

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

DAVID WINDSOR and AGNES WINDSOR

Plaintiffs

- and -

CANADIAN PACIFIC RAILWAY LIMITED

Defendant

This Action was Commenced Pursuant to the
Class Proceedings Act of Alberta,
S.A. 2003, c. C-16.5

STATEMENT OF DEFENCE

1. Except as hereinafter expressly admitted, the Defendant denies each and every allegation contained in the Amended Statement of Claim and puts the Plaintiffs to the strict proof thereof.
2. The Defendant admits paragraph 2 of the Amended Statement of Claim and agrees with the proposal set out in paragraph 21 of the Amended Statement of Claim.
3. The Defendant admits that trichloroethylene ("TCE") migrated from the Defendant's Ogden Yard property, down gradient and beneath certain areas within the Ogden Community in South East Calgary, Alberta ("Ogden").
4. However, the Defendant expressly denies the presence of TCE in the groundwater beneath the property of every member of the Class and further expressly denies that any members of the class have been adversely impacted by the presence of TCE in the groundwater.
5. The Defendant states that the presence of TCE in the air vapours of a particular property within the defined Class does not necessarily mean that there is TCE in the groundwater

beneath that property, as TCE is found in many common household substances that release TCE vapours into the air. Accordingly, the Defendant expressly denies that the presence of TCE in the air vapours of a particular property is evidence that there is TCE in the groundwater beneath that property.

6. The Defendant further denies that any of the members of the class have suffered damages as alleged or at all, or that the presence of TCE in the groundwater beneath certain areas of Ogden community has caused any damages.

I. BACKGROUND

Ogden Shops and CPR Operations

7. The Defendant, through its wholly owned subsidiary Canadian Pacific Railway Company ("CPR"), owns a locomotive shop known as the Ogden Shops, located next to the Ogden Community in South East Calgary, Alberta.
8. The Ogden Shops were constructed in 1912-13. A chlorine based solvent, consisting mostly of trichloroethylene was used from time to time in the Ogden Shops from the mid-1950's to the mid-1980's.
9. During routine environmental testing at the Ogden Shops, the Defendant discovered subsurface TCE under the Ogden Shops. Further investigation revealed that TCE had migrated off-site under certain areas of Ogden.

Education Campaign and Dissemination of Information

10. In 2000, shortly after discovering that TCE had migrated off-site, the Defendant formed a Multi-Stakeholder Committee (the "Committee") consisting of representatives from the Millican-Ogden Community Association, Calgary City Council, Alberta Environment, Calgary Health Region and CPR.
11. The objectives of the Multi-Stakeholder Committee were to ensure that accurate information about the subsurface migration of TCE was circulated to members of the Millican-Ogden community and that risks associated with TCE were properly explained.

12. The Defendant has conducted extensive groundwater testing, air sampling and remediation programs in Ogden (as discussed below), the results of which have been provided regularly to the Multi-Stakeholder Committee and through the Committee, to the community at large.
13. In addition to keeping members of the community informed through the Multi-Stakeholder Committee, the Defendant has also had ongoing communications directly with Alberta Environment, Calgary Health Region, Members of City Council, property owners and residents.

Investigation of off-site migration of TCE

14. Since 2000, the Defendant has commenced and continued an investigation program in order to determine the location, extent and concentrations of TCE migration.
15. The investigation program has consisted of drilling numerous groundwater monitoring wells (in excess of 300), installing numerous soil vapour probes (in excess of 350) and conducting extensive sampling and testing of the groundwater and soil.
16. In 2001, the Defendant, in conjunction and in cooperation with the Multi-Stakeholder Committee, initiated an Indoor Air Quality Testing Program for comparison to Health Canada standards.

Proactive Management and Remediation

17. In addition to the investigative program, testing initiatives and community awareness and education campaign, the Defendant has proactively taken steps to assist in minimizing TCE levels in Ogden, including:
 - (a) Implementing an on-site groundwater remediation system, consisting of:
 - (i) a TCE recovery and source reduction drilling program;
 - (ii) an *in situ* air sparging and soil vapour extraction remediation system; and
 - (iii) a groundwater pump-and-treat remediation system.
 - (b) Installing and implementing improvement measures in individual properties, including sub slab depressurization systems (SSD systems), where appropriate.

