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ENVIRONMENTAL LAW ISSUES FOR REAL ESTATE AGENTS & BROKERS

NOTES FOR BRANTFORD REAL ESTATE ASSOCIATION

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Two weeks ago I finally completed a file involving seriously contaminated groundwater in a nearby city, by selling my client's factory lands to a neighbouring business. The groundwater had been badly contaminated in the '70's by my clients' neighbour, another factory. The contamination was discovered in the early 90's and disclosed to my clients. On behalf of my clients, I sued the neighbour. We eventually settled the action on the basis that my clients would be protected by the neighbour to the agreed fair market value of the property, and efforts began to market the property. The agent was given a summary of environmental conditions and terms of sale which were to be provided to any interested party. Unfortunately, those pages were misplaced and the buyer had not been given much information about the contamination problems.

When the agent brought us an interested party, we found that we then had to begin to provide disclosure to that potential buyer, while trying not to "scare" them away. Eventually, after a great deal of time and effort, that buyer avoided the agreement, based on their unsatisfied concerns about the environmental conditions.

Another buyer expressed interest - an immediate neighbour. This time, we ensured that the buyer had the complete disclosure package from the very first. As well, that buyer was well aware of the situation, being a neighbour, and also having been affected by the groundwater contamination themselves. These negotiations were successful, and we completed the sale two weeks ago.

My clients were winners, because they no longer owned the contaminated property, and had received full value for their land.

The buyer was a winner, because the acquisition suited their expansion plans, and they had received suitable protection in the deal from the other neighbour, with respect to ongoing clean up, and assurances from the MOEE that they would not be required to engage in the clean up themselves.

The neighbour whose lands caused the problem was a winner because they got out of a lawsuit, and limited their future responsibility through the terms of the sale agreement and side agreements with the buyer.

I tell you this story to demonstrate several important points in terms of buying and selling real estate with potential contamination issues.

The first point is that there are right buyers and a wrong buyers for contaminated real estate. I will discuss some additional issues about contaminated lands later, but it is essential that buyers of contaminated real estate be buyers who are **willing** to buy that real estate, and that there be no beating about the bush regarding the actual conditions of the property.

Any sale of contaminated real estate - where there is known or suspected contamination - without full disclosure, will only lead to trouble down the road. Trouble for the seller, and trouble for you, the agents. You will be sued, even if you didn't know about the problems. The buyer's lawyer will sue you first, and ask questions later. You will be put to the defence of the claim, even if you knew nothing. If you did have relevant information about the contamination, your insurance company will be making a payment - unless your insurance policy excludes coverage for environmental risks. In that case, you and your firm are directly exposed.

Sellers are obliged to disclose any known contamination to the buyers. If the seller doesn't know, but suspects contamination, there can still be liability. It is not in the seller's or the agent's interest to try to do anything but disclose the contamination. As the above example shows, there will be a right buyer for the property - and with disclosure, both the seller and the agent can sleep at night, not fearing future law suits coming back to haunt them once the buyer discovers the problem.

The next important point demonstrated by my story is that the terms of the sale are absolutely critical. Don't use "boiler plate" for environmental issues. The seller and the buyer must both get legal advice. There are many possible approaches to arrive at a successful sale of contaminated real estate. There are many ways to allocate the risk - to the buyer, to the seller, to both, and/or to one or more third parties. There are many ways to define and even reduce the risk.

In my example, the risk was reduced by way of the commitment from the third party to continue its clean up, and by way of the letter from the MOEE assuring the buyer that it would not be "on the hook" for the clean up.

The risk was also reduced with terms allowing - even encouraging - the buyer to have its own environmental studies done. All available material, including phase ½ audits dealing with the rest of the property was provided. There were many other provisions as to the environmental issues in that agreement, dealing with various concerns that the parties had, and defining the environmental disclosure that had been provided. There were also important terms defining the remedies that the parties had, and who they had remedies against. These were additional ways of defining, allocating and limiting the risks that each party was assuming.

Of course price can be an important means of reducing and allocating risk. A buyer may take additional risk for a lower price. This may enable the seller to obtain terms limiting or eliminating future liability that the buyer would be unwilling to give if the buyer was paying full price.

Another important point from my example is that of the importance of full information in decision making with respect to contaminated real estate. The unknown in environmental matters can be very scary indeed. The very fact that the existence, scope and type of contamination is unknown or poorly defined will scare away almost all buyers, when contamination is known or suspected.

In the late '80's when I began practising environmental law, the very word "contamination" was enough to ensure that almost any financial institution would avoid the property. The estimates that we were obtaining for clean ups at that time were through the roof. The available technology was limited and there was little competition.

In the last decade, we have witnessed an explosion in environmental clean up technologies, and in environmental clean up and consulting firms. New technologies have been developed, prices have fallen, and the multi-billion dollar a year industry is now very competitive. This is good news for the sale and purchase of contaminated lands. Good news because almost any contamination problem now can be defined, and realistic clean up costs can be assigned. This allows the parties to determine how best to enter into the sale transaction. Will the vendor clean up now, or warrant clean up in the future if required? Should the vendor provide security for such a commitment, and if so, what security? Should there be some provision registered on title for future buyers?

