

BASICS OF SASKATCHEWAN ENVIRONMENTAL LAW

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A. INTRODUCTION

The phrase "Out of sight, out of mind" is never more accurate than when describing contaminated property. Some of the most hazardous sites in our province look perfectly ordinary. Often they are innocuous service station lots; at times, the present use does not even hint at what the property previously held.

Regardless of the present use, the problem usually becomes apparent to the general public when tanks are being dug up, soil is removed, or other remediation efforts take place. That remediation, however, often comes only after a long period of legal maneuvering. It can also signal the beginning of further argument about who has to pay.

This paper will describe the framework that governs Saskatchewan environmental liability in situations such as this. For reasons of time and space, I will be concentrating on contamination of land. This does not mean air pollution, environmental assessment and waste management are less important, but it would be impossible to cover them all in the brief time allotted. Even so, land issues are by far the most common, and illustrate the principles that apply to all contamination situations.

As with any legal issue in Canada and Saskatchewan, both legislation and court decisions apply. This paper will look at each type of law, as well as a couple of other issues that are pertinent *vis a vis* environmental matters.

B. STATUTES AND REGULATIONS

Environmental Management and Protection Act

The EMPA has been in force in Saskatchewan for many years but many residents have never heard of it. Nonetheless, it remains the most important environmental legislation in the province.

The EMPA affects more than just land. It also applies to such things as water reservoirs and land development. The contaminated land provisions are used the most, however, since they are available to both government and the general public (but not necessarily each at the same time). There are five aspects of the EMPA to be aware of.

1. Ministerial Orders

Saskatchewan Environment and Resource Management ("SERM") uses the EMPA as an enforcement tool when there has been a discharge. It is important to note who the EMPA applies to; not everyone has a responsibility to clean up. There is also some ambiguity as to where this line is drawn. With all due respect to SERM, their interpretation of the statute is not binding. Therefore, a SERM order may not automatically be valid against a party.

Three "persons" are potentially liable for clean-up under the EMPA. "The owner of a pollutant" means the owner of a substance immediately before the first discharge of the pollutant, and includes successors, assigns, executors and administrators of such a person. "The person having control of a pollutant" means the person having the charge, management or control of the substance immediately before the first discharge of the pollutant. Again, successors, assigns,

executors and administrators are included. The third category is "the person responsible for the presence of the pollutant". This term is undefined in the Act, and presumably takes its ordinary, everyday meaning.

When there has been a discharge, or a clean-up is required, these persons can be the recipient of an order from SERM. The order can take many forms. The most common, of course, is a direction to remove the contamination in accordance with standards set out by SERM. The order can go much further, however. A person may have to conduct investigations, store the contaminant, maintain records, or take other measures that the Department deems necessary.

But who are these "persons"? The terms are vague, and we have not yet had any Saskatchewan cases to tighten the definitions. Some parties would obviously be included. For instance, a company that actually discharged pollutants would be a "person responsible for the presence of the pollutant", and perhaps would be covered by all three definitions.

Other situations are not so easy to categorize. Are subsequent landowners caught, even when they did not contribute to the pollution? The fact that "successors and assigns" are included is certainly a strong argument that anyone in the chain of title is liable. SERM is taking this view, but there are, in my opinion, equally strong arguments on the other side. The government is aware of this ambiguity, and is working on amending the legislation within the next few months.

Even if subsequent landowners are not liable as a successor or assign, what happens if the contamination continues? For example, it is very common to have former service station sites that are highly contaminated. The hydrocarbons in the soil, such as gas and oil, usually leach onto neighbouring lands. Is this leaching a "new" discharge, so the present owner is considered to be the polluter? Again, there are no cases on point, but you can certainly expect the argument to be raised when appropriate.

In most cases, the order will be issued by the Department, and the recipient will have to comply. Where there is an emergency, however, or where the appropriate person cannot be located, the Minister has the right to perform the remediation himself. The cost can then be charged to the person responsible. Unlike you or I, the Minister does not have to sue to recover this money. Instead, the invoices can be registered at the Court of Queen's Bench, and thereafter, the debt has the effect and enforceability of a judgment of that court.

