



ERRORS & OMISSIONS

A periodic update from the
Lawyer's Professional Indemnity Company

February 1993 Vol. 2 No. 4

Environment a factor in real estate deals

Environmental due diligence has become a hot topic lately for Ontario real estate practitioners. However, the standard among the practising bar in conducting environmental inquiries in the course of handling transactions is inconsistent. Most have found that "standard" environmental letter inquiries are of little assistance in that government records available for inspection are not comprehensive. Response time on inquiries is often slow and usually the information received is of little or no use. What should practitioners do?

Careful practitioners should inform clients early in the retainer that there are real risks associated with relying on government records inquiries. Such inquiries will only yield information contained in government records and the responses will give no assurance about the state of the property or any potential liability.

There is no substitute for early discussion with clients about the range of options available to address environmental concerns. Concern about environmental matters usually increases as one moves from a typical residential real estate transaction to a transaction concerning vacant land where development is contemplated or where the land contains abandoned industrial facilities.

Inform the Client

There are at least three avenues of approach that a careful practitioner might canvass with clients:

1. **Contractual Provisions** - Contractual provisions generally take the form of environ-

mental representations and warranties which are often vigorously negotiated. Vendors often prefer that purchasers satisfy themselves or assume the risks of environmental problems. Purchasers prefer covenants with real prospects for recourse and conditions to permit environmental inspections and audits.

2. **Government Records** - Ordinary letter searches include the following:

- **Section 18 Searches:** Under the *Environmental Protection Act* (EPA), the director is given the power to make clean-up orders and issue certain certificates of approval. A list of these approvals and orders is kept on file at the Ministry in an alphabetical index of names.

To conduct a proper EPA name search, a real estate lawyer should review the chain of title on both the property being purchased and the adjoining properties and compile a list of names of title holders. The careful practitioner would also conduct corporate searches against all corporate names to determine whether corporations have changed their names or amalgamated. The practitioner would also inquire of the client to determine the names of the current and prior tenants/users.

The list of names should be compiled back to 1970 (prior to the passage of the EPA) and a letter should be sent to the Regional Office of the Ministry of the Environment requesting information on whether the names submitted appear on the index record maintained under Sec-

tion 18 of the EPA. Note that orders are not filed by property address or lot and plan description; names are required.

- **Section 24 Searches:** While the EPA does not require that the Ministry keep a list of waste disposal sites, the Ministry has compiled several lists and will, upon request, provide advice as to whether a given property appears on the list(s). Unlike the Section 18 index, these lists are organized by lot and concession. This information must be given to the Ministry in order for them to respond to an inquiry. It is also helpful to provide a sketch locating the property with respect to concession roads and other main roads.
- **Municipal Inquiries:** For the period prior to 1971, the Ministry of the Environment suggests that municipal records be consulted. These inquiries are generally of little use as such municipal records often do not exist.
- **Sewage Service:** In areas without municipal sewers, the usual inquiries should be directed to the authority which administers sewage systems locally.

3. Environmental Inspections and Audits - Conditions are often negotiated into agreements to permit purchasers to commission an "environmental audit". Inspections and audits can be of varying thoroughness and reliability. The effectiveness of the audit will depend in large part on the expense which the client is willing to incur (which can be considerable).

Even where persons are skilled in conducting environmental inspections, contaminants and hazards can still escape detection.

Practical Approach

Generally, if a residential property is described on a plan of subdivision and the plan was registered after the EPA in 1971, it is unlikely that an inquiry of the Ministry of the Environment will disclose environmental problems. Before the EPA was enacted, organized public records were not usually kept. Further, it is unlikely that the activities of homeowners in a subdivision would lead to EPA orders. Also, recent plans of subdivision are generally circulated to the Ministry of the Environment for comment prior to final approval and, accordingly, the probability of significant environmental problems is remote.

Nonetheless, if a solicitor intends to rely on this reasoning in not making EPA inquiries, it is strongly rec-

ommended that this be done only after consulting the client, advising as to the relative risks and costs and obtaining written instructions.

Protecting Remedies

Practitioners should be cautious to obtain environmental information/responses prior to the expiry of the requisition period to preserve important remedies. In a case where a waste disposal site is discovered and no ministerial consent has been obtained, the purchaser might arguably be able to avoid the transaction under most standard agreements since, under Section 46 of the EPA, use of the property would be prohibited for 25 years.

More difficult questions arise when the problems are not discovered within the search period. Careful practitioners might guard against exposure in such circumstances by advising clients of the risk that responses may not be received in time and offering them the option of retaining a professional consultant prior to the expiry of the time period to expedite the matter or conduct independent searches and inquiries.

In the final analysis, there is no better way to reduce the risk of being dragged into an environmental mess than to advise the client about the types of due diligence that can be exercised, the relative costs of pursuing these and the risks inherent in the transaction. Instructions to adjust the level of service in a particular case should be obtained in writing or, at minimum, confirmed in writing early in the retainer.

*Robert S. Cash, B.A. (Hon.), L.L.B.
Partner, Thomson, Rogers.*

This commentary is not intended to be a legal opinion and readers are cautioned not to act on information provided in this commentary without considering the unique circumstances of every case.