# Comprehensive Environmental Legislation:

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In this second of two parts, Mr. McCague examines how environmental law affects individual employees, corporate officers or directors, and purchasers or vendors of property. He offers some thoughts for these individuals on the management of certain aspects of environmental risks.

## Introduction

As little as 20 years ago, there was no comprehensive legislation in force in Ontario. Pollution control was largely regulated by Municipal By-Laws and Local Boards of Health. None of the law schools in the Province offered courses in environmental law, and had they done so, it would have been difficult to develop a curriculum which would have lasted more than a few weeks.

Today, we have comprehensive environmental legislation in force at both the Provincial level, with the *Environmental Protection Act*, and at the Federal level, with the *Canadian Environmental Protection Act*. In addition, there are a number of related statutes containing important environmental provisions,such as the *Ontario Water Resources Act*, the *Ontario Pesticides Act*, the *Canada Fisheries Act*, and the *Transportation of Dangerous Goods Act*.

In recent years, major amendments have frequently been introduced to the legislation, governing the environment. Virtually every law school in the Province now offers courses in environmental law. Environmental concerns top most public opinion polls, and have occupied a central place in recent election campaign. The desire for environmental protection has become a major goal of law and public policy, which appears to be founded on a broad social and political consensus.

## Refuse to Pollute

Clearly, the effect of the *Environmental Protection Act* and the numerous other Ontario statutes relating to the environment, such as the *Water Resources Act*, the *Pesticides Act*, the *Fisheries Act*, the *Environmental Assessment Act*, and the *Transportation of Dangerous Goods Act*, all combine to place Ontario solidly in the forefront as the most environmentally sensitive province in the country.

But as a practical matter, what is the affect of this legislation on you as members of the International Right of Way Association? How do these laws effect you?

Few people know that there is a right to refuse to pollute. However, the *Environmental Protection Act* goes to considerable lengths to protect employees who refuse to pollute. Section 134(b) of the EPA makes it an offense for an employer to dismiss, discipline, penalize or attempt to coerce or intimidate an employee for doing any of the following:

- Complying with the five key environmental statutes in Ontario. This includes refusing work that will pollute or that is lacking a necessary Ministerial approval.
- Complying with a Ministry order, permit or approval.
- "Whistle blowing" or reporting pollution by an employer to the Ministry of the Environment (MOE).
- Seeking enforcement by the MOE

# Part Two

of an environmental statute.

An employee can, therefore, without loss of pay, refuse to put dangerous wastes into the garbage or refuse to allow an unlicensed hauler to take it away. An employee can refuse to operate a machine that is spewing smoke into the sky, or a pump that is putting toxic chemicals into a stream. An employee can even refuse to operate equipment that requires a Ministry permit, if the permit has not been obtained.

An employee punished for refusing to pollute, or whistle blowing, may write to the Ontario Labour Relations Board. After an enquiry, the Board can order the employer to do whatever the Board considers just.

This can include ordering the employer to cease harassing the employee, to rectify the harassment, compensate the employee, and reinstate a dismissed employee with full back pay and seniority. These Board orders can be enforced as though they were orders of the Supreme Court of Ontario.

There is no defense for the employer that the acts complained of may have been performed by a supervisor. The employer is liable for the actions of its supervisory staff. If there is any doubt, since the burden of proof is on the employer, decisions will always be resolved in favour of the employee.

In addition, the employer can be prosecuted by the Ministry of the Environment. The penalties for harassing an employee for refusing to pollute can be as high as $25 for each day that the employee was harassed or kept off the job.

But why should employees care about their company's pollution?

Simply, most employees have a strong sense of right and wrong. They care about the world we live in and we will leave to our children and grandchildren.

And employees have a growing personal interest in avoiding pollution. As the number of environmental prosecutions grow each year, from 54 in 1984 to over 200 in 1987, to over 350 in 1988, employees are coming increasingly under the gun. Incidents of pollution are being traced to particular employees and convictions have been obtained. Examples include a Toronto truck driver who empties barrels of an unknown chemical into the back of his truck creating a cloud of toxic gas; a pilot who sprayed pesticides improperly; and a nanico technician who opened a valve to fill a tank of caustic soda and forgot to close it. He was personally fined $1,500 and ordered to perform 200 hours of community service.

