

ENVIRONMENTAL RISK AND INSURANCE – Everything You Wanted to Know But Were Afraid to Ask!

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Agenda

- What are Environmental Risks and why should you care?
- How can you manage Environmental Risks?
- How Insurance can help
- Questions?



What are Environmental Risks?

- Legacy or Historical Risks
 - Past activities on a site(s) have resulted in pollution conditions
 - Ongoing legal issues (e.g. fines, suits) related to past activities
 - Joint, several and retroactive liability regimes
 - Typically an issue during transactions
- Operational Risks
 - Ongoing activities of company have inherent environmental risks
 - New Regulations can result in the need for expenditures/upgrades
- Contracting and Errors & Omissions (i.e. Professional) Risk
 - Contractors & consultants who perform work for others and/or on 3rd party sites

Emerging Environmental Risks

- Reputational Risk
- Climate Change Risk
 - Physical
 - Regulatory
- Products Liability Risk
- Product Stewardship
 - Strong in EU (REACH) and growing in Canada/US
- EU Environmental Liability Directive
- Natural Resource Damages
- Green Construction Risks

Environmental Risk Management

Drivers and Stakeholders

- Environmental Regulations
- Financial and Non-Financial Reporting Requirements
- Lenders and Insurers Requirements
- Tenant/client Requirements
- Municipalities
- Civil-Society/Non-Government Organizations (NGOs)
- The “Green” Consumers Movement
- Shareholders including Institutional Investors and Activist Shareholders

Environmental Risks and Regulation in Saskatchewan

- Ongoing agribusiness activities
 - Traditional agriculture and concentrated animal feed operations
 - Agrichemicals (extraction, processing, use)
- Significant growth in resource/extractive industries
 - Oil & Gas
 - Mining
- Provincial Legislation
 - *The Saskatchewan Environmental Code*
 - *The Environmental Management and Protection Act, 2010.*

Managing Environmental Risk

- Identify - e.g. due diligence (Phase I and II ESAs, Compliance reviews/audits, building material surveys, etc.)
- Prevent - e.g. develop environmental management system
- Avoid - e.g. don't buy property/business
- Remove - e.g. change your procedures/process
- Transfer - e.g. indemnity agreements including purchase of environmental insurance coverage



Traditional “Risk Handling” Techniques

- Environmental Indemnification
- Risk Financing:
 - Loan/collateral guarantees;
 - Trust funds;
 - Letters of Credit; and
 - Escrow funds.
- Purchase Price Negotiations



Does the Insured have the right environmental/pollution coverage?

- General Liability
 - Often an Absolute Pollution Exclusion
 - Named Peril **and/or** Time Element coverage extension
 - 3rd Party Bodily Injury/Property Damage
 - No on site Clean Up Coverage
 - Waste/Waste management activities not covered
- Excess Liability - Named Peril **and/or** Time Element extension
 - 3rd Party Bodily Injury/Property Damage
 - No Clean Up Coverage
- Auto Policies
 - Typically silent with respect to pollution in Canada
- Property Policies
 - Some may provide a sub-limit (ef \$50K) of pollution coverage related to a named peril

Environmental Insurance - A Strategic Risk Management Tool

- Can provide coverage for claims related to both historical and operational pollution conditions
- Can back-up or substitute for an indemnity
- Can neutralize the effect of “unknown” environmental conditions
- Can bring cost certainty to the cleanup of known conditions
- Can address regulatory re-openers/changes in regulations
- Can reduce toxic tort risks
- Can facilitate financing

Environmental Insurance Tools

- Environmental Impairment Liability (commonly referred to as Pollution Legal Liability or PLL)
- Contractors Pollution Liability
- Lender Liability
- Underground Storage Tank coverage

Note: Different insurers use different names for similar coverage

Main insurers in Canada include: CHARTIS, XL, ACE, Zurich, Liberty, Chubb, Great American, Ironshore*, QBE*, and Beazley*

* Lloyds syndicates

Pollution Legal Liability

TORT

Bodily injury on- and off-site

Property damage on- and off-site,
including Natural Resource
Damage (NRD)

CLEANUP

On-site /off-site cleanup coverage
for contaminants on, within, under
or emanating from the site:

- Unknown pre-existing; and
- New conditions.

