IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd., 2006 NSSC 130

Date: 2006/04/21
Docket: S. H. 192468
Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited

Plaintiff

- and -

United Gulf Developments Limited, and Greater Homes Inc.

Defendants

AND BETWEEN:

United Gulf Developments Limited, and Greater Homes Inc.

Plaintiffs by Counterclaim

- and -

Doug Boehner Trucking & Excavating Limited and W. Eric Whebby Limited

Defendants by Counterclaim

- and -

W. Eric Whebby Limited

Third Party by Counterclaim

- and -

Garden Crest Developments Limited

Fourth Party by Counterclaim

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	March 6, 7, 8 & 9, 2006, in Halifax, Nova Scotia
Written Decision:	April 21 , 2006
Counsel:	Michael J. Wood, Q. C. and Corrie Withrow, for the Plaintiff (Defendant by Counterclaim), Doug Boehner Trucking & Excavating Limited David P. S. Farrar, Q. C., Sean Mudge and Sara Scott, for the Defendants (Plaintiffs by Counterclaim), United Gulf Developments Limited, and Greater Homes Inc. George W. MacDonald, Q. C. And Chris Wilson, for the Third Party by Counterclaim, W. Eric Whebby Limited David G. Coles and Rob MacLeod, for the Fourth Party by Counterclaim, Garden Crest Developments Limited

AN OVERVIEW:

[1] Contaminated Halifax soil resulted in substantial remediation expense. Negligence and consequent damages are claimed. The actors are all competent and knowledgeable people, several of whom with the benefit of hindsight know they could have avoided, in whole or in part the damages which I must attribute to them.

[2] In the course of hearing the evidence, the Defendant, W. Eric Whebby Limited ("Whebby") was at pains to establish the "practice in the trade". This action relates to soil or "fill" excavated from the site of Garden Crest Developments Limited ("Garden Crest"), at the corner of Summer Street and Spring Garden Road in the city of Halifax. Whebby under contract with Garden Crest excavated and transported 268 truck loads, representing approximately 5,000 tons of material to a stock pile on Forward Avenue, a suburban location, where the material was to be incorporated as rough landscaping and backfill in a residential subdivision. Doug Boehner Trucking & Excavating Limited ("Boehner"), the original Plaintiff in this matter, had contracted to provide landscaping services and back-fill to Greater Homes Inc. (Greater Homes**)** which corporation was constructing a series of homes in the development created by United Gulf Developments

Limited. These are two related companies I will refer to them simply as "United".

[3] The excavation and transport took place over several days, including at least part of the holiday weekend ending May 20th, 2002. As the trucks arrived with the material some of it was, at Boehner's direction, immediately placed as back-fill around particular house foundations. The remainder, was stockpiled by Boehner. Those involved believed the material was suitable for its intended purpose around dwellings. Such was apparently not the view of neighbouring property owners who immediately complained to United about "toxic fill". The neighbours concerns were communicated in an e-mail (Exhibit **"**3**")** dated June 15th.

[4] Faced with these complaints United (promptly I presume) raised the issue with Mr. Paul Behner, the general manager of the Boehner firm, and obtained from him verbal assurances that the material to be used for fill was in fact appropriate for the purpose; and that it "had been tested" by Jacques Whitford, a well known consulting firm with expertise in environmental issues. United says Mr. Behner undertook to provide a certificate to that effect. By early October, no certificate had yet been provided and there remained a substantial stock pile of unused material, although by this time

much of it had been placed onto six of the development lots. It was only then that the material was analysed. It proved to be contaminated with both hydrocarbons and heavy metals; was unsuitable for use around residential properties; and, under the direction of the Department of the Environment, United was obliged to remove and dispose of it.

[5] United demanded Boehner initiate the remediation process. Paul Behner visited Mr. Eric Whebby of that firm to advise him of developments and that he could expect a call from Mr. Riles of United. When Riles spoke to Whebby the conversation became confrontational. Whebby declined to accept the suggestion that his firm was in some way responsible. Whebby was not further consulted or advised with respect to remediation and its costs.

[6] Boehner tentatively began the clean up process but soon decided that they could not afford to carry it out. The anticipated cost according to Mr. Doug Boehner was $500,000.00 and at that time his firm was owed $600,000.00 by United. His evidence is that the firm did not have the financial capacity to undertake the work in that circumstance.

[7] In early October a meeting was held involving United, Greater Homes, AMEC (environmental engineers hired by United), Boehner and Garden

Crest to discuss the process which would then take place and, inferentially, to discuss the responsibility of the various parties. The Whebby firm was not advised of, or invited to participate in this meeting.

[8] It is now rather obvious, after the fact, that the problems resulting in this action could have been avoided or at least limited in their impact

- had Garden Crest conducted a detailed chemical analysis of the soil on their property before it was excavated;
- had Whebby conducted an analysis before removal or after delivery;
- had United responded positively to the concerns of neighbouring property owners by analysing the material, or even attempting themselves to assess its suitability;
- had Boehner, when asked for “certification” responded by obtaining such;
- had Boehner and United refrained from placing the material around the subdivision until ascertaining its true nature, thus reducing the cost of the removal and consolidation of the material into one spot from which it could be sent for disposal.

[9] It is impossible to reconcile the conflicting opinions of the quality of the fill. Mr. Chedrawe of Garden Crest is of the view that the material on their site was essentially "clean". On his visit to "Forward Avenue" in October he saw a pile of material that "definitely" did not come from his property, "full of bricks, mortar and debris". His assessment in October coincides with the representations of the neighbours about the material which they saw in May. Steven Milligan, formerly of AMEC, later of United was concerned about its suitability. According to his evidence given on discovery (Exhibit "11) he raised those concerns in May. These opinions contrast inexplicably with the opinions of Jay Mason of Whebby and Paul Behner, both with long experience in the excavation business who felt the material was satisfactory for its intended purpose.

