Canadian Institute of Resources Law

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# Successor Liability For Environmental Damage

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**Discussion Paper**

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## FOREWORD

This paper was selected as the 1989 winner of the Institute's annual national Essay Prize. The Prize, established in 1983, is awarded to the best student essay in Canadian natural resources law submitted to the Institute. The winning entry was selected from among 10 submissions by this year's selection committee, consisting of Hugh Gaudet, Chairperson, Vice President Land and Public Affairs, Chevron Canada Resources Ltd.; Judy Snider, a lawyer with the firm Code Hunter; and Professor Ian Rounthwaite, Professor of Law at The University of Calgary. The contribution of the Selection Committee is gratefully acknowledged.

Mr. Davis was a 1989 graduate of The University of Calgary's Faculty of Law and is now with the Calgary and Edmonton firm of Parlee McLaws.

This is the third time that the winning essay, or a work based upon it, has been published by the Institute. In 1988, the Institute published *Maritime Boundaries and Resource Development: Options for the Beaufort Sea* by Donald Rothwell, which was based on his winning submission to the 1986 competition. Earlier this year the Institute published *Surrounding Circumstances and Custom: Extrinsic Evidence in the Interpretation of Oil and Gas Industry Agreements in Alberta*, by David E. Hardy, the winner of the 1988 Essay Prize.

This paper is a thorough, well-researched piece of work that contributes to the existing literature and will be of great interest to practitioners of real estate and environmental law; the law is stated as it was available to the author on 30 March 1989.

## AVANT-PROPOS

La présente étude a gagné en 1989 le prix de dissertation décerné chaque année par l'institut. Ce prix, offert depuis 1983, est attribué à l'étudiant en droit canadien ayant présenté à l'institut la meilleure dissertation en droit des ressources naturelles. La dissertation gagnante a été choisie parmi treize soumissions par le comité de sélection, composé cette année de Hugh Gaudet, vice-président de la section Land and Public Affairs, Chevron Canada Resources Ltd. (président); Judy Snider du cabinet d'avocats Code Hunter; et du professeur Ian Routhwaite de la faculté de droit de l'université de Calgary. Nous remercions sincèrement le comité de sélection pour sa contribution.

M. Davis a obtenu son diplôme de la Faculté de droit de l'université de Calgary en 1989 et il est maintenant associé au cabinet d'avocats Parlee McLaws de Calgary et d'Edmonton.

C'est la troisième fois que l'institut publie la dissertation gagnante, ou un travail réalisé à partir de cette dissertation. L'institut a publié en 1988 une étude intitulée *Maritime Boundaries and Resources Development: Options for the Beaufort Sea*, par Donald Rothwell, qui était basée sur le document qui lui avait valu le premier prix lors du concours de 1986. Au début de 1989, l'institut a publié la dissertion de David E. Hardy, intitulée *Surrounding Circumstances and Custom: Extrinsic Evidence in the Interpretation of Oil and Gas Industry Agreements in Alberta*, la dissertion qui a valu à l'auteur le prix de 1988.

La présente étude est un travail approfondi, bien documenté, qui contribue à la littérature existante et intéressera beaucoup les spécialistes du droit de l'environment et du droit immobilier; la législation citée est celle dont disposait l'auteur le 30 mars 1989.

## INTRODUCTION

The subject of this paper is the liability for environmental damage as between successors in title to the same property. The basic fact pattern involves a predecessor in interest to land who, through his own lawful use and enjoyment of that land, seriously pollutes it. A subsequent purchaser, after sale, discovers that the land is so heavily contaminated that it is useless for the purposes for which he purchased it, and that its value is significantly less than what he paid for it. The legal issue is whether the polluter of the land can be held liable for the environmental damage which he has caused.

There are two broad bases for imposing environmental liability. The first is the process of sale. This involves the contract and its express terms, the subject matter of the contract, pre-contractual representations, material latent defects, and any non-disclosures. Causes of action include breach of an express or implied warranty, failure of consideration, error *in substantialibus*, misrepresentation, and deceit.

The second basis for imposing environmental liability is what might be called "limitations on rights of user". Each property owner has the right to use and enjoy his property as he so wishes, but there are limits arising from the fact that the exercise of one person's rights may adversely affect another person in the exercise of his rights. So the common law developed a range of legal actions to regulate conflicting uses of neighbouring land. These are nuisance, trespass, the rule in *Rylands* v. *Fletcher*,[1] and negligence. The issue here is whether these principles of neighbourhood can be applied to conflicting land uses over time as between successors in interest in the same land.

Environmental liability as between successors in title is a new area of the law, and its imposition will require the application of related, but factually distinguishable, principles from contract, tort, and property. A comprehensive examination of all theories of liability is not within the scope of this paper. Discussion is confined to two broad issues. First, with regard to the process of sale, where pollution has severely impaired a purchaser's use of his land and where the purchaser could not have discovered the contamination prior to sale but where the vendor had knowledge of the land's true condition, whether

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1. *Rylands* v. *Fletcher* (1868), 3 L.R. H.L. 330; aff'g (1866) 1 L.R. Ex. 265.

the vendor had breached a duty to disclose that latent defect and can be held liable for his non-disclosure? In recent years, the courts have recognized a duty to warn a purchaser of dangerous latent defects, and the question is whether the common law now imposes a more extensive duty to disclose latent defects.

Second, with regard to limitations on rights of user, the broad issue considered is whether a remote predecessor in interest who has polluted the land can be held liable in nuisance as against a successor in title whose rights of user have been severely impaired by the contamination. Historically, nuisance has been the cause of action most frequently employed for environmental damage, and it is the tort which is deemed the most suitable for this type of loss.[2] For that reason, discussion is confined to this tort.

## THE PROCESS OF SALE

### The Duty to Warn

The Notion of Fraudulent Non-disclosure

One of the more important variables in determining liability for environmental damage is whether the pollution is dangerous to health and life. If it is, then different principles will apply than those which govern more typical sales of land. Where the vendor knows about the hazardous waste but fails to disclose that fact to the purchaser who would not otherwise discover its presence by reasonable inspection, then the vendor will be held liable for breach of a duty to warn. A small but influential line of cases now stands for that proposition: *McGrath* v. *McLean*,[3] *C.R.F. Holdings Ltd.* v. *Fundy Chemical International Ltd.*,[4] and *Sevidal* v. *Chopra*.[5]

These cases represent a significant development in the law of fraudulent frustration of purchaser expectations in the sale of land. Prior to these cases, there were four

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2. John P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle — Well-Tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall L.J. 505 at 507; Julian Conrad Juergensmeyer, "Common Law Remedies and Protection of the Environment" (1971) 6 U.B.C. L. Rev. 215 at 216.
3. *McGrath* v. *McLean* (1979), 95 D.L.R. (3d) 144, 22 O.R. 784, 27 Chitty's L.J. 58 (Ont. C.A.).
4. *C.R.F. Holdings Ltd.* v. *Fundy Chemicals International Ltd.* (1984), 19 C.C.L.T. 263, [1982] 2 W.W.R. 385, 33 B.C.L.R. 291 (B.C. C.A.); leave to appeal to Supreme Court of Canada refused (1982), 42 N.R. 358 (S.C.C.) (*sub. nom. Smerchanski* v. *C.R.F. Holdings*).
5. *Sevidal* v. *Chopra* (1987), 41 C.C.L.T. 179, 2 C.E.L.R. (N.S.) 173 (Ont. H.C.).

established categories of fraud:

1. a deliberate falsehood or recklessness as to the truth of a representation;
2. active concealment of defects;
3. partial non-disclosure or misleading half-truths; and
4. failure to correct a statement erroneously but honestly made or one made erroneous by changes in circumstances.

The above-named cases — especially *Sevidal* — add another category:

5. the non-disclosure of a latent defect which constitutes a potential or actual danger.[6]

This development offers a purchaser considerable protection against certain forms of environmental damage. Irvine, in his "Annotation" to the *Sevidal* case,[7] suggests that the holding can be extended beyond dangerous pollutants to include any latent defect which makes premises unfit for habitation and possibly even to commercial properties where the latent defect renders the land unsuitable for its contemplated purpose. With respect, it is submitted that the holding will be limited to dangerous substances and that liability for non-toxic pollution which renders commercial land unfit for its contemplated purpose must wait upon legislative reform. A court may well hold a vendor liable for failure to disclose a non-dangerous latent defect which renders property unfit for habitation, but only on established categories of fraud.

## The "Product Liability" Cases: Foreseeable Harm or Deceitful Inducement?

### *The Duty to Warn in Rivtow Marine*

The case from which the "duty to warn" was derived is *Rivtow Marine Ltd.* v. *Washington Iron Works*.[8] In that case, when a dangerous defect in their cranes came to the attention of the defendant supplier and the co-defendant manufacturer, they failed to warn the plaintiff of the danger. When a similar crane collapsed during use, the plaintiff

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6. *See* John Irvine, "Annotation" [of *Sevidal* v. *Chopra*] (1987) 41 C.C.L.T. 181, for a discussion of the significance of the *Sevidal* case.
7. *Id.*, at 104.
8. *Rivtow Marine Ltd.* v. *Washington Iron Works* (1973), [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692 (S.C.C.).

was forced to take its crane out of service for repairs during its busiest season to prevent an accident. Richie J. for the Supreme Court[9] stated that where a manufacturer was aware of a defect which rendered an article dangerous to any subsequent consumer, then knowledge of that danger gave rise to a duty to warn.[10]

The duty to warn, on this analysis, predates the *Donoghue* v. *Stevenson* "product liability principle"[11] for the negligent manufacture of an article; and thus, in Canadian jurisprudence, there are two product liability rules:

1. liability for injury or property damage arising from the negligent manufacture of an article (*Donoghue* v. *Stevenson*), and
2. liability for injury or loss occasioned by the manufacturer's or supplier's failure to warn of a known dangerous defect or an inherently dangerous article (*Rivtow Marine*).

Ritchie J. explained the source of the liability for dangerous defects to be "based on the fact that the vendor of the article who knew it to be defective was guilty of fraud or deceit and for this reason liable to anyone who suffered as a result of an injury ...."[12] He cited *Langridge* v. *Levy*[13] as authority for this proposition. Despite Ritchie J.'s reference to fraud or deceit, the *Rivtow Marine* product liability rule — like that in *Donoghue* v. *Stevenson* — sounds in negligence. Ritchie J. stated that "there was in this case a breach of duty to warn which constituted negligence ...."[14] The facts of the case support this conclusion. Liability attached to the defendants because of the foreseeable harm that could occur from a breach of the duty to warn of the dangerous defect. There was no fraud here because the defect was discovered only after the sale. The duty to warn arose from the plaintiff's continued reliance on the defendants for advice concerning the crane's operation, not its sale.[15] The defendants were negligent when they breached that duty.

