Better Legislation Needed to Revitalize Urban Brownfields

BY BARRY WEINTRAUB[1]

Contaminated "brownfield" lands sit underutilized or abandoned altogether in the hearts of most Canadian cities. These brownfields are the legacy of industrial practices of previous generations who, through ignorance or inattention, failed to take measures to ensure that their industrial operations did not cause harm to the natural environment.

The continuing existence of brownfields today is evidence of the continuing failure of Canadian governments to put in place the necessary framework to facilitate their revitalization.

Brownfields redevelopment is an efficient, effective and environmentally-friendly way to encourage development using existing infrastructures, services and resources. The location of these sites in urban cores makes them attractive development targets. They are important opportunities to improve the quality of urban life, tourism and public health through the revitalization of urban brownfields and the avoidance of further urban sprawl.

However, most Canadian cities have experienced frustration and delays in promoting brownfields redevelopment. While some steps forward have been taken in recent years, progress remains slow.

The redevelopment of brownfields has been stalled by numerous factors, including a fear of liability for clean-up orders as well as significant costs associated with

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investigation and remediation efforts.

Environmental authorities have broad powers to compel the cleanup of contaminated lands where the contamination is causing adverse effects. These powers can be applied not only to present owners, but also to previous owners and anyone who currently has or in the past had charge, management or control of a site. Liability is unlimited, and may even exceed the value of the person's interest in the property.

Cleanup standards have changed over time, and vary depending on the use of a property, creating further uncertainty and impediments to development.

In addition, many Canadian provinces have been unwilling to certify that cleanups have been completed and have been hesitant to provide "no action letters" to confirm that they will not seek to impose further liability on someone who cleans up historical contamination.

The above factors have historically discouraged prospective purchasers, developers, lenders, municipalities, trustees-in-bankruptcy and even environmental consultants from becoming involved in brownfields redevelopment and cleanup activities. In the case of lenders, they not only have feared being held liable to fund cleanup costs, but also perceived considerable risk that their security would be unenforceable.

In many cases, existing contamination can be managed in such a way as to remove all practical risks to human health and the environment on a cost-effective basis. However, the possibility of regulatory action to require costly clean up of a previous property owner's legacy of contamination still exists. This has combined with stigma often associated with contaminated sites and cost advantages of development on

uncontaminated suburban "greenfields", resulting in the neglect of brownfields in urban cores.

Some Canadian jurisdictions have enacted legislation to encourage brownfields redevelopment, but this legislation has been slow to develop in Canada.

In the United States, legislation enacted in 1980 (the Comprehensive Environmental Response, Compensation and Liability Act, known as the "Superfund" legislation, contained detailed rules for the funding and allocation of liability of contaminated sites on a national priorities list. In the 1990s, spurred by the Clinton Administration's National Partnership Action Agenda, tax incentives were put in place to spur remediation (principally involving the immediate deductibility of cleanup costs) and various American states introduced legislation and funding to encourage brownfields redevelopment of a wider range of brownfields.

Brownfields legislation in Canada has lagged behind the United States. Further, the Canadian regulatory framework is much less detailed than the American framework, giving rise to much greater uncertainty as to the liabilities that will be faced in dealing with brownfield sites in Canada.

The Canadian Council of Ministers of the Environment (CCME) in 1993 established recommended policy principles for brownfields legislation, recently revised and reaffirmed in 2006. These principles have guided brownfields legislation in most Canadian provinces.

British Columbia was one of the first Canadian provinces to enact brownfields legislation. Its scheme includes provisions for the allocation of responsibility for cleanup costs, cost recovery, cleanup standards and a remediation process.

B.C.'s *Environmental Management Act* and its *Contaminated Sites Regulations* now provide for liability to be shared among site owners, former site owners and producers, disposers, transporters and handlers of a contaminating substance, with exemptions for secured creditors, authorized contractors, governmental bodies and remediation contractors and advisors. It also contains a limited innocent purchaser exemption for purchasers who buy land not knowing it is contaminated, provided they exercise due diligence.

Ontario's *Brownfields Statute Law Amendment Act*, *2001* was phased in over several years. It provides limited liability from further regulatory orders for property owners who clean up contaminated sites to acceptable standards. It also provides protections for municipalities, secured creditors, receivers, trustees in bankruptcy, fiduciaries, and property investigators.

The general scheme of Ontario's legislation is that owners file a Record of Site Condition, with a certificate by a qualified person that the site meets existing standards. In return, the owner gets some protection from regulatory orders, which also applies to subsequent owners of the property and to those in charge, management or control of a property. The filing of an RSC is mandatory when the use of a property is changed to a more environmentally sensitive use, such as in changing from industrial to residential use.

Several other Canadian provinces also have legislation based on the CCME principles in varying degrees, but better legislation is needed throughout Canada. In particular, more expansive limits on liability are needed, and more detailed and specific rules to govern cleanups and the allocation of responsibility among responsible parties.

Suggested Sidebar for CCME Principles (Space Permitting):

The brownfields principles recommended by the Canadian Council of Ministers of the Environment are as follows:

1. Polluter pays.
2. Beneficiary pays (to avoid unfair enrichment).
3. Fairness (including certainty, effectiveness, efficiency, clarity, consistency and timeliness and the polluter pays and beneficiary pays principles).
4. Openness, accessibility, and participation.
5. Sustainable development, integrating environmental, human health and economic concerns.
6. A broad net of potential responsible persons, with defined exemptions for lenders, receiver-managers and trustees.
7. The recovery of public funds expended on the remediation of contaminated sites from those deemed to be responsible.
8. The process should facilitate the efficient cleanup of sites and the fair allocation of liability and discourage excessive litigation.
9. A list of factors suggested for use in the liability-allocation process.
10. ADR procedures should be used to resolve liability issues.
11. Governments should clarify their policies for determining which sites are to be designated as contaminated sites, based upon risk to human health and the extent of environmental risk.
12. A responsible person who completes the cleanup of a contaminated site to the satisfaction of a regulatory authority should be issued an official compliance

certificate.

13. Benchmarks should be developed for the remediation of contaminated sites, varied depending upon land use and site location to allow remediation plans to be tailored on a site-specific basis.

14. Regulatory environmental liability associated with a contaminated site should be transferable between parties with full disclosure of all information regarding the site.