145] Mr. Hillary is sued as homeowner of 36 Cameron. 36 Cameron does not directly abut any of the plaintiff's properties. Rather, 36 Cameron is surrounded on its south side by 1235 Bank (FHL's property). Moreover, the evidence establishes that 36 Cameron is not the source of the contamination, which all experts agree is 1235 Bank. Consequently, on these facts, two important factual distinctions are applicable to Mr. Hillary:

(1) He is not an adjoining landowner.

(2) In his role, as a homeowner, he is as well a victim of 1235 — in a situation not much different from that of the plaintiff — with the exception that his property is up-gradient to those of the plaintiff. If his property was down-gradient to those of the plaintiff, the roles might be inverted. In any event, as such, he is in a position similar to those described as persons who have inherited the situation from the primary culprit.

[146] Linden and Feldthusen, *Canadian Tort Law*, Tenth Edition, at pp. 608, 622, make reference to the above and indicate:

(1) When the defendant is not an adjoining landowner, absent an independent wrong, the courts will only hold the defendant liable in nuisance for the direct harm it caused.

(2) If people permit a nuisance, which they did not create, to continue, they may be required to answer for it because they adopted it as their own, noting that knowledge was not previously required but indicating that this now appears to be

> in doubt and making reference to Sappideen and Vines, *Fleming's The Law of Torts*, 10th ed. (2011), at pp. 509–10, and Klar, *Tort Law*, 5th ed. (2012), at pp. 766–67 — that "[l]iability is predicated on actual or constructive knowledge of the hazardous condition, and the occupier's lack of reasonable care in responding to it."

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[147] The above comment at (1) above, relating to non-adjoining landowners, finds it source in the decision of *Hoffman v. Monsanto Canada Inc*., 2005 SKQB 225, 264 Sask. R. 1, aff'd 2007 SKCA 47, 283 D.L.R. (4th) 190, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 347. At para. 122 of the trial decision, the Court indicates:

> The tort of nuisance imposes strict liability when the conditions for its application are met. The implications of holding a manufacturer, or even inventor, liable in *nuisance* for damage caused by the use of its product or invention by another would be very sweeping indeed. It is my conclusion that where the activity complained of is the activity of one who is not in occupation or control of adjoining land, and no independent malfeasance is alleged, then, at the very least, direct causation of the damage alleged must be alleged. This is not the case. I conclude that there are no facts alleged in this case that could support a finding that the defendants substantially caused the nuisance alleged. [Emphasis in original.]

[148] A requirement of some causal link in circumstances relevant to (2) above, when people permit a nuisance which they did not create, also finds support in the cases cited by Mr. Hillary, including *Gatta Homes Inc. v. St. Catherine (City)* (2009), 90 R.P.R. (4th) 40, at para. 176, and *Alfarano v. Regina*, 2010 ONSC 1538, 92 R.P.R. (4th) 53, at para. 124.

[149] Applying the above, the plaintiff's characterization of the claim against the Mr. Hillary vis-à-vis his property at 36 Cameron is based upon his inaction since becoming aware of the presence of DNAPL. However, by the time Mr. Hillary became aware of 36 Cameron's location within the source zone, whether it was shortly after 2002, as is argued by the plaintiff, or shortly after 2007, which I find is most probable, the plaintiff's lands were already contaminated.

[150] I have found that that the most probable time for Mr. Hillary to have known that 36 Cameron was in the source zone is after May 2007 as this is when MW8-07, which is on 36

Cameron, was drilled and before March 13, 2009 when the plaintiff's engineers in their report allude to the possibility of MW8-07 being in the source zone.

[151] As early as 2002, Paterson's groundwater sampling showed that only one of the sampled boreholes had PCE contamination levels below MOE Guidelines. At that time, JDP recommended a remediation of the groundwater under the Plaintiff's property.

[152] By June 2007, the seven new monitoring wells (MW8-07 to MW14-07) advanced throughout the properties all came back with groundwater PCE concentrations in excess of the MOE Guidelines. Moreover, the newly installed monitoring wells that were on the plaintiff's property at 1255 Bank immediately showed the possible presence of DNAPL. The first readings from MW9-07 and MW10-07, both of which are at the north westerly area of 1255 Bank, measured in excess 2000ug/L (the "1% Rule") and therefore were immediately indicative of free-phase PCE (DNAPL).

[153] Subject only to one exception, at no time since 2007 did a monitoring well or borehole that was previously uncontaminated become contaminated. In other words, the need or requirement for remediation at the plaintiff's property has not changed or become any worse since 2007, when, at the earliest, Mr. Hillary became aware that 36 Cameron was within a source zone.

