

# MANAGING THE ENVIRONMENTAL RISKS ASSOCIATED WITH BROWNFIELDS RIMS CANADA CONFERENCE 2011

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# Agenda

- What is a Brownfield?
- Risk Management Issues Associated with Brownfield/Contaminated Sites
- Managing Environmental Risks
- Regulatory Overview
- Incentive Programs
- Recent Examples
- Questions?



## Environment, Sustainability, and Corporate Social Responsibility

- **Environmental risk** as a concern became somewhat mainstream in/around the 1980s.
- **Sustainable Development** was initially defined as “Meeting the needs of the present without compromising the ability of future generations to meet their needs.” (Brudtland Commission, 1987)
- **Sustainability** is a three-legged stool including **economic, environmental, and social responsibilities**.
- Today **environmental risk** needs to be looked at in the context of **sustainability**.

## What is a Brownfield?

- Means different things to different parties
- Potential definitions:
  - “Brownfields are vacant or underused sites with potential for redevelopment. They may be contaminated, often due to former industrial or commercial use.” (Ontario MMAH Web site)
  - Opposite of greenfields?
  - Used land?
  - Infill sites?
- It is likely that most parties dealing brownfields do not think they are dealing with brownfields.

## Brownfields – Which Sectors Most Affected?

- Current and Former Owners/Occupiers of Brownfield Sites
  - Landlord (e.g. real estate sector), tenant, and/or owner/occupier (e.g. manufacturing, retail fueling outlets, dry cleaning operations)
- Prospective Purchasers of Brownfield Sites
  - New landlord (e.g. real estate sector), new tenant, and/or owner/occupier
- Lenders and Investors (e.g. private equity and pension funds)
- Municipalities
- Contractors and Consultants

## Potential Environmental Risks Associated with Brownfield sites

- Indemnities and liabilities associated with land ownership/transfer:
  - Regulatory (cleanup levels, liability releases, “re-openers”, etc.);
  - Tort (injuries, damages);
  - Financial (financial statement disclosures/reporting); and
  - Contractual (credit risks, corporate disclosures).
- Financial cost uncertainties associated with remediation:
  - For identified pollution conditions; and
  - For “unknown” pollution conditions.
- Risks Associated with Ongoing/Future Activities At a Site
- Risks Associated with Actual/Perceived Impacts On Current and/or Future Users of Sites
- Changes In Standards
- Contractor/Consultant Project Risks

## Emerging Environmental Risks

- Reputational Risk
- Natural Resource Damages
- Green Construction Risks
- European Union (EU) Liability Directive

## Environmental Risk Management Drivers and Stakeholders

- Environmental Regulations
- Financial and Non-Financial Reporting Requirements
- Lenders and Insurers Requirements
- Tenant Requirements
- Municipalities
- Civil-Society/Non-Government Organizations (NGOs)
- The “Green” Consumers Movement
- Shareholders including Institutional Investors and Activist Shareholders



## Brownfield Regulatory Overview

- Brownfields and related environmental impacts tend to be regulated at the provincial level in Canada.
- In general, provincial regulations can cast a fairly broad liability “net.”
- Standards for cleanup of soils and groundwater have been gradually becoming more stringent (e.g. recent changes to regulations and standards in Ontario and Alberta).
- Move towards the use of site specific risk assessment.
- Secured Creditors generally protected from environmental liability unless they cause or exacerbate a pollution condition(s).

**NOTE:** This is not intended as a detailed review of the regulations—please consult appropriate legal counsel for advice.

