

## **RECLAIMING CONTAMINATED LANDS: RESOLVING THE BROWNFIELDS STALEMATE IN CANADA**

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**Prohibitive remediation costs and irresolvable legal liabilities are just two of the issues that have hampered the reclamation of contaminated lands across Canada for decades. Now, governments are taking action to encourage efforts to return these lands to productive use. But will it be enough?**

Perhaps it was a long-held perception that, in this huge country of ours, lands was an almost inexhaustible commodity. Maybe it was a rationalization that contaminated properties were “someone else’s problem”. Whatever the reason behind decades of inaction, in the last few years, brownfield redevelopment issues have come to command long overdue attention in Canada.

Typically, brownfields are fenced derelict properties that were once vibrant, productive centrepieces in what are now declining industrial districts. Often, they can be found in otherwise commercially desirable areas. Attempts to capitalize on the latent potential of brownfield properties have long been stymied by a host of legal and economic obstacles. Yet, despite these impediments, brownfield redevelopment projects are now regarded as a major force for urban renewal, economic development and job creation.

By and large, brownfields cease to exist when the market value of contaminated properties comfortably exceeds the cost of remediating them to applicable regulations and guidelines: In these cases, they are usually cleaned up and sold for redevelopment.

However, a “brownfield stalemate” arises when the cost of remediation approaches or exceeds the land’s market value. The stalemate is further perpetuated when the risk profile of a brownfield property (e.g., the threat of legal action if the land use or the clean-up standards are changed) prompts the owner to adopt a defensive stance, such as simply fencing off the property and leaving it vacant.

Furthermore, enthusiasm for brownfield redevelopment projects can be fatally undermined by the potential for serious legal liability (both regulatory and civil) attaching to all the participants in the redevelopment project, including sellers, redevelopers, lenders and subsequent owners and occupiers of rehabilitated brownfield properties. The lack of market incentives, habitual recourse to defensive management strategies and potential legal liability are all factors that frustrate the goal of returning brownfields to active use – a goal that benefits governments (via higher property taxes), owners and developers, and the public.

Breaking the brownfield stalemate requires a comprehensive solution that makes redevelopment a feasible and attractive proposition. The solution must manage legal liability, permit use of risk-assessment-based remediation strategies, educate stakeholders, and encourage participation of traditional sources of financing capital.

### **Olympic Bid Kick-starts Action**

Initial steps towards a brownfield solution in Ontario came as a consequence of Toronto's bid for the 2008 Olympics. A successful bid would have required a large-scale initiative to redevelop prime (but likely contaminated) property located on Toronto's waterfront. The prospect of having global attention focused on Toronto prompted both the Ontario government and the federal government to make brownfields a priority concern.

The experience of the United States in dealing with its extensive brownfield problem has pointed the way in terms of policy and has shown that brownfield redevelopment can be readily accomplished. In Canada, just as in the United States, the federal government must assume a leadership role in creating an effective brownfield strategy. Ottawa must coordinate with provincial and local governments within a broad national program to overcome the obstacles that impede brownfield redevelopment.

### **Deficiencies on Ontario's Law**

The need for a national program and the key role of the federal government was made plain by the 2001 introduction of Ontario's first comprehensive brownfields legislation. While Ontario's legislation is a good first step, it is characterized by what may prove to be two fatal deficiencies that can really only be overcome with federal co-operation.

First, the Ontario initiative does little to encourage the participation of traditional sources of capital financing in each stage of the brownfield redevelopment cycle, from initial remediation through to redevelopment and final use. This deficiency is symptomatic of the legislation's failure to provide adequate financial incentives to potential redevelopers.

Second, the legislation falls short on the issue of legal liability. An effective brownfield strategy must provide a mechanism whereby participants in redevelopment projects can obtain relief from civil liability.

### **Ottawa Develops National Strategy**

But there is another bright spot on the horizon. In December 2001, the federal Finance Minister expressed Canada's interest in becoming a global leader in site remediation and brownfield redevelopment. In pursuit of this goal, the Minister of Finance asked the National Roundtable on the Environment and the Economy (NRTEE) to develop a National Brownfields Redevelopment Strategy. NRTEE'S strategy will include federal, provincial and municipal measures to address key issues, including the legal uncertainty

surrounding civil liability, lack of financing, acceptance of risk-assessment-based remediation strategies and lack of stakeholder awareness. The strategy is currently being developed and will be submitted to the federal government for consideration.

All those involved in the development of the National Brownfields Redevelopment Strategy, along with the Canadian public in general, hope that a comprehensive national brownfields initiative – supported by all levels of government – will help remove the obstacles that currently impede redevelopment and renewal of lands that should be both useful and valuable.

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