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9. *Id.*, at 537-538.
10. While the defendant supplier was under contract to the plaintiff, the co-defendant manufacturer was not.
11. *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L.).
12. *Rivtow Marine*, *supra*, note 8, D.L.R. at 538.
13. *Langridge* v. *Levy* (1837), 2 M. & W. 519, 150 E.R. 863.
14. *Rivtow Marine*, *supra*, note 8, D.L.R. at 544.
15. *Id.*, at 542.

***Fraud and the Duty to Warn***

Ritchie J.'s references to fraud and to *Langridge* v. *Levy*, with respect, introduce a different basis of liability, one outside the facts of the *Rivtow Marine* case. In *Langridge* v. *Levy*,[16] the defendant gun seller was liable in fraud after he warranted that a gun sold to the plaintiff's father was safe, while knowing it to be defective and dangerous. When the plaintiff was injured, his cause of action was not the contractual warranty as he was not privy to the contract; rather it was reliance upon a falsehood told "in order to effect the sale".[17] The gravamen of this tort is making a false representation with the intention that it be relied upon, while knowing that harm could befall the purchaser. In short, the tort consists of deceitful inducement. Parke B. put it thus: "There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done."[18] Presumably, liability could also have been imposed in this case for the negligent failure to warn a customer that the person using the gun might be injured, because such injury was foreseeable to a person within the defendant's contemplation at the time of sale.

***Foreseeable Harm or Deceitful Inducement?***

These two cases demonstrate that the breach of a duty to warn may sound in negligence, in fraud, or both. In *Rivtow Marine*, there was a negligent, but no fraudulent, breach of this duty. In *Langridge* v. *Levy*, the Court found a fraudulent breach based upon deceitful inducement, but it could also have found a negligent breach based upon foreseeable harm. When the breach of the duty to warn sounds in negligence, then liability will be limited to the non-disclosure of dangerous latent defects and will not extend to those defects which merely render the article unfit for the purchaser's purpose, because the basis of liability for the negligent breach of the duty to warn is foreseeable harm. Is the fraudulent breach of this duty also limited to dangerous defects?

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16. *Langridge* v. *Levy*, *supra*, note 13.
17. *Id.*, at 868.
18. *Id.*

Foreseeable harm appears to be an essential component of the fraudulent breach of the duty to warn. Where a vendor fails to warn the purchaser of a potential danger when trying to effect a sale, the circumstances bespeak dishonesty. Mere silence on a potential danger is fraudulent. A crucial concern in cases of environmental liability is whether mere silence during a sale can constitute fraud in the absence of a potential danger (and foreseeable harm). At issue is whether the circumstances clearly denote deceitful inducement in the non-disclosure of a latent defect (pollution) which is not hazardous to health, but nevertheless which is sufficiently noxious to render the land unsuitable for the purchaser's purpose. The cases which found liability for non-disclosure of environmental damage must be examined to see if liability was founded upon foreseeable harm or upon deceitful inducement. Only with the latter would a breach of the duty to warn become a broad basis for imposing environmental liability upon a silent vendor.

Liability for Foreseeable Harm

***Fraudulent Non-disclosure in C.R.F. Holdings***

In the *C.R.F. Holdings* case,[19] the plaintiff purchased land after the vendor told him that certain slag material stored there made "excellent fill". The vendor failed to mention that the slag was radioactive and could only be stored under licence from the Atomic Energy Control Board. The Appeal Court held the defendant liable in deceit on the grounds that the half-truth was deliberately deceptive and had induced the purchaser into the sale. Anderson J.A. also held the defendant liable for breach of the duty to warn the purchaser of the inherently dangerous nature of the waste. He asserted that, "In the circumstances of this case, the failure to disclose the inherently dangerous nature of the thorium waste was fraudulent ...."[20]

As authority for this position, Anderson J.A. relied upon *Rivtow Marine*, and he re-formulated the *Rivtow Marine* principle in terms of the sale of polluted land:

> The vendor of land on which is situate an inherently dangerous substance is guilty of fraud if he sells such land to a purchaser without warning the purchaser that, if the dangerous substance is

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19. *C.R.F. Holdings Ltd.* v. *Fundy Chemical International Ltd.*, *supra*, note 4.
20. *Id.*, at 322.

> not used or disposed of in a specified manner or in the manner prescribed by statute, the purchaser and/or strangers to the contract may suffer a serious risk of injury.[21]

While Anderson J.A. deems a breach of the duty to warn of dangerous substances to be a form of fraud, his explicit explanation for why liability attaches is the foreseeability of harm and not the deceitful inducement to buy. After considering the law with respect to the sale of dangerous chattels, he expressly identifies foreseeability of harm as the factor creating liability:

> There would seem to be no good reason why the law relating to the sale of dangerous chattels should not be applied to the sale of land, where it is reasonably foreseeable that the dangerous substance, situate on the land in question, may be used or disposed of in a manner causing a risk of injury to health.[22]

If the breach of a duty to warn requires foreseeable harm (as Anderson J.A. seems to assume), then a fraudulent non-disclosure is limited to dangerous substances as much as a negligent non-disclosure. Thus, the principle imposing liability for a breach of the duty to warn could not be extended to other, less lethal forms of pollution.

### *Fraudulent Non-disclosure in McGrath*

In the *McGrath* case,[23] the vendor brought an action on the covenant in her mortgage when the purchasers defaulted after a massive landslide from adjacent lands forced them to vacate the premises for nearly two years. Because of insufficient evidence, Dubin J.A. for the majority rejected the purchaser's contention that a problem with landslides constituted a latent defect which rendered the purchased premises unsafe for human habitation. The importance of the case lies in two paragraphs made in *obiter dicta*, and these are worth quoting at length:

> I am prepared to assume that, *in an appropriate case*, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But ... in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representation made by him ....
>
> Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to

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21. *Id.*, at 323.
22. *Id.*, at 324.
23. *McGrath* v. *McLean*, *supra*, note 3.

> disclose the likelihood of such danger, *e.g.*, the premises being sold being subject to radioactivity.[24]

With regard to disclosure of latent defects, the vendor, according to Dubin J.A., may have one of two duties imposed upon him: a duty to disclose a latent defect which renders premises unfit for habitation (first paragraph) and a duty to warn of a dangerous latent defect (second paragraph). The basis of the duty to disclose uninhabitable defects appears to be the established categories of fraud, namely, concealment and reckless disregard of the truth.[25] The first paragraph can be read to include mere knowledge of an undisclosed defect as the basis of liability, but the reference to concealment and reckless disregard of the truth implies that something more is required. Furthermore, the qualification "in an appropriate case"[26] would suggest that where non-hazardous defects rendered premises uninhabitable, the course of dealings, not simply the mere failure to disclose, must reveal deceitful inducement.

Finally, even if *McGrath* is authority for the proposition that the vendor has a duty to disclose any latent defect which renders property unfit for human habitation, the most liberal reading of Dubin J.A.'s reasoning would not extend to a duty to disclose any latent defect which renders commercial land unsuitable for the purchaser's purpose. Thus, neither *McGrath* nor *C.R.F. Holdings* impose liability for fraudulent non-disclosure in the absence of both foreseeable harm and active concealment.

## Liability for Deceitful Inducement: The *Sevidal* Case

### *The Facts and the Decision*

Liability for a breach of the duty to warn was considered in *Sevidal*.[27] A radioactive

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24. *Id.*, at 151-152 [emphasis added].
25. Dubin J.A. in *McGrath*, *id.*, unequivocally rejects at 151-152 the product liability principle in *Donoghue* v. *Stevenson*, *supra*, note 11, as the basis of the disclosure duty. Again, his authority is *Rivtow Marine*, *supra*, note 8, D.L.R. at 542-543. He states at 150 that the *Donoghue* v. *Stevenson* principle is relevant only if the purchaser's complaint relates to the original construction of the premises or the selection of the site. A vendor's knowledge of a dangerous latent defect which he did not create does not fall within the scope of a manufacturer's liability for negligently making a defective article.
    The English position appears to have merged negligent manufacture and negligent failure to warn. *See Hurley* v. *Kyke* (1979), [1979] R.T.R. 265 (H.L.).
26. *Id.*, at 151.
27. *Sevidal* v. *Chopra*, *supra*, note 5.

"hot spot" was found in the backyard of a residential house on land formerly owned by the Ontario Housing Corporation. The defendant vendors owned a house across the street from the radioactive lot, and after initial tests on the surface of their yard conducted by the co-defendant Atomic Energy Control Board (AECB) proved negative, they put their house up for sale. The plaintiff purchasers agreed to buy the house, but the vendors had not disclosed the existence of the radioactive contamination to either the plaintiffs or their realtor.

Prior to closing, the purchasers read about the radioactivity problem in a newspaper report; and after consultations with a solicitor, the purchasers contacted an official at the AECB. When he encouraged them to go through with the sale because the house in question was not affected and the AECB was going to remove the contaminated soil in any event, the plaintiffs decided to close the transaction.

After the purchaser's decision to close but still prior to closing, the AECB found radioactive contamination in the vendor's backyard and informed the vendor of that fact. The AECB did not inform the prospective purchasers as their policy was to deal only with the registered owner of the property. The defendant vendors did not inform the plaintiffs about the contamination. After closing, the plaintiffs discovered the truth, and three years later sold the house for substantially less than what they had paid for it. They sued the vendors, the realtor, the AECB, and their solicitor.

The action was allowed against the vendors for breach of a duty to warn and a breach of a duty to disclose a material change in circumstances, the AECB for negligent misrepresentation and breach of a duty of care, and the realtor on an unrelated ground; the action against the solicitor was dismissed. As against the vendors, the issue was whether the failure to disclose to the purchasers a latent defect, known to the vendors but of which the purchasers were unaware, amounted to deceit. The Court held that it did, where the latent defect presented an actual or potential danger to the purchaser.

The vendors were liable for two material non-disclosures, one before the agreement of sale and the other after the agreement but before closing. Each non-disclosure was sufficient in itself to impose liability on the vendors, but each non-disclosure was a

breach of a different duty owed to the purchasers. The non-disclosures were as follows. First, the failure to disclose that a radioactive "hot spot" had been discovered on another property in the immediate area was a breach of the duty to warn. Second, the failure to disclose the fact that radioactive contamination was discovered on the property itself after agreeing to the sale was a breach of the duty to disclose a material change in circumstances. As liability for the latter non-disclosure falls within a recognized category of fraud, it will not be explicitly considered here.

