

The Six Minute Environmental Lawyer: Federal “Brownfield” Sites



Beament Green,

**979 Wellington Street W.
Ottawa, ON, K1Y 2X7**

613.241.3400

61.241.8555

9/16/2013

Michael S. Hebert* & Julian J. Hutchinson

Email: mhebert@beament.com

*** - author for correspondence.**

Introduction

Contaminated sites are grounded in definitions such as “contaminant” and “adverse effect”¹, while Brownfield sites (in Canada more a Provincial phenomenon, whereas in locations such as the United States of America, it is found in federal legislation) are defined as real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

The power to regulate contaminated sites at both the federal and provincial levels is grounded in the *Canadian Constitution*.² Responsibility for the protection of the environment is divided between the federal and provincial governments. Generally, provinces, territories and cities handle contaminated site management. The federal government is responsible for the assessment/remediation projects of contaminated sites on federal lands (land owned by the federal government or sites where the federal government has accepted full responsibility for the contamination). Such sites include, for example, abandoned mines on Crown lands, airports, government laboratories, ports, and military bases.

Provincial Legislation/Requirements

Briefly, in Ontario, Brownfield sites are, primarily, regulated under by the: *Brownfield Amendment Act [2005]*³ and the *Environmental Protection Act, [1990]* (“EPA”)⁴⁵.

Provincial legislation requires that persons seeking to develop contaminated sites must conduct an Environmental Site Assessment (“ESA”). An ESA is a report that identifies potential or existing environmental contamination liabilities. The analysis, often called an ESA, typically addresses both the underlying land as well as physical improvements to the property and is usually required by the province, lending agencies, and/or

¹ Section 1, Ontario Environmental Protection Act, [1990]http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e19_e.htm;

² Sections 91 and 92, The Constitution Acts, 1867 to 1982: http://laws.justice.gc.ca/PDF/CONST_E.pdf;

³ Brownfield Statute Law Amendment Act, [2005]: ;

⁴ Supra at n. 1;

⁵ This has been recently been amended in 2009 to reflect changes to the assessment process, including modifications to the record of site condition process as well as improving the modified generic risk assessment, and strengthening environmental site condition standards:

http://www.ene.gov.on.ca/environment/en/subject/brownfields/STDPROD_075729.html;

purchasers prior to a conveyance in real property being approved/finalised. A proportion of contaminated sites is categorised as "Brownfield Sites".

Assessments are generally performed in two stages, Phase I⁶ and Phase II⁷, with remediation following if deemed necessary after the completion of both phases. Phase I ESAs typically consist of four tasks, these are: gathering of information about the past and present use of the site, inspection of the site by a qualified environmental professional to the applicable standards, review of the environmental files maintained by both the site owner and regulatory bodies, and the preparation of a report identifying existing and potential sources of contamination. Results of a Phase I ESA determine the need for further site investigation, that is, the need for any type of intrusive sampling and analysis.

A Phase II ESA focuses on gathering specific information as required regarding the property; this can include: surface and subsurface sampling (including sampling of groundwater), above and below-ground storage tank testing, directly measuring conditions such as noise levels, and using environmental models to evaluate the potential migration of contaminants. The result of a Phase II ESA is the determination of the need for a remedial work plan and may also allow for the determination of whether conditions or events at the site are causing, or likely to cause, adverse effects and will require notification to the appropriate regulatory body.

Pertinent Federal Guidelines

Prior to delving into an analysis of the manner in which contaminated sites are handled in the federal sphere, it is appropriate to get an understanding of the predominant pertinent legislations and guidelines. The following are cited as being primarily responsible for this:

⁶ Guide for Completing Phase One Environmental Site Assessments under Ontario Regulation 153/04 - http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/stdprod_087932.pdf;

⁷ Guide for Completing Phase Two Environmental Site Assessments under Ontario Regulation 153/04 - http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/stdprod_087940.pdf;

- *Canadian Environmental Assessment Act, [2012] (“CEAA”)*⁸

The CEAA applies to projects described as “Regulations Designating Physical Activities”. A project may be “designated” by the Minister of the Environment if they are of the opinion that the conducting of the project may cause (adverse) environmental effects, or that public concerns related to those effects warrant the designation. An environmental assessment under CEAA 2012 is required for each project designated by the Minister of the Environment.