[154] Furthermore, Dr. Reynold's evidence was that, even if 36 Cameron was completely free of DNAPL (and all the other properties remained the same), the plaintiff's properties would still be contaminated and newly contaminated groundwater would continue to flow through the plaintiff's property. Consequently, there is nothing Mr. Hillary can do vis-à-vis 36 Cameron that would change the fact that the plaintiff's properties continue to be contaminated from the PCE originating from FHL.

[155] I therefore find that the plaintiff's claim in nuisance against David Hillary fails, as the plaintiff has not established that any inaction on the part of Mr. Hillary since becoming aware of the contamination on 36 Cameron caused any of the substantial interference with the plaintiff's properties.

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Negligence

[156] The plaintiff's claim in negligence against both FHL and David Hillary is dismissed on the basis that the plaintiff has not proven causation.

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[157] The elements of a negligence claim are: duty of care, breach of the standard of care, causation, and damages.

[158] The existence of a duty of care for FHL is obvious and not disputed, as FHL is the plaintiff's adjoining neighbour.

[159] David Hillary argues the absence of a duty of care, alleging that imposing such a duty would create a spectre of indeterminate liability. I disagree and find that Mr. Hillary, as owner of 36 Cameron, has a duty of care — to be careful and avoid acts and omissions that may cause harm to the plaintiff.

[160] The relationship between two close neighbours, such as between Mr. Hillary as homeowner of 36 Cameron and the plaintiff, even if their properties are not adjoining, discloses a sufficient degree of foreseeability and proximity. Moreover, in our circumstances, there are no residual policy considerations which could negate such a duty.

[161] Indeed, the situation as it relates to David Hillary discloses very clearly that there might very well be no other available remedy but negligence — I have not yet found him liable under any of the many claims advanced by the plaintiff. Furthermore, these facts do not suggest a situation where there would then be no logical way to distinguish this claim from an indeterminate number of others who could claim on the basis of this duty of care. This is contradicted by the evidence and by the applicable geographical layout.

[162] On the issue of a breach of the standard of care, I agree with the defendants that this analysis must be divided into different timelines:

(i) 1960 to 1974;

(ii) 2002 and later as it relates to FHL; and

(iii) 2007 and later as it relates to David Hillary.

[163] The evidence, particularly that presented by the plaintiff's experts, was that based on the scientific understanding at the time (prior to 1975), no special care was required in dealing with the PCE/TCE — the recommended disposal method was to pour it out on the ground. No other evidence has been presented on this issue.

[164] Consequently, spills of PCE/TCE that happened between 1960 and 1974 were not in breach of any applicable standard of care.

[165] For the period from 2002 onward, as it relates to FHL, I agree with FHL's arguments and find, on the evidence, that FHL initially took reasonable measures, such as engaging experts and attempting and pursuing the various strategies recommended by their expert. Even if some of the efforts of FHL's expert, CRA, were criticized by the plaintiff's experts, including Golder Associates Ltd., as early as May 2006, there is no evidence that these efforts were in breach of the standard of care applicable to a reasonable property owner. However, I find that from about mid-2013 onward FHL failed to remain engaged in the process and from then on I find that it failed to take any reasonable step, in breach of the standard of care, to prevent or limit further harm to its neighbours. FHL's ultimate failure to respond to any enquiry from the MOECC post-2013, as disclosed by the evidence of Mr. Heeringa, and FHL's failure to comply with any of the 2014 orders is also in breach of the standard of care of a reasonable property owner.

[166] The same analysis applies to Mr. Hillary. Although initially it was reasonable for him to rely on the efforts of FHL and its expert, CRA, he did not act like a reasonable property owner should have acted in the circumstances when he failed to take any step whatsoever from about mid-2013 onward to prevent or limit further harm to his neighbours. If Mr. Hillary intended to successfully argue that he could not understand the 2014 orders, he should have testified. Despite some confusion relating to parts of the testimony of Mr. Heeringa relating to Mr. Hillary, described above, taking no step whatsoever, not even to enquire, cannot and does not meet the standard of care of a reasonable property owner to prevent or limit harm to his neighbours in these circumstances.

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[167] However, irrespective of whether a "but for" test or a "material contribution" test is applied — on the theory that "but for" is not applicable because we cannot distinguish between contamination originating from 1235 Bank or 36 Cameron — I find that the plaintiff has not proven, on a balance of probabilities, that his damages were caused by the defendants' negligent conduct.