OTHER

Non-owned disposal sites
Business interruption/
extra expense/project delay
Transportation

Timeline of Coverage*

Covers
“Unknown Pre-existing”
Contamination

Policy Inception
* Discovery or Third-Party Trigger

Covers
“New”
Pollution Events

Pollution Legal Liability Coverage

- Terms of up to 10 years currently available
- Single site/facility or portfolio program
- Known Pollution Conditions generally excluded:
 - Risk assessed sites can be covered;
 - Coverage can be re-instated after remediation complete; and
 - Change in standards during policy period generally covered.
- Coverage can be excess of an indemnity provided by other party (e.g. seller/purchaser)
- Can include lenders as additional insureds and have policies assignable in the event of default

Pollution Legal Liability (cont)

- Typical underwriting requirements
 - Recent environmental site assessments
 - Loss control reports with details of site operations
 - Details of environmental policies/procedures (eg environmental management system)
 - Purchase/Sale agreements for transactional placements
 - Including any indemnities for pollution conditions
 - Details of any known/suspected environmental claims and/or government orders/fines related to known/suspected pollution conditions
- What are appropriate limits?
 - Depends primarily on severity of risk
 - Number of locations included
 - Term (ie longer term may lead to higher limits)
 - Requirements of regulators/lenders/deal

Contractors Pollution Liability

- Coverage for claims related to pollution conditions caused by, or exacerbated, by a contractor(s)
- Owned/leased locations generally excluded
- Can be annual policies purchased by a specific contractor or project specific policies which can cover general contractor and some/all of their sub-contractors
 - Becoming common on large infrastructure projects and other public private partnerships (“PPP”)
 - Can be owner (ie OCIP) or contractor controlled (ie CCIP) programs

Premium Variables

- Variability of Risk (Severity/Frequency)
- Current/Future Site Use and Surrounding Occupancies
- Environmental Management Policies/Procedures (ie Loss Control)
- Scope and value of “covered operations” under a Contractor Pollution Liability policy
- Competition Between Insurers
- Claims History for Insured and Type of Risk
- Conditions in overall Commercial Insurance Market

Trends In Claims

- Most claims we have seen have been discovery of pollution conditions on Insured's sites:
 - Source can be historical on-site activity and/or from an adjacent site(s).
- Some claims related to offsite impacts on insured's site:
 - Remediation costs; and
 - Diminution in value.
- Not many claims related to government orders (so far...)
- Often result from investigations related to transactions including refinancing, purchase/sale, and decommissioning
- Still relatively new line of insurance coverage so it will take time for more trends to come to light

Who buys Environmental Liability Insurance in Canada?

- Real Estate companies
 - Asset Managers; Properties Managers; REITs, Pension Funds
- Infrastructure Project Managers/Proponents
 - Large engineering firms
- Public Entities
 - Colleges/Universities
 - Municipalities
 - Healthcare facilities
- Engineering/Environmental Consultants/Contractors
- Mining exploration and operating companies
- Manufacturing Companies
- Buyers/Sellers in Transactions

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Questions?
Thank You!

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Environmental Risk

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In the Beginning...

Sources of Environmental Laws

- Statute
- Regulation made under statute
- Certificate of approval, license, permits, administrative order
- Guideline, policy, code and standard- not necessarily "law"
- Common Law (judicial precedents)
- Treaties

Operations, or Transactions...

- Risks come from operations, including actions/omissions, current/past, on site/off site, known/unknown
- Can arise under legislation, approval, order
- Common law duties and liabilities (nuisance, negligence, trespass, strict liability)
- Contract- can allocate risks/liabilities, which can then be the basis for liability
- Disclosure for public companies, for all businesses re finance and insurance and increasingly from supply chain issues

Operations, or Transactions...

