Tribunal case sends shivers

Original polluter responsible despite payment to new owner

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A recent decision of the Environmental Review Tribunal is sending shivers through the business community with a tough approach to polluters' responsibility to ensure that subsequent owners clean up the site.

According to Superior Fine Papers Inc. v. Director, Ministry of the Environment [http://www.ert.gov.on.ca/english/decisions/index.htm] , even where the original polluter has paid for the cleanup and the new owner has assumed liability, the buck still stops with the original entity if no one does the work.

'Previous cases under the fairness principle have looked at the financial ability of the party to carry out the order,' says Marc McAree.

In the case, the owners of a defunct paper mill in Thunder Bay, Ont., received a cleanup order.

Superior Fine Papers Inc. is the current and allegedly impecunious owner of the pulp and paper mill purchased from Thunder Bay Fine Papers Inc.

Thunder Bay Fine Papers had gone into receivership after buying the business from Cascades Inc.

In fact, Cascades paid Thunder Bay Fine Papers $4.5 million to assume responsibility for most of the environmental issues.

It then paid an additional $500,000 for relief from the responsibilities that it still retained under the purchase and sale agreement.

No one did the work, and Cascades was found to be at fault for not including in the contract a sufficient guarantee that subsequent owners would implement its responsibilities or security provisions to ensure the funds were for those obligation only.

Lana Finney, an environmental lawyer at Davis LLP who represented Cascades in the litigation, believes the decision significantly increases the risk of selling a business like the mill as a going concern.

"You have no confidence even if you paid the purchaser that you won't be on the hook down the road to pay a second time if the purchaser goes bankrupt or just doesn't do the work."

Marc McAree, a partner at Willms & Shier Environmental Lawyers LLP, says there's no question that the decision to hold Cascades responsible was hard on the company but notes that one of the basic principles of environmental law is that a company can't contract out of regulatory liability.

"Cascades tried to shift responsibility to the purchaser. What the tribunal is saying is that a former owner will not be able to contract out of regulatory liability but will continue to have responsibility for environmental affairs."

McAree says the type of indemnity provision that was the subject of the dispute is very common.

"What is not so common is for the vendor to pay an amount in cash for the buyer to take on responsibility. Clearly, Cascades had an assessment done which factored heavily in paying the money it did."

One of the arguments Cascades raised in its effort to persuade the tribunal that it shouldn't have to pay twice was the fairness principle.

"Previous cases under the fairness principle have looked at the financial ability of the party to carry out the order," says McAree.

"Sometimes if they are bankrupt or impecunious, the tribunal has excused the parties from paying obligations under the orders, but Cascades got no sympathy whatsoever for that argument.

The tribunal saw it as a sophisticated corporation that had access to all kinds of advice and ought to have thought about how the money could be secured to ensure that it was used for its intended environmental purpose."

Finney believes this approach builds on the line of authority stemming from the Kawartha Lakes decisions in 2009 in which the tribunal stated that the paramount consideration when deciding whether to relieve a company from its obligations is whether doing so will further the overarching purpose of the Environmental Protection Act.

"The tribunal has been scared away from fairness considerations and is purely looking at whether the director has jurisdiction," she says.

The case begs the question of whether everyone should do their own cleanup before they become a vendor. "That's what would happen in an ideal world," says Finney.

"That's what the ministry would like, I'm sure, but it's not always practical. For example, a pulp and paper mill needs an on-site landfill.

The way to clean it up is to properly decommission it: cover it up, put monitoring wells on it so that it is closed up and shut down.

But without an operating landfill, you may not be able to sell the business as a going concern.
"The purchaser would have to find new land on the site to create a new landfill and get all the approvals for that.

Both the decommissioning and getting the new site approved would be very costly, and the second piece of land probably won't have been used as a landfill before, so that's bad for the environment. It's not a practical result for anyone."

McAree doesn't think the significance of the decision will go as far as forcing presale cleanups. "It goes to the question of how you structure the deal so that money paid for an environmental cleanup is spent for those purposes.

Corporation management must turn their minds to finding a mechanism sufficiently and clearly defined in the agreement. It is important that the agreeing party is in effect incentivized within the agreement to actually do the work."

Rick Coburn, a partner at Borden Ladner Gervais LLP in Toronto, recommends that if a company is contracting the work out, it's in its interest to include some means of ensuring that the other party carries it out through, for example, payment schedules linked to performance of obligations.

"You can set aside the money in some form of trust that is advanced for remediation or you can hold back the money entirely and only pay when the work is paid for upon completion of the work or at various milestones."

Coburn still believes remediation agreements are good tools to use in conjunction with a transaction.

"These things need to be talked through in conjunction with the indemnity itself, remembering that at the end of the day, the minister has an overriding concern with the environment and the private contractual arrangements are secondary from the ministry's perspective."

Finney's advice now is for vendors to estimate the value of the environmental liability still on the site and put that sum of money aside from the purchase proceeds in order to meet future environmental liabilities. Still, she concedes that this isn't always practical either.

"It ties up a lot of capital and there is the added problem that you no longer have control of the property, so it's difficult to do environmental work on it. There is also the risk that the purchaser may do something to make the environmental problems worse.

I can envisage the [ministry] may still come knocking on the door of the vendor and say, 'You left your waste behind. You clean it up.'"

What's also key is trying to foresee what might happen, says Coburn. "All things being equal, I am sure the ministry will try and follow the polluter-pays principle, but it's not always possible.

It's very complicated when there is past contamination and ongoing pollution from current uses. You need to attempt as best you can to know the parties and what they're capable of achieving.

If it's going to take a few years to perform the work, try to think of the eventualities and anticipate the things that might change in that time."