

MUNICIPAL LIABILITY FOR ROADWAY CONTAMINATION

THE LONG AND WINDING ROAD

Almost every municipality has contamination under roadways from common sources like gas stations, dry cleaners and local industries. All too often, municipalities aren't aware of soil or groundwater contamination until someone digs, complains or sues.

Municipalities face potential environmental liability for contamination as road owners and from their statutory obligations to maintain and repair roads. They may need to respond to occupational health and safety issues, environmental issues, potential tort claims and possible regulatory actions.

Many off-site property owners and users do not take responsibility for the contamination that they've caused — particularly because roads are all too often considered to be without commercial land value. However, there are numerous consequences of contamination for municipalities that can be far more serious than the impact on the value of the road.

Consequences of contamination

First, workers conducting maintenance and repairs in sewers or other subsurface utilities or reconstructing roads have been exposed to health and safety dangers from toxic or explosive vapours. There may be human health risks to workers at the contamination source property or at com-



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mercial or residential properties where contamination has flowed through and beyond the road allowance.

Second, roads may be the conduit for contaminants to move to adjoining properties. Health risks can occur when explosive or toxic gases move within confined spaces such as sewers and basements. In recent years, health risks from vapour intrusion of petroleum or solvent fumes through cracks in sewers or basement floors and foundation walls has emerged as a rising concern. Diminution of property value resulting from vapour intrusion of solvents into residential homes is driving the application for class action certification in the Cambridge, Ontario case of *Watson v. Northstar Aerospace*.

Municipalities may be liable for contamination caused by others that moves from an adjacent property onto or under a municipal road and continues under the road and onto another innocent third party's property. At some point, a municipality may be obliged to investigate indoor air quality and explosive levels of vapours on abutting, down-gradient properties. It may have a duty to warn third parties of moving contamination. When the municipality becomes aware that contamination is flowing through its roadway, it may have an obligation to take steps to prevent further contaminant migration beyond the road, even though it is not the polluter.

As yet, there is no clear case law to guide municipalities. However, they are targets for potential litigation when road contamination occurs. Moreover, several cases before the courts may recommend an increased duty on public authorities to warn of and abate environmental health risks.

In *Berendsen v. Ontario* [2008] O.J. No. 179 (Ont. S.C.) (currently under appeal), Ontario's Ministry of Transportation was found liable for contamination of water on a dairy farm by its road construction contractors. In the Nova Scotia tar pond case, *MacQueen v. Ispat Sidbec Inc.*, [2007] N.S.J. No. 144, (Jason Murray / iStockphoto.com) (N.S.C.A.) (leave to appeal to SCC denied), a potential class action is being brought against the governments of Nova Scotia and Canada for breach of fiduciary duty for assuring local residents that continuing to live in a contaminated area was safe, where the governments may have known it might not be safe and where the governments may have

had some responsibility for the pollution.

A third source of exposure for municipalities involves the contamination of a municipal road when utilities are replaced and roads reconstructed. Municipalities must excavate road beds and soils to replace and upgrade sub-surface utilities. While undertaking these works, they must ensure worker safety and proper management and disposal of contaminated soil and groundwater.

Uncontaminated groundwater can normally be directed to a nearby sewer. If contaminated, it may need to be pumped out and treated before discharge. Contaminated soil needs to be tested to assess disposal options and may have to be disposed of at a hazardous waste site at extra expense. Significant incremental costs may be incurred by municipalities in dealing with this contamination.

Limiting the risk

Since 2004, *Ontario's Limitations Act, 2002*, has made it increasingly important for municipalities to act promptly on information reported to them about contamination. Since

the limitation for actions is now only two years from discovery, if information takes too long to reach decision-makers, claims can be statute barred.

This means that complaints and claims by third parties as well as any discovery of contamination by municipal staff, contractors and consultants need to be properly recorded and communicated. Municipalities should adopt a systematic approach to manage the receipt of environmental information and reports from adjacent property owners about contamination. They should delegate a staff member or department with responsibility to collect and assess information about contamination that comes to the attention of the municipality. This information should be reviewed regularly and periodically with legal counsel, who should assess limitation periods for bringing suits against polluters.

