



ESAs for Assessors: Avoiding Liability Pitfalls and Perils

Marc McAree
Willms & Shier Environmental Lawyers

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Overview

- Triggers for ESAs
 - Regulatory
 - Market driven
- Changing regulatory landscape
 - Ontario's Brownfields legislation
- Protecting Assessors
 - Quality assurance
 - Contractual protection
 - Insurance

Environmental Site Assessment Triggers

- Transactions
 - Purchase, sale, financing, leasing
- EMS / Due Diligence
- Redevelopment
 - Municipal requirement
 - Ontario Brownfields legislation
- Regulatory
 - Clean-up orders, SSRA
- Civil Lawsuits / Insurance Claims

Contaminated Land Clean-up Guidance

- *MOE Clean-up Guideline and Guidance on Sampling and Analytical Methods*
- CSA
- CMHC
- CCME
- Consulting Engineers of Ontario
- National Groundwater Association
- Ontario Ministry of Housing
- ASTM

Brownfields Amendments Environmental Site Assessments

- Defined in *Environmental Protection Act*
 - **Phase One ESA:** to determine the likelihood that one or more contaminants have affected all or part of the property
 - **Phase Two ESA:** to determine the location and concentration of one or more contaminants in the natural environment.
 - Record of Site Condition must be certified by a “qualified person”
 - CSA Standards referenced by regulation

Brownfields Amendments Prescribed Standards

- Proposed regulation
 - Phase One and Two Site Assessments must be conducted by or under the supervision of a qualified person
- Regulation would adopt (subject to minor adjustments)
 - Phase One standard
 - CSA Z768-01
 - Phase Two standard
 - CSA Z769-00

Brownfields Amendments Qualified Person

- Proposed RSC regulation – “qualified person”
 - QP 1 – person qualified to conduct environmental site assessments and certify an RSC
 - Licensed professional engineer, professional geoscientist, applied science technologist or certified environmental technologist
 - QP 2 – person qualified to supervise and certify RSC based on risk assessment
 - Requires both educational component and prescribed level of risk assessment experience

Contaminated Land Phase One and Two ESAs

- A Phase One ESA may involve
 - Non-intrusive investigations
 - Identify baseline conditions
 - Review of aerial photographs
 - Historical title search
 - Property use records (Insurance plans or city directories)
 - A request for information from regulatory authorities
 - Review of previous Phase One ESA reports
 - Review of company records
 - Review of geotechnical reports
 - Interviews

Contaminated Land Phase One ESA

- Phase One ESA
 - CSA Standard Z768-01
 - Only a snapshot of the day of the site visit
 - Tenants can refuse access, or to divulge information
 - Does not prove that a site is uncontaminated or contaminated
 - Structured to 'catch' indicators of the possibility of contamination

Contaminated Land Phase Two ESA

- Phase Two ESA
 - CSA Standard Z769-00, Phase Two Environmental Site Assessments
 - Usually done when Phase One ESA indicates possible contamination
 - Intrusive testing (usually subsurface)
 - Delineates extent and source of contamination
 - Sets out recommendations (e.g. further stage of drilling investigation or remediation)

Assessor – Problems For Client

- Assessor invites legal problem for client when:
 - Assessor's written report contains speculative information
 - Source of contamination
 - Opinion on "compliance"
 - Report is not privileged
 - Assessor gives legal advice
 - Reports, or recommends reporting of contamination to MOE without legal advice
 - Assessor fails to identify a relevant environmental concern

Reporting to MOE?

- True or False

"The discovery of a soil or ground water Guideline exceedance need only be reported to the MOE if the exceedance occurs at or near property boundaries and the contamination has the potential to migrate off-property."

(from a consulting firm's newsletter)

- When does an assessor have a legal duty to report contamination to the MOE?

