WeirFoulds LLP

# CLIENT UPDATE NEWSLETTER

SPRING 2012

## Welcome!

Welcome to the Spring 2012 edition of our Client Update Newsletter. Here, we provide you with articles about recent developments in business law from a Weirfoulds perspective, and always with your business issues in mind. Whether you are a new or existing client, we're certain that you'll find something of interest and value to you in these discussions.

This quarter's newsletter theme is environmental issues affecting property ownership. Our managing partner, Lisa Borsook, looks at the leasing implications of solar panels on commercial rooftops; Robert Warren discusses Records of Site Condition relating to the sale and development of contaminated lands; Richard Ogden offers some information about soon-to-be released *Mining Act* regulations and the duty to consult with Aboriginal peoples; John Buhlman reviews a recent ARB finding; and we profile Raj Dewan's involvement in the SDTC Cleantech Venture Summit.

We hope you enjoy these insights and invite you to share this newsletter with your clients, colleagues and friends.

## Rooftop Solar Panels: Leased Property Considerations

*Lisa A. Borsook*

A number of landlords, owners and tenants are installing rooftop solar panels on commercial properties. The idea demonstrates a high regard for the use of sustainable energies and offers some tax incentive/carbon credit potentials.

These are all advantages I encourage, but as a commercial real estate/leasing lawyer, I cannot help but turn my mind to the potential legal/leasing implications of such installations, particularly when the owner of the building has tenants occupying space in the building, or is thinking of selling the building. This is not to say that I am against such installations. Far from it! But some reflection is required before entering into leases for solar panels. Here I'll discuss briefly the preliminary considerations landlords and tenants might discuss before having such panels installed.

### Who controls the roof?

In **ground leases**, the entire property and building are leased to the tenant and thus it is the tenant and not the landlord who has control of the roof.

In a **single tenant building**, the landlord may offload the responsibility for the roof to the tenant, or alternatively, the lease may allocate rooftop obligations between the parties. For example, the tenant might have day-to-day repair and maintenance obligations for the roof, while the landlord's obligations are limited to its capital costs. In some cases, the landlord retains the roof obligations, but offloads some costs to the tenant, or may allocate costs depending on whether the maintenance and repairs are structural or non-structural.

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The first step, then, in any discussion of leasing the roof for solar panels is to look at the lease or leases of the building to determine: 1) who controls the roof; 2) how the costs are allocated to the landlord and tenant(s) with respect to the roof; and 3) whether or not any rents earned by the landlord or the tenant in respect of the solar panels need to be attributed against other operating costs or are for the landlord's or tenant's account alone. Another consideration is to determine who will be entitled to the benefit of the carbon credits that might be associated with the panels.

It is also critical to examine any reciprocal operating agreements or agreements with "shadow anchors", which might limit rooftop use or require certain equipment to be screened from view (which could hamper the operation of the panels), or which might prescribe maximum building heights (which are perhaps affected by rooftop installations).

### Solar Panel Lease Considerations

If the panels are not to be purchased, but rather the roof is to be leased to the solar company, the next step is to look at the solar panel lease itself. A landlord or owner should consider: 1) where the panels will be located; 2) their weight and impact on the roof and its maintenance; 3) the allocation of responsibility for maintaining, repairing, upgrading (as the technology evolves), replacing, and insuring the panels, and relocation rights and costs.

An owner/landlord needs to think about maintenance and safety issues, and whether or not the installation will affect any existing rooftop warranties or guarantees, or any signage, dedicated HVAC, telecommunication or satellite rights granted to others. Will the installation affect other utilities in premises in the building? Are any hazardous substances involved? Parties will want to consider whether or not the panel lease, which is usually for a long period of time, can be terminated, or must be assumed by a transferee.

### Don't Forget the Taxman!

Finally, consider property tax implications. The panels and the foundations on which they rest might be tax exempt in proportion to the power they produce for sale to the general public, while not exempt if the electricity is solely for property use, or if the owner is generating income from leasing the rooftop, as opposed to generating income from sale of electricity.

While not intended to hinder or postpone any consideration of whether or not to take advantage of the benefits of such technologies, the foregoing considerations are preliminary to your discussion with the solar panel company before having panels installed.

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## The RSC Dilemma

*Robert B. Warren*

Records of Site Condition ("RSC") were devised to encourage the development of contaminated sites by providing a measure of protection for vendors and purchasers from Ministry of the Environment ("MOE") administrative orders. RSCs are now a standard requirement of purchasers in real estate transactions involving land with any appreciable level of contamination. However, getting an RSC can be time-consuming and costly. Insisting that a vendor get one may kill an otherwise attractive purchase. They are required by law only in limited circumstances.

