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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

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This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Business Law Department, Steven Jeffery at 416.593.3939 or sjeffery@blaney.com.

NEW EXEMPTIONS FROM ENVIRONMENTAL LAW COULD PROMOTE LAND CLEANUP IN ONTARIO

Steven P. Jeffery

Lenders who hold mortgages on polluted real estate in Ontario have been given new protection against the possibility of legal action by the Ministry of the Environment. Similar protections for investors who propose to buy polluted property and clean it up are scheduled to take effect shortly.

It is all part of an effort by the provincial government to give lenders and buyers an opportunity to revitalize spoiled property and have it restored to productive use without having to worry about imminent action under the Environmental Protection Act (EPA).

The new protections are provided by portions of the Brownfields Statute Law Amendment Act, 2001 that amend the EPA. The mortgagee sections, proclaimed in force on December 1, 2002, have long been sought by the secured lending industry and bring Ontario's environmental law regarding secured lenders more into line with U.S. law.

Under the pre-Brownfields EPA, a secured lender could become liable for environmental damage to property on which it held the mortgage if it came into "occupation, charge, management or control" of that property. Since enforcement of a mortgage in default often requires that the mortgagee or its receiver take possession of the property to collect rents, make repairs and so on, the law was of great concern to secured lenders.

Now, a secured creditor who takes certain specified actions will not be deemed under the EPA to be a person who is, or was, in occupation, charge, management or control of the property. These specified actions include preserving or protecting the secured property and responding to any danger to the health or safety of any person that results from the presence or discharge of a contaminant on, in or under the property.

Thus, ordinary site inspections carried out by a mortgagee will not bring the mortgagee environmental liability. Nor with other specified sustaining actions, including preventive and remedial actions that basically constitute a response to an environmental emergency.

In addition, each person who conducts, completes or confirms an investigation in relation to property is now exempted under the EPA. Further, the Act now provides that a mortgagee who forecloses on a property (thereby

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becoming the owner of it) will be exempt from environmental liability for five years, unless the environmental damage arises from the mortgagee's gross negligence or wilful misconduct. This means a foreclosing mortgagee has five years within which to dispose of the property. After that, the mortgagee may become liable for an order made under the EPA.

The Director under the EPA may extend the five year period. Unfortunately, the five year period begins on the date of foreclosure. Therefore, technically, it does not appear possible for a mortgagee to go to the Director to get a longer period of time before its acts to foreclose.

There is an exception set out in the EPA regarding circumstances where an environmental event has occurred that results in danger to the health or safety of any person, impairment or serious risk of impairment of the quality of the natural environment or injury or damage or serious risk of injury or damage to any property or to any plant or animal life. In these exceptional circumstances, the Director may send a creditor who has foreclosed an order requiring compliance with directions specified in the order that are reasonably necessary to ensure that none of the exceptional circumstances exists. This may include a direction requiring the removal or disposal of the contaminant or anything affected by the contaminant; a direction to secure by means of locked gates and so on any land, place or thing; and a direction to provide alternate water supplies.

As a quid pro quo for this new secured creditor exemption, the EPA now requires that, if a secured creditor becomes aware of certain prescribed items of environmental concern, the secured creditor must give notice to the Ministry of the Environment of such item. Further, on the written request of the Director, a secured creditor must provide the Director with a copy of any report that is in the possession or control of the secured creditor and that was prepared in the course of, or as a result of, an investigation to determine whether a contaminant is present or is being discharged on, in or under property.

The EPA has also been amended so that the new exemptions given to secured lenders are are also available, under the same terms and conditions, to receivers and trustees in bankruptcy (who also come into "occupation, charge, management or control"). These provisions mirror provisions that already exist under the Bankruptcy and Insolvency Act of Canada which protect trustees in bankruptcy.

If a receiver or trustee in bankruptcy receives an order from the Director issued under the exceptional circumstances described above, the receiver or trustee may escape having to comply if the order did not arise from the gross negligence or wilful misconduct of the receiver or trustee in bankruptcy and the receiver or trustee in bankruptcy notifies the Director that it has abandoned or disposed of the property within 10 days.