[168] As indicated above, I find that the conduct of the defendants was not in breach of their respective standard of care until about 2013. Although I appreciate that some of the 2015 water readings are higher than earlier readings, Mr. Byerley explained that these different readings could be due to a multitude of collection related factors. More importantly, there is no evidence that these higher readings have any impact on the requirement for remediation of the plaintiff's properties and associated cost.

[169] I make reference to the analysis on this topic conducted under the nuisance heading. As demonstrated, the plaintiff has advanced no evidence of any additional harm or loss suffered as a result of the inaction of any of the defendants from 2013 onward.

Damages

[170] The plaintiff seeks the following relief:

(a) a declaration that the defendants are responsible for contamination of the soils and groundwater at the plaintiff's lands which has migrated from 1235 Bank and 36 Cameron;

(b) damages from the defendants in the amount of $4,374,000.00 for the cost to remediate the plaintiff's lands;

(c) damages from the defendants in the amount of $201,726.71 for engineering costs incurred by the plaintiff to date;

(d) a mandatory order that the defendants be required to implement control and remedial measures at their lands to prevent the continued migration of contamination under, into or through the plaintiff's lands, by remediating the

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source area as may be agreed by the plaintiff, the defendants and the MOECC, or, in the alternative, by remediating the source area in accordance with the report of Geosyntec, dated January 15, 2014;

(e) a declaration that the defendants are bound to indemnify the plaintiff for any and all claims, orders or directions by any third parties, including the MOECC, with respect to the contamination.

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Declaration that defendants are responsible

[171] As mentioned in more detail later in my analysis, declarations should be granted sparingly and with caution.

[172] In this action, I have already made a number of findings, including, that:

- the original source of the PCE/TCE is the dry-cleaning operation carried on by FHL at 1235 Bank between 1960 and 1974;
- the plaintiff is entitled to compensation against FHL under s. 99(2) of the *EPA* as FHL was both the owner of the pollutant and the person having control of the pollutant immediately before the first discharge; and
- the plaintiff has established the tort of private nuisance against FHL.

[173] Furthermore, available damages are dealt with below and constitute an adequate remedy for the plaintiff.

[174] Consequently, the declaratory relief sought by the plaintiff at paragraph (a) above would serve no useful purpose and such an order is therefore not made.

Damages

[175] The Court of Appeal has made it clear that courts may, in environmental cases, award damages not only based on the traditional view of diminution in value but also based on restoration costs, even if those exceed the amount of the decrease in property value. On this, it mentioned that the restoration approach might, in some circumstances, be superior from an

environmental perspective to the diminution of value approach as it could be better at properly funding clean-ups (see *Midwest Properties* at paras. 61–62, 69–70).

[176] Section 99 of the *EPA* provides for the availability to the plaintiff of compensation for loss or damage incurred as a direct result of the spill of a pollutant. Loss or damage is defined quite broadly in that section. Quite similarly, the general focus of tort compensation, involving damage to land, is to put the plaintiff in the position he or she would have been in had the harm not occurred. This generally involves either the diminution in value of the plaintiff's property or the reasonable cost of restoration. Further, it seems axiomatic that, while restoration damages must allow for the full remediation of the property, this exercise must nonetheless be bound by reasonableness considering the facts of each case.

[177] The plaintiff presented, through his experts Mr. Byerley and Dr. Reynolds, eight different remedial scenarios. The costs associated with each of these scenarios vary considerably and some of these scenarios assume conflicting hypotheses. For example, some scenarios clean the source zone on all contaminated properties, including, in addition to those of the plaintiff, 1235 Bank, 36 Cameron, and even those of some unidentified non-parties (part of some of the residential properties to the east of the plaintiff). Some build a barrier to isolate the source zone and then treat the plaintiff's properties through various methods including bioremediation. Other scenarios assume the excavation of all of the plaintiff's properties, as contemplated by their development and cost for the incremental costs resulting from the contamination. To make it even more challenging, some assume that the applicable remedial standard is the residential and coarse soils standard for full depth, while other scenarios assume that the standard is the commercial and medium and fine textured soils for a stratified site condition.

[178] After having assessed the evidence and the various scenarios, I have eliminated the scenarios requiring the remediation of the entire source zone with no barrier to isolate the source zone.

[179] The source zone is located on 1235 Bank, 36 Cameron, 1255 Bank, and also on some of the easterly properties (see Exhibit F at Tab 51 of Exhibit 5, and the evidence of Dr. Reynolds).

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Scenarios addressing the entire source zone are not realistic or workable solutions for a number of reasons, including that, invariably, they will involve some of the unidentified easterly neighbours who have not been sued by the plaintiff and may resist such an intrusion on their property.

