



RealEstateBrief

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The Ontario Brownfields legislation is designed to encourage development of properties that are contaminated or are perceived to be contaminated by reason of prior use. Annie Thuan reviews some recent and upcoming changes to this legislation that are intended to provide more certainty to developers, users and lenders in respect of such properties.

Celia Hitch concludes her series on restaurant leases. In this third and final instalment Celia discusses particular operational issues and how a lease can deal with these. These matters include noise, odours and parking.

Annie Thuan also provides an overview of Aboriginal land claims and its impact on real estate transactions.

What's New in the World of Brownfields



Annie M. Thuan

Introduction

When the Ontario government enacted the *Brownfields Statute Law Amendment Act* (the “Brownfields Act”) in 2001, more certainty was injected into the process of redeveloping properties that have or are perceived to have environmental contamination (brownfield properties) in Ontario.

Under this brownfields regime, parties (including property owners, developers, lenders and receivers) are provided certain protection against regulatory cleanup orders and cost liability. The phase-in of the new brownfields regime was completed in October, 2005.

In an effort to clarify some of the provisions dealing with regulatory liability protections and to further encourage brownfield development, Ontario introduced the *Budget Measures and Interim Appropriation Act, 2007* (Bill 187) in January of 2007. Bill 187 received Royal Assent on May 17, 2007, although not all sections came into force. In order for many of these amendments to take effect, revisions are required to O. Reg. 153/04, the Records of Site Condition regulation.

This article discusses some of the recent changes in the brownfields regulatory landscape as a result of Bill 187, as well as the proposed cleanup standards currently being considered by the Ministry of the Environment (the “Ministry”).

Existing Regulatory Protections

The Brownfields Act introduced a regime which allowed for protection against certain cleanup orders upon filing of a Record of Site Condition (RSC) on the Environmental Site Registry. Unless there is a change in property use to a more sensitive use, such as going from industrial to residential, the filing of an RSC is voluntary and there is no provision requiring that an RSC be filed.

The benefit of filing an RSC, however, is that it protects certain parties from being issued Ministry cleanup orders. This allows eligible parties to move forward with development of a brownfield site with protection from facing a clean up order in the future. The eligible parties include: (a) the person who filed the RSC and any subsequent owners of the property, (b) occupants of the property at any time after the RSC was

filed, and (c) persons with charge, management or control of the property at any time after the RSC was filed.

Bill 187 Limits Circumstances When RSC Protection May be Lost

There are certain “reopeners” or circumstances in which RSC protection may be lost. Bill 187 clarifies the circumstances in which immunity is lost. Many of these clarifications limit the potential liability of “innocent parties” who did not cause or contribute to the contamination.

Bill 187 amendments relating to reopeners that are now in force include the following:

Change in use: in the past, immunity was lost if there was a change in the use of the property to a more sensitive use. Now, loss of immunity applies only to the person who caused or permitted the change in use *and* who owns, occupies or has charge, management or control of the property at the time of the change.

Contraventions of risk management measures: Where a specific restriction imposed on the property is contravened, RSC protection is lost only for the contravening party.

Emergency orders: RSC protection does not apply where the Ministry believes there is a danger to the health or safety of any person resulting from the presence of a contaminant on the property. Bill 187 clarifies that this reopener applies only to the current owner of the property.

False or misleading information: RSC protection may be lost where the RSC contains false or misleading information and, now, also where there is a false or misleading certification statement in the RSC. It is important to note that in this case, *all parties* lose immunity.

Another significant clarification as a result of Bill 187, which is currently not in force, relates to the off-site migration of contaminants. RSC protection is lost if a contaminant migrates to another property after the RSC is filed. Bill 187 clarifies this reopener so that immunity can still be retained so long as the contaminants migrating off-site do not exceed the prescribed environmental standards and the property owner did not cause or permit the contamination.

New Process for Filing Records of Site Condition

In the past, there were significant uncertainties as to when the Ministry would conduct audits on the information submitted for an RSC, leading to uncertainty in the process. Bill 187 introduces a new process for filing an RSC and the possible audit of that RSC. This amendment has not been proclaimed into force and regulations will be required before this new process will take effect.

