

The Protection and Rehabilitation of Contaminated Land: Be More Careful Than Ever in Your Transactions!

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The provisions of the *Environment Quality Act* with regard to land protection and rehabilitation came into force on March 1st, 2003². The regulations implementing these provisions came into force on March 27, 2003³.

The purpose of this newsletter is to set out the major changes made to the Act and the Regulations as well as their effects on real estate transactions. We will therefore begin by describing the new mechanisms prescribed by the Act and then present, in the form of a table, the effects of the Act on real estate transactions.

The Act to amend the Environment Quality Act and other legislative provisions with regard to land protection and rehabilitation and the Land Protection and Rehabilitation Regulation.

Division IV.2.1 of the *Environment Quality Act* governs matters relating to the protection of lands and their rehabilitation in the event of contamination by imposing certain specific obligations for certain categories of industrial or commercial activities.

What is contaminated land?

Land will be considered contaminated for the purposes of these provisions if it contains contaminants which exceed the limit values prescribed by regulation or, if not determined by regulation, are likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment in general, or be detrimental to property. The legislator now specifically states that the term "land" includes the groundwater and surface water present. This means that the characterization study and the rehabilitation plan that may be required under the new provisions of the Act may have to cover groundwater and surface water.

What are the limit values?

Under the *Land Protection and Rehabilitation Regulation*, the limit values⁴ are the contaminant concentrations acceptable in the soil according to several parameters.

¹ Since the new provisions of the EQA respecting contaminated land affect several business sectors, the author felt it would be useful to consult with various colleagues, whom she would like to thank for their insightful comments with respect to the recommendations made in connection with possible transactions:

Yvan Biron	- Environmental Law
Daniel Bouchard	- Municipal and Environmental Law
Pierre Cadotte	- Real Estate Law
Pierre Denis	- Law of Real Security
Marie-Andr�e Gravel	- Business Law
Odette Jobin-Laberge	- Civil Law
Andr� Paquette	- Business Law
�lise Poisson	- Commercial and Real Estate Litigation
Jean-Yves Simard	- Commercial Litigation, Enforcement of Security and Bankruptcy

² S.Q. 2002, c. 11, Section 20.

³ O.C. 216-2003, February 26, 2003, (2003) 135 G.O., 1153.

⁴ These limit values only apply to contaminated land. The criteria of the *Soil Protection and Contaminated Sites Rehabilitation Policy*, adopted by the Minist re de l'Environnement in 1998, continue to apply for, among other things, surface water and groundwater.



Schedule II of the Regulation sets out the acceptable limit values for lands on which, under a municipal zoning by-law, only industrial, commercial or institutional uses are authorized⁵. These limits are for all intents and purposes similar to those formerly established under Criteria C of the *Soil Protection and Rehabilitation of Contaminated Sites Policy* published by the Ministère de l'Environnement in 1998. The limit values set out in Schedule II also apply to lands constituting, or intended to constitute, the site of a roadway or sidewalk bordering a roadway, a bicycle path or a municipal park⁶. The limit values prescribed in Schedule I apply to all other uses not specifically mentioned in Schedule II, whether residential, agricultural, vacation resorts, etc.

What powers does the Minister have?

The Minister of the Environment has been conferred the power to order certain persons to submit a rehabilitation plan together with an implementation schedule:

- where it appears to the Minister that contaminants are present in the land in a concentration exceeding the limit values prescribed by regulation;

or

- where it appears to the Minister that the contaminants, even though they are not determined by regulation, are likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment in general, or to be detrimental to property [The wording is very similar to the last subsection of the current section 20 of the Act.].

The Minister of the Environment may also order certain persons to submit a characterization study:

- where he has reason to believe that the contaminants referred to above may be present in land.

Who is covered?

The persons against whom the Minister may make an order are the following:

- persons or municipalities that, even before the coming into force of the Act, had emitted, deposited, released or discharged all or part of the contaminants; in this case only the "polluter" is covered and **the Act has retroactive effect;**
- persons or municipalities that **allowed**, even before the coming into force of the Act, the emission, deposit, release or discharge of contaminants; this could include directors or officers who, by failing to intervene, implicitly allowed the contamination, or an owner who tolerates the actions of his lessee; **the Act also has retroactive effect in these cases;**
- persons or municipalities that have or have had custody of the land after the coming into force of the Act, as owner or lessee or in any other capacity [trustees, lenders, receivers, interim receivers, controllers and subsequent purchasers could henceforth incur liability in this respect].

