

Environmental Considerations in Real Estate Transactions



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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
 - “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 CanLII 9213 (AB QB)
- Reasonable wear and tear
 - *Westfair Goods Ltd v Domo Gasoline Corp*, 1999 CanLII 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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