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Chapter 8

Civil Liability Relief for Brownfields Redevelopers

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Introduction

Owners and potential developers of brownfield sites in Canada have argued for years that civil liability¹ is a major obstacle to brownfields redevelopment. In 2003 the National Round Table on Environment and Economy recommended that governments enact legislation providing for eventual termination of civil liability for parties who complete an approved cleanup of a brownfield site.²

Developments in 2006 suggest that things are starting to move on this issue. The New Brunswick Liability Working Group, established in September 2004 at the request of the Atlantic PIRI group to study and make recommendations on the issue of liability, finished its work in 2006 and its report is likely to be released soon.³ In December 2005, the government of Ontario established a Brownfields Stakeholder Group to

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¹ For purposes of this chapter, “civil liability” means liability to a party other than government, arising under common law as opposed to legislation.

² National Round Table on the Environment and the Economy, *Cleaning Up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (Ottawa: NRTEE, 2003) at pp. 25-30.

³ Atlantic PIRI (“Partnership in RBCA Implementation”), www.atlanticrbc.com, is a multi-stakeholder group in which the four Atlantic provincial governments work with non-governmental experts to develop and implement a risk-based corrective action process to clean up contaminated sites in Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador. The New Brunswick Liability Working Group has 14 members representing banks, industry, lawyers, insurance companies and government. No environmental NGO or other civil society organization is represented on the group. Release of the group’s final report was delayed by the election of a new

provide a sounding board on brownfields law and policy.⁴ The group met twice in 2006. One meeting was devoted to developing a common understanding of the liability issue and exploring potential solutions. In October, Ontario's Minister of Municipal Affairs told the Canadian Brownfields 2006 conference in Toronto that "we're close to coming to a consensus" on liability issues.⁵

Civil liability, in short, is squarely on the radar screens of several provincial governments. Deliberations appear to have advanced to the stage that some sort of action can be expected soon, although it is too early to predict what kind. Participants in the debate often refer to developments in other jurisdictions – particularly the United States – to support their positions. Until now, however, information about how governments in other jurisdictions are dealing with the civil liability issue has been anecdotal, incomplete and often vague. The aim of this chapter is to begin to fill this gap by summarizing the extent to which governments in the United States offer relief against third party civil liability to stimulate brownfields redevelopment, and asking what lessons this might hold for Canada.

Several kinds of parties face potential civil liability risk in relation to brownfields redevelopment. Alongside the original polluter(s), these include various relatively "innocent" parties who did not actually cause or contribute to the contamination, such as:

- persons who owned or operated a site at the time it became contaminated but did not cause or contribute to the contamination;
- persons who acquired property without knowledge of the contamination, despite having made reasonable inquiries at the time of acquisition ("innocent landowners");
- persons who acquired or plan to acquire property *knowing* it is contaminated but intending to clean it up and redevelop it ("prospective purchasers" before acquisition and "*bona fide* purchasers" thereafter);
- persons who acquired a property after it was cleaned up;
- owners or operators of nearby property that became contaminated as a result of migration of contamination from a contaminated site ("contiguous owners");

provincial government, but as of November 2006 the Working Group expected to present its report and implementation plan to the government imminently.

⁴ The Brownfields Stakeholder Group is made up of approximately 25 organizations representing developers, industry, lenders, insurers, environmental consultants, lawyers, planners and municipal and federal governments, along with two environmental NGOs.

⁵ The Honourable John Gerretsen, Ontario Minister of Municipal Affairs and Housing, speech to Canadian Brownfields 2006 conference, Toronto (October 26, 2006) (speaking notes available from MAH Web site, www.mah.gov.on.ca).

- secured lenders; and
- municipalities that become owners of contaminated sites, often involuntarily.

This chapter is restricted to one subset of these parties, namely "innocent" owners and operators who acquire a site that is already contaminated and who did not cause or contribute to the contamination. This includes, to use the prevailing American terminology, "innocent landowners", "*bona fide* purchasers", "prospective purchasers", "contiguous landowners", and "post-cleanup purchasers". These parties have received the most attention in Canadian debates about civil liability relief. This chapter does not address legislation regarding civil liability of polluters, lenders, fiduciaries, or municipalities. Nor does it address legislation restricted to specific contaminants, such as dry cleaning solvents or petroleum.⁶

Civil Liability Relief for Innocent Owners and Operators in the United States

The U.S. federal government and the majority of state governments have not seen fit to relieve any innocent owners or operators of contaminated land against civil liability to third parties.⁷ While federal legislation and regulations have been enacted or amended numerous times since the early 1990s to limit *regulatory* liability for parties such as secured lenders, innocent landowners, contiguous landowners, *bona fide* purchasers and prospective purchasers, such relief does not extend to civil liability.

For example, the U.S. Environmental Protection Agency's Prospective Purchaser Agreements and Brownfields Covenants Not to Sue do not purport to limit injured third parties' rights to sue in tort.⁸ Nor does the federal *Small Business Liability Relief and Brownfields Revitalization Act of 2002*, which protects small businesses, innocent landowners and *bona fide* prospective purchasers against *regulatory* liability only.⁹ Similarly, many states have introduced voluntary cleanup programs under which purchasers or prospective purchasers who complete a voluntary cleanup to the satisfaction of state environmental regulators receive some form of liability relief in return. The majority of these programs do not purport to limit civil liability to parties other than the state, and some expressly preserve it.¹⁰ The

⁶ See Stepan Wood, *Brownfields Civil Liability Relief: A Survey of Statutory Developments in the United States, United Kingdom and Australia*, report prepared for the Ontario Ministry of Municipal Affairs and Housing (October 23, 2006), available on request from brownfieldsonario@ontario.ca, for a detailed discussion of these issues.