As we mentioned at the beginning of this article, in addition to provisions protecting

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secured creditors, the Brownfields Act contains provisions designed to "encourage the revitalization of contaminated land". We will review these provisions, which have not yet come into force, in a later edition of Blaneys on Business. ■

CAN WE GET THIS LITIGATION SETTLED?

Rodney L.K. Smith, Q.C.

This is the third of three articles by Rodney L.K. Smith, Q.C. group leader of Blaneys' commercial and general litigation group, about measures that business people and their litigation lawyers can take to establish and maintain the clear, constructive relationships that produce the most efficient and effective outcome.

Timely settlements of commercial litigation are obviously highly desirable but often difficult to achieve.

The first thing to do in looking for an early resolution of a case is to make sure you have a realistic assessment of the strengths and weaknesses as well as the settlement value of your own case. Plaintiffs often think that the settlement value of their case is the full amount of what they imagine their loss is.

There are many pitfalls in the litigation process and an experienced commercial litigation lawyer knows that things will seldom turn out at trial the way they have been described in the first meeting with the client.

An assessment of the settlement value of a case depends not only on the known evidence but on an experienced prediction as to how the case might unfold at trial. What will happen at trial will depend more on the elemental justice of the case than any fine legal theories. The same is true whether assessing the settlement value for a plaintiff or the settlement value for a defendant.

Thus, the first step for an early settlement is to have the lawyer give the client a realistic assessment of the settlement value of the case.

The discussion between business people and their lawyer about the settlement value of a case must include a full and frank discussion of the expense of litigation, the drain on staff resources both in the business and at the law firm in collecting documents or information for the lawyer, the extent to which litigation can distract business people from getting on with their business and a realistic assessment of the time that they will have to spend working with the lawyer in preparation or at examinations for discovery or in preparation for trial, which is time they could usefully be spending attending to business.

The next thing a businessperson should ask for is a detailed outline of the lawyer's settlement strategy. Every case unfolds in its own particular way. Some cases are susceptible to the lawyer picking up the phone and arranging to have a coffee with the lawyer on the other side to see if the case can be resolved. Other cases cannot be settled prior to examinations for discovery, even with a heroic effort to mediate.

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There may need to be full production of documents and full examination of the parties so that each side can make a more complete assessment of the strengths and weaknesses of their case. A case that has the potential to be settled after examinations for discovery may be suitable for more vigorous cross-examination at discovery to stimulate settlement. Other cases cannot be settled until the eve of trial simply because a defendant will be looking for every opportunity to delay and will not make a realistic offer until finally cornered.

In the last ten years, the single biggest change on the dispute resolution front has been the advent of ADR - Alternative Dispute Resolution. It is a tool that lawyers are still getting used to. Mediation is the use of a neutral third party to assist in resolving a dispute. There are many cases where mediation can be extremely helpful. In both simple cases and complex cases an energetic mediator can make the difference between settling and failing to reach a compromise solution. There is an art to picking the best time to conduct mediation. There is also an art to picking the right mediator.

As with most things, preparation is the key to a successful mediation. A businessperson should be asking his or her lawyer to describe the pros and cons of mediation and also should be asking the lawyer to set out a strategy to hold a successful mediation.

One of the great benefits of mediation is that it brings the parties together face to face. From my point of view, as a commercial litigation lawyer, I welcome the opportunity to speak directly to the other lawyer's client. If the other lawyer seems to be part of the problem rather than the solution, mediation allows you to cut through that barrier and address the other party directly.

The key factors that will lead to a timely settlement are:

• A realistic assessment of the settlement value of the case;

• A forthright and constructive relationship between the lawyer and client which contains a genuine spirit of partnering and in which both the business person and the lawyer are anxious to see the case settled, and

• There must be a settlement strategy.

Each of these subjects should be discussed fully between the lawyer and the client. Even the spirit of partnering should be the subject of discussion. What is important for the businessperson is to ensure that his or her commercial litigation lawyer has a strategy to deal with settlement. This is a subject that should be discussed fully between lawyer and client. Either can and should raise the subject and the lawyer can then explain in detail his strategy for a cost-effective early resolution. ■

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