

## PUBLICATION

### Liability for damage caused by theft: Who pays?

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In December 2016, trespassers attempted to remove a tank containing approximately 55 liters of hydrochloric acid from our client's property. It appears that the trespassers were able to lift the tank over a high, barbwire fence surrounding the premises and dropped it on the other side of the fence into the neighbouring parking lot. The trespassers abandoned the tank, allowing the hydrochloric acid it contained to spill onto the asphalt, grass and into the sewer.

The cost of cleaning up the spill is in excess of \$75,000 to-date.

Given the above facts, who is liable for the cost of assessing and cleaning up the spill?

While section 12 of the *Occupiers' Liability Act*, RSA 2000, c O-4 states that an occupier does not owe a *duty of care* to a trespasser on the occupier's premises (with the exception of foreseeable child trespassers), the *Act* is silent as to an occupier's *liability* for the acts of trespassers on the occupier's premises.

When a nuisance has been created by the act of a trespasser, or created without the authority, act or permission of the occupier, the occupier is not responsible for that nuisance, at common law.

Given that the adjacent common parking lot is not owned or occupied by the client, could the spill constitute a private nuisance? The spill was arguably an unreasonable interference with the use of the parking lot, but is likely not a "continuing interference" or "continuing condition" necessary to ground an action in nuisance. One could argue that the thieves in this case were reasonably foreseeable, as theft and trespassers on commercial property are not uncommon.

Regardless of the location of the spill or the identity of those who directly caused the spill, the client is likely liable under environmental laws for the remediation. *Alberta's Environmental Protection and Enhancement Act* and the *Canadian Environmental Protection Act* not only impose a duty to report discharges of hazardous substances, but also assign responsibility for remediation and restoration. The general scheme of both the provincial and federal legislation, states that the party with ownership, management and control over a hazardous substance is responsible for cleaning up releases of that substance.

While trespassers may have dropped the tank and broken the drain valve, the tank and its contents were within

the client's ownership, management and control immediately prior to the spill. Regardless of where the spill occurred, the client's ownership and management of the hydrochloric acid is likely enough to hold the client liable for the expenses incurred to clean up any spill, however caused, of that hydrochloric acid.

For further information, please contact any lawyer in our Litigation group.