

# The Brownfields Statute Law Amendment Act

## What's in it for lenders?

### Introduction

The *Brownfields Statute Law Amendment Act, 2001* (Brownfields Act) is expected to introduce greater certainty and fairness into the system for dealing with contaminated lands in the province of Ontario. An important feature of the legislation is the provision of statutory exemptions for secured creditors, receivers and trustees in bankruptcy from orders made by the Ministry of the Environment (MOE) when such parties are acting to enforce their rights against the property of a borrower.

While much of the Brownfields Act is not yet in force, sections dealing with secured lenders came into effect on December 1, 2002, together with regulations specific to such parties. The benefits offered to lenders by the new legislation are described below.

### Secured creditor exemption

The Brownfields Act contains, for the first time in Ontario, a specific liability exemption that extends to creditors and their representatives (including their employees, agents and advisors acting on their behalf). "Secured creditors" can take any of the following actions in relation to secured property, without fear of liability under an MOE order:

- 1) Any action taken for the purpose of conducting, completing or confirming an investigation relating to the secured property;
- 2) Any action taken for the purpose of preserving or protecting the secured property, including action to
  - (i) ensure the supply of water, sewage services, electricity, artificial or natural gas, steam, hot water, heat or maintenance,
  - (ii) secure the property by means of locks, gates, fences, security guards or other means,
  - (iii) ensure that the property is insured under a contract of insurance, or
  - (iv) pay taxes due or collect rents owing with respect to the property;
- 3) Any action taken on the secured property for the purpose of responding to
  - (i) any danger to the health or safety of any person that results from the presence or discharge of a contaminant on, in or under the property,
  - (ii) any impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it that results from the presence or discharge of a contaminant on, in or under the property,
  - (iii) any injury or damage or serious risk of injury or damage to any property or to any plant or animal life that results from the presence or discharge of a contaminant on, in or under the property.

This statutory exemption will replace the protection previously afforded to lenders under agreements with the MOE called "Global Agreements," and such agreements will be terminated.

If, in taking any of the above-protected actions, a secured creditor learns that the presence or discharge of a contaminant has created a danger to the health or safety of any person, there is an obligation to report these circumstances to the MOE's Spills Action Centre within twenty-four (24) hours of becoming aware of the situation.

### **Receiver and trustee in bankruptcy exemption**

Another exemption is provided for receivers (whether appointed privately or by the court) and trustees in bankruptcy and their representatives. The Brownfields Act imports into provincial law the protection for such parties that is already found in the federal *Bankruptcy and Insolvency Act*. No MOE order can be issued against a receiver or trustee in bankruptcy with respect to property held or administered by such party unless the order arises from the gross negligence or wilful misconduct of such party.

### **Owner by foreclosure exemption**

Lenders that become the owners of secured property through foreclosure also gain new protection under the Brownfields Act. They are entitled to hold the property for a period of up to five years without liability under an MOE order except in the case of gross negligence, wilful misconduct, or certain contraventions of an environmental statute or permit by the lender occurring 90 days or more following the foreclosure. There is also an obligation on the part of secured creditors who have foreclosed to provide environmental reports that are in their possession to the MOE, however this does not extend to reports commissioned by parties other than the secured creditor or its representatives.

### **Exceptions to the exemptions**

The protection provided by these exemptions is not absolute. In exceptional circumstances, an MOE order can be made against a receiver or trustee in bankruptcy where there has been a discharge of a contaminant and there are certain risks to human health or the environment. Absent gross negligence or wilful misconduct, the receiver or trustee is not required to comply with such an order if it gives notice within 10 days of receipt of the order that it has abandoned or disposed of its interest in the property. An MOE order can be made against a secured lender who has foreclosed on property where there has been a discharge of a contaminant and there are certain risks to human health or the environment.

### **Conclusions**

The long title of the Brownfields Act is "an Act to encourage the revitalization of contaminated land." While it is debatable whether the legislative changes set out in the Act will in fact achieve that objective, a number of the changes to the Act, including the secured lender provisions, are likely to result in a more predictable regime. The amendments described above recognize that lenders are key players in the re-development of contaminated lands. They are intended to help lenders better identify and manage their liability risks and should assist in the process of evaluating and making decisions respecting property that is or may be contaminated.

### **For more information please contact**

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