In my example, notice was registered on title, thus reducing the risk of all of today's parties with respect to future owners. In other words, any future owner will have notice on title of the clean up issue, and will be unable to allege that they bought property without knowing that it was contaminated. Since a significant amount of the risk of environmental liability is from future owners, this is important protection.

Knowing the type of contamination that is present can be critical with respect to allocating risk to third parties, or to reducing risk by the cooperation of third parties.

In my example, a major financial institution was willing to commit to financing the purchase, at least on the environmental grounds - they were the bank for the neighbour whose lands contaminated the problem, and they were willing to base their financing on that neighbour's commitment to continue the clean-up into the future. As well, this type of knowledge was essential in order to get the MOEE's cooperation in providing assurance letters to potential purchasers.

Since the possibility under our Ontario laws, of owners being required to clean up even if they had nothing to do with causing the problem is another major source of concern as to future liability, the ability to obtain this type of assurance from the MOEE was critical to the sale of our lands. The MOEE would never have done this without being confident that it clearly understood the type of contamination, its geographic extent, and that the source of the contamination had been clearly identified. Of course the fact that the neighbour who had contaminated the groundwater was carrying out an extensive clean up was also very important to obtaining this type of MOEE assistance. This could not be expected in every case.

I'm going to take a few minutes now to talk about the following topics:

A. What is "Environmental Law"? I'll try to give you some a concrete idea of the issues that arise in this field.

B. Some current issues in environmental law. This is a very dynamic and changing time in environmental law, at all levels of government. There are many interesting questions that we should be thinking about in terms of the future directions of environmental policy and legislation.

C. New developments in contaminated lands. If time permits, I'll also speak briefly about a specific area of interest, that of contaminated lands, and about some recent policy changes that are providing more opportunities to deal with contaminated lands, orphaned sites, and unproductive, contaminated properties. Even if we don't have much time for this topic, please take a copy of the notes I've brought this morning, for more detail.

After that, I hope that you have questions, and I'll be happy to answer as many as you have time for.

A. WHAT IS "ENVIRONMENTAL LAW"?

The reason that I am posing this question first, is that I am frequently asked what my field is all about. Unlike other fields of law which may have been around longer, the term "environmental law" does not always bring a clear picture with it.

Environmental Law covers all of the following, and more:

- Advice to businesses about whether they are in compliance with environmental laws and regulations
- Advice to businesses and property owners about their obligations under environmental laws and regulations
- Advice about "due diligence" - ensuring that preventive measures are taken to avoid any government or common law liabilities
- Environmental operations legal "audits" and/or environmental management systems
- Advice to officers, directors and even investors about their possible liabilities under environmental laws
- Land use planning advice, particularly with respect to the many environmental laws
- Advice to financial institutions, local governments (townships, towns, cities), and insurance companies, among others, about their potential for "indirect" liability through their customers or rate payers
- Advice regarding contaminated lands clean up and reuse
- Litigation regarding contaminated lands (e.g. by a neighbouring industry)
- Advice regarding spills, hazardous materials transportation, packaging and

labelling

- Litigation for nuisance, trespass, negligence, personal injury, and other causes of action due to environmental contaminants and hazardous substances

- Constitutional law - for example in challenging legislation that threatens public safety and the environment

- Public health and safety issues arising from contaminants and hazardous substances

- Environmental Assessment Act and Environmental Protection Act hearings

- Waste management advice

- Actions and legal remedies to protect endangered habitats such as wetlands or forests, whether on a locally significant or provincially significant level

- Public education

- Public policy advocacy

B. SOME CURRENT ISSUES IN ENVIRONMENTAL LAW

In addition to the liability and compliance concerns that are reflected in the above list, and that I have discussed, there are some interesting issues that are current in environmental law.

1. What is the "right" kind of environmental regulation? How far should regulatory control go versus voluntary action?

2. What are our expectations of government in terms of health and safety regulation? Do we expect setting of minimum standards, enforcement, and scrutiny as to safe practices? Do we expect government to be familiar with current findings in the health and safety arena?

3. Are our expectations the same regarding environmental regulation?

4. What kind of planning should be done, and at what level of government? For example, should there be provincial policy regarding endangered species, threatened habitats, and other such environmental concerns? If so, how should these policies be

implemented?

5. How should we view the planning process in our local communities? Should we have overall official plans and five to ten year or longer visions? Who should participate in these plans?

6. Are environmental issues segregated from economic issues? Most firms espouse commitment to environmental concerns; many firms are directly based on environmental protection. The environmental consulting, planning, engineering & remediation industry has exploded in the last 10 years, and is now a significant sector of the provincial economy, with a major volume of business in Ontario and large quantities of exports from Ontario.

7. What about the approach that we take to solving environmental and planning issues? Are we thinking small and modular or "megaproject"? Why do those differences matter?