*In addition, the recent amendments to the Environmental Protection Act have significantly increased the personal exposure of officers and directors of corporations.*

Front line employees are not the only ones affected. A pollution offense is committed by everyone in a position of influence and control who could have prevented the discharge including supervisors and management.

After the city of Sault Ste Marie hired an independent contractor who put garbage in an unsuitable place, causing pollution, both the contractor and the city were convicted.

In the case of a chemical firm, the company president owned a piece of land that he leased to the company. The land became polluted, and the president and the company were ordered to prepare a clean-up plan. In addition, one of their company employees was caught pumping acid contaminated liquid into a nearby stream.

As a result, both the company and the president were convicted of failing to comply with the order and discharging the contaminated liquid.

In a third case, employees of a haulage company were caught by Ministry inspectors dumping waste on an uncertified site. The president of the company, who had possession of the books, paid the drivers and arranged for the use of the uncertified site, was personally convicted and fined $28,000.

Employers have something to gain, too, by informing employees of their right not to pollute. Many enterprises have the potential to pollute, and may some day find themselves at the wrong end of a prosecution.

The most important defense available to a company that has polluted is "due diligence" – in other words, did the company do everything reasonably possible to prevent the pollution before it happened? One that has instructed its employees to refuse any work that pollutes will have taken a major step towards establishing this defense.

In addition, the recent amendments to the Environmental Protection Act have significantly increased the personal exposure of officers and directors of corporations. Until the legislation was amended, a director or officer could only be charged with an offense if he or she had been personally involved in its commission.

However, the Act now imposes positive statutory duty on the officers and directors of corporations which engage in an activity which may result in contamination to the natural environment, to take all "reasonable

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care" to prevent such contamination. The failure to discharge this duty is an offense under the Act. Directors and officers may be prosecuted, even if the corporation is not charged. They may be fined up to $5,000 per day on the first conviction, and $10,000 per day on each subsequent conviction, for failure to exercise "reasonable care."

It is within the discretion of the relevant government authority whether to charge individual officers and directors. The Ministry of the Environment will usually include personal charges in circumstances where there has been a deliberate or reckless violation of the legislation, or where the Ministry's investigation into a violation has been met with a lack of cooperation by company personnel, or the concealment of relevant information.

*Once aware of an environmental hazard or liability, a director or officer should respond by taking the appropriate steps to address and remedy the problems which have been identified.*

In view of the significant changes to legislation in this area, directors and officers of corporations should take preventative measures to become aware of, and to reduce their personal environmental exposure and the potential liabilities of their corporations. Directors and officers should be familiar with all activities of the corporation which could have a potential impact on the natural environment. They should also be familiar with the general statutory and regulatory requirements relative to their corporate activities, such as the provisions concerning air and water emissions, waste disposal and the transportation of dangerous goods.

Directors and officers should also ensure that appropriate directives and guidelines are in place and are being carried out concerning corporate activities having an environmental impact. All records required by the relevant regulations should be properly maintained and regularly reviewed. Once aware of an environmental hazard or liability, a director or officer should respond by taking the appropriate steps to address and remedy the problems which have been identified. If appropriate preventative measures are followed, a director or officer who is charged with an offense will be able to establish that he or she exercised reasonable care, and did not authorize or acquiesce in the commission of the offense. Corporations may also be assisted by the effective use of environmental audits. An environmental audit is a systematic review of the policies, procedures and operations of a company who identified its potential environmental exposures and to monitor compliance with relevant legal standards. Environmental audits are normally performed with the assistance of independent consultants and legal counsel. The cooperation of company employees is also required, to provide information. Environmental audits assist in identifying environmental problems, and may afford a due diligence defense in the event of a prosecution. By conducting environmental audits, corporate officers and directors may demonstrate that they have exercised reasonable care.

