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TOXIC REAL ESTATE MANUAL

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2026-1

This year's first release presents the entirety of Toxic Real Estate Manual in a new, more user-friendly, softbound format. Subscribers will receive comprehensively updated versions of this volume, ready for immediate use without the need to file individual pages within a limited binder system.

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What's New in this Update:

This release features an update to the case law and commentary in Chapters 1 (Toxic Real Estate: General Physical Characteristics and Basic Legal Concepts), 2 (Specific Real Property Transactions), and 3 (Minimizing and Resolving Toxic Real Estate Problems).

Highlights

§ 2:12. SPECIFIC REAL PROPERTY TRANSACTIONS—VENDOR AND PURCHASER—PURCHASER'S RECOURSE AGAINST OTHER PARTIES—PURCHASER'S RECOURSE AGAINST FORMER OWNERS—In *1199096 Alberta Inc. v. Imperial Oil Limited*, 2025 ABCA 303 (Alta. C.A.), the Alberta Court of Appeal upheld the lower court's decision dismissing the plaintiff's action due to inordinate delay. In this case, Imperial Oil Limited ("Imperial") had operated a gas station for a period of time on lands sold to Probe Exploration Inc. in 1996, but retained certain wells located on the lands. In 2003, the lands were purchased by MEC Operating Company (MEC) from Probe Exploration Inc. Subsequently, in 2005, the plaintiff, 1199096 Alberta Inc. ("1199"), purchased approximately 185 acres of the lands from MEC. 1199 undertook an extensive investigation in the normal of course of its pre-purchase due diligence. It understood the lands to have various outstanding contamination issues resulting from Imperial's former oil and gas operations. 1199 nonetheless completed the purchase. Between October 2005 and April 2008, 1199 attempted to sell the lands to no avail despite receiving several offers. 1199 alleged that the offers fell through due to environmental concerns for which Imperial and MEC were responsible but had failed to properly remediate. 1199's lenders eventually foreclosed on the lands. In February 2009, 1199 filed a statement of claim against Imperial and MEC alleging that these defendants negligently failed to discharge their statutory remediation obligations. In April 2009, Imperial filed its statement of defence and served its affidavit of records by the end of August 2009. The action remained dormant until 2020. In November 2020, Imperial filed an application to dismiss 1199's action for inordinate delay. The application judge granted the application and dismissed 1199's claim against Imperial. The chambers judge found that Imperial would suffer a significant prejudice if the action proceeded to trial because the passage of time would impede its witnesses' ability to give oral evidence required to defend against the claim of negligence. The Appeal Court upheld the dismissal, confirming that oral testimony, including expert testimony on the standard of care was required because the only cause of action pleaded was negligence and using documents to refresh memories would not be sufficient.

§ 2:19. SPECIFIC REAL PROPERTY TRANSACTIONS—LANDLORD AND TENANT—TENANT'S OBLIGATIONS AND LIABILITIES—TENANT'S EXPRESS AND IMPLIED LEASEHOLD COVENANTS— Even where a claim is brought within time, plaintiff landlords should exercise caution in moving actions forward, particularly in jurisdictions like Alberta where the plaintiff must observe strict requirements to advance its claim. In *Baron Real Estate Investments Ltd. v. Tri-Arrow Industrial Recovery Inc.*, 2026 ABCA 249 (Alta. C.A.), the Alberta Court of Appeal allowed the tenant's

appeal to restore an action previously dismissed by the lower court for delay. The landlord had commenced its claim in 2015 for damage to its property arising out of the tenant's permitted tote-cleaning and hazardous waste processing operations. The lease required the tenant to remediate the lands for any damages brought about by its operation. While it appears that the parties may have been focused on clean-up costs, this did not alleviate the responsibility to move the action forward. The plaintiff served its affidavit of records in 2016. The defendants served their affidavit of records in January 2017 and March 2018, respectively. The examinations, or questioning, was not scheduled until 2020, and then postponed allowing the plaintiff to produce additional documents. In 2021, the plaintiff produced 7,000 new records. In response, the tenant brought an application for delay on the basis that the only significant advancement in the action was the service of the supplemental records, which occurred three years after the plaintiff served its original records. The application judge concluded that the supplemental records had a "potentially significant bearing" on the allegations pleaded by the plaintiff. Accordingly, the applications judge dismissed the defendant's delay application. On appeal before the Alberta Court of King's Bench, the chambers judge allowed the defendants' appeal and dismissed the action for delay on the basis that the supplemental records did not address the central issue of the action and therefore, did not significantly advance the action. The plaintiff appealed this decision to the Alberta Court of Appeal, which allowed the plaintiff's appeal and restored the action against the two defendants. The Appeal Court found that the records produced, including incident reports, spill reports, waste inventories and tracking sheets were material to issues, and that the Chambers Judge erred in determining that the records were peripheral.