Environmental Due Diligence and Managing Environmental Risk in Commercial Transactions

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I. Introduction

Until recently environmental considerations were not specifically addressed in transaction agreements. Today environmental due diligence and managing environmental risk are now fundamental parts of most (if not all) commercial transactions. Whether acting for seller, purchaser, developer, contractor, lessor, lessee, financier, trustee in bankruptcy, receiver or insurer in the context of mergers and acquisitions, real estate, project development or otherwise, some form of environmental due diligence or environmental risk management is necessary. Due diligence leading to the discovery of environmental liability (or even the potential of environmental liability) often causes an instinctive negative reaction. Fortunately proper environmental risk management may be the difference between closing a transaction with economic success or not. To ensure economic success, it is incumbent upon legal counsel to assist clients in completing environmental due diligence and managing environmental risk. This paper is a guiding document for legal counsel, but given (i) the breadth of possible environmental issues, (ii) the large volume of provincial and federal regulations, (iii) the differences among each industry, and (iv) the nuances of each transaction, this paper will not be an exhaustive review of every aspect of environmental due diligence and environmental risk management. Nonetheless, it will provide practical guidance for undertaking environmental due diligence and managing environmental risk.

Prerequisite to any discussion of environmental due diligence and environmental risk management is a firm understanding of environmental regulations and liabilities that exist at common law in Saskatchewan, which are discussed in Part II of this paper. Part III of provides a practical step-by-step checklist to scoping, conducting and managing environmental due diligence. Applying the foundations gained in Parts II and III, Part IV outlines how parties can manage environmental risk, including the availability of new legislative provisions intended to facilitate the transfer of "environmentally impacted sites". Finally, Part V provides a summary of available insurance products that may be used as an alternative or additional risk mitigation tool.

II. Environmental Regulation and Liability in Saskatchewan

A. The Saskatchewan Environmental Regulatory Landscape

Environmental regulation in Saskatchewan is presently a patch-work of provincial and federal legislation administered by several government departments. While the management and protection of the environment in Saskatchewan is principally (but not exclusively) provided for under *The Environmental*

Management and Protection Act, 2010[1] ("EMPA 2010"), many environmental matters and industries with environmental impacts may also be regulated under the following legislation[2]:

Saskatchewan legislation:

- *The Agricultural Operations Act, S.S. 1996, c. A-12.1*
- *The Conservation Easements Act, S.S. 1997, c. C-27.01*
- *The Crown Minerals Act, S.S. 1985, c. C-50.2*
- *The Dangerous Goods Transportation Act, S.S. 1985, c. D-1.2*
- *The Environmental Assessment Act, S.S. 1980, c. E.10.1*
- *The Environmental Management and Protection Act, 2010, S.S 2010, E-10.21*
- *The Fire Safety Act, S.S. 2015, c. F-15.11*
- *The Fisheries Act (Saskatchewan), 1994, S.S. 1995, c. F-16.1*
- *The Forest Resources Management Act, S.S. 1999, c. F-19.1*
- *The Heritage Property Act, S.S. 1980, c. H-2.2*
- *The Mineral Resources Act, 1985, S.S. 1985, c. M-16.1*
- *The Occupational Health and Safety Act, 1996, S.S. 1996, c. O-1.1*
- *The Oil and Gas Conservation Act, S.S. 1979, c. O-2*
- *The Pest Control Act, S.S. 1978, c. P-7*
- *The Pipelines Act, 1998, S.S. 2000, c. P-12.1*
- *The Provincial Lands Act, R.S.S. 1979, c. P-31*
- *The Public Health Act, 1994, S.S. 1994, c. P-37.1*
- *The Reclaimed Industrial Sites Act, S.S. 2007, c. R-4.21*
- *The Saskatchewan Employment Act, S.S. 2014, c. S-15.1*
- *The Water Security Agency Act, S.S. 2005, c. W-8.1*
- *The Weed Control Act, S.S. 2010, c. W-11.1*
- *The Wildlife Act, 1998, S.S. 2000, c. W-13.12*

Federal regulation:

- *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18
- *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7
- *Canada Petroleum Resources Act*, R.S.C. 1985, c. 36 (2nd Supp.)
- *Canada Shipping Act*, 2001, S.C. 2001, c. 26
- *Canada Water Act*, R.S.C. 1985, c. C-11
- *Canada Wildlife Act*, R.S.C. 1985, c. W-9
- *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52
- *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33
- *Criminal Code*, R.S.C. 1985, c. C-46
- *Department of the Environment Act*, R.S.C 1985, c. E-10
- *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.)
- *Energy Efficiency Act*, S.C. 1992, c. 36
- *Energy Supplies Emergency Act*, R.S.C. 1985, c. E-9
- *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 126
- *Federal Sustainable Development Act*, S.C. 2008, c. 33
- *Fisheries Act*, R.S.C. 1985, c. F-14
- *Forestry Act*, R.S.C. 1985, c. F-30
- *Hazardous Materials Information Review Act*, R.S.C. 1985, c. 24 (3rd Supp.), Part III
- *International River Improvements Act*, R.S.C. 1985, c. I-20
- *Migratory Bird Convention Act*, 1994, S.C. 1994, c. 22
- *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22
- *Northwest Territories Waters Act*, 2014, c. 2, s. 66
- *Nuclear Energy Act* (formerly *Atomic Energy Control Act*), R.S.C. 1985, c. A-16 - Preamble [Repealed, 1997, c. 9, s. 7]
- *Nuclear Fuel Waste Act*, S.C. 2002, c. 23
- *Nuclear Liability Act*, R.S.C. 1985, c. N-28
- *Nuclear Safety and Control Act*, S.C. 1997, c. 9
- *Pest Control Products Act*, S.C. 2002, c. 28
- *Species at Risk Act*, S.C. 2002, c. 29
- *Territorial Lands Act*, R.S.C. 1985, c. T-7
- *Transportation of Dangerous Goods Act*, 1992, S.C. 1992, c. 34
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52

1 *The Environmental Management and Protection Act, 2010*, S.S. 2010, c.E-10.22, as amended [EMPA 2010].

2 This list is illustrative only and not exhaustive of all environmental legislation. Once due diligence has been scoped based on the particular industry and transaction, legal counsel should fully review applicable Saskatchewan legislation available online at the Government of Saskatchewan, Queen's Printer website and Federal legislation available online at the Government of Canada, Department of Justice website.

B. EMPA 2010 and Environmental Liability

On June 1, 2015, Saskatchewan's environmental regulation was reformed with the enactment of EMPA 2010 and *The Saskatchewan Environmental Code* (the "Code"). The coming into force of EMPA 2010, together with the implementation of the Code, represent a shift in Saskatchewan's environmental regulation from prescriptive 'command-and-control' regulation to flexible 'results-based' regulation. This legislative reform is particularly relevant to real property transactions and businesses with an environmental impact and establishes the foundation for environmental due diligence and environmental risk management.

In broad terms liability under EMPA 2010 will relate to either (i) consequences for discharging, or the allowing the discharge of, a substance, waste or hazardous waste into the environment unless expressly authorized, or (ii) obligations to take corrective action for an environmentally impacted site. Specifically, under EMPA 2010 environmental liability is likely arise in the following ways:

(1) by discharging, or the allowing the discharge of, a substance into the environment that may cause or is causing an adverse effect, unless expressly authorized,[3]

(2) by being a person responsible for an environmentally impacted site,[4]

(3) by failing to comply with a permit, environmental protection plan, order or the Code,[5]

(4) by discharging, or the allowing the discharge of, a substance into a waterworks that that may cause or is causing water to be unsafe for human consumption or that may cause or is causing a substance in water to vary from permitted concentrations,[6]

(5) by altering, or causing to be altered, or the removal or addition of material from or in or to, a bed, bank or boundary of a watercourse or water body,[7]

(6) by abandoning, discarding or disposing, or allowing the abandonment, discard or disposition, of waste, except as expressly permitted,[8]

(7) by abandoning, discarding or disposing, or allowing the abandonment, discard or disposition, of a hazardous substance except as expressly permitted,[9] or

(8) by being made subject to an immediate environmental protection order or an environmental protection order .[10]

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3 EMPA 2010, *supra* note 1, s.8.
4 EMPA 2010, *supra* note 1, ss.12-21.
5 EMPA 2010, *supra* note 1, s.29.
6 EMPA 2010, *supra* note 1, s. 38.
7 *Ibid.*
8 EMPA 2010, *supra* note 1, ss.49-50.
9 EMPA 2010, *supra* note 1, s.50.
10 EMPA 2010, *supra* note 1, s.55-56.

Environmental due diligence and environmental risk management may relate to any these potential liabilities, however, most due diligence tends to be directed to the acquisition of real property interests and risks underlying environmentally impacted (contaminated) sites.

Like its predecessor *The Environmental Management and Protection, 2002*[11] ("EMPA 2002"), Section 8 of EMPA 2010 prohibits a discharge of a substance into the environment in an amount, concentration or level or at a rate of release that may cause or is causing an adverse effect unless expressly authorized pursuant to:

(1) EMPA 2010,

(2) any other Act of the Legislature of Saskatchewan or the Parliament of Canada,

(3) any permit, licence or order made pursuant to EMPA 2010 or any other Act of the Legislature of Saskatchewan or the Parliament of Canada,

(4) the Code, or

(5) an accepted environmental protection plan.

It should be noted that EMPA 2010 contains a new Section 2(3) which deems an adverse effect to exist where a person exceeds any permissible limit, standard criteria or condition that is prescribed or set out in the Code.[12] Unlike EMPA 2002, however, EMPA 2010 now includes a duty to report a discovery, which consequently expands the scope of persons who have a duty to report and a duty to take corrective action.[13]

Section 9 and Section 11 of EMPA 2010 are most likely to trigger the environmentally impacted sites regime and lead to obligations to take corrective action. Section 9 sets forth the duty to report a discharge and the duty to report a discovery of a substance that may cause or is causing an adverse effect. Section 11 of EMPA 2010 grants to the Saskatchewan Ministry of Environment the power to direct disclosure of certain information relating to sites that contain or may contain a substance that may cause or is causing an adverse effect. In the context of environmental due diligence, the duties of Section 9 need to be properly understood and managed at the outset of the transaction.

Section 9(2) of EMPA 2010 requires that every person who owns or occupies land on which a substance that may cause or is causing an adverse effect is discovered shall report the discovery to the Saskatchewan Ministry of Environment. Similarly, Section 9(3) of EMPA 2010 requires every person, who

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11 *The Environmental Management and Protection Act, 2002*, S.S. 2002, c. E-10.21, as repealed by EMPA 2010, *supra* note 1.

12 Section 2(3) of EMPA 2010 is important in the context of due diligence. When undertaking a review of business operations and approvals, permits or authorizations, it should be determined whether any exceedances of a permissible limit or prescribed condition have occurred such that an adverse effect is deemed to exist. In such case, the property will be deemed to be an "environmentally impacted site".

13 As discussed in greater detail in this paper, environmental due diligence generally occurs prior to the execution of a definitive agreement such that the duty to report may trigger obligations to complete corrective action on the part of owners or lessees and result in financial loss. Accordingly, legal counsel should consider such consequences in an early access agreement to ensure the parties are fully apprised of the potentially negative outcomes and risk is negotiated accordingly.

while conducting work, discovers a substance that may cause or is causing an adverse effect to report the discovery to the Saskatchewan Ministry of Environment. The Code further prescribes that a discovery is to be reported when it is in a quantity or concentration that could pose a serious risk to the environment or public health or safety or if the substance meets the criteria set out in Table 2 of *The Discharge and Discovery Reporting Standard*.

Section 9(2) and Section 9(3) of EMPA 2010 significantly expand the scope of those persons who are under a duty to report and give rise to several considerations in the context of environmental due diligence. First, under section 9(3) the scope of those persons is very broad and, absent certainty of the meaning of "while conducting work", may include:

- employees
- real estate agents
- environmental engineers and consultants
- construction contractors and subcontractors
- utilities (SaskTel, SaskPower, SaskEnergy)
- commercial bankers

In addition police officers and employees of municipalities or governments who are informed of a discharge or discovery of a substance that is causing or may cause an adverse effect are required to report.