The CEAA requires custodians to conduct environmental assessments for proposed projects under specific circumstances. Further, it may affect the redevelopment of contaminated sites when the site or project is listed in the Inclusion and involves a federal trigger. These indicate physical activities and classes of physical activities that may require an environmental assessment before a federal authority initiates or funds them, grants land, or issues approvals. Beyond that, however, it has no direct relevance to the buying or selling of property.

There are two types of environmental assessment conducted under the CEAA (both types of assessments can be conducted by the federal government alone or in cooperation with another jurisdiction, such as a province). These two types are:

- Environmental assessment by a responsible authority, that is conducted by the Agency; and
- Environmental assessment by a review panel that is conducted by a panel of individuals appointed by the Minister of the Environment and supported by the Agency.

An encouraging trend is the recent use of substitution by the Minister. On April 15th 2013, the Federal Minister of the Environment announced the approval of British Columbia’s requests for substitution relating to the environmental assessments of two projects in the province: the Sukunka Coal Mine Project and the Carbon Creek Metallurgical Coalmine Project. The CEAA provided for the substitution from a federal assessment to a provincial assessment where specific requirements of the project as

⁸ Canadian Environmental Assessment Act, [2012]: <http://laws-lois.justice.gc.ca/PDF/C-15.21.pdf>;

set out in sections 32 – 36 of the CEAA are met.⁹ This follows on the federal government's promise to simplify and streamline environmental assessments and to prevent wastefully duplicating environmental assessments resulting in decrease costs and greater efficiency in the processing of approvals.

The Sukunka Coal Mine Project is a proposed development 40 km west of Tumbler Ridge, in North-Eastern British Columbia. The proposal is for a mine to produce eventually 6 million tonnes of coal per year over a span of 20 years. Similarly, the Carbon Creek Metallurgical Coal Mine Project combines open pit mining followed by an underground mine producing 4.1 million metric tonnes of metallurgical coal per year, over a span of 20 years.

In approving the substitute assessment procedure, the Canadian Environmental Assessment Office entered into a Memorandum of Understanding ("MOU") setting out the process leading to substitution, the conduct of the substituted assessment and significant procedures for aboriginal consultation and monitoring. This decision demonstrates the federal government's commitment to simplify the environmental assessments where appropriate. It is to be noted that the Minister, however, has indicated that he will retain the final say over whether the projects will proceed. They will only be allowed to do so if they are deemed to meet Canada's "rigorous environmental protection laws".

- *Canadian Environmental Protection Act, [1999] ("CEPA")*¹⁰

The CEPA enables the federal government to protect the environment and human health from the risks posed by harmful pollutants and to prevent new pollutants from entering the Canadian environment. The Act indirectly applies to site contamination and contains provisions for protection from harmful spills.

*Federal Contaminated Action Plan ("FCAP")*¹¹

⁹ Ibid;

¹⁰ Canadian Environmental Protection Act, [1999]: <http://laws-lois.justice.gc.ca/PDF/C-15.31.pdf>

¹¹ Federal Contaminated Site Action Plan, [2012]:
<http://www.federalcontaminatedsites.gc.ca/default.asp?lang=en;>

The Federal government is taking steps to remediate contaminated lands under their control.¹² In 2005, the federal government created the Federal Contaminated Sites Action Plan (FCSAP) program. This \$3.5 billion, 15-year cost-sharing program, which Environment Canada administers, assists custodians with the costs of assessing and taking action for addressing higher-risk sites.¹³ The program has two key goals: to reduce the risks to human health and the environment from these sites, and to reduce the financial liability for known federal contaminated sites by 2020. The program is divided into three phases: Phase I ended in March 2011, Phase II ends in 2016, and Phase III ends in 2020.¹⁴

- *Federal Contaminated Sites Inventory (“FCSI”)*¹⁵

The Federal Contaminated Sites Inventory programme provides information on all known federal contaminated sites under the custodianship of Federal departments, agencies and consolidated Crown corporations, as well as those that are being, or have been, investigated, to determine whether they have contamination arising from past use that could pose a risk to human health or the environment.