8. What are the opportunities for our children in the fields of environmental endeavour? Are we making sure that they are well prepared to take advantage of the opportunities in science, technology, education, urban planning, policy, medicine, engineering and many other fields that are available from the environmental protection, remediation and planning activities?

9. Have we "internalized" environmental considerations in all of our economic and planning decisions, both locally and in broader scale? Why should we internalize these considerations?

10. What are some of the approaches that we can take to these issues? How do incentives matter? How do we do our risk assessment? Are we interested in innovations like "tradeable emissions" and other market incentives?

11. What are some of the local issues that need to be addressed in provincial policy? For example, what can we do with abandoned, contaminated properties? What are our local "hot spots" that we want to return to productive use?

C. NEW DEVELOPMENTS IN CONTAMINATED LANDS

1. 1996 CONTAMINATED SITES CLEAN-UP GUIDELINES

In May, 1996, the Ministry of Environment & Energy released long-awaited revised guidelines for the clean-up of contaminated sites. Some of the notable points about the new guidelines are:

- The guidelines cover many **more contaminants** than did the previous 1992 draft guidelines.

- The guidelines provide for "stratified" clean-up, depending on the **proposed use** of the land. In other words, different clean up standards to various depths may be selected, depending on whether the land is intended to be used for residential, park, commercial or industrial purposes.

- There are various standards for soil and for ground water, depending upon whether the ground water could be used in drinking wells.

- If anything less than a "full" clean up is selected, **caveats** may have to be registered on the title to the land, so as to advise future potential purchasers, lenders, owners and others that the site was not completely cleaned up, and there may still be some residual contamination at depth.

- The MOEE will not be certifying the clean-ups or giving any assurances about them. It will be entirely **up to the land owner** and its professional consultants to select the appropriate clean up level. However, there are requirements for the engineers to prepare sworn statements as to the clean-up that was completed.

2. MOEE "GLOBAL AGREEMENTS" FOR LENDERS AND OTHER PARTIES

As of the spring of 1997, the Ministry of Environment & Energy, Ontario has approved and is now entering into "global agreements" with lenders and certain other parties concerning their entry onto contaminated lands.

Lenders and others have long been concerned that they may be constrained from investigating the feasibility of a site clean-up in preparation for resale when their customer defaults on a mortgage involving contaminated land. The justifiable fear is that they would then fall into the definition of **"person in control"** under the Environmental Protection Act and thus open themselves to the possibility of a full clean up order from the Ministry of Environment & Energy for the land. Many lenders, therefore, would not make even the most cursory of inspections whenever there was a suspicion of contamination. Obviously, this was detrimental, not only to the lenders who were unable to realize on their collateral, but also to the general public, since many contaminated lands have been sitting idle, untreated and unproductive.

The Ministry of Environment & Energy has provided a partial solution to this problem, by agreeing to enter into the above mentioned "global agreements" in certain circumstances.

These agreements are available to **other parties,** too, such as **municipalities,** and possibly to **insurers** and prospective **purchasers**.

The global agreements provide:

- The Lender or other party **shall not be a "Responsible Person"** under the Ontario environmental laws with respect to any property, nor be subject to any orders, proceedings, etc. with respect to environmental contamination or violations that is already in existence or has already occurred simply by having entered on the land, or having taken action as Lender (or other) to investigate the environmental or other condition of the property.

- Similarly, protection is available for action taken by the Lender (or other) to **preserve or protect the value** of the property, including paying services, taxes etc., and dealing with **immediate danger** or threat of immediate danger to public health and safety.

- It is not necessary to enter into the agreement for every property; in fact it is intended to be global and to cover **all such properties** that the Lender (or other) may thus deal with.

- It is not necessary to notify the MOEE regarding every such entry; the only **notification** requirements are:

    - if the Lender becomes aware of an **immediate danger** or threat of immediate danger to public health and safety

    - if the Lender decides **NOT to proceed** with any further actions or steps because of adverse environmental conditions at the site.

- The Lender must **disclose** to any person who acquires an interest in the property through the Lender, the nature of any environmental problems with the property of which the Lender has knowledge.

- The Lender will provide copies to the MOEE of any **reports** prepared by the Lender with respect to any particular property, upon written request by the MOEE.

These agreements are being negotiated by some, but not all of the major financial institutions in the province. Each bank's head office must be contacted to ascertain whether it has signed such a global agreement with the MOEE.

For **non-lender parties,** the MOEE is amenable to similar agreements, but their applicability must be specifically negotiated on behalf of such parties.

For lenders and non-lenders, **site-specific agreements** may be negotiated with the MOEE. However, the MOEE will only entertain such site-specific agreements if "there is something in it for them". Examples include some defined minimum level of clean up; possibly some financial reserves; or other obvious public environmental benefit to be obtained in exchange for the protection granted to the contracting party.

If you have a situation which may call for such agreements, please don't hesitate to contact me.

I hope that this rapid overview of some of the concerns of environmental law has been of interest and assistance. I will be happy to answer any questions, or discuss any of these issues further.