The principle with regard to the initial non-disclosure appears to be that a vendor is under a duty to warn a purchaser of any latent defect which constitutes an actual danger or a potential danger to the occupier of the property. Failure to disclose such a danger constitutes fraud. Oyen J. stated that:

> They [the vendors] knew about the potentially dangerous latent defect prior to the signing of the agreement. The fact that at the time the agreement was signed the latent defect was only known to be on property in the immediate area and not on the property itself, provides no excuse for non-disclosure. The Chopras were guilty of concealment of facts so detrimental to the Sevidals that it amounted to a fraud upon them, and, therefore, the Chopras are liable in deceit.[28]

The question which this passage begs, it is respectfully submitted, is in what way was the vendors' concealment of facts "detrimental" to the purchasers? Was it detrimental because the potential danger of radioactive contamination on property in the same area might prove to be injurious to the purchasers' health, or was it detrimental because disclosure of a potential danger would adversely affect the price if not the chances of a sale? In short, was it detrimental because of foreseeable harm or merely deceitful inducement?

### *Confusion Between Foreseeable Harm and Deceitful Inducement*

There is some indication that deceitful inducement alone was the basis of liability. One of the cases upon which Oyen J. relied is the unreported decision of *Ford* v. *Schmitt*.[29] In that case, the vendor failed to disclose that the house was insulated with the urea formaldehyde foam insulation (UFFI) which had been banned by the government. Oyen J. explained the decision thus:

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28. *Id.*, at 195.
29. *Ford* v. *Schmitt* (30 November 1984), Waterloo, Doc. No. 11124/82 (Ont. Co. Ct.).

> The Judge held that the failure to disclose the detrimental facts concerning the insulation was a fraudulent and material misrepresentation upon which the purchaser relied to her detriment. The Judge was satisfied that the vendor realized that disclosure of UFFI would adversely affect the price and the chance of a sale. The requisite intention to defraud was therefore imputed to the vendor.[30]

In *Ford* v. *Schmitt*, the emphasis appears to be on fraudulent intent to induce sale rather than foreseeable harm from a potential danger. However, since UFFI could be considered a potential, if not an actual, danger, the fraud in this case may still have been based upon the failure to disclose foreseeable harm.

The confusion concerning the basis of liability, with respect, is also present in Oyen J.'s discussion of the unreported case *Caleb* v. *Potts*,[31] where the failure to disclose a tank to vent methane gas from well water was held not to be fraudulent because the presence of methane gas, while a material factor, was not so material as to render property unsafe. Oyen J. then commented: "There was no active concealment on the part of the vendors and since the presence of methane gas did not render the house dangerous or uninhabitable, they were under no duty to disclose this fact."[32] One reading of this passage is that in the absence of active concealment of potential danger, the vendors may still be liable for failing to disclose a latent defect which renders property uninhabitable. With active concealment, the deceit lies with the vendor's conduct in suppressing the truth; with potential danger, the deceit lies in the very circumstances of the transaction. Oyen J. did not indicate whether liability for the uninhabitability of the property was founded on the vendor's conduct or merely on the circumstances of the transaction. The traditional view has been to require some evidence of a fraudulent intent in the course of dealings. This point will be further considered in the section entitled "Duty to Disclose Material Defects".

### *Potential Danger as the Basis of Liability in Sevidal*

Irvine, in his "Annotation",[33] comments that the extension of fraudulent non-disclosure to cases where the defect is known to be "in the locality", rather than

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30. *Sevidal* v. *Chopra*, *supra*, note 5, C.E.L.R. at 193.
31. *Caleb* v. *Potts* (9 October 1987), Doc. No. CA686/86 (Ont. C.A.).
32. *Sevidal* v. *Chopra*, *supra*, note 5, C.E.L.R. at 194.
33. Irvine, *supra*, note 6.

afflicting the land offered for sale, creates dilemmas in established legal doctrine. He asks: "How close, how serious, and how probable does a potential hazard have to be before a vendor must disclose it to prospective buyers, or risk being adjudged a cheat?"[34] Irvine felt that holding the vendors liable for a defect in the locality was "a little hard".[35] The Court did find on the facts that the contamination in the area was a potential hazard, and on that basis, with respect to Irvine, the decision is sound even though calculating the extent of the risk from neighbourhood hazards in other cases could be quite difficult.

Furthermore, even if there was no danger from the contamination, the decision would not be harsh if the truth was suppressed in an effort to effect a sale and to affect the price. The gravamen of the tort of deceit is not the foreseeable harm, but the fraudulent intent to deceive.[36] Failure to warn of foreseeable harm in the sale of property is *ipso facto* evidence of a fraudulent intent. In the absence of foreseeable harm, presumably other evidence of fraudulent intent would be required. The difficulty with the *Sevidal* case is, on the one hand, the tenuous risk involved and, on the other hand, the absence of any other conduct by the vendor to indicate fraudulent intent. Nevertheless Oyen J.'s finding of a potential danger in the area is a limiting fact in the case's ratio.

Given the Court's finding that contamination in the area could constitute a potential danger, future courts may adopt a liberal interpretation of this notion as it applies to pollutants. That would be one way to expand the duty to warn. There are, however, difficulties with this approach. Consider the definition of "toxic substances" in the *Canadian Environmental Protection Act*:

> a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions
> (a) having or that may have an immediate or long-term harmful effect on the environment;
> (b) constituting or that may constitute a danger to the environment on which human life depends; or
> (c) constituting or that may constitute a danger in Canada to human life or health.[37]

Presumably, any substance which materially impairs the purchaser's purpose will have

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34. *Id.*, at 183.
35. *Id.*
36. This is the reverse of the negligent breach of the duty to warn where the emphasis is on personal injury or damage to property. *See* Glanville Williams, "The Duties of Non-Occupiers in Respect of Dangerous Premises" (1942) 5 Mod. L. Rev. 194 at 201.
37. *Canadian Environmental Protection Act*, S.C. 1988, c.22, s.11.

"an immediate or long-term harmful effect on the environment". So if a court used this statutory definition as a guide, then the purchaser could quite easily have the substance declared toxic. However, he would still face the hurdle of having the pollution found to be a potential danger. On this issue, the *Canadian Environmental Protection Act* is not as helpful, as it appears to make a distinction between substances having a harmful effect on the environment and those constituting a danger to the environment. On the basis of that distinction, a court could rule that a pollutant was harmful, but not dangerous, to the environment, and that only with dangerous pollutants did a duty to warn arise.

***Unresolved Issues in the Wake of Sevidal***

*Sevidal*[38] stands for the proposition that failure to disclose a potential or actual danger is a form of fraud. Unfortunately, the case leaves several issues unresolved. These include:

1. Whether foreseeable harm (a potential danger) is a necessary component of fraudulent non-disclosure?
2. If it is, how much of a risk is required before liability will attach to any non-disclosure?
3. If there is a wider disclosure duty, what are the indicia of deceitful inducement, if any, in the absence of a potential or actual danger?

The question of a wider disclosure duty is highly significant in cases where pollution renders the land unusable, but is not a present or potential danger to health. Where the pollution is not inherently dangerous, then the principles governing more conventional sales of land come into play. Therefore, before the wider disclosure issue can be addressed, the scope of the conventional rules must be assessed, particularly, the doctrine of *caveat emptor.*

***Vendor's Ignorance of a Potential Danger***

As a final point in this section, if the vendor did not know about the potential danger

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38. *Sevidal* v. *Chopra, supra*, note 5.

or could not be expected to know about it, then liability for not disclosing the danger does not attach to the vendor. That was the holding in *Heighington* v. *Ontario*.[39] This was another case generated by the discovery of radioactive waste in the *Sevidal* residential district. While the Court held the Government of Ontario liable in negligence for failing to investigate the site properly in 1945, when it was first made aware of the radioactivity problem, the Court refused to hold the Ontario Housing Corporation liable for a latent defect of which it had no knowledge.

**The Doctrine of *Caveat Emptor***

Unfit for a Particular Purpose

If the pollution is not inherently dangerous or if the vendor or lessor does not know or cannot reasonably be expected to know of its existence, then a duty to warn will not arise. The pollution may nevertheless render the land unfit for the purpose for which it was bought, and the clean-up costs may be enormous. Furthermore, the pollution may not be confined to the conveyed land, and the owner or occupier may be liable in nuisance or trespass to adjoining landowners.

In the absence of a duty to warn, the overriding issue is whether the vendor can be held liable for the fact that the pollution renders the land unfit for the purpose for which it was bought. In trying to hold a vendor liable in these circumstances, the purchaser must find either an exception to this doctrine or a limitation in its scope.

Nature of the *Caveat Emptor* Doctrine

Historically, the risk of defects of quality and fitness in the sale of land or chattel lay with the purchaser. The doctrine which allocated that risk was *caveat emptor*.[40] The general rule for the sale of real property was that in the absence of fraud,

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39. *Heighington* v. *Ontario* (1987), 2 C.E.L.R. (N.S.) 93 (Ont. S.C.).
40. The rationale of the doctrine supposedly lay in the philosophy of rugged individualism. *See* "Comment: Caveat Vendor — A Trend in the Law of Real Property", (1955-56) 5 De Paul L. Rev. 263 at 264, and W. Page Keeton, "Rights of Disappointed Purchasers" (1953) 32 Texas L. Rev. 1 at 1-2.

misrepresentation or mistake, the purchaser must take the property as he finds it.[41] Discovery after closing, that the property was not as valuable or as suitable for the purchaser's purpose as had been thought, was not in itself sufficent grounds for judicial intervention into the bargain which had been struck. As a consequence, application of the doctrine did in many instances defeat the reasonable expectations of purchasers.[42]

Strict reliance upon the doctrine would pose a formidable problem in attaching environmental liability to a vendor for the sale of land so polluted by toxic substances that the land was unfit for the purchaser's particular purpose. Thus, some assessment of the current scope of the principle is required.

The pithy phrase "*caveat emptor*" disguises the fact that there is not just one rule here but several:[43]

1. the seller does not impliedly warrant that the land is suitable for any particular purpose;
2. the seller is not liable for mere "puff" or seller's talk;
3. the seller is not under a duty to disclose patent defects which the buyer could determine by reasonable inspection; and
4. the seller does not have a general duty to disclose latent defects which would render the land unsuitable for the buyer's purpose.

The purchaser of polluted property faces two problems in attaching liability to the vendor where the pollution is fatal to his purpose, but not to his health. The first is that the case law tends to state the various *caveat emptor* rules in "a sweeping and uncritical fashion".[44] The cases must be read carefully to determine both the scope and the rationale for these rules.

