



## **A Developer's Perspective of Risk and Liability**

### **Risk Management – Legal Issues**

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# BROWNFIELDS LEGISLATION

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## Modes of Regulation

- broadly defined prohibitions
  - enforced by prosecutions
- licencing requirements
  - certificates of approval
- administrative orders



# BEFORE BROWNFIELDS LEGISLATION

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## Administrative Orders

- types
  - control
  - stop
  - clean-up
  - restoration
  - monitoring/study



# BEFORE BROWNFIELDS LEGISLATION

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## Scope of Administrative Orders

- owners/previous owners
- tenants/previous tenants
- persons who have or had the charge, management or control of a source of a pollutant



# BEFORE BROWNFIELDS LEGISLATION

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## Deficiencies

- absence of prescribed site condition standards
- no prescribed standards for environmental site assessments
- no standards for auditors
- no requirements that auditors be insured



# BEFORE BROWNFIELDS LEGISLATION

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## Commercial Responses

- requirements for audits
  - representations and warranties
  - indemnification provisions
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- uncertain effect in light of deficiencies



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## Concept Of A Record Of Site Condition

- public notice of the environmental condition of a property
- public notice that it meets specified standards
- measure of protection against administrative orders



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## Legislated Standards For:

- a qualified person
  - insurance requirements
- a Phase I ESA
- a Phase II ESA
- a risk assessment
- the allowable concentrations of contaminants, varying depending on the circumstances of the property, and on its proposed use



# BROWNFIELDS LEGISLATION

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## Brownfields Legislation

- addresses deficiencies
- mitigates risk
  - risk remains with the private sector
- does not eliminate risk
  - off-site migration
  - site assessment based on false or misleading information



# AMENDMENTS TO BROWNFIELDS LEGISLATION

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- off site migration
  - extends immunity in relation to off-site migration
- amended soil and groundwater standards
  - more difficult to obtain RSC
  - increased reliance on risk assessment



# CONCLUSIONS

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- Brownfields legislation reduces risk for the purchase, sale, financing and development of contaminated land
  
- Basic risk allocation remains the same
  - risk remains in private sector
    - reliance on qualified person and underlying insurance policies
      - limitation of liability provisions



# WeirFoulds Environmental Law

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