- Purchase/sale of property: relatively straightforward, but complex issues, particularly related to historic, neighbours and matters that cannot be seen (latent defects)
- Purchase/sale of business/assets: can include property, but also operations, approvals, orders
- Purchase/sale of shares of a company: more complex, because you step into the shoes of the seller... the good, the bad and the ugly (particularly where unknown because historic or that haven't come up, yet)
- Underwriting- sale of shares, with disclosure issues
- Financing- typically protective of lender
- Insolvency/bankruptcy

Select Environmental Legislation (examples)

Ontario

- Environmental Protection Act, Regulations 347 (waste), 419 (air), 362 (PCB waste)
- Ontario Water Resources Act
- Technical Standards and Safety Act, 2000
- Safe Drinking Water Act, 2002
- Clean Water Act, 2006
- Waste Diversion Act, 2002
- Environmental Assessment Act
- Environmental Bill of Rights, 1993
- Toxics Reduction Act, 2009

Saskatchewan

- Clean Air Act
- Environmental Assessment Act
- Environmental Management and Protection Act, 2002 (replacement statute ready but not law)
- Ecological Reserves Act
- Forest Resources Management Act
- Natural Resources Act
- Wildlife Habitat Protection Act

Sources of Liabilities Spills and Discharges

- Federal, provincial, municipal requirements and prohibitions
- "discharge", "deposit", "spill"
- Reporting obligations
- Clean-up and mitigation requirements
- Enforcement: fines (getting bigger!), jail, orders (getting tougher), environmental penalties (administrative monetary penalties/tickets with few defences)
- Civil liability- neighbours in particular

Sources of Liability

Discharge

Ontario

- **EPA, s. 14**: must not discharge a contaminant or ***permit*** the discharge of a contaminant into the natural environment if the discharge causes or may cause an adverse effect
 - discharge: add, deposit, leak, emit, etc.,
 - contaminant: solid, liquid, gas, odour, heat, sound, vibration, radiation or combination
 - natural environment: air, land, water

Saskatchewan

- **EMPA, s. 4**: must not discharge or allow a discharge of a substance into the environment ... that may cause or is causing an adverse effect

Sources of Liability

Ontario

Part X of EPA – Spills

- Spill means, with respect to a 'pollutant', a discharge
 - into the natural environment
 - from or out of structure, vehicle or container
 - abnormal in quality or quantity

Saskatchewan

- civil liability for discharges (s. 15, EPMA)

Sources of Liability Approvals

- licence to carry out activities, otherwise prohibited by law that impact the environment
- federal, provincial and/or municipal
- Offence to:
 - violate the conditions of an approval
 - carry on a prohibited activity without a required approval
 - fail to amend approval when amendment is required (depends on the nature of the approval)

Approvals

- **What do you need an approval for?**
- **In Ontario:**
 - discharges to air or land (s.9, EPA)
 - handling / disposal of wastes (s.27, EPA)
 - establishment of sewage works (s.53, OWRA)
 - permit to take water (s.34, OWRA)
 - engaging in a renewable energy project (s.47.3, EPA)
- **As a *general* rule,**
 - prior to construction, establishment , operation or use of equipment, process or structure
 - prior to modifications to equipment, process or structure (unless a comprehensive approval is in place)
- **In Saskatchewan:**
 - otherwise prohibited discharges (s.4(1)(c), EPMA)
 - construction or operation of waterworks or sewage works (s.21, EPMA)
 - certain discharges to water (s.35, EPMA)
 - changes to watercourses (s.36, EPMA)
 - discharges to air (s.5, CAA)

Sources of Liability Waste

- Key issue that can create liabilities, both operational and legacy
- In Ontario, the EPA is helpful...“includes ashes, garbage, refuse, domestic waste, industrial waste or municipal refuse and such other materials as are designated in the regulations.”
- “Minimized, unusable leftover of a maximized resource”
 - *Philip Enterprises Inc. v. Ontario*