Under the new process, when an RSC is submitted, the Ministry will conduct an initial review and must be satisfied that all the required documents have been submitted. Once satisfied, the Ministry will issue a notice of receipt.

Upon issuance of a notice of receipt, the Ministry must decide, within a specified time period, whether to provide the owner with written notice that: (i) the RSC cannot be filed because it was not completed in accordance with the regulations, or (ii) the Ministry intends to conduct a review of the RSC. Alternatively, the Ministry may provide the owner with written acknowledgement that the RSC has been filed on the Environmental Registry. The Ministry cannot request an audit of the RSC after this time period.

Other Bill 187 Amendments

Bill 187 eliminates the option of addressing contamination by means of “horizontal severances” (separating ownership of the property at the surface level so the owner of the air rights does not have liability). *All* contaminants in the land and groundwater that are on, in or under the property and prescribed by the regulations or standards specified in a risk assessment must now be within the standards. This is a significant change because remediating a property using “horizontal severances” was seen as a cost-effective approach. This amendment is now in force.

Bill 187 extends civil liability protection for municipalities and conservation authorities who rely on RSCs in issuing planning approvals and building permits if the RSC is inaccurate. This revision provides additional comfort to municipalities and eliminates the need for peer reviews (hav-

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ing another consultant review the RSC materials), thereby expediting the process and reducing the time municipalities would otherwise take in issuing planning approvals and building permits. This amendment is also now in force.

New Cleanup Standards Being Proposed

On March 23, 2007, the Ministry proposed new clean-up standards for assessing and undertaking cleanup work. These are the technical specifications as to the permissible level of contaminants.

The new standards would replace the current Ministry Cleanup Guideline “Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*,” dated March 9 2004. The Ministry is currently in the process of reviewing the new proposed standards. Amendments to O. Reg. 153/04 will be required before the new standards take effect.

Under the proposed guideline, some of the current standards have become more stringent, for example with respect to benzene and trichloroethylene. In other cases, existing standards have become less stringent, for example with respect to vinyl chloride.

Once the new standards are finalized, the Ministry intends to introduce a phase-in period (an 18-month time period has been discussed) to permit parties already engaged in existing brownfield redevelopment plans to use the existing standards for the filing of an RSC. The new updated standards are not intended to apply retroactively. Rather the updated standards are intended to apply only after the phase-in period has passed.

Conclusion

Bill 187 amendments have injected further certainty into the brownfields regulatory regime and the process of obtaining an RSC. Of significance are the amendments that clarify and limit the circumstances in which RSC protection from Ministry cleanup orders may be lost. These amendments are designed to encourage brownfields development and should reduce some of the risk of uncertainty for developers, owners, purchasers and vendors.

While uncertainty exists regarding the new proposed cleanup standards, parties that are currently engaged in remediation should complete their remediation and file the RSC as soon as possible to ensure that they receive the benefit of the existing cleanup standards.

It is also important to note that Bill 187 does not address civil liability related to contamination, including claims associated with off-site migration to neighbouring properties. As a result, it remains important that vendors and purchasers adequately allocate this risk in any agreement of purchase and sale by conducting the necessary environmental due diligence and ensuring that the appropriate

indemnities, representations and warranties, and perhaps environmental insurance, are included in the purchase agreement.

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Avoiding Heartburn: Restaurant Leases – Part 3



Celia Hitch

Introduction

In the last two Real Estate Briefs, I have written the first two parts of a three-part series on restaurant leases. Twice in 2007 I spoke at conferences on issues which are specific to restaurant tenants and their lease negotiations

which gave me the opportunity to focus on what makes restaurants different and how to address those differences.

In the first of the series, I spoke to the initial and future identity of the tenant and restaurant operator, including the possibility of a franchisee operating the restaurant. In the second article, I discussed use issues, including issues which

often show up with restaurant uses, like patios and liquor licenses.

In this final article, I will be mostly examining the issues which landlords primarily need to remember in negotiating their restaurant leases, to ensure that the nuts and bolts of potential operational issues have been worked out long before the day when the tenant puts up its “grand opening” banner and opens its doors.

