



A Developer's Perspective of Risk and Liability

Risk Management – Legal Issues

HOT PROPERTIES@CanadianBrownfields2008

October 22-24, Toronto Congress Centre

Robert B. Warren
WeirFoulds LLP



BROWNFIELDS LEGISLATION

WeirFoulds^{LLP}

Modes of Regulation

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



BEFORE BROWNFIELDS LEGISLATION

WeirFoulds^{LLP}

Administrative Orders

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



BEFORE BROWNFIELDS LEGISLATION

WeirFoulds^{LLP}

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

WeirFoulds^{LLP}

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

WeirFoulds^{LLP}

Commercial Responses

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



BROWNFIELDS LEGISLATION

WeirFoulds^{LLP}

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



BROWNFIELDS LEGISLATION

WeirFoulds^{LLP}

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

WeirFoulds^{LLP}

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

WeirFoulds^{LLP}

- 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

WeirFoulds^{LLP}

- 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

WeirFoulds^{LLP}

Robert B. Warren
Phone: 416-947-5075
rwarren@weirfoulds.com