Waste Regulation in Ontario

- *Environmental Protection Act*
 - **Part V “Waste Management”**
 - Part IX “Litter, Packaging, Containers, Disposable Products that Pose Waste Management Problems”
 - **O. Reg. 347 – “General – Waste Management”**
 - O. Reg. 362 – “Waste Management – **PCBs**”
 - “3Rs Regulations”
- *Waste Diversion Act, 2002*
 - Blue Box Waste
 - Municipal Hazardous and Special Waste
 - Waste Electrical and Electronic Equipment
 - Used Tires

Sources of Liability Prohibitions

- Operating waste management system or waste disposal site without certificate of approval (EPA, s.27)
- Depositing (or arranging for deposit) of waste at an unapproved waste disposal site or contrary to a certificate of approval (EPA s.40)
- Using (or arranging for the use) an unapproved waste management system or contrary to conditions of certificate of approval (EPA s.41)

Sources of Liability

Directors' and Provincial Officers' Orders

Ontario

- Written direction by Ministry of Environment ("MOE") Director or Provincial Officer
 - not a charge and conviction; administrative in nature
- Numerous provisions, including
 - Remedial
 - Preventative
 - Stop/control order
- Can be issued to many parties, including:
 - person who causes or **permits** a discharge
 - person who owns/owned or has or had management or **control** of property or an undertaking
 - person who is contravening or has contravened the law

Saskatchewan

- similar provisions in EMPA

Directors' and Officers' Liability

- Positive duty on officers and directors to act diligently
- Federal: Canadian Environmental Protection Act, 1999 ("CEPA"), s.s. 280.1(1)
 - Every director and officer shall take all reasonable care to ensure that corporation complies with the Act, regulations, orders, directions etc.
- Ontario: EPA, s. 194 / OWRA, s. 116
 - Every director and officer shall take all reasonable care to prevent corporation from committing offences, including:
 - unlawful discharges
 - failing to notify the MOE
 - unlawful disposal of certain wastes
 - failing to mitigate the effects of a spill
- Onus is on director/officer to prove he/she took all reasonable steps to prevent the offence
- Not all provinces have followed this trend but likely will be adopted by most over time because of CEPA

Addressing Liabilities Diligence

- For operational matters, due diligence refers to taking reasonable care to prevent an incident, such as an unlawful discharge
- For property acquisition, diligence refers to the steps taken to identify and address potential liabilities
 - Phase I and II site assessments (access, reports, reporting)
 - Key is to retain good, experienced consultant
 - Once identify a liability, need to address: quantify and allocate
 - Need to consider all of the facts and risk tolerance (lender?)
 - MOE Standard or risk assessment? Record of Site Condition?
 - Insurance?

Addressing Liabilities Contaminated Property

- Depends on your ***objective***
 - Own, manage, sell, redevelop, refinance...
- Regulatory authority orders
 - Investigate, remediate, provide water supply
- Civil actions: buyer, neighbour
 - Negligence, nuisance, trespass, strict liability

What you should be afraid of...

- *City of Kawartha Lakes v. MOE* (ERT)
 - 'innocent' landowner ordered to clean up contamination
 - denied appeal for "fairness"; EPA designed to protect environment first (sometimes some unfairness will result)
- *Currie v. MOE* (ERT)
 - Former directors of prior property owner obligated to pay for remediation
 - Burden lies on directors to provide they did not exercise management or control
- *Superior Fine Papers v. MOE* (Ontario ERT)
 - Former property owner paid purchaser to assume remediation obligations – purchaser failed to remediate
 - Party cannot avoid statutory responsibilities through contract

...some good news

- *Smith v. Inco* (Class Action)
 - strict liability/nuisance claims based on release of nickel reduced property values
 - Court of Appeal overturned a \$36 million award to Port Colborne property owners

More good news...Brownfields, but...
(there's always a but...)

- EPA/OWRA orders- qualified immunity (**not s.43 waste**)
- RSC protection:
 - “in respect of a contamination that was discharged into the natural environment before the certification date and was on, in or under the property as of the certification date”
- ***no protection from civil liability***
- certain liability for “re-openers”: off-site migration, emergencies, false information

Thank you

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