Noise and Nuisance Issues

Security is one of the larger issues a landlord will grapple with, both for tenants with patios and for in-line and pad tenants which are open past shopping centre hours. No landlord wants to find out that its roadhouse tenant’s patrons got a bit rowdy on Friday night and so the Saturday morning shoppers arrived to a parking lot littered with beer bottles.

A tenant which may attract some rowdy patrons will likely find its landlord insisting that the tenant be responsible for providing adequate security to its premises. A prudent landlord will want to retain the right to put its own security in place at the tenant’s cost if it does not approve of how the tenant is handling security issues.

On the nuisance side, landlords of enclosed malls need to be particularly sensitive to noise transfer issues. The construction of the property may make it especially sensitive to this type of issue. I once assisted a landlord dealing with a noise issue which was considerably aggravated by the fact that the original building construction had been concrete slab on steel pan – a type of floor construction which tends to transfer sound through it and which can even intensify certain sound ranges – in this case, the bass line from a dance facility.

There is, in fact, a case from Peterborough relating to a 25 year lease signed in the late 1950s. In this case, the landlord leased ground floor space to a restaurant with banquet facilities based on a brochure which showed the restaurant space as part of a single storey plaza building. Subsequently, the landlord constructed a second storey over the restaurant’s space and one

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other tenant’s space and leased it to a bowling alley. According to the evidence, when bowling was going on, the restaurant’s chandeliers shook, the sound of the machines retrieving the bowling balls was clearly audible and patrons of the restaurant could even identify when bowling pins were struck down. Problematically for the restaurant, the bowling alley’s prime hours of operation were also the restaurant’s. In this case, the court found in the restaurant’s favour and assessed damages for lost profits. This is an interesting example, in that it is often the restaurant which has the potential to annoy other tenants, not the other way around. In either event, though, the point is clear

that problems may arise when one tenant’s business causes noise at a level which significantly interferes with another tenant’s business – an issue to watch out for with certain types of restaurants.

Odours and Garbage

As another aspect of any restaurant use, a landlord should expect to spend more time focusing on odours and garbage than might be spent with another type of retail tenant. Cooking food creates smells. Mostly, the smells are pleasant. When the food becomes garbage, the smells can become pretty unpleasant – especially in the summer. Who picks up the garbage, how the garbage is stored, whether the garbage will be refrigerated or unrefrigerated and where it is stored – in a communal facility created by the landlord or within the tenant’s premises – these are all important questions

that need proper consideration before the deal is signed to avoid disputes and costly fixes at a later date. Preventing and/or controlling vermin will also need to be addressed.

As well, although a tenant may believe that its odours of cooking garlic will entice folks to come and eat at their restaurant, the clothing store next door may have some very different views about trying to sell clothes which are permeated with that garlic smell! Landlords need to consider where the restaurant will be placed, how it will be cooking and what precautions it should require from the restaurant tenant to ensure that other tenants are not disturbed by the restaurant’s odours.

Construction Issues

This leads to a larger bundle of issues which are specific to restaurants. Will the tenant be deep frying? If so, is there adequate venting? If not, can it be retrofitted and, if so, who is going to pay for it? This is often a costly retrofit which involves cutting the roof, so clear attention needs to be paid to it when negotiating the deal.

Even if the tenant is not deep frying, not all municipalities permit tenants to cook without venting even if the tenant is just cooking with convection ovens. Other municipalities will only require an ecologizer unit in certain circumstances. The time to ask these questions is before the lease is signed, as the cost differentials are considerable.

Does the space have a gas line? If it was previously used for cooking facilities, it probably will. If it was a shoe store, it probably will not. Again, consideration needs to be given to how much this retrofit will cost and who is going to pay for it.

Along related lines, there should be a requirement in the lease for a regular schedule of grease trap maintenance to reduce the risk of sewage back ups caused by restaurant tenants dumping their grease down the sinks.

Similarly, there needs to be a clear understanding of who is going to clean the venting system and how often, to reduce the risk of fires.

Parking, Valet Parking and Drive Throughs

One last issue which is fairly constant with most food type users is that their customers will place different demands on the parking lots than the customers of other types of retail uses. If the average shopper in a shopping centre spends 45 minutes there, this time may more than double if that shopper stops to eat at a sit down restaurant. Although the gross dollars spent in the shopping centre will inevitably increase and that may justify the impact on parking in the landlord's mind, other retailers – especially destination retailers whose customers want parking close to their

entrances – may protest the amount of time that individual parking spaces are tied up by restaurant patrons.