II. INDIVIDUAL CAUSES OF ACTION

Negligence

Off-Site Migration

18. The Defendant denies at all material times when TCE was used at the Ogden Shops, that it owed a duty of care to prevent TCE from migrating off-site from the Ogden Shops.
19. The Defendant further denies that it was negligent, careless or reckless in its use of TCE or in failing to prevent TCE from migrating off-site from the Ogden Shops.
20. Rather, at all material times the Defendant exercised the standard of care required of it by industry custom and practice, common law and provincial and federal statute, regulation and guideline.
21. In the alternative, if the Defendant's conduct breached a duty and standard of care owing to the Plaintiffs or any Class Members or some of them, which is not admitted but expressly denied, then any damages or losses that have been incurred, which are not admitted but expressly denied, were not caused by the Defendant's conduct.
22. In the further alternative, if the Defendant's conduct breached a duty and standard of care owing to the Plaintiffs or any Class Members or some of them, which is not admitted but expressly denied, then any damages or losses that have been incurred, which are not admitted but expressly denied, are not sufficiently proximate and are too remote in law to justify the imposition of liability.

Post Discovery of Migration

23. In specific response to paragraph 17(f) of the Amended Statement of Claim, the Defendant states that at all material times after learning that TCE had migrated off-site from the Ogden Shops, the Defendant took all reasonable, timely and appropriate measures to mitigate, remediate and prevent further off-site migration of TCE. Some particulars of such measures are outlined in paragraphs 14 through 17 above.
24. In the alternative, if the Defendant failed to take all reasonable, timely and appropriate measures to mitigate, remediate and prevent further off-site migration of TCE, which is

not admitted but expressly denied, then any damages or losses that may have been incurred, the existence of which is not admitted but expressly denied, were not caused by the Defendant's conduct.

25. In the further alternative, if the Defendant failed to take all reasonable, timely and appropriate measures to mitigate, remediate and prevent further off-site migration of TCE, which is not admitted but expressly denied, then any damages or losses that may have been incurred, the existence of which is not admitted but expressly denied, are not sufficiently proximate and are too remote in law to justify the imposition of liability.

Trespass

26. The Defendant denies that it has trespassed on the Plaintiffs' lands or on any Class Member's lands, as alleged in paragraph 16 of the Amended Statement of Claim, or at all.
27. In particular, the Defendant denies that TCE migrated directly from the Ogden Shops to the Plaintiffs' lands or to any other Class Members' lands. Rather, the migration of TCE from the Ogden Shops down gradient beneath certain areas within Ogden, was fundamentally dependent on complex natural and physical intervening factors.
28. The Defendant further denies that TCE has physically interfered with the Plaintiffs' lands or with any Class Member's lands.

Nuisance

29. The Defendant denies that it has created or contributed to a nuisance, as alleged in paragraph 16 of the Amended Statement of Claim, or at all.
30. The Defendant states that neither the Plaintiffs nor any Class Members have experienced a substantial and unreasonable interference with the use and enjoyment of their lands as a result of the off-site migration of TCE from the Ogden Shops beneath certain areas within Ogden.
31. The Defendant further states that neither the Plaintiffs nor any Class Members have experienced financial difficulties or inconvenience with respect to obtaining a mortgage, securing financing, or otherwise using their property as collateral as a result of the off-site migration of TCE from the Ogden Shops beneath certain areas within Ogden.