2. Duty to Report

Section 9 of the EMPA creates a broad reporting requirement. The owner of a pollutant, the person having control of a pollutant, any person on whose property a pollutant is located, or any other person who has knowledge relating to the pollutant or its discharge must furnish and maintain any information that the minister or an environment officer may request. There is still not a positive duty to come forward without being approached by the minister, but remember that there may be further obligations under other statutes, Codes of Ethics, and the like.

The failure to disclose under s. 9 can open a person up to additional penalties under the EMPA. On the other hand, there can be a conflict with other principles. For example, a lawyer might be bound not to disclose because of solicitor/client privilege.

3. Statutory Civil Liability

A ministerial order is the basic weapon that the government can use against polluters. What about private citizens, especially those that may have suffered contamination from other lands?

In addition to the common law remedies discussed below, s. 13 of the EMPA permits a specific form of lawsuit in such circumstances.

A Section 13 action can apply if there has been any economic loss, personal injury, loss of life, or loss of use or enjoyment of property. The victim in such a case has a right to compensation from the owner of the pollutant, and from the person having control of the pollutant, for loss arising from a discharge, or for defaulting under ministerial orders or reporting requirements.

A victim does not have to prove the defendant was at fault, or negligent, or that he/she willfully intended to cause the damage. There are two defences that remain, however. First, and probably less importantly, if the discharge was caused by an act of war, or an exceptional natural phenomenon, no liability results. Acts of God would thus not give rise to a civil suit under this statute.

The more important defence is known as the "due diligence defence". If the defendant took "all reasonable steps" to prevent the discharge, he or she will not be liable under Section 13. What are all reasonable steps? Simply stated, they will depend on the circumstances. For example, nuclear waste material will probably have to be handled much more stringently than household garbage. Those persons in the business of handling hazardous waste might also be held to a higher standard.

The due diligence defence is not only applicable to EMPA actions. There are a number of environmental offences which allow such a defence. This has spawned a growing awareness among businesses that due diligence plans should be put into place. In essence, a system is created to try to avoid problems before they occur. Checklists can be used to define the "environmental conscience" of the business, and ongoing monitoring must be maintained. If despite these safeguards a discharge still occurs, the business will be able to point to its preventative system as an example of taking "all reasonable steps". Due diligence is very important in avoiding environmental liability, and will be discussed elsewhere in these materials.

It is important to note, though, that the due diligence defence does not apply to ministerial orders. This can be important to present landowners who are trying to recover from a former polluting property owner. If you sue a party directly under Section 13, the defendant will probably argue that it was duly diligent. This could defeat your claim. To avoid this, you might try to convince SERM to issue a ministerial order against the polluter. The due diligence defence could not be raised, and you would be much less likely to be saddled with the clean-up cost.

4. Limitation Dates

A further restriction on liability under Section 13 is that actions must be brought within a certain period of time. For most purposes, this term is 6 years from the date the discharge occurred (it sometimes starts to run on the date the discharge could reasonably have been discovered).

Limitation dates are always a concern in environmental cases because of the insidious nature of pollution. Most problems arise from leaking underground storage tanks, which are undetectable through simple visual inspection. Unless strict monitoring procedures are followed, it is easy for leaks to start and continue for months and even years before being discovered. Further, the fact the contamination is hidden means land can be bought by innocent purchasers with no knowledge of a previous discharge. It might only be years later, by accident, that the discharge comes to light. If this is beyond the 6 year period, no legal remedy may be available.

5. Liability

Who is liable under the EMPA? We have already mentioned those persons who may have control or ownership of the pollutant. The most important other class that can be fined or jailed is directors/officers of wrongdoers. The trend is for this type of liability to become more common, as governments fear that polluters will simply hide behind a corporate shell to avoid clean-up costs. Non-owner liability will be discussed in more detail elsewhere in these materials.

Hazardous Substance Regulations

The Hazardous Substance Regulations ("the Regulations") are actually a part of the EMPA, since they are passed under the authority of that Act. However, the Regulations are a fairly complete code in of themselves. Because of their importance, they will be discussed in a separate paper. For these purposes, you should be aware that the Regulations set out storage standards for warehouses and tanks.

Spill Control Regulations

It was mentioned above that there is not a direct duty to disclose under Section 9 of the EMPA — one can wait until a request is received from the Minister or an environmental officer. Under the Spill Control Regulations, the onus is much greater.