The second obstacle is the pronouncement on the doctrine by the Supreme Court of

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41. Bora Laskin, "Defects of Title and Quality: Caveat Emptor and the Vendor's Duty of Disclosure" (1960) L.S.U.C. Special Lectures 389 at 403; Samuel L. Wilkins, "Caveat Emptor — Sale of Unimproved Land" (1982) 34 South Carolina L. Rev. 193 at 193; and Edward Sugden, *Concise and Practical Treatise of the Law of Vendors and Purchasers of Estates*, 14th ed. (London: H. Sweet, 1862) at 335.
42. Keeton, *supra*, note 40, at 1.
43. *Id.*, at 2.
44. Williams, *supra*, note 36, at 194.

Canada in *Fraser-Reid* v. *Droumtsekas*.[45] While this doctrine has been under attack in a number of jurisdictions, most notably in various American states,[46] the Canadian Supreme Court in the *Fraser-Reid* case apparently re-affirmed its reign in land sales. Dickson J. (as he then was) declared:

> Although the common law doctrine of caveat emptor has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land .... [N]otwithstanding new methods of house merchandising and, in general, increased concern for consumer protection, caveat emptor remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.[47]

If the "pristine force" of *caveat emptor* still pertains to all four of the doctrine's rules, then the scope for imposing environmental liability will be quite limited.

Despite the sweep of both the case law and Dickson's pronouncement in *Fraser-Reid*, it is submitted that the purchaser of polluted property will have a remedy if the vendor knew that the pollution made the land unsuitable for the buyer's purpose *and* if the buyer coud not have discovered the existence of the pollution by reasonable inspection prior to sale. *Caveat emptor's* pristine force is limited to implied warranties. However, the law with regard to a duty to disclose material latent defects in the wake of *Sevidal*[48] is uncertain.

Implied Warranty as to Fitness

***Two Judicial Approaches to Serious Latent Defects***

The advantage of a warranty as to fitness for a purpose is that the purchaser could impose liability for environmental damage in two situations in which he would otherwise be denied a remedy: 1. the vendor did not know about the pollution, or 2. the purchaser could have discovered the pollution by reasonable inspection. On the issue whether an implied warranty as to fitness is part of every contract for the sale of real property, there

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45. *Fraser-Reid* v. *Droumtsekas* (1979), [1980] 1 S.C.R. 720, 9 R.P.R. 121.
46. One of the strongest attacks on *McDonald* v. *Mianecki* (1979), 398 A. 2d 1283 (N.J. S.C.).
47. *Fraser-Reid* v. *Droumtsekas*, *supra*, note 45, R.P.R. at 129-130.
48. *Sevidal* v. *Chopra*, *supra*, note 5.

are two competing, but not necessarily contradictory, lines of authority. The first affirms the *caveat emptor* rule of no implied warranty separate from the intentions of the parties and limits any remedies for frustrated purchaser expectations to fraud by the vendor and an error *in substantialibus*.[49]

The second line of cases does not directly challenge this rule, but in certain circumstances admits defective performance as grounds for avoiding a contract. This is the competing "doctrine of substantial performance", and it offers a basis for imposing environmental liability other than fraud.[50] The scope of each doctrine will be examined in turn.

### *Original Rationale for the Rule Against an Implied Warranty as to Fitness*

While statute eventually altered the position with respect to the sale of chattels, the courts refused to imply into the conveyance of land a warranty that the land should be reasonably fit for the purpose for which it was taken. The case which unequivocally established the rule was *Sutton* v. *Temple*.[51] There the defendant lessee agreed to rent pasture land for his cattle from the plaintiff lessor, but, unbeknown to either party, the field had been spread with manure containing poisonous particles of paint. When several of his cattle died, the lessee refused to pay the outstanding rent on the grounds that the land was unfit for the purpose for which it was leased. The Court held that the lessee was bound by his bargain even though he took the land for a particular purpose and that purpose was not fulfilled. The Court stated: "The general rule must therefore be, that where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay that rent, whether it answer the purpose for which he took it or not."[52] The rationale for the decision was that an implied warranty as to fitness amounted to a guarantee that the lessee or vendee would benefit by his occupation of the land and such a guarantee, in the

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49. *Redican* v. *Nesbitt* (1923), [1924] 1 D.L.R. 536 (S.C.C.) at 541-542.
50. For an account of this principle, *see* S.J. Stoljar, "Substantial Performance in Contracts of Sale" (1954) 32 Can. Bar Rev. 251.
51. *Sutton* v. *Temple* (1843), 12 M. & W. 52, 152 E.R. 1108.
52. *Id.*, at 1112.

Court's view, would undermine the very basis of contractual bargains. The Court could see no difference between loss of income from poisoned grass and loss of income from grass damaged by weather. The rule, therefore, was held to be "absolute".[53]

With respect, while the decision may have been a reasonable allocation of the risk of an unknown latent defect, the Court's reasoning is unsound. The Court implicitly assumed that a warranty as to fitness was not only one of beneficial occupation but also one of profits. The former does not entail the latter, and there are two factors which can delimit any implied warranty as to fitness for a purpose. There would be an implied warranty where: 1. the defect of quality could not be discovered by reasonable inspection, and 2. the latent defect amounted to an initial failure of consideration. The integrity of contractual bargains is not threatened where one party does not receive what he bargained for. The only sound basis of the decision was the lessor's ignorance of the latent defect and the necessity of the Court to allocate the risk in such circumstances. Even so, the result was harsh, as the poisoned grass had rendered the leasehold estate useless to the lessee.

### *Canadian Affirmation of the Rule Against an Implied Warranty, but a Change in Rationale*

The Supreme Court of Canada has consistently affirmed the principle that, in the sale of real estate, there is no implied warranty that the land will be of any particular quality or fit for any particular purpose.[54] The rationale for the implied warranty rule, however, has changed dramatically. In *Redican*, the rule was justified on two grounds: 1. "Finality and certainty in business affairs",[55] and 2. the opportunity of the purchaser to protect himself by express warranty.[56] This emphasis on the integrity of contractual bargains and purchaser self-reliance made the courts largely unsympathetic to the frustration of purchasers' reasonable expectations.

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53. *Id.*
54. *Cole* v. *Pope* (1898), 29 S.C.R. 291; *Redican* v. *Nesbitt*, *supra*, note 49; *Fraser-Reid* v. *Droumtsekas*, *supra*, note 45.
55. Duff J., *Redican* v. *Nesbitt*, *supra*, note 49, at 543-544.
56. *Id.*, at 542.

In *Fraser-Reid*, Dickson J. (as he then was) acknowledged that *caveat emptor* was a judicial creation and that the rule's application in its present form can lead to "irrational" results (there is an implied warranty to a house 99% complete, but none for a fully completed house); nevertheless he held that any extension of protection to purchasers of land by the device of an implied warranty must be done by statute, and not by the courts.[57] The introduction of a legislative scheme in Ontario apparently had pre-empted any judicial initiative. While the Court's tolerance of an irrational and unjust distinction is disappointing,[58] nevertheless the integrity of contractual bargains and purchaser self-reliance is no longer an overriding concern. The "credulous or indolent purchaser" still will not find a sympathetic hearing of his folly,[59] but the way is open to protect purchasers' reasonable expectations by the use and development of legal devices other than the implied warranty.

One device is the express or collateral warranty. The Court in *Fraser-Reid* found an express warranty in the contract of sale by creatively interpreting one of its terms. However, this approach is unlikely to be adopted in commercial contracts of sale, where the bargaining power between the parties is more equal.[60] So the purchaser must look to other devices to impose environmental liability on his vendor.

The Doctrine of Substantial Performance

***Purchaser Remedies Where the Vendor is Ignorant of a Latent Defect***

A critical variable affecting judicial willingness to employ a legal device to give effect to a purchaser's reasonable expectations with respect to environmentally clean land is whether the vendor knew of the presence of pollution. Where the vendor is ignorant of the true condition of the land, then the purchaser is unlikely to succeed in imposing environmental liability upon the vendor.

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57. *Fraser-Reid* v. *Droumtsekas*, *supra*, note 45, R.P.R. at 136.
58. For a discussion on this point, *see* Barry Reiter, "Annotation" [of *Fraser-Reid* v. *Droumtsekas*] (1980) 9 R.P.R. 122.
59. *Fraser-Reid* v. *Droumtsekas*, *supra*, note 45, R.P.R. at 129.
60. *See McDonald* v. *Mianecki*, *supra*, note 46, for a critique for the *caveat emptor* rule as it applies to house buyers.

The only prospect of a remedy for the purchaser lies in invoking one of a number of related legal doctrines: substantial performance, failure of consideration, error *in substantialibus*, equitable rescission for an innocent misrepresentation, or contractual mistake. Historically, these constituted different legal principles, but, for the purpose of this discussion, they all have a similar underlying rationale. The purchaser agreed to a contract of sale on the basis of some fundamental erroneous assumption of fact, and while that error may have resulted from the vendor's misdescription or innocent misrepresentation, it was not induced by fraud. In such circumstances, the courts may refuse to enforce the bargain.[61]

***Rescission for Substantial Misdescription***

A classic formulation of this approach is found in the case of *Flight* v. *Booth*.[62] There, a restrictive covenant in a lease was misdescribed at an auction of leasehold premises to preclude any "offensive trade", when it actually precluded nearly all trades. The Court held that the discrepancy between the particulars and the lease was sufficiently material to entitle the purchaser to rescind the contract and stated the rule thus:

> where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether .... Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale ....[63]

So the test for renouncing the bargain appears to be the purchase of a thing different from that which the purchaser thought he was buying.[64]

*Flight* v. *Booth* was applied in *In re Puckett and Smith's Contract*,[65] where a latent defect of an underground water culvert unknown to the vendor on property for sale described as "suitable for development" was a major drawback to the purchaser's

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61. Stoljar, *supra*, note 50; G.H.L. Fridman, "Error in Substantialibus — A Canadian Comedy of Errors" (1978) 56 Can. Bar Rev. 603; F.A. Schroeder, *Developments in the Law of Vendor and Purchaser and Mortgages — 1976* (Vancouver: Centre for Continuing Education, University of British Columbia, 1976) at 22-24.
62. *Flight* v. *Booth* (1834), 1 Bing (N.C.) 370, 131 E.R. 1160.
63. *Id.*, E.R. at 1162-1163.
64. "Error in Substantialibus", *supra*, note 61, at 607; *Fraser-Reid* v. *Droumtsekas*, *supra*, note 45, R.P.R. at 129-130.
65. *In re Puckett and Smith's Contract* (1902), [1902] 2 Ch. 258.

expressed use of the land for building purposes. Rescission was granted, even though the defect only increased the costs of development, rather than making development impossible. One explanation for the result is that this defect as to quality amounted to a defect as to title.