High end restaurants often offer valet parking, which is one of many reasons why they rarely locate in shopping centres, no matter how high end the centre is. Valet parking drop off and pick up usually happens in fire routes, so clear expectations need to be articulated to avoid conflict between the landlord and the tenant. Dedicated valet parking spaces – which may be acceptable for the generic use of all patrons at the shopping centre – will be resented by the other tenants if they are dedicated solely to the use of one restaurant tenant, since all tenants' common area dollars are paying for the maintenance of those valet parking spaces!

Valet parkers usually require some kind of kiosk on the sidewalk, both to store the car keys and to keep the elements somewhat at bay on bad weather days. Again, not all other tenants are going to relish this kind of exclusive licence use of the common areas that all tenants are paying for.

The last parking and car-related issue is the creation of a dedicated drive through lane. We are starting to see, in Canada, the creation of drive throughs for pharmacies, in addition to food outlets. We also have an increasing number of bank ATM drive throughs but generally we still associate drive through lanes with food uses – especially coffee or other fast food uses.

One obvious issue in creating these is to ensure that cars exiting the drive through lanes can do so safely, without causing back ups. On the other side of the coin, there has to be a safe place for the cars using the drive through to queue up so that they do not create a traffic hazard for other drivers or an obstruction preventing other shoppers from entering or leaving their parking spaces.

The location of the drive through lane also has to make sense within the existing rights in the shopping centre. There is no point in agreeing in the middle of the winter to provide

There is no point in agreeing in the middle of the winter to provide the tenant with a drive through lane, only to discover when spring arrives that a food store's garden centre will effectively block all access to the drive through lane. Shopping centres are complex entities which sometimes have almost encyclopedic layers of rights affecting them. Checking and cross checking are the obvious order of the day here.

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Some Final Thoughts

Most of what restaurant tenants do is sufficiently similar to what other retail users do that they can be processed within

the same context and can sign the same lease form. In approaching the preparation and negotiation of that lease form, though, whether you are the landlord or the tenant, there will always be some issues which will require some extra thinking – lest you too get a case of heartburn from your restaurant lease!

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Aboriginal Land Claims: A Primer on the Elephant in the Room



Annie M. Thuan

Recent events such as those in Caledonia, Ontario demonstrate the devastating effect that unresolved Aboriginal land claims can have on property owners, vendors, purchasers and developers.

Property owners who unknowingly purchase lands that are subject to an Aboriginal land claim may later find that their property value has suddenly decreased significantly. Developers may find themselves in similar situations with their proposed development subject to enormous delays and additional costs as a result of opposition by Aboriginal groups claiming title to that land.

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What is an Aboriginal Land Claim?

A land claim is a formal assertion by an Aboriginal community that it has legal entitlements over a tract of land.

Aboriginal land claims generally fall into two categories:

- 1) comprehensive land claims, which are based on Aboriginal title, and
- 2) specific land claims, which generally include allegations of non-fulfillment of terms under a treaty or improper dealing with reserves as regulated by the *Indian Act*.

In short, comprehensive land claims are claims made by First Nations who have not entered into a treaty with the

Crown and are based on the assertion of continuing Aboriginal title to the lands in question. Aboriginal title arises by virtue of the Aboriginal people’s prior occupation of the lands which were never extinguished or surrendered to the Crown by treaty. Prior to modern times, the treaty process across provincial regions in Canada was inconsistent. For example, while most of the land area of Ontario is subject to

historical treaties, only a small portion of the land area of British Columbia is. Therefore, Ontario has far fewer comprehensive land claims than British Columbia.

Now, a further word or two about specific land claims. Many historical treaties provide that Aboriginal peoples give up their title to the land in exchange for reserves, small annual payments, and the right to hunt and fish off the reserve in certain circumstances. Specific land claims include claims by First Nations of non-fulfillment of

terms under a treaty, the improper administration of lands by the government, that tracts of lands were illegally taken away from reserves, that lands have been illegally occupied or that reserves were not surveyed correctly. Treaty land entitlement (“TLE”) claims refer to lands that the Crown failed to provide to First Nations under the terms of a treaty. According to Indian and Northern Affairs Canada, a total of 277 land claims have been filed in Ontario and 522 have been filed in British Columbia against the federal government.