The inventory also includes non-federal contaminated sites for which the Government of Canada has accepted some or all responsibility. It does not include sites where contamination has been caused by, and which are under the control of, enterprise Crown corporations, private individuals, firms, or other levels of government.

It is to be noted that there are over 22,200 sites for which the federal government is responsible that are listed in the Federal Contaminated Sites Inventory.¹⁶ This number includes confirmed contaminated sites, suspected contaminated sites, and over 11,000 closed sites where remediation was either completed or not required.

¹² <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=DC9C7CF3-CBA1-40FA-BF69-3D6B3B272BD1>;

¹³ 2012 Spring Report of the Commissioner of the Environment and Sustainable Development, Chapter 3—Federal Contaminated Sites and Their Impacts, (2012): http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_201205_03_e.pdf;

¹³ *Ibid*;

¹³ Federal Contaminated Sites Inventory, [2012]: <http://www.tbs-sct.gc.ca/fcsi-rscf/home-accueil-eng.aspx>

¹⁶ *Ibid*;

*National Classification System for Contaminated Sites, [2008]*¹⁷

The *National Classification System for Contaminated Sites* [NCSCS] is used by the federal government to aid in the evaluation of contaminated sites. Its purpose is to assist in the identification and prioritization of sites, which may be considered to represent varying risks of contamination. The system classifies contaminated sites into general categories of risk in a rational and systematic manner, according to their current or potential (adverse) impact on human health and/or the environment; most notably applying to both federal and privately held contaminated sites.

It is, however, not designed to provide either a qualitative or quantitative risk assessment, but rather is a purely a tool specifically for the classification and prioritization of contaminated sites. The system screens sites with respect to the need for further action (e. g., characterization, risk assessment, remediation, etc.) to protect human health and the environment. Although many of the factors involved in a risk assessment study are addressed in this system, the procedure should not be used out of context to conduct risk analyses on individual sites.

Discussion

While at the provincial level, legislation tends to represent a sophisticated regime, and while there does appear to be some federal guidelines and plans in existence, a substantial quantitative system is absent. In this section, we will give an overview of existing federal guidelines/legislation, while indicating that there are particular holes regarding applicable standards that need to be filled. Of particular interest is the failure of the federal government to address issues relating to the conveyance of land, responsibility of any requisite cleanups if required, and to what standards these cleanups will be ordered and will have to meet.

It is important to note, that recent case law has held that owner pays, thus indicating that should land be conveyed, the person whom now owns the land could be

¹⁷ National Classification System for Contaminated Sites Guidance Document:
http://www.ccme.ca/assets/pdf/pn_1403_ncscs_guidance_e.pdf

responsible for the cleanup (referring to the Kawartha Lakes decision)¹⁸. Writing for a unanimous Court, *Goudge J.* stated at paragraph 19:

“In this case, all agree that the appellant is innocent of any fault for the spill. I agree with the Tribunal and the Divisional Court that evidence that others were at fault for the spill is irrelevant to whether the order against the appellant should be revoked. That order is a no fault order. It is not premised on a finding of fault on the part of the appellant but on the need to serve the environmental protection objective of the legislation.”

While some have criticised this decision, the facts as they stand indicate, that upon the conveyance of land the previous “polluter pays” principle is now much broader. That is, if the federal government were to convey land to an innocent third party, the responsibility could then fall on that third party to fund the clean-up. This places all parties in a bit of a quandary; for example, since the lands will now be under the purview of the province, an ESA will be required before the conclusion of the sale and purchase of real property. Further, as the new “owners” of the land would these innocent parties be forced to foot the bill? However, what is even of more importance is to what standards is the site(s) being assessed and who will be responsible for the administration of such.