Assessor Professional Legal Obligations

- Examples
- *Professional Engineers of Ontario Act*
 - Regulation 941 – defines professional misconduct
- *Professional Geoscientists Act, 2000*
 - O.Reg. 60/01 Code of Ethics of Professional Geoscientists

Environmental Claims Assessor's Reports

- Exposure to risk – anyone who relies on the report can sue assessor
 - e.g. Purchaser may pay but bank is client
- Assessor's reports may contain non-reliance disclaimer barring third parties (i.e. purchasers) from relying on the report
 - *Wolverine Tubing*
 - *Burgoyne*
- Assessors are often asked for reliance letters

Environmental Claims Assessor's Reports

- Relying on other assessor's reports
 - Purpose of report might be different from your clients' intended purpose or scope (e.g. soil not groundwater, geography)
 - Report may be outdated
 - Your client has no privity of contract with other assessor – will have to sue you
 - If other assessor may have done substandard job – you will be stuck to pay for his/her negligence

Contractual Protection

- For all investigations assessors should obtain agreement in writing
 - Precisely define scope of work
 - Clearly specifying right of access, right to drill, dig, confidentiality of results...
 - Limitation of liability
 - Avoid claim by owner that drilling or other activities of the assessor caused or exacerbated contamination

Professional E&O Insurance

- Be sure that policy covers all aspects of work that assessor does
 - Coverage in high risk areas (e.g. mould remediation) is being denied
 - Insurers may require assessor's to enter into written contracts for work
 - Ensure coverage amount adequate (\$)
- If assessor is relying on other consultants, labs, etc., ensure they are covered

Negligence

- *MTO v. CH2M Hill (Sept. 2002)*
- Consultant accepted contract with MTO to identify contamination pre-purchase
- Consultant conducted intrusive investigation and indicated that contamination did not exceed MOE Clean-up Guideline
- MTO purchased at full (clean) market value

Negligence

- When MTO excavated property contamination discovered
- MTO hired another consultant to clean-up contamination and sued original consultant
- Defendant argued:
 - Damages limited to fees paid for report
 - Not negligent
 - Low budget contract did not require full Phase Two

Negligence

- Judge found consultant was negligent
 - Had to pay \$130K cost of clean-up
 - Did not have to pay costs of second consultant
- Negligence included
 - Failure to do fire insurance search
 - Failure to locate original tanks, therefore drilled wrong location
 - Poorly documented work
 - No records of some field work
 - Vapour testing done in winter when invalid
- Failed to meet professional standard

Quality Control

- Exercise at least the skill and knowledge normally possessed by members of the profession in the same locality
- Complying with industry standards is not always sufficient; an entire industry can be negligent!
- Stay abreast of new techniques, testing methods, technologies and other industry changes
- May owe a duty of care to third parties if it is reasonably foreseeable that the third party may be injured by the EP's conduct
- Document due diligence through written memoranda, letters, reports, photography, check lists and questionnaires, and exclusion clauses

Biography

Marc McAree, B.A. (Hons.), LL.B., M.E.S. is an environmental lawyer and partner at Willms & Shier, Environmental Lawyers www.willmsshier.com. He is also a trained and accredited mediator. Marc provides advice to corporations and other private interest clients on all aspects of contaminated land, environmental compliance and approvals, and environmental risk management. He also represents clients in civil litigation matters, defends them against environmental prosecutions and appears before administrative tribunals.

Marc completed the joint Bachelor of Laws/Masters in Environmental Studies programme at York University. His Masters thesis is titled *Environmental Culpability of Corporate Directing Minds: Strict Liability Offences and Due Diligence*. Marc is a member of the Ontario Bar Association Environmental Law Section Executive, and Past Chair of the OBA Young Lawyers' Division.

He has been published in *EnviroNews*, *Canadian Environmental Regulation and Compliance News*, and *Service Station and Garage Management*. Marc lectures frequently on environmental matters. He is an Approved Course Instructor with the Ontario Real Estate Association where he presents a course titled *Contaminated Land: Avoiding Pitfalls and Closing Deals!* to real estate brokers and agents throughout Ontario.