These claims relate to allegations that the federal government failed to provide lands as required by treaty, took reserve lands without a proper surrender, failed to live up to the terms of a reserve land surrender, failed to protect reserve lands in violation of the Crown's fiduciary duty, or mismanaged First Nation trust funds. There are also claims that certain lands were never given up by treaty; that is, that the First Nation still has Aboriginal title to the lands.

Coping with Outstanding Aboriginal Land Claims

Unless the Aboriginal title or treaty right was extinguished prior to 1982 or surrendered or otherwise given up by treaty, such Aboriginal land claims continue to be a burden on the Crown's underlying title and, in some cases, may even bring into question the validity of the Crown patent.

This was the case in *Chippewas of Sarnia Band v. Canada (Attorney General)*, which involved an action for the recovery of private lands over a large area within the City of Sarnia, which was formerly part of the Chippewas' reserve.

Fortunately for the innocent landowners, the Court found that the Aboriginal title and treaty rights in the disputed lands were extinguished by the application of a modified defence of *bona fide* purchaser for value without notice. The Court considered the Chippewas' 150-year delay in asserting their claim and the reliance of innocent third parties on the apparent validity of the patents. This modified doctrine of *bona fide* purchaser for value without notice was based on balancing the interests of innocent landowners with that of an innocent First Nation, where the First Nation interest could be satisfied by receiving damages from the Crown for a breach of fiduciary duty.

Discovering Outstanding Land Claims

This raises the question of the scope of the title search that would be necessary to preserve the modified defence of *bona fide* purchaser for value without notice. The issue is further complicated by the fact that there is currently no adequate mechanism for searching whether a property is subject to a land claim. The courts have indicated that notice of an Aboriginal land claim is not an interest that is capable of being registered on the

Land Registry in either British Columbia or Ontario pursuant to the applicable *Land Titles Act*. The federal and provincial governments have websites that contain information on the various outstanding land claims alleged by First Nations. These sites, however, are by no means kept current daily nor are they guaranteed to be comprehensive. This area of law is still developing.

Is Title Insurance a Viable Option?

Currently, many standard title insurance policies contain specific exclusions with respect to Aboriginal title claims. Given the risks involved, it would be unlikely that title insurers would be willing to provide coverage for risks related to Aboriginal land claims. There are situations where title insurers may be willing to provide some limited coverage, such as when the First Nation is not seeking a return of the lands but

only compensation, and the negotiations with the government are close to settlement.

Some Final Thoughts

Aboriginal land claims continue to be an active issue for the real estate industry, particularly as development spreads beyond the well-established urban centres of the country, where opportunities for development are increasingly scarce. Regrettably, Aboriginal land claims, whether in the form of Aboriginal title or treaty lands, if left to be resolved between the government and the First Nations on their own, will continue to infuse uncertainty and unpredictability into real estate transactions.

Ed.: *This is an abridged version of a longer paper which was prepared for a presentation delivered by Annie Thuan at the Law Society of Upper Canada, Six Minute Real Estate Lawyer Program in November 2007.*

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Fortunately for the innocent landowners, the Court found that the Aboriginal title and treaty rights in the disputed lands were extinguished by the application of a modified defence of bona fide purchaser for value without notice.

Events

Basic Commercial Leases in Ontario

Presented by Lorman Education Services
Best Western Primrose Downtown Toronto
111 Carlton Street, Toronto, ON
May 28, 2008

Lang Michener Speakers:

Celia Hitch – “Who Are You? Tenant Identity”
William (Bill) Rowlands – “The Turning Tide
– Lease Defaults and Remedies”

The Basic Commercial Leases Conference will focus on how to avoid the pitfalls of commercial leases.

Women in Leadership Conference

Presented by Career Women Interaction
Terminal City Club
837 West Hastings Street, Vancouver, BC
May 29, 2008

Lang Michener Speaker:

Stacey J. Handley – “Women and Power”

The Women in Leadership Conference will focus on several topics including: negotiating effectively, the role of mentoring, and communication strategies.

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