Second, Sections 9(2) and 9(3) require the reporting of historical discharges that are causing or may cause an adverse effect. Previously, under EMPA 2002 there was no duty upon anyone but the person responsible for a discharge to report and no duty to report historical discharges. Third, Sections 9(2) and 9(3) are problematic when the substance is not "causing" an adverse effect but rather "may cause" an adverse effect. The determination as to whether a substance "may cause" an adverse effect is undoubtedly complex and those who make the discovery may not be capable of making such a determination. Fourth, EMPA 2010 does not provide certainty as to whether the duty to report a discovery is retroactive. Accordingly, it is unknown if the Saskatchewan Ministry of Environment will interpret Sections 9(2) and 9(3) to require reporting the discovery of a substance that is causing or may cause an adverse effect where the discovery was made prior to June 1, 2015. When completing due diligence, query the effect of a person who reviews an environmental site assessment completed prior to June 1, 2015 (the effective date of EMPA 2010) that disclosed the presence of a substance that is causing or may cause an adverse effect.

The effect of the duty to report a discovery is concerning in the context of real property transactions and environmental due diligence. Given the increased scope of the duty to report, clients and legal counsel need to be mindful of the duty when preparing for the transaction and undertaking environmental due diligence. Site preparation, historical title review, past environmental site assessment reports and other due diligence may give rise to a reportable discovery. Additionally, pre-transaction

negotiations as to whether a party will permit environmental due diligence (including phase 1 or phase 2 environmental site assessments) are now necessary and should be documented in an early access agreement. Environmental due diligence may lead to a discovery of a substance that may cause or is causing an adverse effect and such discovery will trigger a duty to report the discovery to the Saskatchewan Ministry of Environment. Following such reporting, there may be a duty on the owner or occupier of the land to take immediate remedial action. It needs to be borne in mind that this would all occur prior to any definitive agreements providing for environmental risk management.

Pursuant to Section 10 of EMPA 2010, the person who caused the discharge in contravention of EMPA 2010 and the owner or occupier of land in respect of which a Section 9 report has been made are required, as soon as possible, to take all reasonable emergency measures consistent with public safety to repair and remedy undue risk or reduce or mitigate danger to life, health, property or the environment that results or may reasonably be expected to result from the discharge of the substance. While Section 10 has thresholds such as "reasonable emergency measure", "consistent with public safety" and "undue risk", owners and occupants have little guidance as to the corrective action that may be required.

The concerning effect of Sections 9 and 10 is that if a substance is discovered and reported in accordance with EMPA 2010, then the owner or occupier, as the case may be, will be charged with a duty to take immediate action to address such discharge, regardless of whether they are the person responsible for the discharge or not. Perhaps of greater concern, reports of a discovery of a discharge will be searchable in a public registry and such reporting will undoubtedly impact the immediate marketability of the property or scuttle the deal currently being negotiated. Additionally, and potentially even more problematic, the report may lead to a requirement to conduct a site assessment that may result in a determination that the site is an environmentally impacted site which will have a direct impact on the value and marketability of the property as well as give rise to obligations under EMPA 2010 to take corrective action. Accordingly, in the context of real property transactions, consideration must be given as to whether a party will be permitted to conduct environmental due diligence. Environmental due diligence should not be undertaken until this potential environmental liability is properly managed with an early access agreement.

Once a site is an environmentally impacted site, the environmentally impacted sites regime in Part III, Divisions 2 - 5 of EMPA 2010 sets forth the framework for corrective action. The new framework is different from the framework previously established under EMPA 2002 regulating contaminated sites. In the context of real property transactions (whether selling, purchasing, leasing, developing or supplying), the responsibility for an environmentally impacted site will attach to any person who meets the

enumerated categories of "persons responsible" under Section 12 of EMPA 2010. These categories include the following:

- every person who caused or contributed to a discharge or the presence of the substance,[14]
- every person who had possession, charge, management or control of the substance whose actions or omission caused or contributed to a discharge or presence of the substance,[15]
- every owner or occupant of land on which a substance is discharged if the discharge occurs as a consequence of the acts or omissions of the owner, occupant or any person who, with the consent of the owner or occupant, has lawful possession of the property,[16]
- every owner or occupant of land subsequent to the owner or occupant described above,[17]
- if the discharge occurs in the course of transportation, the person transporting the substance,[18]
- every owner of the substance in prescribed circumstances,[19]
- directors of a corporation who (i) directed, authorized, assented to, acquiesced in or participated in an act or omission of the corporation that resulted in a discharge, or (ii) authorized a dividend or distribution at a time when the director knew or should have known the dividend or distribution impaired or could be reasonably expected to have impaired the ability of the corporation to prevent, mitigate, remedy or reclaim adverse effects on land owned or occupied by the corporation,[20]
- every person who has agreed to be liable for the discharge or presence of the substance, or agreed to mitigate, remedy or reclaim adverse effects caused or contributed to by the discharge or the presence of the substance,[21] and
- every person to whom responsibility for an environmentally impacted site has been transferred in accordance with EMPA 2010.[22]

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14 EMPA 2010, *supra* note 1, s.12(2)(a).

15 EMPA 2010, *supra* note 1, s.12(2)(b).

16 EMPA 2010, *supra* note 1, s.12(2)(c).

17 EMPA 2010, *supra* note 1, s.12(2)(d). Awareness of Section 12(2)(d), together with Section 12(2)(c), is critical in the context of environmental due diligence and environmental risk management.

18 EMPA 2010, *supra* note 1, s.12(2)(e).

19 EMPA 2010, *supra* note 1, s.12(2)(f).

20 EMPA 2010, *supra* note 1, s.12(2)(g).

21 EMPA 2010, *supra* note 1, s.12(2)(h).

22 EMPA 2010, *supra* note 1, s.12(2)(i).

Pursuant to Section 13 of EMPA 2010, the Saskatchewan Ministry of Environment may require a person who is or may be a person responsible to conduct a site assessment if the Minister reasonably believes that the site may be an environmentally impacted site. This is a departure from EMPA 2002 where it was previously the Saskatchewan Ministry of Environmental who made the determination of whether a site was a contaminated site. The effect of this reform is to shift the expense of the determination to the persons responsible (or potential persons responsible) and to require the determination be made by "qualified persons".[23] It remains to be seen how the Saskatchewan Ministry of Environment will make a determination of who may be required to complete a site assessment under Section 13. There are, however, some concerns which parties to real property transactions should be alerted to.

First, the Saskatchewan Ministry of Environment does not need to be certain that the person ordered to complete a site assessment is in fact a person responsible. Rather it is sufficient that such person "may be" a person responsible. While practically such determination may not be possible until completion of a site assessment, it burdens those who may not be persons responsible with the expense of completing a site assessment or, alternatively, challenging the determination. Second, it is sufficient that such site "may be" an environmentally impacted site. This may lend itself to an unfavourable result where a party completes a site assessment only to determine that the site is not an environmentally impacted site and without compensation for costs incurred to make such determination. Third, and in part related to the broad generic drafting of Section 13, there is no measurable means to identify or assess the Minister's reasonable belief underlying the order.

Parties aggrieved by Section 13 have the immediate and limited option of seeking judicial review of the Minister's belief. In the alternative, an aggrieved party may choose to wait until an environmental protection order is issued under Section 57 of EMPA 2010 then appeal to the Saskatchewan Court of Queen's Bench court pursuant to Section 63 of EMPA 2010. Regardless, challenging a Section 13 determination will be difficult as either (i) the aggrieved party will need to establish that they are not in fact a person responsible nor "may be" a person responsible, or (ii) there is no basis to conclude that the site "may be" an environmentally impacted site. In each case the Saskatchewan courts are likely to review the decision on the "reasonableness" standard (as opposed to "correctness" standard) making a successful challenge difficult.

Pursuant to Section 14 of EMPA 2010, if a site assessment discloses that the site is an environmentally impacted site, the person required to conduct the site assessment in accordance with Section 13 is required to prepare a corrective action plan that satisfies any prescribed requirements and

[23] EMPA 2010, *supra* note 1, s.2(bb).

any requirements set out in the Code. This is concerning as Section 13 may be imposed upon a person who is in fact not to a person responsible. While there is some uncertainty in Section 14, it is generally understood that only those persons who have been determined to be persons responsible will be required to prepare a corrective action plan. It is expected that the "polluter pays" principle of Saskatchewan environmental legislation will guide the Saskatchewan Ministry of Environment's determination of persons responsible and, despite the gap in legislative drafting, there is no reason to believe the Minister would direct a person who is not a person responsible. By Section 15 of EMPA 2010, if more than one person qualifies or may qualify as a person responsible, all persons who so qualify are required to jointly prepare a corrective action plan. Finally, under Section 17 of EMPA 2010, the Saskatchewan Ministry of Environment may require financial assurance if the corrective action plan concludes that the process to be undertaken is risk management with future reclamation.

Following reclamation of an environmentally impacted site in accordance with the corrective action plan, by Section 18 of EMPA 2010 the person(s) responsible may apply to the Minister for a "notice of site condition" and register the same in the registry established by EMPA 2010. Upon filing a notice of site condition and subject to certain conditions and limitations, by Section 20 of EMPA 2010 the Saskatchewan Ministry of Environment will not require a site assessment nor corrective action or issue an environmental protection order. The benefits and limitations of a notice of site condition are discussed in greater detail in Part IV.B.ii.

C. Common Law and Environmental Liability

In addition to EMPA 2010, environmental liability may be based on traditional common law tort claims of private and public nuisance, riparian rights, strict liability, trespass, negligence and negligent misrepresentation, deceit and fraudulent misrepresentation, breach of the duty to disclose, breach of the duty to warn, breach of fiduciary duty and waste. The following is a brief summary of each of these common law tort claims.[24]

- *Private Nuisance.* Private nuisance entails that a defendant may not cause substantial or unreasonable interference with the plaintiff's use and enjoyment of its land.[25]

[24] This list is illustrative only. For the purposes of environmental due diligence, a general understanding of these "toxic torts" is necessary but if through environmental due diligence a fact is discovered that may give rise to a claim, the full extent of the common law should be examined and analyzed relative to the discovered fact.

[25] For further general discussion and discussion specific to environmental claims, see Frederick Cockburn, *Toxic Real Estate* (Toronto: Canada Law Book, A Division of Thomson Reuters Canada Limited, 2015) at I-22 [Toxic Real Estate].

- *Public Nuisance.* Public nuisance is broader than private nuisance in that it confers a right of action for damages arising from the defendant's use of its land even though no rights to the plaintiff's land have been affected, but is restricted in that a plaintiff can only claim if it has suffered special or particular damage over and above that suffered by the public at large.[26]

- *Riparian Rights.* Riparian rights protect a plaintiff's right to the flow of waters over its property without sensible alteration in quantity or quality.[27]

- *Strict Liability (Rylands v. Fletcher).* Strict liability is a tort that varies slightly from negligence, nuisance and trespass. It generally requires the use of the land to be 'non-natural', followed by an escape, leading to mischief and compensable damages.[28]

- *Trespass*. Trespass is any invasion of property however slight and, in the context of environmental trespass, it must be proven that the defendant intentionally caused the contaminant to enter the plaintiff's land.[29]

- *Negligence and negligent misrepresentation.* A successful claim of negligence requires the plaintiff to prove that the defendant breached a duty of care owed to the plaintiff, which caused the plaintiff to suffer damages.[30]

- *Deceit or fraudulent misrepresentation.* Fraudulent misrepresentation occurs when a defendant knowingly makes a false representation with the intent to deceive the plaintiff, and the representation induces the plaintiff to act, resulting in damages.[31]

- *Breach of the duty to disclose.* Similar to fraudulent misrepresentation, a party may be under a duty to disclose information which would be a benefit to the other party. This duty generally arises under the scope of the fiduciary duty, but may also exist under certain contractual relationships, such as real property transactions and lease transactions.[32]

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26 *Ibid* at I-25.
27 *Ibid* at I-26.1.
28 *Ibid* at I-26.2.
29 *Ibid* at I-28.1.
30 *Ibid* at I-28.2.
31 *Ibid* at I-28.4.
32 *Ibid* at I-29.

