

**Clearing the Brownfields:
Offsetting the Risks to Sustainable Development of
Contaminated Land**

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Abstract

This research develops eight recommendations for amendments to key Ontario legislation affecting Brownfield redevelopment that, if implemented, will reduce the liability and risk associated with the development of contaminated land and benefit stakeholders, such as, municipalities and developers.

Utilizing the methodology of law and economics, this research examines the legal landscape in Ontario and expands the dialogue regarding the risks of developing contaminated land. Through this examination, this research uncovers the origins of the risks of Brownfield redevelopment and extrapolates recommendations for amendments to legislation and policy that balance the liability of Brownfield redevelopment with the protection of the environment.

Recent developments in environmental law appear to increase environmental protection, but actually limit Brownfield redevelopment in Ontario by increasing liability and costs. The polluter pays principle that has been entrenched in Canadian law has governed the law in respect of contaminated lands for decades. However, as society evolves, the common law is forced to re-evaluate environmental protection in the face of contaminated lands. This evolution of the law is an attempt to intervene to correct a market failure that exists with respect to contaminated lands. The increased liability associated with Brownfield redevelopment translates into heightened costs to redevelop the land, which also severely threatens environmental justice in Ontario. The recommendations in this research will benefit stakeholders, the public, and the environment. With respect to stakeholders, it will be of assistance to municipalities, cities, developers, corporations, secured lenders, mortgage insurers and the government. The risks associated with Brownfield redevelopment can be offset by the recommended corrections to legislation regarding liability and stronger policies that create accessible programs and incentives to promote just, innovative, and sustainable redevelopment.

Part One: Introduction

I. Introduction to Brownfield Redevelopment

The Ontario landscape is comprised of a wide array of properties, zoned from industrial to rural, and everything in between. The Ontario Ministry of Finance projects that the population for the Greater Toronto Area alone will grow from 6.6 million in 2015 to close to 9.5 million in 2041, which represents a 42.9% increase.¹ As populations rise quickly in cities, there is a quest to find land that can be developed to meet the needs of these growing communities. In 2003, the National Round Table on the Environment and Economy stated that there were up to 30,000 Brownfield sites located across Canada.² Brownfields are defined by the Ontario 2014 *Provincial Policy Statement* as “undeveloped or previously developed properties that may be contaminated. They are usually, but not exclusively, former industrial or commercial properties that may be underutilized, derelict or vacant.”³ These properties are characteristically located in the heart of urban Canada. Given the abundance of Brownfield sites in prime real estate locations, coupled with the impending population growth, Brownfield properties are the “holy grails” in these quests for useable land.

Brownfield sites are often located in prime real estate locations, such as urban or downtown areas, and along major transportation routes. Brownfield sites are generally considered eyesores. They are typically abandoned factories, former gas stations or drycleaners, and railroads. Brownfield redevelopment is a necessary sustainable development choice. Since

¹ Ontario Ministry of Finance, *Ontario Populations Projections Update Spring 2016 Based on the 2011 Census*, (Ontario: Queen’s Printer for Ontario, 2016) at 12.

² National Round Table on the Environment and the Economy (NRTREE), *Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada*, (Ottawa: National Round Table on the Environment and the Economy, 2003) at 2 [NRTREE]. Also, the Federal Contaminated Sites Inventory indicates that there are 22,000 federal contaminated sites. For more information and the definition of a federal contaminated site, see Treasury Board of Canada Federal Secretariat, “Federal Contaminated Sites Inventory” Queens Printer for Canada, online: <<http://www.tbs-sct.gc.ca/fcsi-rscf/home-accueil-eng.aspx>>.

³ The Ministry of Municipal Affairs and Housing, “*Provincial Policy Statement*”, (2014) Queens Printer for Ontario at 29, online: <<http://www.mah.gov.on.ca/Asset1421.aspx>> [Ministry, “Provincial Policy Statement 2014”].

these properties are contaminated and usually abandoned, redevelopment is necessary in order for the sites to be utilized. However, liability associated with Brownfield redevelopment imposes legal roadblocks and financial barriers to utilizing this land. While the judiciary is a necessary and beneficial force in advancing environmental law, recent case law has hampered Brownfield redevelopment. Furthermore, the common law and legislation may impose liability for remediation of these sites. Finally, the situation is complicated by the fact that while provincial governments create laws regarding these matters, it is municipalities that are typically left with responsibility for Brownfields.

In order to evidence remediation, a record of site condition and certain phases of site assessments are necessary.⁴ Brownfield sites are typically abandoned because no party wants to take responsibility for the property due to the high potential for liability associated with remediation. Remediation is the term used to describe the clean-up of these contaminated sites, which is necessary in order for the properties to be redeveloped. The Ontario *Environmental Protection Act*⁵ (“EPA”) requires certain procedures to clean up Brownfields, which include assessing remediation options, implementing clean-up, and confirming remediation has occurred. Given that the space occupied by Brownfields is a potential goldmine in light of impending population growth and urban sprawl, there has been a push at the provincial level for Brownfield development. Ontario *Provincial Policy Statements* and legislation are aimed at redeveloping these sites. However, substantial political, legal, and financial barriers remain.

This research explores why Brownfields remain undeveloped and how to remedy this problem through legal interventions. It will examine the liability associated with Brownfield

⁴ *Environmental Protection Act*, RSO 1990, c E 19, s. 168.4 and O Reg 153/04.

⁵ *Environmental Protection Act*, RSO 1990, c E 19 [EPA].

redevelopment in Ontario and will answer the following questions: First, how do legislation and policy in Ontario influence Brownfield redevelopment? Second, what is the effect of past and recent case law on the redevelopment of Brownfield sites? Finally, what amendments to legislation and policy are necessary to correct the market failure that still exists in respect of Brownfields, taking into account environmental justice concerns? In summary, this research will clarify the risks associated with Brownfield redevelopment and identify potential policies and incentives to promote accessible, innovative, and sustainable Brownfield redevelopment. These questions will be examined through the methodological lens of economics and the law. With increased understanding of liabilities, financial incentives/programs in the financial and insurance sectors, increased government funding, and innovation, the barriers to Brownfield redevelopment can be overcome. Incentives must offset the risk of liability, costs of remediation, and the potential liability associated with Brownfield redevelopment.

The present legal landscape affecting Brownfields in Canada has developed out of two main principles, which are rooted in history and have molded the present Canadian legal scene. These two concepts are the: (1) the polluter pays principle, and (2) sustainable development. Each concept is explained below. The polluter pays principle is the foundation of Canadian law in respect of liability for pollution and will be further examined in Part Three. The adverse effects of contamination of land are felt in communities surrounding Brownfields. This reinforces the necessity that proposed solutions consider any disparities in environmental harm. For this reason, the third concept explained below is that of environmental justice. A more fulsome discussion of environmental justice is found in Part Four.

i. The Polluter Pays Principle

The basic premise underlying legislation, case law, and policy regarding the remediation of contaminated sites in Ontario is the polluter pays principle. Although the polluter pays principle is presently solidified in law, the principle was originally developed as an economic concept to internalize the cost of pollution. In 1992, the Organisation for Economic Co-operation and Development (“OECD”) defined the polluter pays principle in “The Polluter Pays Principle OECD Analyses and Recommendations” (“1992 OECD Report”). In a nutshell, the 1992 Report explains that the polluter pays principle means that the polluter “should bear the costs of pollution prevention and control measures”⁶, which are “decided by public authorities to ensure that the environment is in an acceptable state”.⁷ Basically, the principle requires that the polluter bear the cost of measures necessary to protect the environment.⁸

ii. Sustainable Development

This paper will rely on the definition supplied by the Brundtland Commission in *Our Common Future: Report of the World Commission on Environment and Development (Our Common Future)*.⁹ *Our Common Future* was born out of the realization that the Earth’s ecosystems could not be sustained in the long term based on the present environmental damage being caused by society, which was primarily focused on economic development. It was written for the purpose of supplying policy directives to states in an effort to curb environmental degradation on a global scale. In *Our Common Future*,¹⁰ the Brundtland Commission defines sustainable development as “development that meets the needs of the present without

⁶ Organisation for Economic Co-operation and Development, “The Polluter Pays Principle OECD Analyses and Recommendations” (1992) Environment Directorate, Organisation for Economic Co-operation and Development at Forward para1.1 a [1992 OECD Report].

⁷ *Ibid* at Forward para1.1 a.

⁸ *Ibid*.

⁹ GH, Brundtland, and United Nations World Commission on Environment and Development (WCED), *Our Common Future: Report of the World Commission on Environment and Development*, Annex to A/42/427 (Oxford: Oxford University Press, 1987) [Brundtland].

¹⁰ *Ibid*.

compromising the ability of future generations to meet their own needs”.¹¹ Sustainable development requires that present and future economic and social development in each state is planned sustainably. Although the term itself can be clearly defined, sustainable development is a complex theory with many variations in practice.¹²

The clarity of the term becomes muddled as it is applied across disciplines and the legal field is no exception. Although a thorough review of the theory of sustainable development is beyond the scope of this paper, it is necessary to discuss the application of sustainable development in Canadian law. The term itself has been integrated into many policies and legislation across the globe, but the practice is far more elusive. The most recent attempt to integrate sustainable development practice in Canada occurred in 2008 when Canada enacted the *Federal Sustainable Development Act*¹³ (“*Federal Sustainable Development Act*”). The *Federal Sustainable Development Act* defines sustainable development similarly to *Our Common Future*, as, “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.¹⁴ In 2010, the Federal government of Canada released, *Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada*,¹⁵ (“*Federal Sustainable Development Strategy*”) which was required by the *Federal Sustainable Development Act*. The stated purpose of the *Federal Sustainable Development Strategy* was to make Canada’s environmental decision making processes more accountable and transparent¹⁶ by

¹¹ *Ibid* at Chapter 2, Para 1.

¹² For an explanation and critical analysis of sustainable development, see generally Graham Mayeda, “Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law” (2004) 15 *Colo. J. Int’l Envtl. L. & Pol’y* 29 [Mayeda]; Christopher D. Stone, “Deciphering ‘Sustainable Development’” (1994) 69 *Chi.-Kent L. Rev.* 977. See also Lynda M. Collins, “Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance” (2007) 30 *Dal. L.J.*; Bosire Maragia, “The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That Is Needed?” (2006) 18 *Geo. Int’l Envtl. L. Rev.* 197.

¹³ *Federal Sustainable Development Act* SC 2008, c 33 [FSDA].

¹⁴ *Ibid* at s. 2.

¹⁵ Environment Canada, Sustainable Development Office, *Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada*, (Canada: Queen in Right of Canada, October 2010) available at: <http://www.ec.gc.ca/dd-sd/default.asp?lang=En&n=F93CD795-1>

¹⁶ *FSDA*, *supra* note 13 at s. 3.

creating a framework for sustainable development and planning in Canada, which purports to strengthen the environmental assessment process in Canada.

iii. Environmental Justice

The purpose of this paper is to broaden the dialogue on the risks associated with Brownfield redevelopment in order to determine methods for offsetting these risks. Once the causes of these risks are brought to light, the hope is that changes to policy can be made to develop incentives to promote just, innovative, and sustainable redevelopment in Ontario. Recent developments in environmental law limit Brownfield redevelopment in Ontario by increasing liability and costs. This undermines environmental justice in Ontario.

Statistics from 2009 indicate that there are approximately 30,000 Brownfields sites in Canada and that this contaminated land comprises almost 25% of urban Canada.¹⁷ The excessive costs and liabilities associated with redeveloping Brownfields are a prime reason why few properties are actually remediated. The result is that both the environment and Canadian society suffer. The effects on the environment and society are deep and far-reaching. Brownfields “adversely impact a neighbourhood’s image and quality of life, and in some cases pose risks to human health and the environment”.¹⁸ The physical effects on the environment are felt by Canadian society in several ways, however these effects are not borne equally by all Canadians. Environmental justice assumes that every Canadian has the right to environmental protection and it identifies the inequitable effects of environmental harm in order to bring attention to injustice. Scott explains that “[e]nvironmental justice is a social movement, and a theoretical lens, that is focused on fairness in the distribution of environmental benefits and burdens, and in the processes that determine those distributions” and it is focused on the fair treatment of poor,

¹⁷ The Federation of Canadian Municipalities, *Brownfields*, (Ottawa, Ontario: The Federation of Canadian Municipalities, 2009) at 2.

¹⁸ NRTREE, *supra* note 2 at ix.

racialized and indigenous communities in environmental policy.¹⁹ Brownfield sites are typically former manufacturing and industrial sites that are located near marginalized communities,²⁰ leaving these communities open to environmental harm. This disparity could be addressed by increasing the accessibility of Brownfield redevelopment.

II. Thesis Statement

The political and legal landscape in Ontario presents challenges to Brownfield redevelopment. Recent developments in environmental law appear to increase environmental protection, but actually limit Brownfield redevelopment in Ontario by increasing liability and costs. The polluter pays principle that has been entrenched in Canadian law has governed the law in respect of contaminated lands for decades. However, as society evolves, the common law is forced to re-evaluate environmental protection in the face of contaminated lands. This evolution of the law is an attempt to intervene to correct a market failure that exists with respect to contaminated lands. The increased liability associated with Brownfield redevelopment translates into heightened costs to redevelop the land, which severely threatens environmental justice in Ontario. The risks associated with Brownfield redevelopment can be offset by further corrections to legislation regarding liability and stronger policies that create accessible programs and incentives to promote just, innovative, and sustainable redevelopment.

The purpose of this research is to expand the dialogue regarding the risks of Brownfield redevelopment with a goal of extrapolating recommendations for balancing this liability with protecting the environment. Once the origins of these risks are understood, recommendations for amendments to legislation and policy become evident.

¹⁹ D. N. Scott, "What is Environmental Justice?" (2014) Osgoode Legal Studies Research Paper Series, Paper No. 72, 10: 16 at 1 [Scott, "Environmental Justice"].

²⁰ See Dan Zuberi, Ariel Judith Taylor, *(Re)Generating Inclusive Cities: Poverty and Planning in Urban North America* (New York: Routledge, 2017).

III. Methodology

i. The Law and Economics Methodology

The prime urban location and abundance of Brownfield sites in the property market begs the question, why are Brownfields not being developed? What role does the Canadian legal system play in this conundrum? Given that this research seeks to understand the effect the legal system has in Brownfield redevelopment, a natural and requisite choice of methodology to examine such questions is the methodology of law and economics. Put simply, the law and economics methodology applies economic theory to law and legal systems.²¹ The school of law and economics caught fire following Ronald Coase's research in the 1960's regarding economic externalities.²² Richard Posner, "probably the world's most influential legal thinker over the last half-century..."²³ is considered to be one of the founding thinkers in law and economics.²⁴ In his text, *Economic Analysis of Law*, Posner discusses the integral economic tenets that the methodology applies to the law.²⁵ One basic concept is that individuals make rational choices to maximize utility. This is the foundation for four key economic principles. First, demand for a good falls as the price for the good increases. Second, opportunity cost is the value that an individual could get for a good in its next best alternative use. Opportunity cost is the determining factor for the supply of a good. The price of a good tends to align with opportunity cost.²⁶ Third, the equilibrium is the point where price is determined. Equilibrium is the point where consumers have no interest in demanding more of a good for a certain price and producers

²¹ Richard Posner, *Economic Analysis of Law*, 9th ed (New York: Wolters Kluwer Law & Business, 2014) at 30. See also Richard Posner, "Richard T Ely Lecture The Law and Economics Movement", (May 1987) AEA Papers and Proceedings at 4 [Posner, "Economic Analysis"].

²² Sophie Harnay & Alan Marciano, "Posner, Economics and the Law: From "Law and Economics" to An Economic Analysis of the Law" (2009) 31:2 Journal of the History of Economic Thought, 216.

²³ Cass R. Sunstein, "Richard Posner, Leader of a Legal Revolution", online: (2017) Bloomberg View (Opinion Law), online: <www.bloomberg.com/view/articles/2017-09-03/richard-posner-of-a-legal-revolution>.

²⁴ Thomas A. Miceli, "Economic Models of Law" in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts* (Oxford, Oxford University Press, 2015) 10 at 20 [Miceli, "Economic Models"].

²⁵ Posner, "Economic Analysis", *supra* note 21 at 3-28.

²⁶ *Ibid* at 9.

have no interest in supplying more of a good at the opportunity cost.²⁷ Fourth and finally, goods (or resources) tend to gravitate to their most valuable use at equilibrium. Economic theory “incites a search for economic or regulatory or even psychological reasons why the market is not in equilibrium and thus failing to allocate resources with maximum efficiency”.²⁸ These tenets form the basis for economic analysis of the law.

The law and economics methodological approach is particularly relevant to this research because property rights and liability can be assessed using economic reasoning, particularly in the environmental law realm where there is an externality, namely, pollution. In 1960, Coase authored *The Problem of Social Cost*, wherein he argues that economists need to consider the total effects caused by a pollution problem, which often include a social large-scale cost incurred by the many, as opposed to the costs experienced by the immediate people involved in the problem.²⁹ Coase begins by using an example of property owned by a farmer whose crops are ruined by cows owned by the adjacent rancher property owner. He uses the example to illustrate that regardless of whether the law allocates rights to the farmer or the rancher, the ultimate use of the farmer’s property remains unchanged because in either case bargaining by the farmer and rancher will lead to the maximization of the value of the farmer’s property. He goes on to apply an economic analysis to several common law cases involving legal analysis of pollution problems (such as noise and air pollution). In so doing, Coase reveals that the imposition of liability on the “polluting” party is akin to dealing with the marginal cost but does not consider the total relationship, which may also include bargaining and a social cost. Coase argues that there is a lack of consideration regarding the reciprocal nature of many pollution problems. He concludes

²⁷ *Ibid* at 11.

²⁸ *Ibid* at 11.

²⁹ Ronald H. Coase, “The Problem of Social Cost” (Oct. 1960) 3 *Journal of Law and Economics* at 1-44 [Coase, “Social Cost”].

that in making policy decisions about social arrangements it is necessary to consider the total effect of these decisions.³⁰ There are several important stakeholders that must be included in policy decisions involving Brownfields, such as municipalities, developers, society (including marginalized communities adjacent to Brownfields) and the environment.

Posner believes that Coase's work was one of the "first modern attempts to apply economic analysis systematically to areas of law that do not regulate avowedly economic relationships" and it "opened a vast field of legal doctrine to fruitful economic analysis".³¹ This research investigates the liabilities associated with Brownfield redevelopment in an effort to explain a failure in the property market, namely the failure to redevelop polluted property located in prime locations. As such, Part Five of this research will provide a detailed analysis of the market failure that exists with respect to Brownfields using law and economics.

IV. Hypothetical: The Enterprise Property

Throughout this research, the following hypothetical example will be used to illustrate and apply important concepts. Use of the hypothetical will provide accountability in the sense that it will model effects of legislation, common law, policy, and theory in the real world to provide a realistic approximation of a Brownfield redevelopment in Ontario.

Imagine it is 1970 and an oil and gas producing company called, "Oozing Oil Inc." wishes to grow its business and build a petroleum production plant in Ontario. An undeveloped piece of property is available in "Municipity", a municipality on the edge of an industrial-zoned area adjacent to vacant land that is zoned residential. The property is located at "Enterprise Avenue", (the property is hereinafter referred to as the "Enterprise Property"). Oozing Oil Inc.

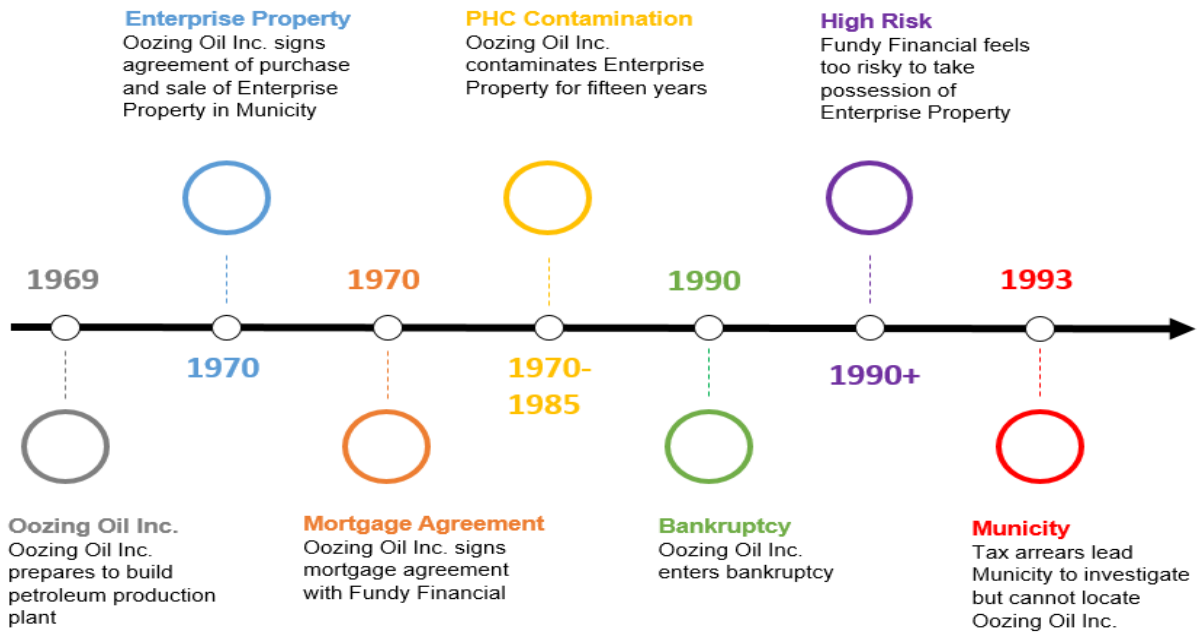
³⁰ *Ibid* at 2 and 44.

³¹ Posner, "Economic Analysis", *supra* note 21 at 30.

signs an agreement of purchase and sale to buy the Enterprise Property, which is conditional on financing. Next, Oozing Oil Inc. takes its agreement of purchase and sale to “Fundy Financial”, a lender in the financial market. Oozing Oil Inc. and Fundy Financial sign a mortgage agreement, which contains the standard terms and conditions of a mortgage, including that Fundy Financial is entitled to possession of the Enterprise Property if Oozing Oil Inc. fails to pay the mortgage. Fundy Financial and Oozing Oil Inc. agree to receive mortgage insurance from “Cover Insurance”, on Enterprise Property, whereby Fundy Financial will receive insurance monies in the event that Oozing Oil Inc. defaults on its mortgage. Once Oozing Oil Inc. closes on the agreement of purchase and sale, Oozing Oil Inc. is registered on title to the Enterprise Property. The financing from Fundy Financial is secured and registered on the title to the Enterprise Property. Oozing Oil Inc. proceeds to manufacture petroleum products at the Enterprise Property for fifteen years. Over time, the manufacturing plant contaminates the property and petroleum hydrocarbons (PHC) contaminants leach into the soil and groundwater. The recession during the 1980s is hard on Oozing Oil Inc. and it becomes insolvent and goes bankrupt in 1990. Oozing Oil Inc. is not able to pay the mortgage payments and Fundy Financial is faced with the decision of whether or not to take possession of the property so that it can recoup its investment; however, in order to do this, the property must be sold. At this point, Fundy Financial’s legal advisers are asked about the potential liability associated with taking control of the Enterprise Property. The assessment of risk is too high and Fundy Financial does not take possession. (Cover Insurance came to a similar conclusion.) The Enterprise Property sits vacant for years, with the last owner in title being Oozing Oil Inc. In 1992, the tax arrears on the Enterprise Property are such that Municipality becomes concerned. When Municipality investigates, it cannot locate the corporation, Oozing Oil Inc., as it is bankrupt and none of the officers of the corporation can be found. A

visual timeline is provided below in Figure 1.1: Timeline for the Enterprise Property Hypothetical.

Figure 1.1: Timeline for the Enterprise Property Hypothetical



Part Two: Relevance of Research

I. Relevance of Research

Research in this field will benefit stakeholders, the public, and the environment. With respect to stakeholders, it will be of assistance to municipalities, cities, developers, corporations, secured lenders, mortgage insurers and the government. It will also be beneficial to the legal advisors of these key players. Presently, these parties are resistant to take control of Brownfield properties due to the high liability associated with the remediation of these properties. It will provide these stakeholders with a clear picture of the Canadian legal landscape in respect of Brownfield redevelopment and remediation of contaminated sites. It will also provide insight into possible ways of improving legislation and policy in order to reduce liability. Furthermore, it will benefit the public and the environment because it has the potential to increase investment and remediation of these lands, which currently present health and safety concerns.

Part Three: Liability

I. Present Landscape in Ontario: Liability

i. Introduction

The Canadian legal landscape that shapes Brownfield redevelopment is complex and varied. A developer of a Brownfield property waiting to break ground is faced with several categories of risk, including legislative and common law liability originating from the polluter pays principle.³² As such, legislation and policies affecting redevelopment exist on the federal, provincial, and municipal levels. Furthermore, statutes imposing liability exist in many fields of law including real property, contract, tort, and environmental law. The liability associated with Brownfield redevelopment in each of these fields of law will be discussed in detail in this Part.³³ In addition, case law that sets precedents for the imposition of liability exists in the Supreme Court of Canada, provincial Courts of Appeal and Superior Courts, as well as in environmental and municipal boards and tribunals. Relevant case law in each field of law associated with Brownfield redevelopment will also be examined in this section.³⁴

This Part begins by introducing the polluter pays principle, the theory that forms the basis for liability related to pollution in Canada. Next, it explores liability based in legislation and case law with respect to environmental law, contract law, real property law, land use planning law, and tort law.

ii. The Polluter Pays Principle

In a perfect market, the purchaser of a good will incur the cost of purchasing the good and receive all the benefit of the good itself, while the supplier of a good will absorb the cost to

³² See Part Three, ii, *below*. The polluter pays principle, which will be explored in this Part, places the responsibility for the costs associated with pollution on those who take part in the environmentally harmful conduct. See Jamie Benidickson, *Environmental Law*, 4th ed (Toronto: Irwin Law Inc., 2013) at 23.

³³ See Part Three: Liability, A, B, C, D, *below*, for more on this topic.

³⁴ See Part Three: Liability, A, B, C, D, *below*, for more on this topic

produce the good and get all of the benefits from selling it. However, if a good has extra costs that are not captured by the market price, there is a negative externality. Goods such as this will be oversupplied. Society incurs the costs of pollution. Consequently, pollution is a negative externality that is not captured in the market. The polluter pays principle assumes that environmental resources are scarce and that the use of the environment is not cost-free. Furthermore, it is typically the public and not the polluter who bears the cost of pollution.

The initial aim of the polluter pays principle was economic efficiency and not legal fairness. “It [wa]s designed not to punish polluters but to set appropriate signals in place in the economic system so that environmental costs are incorporated in the decision-making process and hence arrive at sustainable development that is environment-friendly”.³⁵ The polluter pays principle intends to correct the fact that the cost of pollution resulting from a corporation’s actions was not “internalized”, meaning that the cost was not borne by the polluter corporation. Thus, it places the responsibility for the costs associated with pollution on those who produce the harmful effects and those that attempt to avoid this cost by imposing it on society.³⁶ The goal of the polluter pays principle is that the “private costs of goods and services reflect the relative scarcity of the environmental resources” that are used to produce them.³⁷

Legal regulation transformed the polluter pays principle from a theoretical economic concept to a principle of environmental regulation.³⁸ A 1992 Report by the OECD explains that “[w]hen a charge is levied, it induces polluters to treat their effluents as long as the treatment costs remain lower than the amount of the charge they would otherwise be compelled to pay in the absence of pollution abatement”.³⁹ The 1992 OECD Report itself indicates that the polluter

³⁵ 1992 OECD Report *supra* note 6 at Forward, para 3.

³⁶ *Ibid* at Forward, para 1.1 c. See Jamie Benidickson, *Environmental Law*, 4th ed (Toronto: Irwin Law Inc., 2013) at 23.

³⁷ *Ibid* at Explanatory Reports, para A.3.

³⁸ *Ibid* at Note on Implementation of the Polluter-Pays Principle at para B. 5.

³⁹ *Ibid* at Explanatory Notes, para B. 6.

pays principle has been considered “a general principle of international environmental law” since 1990.⁴⁰ The polluter pays principle was formally recognized by the United Nations in the 1992 *Rio Declaration on Environment and Development* (“1992 Rio Declaration”).⁴¹ Principle 16 of the 1992 Rio Declaration states:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.⁴²

Further to Principle 16, on September 14th 1999, Canada revised the Preamble of the *Canadian Environmental Protection Act, 1999*⁴³ (“CEPA”), to recognize the adoption of the polluter pays principle.

Canada’s provincial authorities, such as Ontario, have passed legislation incorporating the polluter pays principle into provincial legislation. Presently, several provisions of the Ontario *EPA* implement the polluter pays principle by providing for remedial and preventative measures and the issuing of control or stop orders to owners, occupiers, or persons having charge, management, or control of contaminants.⁴⁴

iii. Liability

Statutory liability embodying the polluter pays principle arises at both the federal and provincial level. Many fields of common law converge on the subject of Brownfield redevelopment, including environmental, contract, real property, land use planning, and tort law.

⁴⁰ *Ibid* at Forward, para 2.

⁴¹ The United Nations General Assembly, *Report of the United Nations Conference on Environment and Development, Annex I Rio Declaration on Environment and Development, United Nations*, (Rio de Janeiro: The United Nations General Assembly, 3-14 June 1992) Vol.I. [UN Report].

⁴² *Ibid* at Principle 16.

⁴³ *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [CEPA]. See also, Parliament of Canada, “Legislative History of Bill C-32: The Canadian Environmental Protection Act, 1999, LS285-E” (Ottawa: Parliament of Canada, April 21, 1998) online: <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=C32&Parl=36&Ses=1&source=Bills_House_Government> [Parliament, CEPA].

⁴⁴ *EPA supra* note 5, at ss. 17, 18, 7 and 8 respectively. These specific provisions of the *EPA* are discussed herein in Part Three: Liability, A. Environmental Law, II Provincial Environmental Legislation, pp. 19-22.

There is also significant Canadian case law specifically discussing the polluter pays principle and Brownfields.

The fact that Brownfield redevelopment attracts numerous statutes and encompasses multiple areas of the law is no surprise. Consider the hypothetical of the Enterprise Property from Part One of this research. First, Brownfields, such as the Enterprise Property, are real property. Second, Brownfields are real property typically found in urban communities that have had a commercial or industrial use. (Recall that the Enterprise Property is zoned industrial, but is adjacent to a residential-zoned property.) Third, transactions involving real property require contracts, such as an agreement of purchase and sale and a mortgage agreement. Fourth, real property that is abandoned often becomes the responsibility of cities or municipalities. (Recall that Municipality is faced with tax arrears on the abandoned Enterprise Property.) Fifth, contamination raises environmental concerns typically dealt with in provincial environmental protection statutes. Sixth, contamination that spreads to adjacent landowners impinges on property rights and gives rise to liability in tort. As Pardy explains, environmental law is composed of multiple elements in Canadian law ranging from common law and the civil liability available in contract and tort, to federal and provincial legislation that consists of “impact assessments, regulations, permits, approvals, plans orders, reviews, guidelines, expropriations, and other forms of control and oversight...”⁴⁵ This research explores the potential liability in each field of law by describing the statutory liability and analysing the applicable case law for that particular field of law.⁴⁶

⁴⁵ Bruce Pardy, “Ecolawgic, The Logic of Ecosystems and the Rule of Law” (Canada: Fifth Forum Press 2015) at 77 [Pardy].