Some Canadian courts have adopted this reasoning of a substantial difference between that bargained for and that received, but have tended to characterize the defective performance as an error *in substantialibus* or as a failure of consideration. In *Alessio* v. *Jovica*,[66] the purchaser was, because of drainage problems, unable to obtain a building permit on land represented to him as property on which he could build a duplex. The Alberta Court of Appeal granted rescission on the basis that there was "a total failure of consideration" which amounted to an error *in substantialibus*.[67]

***Limitations to Relief for the Vendor's Defective Performance***

In all of these cases there had been an express, albeit innocent, misdescription of the property which had induced the purchaser to buy, which made the property appear to be suitable for the purchaser's purpose when, in fact, a latent defect rendered the property unsuitable or materially less suitable. In principle, this type of defective performance should be available to the purchaser of severely polluted land. However, there are a number of grounds on which a remedy may be refused. First, the pollution must prevent the purchaser from getting substantially what he contracted for; otherwise, there is no relief. Thus, in *Shepherd* v. *Croft*,[68] the purchaser bought a house and adjoining lands described as "residential property" with the express purpose of building on the adjoining land. An underground watercourse made this plan substantially more expensive, but the Court refused any relief on the grounds that the purchaser got materially what she bargained for, namely, residential property.

Second, in the absence of an express misdescription, the courts will refuse the

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66. *Alessio* v. *Jovica* (1973), 42 D.L.R. (3d) 242 (Alta. C.A.); rev'g (1973), 34 D.L.R. (3d) 107 (Alta. S.C., T.D.).
67. *Id.*, at 255 and 257-258.
68. *Shepherd* v. *Croft* (1910), [1911] 1 Ch. 521.

purchaser a remedy. In *Scott-Polson* v. *Hope*,[69] an infestation of moths in the insulation rendered a second-hand house uninhabitable. The Court refused rescission for a total failure of consideration on the grounds that the vendor was unaware of the defect and had not misdescribed the property nor expressly or impliedly warranted its fitness for human habitation.

Finally, even if there is misdescription which materially affects the purchaser's bargain, the purchaser faces considerable judicial resistance to granting a remedy whenever the vendor is ignorant of the debilitating defect. In *Boulderwood Development Co.* v. *Edwards*,[70] the defendant developer carelessly and recklessly but honestly stated that a residential lot for sale "appeared solid enough". In fact, fill from other lots concealed the marshy soil of the lot, and foundations laid for the purchaser's house cracked. When the purchaser had to take another lot in the development, he sought damages for the abortive construction. The Nova Scotia Appeal Court refused relief on the grounds that the vendor did not know about the defect and had advised the purchaser to rely upon his own concrete expert.

## The Duty to Disclose Material Defects

### Deceit and Mere Silence

If the vendor knows of a material defect affecting the value or quality of the property for sale, the issue then becomes whether the law will impose a duty upon that vendor to disclose the defect to the purchaser. The traditional rule is that there is no general duty to disclose defects of quality, whether they be patent or latent.[71] As stated in *Williams' Contract for Sale of Land*, "It is the business of the purchaser to ensure that the premises are suitable for his intended purpose."[72]

*Caveat emptor* still applies in all its traditional rigour to patent defects, and the law will not protect the imprudent purchaser who has failed to make reasonable inspection of

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69. *Scott-Polson* v. *Hope* (1958), 14 D.L.R. (2d) 333 (B.C.S.C.).
70. *Boulderwood Development Co.* v. *Edwards* (1984), 30 C.C.L.T. 223 (N.S. A.C.).
71. The law is succinctly stated in *Hals.*, 4th ed., paras. 51 and 54.
72. G. Battersby, *Williams' Contract for Sale of Land and Title to Land*, 4th ed. (London: Butterworth, 1975) at 113.

the property. However, in *Jung* v. *Ip*,[73] Gotlib D.C.J. enunciated quite a different rule on the obligation to disclose latent defects: "It is now clear that the law of Ontario is such that vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive."[74] *Sevidal*[75] was cited as authority for this proposition. With respect, I have argued that the ratio of *Sevidal* does not extend as far as Gotlib D.C.J. asserts, and that there is considerable uncertainty as to how expansive the duty to disclose has become in the wake of the *Sevidal* decision.

The fact pattern under consideration here is the presence of sufficient pollution to constitute a latent defect which is not dangerous, but which does render land sold unsuitable or substantially less suitable for the purchaser's purpose. The vendor, although aware of the defect, did not disclose it to the purchaser. The issue is whether the vendor's mere silence concerning the latent defect amounted to a fraudulent non-disclosure. There are two lines of authority on this issue.

The Necessity of "Active Non-disclosure"

The predominant view is that mere non-disclosure of a material fact is not sufficient to ground an action in deceit. There must be some act of deception before liability attaches.[76] In *Sorensen* v. *Kaye Holdings Ltd.*,[77] the vendor of a resort with a swimming pool failed to reveal that it had been convicted of violating health regulations in the operation of its pool and simply advised the purchaser that the Board of Health might require a permit. The Board of Health subsequently refused to issue a permit, thereby necessitating the need for major renovations. The Appeal Court held that the plaintiffs were aware of the relevant facts at all material times, and that they had been put on

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73. *Jung* v. *Ip* (1988), 47 R.P.R. 113 (Ont. Dist. Ct.), the facts of which are discussed in the text at note 83, *infra*.
74. *Id.*, at 126.
75. *Sevidal* v. *Chopra*, *supra*, note 5.
76. The classical formulation of this rule was enunciated by Lord Cairns in *Peek* v. *Gurney* (1873), 6 L.R. H.L. 377 at 403:
> Mere non-disclosure of material facts, however morally censurable ... would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.
77. *Sorenson* v. *Kaye Holdings Ltd.* (1979), [1979] 6 W.W.R. 193, 14 B.C.L.R. 204 (B.C.C.A.).

sufficient inquiry. Lambert J.A. stated that, in the absence of a fiduciary relationship or a contract of utmost good faith, some positive assertion which amounted to a misrepresentation was required for the tort of deceit.[78] As he stated, "Deceit is a tort involving intent."[79]

A few Canadian cases do appear to hold that the failure to disclose can constitute a fraudulent misrepresentation.[80] However, all of these cases involve, in one form or another, what one judge has called "active non-disclosure", that is, efforts by the vendor to prevent the purchasers from discovering the true state of affairs. Thus, they are all reconcilable with the doctrine with *caveat emptor*. In *Abel* v. *McDonald*,[81] the basement floor dropped several inches, causing considerable damage after the agreement of sale had been signed, and the vendor's refusal to allow the purchaser in to measure for decorations constituted fraudulent active non-disclosure. In *Rowley* v. *Isley*, the Court held that the failure to disclose an infestation of cockroaches and prior fumigation was "a fraudulent misrepresentation arising from a suppression of the truth."[82] Liability attached, not because of the vendor's silence, but because the vendor's agent had remained silent after being instructed to disclose the true condition of the premises. So, in the circumstances, the Court could readily conclude that the non-disclosure was done with fraudulent intent to effect a sale.

There was also active concealment in *Jung*.[83] In that case, the house had an infestation of termites. During inspection, the prospective purchasers asked about replacement flooring, and were told by the vendor's son that it was the repair of water damage, when the damage had actually been caused by the termites. So this case does not require the broad holding which Gotlib D.C.J. enunciated, and could have been

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78. *Id.*, at 225.
79. *Id.*, at 226.
80. In *Hansen* v. *Twin City Construction Co.* (1982), 136 D.L.R. (3d) 111 (Alta. Q.B.), Feehan J. seemed prepared to accept the view of Dubin J.A. that a mere non-disclosure can be fraudulent when the vendor showed a purchaser what appeared to be a genuine fireplace with ashes without disclosing that it was an artificial fireplace. However, fraud was not pleaded and Feehan J. did not have to decide the issue.
G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Carswell, 1976) at 290, characterized the law on non-disclosures as "uncertain".
81. *Abel* v. *McDonald* (1964), 45 D.L.R. (2d) 198 (Ont. C.A.).
82. *Rowley* v. *Isley* (1951), [1951] 3 D.L.R. 766 (B.C. S.C.) at 767.
83. *Jung* v. *Ip*, *supra*, note 73.

decided within an established category of fraud.

The only case in which mere silence was held to be fraudulent was *Sevidal*,[84] when the vendors failed to reveal the presence of radioactive contamination in their backyard. However, the dangerous nature of the pollution would have placed the vendors under a duty to warn.

The Case for Fraudulent Silence

There is a good argument that in certain circumstances mere silence should be deemed fraudulent. Consider the case where the purchaser has disclosed his purpose for the land and the vendor fails to reveal that a latent defect known to him will nullify that purpose. In this instance the vendor's silence, in conjunction with the purchaser's misapprehension, has surely induced the sale, and the effect is deceitful inducement. Or consider the following problem:

> The distinction therefore is but a thin one between a man who has plastered over a rent in the main wall and papered it over, and then sells, subject to all faults, knowing that the purchaser cannot discover this fatal one, which he does not point out, and a man who, knowing that the defect is thus concealed, sells the estate with all its faults without disclosing this, which he knows cannot be discovered: in either case the purchaser is deceived. In the first case, no doubt, the seller by his act hides the defect, but there is no positive fraud in hiding the defect; the fraud is committed, or at least consummated, when the seller by his silence induces the purchaser to buy without the means of knowledge.[85]

Despite Gotlib D.C.J.'s assertion in *Jung*,[86] the common law does not appear to have progressed as far as Sugden's rationale would allow. Liability for a latent defect which nullifies the purchaser's purpose or materially affects the value of his bargain will probably have to wait upon legislative reform.

The effect of *Sevidal*[87] could well be a greater willingness by the courts to find fraudulent inducement arising from a course of dealings in which the vendor remained silent as to a latent defect materially affecting the purchaser's expectations about the property. If so, then there would be less reliance on the various devices associated with the doctrine of substantial performance.

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84. *Sevidal* v. *Chopra*, *supra*, note 5.
85. Sugden, *supra*, note 41, at 333-334.
86. *Jung* v. *Ip*, *supra*, note 73.
87. *Sevidal* v. *Chopra*, *supra*, note 5.

## LIMITATIONS ON RIGHTS OF USER

### The Torts of Neighbourhood

As against the polluter of land which is subsequently sold, an alternative basis of liability may be limitations as to rights of user of the land. While ostensibly unfettered, an owner or occupier's right to use and enjoy his land at common law has certain limitations demarcated by the torts of nuisance, trespass, the rule in *Rylands* v. *Fletcher*,[88] and negligence.