- *Breach of duty to warn.* In certain contexts, there is a specific duty to warn that exists separate and apart from the duty to disclose and fiduciary duty. The duty to warn arises when facts or circumstances exists which may cause another person physical damage or harm. In the context of environment, this duty may arise in manufacturer product liability cases or with the mishandling of hazardous substances.[33]

- *Breach of fiduciary duty.* The fiduciary duty is a special duty of utmost good faith and includes a duty of confidentiality and a duty to make full disclosure.[34]

- *Waste.* In lessor and lessee relations, a lessee may not commit waste against the lessor's reversionary interest. Waste is a causing of lasting injury to the reversion and may be due to a positive act or due to neglect or omission. [35]

In addition to these common law tort claims, environmental claims are often grounded in contract law. It is not possible to summarize the countless ways a contractual breach may occur but, in the context of the environment, such claims tend to relate to: onsite (historic) contamination, migration of contaminants, misrepresentations, indemnity claims, actions or omissions under lease tenancies and insurance coverage denial.

Finally, many jurisdictions include a statutory right of action. EMPA 2010 repealed the statutory cause of action that previously existed under EMPA 2002. As EMPA 2010 was enacted June 1, 2015 (only seven months prior to the date of this paper) many parties are, however, still claiming the under Section 15 of EMPA 2002 which provided:

> "[s]ubject to subsections (4) and (5), any person, including the Crown in right of Saskatchewan or in right of Canada, has a right to compensation from: (a) the person responsible for a discharge for loss or damage incurred as a result of: (i) the discharge of a substance, (ii) neglect or default in the execution of a duty imposed pursuant to section 4, or (iii) an investigation or action taken pursuant to section 8 or 52, and (b) any person to whom an environmental protection order has been issued for loss or damage incurred as a result of the execution or intended execution, or neglect or

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33 *Ibid* at I-29.
34 *Ibid* at I-29.
35 *Ibid* at I-31.

default in the execution, of the environmental protection order without proof of fault, negligence or wilful intent."[36]

III. Environmental Due Diligence

A. Early Stage Planning and Scoping Due Diligence

Setting the parameters and establishing the framework for the due diligence process is the single most important task of a transaction. These steps when properly executed facilitate fully informed risk management and the allocation of risk in the underlying transaction documentation. Unfortunately, more often than not, this step is completely forgone, poorly executed or poorly communicated among the transaction team, which leads to unnecessary or improper risk allocations, client frustration, increased costs or unnecessary costs relative to the risk reduction gained.

The single most important question when establishing the framework and parameters for the due diligence process is: "*What is important to the client?*" This question may be trite but cannot be ignored given that lawyers may only act on client instructions. Undoubtedly, legal advice and other transaction particulars will also serve to set the framework and parameters for the due diligence process, but the answer to this relatively simple question provides legal counsel a lens into the client's business and will serve to balance business interests and legal risks which will ultimately lead to closing the transaction. It also allows for the determination of the client's risk profile, which may vary from 'leave no stone unturned' to 'put it on the back burner'. By determining what matters to your client and your client's risk profile, legal counsel is then in the best position to start scoping environmental due diligence.

In addition to determining what matters to the client, other factors to be considered at the outset of scoping environment due diligence include:

- what is the general nature of the business (agricultural, mining, oil and gas, retail/commercial, land development, etc.) and the risks inherent to the industry,
- what is in the general risk of the proposed transaction given the general law on the subject matter (share acquisitions, asset acquisitions, "as-is, where-is" sales, tenancy contracts, project development, industry-specific regulation),
- what is the estimated time to complete the anticipated environmental due diligence and how does this align with the estimated transaction timeline,
- do banks or lenders require environmental due diligence and environmental reports of any kind,

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[36] *Supra* note 11 at s.15(3).

- what environmental due diligence will the client undertake, if any,
- what environmental due diligence will environmental engineers/consultants undertake, if any,
- what level of management will legal counsel have over due diligence conducted by the client and environmental engineers/consultants,
- should legal counsel retain environmental engineers/consultants to establish solicitor-client privilege in order to protect against future disclosure, and
- in the context of real property, what are the legal boundaries of the land and should these boundaries be extended to adjacent and neighbouring lands.

Circumstances may exist such that environmental information should be made subject to solicitor client privilege. Accordingly, at the outset, it should be considered with the client whether the environmental consultant should be retained by the client or the law firm. While any number of reasons may warrant structuring environmental due diligence subject to solicitor-client privilege, such structure would typically arise where the client is completing the due diligence and subsequent remedial work with an expectation that they will be seeking contribution against other parties. Additionally, legal counsel may retain the environmental consultant if the client is a publically listed entity, has other public reporting obligations, may be required to disclose information under applicable freedom of information legislation or otherwise has reason to proceed with confidentiality. An additional technique is to separate the factual information in the report from the recommendations and conclusions. Even if legal counsel is not retaining the environmental consultant, it will likely manage the environmental consultant and the environmental information produced, in which case retaining the best environmental consultant requires advance consideration of the transaction and potential concerns.

Regardless of which party retains the environmental consultant, legal counsel and the client should conduct necessary due diligence on the environmental consultant. Like law firms, environmental consultants each have areas of expertise, and the following factors should be considered prior to formalizing the engagement:

- reputation, relative expertise and experience with potential substances of concern (petroleum hydrocarbons, volatile organic compounds, metals, etc.),
- industry experience (mining, oil & gas, agriculture) and specialised remedial techniques (particularly in relation to alternative risk management solutions),
- understanding of Saskatchewan regulation (particularly with the engagement of a national-based environmental consultant that does not have a Saskatchewan branch office),

- relationship with the Ministry of Environment,
- cost and ability to meet the transaction timeline,
- insurance coverage, and
- the use of subcontractors and other third-party suppliers such as laboratory analysis.

In addition, legal counsel should review the environmental consultant's service agreement, including:

- the scope of the service to ensure the end result is consistent with the desired risk allocation,
- the standards being applied to ensure that applicable Saskatchewan standards are referenced (particularly with the engagement of a national-based environmental consultant that does not have a Saskatchewan branch office)
- the limitation of liability and third party use to ensure that those who will be relying on the environmental report are not excluded,
- confidentiality, subject only to the environmental consultant's obligations to report subject to applicable laws, and
- conflict of interest, particularly if the environmental report will be relied on by all parties to the transaction.

Depending on the context of the transaction multiple parties may be relying on the environmental report and it is critical to ensure such parties are expressly included in the agreement or are each later provided with a reliance letter. It is recommended that these considerations occur in advance of the engagement and all necessary parties be party to the agreement as many environmental consultants will charge additional fees to later provide reliance letters. Failure to consider this issue at the outset or within the definitive agreement may result in additional costs for such parties or an inability to rely on the environmental reports and sue if issues later arise. Accordingly, legal counsel should address contractual provisions when drafting or negotiating the definitive agreement. By way of example, the following typical provision should be avoided:

> The Vendor will provide the Purchaser with a Phase 1 Environmental Site Assessment, at Vendor's sole cost, verifying that the property is free of any potential or actual environmental contamination…

Nearly all environmental consultant service agreements will contain a disclaimer that will outright prohibit third party use of the report or state that any use by the third-party is solely the responsibility of the third party. A typical example of such third-party exclusion is:

> Third Party Reliance: Only the [Client] shall be entitled to rely on the [Documents] provided […] in the performance of the [Services]. The [Documents] relate solely to the [Services] for which the [Consultant] has been retained and shall not be used or relied upon by the [Client] or any third party for any variation or extension of the [Services], any other project or any other purpose. Any unpermitted use by the [Client] or any third party is strictly prohibited.

Several courts in Canada have upheld environmental consultant third-party disclaimers as a defence to a claim of liability by a third party.[37] Considering the above clauses specifically, a Newfoundland court held that the environmental consultant owed no duty of care to the buyer.[38] The court cited to the seminal House of Lords decision *Hedley Byrne & Co. v. Heller & Partners,*[39] the principles of which were applied by the Supreme Court of Canada in *Edgewood Construction Limited v. N.D. Lee Associates,*[40] and held that a duty of care will not arise when in the contract the defendant employs specific language disclaiming such a duty.

Additionally, if a purchaser is relying on a vendor's consultant's report, it needs to be borne in mind that environmental consultants take instructions from their clients and the reporting may be limited based on the scope of the engagement or budgetary constraints. If such a report is being relied upon, it should be thoroughly reviewed to assess matters such as the location and amount of subsurface testing, the testing of ground water, testing to consider possible off-site migrations and so on. Reliance on the other party's environmental consultant's report is no replacement for environmental due diligence to be conducted by the reliant party.

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37 See *Wolverine Tube (Canada) Inc. v. Noranda Metal Industries Ltd.*, [1995] 26 O.R. (3d) 577 and *Community Mental Health Initiative Inc. v. Summit Lounge Ltd.*, 2014 CanLII 63978 (NL SCTD) [Summit Lounge].

38 See Summit Lunge. *Ibid.*

39 *Hedley Byrne & Co. v. Heller & Partners* [1964] A.C. 465 (H.L.).

40 *Edgewood Construction Limited v. N.D. Lee Associates*, [1993] 3 S.C.R. 206.

B. Environmental Due Diligence Tools and Checklists

Environmental due diligence can be generally divided into two distinct categories: (i) environmental due diligence requested from the opposite party, and (ii) environmental due diligence generated independently of the opposite party. Regarding the first category, at a minimum, legal counsel's standard due diligence checklist should provide a general request for the following environmental disclosure:

a) All environmental permits, licenses, certificates of compliance, consents, approvals and authorizations under all applicable environmental laws.
b) All notices, reports and filings made with or to any governmental body regarding the environment.
c) Details of all contaminants used, handled, stored, transported, packaged, sold, offered for sale, emitted or produced by the company.
d) Any reports or other written documents or materials regarding environmental matters, including Phase I or Phase II Environmental Site Assessments.

This list is appropriate in the general case, however, for transactions with obvious and significant environmental considerations, a more detailed and thorough checklist may be appropriate. Attached to this paper as Appendix A is a detailed environmental due diligence checklist suitable for such transactions. The attached checklist is detailed but not exhaustive of environmental considerations. All references may not be appropriate in all cases. Legal counsel, together with the client and any environmental consultants, should review this checklist in the context of the transaction.

In addition to environmental due diligence requests of the opposite party, there are several other investigative tools available to assist with environmental due diligence which generate information independently of the opposite party. The following environmental due diligence checklist identifies the usual government bodies and databases for environmental due diligence and other usual due diligence:

- conduct historical title review to determine the registered owners of lands,
- contact the appropriate environmental regulatory authorities:
  - Saskatchewan Ministry of Environment,[41]
  - Environment Canada,
  - Department of Fisheries and Oceans,
  - Saskatchewan Ministry of the Economy,

[41] See Appendix B for the Saskatchewan Ministry of Environment, Environmental File Search Application. The application is also availiable online at: http://www.environment.gov.sk.ca/spills.

- Saskatchewan Ministry of Labour Relations and Workplace Safety (Employment Standards and Occupational Health and Safety)
- Saskatchewan Ministry of Health, and
- Local Public Health Authorities,

to request a file search and to determine whether:

- any notices, directions, orders, licenses, approvals (including remediation, stop and control orders) have been issued,
- any environmental concerns, complaints, inspections or abatement records exist,
- there are reported spills or discharges,[42] and
- there are any hazardous substance storage facilities on site.[43]

– conduct environmental records searches:

- EcoLog ERIS,[44]
- Saskatchewan Ministry of Environment Environmentally Impacted Sites Registry (Spills Reports, Discovery Reports, Environmental Assessments, Corrective Action Plans, Notice of Site Condition),[45]
- National Pollutant Release Information,
- Saskatchewan Ministry of Environment Hazardous Substance Storage Facilities Database,
- Saskatchewan Ministry of Environment Waste Disposal Site Database,
- Saskatchewan Ministry of Environment Waste Water Discharge Database,
- Saskatchewan Ministry of Economy Upstream Oil & Gas Site Spills,
- Saskatchewan Ministry of Economy Horizontal Wells Database,
- Saskatchewan Ministry of Agriculture Intensive Livestock Operations Approvals,
- Saskatchewan Ministry of Agriculture Pesticide Register,
- Saskatchewan Water Security Agency Water Wells Information Systems,
- Saskatchewan Water Security Agency Watershed Restrictions,

– conduct phase 1 environmental site assessments and/or compliance audits (which often includes an EcoLog ERIS search and historical title review), and

– conduct phase 2 environmental site assessments, if appropriate and recommended.