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[180] Experts identified, early on, that some barrier system could be implemented to isolate the plaintiff's properties, as a much more practical alternative to the remediation of the entire source zone. The logic of this approach is, in the circumstances of this case, inescapable. Considering the evidence, alternatives that isolate and remedy the plaintiff's properties present, in these circumstances, as the most reasonable and appropriate to adopt when assessing the various scenarios as they are practical and will reasonably and effectively put the plaintiff in the position he would have been in had the harm not occurred.

[181] From my perspective, this leaves the following remedial alternatives to consider:

A - Byerley alternative 3 (Exhibit 5, Tab 45 – but limited to the plaintiff's properties)

[182] Mr. Byerley's alternative 3, when limited to the plaintiff's properties, involves isolation of the source zone by the construction of an impermeable barrier along the perimeter of the source zone at 1235 Bank and 36 Cameron Avenue and remediation of the plaintiff's properties by ISCO followed by enhanced bioremediation of impacted groundwater. Mr. Byerley priced this alternative on the basis of Table 3 for residential and coarse soils standards. It would require 10 to 15 years and would cost 1.95 million, plus groundwater monitoring:

- $450,000 for an impermeable barrier along 1235 Bank Street and 36 Cameron Avenue (excluding groundwater monitoring – he accepted the midpoint between 400,000 and $500,000);
- $1.50 million for the ISCO and bioremediation treatment to 1255 Bank and 1263 Bank Street (he indicated between 1.2 to 1.7 million but during cross-examination indicated that if you built a wall around the source zone for

$450,000, as he proposes, you could clean 1255 and 1263 Bank for $1.5 million), plus groundwater monitoring.

B – Byerley's excavation during redevelopment alternatives (Exhibit 5, Tab 48)

[183] In a subsequent report of January 29, 2014, Mr. Byerley approached remediation of the plaintiff's lands by way of excavation and disposal, with excavation occurring during a redevelopment of the plaintiff's properties. He assumed that the footprint of the underground parking would occupy the total site area and that the above ground structure would have a rear yard setback of 7.5 metres. He considered two alternatives for a watertight foundation: a geomembrane liner or a concrete diaphragm wall. He calculated the cost of the foundation of the building, as if the properties were not contaminated, at $4,332,000. He calculated the cost of the foundation, with a water tight geomembrane liner and dewatering system, scenario 2, at $8,416.000, and he calculated the cost of the foundation with a watertight concrete diaphragm wall, scenario 3, at $8,706.000. The difference with the base cost would represent the incremental cost of remedial efforts: $4.084 million for scenario 2 and $4.374 million for scenario 3 (the latter is the scenario preferred by the plaintiff).

C - Reynolds' GS-2 alternative (Exhibit 5, Tab 51)

[184] Dr. Reynolds suggested two alternative remediation strategies: GS-1 and GS-2. He priced for their current land use of industrial/commercial, using stratified geology (Table 5) and for fine to medium grained soils. He agreed that it would be more expensive for residential land use at Table 3 (full depth) using coarse soils.

Analysis

[185] I eliminated Mr. Byerley's alternative 3, described above at (A), on the basis of the comments and the more up to date recommendations of Dr. Reynolds and make reference to the criticism of that alternative contained in the August 21, 2012 report of Dr. Reynolds at pages 18–19.

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[186] I eliminated Dr. Reynolds' GS-1 alternative as it involves treatment of the source zone which, as indicated above, I find not to be a practical or workable solution. Further, I found that the arguments raised by FHL in support of the GS-1 alternative, that the Court should assume that all properties will be remedied together, are contradicted by the evidence and by the lack of cooperation by FHL since 2013. Indeed, it seems somewhat disingenuous for FHL to ask this Court to pick the less expensive option (after required adjustments to GS-1) on the assumption that the MOECC will compel FHL to do what FHL has not done to date.

[187] GS-2 would cost $1.21 million and require eight to ten years. It isolates the source zone and treats 1255 Bank with injections. It seems by far to be the most carefully thought out, as well as the most technologically advanced and most efficacious, alternative. However, it assumes slightly aggressive remedial standards which, as will be seen later, I find to be contradicted by the evidence. As a result, although it clearly presents as the most reasonable and best alternative, considering the particular circumstances of this case, adjustments to the projected cost will be required if it is to be used for purposes of assessing damages.

[188] I disagree with the contentions of the plaintiff that GS-2 is a starting point, prepared and predicated upon what remediation might be accomplished for a total cost of $1.8 million, being the value of the Fraser Hillary's Limited site plus 50% and that it would not fully remediate the plaintiff's properties. This is not at all what is indicated in Dr. Reynolds' report and this is not what he indicated in his evidence. Rather, it is a reasonable alternate remediation approach that is extremely focused on the available evidence.

