

**2018 ICSC CANADIAN LAW CONFERENCE  
BREAKFAST ROUNDTABLE TUESDAY MAY 1, 2018**

**ENVIRONMENTAL LAW 101**

*Talia Gordner – Blaney McMurtry LLP*

*Janet Bobechko C.S. (Environmental Law) – Norton Rose Fulbright Canada LLP*

**1. What do you need to know before entering into a lease?**

• **Landlord:**

- Tenant's anticipated property use and whether there are any environmentally sensitive operations, equipment or chemicals (i.e. storage tanks, underground lines/piping, gas stations, dry cleaners, waste sites).

• **Tenant:**

- Whether there is any pre-existing contamination or hazardous substances present in or on the Premises, and if so, whether there is any type of management plan in place.
- It may be useful to obtain an environmental overview of the site and information regarding its prior uses (particularly where there is significant industrial activity, visible storage tanks and/or contamination, etc.).

**2. What do you need to do to protect yourself in entering into a lease?**

• **Landlord:**

- Ensure that there is sufficient language in the lease / offer to lease restricting any, or providing stringent protocols for, environmentally sensitive operations, equipment and chemicals and providing for a comprehensive Tenant environmental indemnity and remediation requirements.
- Consider requiring a baseline at commencement of term and exit environmental audit. Determine how to apportion risk of pre-existing and exacerbation during term.
- Include terms requiring parties to conform to changes in law and clean-up standards (consider if Risk Assessment is an option)
- Lease should cover whether Landlord or Tenant is responsible for off-site migration coming onto the premises.
- Ensure that a sufficient covenant is obtained to make good / back-stop any environmental contamination (i.e. adequate deposit, letter of credit or guarantee).
- Consider requiring the Tenant to obtain environmental insurance.

• **Tenant:**

- Ensure that lease / offer to lease language makes Landlord responsible for any pre-existing contamination and that Landlord provides a representation and warranty that it is not aware of any contamination affecting the Premises (or if the Landlord is aware of something, that it is disclosed and expressly excluded from Tenant's obligations and liability).
- Obtain a copy of and review any Designated Substances Survey and/or Asbestos Management Plan.
- Depending on the prior use of a site and the circumstances, insist on a baseline environmental report.

**3. Additional considerations:**

- Available site assessment tools include obtaining: Phase 1 and/or Phase 2 Environmental Site Assessments, Building Condition Assessment, and Designated Substances Survey.
- Irrespective that contamination may be caused by a Tenant, the Ministry of the Environment and Climate Change and other authorities will pursue the Landlord and otherwise the deepest pockets to satisfy a clean-up order.
- A Landlord can also be liable for contamination caused by its Tenant vis-à-vis off-site migration.
- A Tenant's environmental indemnity is only as strong as the covenantor / Tenant.