

L E S P E R A N C E

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UNDERGROUND OIL STORAGE TANKS

A Property Owner's Guide

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If your home, townhouse or condominium was built before 1970, there may be an underground oil storage tank (“UST”) on your property.

Many homes built between 1910 and 1970 were heated using oil stored in USTs buried close to the foundation. When natural gas became available, USTs were commonly filled with sand or capped. However, many USTs that remained buried have rusted out, corroded and leaked fuel, causing soil and groundwater contamination. USTs are a common source of contamination of residential property, particularly if they are buried and there are no indications that an underground tank is present.

The presence of contamination from a UST can affect the health and safety of occupants. It can also affect the market value of the property. As well, current and future owners can face legal liability (including the costs of remediation) if their property is contaminated and/or if the contamination migrated onto a neighbouring site. For those reasons, USTs should be properly decommissioned or removed.

The *BC Fire Code Regulation*, municipal bylaws, the *Environmental Management Act* (“EMA”) and Contaminated Sites and Hazardous Waste Regulations govern USTs.

USTs are not registered on title. For that reason, homeowners may not realize that they have a UST on their property.

We recommend that property owners follow these “10 commandments” for dealing with actual or potential USTs and environmental contamination.

1. ***Verify the presence of a UST, contamination***

If you suspect the presence of a UST on your property, we recommend that you look for the following signs:

- a filler pipe sticking out of the ground;

- a vent pipe at the side of the house;
- a metal pipe cap close to the front or back yard;
- a sunken area on your lawn; or
- a rainbow sheen in puddles on the property during periods of heavy rain.

Even if these indications are not present, a UST may still exist on the property which can leak fuel and contaminate the property, neighbouring properties and the groundwater. We recommend that you hire a qualified professional to survey the property to rule out the presence of a UST.

Even if there is no UST on the property, the site could still be contaminated by a previously removed UST or by migration from a neighbouring property.

2. Obtain information

Knowledge is power. We recommend that you obtain as much information as possible about the history of the property and other properties in the area. To obtain more facts about a property, you should consider:

- asking the current and previous owners, occupants and neighbours;
- searching the land title office for information on previous and current owners of the property and adjacent sites;
- visiting the local government website or attending city hall, as most municipalities will have either a building or permits department, and larger municipalities may have an industrial waste or environmental department;
- viewing the provincial government's Contaminated Sites Registry, available at www.bconline.gov.bc.ca, as a registry search may contain information on the subject property and surrounding sites that were investigated or remediated;
- checking with the local fire commissioner for information regarding reported spills, violations of regulations regarding storage, and handling and use of flammable and combustible materials; and

- making a request for further information directly to the regional office of the Ministry of Environment that is responsible for the property.

3. *Contact the local municipality for direction*

If you discover a UST or contamination, contact your local government office for information on the process to follow. Depending on the municipality, the requirements may be to remove the tank or decommission it.

For example, in the City of Vancouver, all USTs no longer in use or out of service for two years must be removed unless deemed impractical by the fire chief. As of June 1, 2010, District of West Vancouver homeowners must pay a \$250 levy on their USTs or that amount will be added to their property taxes.

4. *Retain an environmental consultant*

An environmental consultant can determine whether the property is a “contaminated site” as required by the EMA and the extent and boundaries of the contamination.

In a statutory cost recovery action, the Court requires proof that the property in question was a “contaminated site”. The consultant will collect soil samples, test for contamination and delineate the site so that the area can be properly designated as a contaminated site by the Ministry of Environment or the Court. A visual inspection of the area is not enough.

The consultant will also prepare a report detailing the tank removal, the amount of soil removed and the levels of contamination before and after the remediation process. The consultant will also ensure that the UST and the contaminated soil are safely transported to an approved disposal facility.

5. *Remediate the property*

If the property is contaminated, the EMA requires the current owner or operator to remediate the site, even if the current owner or operator did not cause the contamination.

A qualified environmental consultant will ensure that good engineering and environmental practices are followed when removing or decommissioning a UST and remediating the soil.

Remediation costs vary and include fees for a work permit, an engineer or environmental consultant report, excavation and removal. Costs to remediate contaminated soil can be significant and include transportation and disposal of dangerous goods.