[189] I also disagree with the plaintiff's arguments that GS-2 is not a workable solution, including particularly that the presence of the ZVI permeable reactive barrier, proposed by Dr. Reynolds, would permanently prevent the redevelopment of the plaintiff's properties in a manner which reflects the highest and best use of the property. The plaintiff presented no evidence in support of these contentions. Rather, the plaintiff presented Dr. Reynolds as part of his case and evidence, including Dr. Reynolds 2012 GS-2 alternative.

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[190] Dr. Reynolds' evidence is that scope of GS-2 contemplates the installation of a 25-metre long ZVI PRB, which would start at a point where the plaintiff's property intersects the laneway that is owned by Fraser Hillary Limited – which is the lane way that separates the plaintiff's properties from 36 Cameron. The PRB would then extend down toward Bank Street, acting as a filter for all PCE contaminated water that crosses its path, to a point where there would be no further concern of contamination. I have no evidence that this cannot be incorporated into the plaintiff's contemplated redevelopment. The same comments would generally hold true for Mr. Byerley's alternative 3, described above, which also involves isolation of the source zone via the construction of an impermeable barrier along the perimeter of the source zone.

[191] I eliminated the excavation during redevelopment alternatives, described at (B) above, for a number of reasons. These alternatives involve a number of uncertainties that could drastically impact the indicated differential cost. They assume that the underground parking would occupy the entire lot which seems uncertain considering the evidence of Mr. Juteau and Mr. Phillips. Further, they assume a two-level parking garage which seems at odds with earlier architectural drawings. Mr. Byerley also had difficulty explaining parts of his pricing for these alternatives. For example, he used $13.00 per metric tonne to dispose of clean or background soils as opposed to the $17.00 amount indicated in an earlier quote. As well, these alternatives do not consider that the plaintiff is unable to develop his properties until 2024, the end of the last lease – Mr. Byerley was unaware of this. As indicated, the plaintiff provided no evidence of any concrete plan to deal with his tenants in the event of a redevelopment and I do not accept his vague answers that somehow he could be permitted to redevelop these properties any earlier than at the expiration of the leases. As such, the cost associated with any of these scenarios would as well likely over-compensate the plaintiff as neither is discounted for time. Moreover, and more importantly, I reference the following three points: (1) these excavation scenarios make no use of this available time – almost seven years – to consider and implement more effective and less expensive alternatives; (2) the plaintiff provided no convincing evidence of how these excavation options could be coordinated with his leases; and (3) the plaintiff provided no evidence of any prejudicial financial impact of selecting a remediation approach that could last ten years and require a permanent underground barrier (as that proposed by his expert witness, Dr. Reynolds).

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[192] Dr. Reynolds explained that the criterion that determines speed is risk. He indicated that it is not unusual to prefer a slow and less expensive option for a site that poses no risk to human health and ecology, which the experts agreed is currently the case for the plaintiff's properties. This seems to have been disregarded by the plaintiff and by Mr. Byerley in the elaboration of the excavation during redevelopment alternatives (Exhibit 5, Tab 48) and, as indicated, the plaintiff presented no evidence of any prejudicial financial impact related to time. Dr. Reynolds explained that if there was imminent risk to human health he would have considered faster options but here, as there is no risk to human health known to date, ten years seemed a reasonable timeframe. I agree.

[193] Consequently, when considering the evidence in assessing the reasonableness of the excavation options presented by the plaintiff, described above, I find that they are not reasonable.

[194] The above comments are generally reflective of my appreciation of Dr. Reynolds as a witness. He was by far the most impartial witness. He answered all questions in the most straightforward manner, irrespective of whether he was answering in chief or in cross, and made appropriate concessions. He genuinely tried to be helpful to all, in a manner that should inspire all expert witnesses. Mr. Byerley was also a credible witness but, by opposition to Dr. Reynolds, he was often too protective of the plaintiff and quite reluctant to concede the obvious.

[195] Dr. Reynolds holds a PhD in hydrogeology and is a specialized expert in the relevant fields. His focus is on contaminant hydrogeology, rather than hydrogeology in general, and Dr. Reynolds' work in the field of DNAPL and contaminants is extensive and perfectly applicable to the present situation. Likely due to his superior expertise in the area of contaminant remediation, he recommended applying state-of-the-art technologies to the situation. For example, he applied zero-valent iron (ZVI) to his GS alternatives in place of more traditional potassium permanganate, which Dr. Reynolds testified had been in use for over 200 years and would not work well on this site. As a further example, he suggested the use of membrane interface probes to gather required information, in place of boreholes. I place a lot of weight on his evidence.