Other benefits are the opportunity to increase environmental awareness on company employees, to assist in strategic planning for the future, and to promote positive public relations as a responsible corporate citizen.

### Purchasing and Selling Properties and Businesses

Another area that I would like to briefly discuss is the effect of the presently existing environmental law on the purchase and sale of properties in the province of Ontario.

It is abundantly clear that there are now substantial risks involved in buying or selling properties with potential environmental problems. Purchasers of such properties render themselves liable to prosecutions, administrative orders, and clean-up requirements by environmental regulators, as well as potential civil law claims for environmental damage and personal injury. The ultimate cost of these transactions can significantly impact the economics of the transaction in question.

From the seller's perspective, the law of caveat emptor (buyer beware) is increasingly giving way to a judicial inclination to find fraud in circumstances where all potentially detrimental information "known" to the vendor is not disclosed to the purchaser. The degree to which knowledge of an official, employee, or agent of a vendor can be imputed to a corporate vendor in the circumstances will, no doubt, continue to be developed in the case law.

As well, intermediaries in such transactions, such as real estate agents and listing brokers, may now be subject to potential liability for not adequately informing themselves as to the nature of the property in respect of which they are acting.

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And so, it would appear that our law has developed to the point where it is unwise for transactions involving properties or businesses with potential environmental problems to be entered into or completed without a clear understanding of:

- The nature and extent of the

problem, and
- The means by which responsibility for that problem will be allocated among the parties involved.

Assessing the potential environmental liabilities associated with the property acquisition, and allocating the responsibility for those potential liabilities may, if one is lucky, be relatively straight forward and non-contentious. More likely, however, the characterization and resolution of these issues will be a matter of some difficulty.

Except in unusual circumstances, unquestionably the most troublesome part of this process will involve the reliable assessment of the nature of present and potential environmental liabilities. There are at least three reasons for this:

- It is often extremely difficult to determine (a) The nature and extent of the contaminant, and (b) What will be required, and accepted, by way of remediating the contamination.
  As you know, there are some real limitations in our ability to accurately determine soil and groundwater problems, which are usually the most costly to remediate.
- The environmental regulator is almost always the "wild card" in these situations. Regulators respond to political pressures, and their responses to otherwise identical fact situations can often differ substantially, depending on the amount of perceived public concern. When and how government will move to require an apparent environmental problem to be dealt with is always a guessing game.
- Related to both of these points, even if the nature of the problem can be defined, and the amount of regulatory attention anticipated, the cost of the "fix" cannot be readily determinable. Again, the approach of the environmental regulators to what is required may vary widely, depending on the amount of political and public pressure that government is under with respect to a particular situation. There is an enormous amount of discretion that can be, and is often, applied in these circumstances. A requirement to remove and dispose of soil, or monitor and treat groundwater, as opposed to some other method for alleviating contamination, can increase the cost of a remediation program by a factor of 4 or 5 times or more. (BP vs. Wasaga Beach)

The other associated problem, of course, is that standards and requirements can be changed in the future. The Ministry of the Environment does not, provide covenants not to further enforce its legislation, if an approved clean-up is carried out. By analogy, recent statutory amendments in the United States require the Environmental Protection Agency to re-visit agreed upon remedial orders for hazardous waste sites every 5 years, in light of the then current technologies and standards.

I will not deal here with the intricacies of due diligence or environmental audits in the context of real estate transactions, nor with the various issues associated with the structuring of these transactions to properly allocate environmental liabilities. One point is clear, however, and that is the proper time to deal with these matters is early on and not at the end of potentially troublesome transactions.

Finally, I would like to comment on the environmental responsibilities and liabilities associated with the purchase and sale of a property, first from the purchaser's perspective, then from the perspective of the vendor.