⁴⁶ See Part Three: Liability, A, B, C, D, *below*.

A. Environmental Law

The risk of liability under environmental legislation is significant. This risk is far-reaching as it is possible for it to attach to past, present, and future owners of a polluted property, whether or not that owner polluted the site.⁴⁷ The Supreme Court of Canada’s landmark decision of *Imperial Oil Ltd v Quebec (Minister of Environment)*, (“*Imperial Oil*”)⁴⁸ affirms the entrenchment of the polluter pays principle in Canadian law and its existence in the majority of federal and provincial environmental statutes in Canada. This section on environmental law explores liability with respect to federal and Ontario legislation and case law.

I. Federal Environmental Legislation

At the federal level, the polluter pays principle is codified in the Preamble of *CEPA*, which reads as follows:

...Whereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;
...Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the “polluter pays” principle;⁴⁹

The purpose of the *CEPA* is to prevent pollution and protect both the environment and human health and assist with sustainable development.⁵⁰ The *CEPA* is an enabling statute and allows for the federal government to enact regulations related to the purpose of *CEPA*. The *CEPA* allows the federal government to impose processes to identify, assess, and address environmental and health risks.⁵¹ Although the *CEPA* embeds the polluter pays

⁴⁷ Nathalie Chalifour and Ahab Abdel-Aziz, “The Canadian Brownfields Manual. Brownfields Redevelopment In Canada: Moving from Liability to Opportunity” (Ontario: LexisNexis 2004) at 3.1 [Brownfields Manual].

⁴⁸ *Cie petrolier Imperiale ltee c Quebec (Tribunal administrative)* 2003 CarswellQue 2315. 2003 SCC 58, [2003] 2 SCR 624. *Imperial Oil Ltd v Quebec (Minister of Environment)*, 2003 CarswellQue 2315. 2003 SCC 58, [2003] 2 SCR 624, at para 23 [*Imperial Oil*]. See Part Three: Liability, A, III *below*, for more on this topic.

⁴⁹ *CEPA supra* note 43 at Preamble.

⁵⁰ *Ibid.*

⁵¹ Minister of Environment and Climate Change, *Canadian Environmental Protection Act, 1999 Annual Report for April 2015 to March 2016*, (Gatineau: Her Majesty the Queen in Right of Canada, 2017) at 1.

principle into federal legislation, the aim of the legislation is to establish a structure for the management of toxic substances from manufacture through to disposal.⁵² Consequently, the *CEPA*'s relevance to liability in respect of Brownfields is limited to standards and guidelines regarding toxic substances and any pollution related to the manufacture of such substances. Liability under the *CEPA* may attach under Division Four with respect to fuels and relevant regulations enacted by virtue of the *CEPA*.⁵³ It may also attach in respect of the release of a toxic substance by virtue of s. 95 or in respect of regulations imposed in respect of such releases by virtue of s. 97.⁵⁴

The *CEPA* also contains provisions for environmental protection orders, which have similar language to relevant provincial provisions. Section 235 of the *CEPA* allows an environmental protection officer to issue an environmental protection order directing a person to take reasonable measures to protect the environment and public safety.⁵⁵ This provision applies to anyone who “owns or has the charge, management or control of the substance...or the property on which the substance or product is located”⁵⁶ and extends to anyone who causes or contributes (or, is likely to cause or contribute) to a contravention of *CEPA*. Section 235(4) lists several measures that the order can require and includes a broad power to require any other measure deemed necessary, including the restoration of the components of the damaged environment or the protection of the components of the environment that are at risk.⁵⁷

⁵² Parliament *CEPA*, *supra* note 43.

⁵³ *CEPA supra* note 43 at ss. 139(1)(2) & 140(1).

⁵⁴ *Ibid* at s. 97.

⁵⁵ *Ibid* at s. 235(1).

⁵⁶ *Ibid* at s. 235(3).

⁵⁷ *Ibid* at s. 235(4)(f).

II. Provincial Environmental Legislation

Ontario's *Environmental Protection Act*⁵⁸ ("EPA") also codifies the polluter pays principle. In particular, the general Provisions of Part II of the *EPA*, namely sections 6, 7, and 8 embody the polluter pays principle.⁵⁹ The general provisions of Part II of the *EPA* outline penalties related to pollution and environmental contamination based on a party's present or past ownership, occupation, and control of a property. The discharge of pollution is dealt with in section 6, which prohibits the release of contaminants into the natural environment. A control order regarding such a discharge may be issued under section 7. Section 8 provides for a stop order in respect of discharges of contaminants. Excerpts from ss. 6, 7, and 8 are reproduced below.

6. (1) No person shall discharge into the natural environment any contaminant, and no person responsible for a source of contaminant shall permit the discharge into the natural environment of any contaminant from the source of contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.

7. (1) When the report of a provincial officer contains a finding that a contaminant discharged into the natural environment is a contaminant the use of which is prohibited by the regulations or is being discharged in contravention of section 14 or the regulations, the Director may issue a control order directed to,

- (a) an owner or previous owner of the source of contaminant;
- (b) a person who is or was in occupation of the source of contaminant; or
- (c) a person who has or had the charge, management or control of the source of contaminant.

8. (1) When the Director, upon reasonable and probable grounds, is of the opinion that a source of contaminant is discharging into the natural environment any contaminant that constitutes, or the amount, concentration or level of which constitutes, an immediate danger to human life, the health of any persons, or to property, the Director may issue a stop order directed to,

- (a) an owner or previous owner of the source of contaminant;
- (b) a person who is or was in occupation of the source of contaminant; or
- (c) a person who has or had the charge, management or control of the source of contaminant.⁶⁰

⁵⁸ *EPA*, *supra* note 5.

⁵⁹ *EPA*, *supra* note 5 at s. 3(1).

⁶⁰ *EPA*, *supra* note 5 at ss. 6-8.

For the purposes of the Enterprise Property hypothetical, ss. 6, 7, and 8 of the *EPA* become significant at several points along the timeline. First, the fact that past, present, and future owners or controllers of a site may be held liable for remediation will be significant in the assessment completed by the legal advisors for Fundy Financial and Cover Insurance. The risk applies not only to Fundy Financial (or Cover Insurance), but also to any future owners to whom the Enterprise Property may be sold. The same considerations will also be important in Municipality's decision matrix regarding whether to act on the tax arrears. Furthermore, these considerations are also relevant if a developer or potential purchaser were to take an interest in the Enterprise Property. In addition to ss. 6, 7, and 8, the *EPA* contains many other provisions relevant to a discussion regarding Brownfield redevelopment. Section 14 is the general prohibition provision, making it an offence for any person to discharge, cause or permit the discharge of a contaminant that may cause an adverse effect on the natural environment. Sections 17 and 18 are particularly relevant to Brownfields. Under s. 17, a person who discharges a contaminant into the environment must remediate the damage. Section 17 states:

17. Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to,

- (a) repair the injury or damage;
- (b) prevent the injury or damage; or
- (c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies.

Section 18 allows the Director to issue an order to prevent contamination to anyone who “owns or owned or who has or had management or control of an undertaking or property”.⁶¹ It reads:

⁶¹ *EPA*, *supra* note 5 at s. 18.

18. (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.
3. To implement procedures specified in the order.
4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.
5. To monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director.
6. To study and to report to the Director on,
 - i. the presence or discharge of a contaminant specified in the order,
 - ii. the effects of the presence or discharge of a contaminant specified in the order,
 - iii. measures to control the presence or discharge of a contaminant specified in the order,
 - iv. the natural environment into which a contaminant specified in the order may be discharged.
7. To develop and implement plans to,
 - i. reduce the amount of a contaminant that is discharged into the natural environment,
 - ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or
 - iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,
 - A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and
 - B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.
8. To amend a plan developed under paragraph 7 or section 91.1 in the manner specified in the order.

Any successors, assigns, and receivers are bound by such orders⁶² although liability is capped to the amount of assets held or administered.⁶³ Part X deals with the prevention and reporting of spills of pollutants as well as with orders in respect of spills having an adverse effect on the environment. Of significance in Part X is s. 99(2) regarding compensation of spills due to the fault of another party. Section 99(2) provides,

⁶² *Ibid* at s. 19(1)(3).

⁶³ *Ibid* at s. 19(2)(4).

99. (2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
- (a) for loss or damage incurred as a direct result of,
 - (i) the spill of a pollutant that causes or is likely to cause an adverse effect,
 - (ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
 - (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
 - (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part, the protection and conservation of the natural environment

Part XI of the *EPA* authorizes the issuance of control orders with respect to the control of the discharge of a contaminant. Part XV provides for remediation orders to prevent contamination, such as s. 157.1(1), which reads:

- 157.1 (1) A provincial officer may issue an order to any person who owns or who has management or control of an undertaking or property if the provincial officer reasonably believes that the requirements specified in the order are necessary or advisable to as,
- (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
 - (b) to prevent, decrease or eliminate an adverse effect that may result from,
 - (i) the discharge of a contaminant from the undertaking, or
 - (ii) the presence or discharge of a contaminant in, on or under the property.

Note the subtle difference between the wording found in ss. 17 and 18 (and ss. 7-8) as compared to s. 157.1. In ss. 7-8, the order is against “a person who owns or owned or who has or had management or control of an undertaking or property”. Section 17 requires “the person” to repair the damage to the environment. However, in s. 157.1 this language extends to “any person...” [emphasis added]. This subtlety in legislative language will play out in case law (discussed later in Part Four) to have the effect of extending liability to anyone, whether or not they are at fault, by virtue of s.157.1.

Finally, Part XV.1 of the *Act* deals with records of site condition, and Part XV.2 speaks to the exception that reduces the liability of municipalities, secured creditors, receivers, trustees in bankruptcy, fiduciaries, and property investigators. These Parts are the most relevant for the

remediation and/or redevelopment of contaminated sites, such as Brownfields. They were introduced to the *EPA* through the *Brownfields Statute Law Amendment Act, 2001*⁶⁴ SO 2001 c17 (“*Brownfields Statute Law Amendment Act*”), which was designed to improve investment in Brownfields. There are two different occurrences that may give rise to remediation. First, remediation may be ordered by the Ministry of the Environment or a judicial body. Second, remediation may be required in order to develop or change the use of a Brownfield.

Part XV.1 establishes the rules governing changing the use of a property and the necessity for a record of site condition. This Part of the *Act* sets the groundwork for the complex environmental assessment process that is required for Brownfield redevelopment. A step-by-step diagram with accompanying legislative citations is provided in Figure 3.1: Remediation Process. The regulatory remediation process begins with a reading of s. 168.3.1(1) from Part XV.1. Section 168.3.1(1) states that a person shall not change the use of a property from industrial or commercial use to residential or parkland use.⁶⁵ The exception to this prohibition is found in s. 168.3.1(2), which states that s. 168.3.1(1) does not apply if a record of site condition has been filed in the Records of Site Condition Registry.⁶⁶ Typically, when contaminated land is going to be redeveloped, the use of the land will change to a more sensitive use.⁶⁷ In this case, an owner of the property must file a record of site condition, as required under s. 168 of Part XV.1 of the *Act*. A “qualified person”,⁶⁸ such as an engineer, must supervise any necessary site and risk assessments required for a filing of a record of site condition. A record of site condition is the

⁶⁴ *Brownfields Statute Law Amendment Act, 2001* SO 2001 c 17 [*Brownfields Statute Law Amendment Act*].

⁶⁵ *EPA*, *supra* note 5 at s. 168.3.1(1).

⁶⁶ The Registry containing filed Records of Site Condition is managed by the Ontario Ministry of the Environment and Climate Change. The Registry can be accessed online at: <https://www.lrcsde.lrc.gov.on.ca/BFISWebPublic/pub/searchFiledRsc_search?request_locale=en>. Ministry of the Environment and Climate Change, “Records of Site Condition Database” (09 October 2017) (Ontario: Ministry of the Environment and Climate Change, 2017) online: <www.lrcsde.lrc.gov.on.ca/BFISWebPublic/pub/searchFiledRSC_search?request_locale=en> [Registry].

⁶⁷ This is unless, of course, the intention is to redevelop the property for the same use as it was being used for previously. For example, if a property owner were to decide to redevelop a derelict property formerly containing an oil production plant with the intended future use being an oil production plant, this would not be a change of use to a use of a more sensitive nature. On the other hand, if the same property owner wished to redevelop the land to be used as a future residential or park area, this would be a more sensitive use.

⁶⁸ Records of site Condition, Part XV.1 of the Act, O Reg 153/04, s. 5 [O Reg 153/04].

ultimate document required in the long and complex process required in order to redevelop a Brownfield. A record of site condition will state that there are no contaminants on the property, or that the property meets the standards for the intended use of the property with respect to any contamination.

In order to obtain a record of site condition under s. 168.4 of the *EPA*, a complex process may be undertaken. First, a phase one environmental site assessment must be conducted; this is a preliminary environmental site assessment that is completed to “determine the likelihood that one or more contaminants have affected any land or water on, in or under the property”.⁶⁹ If the phase one environmental site assessment uncovers no likelihood of contamination and a phase two environmental site assessment is not needed, then the owner may file a record of site condition and may change the use of the property.

However, if the phase one environmental site assessment proves that further assessment is necessary, a phase two environmental site assessment must be carried out. This step involves a more invasive and detailed assessment of the property to “determine the location and concentration of one or more contaminants in the land or water on, in or under the property”.⁷⁰ At this stage, any soil or other samples will be laboratory tested to determine if the contamination meets regulatory standards. If the property meets the applicable standards, a record of site condition may be filed. However, if the property fails to meet the standards referenced in the *EPA* and accompanying O Reg 153/04 (discussed in detail below), and unless a risk assessment is completed and accepted by the Minister of the Environment and the property receives a certificate of property use by virtue of s. 168.6(1) of the *EPA*, then the property must be remediated.⁷¹

⁶⁹ *EPA*, *supra* note 5 at s. 168.1.

⁷⁰ *Ibid.*

⁷¹ *EPA*, *supra* note 5 at s. 168.4.

A risk assessment is generally used when a phase two environmental site assessment has revealed a contaminant in excess of a general standard, but where remediation to that standard is considered unreasonable.⁷² Once the property is remediated and testing has confirmed remediation was successful, a record of site condition may be filed. If a certificate of property use was issued, it may require that certain action be taken regarding a contaminant or that certain uses are not permitted on the property.⁷³ In this case, in order to change the use, remediation would be required in order to submit a record of site condition. The method of remediation will depend on several factors including the type and quantity of contamination.

In the Enterprise Property example, suppose that in 1995, Municipality sold the Enterprise Property. Given the likelihood of contamination, assume a developer, “Construction Corp.,” decided to take a risk and purchase the Enterprise Property for the value of the tax arrears, say, \$20,000. Construction Corp. may be incited by Municipality’s policy to provide certain tax breaks or grants for Brownfield property and may hope to make an agreement with Municipality to turn the Enterprise Property into a high-density housing complex. The adjacent land is no longer vacant and now houses single-family and high-density residences. In this scenario, Construction Corp. will be changing the use of the Enterprise Property from industrial to residential. Consequently, Construction Corp. will require a record of site condition and will need to go through the remediation process in order to remediate, or show that remediation is not necessary.

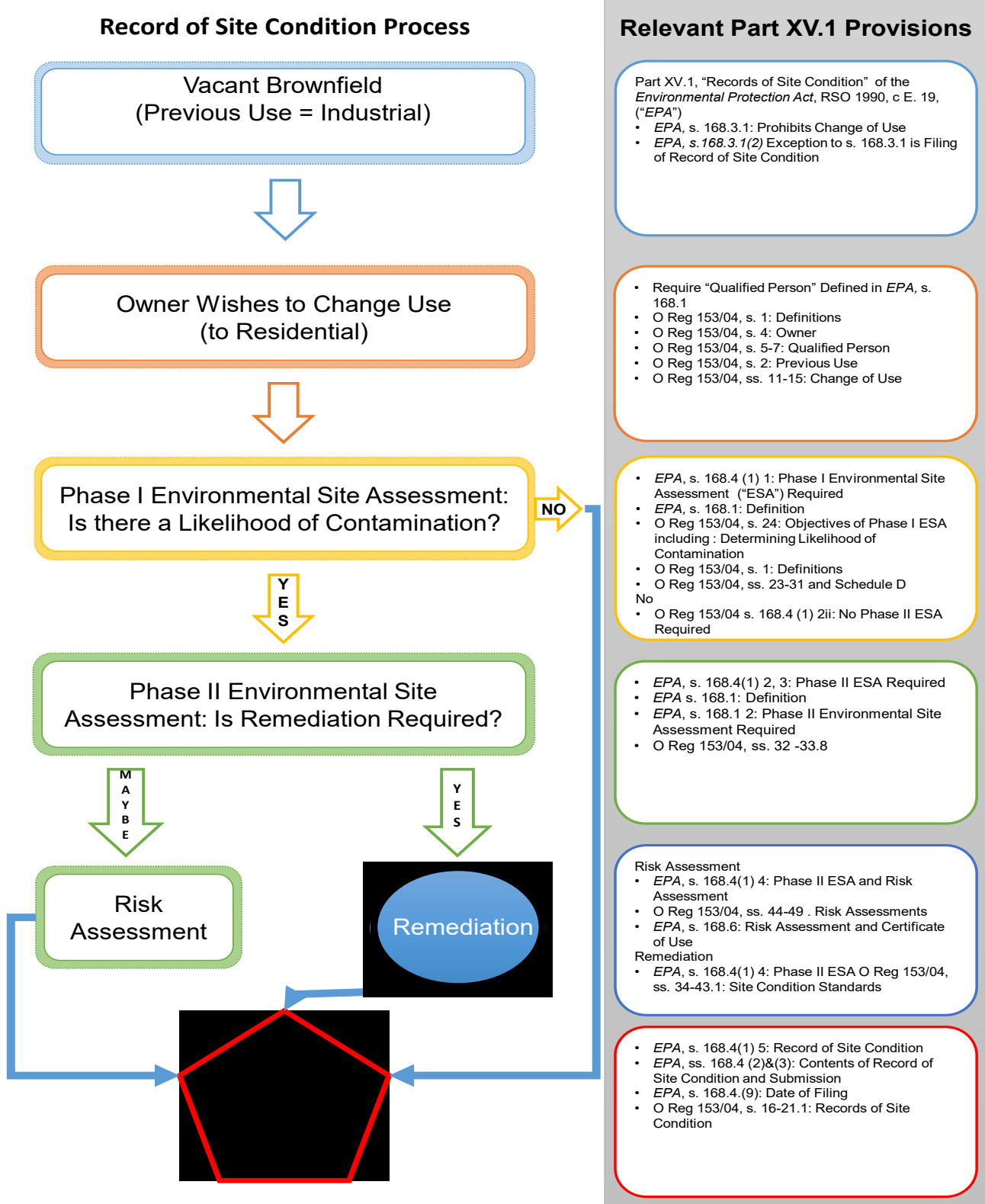
The Ontario regulations established under Part XV of the *EPA* that outline the rules regarding property use and records of site condition are found in O Reg 153/04. These regulations establish the detailed rules regarding records of site condition, such as how present use will be determined and who will fit the definition of an owner of a property for the purposes

⁷² Ministry of Municipal Affairs and Housing, “Fact Sheet: Understanding Risk Assessment – Ontario” (2007) Queen’s Printer for Ontario at 1, online: < <http://www.mah.gov.on.ca/AssetFactory.aspx?did=8997>>.

⁷³ *EPA*, *supra* note 5 at s. 168.6.

of a record of site condition. The regulations also define the rules and processes required for changing the use of a property, which necessarily apply for redeveloping a Brownfield property. Part V through X of the regulations outline the requirements for filing records of site condition, obtaining Phase One and Phase Two Environmental Site Assessments, and dealing with site conditions standards, risk assessments, and certificates of property use. It is these regulations that set out the details of the multifaceted process required for remediation of a Brownfield site. Figure 3.1: Remediation Process illustrates the basic process required in order to obtain the requisite record of site condition.

Figure 3.1: Remediation Process



Recall the relevance of Part XV.2 of the *EPA* as it contains the exceptions to liability. As discussed, the *EPA* makes development of Brownfields difficult because it imposes penalties for contamination on present and past ownership and control of a property. Furthermore, recall that in real property law, liability runs with the land. Consequently, any party that is on title or has responsibility for a property may attract liability. However, Part XV.2 of the *EPA* was amended to limit the liability for certain parties including municipalities, secured creditors, receivers, trustees in bankruptcy, fiduciaries, and property investigators.

Section 168.7(1) provides for an immunity from Ministerial orders for certain owners or occupiers of property where a record of site condition has already been filed. Section 20 extends this protection to successive owners under certain conditions. This is a significant protection afforded to owners that have already undergone the requisite processes required under the *EPA* to ensure a property is free from contamination. Practically, it means that once a site has been approved as remediated, the owner and future owners are protected from the orders found in the *EPA*. This is a significant protection to those who have already undergone remediation, however, it does not limit the liability for owners or developers of Brownfield sites unless and until such remediation is complete. In the example of the Enterprise Property, Oozing Oil Inc., Fundy Financial, Cover Insurance, Municipality, and Construction Corp. would all be exposed to this liability if any of these parties was found to own, control, or have owned or controlled the Enterprise Property. The limitation to liability would only apply to these parties if the s. 20 conditions were satisfied, the Enterprise Property was fully remediated and a record of site condition was filed in the Registry.

With respect to municipalities, s. 128 of the *EPA* establishes that certain actions that may be taken by a municipality as listed in s. 168.12(2), will not attract liability. Section 168.12(2) includes actions such as the municipality entering upon land to respond to a danger posed by a

contaminant, for example.⁷⁴ Part XI of the *Municipal Act*⁷⁵ provides municipalities with the authority to sell a property due to tax arrears and that if there is no purchaser, the property then vests to the municipality under a notice of vesting.⁷⁶ Section 168.12(2)4 and 5 of the *EPA* include the actions of exercising a right to levy by distress in relation to an unpaid amount and taking action on a property for the purposes of Part XI of the *Municipal Act*. The limitation of liability found in s. 168.12(1) of the *EPA* for municipalities is extensive.⁷⁷ Most significantly, by virtue of s. 168.12(1)(b) if a municipality commits these types of actions, the municipality is not considered to have had the “charge, management or control of a source of contaminant”. Furthermore, s. 168.13(1) indicates that if a property interest vests in the municipality, an order cannot be issued against it save for gross negligence or circumstances prescribed by regulations.

Similar provisions exist with respect to secured creditors, receivers, and trustees in bankruptcy. A secured creditor may include a financial institution, mortgage lender, or mortgage insurer. By virtue of contract law and the *Mortgages Act*, a lender may take possession to a property. The common law may also hold that by a lender taking certain actions, a lender becomes a mortgagee in possession. Together, ss. 168.18(1) and (2) of the *EPA* indicate that the actions of investigating a property, preserving the property, entering upon land to respond to a danger posed by a contaminant and any other action prescribed by regulations will not constitute “charge, management or control of a source of contaminant”. Furthermore, s. 168.18(1) states that if a secured creditor takes possession of the property through foreclosure, an order cannot be

⁷⁴ *Municipal Act, 2001*, SO 2001 c25, s. 169.12(2)3 [*Municipal Act*].

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at s. 378(5).

⁷⁷ Section 168.12(1) of the *Municipal Act, 2001*, SO 2001 c25 reads: s. 168.12 (1) A municipality or a municipal representative who takes an action described in subsection (2) is not, for that reason alone, (a) a person who is or was in occupation of a source of contaminant for the purpose of subsection 7 (1) or 8 (1); (b) a person who has or had the charge, management or control of a source of contaminant for the purpose of subsection 7 (1) or 8 (1); (c) a person responsible for the purpose of section 12; (d) a person who has or had management or control of an undertaking or property for the purpose of subsection 18 (1); (e) a person who has or had charge and control of land, a building or waste for the purpose of section 43; (f) an occupant or previous occupant of land or a building for the purpose of section 43; (g) a person having control of a pollutant for the purpose of subsection 97 (1); (h) a person having the charge, management or control of any real property or personal property for the purpose of subsection 97 (1); or (i) a person who has management or control of an undertaking or property for the purpose of subsection 157.1 (1).

issued against it unless the secured creditor was negligent. The time period for an exemption in respect of a foreclosure is five years, or as extended by the Director.⁷⁸ Section 168.19 extends similar protection to receivers and trustees in bankruptcy. However, this exemption from liability is not absolute. The exemptions found in ss.168.18 and 168.19 do not apply if the Director has reasonable grounds to believe that the contaminant poses a danger to a person's health and safety, there is a serious risk of impairment of the quality of the natural environment, or there is serious risk of injury or damage to property or plant or animal life.⁷⁹ However, s. 168.20(3) provides a caveat to the extension of liability found in ss. 168.20(1). If a record of site condition has already been filed in the Registry an order cannot be issued under ss. 168.20(1) and (2), unless the Director has reasonable grounds to believe that a contaminant on, in, or under the property, has caused a danger to health and safety of a person. Consequently, secured creditors, receivers, and trustees in bankruptcy generally will not be liable if a record of site condition has already been filed.

As an aside, it is worthwhile to note that receivers have further protection under the *Bankruptcy and Insolvency Act*,⁸⁰ (“*Bankruptcy and Insolvency Act*”). In the case where a receiver is appointed under the *Bankruptcy and Insolvency Act*, s. 14.06(2) states that a receiver will not be personally liable for previous contamination to the property arising prior to the receivership. Section 14.06(4) of the *Bankruptcy and Insolvency Act* also provides some reassurance for receivers as it permits a receiver to avoid personal liability by disposing of any interest in a contaminated property within ten days (or a longer period as prescribed by a court). Fiduciaries are treated somewhat differently under s. 168.23 of the *EPA*. Under s. 168.23, the liability of a fiduciary is limited to the value of the assets that they hold or are administering for

⁷⁸ *EPA*, *supra* note 5 at s. 168.18(4).

⁷⁹ *EPA*, *supra* note 5 at ss. 168.20(1)(2).

⁸⁰ *Bankruptcy and Insolvency Act*, RSC 1985 c B3.

the fiduciary property. Finally, s. 168.26 of the *EPA* prescribes that persons investigating a property in order to reduce contamination will also not be held to have “charge, management, or control” of the contaminant.⁸¹ Overall, the *EPA* supplies significant ammunition for Ontario courts to impose liability in respect of Brownfields.

III. Case Law

i. *Cie petrolier Imperiale ltee c Quebec (Tribunal administrative)*⁸² (“*Imperial Oil*”)

Imperial Oil, a 2003 decision of the Supreme Court of Canada, is a landmark case establishing the polluter pays principle in Canada⁸³. The issue before the Supreme Court was whether the Quebec Minister of the Environment acted with bias in issuing certain orders to Imperial Oil Ltd. However, the heart of the Supreme Court’s decision focuses on the statutory context of the Minister’s decision and ultimately affirms the centrality of the polluter pays principle in Canada. This focus is in direct correlation with the argument presented by the Intervener, Friends of the Earth. Although Imperial Oil Ltd. argued that the case turned on pure questions of public law and not on environmental law⁸⁴, the Supreme Court stated that, “[a]lthough the appeal heard by the Court raises an administrative law issue in the context of an application for judicial review, the question relates to an environmental protection problem in Quebec”.⁸⁵

To summarize, several key paragraphs of the decision have proven significant in furthering the polluter pays principle in Canadian common law. First, the Supreme Court

⁸¹ *EPA*, *supra* note 5 at s. 168.26.

⁸² *Imperial Oil*, *supra* note 48.

⁸³ Mira Gauvin & Anne-Marie Sheahan, “Imperial Oil Ltd. v. Quebec (Minister of the Environment), November 28, 2003”, (2003-2016) McCarthy Tetrault, online: < http://www.mccarthy.ca/article_detail.aspx?id=1451>.

⁸⁴ *Cie petrolier Imperiale ltee c Quebec (Tribunal administrative)* 2003 CarswellQue 2315, 2003 SCC 58, [2003] 2 SCR 624. *Imperial Oil Ltd v Quebec (Minister of Environment)*, 2003 CarswellQue 2315, 2003 SCC 58, [2003] 2 SCR (Factum of the Intervener Friends of the Earth) at para 10 [*Imperial Oil Factum Intervener*].

⁸⁵ *Imperial Oil*, *supra* note 48 at para 18.

affirmed that similar legislation to s. 31.42 of the *Environment Quality Act*⁸⁶ (the “*EQA*”), (which embodies the polluter pays principle,) existed in “almost all federal and provincial environmental legislation” and that the polluter pays principle is recognized internationally.⁸⁷ Second, the Court refused to accept that the issue was simply a matter of administrative law and held that the fact that the Minister made his decision based on an environmental statute that offered certain environmental protections was relevant. In fact, the Supreme Court noted that, “[t]he Quebec legislation reflects the growing concern on the part of legislatures and of society about the safeguarding of the environment”.⁸⁸ The third significant statement is with respect to s. 31.42 of the *EQA*, where the Court indicates that this section applies the “polluter-pays principle, which has now been incorporated into Quebec’s environmental legislation...[and] has become firmly entrenched in environmental law in Canada”⁸⁹ and at the international level.⁹⁰ Fourth, and most significantly, the Court makes a standalone statement in paragraph twenty-four that has been cited in many cases following the decision. Paragraph twenty-four states that the polluter pays principle “assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution”.⁹¹

At the relevant time, s. 31.42 of the *EQA*⁹² stated:

Where the Minister believes on reasonable grounds that a contaminant is present in the environment in a greater quantity or concentration than that established by regulation under paragraph *a* of section 31.52, he may order whoever had emitted, deposited, released or discharged, even before 22 June 1990, all or some of the contaminant to furnish him with a characterization study, a programme of decontamination or restoration of the environment describing the work proposed for the decontamination or restoration of the environment and a timetable for the execution of the work.

⁸⁶ *Environment Quality Act*, R.S.Q. c. Q-2 [*EQA*].

⁸⁷ *Imperial Oil*, *supra* note 48 at para 23.

⁸⁸ *Ibid* at para 19.

⁸⁹ *Ibid* at para 23.

⁹⁰ *Ibid* at para 23.

⁹¹ *Ibid* at para 24.

⁹² *EQA*, *supra* note 86.

Moreover, where the Minister believes on reasonable grounds that a contaminant prohibited by regulation of the Government is present in the environment or that a contaminant present in the environment is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or to otherwise impair the quality of the soil, vegetation, wildlife or property, he may issue an order to the same effect to whoever has emitted, deposited, released or discharged, even before 22 June 1990, all or some of the contaminant.

The order shall include a statement of the reasons invoked by the Minister and specify the time within which the documents must be furnished to him. The order takes effect 16 days after its notification or on any later date stated therein.

