

CON·STRUCT

Part of Volume 1, Issue 1

DEALING WITH CONTAMINATED LANDS: LESSONS LEARNED

Whether a local government is buying, selling or regulating the development of land, environmental issues often play a significant role. Over the last few decades, the identification and allocation of environmental risk has become increasingly detailed and sophisticated, making an understanding of BC's Environmental Management Act (EMA) and Contaminated Sites Regulation (CSR) critical.

The EMA and CSR regulate the contamination of lands, impose obligations to remediate contaminated lands, set standards defining contaminated sites, create liability for persons responsible to pay the cost of remediation and link satisfactory remediation to other regulatory approvals (e.g. rezoning and subdivision). A foundation of this scheme is the "polluter pays" principle, which requires polluters to pay the cost of the clean-up of contamination from which they have benefitted in the past (even in cases where their polluting activities had not been prohibited or had been authorized at the time they occurred). Specifically, Part 4 of the EMA imposes liability to remediate a "contaminated site" on "responsible persons" and creates a statutory cause of action which permits a cost recovery claim for remediation costs reasonably incurred. Under this scheme, prior owners can protect themselves from future liability through the "Certificate of Compliance" (COC) regime, which requires demonstrating compliance with the EMA's risk-based or numerical remediation standards.

In addition, did you know that...

- the EMA casts a wide net of liability for contaminated sites remediation. "Responsible persons" include current

or former owners of a contaminated site or a site from which contamination migrated and may also include those who produce or transport hazardous substances.

- there are exemptions from liability, including for a government body that involuntarily acquires ownership of contaminated land (e.g. through a tax sale), a person who "innocently" acquires contaminated land and a person whose site is contaminated only by migration from another site.

- a person is not responsible for remediation if they are a current or previous owner of an easement, right of way or section 219 covenant, provided they can establish that any use of the site did not result in contamination in whole or in part.

- liability under the EMA is absolute (e.g. there is no defence of due diligence), retroactive (e.g. there is liability for clean-up of past contamination) and joint and separate (e.g. one or more persons are liable to pay the entire clean-up cost, if other responsible persons cannot or will not pay their share).

- if you acquire a site that has already been remediated (and a COC issued), you may be liable for further remediation depending on your intended use of the site. A "responsible person" is only required to bring the contaminated site to the applicable standard for its current use, not to a future higher use that may be made of the site by a future purchaser.

- while a COC provides some assurance that contamination issues have been addressed, it is not a guarantee

(Continued on page 2)

that there is not contamination on the property (e.g. does the COC cover the entire site or only a portion? Were potential off-site impacts addressed? How old is the COC? Could there have been additional contamination of the land since the date of issuance? Have legislative standards changed since the COC was issued? Is the COC based on remediation to numeric standards or a risk assessment? In the latter case, contaminants remain on the site and may be subject to ongoing monitoring and control requirements).

- finally, the EMA will not provide immunity to prior owners who had undertaken remediation in the past, but which remediation falls short of the EMA's current standard - even where remediation was performed in consultation with government officials at the time and comfort letters or other governmental assurances were provided.

June, 2016
Pam Jefcoat



Pam Jefcoat
604.358.2248
pam@civiclegal.ca

Pam brings over 18 years of combined legal experience in local government and commercial real estate matters with a focus on land use planning, subdivision, rezoning and redevelopment of residential, mixed-use and industrial properties. Pam has worked on numerous large-scale development projects throughout the Province and provides strategic and practical advice on project development, infrastructure financing and transactional matters. Pam also has a Master's Degree in Public Administration and is a seasoned advisor for local governments in all aspects of their legislative authority, including bylaw development, constitutional jurisdiction, conflict of interest and FOIPPA.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.