## The Purchaser's Perspective

The first important step for a purchaser in any commercial real estate transaction is to obtain a proper definition and understanding of the nature of the potential environmental problems that may arise in the circumstances. This is usually done by asking for full disclosure from the vendor, and incorporating the information into the contract or offer to purchase as representations and warranties. The purchaser and its professional advisors should then carry out their own appropriate due diligence including, where advisable, a specific independent environmental audit. Once all the issues have been identified, the purchaser will decide whether to proceed with the purchase and, if so, how best to structure the transaction and negotiate and settle upon the most appropriate terms, including the price. Finally, the written contractual arrangements, usually by means of representations, warranties, covenants and indemnities, should be concluded to adequately deal with and properly allocate the risks involved.

*Detailed site inspections should specifically report on obvious environmental issues – cleanliness, handling of wastes, presence of storage tanks and toxic substances, special processes or equipment used.*

## Disclosure and Due Diligence Techniques

There are essentially four important ways to obtain a clear definition of any possible environmental law problems and an understanding of *the potential liabilities and estimated* financial risks that may be involved in a transaction.

The first method is to **obtain as much information as possible from the vendor.**

It is the normal first step for the purchaser to inspect the asset involved in the transaction, and to

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obtain general information from the vendor about the nature of the business involved prior to making an Offer to Purchase. Any vendor that is serious about selling its property or business for the best possible price should be willing to disclose everything to the purchaser, and allow the purchaser to do whatever investigation it deems necessary in the circumstances. The best source of information, therefore, is usually the vendor.

special processes or equipment used. The business policies, procedures and employee training practices in the environmental areas should be reviewed and assessed. Documentation concerning the transportation of dangerous goods and handling of hazardous wastes should be obtained and the relationship with suppliers and carriers reviewed.

In addition to providing information directly, the vendor should also permit the purchaser to have full access to the vendor's records and assets and to permit any investigation or testing that may be appropriate in the circumstances. The purchaser should insist on this and obtain the necessary permission either in a preliminary disclosure and confidentiality agreement or in the Agreement of Purchase and Sale itself.

*It is unrealistic to expect that a soils investigation of a site will uncover all of the potential areas of concern if the history of the site is not known or understood.*

Unfortunately, however, in may cases environmental issues were not in the forefront when the vendor acquired the property and therefore, there may be information and environmental problems that a vendor is not now aware of. The due diligence by the purchaser is therefore also extremely important and necessary.

Enquiries should be made concerning not only the present use of the lands in question, but also its historical usage. It is unrealistic to expect that a soils investigation of a site will uncover all of the potential areas of concern if the history of the site is not known or understood. In my experience, knowing where old spills occurred, and of past practices, has lead to the most effective investigation, since it can often explain previously unexplainable data. However, too often reports of investigations are completed where the history of the site and interviews with former staff are omitted.

Enquiries should also be made respecting the use of the surrounding land. (Dillon ats Ottawa – Vocisano property and Delzotto property).

Detailed site inspections should specifically report on obvious environmental issues – cleanliness, handling of wastes, presence of storage tanks and toxic substances,

Often information received from the vendor can be usefully verified by conducting personal interviews with long-time production employees, former employees, neighbors, local businessmen and municipal authorities.

The second way to obtain a clear definition of any possible environmental law problems involves **conducting general searches of public records**. These include:

- Real estate title searches to determine the history of the ownership;
- Topography maps and aerial photographs from Ministry of Natural Resources;
- Business or company searches can provide information on the individuals involved in the business and the corporate details of the business carried one;
- Law suits in progress and execution to determine the nature of the claim made and the results obtained; and
- Media searches to determine the extent of environmental problems in the area and any criminal prosecution as well as public attitudes and community relations in the area.

**Contacting government authorities** is a third method of obtaining environmental related information on any asset to be purchased. For example, the Ministry of the Environment maintains records of what sites have been used as waste disposal sites, coal tar sites and PCB storage sites. The Ministry also has an index of orders and approvals issued pursuant to the *Environmental Protection Act*. Local municipal searches often provide useful information about the historical use of the site. The local medical officer of health will also have records concerning any septic tanks still on the property.