Without being too cynical, it must be noted that the majority of contaminated sites are in remote and/or rural locations, that is outside of densely populated urban centres and as such they may not present a great incentive for the federal government to take action.¹⁹ For example, in several studies and evaluations since 2005, Environment Canada has

¹⁸ *Kawartha Lakes (City) v. Ontario (Environment)*, [2013] ONCA 310:
<http://canlii.ca/en/on/onca/doc/2013/2013onca310/2013onca310.pdf>;

¹⁹ James M. McKenzie, *Environmental Laws of First Nations Reserves: Bridging the Regulatory Gap*, (2013): http://www.env.gov.bc.ca/epd/remediation/presentations/ppc-03-13/regulatory/james_mackenzie_paper.pdf;

confirmed the existence of a gap in environmental regulations on native reserves.²⁰ The federal government has also recognized the existence of a regulatory gap.

It must be noted however, that to their great expense, the federal government has taken responsibility for the remediation of some contaminated lands prior to redevelopment by private developers. Such can be seen at the current Claridge Homes development in the LeBreton Flats, Ottawa, where the federal government invested \$99 Million in government funding to remediate the lands there, prior to transferring construction to Claridge Homes.²¹ Additionally, Federal Minister of the Environment John Baird has said that the Canadian government will be an active participant in the cleanup of the Domtar lands, also in Ottawa, following the announcement of a potential buyer for the property.²² While these are admirable steps being taken, it is still not clear to what standards to which the remediation has and is being done.

It is accepted that while the federal government has made progress in the form of the amended CEAA and plans such as the FCSAP and FCSI, much is left to be done. There is still great uncertainty with respect to the jurisdiction of the federal regulations, the willingness to affect their application, and the apparent lack of direction regarding how contaminated lands being redeveloped are to be treated.

This is in stark contrast, to how similar situations are dealt with in the United States of America., where, since 1995 Brownfield and land revitalization legislation has formed a part of their Environmental Protection Act's legislation.²³ There, Brownfields grants: serve as the foundation of their Brownfields Program, support revitalization efforts by funding environmental assessment, cleanup, and job training activities, provide funding for Brownfield inventories, planning, environmental assessments, and community outreach. Brownfields were also found to provide environmental training for residents of

²⁰Ibid;

²¹ Courtney Symons, Ottawa Business Journal, Construction crews returning to LeBreton Flats in December, August 12 2012, <http://www.obj.ca/Real-Estate/Construction/2012-08-29/article-3063569/Construction-crews-returning-to-LeBreton-Flats-in-December/1>;

²² Elizabeth Payne, Ottawa Citizen, "There will be federal role in Domtar lands clean-up, Baird aide says", <http://www.ottawacitizen.com/news/There+will+federal+role+in+Domtar+clean+Baird+aide+says/8738294/story.html>;

²³ Brownfields and Land Revitalization: http://www.epa.gov/Brownfields/basic_info.htm.

resident communities. Further, such grants provide direct funding for cleanup activities at certain properties with planned green-space, recreational, or other not-for-profit uses.

Conclusion

The federal government's potential investment in a Brownfields Program could result in various advantages including, but not limited to including an increase in income/employment associated with Brownfields cleanup. Further, it could provide guidance and incentives to support economic revitalization, and empower communities to address the Brownfields in their areas and promote new initiatives to help revitalize such communities across Canada. To do this however, would require that which the federal and provincial governments for years have struggled with, that is of the harmonization of legislation to enable us to all be reading from the same journal.

Encouraging progress can be accelerated by further use of the substitution provisions, which are particularly helpful in jurisdictions such as Canada with overlapping, non-matching environmental regulations. For the present, as long as the current trend towards the re-use of federal sites continues, stakeholders will have to be cognizant of provincial regulations and tailor federal assessment and remediation provisions to harmonize with provincial requirements.