Within 60 days of receipt of the documents, the Minister may approve the proposed decontamination or restoration work and the timetable for its execution, with or without amendment. Whoever is named in the order as being responsible for the source of contamination shall at the request of the Minister provide him, within the time he fixes, with any information, research findings or study he may need to grant his approval.

Whoever is named in the order as being responsible for the source of contamination shall execute the work in accordance with the timetable, as approved by the Minister.⁹³

As noted in the factum of the Friends of the Earth, similar “polluter pays” provisions existed throughout the provinces at this time. In particular, recall that ss. 6, 7, and 8 of the Ontario *EPA*, which was passed in 1990, provide that control and stop orders may be directed to an owner or former owner, an occupier, or a person with “charge, management or control” of a contaminant.

The facts of the case date back to 1920 when Imperial Oil Ltd. first built a petroleum products storage plant in the City of Levis. The facility was used until 1973. In 1979, the property was sold and the plant was destroyed. In 1987, the property was sold to a developer for residential use. At this time, soil studies showed the existence of petroleum hydrocarbons and the developer undertook soil characterization studies confirming contamination. The Quebec Minister of the Environment requested more studies and later approved the decontamination procedures that were recommended. When the decontamination was complete, the Minister

⁹³ *EQA*, *supra* note 86 at s. 31.42.

approved the site for building. It is worth noting that Imperial Oil Ltd. was not contacted during that time. Building began following Ministerial approval.⁹⁴

However, in 1994, property owners found signs of petroleum hydrocarbons in the soil. Studies confirmed the land could not be used for residential purposes. Landowners sued the seller and the City of Levis. The Minister was also joined as a party to the action. The City undertook discussions with the Minister and in 1998, the Minister filed an order under s. 31.42 of the *EQA* against Imperial Oil Ltd. The order required Imperial Oil Ltd. to complete a soil characterization study because it was a former owner of the land. Imperial Oil Ltd. did not comply with the order. Instead, it appealed to the Administrative Tribunal of Quebec in 1999 asserting that the Minister was biased and that the order could not be made against Imperial Oil Ltd. Ultimately, the Tribunal upheld the Minister's order. On the first issue, Imperial Oil Ltd. argued that the Minister's decision did not follow the rules of procedural fairness and that the Minister was in a conflict of interest given the earlier approval of the site for residential building, and the Minister's own potential for liability.⁹⁵ The Tribunal rejected this argument. On the second issue, the Tribunal held that the orders could be made against a former owner of a site who may have been responsible for the pollution, even if it was no longer the owner. The Tribunal relied on ss. 31.42 and 31.43 of the *EQA*. Furthermore, the Tribunal held that the evidence showed that the hydrocarbons originated from Imperial Oil Ltd.⁹⁶

Imperial Oil Ltd. sought an application for judicial review with the Quebec Superior Court. Again, Imperial Oil Ltd. focused on the Minister's impartiality and conflict of interest. Here, Imperial Oil Ltd. argued that there was a conflict of interest because the Minister had been

⁹⁴ *Imperial Oil*, *supra* note 48 at paras 3-5.

⁹⁵ *Ibid* at paras 6-8.

⁹⁶ *Ibid* at para 9.

joined in the legal suits regarding contamination and that Imperial Oil Ltd. had not been informed of the contamination during the early stages. In short, the Court set aside the Tribunal's decision and accepted the conflict of interest argument.⁹⁷ The Minister appealed to the Quebec Court of Appeal. The Court of Appeal overturned the Superior Court's decision and dismissed the application for judicial review. Of particular relevance is the Court of Appeal's ruling that there may have been an appearance of bias, but that because "the Minister alone may perform the functions and exercise the powers provided for by the Act to ensure that the obligations that the legislation imposes on the polluter are met in order to protect the environment in Quebec",⁹⁸ there was a state of necessity that justified an exception to the principle of impartiality.⁹⁹

On further appeal, the Supreme Court of Canada characterized the issue to be addressed as whether the Minister acted outside of the scope of procedural fairness, but emphasized the environmental context of the appeal. Imperial Oil Ltd. argued that this was simply a question of administrative law. However, taking up the argument proffered by the Intervener, Friends of the Earth, the Court held that this issue could not be decided without first considering the statutory context of environmental protection in Quebec within which the Minister made his decision.¹⁰⁰ The Supreme Court decision contains a lengthy paragraph wherein it explains that similar legislation exists in "almost all federal and provincial environmental legislation" and that the polluter pays principle is recognized internationally.¹⁰¹ Imperial Oil Ltd. argued that the Minister owed a duty of impartiality, which was not filled because he was in a conflict of interest. In response, the Supreme Court analyzed the duty within the statutory context of the *EQA* noting that, "[t]he Quebec legislation reflects the growing concern on the part of legislatures and of

⁹⁷ *Ibid* at paras 10-11.

⁹⁸ *Ibid* at para 13.

⁹⁹ *Ibid* at paras 12-13.

¹⁰⁰ *Ibid* at para 18.

¹⁰¹ *Ibid* at para 23.

society about the safeguarding of the environment”¹⁰² The Court indicated that the *EQA* affirms that everyone is entitled to a healthy environment and its protection and that the Minister plays a key role in the administration of the *EQA*, which it described as “[t]he centerpiece of Quebec’s environmental legislation”.¹⁰³

The Supreme Court confirmed that the Minister has the power to make orders with respect to environmental contamination including the power under s. 31.42 of the *EQA* to require those legally responsible for the contamination to conduct characterization studies. A review of s. 31.42 of the *EQA* reveals permissive language, however, “the Court chose to speak to the Minister’s role as both a discretionary power and a responsibility”.¹⁰⁴ In so doing, the Court “referred to the overall objectives of the *EQA*...and emphasized that the Minister had not simply an authority to deal with the environmental problem at hand, but also had a duty to do so”.¹⁰⁵ In addition, it cited this section as “one of the most important enforcement tools” for environmental law in Quebec and confirmed that the orders were properly made.¹⁰⁶ In its decision, the Supreme Court unequivocally stated that the polluter pays principle requires the polluter to remediate contamination.¹⁰⁷

With respect to the duty of impartiality, the Supreme Court cited several cases, including the Supreme Court case of *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*¹⁰⁸ (“*Newfoundland Telephone*”), in its acknowledgment that it must consider the “contextual nature of the content of the duty of impartiality which,...may vary

¹⁰² *Ibid* at para 19.

¹⁰³ *Ibid* at para 20.

¹⁰⁴ Jerry V. DeMarco, “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?” (2007) 17 J. Env. L. & Prac. 159 at 166 [DeMarco, “Supreme”].

¹⁰⁵ *Ibid* at 167.

¹⁰⁶ *Imperial Oil*, *supra* note 48 at paras 25-27.

¹⁰⁷ *Ibid* at para 24.

¹⁰⁸ *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623, 89 DLR (4th) 289 (SCC).

in order to reflect the context of a decision-maker's activities and the nature of its functions"¹⁰⁹. The Court concluded that the Minister was simply fulfilling his duty. This argument carried over with respect to the rules of procedural fairness. The Supreme Court held that the concept of impartiality as it applies to courts does not apply and that the Minister was performing his duty, which was to fulfill the objectives of the *EQA*.

The *Imperial Oil* case provided the Supreme Court with an opportunity to solidify the polluter pays principle in Canada. This idea is supported by environmental law scholar and counsel for Friends of the Earth, Jerry DeMarco. As DeMarco discusses, the Court made an important distinction by interpreting the Minister's power broadly based in the larger context of the overall objectives of the *EQA*.¹¹⁰ It also presented an opportunity for the Supreme Court to affirm that polluters could not carve the environment out of the issue. *Imperial Oil* upholds that environmental legislation and any accompanying legislative roles are not created in a vacuum and must be interpreted based on their purpose of protecting the environment. "This type of analysis helps ensure that environmental rights are given proper effect and that clear legal consequences arise, such as a duty to act on the part of statutory decision-makers."¹¹¹

The Supreme Court's decision in *Imperial Oil* enshrined the polluter pays principle in Canadian common law.¹¹² As such, *Imperial Oil* paved the way for further litigation to remediate contaminated sites across Canada, and in particular, in Ontario. The corollary to this is that liability to remediate contaminated sites also began to grow.

¹⁰⁹ *Imperial Oil*, *supra* note 48 at para 31.

¹¹⁰ DeMarco, "Supreme", *supra* note 104 at 166-167.

¹¹¹ *Ibid* at 167.

¹¹² *Imperial Oil*, *supra* note 48 at para 24.

ii. Case Law Affirming *Imperial Oil*

Since the *Imperial Oil* decision, at least four cases have followed the *Imperial Oil* reasoning and the case has been cited in at least sixty-two Canadian decisions.¹¹³ A review of several cases reveals that the most significant statements made by the Supreme Court are those reinforcing the importance of the polluter pays principle in Canada (as per paragraph twenty-four of *Imperial Oil*).

Most importantly, in the Supreme Court of Canada decision of *Barrette c Ciment du St-Laurent Inc*¹¹⁴ (“*Barrette*”), the Supreme Court affirms the *Imperial Oil* decision by citing paragraph twenty-four and indicating that the no-fault liability legislation in question reinforces the use of the polluter pays principle. Out of the many cases that cite *Imperial Oil*, *Barrette* is one of the most relevant as it is the highest level case that is on-point with the decision. *Barrette* was a class-action case originally brought in Quebec involving a cement company that operated near a community. It was a nuisance case where a class of neighbours argued that the smoke, dust, and odour pollution released by the plant constituted an excessive nuisance. Although the cement company argued that it was not liable on the basis of fault, the Supreme Court held there was a no-fault liability system in Quebec civil law. At paragraph eighty, the Court states,

No-fault liability also reinforces the application of the polluter-pay principle, which this Court discussed in *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, [2003] 2 S.C.R. 624, 2003 SCC 58 (S.C.C.):

To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities. [para. 24]¹¹⁵

¹¹³ Based on a WestlawNext search completed June 27, 2016.

¹¹⁴ *Barrette c. Ciment du St-Laurent inc*, 2008 CarswellQue 11070, 2008 SCC 64, [2008] 3 SCR 392.

¹¹⁵ *Ibid* at para 80.

As the above citation illustrates, the Supreme Court re-affirms the recognition of the polluter pays principle in paragraph twenty-four of *Imperial Oil*.

Other provincial-level cases, such as the Ontario case of *Grant v Ontario (Director, Ministry of the Environment)*¹¹⁶ (“*Grant*”), also cite paragraph twenty-four of the *Imperial Oil* decision. In *Grant*, rubber powder was found on a property housing a rubber buffing dewatering company. The company was ordered to clean up the site, however, there was disagreement as to who was responsible for the management of the company and therefore liable for remediation. The Court held that liability rested with anyone who had management and control of the property. The Court indicated that the purpose behind the relevant legislation (s. 157.1 of the *EPA*) was the polluter pays principle, and adopted paragraph twenty-four of *Imperial Oil*.¹¹⁷

A similar analysis occurs in *Nova Scotia (Attorney General) v Marriott*,¹¹⁸ (“*Marriott*”). In *Marriott*, the case turned on whether an owner of a mechanic shop was liable for pollution resulting from a previous owner’s equipment on the property. The owner found canisters on the property and improperly discarded the canisters resulting in an explosion. The Court held that ownership was irrelevant and that the owner was liable because he had management and control of the property. The Court states, “Nova Scotia is far from being the only jurisdiction to enact legislation adopting the polluter-pay principle”¹¹⁹ and cites paragraphs twenty-three and twenty-four of *Imperial Oil*.

Imperial Oil has also recently been considered in the case of *Midwest Properties Ltd v Thordarson*¹²⁰ (“*Midwest*”). This case is particularly relevant to this discussion because the Court

¹¹⁶ *Grant v Ontario (Director, Ministry of the Environment)*, 2009 CarswellOnt 5963, 46 CELR (3d) 213.

¹¹⁷ *Ibid* at para 69.

¹¹⁸ *Nova Scotia (Attorney General) v Marriott*, 2008 NSSC 160, 36 CELR (3d) 268.

¹¹⁹ *Ibid* at para 39.

¹²⁰ *Midwest Properties Ltd v Thordarson*, 2015 CarswellOnt 18029, 2015 ONCA 819, additional reasons provided in 2016, CarswellOnt 1953, 2016 OCA 230 notice of appeal filed 2016 CarswellOnt 1953 [*Midwest*].

pierced the corporate veil and found the principal of a company jointly and severally liable in an effort to make the polluter pay.¹²¹ This case turns on s. 99(2) of the *EPA*, which provides for compensation to those who suffer loss or damage due to spills. In *Midwest*, Midwest Properties Ltd. purchased a property adjacent to one owned by a company that repaired petroleum equipment. Midwest Properties Ltd. was considering purchasing the adjacent property and was allowed to complete a phase one and two environmental assessment. The assessment confirmed contamination. When Midwest Properties Ltd. learned of this, it completed an assessment on its own property and learned that it was also contaminated. Midwest Properties Ltd. sued the neighbouring company and claimed compensation under s. 99(2) of the *EPA*. The Court of Appeal overturned the trial decision that had held that providing compensation under s. 99(2) of the *EPA* would be akin to a double recovery because the Ministry of the Environment had ordered a cleanup. Instead, it held that the company itself, as well as the principal, Thordarson, were jointly and severally liable for \$1,328,000 and also found liability in nuisance and negligence, awarding \$50,000 in punitive damages. In its decision, the Court explains:

This approach to damages reflects the "polluter pays" principle, which provides that whenever possible, the party that causes pollution should pay for remediation, compensation, and prevention: see Pardy, at p. 187. As the Supreme Court has noted, the polluter pays principle "has become firmly entrenched in environmental law in Canada": *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.), at para. 23. In imposing strict liability on polluters by focusing on only the issues of who owns and controls the pollutant, Part X of the *EPA*, which includes s. 99(2), is effectively a statutory codification of this principle.¹²²

¹²¹ Jack Coop, Jennifer Fairfax, Patrick G. Welsh, & Rebecca Hall-McGuire, "Ninety-Nine Problems: Ontario Court of Appeal Releases Significant Decision for Environmental Civil Litigation" (7 December 2015) Osler, online: <<https://www.osler.com/en/resources/regulations/2015/ninety-nine-problems-ontario-court-of-appeal-rele>>.

¹²² *Midwest*, *supra* note 120 at para 68.

Ultimately, the case law confirms the over-arching importance of the polluter pays principle in Canadian environmental law. While not centrally concerned with environmental protection, contract law also raises the specter of liability in the Brownfields context.

B. Contract and Statutory Matters Ancillary to Contract Law

Real property matters typically involve the common law of contract because real property is conveyed by an agreement of purchase and sale. Furthermore, financing of real property transactions is based on contracts, such as mortgage agreements and mortgage insurance agreements. More complex commercial real property developments are typically governed by various multi-party agreements, including umbrella agreements involving cities or municipalities, lenders, and investors. When something goes wrong, parties look to the contract for a determination of rights as well as to relevant statutes, such as legislation regarding mortgages and bankruptcy and insolvency. In the Brownfields context, there is substantial scope for liability under the laws of contract.

Consider the Enterprise Property scenario where the Enterprise Property was used as an oil production plant. In this scenario, the former owner, Oozing Oil Inc. had title to the property. Consequently, the property register for the Enterprise Property states that Oozing Oil Inc. holds title to the property. When Oozing Oil Inc. first purchased the Enterprise Property, Oozing Oil Inc. required financing from Fundy Financial in the form of a mortgage. This mortgage would then also appear on title to the Enterprise Property. This mortgage is governed by a mortgage agreement between Oozing Oil Inc. and Fundy Financial (or, the mortgagee). It is also likely that Cover Insurance provided mortgage insurance to Fundy Financial in respect of the Enterprise Property, for which another agreement exists between Fundy Financial and Cover Insurance. (Real property law concepts, such as registration of title, will be explored in the following section on real property law.)

Once something goes wrong and a party defaults or fails to perform a condition of any one of the agreements described above, liability ensues. The rights and responsibilities of each party will depend on the terms of the agreements and on any applicable statutes. Moving through the example of the Enterprise Property, liability may attach to several parties at multiple points in time. If Oozing Oil Inc. contaminates the real property and, for whatever reason, does not pay the mortgage on the property, the provisions of the mortgage agreement will govern. There are certain rights and obligations of mortgagors and mortgagees that the *Mortgages Act*¹²³ (“*Mortgages Act*”) states form implied covenants in a mortgage agreement. Relevant for this discussion is s. 7(iv) of the *Mortgages Act*, which states that on default, the mortgagee shall have quiet possession of the land. The covenant that a lender (mortgagee) will have possession of the real property for which the mortgage was provided is standard in most mortgage agreements. The most obvious reason that this covenant exists is so that the lender has the ability to deal with the property in order to recover the mortgage monies. However, in the hypothetical scenario, if Oozing Oil Inc. defaulted on its mortgage and the property is contaminated, would Fundy Financial necessarily be in a rush to take possession of the Enterprise Property? For a variety of liability reasons discussed in this paper, the answer is likely, no. However, by virtue of the mortgage contract, there may be other options. For example, the lender may try to force Oozing Oil Inc. to remediate the property prior to possession. However, there may be difficulties with enforcement. Consider the many possibilities that exist regarding a defaulting mortgagee. For example, it may be that Oozing Oil Inc. is insolvent and has declared bankruptcy. Or it may be that Oozing Oil Inc. is judgment proof, meaning that it holds no assets, such that even if Fundy Financial attempted to collect the debt, Oozing Oil Inc. would have no assets to liquidate. In

¹²³ *Mortgages Act*, RSO 1990 c M40 [*Mortgages Act*].

these scenarios, the lender is forced to consider whether to take possession of the property in order to attempt to recover the money that was lent to Oozing Oil Inc.

Even if a lender decides that it does not want to take on the risk of liability associated with a contaminated property, it may be held to be a mortgagee in possession nonetheless. Suppose that Fundy Financial decides not to take title to the Enterprise Property, but instead wishes to sell some of the personal property left on the Enterprise Property in order to recover some of its money? Generally speaking, when a lender asserts its rights as a mortgagee, it becomes a mortgagee in possession.¹²⁴ Significant obligations attach to the lender if it is held to be a mortgagee in possession. For example, lenders become liable for any rents and profits and must account for these. Whether the lender takes title to the Enterprise Property, or is held to be a mortgagee in possession, the lender is exposed to liability, including the environmental law liabilities previously discussed. The caveat is that the lender may fall under one of the exceptions discussed in Part XV.2 of the *EPA*.

This situation is complicated by the fact that a lender with mortgage insurance may look to its mortgage insurer in order to recover from the defaulted loan. In the Enterprise Property scenario, this would mean that Fundy Financial may take possession of the Enterprise Property with the intent to sell it. However, if it meets both the statutory requirements and terms of the agreement with Cover Insurance, and fails to sell the Enterprise Property, Cover Insurance may inherit the Enterprise Property. (The contractual rights between a lender and mortgage insurer often include a transfer of title to the mortgage insurer where the mortgage insurer assumes the rights of the lender. This would place the mortgage insurer in the same place as the lender.)

¹²⁴ See Rayner, WB & RH McLaren, *Falconbridge on Mortgages*, (4th ed) (Agincourt, Canada Law Book, 1977) at 643. See also, *First City Development Ltd v Central Mortgage & Housing Corp*, 1981 CarswellNS 96, 130 DLR (3d) 175, at 28.

Whether or not a party takes title to the property, real property taxes may also be owing to a city or municipality where a property is located. In the Enterprise Property hypothetical, Municipality is owed tax arrears. The liability for real property taxes could be significant. In fact, it is possible that cumulative outstanding real property taxes could exceed the value of the property. By virtue of s. 375(5) of Part XI of the *Municipal Act*, 2001¹²⁵ (“*Municipal Act*”), a municipality’s lien for property taxes takes priority over all other parties’ interest in the land (as long as the parties were provided with notice as per s. 374). Furthermore, under Part XI of the *Municipal Act* a municipality, such as Municipality may have the ability to sell the Enterprise Property for arrears. The *Municipal Act* states that if there is a purchaser, the municipality will register a tax deed to the purchaser. If there is no purchaser, the property then vests to the municipality under a notice of vesting.¹²⁶

The risk of liability associated with contractual obligations is a serious concern in Brownfield redevelopment. Closely linked to the contractual issues that arise in Brownfields redevelopment is the body of common law regulating rights in real property generally.

C. Real Property and Land Use Planning

This section provides an overview of real property and land use planning legislation in Ontario, as well as an analysis of recent, relevant Ontario case law that imposes significant barriers on Brownfield redevelopment in Ontario.

I. Real Property: Ontario Legislation

As a starting point, it is important to understand the common law regarding real property in Ontario. Under common law, an individual that has an interest in real property holds the property rights to the real property and can enforce these rights against others. In law, there are

¹²⁵ *Municipal Act*, *supra* note 74.

¹²⁶ *Ibid* at s. 378(5).

various kinds of interests in real property. A fee simple interest – the typical interest relevant in Brownfields redevelopment – is an absolute right to land that exists indefinitely. In Ontario, there are two systems for recording interests in land. These systems are legislated under the *Registry Act*¹²⁷ (“*Registry Act*”) and the *Land Titles Act*¹²⁸ (“*Land Titles Act*”). In the past, rights registered under the *Registry Act* were recorded in paper format at registry offices. However, the *Land Titles Act* now requires electronic registration of title, and guarantees title, such that the record of title does not necessarily have to be searched back to forty years prior.

Presently, an individual with a fee simple interest in land has title to the land and this title is registered electronically under the *Land Titles Act*. Of key importance in a discussion on Brownfields is that section 87 of the *Land Titles Act* confirms that liability runs with the land, meaning that an individual owner is liable for the real property to which the individual owner holds title. Consequently, if Owner A conveys title of Property X to Purchaser B, Purchaser B becomes Owner B and as such becomes liable for Property X. The doctrine of *caveat emptor*, or buyer-beware prevails. This means that purchasers must act with due diligence before buying a property because if a purchaser takes title and becomes the owner, the new owner will inherit the responsibility for any title defects of the property.¹²⁹

Using the hypothetical of the Enterprise Property, imagine that it is 1980 and that Oozing Oil Inc. decides to sell the Enterprise Property. Assume that there is no evidence *registered on title* to the Enterprise Property that suggests the property is contaminated. A purchaser, “Rush Buyer”, decides to buy the Enterprise Property without doing any due diligence (such as taking a soil sample). An agreement of purchase and sale is completed and Rush Buyer becomes the owner of the Enterprise Property. One week later, the adjacent property owner sues Rush Buyer

¹²⁷ *Registry Act*, RSO 1990 c R 20.

¹²⁸ *Land Titles Act*, RSO 1990 c 19, L5.

¹²⁹ Brownfields Manual, *supra* note 47 at 4.6.

due to soil contamination. Given that Rush Buyer is on title to the Enterprise Property, s. 87 of the *Land Titles Act* provides that Rush Buyer is liable. The doctrine of *caveat emptor* imposes on a purchaser the obligation to inspect a property because in common law (subject to certain exceptions) there is no warranty that a property is fit for a specific purpose.¹³⁰

In summary, parties on title to Brownfield properties are liable for any defects on title, including responsibility for remediation and for any issues arising out of contamination of adjacent property. Provincial legislation and policy related to land use planning also impose liability on parties on title to Brownfield properties.

II. Provincial Land Use Planning

There are several provincial land use planning statutes, regulations and policies that embody the polluter pays principle and that are related to Brownfield redevelopment. Of significance are the *Planning Act*¹³¹ (the “*Planning Act*”), Ontario’s *Provincial Policy Statements* (“*Provincial Policy Statements*”), and the *Brownfields Statute Law Amendment Act, 2001*¹³² (the “*Brownfields Statute Law Amendment Act*”).¹³³ It is also important to note that there are various provincial regulations that impact Brownfield redevelopment and remediation. Furthermore, other planning related instruments, such as the *Development Charges Act, 1997*¹³⁴ and the *Smart Growth for Our Communities Act*¹³⁵ are also relevant.¹³⁶

¹³⁰ *Ibid* at 4.12 – 4.12.1 and 4.43.

¹³¹ *Planning Act*, RSO 1990 c P13 [*Planning Act*].

¹³² *Brownfields Statute Law Amendment Act*, *supra* note 64.

¹³³ See Part Three: Liability, C, II, i, ii, iii, *below*, for more on this topic.

¹³⁴ *Development Charges Act, 1997* SO 1997 c 27 [*Development Charges Act*].

¹³⁵ *Smart Growth for Our Communities Act*, SO 2015 c 26 [*Smart Growth for Our Communities Act*].

¹³⁶ See Part Three: Liability, C, II, iv, *below*, for more on this topic.

i. *Planning Act*

Section 92(13) of the *Constitution Act, 1867*¹³⁷ provides provincial governments with authority over property and civil rights in the provinces.¹³⁸ The primary instrument for land use planning in Ontario is the *Planning Act*.¹³⁹ There are several purposes of the *Planning Act*, which include: to provide for a land use planning system led by provincial policy, to encourage sustainable economic development, and to incorporate matters of “provincial interest” into provincial and municipal planning.¹⁴⁰ A non-exhaustive list of matters of “provincial interest” is set out in section 2 of the *Planning Act*, which lists several environmental, health, safety, planning and social concerns.¹⁴¹ With respect to contaminated lands, ss. 2(h) and (o), regarding the development of healthy and safe communities, and the protection of public health and safety, respectively, are the most relevant.¹⁴²

It is important to note that both the Province of Ontario and any relevant municipality are involved in land use planning in a given area. The Minister of Municipal Housing and Affairs, along with a municipal council, any applicable local board and/or planning board and the Ontario Municipal Board all play particular roles under the *Planning Act*.¹⁴³ The roles of the Province and any municipality are generally separated out by having the Province perform the high-level, functions and the municipalities performing a more detailed role specific to the municipality itself. The Province fleshes out the provisions of the *Planning Act* by enacting *Provincial Policy Statements* regarding land use planning and drafting provincial plans.¹⁴⁴ In turn, municipalities

¹³⁷ *Constitution Act, 1867*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹³⁸ *Ibid* at s. 92(13).

¹³⁹ Ministry of Municipal Affairs and Housing, “The Planning Act” Queens Printer for Ontario (2015) online: <<http://www.mah.gov.on.ca/Page1760.aspx>>. [Ministry, “Planning Act” 2015].

¹⁴⁰ *Planning Act*, *supra* note 131 at s. 1.1(a)(b)(c).

¹⁴¹ *Ibid* at s.2.

¹⁴² *Ibid* at s. 2(h)(o).

¹⁴³ *Ibid* at s.2.

¹⁴⁴ *Ibid* at s. 3(1). See also, Ministry, “Planning Act” 2015, *supra* note 139.

draft locally-based plans including the official plans, as well as the rules governing building and development, such as zoning by-laws. The *Planning Act* has been amended by section 28 to deal specifically with the role that municipalities play in the redevelopment of lands, such as Brownfields. Section 28 allows a municipality to design a community improvement plan that designates certain areas to be redeveloped, which may include the provision of affordable housing. This amendment allows the municipality to pass a by-law for the municipality to acquire, hold and clear certain designated lands for the purpose of a community improvement plan.¹⁴⁵ Alternatively, the municipality may assist a registered owner in redeveloping the land by providing grants or loans to “pay for the whole or any part of eligible costs of the community improvement plan”.¹⁴⁶ However, s. 28(7.3) of the *Planning Act* provides that these grants and loans, coupled with any municipal tax assistance provided under s. 365.1 of the *Municipal Act* cannot exceed the eligible costs of the community improvement plan.

The powers of a municipality are outlined in the *Municipal Act*. Similar to a corporation, a municipality has the rights and powers of a person.¹⁴⁷ As discussed above, Part XI of the *Municipal Act* provides a municipality with a priority statutory lien in respect of real property taxes and the ability to sell a property for arrears. Section 8 of the *Municipal Act* provides that the powers of a municipality are to be interpreted broadly so as to allow a municipality to govern its affairs appropriately. Relevant to this discussion is that section 365.1(2) provides that a municipality may pass a by-law to cancel, reduce or refund taxes levied on an eligible property, (which is defined to include properties for which a phase two environmental site assessment is being completed). The Ontario Municipal Board currently hears appeals of decisions made under

¹⁴⁵ *Planning Act*, *supra* note 131 at s. 28(3).

¹⁴⁶ *Ibid* at s. 28 (7). For the purposes of s. 28(7) the Act defines eligible costs in s. 28(7.1) as “For the purposes of subsection (7), the eligible costs of a community improvement plan may include costs related to environmental site assessment, environmental remediation, development, redevelopment, construction and reconstruction of lands and buildings for rehabilitation purposes or for the provision of energy efficient uses, buildings, structures, works, improvements or facilities.”

¹⁴⁷ *Municipal Act*, *supra* note 74 at s. 9.

the *Planning Act*, any official plans, and zoning by-laws. Presently, under Ontario's proposed Bill 139, entitled, *Building Better Communities and Preserving Watersheds Act*, 2017, the Ontario Municipal Board would become a Local Planning Appeal Board. The suggested changes under Bill 139 would increase public accessibility and provide more say for local communities in the development and planning of these communities.

ii. *Brownfields Statute Law Amendment Act*

The *Brownfields Statute Law Amendment Act* amends key provincial environmental statutes to facilitate investment in contaminated lands, such as Brownfields. It is characterized as “an Act to encourage the revitalization of contaminated land”.¹⁴⁸ Of particular relevance to this research are the amendments made to the *EPA*, *Municipal Act*, and the *Planning Act*. The relevant amendments to these three statutes have been referenced throughout this paper. Recall that the *Brownfield Statute Law Amendment Act* amended the *EPA* by inserting Parts XV.1 and XV.2 regarding records of site condition, and liability exceptions, respectively. The *Municipal Act* was amended with respect to Parts III and IV to add wording regarding the reduction of taxes in respect of eligible properties and tax sales, as explained above. Finally, the *Planning Act* amendments relate to the community improvement plans, which have also been discussed. Further confirmation of the government of Ontario's desire to promote Brownfield redevelopment is found in Ontario's *Provincial Policy Statements*.

iii. *Provincial Policy Statements*

Evidence of the Ontario government's commitment to the remediation of contaminated lands is displayed in Ontario's Provincial Planning Policies and Statements. The Province of Ontario, through the Ministry of Municipal Affairs and Housing, releases *Provincial Policy*

¹⁴⁸ *Brownfields Statute Law Amendment Act*, *supra* note 64.

Statements that outline the Province’s stance on land use planning. Ontario *Provincial Policy Statements* are issued under section 3 of the *Planning Act*. The Ministry’s website states that these policies provide “clear policy direction on land use planning to promote strong communities, a strong economy, and a clean and healthy environment”.¹⁴⁹ It is notable that Ontario’s 2005 and 2014 *Provincial Policy Statements* identify Brownfields as opportunities for redevelopment and indicate the necessity of Brownfield redevelopment in order to meet land-use requirements.¹⁵⁰

Recall that the case of *Imperial Oil* gave a broad interpretation of the government’s power to protect the environment. A study of the *Provincial Policy Statements* written following the decision reveals trends in how the government intends to use this power. The Preamble to the 2005 *Provincial Policy Statement* integrates several elements of environmental protection. For example, the Preamble states, “[t]he Provincial Policy Statement provides for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural environment”.¹⁵¹ It also states, “[p]rovincial plans and municipal official plans provide a framework for comprehensive, integrated and long-term planning that supports and integrates the principles of strong communities, a clean and healthy environment and economic growth, for the long term”.¹⁵² The 2014 *Provincial Policy Statement* echoes this Preamble with minor amendments.