However, the Minister may not make an order against a person that has or has had custody of land where it is established⁷:

- that the person was unaware of and had no reason to suspect the presence of contaminants in the land, having regard to the circumstances, practices and duty of care;

or

- that, once becoming aware of the presence of contaminants in the land, such person acted in conformity with the law, as to the custody of the land, in particular as regards the duty of care and diligence;

or

- that the presence of contaminants in the land results from outside migration from a source attributable to a third person.

What are the obligations of industrial users, municipalities, owners, lessees, or other persons that have custody of contaminated land?

- a) Where a person is the subject of an order because it appears to the Minister that contaminants are present in the land in a concentration exceeding the limit values prescribed by regulation, or that the contaminants, even though they are not determined in the regulation, are likely to adversely affect the life, health safety, welfare or comfort of human beings, other living species or the environment in general, or to be detrimental to property, that person:

⁵ Except lands where elementary-level and secondary-level educational institutions, childcare centres, day care centres, hospital centres, residential and long-term care centres, rehabilitation centres, child and youth protection centres, or correctional facilities are built.

⁶ Except play areas.

⁷ A "polluter" cannot benefit from such an exemption.

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- must claim an exemption, where appropriate;
- in the absence of an exemption, is required to submit a rehabilitation plan together with an implementation schedule;
- is required to register a notice of contamination in the land register if the concentration exceeds the regulatory limit values;
- if he or she wishes to leave in place soils containing contaminants in a concentration exceeding the regulatory limit values, the rehabilitation plan must be accompanied by a toxicological and ecotoxicological risk assessment and groundwater impact assessment. The plan must in such a case contain a statement of the land use restrictions that will apply;
- is required to obtain the written consent of the owner if the rehabilitation plan provides for land use restrictions. The consent document must accompany the plan submitted for approval;
- if the approved plan contains land use restrictions, the person must register in the land register a notice of land use restriction and transmit a copy thereof to the Minister and, where applicable, the owner of the land;
- if the approved plan is later amended, the person must register in the land register a notice setting out the changes made;
- as of completion of the work specified in the plan, the person must obtain and transmit to the Minister a certificate of an expert stating that such work was carried out in accordance with the plan⁸;
- may register a notice of decontamination in the land register if decontamination work has been carried out on the land and a subsequent characterization study

has shown that no contaminants are present, or that contaminants are present in a concentration not exceeding the regulatory limit values.

- b) Where a person is subject to an order because the Minister has reason to believe that contaminants may be present in a concentration exceeding the regulatory limit values or are likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment in general, or to be detrimental to property:
- that person may be ordered to submit a characterization study⁹ and, to the extent that the results of the study indicate contamination, may be subject to the obligations previously set out in the foregoing Division (IV a).
- c) Where the person permanently ceases an industrial or commercial activity of a category designated by regulation¹⁰, that person:
- is required to perform a characterization study within six (6) months of the cessation of such activities or within such additional time not exceeding eighteen (18) months as the Minister may grant;
 - the study must be transmitted to the Minister and to the owner of the land;
 - if the results of the study reveal the presence of contaminants in a concentration exceeding the regulatory limit values, the person must submit to the Minister a rehabilitation plan together with an implementation schedule and a plan for the dismantling of the installations on the land, where applicable;

- that person is required to register a notice of contamination in the land register if the concentration exceeds the regulatory limit values;
 - the contaminants exceeding the regulatory limit values may be left in place provided that a toxicological and ecotoxicological risk assessment and groundwater impact assessment are submitted with the plan;
 - the person is required to obtain the written consent of the owner if the plan provides for land use restrictions. The consent document must accompany the plan submitted for approval;
 - a notice of use restriction must be registered in the land register if the plan contains land use restrictions;
 - a certificate of an expert must be obtained and transmitted to the Minister as soon as the work is completed stating that such work was carried out in accordance with the plan;
 - where applicable, a notice of decontamination may be registered in the land register if the conditions of registration of such notice are met.
- d) Where a person, as owner, lessee or in any other capacity, has the custody of land in which contaminants resulting from an activity designated by regulation are found in a concentration exceeding the regulatory limit values¹¹, that person:

⁸ The Minister maintains a list of experts qualified to provide such attestations.

⁹ The study must be certified by an expert. The Minister maintains a list of experts qualified to provide such attestations.

¹⁰ The Regulation lists one hundred six (106) commercial and industrial categories of activities.

¹¹ This situation covers the current operator.

