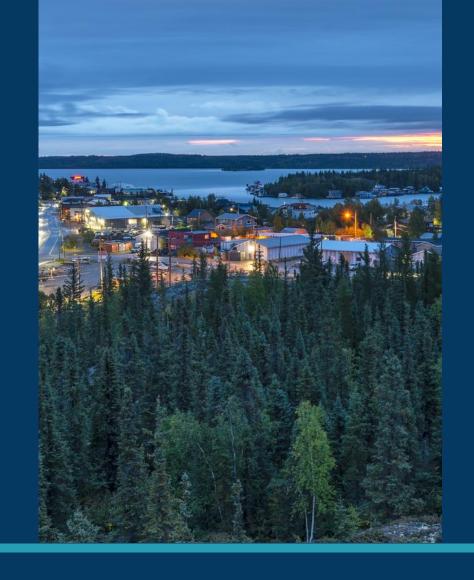
Environmental Considerations in Real Estate Transactions



Outline

- Regulatory and civil liability
- Due diligence in a transaction and "buyer beware"
- Landlord-tenant issues

Challenges and solutions

Regulatory and Civil Liability

Civil Liability

- Common law causes of action: nuisance, strict liability, trespass, negligence
- Action in contract: duty to disclose/misrepresentation, leases

Legislation and Regulatory Liability

- Jurisdiction over the environment
 - Constitution Act 1867 divides "heads of legislative powers" between federal and provincial governments
 - > Shared jurisdiction (federal, provincial, municipal)

Regulatory and Civil Liability cont'd

- Federal jurisdiction includes:
 - > Sea coast, inland fisheries and aquaculture
 - > Criminal law provisions in federal environmental legislation
 - > Extra-provincial works and undertakings, such as pipelines
 - > Federal lands and undertakings
- Provincial jurisdiction includes:
 - Provincially owned land and water
 - Property and civil rights
 - Management of natural resources

Managing and Apportioning Risk

- Clean-up and reporting obligations
 - Environmental protection and Enhancement Act ("EPEA")
- Polluter pay principle typically, first, but not only, choice
- "Person responsible" wide net
 - Sears Canada Inc et al v Director, Alberta Environment and Parks, 2020 ABEAB 6
 - o "when in doubt, report": Castonguay Blasting Ltd. v. Ontario, 2013 SCC 52
- Remediation Certificates

Regulatory and Civil Liability cont'd

One cannot contract out of regulatory liability....

but you can take steps to mitigate the risk/losses

Due Diligence and "Buyer Beware"

- General rule, caveat emptor or "let the buyer beware"
 - > exception for residential property
- "Merger" of executory stage and the conveyance of the property
 - Fraser-Reid v Droumtsekas, [1980] 1 SCR 720
 - >Survival clauses

Due Diligence and 'Buyer Beware' cont'd

- Environmental reps and warranties now commonplace
- Reliance on warranty
 - >survival clause
- Reps as condition or due diligence option
 - misrepresentation, duty to disclose
- Remedies for breach of warranty vs. breach of condition

Due Diligence and 'Buyer Beware' cont'd

- Duty to warn of latent defect, vendor silence
 - ➤ Includes physical damage or unfitness of property
 - > Safety component?
 - ➤ High threshold in commercial transactions?
- Case law examples:
 - McGrath v MacLean, 1979 CarswellOnt 1426 (CA) (residential)
 - > Temple v Thomas, 2007 ABQB 316 (residential)
 - > Home Exchange (Alberta) Ltd v Goodyear Canada Inc, 2007 ABQB 371 (commercial)

Landlord-Tenant Issues

- What does the lease say?
- Implied clean-up obligation
 - Darmac Credit Corp v Great Western Containers Inc, 1994 CanLll 9213 (AB QB)
- Reasonable wear and tear
 - Westfair Goods Ltd v Domo Gasoline Corp, 1999 CanLll 18649 (MB CA)

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- Limitation clauses
 - Use and reliance
 - Caps on liability
- Contract and tort considerations

- Due diligence in real estate transactions
 - Lakeview v Suncor, 2016 ABQB 288
 - Brookfield v IOL, 2017 ABQB 218

Wetlands and Other Water Bodies

- Beds and shores (natural) vested in the Provincial Crown
 - Public Lands Act, s. 3
- Surface water and groundwater vested in the Provincial Crown
 - Water Act, s. 3
- "Wetland" saturated soils, certain vegetation
- General prohibitions on disturbing under the Water Act
 - Approvals to undertake work
 - Alberta Wetland Policy
 - Codes of Practice

Wetland and Other Water Bodies cont'd

- Federal jurisdiction under the Fisheries Act
 - Works affecting "water frequented by fish"
 - Broad application
 - Severe penalties
- Prohibitions on:
 - Harmful alteration, disruption or destruction of fish habitat
 - Deposit of deleterious substances

Challenges and Solutions

- Common challenges
 - Passage of time since contaminating event
 - Limitations periods
 - EPEA section 218
 - Polluter is gone
 - Technical uncertainty
 - Site conditions
 - Effectiveness of remedial approach
 - Cost of investigations
 - Regulatory lag and timing of the deal

Challenges and Solutions cont'd

- Potential solutions
 - Baseline testing
 - Indemnities
 - Holdbacks
 - Remediation certificates
 - Implementation and assumption of RMP

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Q & A



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Thank You

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