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[196] However, as indicted above, Dr. Reynolds assumed that the plaintiff's properties would retain their commercial zoning and use, and therefore he used the commercial standard which, I agree with the plaintiff, is not appropriate considering the evidence.

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[197] If the contamination was not present, the plaintiff testified he would have redeveloped his lands and would construct a mixed commercial/residential complex. I accept that reinstating his properties to the residential standard is reasonable in the circumstances as it is supported by the evidence of Mr. Juteau and Mr. Phillips that this would constitute the highest and best use of the plaintiff's properties and would likely be approved by the City.

[198] Consequently, it is reasonable and appropriate to apply the residential standard.

[199] As set out above, the MOECC has determined, on a preliminary basis back in 2003, that the appropriate generic standards for the plaintiff's properties is Table 3 Full Depth Generic Site Condition Standards in a Non-Potable Ground Water Condition for industrial/commercial property use (found at Exhibit E). Section 168.3.1 of the *EPA* prohibits a change of the use of a property from commercial use to residential use unless a record of site condition has been filed in the Environmental Registry in respect of the property. Section 168.4(1) of the *EPA* sets out the criteria which must be met to submit for filing a record of site condition, and includes certification by a qualified person that the property meets either generic site criteria (as set out in the applicable Table) or the standards specified for the property in a risk assessment accepted by the MOECC.

[200] According to Mr. Heeringa, the MOECC would be unlikely to approve a risk assessment for a site which has free phase products present, which is the case with the plaintiff's properties.

[201] Mr. Heeringa and Dr. Reynolds confirmed the four (4) geological units on the site (Exhibit 6, Tab 73 and Exhibit 5, Tab 51– from surface downward: fill; fine to medium sand; silty and till, interbedded with medium to coarse sand or gravel layers; and fractured limestone bedrock). However, Mr. Heeringa testified that if the soil comprises coarse grain, then the MOECC geologist will apply coarse grain to the entire site. He indicated further that in the absence of requested information, the MOECC will require full depth rather than stratified.

While FHL challenged the evidence of Mr. Heeringa during his cross-examination and in their written submissions, the above remains the evidence of the MOECC before this Court.

[202] Dr. Reynolds, being again quite candid in his answers, indicated that a case could be made for either Table 3 or Table 5, and that in his opinion the medium to fine standard is the appropriate standard but he cautioned that this should be confirmed with the regulator (see as well pages 20 and 21 of his August 21, 2012 report – Exhibit 5, Tab 51).

[203] The evidence of the regulator (MOECC) is as stated above. Further and in that regard, I note that Mr. Byerley recommends and used for all of his alternatives the Table 3 standards for residential property with coarse soils, which I agree better reflects the evidence of the MOECC and the evidence of the plaintiff related to contemplated use.

[204] Consequently, for purposes of assessing damages in this action, I find that the applicable standards are those found at Table 3 of Exhibit E, applicable for residential property use with coarse soils.

[205] In trying to adjust the cost of the GS-2 option to reflect the above applicable standards, I consider the following:

- The standards for non-potable groundwater are the same for either type of property use (commercial or residential) and they are the same in both Table 3 and Table 5 for either type of property use.
- However, the standards for non-potable groundwater are quite different (the same difference in either Table) for coarse textured soils (1.6) compared to medium and fine textured soils (17) – by an order of 10.
- The standards for soils are comparatively more demanding between the two tables for differently textured soils.
- This was addressed by Dr. Reynolds. He indicated that it would be more expensive for residential land use and coarse soils at Table 3, that his prices for GS-2 are for

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commercial use with medium and fine soils and that as such they would very much underestimate the cost for residential land use with coarse soils.

- However, later in his cross-examination, Dr. Reynolds, in reference to questions about the difference in cost of Table 3 vs. Table 5 criteria when considering the In-Situ Chemical Oxidation (ISCO) method of source zone remediation, which method of source zone remediation was discussed in Dr. Reynolds' January 15, 2014 report (Exhibit 5, at Tab 52), indicated that if he re-calculated his estimates using the more demanding standards of Table 3 for coarse soils, for some of his options relating to source zone the cost would increase while for some it would be the same price.

- In that same context (while addressing ISCO and ZVI/clay approaches), Dr. Reynolds indicated, while addressing a source zone remediation, that: "I'm not going to say that it would be identical but it would vary by a couple of percent" and later, while addressing the difference in standards between 21 and 0.28 (Table 5 for commercial and medium and fine soils vs. Table 3 for residential and coarse soils), he indicated that while these are significant differences, they are not significant from a cost perspective. He stated that it may be about 5 to 10% more, he could not give an exact number but he indicated that it is not double for instance and later indicated, still while addressing source zone remedies, that there will be some difference but it will be less than 50%, it will not be 100% and it will be less than 50% – to treat the source zone to these standards.