⁷ The same appears to be true for the United Kingdom and Australia. Wood, *ibid.*

⁸ Michael B. Gerrard, ed., *Brownfields Law and Practice* (Newark, N.J.: Matthew Bender, 1998), chapter 13, "EPA Prospective Purchaser Agreements and Comfort/Status Letters".

⁹ P.L. 107-118, January 11, 2002, 115 Stat. 2356.

¹⁰ *E.g.*, N.Y. Environmental Conservation Law § 27-1421 ("Nothing in this section shall

farthest most states and the federal government go is to relieve certain cleanup contractors and “Good Samaritans” who assist with hazardous spills against civil liability arising out of releases caused or exacerbated by their actions.

Seven U.S. states – Florida, Iowa, Massachusetts, Michigan, Missouri, New Jersey and Virginia – have enacted legislation designed to immunize innocent owners and operators of brownfields against civil liability to some degree. A further four states – Alabama, California, Connecticut and Georgia – have enacted legislation that is unclear but might be interpreted as limiting such liability. Most of these immunities are available only to a narrow class of eligible parties, in limited circumstances, subject to numerous conditions. Most appear to apply in situations where the risk of civil liability was small to begin with. These provisions are, on the whole, not widely known by brownfields lawyers, not widely relied on in practice and not perceived to be an important element of the brownfields legal regime in the U.S. A leading U.S. brownfields lawyer characterizes them as being “below the radar screens” of brownfields practitioners.¹¹

Many of these legislative provisions are drafted in vague, ambiguous or convoluted terms that make it very difficult to ascertain whether, how, or to what extent they limit third party civil liability. Almost none of them have been tested in court, as a result of which it is difficult to predict how they might be interpreted. In the U.S., as in other common law jurisdictions, a statute will generally not be interpreted as limiting or removing common law rights of action unless it does so unequivocally or is so repugnant to the common law that the two cannot coexist, and this principle has been invoked to hold that a purported brownfields civil liability limitation did not bar a private lawsuit.¹² It is therefore safe to assume that limitations of civil liability will be construed narrowly in favour of affected third parties and must be clear and unequivocal to take effect. This is to say nothing of such provisions’ constitutional validity.¹³ For purposes of this chapter, the provisions characterized as “uncertain” are included along with those that clearly purport to limit civil liability, with an explanation why they were classified as uncertain.

affect the liability of any person with respect to any civil action brought by a party other than the state”); Minnesota Environmental Response and Liability Act, Minn. Stat. § 115B.12 (“nothing in [the statute] shall be construed to limit or restrict in any way the liability of any person under any other state or federal law, including common law, for loss due to personal injury or disease, for economic loss, or for response costs arising out of any release or threatened release”).

¹¹ Interview with Michael Gerrard, Arnold & Porter, New York (October 17, 2006).

¹² *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So.2d 1045, rehearing denied, review denied 799 So.2d 218 (Fla. C.A., 2d Dist., 2001) (interpreting Florida’s dry cleaning contamination liability relief legislation, which is not discussed in this chapter; see Wood, *op. cit.*, footnote 6, at pp. 17-18).

¹³ See *Bormann v. Board of Supervisors In and For Kossuth County*, 584 N.W.2d 309 (Iowa, 1998) (holding nuisance immunity provision in right-to-farm legislation unconstitutional).

Rather than reciting the details of all of these statutory provisions, the chapter focuses on those that appear the most noteworthy. For each of these “key” immunity provisions, the chapter describes who is eligible for immunity, the scope of immunity, the conditions for obtaining or maintaining it, the events that trigger it, and any “reopeners” of liability. There is remarkable variation on all of these points. Thereafter the chapter summarizes developments in other states, very briefly.

Michigan

Michigan has two legislative provisions, in force since 1995, that provide limited civil liability protection to innocent parties and, in some circumstances, polluters. First, parties who are explicitly exempted from statutory cleanup liability and who comply with a statutory obligation to prevent further exposure are immune against statutory or common law claims for performance of cleanup activities with respect to pre-existing contamination.¹⁴

- *Eligibility*: Anyone who is expressly exempted from statutory cleanup liability is eligible. This includes innocent landowners. It also includes *bona fide* or prospective purchasers who conduct a “baseline environmental assessment” (BEA) within 45 days of acquiring the property and disclose the results to the state and any subsequent transferee. No government determination of eligibility is required. Polluters who have complied with Michigan’s cleanup legislation¹⁵ are also eligible.
- *Scope*: Because immunity may be available to polluters, it is confined to “a claim in law or equity for performance of response activities”¹⁶ and explicitly excludes tort claims for consequential damages.¹⁷ The purpose is to bar civil claims similar to statutory cleanup or cost recovery claims and prevent third parties from doing an end run around the statute.
- *Conditions*: Eligible parties who know of contamination on their property must comply with a statutory duty to prevent exacerbation of existing contamination, exercise “due care” to mitigate

¹⁴ Michigan Environmental Response Act, Mich. Comp. L. § 324.20142(1).

¹⁵ This requires, among other things, that the polluter determine the nature and extent of the release, report it, stop it at the source, immediately take any practical and cost-effective response actions, and “diligently pursue” cleanup to regulatory criteria. Environmental Response Act, § 20114.

¹⁶ Environmental Response Act, § 20142(1).

¹⁷ Immunity does not cover “tort claims unrelated to performance of response activities”, “tort claims for damages which result from response activities”, or “tort claims related to the exercise or failure to exercise responsibilities under section 20107a”. Environmental Response Act, § 20142(2).