WHO SHOULD HAVE KNOWN:

[10] Daniel Charles (Danny) Chedrawe was the project manager and partner in the project undertaken by Garden Crest Developments Limited. He has long term and extensive experience in development and construction projects in and around Halifax. He testified that he has been involved in the development of perhaps 1000 apartments and 500 homes, including projects

at Regatta Point, Flemming Park, Lancaster Ridge, Colby Village and Clayton Park West .

[11] He described the project undertaken by Garden Crest as involving the demolition and removal of six older buildings at the corner of Summer Street and Spring Garden Road. Their removal made available a land area of 66,000 square feet for the development, in two phases, of 134 residential units in addition to commercial and office space. The first phase, a redevelopment of the old Summer Gardens apartment house together with a high rise 54 unit building would occupy the northern portion of the property. The development of phase two, the southern portion, would follow. Garden Crest invited tenders for demolition of the buildings and for excavating the site from a number of specialist contractors including both Whebby and Boehner. Whebby got the contract for excavation and removal of the surplus fill with associated work. Their agreement was reduced to writing by Exhibit “7" dated November 27, 2001. This contract specifically excluded from Whebby’s responsibilities

- demolition or removal of existing structures;
- excavation of <u>contaminated material</u>. (my emphasis)

[12] Harold “Jay” Mason, a man in his mid forties was project manager for Whebby. He has extensive experience in the construction industry in and about the Halifax area. Specifically, he had been engaged for 15 to 20 years in excavation. By experience and training he is equipped to perform survey work necessary to establish elevations and grid lines. Aside from learning on the job, he has taken formal courses relating to his work. With a number of employers, he has worked variously as foreman, surveyor, estimator and as in this case, project manager on excavation jobs. Ironically he is now employed as “general manager” with Boehner.

[13] Working for Whebby’s, he was to oversee the removal of excess materials to permit the construction of footings and concrete slabs for the new buildings, and prepare the site for the installation of various municipal and utility services. He prepared the estimates necessary for Whebby to tender on the work to be done. Mason struck me as a competent and experienced contractor. In undertaking this project he had no significant concern about encountering contaminated materials since that was covered by a standard exclusion in the contract made with Garden Crest.

[14] Paul Douglas Behner would have been in his late 30's when this work was done. He is now the managing partner of Tracks Construction Limited. He

is the son of Doug Boehner, and was at the relevant time the general manager of the Boehner firm. His formal education was grade 12, and two years of community college in an automotive course. At present, he claims 15 years experience in excavation work. When Boehner (the party) indicated they would not attempt to remediate the problems at Forward Avenue, Paul Behner and his new firm did explore the possibility of doing so by remediating the soil on site. This apparently proved uneconomic.

[15] Paul Behner, on behalf of Boehner, had responded to the invitation to tender on the Garden Crest excavation project. He had also prepared to tender on the demolition of the former buildings and the removal of construction debris as a companion project. In doing so, he obtained from Garden Crest the results of two studies done on the Garden Crest property by Jacques Whitford and Associates Limited (Jacques Whitford).

[16] The first of those has been referred to as a “geo-technical report”. Its purpose was to assess the sub-surface conditions and to provide geo-technical recommendations for site preparation and for the design of building foundations. The second report was entitled “phase I and limited phase II environmental site assessment”. The executive summary attached to the latter report indicates the consultants “conducted a limited phase two

ESA on the subject site". The tone of the document makes it clear that the focus of the enquiry was on the possibility of petroleum contamination. Both reports were prepared for Garden Crest prior to their acquisition of the property.

[17] Boehner arranged with Mason to transport surplus fill from the Garden Crest site to Forward Avenue where Boehner had a contract for site preparation and landscaping relating to the extension of the subdivision and to facilitate the construction of several houses. There was little or no soil at the Forward Avenue site which was very rocky in character. Behner agreed to pay $25.00 to assist in the cost of trucking the material to this location. He knew it was originating at the Garden Crest site and in the normal course he said, he would have gone to that site to see what was available for excavation. His "standard practice" may not have been followed since he was already familiar with the site as a result of his own bid.

[18] Boehner and Mason were old friends and when Mason came to Forward Avenue to see where the material was to be landed, they exchanged some general news about themselves and families and he said Mason "understood what we were looking for", it being obvious that it was being used for

landscaping a residential subdivision. He needed uncontaminated fill, without rocks or debris.

[19] Behner's recollection was that the fill began to arrive over the May long weekend. It was hauled and dumped by Whebby trucks and stockpiled by Boehner equipment on lots #'s 7 & 8 in the subdivision plan (Exhibit "5"). Evidence with respect to his recollection of the specific dates of delivery are placed in some doubt by the recollection of others and certain of the dated documents. The long weekend in May of 2002 was that ending May 20th. The delivery of materials was completed sometime before May 24th, the following Friday, when Whebby invoiced Boehner for 268 loads of fill (Exhibit "6" Tab 9).

[20] In October when United had been told by the Department of Environment (DOE) that the material was unacceptable for use in the subdivision, Behner contacted Eric Whebby. He described his visit to the Whebby office where, upon being informed, Whebby responded with comments to the effect that he was upset with his staff, that his company had procedures in place for dealing with contaminated materials, and that if you don't know what's in the soil, "you don't put it in our truck". "He was genuinely interested in

helping to solve the problem." Behner further testified that he had a talk with Chedrawe to see what could be done.