- Dr. Reynolds also inferred that it would be less for the not source zone remedies, or to remediate the parts of the properties not within the source zone, and in this context he made reference to his report at Exhibit 5, Tab 51, where at p. 10, he indicates:

> It is important to realize that the majority of PCE soil exceedances reported in the various site investigation reports are not indicative of free phase PCE contamination. It is reasonable to assume that once the groundwater plume is remediated, the majority of soil at the site will no longer exceed MOE criteria.

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- In this same context, inferring that it would be less for the not source zone area of the properties, he also explained that if you remove the source what is left is a very small fraction and it is unlikely to put you above the MOE standards – all of them, that it would then be very unlikely that you would exceed any of the standards.
- I note further that in his August 21, 2012 report (Exhibit 5, Tab 51), Dr. Reynolds explains at page 23 that the ZVI approach is similar to the ISCO approach, such that by inference his reasoning relating to required increases in his cost outline may be applied to the ZVI approach.

[206] Given that Dr. Reynolds' report provides that the ZVI approach is similar to the ISCO approach, and that the ISCO approach would cost between 5% and 10% and later in his evidence but less than 50% more to treat the source and get from the Table 5 to Table 3 standards, as indicated above, and given his inference that it would be at the lower end for the remedial costs associated with the parts of the property not within the source zone, I will make the following adjustments to the GS-2 alternative:

- 45% increase to the cost of the ZVI injection to treat the portion of the source zone on the plaintiff's properties ($290,000 plus 45%);
- 10% increase on the other costs of the GS-2 alternative; and
- considering the lack of cooperation of FHL since 2013, despite the many efforts and orders to date of the MOECC and considering the resulting high level of uncertainty associated with FHL's future remedial efforts – no evidence was presented by FHL, including none that it intends to remediate the source zone on any of the contaminated properties – I will allow a further amount of $200,000 as a contingency for the repair or replacement of the ZVI PRB barrier, which replacement may be required in 15 years.

[207] I have applied adjustments at the high end of what was suggested by Dr. Reynolds and have allowed an important contingency in a conscious effort at ensuring that the plaintiff is fully

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compensated for the reasonable remedial alternative allowed, such that he may proceed with his contemplated redevelopment.

[208] Applying the above adjustments to the cost amounts for the GS-2 alternative brings the total cost of this alternative from $1,210,000 to $1,432,500, and adding the contingency associated with the replacement of the PRB barrier brings the total amount allowed for that alternative to $1,632,500.

[209] In addition to the above, Mr. Huang has to date paid the following for the involvement of various experts and engineers at his properties: $20,923.96 to Paterson, $166,309.08 to Golden ($161,094.82 + $5,214.26) and $14,493.67 to Geosystem (Exhibit 7, at Tabs 5, 6 and 7), totalling $201,726.71 which shall be added to the amounts otherwise available for damages, plus any applicable pre-judgement interest.

[210] I am not allowing any reduction for the Brownfields Grant as the evidence is too uncertain to warrant any reduction for this possibility. Similarly, I am not allowing any reduction for the alleged contributory negligence of the plaintiff as the evidence does not establish that any of the alleged negligence on the part of the plaintiff, even if established, caused or contributed in any way to the plaintiff's losses, and I make reference to my earlier causation analysis.

Order for Remediation

[211] With respect to the relief sought at (d) above, a request for a mandatory order, I find that such an order would be inappropriate for two reasons: first, the plaintiff's ongoing concerns are met as a result of my award of damages, which includes a barrier, and, second, any orders for source zone remediation should be sought by the prosecutorial arm of the MOECC and enforced in the appropriate proceedings.

[212] Given that I have awarded damages to allow the plaintiff to remediate and isolate his properties, I find that the requested relief is not required. The barrier isolating the plaintiff's properties alleviates his concern about the continued contamination as the evidence of Dr. Reynolds was that a barrier would protect the plaintiff's lands from further contamination.

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[213] Equitable relief, such as a mandatory order, is only available where damages are not an adequate remedy (see *Pointe East Windsor Ltd. v. Windsor (City)*, 2014 ONCA 467, 374 D.L.R. (4th) 380, at para. 17). Here, the damages I have awarded constitute an adequate remedy, as the presence of PCE/TCE on the defendants' properties could not affect the plaintiff if his properties are isolated as recommended by the experts.