The basic fact pattern involves a remote predecessor in title or occupier of land who, through the use and enjoyment of his land, severely pollutes it. At the time, his activities are lawful and likely to be of value to the community. The land is sold one or more times and is eventually held by an intervening successor in title who is unaware of the pollution or of its extent. The land is sold to the plaintiff who has no cause of action against the vendor, because the vendor had no knowledge of the pollution and could not reasonably be expected to have acquired such knowledge. At issue is whether the present successor in title has a cause of action as against a remote predecessor in title, where the activities of that predecessor have resulted in serious pollution of that land.

The present discussion will be confined to the tort of nuisance. Most of the arguments, both for and against, will apply equally to trespass and to the rule in *Rylands* v. *Fletcher*, and indeed any cause of action should be framed in the alternative for all three torts. However, the latter two torts have complications which nuisance avoids. With trespass, the plaintiff must demonstrate not only a direct interference with another person's property as between successive owners, but also a continuing interference after the offending activity has ceased and ownership in the land has been relinquished. With the rule in *Rylands* v. *Fletcher*, the plaintiff must show both that pollution of land can constitute an escape of a dangerous substance upon conveyance of the land from one owner to another and that the polluter's use of that land was non-natural.

A fourth cause of action is, of course, negligence, but this tort has even further complications. First, the plaintiff must establish that a remote predecessor in title owes a

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88. *Rylands* v. *Fletcher*, *supra*, note 1.

duty of care in his use and enjoyment of the land to all successors in title. To find such a duty would, in effect, impose a type of trust upon the holder of an estate to individuals who have not yet acquired any interest in that estate. Second, even if such a duty were found, the plaintiff must show that the polluter in some way breached a standard of care. This will be an exceedingly difficult evidential problem if the standard pertains to the operation of the polluter's activities (for example, the negligent operation of an oil refinery). Reliance upon the doctrine of *res ipsa loquitur* would make the chances of success even more precarious. If the standard of care consists of an obligation to restore the land — this would be the most likely favourable finding — then the action can and should be pleaded in the alternative in nuisance. Finally, even if negligence could be proved, the plaintiff may be denied his damages because they consist of purely economic loss. Most of the damages which could be claimed are the clean-up costs, and under the ruling in *Rivtow Marine*,[89] a defendant is not liable for the costs of repair to negligently produced articles. Only damage to other property can be claimed.

**The Elements of Private Nuisance**

Because of the wide and disparate range of conduct to which it has been applied, nuisance has been called, by one judge, the "hazy branch of tortious liability".[90] While the boundaries of the tort may be amorphous, pollution of land, it is submitted, falls within recognized parameters of the tort.

The gist of a private nuisance is an unreasonable or intolerable interference with an occupier's use and enjoyment of his land.[91] Nuisance is a tort arising out of the reciprocal duties owed by neighbouring occupiers of land. As the Court stated in *Cunard* v. *Antifyre, Limited*: "Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the

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89. *Rivtow Marine*, *supra*, note 8.
90. Gratton D.C.J. in *Brewer* v. *Kayes* (1973), [1973] 2 O.R. 284 (Dist. Ct.) at 288.
91. John G. Fleming, *The Law of Torts*, 6th ed. (London: Sweet & Maxwell, 1983) at 384; R.F.V. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987) at 59 [hereinafter *Salmond*]; F.H. Newark, "The Boundaries of Nuisance" 65 Law Q. Rev. 480 at 482.

use or enjoyment of neighbouring property ...."[92] Thus, the circumstances in which a nuisance is created are the incompatible uses of neighbouring property "when all of the conflicting parties are acting in good faith and with reasonable care."[93]

Nuisance is a deleterious state of affairs rather than any particular tortious act. Consider the following account: "Nuisance is commonly a continuing wrong — that is to say, it consists in the establishment or maintenance of some state of affairs which continuously or repeatedly causes the escape of noxious things onto the plaintiff's land ...."[94] Thus, the focus of the tort is on the interest which has suffered — that is, the type and degree of interference with another occupier's rights — rather than the tortfeasor's wrongful conduct which has caused the nuisance.[95] The critical test for an actionable nuisance, then, is not whether the defendant's action was a reasonable use of his property in the circumstances. Rather the test is whether the interference with another occupier's rights was unreasonable or intolerable.[96]

In summary, the elements of an actionable private nuisance are:

1. an interference with an occupier's use and enjoyment of his land,
2. which is unreasonable or intolerable,
3. which arises from conflicting or incompatible uses of neighbouring property, and
4. which results in a continuing wrong.

If pollution is an action which diminishes or nullifies an occupier's rights of user, then at issue is whether the polluter of land can be held liable to successors in title as well as neighbouring occupiers for the creation of a nuisance. There are two sub-issues here:

1. Whether the pollution of land by a predecessor in title constitutes an interference with the use and enjoyment of that land by a successor in title? If it does, whether that interference was unreasonable or intolerable?
2. If the pollution does constitute a nuisance, whether the predecessor in title who created it can be held liable?

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92. *Cunard* v. *Antifrye, Limited* (1932), [1933] 1 K.B. 551 at 557.
93. Daniel R. Coquillette, "Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment" (1979) 64 Cornell L. Rev. 761 at 794.
94. *Salmond, supra*, note 91, at 61.
95. *Id.*, at 80. See also Fleming, *supra*, note 91, at 378.
96. *Salmond, id.*, at 82. See also Fleming, *id.*, at 386.

**American Precedents for Environmental Liability**

No Canadian court has addressed the issue of liability in nuisance for environmental damage by a predecessor in title or interest.[97] At least three American courts have ruled on this question. *State, Dept. of Environ. Protect.* v. *Ventron*[98] and *T & E Industries Inc.* v. *Safety Light Corp.*[99] held the predecessor in title strictly liable for contaminating the land in question, whereas *Philadelphia Electric Co.* v. *Hercules Inc.*[100] dismissed the action in private nuisance. The facts of these cases need to be set out before assessing the basis upon which liability was granted or denied.

*Ventron* and Predecessor Liability for Environmental Damage

In *Ventron*,[101] the defendants were the current owner and two predecessors in title of land which had been severely polluted with mercury-laden waste. The pollution was the result of a mercury processing plant which had been operated by three predecessors in title. The original owner ceased its corporate existence upon sale to the first defendant operator (Wood Ridge) who subsequently sold the plant to the second defendant operator (Ventron). The third defendant (Wolf), the current owner, was a commercial real estate developer who had purchased the land intending to demolish the mercury plant and to construct a warehousing facility. Wolf, at the time of purchase, was not aware of the extent of the contamination as Ventron had not disclosed the contents of an environmental study which it had commissioned. Upon discovering that the mercury contamination was seeping into an adjacent river, New Jersey's Department of Environmental Protection, the plaintiff in the case, sought to impose clean-up costs on the successive owners of the property. Wolf cross-claimed against the other two defendants for fraudulent non-disclosure in the sale of realty. The Appeal Court held the two operators of the mercury plant liable: 1. for the clean-up costs both under common law

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97. *Sprung Environponics Ltd.* v. *City of Calgary and Imperial Oil Limited* (1988), Statement of Claim, Calgary, Suit No. 8801-12601; if it goes to trial, this could be the first Canadian case on point.
98. *State, Dept. of Environ. Protect.* v. *Ventron* (1983), 468 A. 2d 150 (N.J. S.C.) [hereinafter *Ventron*].
99. *T & E Industries Inc.* v. *Safety Light Corp.* (1988), 546 A. 2d 570 (N.J. C.A.).
100. *Philadelphia Electric Co.* v. *Hercules Inc.* (1985), 762 F.2d 303 (U.S. C.A.) [hereinafter *Hercules Inc.*]. The facts of this case are set out in the text at note 110, *infra*.
101. *Ventron*, *supra*, note 98.

principles for the abatement of a nuisance and under a New Jersey spills Act, and 2. for fraudulent non-disclosure.

While the basis for imposing liability appeared to be public rather than private nuisance — the Department of Environmental Protection was not claiming damages for the impairment of its rights of user — the analysis and principles enunciated by the Court would apply to injury to both private and public rights. The Court stated: "those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for the resultant damages."[102] And later:

> We recognize that one engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, "the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it." *Restatement (Second) [of the Law of Torts (1977)]* ....[103]

The emphasis here is on the liability of the person causing damage to the innocent person suffering the loss. That "innocent person" presumably could include the successor in title.

The precedent value of this case for predecessor liability for environmental damage, however, is limited for three reasons. First, the defendant operators were held liable for the harm resulting from abnormally dangerous activities. So the ruling falls within the more restrictive *Rylands* v. *Fletcher* liability. Second, the defendants arguably were liable for the continuing interference with neighbouring property owners. In that case, the liability would be imposed for harm caused by the contemporaneous escape of a dangerous substance rather than an escape through the conveyance of the land. Finally, the innocent purchaser was granted relief on the basis of fraudulent non-disclosure rather than a successor in title whose rights of user had been impaired. The Court could have applied its general principle of strict liability for harm caused to "innocent persons" to the successor in title, but declined to do so.

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102. *Id.*, at 157.
103. *Id.*, at 160.

*T & E Industries Inc.* and Liability of the Remote Predecessor in Title for Environmental Damage

The case of *T & E Industries Inc.*[104] is directly on point. In that case, the defendant was a successor to a corporation which had conducted a radium processing operation on the disputed land for nine years until 1926. Solid waste containing radium had been deposited onto the vacant and unimproved portions of the site. The land was first sold in 1943 and then sold a further three times before the plaintiff purchased it in 1974. In 1979 the plaintiff discovered the unnatural levels of radiation and had to severely restrict the use of the contaminated part of the site. The plaintiff sued the defendant for damages. The Court held the defendants strictly liable for the contamination on the principle that a defendant who engages in an abnormally dangerous activity which introduces an unusual danger into the community should bear the costs of the ensuing danger.

The Court rejected the defendant's contention that the principles of strict liability — or by implication those of nuisance — are only applicable when actions on one's own property interferes with the rights of a neighbour, not to the successor in title of the contaminated property. The Court asserted: "We see no practical or legal distinction between the rights of a successor in title to use and enjoy its land and the rights of a neighboring property owner. Both have rights and both can suffer injury through the acts of a prior owner."[105] Unfortunately, the Court only mentioned in passing one argument for imposing liability, and that was the fact that the contaminated condition of the property was a latent defect of which the innocent purchaser had no notice and that as between the purchaser and a remote predecessor in title, there was no opportunity to fix and adjust rights by contract. As for the doctrine of *caveat emptor*, it was simply dismissed as being "outdated in today's complex society".[106]

The Court did not consider any other arguments either in favour of or against the legal distinction between successor and neighbour rights of user. The one case which did uphold this distinction, namely, *Hercules Inc.*,[107] was dismissed as "unpersuasive in light

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104. *T & E Industries Inc.*, *supra*, note 99.
105. *Id.*, at 576-577.
106. *Id.*, at 577.
107. *Hercules Inc.*, *supra*, note 100.

of *Ventron.*"[108] This is most curious, since *Hercules Inc.* provided the counter-argument to the one reason offered by the Court in *T & E Industries Inc.*: while it is true that the purchaser could not protect himself by contractual rights as against the remote predecessor in title, the reason that he was pursuing that party and not his vendor was the result of his failure to protect himself in the contract of sale with his vendor. These competing arguments will be considered further in the following section.