[21] He was cross examined about his practice with respect to materials excavated in downtown Halifax and his assumptions about the soil at this particular site. He said he believed it to be normal fill without a problem. In effect he said he was "comfortable", comfortable that the fill would be appropriate for use at Forward Avenue, in spite of "a couple of hot spots" flagged in the geotechnical reports. When referred to his previous evidence on discovery, when he had said he demanded an assurance from Mason that the fill would be "clean" he conceded that his comment was made at the end of their conversation while Mason was walking towards his truck and when Behner uttered words to the effect "I assume the fill will be clean, right?"

[22] Jay Mason in his direct evidence had no recollection of giving any assurances, although he did believe the fill would be suitable for use in a residential area. However he also testified that Behner never asked whether the soil was clean or whether he could provide an "environmental certificate" to assure that was the case. Indeed he did not recall in his experience ever having been asked for such a certificate.

[23] Steven Walter Milligan is new to the rough and tumble of the construction industry. He has been employed as the senior development manager for United since June 3rd, 2002. He completed an engineering degree in 1977 and has been a professional engineer since 1982. Prior to coming to work with United, he had been with their consulting engineers AMEC, working as their construction manager for streets and services with AMEC. Before that he was 22 years with Aldernay Consultants. He is also a qualified land surveyor. His last responsibility with AMEC was in designing and supervising the development of the subdivision at Forward Avenue where Boehner was the primary contractor for streets and services and excavation for United's sister company Greater Homes Inc. For the latter, Boehner was engaged in the excavation and back-filling related to the new homes within the subdivision. This corporate arrangement sees United creating subdivisions in which Greater Homes builds the houses.

[24] I formed a very positive opinion of Mr. Milligan and his honest and conscientious approach to this problem of contaminated soil. He terminated his employment with AMEC about two weeks before beginning with United. It seems that before June he became aware of complaints coming from the neighbourhood about "toxic" material being imported. It was, however, not

until June 15th that these concerns were communicated in writing to United by Dr. Patricia Manuel, acting as a spokesperson for herself and her neighbours. It fell to Mr. Milligan to contact Boehner about the problem. At this point he says he was advised by Paul Behner that the importation of material was almost completed and that the material had been tested and "was clean". He said there were further discussions with Behner and that during those conversations "we kept asking for certification and he kept promising". Ultimately United was furnished with a copy of a letter written by Jacques Whitford Environment Limited (Jacques Whitford) and dated October 8th, 2002 (Exhibit "4") which was directed to Danny Chedrawe of Garden Crest. This letter did not satisfy his concerns. Ultimately, in response to DOE demands United retained AMEC to test the imported fill. This analysis confirmed that all the imported material had to be "immediately removed from the site". Milligan testified that he then informed Boehner of the problem. Boehner promptly commenced some work preparatory to remediation, but quickly abandoned the effort.

[25] I suggested earlier that Milligan in his previous experience had been somewhat insulated from the rough and tumble of a contractor's life. His experience was that of a consultant and the cautionary measures that

consultants must take in order to protect themselves and their clients. So, in cross examination, when he was asked about his experience "while with AMEC" and whether it would have been his practice to "require certification" that imported fill was clean, he agreed "that would have been his practice". He was again asked if the source of this material coming from downtown Halifax would be a "sufficient cause" to make him think that it should be tested; he indicated that was correct. In particular he testified that this would have been the practice of AMEC since 1997 or 1998. I conclude that the care which Mr. Milligan would have taken with respect to imported fill, resulting with his experience with AMEC, did not reflect the "general practice" of the contractors in the excavation business in Halifax in 2002. The essence of the evidence given by Mason, Boehner and Whebby was that unless there was something to alert them to a problem with contamination, their assumption would be that the material would be as it appeared.

[26] Christopher MacLean Stevenson Elliott, testified about the steps taken under the supervision of AMEC to remove the contaminated soil. He was asked about the company's practice with respect to sampling for contamination. He indicated that the previous use of the area from which fill was being removed might be the trigger for requiring it to be tested, and went on to say

"it's not an easy answer . . . we sample all soils from downtown Halifax for heavy metals". When asked about how long that practice had been effect, he said "that is the practice of my company since 1997, 1998".

[27] Douglas Boyd Boehner is semi-retired. His son Paul was managing the company in 2002 and the father only heard about the work done by his company when a problem developed in October. At that time his son had left the company. When contacted about the soil Doug Boehner responded "we'll help get rid of it". On reflection or inquiry, one possible destination was "Enviro Soil". Mr. Boehner explained that Enviro Soil required payment of "$500,000.00 up front" and that there was a very substantial account owing to his firm by Greater Homes. In effect he "didn't have the money" to do anything about the contaminated fill. Under cross examination he testified that he had been 32 years in the excavation business and trading in fill. He conceded that he "never" required an environmental test before excavating, never tested materials before trucking it away and that in giving or receiving fill the terms "structural" or "general" are used as a description. "Structural" being fill which can be compacted and made capable of supporting structures.

THE MATERIAL:

[28] The theory was advanced on behalf of Garden Crest and Boehner that the fill which was found to be contaminated in October was not the fill that was delivered and stockpiled in May. In argument this was referred to as the "Phantom Delivery" theory.

[29] United retained AMEC as consultants in October and the fill was tested. AMEC extracted ten samples for analysis. A note on Exhibit "5", a landscape plan, indicates that five lots had been already "backfilled". The sketch which is in evidence as Exhibit "1" Tab 5 indicates six samples taken from the various lots and four samples from the remainder of the stockpile. It is obvious that the stockpile would have been a mixed jumble of material dumped by Whebby's trucks and piled by Boehner's equipment. The evidence is clear also that some of the imported material was not mixed in the stock pile but went directly into back-filling and landscaping on some of those five lots while some others were back-filled from the stock pile at a later date. I infer that the process had continued over the intervening months between the end of May and the first of October. The analysis which was reported to United found all samples to be contaminated requiring its removal and destruction/disposition. Environmental guidelines had established the maximum content of various elements permissible in soil in

residential areas. **Every sample** exceeded these limits for lead and arsenic. Several samples exceeded permissible limits for hydrocarbons and most failed in the area of forbidden PH's.