Should the purchaser demand one? Can a vendor refuse to provide one? Can the purchaser's interests be adequately protected without one? These questions constitute the RSC dilemma.

Part XV.I of the *Ontario Environmental Protection Act* ("EPA") permits an owner of property to apply for an RSC. Obtaining an RSC requires a "qualified person" to undertake, at a minimum, a Phase I environmental site assessment and, in most cases, a Phase II environmental site assessment, to certify to the MOE that the property meets applicable soil and groundwater standards. Once an RSC is obtained, the MOE is precluded from imposing administrative orders on, among others, an owner or previous owner of the site.

Recent amendments to the EPA, and to *Ontario Regulation 153/04* under the EPA, have made the requirements for getting an RSC more difficult. Getting an RSC is now more time-consuming and costly.

What is often forgotten is that RSCs are only required, as a matter of law, in a limited range of circumstances, typically where the use of the property is being changed from industrial or commercial to residential or parkland. An RSC would not be required, as a matter of law, for many real estate transactions.

RSCs represent a material improvement, in terms of the level of protection for both vendors and purchasers, from what existed in the past, because of the protection from administrative orders. Purchasers and lenders, may insist that a vendor provide an RSC, in effect as a kind of enhanced insurance policy on the environmental condition of the property, even where one is not required.

Obtaining an RSC adds time and cost to a real estate transaction. Purchasers, vendors, and lenders can legitimately refuse or decide not to get an RSC when one is not required by law. Whether to get one will be a function of several factors, chiefly whether there has been an adequate examination of the environmental condition of the property, backed by the opinion of a qualified environmental consultant, and the vendor's willingness to provide contractual and financial assurances in the event that environmental conditions are worse than detected.

It should be noted that some municipalities demand an RSC as a condition of development. Some lenders may also demand an RSC, regardless of the level of contamination.

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## New Mining Regulations to Resolve Disputes in Aboriginal Consultation

*Richard Ogden*

Soon-to-be-released *Mining Act* regulations will show the Government of Ontario taking seriously its duty to consult with Aboriginal peoples and, more practically, taking seriously the delay in natural resource development which can result from a failure in consultation. These regulations

## Dancing with Elephants

In December 2011, WeirFoulds proudly co-sponsored "Dancing with Elephants", the Sustainable Development Technology Canada (SDTC) Cleantech Venture Summit in Vancouver, BC. This invitation-only event focused on investment opportunities in Canada's emerging clean technology sector, facilitating interaction between top tier North American CleanTech venture and industry leaders.

As defined on its website, SDTC is:

> "a not-for-profit foundation that finances and supports the development and demonstration of clean technologies which provide solutions to issues of climate change, clean air, water quality and soil, and which deliver economic, environmental and health benefits to Canadians. SDTC operates two funds aimed at the development and demonstration of innovative technological solutions. The $590 million SD Tech Fund™ supports projects that address climate change, air quality, clean water, and clean soil. The $500 million NextGen Biofuels Fund™ supports the establishment of first-of-kind large demonstration-scale facilities for the production of next-generation renewable fuels."

Bringing together industry professionals such as policy makers, CEOs, venture capitalists, entrepreneurs, investment bankers, the summit opened discussions between experts on clean technologies' significance to the environment, and the Canadian and global economies.

In addition to co-sponsoring this important event, WeirFoulds lawyer Raj Dewan participated in a roundtable discussion about the legal challenges that CleanTech ventures may face. Moving forward with this important organization, Raj is negotiating with the SDTC to bring a regular series of educational seminars to Ontario audiences. As Raj emphasizes:

> "WeirFoulds is focusing on this sector given the number of high growth opportunities associated with it and the global leadership position which the TSX has with the most CleanTech listings. We are exploring a number of cross-border opportunities with US-based CleanTech funds and US CleanTech companies exploring the opportunities in the Canadian capital markets."

The valuable accomplishments of Canadian and international CleanTech companies will always depend on each pioneering, entrepreneurial team's ability to successfully steer itself through the development process. Bringing promising, innovative ideas to commercial fruition is not always easy. WeirFoulds prides itself on working with such innovators, collaboratively and expertly guiding them every step of the way to commercial success.

will introduce a mechanism to assist with resolution of disputes between Aboriginal communities and mining sector participants concerning the Crown's duty to consult. This mechanism is important because the duty to consult Aboriginal peoples is a constitutional duty and so can override otherwise valid regulatory approvals.

