

## Contaminated Land:

### Should the Vendor or the Purchaser Perform the Site Characterization Study?

By H el ene Lauzon and Yvan Biron



The provisions of the *Environment Quality Act* ("EQA") regarding contaminated land require a person intending to change the use of a parcel of land to perform a site characterization study<sup>1</sup> if certain specific industrial activities have been carried on there<sup>2</sup>. If this study reveals the presence of contaminants in excess of the limit values prescribed by regulation<sup>3</sup>, a notice of contamination must be registered in the land register against the property in question.

Over the years, we have observed that in many transactions, the vendor, rather than the purchaser, has fulfilled the obligation to perform the site characterization study, within the framework of the "environmental audit" (due diligence) process.

We believe that this is the route to follow in order to avoid the vendor being required to register a notice of contamination when he has no certainty of the completion of the transaction.

Indeed, only site characterization studies "performed pursuant to this Act" can result in the obligation to register a notice of contamination in the land register<sup>4</sup>, and the EQA requires only the person intending to change the use of land to perform a site characterization study in advance and register a notice of contamination.

If the vendor performs such a study, it is with the aim of selling the land to the highest bidder, regardless of the projected use. It is usually the purchaser who plans to change the use of the land. A site characterization study which is performed for the purposes of selling does not trigger the obligation to register a notice of contamination, because it is not a study performed "pursuant to this Act".

However, if the study is performed by the potential purchaser for the purpose of changing the use of the land and it reveals that the limit values set by regulation are exceeded, a notice of contamination must be registered in the land register, because, in this case, it is a site characterization study performed specifically pursuant to subsection 31.53 of the EQA.

The EQA specifies that the notice of contamination must be registered by the person who commissioned the site characterization study. This means that the potential purchaser performing the study for the purposes of a change of the use of a parcel of land would probably be obliged to register the notice, even if the transaction ultimately does not materialize.

To avoid any discussion in this regard with the Ministry of Sustainable Development, Environment and Parcs and to prevent the registration of a notice of contamination which would affect the vendor's title prematurely, **we recommend that a site characterization study, in the context of a potential sale, always be performed by the vendor because, in this case, the registration of a notice of contamination is not necessarily required.**

<sup>1</sup> Subsection 31.53 EQA.

<sup>2</sup> Schedule III of the *Land Protection and Rehabilitation Regulation* establishes the list of these industrial activities.

<sup>3</sup> These limit values are established in Schedules I and II of the Regulation.

<sup>4</sup> Subsection 31.58 EQA.



It would also be wise to specify in the offer to sell that the site characterization studies will be prepared by the vendor but transmitted to the purchaser for consultation only, and delivered on the closing date, if applicable. Thus, if he wishes to change the use of the property after taking possession, the purchaser will be able to use studies conducted by the vendor or have new studies prepared and, if applicable, register a notice of contamination in the land register. He will subsequently be required to submit a rehabilitation plan for approval by the Ministry of Sustainable Development, Environment and Parcs.

Hélène Lauzon  
Yvan Biron

**You can contact any of the following members of the Environmental, Energy and Natural Resources Law group in relation with this bulletin.**

**At our Montréal office**

**Yvan Biron**  
514 877-2910  
ybiron@lavery.qc.ca

**Hélène Lauzon**  
514 877-2985  
hlauzon@lavery.qc.ca

**Louis André Leclerc**  
514 877-2991  
laleclerc@lavery.qc.ca

**Mathieu Quenneville**  
514 877-3087  
mqenneville@lavery.qc.ca

**Michel Yergeau**  
514 877-2911  
myergeau@lavery.qc.ca

**At our Québec City office**

**Daniel Bouchard**  
418 266-3055  
dbouchard@lavery.qc.ca

**Montréal**

Suite 4000  
1 Place Ville Marie  
Montréal, Québec  
H3B 4M4

Telephone:  
514 871-1522  
Fax:  
514 871-8977

**Québec City**

Suite 500  
925 chemin Saint-Louis  
Québec City, Québec  
G1S 1C1

Telephone:  
418 688-5000  
Fax:  
418 688-3458

**Laval**

Suite 500  
3080 boul. Le Carrefour  
Laval, Québec  
H7T 2R5

Telephone:  
450 978-8100  
Fax:  
450 978-8111

**Ottawa**

Suite 1810  
360 Albert Street  
Ottawa, Ontario  
K1R 7X7

Telephone:  
613 594-4936  
Fax:  
613 594-8783

**Subscribing**

You may subscribe, unsubscribe or modify your profile by visiting our website at: [www.laverydebilly.com/htmlen/Publications.asp](http://www.laverydebilly.com/htmlen/Publications.asp) or by contacting Carole Genest at 514 871-1522, extension 3911.

Copyright © 2004, Lavery, de Billy, L.L.P. - Barristers and Solicitors. This bulletin provides our clients with general comments on recent legal developments. The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.