[30] There is a factual issue as to when and how this material arrived. That the stock pile and the various lots already landscaped were contaminated and that remediation was required is not disputed. Indeed a consent order determining that fact as between United and Boehner has been issued. On June 15th Patricia Manuel wrote an e-mail to Kevin Riles of United

> "What can you tell me about the "toxic soil" now on the site? Yes you read correctly "toxic" . . . I have been receiving calls from neighbours asking me what I know about the fill that has been brought to the site over the past several weeks. People are calling it toxic . . . I had a good look when it first arrived . . . it appears to be Halifax till . . . Some of the stuff . . . looks like material from an old developed site . . . There is a lot of foreign material in it. People here are telling me it is from the excavation at the corner of Spring Garden Road and Summer Street . . . What is the content of the fill? What is the land use history of the source location? . . . Fill from previously used sites does have the potential to be dirty. **Lead is always a concern in urban fill** . . . I am suggesting to people that they call . . . the Department of Environment.

[31] Curiously Dr. Manuel was not called as a witness, nor were any of the complaining neighbours. She may have had some expertise in the subject matter about which she was writing since she signs off as Associate Professor of Planning/Occupational Therapy Dalhousie University.

[32] When Danny Chedrawe heard of the complaint he went immediately to the site of the stock pile to take a look at the material himself. He testified that "In my opinion that fill did not come from my site. It was obviously not suitable . . . if it was from my site someone was asleep at the wheel". An experienced developer, it was apparent to him that the fill was intended for use at a residential (R1) site.

[33] When Steve Milligan from United (formerly of AMEC) was cross examined with respect to his own observations of the material in the stock pile he agreed that it contained concrete, tin cans, and chunks of roofing. He conceded that he had smelled an odour of oil and/or creosote coming from the stock pile but denied that he had done so in July or August, leaving September/October as a possibility. (Another witness had testified that as the stock pile was used materials orange and black were exposed.) He agreed that finding orange and black staining in the stockpile was a concern "but most of it was already incorporated in the lots by the time we got the complaint". When cross examined on behalf of Whebby he reiterated his opinion that if fill is imported from peninsular Halifax it should be tested for heavy metals. He agreed that he had on discovery described the material as containing bricks, mortar and old junk triggering numerous conversations on

the subject after he came with United and saw the material in July, but he had not formed the opinion that it could not be used because he said he did not observe any smell. He was sufficiently concerned however that both he and Mr. Riles were asking Boehner in August and September to provide the environmental certificate which had been promised. He relied on assurances from Paul Behner confirming the material was “clean”, meaning no hydrocarbons and no heavy metals.

[34] What do we know of the quality of the material before it was removed from Summer Street?

[35] What we have is the letter (Exhibit “4) from Jacques Whitford to Mr. Chedrawe dated October 8th of that year. It reviewed for his benefit the assessments made by that engineering firm during the course of their due diligence assessment before the property was purchased and a further analysis while Whebby was excavating. In the course of excavation an unexpected oil tank had been encountered at 1528 Spring Garden Road. Its contents had been spilled by Whebby forces, work had been stopped and an environmental clean up initiated. The invoice from Whebby to Garden Crest for hauling the contaminated soil to Enviro Soil is dated May 21st suggesting that aspect of the project was completed before that date. The excavation

and transport of other material continued as this clean up was being effected. There is no evidence before me with respect to when Jacques Whitford reported their findings to Garden Crest with respect to contamination. Exhibit "4" says "J. W. was contacted when hydrocarbon impacts were identified around the abandoned underground storage tank at the rear of Civic Number 1528 Spring Garden Road. Soil excavated from this area was impacted with petroleum hydrocarbons, **metals and PAH's** and was delivered to Enviro Soil Limited for disposal". (my emphasis)

[36] On the evidence before me this is the first occasion when the presence of metals and PAH's on the site have been flagged as an environmental issue. It was heavy metals and PAH's which ultimately became a major concern at the Forward Avenue site and they are not detectable by normal human senses, that is to say they cannot be detected by "letting the soil run through your fingers" (as suggested at trial) nor by sight or smell. It is clear that the focus for Jacques Whitford and all the parties involved was on possible hydrocarbon contamination.

[37] Aside from the Jacques Whitford analysis and complaints from the neighbourhood there were other warning signs. Christopher Elliott, an environmental engineer with AMEC was told by Scott Preston, his

environmental technologist who took the samples in October, that there was an odour of hydrocarbons coming from the stock pile. Mr. Elliot himself went to make his own observations a couple of days later and found the stock pile containing glass, pipe, construction materials and not just soil. It had a clear odour of petroleum about it. He recommended (Exhibit "1" Tab 3) that it be "immediately removed from the site". It was his investigation which triggered the meeting of Boehner, United and Chedrawe to discuss the necessary remediation. My understanding of Mr. Elliott's evidence was that the meeting related more to laying blame than to remediation.

[38] On cross examination Elliott conceded that it is sometimes necessary to "test" to know if there are contaminants' and that the requirement for tests might be triggered by a knowledge of the previous use made of the materials. To achieve a level of certainty, the soil would have to be analysed before it was removed from its original location. As noted earlier his firm makes it a practice to "sample all soils from downtown Halifax for heavy metals". . . since 1997 1998. Again in cross examination with respect to his first observations of the stock pile and the material that had been spread where visible he said that upon seeing it he "suspected the material was inappropriate" for use at that site. While he did not endorse the use of the

term debris, he said it was general refuse . . . regular fill from historic Halifax. It was “immediately” apparent to him that the material needed to be tested.