With respect to contaminated sites, Ontario’s 2005 *Provincial Policy Statement* identified a need to redevelop contaminated sites in an effort to curb urban sprawl. Ontario’s 2005 and 2014

¹⁴⁹ The Ministry of Municipal Affairs and Housing, “Brownfields Ontario: Encouraging Revitalisation and Intensification with Brownfield Redevelopment”, (2008-2015) Queen’s Printer for Ontario online: <<http://www.mah.gov.on.ca/Page224.aspx>> [Ministry, “Brownfields”].

¹⁵⁰ *Ibid.*

¹⁵¹ The Ministry of Municipal Affairs and Housing, “*Provincial Policy Statement*”, (2005) Queens Printer for Ontario at Preamble p. 1, online: <<http://www.mah.gov.on.ca/Asset1421.aspx>> [Ministry, “Provincial Policy Statement” 2005].

¹⁵² *Ibid.*

Provincial Policy Statements seek to promote opportunities for redevelopment taking into account existing building stock, including contaminated sites.¹⁵³ Article 1.1.3.3. of both the 2005 and 2014 *Provincial Policy Statements* reads:

1.1.3.3 Planning authorities shall identify and promote opportunities for *intensification* and *redevelopment* where this can be accommodated taking into account existing building stock or areas, including *brownfield sites*, and the availability of suitable existing or planned *infrastructure* and *public service facilities* required to accommodate projected needs. *Intensification* and *redevelopment* shall be directed in accordance with the policies of Section 2: Wise Use and Management of Resources and Section 3: Protecting Public Health and Safety.¹⁵⁴

Article 3.0 regarding the protection of public health and safety indicates that “[d]evelopment shall be directed away from areas of natural or human-made hazards where there is an unacceptable risk to public health or safety or of property damage”.¹⁵⁵ Interestingly, the 2014 *Provincial Policy Statement* reads the same, but adds at the end of sentence “...and not create new or aggravate existing hazards”.¹⁵⁶ With respect to human-made hazards, such as contaminated sites, Article 3.2 of the 2005 *Provincial Policy Statement* states:

3.2.1 Development on, abutting or adjacent to lands affected by *mine hazards; oil, gas and salt hazards; or former mineral mining operations, mineral aggregate operations or petroleum resource operations* may be permitted only if rehabilitation measures to address and mitigate known or suspected hazards are under-way or have been completed.

3.2.2 Contaminated sites shall be remediated as necessary prior to any activity on the site associated with the proposed use such that there will be no *adverse effects*.¹⁵⁷

The 2005 *Provincial Policy Statement* has been replaced by the 2014 *Provincial Policy Statement*, which amends the article dealing with human made hazards by rephrasing Article

¹⁵³ *Ibid* at 1.1.3.3 at p. 5.

¹⁵⁴ The Ministry of Municipal Affairs and Housing, “*Provincial Policy Statement*”, (2005 & 2014) Queens Printer for Ontario at 1.1.3.3 at p. 5 and 1.1.3.3 & at p. 8, respectively, online: <<http://www.mah.gov.on.ca/Asset1421.aspx>>.

¹⁵⁵ Ministry, “*Provincial Policy Statement*” 2005, *supra* note 151 at 3.0 at p. 22.

¹⁵⁶ Ministry, “*Provincial Policy Statement*” 2014, *supra* note 3 at 3.0, p. 30.

¹⁵⁷ Ministry, “*Provincial Policy Statement*” 2005, *supra* note 151 at 3.2.1, p. 23. As explained above, this process is governed by Part XV.1 of the *EPA*.

3.2.2 as follows, “[s]ites with contaminants in land or water shall be assessed and remediated as necessary prior to any activity on the site associated with the proposed use such that there will be no adverse effects”.¹⁵⁸ Part Four of this research will highlight the programs in place in Hamilton that seek to implement the vision of the *Provincial Policy Statements*.

iv. *Development Charges Act* and the *Smart Growth for Our Communities Act*

When an owner of land in a municipality intends on redeveloping that land, there are specific and lengthy processes in place imposed by municipalities that stem from *Planning Act* requirements. These processes include receiving records of site condition, drafting of various plans of development and payment of development charges, and requests for zoning approvals and building approvals. The *Development Charges Act* is a statute that provides municipalities with the power to pass by-laws imposing fees for such development. The *Act* also allows for agreements regarding costs and services associated with land development. Mechanisms for complaints and appeals of by-laws are also provided for in the *Act*.

The *Smart Growth for Our Communities Act* was enacted in order to provide the public with more say in how communities are developed. As such, it not only amends the *Development Charges Act* but, more importantly, it amends several *Planning Act* regulations related to planning permits, zoning, official plans and plans of subdivision. All amendments were in force as of July 1st, 2016. With respect to the *Development Charges Act*, the amendments require increased community involvement in how municipalities spend development charges.¹⁵⁹ The amendments with respect to the *Planning Act* are more significant in relation to this research.

¹⁵⁸ Ministry, “Provincial Policy Statement” 2014, *supra* note 3 at 3.2.2, p. 32.

¹⁵⁹ Sections 26(1.1) and (1.2) of the *Development Charges Act* state that development charges are due when the first building permit is issued for a building, or, where the development is to take place in phases, the charges are due at each phase. Under the *Smart Growth for Our Communities*, s. 10(4) of the *Development Charges Act* was amended to require that a development charge background study, which is required before a development charge by-law can be passed, is made publicly available sixty days before it is passed or repealed. Subsections 43(2) and (2.1) require municipalities to issue more detailed financial statements and publicly report regarding how development charges are spent and s.60(1)(v) requires that municipalities explain development charge by-laws.

Ontario's Ministry of Municipal Affairs and Housing indicates that the amendments set clear rules for land use planning and appeals, protect greenspaces, make it easier to resolve disputes, and provide the public with greater say in community planning.¹⁶⁰ The relevance of these amendments that seek to integrate community involvement into the planning process is particularly valuable with respect to environmental justice and Brownfields (covered in Part Five of this research) and the recommendations made in this research (found in Part Six).

Importantly, the amendments changed the frequency of *Provincial Policy Statement* reviews from every five years to every ten years. Although this may seem counter-intuitive to increasing effectiveness of the planning process, the reality is that municipalities lacked time to coordinate official plans with *Provincial Policy Statements* every five years, and the government feels that the longer interval between reviews will provide more stability for municipalities.¹⁶¹ This amendment is reflected in s. 26(1) of the *Act*, which now requires that official plans be reviewed and revised every ten years after new official plans come into effect and every five years thereafter. The Ministry of Municipal Affairs and Housing indicates that this will allow municipalities "more time to engage with stakeholders in the review process".¹⁶² The involvement of key players in the Brownfield redevelopment process, such as developers, investors, and the community, will advance the growth of Brownfield redevelopment in municipalities. An environmental win is found in s. 42(1) of the *Planning Act*, which provides that a condition of approval for redevelopment of land is that, depending on use, two or five percent of the land must be conveyed to the municipality for parkland. Mandatory conveyances

¹⁶⁰ The Ministry of Municipal Affairs and Housing, "The Smart Growth for Our Communities Act, 2015 (Bill 73)", (2008-2015) Queens Printer for Ontario, online: <<http://www.mah.gov.on.ca/Page11014.aspx>>. See also, The Ministry of Municipal Affairs and Housing, "The Smart Growth for Our Communities Act, 2015, Highlights of Changes to the Planning Act")", (2008-2015) Queens Printer for Ontario, online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=15071>> [Ministry, "Smart Growth"].

¹⁶¹ *Ibid* at 13.

¹⁶² *Ibid* at 17.

for parkland reflects the Province's desire to develop sustainably. Accordingly, a certain percentage of a Brownfield redevelopment site could be conveyed to a municipality as parkland.

While it is true that the goal of many of the amendments is to increase public involvement in the planning process, it is worthwhile to note that the appeal process in respect of such matters as provincial approvals, has been removed under the guise of streamlining the process. For example, s. 17(24.4) and (24.5) have been amended to remove the ability to appeal decisions of municipalities. On the issue of Brownfields redevelopment, this is a double-edged sword because the appeal has only been eliminated where a municipality is implementing a provincially approved matter into an official plan.¹⁶³ Consequently, if a municipality were simply integrating Brownfield redevelopment as per a *Provincial Policy Statement* into an official plan, there would be no right of appeal. Finally, where an appeal has been made to the Ontario Municipal Board due to the indecision of a municipality, new s. 2.1(2) states that the Ontario Municipal Board "shall have regard to any information and material" that the municipal council received. The stated goal is to clarify "that all public input at [the] municipal level must be considered by approval authorities" and the Ontario Municipal Board.¹⁶⁴ This amendment is relevant to Brownfield redevelopment because it provides key players in the Brownfield redevelopment process with an opportunity to share information with the municipality, which will be passed on to the Ontario Municipal Board in the event that the municipality fails to make a decision in relation to development of a contaminated site. The goal of integrating public input into the planning processes has been woven in to many of the amendments discussed thus far. However, the goal of citizen engagement is made clear with the amendments in ss. 16(1)(b) and (2). These amendments state that an official plan shall contain "a description of the measures and

¹⁶³ Ministry, "Smart Growth", *supra* note 160.

¹⁶⁴ *Ibid* at 9.

procedures for informing and obtaining the views of the public” regarding proposed amendments to the official plan, zoning by-laws, and other relevant documents.¹⁶⁵ Planning Advisory Committees have also been mandated under s.8 of the *Planning Act*. Section 8(1) now requires the council of every lower and upper-tier municipality (with minor exceptions) to have a Planning Advisory Committee, whose members must include one resident of the community. The purpose of these committees is to ensure “citizen representation” and that “land use advice provided to councils includes citizen perspectives”¹⁶⁶ Increased public consultation and involvement in the planning processes related to the redevelopment of Brownfield sites provides stakeholders with an opportunity to provide insight, which has the potential to further sustainable development and to shape municipal programs to offset liabilities in Brownfield redevelopment.

Real property law assigns liability to individuals holding title to Brownfields properties. This liability risk is juxtaposed against recent developments in provincial land use policy that encourage Brownfield redevelopment. Although the Province supports Brownfield redevelopment, Ontario case law reinforces the serious liability risks associated with contaminated property.

III. Case Law

i. *Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*¹⁶⁷ (“*Kawartha Lakes*”)

The decision in *Kawartha Lakes* came as a shock to many individuals working in the real property market in 2013. In fact, the 2013 decision of *Kawartha Lakes* spurred this research because it suggested that society’s values were changing with respect to the polluter pays principle. Until *Kawartha Lakes* was decided, it was generally understood that “polluter pays”

¹⁶⁵ *Planning Act*, *supra* note 131 at ss. 16(1)(b) and (2).

¹⁶⁶ Ministry, “Smart Growth”, *supra* note 160 at 8.

¹⁶⁷ *Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*, 2013 CarswellOnt 5503, 2013 ONCA 310 [*Kawartha Lakes*].

was the governing principle in Brownfields liability. However, the *Kawartha Lakes* precedent imposes a higher level of liability and due diligence in real estate transactions with respect to contaminated lands. This shift in the law regarding the polluter pays principle is a sign of a failure in the market that the judiciary felt was necessary to correct.

The *Kawartha Lakes* ruling was an Ontario Court of Appeal decision. On December 18th, 2008, fuel oil was delivered to a residential property owned by the Gendrons. Several hundreds of liters of fuel oil leaked from a fuel tank located in the basement of the home and caused contamination of the Gendrons' property and the adjacent road allowance owned by the City of Kawartha Lakes, which bordered Sturgeon Lake. On December 30th, 2008, the Ministry of the Environment issued an order requiring the Gendrons to remediate the adverse effects of the spill. Paragraph five of the Court of Appeal decision notes that this order was "based on the Gendrons' fault, namely their suspected violation of the Act by discharging or permitting the discharge of a contaminant into the natural environment".¹⁶⁸ The Gendrons' insurer hired a clean-up firm to remediate the spill, but ran out of funds and could not remediate the City's property. The Ministry of the Environment then issued an order requiring the City of Kawartha Lakes to remediate its property and prevent contamination of the lake. The order was issued under s. 157.1 of the *EPA*, which allows an order to be issued to anyone who owns or has management or control of a property to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the property.¹⁶⁹ The City appealed the order to the Environmental Review Tribunal. The City also commenced civil proceedings and issued orders against the Gendrons, the fuel provider and the Technical Standards and Safety Authority (TSSA) under s. 100.1 that

¹⁶⁸ *Ibid* at para 5.

¹⁶⁹ *EPA*, *supra* note 5 at s. 157.1(1).

requires the owner of a pollutant to pay the City for any costs the City incurs to remediate. The orders were appealed, which results in an automatic stay.

At the Tribunal, all parties agreed that the City did not play any role in the contamination. The City argued the order was unfair and contrary to the polluter pays principle because it was not in fact the polluter in this case.¹⁷⁰ On this basis, the City asked to submit evidence of the fault of the Gendrons, the fuel provider, and the fuel tank manufacturer. The Tribunal found it was not the appropriate forum for determining who was at fault, that protecting the environment was a time-sensitive matter, and that the issue of fault could be dealt with in a civil action. The Tribunal allowed the City's argument that it was innocent and that the order was apparently inconsistent with the polluter pays principle. However, the Tribunal held that the *Act*, and s. 157.1, specifically, contemplated making innocent owners liable for remediation and that the legislature had accepted some unfairness as justifiable in order to protect the environment. It stated that "if environmental work was necessary, the environmental protection objective of the Act takes precedence over the 'polluter pays' principle".¹⁷¹ Furthermore, it stated that the City could not simply rely on its own innocence without putting forward an alternative environmentally responsible solution that would meet the legislative objective of environmental protection. Ultimately, the Tribunal dismissed the appeal and the City appealed to the Divisional Court.

At the Divisional Court, the City put forward three arguments. First, it argued that the Tribunal erred in law by failing to consider case law that states a Tribunal must consider fairness factors when deciding whether to enforce such an order. Second, it argued that the Tribunal's decision was unreasonable because a fundamental principle that should guide its exercise of discretion under the *EPA* is the polluter pays principle. Finally, it argued that the Tribunal

¹⁷⁰ *Kawartha Lakes*, *supra* note 167 at 10.

¹⁷¹ *Ibid.*, at 12.

breached the rules of natural justice because the Tribunal did not allow the City to submit evidence with respect to fault. The City contended that since it was not permitted to bring forward this evidence, it could not put forward evidence on alternative solutions.

In the Divisional Court's review of whether the Tribunal committed an error in law, it considered a number of relevant precedents, including *724597 Ontario Ltd., Re*,¹⁷² ("*Appletex*") and *Montague v Ontario (Ministry of the Environment)*¹⁷³ ("*Montague*"). The 1995 case of *Appletex* relieved two people from partial liability associated with an order to remediate based on fairness factors. These factors included "considerations as to whether the person to whom the order was directed had exercised due diligence to avoid creating the problem, whether the causes of the problem were within or outside of the orderer's control and whether the orderer could have foreseen the risk or problem that had occurred"¹⁷⁴ However, the Divisional Court notes that the Tribunal decision (in *Kawartha Lakes*) focused on how the case law had adapted since *Appletex* and referred to *R v Consolidated Maybrun Mines Ltd.*,¹⁷⁵ ("*Maybrun*"). The Court reasoned that *Maybrun* shifted the focus to the purpose of the *EPA*, which is "not just to remedy environmental damage that has occurred, but to prevent further contamination from occurring" and that this purpose should be considered when interpreting procedures established by the statute.¹⁷⁶ In *Montague*, the Tribunal determined that the Director was not obliged to make an order against a new owner with no knowledge of the previous contamination because of the financial burden on the owner; the Divisional court adopted a standard of review of correctness. However, case law following *Montague*, including the Supreme Court case of *Dunsmuir v New*

¹⁷² *724597 Ontario Ltd., Re* 1995 CarswellOnt 977, [1995] OJ No 3713.

¹⁷³ *Montague v Ontario (Ministry of the Environment)* 2005 CarswellOnt 971, [2005] OJ No 868.

¹⁷⁴ *Kawartha Lakes*, *supra* note 167 at 21.

¹⁷⁵ *R v Consolidated Maybrun Mines Ltd.*, 1998 CarswellOnt1476, [1998] 1 SCR 706.

¹⁷⁶ *Kawartha Lakes*, *supra* note 167 at 21.

Brunswick,¹⁷⁷ held that more deference was necessary. Consequently, the Divisional Court in *Kawartha Lakes* decided that the appropriate standard was reasonableness.

When the Divisional Court turned its mind to a review of the Tribunal’s decision in *Kawartha Lakes* regarding a failure to accept evidence regarding the fairness factors, the Divisional Court held that there was no error in law and that *Appletex* and *Montague* “stand for the principle that the Director may take into account any one or more “fairness” factors...Neither case holds that the Director must take any one or more of these factors into account”.¹⁷⁸ Based on this reasoning, the Divisional Court dismissed the appeal. Paragraph forty-two of the Divisional Court’s decision is particularly telling about the current legal landscape on this matter. There, the Divisional Court responds to the Gendrons’ contention that the Court should not hear the appeal because the issue is moot since the City had already remediated its property. The Divisional Court responds by stating,

In this case, it is our view that the resolution of the issues in this appeal is in the public interest...The circumstances giving rise to this appeal are likely to recur between the City (or other similarly-placed municipalities or entities) and MOE. Environmental contamination of municipally owned property through no fault of the municipality is a phenomenon that could repeat itself, giving rise to the questions at stake in this appeal. We do not wish resolution of these questions to come at the expense of environmental damage by insisting that if the City wishes to appeal a determination on the issue it has raised in this appeal, it should not comply with an order to remediate.

The above excerpt from the Divisional Court in *Kawartha Lakes* is pertinent to this research, as it confirms that liability concerns with respect to contaminated properties pose a genuine, probable, and ongoing risk in Ontario’s real property market. Furthermore, the Divisional Court confirms the need for clear rules and guidance regarding how to determine

¹⁷⁷ *Dunsmuir v New Brunswick*, 2008 CarswellNB 124, 2008 SCC 9.

¹⁷⁸ *Kawartha Lakes*, *supra* note 167 at 54.

liability and responsibility for remediation. It also brings attention to the key role that municipalities play in the remediation of contaminated lands.

With respect to whether the Tribunal's decision was unreasonable because it failed to consider the polluter pays principle and led to an adjournment of the appeal of the City's s. 100.1 order, the Divisional Court indicates that s.157.1 of the *EPA* is an "owner pays" enforcement mechanism and does not reference fault.¹⁷⁹ Accordingly, it held that the City's issue was with the drafters of the legislation and not with the Tribunal. Furthermore, it held that the Tribunal's decision did not preclude the City from pursuing a s.100.1 remedy. On the issue of the Tribunal's failure to hear the City's evidence and breach of natural justice, the Divisional Court found that the Tribunal did not prevent the City from calling evidence on alternative ways of protecting the environment. Alternatively, if it did, this is because the City did not show how the evidence it wished to submit was relevant to the objective of preserving the environment.

When the matter reached the Ontario Court of Appeal, the Court of Appeal wasted little time reviewing the previous decisions. It found that the Tribunal considered the polluter pays principle and there was no error in law. The Court of Appeal confirmed that all parties agreed that the City was an innocent victim, but that evidence related to fault was irrelevant because the s. 157.1 order is a "no-fault order" meaning that "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".¹⁸⁰ The Court of Appeal held that the real question was whether the order served the objective of the legislation and noted that entering into a fault-finding exercise would be counter to the time-sensitive objective of environmental protection in situations of contamination.

¹⁷⁹ *Ibid* at 77.

¹⁸⁰ *Ibid* at 19.

Although the City had an opportunity to sue for recovery civilly and also had a s. 100.1 remedy whereby a municipality can recover its remediation costs (where it did not cause the contamination), the case law affirmed that the City was required to remediate and pay the costs for remediation. In this instance, all costs are borne ultimately by the taxpayers, which is a quantifiable and distributed social cost. The reasoning in *Kawartha Lakes* begged the question: Would the result have been different if the adjacent property owner was not a municipality? In other words, what if the adjacent property owner was another resident (perhaps one without the means to pay)?

Although *Kawartha Lakes* may appear to be a win from an environmental perspective, two caveats must be noted. First, the polluter did not pay in this instance; and the question as to why the polluter did not pay remains an important one (particularly in the legal context). Second, although the objective of the *EPA* is met, the law regarding liability for the pollution becomes muddied. This adds fodder to the question of how the law (by way of state intervention) has failed to address the market failure of property contamination. In summary, there may be an immediate environmental win, but this win is only skin-deep as it does not address the failure to efficiently capture the externality, deviates from the polluter-pays principle, and adds more dirt to an already muddied liability scheme. The *Kawartha Lakes* decision marks a departure in the common law approach to remediation of contaminated sites in Ontario from a polluter pays foundation, to an “owner pays” basis, which ranks immediate environmental remediation as supreme. The civil liability and s. 100.1 claims both continued following this decision. Although the City settled the civil proceedings with the fuel provider and the TSSA, the matter is ongoing as against the Gendrons and the Gendrons are also pursuing matters civilly in relation to the spill.

Kawartha Lakes upheld a no fault order requiring the municipality to remediate an adjacent property even though the municipality had no role in the spill. For this reason,

Kawartha Lakes poses a concern for owners of contaminated properties and owners of adjacent properties, (which has infinite permutations). The fact that the Court of Appeal held that environmental protection outweighed the polluter pays principle is arguably a step forward in environmental protection. However, it presents a roadblock in the redevelopment of Brownfields because it increases risk. Imposing a higher level of liability (and due diligence in real estate transactions) is likely to curb investment in the development of contaminated lands because of the potentially heavy financial burden of remediation. Former polluting owners of Brownfields are often bankrupt, have disappeared, or have no assets/are judgment-proof. When developers consider purchasing a Brownfield to redevelop it, they face the liability associated with polluter-pays provisions. When cities, lenders, creditors, and insurers contemplate what to do with Brownfields, these liability concerns are considered. *Kawartha Lakes* affirms that if the contamination migrates, adjacent property owners are also at risk. However, it goes even further, as it contemplates that “any person who owns or who has management or control of an undertaking or property”¹⁸¹ may be liable to remediate.

Apply the *Kawartha Lakes* decision to the Enterprise Property hypothetical and imagine that the adjacent vacant, residential-zoned property had been developed into a subdivision, “Commuter Community”. In 1995, residential property owners in the Commuter Community notice a substance oozing up from the ground. The residential owners complain to Municipality. Municipality investigates and soil testing confirms the soil is contaminated with petroleum hydrocarbons. Based on the precedent in *Kawartha Lakes* it is conceivable that the Ministry of the Environment could order each resident of Commuter Community to remediate.

¹⁸¹ *EPA, supra* note 5 at s. 157.1.

Three cases have followed *Kawartha Lakes* since it was decided: (1) *IMP Group International Inc v Nova Scotia (AG)*¹⁸² (“IMP Group”), (2) *Krek v Ontario (Environment and Climate Change)*¹⁸³ (“Krek”), and (3) *Hamilton Beach Brands Canada Inc v Ontario (Environment and Climate Change)*¹⁸⁴ (“Hamilton Beach”).

In the Nova Scotia Supreme Court case of *IMP Group*, the Plaintiff (“IMP”) brought a motion for discovery of documents. The Attorney General had ordered that IMP had to remediate a property that it currently owned. However, the property was previously owned by a Crown corporation and IMP argued that the Attorney General failed to disclose relevant documents regarding the previous ownership of the property. The Attorney General cited *Kawartha Lakes* on the grounds that IMP was making the same argument that the City made in *Kawartha Lakes*. The Attorney General asserted that IMP was arguing that the polluter should pay and that fault was relevant to an order for remediation. The motion was dismissed because there was a lack of evidentiary basis to order discovery. Although the Supreme Court of Nova Scotia found that *Kawartha Lakes* had no bearing to the outcome of the case, the case is relevant in that *Kawartha Lakes* was cited in an attempt to assert liability on a party who controlled a property, whether or not it played a role in the spill.

A second case citing *Kawartha Lakes* is *Krek*. At issue in this case was the liability associated with an oil spill on Mr. Krek’s property that occurred in 1990. The spill contaminated neighboring properties. Mr. Krek was ordered to remediate the spill. The case was being appealed on the basis of standard of review and jurisdiction. The Tribunal’s decision was in regards to the scope of the appeal and the organization of the relevant issues. In the Tribunal’s discussion of the

¹⁸² *IMP Group International Inc v Nova Scotia (AG)*, 2013 CarswellNS 811, 2013 NSSC 332.

¹⁸³ *Krek v Ontario (Environment and Climate Change)*, 2015 CarswellOnt 164, [2015] OERTD No 48 [“*Krek*”].

¹⁸⁴ *Hamilton Beach Brands Canada Inc. v Ontario (Environment and Climate Change)*, 2017 CarswellOnt 13603, 2017 OERT No. 17025 [“*Hamilton Beach*”].

relevant principles in making determinations relating to the relevant issues, the Tribunal cited *Kawartha Lakes* as the case identifying the principle that the Tribunal's task on appeal "is not to determine fault for a spill but rather, to determine how the environmental protection objectives of the EPA should be fulfilled".¹⁸⁵

The third case that cites *Kawartha Lakes* is *Hamilton Beach*. *Hamilton Beach* adds force to the argument that the deviation from the polluter pays principle in *Kawartha Lakes* muddies the law in respect of liability of contaminated lands. This case is also illustrative of the concern raised above regarding the application of the *Kawartha Lakes* decision to Brownfield properties. In *Hamilton Beach*, an industrial property owned by Carillion Canada Inc. ("Carillion") was contaminated between 1962 and 1975 by Proctor-Silex Limited. Hamilton Beach Brands Canada Inc. ("Hamilton") purchased Proctor-Silex Limited and took over the lease of the property in 1983. (Hamilton Beach Brands Canada Inc. presently includes the Proctor-Silex brand in its portfolio and is owned by NACCO Industries, Inc.) The property was sold to Mr. DiRocco in 1985 and Mr. DiRocco sold the property in 2015 to a numbered company. Hamilton learned of the contamination in 2008 when a substance seeped through the floor of the building. Between 2008 and 2016 several investigations and draft orders were made and it was determined that the contamination had spread to several off-site properties.

In 2017 an order was issued under s. 18 of the *EPA* that required Carillion, Hamilton, Mr. DiRocco, and the numbered company (hereinafter the "Orderees") to delineate the contamination that had migrated to the off-site properties. The Orderees filed a motion arguing that the Director did not have jurisdiction to make an order that applied to off-site properties and to future adverse effects of contamination. Of significance is the Orderees' argument summarized in paragraph

¹⁸⁵ *Krek*, *supra* note 183 at 9.

twenty-nine of the decision wherein they argue that s.17 is a fault-based order addressing past discharges based on the polluter pays principle. The Orderes contrast s. 17 with s.18 and reason that s. 18 is an “owner pays” principle and is fault-free. They further contend that an order to remediate off-site properties “would put an innocent owner of property in a worse position than a person at fault, namely, the polluter” because that would impose liability “in an indeterminate amount for an indeterminate time to an indeterminate class”.¹⁸⁶ They also argue that doing so would lead to “an absurd result and cannot reflect the intent of the legislature”.¹⁸⁷ In support of this argument, the Orderes refer to *Kawartha Lakes* by arguing that the Director can make a s. 18 order against the Orderes to perform the work on-site and a separate order to the owners of the other properties to do the work off-site.¹⁸⁸

The Tribunal rejected the Orderes’ arguments and cited three cases regarding the legislative interpretation of the *EPA*. First, it reiterated that in *R v Castonquay Blasting Ltd*,¹⁸⁹ the Court’s interpretation of s.15 of the *EPA* was based on upholding “a nexus to the statutory objective of environmental protection”.¹⁹⁰ Second, it indicated that in *R v Canadian Pacific Ltd*,¹⁹¹ the Supreme Court of Canada held that “the objective of environmental protection is ambitious in scope. The legislature is justified in choosing equally ambitious means for achieving this objective”.¹⁹² Finally, it cited *Kawartha Lakes* as an authority affirming the environmental protection objective of the *EPA*. The Tribunal finds that the Orderes’ arguments regarding the interpretation of s.18 are at odds with these cases and the purpose of the *EPA*.¹⁹³ It states: “contamination and adverse effects are not constrained by the boundaries of a property”.¹⁹⁴ It

¹⁸⁶ *Hamilton Beach*, *supra* note 184 at 29.

¹⁸⁷ *Ibid* note 178 at 29.

¹⁸⁸ *Ibid* at 31.

¹⁸⁹ *R v Castonquay Blasting Ltd*, 2013 CarswellOnt 14069, 2013 SCC 52.

¹⁹⁰ *Hamilton Beach*, *supra* note 184 at 76.

¹⁹¹ *R v Canadian Pacific Ltd*, 1995 CarswellOnt 7238, [1995] SCJ No 62.

¹⁹² *Hamilton Beach*, *supra* note 184 at 78.

¹⁹³ *Ibid* at 75.

¹⁹⁴ *Ibid* at 85.

concludes that the Director has the jurisdiction to make an order under s. 18(2) requiring a person who owns or who owned land or had management or control of an undertaking or property that is contaminated to delineate contamination that has migrated off-site.

In *Hamilton Beach*, the Orderes asserted that the decision in *Kawartha Lakes* supported limiting the liability of a polluter to the polluter's property and not to adjacent properties. This conclusion was reached because *Kawartha Lakes* supported an order for an innocent adjacent property owner to be liable for remediating contamination that migrated onto the property. The property in *Hamilton Beach* is contaminated land akin to a Brownfield. In this scenario, the Tribunal has affirmed that an owner of contaminated land will be liable for remediation of contamination to adjacent properties. If the owner is nowhere to be found or has no means to pay, *Kawartha Lakes* supports orders for adjacent property owners to remediate. However, in this case the adjacent property owners were not a municipality and would not be privy to the s. 100.1 *EPA* remedy. The lingering question in *Kawartha Lakes* was whether the decision would be different if the adjacent property owner was not a municipality – it would seem that *Hamilton Beach* has answered this question.

These recent cases illustrate a paradox in Ontario's regulation of contaminated lands. While stringent legislative liability increases the likelihood of remediation in the specific instances that are the subject of the orders in question, it simultaneously decreases commercial incentives to redevelop Brownfields throughout the Province. Tort law may, in turn, add further liability concerns to those considering remediating and redeveloping a contaminated property.

