

STATUTORY RIGHT TO COMPENSATION FOR REMEDIATION APPLIES TO SPILLS OCCURRING BEFORE THE RIGHT WAS IN FORCE

By Stanley D. Berger

On March 6, 2017 Superior Court Judge P.E. Roger ruled in *Huang v. Fraser Hillary's Ltd.*, 2017 ONSC 1500 that section 99 of Ontario's *Environmental Protection Act* R.S.O. 1990, c.E19 allowed the plaintiffs to recover compensation against a neighbouring dry cleaning business for remedial expenses for the tetrachloroethylene (PCE,PERC) and trichlorethylene (TCE) contamination of soils and groundwater on the plaintiff's property. The statutory right under s.99 is confined to spills which are defined in s.91(1) of the Act as "from, or out of, a structure, vehicle or other container". Fault or negligence is not a requirement of the statutory right to compensation under s.99. The evidence established that the PCE/TCE moved from a structure or container into the natural environment for a 14 year period between 1960-1974. The right to compensation in the Act was introduced in 1979 and only proclaimed in 1985 after the "spills" had stopped. The Court decided that applying the statute to the spills did not amount to retrospective application. Alternatively, the presumption against retrospective application of the law was inapplicable given that the right was designed to protect the public. Finally and in any event, even if the presumption against retroactivity applied, it had been rebutted by clear language in the statute.

On the law being prospective in its application, the Court said at par. 84 : "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." Alternatively, the purpose of this right was to protect the public and more particularly, innocent parties by granting 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 at pars. 70, 73* ." (at par. 97) In so doing, the presumption against retroactivity would not apply since the statute conferred a benefit and was not punitive. Finally, even if the compensation provision was punitive and for that reason would not rebut the presumption of retroactivity just because it was protective of the public, the right to compensation was expressed as a present right and the definition of spills was not limited to discharges occurring after the coming into force of the section in 1985.



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