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[42] For spills prior to January 1, 1998, by searching a compact disc available from the Saskatchewan Ministry of Environment and, for spills after January 1, 1998, by searching online at http://environment.gov.sk.ca/saskspills/spills_srch.asp.

[43] Completed online at http://environment.gov.sk.ca/saskspills/Hazstg_srch.asp.

[44] See Appendix C for a list of the databasis searched by Ecolog Environmental Risk Information Services Ltd.

[45] As of the date of writing the Saskatchewan Ministry of Environment Environmentally Impacted Sites Registry was not established.

On receipt of the results of such searches, legal counsel must review and consider each in the context of the environmental regulatory liabilities and common law liabilities in Saskatchewan. For example, as mentioned in Part II of this paper, Section 2(3) of EMPA 2010 is important in the context of due diligence. When undertaking a review of business operations and approvals, permits or authorizations, it should be determined whether any exceedances of a permissible limit or prescribed condition have occurred such that an adverse effect is deemed to exist. In such case, the property will be deemed to be an environmentally impacted site and the consequence of such would need to be considered and, if desired, managed in the definitive agreement.

The environmental due diligence requested from the opposite party often forms the basis of the representations, warranties and indemnities that are negotiated in the definitive agreement. However, this information should not be wholly relied upon as such representations, warranties and indemnities are often negotiated with limitations and exclusions, may only survive for a limited period of time and are only as good as financial position of the party giving them. Additionally, and most importantly, the environmental due diligence exercise is not intended to merely assign liabilities, but rather, quantify and price the risk for transaction consideration.

IV. Managing Environmental Risk

It is often the case that parties are aware of environmental issues prior to completing the necessary environmental due diligence. Following environmental due diligence parties will be in position to (i) quantify and price the environmental risk or issues and adjust the transaction consideration accordingly, and (ii) negotiate and assign environmental risk.

A. Tracking Environmental Due Diligence into the Definitive Agreement

i. *Purchase and Sale Agreements*

At the outset, and despite being obvious, it is important to note that each agreement will need to be drafted and tailored to the specific environmental issues identified during due diligence and the negotiations and management of the environmental risk. Such drafting may include detailed pre or post-closing covenants to remediate environmental impacts. Additionally, such remedial covenants may be secured by a holdback, guarantee, mortgage or other form of security. The agreement will ultimately allocate the risk between the contracting parties as negotiated but there are customary provisions which occur in all purchase and sale agreements which should be carefully considered. The results of the due diligence will usually form the basis of a disclosure letter or schedule which serves to supplement or limit the representations and warranties of the transferor. Additionally, environmental matters will be present

in the following parts of the agreement: parties to the agreement, recitals, definitions and interpretation, survival periods, indemnities, security, pre and post-closing covenants and miscellaneous boilerplate provisions, as all include potential drafting pitfalls if not fully considered.

a. Parties to the Contract and Recitals

The introduction to the agreement should be considered to ensure the parties to the transaction align with the results of environmental due diligence (i.e. notices, permits, approvals). Additionally, it needs to be ensured that the contracting parties can deliver the environmental covenants and have the financial means to satisfy any environmental risk allocation now and in the future. Finally, as discussed in Part IV.B.i, EMPA 2010 expressly includes as a person responsible any party who agreed by contract to be liable for the presence or discharge of a substance, or to mitigate, remedy or reclaim an adverse effect. Accordingly, the parties to the agreement need to align with legislative provision if required.

Quite often in transactions with environmental risk, the parties will set forth the background to the transaction in the recitals to the agreement. Recitals are not legally binding unless expressly made so in the agreement. The issues around whether to make such factual statements legally binding should be fully considered.

b. Definitions

Depending on the context, the transacting parties may desire broad or narrow definitions. In either case, these should be fully considered to ensure they align with the environmental due diligence, transaction negotiations and environmental risk management. The usual environmental related definitions to be carefully considered are: "Hazardous Substances", "Environmental Laws", "Environmental Claims", "Release" and "Remediation Standard". In addition, environmental matters may also touch on the usual definitions: "Governmental Authority", "Notices", "Orders", "Permits" and "Vendor's Knowledge" and so on.

A sample definition of "Environmental Laws" is provided for illustration:

> "Environmental Laws" means any and all local, municipal, provincial (including *The Environmental Management and Protection Act, 2010* (Saskatchewan) and any regulations promulgated thereunder, and *The Saskatchewan Environmental Code* and the standards adopted thereunder, each as amended) or federal law, statute, ordinance, code, requirement, rule, regulation, guideline, order or common law principle or doctrine, past or future, relating to the protection of the environment, human, plant or animal health, the health and safety of the workplace, an [Environmental Activity] or the environmental conditions in, on, under or about or migrating to or from the [Property] including but not limited to soil, groundwater, vapour and indoor and ambient air conditions.

The definition of "Environmental Laws" gives rise to several considerations, including:

- whether liability extends beyond regulatory orders such that the definition should include court decisions, common law, directives or other guidance documents,
- whether the scope extends to matters that are related to workplace safety, occupational health and safety, public health or the use and manufacture of substances, and
- whether references to regulatory standards are as of the contract date and who bears the risk of changing environmental laws.

The transferor and the acquirer, together with counsel, should ensure that the definition does not unnecessarily or unintentionally extend beyond the scope of the negotiated environmental risk management.

A sample definition of "Environmental Claims" is provided for illustration:

> "Environmental Claims" means any and all enforcement, clean up, removal, remedial or other governmental or regulatory actions, complaints, tickets, notices, directives, citations, charges, proceedings of any nature or kind, penalties, fines, prosecutions, inspections, investigations, injunctions or orders (including, without limitation, pollution prevention, pollution abatement and remediation orders) pursuant to any [Environmental Laws] which pertain to [Contaminants], or alleged [Contaminants] and whether known or unknown at the [Closing Date], or the threat of [Contamination] and any and all liabilities, claims, demands, causes of action, losses, damages, costs and expenses of any nature or kind made or asserted by any third party against the [Vendor] relating to damage, contribution, cost recovery, compensation loss or injury resulting from the presence, [Release] or threatened [Release] of any [Contaminants] or alleged [Contaminants], exposure to [Contaminants] or the violation or alleged violation of [Environmental Laws] in connection with the [Contaminants], but specifically excludes any claims from full or part-time employees (current or former), contractors, representatives, agents of the [Vendor] or any of the other Indemnified Parties arising out of the course of their employment or other authorized duties on behalf of the [Vendor] or other such [Indemnified Parties], whether now known or unknown and whether manifested prior to or after closing of the transaction contemplated by the Agreement of Purchase and Sale.

Whether the definition of "Environmental Claims" is detailed or follows the more general definition of "Claims", such definition gives rise to several considerations, including:

- whether risk allocation extends to third party claims or is limited to regulator claims only,
- whether the obligations of the contracting parties are limited to specific known or unknown contaminants,
- whether references to regulatory standards are as of the contract date and who bears the risk of changing environmental laws, and
- the geographical boundaries of the presence of the contaminants.

Similar themes apply to all other environmental-related definitions. Finally, parties should avoid vague and ambiguous terms relating to the remediation and remedial standard, such as "remediate", "clean-up", "correct", "applicable standards", "applicable laws", "pristine", "contaminants" and so on.

c. Representations and Warranties and Survival

Much of the environmental due diligence and risk allocation will be provided for in the representations and warranties of the agreement. In relation to environmental matters, these representations and warranties tend to address: hazardous substances, release of hazardous substances, offences, orders, reporting, disposal sites, permits, documents, records and audits, adverse environmental conditions, adverse occupational health and safety occurrences, underground storage tanks and compliance with environmental laws.

It needs to be ensured that these representations and warranties align with the parties' negotiated allocation of risk and the actual environmental issues present. The usual back-and-forth negotiations should not be conducted in absence of understanding environmental risk and strategy for managing that risk. From the transferor's perspective, these representations and warranties should be specific and narrow, subject to knowledge and materiality, subject to due diligence disclosure, limited to known circumstances and not simply a means of risk allocations and exclusive of historic operations. The acquirer in all cases would take contrary positions and in particular should note that representations as to compliance with environmental laws does not equate to no contamination.

Consideration should be given to whether environmental representations and warranties (and the related indemnities) should survive longer than other representations and warranties. Environmental representations and warranties will often extend for six years given that EMPA 2010 modifies Sections 5 and 7 of *The Limitations Act*[46] and creates a six year limitation period from discovery for an "environmental claim". Environmental liabilities or concerns may not be obvious or evident for many years unless a detailed environmental audit is conducted and discovers a problem or potential problem. Finally, liabilities at law (under EMPA 2010 or otherwise) to the government may not be contracted out so risks associated with regulatory orders will continue indefinitely.

d. Indemnities and Security

Indemnities are complex and, in the context of environmental claims or remedial obligations, are often the subject matter of a separate agreement. From all parties' perspective the scope of the remedial clean-up obligations should be well established, defined and controlled, particularly for the party who will

[46] *The Limitations Act,* S.S. 2004 c. L-16.1, as amended.

accept the financial cost. At a minimum, the following considerations should be addressed in the agreement:

- which parties will be involved in the remedial clean-up obligations and what roles various parties will serve,
- how will the Saskatchewan Ministry of Environment be engaged in the process,
- how environmental risk will be reduced based on mechanisms available in EMPA 2010,
- what is the endpoint selection standard (how clean is clean),
- the scope of the indemnity:
    - whether the indemnity applies only to transferor's releases or any releases,
    - whether the obligations extend to third party claims or are limited to regulatory orders, and
    - whether the scope of the loss extends beyond clean-up costs to include matters such as business interruption, statutory penalties or court awarded damages,
- whether the environmental indemnity is intended to be the exclusive remedy of the parties,
- how the environmental indemnity obligations will be secured, if at all, and
- whether costs should be capped or extended beyond the usual maximum caps, particularly if remedial clean-up costs or other indemnified risks are likely to exceed the purchase price.

In addition, the typical issues of a party's financial ability to satisfy indemnity obligations should be thoroughly considered. With traditional indemnities, parties will often rely upon a holdback as security. As environmental indemnities often extend to six years, a holdback may not be a negotiable option. Security may be in the form of (i) extended payment terms, (ii) holdbacks and escrows, (iii) guarantees, which should be drafted and negotiated in contemplation of Section 12(2)(i) of EMPA 2010, (iv) collateral mortgages, with considerations given to a consent to receivership, (v) letter of credit or (vi) performance bonds. The collateral mortgage is a particularly useful, cash-free security tool where environmentally impacted sites are sold at a discount with post-close remediation covenants being placed on the acquirer. In the event that the acquirer fails to perform the covenants and a governmental authority directs the transferor to clean-up the site, the transferor can take possession of the land as compensation.

e. Other Standard Contractual Provisions

Special care should also be directed to the mechanical or boilerplate provisions to ensure consistency with detailed environmental provisions of the agreement. The provisions may include:

- interim covenants as to use of land or operation of a business,
- conditions of closing,

- confidentiality,
- releases of liability,
- miscellaneous boilerplate clauses: further assurances, time of the essence, public announcements, third party benefit of the agreement, entire agreement, amendments and waivers, assignment, notices and governing law.

Attached as Appendix D is a checklist[47] that will assist in reviewing a typical asset or share purchase agreement. In the context of a lease agreement, the results of environmental due diligence may impact on several customary lease provisions. For industries with obvious environmental impacts, the lease should clearly set forth the framework to complete environmental site assessments at the start and end of the term and delineate the responsibilities of the lessor and lessee accordingly. Attached as Appendix E is a checklist[48] that will assist in reviewing a typical lease agreement. In any case, however, environmental issues may be complex and, if so, should be appropriately addressed by clear contractual arrangements which may require varying from the typical provisions of a purchase and sale agreement or lease agreement.

