"SOME DEALS STINK - LAND TRANSACTIONS INVOLVING ENVIRONMENTAL CONTAMINATION" ARTICLE

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B 4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

SOME DEALS STINK – LAND TRANSACTIONS INVOLVING ENVIRONMENTAL CONTAMINATION

Lawyers like chasing down “environmental angles” on their files just about as much as they like chasing down tax angles. Whether it’s a corporate or commercial transaction, or dealing directly with real property, clients need both legal and technical guidance on lurking environmental issues.

Here is an example of a situation encountered every day by commercial solicitors: the purchase and sale of land. If there is one thing unwitting purchasers of contaminated land have in common, it is that each wishes they would have simply found out the site was contaminated so that the contamination could have been considered along with all other important factors in the deal. Some insight into this area of law can help to avoid certain pitfalls.

RESPONSIBLE PERSONS (RPs): RPs are defined in the *Environmental Management Act* (EMA) as current and former owners, operators, producers and transporters connected to a “contaminated site”. They are jointly, severally, retroactively and absolutely liable. The purchaser of contaminated land becomes a current owner and is potentially responsible for cleaning up the site even though it may not have played any role in polluting it.

INNOCENT PURCHASERS: The EMA, however, and its closest friend, the Contaminated Sites Regulation (CSR), provide some innocent purchasers with an escape from liability in the form of an exemption found at section 46 (1)(d) of the EMA and 28 (a) of the CSR. Together, they exempt from liability a purchaser who is not a polluter, who essentially took all reasonable steps to determine prior owners and uses of the site before buying and who undertook other investigations to minimize their potential liability.

INVESTIGATIONS: Ascertaining prior owners and uses can be done in a relatively efficient manner using modern technology. If the results reveal red flags such as former automotive repair activities or ownership by an energy company, then further investigations can be undertaken or the purchase abandoned. Risk can also be measured through the testing of soils, searching for underground oil tanks and searching the contaminated sites registry and other public records.

ALLOCATING RISK: Sometimes, with or without investigating the environmental status of a given site, a purchaser will want to buy land that carries a degree of environmental risk. The purchaser can address this risk by proposing that the seller either clean up any known contamination by a certain date (and inserting a subject clause or contractual term) or reduce the price accordingly.

If the seller is prepared to share “potential” risk – not just the cost of addressing known or likely contamination – a purchaser may seek an indemnity from the seller. This would potentially see the seller receive full price for the property, but would allow the purchaser to claw back some of that money if faced with environmental liability in the future. Indemnities can take many forms and are as varied as the circumstances of any given case and the imagination of counsel. An indemnity, however, is only as valuable as the capacity of the indemnitor to pay.

The EMA does not reward risk-takers; it seeks to support business decisions made by those attempting to manage the risks inherent in many corporate, commercial and real property transactions. The EMA does not ignore contract or common law, nor does it attempt to strip the courts of their equitable bent. Rather, terms such as “just” and “fair” are explicitly employed to guide the court in allocating liability amongst responsible persons.

Protecting your interests in land deals begins with common sense: ask questions about what you are buying. This is often enough. However, when these questions reveal an odour, dig a little deeper. In fact, get to the bottom of it.