The new regulations are part of Phase II of the *Mining Act* modernization project. Phase II regulations will also include a new system of exploration plans and permits which categorizes exploration activities according to their potential impact.

The dispute resolution mechanism will take its basic structure from the *Mining Act*. Section 170.1 (not yet in force) permits the Minister to designate one or more individuals, or a body, to hear and consider disputes arising under the *Mining Act* which relate to the duty to consult Aboriginal peoples. Such individuals or body will then report to the Minister and set out recommendations.

During its development of the regulations the Ontario Ministry of Northern Development, Mines and Forestry proposed two streams to the dispute resolution mechanism: 1) a hearing-like procedure for disputes arising in relation to a permit decision, and; 2) a mediation-based process for disputes arising from advanced exploration or pre-production mine activities. Whatever proposal the regulations adopt, they should include provisions concerning: timelines; how any submissions are made, and; the content of any factual record, including whether affidavit evidence is available. Other important matters such as counsel funding for often under-resourced Aboriginal communities may be left to the parties.

The harsh economic conditions facing most Northern Ontario Aboriginal communities and the mineral wealth lying under their traditional lands suggest that the dispute resolution mechanism will be much used.

That is not a bad thing. The danger in failing to consult adequately is evident in two recent judgments. In *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708 (January 3, 2012), the Ontario Superior Court of Justice enjoined Solid Gold Resources Corp. from further exploratory activity pending additional consultation. Further, in *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675 (December 2, 2011), the B.C. Supreme Court enjoined Taseko from undertaking exploratory work and clearing timber – activities otherwise permitted by Taseko's permits.

In addition, use of the dispute resolution mechanism may help industry participants demonstrate to investors that they have addressed any environmental, social and governance (ESG) concerns. Such concerns, including observance of the principle of free, prior and informed consent (FPIC) are receiving increasing attention in the natural resources sector.

The new *Mining Act* dispute resolution mechanism will provide an additional tool to help the mining industry, and for many will be unavoidable. However, it will not change the best advice for industry participants: consult early and often and, most importantly, build a relationship.

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## ARB Reduces Contaminated Property's Taxation Value to Zero

*John M. Buhlman*

Recently the Assessment Review Board (ARB) reduced a contaminated property's value for taxation to zero. The ARB is the tribunal that determines disputes on the assessed value of property. Municipal taxes are based on a property's assessed value.

The property in question, a residential house, was built on a source of methane gas. The issue was whether the property had any value because of the methane on the property.

The property owners gave evidence of very high levels of methane on the property. A methane gas alarm inside the house was frequently going off, and the fire department had been called several times because of the alarms.

Consulting engineers found that the methane control system installed at the time the house was built was not up to current standards and testified that the source of methane needed to be removed. They estimated that the cost of repairs would exceed the value of the house.

An insurance broker the property owner consulted could not obtain insurance on the house and property because of the methane. Unable to bear the costs of bringing the methane control system up to standard, the owners consulted a broker about selling the property, only to find that their real estate broker would not list the house for sale. In refusing the listing, the broker said that no one would be interested in buying the property because they would not be able to either insure or mortgage it because of the methane levels.

The ARB found this to be an exceptional case. The methane problem, it ruled, is more than a mere nuisance, posing a real hazard. Such hazard had a devastating effect on the current value of the house making it unsellable. Considering how the cost of repairs exceeded the value of the property, the current value for taxation purposes was set to zero. This case shows how seriously environmental contamination can affect the value of a property. In similar situations, contaminated property owners should consider seeking reductions in taxation assessments for those properties.

## CONTRIBUTORS


**John Buhlman** is an experienced litigator who acts on complex environmental and commercial litigation. A key part of his practice involves advising clients on regulatory compliance with environmental laws.

**Richard Ogden**'s broad practice includes high-profile corporate-commercial cases, multi-jurisdictional disputes, constitutional matters, class actions, and appeals and judicial review applications.

**Lisa Borsook** is the Managing Partner of WeirFoulds and heads the firm's leasing practice. She has been recognized as a leading practitioner by Lexpert and Best Lawyers in Canada.

**Robert Warren** is recognized as one of Canada's leading regulatory lawyers. He specializes in the energy, environmental and transportation fields.

**Rajeev Dewan** is a corporate finance lawyer with a wide range of international regulatory and transactional experience relating to capital markets, private equity and financial services regulation.


**We would love to hear from you!** We invite your feedback, and welcome ideas for topics that may be of interest to you. Please contact Sonya Zikic at szikic@weirfoulds.com.

## ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.