B. EMPA 2010 and the Transfer of Environmentally Impacted Sites

i. Section 19 Transfers and Limited Releases from Regulatory Environmental Liability

Where a site has be determined to be an environmentally impacted site, Section 19, in conjunction with Section 12(2)(i), each of EMPA 2010 and the Code allow for the transfer of an environmentally impacted site that will result in the transferor receiving the benefit of a limited release from the Saskatchewan Ministry of Environment. A Section 19 transfer is applicable when corrective remedial action and a notice of site condition (formerly referred to as closure) are not the purchaser's immediate objective. For example, if the industrial operations are going to continue and the site will continue to be an environmentally impacted site (such as a the sale of a gas station that will continue to operate as a gas station following completion of the transaction), then a Section 19 transfer can be utilized to minimize the transferor's risk following the transaction. The acquirer will be required to manage the impacts in accordance with EMPA 2010, the Code and other applicable standards. It is intended that Section 19 will provide a reliable mechanism for transfer of responsibility which will also serve to facilitate productive use of brownfields.

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[47] This checklist is adapted from Babe, Jennifer E., *Sale of A Business* 10th ed. (Markam, Ontario: LexisNexis Canada Inc.).

[48] *Ibid.*

Section 12(2)(i) includes as a person responsible every person to whom responsibility for an environmentally impacted site has been transferred in accordance with Section 19 of EMPA 2010. Section 19 provides that responsibility for an environmentally impacted site may be transferred by a person responsible to another person if:

(a) the other person has agreed to accept responsibility for the environmentally impacted site,
(b) a site assessment has been conducted setting out the nature and extent of the presence of the substance that may cause or is causing an adverse effect on the site and any adjacent property,
(c) a corrective action plan is prepared,
(d) an estimate of the costs to carry out the corrective action plan has been prepared,
(e) the other person has agreed to undertake the corrective action plan within the time frame contemplated in the corrective action plan, and
(f) the other person has provided the Minister of Environment with financial assurance in the amount and in the form acceptable to the Minister equal to: (i) the anticipated costs of reclaiming the site, and (ii) an additional contingency amount.

The Code further requires that such agreement to accept responsibility for an environmentally impacted site must (i) be in writing, (ii) be signed and dated, (iii) include a provision stating that the person accepting responsibility accepts full and complete responsibility for any environmental issues identified in the site assessment and the corrective action plan, and (iv) include an acknowledgement that the person accepting responsibility is aware of the requirements set out in Division 4 of Part III of EMPA 2010 and Chapter B.1.4 of the Code.

Following completion of the agreement with the statutorily required provisions, pursuant to Section 20(2) of EMPA 2010 the transferor will receive the benefit of limited release from the Minster of Environment upon the registration of the corrective action plan. Specifically, the transferor will not be required to prepare a site assessment or corrective action plan and the Minister will not issue an environmental protection order against the transferor. This release is limited, however, to the substances identified in the corrective action plan. In addition, the Minister may revoke the release if the Minster later determines that the corrective action plan did not completely or accurately describe (i) the condition of the site before it was reclaimed was filed or the reclamation activity undertaken or required to be undertaken, or (ii) the corrective action plan contains false or misleading statements.

Accordingly, from the transferor's perspective it is recommended that the preparation of a corrective action plan be undertaken by the transferor, and from the acquirer's perspective preparation of the corrective action plan should be undertaken by the acquirer. If the impact is discovered through

environmental due diligence, it is likely that these obligations will be jointly undertaken. The transaction particulars and the ensuing negotiations will dictate which party will incur the cost of preparing the corrective action plan but, given the liability is with the transferor and it will receive the benefit of the limited release, it is arguably the transferor's cost to bear. Finally, the agreements with respect to the joint preparation of a site assessment and corrective action plan will be factually nuanced. Clients and legal counsel should fully consider all applicable issues, many of which will be similar to considerations that underlie remedial clean-up agreements and are discussed below in Part IV.B.ii of this paper.

It needs to be borne in mind that the limited release relates only to regulatory liability. A Section 19 transfer will not operate to release third party claims. The transferor and its legal counsel will still need to ensure the customary contractual risk mitigation provisions cover this risk and the limitations of Section 19 and Section 20(2), including representations, warranties, indemnities or insurance, provided that it is agreed that the acquirer will accept these risks.

The acquirer and its legal counsel, on the other hand, need to be mindful of the additional costs and delays that may occur as a result of including the Saskatchewan Ministry of Environment in the transaction process. Additionally, the acquirer will be liable for the substances identified in the site assessment and corrective action plan. Finally, the corrective action plan may be restricted to "compatible use". The term "compatible use" is defined in Section 21(1) as "a use of a site for a purpose that is not likely to cause adverse effects as a consequence of the condition of the site as set out in the documents registered in the registry." The effect of this definition is to restrict the use of the land. In the event that a site is being used for an incompatible use, the Minister may issue an environmental protection order. Accordingly, in advance of entering into a definitive agreement, the acquirer, its environmental consultants and its legal counsel should fully assess the uses within the restrictions of compatible use, costs of future reclamation and what corrective action is being provided for in the corrective action plan. This requires advanced planning as to what actions the acquirer may rely upon to apply for a notice of site condition, which are discussed further below.

ii. Notice of Site Condition and Limited Releases from Regulatory Environmental Liability

Pursuant to Section 18 of EMPA 2010, if a party reclaims an environmentally impacted site in the manner set forth in an approved corrective action plan, an application for notice of site condition can be submitted to the Saskatchewan Ministry of Environment. If the Minster is satisfied that the notice of site condition accurately depicts the state of the site and that it complies with EMPA 2010 and the Code, the Minster must direct the notice of site condition be registered in the registry, which will result in a limited release of liability for the person responsible and each successor in title to the lands. Similar to a Section

19 transfer, following the registration of the notice of site condition, the Minster will not direct that such person responsible prepare a site assessment or corrective action plan and the Minister will not issue an environmental protection order against the person responsible, the owner (if not the same person) or any future owner of the lands. While the order is not expressly stated to extend to other persons responsible, the effect of the order and the completion of the remedial work is to release all persons responsible, subject to the limitations of EMPA 2010. The release afforded by registering a notice of site condition is limited to only those substances identified in the notice of site condition. Additionally, like Section 19 transfers, the Minister may revoke the release if the Minster later determines that the notice of site condition did not completely or accurately describe (i) the condition of the site before it was reclaimed was filed or the reclamation activity undertaken or required to be undertaken, or (ii) the notice of site conditions contains false or misleading statements.

Closure, and ultimately a notice of site condition, can be achieved in many different ways, including application of administrative or engineered controls, substance removal (remediation) and risk-based closure or any combination. Pursuant to the *Administrative Control Standard* adopted under the Code, a proponent can use title instruments, zoning controls and land use restrictions as administrative controls. These controls generally include restrictive covenants prohibiting subsurface and residential development and are common with gas station or bulk fuel station divestures by national petroleum companies. It is incumbent on proponents, environmental consultants and legal counsel to understand the various options which closure and notice of site condition may be obtained. Relying upon these options may allow the parties to reduce the financial burden associated with the environmental impact or reduce the underlying environmental risk to acceptable levels.

In the context of a purchase and sale transaction, a notice of site condition may be something the transferor wishes to achieve prior to marketing and transferring the property or, it may be a matter negotiated as part of the definitive agreement, documented with detailed remediation and clean-up covenants and allocated in the purchase price. At first blush, it may seem that only the cost of completing the corrective action should factor into the purchase price, however, the value of the limited release should also be priced and factored into the purchase price.

Many of the considerations discussed with respect to Section 19 transfers are equally applicable to applications for a notice of site condition, including the limited nature of the release and the need to rely on customary contractual risk allocations for claims outside of the release and others discussed. Depending on the timing of completion of the corrective action pursuant to the corrective action plan, transacting parties will need to establish the mechanics for completion of the remedial work. These covenants may be documented in a separate agreement and give rise to several considerations, including:

- which party undertakes to carry out the corrective action and apply for the notice of site condition,
- which party will engage and pay the environmental consultants, engineers and remedial contractors,
- what costs are included or excluded, for example:
    - excavation, demolition and removal or disposal of substances and hazardous substances not identified in the corrective action plan,
    - clean backfill and engineered backfill,
    - off-site disposal fees (which vary depending on the substances to be disposed of) and transfer fees to off-site disposal (which increase relative to the total distance to travel),
    - costs to register the notice of site condition,
- what is the timeline for completion and what are the contingencies if the Saskatchewan Ministry of Environment is delayed,
- how clean is clean and endpoint selection (remediation standard):
- whether the parties simply desire the end result (a notice of site condition) or whether the parties desire to contract the means to the end result (application of administrative or engineered controls, substance removal (remediation) and risk-based closure or any combination),
- if the corrective action is being undertaken voluntarily, whether the Saskatchewan Ministry of Environment will be engaged throughout the process or only at the end of the time of application for a notice of site condition,
- whether remedial clean-up is a pre-close or post-close covenant, and
- the allocation of risk for failure to complete the remedial clean-up, and the mechanics to ensure risk mitigation, such as holdbacks, guarantees, mortgages, transfer backs, insurance, bonds, etc.,

Remedial clean-up covenants are not 'one-size fits all' agreements and legal counsel will need to consider all the specific liabilities in the given situations and draft the agreement accordingly.

iii. Other EMPA 2010 Considerations

Important in the context of purchase and sale transactions and lease transactions, Section 12(2)(c) of EMPA 2010 defines an owner or occupant as a person responsible if the discharge occurs in consequence of the acts or omissions of the owner, occupant or any person who, with the consent of the owner or occupant, has lawful possession of the property. This category of person responsible has been refined to include an element of causation on the part of the owner or occupant. The predecessor category did not require that the discharge be in consequence of the acts or omissions of the owner,

occupant or any person who, with the consent of the owner or occupant, has lawful possession of the property. Most importantly in the context of purchase and sale transactions and lease transactions, Section 12(2)(d) includes as a person responsible every owner or occupant of land subsequent to the owner or occupant described above as a person responsible subject to the exclusions in Sections 12(3)(d) and (e).

Similar to EMPA 2002, a subsequent owner or occupant may be within the exception set forth in Section 12(3)(d) of EMPA 2010 which excludes from persons responsible a person who is or was an owner of land on which a substance was discharged prior to such person becoming an owner or occupant and such person could not be reasonably expected to know or discover the existence of a substance at the time of becoming an owner or occupant. This exclusion only benefits transactions which do not require any level of environmental due diligence such as residential transactions, low value commercial transactions or any commercial transaction that does not have operations with an environmental impact (provided that a lender has not made an environmental site assessment a condition of financing). For all other situations, prudent due diligence will likely reveal any issues thereby negating a subsequent owner from relying on this exclusion. Additionally, the reasonable person standard may be such that even absent due diligence, if it would have been reasonable to conduct the same then the exclusion is not available.

Section 12(3)(e) of EMPA 2010 introduces a new limited exception in that a person who is or was an owner or occupant of land on which a substance was discharged before that person became the owner or occupant will not be a person responsible if a notice of site condition was filed. Such exclusion will only be available if the owner or occupant has not aggravated the existing adverse effect and has not discharged a new substance or additional substance into the environment. Additionally, such exclusion is limited to the relief granted pursuant to EMPA 2010 in respect of the notice of site condition (discussed in Part IV.b.ii). In any event, this is a welcome improvement to Saskatchewan environmental laws and will provide commercial certainty to parties seeking to sell and/or develop environmental sites.

Particularly important in purchase and sale transactions and lease transactions, EMPA 2010 allows parties to contractually transfer the responsibilities of a person responsible. Section 12(2)(h) includes as a person responsible every person who has (i) agreed by contract to be liable for the discharge or presence of the substance, or (ii) agreed to mitigate, remedy or reclaim adverse effects caused or contributed to by the discharge or the presence of a substance. One potential use of this provision is by a purchaser as security for a vendor's covenants, representations, warranties and indemnities. In the case where land is held in a single purpose (shell) corporation or the selling corporation will be liquidated and wound-up with money being moved to the beneficial owners, the transacting parties may use this section to attach the

obligations of a person responsible to align with the financial picture. No matter the use of Section 12(2)(h), parties should expressly price and apportion risk accordingly. Again, it is important to note that EMPA 2010 does not expressly provide that the Saskatchewan Ministry of Environment will not pursue a person who is otherwise a person responsible simply because a contractual transfer of risk has occurred. Indemnities and other traditional risk mitigation steps are still prudent.