When a spill occurs, the person having control of a pollutant must report the spill as soon as possible to SERM, each owner of a property on which the pollutant is spilled, and the owner of the pollutant. In addition, every police officer and employee of an urban or rural municipality who has knowledge of a discharge must report the spill to SERM, unless they have reasonable grounds to believe that it has been reported by another person.

The report is actually in two parts. First, a telephone report must be made (to (800) 667-3503) giving the basic details. Within seven days thereafter, a more detailed written report is required.

In addition to the reporting requirement, the responsible persons must take all reasonable action to contain the pollution and minimize the effects of the spill.

Canadian Environmental Protection Act ("CEPA")

CEPA could be called the federal equivalent of EMPA. This is an oversimplification, however. There are overlaps between the two statutes, but they do have different goals. In addition, the two levels of government have, for the most part, been able to divide jurisdictional issues that fall within the overlapping areas.

CEPA is more directed at the "big picture" than EMPA. Whereas the latter statute provides much of the detail required for dealing with environmental contamination, CEPA exists more to provide a policy framework within which the various provinces can work. Therefore, the federal government's concern is to ensure certain minimum standards are met, and that those standards are roughly equivalent across the country. If those goals are met, the day to day aspects of environmental contamination and enforcement will usually be left to individual provinces.

You will continue to have contact with the national branch of government. Federal environmental officers may still come calling with warrants, orders and the like. In most cases that our office has seen, this involves toxic substance situations. For example, the Act permits

the creation of a "Domestic Substances List", which includes all substances that are used, manufactured or imported into Canada. The operation of the List is simple — one cannot use, manufacture or import a substance that is not on the DSL. The List contains tens of thousands of substances, so most common materials are already included. Nonetheless, persons should be sure any special chemicals they rely on in their business are on the DSL.

Other provisions of CEPA deal with nutrients (that is, those substances which can lead to algae and weed growth in water), release of contaminants, international air pollution, and ocean dumping. These requirements are very general, and are usually specifically dealt with through separate regulations.

In summary, you should not try to memorize every regulation passed under CEPA — there are too many, and the majority will never affect you. However, if an environmental issue arises, remember CEPA is there and it should be examined for applicability.

Other

The above legislation is undoubtedly the most important to Saskatchewan residents. Despite this, there are literally dozens of federal, provincial and municipal statutes, regulations and bylaws that can apply in environmental matters. Some of these include:

1. *The Ozone-depleting Substances Control Act.* As its name implies, this Act is concerned with items like Freon™ and other CFC's that are alleged to be harming the ozone layer. There are two goals. First, sale and disposition of substances is strictly controlled, and a Code of Practices is adopted. Secondly, many uses of CFC's will be banned.
2. *The Clean Air Act.* This is the primary air pollution statute in the province. Most emissions, incinerations and other operations impacting on air quality are regulated and/or prohibited.
3. *The Environmental Assessment Act.* Provincial and federal Assessment Acts have garnered a great deal of publicity because of the Oldman and Alameda dam projects. Megaprojects such as these are not the only situations affected. Technically, any activity that could have an effect on the environment will require an impact statement to be prepared, or possibly public hearings. Thus far, the government has been fairly relaxed on these requirements, but expect a much more comprehensive Assessment Act in the near future.
4. *The Litter Control Act.* To date, this Act has been most concerned with ordinary refuse and refillable beverage containers. Waste management has become a hot topic, however, and there will probably soon be a comprehensive Waste Minimization Act. This will cover recycling, reuse, reduction and all stages of the waste stream, from design and production to ultimate disposal. The tax which has been imposed on tetra-paks and other packaging is a first step in this direction.

These are just a few of the statutes involved. Again, if an environmental liability seems imminent, advice should be immediately sought to determine possible exposure.

C. COMMON LAW LIABILITIES

Statutes are not the only laws that one needs to be concerned with. Although environmental awareness is fairly new, hundreds of years of court cases have given us many rules to use. For some purposes, these are preferable to proceeding under a statute, although this is not always

the case. In most environmental lawsuits, relief will be sought under both statute and the common law.

Nuisance

Nuisance is one of the oldest methods of dealing with pollution problems. It applies where a person has unreasonably and substantially interfered with another person's use and enjoyment of his or her land. This can refer to noise, unpleasant odours, or physical contamination.