[39] Jay Mason told us that he had no concern about contamination of the material on the site except for the probable hydrocarbon contamination resulting from the rupture of the oil tank they excavated. Jacques Whitford were promptly called in to supervise that aspect of the project and he thought his obligations in that respect were fulfilled. It was his opinion that the fill on the site was suitable for a residential area and he supplied it to Boehner as “general fill”. He arranged with Paul Behner that Whebby trucks would deliver the fill to the Forward Avenue site and dump it with Boehner equipment being used to create a stock pile.

[40] No witnesses were produced who had intimate first hand knowledge of what this fill was like when it was transported before October. Mason spoke of a foreman who would have been present at the excavation site on a full time basis. Apparently it was the foreman who worked with Jacques Whitford for the removal of the material contaminated by the ruptured fuel tank. No truck driver, machine operator or “pick and shovel man” was called to tell us what they saw. Mason did tell us that he instructed the foreman to have Jacques

Whitford visit Forward Avenue and ensure that none of the hydrocarbon contamination had reached that destination. He said he took that precaution because trucks were moving material to Forward Avenue at the same time as they were removing the material known to be contaminated. Mason testified that the foreman told him that was done. The evidence in relation to that is of course hearsay, Mason did not relay that concern to Boehner.

[41] Mason's evidence discloses another circumstance which I suggest, five years after the event, should have caused him to monitor more closely what his workmen were doing. He went to the Garden Crest site to remove soil and rock. He expected to find empty concrete boxes where the demolished structures had been removed from the site. That is not what he found. He found the site had been levelled and the basements filled with "demolition debris" which included "wood and the remnants of the buildings". His evidence was that his workers simply moved that construction debris over onto the area to be excavated as Phase Two. It was not his job to remove it from the site. However, the description of the material that arrived at Forward Avenue persuades me that some of this material found its way onto the trucks instead of simply being pushed aside. Under cross examination on behalf of Whebby the point was made with Mr. Mason that it was not in

his interest to remove contaminated fill from the site. Contaminated material was an exclusion in their lump sum contract. If contaminants had been identified as in the case of the ruptured oil tank that material would have been removed under the supervision of Jacques Whitford and at the expense of Garden Crest.

[42] With respect to the requirement that an environmental certificate be furnished to accompany soil being excavated from downtown Halifax, Mason's evidence was that he could not recall in his experience ever having been asked for such a certificate. It is apparent that if there is a ubiquitous problem relating to contamination on peninsular Halifax Mr. Mason is not aware of it and he said his company had no "policy" that he was aware of with respect to soils and contaminants. Paul Behner testified that it would have been standard practice for him to see the material on site at Garden Crest before it was excavated. He said when it arrived he had no concerns. It was a mixture of fine material, sand, some of it was black, some of it was glacial till. He smelled no odour, otherwise he would have stopped its delivery. His evidence was that he knew nothing of any complaints until he heard of it in October.

[43] He also testified with respect to the quantity that they received at the site at least the 268 loads which was invoiced to his firm. At or about that time he said he told Mason that "we didn't need any more . . . more did come and I called again". Mason informed him that "they were just finishing up" and "don't worry, you won't be charged for it". The fill was imported over a period of two to three weeks at the most.

[44] With respect to the Phantom Delivery theory Behner was asked about a complaint communicated to him from United about truck traffic at Forward Avenue after the stock pile had been made. The allegation is that Whebby trucks removed some of the stockpiled material and replaced it with other material. Upon hearing this, Behner testified he telephoned Mason to ask him "What is going on . . . your trucks are on our site". He testified that he saw at least a loader and a dump truck and "it looked like it was re-arranging the stockpile". He said Mason told him they needed to relocate some fill to another site, that he had responded saying "We paid for good fill" (if you are going to replace it) "We did not want to receive fill with rock in it".

[45] There is a credibility problem with this evidence. First of all the date or timing is uncertain by Mr. Behner's own evidence. There must have been at least one truck driver and one machine operator with actual knowledge about

the removal and replacement of material. As pointed out by counsel, there must be work records in the possession of the Whebby firm that could have been produced; and perhaps more eloquently Mason was never asked about this alleged activity while he was on the witness stand.

[46] On the evidence, I am satisfied that Mason and Behner had virtually no conversation about the "quality" of the fill. They were both in the business. They had both bid on the excavation contract. They were both content that the material was suitable for its intended use in a residential subdivision by its physical nature. They were both cognizant of the standard practice with respect to contaminated materials, that it would be automatically excluded from the contractors responsibility, and the disposal of it would attract supervision by the Department of Environment and or environmental engineers. With respect to the general character of the fill to be supplied, it was necessary only that it be capable of forming an appropriate sub-soil to bring the building lots up to their designed elevations and of course back-filling around foundations.

[47] Paul Behner's evidence is to the effect that as Mason was leaving the sight after their arrangement was made he called out "it has to be clean". Mason denies that. "Clean" in the context of all the evidence means free of

contamination. It is quite apparent that both these men, both experienced excavators, assumed and even believed that the material at the Garden Crest site was clean, subject to a minor risk of hydrocarbon contamination.

[48] When asked to comment on evidence that as the stock pile was being moved around the site it exposed material that was orange and black in color and contained concrete and re-bar Behner expressed surprise. He said he saw the stock pile as it was being created and saw nothing of that nature. What he saw being stockpiled he thought was “clean”. He had not detected any odour of hydrocarbons at any time.