D. Tort Law

As seen in the extension of the hypothetical for the Enterprise Property, liability to adjacent property owners, or to a greater extent, communities in the vicinity of the Brownfield, (such as Commuter Community), is another risk associated with Brownfields. Up to this point,

this research has dealt with the treatment of contamination of property in environmental, contract, real property, and land use planning law. These areas of the law each possess a substantial statutory framework and case law interpreting the relevant legislation. In contrast, the final segment of Canadian law that deals with the legal analysis of property contamination is the common law of torts. In the past, the “common law of torts was a primary form of environmental and land use regulation”.¹⁹⁵ Remedies in civil actions are generally in damages or compensation. With respect to the common law of tort, liability related to the polluter pays doctrine exists in the realm of property torts, including trespass, nuisance, and strict liability.¹⁹⁶ Negligence will also be explored. Collins and McLeod-Kilmurray assert that “property torts may provide effective compensation for environmental harms and send a market signal that encourage precaution in the face of environmental threats”.¹⁹⁷ Given that each field of tort has a different function in law and its own set of common law tests, each field will be explored separately with supporting case law.

I. Negligence

Negligence is a civil cause of action grounded in common law. Generally, negligence requires several elements: (a) a duty of care, (b) a breach of a standard of care (negligent conduct), (c) a damage that resulted from the breach, and (d) a causal connection between the damage and the breach (factual and legal causation).¹⁹⁸ In terms of negligence for environmental harm, Chalifour and Abdel-Aziz rephrase the essential elements of negligence with respect to contaminated land. They indicate that case law in Canada affirms that there is a duty to prevent “substantial damage by off-site migration of current day contamination to a neighbour’s property”.¹⁹⁹ However, case law demonstrates that historical contamination caused by “practices

¹⁹⁵ Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts*, (Toronto: Thomson Reuters Canada Limited, 2014) at 51 [Collins & McLeod-Kilmurray, “Toxic Torts”].

¹⁹⁶ Brownfields Manual, *supra* note 47 at 4.69. *Ibid* at 51.

¹⁹⁷ Collins & McLeod-Kilmurray, “Toxic Torts” *supra* note 195 at 51.

¹⁹⁸ A.M. Linden & L.N. Klar, *Canadian Tort Law, Cases, Notes, & Materials* (11 ed) (Toronto: Butterworths, 1999) at 156 [Linden, “Tort Law”].

¹⁹⁹ Brownfields Manual, *supra* note 47 at 4.92.

or conduct that were consistent with the prevailing standards of the day” may not result in a finding of negligence.²⁰⁰

A good example of a case of negligence with respect to soil contamination is the case of *Allain v Texaco Canada Ltd*²⁰¹ (“*Allain*”). In this case, the plaintiff owned property and entered into a mortgage with the defendant whereby the plaintiff agreed to purchase gas exclusively from the defendant for a period of twenty years, or until such time as the plaintiff had purchased a total of 1,300,00 gallons of gasoline. The defendant installed two storage tanks on the plaintiff’s property and in 1960 there were signs of gasoline leakage from the storage tanks. Although the plaintiff complained, the defendant took no action until 1964. The defendant removed the leaking storage tank and replaced it, but the soil was not remediated. The plaintiff continued to notice contamination in the water supply and soil. In 1971, a lease between the plaintiff and defendant confirmed that the defendant was the lessor of the storage tanks. In 1974, the station exploded. The trial court found that gasoline storage was the defendant’s responsibility, that the defendant knew about the dangers posed by leaked gasoline, and that the defendant was negligent.²⁰² It stated that the defendant had been in the gasoline business for many years and had the knowledge and means to clean up the soil.²⁰³ It went on to hold that the defendant owed a duty to the plaintiff to remove or take corrective measures to clean up the gas and breached that duty.²⁰⁴

Negligence liability is always a concern for Brownfields redevelopers, though it is less onerous than statutory liability provisions since liability only applies where the defendant acts unreasonably. Theoretically, trespass sets an even higher bar for liability, but it can be established in many cases involving contaminant migration from Brownfields.

²⁰⁰ *Ibid* at 4.92.

²⁰¹ *Allain v Texaco Canada Ltd*, 1978 CarswellNB 407, [1978] NBJ No 106, 21 NBR (2d) 681 (CA).

²⁰² *Ibid* at 44.

²⁰³ *Ibid* at 25-27.

²⁰⁴ *Ibid* at 43.

II. Trespass

The tort of trespass to land requires an intentional, direct, physical intrusion onto land possessed by another. Although trespass requires some form of physical entry into the plaintiff's land, the tort may be committed by propelling an object or discharging a substance.²⁰⁵ A quote from Lord Camden L.C.J., from the case of *Entick v Carrington*,²⁰⁶ ("*Entick*") best illustrates the foundation of trespass,

...[E]very invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without any licence but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass or even treading upon the soil.²⁰⁷

As Lord Camden states, trespass is concerned with protecting a landowner's exclusive, autonomous right to his or her property.

Trespass is actionable per se, thus, a plaintiff need not prove damage or a decrease in value of the property, or interference with use of the property. In the context of Brownfields and contamination of adjacent lands, this would mean that a plaintiff must establish that the defendant caused contamination that migrated to the adjacent property, but the plaintiff does not have to prove any loss or injury. With respect to the Enterprise Property hypothetical, this would mean that if the residents of Commuter Community filed a class action suit against Oozing Oil Inc., the plaintiffs only have to prove that the petroleum hydrocarbons migrated directly from Oozing Oil Inc. and that they leached into the soil on their properties. Remedies available in trespass include damages for injury to the land and an injunction to abate the contamination.

²⁰⁵ *Smith v Inco*, 2010 CarswellOnt 4735, 2010 ONSC 3790, at 37, partially reversed in 2011 CarswellOnt 10141, 2011 ONCA 628, appealed in 2011 CarswellOnt 14872, [2011] SCCA No 539, leave to appeal refused in 2012, CarswellOnt 4932, [2010] 1 SCR xii (note) [*Inco*].

²⁰⁶ *Entick v Carrington*, Common Pleas (1765), 19 State Trials 1029, [1558-1774] All ER Rep 41.

²⁰⁷ *Ibid*, cited in Linden, "Tort Law", *supra* note 198 at 72.

Turning to relevant Canadian case law, in *Windsor v Canadian Pacific Railway*²⁰⁸ (“*Windsor v Canadian Pacific*”), a class action suit was filed against the Canadian Pacific Railway alleging that a chemical used at the repair facility contaminated adjacent properties. In its decision on the motion to certify, the Court stated that “...the class claims founded in trespass do not need to prove damage, where damage may be inferred by the simple fact of the event of trespass”.²⁰⁹ The Court also held that “...every invasion of private property, be it ever so minute, is a trespass”.²¹⁰ Furthermore, it is not necessary to establish that the trespass involved a dangerous substance. *Friesen v Forest Protect Ltd*²¹¹ (“*Friesen*”) states that test for trespass “does not involve any question of whether or not the [substance at issue] may have been toxic or non-toxic, because even to have thrown water, or garbage, or snow, or earth tippings or any other substance on the property would equally have amounted to an act of trespass”.²¹² This makes sense given that trespass is fundamentally about protecting the sanctity of a property owner’s right of autonomy in her own lands.

The two challenging elements in environmental trespass cases are intention and directness. Defendants will frequently argue that they had no intent to contaminate the plaintiff’s property. However, as Collins and McLeod-Kilmurray argue, “where it is substantially certain that discharged substances will be deposited on the lands of someone, intent is established with respect to everyone in the deposition zone” through the doctrine of “imputed intent”.²¹³ With respect to Brownfields, this is particularly concerning for potential developers; given that leaching of contaminants is a generally accepted reality, all that this argument would require was

²⁰⁸ *Windsor v Canadian Pacific Railway*, 2006 CarswellAlta 633, 2006 ABQB 348.

²⁰⁹ *Ibid* at 63.

²¹⁰ *Ibid*.

²¹¹ *Friesen v Forest Protect Ltd*, 1978 CarswellNB 239, [1978] NBJ No 30.

²¹² *Ibid* at 162.

²¹³ Collins & McLeod-Kilmurray, “Toxic Torts”, *supra* note 195 at 75.

(actual or constructive) knowledge on the part of an oil producer that an emission of contaminants had occurred.

With respect to directness, Brownfields claims fall into an ambiguous area of tort law; many environmental trespass claims are defeated by an absence of directness. Collins and McLeod-Kilmurray point to the case of *Smith v Inco*²¹⁴ as a prime example of failure to establish trespass due to a lack of directness. There, the Court held that the deposit of airborne particles of nickel oxide on plaintiffs' properties was not sufficiently direct to constitute a trespass because the pollution was carried to their properties by the wind. This case is arguably distinguishable from most Brownfields cases, which may involve nothing more than the operation of gravity (or passive dispersion) to bring contaminants from one property to another.

In the case of *Mortgage Insurance Co of Canada v Innisfil Landfill Corp*,²¹⁵ for example, the Crown brought an action against a receiver that operated a garbage dump because there was a build-up of leachate in the dump and the receiver failed to advise the Ministry. Adjacent property owners attempted to bring a class action in trespass, nuisance, and strict liability. In respect of trespass, the property owners alleged that the leachate had invaded their properties and they were entitled to damages. The Court ultimately held that the neighbours failed to establish damages, but that there was likely a trespass. The Court reiterated the tests established in *Kerr*, *Entick*, and *Friesen*, but held that damages in respect of leachate trespass in this case were nominal at best. In general, the case law suggests that plaintiffs will often be able to establish trespass in contaminated lands scenarios.

²¹⁴ *Inco*, *supra* note 205.

²¹⁵ *Mortgage Insurance Co of Canada v Innisfil Landfill Corp*, 1996 CarswellOnt 1843, [1996] OJ No 1736.

III. Nuisance

In Canada, the two recognized types of nuisance in common law are private nuisance and public nuisance. Private nuisance is a “substantial and unreasonable” interference with use and enjoyment of property.²¹⁶ In private nuisance, the interference must be to a degree that would not be tolerated by the ordinary occupier of land.²¹⁷ Public nuisance is somewhat more complicated in that it is any activity that unreasonably interferes with the public’s health, safety, morality, comfort, or convenience.²¹⁸

Public nuisance can be contrasted to private nuisance by the fact that it overlaps with criminal or quasi-criminal offences, whereas private nuisance is purely a civil cause of action. Public nuisance is either an aggregation of private nuisance or involves an action for harm to a public resource. Presumptively, actions brought in public nuisance are only available to the Attorney General, or with the consent of the Attorney General.²¹⁹ The exception to this rule is in instances where a public nuisance causes damage to a private individual and there is evidence of a special injury.²²⁰ It is conceivable that such an exception may apply to instances where contamination on a Brownfield migrates to public spaces, parklands, or public waterways. Standing under the “special injury” rule has traditionally been a roadblock to recovery for many plaintiffs in public nuisance cases, but this may be changing.

For many years, the precedent establishing a test for standing with respect to special injury in public nuisance was *Hickey v Electric Reduction Co. of Canada*²²¹ (“*Hickey*”). In *Hickey*, Electric Reduction Co. of Canada owned a phosphorous plant in Long Harbour, Placentia

²¹⁶ *Antrim Truck Centre Ltd v Ontario (Ministry of Transportation)*, 2013 CarswellOnt 2354, 2013 SCC 13, at 18 and 19 [*Antrim*].

²¹⁷ J. McLaren, “Nuisance in Canada” in Linden (ed), *Studies in Canadian Tort Law* (1968), at 320 published in Linden, A.M. & Klar, L.N., *Canadian Tort Law, Cases, Notes, & Materials* (11 ed) (Toronto: Butterworths, 1999) at 531 [McLaren, “Nuisance”].

²¹⁸ *Ryan v Victoria (City)*, 1999 CarswellBC 79, [1999] 1 SCR 201 at 52.

²¹⁹ McLaren, “Nuisance”, *supra* note 217 at 532.

²²⁰ Collins & McLeod-Kilmurray, “Toxic Torts”, *supra* note 195 at 53.

²²¹ *Hickey v Electric Reduction Co. of Canada*, 1971 CarswellNfld 30, 21 DLR (3d) 368 [*Hickey*].

Bay. The defendant company released poisonous waste into the bay that killed the fish in the bay depriving the plaintiff fishers of their livelihoods. However, the Court found that the special injury rule was not met as “the resulting pollution created a nuisance to all persons...”²²² Although the Court held that there was pollution of the Bay, which constituted a public nuisance, the plaintiffs could not bring a suit for recovery in public nuisance as they had not suffered a special injury. Collins and McLeod-Kilmurray confirm that this hurdle has marginalized the use of public nuisance by private individuals.²²³

However, they cite the case of *Gagnier v Canadian Forest Products Ltd*²²⁴ (“*Gagnier*”) as a potential beacon of hope for those wishing to privately pursue the tort of public nuisance. In *Gagnier*, commercial crab fishers brought an action in several torts, including public nuisance, on the grounds that several pulp mills dispersed pollutants into the public water, which ultimately led to the federal government closing the commercial fishing grounds and the fishermen losing their ability to earn a living. In the Court’s assessment of the public nuisance claim, it distinguishes *Hickey* by stating that it is not binding on the Court and by stating that *Hickey* failed to consider three Ontario cases that awarded damages in instances where a particular class of persons suffered damage even though the potential existed for the damage to be common to all persons of that class. The Court refers to early Ontario case law, including *Rainy River Navigation Co v Watrous Island Boom Co*²²⁵ and *Rainy River Navigation Co v Ontario & Minnesota Power Co*²²⁶ which establish a cause of action and an award for damages to shipping companies that were unable to navigate through public waterways due to commercial interference. Although these cases do not speak directly to standing in public nuisance, the cases

²²² *Ibid* at 8.

²²³ Collins & McLeod-Kilmurray, “Toxic Torts”, *supra* note 195 at 53.

²²⁴ *Gagnier v Canadian Forest Products Ltd*, 1990 CarswellBC 1981, [1990] BCJ No 1764 [*Gagnier*].

²²⁵ *Rainy River Navigation Co v Watrous Island Boom Co*, 1914 CarswellOnt 283, 26 OWR 456.

²²⁶ *Rainy River Navigation Co v Ontario & Minnesota Power Co*, 1914 CarswellOnt 373, 17 DLR 850.

award damages to private parties based on a nuisance affecting a public waterway. Damages were awarded to particular shipping companies without regard to whether the companies had a peculiar damage that differed from the public-at-large. The Court held that these cases support a broader ability to recover than that held in *Hickey* and that “all that should need to be proved is a significant difference in degree of damage between the plaintiff and members of the public generally”.²²⁷

In 2016, a Newfoundland Court agreed with the reasoning in *Gagnier* as opposed to the *Hickey* case from its own jurisdiction. The case of *George v Newfoundland and Labrador*²²⁸ (“*George*”) was a class action suit brought on behalf of a class of residents killed or injured by a motor vehicle collision with a moose on a public highway. Evidence confirmed that the moose population was booming and that three and half percent of motor vehicle collisions were due to moose collisions.²²⁹ One of the claims was brought in public nuisance. Although the Court agreed with the trial judge’s finding that there was no public nuisance, it was on the grounds that permitting moose to roam was not an unreasonable interference with the public’s access to highways. The Court then commented on a private claim in public nuisance. In so doing, it reviews the work of Allen M. Linden and Bruce Feldthusen in *Canadian Tort Law*²³⁰, along with the cases of *Hickey* and *Gagnier*. The Court states that it would adopt the view of Linden and Feldthusen that a special damage is a “particular damage; a special loss suffered by an individual which is not shared by the rest of the community”.²³¹ The Court agrees with *Gagnier* that “a difference in the degree of damage should be a sufficient basis for recognizing the right of an individual to sue in public nuisance”.²³² The Court ends its review of public nuisance by stating

²²⁷ *Gagnier*, *supra* note 224 at 43.

²²⁸ *George v Newfoundland and Labrador*, 2016, CarswellNfld 199, 2016 NLCA 24 [*George*].

²²⁹ *Ibid* at 1.

²³⁰ Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law* (9th ed) (Markham: LexisNexis, 2011), [Linden & Feldthusen, “Canadian Tort”].

²³¹ *Ibid* at 505.

²³² *George*, *supra* note 228 at 115.

that courts “strain against a conclusion that private rights are intended to be sacrificed for the common good”.²³³ It is worth noting that Linden and Feldthusen's text also states that a special damage is one “over and above the general suffering or inconvenience to the public” and that a claimant must demonstrate that the damage has placed them in a different position than other members of the public.²³⁴ *George* and *Gagnier* soften the test for standing to allow a private individual who can evidence a different degree of damage, such as a loss of livelihood, to establish standing. This shift increases the potential liability for owners of Brownfields.

Collins and McLeod-Kilmurray argue that damage to livelihood is sufficient to distinguish a person's injury as “special” in contrast to injury to the general public. They also make the same argument with respect to a public nuisance affecting Aboriginal rights. Furthermore, Collins and McLeod-Kilmurray argue that by decreasing the availability of the damage, *Hickey* undermines the “importance of environmental protection and a valid role for private law in achieving this end”.²³⁵ Consequently, the authors are proponents of “creating a form of public interest standing in the context of public nuisance” in order to address this deficiency.

As Chalifour and Ahab Abdel-Aziz note in the Canadian Brownfields Manual, private nuisance is the more commonly litigated form of nuisance in Canada. The overlying purpose of the tort of nuisance is the protection of private property interests where the assumption is that the private property owner has a right to the reasonable use and enjoyment of his/her property.²³⁶ However, each property owner maintains this right and therefore courts must balance “competing interests of landowners”²³⁷ when assessing private nuisance cases. The essential element

²³³ *Ibid* at 117.

²³⁴ Linden & Feldthusen, “Canadian Tort”, *supra* 230 at 505

²³⁵ Collins & McLeod-Kilmurray, “Toxic Torts” *supra* note 195 at 55.

²³⁶ *Ibid* at 58.

²³⁷ *Ibid* at 59.

necessary in a private nuisance claim is an interference (indirect or direct) with the use and enjoyment of this property interest.²³⁸ Remedies generally include damages and/or an injunction to discontinue the interference. In order to prove a private nuisance, the plaintiff must prove either a substantial and unreasonable interference with the use of property, or a material injury or damage to the property”.²³⁹ Environmental contamination is a quintessential nuisance and damages in such cases can include compensation for adverse health effects.²⁴⁰ Those incurring the damage must have some form of possession of the property, however, causing the nuisance do not require possession of land.

With respect to Brownfields, contamination to neighboring properties would give rise to nuisance liability.²⁴¹ A 1970 precedent in respect of property contamination is the case of *Sturge v Imperial Oil Ltd.*²⁴² In this case, the defendant’s gas station leaked gasoline, which migrated to the plaintiff’s property. The smell of gasoline persisted on the property and in the home for some years in the spring and fall and caused damage to the driveway. The Court found that the plaintiffs were inconvenienced by the defendant and held the defendant liable in nuisance, awarding compensatory damages to the plaintiffs.

There are two hurdles to establishing a private nuisance claim. First, the plaintiff must prove that there is a substantial interference with the use and enjoyment of the plaintiff’s property. In order to qualify as substantial, the interference must be “non-trivial” and must surpass a “threshold of seriousness”.²⁴³ Second, if the interference is substantial, it must be “unreasonable in all of the circumstances”.²⁴⁴ In *Antrim Truck Centre Ltd v Ontario (Ministry of*

²³⁸ McLaren, “Nuisance”, *supra* note 217 at 531.

²³⁹ Brownfields Manual, *supra* note 47 at 4.71, 4.76A.

²⁴⁰ Collins & McLeod-Kilmurray, “Toxic Torts” *supra* note 195 at 57. See also, Brownfields Manual, *supra* note 45 at 4.73.

²⁴¹ Collins & McLeod-Kilmurray, “Toxic Torts” *supra* note 195 at 56-57.

²⁴² *Sturge v Imperial Oil Ltd.*, 1970 CarswellNfld 21, 1 Nfld & PEI 279.

²⁴³ *Antrim*, *supra* note 216 at 19 and 23.

²⁴⁴ *Ibid* at 19.

Transportation (“*Antrim*”), the Court clarified that the focus is on the effect on the plaintiff by stating the “burden is on the claimant to show that the interference is substantial and unreasonable, not to show that the defendant’s use of its own land is unreasonable”.²⁴⁵ With respect to contaminated property, establishing damage in private nuisance is fairly simple because it is tangible. Collins and McLeod-Kilmurray opine that “a material physical injury to real property ...will almost always constitute a nuisance”.²⁴⁶ In the context of Brownfields, there are four important factors in the determination of whether a nuisance exists.²⁴⁷ First, and foremost, is the severity of the interference, having regard to its nature, duration, and effect.²⁴⁸ The degree of contamination, the toxicity of the substance at issue, and the effect on the plaintiffs are crucial considerations in nuisance cases arising in the Brownfields context. If, for example, the plaintiff has become ill as a result of the contamination, or its water source has been polluted, the interference will almost certainly constitute a nuisance. Second, the location of the property (“the character of the locale”) will also be a factor in assessing whether the interference suffered by the plaintiff is unreasonable.²⁴⁹ For example, if the nuisance occurs in an industrial area, those in the area would have different expectations of what is reasonable as compared to a suburban neighbourhood. A third factor is the utility of the defendant’s conduct, and this is particularly relevant in cases involving government defendants.²⁵⁰ Finally, the sensitivity of the plaintiff’s use is important; a plaintiff cannot by its unduly sensitive use of property (e.g. growing a rare and fragile plant) convert its neighbours into tortfeasors. Nuisance need not result from intentional or

²⁴⁵ *Ibid* at 28.

²⁴⁶ Collins & McLeod-Kilmurray, “Toxic Tort”, *supra* note 195 at 64.

²⁴⁷ Brownfields Manual, *supra* note 47 at 4.80 - 4.83.

²⁴⁸ *340909 Ontario Ltd v Huron Steel Products (Windsor) Ltd*, 1990 CarswellOnt 758, 73 OR (2d) 641 at 14, *aff’d* by 1992 CarswellOnt 1705, 9 OR (3d) 305.

²⁴⁹ *Ibid* at 14.

²⁵⁰ *Ibid* at 14.

negligent conduct, and subsequent owners of a property may also be liable if they continue a nuisance.²⁵¹

However, as Collins and McLeod-Kilmurray specify, it will be more onerous a job to prove nuisance when the effect of the contamination is uncertain or invisible.²⁵² To understand the law in this context, an analysis of the Court of Appeal decision in *Inco*²⁵³ is necessary. *Inco* was a class action suit involving seven thousand residents living proximate to the Inco Limited nickel refinery. The nickel refinery released nickel particles into the air that were dispersed downwind. In 2000, a soil sample confirmed high levels of nickel in the soil of property owners living downwind from the refinery. The property owners sued in private nuisance and strict liability, arguing that the contamination led to a public concern for potential adverse health effects, which led to a diminution of property values. In finding for the plaintiffs on the private nuisance claim, the trial judge held that the presence of nickel in the soil was a physical damage to the properties and that it was material since it led to a diminution in property values. The trial judge held that the specific levels of nickel in the soil and any actual effects were not relevant to liability.²⁵⁴

The Ontario Court of Appeal held that the residents failed in nuisance because they could not prove physical harm to their properties due to the nickel particles. The Court held that the law of nuisance involves assessing competing interests and determining if the interference is unreasonable.²⁵⁵ It reiterated that “reasonableness” in nuisance is assessed based on the effect of the defendant’s conduct on the plaintiff’s property rights and not on the nature of the defendant’s conduct.²⁵⁶ The Court also held that the interference can take different forms, including physical

²⁵¹ *Ibid* at 4.84.

²⁵² Collins & McLeod-Kilmurray, “Toxic Tort”, *supra* note 195 at 65.

²⁵³ *Smith v Inco Ltd*, 2011 CarswellOnt 10141, 2011 ONCA 628 [*Inco* CA 2011].

²⁵⁴ *Ibid* at 39

²⁵⁵ *Ibid*, at 39.

²⁵⁶ *Ibid* at 40.

injury to land.²⁵⁷ It confirmed that when a claim is based on physical damage to property and not on interference with use and enjoyment, the physical damage is accepted as unreasonable and nuisance is established without the need to balance any competing interests.²⁵⁸ However, the Court found that there was no physical damage to the property. It indicated that the claimants did not attempt to prove that the nickel affected property use, nor did the claimants show that there was any detrimental effect on the land or its use. Although the claimants noted potential health concerns, they did not “show that the nickel particles caused actual harm to the health of the claimants or at least posed some realistic risk of actual harm to their health and wellbeing”.²⁵⁹ Moreover, “a mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property”.²⁶⁰

The Court of Appeal goes on to state the claimants would have established that the particles “caused actual, substantial, physical damage to their properties” if they had shown that the nickel levels posed a risk to health.²⁶¹ The Court also stated that the claimants needed to show that nickel “at any level” posed a health risk, or, that the levels were above levels at which “there was a risk to human health and wellbeing”.²⁶² The Court of Appeal also rejected the trial judge’s holding that the cause of action existed due to the public concern about the potential health risks rather than the nickel levels in the soil. It held that “actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents”.²⁶³

²⁵⁷ *Ibid* at 43.

²⁵⁸ *Ibid* at 45 and 48.

²⁵⁹ *Ibid* at 57.

²⁶⁰ *Ibid* at 55.

²⁶¹ *Ibid* at 58.

²⁶² *Ibid* at 61.

²⁶³ *Ibid* at 67.

Inco's failure to find nuisance in this instance may make Brownfield owners breathe a sigh of relief. However, Collins and McLeod-Kilmurray would argue that this relief will be short-lived. They take issue with the fact that the Court of Appeal imposed a requirement that the contaminant exceed a governmental guideline because if the public's view changed regarding these properties, which resulted in a decrease in property values, then the quantity of nickel in the soil had surpassed a level of acceptance in society. Collins and McLeod-Kilmurray also argue that scientific uncertainty necessitates that standards be assessed continuously. They conclude that "diminution in property values constitutes consequential harm flowing from the contamination, and provides the court with a method to quantifying damages".²⁶⁴ This is most certainly the case in the field of real property.

In the real property market, properties are often de-valued based on a negative public opinion or stigma. In the case of *Tridan Developments Ltd v Shell Canada Products Ltd*²⁶⁵ ("*Tridan*"), the Court accepted that a property decreases in value based on a negative public view (or, stigma,) due to contamination. The trial court awarded damages based on a diminution of value due to knowledge that the property was once polluted. Although the Court of Appeal overturned this ruling, this is because it held that the residual loss of value due to stigma was eliminated if a site is remediated to a pristine level.²⁶⁶ The case therefore does support liability for environmental stigma in the Brownfields context, consistent with available data on property values in contaminated areas. Municipal tax valuations are often litigated for a failure to adequately acknowledge contamination to property affecting property values. In these cases, courts have acknowledged a negative public opinion by decreasing estimated land value. Take,

²⁶⁴ Collins & McLeod-Kilmurray, "Toxic Tort", *supra* note 195 at 67.

²⁶⁵ *Tridan Developments Ltd v Shell Canada Products Ltd*, 2000 CarswellOnt 1969, (2000) 35 RPR (3d) 141 reversed, 2002 CarswellOnt 1, [2002] OJ No 1.

²⁶⁶ *Ibid* at 12, 16, 17.

for example, the case of *Farago v Ontario Property Assessment Corp., Region No. 31*,²⁶⁷ where the Ontario Assessment Review Board found that the subject property had been damaged by the arsenic soil contamination and the publicity concerning the contamination. In this case, the Board held that a twenty-five percent reduction in the value was insufficient and required a fifty percent reduction in the assessment. In the case of *Kowbel v Ontario Regional Assessment Commissioner, Region for Nepean (City)*,²⁶⁸ the assessment board had reduced the property value of a home in a community where there had been an oil spill. The spill was remediated but there was ongoing litigation. The Ontario Municipal Board held that the value of the land was zero and that the residence should have a value of fifty percent because “the land is of no value until such a time as evidence is forthcoming indicating the contrary”.²⁶⁹

In further support of the recognition of diminution of property values due to negative public opinion, Mitchell writes of two types of damages in real property, namely direct (measured by the cost to remedy) or indirect (often referred to as stigma damages).²⁷⁰ Mitchell contends that even after remediation, there are long-lasting effects on the property that can be reflected in stigma damages.²⁷¹ These long-lasting effects may include ongoing restrictions on use, uncertainty in the effectiveness of remediation, uncertainty of changing remediation standards, the possibility of more contamination being found, and lack of accurate market data. Furthermore, recall the case of *Midwest*, which recently overturned a trial court decision where the trial judge had found that the plaintiff could not prove nuisance because it was unable to prove property damage. As previously stated, *Midwest*'s environmental site assessments of Mr. Thordarson's property led to a discovery of contamination on Mr. Thordarson's property and on

²⁶⁷ *Farago v Ontario Property Assessment Corp., Region No. 31*, 2001 CarswellOnt 5665, 42 OMBR 224.

²⁶⁸ *Kowbel v Ontario Regional Assessment Commissioner, Region for Nepean (City)*, 1995 CarswellOnt 5212, [1995] OMBD No 1460.

²⁶⁹ *Ibid* at 6.

²⁷⁰ Phillip S. Mitchell, “Estimating Economic Damages to Real Property due to Loss of Marketability, Rentability, and Stigma” *The Appraisal Journal*, (April 2000) 162 at 162.

²⁷¹ *Ibid* at 163.

its own property. Evidence at trial confirmed that contamination results exceeded Ministry standards for PHCs in the groundwater and soil. One expert witness in environmental site assessments and financing confirmed two concerns, “(1) potential third-party liability as a result of offsite migration through groundwater, and (2) diminution of the value of the property and the ability to use the property as collateral”.²⁷² The expert witness indicated that it was not a property that a lender would finance. For the purposes of this research, the relevant issues in the appeal were with respect to the interpretation of s. 99(2) of the *EPA* (addressed above) and with respect to nuisance. On nuisance, the trial court rejected the claim indicating that Midwest did not prove damages and that it needed to show an increase in chemical contamination on the property from the time it became the owner.

On proof of damages, the Court of Appeal held that common law precedent established that damages could be awarded based on the diminution in property value caused by the injury or based on remediation costs, “even if those costs exceed the amount of the decrease in property value”.²⁷³ Ultimately, the Court held that *Tridan and Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd*²⁷⁴ supported the use of remediation costs as a measurement of damages. The court held that this approach “reflects the “polluter pays” principle, which provides that whenever possible, the party that causes pollution should pay for remediation, compensation, and prevention”.²⁷⁵ With respect to the nuisance claim, the Court cited *Inco* and rejected the trial judge’s decision that there was no nuisance because damages were not proven. Instead, the Court held that there was “uncontradicted evidence that supported a finding that damage had been suffered”²⁷⁶ and relied on the test in *Antrim* in finding that

²⁷² *Midwest*, *supra* note 120 at 29.

²⁷³ *Ibid* at 61. The Court cites *Hosking v Phillips* (1850) 154 ER 801 3 Exch 168 (Eng Exch) in support of the former and *Jens v Mannix Co* (1978) 89 DLR (3d) 351 (BCSC) as well as *Horne v New Glasgow (Town)* (1953) [1954] 1 DLR 832 (NSSC) in support of the latter.

²⁷⁴ *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd*, 2014 CarswellOnt 6103, 2014 ONSC 288.

²⁷⁵ *Midwest*, *supra* note 120 at 68.

²⁷⁶ *Ibid* at 105.

