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Real Estate

Dilution of 'polluter pays' principle in Environmental Protection Act

By **Harjot Atwal**

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(May 13, 2020, 1:02 PM EDT) -- In the commercial real estate context, I always tell my clients that environmental due diligence is a "must." It is not unheard of, for example, to end up paying hundreds of thousands of dollars in remediation and cleanup costs after closing (depending on the scope of the issue), when later discovering your property's contamination history. As a result of a recent Divisional Court pollution case where leave to appeal was denied, prospective purchasers should be even more wary. In a way, the decision literally further extends environmental liability beyond their property's boundaries.

The decision in question is *Hamilton Beach Brands Canada Inc. v. Ontario (Ministry of the Environment and Climate Change)* [2018] O.J. No. 4500 which confirms an expanded scope of the Ministry of the Environment's (MOE) enforcement power to combat pollution pursuant to s.18 of the *Environmental Protection Act.* In the case, the non-polluting orderees — a current owner, former owners and a current tenant of a subject property — were disputing an order that compelled them to delineate and mark the boundaries of groundwater, surface water and soil contamination that had spread across neighbouring off-site properties.

The parties did not dispute that the source of the contamination was another (now defunct) prior tenant's manufacturing operations on the subject property between 1962 and 1975. However, the non-polluting orderees were concerned a future remediation order may require them to complete costly cleanup of off-site properties as well, in addition to just delineating pollution boundaries across them. Accordingly, they attempted to have the delineation order quashed in its entirety, basing their arguments on statutory interpretation principles and the purpose of the Act.

Firstly, the orderees argued that s. 18 was preventive only and temporally limited, asserting the section applied only to either future contamination that had not yet materialized or further environmental harm caused by pollution currently existing on the subject property (at the time the order was made). They further contended that s. 18 orders should be limited in geographic scope, in that they could only require remedial and preventive work on the subject property as opposed to other off-site properties.

Part of this thinking was based on the fact that s. 18 is a no-fault absolute liability provision that can apply to all persons who have or had an interest in the property, whereas s. 17 remedial orders are fault-based and accordingly less limited since they concern "any person [that] causes or permits the discharge of a contaminant into the natural environment."

The court, however, disagreed with this reasoning. Instead, it confirmed that the MOE's s. 18 order power is also unlimited in geographic and temporal scope, can be applied to current or former owners/occupiers regardless of whether they actually caused the original discharge of environmental contaminants in the first place, and can lead to the "absurd result of placing an innocent owner of property in a worse position than a person at fault, namely, the polluter."

From a practical perspective, based on the court's conclusions that environmental liability can be indeterminate pursuant to s. 18 of the Act, the only apparent way to reduce one's environmental risk

level is to engage in a greater amount of pre-purchase due diligence. This can be costly. Depending on the size of the property and other factors, a Phase 1 Environmental Site Assessment (ESA) involving a visual property inspection and examination of historical records usually costs between $3,000 and $5,000, while a Phase 2 ESA involving soil sampling and more invasive testing can range from $7,000 to $60,000.

However, in allowing one to potentially identify expensive contamination prior to signing an agreement of purchase and sale (APS) and committing to a transaction with hundreds of thousands of dollars of possible liability, the financial benefits of such ESAs clearly outweigh their burden. Of course, one could always try to negotiate with the vendor to absorb some of these ESA costs.

If the APS is also made conditional on satisfactory environmental due diligence in the purchaser's sole discretion, this further provides a way to exit the transaction and avoid liability, especially if the ESA results prove unfavourable. Moreover, many lenders also require such ESAs anyway, as a key pre-condition prior to approving a transaction's financing or agreeing to fund a new property development.

Concerned commentators have argued that the *Hamilton Beach* decision undermines the purpose of the Act's "Brownfield" regime. Brownfields are properties that have become abandoned, idle or underutilized due to past contamination, but still have redevelopment and economic potential if they are restored back to environmentally accepted standards. Pursuant to s. 168 of the Act, once a record of site condition (RSC) is filed after receiving the results of a Phase 1 and/or Phase 2 ESA, the MOE is no longer able issue certain enforcement orders (pursuant to s.17 or s.18, for example) on a go-forward basis.

Such commentators have claimed this provision is an illustration of the "polluter pays" principle, as it provides some environmental liability protection to owners/occupiers while simultaneously encouraging Brownfield revitalization.

However, the court disputed this line of thinking again, contending its interpretation of s.18 and the Brownfield regime was consistent with the Act's purpose here. Essentially, since s.168.7(3) of the Act indicates the protection established by the RSC filing does not apply if the contamination migrates to another property after a specified date, it was ruled that the legislature intended the MOE to be authorized to issue off-site orders.

While the foregoing analysis appears to validate commentators' concerns that the polluter pays principle has been diluted by *Hamilton Beach*, the court may have also been guided by other principles. Reference is briefly made to how the "precautionary" and "preventive" principles — international interpretive aids in environmental law — also support the court's decision. However, the court found it unnecessary to analyze them further, having otherwise resolved any ambiguity with s. 18 of the Act using modern statutory interpretation principles. It will be interesting to see if Ontario courts address these other international environmental principles in greater detail in future.

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