Municipalities also need to assess whether contamination exists and presents any concerns before undertaking a road works program that might involve a contaminated area. Failure to do so means that the municipality risks identifying environmental concerns during excavation that will bring the work to a halt, complicate and increase the time

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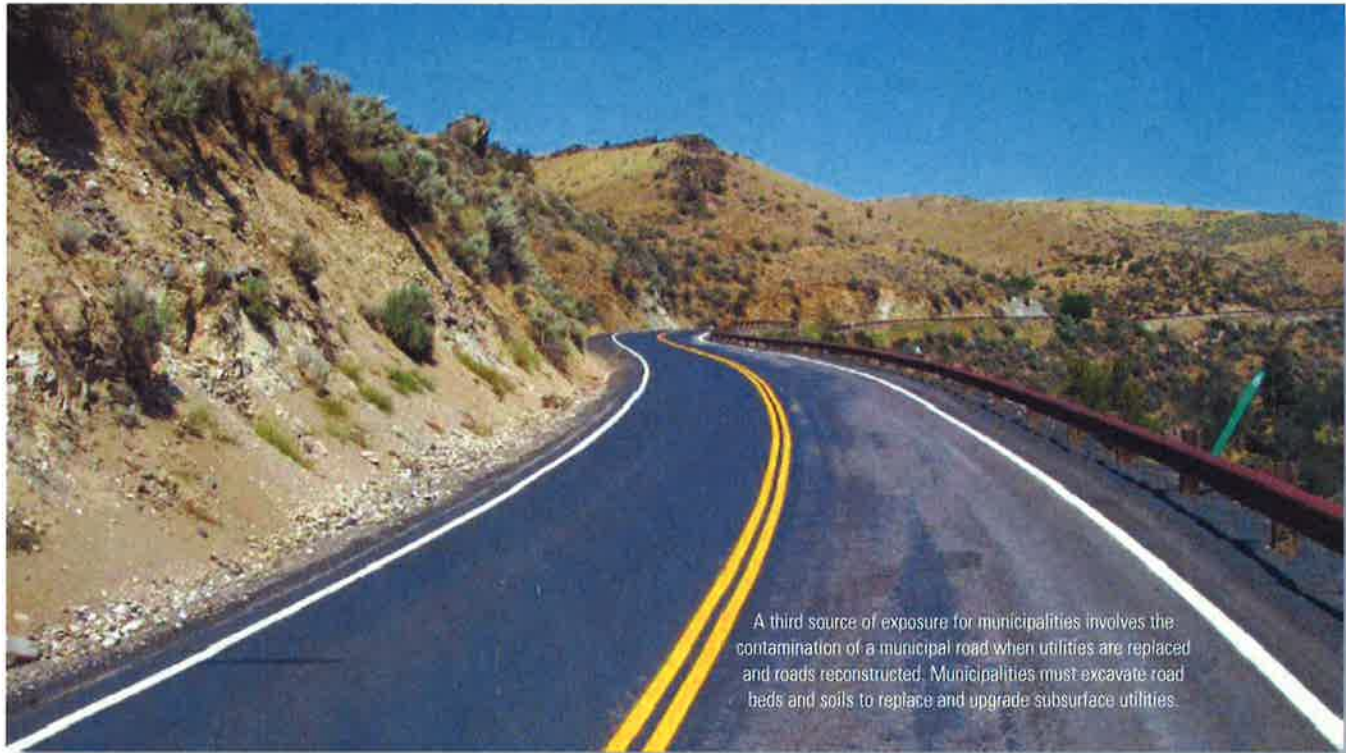
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and cost to complete the work, which may inadvertently put workers at risk. Municipalities should consider bringing claims against adjacent and abutting property owners and users that pollute their roads. This can start by placing the neighbouring property owner on notice of the presence of contamination in the road and seeking a negotiated resolution. Where possible, municipalities should require the polluting property owner to stop the ongoing migration of the contamination onto the road and to clean up contamination on the source property, on the road and on any property to which the contamination has moved.

Indemnities

Municipalities should require indemnities from polluters as an appropriate solution in certain circumstances. An indemnity may provide for recovery of incremental costs of road reconstruction related to contamination, third-party claim costs and costs to respond to action that regulators may take such as issuing investigation and clean-up orders.

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