CONCLUSIONS:

[49] Mr. Coles on behalf of Garden Crest and Mr. MacDonald on behalf of Whebby are agreed that my decision should follow a step by step process in determining the rights of various parties. They advocated a three step process for determining liability as between Whebby and Garden Crest. Ultimately I have concluded that all the parties to this action have contributed to a greater or lesser extent to the loss suffered. My thinking follows from these steps; findings of fact:

- soil was delivered by Whebby to Boehner at the Forward Avenue site;

- all that soil or fill originated at Garden Crest;
- included in it was material contaminated with hydrocarbons and heavy metals which when mixed and stockpiled rendered the whole of the material unfit for use in a residential area;
- while Whebby worked in this site samples of the material were analysed by Jacques Whitford revealing heavy metal contamination; a fact not communicated to Whebby;
- that Garden Crest, Whebby and Boehner were alive to the possible existence of hydrocarbon contamination before the material was moved;
- that there was no prevailing practice among contractors to initiate testing for contaminants before excavating Halifax soils;
- that as soon as the fill arrived at Forward Avenue neighbourhood concerns were expressed to United as to the “toxic” nature of the material;
- that no significant action was taken by United to verify the fitness of the soil until October;
- that the material was used as back-fill and landscaping on an as needed basis from May until mid October when it was

condemned after analysis initiated by AMEC on the instructions of United;

- that as a result of that analysis there remained a stock pile of material which had not been distributed and the majority of the material which had been already distributed which United was obliged to re-excavate, process and send to the Chester Landfill.

THE LAW:

[50] The parties have put to the court three alternative legal concepts as providing a basis for the recovery of damages in this matter. They are negligence, nuisance and the statutory protection provided under the ***Sale of Goods Act***.

[51] I have concluded that the principals relating to negligence have application in the present circumstances. So my reference to nuisance and the ***Sale of Goods Act*** will be cursory.

NUISANCE:

[52] I am referred to the text "***Canadian Tort Law***" (6th edition) Linden where "nuisance" is described as "a field of liability". It describes "a type of harm that is suffered" rather that a kind of conduct that is forbidden . . . "an

unreasonable interference with the use and enjoyment of land by its occupier". . .

[53] The usual claimants are the owners and occupiers of property which is subjected to noise, noxious odours, flooding or other encroachments of that sort which detract from the use and enjoyment of ones property. Most frequently it is the owner of the property immediately adjacent who is guilty of creating such nuisance. Linden puts the concept succinctly as "an unreasonable interference with the use and enjoyment of land". That United has suffered interference with the use and enjoyment of their land, the new subdivision, is evident. Whether the facts here lead to a circumstance giving rise to "nuisance" is clearly arguable, but the situation is unusual. To accord judgment on the basis of nuisance would seem to me to expand what is normally contemplated by that concept. Here, there is an interference with the use and enjoyment of the land that is not caused by an adjoining land owner as a result of the use and occupation of that other property. The impairment is caused by the importation of the contaminated material from a property location not related in any way to that which has suffered the injury. Nor is the interference "persisting" in the usual way. That is to say, it arises from a single incident of use of the Garden Crest site, if excavation

can be called a “use”, and the action was finite. So while I conclude that the argument can be made, I find myself uncomfortable with that concept. On these facts I have had the benefit of reviewing the cases submitted by counsel: *Vaughn v. Halifax Dartmouth Bridge Commission* 1961 29 DLR 2nd 523, a decision of the Nova Scotia Supreme Court “in banco” and another case *South Port Corporation v. Esso Petroleum, etals*, [1954] 2 ALL E. R. Page 561, a decision of the Court of Appeal as well as *Overseas Tankship etc. v. Miller Steamship etc.* [1967] 1 A.C. 617 (Wagon Mound No. 2). In the latter case the Law Lords preferred to apply the Law of Negligence.

SALE OF GOODS:

[54] An argument may also be made under the ***Sale of Goods Act,*** R.S.N.S. 1989, c.408 the principle basis for recovery put forward on behalf of Boehner Trucking. The relevant provision is:

S. 17. “Subject to this act and any statute in that behalf, there is **no implied warranty** or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, **except** as follows:

> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to

> show that the **buyer relies on the seller's skill or judgment** and the goods are of a description that it is **in the course of the sellers business** to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where **goods are bought by description** from **a seller who deals in goods of that description**, whether he be the manufacturer or not, **there is an implied condition** that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. (my emphasis)

[55] As is so often the case the legal concept and/or a statute appears so straight forward only to be confounded by the facts. In the present case we have two buyers, Boehner and United. Boehner allegedly gave assurances to United that the fill it was selling was suitable for the "particular purpose". While it is less certain that such assurances were given by Whebby, I have concluded that the knowledge of Whebby as to the use of the fill is implied from the circumstances. The reliance on the seller's skill and judgment is much less clear. Both excavators were in the "business", but Boehner's knowledge of the nature of the fill *in situ* was superior to that of Whebby. As to "fitness", both Boehner and United **were in a better position than Whebby** to evaluate the material as it was being stockpiled on their site.

[56] The words I have emphasized in both S s. (a) and (b) could conceivably have application here.

[57] While there is an arguable basis for a claim under the ***Sale of Goods Act***, I am not persuaded that either United or Boehner have established the case for liability. As I have already indicated, Boehner had greater knowledge of the fill than Whebby when the deal was made. After it landed at Forward Avenue both United and Boehner knew or ought to have known that the fill was unsuitable to be placed in their subdivision. A reasonable person with that knowledge would have stopped any further deliveries, and taken action to avoid further loss. I conclude that Boehner cannot rely on the provisions of the ***Sale of Goods Act*** either as to "expertise" or "description".

