

**FACT SHEET:
Protecting Yourself in Land Purchases**

This fact sheet is intended to provide answers to common questions that a potential buyer may have about contaminated property or brownfields. It is also intended to outline steps a buyer can take to reduce his or her risk of liability for environmental problems.

What is a contaminated site?

What is a brownfield?

If I am interested in buying a property, how do I know it isn't contaminated?

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What is a contaminated site?

A contaminated site is a property that contains substances at levels above set standards or laws. It can also be a property that poses an immediate or long-term hazard to human health or the environment.

What is a brownfield?

A brownfield is a vacant or underused property where past actions have resulted in contamination, and the property has a strong potential to be redeveloped for other uses. Most brownfields share the following common traits:

- some degree of environmental contamination;
- contamination is a result of prior use, often due to past commercial or industrial activity;
- the site is currently abandoned, inactive or otherwise underused; and

- the site is often located in urban settings, where existing municipal services and infrastructure (such as roads, water and sewer service) are in place.

For more information on this topic, please see the Environmental Law Centre's fact sheet on Brownfields.

If I am interested in buying a property, how do I know it isn't contaminated?

The basic legal rule for buying property is "buyer beware." This means buyers must satisfy themselves of the condition of a property before agreeing to buy it. The process of making inquiries and other investigations to determine the condition of property is called "due diligence." Some typical steps of the due diligence process are described below.

(1) Ask questions

Sellers and real estate agents are under certain legal duties to disclose information about the property. A seller is required to disclose defects on the property that cannot be revealed through a careful inspection of the property by a buyer. These defects are called "latent defects."

You should ask the seller and the real estate agent questions about the property's past and current uses. Be very thorough in your questioning. What was the property used for beforehand? Even if you are building a new house on undeveloped land, you should ask the developer or builder what was on the land before it was developed. Industrial uses, oil and gas structures, septic tanks, underground storage tanks and landfills are examples of activities that should raise red flags about the condition of the property. If the seller has done any environmental testing on the property, you should ask for a copy of the reports.

Some types of contamination move easily from one piece of property to another so you should ask about neighbouring properties. You may want to question neighbouring landowners.

(2) Inspect the property

Go to the site and inspect it yourself. Some contamination may be obvious, such as drums of chemicals. Others may be hidden, such as underground storage tanks. Pay attention to neighbouring properties as well.

Ideally, a buyer will have viewed the property before entering into an offer to purchase. An initial viewing may not be enough to determine the property's environmental condition. You should consider including a clause in your offer to purchase that allows the inspection and testing of the property. You can also make the offer conditional upon your acceptance of the property's environmental state.

Most often, the environmental condition of a property is examined by means of an environmental site assessment (ESA). You need to hire an environmental consultant to do an ESA. The consultant will produce a report that will tell you the likelihood that the site is contaminated. More extensive ESAs can be done to tell you the extent of contamination on the property and how to clean it up.

(3) Perform searches and review documents

There are searches that can be done to gain further information about the environmental condition of a property. Some information sources are listed below, but this is not a complete listing of all the types or sources of environmental information that may be available. There is currently no one-stop source or database containing information on the environmental condition of a property. This information is dispersed among different agencies and sources. Buyers should focus on locating documents or sources that might give information about previous and current uses of the property and environmental conditions.

For instance, a land titles search is normally done in all real estate transactions. While doing this search, you may want to do a historical titles search. This can give you information about the past uses of the property.

The Environmental Law Centre carries out two types of searches. One type of search is the “environmental historical enforcement search” which provides information on enforcement action (such as tickets, prosecutions and orders) taken under the *Environmental Protection and Enhancement Act (EPEA)* and previous legislation. The second type of search is the “wellsite reclamation historical search,” which provides information on reclamation certificates and related orders for private lands. There is a fee to have these searches performed. Request forms for these searches are available from the Environmental Law Centre by contacting (780) 424-5099 or 1-800-661-4238 (toll free number), or the forms can be downloaded from the website at <http://www.elc.ab.ca/enforcement/index.cfm> and <http://www.elc.ab.ca/wellsite/index.cfm>.