[t]he invasion of PHC onto Midwest's property, to the point that the product is of such a concentration that it can no longer dissolve in groundwater and is found to pose a risk to human health, cannot be classified as trivial, insubstantial, or reasonable. The interference becomes all the more unreasonable with the significant cost to Midwest to remediate the contamination and undo the damage to the soil and groundwater on its property is considered. This is not the kind of interference with the use or enjoyment of property that society, through the law of nuisance, expects a property owner such as Midwest to bear in the name of being a good neighbour.

Since the categories of nuisance are not closed, Collins and McLeod-Kilmurray argue that there is room for a new category of "material chemical damage".²⁷⁷ Alternatively, they suggest that the law could address this kind of harm in the tort of trespass.²⁷⁸ This is because trespass can be established based on the simple act of placing "any substance on the plaintiff's property"²⁷⁹ without the need to show damage (as required for nuisance in the case of *Inco*). In the ongoing hypothetical of the Enterprise Property, either cause of action ends in the same result. Both causes of action impose liability on the owner or controller of a Brownfield property.

IV. Strict Liability

Strict liability is a narrow cause of action and imposes liability whether or not an act was negligent or intentional. The essential elements of strict liability are a non-natural use of land and an escape resulting in damage. Strict liability is reserved for conduct that is so hazardous or inappropriate that the person taking part in the act should bear the loss, regardless of fault. Linden and Klar clarify that non-natural use is one that is "either so fraught with danger, or so unusual in a given community, that it is felt that the risk of loss should be shifted from the person injured to the person who, merely by engaging in such conduct, created the risk which resulted in

²⁷⁷ Collins & McLeod-Kilmurray, "Toxic Torts", *supra* note 195 at 67.

²⁷⁸ *Ibid* at 69.

²⁷⁹ *Ibid* at 69.

the harm”.²⁸⁰ Similar to nuisance, strict liability requires evidence of harm or injury. Remedies in strict liability include damages and injunctions. The test for strict liability originates in the case of *Rylands v Fletcher*²⁸¹ (“*Rylands*”). In *Rylands*, Justice Blackburn for the House of Lords upheld this premise, stating “the person who for his own purposes brings on his lands...anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damages which is a natural consequence of its escape”.²⁸² Lord Cairns also distinguished between natural and non-natural use by defining a natural use as something done for the purpose of the ordinary course of enjoyment of land. In contrast, non-natural use constituted a use that was not what the land, in its natural condition was purposed for. Lord Moulton elaborates on the concept of non-natural use in *Rickards v Lothian*,²⁸³ wherein he states, “[i]t is not every use to which land is put that brings into play that principle [laid down in *Rylands v Fletcher*]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community”.²⁸⁴

In comparison to nuisance, a cause of action in strict liability is more expansive because it may be asserted by any person affected by the defendant’s non-natural use of his/her property; the plaintiff need not have any possessory interest in land.²⁸⁵ However, strict liability also captures a more narrow range of conduct in that it is limited to non-natural use that presents “a risk of significant damage to others – damage going beyond a mere interference with amenity or the quiet enjoyment of one’s land”.²⁸⁶ In order to show strict liability with respect to

²⁸⁰ Linden, & Feldthusen, “Canadian Tort”, *supra* 230 at 489. See also Lewis N. Klar, *Tort Law* (Toronto: Carswell Thomson Professional Publishing, 1996) at 454.

²⁸¹ *Rylands v Fletcher* (1866) LR 3 HL 330, [1861-73] All ER Rep 1 (UKHL) [*Rylands*].

²⁸² *Ibid*, Blackburn J.

²⁸³ *Rickards v Lothian*, Privy Council [1913] AC 263, 82 LJPC 42.

²⁸⁴ *Ibid*.

²⁸⁵ Collins & McLeod-Kilmurray, “Toxic Torts” *supra* note 195 at 77.

²⁸⁶ *Ibid* at 77.

contaminated lands, Chalifour and Abdel-Aziz state that a plaintiff must establish a build-up of a non-natural substance that is likely to cause mischief and the substance must have been discharged from the land.²⁸⁷ In *Inco*, the Court elaborates on the concept of non-natural use, stating that, “the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user”.²⁸⁸

However, the *Inco* decision restricts the availability of strict liability in Ontario. The decision turned on whether Inco’s use of its land was a non-natural use. The Court of Appeal overturned the trial judge’s decision, on the basis that the law requires two elements: (1) a hazardous activity, and (2) a use that is inappropriate to the place.²⁸⁹ It defined inappropriateness as that which would depend on factors such as the risk posed by the use.²⁹⁰ With respect to a non-natural (or hazardous activity), the Court stated that compliance with environmental and zoning regulations, although not a defence to strict liability, is an “important consideration”.²⁹¹ Ultimately, it held that “Inco operated a refinery in a heavily industrialized part of the city in a manner that was ordinary and usual and did not create risks beyond those incidental to virtually any industrial operation”.²⁹² With respect to the element of escape causing harm, the Court held that the escape did not have to be a single escape and could be composed of multiple escapes that had a cumulative effect. However, it held that “escape” in this context refers to the unintended consequences of a defendant’s operation. The Court noted that the trial judge failed to consider that the “emissions were an integral part of Inco’s refinery operation and were released by Inco

²⁸⁷ Brownfields Manual, *supra* note 47 at 4.103.

²⁸⁸ *Inco* CA 2011, *supra* note 253 at para 98.

²⁸⁹ *Ibid* at para 91 and 92.

²⁹⁰ *Ibid* at 92.

²⁹¹ *Ibid* at para 100.

²⁹² *Ibid* at 103.

intentionally on a daily basis for 60 odd years”.²⁹³ It concluded that such deliberate, intentional, and ongoing discharges did not meet the definition of “escape” within the tort of strict liability.

Since *Inco*, several cases have followed the ruling. In *Macqueen v Sydney Steel Corp*²⁹⁴ (“*Macqueen*”), a class action suit was filed against Sydney Steel Corporation (“Sydney”) alleging that Sydney’s operation resulted in the escape of pollutants into the air, which caused personal injury, nuisance, and an ongoing health risk. One cause of action was based on strict liability (*Rylands*). The Court stated that strict liability requires “an escape from property occupied by the appellant; and the use of land by the appellant must be “non-natural”, “out of the ordinary” or “special”.²⁹⁵ With respect to the requirement of non-natural use, the Court reasoned that the respondents’ argument that the “release of the contaminants [created] an abnormally dangerous and pervasive risk”²⁹⁶ was a viable approach to this element. With respect to escape, however, the Court agrees with *Inco* and holds that escape must be unintentional in order to give rise to strict liability. It goes on to state that “[s]uch an intentional act more properly belongs to cases of trespass or nuisance or possibly negligence...”²⁹⁷ *Windsor v Canadian Pacific* also followed both *Inco* and *Macqueen*. In *10565 Newfoundland Inc v Canada (AG)*²⁹⁸ (“*Newfoundland Inc*”), Canada relied on *Inco* in its argument for a bifurcated trial arguing damages should be tried first because *Inco* required proof of damage to support strict liability. In *Newfoundland Inc*, fuel from an air base leached underground a hotel. The Court distinguished *Inco* since *Inco*’s activities were lawful and well known whereas in *Newfoundland Inc*, the contamination occurred underground, was not obvious, and was inadvertent.²⁹⁹ It held that the second phase of trial would be where the

²⁹³ *Ibid* at 74.

²⁹⁴ *Macqueen v Sydney Steel Corp*, 2013 CarswellINS 918, 2013 NSCA 143.

²⁹⁵ *Ibid* at 61.

²⁹⁶ *Ibid* at 68.

²⁹⁷ *Ibid* at 80.

²⁹⁸ *10565 Newfoundland Inc v Canada (AG)*, 2015 CarswellNfld 80, 40 1136 APR 352.

²⁹⁹ *Ibid* at 25.

Court would learn whether this was lawful. The Court did not allow for a bifurcated trial and no further proceedings are reported.

The *Inco* line of reasoning has the effect of reducing the likelihood that a Brownfield owner may be found strictly liable in tort. Collins and Freitag argue that *Inco* is a departure from the principle in *Rylands*, and that strict liability “provides a useful residual mechanism for environmental protection that is largely consistent with the overall functions of tort law”³⁰⁰. Collins and Freitag argue that the rule in *Rylands* acts as a deterrent to pollution, but that it has effectively been eviscerated by the Ontario Court of Appeal’s decision in *Inco*. Recall that *Inco* held that the fact that the facility was in an industrial area meant that nickel refining was a usual use. Collins and Freitag argue that *Inco*’s imposition of the requirement for an inappropriate use has given municipal law priority over strict liability. Furthermore, holding that deliberate discharges are not an “escape” within *Rylands* has the counterintuitive effect of making intention a defense to strict liability. In other words, Collins and Freitag contend that it contemplates that a polluter can defend itself on the grounds that it intended to pollute.³⁰¹ The *Inco* line of reasoning is an apparent loss for environmental protection but favours reduced liability for Brownfield property owners.

V. Summary Regarding the Law of Torts

Over time, the property torts of trespass, nuisance, and strict liability have formed a jurisprudence that protects the environment. In order to determine which cause of action may prove successful, each cause of action must be assessed based on the necessary elements required to establish the tort and applied to the facts. Trespass ultimately protects a person’s right to land

³⁰⁰ Lynda Collins & Laura J Freitag, “Rescuing Rylands: Strict liability and environmental protection in Canada,” (2015) 23 Tort L Rev 85, at 86.

³⁰¹ *Ibid* at 93.

and presently requires direct interference with property and intentional interference. However, trespass does not require proof of damages. Private nuisance, on the other hand, requires proof of damage. Strict liability also requires proof of damages, however, *Rylands* requires non-natural use and an escape that causes damage to others.

Imagine that the legal advisors for the Commuter Community in the Enterprise Property hypothetical were formulating their legal strategy and applied the principles in these three causes of action to their case. Given that PHCs have leached into the soil and groundwater of the residential properties, the legal advisors would have a simple time establishing a tort of trespass. As in *Windsor v Canadian Pacific*, the legal advisors would need to prove that the PHCs directly invaded the plaintiffs' properties, but would not need to establish damages. This is not the case with private nuisance, where *Inco* suggests that liability may require establishing that the PHCs occurred at levels causing risk or damage to human health. If the "material physical damage" branch of nuisance does not give rise to liability, there may still be liability if there is a substantial and unreasonable interference with the use and enjoyment of the property, for example if future uses are restricted due to the contamination. Finally, with respect to strict liability, *Inco* suggests that liability will not attach if the use of the Enterprise Property was consistent with municipal planning in Municipality (and even if it was not, there may be a *de facto* defense of intent to pollute). Overall, Commuter Community is most likely to succeed in trespass and nuisance, and this will often be the case in Brownfields scenarios.

Part Four: Innovation in Brownfield Redevelopment Policy

I. Introduction

As has been illustrated, the Brownfields problem is a complex one that engages multiple, inter-connected disciplines and dimensions. This Part focuses on innovations in policy, science, and funding that could “change the game” in Brownfield redevelopment. It begins by providing an overview of the City of Hamilton’s Brownfields programs, which are recognized for their sustainability and technical innovation. It then highlights some inventive scientific technologies in soil remediation, before canvassing potential funding and investment options. Finally, examples of community-focused policies that have proven effective in addressing environmental injustice will also be explored.

Presently, municipalities and cities, such as the City of Hamilton, run programs and incentives to redevelop Brownfields that offer models that can be emulated. To date, successful methods for decreasing or distributing costs include multi-party agreements between municipalities, private investors, and developers that provide for local community engagement to build environmentally and socially responsible projects. Hamilton’s Environmental Remediation and Site Enhancement (ERASE) program been recognized in Ontario for redeveloping Brownfields³⁰² and “has been used by several other Canadian municipalities as the template for their brownfield redevelopment plans and incentive programs”³⁰³. Recall the recent amendments to the *Planning Act* that include municipal grants and loans to a registered owner developing land

³⁰² For example, Hamilton’s Downtown/West Harbourfront Remediation Loan Pilot Program won the Category 3 (Financing, Risk Management and Partnerships) Canadian Urban Institute Brownie Award in 2013. Hamilton is also a finalist in the Category 2 (Remediate-Sustainable Remediation and Technological Innovation) for 2017. Brownie Awards recognize innovators in Brownfield redevelopment. See Canadian Urban Institute Brownie Awards 2017 “Brownie Awards” (2017) 2017 Brownie Awards, online: <<http://brownieawards.ca/>>.

³⁰³ Canada Mortgage and Housing Corporation (CMHC), “Environmental Remediation and Site enhancement (ERASE) Community Improvement Plan (CIP) Initiative”, *Brownfields Redevelopment for Housing, Case Studies Brownfield Initiatives*, (2017: CMHC) online: <<https://www.cmhc-schl.gc.ca/en/inpr/su/sucopl/upload/Brownfield-Redevelopment-for-Housing-in-Canada-Case-Studies-Environmental-Remediation-and-Site-Enhancement-ERASE-Community-Improvement-Plan-CIP-Initiative-Hamilton-Ontario.pdf>> [CMHC, “ERASE”].

for the purpose of paying eligible costs of a community improvement plan, ERASE is a community improvement plan that includes programs “designed to encourage and promote [B]rownfield redevelopment”.³⁰⁴ The plan includes a study grant program, redevelopment grant program, education tax assistance program, the downtown Hamilton-West Harbourfront remediation loan program, municipal acquisition and partnership program, and development charge reduction program. Three of these programs offer incentives in the form of tax breaks or subsidies during remediation or following remediation and/or redevelopment. In so doing, these programs reduce the remediation costs. The study grant program provides grants for environmental studies including up to fifty percent of Phase II ESA and/or remediation to a maximum of \$20,000 for up to two studies and \$25,000 for each Brownfield property.³⁰⁵ Redevelopment grants are also available to cover eighty percent of the increase in municipal property taxes for up to ten years following completion of site remediation.³⁰⁶ Given that the tax base has increased due to the redevelopment, there is no loss to the municipality.³⁰⁷ If a developer receives this grant, it may apply the cost of remediation to the development charges due for the property under the development charge reduction program. The education tax assistance program offers a freeze on the educational tax portion of property taxes and the Province may match this for up to three years following redevelopment of the site.³⁰⁸

Two other ERASE programs broaden the accountability for the remediation costs and potential liability, while at the same time increasing community involvement and sustainability. These programs are significant as they have played a role in advancing environmental justice in

³⁰⁴ The City of Hamilton, “ERASE Community Improvement Plan”, (2015) The City of Hamilton, online: <<https://www.hamilton.ca/municipal-incentive-programs/brownfieldserase-programs>> [Hamilton, “ERASE”].

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ For example, see CMHC, “ERASE”, *supra* note 303 at 6, where it explains that without the ERASE Redevelopment Grant, a project would not be redeveloped and thus the prior tax assessment would stand, such that there would be no increase in revenue for the City due to the new assessment based on redevelopment.

³⁰⁸ Hamilton, “ERASE”, *supra* note 304.

Hamilton. The Downtown-West Hamilton Harbourfront remediation loan program is part of the City's community improvement plan to redevelop an area of contaminated former industrial lands along the West Harbour waterfront into a waterfront community. The City's plan involves revitalizing this area by focusing on the attractiveness of the waterfront to make it a "recreational destination".³⁰⁹ In so doing, the plan indicates guiding principles of health and sustainability³¹⁰ and requires community involvement, water conservation, energy-efficient buildings, major parks, and a maximum building height of eight stories.³¹¹ The program offers low interest loans equal to eighty percent of the cost of remediation, which are capped at \$400,000 per property or project and support developers who are waiting to receive the aforementioned grants.³¹² Through its municipal acquisition and partnership program, Hamilton provides a list of Brownfield properties owned by the City that it is within the boundaries of the community improvement plan and that it wishes to have redeveloped. The City then works with developers to induce investment and remediation of these properties. Using this program the City can assist in funding pilot projects that "showcase the use of innovative tools such as new environmental remediation technologies".³¹³

Typical forms of remediation are expensive and include excavation, dig and dump, landfilling, incineration, soil washing, and the addition of oxidants.³¹⁴ However, scientific innovation has led to sustainable solutions such as bioremediation, where microorganisms digest contaminants, and terrestrial carbon sequestration, where carbon-rich soil amendments are added

³⁰⁹ The City of Hamilton, "West Harbour (Setting Sail) Secondary Plan", (June 2012) The City of Hamilton, online: <https://d3fp1lflm7bbt3.cloudfront.net/sites/default/files/media/browser/2015-04-20/west-harbour-setting_sail-secondary-plan.pdf> at 1 [Hamilton, "West"].

³¹⁰ *Ibid* at 3.

³¹¹ Hamilton, "West", *supra* note 309 and The City of Hamilton, "Waterfront Redevelopment", (2015) The City of Hamilton, online: <<https://www.hamilton.ca/city-initiatives/priority-projects/waterfront-redevelopment>>.

³¹² Hamilton, "ERASE", *supra* note 304.

³¹³ *Ibid*.

³¹⁴ Mallavarapu Megharaj and Ravi Naidu, "Soil and brownfield remediation" (2017) 10:5 Microb Biotechnol at Introduction, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5609233/>>.

to the soil.³¹⁵ Further funding toward scientific innovation to reduce the cost of remediation will allow for further remediation. As remediation companies gain experience in remediation, economies of scale will also be created, which will provide an overall decrease in the cost of remediation. Funding would need to come from federal and provincial sources. Presently, there is a Green Municipal Fund administered by the Federation for Canadian Municipalities, which is available for “municipal environmental initiatives” including funding for Brownfield remediation and site management.³¹⁶

Private funding has also proven effective in Brownfield redevelopment because it spreads the risk and cost. A prime example is the remediation and redevelopment of the former industrial lands located along the Don River in Toronto into the Pan American Athletes’ Village, which won a Canadian Urban Institute Brownie Award in 2013 for “Best Overall Project”.³¹⁷ The lands were appropriated by the Province and the Province entered into a Public – Private Partnership (P3) Agreement³¹⁸ whereby it partnered with a private equity investor to finance and redevelop the lands. The athletes’ village was designed to convert to a “sustainable mixed-use neighbourhood”³¹⁹ following the 2015 Pan American Games.³²⁰ The design integrates public and community uses with work uses and includes pedestrian walkways, living rooftops, car and bicycle parking, pathways, and links to parks.³²¹

³¹⁵ United States Environmental Protection Agency, “Terrestrial Carbon Sequestration”, (February 2011: United States, Environmental Protection Agency) online: <<https://clu-in.org/ecotools/seq.cfm>>.

³¹⁶ Federation for Canadian Municipalities, “Green Municipal Fund”, (2017: Ottawa, Federation for Canadian Municipalities) online: <<https://fcm.ca/home/programs/green-municipal-fund/what-we-fund/eligibility/brownfields-funding.htm>> [Federation, Green].

³¹⁷ Canadian Urban Institute Brownie Awards 2017, “2013 Canadian Urban Institute Brownie Awards” (2017), online: <<http://brownieawards.ca/winners2013/>>. See also, online: <<https://www.canadianconsultingengineer.com/environmental/site-remediation-for-panam-athletes-village-wins-brownie-award/1002686300/>>.

³¹⁸ PPP Canada Inc., “PPP Canada What is a PP3?” (PPP Canada Inc.) online: <<http://www.p3canada.ca/>>.

³¹⁹ Canadian Architect, “2015 Pan Am/Parapan American Games Athletes’ Village, Canary District” (2017: IQ Business Media) online: <<https://www.canadianarchitect.com/features/2015-pan-am-parapan-american-games-athletes-village-canary-district/>>.

³²⁰ *Ibid.*

³²¹ *Ibid.*

Implementing programs that bring several players to the table to redevelop lands assists in spreading out the cost of remediation and can be used to assist parties who bear the costs (and consequences) of environmental contamination. Recall that the theory of environmental justice seeks to promote a fair distribution of environmental benefits and burdens and the fair treatment of marginalized communities in environmental policy.³²² To paraphrase Dr. Robert Bullard, it is the concept that all people are equally entitled to the protection of their environment.³²³ Industrial polluters were, and still are, often located in locations where marginalized groups live. This reality is often due to power imbalances that push pollution into the path of least resistance.³²⁴

It is no surprise then, that the environmental justice movement is often concerned with Brownfield locations. The environmental justice movement originated in the United States and is now growing in Canada.³²⁵ Canadian studies have demonstrated (inter alia) systemic discrimination against Indigenous peoples in drinking water quality³²⁶ and disproportionate exposure to urban air pollution related to family status and low education.³²⁷ Moreover, examples with respect to soil contamination are beginning to surface. For example, in Alberta, the Province has licensed over 2600 oil and gas wells on the lands of the Indigenous community of the Lubicon Cree and the Lubicon Cree are arguing that it is reducing their resistance to infection and leading to diseases caused by poor sanitation.³²⁸ Buzzelli suggests that environmental justice may soon be raised with respect to the Sydney Tar Ponds in Canada. Interestingly, Ecojustice was involved in a case of toxic torts and the Sydney Tar Ponds, which

³²² Scott, "Environmental Justice" *supra* note 19 at 1.

³²³ Dr. Robert Bullard, "The Wrong Complexion for Protection: Race and Environmental Justice" *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, The College of Letters and Science in conjunction with Environmental Studies Program, (2006) UC Santa Barbara, University of California Television, online: <https://www.youtube.com/watch?v=SYVvbs6XsNw>.

³²⁴ *Ibid*. See also, Michael Buzzelli, "Environmental Justice in Canada-It Matters Where You Live" Canadian Policy Research Networks Research Report (December, 2008) Canadian Policy Research Networks at 2 [Buzzelli, "Justice"].

³²⁵ Buzzelli, "Justice", *supra* note 324 at 2.

³²⁶ *Ibid* at 6.

³²⁷ *Ibid* at 5.

³²⁸ Amnesty International Canada, "The Lubicon Cree: A Case Study in Ongoing Human Rights Violations" (2015) Amnesty International Canada, online: <<http://www.amnesty.ca/our-work/issues/indigenous-peoples/the-lubicon-cree-ongoing-human-rights-violations>>.

was rejected as a class action by the Supreme Court.³²⁹ Given the origin of the movement, there are many examples of environmental injustice and Brownfields in the United States. Most Brownfields in the United States are located in “depressed rural and urban neighbourhoods, primarily populated by minority and low-income residents”.³³⁰

Gallagher and Jackson argue that Brownfield programs assist in communities plagued with environmental injustice.³³¹ They consider programs collaboratively funded by both public and private parties and how such programs have led to remediation. Gallagher and Jackson find that “Brownfields programmes provide environmental justice to distressed communities by applying private sector remediation and real estate expertise to abandoned and contaminated properties”.³³² There are several components to successful programs for redevelopment. These include the federal government providing states with funds for the programs and providing funding to the communities and incentives to developers.³³³ They also cite increased community participation in site redevelopment as a necessary tool.³³⁴ Furthermore, the American Environmental Protection Agency and the National Environmental Justice Advisory Committee held hearings in 1995 for community members affected by Brownfields and environmental justice supporters. One important decision that they reached was that it was imperative to have “meaningful community participation in decision-making for brownfields remediation and redevelopment”.³³⁵

³²⁹ Ecojustice, “A dark day for Sydney residents & environmental justice in Canada” (2016) Ecojustice, online: <www.ecojustice.ca/a-dark-day-for-sydney-residents-environmental-justice-in-canada/>.

³³⁰ D.R. Gallagher & S.E. Jackson, S.E. “Promoting community involvement at brownfields sites in socio-economically disadvantaged neighbourhoods” (2008) *Journal of Environmental Planning and Management* 51: 5, 615-630, at 616.

³³¹ *Ibid.*

³³² *Ibid* at 615.

³³³ *Ibid* at 616.

³³⁴ *Ibid* at 617.

³³⁵ Center for Energy and Environmental Policy, University of Delaware, “Community Participation is Key to Environmental Justice in Brownfields”, (Winter 2001) *Race Poverty and the Environment*, at 6.

Hamilton has been a “hotspot” for environmental justice concerns in Ontario and it has put these insights into action. Hamilton’s West Harbourfront project recognized a need for public engagement and has included regular public meetings to receive public input. It has launched a public engagement committee and drafted a public engagement charter,³³⁶ which includes eight community engagement principles including accountability, collaboration, and open communication. Based on community feedback, this community engagement program offers a “Community Storefront” location and regular monthly community meetings. The program also created a new job position on community engagement.³³⁷

Redevelopment of Brownfields located in poor socio-economic communities requires teamwork. Increased community involvement, public funding, and support from developers and non-governmental organizations is important because it provides a voice to the community affected by contamination and also spreads risk with respect to the remediation costs and potential liability. Engaging in Brownfield redevelopment in marginalized communities can also result in creative solutions that can be used as roadmaps in the future. Brownfields are being used as “a tool to alleviate long-standing problems” in communities in San Diego/Tijuana where communities were targeted in the 1920s for industrial development because of the high percentage of people of colour.³³⁸ In this case, the City used zoning to relocate these industrial polluters to industrial zones. The Environmental Health Coalition coined the phrase “emerging Brownfields” because even though these locations were not abandoned as per the definition of Brownfields, they were “under-utilized and not subject to private redevelopment due to potential

³³⁶The City of Hamilton, “Public Engagement Charter”, (2015) The City of Hamilton, online: <<https://www.hamilton.ca/city-initiatives/strategies-actions/public-engagement-charter>>.

³³⁷ City of Hamilton, “Community Engagement for the Waterfront,” (2016) City of Hamilton, online: < <https://www.hamilton.ca/city-initiatives/priority-projects/community-engagement-waterfront>>.

³³⁸ Environmental Health Coalition, “Emerging Brownfields” Race, Poverty & the Environment, (2001) 8:1 at p. 4 [Environmental, “Emerging”].

site contamination and public health threats”.³³⁹ In so doing, the Environmental Health Coalition put forward the idea of using Brownfields funding as a way to begin the process of relocation. The relocation received a Brownfields grant and brought together a team of organizations including the City, a developer of affordable housing, the Metropolitan Area Advisory Committee, and the Environmental Health Coalition. In this instance, the project was stymied by the fact that the City could not purchase the property. However, it is an excellent example of how creative solutions are born out of teamwork, City support, and economic ingenuity.

Programs such as Hamilton’s ERASE programs and those studied by environmental justice scholars, provide insight into possible amendments required to further Brownfield redevelopment.

³³⁹ *Ibid* at p. 4.

Part Five: Analysis

I. Introduction

Part Five involves an economic analysis of the present legal landscape. It begins with an overview of the real property and Brownfield property markets in Ontario. Next, it provides an economic analysis of the present liabilities in environmental, real property, land use planning, and tort law with respect to Brownfield redevelopment. It also explains the present landscape using a cost calculation for Brownfield redevelopment. Finally, it discusses methods to address the dearth of Brownfield redevelopment.

II. The Property Market in Ontario

i. Current Real Property Market in Ontario

In April 2017, the Ontario government introduced *Ontario's Fair Housing Plan* in response to anomalies in the Ontario housing or property market. The government justified this *Plan* by citing data that confirms a rise in the price of housing coupled with a rise in population in the Greater Toronto Area.³⁴⁰ The government indicated that “[a]fter two consecutive years of double-digit gains, average house prices in the Toronto region reached \$916,567 in March 2017, up 33.2 percent from a year earlier”.³⁴¹ This trend of increased prices in the Greater Toronto Area has been ongoing since 2008.³⁴² The trend also occurred in the commercial real estate market. The year 2016 saw a twelve percent increase from 2015 in investment property sales, (which includes land sales and the sale of office, retail, industrial, hotel and rental apartments).³⁴³ In the Greater Toronto Area, the office vacancy rate in 2016 was 9%,³⁴⁴ confirming that demand

³⁴⁰ Ministry of Finance, “Backgrounder: Ontario’s Fair Housing Plan” (20 April 2017), Government of Ontario, online: <<https://news.ontario.ca/mof/en/2017/04/ontarios-fair-housing-plan.html>>.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ Altus Group, “Record Breaking Year for Greater Toronto Real Estate Market” (27 January 2017) online: <<https://datasolutions.altusgroup.com/record-breaking-year-gta-2017/>>.

³⁴⁴ Toronto Dominion Economics, “Canadian Commercial Real Estate Outlook” (9 February 2017) online: <www.td.com/economics> at 13.

remains high. This rate is similar in Ottawa, where the office vacancy rate was 10.5%.³⁴⁵ In Ottawa, housing prices were more subdued, with a six percent increase from the fourth quarter of 2015 to an average resale price of \$403,689 in the fourth quarter of 2016.³⁴⁶ Ottawa's population also grew from 960,754 to 968,580.³⁴⁷

ii. Brownfield Property Market in Ontario

From an economic standpoint, a rise in the price of a good is the market's response to an increase in demand and/or a lack of supply. One of the basic laws of economics is that when demand is high and supply is low, the price will be high. The present real property market in urban centers will have a similar trajectory. Consequently, any available land in urban centers is highly sought after. The demand for Brownfields properties, typically located in these urban centers, is not on trend. Investment in Brownfield properties is not growing at the same rate as investment in similar properties in similar locations.

Without taking into account the current *Provincial Policy Statements* that promote Brownfield redevelopment, the above-mentioned statistics and discussion of the law of supply and demand reflect a market demand for real property. It would therefore be expected that there would be substantial numbers of Brownfield properties being sold or redeveloped in these cities. Presently, there is no record of the number of Brownfields sold or redeveloped in Canada. However, as required by Part XV.1 of the *EPA*, the Ontario Ministry of the Environment and Climate Change keeps an ongoing database of the records of site condition in its registry.³⁴⁸ A record of site condition "sets out the environmental condition of a property at a particular point in

³⁴⁵ *Ibid* at 16.

³⁴⁶ City of Ottawa, "Economic Development Update Q4 2016", (January 2017) (Ottawa: City of Ottawa 2017) online: <www.ottawa.ca/en/business/business-resources/economic-development-initiatives/economic-development-update/2016#economic-development-update-quarter-4-2016>.

³⁴⁷ *Ibid*.

³⁴⁸ Registry, *supra* note 66.

time, based on environmental site assessments” and must be filed before owners can change a property use to a more sensitive use.³⁴⁹ A search of the database in October 2017 reveals eight records of site condition filed in Ottawa. However, further study of these eight records reveals that likely only six would qualify as Brownfields containing contaminated land. With over 12,000 Brownfields located in Ontario alone³⁵⁰ and high demand for real estate, the question remains as to why Brownfields are not being redeveloped in larger numbers. The price for redeveloping Brownfields is extremely high and the demand is extremely low such that Brownfields are not allocated with maximum efficiency. The lack of investment in Brownfield properties is due to the negative externality of contamination.

III. Economic Analysis of the Law

Economic theory states that the proper reaction to market failure, such as pollution, is state or government intervention. If Brownfield properties are contaminated, the (polluted) property may have adverse effects on others. To add to the complexity, in this case the pollution is in actually in, on, or part of, the good. Pollution itself is a negative externality because it may have adverse effects on others. As such, the property as a whole may be an externality. Pigou’s theory was to tax the individual who caused the pollution. However, Coase’s theorem acknowledged the existence of legal rights and bargaining, which Pigou left unattended. Livermore and Rivesz confirm that “the existence of transaction costs and incomplete property rights imply that private bargaining alone will not always result in a social-welfare maximizing outcome”.³⁵¹

³⁴⁹ *Ibid.*

³⁵⁰ Ontario Real Estate Association (OREA), “Submission to the Standing Committee on Finance and Economic Affairs Pre-Budget Submission (February 2016) (Duncan Mills: Ontario Real Estate Association 2016) online: <<https://www.prea/cp/~media/Fles/Government%20Relations/Issues/Provincial-Budget-Submission.pdf?la=en>>.

