Harper Grey discusses environmental liability risk for landlords

By Una Radoja and Adam Way

That landlords face liability for the conduct of their tenants is not a novel concept for most landlords. Indeed, it is standard practice for landlords to build several provisions into their commercial lease agreements as a precaution against this exposure to liability from their tenants operations on their land.

However, few landlords fully appreciate the potential environmental liability risks they are exposed to as a result of the activities of their tenants, which exist both during and well after tenancy has concluded. The purpose of this article is to explain what some of these environmental liability risks are and to outline preventative steps that landlords can take in order to minimize their exposure.

What potential environmental liability risks do landlords face?

The key piece of legislation in British Columbia that addresses this issue is the *Environmental Management Act*, SBC 2003, c. 53 ("EMA") and its accompanying regulation, the Contaminated Sites Regulation, BC Reg. 375/96 ("CSR"). Together, the EMA and CSR, set out a number of responsibilities, obligations and powers related to the investigation and clean-up of contaminated sites.

Cost Recovery Claim

The EMA creates a statutory cause of action known as a "cost recovery claim" whereby a person who has incurred costs of remediation related to a contaminated site can recover such reasonably incurred costs from "responsible person(s)". Generally speaking, the costs recoverable under this cause of action include all costs to investigate and remediate the contaminants from the impacted properties, with the only caveat that the costs must be "reasonable". A cost recovery claim is, intentionally, very favourable to the person who has incurred the costs of remediation to permit recovery. This is because the entire contaminated sites statutory regime has as one of its objectives being the timely clean-up of contaminated sites. As such, liability is strict, in that it does not depend on a finding of fault on the part of the potential responsible person.

The EMA also sets out a broad definition of those responsible for remediation of contaminated sites, which includes all current and former "owners" or "operators". Of course, a tenant whose activities cause the contamination will be considered an "operator" and likely the primary target as the polluter (e.g. operator of a dry-cleaner or gas station). The landlord, on the other hand, will meet the definition of an "owner", and will, therefore, attract responsible person status, absent the availability of limited exemptions, even if it did not contribute to the contamination.

What this means in practical terms is that should the tenant no longer be around or, alternatively, impecunious, this leaves the landlord exposed for the costs of clean-up of the landlord's land as well as any neighbouring lands impacted by contaminant migration. Because liability under a cost recovery claim is joint and several, the party that has incurred the remediation costs may seek to recover all of those costs against the landlord, who would then be left to seek allocation from the other responsible parties (including the tenant) to their respective degree of fault. It is also often the case that contamination is discovered years after the polluting-causing activities. This means that the risk of certain parties being no longer around or without assets is even greater.

It is possible for a landlord to be exempt from "responsible person" status. For example, if at the time the landlord purchased the property it was not contaminated and the landlord did not itself dispose of, handle or treat a substance so as to cause the site to become contaminated during its ownership, the landlord may be exempt. However, this exemption is significantly curtailed by means of section 29 of the CSR which says that it does not apply if the owner (1) voluntarily leased the property, (b) knew or should have known that a contaminating substance may be used and may cause the site to become contaminated, and (c) the lessee did in fact cause the contamination. Therefore, if a landlord has knowledge of the nature of the activities taking place on the premises and ought to have suspected that such activities may cause contamination, it is unlikely that it will be able to rely on this exemption.

Remediation Orders

The other way in which landlords may be exposed is through the issuance of a remediation order by a director. A remediation order can be issued to any responsible person. If the tenant is causing the contamination, it is likely that the order will be issued directly to it. However, should the tenant that caused the contamination no longer be around when the contamination is discovered, which is not uncommon, the landlord may be left to comply with the order (absent an exemption).

What can landlords do to mitigate the risks of environmental liability?

There are several steps that landlords can take in order to address their risk of exposure to environmental liability arising from the operations of their tenant.

1. **Due Diligence**: It is important that a landlord understand the nature of the tenant's operations and any protocols it may have in place to prevent contamination (if the operations creates a risk of pollution), before agreeing to the tenancy. This type of due dilligence without saying but is especially applicable if there is a concern about possible environmental impacts (this will apply in most industrial scenarios, and certain commercial contexts). A landlord will not be exempt from responsible person status if it "should have known" that contamination may be caused by the conduct of the tenant. As such, it is important that landlords complete their due diligence at an early stage. Some of these facts may also be incorporated into the lease agreement as representations and warranties.

2. **Environmental Monitoring**: If it is known or suspected that a tenant's activities have the risk of impacting the environment, it is important that landlords require regular environmental testing during the tenancy. This helps ensure compliance with best environmental practices and to identify when and if contamination may be occurring. It is advisable that this be built directly into the commercial lease agreement as well.

3. **Environmental Contingency Plan**: Lease agreements should be clear as to what must happen if contamination is discovered during the tenancy. For instance, the landlord will want to specify what environmental standard (numeric or risk-based) the contaminants must be remediated to if a legal instrument from the Ministry of Environment is desired (i.e., a certificate of compliance on completion of remediation) and the tenant's obligation to provide one must be clearly stated in the lease. There is significant room for interpretation under the legislation on this issue, so it preferable for the landlord to put some parameters around this in advance. Understanding this risk and taking the necessary steps to build appropriate protection clauses into the lease agreement are critical to successfully mitigating exposure.

4. **Indemnity Provisions:** Landlords may wish to incorporate protective clauses, such as environmental indemnities, that will continue to apply after termination of the tenancy. An indemnity is particularly important for environmental contamination because such contamination is often discovered years after the polluting-causing activities have ceased. Ideally, the indemnity would be worded such that it covers not only costs incurred by the landlord or claims arising from its own land, but also any costs or claims from third parties such as impacted neighbouring property owners.

In summary, landlords face the potential for significant environmental liability risks from the activities of their tenants. Unfortunately, this risk does not end when the tenant vacates and will often come to fruition years or even decades later when the contamination is discovered, often in the context of a redevelopment. However, there are several steps that landlords can take in advance in order to minimize the risk of being exposed to environmental liability.

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