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Environmental Liability

What is it and how is it managed?

CANECT
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1


1

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Ms. B. Owner of Developers Inc. ("Buyer") wants to purchase site B from Mr. W. owner of Manufacturing Inc. ("Seller").

2

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Some facts

- There might be contamination on any of A, B or C
- Should buyer care?
- Why?

3

3

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Environmental Liability – what does it mean?

- Liability for what?
- Liability to whom?

4

4

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5

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Environmental Liability –the three main classes of environmental liability


- Liability in Contract
 - Buyer and seller
 - Only between parties to the contract

- Liability in negligence
 - To neighbours? Occupants?
 - Duty to take reasonable care to not cause others foreseeable harm

- Regulatory liability
 - Duty to not cause an "adverse effect" to biological receptors

6

6

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Liability in Contract

- Liability in Contract
 - Buyer and seller
 - Only between parties to the contract
- “buyer agrees to buy property B from seller for \$10m?
- Does contract need to say anything else?
- What information might purchase want about the environmental condition of the site?
- How does purchaser obtain information?
- What time is needed?
- Who pays for the investigations?
- What does buyer do with the information once obtained?

7

7

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Managing Liability in Contract


- Contamination at the site
 - Where did it come from?
 - Is it going anywhere?
 - What are options for managing it?
 - Remediate?
 - Risk manage?
 - Does this impact price?
 - How is this measured?
 - Risk of neighbours suing?
 - Indemnities?

8

8

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9

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Liability in Negligence

- The compensation principle
 - An injured person is entitled to compensation from one who causes the reasonably foreseeable harm
- If contamination is moving from B to C, should Buyer care?
- What can buyer do about it?
- Does it matter WHEN contamination moved in relation to when buyer proposes to become an owner?
- Should buyer worry about contamination affecting Indoor air quality of the existing building?

10

10

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11

11

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Regulatory Liability

- Ontario's Environmental Protection Act
 - Provincial Officers' powers:
 - Investigate
 - Issue orders to protect the natural environment
 - Clean up
 - Manage
 - Order to "persons who have or had charge management or control"
 - Corporate vs personal Liability?
 - Issue charges --- seek fines
 - "Cause or permit" the "escape" of a "contaminant" into the natural environment that "may cause an adverse effect"

12

12



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Regulatory Liability

- Ontario's Environmental Protection Act
 - Issue charges --- seek fines
 - "Cause or permit" the "escape" of a "contaminant" into the natural environment that "may cause an adverse effect"
 - "persons who have or had charge management or control"
 - Seller could still be liable after sale...
 - How can seller protect themselves?
 - Contract?

13

13



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Managing Environmental Liability – The Due Diligence Investigation

- Allow sufficient time to conduct a full investigation of the site and surroundings ("Due Diligence Period")
- Phase I and Phase II ESAs
 - Hire a good environmental consultant
 - Negotiate who pays ...buyer? Seller? Shared?
- Phase I
 - Non intrusive, "paper" investigation
 - History of site and surroundings(include records from seller and previous reports)
 - Previous uses
 - Previous spills
 - Keep in mind changing regulations and standards of care
- Phase II
 - Intrusive investigation
 - Soil and Groundwater
 - Based on phase I (where and what for)
 - The problem of emerging toxins
- Look for existing claims/demands from neighbours and regulators (and ask!)

14

14



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Managing Environmental Liability – Typical Contract Terms

- Allocate the risks through the contract
- Purchase price
 - Reduction in price?
 - Risk of over or underestimating cost
 - Fixed reduction vs holdback
- Sellers' representations and Warranties
 - No claims
 - No Spills
 - No regulatory Orders
 - All reports disclosed
- Buyers' reps and warranties?
 - To redevelop to residential
 - To remediate
 - To obtain a record of Site Condition
- Rep and Warranty Insurance? D&O insurance? (but this has limits!)
- Indemnities ("private insurance" between sellers and buyers)
 - Claims arising before closing
 - Claims arising post closing but dealing with pre-closing contamination movement
 - Claims arising post closing but dealing with post-closing contamination movement

15

15


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Managing Environmental Liability – some final considerations for consultants' reports

- Understand the client's reasons for asking for Phase I and Phase II and (perhaps) a remediation cost options report
 - RSC?
 - Internal DD?
 - Possible sale?
 - Possible Purchase?
- Would you give each one of the above the identical report?
 - Should you consider
 - Potential contaminants not listed in Reg 153/04?
 - Risk of plume moving offsite?
- Reliance letters?
 - When should you negotiate their terms?

16

16