NEGLIGENCE:

[58] All the parties are bound to each other as a result of their individual contractual relationships. None the less, their respective rights, after the event, are most readily dealt with by applying the legal concepts of negligence. Their various contracts establish their relationship to each other and the law implies a duty of care, the one to the other. All that requires adjudication is whether any or all of the parties failed in their duty of care and what damages ought to flow from that failure. Counsel have cited a

decision of the Supreme Court of Canada *Ryan v. Victoria (City)* [1999] 1 S.C.R. 201, where Major J. is quoted at paragraph 28:

> 28 Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[59] In his text ***Canadian Tort Law*** (6th edition) (Allen M. Linden) the author discusses the difficulty the courts have had in attempting to fashion some clear formula for defining certain components of negligence, specifically remoteness, proximate cause and the extent of liability. These elements covered in chapter 10 of his text make it clear that each case is different; the results in each depending upon its own circumstances. There is a broad range of considerations imported into the cases. The discussion inevitably incorporates phrases such as “community standards, common practice, intervening cause, proximate cause, remoteness, mitigation, contributory negligence, and last clear chance to avoid”. Perhaps the primary and distinguishing feature of “negligence” is foreseeability and the reasonable man.

[60] A flavour of the text book discussion may I hope be gathered from the following quotations . . .

> a "real risk" may be "remote" but "if a real risk is one which would occur to the mind of a reasonable man . . . and which he would not brush aside as far fetched . . . then surely he would (mitigate) such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense (Wagon Mound [1967] 1 A.C. 617)

And this quote which comes from *Palsgraf v. Long Island Railroad* (Linden, 341):

> What we . . . mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics . . .
>
> We draw an uncertain and wavering line, but draw it we must as best we can . . . It is all a question of fair judgment, always keeping in mind the fact that we endeavour to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

[61] And again: quoting Dixon J. A. in *Hoffer v. School Division of Assiniboine South* [1971] 4 W.W.R. 746:

> It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable . . . the (ensuing) damage was of the type or kind which any reasonable person might foresee . . . when one permits a power toboggan to run at large, or when one fires a rifle

> blindly down a city street, one must not define narrowly the outer limits of reasonable provision. The ambit of foreseeable damage is indeed broad.

[62] Before abandoning this brief review of the Law of Negligence in general, there is one passage in the "Overseas Tankship" case (at p. 642) which has particular resonance here, where the parties being all experienced contractors and developers undoubtedly did some weighing of risk vs. cost; and perhaps even contemplated the fact that the transport of contaminants was illegal unless under arrangement with DOE. The passage follows;

> But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that *Bolton v. Stone* would have been decided differently. In their Lordships judgment *Bolton v. Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man.

DUTY:

[63] To come to the particular arguments made in this case; the basis of liability must be established in law. United has borne the costs of remediation but they have a contractual relationship with Boehner only. How then can Whebby and Garden Crest be found liable? Two cases have been cited in

argument on behalf of Whebby. They are *Foyer Valad Inc. v. Red River Construction Company* 1999 Carswell MAN 275 (CA) and *Strike v. Ciro Roofing Products U.S.A. Inc.* 1988 Carswell BC 689 (SC). In the former case two sub-contractors had performed construction services on behalf of the general contractor. The work of the plumbing sub-contractor was negligently performed resulting in loss to the owner. As a result remedial work was required. The following proposition taken from counsel's brief I take to be an accurate statement;

> "The court noted that the action against the two sub-contractors was *in tort* as there was no contractual link between the plaintiff and the two sub-contractors.

[64] The *Strike* case involved a claim with respect to a built-up roof where the roof membrane had been improperly installed. The owner was obliged to replace it at a cost of $100,000.00. Once again, the sub-contractor was found to be liable to the owner for the damage sustained on the basis of negligence, in spite of there being no contractual link between the two parties. The court is quoted as saying:

> "The relationship between the owners and (the roofer) was as close as it could be short of privity of contract. (The roofer) must be taken to have known that if the work was done negligently, the resulting defects would require remedial measures which would result in financial loss to the owners".

[65] The relationship between Whebby and United was as close as it could be, short of privity of contract. There was a duty owed.

BREACH:

[66] It is argued on behalf of Whebby that there was no lack of care. That what was done in this case was simply done in accordance with the custom of the industry. "The exchange of fill between excavation companies is commonplace in the industry."

[67] There is no evidence before me which would cast doubt on the assertion that "Whebby was under the impression that it was supplying "clean" fill to Boehner" and that "it is not the standard practice in the industry to test the entire fill that is delivered to a particular site".

[68] The fact is however that Boehner is in exactly the same position in terms of their good intentions when the arrangement was made with Whebby and when the material was delivered to the Forward Avenue site. Boehner believed it was acquiring clean fill and I am sure would have adopted the proposition that "it is not a standard in the industry" to do an analysis of each load for contaminants. I am persuaded by the evidence that the general practice in the industry is to be guided by the five senses of their workmen on the ground to alert them to any likelihood of contamination. In the

evidence before me we have the disadvantage of having no evidence from any of the workmen actually shovelling or carrying the material. We do not have the benefit of knowing what they saw or what they smelled. On the other hand there is significant indication of problems known or which should have been known to all the management people who testified. The letter from Jacques Whitford, Exhibit “4", reproduced at Exhibit “6" Tab 11, reveals that heavy metal contamination was found in the fill during excavation. Garden Crest had a duty to bring that information to the attention of Whebby. The removal of contaminated material was the obligation of Garden Crest under their contract with Whebby. Whebby was under a duty to deliver clean fill to Forward Avenue and were paid, albeit a token fee, for doing so. In fact, the fill delivered included demolition debris which should have been obvious to both Whebby and Boehner in the exercise of reasonable prudence. The questionable quality of the fill was apparently obvious to people living in the neighbourhood. The concerns or the conclusions of the neighbours might be deprecated because of their lack of expertise or lack of knowledge of the “trade”. Nonetheless, the tenor of the complaint registered by Dr. Manuel with United, especially when

coupled with Mr. Milligan's observations was sufficient to demand that United have an analysis done before actually placing the material

WHO WILL PAY:.