Nuisance is "fault neutral". That is, the focus is on the damage suffered by a plaintiff, and little or no consideration is given to whether the defendant purposefully or intentionally caused the wrong. The type of damage suffered may affect defences available, though. If actual property damage occurs (as opposed to only interference with use and enjoyment of the property), liability will be almost automatic.

The defendant in a nuisance action does not have to be the actual polluter. Cases have held an owner of polluted land to be liable, even when he or she did not cause the original contamination. The acquisition of land can therefore cause unforeseen problems to a purchaser. This helps to explain the popularity of environmental audits to determine if there are hidden liabilities.

Negligence

Negligence is not confined to environmental cases. It is used in everything from personal injury actions to drug tampering liability suits. It can apply whenever one party has breached a duty of care that was owed to another. This includes situations where it was reasonably foreseeable that property damage or personal injury would have been caused by the lack of care.

The duty of care depends on all of the relevant circumstances. The handling of chemicals in a residential area will require more care than if the processing is done on a remote industrial site. Salt water will not require as many safeguards as gasoline. Again, the test is what a reasonable person would do in the circumstances.

As a result, fault is more of an issue than in nuisance. This is often a problem in environmental cases, since the damage may have occurred many years ago, under doubtful circumstances. There are clearly problems in trying to prove negligence when memories and facts are so old.

D. OTHER ISSUES

Orphan Sites

Contaminated land is often treated as a hot potato. Polluters try to divest themselves of ownership in the hope of avoiding liability. Purchasers refuse to buy. Municipalities give up their tax lien rights, and write off the land. Lenders discharge their security and refuse to proceed with foreclosure.

The result of this is land without an owner, or "orphaned property". In actual fact, land can never be without an owner — someone will always show up on title. However, that person may be bankrupt or insolvent. Lawyers refer to them as "judgment proof parties". There is no point in directing an order or lawsuit against them since they will not pay.

This problem of orphan sites can arise whenever the cost of clean-up equals or exceeds the value of the land itself. If anything, it is even more of a problem in Saskatchewan than in other

more industrialized provinces, since our land values are relatively low. Despite this, the cost of clean-up is similar to other jurisdictions. The result is a fairly high percentage of potential orphan sites. For example, a service station lot in small-town Saskatchewan might have a value of \$10,000-\$20,000. It is virtually impossible to clean up significant contamination for less than that amount.

The resolution of orphan sites is still in limbo. A shotgun approach is most often favoured by plaintiffs, including SERM. That is, every possible party with an interest will be sued (the polluter, subsequent owners, mortgage companies, receivers, etc.) in the hope that one of them will be found liable. At most risk in a situation like this are the "deep-pockets" defendants like banks and municipalities. If every other party cannot pay the judgment, only those solvent ones will be left.

Retroactivity

It is obvious that contamination standards are more stringent than they have ever been. Some parties are claiming that this is unfair, because it changes the playing field after the game has started.

The EMPA is a good example of this. Technically, it can apply to a discharge that occurred even before the Act was proclaimed in 1984. What happens if an oil company has been carrying on business for decades, in accordance with the standards of the day? All of sudden the EMPA is passed, with increased duties and liabilities. It may be that the business can comply with new standards from that day forward, but it cannot do anything about the past. The result can be severe and unforeseen financial exposure.

This problem will not go away. We have no idea of what standards will be in future years, or if our actions today will be held to those requirements. If they are, perhaps we should be allowing for contingencies in future clean-up costs.

E. CONCLUSION

This has been a general summary of environmental liability law in Saskatchewan. It is by no means exhaustive, but it does illustrate the main principles involved.

Governments today are wrestling with many competing interests when assessing liability. Making the polluter pay seems to be the fairest rule, but it does not work all the time. The polluter may be insolvent or judgment proof. The question then becomes whether the person with the deepest pockets, or the person who will most benefit from clean-up, or someone else, will bear the costs.

Some of these issues may be resolved in the next amendments to the EMPA, but these are still in the early discussion stages. Until then, the best approach is prevention: avoid purchasing polluted land where possible. If you already own contaminated property, investigate your options fully. There may be a cost, but non-action will only increase your exposure.

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