

Business Beware!

Upcoming Environmental Legislation Could Wreak Havoc on SMEs.

By
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OVER THE NEXT FEW MONTHS, THE FEDERAL, PROVINCIAL and territorial governments across Canada will be monitoring how British Columbia implements revisions to its environmental clean up legislation - particularly in Saskatchewan, Alberta and Manitoba.

But interest is certainly not limited to those jurisdictions. Small- and medium-size businesses throughout Canada - and particularly those in British Columbia because it's a leader in this type of legislation - are often at greater risk of encountering environmental liability than larger businesses. But all business-owners and their shareholders should pay close attention to this developing legal field in the next few years because this law is so tough that ignorance can literally kill a business unlucky enough to be snared in its web. Liability is so high that the cost of clean up can easily be in the millions.

Much of our environmental clean-up law casts a wide net. Smaller businesses are most often at risk because they are usually tenants, landowners or in some other sense the hands-on operators of industrial or formerly industrial land. That puts them in the front lines of lawsuits and government investigations if land is discovered to be contaminated - and the definition of "contamination" is unpredictable.

This fall, the British Columbia government is expected to pass the new Environmental Management Act (EMA). In it are provisions that may yet be changed - it depends on how successful those lobbying against are - but these provisions is worrisome. The new law, like the old, has a broad sweep and has serious implications for anybody with an interest in land that the government regulators deem to be contaminated. In the law's eyes, virtually anybody who has carried on an activity at a contaminated site may be found to be an "operator" on that site, and if you had any "interest" in the contaminated site itself, even if that link is tenuous, you may be deemed an "owner."

It gets worse: all owners and operators, present and historic,

can potentially be named responsible by B.C.'s director of waste management and ordered to clean up a contaminated site - even if they did not dump the oil or spill the chemical.

Producers and transporters of nasty substances, whether they are going to or from a contaminated site, may also be found responsible, but they must be shown to have actually "caused" the contamination as well. There is no such causation protection for owners and operators.

Numerous owners, operators, producers and transporters may be found responsible for contamination at any given site. But there exists a worrisome provision, which may yet change by the time the law is introduced. Each is jointly and severally liable for the clean up of such contamination. That means, and it doesn't get more simple or tougher than this, that each responsible person is technically responsible for the entire clean up, regardless of the portion of the contamination each person actually caused. Business people in B.C. are hoping this provision won't be as stringent in the final legislation as it is in the draft bill, but they should be doing more than hoping if they want changes.

UNDERSTANDING THE LETTER OF THE LAW

Environmental law is designed to be "polluter-pay" legislation. Theoretically, then, the actions of government officials should focus responsibility for contamination on the actual polluters and ultimately the cost of clean up should be borne by each polluter in proportion to their degree of contribution. Upfront, however, the government's key objective is to get the problem cleaned up and to worry about apportionment later amongst "responsible persons". This does not speak to the best interests of those on the hook.

In B.C., directors, officers and even employees of a polluting company face another problem: they are arguably automatically responsible for their company's wrong-doing, even if they personally had nothing to do with the contamination. This auto-

matic responsibility comes into play when the director of waste management is establishing a list of responsible parties to do the initial clean up at a given contaminated site.

Smaller businesses that are subsidiaries of larger companies also face responsibility for contamination, even when true control seems to be held by the parent. Similarly, the degree of control a parent company exerts over a subsidiary can lead to the parent company being found responsible for the subsidiary's



actions. There may be more than one owner and operator at any given site because "control" over an operation that causes contamination is not often in the hands of just a single party.

Private agreements, through which two or more parties may determine or allocate responsibility at a contaminated site by contract, are particularly important to the day-to-day operation of a small- and medium-size business. Any business in any industry can prepare asset and share purchase agreements, property sale agreements and other contracts in such a way as to minimize their risk of responsibility for historic or even future contamination. But it's fundamental under this new regime that anybody contemplating becoming involved in a property perform due diligence to ensure they know what has likely occurred on that property in the past. Was there once a chemical plant on it? Did the property once house storage tanks? These are the kinds of questions that need to be asked first.

The B.C. Supreme Court recently ruled that every lease contains an implied term requiring the tenant to return the property to its owner in a clean state. This important decision found, despite the property owner's full knowledge of the contaminating activities carried on by the tenant, that it was the tenant who should bear 100 per cent of the costs of clean up. A clear lease agreement can potentially counter this assumption and place responsibility where the parties want it to be.

EXCEPTIONS TO THE RULE

Exemptions from responsibility exist for certain individuals in B.C. Other provinces have similar protections. For example, in B.C., you are not responsible for contamination that has migrated from a neighbouring property through no fault of your own. Purchasers of land may also be exempt from responsibility if they make every effort to ensure a property is clean before purchasing it. Certain landowners also have an exemption from responsibility where they buy clean land and have nothing to do

with the land's subsequent contamination by a third party. Every small- and medium-size business in the country should be familiar with all exemptions in their area in order to take the steps necessary to protect them down the road if their land is deemed contaminated.

Environmental consultants, who are often small consulting companies or partnerships, also have an important exemption in B.C. Specifically, if not negligent, an environmental consul-



tant cannot be deemed a responsible person merely by virtue of carrying out clean-up operations on a contaminated site. But, if an environmental consultant is negligent, they lose their exemption under the legislation and potentially become a responsible person, with all the difficulties such a designation entails, in addition to any liability they may face as a result of their negligence.

Responsible persons may be able to obtain insurance coverage for the costs of clean up, despite the absolute pollution-exclusion clause found in most commercial general liability policies. Such coverage may even include a requirement that the insurance company pay legal costs associated with the defence of claims against the insured person, whether or not they are ultimately liable. This potential saviour should not go unexplored.

Smaller businesses are uniquely vulnerable for environmental liability because they have often had some hands-on contact with the site in question. This can mean, even if not the polluter, the smaller company can be dragged through negotiations with government regulators, an appeal to the Environmental Appeal Board, and a trial to determine who is responsible for what. The defence of such cases can be as much as the cost of clean up. Therefore, any contractual protection that can be obtained from the real polluter, the landlord or tenant (as the case may be), or the buyer or seller - with the right parties as signatories to the contract - can greatly assist when a contamination problem is later discovered on land with which your company has had some degree of contact. Buyer beware has become everyone beware in B.C., and elsewhere.

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