[69] Attempting to fashion some "rough justice" to fashion that "arbitrary line" between the responsibilities of the parties as referred to in the cases earlier noted; I conclude that while Whebby must shoulder the larger share of responsibility for the damages caused and the costs of remediation, the other three parties must contribute because of their own contributory negligence and or failure to mitigate. Garden Crest will bear the least liability. I bear in mind that except for the letter of October 8th, there is no evidence as to when heavy metal contamination was brought to their attention. There is evidence that all the fill removed from their site when mixed, contained heavy metals and hydrocarbons to the extent that it was contaminated. There is no evidence with respect to whether those concentrations were uniform across their property or concentrated in one or two "hot spots". If it had been identified before its removal, then Garden Crest would have been obliged to pay the full cost of excavation and disposal. I am not prepared to assume that the original site was uniformly contaminated. Accordingly I think it

appropriate to limit Garden Crest's liability to fifteen per cent of the disposal cost as calculated hereunder.

[70] Whebby was paid by Boehner for the delivery of contaminated fill. The fill subsequently had to be removed. That payment should be refunded. At the point when AMEC had been retained to dispose of the material some of it had never been removed from the original stockpile. If the facts had been known in mid June, Whebby would have been solely responsible for the removal and disposal of that fill. The cost of disposing of that remainder pile then is entirely for Whebby's account. Similarly had United demanded the certificate of analysis that was talked about in the evidence from Whebby as of mid June; they would have been entitled to recover the cost of getting one done themselves, from Whebby. Whebby is entirely responsible then for the cost of the initial analysis by AMEC.

[71] It must have been evident to Boehner as it was to United and as it was to the neighbours that the material was unsuitable for use around residential properties. The expense of placing the material around the subdivision and its subsequent removal and screening as well as replacing it with clean soil is not broken down by the evidence in a manner which would permit any nice attribution of costs to the various facets of the operation. I consider the cost

of removing and screening the material and the cost of replacing it with other material to be too remote from Whebby's activities for it to be liable for these costs. The proximate or intervening cause leading to these costs was the lack of care and prudence on the part of Boehner and or United. Since it is impossible to separate the various elements and in the interest of "rough justice", the costs of that remediation work will be shared equally by Whebby, Boehner and United.

[72] To put a value on my findings and conclusions, my starting point is the financial analysis appearing in Exhibit "1" Tab 41. I find the cost of remediation to have been:

AMEC Engineering and Consulting professional fees and disbursements	$ 77,900.47
Cost of excavation and trucking, retrieval of material which had been placed around the subdivision, screening, stockpiling and loading of same for removal to Chester Landfill	233,570.17
Chester Landfill tipping fees @ $35.00 a ton	182,435.30
Miscellaneous costs including exploring Trax alternative method of disposal, repairing and replacing electrical services destroyed in the remediation process	6,212.34

GRAND TOTAL	**$500,118.28**

GARDEN CREST:

[73] The contaminated material originated with Garden Crest. It is appropriate that they bear the additional costs of disposing of some portion of the total material at an appropriate site. The soil *in situ* was in all likelihood not (homogeneous) all contaminated. I arbitrarily fix fifteen percent (15%) of that excavated as requiring environmentally approved disposal. That proportion of soil trucked and dumped at Chester Landfill will be at the expense of Garden Crest. I calculate 15% of Chester Landfill tipping fee ($182,435.30) to be $27,365.00 and 15% of trucking (171 loads) to be $7,695.00 for a total of $35,060.00.

WHEBBY:

[74] Whebby will repay the price received for delivery of material to Boehner. If all parties had appreciated the quality of the material there would have been no sale. Repay invoice Exhibit “6" Tab 9 - 268 loads at $25.00 ($7705.00). The material removed to the landfill site was in three piles. The “remainder” stockpile represented 35.1% of the total material going to the land fill. That material must be disposed of at the expense of Whebby. Hence, Whebby

will pay 35.1% of tipping fee - $182,435.00 ($64,035.00) and of trucking expense that is 35.1% of $57,580.00 ($20,206.00). A timely response from Boehner and United and the obtaining of an analysis would have disclosed the contaminant problem. The cost of such testing would be recoverable from Whebby. The initial analysis cost $1450.60 plus $6811.51 for a total of $8261.11. In round figures these four items total $100,207.00.

BOEHNER/UNITED:

[75] The material, when initially stockpiled by Boehner should have alerted prudent persons to a genuine possibility of problems with contamination and the general suitability of the fill. That observation would have been confirmed by neighbours as it was by Chedrawe upon his first visit. I find the concern about the quality of the fill was brought to the attention of United and then to Boehner and then to Whebby. The cost related to remediation and disposal of that sixty five percent (65%)portion of material cannot be specifically attributed. It will therefore be shared equally by those three parties. The resulting apportionment of expense can be determined in the following manner. Total cost of remediation and disposal $500,118.28. Garden Crest will bring into the pot $36,002.00. Whebby will bring into the

pot $100,207.00. These two total $136,209.00 leaving a balance of $363,909.00. This remainder amount represents the remainder costs of remediation including tipping fees at Chester landfill, trucking, recovery of materials already used for backfill and landscaping, screening, chemical analysis, etc. It is impossible to attribute specific liability to specific parties. All having been contributorally negligent in creating the circumstance which required this expense, it will be divided equally among the three, with Whebby's share being $121,303.00.

[76] Boehner and United have executed an agreement providing for arbitration relating to this and other matters arising between them. The claim which either or both of them have against Garden Crest and Whebby will therefore be satisfied by payment into court or otherwise as agreed among counsel for the benefit of those two parties. Garden Crest will pay $36,002.00 and Whebby will pay $221,510.00.

[77] United and Boehner will have their costs taxed as one bill against Whebby. No costs will be ordered for or against Garden Crest.

Haliburton J.