Strict Liability

32. The Defendant denies that it is liable in strict liability, as alleged in paragraph 18 of the Amended Statement of Claim, or at all.
33. The Defendant denies that it accumulated TCE at the Ogden Shops and engaged in a non-natural use of TCE at the Ogden Shops, and denies that TCE escaped as a result of its accumulation at the Ogden Shops.
34. In particular, at all material times neither TCE itself, nor the use made of it by the Defendant, was considered to be non-natural, dangerous, hazardous, special or extraordinary. Rather, at all material times, TCE was used in a broad range of commercial and industrial practices and at all material times was considered to be a non-harmful substance that was suitable and effective for use as a cleaning and degreasing agent.
35. Further, or in the alternative, if TCE escaped from the Ogden Shops while a non-natural use or hazardous use was being made of the same, which is not admitted but expressly denied, then any damages or losses which may have resulted from the escape, which are not admitted but expressly denied, were not reasonably foreseeable at the time of such use.

Failure to Warn and Misrepresentation

36. The Defendant denies the allegations made in paragraphs 6, 13 and 17 (a) through (e) of the Amended Statement of Claim and notes that these allegations pertain to individual issues and causes of action, Breach of Duty to Warn and Misrepresentation, which have not been certified.
37. The Defendant denies at all material times that it owed a duty of care to advise or otherwise inform the Plaintiffs or any Class Members or some of them, that TCE was being used at the Ogden Shops. At the time of such use, none of the Plaintiffs or Class Members were property owners in Ogden.

38. Further, at all material times and once the off-site migration of TCE had been identified, the Defendant took all reasonable, timely and appropriate measures to ensure accurate and appropriate information was communicated to the Plaintiffs and Class Members.
39. In particular, the Defendant commenced several public awareness initiatives aimed at ensuring accurate information about the subsurface migration of TCE was communicated throughout the community of Ogden. Some particulars of such initiatives are outlined in paragraphs 10 thru 13.

III. DAMAGES AND CAUSATION

40. The Defendant states that the Plaintiffs or any Class Members have not incurred damages as alleged at paragraph 15 of the Amended Statement of Claim, or at all. Specifically, the Defendant states that:
 - (a) None of the Plaintiffs' lands or the lands of any Class Members have been rendered unhealthy and less fit for use and occupation as residences and the Defendant specifically denies that the lands are damaged as a result;
 - (b) None of the Plaintiffs or Class Members have incurred any expenses, costs or damages associated with repairs or mitigation measures in respect of their lands or residences;
 - (c) None of the Plaintiffs' lands or the lands of any Class Members have a reduced value for purposes of renting to third parties; and
 - (d) None of the Plaintiffs' lands or the lands of any Class Members have been diminished in value.
41. In the alternative, if the Plaintiffs or any Class Members have incurred damages as alleged in paragraph 15 of the Amended Statement of Claim or otherwise, which is not admitted but expressly denied, there is no connection between concentration levels of TCE in the subsurface of Ogden and such damages.

IV. FAILURE TO MITIGATE

42. Further, or in the alternative, if the Plaintiffs or any of the Class Members have suffered loss or damage as alleged or at all, which is not admitted but expressly denied, they have failed to mitigate such loss or damage.

DATED in the City of Calgary, in the Province of Alberta, this 16th day of June, 2008.

DELIVERED by Macleod Dixon LLP, Barristers and Solicitors, whose address for service is in care of the said solicitors at 3700, 400 3rd Avenue S.W., Calgary, Alberta, T2P 4H2, Attention: Judson E. Virtue.

Action No. **0501-00241**

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

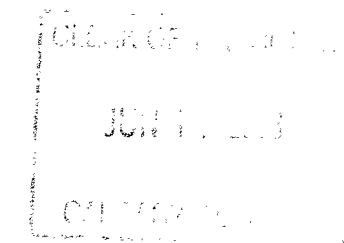
DAVID WINDSOR and AGNES WINDSOR
Plaintiffs

- and -

Canadian Pacific Railway Limited
Defendant

This Action is commenced pursuant to the
Class Proceedings Act of Alberta,
S.A. 2003, c. C-16.5

STATEMENT OF DEFENCE



MACLEOD DIXON LLP
3700 Canterra Tower
400 Third Avenue SW
Calgary, Alberta T2P 4H2
Telephone: (403) 267-8222
Fax: (403) 264-5973
Attention: Judson E. Virtue

File No. 410348/JEV