V. Environmental Insurance

An additional tool to minimize environmental liabilities is insurance. The provision of environmental insurance may form part of the requirements of the definitive agreement or may be independently acquired to protect the interests of the acquirer or financier. All national insurance companies will offer a number of insurance coverages each as specific as context requires, but the products generally are classifiable into the following:

- *Pollution Legal Liability (PLL)*. Pollution Legal Liability insurance is widely available in Canada, is commonly used in commercial transactions and is the typical solution for unknown pre-existing pollution risks, but expressly excludes known existing conditions. Coverage will generally include: clean-up of new releases, clean-up of unknown pre-existing conditions, divested properties, excess of indemnity to cover counterparty credit risk, third party liabilities (bodily injury/property damage), business interruption, non-owned disposal sites, fines and penalties, natural resources damage, transportation and legal defence of all of those coverages previously listed. Insureds and legal counsel should carefully review the policy and be wary of exclusions, mandatory versus voluntary remediation and issues when both contracting parties are party to the coverage.

- *Remediation Stop Loss (Cost Cap)*. Remediation Stop Loss insurance insures against cost overruns and controls price uncertainty on remediation projects generally when:
    - the actual extent of contamination is greater than estimated,
    - the actual degree of contamination is greater than anticipated,
    - previously unidentified contaminants are discovered,
    - increased time for remediation causes financial loss,
    - offsite cleanup of contamination adjacent to the covered site is assumed, and
    - changes in environmental regulations and standards.

  There tends to be a limited appetite and capacity for this type of coverage as generally limits are $10,000,000 to $15,000,000 per project with terms of up to 10 years. These policies also require extensive examination of the remediation and have contingencies built in.

- *Environmental Liability Buyout*. Environmental Liability Buyout insurance (which can be arranged during or after a transaction) allows owners to divest clean-up liability and other liabilities to a third party contractor and operates similar to a liability divestiture in a M&A transaction. It is simply the contractual transfer of cleanup obligations and liability with agencies to a third party contractor in exchange for the net present value of the estimated cleanup costs and associated risk transfer elements at the time of the transaction. Depending on the context, two principle risks are capable of being be transferred: (1) Known Cleanup Cost Obligations and (2) Unknown Pre-Existing Conditions. Additionally, sometimes third party bodily injury/property damage, natural resources damages, and regulatory obligations can be transferred as well, if more risk abatement is desired.

- *Contractor's Pollution Liability (E&O)*. Errors and omission liability insurance can be obtained to manage risks related to environmental consultants and engineers.

Each of these insurance products will serve to mitigate risks identified during environmental due diligence and which cannot be adequately managed by the client's risk profile. However, the premiums associated with environmental insurance are high, which limits the use of such tools to significant transactions with large land parcels and high market value.

VI. Conclusion

Completing environmental due diligence, negotiating a definitive agreement and other collateral agreements, completing a Section 19 transfer, obtaining a notice of site condition or seeking environmental insurance are all options to manage environmental risk. Each transaction will be unique and requires using some or all of these options. Legal counsel, with an in-depth understanding of environmental regulation, environmental liability and the use of these risk-mitigation tools, will ensure that a transaction adequately manages environmental risk and balances that risk with a client's business interests. Provided the risks (known and unknown) are clearly understood, all transacting parties should be satisfied with the negotiated outcome and reasonably satisfied that environmental liabilities can be controlled, the net effect of which will be a closed transaction with mutual economic benefit.

APPENDIX A

DETAILED ENVIRONMENTAL DUE DILIGENCE CHECKLIST

[This checklist is detailed but not exhaustive of environmental consideration. All references may not be appropriate in all cases. Legal counsel, together with the client and any environmental consultants, should review this checklist in the context of the transaction.]

The following information should be reviewed and questions should be answered to determine whether there are environmental concerns or issues that need further consideration.

A. Real Estate / Surrounding Lands

1. Physical description of the property, all buildings thereon and any areas that have been filled or graded by non-natural causes, or filled with material of unknown origin.

2. Detailed plans, maps and surveys available (i.e. historical maps, aerial photographs, fire insurance records, geological, topographic and use and soil maps, building plans, utility company records, land title and property assessment records).

3. A description of surrounding properties and past and present uses, if known, and any environmental risks associated with them.

4. Details of ground water and surface water uses and drainage issues in the area.

5. Check whether the property has ever been used for waste disposal or for the transfer, storage, recycling, or treatment of waste. If so, provide whatever particulars are available, including any licences or approvals and their supporting documentation.

6. Any evidence on the site of soil staining, vegetation damage, unusual odours, or surface water discolouration.

B. Specific Business Information

1. A description of the businesses and operations on site, including any industrial processes carried on.

2. Copies of all environmental plans, certificates and permits. See Exhibit A for a list of possible environmental legislation requiring permits.

3. Review of materials handling information (i.e. products received, inventoried, produced, generated, transported and stored). Check material safety data sheets ("MSDSs").

4. Copies of hazardous material storage registration, details of any wastes generated on the site, where they are disposed of, and identity of the carrier(*s*).

5. Copies of licences for any pesticides or herbicides used on the property.

6. Details of waste water discharges, sewer or septic by-law compliance issues, and copies of sewer or septic permits and approvals.

7. Inventory of air emission and any odour release points.

8. Information on whether the operations on the property emit hazardous air pollution such as mercury, vinyl chloride, lead, asbestos, beryllium, benzene, CFCs or other refrigerants, or arsenic, and whether the property is in compliance with any applicable emission standards for such pollutants.

9. Describe air pollution control equipment installed (*e.g.*, body shop, spray paint room).

10. For any substances used on the property that are specifically designated or regulated under occupational health and safety regulations, identify the substances and provide particulars of their use and any precautions taken and required programs in place with respect to worker exposure.

11. Employee, workers' compensation and occupational, health and safety records and concerns.

12. Verify that no vibration or noise problems exist.

C. Hazardous Substances

1. Records of any above or underground storage tanks, including inspections, upgrading, records of tanks removed and removal of any contaminated soil, any information filed and acknowledgements received, including copies of approvals issued pursuant to *The Hazardous Substances and Waste Dangerous Goods Regulations.*

2. Building inspection for signs of friable asbestos, including pipe wrapping, ceiling tiles, sprayed on fireproofing, or acoustical plaster.

3. Check building for Urea Formaldehyde Foam Insulation.

4. Details of any PCBs in active use, and details of any PCB storage sites on the property, including copies of licences.

5. Check whether any radioactive materials are stored on site or concern about the presence of radon in the area.

6. Check if there are any drums or containers storing chemicals on the site. If so, are they properly labelled and in compliance with Workplace Hazardous Materials Information Systems ("WHMIS").

7. Description of solvents and degreasers used on the property, the volumes, storage prior to use, volume of spent solvents generated, and storage, recycling, and disposal practices for such spent solvents.

D. Environmental Management Practices

1. Review all policies, practices, procedures and systems in place dealing with the management of environmental and related occupational health and safety, product liability and transportation of dangerous goods concerns (*e.g.*, board of directors' resolutions, company policies, communication and reporting procedures, internal personnel involved, training and education programs in place, use of external experts, on-going compliance review and continuous improvement procedures, emergency response programs regarding spills/discharges, fires, accidents, investigations etc.).

2. Obtain copies of any environmental audits, assessments, investigations or evaluations that have been done in the past. Review the third party limitations contained in each document.

3. Review all waste reduction and recycling programs.

4. Examine any energy efficiency programs.

5. Discuss knowledge of environmental laws with plant personnel and systems in place to keep up-to-date and advised of upcoming changes in law or policies and practices of regulators.

E. Regulatory or Civil Concerns

1. Details of any spills or other incidents reported.

2. Notices of any past or proposed orders or actions (including inspections and investigations) against the owners or occupants of the property.

3. Details of any civil proceedings for environmental damage brought or threatened against the owners or occupants of the property or the surrounding area, if known.

4. Review of all contracts to determine potential environmental issues relating to product liability, representations and warranties, assumptions of liability, releases of claims, indemnity claims.

5. Review all insurance policies covering liability in connection with environmental matters.

6. Review of environmental stakeholders involved in the business.

EXHIBIT A

SASKATCHEWAN ENVIRONMENTAL REGULATION

[This list is not exhaustive of all Saskatchewan environmental regulation.]

Saskatchewan legislation:

- *The Agricultural Operations Act, S.S. 1996, c. A-12.1*
- *The Conservation Easements Act, S.S. 1997, c. C-27.01*
- *The Crown Minerals Act, S.S. 1985, c. C-50.2*
- *The Dangerous Goods Transportation Act, S.S. 1985, c. D-1.2*
- *The Environmental Assessment Act, S.S. 1980, c. E.10.1*
- *The Environmental Management and Protection Act, 2010, S.S 2010, E-10.21*
- *The Fire Safety Act, S.S. 2015, c. F-15.11*
- *The Fisheries Act (Saskatchewan), 1994, S.S. 1995, c. F-16.1*
- *The Forest Resources Management Act, S.S. 1999, c. F-19.1*
- *The Heritage Property Act, S.S. 1980, c. H-2.2*
- *The Mineral Resources Act, 1985, S.S. 1985, c. M-16.1*
- *The Occupational Health and Safety Act, 1996, S.S. 1996, c. O-1.1*
- *The Oil and Gas Conservation Act, S.S. 1979, c. O-2*
- *The Pest Control Act, S.S. 1978, c. P-7*
- *The Pipelines Act, 1998, S.S. 2000, c. P-12.1*
- *The Provincial Lands Act, R.S.S. 1979, c. P-31*
- *The Public Health Act, 1994, S.S. 1994, c. P-37.1*
- *The Reclaimed Industrial Sites Act, S.S. 2007, c. R-4.21*
- *The Saskatchewan Employment Act, S.S. 2014, c. S-15.1*
- *The Water Security Agency Act, S.S. 2005, c. W-8.1*
- *The Weed Control Act, S.S. 2010, c. W-11.1*
- *The Wildlife Act, 1998, S.S. 2000, c. W-13.12*

Federal regulation:

- *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18
- *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7
- *Canada Petroleum Resources Act*, R.S.C. 1985, c. 36 (2nd Supp.)
- *Canada Shipping Act*, 2001, S.C. 2001, c. 26
- *Canada Water Act*, R.S.C. 1985, c. C-11
- *Canada Wildlife Act*, R.S.C. 1985, c. W-9
- *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52
- *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33
- *Criminal Code*, R.S.C. 1985, c. C-46
- *Department of the Environment Act*, R.S.C 1985, c. E-10
- *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.)
- *Energy Efficiency Act*, S.C. 1992, c. 36
- *Energy Supplies Emergency Act*, R.S.C. 1985, c. E-9
- *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 126
- *Federal Sustainable Development Act*, S.C. 2008, c. 33
- *Fisheries Act*, R.S.C. 1985, c. F-14
- *Forestry Act*, R.S.C. 1985, c. F-30
- *Hazardous Materials Information Review Act*, R.S.C. 1985, c. 24 (3rd Supp.), Part III
- *International River Improvements Act*, R.S.C. 1985, c. I-20
- *Migratory Bird Convention Act*, 1994, S.C. 1994, c. 22
- *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22
- *Northwest Territories Waters Act*, 2014, c. 2, s. 66
- *Nuclear Energy Act* (formerly *Atomic Energy Control Act*), R.S.C. 1985, c. A-16 - Preamble [Repealed, 1997, c. 9, s. 7]
- *Nuclear Fuel Waste Act*, S.C. 2002, c. 23
- *Nuclear Liability Act*, R.S.C. 1985, c. N-28
- *Nuclear Safety and Control Act*, S.C. 1997, c. 9
- *Pest Control Products Act*, S.C. 2002, c. 28
- *Species at Risk Act*, S.C. 2002, c. 29
- *Territorial Lands Act*, R.S.C. 1985, c. T-7
- *Transportation of Dangerous Goods Act*, 1992, S.C. 1992, c. 34
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52

APPENDIX B

SASKATCHEWAN MINISTRY OF ENVIRONMENT – ENVIRONMENTAL FILE SEARCH APPLICATION

PRINT CLEAR SAVE

Ministry of Environment

Government of Saskatchewan

Environmental File Search Application

October 2015 | CSB | CSB21007

Please complete an application form for each site in order that the Environmental Protection Branch can effectively respond to your request. A file search is the examination of hardcopy files for more information then may be contained in the SaskSpills database or the Hazardous Material Storage (SHMS) spreadsheet.

