

Contaminated Sites for Fiduciaries



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Overview

- How clean is “clean”?
- Who’s responsible?
- What can you do with a contaminated site?



How Clean is Clean?

- Background
- Generic
 - Potable / Non-Potable
 - Land Use
 - Stratified
- Risk Assessment

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Generic

- Soil, Sediment, Water
- Potable / Non-Potable
- Land Use
 - Residential / Industrial / Agricultural / etc.
- Stratified

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Which Generic?

- Reg. 153/04: *Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act, March 9, 2004 / Oct. 1, 2004*
- *Guideline for Use at Contaminated Sites in Ontario (1994 to 2004)*
- Next?

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Tables

- 1: Background / Sensitive
- 2: Full Depth, potable
- 3: Full Depth, non-potable
- 4 / 5: Stratified potable / non-potable
- 6: Soil Extract and Groundwater
(whether shallow soil)

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Risk Assessment

- MOE review and acceptance
- Slow
- Unpredictable
- Expensive
- Financial Assurance

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How do you know if it's clean?

- Record of Site Condition
 - Date?
 - Phase I / II?
 - Environmental Site Registry
- Certificate of Property Use
- Other documents?

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Who says it's clean?

- Qualified Person
 - Insurance
- Regulators?
- Can you rely on what they say?

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Will it stay clean?

- When the standards change?
- When contaminants degrade?
- When contaminants migrate?

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Are MOE standards enough?

- *Tridan v. Shell*
- Impact on value
- What is “pristine”?

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If it's not clean

- Hazardous to occupants / neighbours?
- S. 14
- Cleanup obligations (spills)
- Change of land use
- Building permits
- Impact on value

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Overview

- How clean is “clean”?
- **Who’s responsible?**
 - **Orders**
 - **Protections from orders**
- What can you do with a contaminated site?

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MOE Orders

- Environmental Protection Act
 - Also OWRA, TSSA, CWA, SDWA, etc.
- Stop orders, Control orders
- Preventive orders, Cleanup orders
- Orders to Pay

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Orders: Liability Bomb

- No fault
- No limitation period
- No cost limit
- No fairness limit
- Retrospectivity
- Uncontrolled MOE discretion

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Who can be ordered?

- Owns or owned or has or had management or control of an undertaking or property, s. 18, 97, 157.1
- Has or had charge, management, control of source of contaminant, s. 7, 8, 14
- Has or had charge and control of land, building or waste, s. 43

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= Anyone with “control”

- Past or present
- Includes non-polluters:
 - Owner, occupant
 - Officers, directors
 - Anyone in possession
 - Receivers, trustees
 - Individual / corporate
- Control without possession?

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Protection from Orders?

- Record of Site Condition (RSC)
- Bankruptcy and Insolvency Act
- Environmental Protection Act, protection for fiduciaries
 - S.168.23 to 168.26
 - Reg. 298/02

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How much protection from an RSC?

- No MOE signoff
- No protection during cleanup
- No protection against civil suits
- No protection against prosecution or EPs

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Reopeners where

- Contaminant moves off-site
- RSC based on false / misleading information
- Certificate of Property Use or s.18 risk management order contravened
- Danger to health or safety

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Other weaknesses of RSCs:

- The invalidators:
 - Change of use
 - False information
 - Migration across the property line
 - What if the property line moves?
 - Improvements in detection technology?
- How risky is it to submit past RSCs?

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What isn't control?

- S. 168.26 EPA
- Some commercially reasonable acts of secured creditor \neq control:
 - Investigate conditions
 - Reduce contamination
 - NOT
 - Secure site
 - Pay taxes, insurance
 - Respond to emergencies

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Order against fiduciary

- No personal liability unless gross negligence, willful misconduct;
- Must exhaust estate, except administration costs
- S. 168.23 EPA

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Fiduciaries' Duty to Report

- S. 168.24 EPA
- Danger to health and safety
- As a result of discharge or presence of contaminant
- Report to SAC w/in 24 hours

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Access to Environmental Reports

- S. 168.25 EPA
- Fiduciary must turn over environmental reports on request

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Overview

- How clean is “clean”?
- Who’s responsible?
- **What can you do with a contaminated site**

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What can you do with a Contaminated Site

- Clean it
- Abandon it
- Sell it

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Clean it?

- Dig and dump
- Land farming
- *In situ*:
 - Chemical oxidation
 - Bioremediation
 - Air sparge, etc.

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Contaminants are different

- The big three:
 - Petroleum
 - Heavy metals
 - Chlorinated solvents

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Not everything can be cleaned

- Engineers are optimists
 - Cost
 - Time
 - Result
- Lawyers must be pessimists
- *Who is wrong more often?*

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Risk it away

- For deep pockets with lots of time
- Risk management plan /CPU
- Impact on mortgage ability
- How to enforce CPU conditions?
- Who maintains documents / FA if subdivided?

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Abandon it?

- Note short deadlines in BIA, EPA
- Don't miss the deadline

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Sell it?

- Agreement of Purchase and Sale
 - Disclosure
 - Warranty / reliance
 - Deceit
 - Latent / Patent Defect

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Agreement of Purchase & Sale

- Identify Risks
 - ESA, inspection
- Allocate Known Risks
- Allocate Unknown Risks
 - Insurance?
 - Escrow?
 - Price?

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Vendor must

- Truthfully answer questions
- Obligation to disclose?
 - latent defects
 - buried tanks
 - danger v. value

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Will it come back to bite you?

- Will the cleanup work?
- Will the buyer be solvent?
- Will more contamination be found?
- Did anything go wrong on your watch?

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The Consultant

- *Qualified Person?*
- Does she know what she's doing?
- Insurance
 - What does it cover?
 - When does coverage expire?
 - Are there current / future claims against her?
 - Claims-made policies
- Proving negligence

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Trusting a Consultant

- The retainer letter
- Limitations on liability
- Legal right to rely on the report
- Quality of the work / benchmarks
- Changes in scope

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Conclusions

- Contaminated sites still risky, technical, cost extra time and money
- Rules and numbers keep changing
- Some protection for very careful fiduciaries
- Sometimes they're worth it.

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Questions?

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