- is required, on being informed of the presence of the contaminants at the limits of the land or of a serious risk of off-site contamination which could compromise a use of water, to give immediate notice thereof in writing to the owner of the neighbouring land concerned;
- is required to notify the Minister and the owner of the neighbouring land of any serious risk of off-site contamination;
- for certain categories of industrial or commercial activities¹²:
 - ⇒ the person is required to monitor groundwater quality at the hydraulic downstream of the land:
 - i) if the land has a phreatic water level feeding all or part of a subsurface drinking water intake,
 - ii) if the land is located less than a kilometre from a surface drinking water intake¹³,
 - ⇒ the person is required to take, three (3) times per year, groundwater samples at each sampling point,
 - ⇒ the person is also required to set up a monitoring well system on the relevant land.
- e) Where a person intends to change the use of the land on the site of an industrial or commercial activity of a category designated by regulation, that person:
 - is required to perform a site characterization study [unless such a study already exists, together with a certificate of an expert stating that the study meets the requirements of the guide prepared by the Minister and is still current];
 - is required to transmit a copy of the completed study to the owner and the Minister, together with the certificate of an expert;
 - is required to register a notice of contamination in the land register if the concentration exceeds the regulatory limit values;
 - is required to submit to the Minister's approval a rehabilitation plan with an implementation schedule if contaminants are present in the land in a concentration exceeding the regulatory limit values;
 - if the plan provides that contaminants are to be left in the land, it must be accompanied by a toxicological and ecotoxicological risk assessment and groundwater impact assessment;
 - in such a case where contaminants are to be left in the land, the person must inform the public by means of a notice published in a newspaper circulated in the municipality and by the holding of a public meeting. A copy of the notice and a report of the observations made at the public meeting must accompany the plan;
 - the person must obtain the written consent of the owner if the plan provides for land use restrictions. The consent document must accompany the plan submitted for approval;
 - a notice of land use restriction must be registered in the land register if the plan provides for land use restrictions;
 - a certificate of an expert must be obtained as soon as the work is completed stating that such work was carried out in accordance with the plan;
- where applicable, a notice of decontamination may be registered in the land register if the conditions of registration of such notice are met;
- the person must obtain building and subdivision permits, where applicable, from the municipality, which permits may only be issued if an expert attests that the proposed operation is consistent with the rehabilitation plan.
- f) Where a person intends to rehabilitate all or part of contaminated land on a voluntary basis and to leave in the land contaminants in a concentration exceeding the regulatory limit values, that person:
 - must submit to the Minister a rehabilitation plan accompanied by an implementation schedule and a toxicological and ecotoxicological risk assessment and groundwater impact assessment;
 - a characterization study must be attached to the plan;
 - is required to register a notice of contamination in the land register;
 - the person is required to obtain the written consent of the owner if the plan provides for land use restrictions. The consent document must accompany the plan submitted for approval;
 - a notice of land use restriction must be registered in the land register if the plan provides for land use restrictions;
 - a certificate of an expert must be obtained as soon as the work is completed stating that such work was carried out in accordance with the plan;

¹² The Regulation lists forty-six (46) categories of activities.

¹³ This monitoring requirement will not apply if it is shown that the industrial or commercial activity carried out on the land is not likely to alter the quality of the water.

- where applicable, a notice of decontamination may be registered in the land register if the conditions of registration of such notice are met.

Lastly, an owner of contaminated land who, before the coming into force of the Act, entered into an agreement with the Minister to provide for the rehabilitation of the land must register in the land register any land use restriction mentioned therein. Such agreement shall be considered to be a rehabilitation plan approved by the Minister.

What specific obligations are applicable to municipalities?

The above-mentioned requirements are equally applicable to persons and municipalities. In addition, municipalities alone are required to do the following:

- maintain a list of contaminated lands situated in its territory on the basis of the notices registered in the land register received from the Minister (notice of contamination, notice of use restriction, notice of amendment of a rehabilitation plan, notice of decontamination);
- prior to issuing a building or subdivision permit, obtain a certificate of an expert establishing that the project for which the permit application is made is consistent with the rehabilitation plan.

Therefore, as a precautionary measure, businesses and municipalities should draw up an inventory of their land, perform a characterization study on all land to find out what caused the contamination, if there is contamination, and determine the best procedure to follow to comply with their duty of care. Similarly, if land is contaminated, assess the need for the person who has custody, the lessee or the owner to notify the owner of the neighbouring land and take the necessary steps if there are contaminants at the limits of the land or if there is a serious risk of off-site contamination which could compromise a use of water.

Our firm can help you implement, measures that will bring your business or municipality into compliance with these new legal provisions.