NOTE: The completeness of information supplied will affect the accuracy of the file search. **Applications without a Spill/Incident Number for a spill or an Operation ID Number for SHMS will be returned to the sender without a search being conducted.**

What if I have questions?

For assistance completing this application or for more information, please contact our Client Service Office:

Email:	centre.inquiry@gov.sk.ca
Telephone (toll free in North America):	1-800-567-4224
Telephone (Regina):	306-787-2584

The following information **will be required** to conduct an Environmental File Search.

Search Criteria

Spill/Incident Number _____ **OR** **Operation ID Number** _____

Site Information

Current Business Name: _____

Current Property Owner's Name: _____

Business Mailing Address: _____

Location of Property: (Complete either section A OR B) _____

(A) Urban Property:

Address

_____

City or Town _____ Postal Code _____

Storage Facility Code (if known):

_____

Other information to assist the search (i.e. previous owners, previous business name, current and past property uses, correspondence with department, etc.)

_____

(B) Rural Property:

Legal Land Description:

Section | Township | Range | Meridian

East | West

Latitude: | Longitude:

Deg: | Min: | Sec: | Deg: | Min: | Sec:

Acknowledgments

- The search response is compiled by the department from a combination of manual and computerized file searches. The response is subject to the accuracy of information and material supplied by outside parties and Ministry of Environment makes no representations or warranties as to the accuracy or sufficiency of it. The integrity of the data supplied by outside parties diminishes with the age of the reported information;
- The search response will be site specific and may not reflect contamination or the existence of a pollutant from an off site source;
- Environment makes no representations or warranties as to whether or not the party being searched is in compliance with any provincial or federal Act, Regulation, Approval, Licence or Permit or as to the relevance of the search response; and
- Environment makes no representations or warranties whether or not there are any environmental concerns as to the land being searched nor as to the environmental status of the land. It is recommended that an environmental audit or site assessment be conducted by an independent third party consultant.

I, _____ , acknowledge that I have read and understood the above.

Name (Please Print) | Company Name | Date

Address | City | Postal Code | Phone

Available Information

The file search will include information supplied to the Environmental Protection Branch pursuant to the following regulations:

- *The Environmental Management and Protection Act;*
- *The Environmental Spill Control Regulations;* and
- *The Hazardous Substances and Waste Dangerous Goods Regulations.*

Information to be disclosed will include:

- Registration status and Storage facility details pursuant to the *Hazardous Substances* and *Waste Dangerous Goods Regulations;* and
- Reported Spills pursuant to *Environmental Spill Control Regulations.*

Environmental Search Fee

There is an environmental file search fee for each site specified. The fee is $98.13 per site ($93.46 + G.S.T. of $4.67) as defined by civic address or legal land description. A cheque or money order, in the amount owing made payable to the **Minister of Finance**, must accompany the application form(s). We will endeavour to respond to your request within 30 days of receipt. Please return the completed form, along with your payment, to:

Environmental File Search Request
Ministry of Environment
Finance and Administration
Box 1064
Regina, SK S4P 3B2

APPENDIX C

ECOLOG ENVIRONMENTAL RISK INFORMATION SERVICES LTD. SEARCHES

Appendix: Database Descriptions

Ecolog Environmental Risk Information Services Ltd can search the following databases. The extent of Historical information varies with each database and current information is determined by what is publicity available to Ecolog ERIS at the time of update. ***Note:*** *Databases denoted with " * " indicates that the database will no longer be updated. See the individual database description for more information.*

Automobile Wrecking & Supplies: Private AUWR
This database provides an inventory of all known locations that are involved in the scrap metal, automobile wrecking/recycling, and automobile parts & supplies industry. Information is provided on the company name, location and business type.

Chemical Register: Private CHEM
This database includes a listing of locations of facilities within the Province or Territory that either manufacture and/or distributes chemicals.

Convictions: Provincial CONV
This database summarizes the penalties and convictions handed down by the Saskatchewan courts. Companies and individuals that have been found guilty of environmental offenses under Saskatchewan's Environmental Protection Legislation are listed in this database. The records in this database are associated with the City the offense took place and are not plotted.

Wastewater Dischargers: Provincial DIS
This database is maintained by SERM and supplies the locations of the wastewater dischargers in the province. The geographic coordinates have been provided in DLS (Dominion Land Survey) format but do not contain offsets that are necessary to pinpoint a specific location. Therefore, locations will be accurate to the LSD or Quarter section only.

Environmental Effects Monitoring: Federal EEM
The Environmental Effects Monitoring program assesses the effects of effluent from industrial or other sources on fish, fish habitat and human usage of fisheries resources. Since 1992, pulp and paper mills have been required to conduct EEM studies under the Pulp and Paper Effluent Regulations. This database provides information on the mill name, geographical location and sub-lethal toxicity data.

ERIS Historical Searches: Private EHS
EcoLog ERIS has compiled a database of all environmental risk reports completed since March 1999. Available fields for this database include: site location, date of report, type of report, and search radius. As per all other databases, the ERIS database can be referenced on both the map and "Statistical Profile" page.

Environmental Issues Inventory System: Federal EIIS
The Environmental Issues Inventory System was developed through the implementation of the Environmental Issues and Remediation Plan. This plan was established to determine e location and severity of contaminated sites on inhabited First Nation reserves, and where necessary, to remediate th se that posed a risk to health and safety; and to prevent future environmental problems. The EIIS provides informati n on the reserve under investigation, inventory number, name of site, environmental issue, site action (Remediation, ite Assessment), and date investigation completed.

Environmental Spills: Provincial ES
This database includes an inventory of known spills that occ rred throughout the province and that are reported under regulation R.R.S. c. D-14, Reg. 1. Some of the geographic ordinates have been provided in DLS (Dominion Land Survey) format but do not contain offsets that are necessar o pinpoint a specific location. Therefore, locations will be accurate to the LSD or Quarter section only.

Federal Convictions: Federal FCON
Environment Canada maintains a database referred to as th "Environmental Registry" that details prosecutions under the Canadian Environmental Protection Act (CEPA) and the Fis eries Act (FA). Information is provided on the company name, location, charge date, offence and penalty.

Contaminated Sites on Federal Land: Federal FCS

The Federal Contaminated Sites Inventory includes information on all known federal contaminated sites under the custodianship of departments, agencies and consolidated Crown corporations as well as those that are being or have been investigated to determine whether they have contamination arising from past use that could pose a risk to human health or the environment. The inventory also includes non-federal contaminated sites for which the Government of Canada has accepted some or all financial responsibility. It does not include sites where contamination has been caused by, and which are under the control of, enterprise Crown corporations, private individuals, firms or other levels of government.

Hazardous Material Storage: Provincial HMS

The Saskatchewan Hazardous Materials Storage Program collects this information. With the approval of the Ministry of Environment, hazardous substances and waste dangerous goods can be stored in underground storage tanks, above-ground storage tanks, outdoor storage site and warehouse/indoor storage sites. A hazardous substance/waste is defined as a substance/waste that because of its quantity, concentration or physical, chemical or infectious characteristics, either individually or in combination with other substances, is an existing or potential threat to the environment or human health. This inventory includes information on operator ID, operation name, address, legal land description and operation status.

Horizontal Wells: Provincial HORW

Saskatchewan Industry and Resources maintains an inventory of all horizontal wells drilled in the province. The database provides detailed information in regard to well name, owner name, status, licence no., initial and final drilling date, well type, horizon name and pool name.

Hazardous Substance Storage Sites: Provincial HSSS

This is an inventory of hazardous substance storage sites that must be registered under regulation 25/92, S. 3. The database is a catalog of information on the location of outdoor and warehouse sites, housing hazardous products used by companies in the agricultural, chemical, farming, warehousing, trucking, waste recycling, distribution, service stations/repair shops, bulk stations, autobody, mining, and manufacturing industry. Information is provided on the type of product(s) stored, application date, company name, location, and the type of business service operated on site. For current information, please refer to the HMS database.

Hazardous Substance Storage Tanks: Provincial HSST

This is an inventory of hazardous substance storage tanks that must be registered under regulation 25/92, S. 3. The database is a compilation of information on aboveground and underground storage tanks that hold substances such as gasoline, diesel, chemicals, heating oil, kerosene and alcohol blended products. Information is provided on the contents and capacity of the tank, company name, location, and the type of business service operated on site. For current information, please refer to the HMS database.

Indian & Northern Affairs Fuel Tanks: Federal IAFT

The Department of Indian & Northern Affairs Canada (INAC) maintains an inventory of all aboveground & underground fuel storage tanks located on both federal and crown land. Our inventory provides information on the reserve name, location, facility type, site/facility name, tank type, material & ID number, tank contents & capacity, and date of tank installation.

Intensive Livestock Operation Approvals: Provincial ILOA

Under the Agricultural Operations Act, certain types of intensive livestock operations are required to obtain plan approval. Approvals are subject to the size of operation and their proximity to a water source. Those requiring plan approval must submit documentation regarding manure storage, utilization of manure nutrients and disposal method for dead animals. Sask. Agriculture, Food and Rural Revitalization maintains a database of approvals issued over the last three decades, for operations that may or may not be currently operational. An ILO plan approval may have been issued to an intensive livestock operation but never been constructed, been approved and not constructed yet, or it may have been constructed and later discontinued. There is no distinction in the database between operational and non-operational sites. Please note that the value "Sum of Animal Units" is a calculation used to compare different types of livestock operations (each type of animal is rated on a scale). Geographic coordinates were provided in DLS (Dominion Land Survey) format but do not contain offsets that are necessary to pinpoint a specific location. Therefore, locations will be accurate to the Quarter section only.

Canadian Mine Locations: Private MINE

This information is collected from the Canadian & American Mines Handbook. The Mines database is a national database that provides over 290 listings on mines (listed as public companies) dealing primarily with precious metals and hard rocks. Listed are mines that are currently in operation, closed, suspended, or are still being developed (advanced projects). Their locations are provided as geographic coordinates (x, y and/or longitude, latitude). As of 2002, data pertaining to Canadian smelters and refineries has been appended to this database.

Mineral Occurences: Provincial MNR

Saskatchewan Energy and Mines maintains an inventory of 2890 separate mineral occurrences in the "Saskatchewan Mineral Deposit Index" regarding metallic, industrial mineral and coal deposits. Information within the database pertains to the SMDI No., showing name, location, commodity, deposit type, status, classification and geographical reference data. For additional information regarding geological data and exploration history, please contact the office and quote the SMDI No.

National Analysis of Trends in Emergencies System (NATES): Federal NATE

In 1974 Environment Canada established the National Analysis of Trends in Emergencies System (NATES) database, for the voluntary reporting of significant spill incidents. The data was to be used to assist in directing the work of the emergencies program. NATES ran from 1974 to 1994. Extensive information is available within this database including company names, place where the spill occurred, date of spill, cause, reason and source of spill, damage incurred, and amount, concentration, and volume of materials released.

National Defence & Canadian Forces Fuel Tanks: Federal NDFT

The Department of National Defence and the Canadian Forces maintains an inventory of all aboveground & underground fuel storage tanks located on DND lands. Our inventory provides information on the base name, location, tank type & capacity, tank contents, tank class, date of tank installation, date tank last used, and status of tank as of May 2001. This database will no longer be updated due to the new National Security protocols which have prohibited any release of this database.

National Defence & Canadian Forces Spills: Federal NDSP

The Department of National Defence and the Canadian Forces maintains an inventory of spills to land and water. All spill sites have been classified under the "Transportation of Dangerous Goods Act - 1992". Our inventory provides information on the facility name, location, spill ID #, spill date, type of spill, as well as the quantity of substance spilled & recovered.

National Defence & Canadian Forces Waste Disposal Sites: Federal NDWD

The Department of National Defence and the Canadian Forces maintains an inventory of waste disposal sites located on DND lands. Where available, our inventory provides information on the base name, location, type of waste received, area of site, depth of site, year site opened/closed and status.