The Fuel Safety branch of the Ministry of Consumer and Commercial Relations maintains records of underground storage tanks. In this regard, the *Gasoline Handling Act* obliges the vendor to disclose to the purchaser the existence of underground storage tanks and their compliance with the legislation.

Government agencies are often under duty of confidentiality and are reluctant to provide information, unless there is either a written authorization to do so from the vendor or an application approved under the *Freedom of Information and Protection of Privacy Act*. Consequently, the purchaser should obtain from the vendor the required approvals.

The most important and effective means of specifically defining the environmental problems that are existing or may arise, is to **have an independent environmental audit conducted**. It is beyond the scope of this presentation to consider environmental audits in any further detail than I did earlier.

Suffice it to say that if an audit

reveals environmental problems, the simplest provision in any contract is to give a right of termination. This right of termination could be given to either the vendor, or the purchaser, or both, and could be triggered by the discovery, by either party, that such problems exist.

Alternatively, the right of termination could be more narrowly defined, and arise only if the problems could:

- Cost over a certain amount to remedy;
- Take a certain length of time to remedy;
- Be of particular concern to the purchaser; or
- Involve particular suspected problems such as groundwater contamination.

If only one party wishes to terminate the contract for environmental reasons, a more complicated approach gives the other party the option to perform the remedial work, and keep the contract in force. Of course, there are a number of variations possible.

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Environmental audits are often an important consideration for prospective lessees and financing institutions. Serious contamination by the lessor could have the effect of disrupting the lessee's operation, notwithstanding the lessee may not be responsible. A secured creditor will not want to find itself precluded from realizing on security because of serious environmental liabilities discovered after the money has been advanced.

Although environmental audits are becoming more commonplace in Canada, unfortunately there are no

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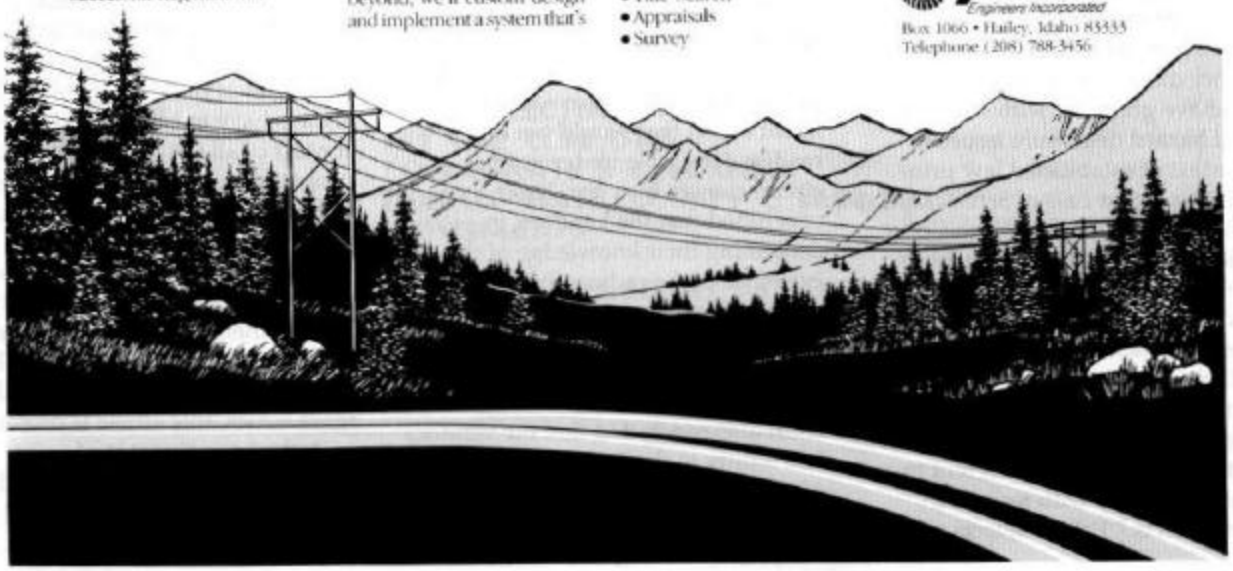

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statutory provisions concerning the protection against disclosure of any audit information, and the use of such information by the regulators against the owners in connection with the prosecution of an offense. Care must therefore be taken on how environmental audits or assessments are structured and carried out. Where appropriate, in order to best protect the parties, special steps should be considered to invoke a solicitor/client privilege, as well as the general confidentiality or trade secret argument.