[214] Further, as sought, the remediation order would be too broad and could interfere with the legitimate rights of some owners not involved in this matter, including homeowners that live within the source zone, whom the plaintiff did not join as parties to these proceedings.

[215] I agree with the defendants that *Midwest Properties* does not assist the plaintiff in its submissions on this point. In *Midwest*, the plaintiff did not seek a remediation order; instead, it sought compensation under s. 99 of the *EPA* and the defendant argued that compensation could result in double recovery for the plaintiff given that an MOECC order had already been imposed. Here, the plaintiff is seeking a remediation order, which is properly within the role of the MOECC and not the courts (see esp. *EPA*, ss. 4–5, 17–18).

[216] I adopt the statements of Justice Bryant in *Newmarket (Town) v. Halton Recycling Ltd.* (2006), 274 D.L.R. (4th) 447 (Ont. C.A.), at para. 109: "Courts do not have the ability or expertise to supervise the performance of ongoing complex technical matters and it is not the function of the courts to become the regulator".

[217] For these reasons, I decline to make the remediation order requested at (d) above.

Order for Indemnification

[218] With respect to the order sought by the plaintiff at (e) above, namely, one that indemnifies it "for any and all claims, orders or directions by any third parties, including the MOECC, with respect to the contamination", I find that such an order is premature and hypothetical and, as such, I decline to make same.

[219] Any declaratory orders made under s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, are discretionary and should only be made in appropriate circumstances:

> The court's discretion to make a declaration should be exercised sparingly and with extreme caution: *Re Lockyer*, [1934] O.R. 22 (C.A.). As a general policy, the court will not make a declaratory order or decide a case when the decision will serve no practical purpose because the dispute is theoretical, hypothetical or abstract, and the remedy of declaratory relief is not generally available where the dispute or legal right may never arise: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Green v. Canada (Attorney General)*, 2011 ONSC 4778 (S.C.J.).
>
> Being a discretionary remedy, the court will withhold the exercise of its discretion to grant a declaration in circumstances in which a declaration cannot meaningfully be acted upon by parties; a declaration must have some utility: *Solosky v. The Queen*, [1980] 1 S.C.R. 821[;] *Giacomelli v. Canada (Attorney General)*, 2010 ONSC 985.
>
> (*Glaspell v. Ontario*, 2015 ONSC 3965, at paras. 28–29)

[220] Here, the declaration sought by the plaintiff concerns hypothetical issues that may never arise. There is no evidence before me that any third parties have a claim against the plaintiff. This is not a case where the declaration sought will serve a practical purpose; it cannot meaningfully be acted upon by the parties.

[221] Furthermore, and quite importantly, a determination of whether the plaintiff ought to be indemnified by one or by both of the defendants is better left to the ultimate trier of fact if or when a later proceeding is ever commenced, based on all the available evidence at that time. Without a concrete factual matrix upon which to decide the appropriate degree of indemnification, if any, that may exist as between the plaintiff, an unknown third party or parties, and the defendants (FHL and/or Mr. Hillary), I decline to make such an order and find that it would be inappropriate at this time and in these circumstances to pronounce on the legal conclusions that may or may not follow upon one or both of the defendants in such undefined future proceedings.

[222] Based on the foregoing, I decline to order the declaratory relief requested by the plaintiff at (e) above.

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Conclusion

[223] An Order may issue against the defendant Fraser Hillary's Limited for damages in the amounts of $1,632,500 and $201,726.71, together with any applicable pre-judgment and post-judgment interest available on any parts thereof pursuant to ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. All other claims are dismissed.

[224] I am quite hopeful that the parties will be able to resolve the issue of costs. Otherwise, brief written submissions not to exceed five pages, together with a copy of any required documents, shall be delivered on the following schedule: (1) by the plaintiff by April 28, 2017; and (2) by each of the defendants within 20 days of receiving the plaintiff's submissions. Kindly advise should a brief extension be required to facilitate your resolution of this issue. Costs submissions, if any, may be sent to me by email. Unless extensions are granted, I will assume that the issue of costs has been resolved if submissions are not received by the end of May 2017.

My thanks to counsel for their professionalism throughout.

Mr. Justice Pierre E. Roger

Released: March 6, 2017

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CITATION: *Huang v. Fraser Hillary's Limited*, 2017, ONSC 1500
COURT FILE NO.: 07-CV-39359
DATE: 2017/03/06

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

EDDY HUANG

Plaintiff

– and –

FRASER HILLARY'S LIMITED and DAVID HILLARY

Defendants

REASONS FOR DECISION

P. E. Roger J.

Released: March 6, 2017

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