Given the fact that the Supreme Court of Canada in *Fraser-Reid*[109] has affirmed the "pristine force" of the *caveat emptor* doctrine, convincing arguments will have to be marshalled if environmental liability is to be imposed upon a remote predecessor in title. These will be considered under the two sub-issues identified earlier, namely, whether pollution can constitute an unreasonable interference with successor rights, and whether liability can be imposed upon a remote predecessor in title for environmental damage.

**Interference with Successor Rights**

The Relevance of *Caveat Emptor*

There are at least two arguments supporting the contention that the legal distinction between neighbouring users of land and successor users of land is important, namely, the "judicial zoning function" of a nuisance action and the "implied warranty" of successor rights. These arguments were made — though only in a cursory fashion — in *Hercules Inc.*[110] and the facts of that case will be outlined before considering the Court's rationale.

In *Hercules Inc.*, the predecessor in title operated a hydrocarbon resin manufacturing plant and deposited various resins and their by-products on the property. The plaintiff then acquired the land, but subsequently was ordered by the Department of Environmental Resources to clean up the pollution after resinous materials were discovered seeping from the banks of a river adjacent to the site. The plaintiff sought indemnity from the defendant, who had acquired all the assets of the vendor. The Court held that the purchaser could not recover on the basis of a private nuisance for conditions

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108. *T & E Industries Inc., supra*, note 99, at 577.
109. *Fraser-Reid* v. *Droumtsekas, supra*, note 45.
110. *Hercules Inc., supra*, note 100.

on the very land transferred, as that would merely circumvent limitations on vendor liability inherent in the rule of *caveat emptor*. As indicated, the reasons for the decision were the judicial zoning function of nuisance and the unacceptable implied warranty notion of successor actions against predecessors in title. Each of these will be considered in turn.

Nuisance as "Judicial Zoning"

The historical role of private nuisance law was the regulation of competing land uses.[111] That is to say, the common law governed conflict between two sets of subsisting user rights. The Court, in *Hercules Inc.*, stated the rationale of nuisance law thus: "the goal of nuisance law is to achieve efficient and equitable solutions to problems created by *discordant* land uses."[112] According to the Court, nuisance law performs more a zoning function rather than a function of consumer protection.[113] This characteristic of the nuisance tort has two aspects which preclude its application to successors in title.

First, determining whether there is an actionable nuisance requires a balancing of the competing uses of land. As the House of Lords stated in *Sedleigh-Denfield* v. *O'Callaghan*: "a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with."[114] The basis on which this balancing is done is "reasonable use".[115] However, the test is not whether the defendant has acted reasonably, but whether the defendant has acted reasonably having regard to the fact that he has a neighbour.[116]

Whether a user has created a nuisance, then, will depend upon who his neighbour is and which uses he is making of his land. This is the rationale for zoning land for residential and industrial uses. Factors to be taken into account include the condition of other property in the neighbourhood, the nature of the locality, and other circumstances

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111. McLaren, *supra*, note 2, at 531.
112. *Hercules Inc.*, *supra*, note 100, at 314.
113. *Id.* See also Joel Franklin Brenner, "Nuisance Law and the Industrial Revolution" (1974) 3 J. Legal Studies 403 at 406.
114. *Sedleigh-Denfield* v. *O'Callaghan* (1940), [1940] A.C. 880 at 903.
115. *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 122 E.R. 27 (K.B.); Fleming, *supra*, note 91, at 386.
116. Fleming, *id.*, at 386; *Salmond*, *supra*, note 91, at 82.

which show reasonable employment of the property.[117]

Competing uses cannot be balanced over time, because the original owner during his use of the land does not know who his successors in title will be, let alone what activities they may wish to engage in on the land. Every landowner would be forced to restore his land to its pristine condition prior to sale lest a successor in title acquire the land for a use rendered impossible because of the prior enjoyment exercised over the land.

The "zoning function" of actionable nuisance has a second aspect which precludes its application to successors in title. The tort of nuisance developed because neighbours had no contractual means of protecting the proprietary interest which they held in the land. As the Court stated in *Hercules Inc.*: "Neighbours, unlike the purchasers of the land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation."[118] Purchasers negotiate at arm's length and are free to impose conditions and warranties to protect their future use and enjoyment of the land. No such opportunity exists for the protection of a neighbour's proprietary rights of user.

The Implied Warranty in Successor Rights of User

There is a second legal distinction between rights of a successor in title to use and enjoy its land and the rights of a neighbouring property owner. The creation of a nuisance deprives a neighbour of rights which he had been exercising. This is, in effect, one of the tests for an actionable nuisance, namely whether the plaintiff occupier has been dispossessed of his rights of user.

The successor in title, however, is not dispossessed of any user rights. He merely fails to acquire rights which he thought that he was obtaining. This is not an uncommon experience where the bargain struck has turned out not to be as good as expected.

If the polluter of land has to ensure that successors in title receive all the user rights which they had expected when entering into an agreement of sale, then the polluter must guarantee the suitability of the land to the purchaser's particular purpose. That guarantee would be operative even though the polluter only knows his immediate successor in title

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117. *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H.L.C. 642, 11 E.R. 1483 at 1485.
118. *Hercules Inc.*, *supra*, note 100, at 314.

and does not know any of the future purposes for which the land will be acquired.

Through a nuisance action, the successor in title would acquire an implied warranty as to the land's fitness. Thus, by framing the action in nuisance, the successor in title circumvents the *caveat emptor* rule. The Court of Appeal in *Hercules Inc.* explains the consequences of such circumvention:

> allowing a vendee a cause of action for private nuisance for conditions existing on the land transferred — where there has been no fraudulent concealment — would in effect negate the market's allocations of resources and risks, and subject vendors who may have originally sold their land at appropriately discounted prices to unbargained-for liability to remote vendees.[119]

The price of the property may have reflected the possibility of environmental risk. Furthermore, if the vendor is the polluter and *caveat emptor* precludes an action in contract, then the availability of a nuisance action would allow the purchaser greater rights than the contract permits. It would even be an escape from a contractual term that the purchaser take the land "as is".

Strict Liability for Pollution

There are at least two main arguments in favour of imposing environmental damage upon a polluter who is no longer the owner of the contaminated property, namely, strict liability for the creation of a nuisance and the impairment of possessory rights.

### *The Standard of Reasonable Use of Property*

Actionable nuisance has been directed at two kinds of harm:[120]

1. discomfort in the enjoyment of land — this involves an interference with the beneficial use of the property (for example, smells from a pig farm);
2. actual physical injury to the property which renders particular uses impossible (for example, sewage seeping from a municipal sewage lagoon or flood-water from the failure of an adjoining drain).

With both types of harm, reasonable use is the standard by which an actionable nuisance is determined. However, the process of balancing competing users of the land

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119. *Id.*, at 314-315.
120. *Salmond, supra*, note 91, at 63.

in assessing intolerable discomfort is quite different to that in assessing intolerable physical injury. Whether the defendant's occupation was a lawful trade, necessary or useful to the community, and carried on in a reasonable and proper manner and in a reasonable and proper place is the critical test for determining whether ensuing personal discomfort to the plaintiff is an actionable nuisance.

Different considerations apply where physical injury to property has occurred.[121] These are set out in the seminal case of *St. Helen's Smelting Co.*: "The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property."[122] The plaintiff was arguing damage to his trees and shrubs by a copper smelter's noxious fumes, not personal discomfort from those fumes. The defendant had contended on the authority of *Hole* v. *Barlow*[123] that the smelter was essential to the business of life and was conducted in a reasonable and proper manner in a reasonable and proper place, namely, the industrial northwest of England. The Court rejected the defendant's contention and stated:

> in the county of Lancaster above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights .... Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.[124]

With material damage, then, the standard of reasonable use is reduced to a *de minimis* rule. The critical test is how substantial was the injury and how great the interference with the plaintiff's use and enjoyment of his property.

Once the plaintiff establishes substantial material injury to his property, the person causing the nuisance cannot then plead reasonable use of his own property, nor can he plead the social utility of his activities.[125]

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121. Brenner, *supra*, note 113, at 413; *Salmond*, *supra*, note 91, at 63.
122. *St. Helen's Smelting Co.* v. *Tipping*, *supra*, note 117, at 1487.
123. *Hole* v. *Barlow* (1858), 4 C.B. (N.S.) 334, 140 E.R. 1113.
124. *St. Helen's Smelting Co.* v. *Tipping*, *supra*, note 117, at 1487-1488. See also Brenner, *supra*, note 113, at 413.
125. *Salmond*, *supra*, note 91, at 72 and 81.

***Strict Liability in the "Sewage" Cases***

The "sewage" cases[126] in Canada illustrate this principle. In *Fort Henry Hotel*,[127] unbeknown to the defendants, the junction of its sewage pipe traversing the plaintiff's property eroded, and effluent seeped out and flooded the plaintiff's basement. McRuer C.J., quoting Denman J. with approval, stated that:

> The prima facie right of every occupier of a piece of land is, to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining .... Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they make take of it.[128]

In *Portage La Prairie* v. *B.C. Pea Growers Ltd.*,[129] sewage from the defendant's sewage lagoon swept onto the plaintiff's property, damaged its crops, and flooded its mill. There had been no negligence on the part of the engineers responsible for the lagoon's construction. The Supreme Court held the defendant municipality liable in nuisance and stated that: "it was not necessary, in order to fix the appellant with liability for the creation of a nuisance, for the respondent to establish negligence on the part of the appellant or of its engineers in the construction of the lagoon."[130] In effect, the municipality was held strictly liable for the interference with the plaintiff's use and enjoyment of his property.

Pollution can have a similar effect on land as sewage has: it can deprive the occupier of any use or enjoyment until removed. Even where it does not dispossess the occupier of all his user rights, it can significantly impair those rights and reduce the value of his property. Pollution, then, interferes with the use or enjoyment of the land's successors in title. It, therefore, should be an actionable nuisance.