National Environmental Emergencies System (NEES): Federal NEES

In 2000, the Emergencies program implemented NEES, a reporting system for spills of hazardous substances. For the most part, this system only captured data from the Atlantic Provinces, some from Quebec and Ontario and a portion from British Columbia. Data for Alberta, Saskatchewan, Manitoba and the Territories was not captured. However, NEES is also a repository for all previous Environment Canada spill datasets. NEES is composed of the historic datasets ' or Trends ' which dates from approximately 1974 to present. NEES Trends is a compilation of historic databases, which were merged and includes data from NATES (National Analysis of Trends in Emergencies System), ARTS (Atlantic Regional Trends System), and NEES. In 2001, the Emergencies Program determined that variations in reporting regimes and requirements between federal and provincial agencies made national spill reporting and trend analysis difficult to achieve. As a consequence, the department has focused efforts on capturing data on spills of substances which fall under its legislative authority only (CEPA and FA). As such, the NEES database will be decommissioned in December 2004.

National PCB Inventory: Federal NPCB

Environment Canada's National PCB inventory includes information on in-use PCB containing equipment in Canada including federal, provincial and private facilities. All federal out-of-service PCB containing equipment and all PCB waste owned by the federal government or by federally regulated industries such as airlines, railway companies, broadcasting companies, telephone and telecommunications companies, pipeline companies, etc. are also listed. Although it is not Environment Canada's mandate to collect data on non-federal PCB waste, the National PCB inventory includes some information on provincial and private PCB waste and storage sites. Some addresses provided may be Head Office addresses and are not necessarily the location of where the waste is being used or stored.

National Pollutant Release Inventory: Federal NPRI

Environment Canada has defined the National Pollutant Release Inventory ("NPRI") as a federal government initiative designed to collect comprehensive national data regarding releases to air, water, or land, and waste transfers for recycling for more than 300 listed substances.

Upstream Oil & Gas Site Spills: Provincial OGS

Saskatchewan Industry and Resource compiles spill information pertaining to crude oil, produced water and spills on upstream oil and gas facilities. Information includes location, date of spill, substance spilled, total amount spilled and source.

Oil and Gas Wells: Private OGW

The Nickle's Energy Group (publisher of the Daily Oil Bulletin) collects information on drilling activity including operator and well statistics. The well information database includes name, location, class, status and depth. The main Nickle's database is updated on a daily basis, however, this database is updated on a monthly basis. More information is available at www.nickles.com.

Private PAP

Canadian Pulp and Paper:

This information is part of the Pulp and Paper Canada Directory. The Directory provides a comprehensive listing of the locations of pulp and paper mills and the products that they produce.

Parks Canada Fuel Storage Tanks: Federal PCFT

Canadian Heritage maintains an inventory of all known fuel storage tanks operated by Parks Canada, in both National Parks and at National Historic Sites. The database details information on site name, location, tank install/removal date, capacity, fuel type, facility type, tank design and owner/operator.

Pesticide Register: Provincial PES

Saskatchewan Agriculture and Food maintains a database of all vendors of registered pesticides.

Retail Fuel Storage Tanks: Private RST

This database includes an inventory of retail fuel outlet locations (including marinas) that have on their property gasoline, oil, waste oil, natural gas and / or propane storage tanks.

Scott's Manufacturing Directory: Private SCT

Scott's Directories is a data bank containing information on over 200,000 manufacturers across Canada. Even though Scott's listings are voluntary, it is the most comprehensive database of Canadian manufacturers available. Information concerning a company's address, plant size, and main products are included in this database.

Waste Disposal Site Inventory: Provincial WDS

This inventory pertains to registered waste disposal sites within the province of Saskatchewan. Specific dates as to when the waste disposal site was activated are not available. The geographic coordinates have been provided in DLS (Dominion Land Survey) format but do not contain offsets that are necessary to pinpoint a specific location. Therefore, locations will be accurate to the LSD or Quarter section only.

Water Well Information System: Provincial WWIS

This database was collected from Saskatchewan Water, Water Resource Administration and contains over 100,000 records. The geographic coordinates have been provided in DLS (Dominion Land Survey) format but do not contain offsets that are necessary to pinpoint a specific location. Therefore, locations will be accurate to the LSD or Quarter section only.

Appendix D

Asset/Share Provisions for Environmental Consideration

Overview of Key Provisions Relating to Environmental Matters - Agreements of Purchase And Sale Representations and Warranties			
No.	Provision	Description	Importance & Special Concerns
1.	Parties	Ensure proper legal name of parties involved.	▪ Ensure the parties to the transaction align with the results of environmental due diligence (i.e. notices, permits, approvals). ▪ Ensure parties can deliver the environmental covenants and have the financial means to satisfy any environmental risk allocation and environmental now and in the future.
2.	Recitals	Introduction to document and transaction.	▪ Not legally binding unless made so in the agreement. ▪ If recitals include environmental facts, ensure contractual provisions to make facts legally binding.
3.	Definitions	Defining certain key capitalized terms. These need to be reviewed carefully in the context of each transaction.	▪ Review and ensure appropriate risk allocation in the usual environmental definitions: o Governmental Authority o Hazardous Substances (limited to statutory definitions?) o Laws o Environmental Laws (inclusive of public health, employment and occupational health and safety?) o Claims o Environmental Claims (limited to regulatory orders or inclusive of all third party claims?) o Notices o Orders o Permits o Release (consider scope "in, on under and through"? Lands? Adjacent or Neighbouring Lands?) o Vendor's Knowledge
4.	Representations and Warranties	Means of having parties give information that may be required and agreed upon as a basis to proceed. Also important for the allocation of risks and liability provisions contained in the indemnification section. These are statements regarding some past or existing facts or circumstances or state of affairs.	If not true, the following may result: (a) renegotiation of price or other terms of the transaction, (b) rescission or termination of contract, or (c) damages for breach of warranty under indemnification clause. The following are examples of key topics that are often included as the subject matter of environmental representations and warranties: 1. Hazardous Substances 2. Release of Hazardous Substances 3. Offences 4. Orders 5. Reporting 6. Disposal Sites 7. Permits 8. Documents, Records and Audits 9. Adverse Environmental Conditions 10. Adverse Occupational Health and Safety Occurrences 11. Due Diligence/ Compliance Programs 12. Underground Storage Tanks 13. Compliance with Environmental Laws The following are key concerns that arise during the negotiation of appropriate representations and warranties: (i) the scope and breadth of the representations and warranties that the

Overview of Key Provisions Relating to Environmental Matters - Agreements of Purchase And Sale Representations and Warranties			
No.	Provision	Description	Importance & Special Concerns
			parties are willing and able to make, (ii) the details of specific exceptions to the general representations and warranties (usually by means of a disclosure schedule), (iii) the limitation on particular representations and warranties by: ▪ some sort of materiality basis, ▪ "to the knowledge of the Vendor", ▪ "to the best of the Vendor's knowledge after due inquiry", ▪ limiting to actions taken by Vendor or arising during Vendor's ownership, ▪ exclusions for matters known by the Purchaser, (iv) any limitation on liability as to a specific dollar amount: ▪ as a floor (to eliminate claims for trifling amounts), ▪ as a ceiling (usually something less than the purchase price), (v) the length of time that the representations and warranties survive following the closing, (vi) the mechanics as to the giving of notice of any breach to the vendor by the purchaser and allowing the Vendor either time to remedy the same or opportunity to take action to minimize the damages.
5.	Survival Clause	Sets out the period during which the representation and warranties can be relied on or a claim made thereunder.	EMPA 2010 modifies Sections 5 and 7 of *The Limitations Act* and creates a six year limitation period from discovery for an "environmental claim". This extended statutory limitation period should be considered in the context of typical contractual survival clauses which amend limitation periods Environmental liabilities or concerns may not be obvious or evident for many years unless a detailed environmental audit is conducted and discovers a problem or potential problem. Liabilities at law (under EMPA 2010 or otherwise) to government or other third parties may not be "contracted out".
6.	Exclusions	Means of having certain concerns excluded from the transaction.	The following are examples of matters that may be important in an environmental context: (i) exclusion of certain assets or part of the property to be purchased and sold, (ii) exclusion of certain liabilities to be assumed, (iii) limiting the scope of the may be conducted, (iv) limiting the extent of the representations and warranties.
7.	Covenants	Clauses setting out agreements made to do or not to do something in the present or in the future.	Examples of covenants that are important in an environmental context include: (i) representations and warranties true and correct at closing, (ii) conditions performed or complied with, (iii) actions until closing, (iv) ongoing disclosure, (v) access for inspection or environmental audit and provisions regarding scope, costs, reports, involvement with regulations, (vi) special confidentiality provisions - solicitor-client privilege, (vii) further assurances. In addition, there may be pre or post close remedial obligations attaching to the vendor or the purchaser. These covenants should be clearly established and may be supported by financial assurances.
8.	Financial Security Arrangements	Provisions for some sort of security or other arrangements to ensure that the parties will be able to fulfil their obligations. Consider the use of Section 12(2)(i) of	(i) Extended Payment Terms (ii) Escrow (iii) Guarantees (iv) Letters of Credit (v) Performance Bonds (vi) Insurance

Overview of Key Provisions Relating to Environmental Matters - Agreements of Purchase And Sale Representations and Warranties			
No.	Provision	Description	Importance & Special Concerns
		EMPA 2010	(v) Collateral Mortgages
9.	Indemnities	Provisions that expressly provide for the protection against loss or damage and the reimbursement for loss, damage and injury	Express contractual arrangement between the parties, (a) confirming their direct obligations, and (b) providing for resolution of third party claims. Consider whether indemnity should be limited to regulatory orders only or inclusive of third party claims. The indemnity may be quite complex the typical provisions should be analyzed in light of the environmental due diligence: (i) conditions precedent to recovery by the claimant, (ii) threshold or deductible claim amounts (iii) maximum claim amounts (Note: remediation costs may exceed the usual purchase price limitation):. (iv) mechanics for settling and paying claims:.
10.	Conditions of Closing	Provisions that expressly provide for closing requirements and arrangements for a waiver thereof or rescission rights under the contract.	The following conditions may be important in an agreement with respect to environmental matters: (i) the condition that the representations and warranties contained in the agreement shall be true and correct at the time of closing with the same force and effect as if made at and as of such time as well as on the date of the agreement, (ii) that the other party shall have performed or complied with all of the terms, covenants and conditions of the agreement to be performed or complied with by it at or prior to the time of closing, (iii) that a certificate or other instrument of the party or its officers be delivered to confirm that its representations and warranties are true and correct at the time of closing, (iv) that the exercising of rights of access and inspection shall not affect or mitigate the covenants, representations and warranties otherwise also made under the contract, (v) that no material change shall have occurred to the business being acquired prior to the closing or to the laws relating to the business or the property, (vi) that the purchaser is able to obtain financing for the transaction, (vii) that a satisfactory environmental audit has been performed, (viii) that an appropriate clean-up agreement or environmental agreement be entered into by the parties providing for an allocation of the responsibilities of the parties to address any environmental problems that have been discovered prior to closing, (ix) that any consents required under contracts or from regulatory authorities have been obtained.
11.	Boiler Plate Clauses	Standard General or Miscellaneous provisions dealing with routine matters that are important for environmental matters	(i) Further Assurances (ii) Time of the Essence (iii) Public Announcements (iv) Benefit of the Agreement (v) Entire Agreement (vi) Amendments and Waiver (vii) Assignment (viii) Notices (ix) Governing Law

Appendix E

Lease Provisions for Environmental Consideration

Overview of Key Provisions Relating to Environmental Matters - Leases		
No.	Clauses	Comments
1.	Use	Open/Closed and
2.	No nuisance	No ___ yes___
3.	Cleanliness and no wastes	No ___ Yes ___
4.	Compliance	Laws, regulations, orders, policies?
5.	Payments - additional rent	Utilities and services, repairs, landlord's work
6.	Landlord entry	Inspection rights
7.	Landlord work	Repairs, clean up
8.	Landlord remedies	Termination, do repairs work
9.	Assignment/subletting	Landlord consent - No___ Yes ___
10.	Environmental audit rights	Base line, during, on termination
11.	Notice of environmental matters	Investigations, orders, inspections
12.	Hazardous substances provisions	Notice, general and / or specific compliance, clean up
13.	Indemnity Provisions	General and/or specific
14.	Financial security provisions etc	Performance bond letter of credit
15.	Specific environmental covenants, representations warranties	Taylor made to deal
16.	Survival clause	General and/or specific