*With respect to the vendor's perspective, the extent of the vendor's obligation to disclose relevant environmental information to a purchaser is driven by moral, legal and contractual imperatives.*

### The Vendor's Perspective

With respect to the vendor's perspective, the extent of the vendor's obligation to disclose relevant environmental information to a purchaser is driven by moral, legal and contractual imperatives. A vendor's natural instinct to divulge as little as possible must be balanced against potential legal liability for inadequate disclosure, contractual trade-offs made in the bargaining process, and the vendor's place and profit profile in the business and general community.

In the general absence of specific statutory disclosure guidelines, the courts have grappled with environmental hazard disclosure issues in the context of established law principles. The recent case of *Servidal vs. Chopra* (1987) an Ontario High Court decision, has drawn much attention in the legal community, perhaps as much for the notoriety of the subject matter, radioactive soil, as for the significance of the legal reasoning.

It has been generally accepted that the vendor's duty to disclose "patent defects" is significantly different from the vendor's duty with respect to "latent defects." Patent defects are those defects which would be obvious to a reasonable purchaser on inspection. Latent defects are those which would not readily be detectable under normal circumstances by a purchaser upon inspection. In *Servidal vs. Chopra*, the vendors, prior to signing the Agreement of Purchase and Sale, were aware that radioactive material had been discovered in the immediate vicinity of their property. Approximately one week prior to closing, the vendors were informed that radioactive material was contained in the soil on their property. However, the vendors did not disclose any of this information to the purchaser, either at the time the agreement was signed, or up to and after closing the transaction.

On the issue of the vendor's duty of disclosure, the court affirmed the general rule that the doctrine of caveat emptor (buyer beware) applies to matters of quality and condition of property. However, where there has been fraud, mistake or fraudulent misrepresentation on the part of the vendor, caveat emptor ceases to operate.

The court in *Chopra*, after establishing that the radioactive soil was a latent defect that would not be readily detectable under normal circumstances by a purchaser, concluded that the vendors, in concealing their knowledge of the existence of the radioactive material, were guilty of concealment of facts so detrimental to the purchaser that it amounted to a fraud and therefore the vendors were liable in deceit. The court also concluded that the vendors had a duty to disclose the discovery of the radioactive soil to the purchasers after the signing of the agreement, but prior to closing.

As a result of this case, a vendor's common law duties to prospective purchasers may be summarized as follows:

- Patent defects – that is defects which could be discovered on inspection by a reasonably careful purchaser are generally subject to the rule of caveat emptor, absent contractual warranty or concealment;
- Latent defects – that is defects which could not be discovered on inspection by a reasonably careful purchaser, must be disclosed if known to the vendor. Failure of the vendor to disclose, or misrepresentation by the vendor, will entitle a purchaser to rescind the contract and damages.

Thus, in the environmental context, the common law would dictate that a vendor would be required to disclose the existence of latent defects, such as buried hazardous wastes on his properties, if known to the vendor, but need not specifically disclose a patent defect, such as a clearly visible, identified and properly maintained PCB storage site.

### Conclusion

It is clear that environmental law problems are going to continue to be an increasingly significant consideration in commercial real estate and business transactions in Canada. The environmental issues, however, and allocation of the risks involved, will always have to be resolved in the context of all the other aspects of the proposed transaction, including the important overall business, financial and tax consideration.

In recent years, the issues associated with environmental liability and management have become increasingly involved and complex. While it has not been possible to cover all of these issues, this article is presented with the hope that it is of some assistance in understanding and dealing with the environmental aspects of day to day business.