# Managing Environmental Risk

- Identify - e.g. due diligence (Phase I and II ESAs, building material surveys, etc.)
- Prevent - e.g. develop environmental management system
- Avoid - e.g. don't buy property
- Remove - e.g. remediate contaminated site
- Transfer - e.g. indemnity agreements including purchase of environmental insurance coverage



## Brownfield Incentive Programs - Examples

- Federation of Canadian Municipalities – Green Municipal Fund
  - Grants and loans for assessment, remediation and redevelopment of brownfields
- Quebec Revi-Sol Program
  - Grants and loans for brownfields
- Ontario Community Improvement Plans and Tax Incentives for Brownfields
- British Columbia Brownfield Renewal Strategy
  - Grants for Brownfield assessment and remedial action plans

### Sources:

Canadian Brownfields Network – [www.canadianbrownfieldsnetwork.ca](http://www.canadianbrownfieldsnetwork.ca)

About Remediation – [www.aboutremediation.com](http://www.aboutremediation.com)

## Traditional “Risk Handling” Techniques

- Environmental Indemnification
- Risk Financing:
  - Loan/collateral guarantees;
  - Trust funds;
  - Letters of Credit; and
  - Escrow funds.
- Purchase Price Negotiations



## Environmental Insurance

### A Critical Strategic Brownfields Tool

- Can back-up or substitute for an indemnity
- Can neutralize the effect of “unknown” environmental conditions
- Can bring cost certainty to the cleanup of known conditions
- Can address regulatory re-openers/changes in regulations
- Can reduce toxic tort risks
- Can facilitate financing

## Environmental Insurance Tools

- Environmental Impairment Liability (commonly referred to as Pollution Legal Liability or PLL)
- Contractors Pollution Liability
- Cost Cap/Remediation Stop Loss
- Lender Liability

Note: Different insurers use different names for similar coverage.

Main insurers in Canada include: CHARTIS, XL, ACE, Zurich, Liberty, Chubb, and Great American

## Pollution Legal Liability Coverage

- Terms of up to 10 years currently available
- Known Pollution Conditions generally excluded:
  - Risk assessed sites can be covered;
  - Coverage can be re-instated after remediation complete; and
  - Change in standards generally covered.
- Coverage can be excess of an indemnity provided by other party (e.g. seller/purchaser)
- Can include lenders as additional insureds and have policies assignable in the event of default

## Premium Variables

- Expected Remedial Costs/Stage of Remediation
- Future Site Use and Surrounding Occupancies
- Variability of Risk (Severity/Frequency)
- Competition Between Insurers
- Level of Characterization
- Claims History (Insured and Risk)



## Trends In Claims

- Most claims we have seen have been discovery of pollution conditions on insured's sites:
  - Source can be historical on-site activity and/or from an adjacent site(s).
- Some claims related to offsite impacts on insured's site:
  - Remediation costs; and
  - Diminution in value.
- Not many claims related to government orders (so far...)
- Often result from investigations related to transactions including refinancing, purchase/sale, and decommissioning
- Still relatively new line of insurance coverage so it will take time for more trends to come to light

## Brownfields Trends and Thoughts...

- Traditional real estate companies getting used to brownfields (they just don't tend to advertise the fact)
- Lenders are getting more comfortable with risk assessed sites, as long as the rest of the business case makes sense (and for the right borrowers)
- Consultants and contractors are willing to provide fixed-price bids and/or take some financial interest in brownfields sites
- Regulatory clarity and flexibility improving but often with more stringent cleanup standards
- Insitu remediation technologies becoming more common
  - More options
  - Becoming less costly

## Recent Brownfield Example

- Former heavy manufacturing site with significant soil and groundwater contamination, as well as “free product”
- Developer client looking to purchase site, remediate the most of the impacts and perform a risk assessment to deal with the rest
- Vendor will indemnify the Developer and maintain responsibility for the contamination that remains in part of the site as well as related offsite impacts (if any). Developer takes responsibility for the remainder of the site and indemnifies the Vendor.
- Insurance program provides coverage to Developer excess of the indemnity from the Vendor. Program initially excludes onsite coverage for cleanup until remediation completed and then “coverage buy-back” option. Vendor added as Insured relative to any onsite claims once remediation completed.

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**Questions?**  
Thank You!

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