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126. *Esco* v. *Fort Henry Hotel* (1962), 35 D.L.R. (2d) 206, [1962] O.R. 1057 (Ont. H.C.); *Portage La Prairie* v. *B.C. Pea Growers Ltd.* (1965), 54 D.L.R. (2d) 503 (S.C.C.); *Royal Anne Hotel Co.* v. *Ashcroft* (1979), [1979] 2 W.W.R. 462 (B.C. C.A.). For a similar approach with dust, see *Kent* v. *Dominion Steel & Coal Corp.* (1964), 49 D.L.R. (2d) 241 (Nfld. S.C.).
127. *Esco* v. *Fort Henry Hotel, id.*
128. *Id.*, D.L.R. at 210.
129. *Portage La Prairie* v. *B.C. Pea Growers, supra*, note 126.
130. *Id.*, at 508-509.

The Impairment of Possessory Rights

In further support of the application of nuisance principles to environmental damage, the loss of user rights arguably does not amount to an implied warranty as to fitness of purpose. If there is an apt comparison with contractual rights, such a loss is more akin to failure of consideration in the sense that the subject matter of the contract did not exist. Property is a bundle of rights, including rights of user. The activities of the polluting predecessor in title had destroyed or severely impaired a significant number of those rights.

The effect of pollution, then, is to destroy the user rights of successors in title. Thus, the impact is much greater than merely rendering the land unsuitable for a particular purpose. The contamination can make it impossible to possess the land, that is, any use and enjoyment becomes impossible. That appears to be the case in *Ventron*[131] (where the mercury and other toxic wastes were "abnormally dangerous" and in amounts dangerous to health and life) and in *T & E Industries Inc.*[132] (where access to certain parts of the property had to be severely restricted because of the radioactive contamination). The pollution may not be so severe as to preclude possession altogether, but it can still severely impair the occupier's rights of user. That was surely the case in *Sevidal.*[133] On this basis, *Ventron* and *T & E Industries Inc.* can be distinguished from *Hercules Inc.*[134] In the latter case, the pollution was "resinous materials" which leached from a waste pond into an adjacent river. The issue was liability for clean-up costs imposed under statutory regulation. At no stage were the plaintiff's possessory rights of user impaired by the pollution.

The limitation to the "possessory rights" argument is that like the duty to warn — it could be confined to dangerous substances. Where the pollution renders the land unsuitable for a limited number of uses or where it merely imposes manageable clean-up costs, then the courts may well conclude that the purchaser had been imprudent not to seek protection in its contract of sale. After all, the purchaser will rarely be in the

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131. *Ventron, supra*, note 98.
132. *T & E Industries Inc., supra*, note 99.
133. *Sevidal* v. *Chopra, supra*, note 5.
134. *Hercules Inc., supra*, note 100.

position to claim that it had no suspicion whatsoever that the land had been polluted. Rather, the purchaser will usually be contending that it did not appreciate the extent of the contamination. In such circumstances, as between commercial parties, *caveat emptor*.

The Continuing Nuisance

If the purchaser as against a remote predecessor in title can establish that upon conveyance of the land pollution becomes an actionable nuisance, then a further hurdle is the basis for imposing liability upon the creator of the actionable nuisance. There are two main arguments against holding the polluter liable in the circumstances. First, at the time of the action, the polluter no longer holds an interest in the property and does not have the power to abate the nuisance. Second, at the time that the land was contaminated, the successor in title did not have an interest in the property and so his rights were not damaged when the nuisance was created.

***Vendor Liability Subsequent to the Alienation of Property***

There is good case authority to meet both these objections, and consequently, only a brief review is required here. As a general rule, the creator of a nuisance remains liable even after alienating his property. The alienation of the power to redress the nuisance does not allow its creator to escape liability. In *Roswell* v. *Prior*,[135] the defendant had erected a building which interfered with the plaintiff's right to ancient lights, but before the action was brought, the defendant had leased the building to a third party. The Court held:

> And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it .... [T]he putting it out of one's power to abate a nu[i]sance is as great a tort as not to abate it when it is in your power to do it. And it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages ....[136]

Perhaps the most eloquent statement of this principle — and one destined to be repeated — is the following in *Ventron*: "Even if they [the polluters] did not intend to pollute or

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135. *Roswell* v. *Prior* (undated), 12 Mod. 635, 88 E.R. 1570.
136. *Id.*, at 1573.

adhered to the standards of the time, all of these parties remain liable. Those who poison the land must pay for its cure."[137]

### *Successor Rights Prior to the Acquisition of Title*

The objection that the successor in title did not have an interest in the property when the nuisance was created can be countered by two arguments: the creation of a continuing nuisance or the creation of a potential nuisance. *Masters* v. *London Borough of Brent*[138] addressed the problem of a continuing nuisance. There the roots of the defendant's tree had caused subsidence of a wall of a house owned by the plaintiff's father. The plaintiff purchased the house, carried out the necessary repairs, and sued the defendant for damages. The defendant contended that as the damage had occurred before the plaintiff had acquired an interest in the premises, he was precluded from bringing the action. The Court rejected that contention on the grounds that a continuing nuisance had been created and that those who are in possession may recover losses with respect to such a nuisance. The date on which the owner acquired his interest was irrelevant. The Court put it thus:

> Where there is a continuing nuisance inflicting damage on premises, those who are in possession of the interest may recover losses which they have borne whether the loss began before the acquisition of the interest or whether it began after the acquisition of the interest. The test is: what is the loss which the owner of the land has to meet in respect of the continuing nuisance affecting his land?[139]

By analogy, pollution constitutes a continuing nuisance for which the purchaser can claim damages upon the acquisition of his interest in the land.

The "subsidence" cases[140] have approached the problem of the delay in the successor's acquisition of his interest with the notion of the creation of a potential nuisance. Typically in these cases, an adjoining landowner excavates soil which provides lateral support to his neighbour's land. Subsidence does not occur until after the excavator has conveyed his interest in land. The issue is whether the excavator can be

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137. *Ventron*, *supra*, note 98, at 160.
138. *Masters* v. *London Borough of Brent* (1977), [1978] 2 All E.R. 664 (Q.B.).
139. *Id.*, at 669.
140. *Fennell* v. *Robson Excavations Pty. Ltd.* (1977), [1977] 2 N.S.W.L.R. 486 (C.A.); *Byrne* v. *Judd* (1908), 27 New Zealand L. Rep. 1106 (N.Z. C.A.); *Dalton* v. *Henry Angus & Co.* (1881), 6 App. Cas. 740.

held liable for the damage when the cause of action did not arise upon the removal of the soil, but only upon the actual subsidence. In *Fennell* v. *Robson Excavations Pty. Ltd.*,[141] the Court held that removal of the soil had created "a potential nuisance" and, upon the occurrence of subsidence, "the nuisance was complete".[142] By analogy, even if the pollution was not a nuisance *per se* because there was no damage to another occupier's rights of user, it constitutes a potential nuisance which is complete upon conveyance when the damage to the purchaser's possessory rights occurs.

## CONCLUSION

As a summary, a number of rules of liability can be identified. With regard to the process of sale, the following rules are likely to govern liability for environmental damage:

1. If the vendor does not know, and cannot be expected to know, about the pollution, then the purchaser is unlikely to succeed.
   a. The Supreme Court of Canada has ruled that there is no general implied warranty as to fitness of the land in contracts for the sale of real property.
   b. The only grounds on which a purchaser would succeed are an express or collateral warranty, failure of consideration, or an error *in substantialibus*.
2. If the pollution could have been discovered by reasonable inspection, then the imprudent purchaser will be denied a remedy.
3. If the court concludes that the purchaser would not have entered into the contract if he had known about the pollution of which the vendor was aware, then any misrepresentation or partial non-disclosure will be deemed fraudulent.
4. If, to the knowledge of the vendor, the contamination constituted an actual or potential danger to health and life and if the vendor failed to warn the purchaser of that danger, then the vendor will be liable for a fraudulent breach of a duty to warn.
5. If the vendor failed to disclose a latent defect of which the vendor knew would render the land unsuitable for the purchaser's purpose, then the vendor's silence may

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141. *Id.*
142. *Id.*, at 492-493.

be viewed as a fraudulent suppression of the truth.

6. The court will invoke the doctrine of *caveat emptor* where there has been a non-disclosure of a latent defect which is material to the purchaser but not sufficient to deprive him of his bargain. Thus, a mere clean-up liability is unlikely to succeed in the absence of any active concealment.

With regard to limitations on the rights of user, the prospects of imposing liability for environmental damage are much more speculative. The courts may well take the view that such liability is best imposed by statute in which the interests of the purchaser, vendor, and remote predecessor in title can be properly balanced.[143] In the absence of statutory reform, the following rules are likely to govern environmental liability:

1. Where contamination renders land useless or unsafe for the purchaser's purpose rather than merely imposes a clean-up liability upon the purchaser, an actionable nuisance is more likely to be found as between successors in title.
   a. Compensation for a clean-up liability looks much like an implied warranty as to fitness, and if the purchaser wanted such protection, he should have stipulated it in his contract of sale.
   b. Land rendered useless or unsafe by pollution impairs the purchaser's rights of user, and while this is not strictly a dispossession, it does make possession of the land impossible.

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143. The policy objective of any legislation is likely to be: the polluter must pay for any clean-up costs. The most effective approach is to have a public agency undertake any clean-up and to recover the costs from the polluter. This is the approach taken in the United States (with the federal *Comprehensive Environmental Response, Compensation and Liability Act* [hereinafter CERCLA] of 1980 (Pub. L. No. 96-510, 94 Stat. 2767), popularly known as "Superfund") and in Ontario (with Part IX of *The Environmental Protection Act*, R.S.O. 1980, c.141, popularly known as the "Spills Bill").

Under this type of legislative scheme, the main difficulty in balancing the interests of purchaser, vendor, and remote predecessor in title arises when the polluter has subsequently gone bankrupt or has disappeared as a corporate entity. Then the critical issue is who, in the absence of the polluter, will bear the clean-up costs. In the United States, judicial expansion of environmental liability under CERCLA has extended to financial lenders that take security interests in property as collateral for loans. For a discussion of this development, *see* Patricia L. Quentell, "Comment: The Liability of Financial Institutions for Hazardous Waste Cleanup Costs under CERCLA" (1988) Wisconsin L. Rev. 139. The extent of liability under the Spills Bill has yet to be determined.

2. The principle on which liability for environmental damage is imposed upon the remote predecessor in title who polluted the land is the rule that a creator of a nuisance is liable for its continuance even after he has ceased occupation.

Liability for environmental damage poses a new challenge to established legal principles. A number of these principles may well be extended without doing violence to their underlying logic. Others will prove a bar to recovery, and until statutory reform introduces new remedies, the purchaser will have to take greater care in his inspection of the property.

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