In order to seek compensation for a cost recovery action under the EMA, the owner or operator must have already incurred the remediation costs. Future costs are not compensable under the EMA. See point #7 for information on cost recovery actions.

6. *Duty to disclose*

If a site investigation reveals that contamination has migrated or is likely to have migrated from your property to a neighbouring site, within 15 days you must provide written notification to the owners of the neighbouring site and a copy of the notification to the director. The requirement to provide notice is a statutory duty under the EMA, so a registered letter is recommended.

The written notice must contain your name and address, the name, address and telephone number of the person to contact regarding the investigation, and a general description of the nature of the migration or likely migration of each substance.

7. *Consider a cost recovery action*

The EMA provides a cause of action for parties to recover their reasonably incurred costs of remediation of a contaminated site. Section 47(5) of the EMA provides that any person who incurs costs in carrying out remediation of a contaminated site may commence an action to recover their reasonably incurred costs from one or more “responsible persons”.

In order to bring this statutory cause of action, three criteria must be met:

1. the costs must be incurred;
2. the costs must relate to a clearly delineated contaminated site; and
3. the costs must be reasonable.

Finally, the costs are only recoverable from “responsible persons”, who are jointly and separately liable for these costs. The cause of action is retroactive, meaning

that not just current owners or operators of the site are liable, but previous owners and operators are also liable. In addition to owners and operators, the following categories of persons are responsible for remediation of contaminated site: persons who transported the contaminants; and in limited circumstances secured creditors and producers of the contaminants. It is important as a preliminary matter to identify and locate all potential “responsible persons”.

In addition to a cost recovery action under the EMA, you may also have a claim in tort such as breach of contract, negligence, negligent misrepresentation and nuisance. Plaintiffs can pursue both a statutory action under the EMA and a common law action simultaneously to recover the costs of remediation.

Parties to a cost recovery action should obtain independent legal advice to ensure they have explored all avenues and exhausted various options to ensure their rights are protected and obligations fulfilled.

8. Notify your insurer

Contamination from your property may have migrated onto neighbouring sites or into the ground water. You should immediately notify your insurer, as the third party liability portion of your insurance policy may provide coverage for certain costs of remediation.

9. *Buying or selling a property*

Sellers

Property owners have a duty to disclose to purchasers if a UST is present on the property or if one has been removed or decommissioned. If an owner fails to disclose the existence of a UST to a prospective buyer, he or she can be sued by the buyer for misrepresentation and breach of contract.

An owner of residential property should not represent to a potential purchaser that there is no UST on the property unless he or she is certain of that fact.

We recommend that you do not enter into a contract of purchase and sale if you know or suspect there is a UST or environmental contamination on the property until and unless you have sought legal advice. Purchase and sale contracts include a standard clause that ‘time is of the essence’. Contamination remediation often costs more and takes longer than anticipated; it is that much

more stressful to deal with when you are 'under the gun' and trying to meet a contractual deadline.

If you do enter into a contract with a buyer, notwithstanding the presence of a UST or contamination, you must disclose that fact to the buyer, confirm in writing which party is responsible for carrying out the remediation, and adjust the purchase price accordingly to account for the cost of the clean-up.

Buyers

A buyer who suspects there may be a UST or contamination on the subject property should make the offer subject to inspection and satisfactory results of soil tests.

Buyers should have the property inspected and to seek expert opinion legal advice and the services of a qualified expert on the matter, especially if the underground or above ground storage tank is thought to be leaking.

A buyer who agrees to purchase a contaminated property at a discount should confirm in advance that he or she will be able to obtain home insurance, and review any policy exclusions.

If a UST is detected or suspected, buyers who insist on making the purchase may wish to confirm with their lender that it will not affect their ability to obtain financing.

Finally, buyers should familiarize themselves with the requirements of the provincial Fire Code and any municipal requirements concerning unused or abandoned USTs.

10. *Seek legal advice*

Deadlines to sue (known as limitations periods) may preclude you from maintaining an action to recover the cost of remediation. You may also be bound by contractual obligations set out in a lease or purchase agreement.

It is important to seek independent legal advice as soon as possible if you discover a UST or any contamination on your property.

For more information or to book a consultation:

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