Impact of the provisions of the *Environment Quality Act* respecting contaminated land and of the *Land Protection and Rehabilitation Regulation* on your transactions.

SALE

Seller (owner)

Before the coming into force

- The “**polluter**” seller of contaminated land may be the subject of an order¹⁴ even if he completed the sale before the coming into force of the Act, since the Act has retroactive effect.
- The “**non-polluter**” seller of contaminated land is not exposed to an order to perform a characterization study or a decontamination plan if he completed the sale of the land before the coming into force of the Act.

After the coming into force

- The “**polluter**” seller of contaminated land who sells his land after the coming into force of the Act may be the subject of an order¹⁵ even for the past.
- The “**non-polluter**” seller of contaminated land who sells his land after the coming into force of the Act may henceforth be the subject of an order as owner who has or has had the custody of contaminated land¹⁶.

SALE

Purchaser

Before the coming into force

- **A Purchaser** who, before the coming into force of the Act, acquired contaminated land may, as owner, be subject to an order in the future even if he has not contributed to the contamination.

After the coming into force

- **A Purchaser** who, after the coming into force of the Act, acquires contaminated land may, as owner, be subject to an order even if he has not contributed to the contamination¹⁷.

¹⁴ He is exposed to the requirement of performing a characterization study and drawing up a rehabilitation plan for past contamination. He will not be entitled to an exemption.

¹⁵ Ibid.

¹⁶ Subject to the exemption he may be entitled to, where applicable, he is exposed to the requirement of performing a characterization study and drawing up a rehabilitation plan. Depending on the type of activities carried out on his land, he may also be exposed to the obligation of implementing a groundwater quality monitoring program at the hydraulic downstream of the land.

¹⁷ Subject to the possibility of claiming an exemption where applicable.

LEASE

Lessor

Since the coming into force

- A **lessor**, whether or not he contributed to the contamination may henceforth be subject to an order either as a “polluter” owner, a “non-polluter” owner who, by failing to act, allowed contamination to occur or simply as an owner who has custody of the contaminated land¹⁸.

LEASE

Lessee

Since the coming into force

- A **lessor** of contaminated land, **whether or not he contributed to the contamination**, may henceforth be the subject of an order either as “polluter” lessee or as a lessee having custody of the contaminated land, even if did not contribute to the contamination¹⁹.

FINANCING

Hypothecary creditor

Before the coming into force

- A **hypothecary creditor** who, before the coming into force of the Act, obtained the simple administration of property further to a judgement ordering the forced abandonment, took possession of contaminated land for purposes of administration, or resumed possession of such land in payment of his claim, may not be subject to an order compelling him to perform a characterization study or make a rehabilitation plan.

After the coming into force

- If, after the coming into force of the Act, a **hypothecary creditor** obtains the simple administration of property further to a judgement ordering the forced abandonment, takes possession for purposes of administration, or takes contaminated land in payment of his claim, he may, as of March 1, 2003, as “custodian” of the land, be subject to an order compelling him to perform a characterization study or make a rehabilitation plan²⁰.

¹⁸ He is exposed to the requirement of performing a characterization study and drawing up a rehabilitation plan.

¹⁹ Subject to the possibility of claiming an exemption where applicable.

²⁰ Subject, however, to the possibility of claiming an exemption. Note also that the Act does not have retroactive effect for the “custodian”.

BANKRUPTCY

ARRANGEMENTS WITH CREDITORS

Trustee
Receiver
Interim receiver
Controller

Before the coming into force

- If, before the coming into force of the Act, the “custodian” (**trustee, receiver, interim receiver or controller**) has taken possession of contaminated land for purposes of administration, he may not, in principle, be subject to an order compelling him to perform a characterization study or a rehabilitation plan.

After the coming into force

- If, after the coming into force of the Act, the “custodian” (**trustee, receiver, interim receiver or controller**) has taken possession of contaminated land for purposes of administration, he may, as “custodian”, be subject to an order compelling him to perform a characterization study or a rehabilitation plan subject, however, to section 14.06 of the *Bankruptcy Act* or section 11.8 of the *Companies’ Creditors Arrangement Act*.