³⁵¹ Michael Livermore and Richard Revesz, “Environmental Law and Economics” in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (Oxford, Oxford University Press, 2015) at 511.

Recall from the discussion in Part One that Coase's theory discusses how the imposition of a legal right on the "polluting" party is akin to dealing with the marginal cost but does not consider the total relationship, which may also include bargaining and a social cost.³⁵² Recall as well that where bargaining is not possible, Miceli contends that the law is relevant because parties do not have an ability to rearrange property rights, such that "the law must be designed with the explicit goal of efficiency in mind".³⁵³ To marry these theories, where bargaining does not work, the law can be used as a means of addressing the market failure. However, the law should consider the total relationship and should strive for efficiency in the market. The question then becomes whether the present Canadian legal framework for Brownfields is efficient.

Coase's work does not distinguish between rights and liabilities in law. This distinction is relevant to research regarding Brownfield redevelopment as our legal system contains legislation and common law that affects Brownfields. Legislation assigns legal rights to property owners and imposes liabilities on parties for pollution. Case law considers disputes involving legal rights and further imposes obligations on parties. As Miceli notes, this work is left for Calabresi and Melamed, who distinguish between property rights, inalienable rights, and liability.³⁵⁴ Calabresi and Melamed see property rights as grants of entitlement provided by government. These rights can be bought and sold or negotiated between parties with little state intervention. However, the State also protects certain rights by imposing liabilities. They note that a common reason for imposing liability to protect a property right is because "market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation" and the choice is "often made because it facilitates a combination of efficiency and

³⁵² Coase, "Social Cost", *supra* note 29 at 2 and 44.

³⁵³ Miceli, "Economic Models", *supra* note 24 at 20.

³⁵⁴ Guido Calabresi & A. Duncan Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harvard Law Review 1089.

distributive results which would be difficult to achieve under a property rule”.³⁵⁵ Calabresi and Melamed note that the imposition of liability in the pollution context is a form of redistribution that is not attainable with a property right unless efficiency is forgone.

By definition, Brownfields are polluted properties. Consequently, their study involves consideration of property rights and liabilities regarding both pollution and property. As Miceli points out, the role of the law in property transactions is “complementary to markets in promoting the efficient allocation of resources”.³⁵⁶ In terms of economics, typical options for state intervention may include assigning property rights, imposing regulations, and charging taxes or providing subsidies.³⁵⁷ However, in disputes, the law is a “substitute for market exchange in organizing the transfer of entitlements because bargaining costs preclude voluntary transfers”.³⁵⁸ In the case of Brownfield redevelopment, there is a market failure. The extra costs (remediation costs and potential liability) associated with contaminated land are externalities that the Canadian law has not fully addressed and these costs are being disproportionately borne by those who wish to develop the properties, namely developers and municipalities.

A typical regulatory approach involves making laws enforceable against polluters. In this situation, the government imposes a standard on polluters, forcing polluters to change production. To date, in Ontario, this approach has included environmental legislation and case law, as well as property tort law in favour of environmental protection. Generally, the legislation is aimed at imposing liability for pollution and does not capture redeveloping contaminated lands. Recent amendments to legislation (such as, *Brownfields Statute Amendment Act* and the *Safe Growth for*

³⁵⁵ *Ibid* at 1110.

³⁵⁶ Miceli, “Economic Models”, *supra* note 24 at 20.

³⁵⁷ Joseph E. Stiglitz & Robin W. Boadway, “Principles of Micro-Economics and the Canadian Economy” (U.S.A.: W.W. Norton & Company, Inc. 1994) at 613.

³⁵⁸ Miceli, “Economic Models”, *supra* note 24 at 20.

Communities Act) are a step in the right direction as they seek to carve out exceptions to liabilities in an effort to increase remediation and redevelopment.

The economic theory of taxing negative externalities originated with Pigou. Taxes on polluters increase the cost of production for polluters, which makes pollution less attractive. The idea is to tax the polluter by a tax equivalent to the cost of the negative externality borne by society, which forces the polluter to factor this externality cost into the cost of production. By doing so, economic efficiency is created because the price of goods and services will reflect the full cost of production.³⁵⁹ The positive effect of taxes is that it causes polluting corporations to invest in pollution control technology. However, the reality is that a tax on production is usually borne by consumers in the form of higher prices. This also does not address the total cost of redevelopment, which is making it unrealistic to redevelop Brownfield sites. An alternative is to use subsidies, as a reward for good behaviour.³⁶⁰

An economic solution that fails to take into account the context of contaminated lands will not be successful. Chalifour's research regarding ecological economics confirms the need to frame solutions in the context of community and sustainability.³⁶¹ In the twentieth century, there has been a focus on neoclassical economics, which is the idea that the free market will determine the optimal allocation of resources. However, as Chalifour discusses, "[a] fundamental flaw in the theory of neoclassical economics identified by ecological economics is the fixation on growth as an end".³⁶² Instead, Chalifour prefers the framework of ecological economics as researched by Herman Daly. Environmental economists were introduced to the concepts of Herman Daly and John Cobb Jr. in their text, "For the Common Good", which reconstructed economic theory to

³⁵⁹ *Ibid* at 612.

³⁶⁰ *Ibid* at 610.

³⁶¹ Nathalie J. Chalifour, "Ecological Economics, Sustainable Land Use, and Policy Changes" eds Nathalie J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye, John R. Nolon, *Land Use Law for Sustainable Development* (Cambridge University Press, 2007) at 526 [Chalifour "Ecological"].

³⁶² *Ibid* at 528.

incorporate the aims of community, the environment and sustainability as opposed to the common goal of growth as characterized by the Gross National Product of a country.³⁶³ In this text, Daly and Cobb discuss how a shift in people's attitudes is required and that a sustained willingness to change depends on a love of the earth that human beings once felt strongly, but that has been thinned and demeaned as the land was commodified".³⁶⁴ Chalifour writes that instead of aiming for growth, "[a]n alternative paradigm is the notion of development, which is defined by the ecological economists Daly and Farley as 'the increase in quality of goods and services as defined by their ability to increase human well-being, provided by a given throughput'".³⁶⁵ Chalifour contends that the goal of development in ecological economics is a "more realistic...objective for economic policy".³⁶⁶ Her research reviews various economic instruments that have been used to deal with the negative externalities associated with environmental degradation, such as regulation to "prohibit activities or mandate[s] a particular standard".³⁶⁷ She concludes that these mechanisms fail to internalize the externality and fail to provide incentive to progress beyond the regulatory threshold.³⁶⁸ At the end of the day, Chalifour argues that pure economic approaches to pollution are based on reaching an equilibrium between supply and demand that acknowledges the negative externality or cost of pollution on society, but these may fail to solve the environmental, health, or social risks and damages associated with pollution. It is on this basis that Chalifour argues for ecological fiscal reform by incorporating environmental concerns in the solution.³⁶⁹

³⁶³ Herman E. Daly & John B. Cobb Jr., *For the Common Good: Redirecting the economy toward community, the environment, and a sustainable future*, (U.S.A.: Beacon Press, 1994) at 378.

³⁶⁴ *Ibid* at 380.

³⁶⁵ Chalifour "Ecological", *supra* note 361 at 528.

³⁶⁶ *Ibid* at 528.

³⁶⁷ *Ibid* at 531.

³⁶⁸ *Ibid* at 531.

³⁶⁹ Chalifour "Ecological", *supra* note 361.

An ecological economic model for Brownfields redevelopment prioritizes environmental restoration in an economically literate regime that solves the market failure with respect to Brownfields.

IV. Effect of Environmental, Real Property, Land Use Planning, and Tort Law, including Recent Case Law

This research argues that in order to increase investment in Brownfield redevelopment, any government intervention must target the failure specific to the Brownfield redevelopment market. In so doing, it must consider the cost/liability, the typical parties who bear the risk, and the timeline. Furthermore, the primary purpose behind any solution must be sustainability and preservation of the environment rather than on economic growth. The total cost to redevelop a Brownfield is equal to: (1) the Purchase Price; (2) the Remediation Cost; (3) the Potential Liability to Adjacent Owners; and (4) the Development Cost:

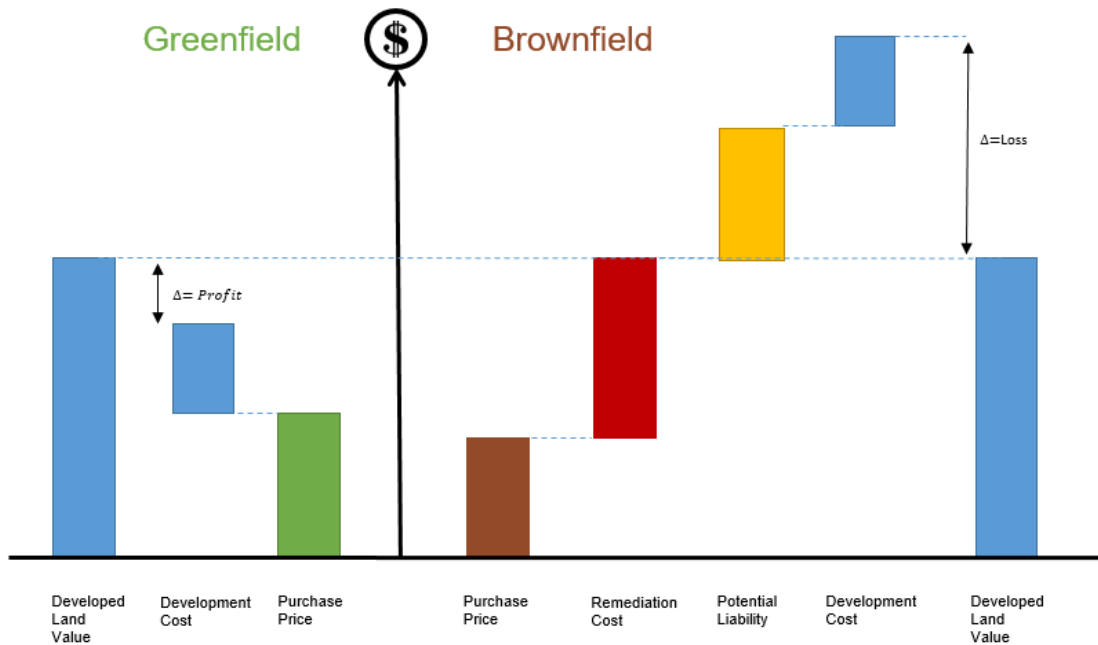
$$\text{Total Cost} = \text{Purchase Price} + \text{Remediation Cost} + \text{Potential Liability} + \text{Development Cost}$$

With respect to the Purchase Price, this may differ depending on location and on the extent of contamination. However, in a typical case where the developer presently owns the land, or purchases it through a tax sale, the Purchase Price is nominal. With respect to the Remediation Costs, these are significant and dependent on the extent of contamination. For example, the estimated cost to remediate LeBreton Flats in Ottawa is a jaw-dropping \$170 Million.³⁷⁰ (Recall that in order to redevelop these properties into a more sensitive use, Brownfields must undergo the process to obtain a record of site condition, which requires remediation). The risk of Potential Liability, particularly with respect to adjacent owners, is unquantifiable and unforeseeable,

³⁷⁰ David Reevely, "City Doesn't Want to Cover LeBreton Flats clean-up costs, report reveals" (October 27, 2017: Ottawa, Ottawa Citizen) available online: < <http://ottawacitizen.com/news/local-news/city-doesnt-want-to-cover-lebreton-flats-cleanup-costs-report-reveals>>.

making it extremely unattractive to even the risk-seeking investor. The Development Cost is an additional cost, but is static for either a Brownfield or a “Greenfield” (i.e. an uncontaminated site that has not been developed), assuming that remediation has occurred in the case of Brownfields.

Figure 5.1: Costs of Brownfield Redevelopment



With respect to cost/liability, as illustrated in Figure 5.1: Costs of Brownfield Redevelopment, there is a significant gap in the Total Cost to redevelop a Brownfield versus the Total Cost to develop a Greenfield. Assuming the Purchase Price of a Brownfield is nominal and the Development Cost is static, this is because the Total Cost to redevelop a Brownfield includes two additional variables, namely the Remediation Cost and the unforeseeable and unquantifiable Potential Liability to adjoining landowners. In order to correct this, legislation and policy must target remediation costs and the potential liability to adjacent landowners.

Frequently, the parties that bear the additional cost/liability associate with Brownfields are innocent owners and/or developers and municipalities. Consequently, municipalities and innocent owners and/or developers must be the focus of any solution. Recall as well that part of

the cost/liability is borne by society-at-large and that all of the players must be considered in order to provide efficiency in the market. As such, the entire development market, including Greenfields, should also be considered. Furthermore, policy must consider the costs and risks of all players, including local communities, in the Brownfield redevelopment process. Finally, legislative solutions must consider the point-in-time in the Brownfield redevelopment market that should be targeted in order to increase investment. Given that a large disincentive to investment is the unforeseen risk associated with liability, front-end solutions will make investment more palatable.

In order to ensure sustainability in Ontario, Brownfields require redevelopment to meet growing population needs. Part Three provided an analysis of the legal framework in Ontario with respect to contaminated lands. It described how the polluter pays principle and the case of *Imperial Oil* laid the framework for liability for contamination in environmental law. Real property law states that liability runs with the land and the doctrine of caveat emptor applies, such that owners of property take on the liabilities on title to a property. Environmental law entrenched the polluter pays principle into Ontario legislation by attaching liability to a party's present or past ownership, occupation, and control of a property. When these legal concepts collide in property contamination disputes, the role of cities and municipalities is heightened. Liability is not restricted to polluters and includes owners as the recent case of *Kawartha Lakes* proved when it extended liability to adjacent landowners that were victims of contamination. Therefore, the liability risk associated with owning (or, owning property adjacent to a Brownfield,) is high.

The environmental and real property legislation was designed by the government to counteract the market failure that existed with respect to pollution. Early case law followed suit. However, the reality is that this legislation and case law reflects Pigou's theory of externalities and it fails to take into account Coase's theory that the solution must consider all players and

social cost. The present legal framework has not led to an efficient equilibrium. By imposing liability as it presently has, the government has missed key factors that must be addressed in order to redevelop Brownfields. In order to do so, the law must consider the total relationship, including all parties involved in Brownfield redevelopment. The present legal framework does not take into account the reciprocal nature of the problem, which, in theory, is broader than the law of supply and demand and includes a societal element.

V. Addressing the Market Failure in Legislation and Policy

i. Introduction

Recent developments in Ontario legislation have attempted to get at the issue, but have not quite hit the mark. The *Brownfield Statute Law Amendment Act* amended several provincial statutes in an effort to increase investment in Brownfields. Recall that the *Brownfield Statute Law Amendment Act* amended the *EPA* by inserting Parts XV.1 and XV.2 regarding records of site condition, and liability exceptions, respectively. These amendments made the process for filing a record of site condition more clear and provided exceptions to liability for remediation. These amendments limit the liability for municipalities, secured creditors, and receivers, trustees in bankruptcy, fiduciaries, and property investigators. The amendments missed key players in the redevelopment of Brownfields: the innocent owners and/or developers of Brownfields. The reality is that if the polluter disappears, the owner will be liable. Unless this issue is resolved, Brownfields will continue to be contaminated, un-remediated, and unused. In order to increase Brownfield redevelopment, the law must be amended to extend this exception to innocent owners and/or developers who guarantee their intent to redevelop and remediate a Brownfield. Additional amendments to provincial legislation containing mandatory language is also required. Legislation and policies driven by environmental protection that regulate the front-end of the purchase process hold the most promise for a sustainable future. Furthermore, change must target

the players that bear the brunt of the risk, namely municipalities and the innocent owners and/or developers. The risk must be spread so that the cost is born by many instead of by a few. Finally, similar to the need for angel investors in a start-up enterprise, municipal policies must entice private investment through innovation.

ii. Amendments to the *EPA*

With respect to targeting the Remediation Cost, the *EPA* must be amended to provide a limitation of liability for the innocent owner and/or developer who guarantees redevelopment. The limitations to liability provided in Part XV.2 of the *EPA* as amended by the *Brownfield Statute Law Amendment Act* must be extended to include the innocent owners and/or developers of Brownfields. The language of this amendment requires significant foresight and planning in order to ensure that a strict test is imposed in order to qualify. Language would need to ensure that:

- (1) Every owner and/or developer provides evidence of innocence in the contamination of the property;
 - a) This evidence would include that the particular owner(s) and/or developer(s) were not on title to the Brownfield property during the period of contamination.
- (2) Every owner and/or developer provides evidence and a guarantee that the owner and/or developer will redevelop the Brownfield property in compliance with the *EPA* and any relevant provincial policies and municipal by-laws; and
 - a) An agreed-to redevelopment plan between the municipality or city and owner(s) and/or developer(s) must be included as a schedule to this agreement.
- (3) Every owner and/or developer entered into an agreement with the requisite municipality or city.

- a) The agreement must include strict warranties and guaranties provided by every owner and/or developer regarding remediation and compliance with the *EPA* and any relevant provincial policies and municipal by-laws.
- b) The agreement must include that the owner and/or developer pay a small percentage of profits per year into a provisional fund for the first ten years of ownership in the event that the contamination has migrated and the ESA does not disclose this. This fund would revert back to the owner and/or developer on the anniversary of the tenth year of ownership. (This is a front-end solution designed to enhance Brownfield redevelopment by decreasing potential future, unspecifiable, liability through private, rather than public, investment. Requiring the developer to provide a small percentage of future profits from the redevelopment, forces the developer to provide a safety net in the event of future liability to adjacent owners. At the same time, this offsets the potential burden borne by the municipality and society. Most importantly, although it is a front-end solution it is not an up-front cost, as it only becomes “payable” once the site is developed and profitable. Furthermore, if the developer is diligent in its remediation efforts, the fund is future equity as it is designed to revert back to the developer following a period of ten years without contamination of adjacent lands.³⁷¹)

This amendment would only limit the liability of the owner and/or developer in respect of an order to remediate, however, by virtue of the agreement, the owner and/or developer would be agreeing to redevelop the property in compliance with the *EPA*, which requires remediation.

Given the unforeseeable risk associated with potential control orders, this would be significant in

³⁷¹ This differs from the United States’ Environmental Protection Agency’s Superfund, which consists of publicly-funded money available to the Environmental Protection Agency where there is “no viable responsible party” for remediation of contaminated sites. United States Environmental Protection Agency, “Superfund” (November 9, 2017: United States Environmental Protection Agency) online: <<https://www.epa.gov/superfund/what-superfund>>.

reducing risk. It would also eliminate potential Remediation Costs, such as legal costs and overhead associated with litigation and dealing with these orders. This limitation would be similar to the limitation of liability for secured creditors found in s. 168.17 of the *EPA*, which includes that the secured creditor is not (for any reason alone) a person in occupation of a source of contaminant for the purpose of subsection 7 (1) or 8 (1), or, a person who has or had the charge, management or control of a source of contaminant for the purpose of subsection 7 (1) or 8 (1), or a person who has or had management or control of an undertaking or property for the purpose of subsection 18 (1), or a person who has management or control of an undertaking or property for the purpose of subsection 157.1 (1).³⁷² The recommended limitation does not decrease a developer's cost to remediate, which also means that the government is not losing much in extending this to developers. However, it does diminish the risk imposed on an owner and/or developer that guarantees redevelopment because the cost becomes foreseeable. Developers no longer have to fear a remediation order by taking ownership; instead developers agree to remediate the property. This also eliminates potential legal fees to fight orders, which are a deterrent to development.

In order to truly alleviate the liability imposed on innocent owners that intend to redevelop Brownfields, the liability would require further limitation with respect to adjacent property owners. Given that *Provincial Policy Statements* identify Brownfields as opportunities for redevelopment and indicate the necessity of Brownfield redevelopment in order to meet land-use requirements,³⁷³ it is difficult to understand the lack of foresight in dealing with this issue. If Ontario genuinely seeks to redevelop Brownfields, the government would need to provide a limitation of liability to those innocent owners and/or developers who seek to do just this.

³⁷² *EPA*, *supra* note 5 at s. 168.17(1).

³⁷³ Ministry, "Brownfields", *supra* note 149.

Amending the *EPA* to provide a limitation or a ceiling on the maximum liability of innocent owners and/or developers who have guaranteed Brownfield redevelopment (through the amendment listed above with respect to limiting liability for orders under the EPA) in respect of contamination of adjacent lands would decrease the unforeseeable risk associated with Potential Liability. By eliminating the potential for infinite liability, the government deletes a portion of the cost borne by innocent developers. It does not eliminate any cost imposed on innocent adjacent landowners or taxpayers. However, these costs can be redistributed by implementing the front-end solutions proposed here and further explored below whereby the municipality builds a provisional fund, and also through further community and incentive-based policies.

iii. Amendments to the *Planning Act*, *Municipal Act*, and *Mortgages Act*

This research also recommends the aggressive approach of amending key provisions of the *Planning Act* and *Municipal Act* to include mandatory rather than permissive language regarding community improvement plans. Subsections 28(2) and (4) provide that a municipality may designate an area as a community improvement project area and pass a by-law to improve that area. The permissive language of ss. 28(2) and (4) would need to remain. This provision theoretically allows a municipality to take a project area dense with Brownfield sites and develop a plan for improvement. Subsections 28(7), (7.1) and (7.2) detail how a municipality may provide grants or loans with respect to community improvement project areas. This research recommends that subsections 28(7), (7.1), and (7.2) be amended to exchange permissive language for mandatory language. For example, ss. 28(7) would be amended to state that “For the purpose of carrying out a municipality’s community improvement plan that has come into effect, the municipality **shall** make grants or loans...”³⁷⁴ Furthermore, s. 365.1 of the *Municipal Act*

³⁷⁴ *Planning Act*, *supra* note 131 at s. 28(7).

must be amended to eliminate permissive language and mandate municipalities to pass by-laws to cancel, reduce or refund taxes levied on an eligible properties, which include Brownfields. Requisite language will mandate incentives for Brownfield remediation and genuinely support *Provincial Planning Statements*. These amendments would require municipalities to create such programs as those implemented by the City of Hamilton (discussed below).

As illustrated in *Kawartha Lakes*, Brownfields liability often ends up resting on the municipality. Any liability shouldered by the municipality is ultimately that of the taxpayers, which imbalances the equation. The recent amendments to include municipalities in the limitation of liability found in s. 168.17 of the *EPA* is a good starting point, however, this limitation does not eliminate the requirement to remediate. Furthermore, as seen in Part Three, s. 2 of the *Planning Act* makes municipalities responsible for ensuring the development of healthy and safe communities, and the protection of public health and safety. Given this, reform should focus on changes that can be made at the municipal level. This research recommends an amendment to the *Municipal Act* to require municipal by-laws (mandated by the Province, through a *Provincial Policy Statement*) that require all Greenfield developers to provide an up-front lump sum development fee. This up-front development fee will be placed in a provisional municipal fund available for innocent owners and/or developers of Brownfields who are held liable for remediation of adjacent lands, but that have satisfied the recommended amendment regarding the limitation of liability discussed above. (Municipalities presently have the ability to make funds by virtue of s. 107(1) of the *Municipal Act*.) In addition to being available for innocent owners and/or developers held liable for contamination for adjacent landowners, the provisional fund can be used by the municipality to implement the programs recommended in this research, including, incentives, tax breaks, and grants. The logic behind placing this requirement on Greenfield

development is three-fold. First, it spreads the cost borne by society for the pollution. Second, and more importantly, Greenfield development is chosen by developers because it is the more cost-effective choice. There are no Remediation Costs or Potential Liability costs. Consequently, any “tax” imposed on Greenfields has the effect of offsetting these costs in Brownfield redevelopment, thus making Brownfield redevelopment more attractive. The up-front lump sum must be reasonable and does not have to be overly aggressive as it will accumulate in the fund, having a cumulative effect in the development market. Third, it promotes sustainability and environmental protection because it makes Brownfield redevelopment an option, rather than investing in Greenfields and further encroaching on the environment. If this makes municipalities nervous, a less aggressive approach would be to similarly impose this up-front tax on industrial development for contaminant-intensive uses, such as petroleum production plants. The *Municipal Act* should also be amended to require municipal by-laws to mandate yearly soil and water-table sampling for high-risk contaminating industries.

Alternatively, two other amendments could be used. Provinces could consider amending the *Mortgages Act* to oblige lenders to require up-front security for high-risk contaminating industries. The security could be held in trust for lenders, but assignable to a municipality and could only be used in respect of remediation or liability associated with contamination. The reason that this would need to be done at a statutory level is to equalize the playing field in the financial market; otherwise competition would lead to certain lenders providing high-risk loans without this provision. This requirement could be negated if the business guarantees that certain processes are in place to ensure no contamination will occur. A second alternative is to impose a requirement in the *Municipal Act* for municipal by-laws to require high-risk contaminating industries to set up a remediation fund, which would also be assignable to the municipality as

necessary. However, these two alternatives are akin to up-front taxes on polluters and would be subject to the criticism that tax on the polluter is ultimately borne by the consumer.

iv. Implementation of Programs to Promote Brownfield Redevelopment

Successful municipal Brownfield redevelopment programs include five components. Programs must be designed to (1) Reduce remediation and redevelopment costs, (2) Incorporate innovative ideas and remediation methods, (3) Include sustainable redevelopment as an essential purpose, (4) Involve the community and multiple players, and (5) Support environmental justice. Each of these components must be a guiding principle of a municipality's community improvement plan.

As discussed, a key component in offsetting the liability associated with Brownfield redevelopment is a reduction in remediation and redevelopment costs. There are a number of ways to reduce these costs, however, the integral consideration is that the reduction of costs must be a purpose of the community improvement plan and must be built-in to all programs for redevelopment.

Remediation costs can be reduced over time with economies of scale and further scientific research into innovative and cost-effective ways of remediation, such as those discussed in Part Four. As discussed, scientific innovation requires funding from the federal and provincial government, or from private investment. Presently, the Green Municipal Fund is administered by the Federation for Canadian Municipalities. The Green Municipal Fund is available for "municipal environmental initiatives" and provides funding for Brownfield remediation and site management.³⁷⁵ Municipalities may apply to The Green Municipal Fund to receive money for Brownfield programs such as Hamilton's ERASE programs. There are also private equity

³⁷⁵ Federation, Green, *supra* note 316.

investors that invest in Brownfield properties and remediation, such as those utilized in the Toronto Pan American Games example discussed in Part Four.

A primary purpose of Brownfield redevelopment programs must be sustainability. In order to redevelop Brownfields sustainably, development must meet present needs without compromising future needs. The redevelopment of Brownfields, rather than Greenfields, is the first step towards environmental sustainability. In addition, Brownfield redevelopment projects must be designed to balance the needs of the community with environmental protection. A prime example is Hamilton's Downtown-West Harbourfront plan, which was created with the guiding principle of sustainability. Another example is the Toronto Pan American Athletes' Village that converted to a mixed-use neighbourhood following the Pan American Games.

Municipalities must utilize the community improvement plan provisions to create programs designed to increase Brownfield development through grants, subsidies, and tax breaks. As discussed in Part Four, programs that provide this type of funding reduce remediation and redevelopment costs and make Brownfield redevelopment more attractive. The ERASE programs justify the need for community involvement in order to further sustainable redevelopment. The benefit of community involvement also assists in promoting environmental justice through inclusion of potentially marginalized individuals that disproportionately bear the consequences of property contamination. Community improvement plans that embed values of sustainability and health promote environmental justice and ensure a viable future for these properties and the communities surrounding them. When municipalities work with investors and developers to redevelop these sites, the liability and cost is dispersed and more manageable. Collaboration and a mixture of public and private funding can assist the community, including those disproportionately affected by contamination.

Consequently, it is necessary for the Province to mandate increased community involvement in the development stages of Brownfield redevelopment in order to include the public in the equation. To some extent these mechanisms exist in Ontario's *Provincial Policy Statements*, however, they are permissive. For example, Article 1.2.2 of the 2014 *Provincial Policy Statements* indicates that planning authorities are encouraged to coordinate planning matters with Aboriginal communities.³⁷⁶ The recent amendments to the *Development Charges Act* and the *Planning Act* found in the *Smart Growth for Our Communities Act* discussed in Part One also speak to increased community involvement in how municipalities spend development charges and an increased public voice in community planning.³⁷⁷ This type of amendment is necessary in order to address the social cost of contamination and provide the community with a say in how Brownfields are redeveloped.

v. Provisional Fund for the Implementation of the Recommended Amendments

Hamilton's Brownfields programs provide insight into necessary additions to Ontario's legal framework for Brownfields. This research has recommended mandatory language in s. 365.1 of the *Municipal Act* to require municipalities to put these types of programs in place. An even more aggressive approach would be to mandate similar programs to those found in the ERASE program. Hamilton's program was the first of its kind in Canada and is modeled after financial incentive programs used in the United States.³⁷⁸ However, one might wonder how the municipality can fund these initiatives? As noted, some incentives are based on future values of the property and as such save developers money while not costing the municipality money. Funding was also provided through the Green Municipal Fund by the Federation of Canadian

³⁷⁶ Ministry, "Provincial" 2014, *supra* note 3.

³⁷⁷ Ministry, "Smart Growth", *supra* note 160.

³⁷⁸ CMHC, "ERASE", *supra* note 303 at 2.

Municipalities,³⁷⁹ which is available to parties performing remediation/risk management or renewable energy production on Brownfield sites or to eligible redevelopment projects built on remediated sites.³⁸⁰ Furthermore, if the recommendations with respect to a legislated fund applicable to Greenfield development are implemented, this fund can be used by municipalities to offset the gap that exists between developing Greenfield and Brownfield properties. Doing so at a municipal level provides transparency and accountability to municipalities. It allows municipalities and communities to see the fruits of their own labour. It is also more cost-effective than a process involving transfers from governments. Although the imposition of lump sum payment is akin to a tax, by using this fund to reinvest in Brownfields, the results are different. When taxes are used to target pollution, taxes lead to cost-effective decisions to reduce pollution.³⁸¹ Here, it is being used to induce remediation. Furthermore, although taxes are often criticised for raising prices and being borne by consumers,³⁸² in this case it will be borne directly by those wishing to develop fresh land, which promotes environmental protection.

By using the fund to make Greenfield development less attractive, while at the same time targeting the remediation costs of Brownfields, this recommendation uses an economic and regulatory tool to further environmental protection. Integrating environmental protection into the regulatory tool is consistent with Chalifour's research regarding ecological economics.³⁸³ Shifting the municipality's values to focus on sustainability furthers the ideal that land is not simply a commodity but also a necessary resource for human life. When community improvement plans are designed with the goal of sustainability rather than economic growth, the

³⁷⁹ *Ibid* at 4.

³⁸⁰ Federation, "Green", *supra* note 316.

