

## **INSURANCE IS A RISK MANAGEMENT TOOL FOR BROWNFIELDS**

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There is a movement in Ontario to encourage more widespread "brownfield" redevelopment.

Brownfields are commonly defined as abandoned, idle or under-utilized industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

Initiatives to encourage brownfield redevelopment have been advanced by all levels of government – federal, provincial and municipal.

However, even if each level of government successfully deploys its intended brownfield initiatives, it will still remain essential to capitalize on environmental insurance policies as a key tool to overcome the liability and cost-exposure protection gap that no level of government has proposed to eliminate. Environmental insurance policies have been used to facilitate brownfield redevelopment in the United States but, to date, they have not been widely used in Canada.

What follows is a summary of certain widely used strategies that employ insurance as a tool (1) to help property owners sell their contaminated lands while at the same time fulfilling perceived or actual moral and financial responsibilities (owners of such lands often leave idle or abandon altogether such properties because of fears that liability could result from any sale), (2) to make these properties attractive projects for redevelopers and (3) to satisfy traditional bank financing concerns.

### ***Federal government initiatives***

The federal government has commissioned the National Round Table on Environment and the Economy (NRTEE) to prepare a report on brownfield redevelopment initiatives. This report is to be released in advance of a NRTEE-sponsored national consultation concerning the need for a more co-ordinated, multi-stakeholder effort to promote brownfield redevelopment and contaminated site clean-up as a cornerstone of Canada's community sustainability agenda.

The report will identify how the federal government can encourage redevelopment with amendments to legislation that provide financial incentives and liability protection. As well, the report stresses the need to educate the public on the importance of reinvesting in derelict lands to ensure the economic vitality of our communities.

### ***Provincial government initiatives***

On May 17, the Ontario provincial government introduced Bill 56, *The Brownfield Statute Law Amendment Act, 2001*. If enacted, this Bill would not only significantly amend Ontario's *Environmental Protection Act* and other relevant statutes, but it would also form the legislative foundation for the province's brownfield redevelopment initiatives.

With Bill 56, the Ontario government is striving to provide more certainty and to reduce the risks associated with remediation by, among other things, recasting several aspects of Ontario's existing guideline-based remediation regime. Bill 56 seeks to build on the principles and concepts familiar to guideline users and also to provide limited immunity from regulatory action in specific circumstances.

Bill 56 includes financial incentives, but only on a limited scale. Bill 56 would amend the *Municipal Act* to allow municipalities to provide financial incentives to landowners in the form of municipal tax relief, which could permit the freezing or cancelling of property taxes for the period during which remediation is undertaken.

Moreover, subject to the approval of the Minister of Finance, municipalities could provide limited school tax relief.

However, Bill 56 does not address the uncertainty related to potential civil liability arising from brownfield sites; nor does it address the uncertainty associated with predicting clean-up or management costs that can be associated with brownfield sites.

### ***Municipal government initiatives***

Some municipalities have also developed their own brownfield initiatives. For example, the City of Hamilton passed its environmental remediation and site enhancement (ERASE) community improvement plan in March of this year. This program includes the following five major components:

- Grants to offset any increases in municipal taxes that would result from an increased property assessment due to the improvement/redevelopment of brownfield property;
- Grants to offset part of the costs of executing environmental studies;
- Rebates of various municipal fees depending on type of use/location within the project area;
- Education, marketing and database programs that provide information to developers on program and development opportunities; and

- A pro-active approach by the municipality to acquire, rehabilitate and redevelop brownfield properties, both directly and in partnership with the private sector.

Clearly, all levels of government have recognized the need to assist with brownfield redevelopment. However, even if all three levels of government are successful in implementing their brownfield initiatives as planned, two of the major barriers to brownfield redevelopment, the uncertainty regarding clean-up and management costs in addition to civil liability exposure, will remain unaddressed.

### ***Insurance issues***

There are three main sources of potential liability faced by owners and redevelopers of brownfield sites:

- New-found contamination or more extensive contamination than originally anticipated;
- Conditions exacerbated or created during remediation; and
- Third party claims.

The financial issues that should be considered by redevelopers when weighing a decision whether to work with brownfield versus greenfield sites include the following:

- Is this a commercially viable property:
- Is there going to be adequate return on the investment:
- What is the cost of cleanup and how certain is that cost?
- What is the potential future environmental liability?

One of the tools that should be considered to manage risks and assist with the uncertainties referred to above is insurance. An environmental insurance program can protect against liability risks that arise from unknown pre-existing contaminants, conditions exacerbated or created during remediation, and future contamination.

By transferring such risks to an insurer, a property owner/operator can bring greater certainty to its financial planning when remediating, developing and operating a contaminated site.

One of the major concerns faced by brownfield redevelopers is the wariness of financial lenders when faced with a proposal for brownfield redevelopment. Insurance policies have been profitably used to assuage the lenders' concerns in this regard. The use of various forms of environmental insurance can provide protection to the owners and others, both during and after remediation.

### ***Cost-cap insurance***

Cost-cap insurance is widely used in the United States to encourage brownfield redevelopment. Such insurance helps manage the risk and uncertainty associated with starting or continuing an environmental remediation project.

Cost-cap insurance essentially caps the costs that the owner will have to incur in order to remediate a brownfield site at a specified maximum and transfer costs in excess of that cap to an insurer.

The insurance covers cost overruns resulting from contamination that exceeds initial estimates, new-found contamination and governmental change orders. Cost-cap insurance ensures that funds would still be available for the entire clean-up of the contaminated site.

It protects against financial loss that could inhibit the owner's operations and profitability.

### ***Pollution legal liability insurance***

Pollution legal liability insurance is also available to encourage brownfield redevelopment. It covers environmental exposures at, emanating from, or relating to the ownership or operation of a site. This includes first- and third-party clean-up costs, third-party bodily injury expenses and third-party property damages arising from on-site and/or off-site pollution conditions.

Coverage is also available for first-party business interruption and first-party diminution in property value caused by an on-site pollution condition. Policies can respond to conditions that are known or unknown and pre-existing or future. Coverage can take into account changes in government regulations. Long term policies are available up to 10 years.

A common concern of many holders of contaminated properties is that the developer/buyer of contaminated lands does not have a sufficiently strong covenant for the seller to rely on if protection is to be given to the seller by way of indemnities from the buyer. Pollution legal liability insurance is available to secure or replace the buyer's covenant in many circumstances.

## **Conclusion**

While we can hope that brownfield initiatives pursued at all levels of government will continue to wear down the barriers to ongoing brownfield redevelopment, it seems unlikely that every obstacle will be readily overcome.

The use of environmental insurance products can alleviate the concerns of interested stakeholders and facilitate transactions by removing risk and uncertainty. Financial institutions can lend more confidently without fear of loss from default by developers who cannot cover clean-up costs.

At the same time, developers can take on projects confident that they will not inherit an environmental nightmare.

Developers can take heart from public sector initiatives and avail themselves of private sector insurance products to help satisfy the concerns of all involved parties so that redevelopment deals can go forward and brownfield properties can become assets instead of liabilities.

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