Recommendations²¹

Seller
Purchaser
Lessor
Lessee
Purchase by a municipality following a sale resulting from unpaid taxes

- Obtain all the characterization studies conducted on the land which is the object of the transaction;
- Index the industrial or commercial activities carried out on the land;
- Assess the need to conduct a new characterization study;
- Determine the cost of the studies;
- Determine the effects on the transaction of unsatisfactory conclusions of the characterization study;
- Verify the state of neighbouring properties;
- Verify at the registry office whether a notice of contamination, land use restriction, amendment of the plan or decontamination has been registered against the property which is the object of the transaction and against neighbouring properties;
- Verify with the municipality and the Ministère de l’Environnement whether there are any permits or notices of infringement;
- Verify the municipality’s list of contaminated lands;
- Re-assess the market value of the property, where applicable;
- Determine which party will assume the risks associated with the contamination, including the costs of rehabilitation, and negotiate the appropriate representations, warranties and indemnification clauses;
- Verify, where applicable, what the requirements of the hypothecary creditor are;

²¹ N. B.: Persons who have or have had the custody of contaminated land may be exempt from liability if they establish that they fall into one of the three (3) situations referred to in the Act. See in this respect the first part of the Bulletin. We are also aware that some of the recommendations may not be respected or met as part of a negotiation process.

Recommendations

- Provide for the need to obtain a bond or insurance, if available;
- Determine who will assume the responsibility covering the cost of rehabilitation;
- Send the purchaser or the lessee any rehabilitation plan already approved by the Ministère de l'Environnement;
- Determine in what state the land is handed over at the time of the transaction;
- Determine what effect the approval or refusal of the rehabilitation plan by the Minister will have on the transaction;
- If required by regulation, determine which party will assume the obligations respecting groundwater quality monitoring and what the obligations respecting the results of such monitoring will be;
- Take into account the fact that, with respect to any building or subdivision project, the building and/or subdivision permit of the municipality may only be issued if the project complies with the rehabilitation plan approved by the Minister;
- In the case of a lease, provide for the need to conduct a characterization study before, during and at the end of the lease and determine in what state the premises will be handed over;
- In the case of a lease, determine the obligations of the lessee in the event of an accidental spill or a breach of an environmental statute or regulation;
- In the case of a lease, determine the rights of the lessor in the event of default by the lessee;
- In the case of a lease, determine the obligations of the lessee towards the owner if he wishes to submit a rehabilitation plan to the Ministère de l'Environnement for approval;

Hypothecary Creditor

Most of the above recommendations apply to hypothecary creditors, but we would add the following:

Before disbursing the loan:

- Assess the environmental risk of the activities of the borrower;
- Determine whether it is necessary to rehabilitate contaminated land to avoid, among other things, a possible prior claim by the State if the Minister of the Environment performs the rehabilitation;
- Require reports on the environmental state of the site throughout the term of the loan, including the results of groundwater quality monitoring, if this obligation is applicable to the matter at hand.

Recommendations

Before realizing the securities:

- Obtain a characterization study;
- Assess the advisability of realizing the security in a context of insolvency to benefit from the relative immunity in favour of the trustee;
- Determine what is the best way to realize the security to minimize your liability, especially since, after the Act comes into force, the hypothecary creditor who has **custody** of contaminated land is exposed to the obligation of complying with the rehabilitation plan already approved by the Ministère de l'Environnement. Should you favour one of the following methods?
 - ⇒ simple administration of the property pursuant to a judgment ordering the forced abandonment;
 - ⇒ taking possession for purposes of administration;
 - ⇒ taking in payment;
 - ⇒ sale under judicial authority;
 - ⇒ sale by the creditor.
- Since the Act provides that the Minister may perform the rehabilitation of the land in the event of default by the person who has **custody** of it, the claim may be guaranteed by a legal hypothec and constitutes **a prior claim of the State**. One might ask whether this claim will have priority over any conventional hypothec published before the coming into force of the Act.

Trustee
Receiver
Interim Receiver
Controller

- Section 14.06 of the *Bankruptcy Act* and section 11.8 of the *Companies' Creditors Arrangement Act* release from all liability the trustee, receiver, interim receiver or controller, including the **custodian** within the meaning of the Act, for any act or damage related to the environment which occurred before their intervention. They are also released from any liability arising out of any act or damage attributable to non-compliance with an order, provided certain conditions are met. These provisions seem to cover orders of a curative nature;
- What about orders of a preventive nature compelling the performance of a characterization study, or aimed at implementing a groundwater monitoring control program? Are "**custodians**" liable?
- Since the Act provides that the Minister may perform the rehabilitation of the land in the event of default by the "**custodian**", the claim may be guaranteed by a legal hypothec and constitutes **a prior claim of the State**. The claim may be recognized as a secured claim in the context of insolvency (bankruptcy, proposal, arrangement) provided the notice of hypothec has been duly published beforehand.

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