³⁸¹ David Driesen, "Economic Instruments for Sustainable Development" eds Benjamin Richardson and Stepan Wood, "Environmental Law for Sustainability: A Reader," (North America: Hart Publishing 2006) at 293.

³⁸² *Ibid* at 294.

³⁸³ Chalifour "Ecological", *supra* note 361.

municipality will increase the quality of life of its residents. This ideology also utilizes Coase's requirement that the entire context of pollution must be considered, including the social cost.

vi. Reinforcing the Role of the Judiciary

As seen in Part Three, the judiciary has attempted to correct the market failure associated with contaminated lands. An often understated role of the judiciary is upholding society's values. It is often the judiciary who step in to right a wrong that the present legislation cannot. Presently, case law regarding environmental protection is dynamic in Ontario in the field of environmental law (particularly at the Environmental and Land Tribunals of Ontario) and in the field of property tort law. Judge-made law attempts to rectify a failure in the market where state intervention has also presently failed.³⁸⁴ Thus, when the polluter pays principle fails, judge-made law in environmental tribunals (upheld by courts), such as *Kawartha Lakes*, emerges. *Kawartha Lakes* is the judiciary's attempt to ensure the environmental protection is at the forefront of society's priorities. The concern that *Kawartha Lakes* raises is whether this attempt correctly balances the equation and captures the social cost. In *Kawartha Lakes*, the adjacent property owner shouldered the liability. As discussed, it is questionable if the decision would have been different if the adjacent property owner was not a municipality (with a statutory collection option). Should the polluter pays principle be extended to an "innocent owner pays" principle in the case of abandoned Brownfields? This research argues that this will not correct the market failure in the real property market as it does not address the social cost. In fact, it inflates the social cost.

However, the judiciary's hands are tied to an interpretation of statute. Consequently, statutes require the suggested amendments found in this Part in order to address this concern. Provincial and municipal policies must also address the concern. A simple way that these

³⁸⁴ See, Micelli, "Economic Models", *supra* note 24, at 17. See also, Posner, "Economic Analysis", *supra* note 21 at 252.

policies can begin to address this concern is by increasing public consultation. The increase of public access to land use planning matters has had a positive effect on Brownfield redevelopment. Further legislation requiring public consultation, such as that found in the *Smart Growth for Communities Act*, provides an opportunity for innocent owners and/or developers to voice the intricacies of the effects of these types of decisions.³⁸⁵

The liability of Brownfield owners is increased by the law of tort as it holds owners of contaminated lands liable for injuries to adjacent property owners. The tort of trespass presently imposes the highest likelihood of liability. However, Collins and McLeod-Kilmurray feel that liability in nuisance is a possibility. They contend that the *Inco* reasoning requiring contamination in excess of a standard is not in-line with present societal views and they feel that where a clean property is contaminated, there has been “material physical damage”.³⁸⁶ Alternatively, they argue that there is room for a category of “material chemical damage”.³⁸⁷ Research by van Rensburg supports the need for further consideration regarding measuring damage. She contends that if counsel can provide sufficient evidence of damages, including evidence that supports a measurement of damages resulting from negative public opinion, or stigma, courts may be encouraged to “invoke more effective and creative remedies”.³⁸⁸ This could expose a Brownfield owner to the possibility of greater liability, however, if this were imposed on the true polluter this would have little effect on redevelopment and would better allocate social cost.

Presently, the law of tort is used primarily by property owners adjacent to contaminated lands. From an economic point of view, the case law in the tort of nuisance involves an assessment by each party of how much they are willing to pay to avoid interference. However,

³⁸⁵ Ministry, “Smart Growth”, *supra* note 160.

³⁸⁶ Collins & McLeod-Kilmurray, “Toxic Torts”, *supra* note 195 at 67.

³⁸⁷ *Ibid* at 67.

³⁸⁸ Katherine M. van Rensburg (2004) “Deconstructing Tridan: A Litigator’s Perspective”, 15 J. Env. L. & Prac. 85.

recall Coase's theory that if a resolution does not take into account the fact that parties can bargain, it will be inefficient.³⁸⁹ Consequently, the law of tort must account for the costs borne by all parties in order to reach an efficient result. If a polluter abandons a property and it reverts to a municipality, does the municipality have recourse in tort law? Pursuing a polluter in the law of nuisance or strict liability may be an alternative mechanism available in the future to parties who wish to redevelop (and remediate) a Brownfield. As Posner identifies, the law of nuisance seeks to balance rights by providing an incentive for polluters not to pollute.³⁹⁰ Furthermore, Collins and McLeod-Kilmurray point out, tort actions can "compensate injured victims in ways rarely accomplished by statutes, and can create powerful economic disincentives to chemical carelessness".³⁹¹ Certainly, if the judiciary is provided with full information, this would be an opportunity to re-allocate the social cost associated with contaminated lands. Legislation that provides the public, including adjacent landowners and developers, with an opportunity to provide valuable information on the effects of Brownfields and on the remediation process, will facilitate judge-made law that balances the interests of key players and society as a whole. This change will lead to common law that eliminates the gap between the development of Greenfield and Brownfield properties and targets the remediation and potential liability costs that makes Brownfield redevelopment unattractive.

VI. Conclusion

In order to address the market failure in Brownfields redevelopment, amendments to the *EPA, Planning Act, Municipal Act, and Mortgages Act* must be completed. The recommended amendments are focused on providing a limitation of liability to innocent owners and/or

³⁸⁹ Linden, *Tort Law*, *supra* note 198 at 574.

³⁹⁰ Posner, "Economic Analysis" *supra* note 21 at 63.

³⁹¹ Collins & McLeod-Kilmurray, "Toxic Torts", *supra* note 195 at 3.

developers and the creation of a provisional fund. These amendments are specifically designed to address Coase's theory that the entire context of pollution must be considered in order to address the negative externality of pollution. The recommended amendments target key players in Brownfield redevelopment and impose front-end solutions. Moreover, municipal policy for Brownfields redevelopment programs must embed five guiding principles in the municipal planning of Brownfield redevelopment, including reduction of costs, innovation, sustainability, community engagement, and environmental justice. Finally, the role of the judiciary must be reinforced through increased public consultation and information sharing. The implementation of the recommended amendments to legislation and policy will align the law with Ontario's *Provincial Policy Statements* encouraging Brownfield redevelopment and have the effect of increasing Brownfield redevelopment in Ontario.

Part Six: Summary of Recommendations/Findings: Recommendations

I. Summary of Recommendations/Findings

The recommendations and findings established in this research are summarized below in list form.

1. Extend the limitation of liability found in s. 168.17 of the *EPA* to innocent owners and/or developers who guarantee redevelopment.
2. Amend the *EPA* to limit or cap the liability of innocent owners and/or developers who have guaranteed Brownfield redevelopment (through the amendment listed above with respect to limiting liability for orders under the *EPA*) in respect of contamination of adjacent lands.
3. Amend the *Planning Act* and *Municipal Act* to include mandatory rather than permissive language regarding community improvement plans. Amend subsections 28(7), (7.1), and (7.2) of the *Planning Act* to exchange permissive language for mandatory language requiring grants and loans in respect of community improvement plans. Amend s. 365.1 of the *Municipal Act* to eliminate permissive language and mandate municipalities to pass by-laws to cancel, reduce or refund taxes levied on an eligible properties, which include Brownfields.
4. Amend the *Municipal Act* to require municipal by-laws that require all Greenfield developers to provide a reasonable up-front lump sum development fee. This fee will be placed in a provisional municipal fund available (as per s. 107(1) of the *Municipal Act*) for innocent owners and/or developers of Brownfields. The purpose of this economic and regulatory tool is to promote sustainability and environmental protection. This fund will be used by municipalities to assist innocent owners and/or developers held liable for

contamination of adjacent lands and to provide grants, loans, and incentive-based policies through community improvement plans.

5. Amend the *Municipal Act* to require municipal by-laws to mandate yearly soil and water-table sampling for high-risk contaminating industries.
6. Two alternative amendments include amending the *Mortgages Act* to oblige lenders to require up-front security for high-risk contaminating industries. The security would be held in trust for lenders, but assignable to a municipality for remediation or liability associated with contamination. This requirement could be negated if the business guarantees that certain processes are in place to ensure no contamination will occur. A second alternative is to impose a requirement in the *Municipal Act* for municipal by-laws to require high-risk contaminating industries to set up a remediation fund, which would also be assignable to the municipality as necessary.
7. Provincial and municipal legislation and policy must continue to increase public consultation and engagement. Legislation must mandate public consultation and provide an opportunity for the public, adjacent landowners, and innocent owners and/or developers to voice the intricacies of the effects of planning decisions.
8. Further legislation is required to allow the public, including adjacent landowners and developers, to provide tribunals and boards with information on the effects of Brownfields and remediation. Intervention by stakeholders will facilitate judge-made law that balances the interests of key players in Brownfield remediation and of society as a whole. This change will lead to common law that eliminates the gap between the development of Greenfield and Brownfield properties, and targets the liabilities that make Brownfield redevelopment unattractive.

Bibliography

Legislation

Bankruptcy and Insolvency Act, RSC 1985 c B3.

Brownfields Statute Law Amendment Act, 2001 SO 2001, c 17.

Canadian Environmental Protection Act, 1999, SC 1999, c 33.

Constitution Act, 1867, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Development Charges Act, 1997 SO 1997, c 27.

Environmental Protection Act, RSO 1990, c E 19.

Environment Quality Act, RSQ c Q-2.

Federal Sustainable Development Act, SC 2008, c 33.

Land Titles Act, RSO c 19 L 5.

Municipal Act, 2001, SO 2001, c 25.

Negligence Act, RSO 1990 c N 1.

O Reg 153/04.

O Reg 222/07.

Planning Act, RSO 1990, c P13.

Registry Act, RSO 1990 c R 20.

Smart Growth for Our Communities Act, SO 2015 c 26.

Jurisprudence

10565 Newfoundland Inc v Canada (AG), 2015 CarswellNfld 80, 40 1136 APR 352.

114957 Canada Ltee (Spraytech, Societe d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241

724597 Ontario Ltd., Re 1995 CarswellOnt 977, [1995] OJ No 3713.

Ada Lockridge v Director (Ministry of Environment), Ontario Superior Court of Justice, (DC), Court File No. 528/10.

Allain v Texaco Canada Ltd, 1978 CarswellNB 407, [1978] NBJ No 106, 21 NBR (2d) 681 (CA).

Antrim Truck Centre Ltd v Ontario (Ministry of Transportation), 2013 CarswellOnt 2354, 2013 SCC 13.

Barrette c. Ciment du St-Laurent inc, 2008 CarswellQue 11070, 2008 SCC 64, [2008] 3 SCR 392.

Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 CarswellOnt 6103, 2014 ONSC 288.

Cie petrolier Imperiale ltee c Quebec (Tribunal administrative), 2003 CarswellQue 2315, 2003 SCC 58, [2003] 2 SCR 624. *Imperial Oil Ltd v Quebec (Minister of Environment)*, 2003 CarswellQue 2315. 2003 SCC 58, [2003] 2 SCR (Factum of the Intervener Friends of the Earth).

Entick v Carrington, Common Pleas (1765), 19 State Trials 1029, [1558-1774] All ER Rep 41.

Farago v Ontario Property Assessment Corp., Region No. 31, 2001 CarswellOnt 5665, 42 OMBR 224.

Friesen v Forest Protect Ltd, 1978 CarswellNB 239, [1978] NBJ No 30.

Gagnier v Canadian Forest Products Ltd, 1990 CarswellBC 260.

George v Newfoundland and Labrador, 2016 CarswellNfld 199, 2016 NLCA 24.

Grant v Ontario (Director, Ministry of the Environment), 2009 CarswellOnt 5963, 46 CELR (3d) 213.

Hamilton Beach Brands Canada Inc v Ontario (Environment and Climate Change), 2017 Carswell 13603, 2017 OERT No. 17025.

Hickey v Electric Reduction Co of Canada, 1971 CarswellNfld 30, 21 DLR (3d) 368.

IMP Group International Inc v Nova Scotia (AG), 2013 Carswell 811, 2013 NSSC 332.

Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment), 2013 CarswellOnt 5503, 2013 ONCA 310.

Kerr v Revelstoke Building Materials Ltd, 1976 CarswellAlta 265, [1976] WWD 139.

Kowbel v Ontario Regional Assessment Commissioner, Region for Nepean (City), 1995 CarswellOnt 5212, [1995] OMBD No 1460.

Krek v Ontario (Environment and Climate Change), 2015 CarswellOnt 164, [2015] OERTD No 48.

Macqueen v Sydney Steel Corp, 2013 CarswellNS 918, 2013 NSCA 143.

Midwest Properties Ltd. v Thordarson, 2015 CarswellOnt 18029, ONCA 819, additional reasons provided in 2016, CarswellOnt 1953, 2016 OCA 230, notice of appeal filed 2016 CarswellOnt 1953.

Montague v Ontario (Ministry of the Environment) 2005 CarswellOnt971, [2005] OJ No 868.

Moore v Smith Construction Co, 2013 CarswellOnt11615, 2013 ONSC 5260 at 56-57, reversing Small Claims Court decision at Renfrew, Ontario dated November 3, 2011.

Mortgage Insurance Co of Canada v Innisfil Landfill Corp, 1996 CarswellOnt 1843, [1996] OJ No 1736.

Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities) [1992] 1 SCR 623, 89 DLR (4th) 289 (SCC).

Nova Scotia (Attorney General) v Marriott, 2008 CarswellINS 277, 2008 NSSC 160, 36 CELR (3d) 268.

Rainy River Navigation Co v Ontario & Minnesota Power Co, 1914 CarswellOnt 373, 17 DLR 850.

Rainy River Navigation Co v Watrous Island Boom Co, 1914 CarswellOnt 283, 26 OWR 456.

R v Canadian Pacific Ltd, 1995 CarswellOnt 7238, [1995] SCJ No 62.

R v Castonquay Blasting Ltd., 2013 CarswellOnt 14069, 2013 SCC 52.

R v Consolidated Mayburn Mines Ltd. 1996 CarswellOnt 872, 28 OR (3d) 161 (CA).

Rickards v Lothian, Privy Council [1913] AC 263, 82 LJPC 42.

Ryan v Victoria (City), 1999 CarswellBC 79, [1999] 1 SCR 201.

Rylands v Fletcher, (1866) LR 3 HL 330, [1861-73] All ER Rep 1 (UKHL), Blackburn J.

Sidiropoulos v Sullivan, 2002 CarswellBC 1875, 2002 BCSC 1271.

Smith v Inco, 2010 CarswellOnt 4735, 2010 ONSC 3790, at 37, partially reversed in 2011 CarswellOnt 10141, 2011 ONCA 628, appealed in 2011 CarswellOnt 14872, [2011] SCCA No 539, leave to appeal refused in 2012, CarswellOnt 4932, [2010] 1 SCR xii (note).

Sturge v Imperial Oil Ltd, 1970 CarswellNfld 21, 1 Nfld & PEI 279.

Tridan Developments Ltd v Shell Canada Products Ltd, 2000 CarswellOnt 1969, (2000) 35 RPR (3d) 141 reversed, 2002 CarswellOnt 1, [2002] OJ No 1.

Windsor v Canadian Pacific Railway, 2006 CarswellAlta 633, 2006 ABQB 348.

Secondary Materials

Altus Group, “Record Breaking Year for Greater Toronto Real Estate Market” (27 January 2017) online: <<https://datasolutions.altusgroup.com/record-breaking-year-gta-2017/>>.

Amnesty International Canada, “The Lubicon Cree: A Case Study in Ongoing Human Rights Violations” (2015) Amnesty International Canada, online: <<http://www.amnesty.ca/our-work/issues/indigenous-peoples/the-lubicon-cree-ongoing-human-rights-violations>>.

Benidickson, Jamie, *Environmental Law*, 4th ed (Toronto: Irwin Law Inc., 2013).

Brundtland, GH, and United Nations World Commission on Environment and Development (WCED), *Our Common Future: Report of the World Commission on Environment and Development*, Annex to A/42/427 (Oxford: Oxford University Press, 1987).

Bullard, Robert, Dr., “The Wrong Complexion for Protection: Race and Environmental Justice” *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, The College of Letters and Science in conjunction with Environmental Studies Program, (2006) UC Santa Barbara, University of California Television, online: <<https://www.youtube.com/watch?v=SYVvbs6XsNw>>.

Buzelli, Michael, “Environmental Justice in Canada-It Matters Where You Live” Canadian Policy Research Networks Research Report (December, 2008) Canadian Policy Research Networks.

Calabresi, Guido & Melamed, A. Duncan, “Property Rules, Liability Rules and Inalienability: One View of the Cathedral” (1972) 85 *Harvard Law Review* 1089.

Canada Mortgage and Housing Corporation (CMHC), “Environmental Remediation and Site enhancement (ERASE) Community Improvement Plan (CIP) Initiative”, *Brownfields Redevelopment for Housing, Case Studies Brownfield Initiatives*, (2017: CMHC) online: <<https://www.cmhc-schl.gc.ca/en/inpr/su/sucopl/upload/Brownfield-Redevelopment-for-Housing-in-Canada-Case-Studies-Environmental-Remediation-and-Site-Enhancement-ERASE-Community-Improvement-Plan-CIP-Initiative-Hamilton-Ontario.pdf>>.

Canadian Architect, “2015 Pan Am/Parapan American Games Athletes’ Village, Canary District” (2017) *IQ Business Media*, online: <<https://www.canadianarchitect.com/features/2015-pan-am-parapan-american-games-athletes-village-canary-district/>>.

Canadian Urban Institute, “2013 Canadian Urban Institute Brownie Awards” (2017) Canadian Urban Institute online: <<<http://brownieawards.ca/winners2013/>>>.

Canadian Urban Institute, “Brownie Awards 2017” (2017) Canadian Urban Institute online: <<http://brownieawards.ca/>>.

Center for Energy and Environmental Policy, University of Delaware, “Community Participation is Key to Environmental Justice in Brownfields”, (Winter 2001) *Race Poverty and the Environment*.

Chalifour, Nathalie and Abdel-Aziz, Ahab, “The Canadian Brownfields Manual. Brownfields Redevelopment In Canada: Moving from Liability to Opportunity” (Ontario: LexisNexis 2004).

Chalifour, Nathalie J., “Ecological Economics, Sustainable Land Use, and Policy Changes” eds Chalifour, Nathalie J., Kameri-Mbote, Patricia, Lye, Lin Heng, Nolon, John R., *Land Use Law for Sustainable Development* (Cambridge University Press, 2007).

City of Ottawa, “Economic Development Update Q4 2016”, (January 2017) (Ottawa: City of Ottawa 2017) online: <www.ottawa.ca/en/business/business-resources/economic-development-initiatives/economic-development-update/2016#economic-development-update-quarter-4-2016>.

Coase, Ronald H., “The Problem of Social Cost” (Oct, 1960) 3 *Journal of Law and Economics* 1.

Collins, Lynda M, “Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance” (2007) 30 *Dal. L.J.*

Collins, Lynda & Freitag, Laura J., “Rescuing Rylands: Strict liability and environmental protection in Canada,” (2015) 23 *Tort L Rev* 85.

Collins, Lynda & Mcleod-Kilmurray, Heather, *The Canadian Law of Toxic Torts*, (Toronto: Thomson Reuters Canada Limited, 2014).

Coop, Jack, Fairfax, Jennifer, Welsh, Patrick G., & Hall-McGuire, Rebecca, “Ninety-Nine Problems: Ontario Court of Appeal Releases Significant Decision for Environmental Civil Litigation” (7 December 2015) Osler, online: <<https://www.osler.com/en/resources/regulations/2015/ninety-nine-problems-ontario-court-of-appeal-rele>>.

Daly, Herman E. & Cobb Jr., John B., *For the Common Good: Redirecting the economy toward community, the environment, and a sustainable future*, (U.S.A.: Beacon Press, 1994).

DeMarco, Jerry V., “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?” (2007) 17 *J. Env. L. & Prac.* 159.

Driesen, David, "Economic Instruments for Sustainable Development" eds Benjamin Richardson and Stepan Wood, "Environmental Law for Sustainability: A Reader," (North America: Hart Publishing 2006).

Ecojustice, "A dark day for Sydney residents & environmental justice in Canada" (2016) Ecojustice, online: <www.ecojustice.ca/a-dark-day-for-sydney-residents-environmental-justice-in-canada/>.

Environment Canada, Sustainable Development Office, *Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada*, (Canada: Queen in Right of Canada, October 2010) online: <<http://www.ec.gc.ca/dd-sd/default.asp?lang=En&n=F93CD795-1>>.

Environmental Health Coalition, "Emerging Brownfields" Race, Poverty & the Environment, (2001) 8:1.

Federation for Canadian Municipalities, "Green Municipal Fund", (2017: Ottawa, Federation for Canadian Municipalities) online: <<https://fcm.ca/home/programs/green-municipal-fund/what-we-fund/eligibility/brownfields-funding.htm>>.

Gallager, D.R. & Jackson, S.E., "Promoting community involvement at brownfields sites in socio-economically disadvantaged neighbourhoods" (2008) *Journal of Environmental Planning and Management* 51: 5, 615-630.

Gauvin, Mira & Sheahan, Anne-Marie, "Imperial Oil Ltd. v. Quebec (Minister of the Environment), November 28, 2003", (2003-2016) McCarthy Tetrault, online: <http://www.mccarthy.ca/article_detail.aspx?id=1451>.

Harnay, Sophie & Marciano, Alan, "Posner, Economics and the Law: From "Law and Economics" to An Economic Analysis of the Law" (2009) 31:2 *Journal of the History of Economic Thought*, 216.

Klar, Lewis N., *Tort Law* (Toronto: Carswell Thomson Professional Publishing, 1996).

Lee, Marilyn G., "How Tribunals and Appeal Boards Are Contributing to Advances in Environmental Laws" (2014) 26 *J. Env. L. & Prac.* 249.

Linden, A.M. and Feldthusen, Bruce, *Canadian Tort Law* (9th ed) (Markham: LexisNexis, 2011).

Linden, A.M. & Klar, L.N., *Canadian Tort Law, Cases, Notes, & Materials* (11 ed) (Toronto: Butterworths, 1999).

Livermore, Michael A. and Revesz, Richard L., "Environmental Law and Economics" in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics: Volume2: Private and Commercial Law* (Oxford, Oxford University Press, 2015).

Maragia, Bosire, "The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That Is Needed?" (2006) 18 *Geo. Int'l Envtl. L. Rev.* 197.

Mayeda, Graham, “Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law” (2004) 15 *Colo. J. Int’l Env’tl. L. & Pol’y* 29.

McLaren, J. “Nuisance in Canada” in Linden (ed), *Studies in Canadian Tort Law* (1968), at 320 published in Linden, A.M. & Klar, L.N., *Canadian Tort Law, Cases, Notes, & Materials* (11 ed) (Toronto: Butterworths, 1999).

Megharaj, Mallavarapu & Naidu, Ravi, “Soil and brownfield remediation” (2017) 10:5 *Microb Biotechnol* at Introduction, online: < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5609233/>>.

Miceli, Thomas A., “Economic Models of Law” in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts* (Oxford, Oxford University Press, 2015) 10.

Minister of Environment and Climate Change, *Canadian Environmental Protection Act, 1999 Annual Report for April 2015 to March 2016*, (Gatineau: Her Majesty the Queen in Right of Canada, 2017).

Mitchell, Phillip S., “Estimating Economic Damages to Real Property due to Loss of Marketability, Rentability, and Stigma” *The Appraisal Journal*, (April 2000) 162.

National Round Table on the Environment and the Economy (NRTREE), *Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada*, (Ottawa: National Round Table on the Environment and the Economy, 2003).

Ontario Ministry of Finance, *Ontario Populations Projections Update Spring 2016 Based on the 2011 Census*, (Ontario: Queen’s Printer for Ontario, 2016).

Ontario Real Estate Association (OREA), “Submission to the Standing Committee on Finance and Economic Affairs Pre-Budget Submission (February 2016) (Duncan Mills: Ontario Real Estate Association 2016) online: <<https://www/prea/cp/~media/Fles/Government%20Relations/Issues/Provincial-Budget-Submission.pdf?la=en>>.

Organisation for Economic Co-operation and Development, “The Polluter Pays Principle OECD Analyses and Recommendations” (1992) Environment Directorate, Organisation for Economic Co-operation and Development.

Pardy, Bruce, “Ecolawgic, The Logic of Ecosystems and the Rule of Law” (Canada: Fifth Forum Press 2015).

Posner, Richard, *Economic Analysis of Law*, 9th ed (New York: Wolters Kluwer Law & Business, 2014).

Posner, Richard, “Richard T Ely Lecture The Law and Economics Movement”, (May 1987) AEA Papers and Proceedings.

PPP Canada Inc., “PPP Canada What is a PP3?” (PPP Canada Inc.) online: <<http://www.p3canada.ca/>>.

Rayner, W.B. & McLaren, R.H., *Falconbridge on Mortgages*, (4th ed) (Agincourt, Canada Law Book, 1977) at 643. See also, *First City Development Ltd v Central Mortgage & Housing Corp*, 1981 CarswellNS 96, 130 DLR (3d) 175.

Reevely, David, “City Doesn’t Want to Cover LeBreton Flats clean-up costs, report reveals” (October 27, 2017: Ottawa, Ottawa Citizen) available online: <<http://ottawacitizen.com/news/local-news/city-doesnt-want-to-cover-lebreton-flats-cleanup-costs-report-reveals>>.

Registry Records of Site Condition, Ontario Ministry of the Environment and Climate Change, online: <https://www.lrcsde.lrc.gov.on.ca/BFISWebPublic/pub/searchFiledRsc_search?request_locale=en>.

The City of Hamilton, “Community Engagement for the Waterfront,” (2016) City of Hamilton, online: <<https://www.hamilton.ca/city-initiatives/priority-projects/community-engagement-waterfront>>.

The City of Hamilton, “ERASE Community Improvement Plan”, (2015) The City of Hamilton, online: <<https://www.hamilton.ca/municipal-incentive-programs/brownfieldserase-programs>>.

The City of Hamilton, “Public Engagement Charter”, (2015) The City of Hamilton, online: <<https://www.hamilton.ca/city-initiatives/strategies-actions/public-engagement-charter>>.

The City of Hamilton, “Waterfront Redevelopment”, (2015) The City of Hamilton, online: <<https://www.hamilton.ca/city-initiatives/priority-projects/waterfront-redevelopment>>.

The City of Hamilton, “West Harbour (Setting Sail) Secondary Plan”, (June 2012) The City of Hamilton, online: <https://d3fp1lf1m7bbt3.cloudfront.net/sites/default/files/media/browser/2015-04-20/west-harbour-setting_sail-secondary-plan.pdf>.

The Federation of Canadian Municipalities, *Brownfields*, (Ottawa, Ontario: The Federation of Canadian Municipalities, 2009).

The Ministry of the Environment and Climate Change, “Records of Site Condition Database” (09 October 2017) (Ontario: Ministry of the Environment and Climate Change, 2017) online: <www.lrcsde.lrc.gov.on.ca/BFISWebPublic/pub/searchFiledRSC_search?request_locale=en>.

The Ministry of Finance, “Backgrounder: Ontario’s Fair Housing Plan” (20 April 2017), Government of Ontario, online: <<https://news.ontario.ca/mof/en/2017/04/ontarios-fair-housing-plan.html>>.

The Ministry of Municipal Affairs and Housing, “Brownfields Ontario: Encouraging Revitalisation and Intensification with Brownfield Redevelopment”, (2008-2015) Queen’s Printer for Ontario online: <<http://www.mah.gov.on.ca/Page224.aspx>>.

The Ministry of Municipal Affairs and Housing, “Fact Sheet: Understanding Risk Assessment – Ontario” (2007) Queen’s Printer for Ontario at 1, online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=8997>>.

The Ministry of Municipal Affairs and Housing, “Provincial Policy Statement”, (2005) Queens Printer for Ontario at Preamble p. 1, online: <<http://www.mah.gov.on.ca/Asset1421.aspx>>.

The Ministry of Municipal Affairs and Housing, “Provincial Policy Statement”, (2014) Queens Printer for Ontario at 29, online: <<http://www.mah.gov.on.ca/Asset1421.aspx>>.

The Ministry of Municipal Affairs and Housing, “The Planning Act” Queens Printer for Ontario (2015) online: <<http://www.mah.gov.on.ca/Page1760.aspx>>.

The Ministry of Municipal Affairs and Housing, “The Smart Growth for Our Communities Act, 2015 (Bill 73)”, (2008-2015) Queens Printer for Ontario, online: <<http://www.mah.gov.on.ca/Page11014.aspx>>.

The Ministry of Municipal Affairs and Housing, “The Smart Growth for Our Communities Act, 2015, Highlights of Changes to the Planning Act””, (2008-2015) Queens Printer for Ontario, online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=15071>>.

The United Nations General Assembly, *Report of the United Nations Conference on Environment and Development*, Annex 1 Rio Declaration on Environment and Development, United Nations, (Rio de Janeiro: The United Nations General Assembly, 3-14 June 1992) Vol. I.

Toronto Dominion Economics, “Canadian Commercial Real Estate Outlook“(9 February 2017) online: <www.td.com/economics>.

Treasury Board of Canada Federal Secretariat, “Federal Contaminated Sites Inventory” Queens Printer for Canada, online: <<http://www.tbs-sct.gc.ca/fcsi-rscf/home-accueil-eng.aspx>>.

Scott, Dana N., “Gender-benders”: Sex and Law in the Constitution of Polluted Bodies” (2009) *Feminist Legal Studies*, 17.

Scott, D. N., “What is Environmental Justice?” (2014) *Osgoode Legal Studies Research Paper Series*, Paper No. 72, 10: 16.

Stiglitz, Joseph E. & Boadway, Robin W., “Principles of Micro-Economics and the Canadian Economy” (U.S.A.: W.W. Norton & Company, Inc. 1994).

Stone, Christopher, “Deciphering ‘Sustainable Development’” (1994) 69 *Chi.-Kent L. Rev.* 977.

Sunstein, Cass R., “Richard Posner, Leader of a Legal Revolution”, (2017) Bloomberg View (Opinion Law), online: <www.bloomberg.com/view/articles/2017-09-03/richard-posner-of-a-legal-revolution>.

United States Environmental Protection Agency, “Superfund” (November 9, 2017: United States Environmental Protection Agency) online: <<https://www.epa.gov/superfund/what-superfund>>.

United States Environmental Protection Agency, “Terrestrial Carbon Sequestration”, (February 2011: United States, Environmental Protection Agency) online: <<https://clu-in.org/ecotools/seq.cfm>>.

van Rensburg, Katherine M. (2004) “Deconstructing Tridan: A Litigator’s Perspective”, 15 J. Env. L. & Prac. 85.

Wood, Stepan & Johannson, Lynn, “Six Principles for Integrating Non-Governmental Environmental Standards into Smart Regulation”, (2008) 46 Osgoode Hall Law Journal, 345.

Zuberi, Dan & Taylor, Ariel Judith, *(Re)Generating Inclusive Cities: Poverty and Planning in Urban North America* (New York: Routledge, 2017).