Municipalities can provide information on orders that they have issued related to violations of their bylaws or orders that they have issued under *EPEA* to clean up unsightly property. The local fire marshall or fire department may provide information about fire prevention orders that have been issued under the *Fire Code* regulations. How to access this information varies from municipality to municipality, as does the cost of the search.

The Petroleum Tank Management Association of Alberta maintains an inventory of petroleum tank locations in Alberta and a partial inventory of abandoned tank locations. There is a fee to have this search performed. Request forms for this service are available from the Petroleum Tank Management Association of Alberta by contacting (780) 425-8265 or 1-866-222-8265 (toll free number), or further information is available on the website at <http://www.ptmaa.ab.ca/>.

The Alberta Safety Codes Council can provide information on orders that require action for compliance with safety codes. There should be no charge for this search. For more information contact the Alberta Safety Codes Council at (780) 413-0099 or 1-888-413-0099 (toll free number).

The Alberta Energy and Utilities Board (EUB) can provide information on wells, pipelines, and other oil and gas structures licensed by the EUB. The EUB may

also have a record of petroleum spill incidents at well and pipeline sites. For more information, contact the EUB, Information Services at (403) 297-8190.

(4) Consider the price

Price may indicate if the land has problems. If the price seems too good to be true, it should raise red flags about the condition of the property. Be careful when buying a property on an “as is” basis for a discounted price. This is the classic buyer beware situation, where a careful buyer should take the time to inspect the property and review documents and information related to the property before submitting an offer to purchase.

What happens if I find out a property is contaminated?

It is ultimately the buyer’s choice whether or not to purchase a particular property. You have to be comfortable with the level of risk associated with purchasing a property with environmental problems. The following are some options to consider if you find out a property is contaminated.

(1) Get more information

If you know or suspect that the property is contaminated, you should ensure that you have an environmental site assessment (ESA) done on the property. You need to hire an environmental consultant to do an ESA. An ESA can indicate if a property is contaminated, the extent of contamination, and the options for cleaning it up. This can help you decide if you still want to buy the property, or help you determine if you want the price reduced to off-set the costs of cleanup.

If you are obtaining financing to buy the property, be sure to ask your lender what information it requires about the property. Some lenders require an ESA to be done if it is suspected the land is contaminated.

You can ask the seller if he or she has done an ESA on the property and ask for a copy of the report. However, be careful about relying on the ESA reports done by the seller. Look at the date on the seller’s report. How old is it? Has there

been any enforcement action (such as tickets, prosecutions or orders) issued since the report was done? What activities have occurred on the land since the report was completed? Could the land have been contaminated after the report was prepared?

You should also be aware that some ESA reports include disclaimer clauses on who can use and rely on the report. Review the seller's ESA report carefully. The report may state that the report can only be used by the seller. This means that if the ESA turns out to be wrong, you could not sue the person who prepared the ESA report for damages.

(2) Modify the offer to purchase

You can add terms and conditions to your offer to purchase to deal with contamination issues. Examples include the right to do an ESA on the property or other investigations, and the ability to back out of the contract if the results are unacceptable. You may also consider adding conditions related to the seller cleaning up the property before or after the sale closes.

You will also want the offer to purchase to include warranties by the seller. Warranties are promises made by one party to another that certain facts or circumstances exist at the time that the warranties are made. For example, the seller may warrant that the property is free from contamination.

A real estate agent can draft special conditions and warranties. Sometimes these are added to the standard real estate agent's form or a unique document can be created specifically for your particular transaction. In some cases, you may wish to have a lawyer with environmental law experience to assist you in developing an offer to purchase if the standard form does not address your concerns.

What should I do if I find out after buying property that it is contaminated?

Alberta Environment should be contacted as soon as contamination is discovered. Reports can be made by phoning 1-800-222-6514 (24-hour toll-free number). Contamination must be reported if it may cause an "adverse effect."

This can sometimes be difficult to determine, so it is better to err on the side of caution and report contamination.

For more information on who can be liable for cleaning up contaminated property, please see the Environmental Law Centre's fact sheet on Brownfields.

Can I sue the seller if I find out the land is contaminated?

If the seller and real estate agent were aware of contamination and failed to disclose it, you may be able to sue them for damages you incur as a result of "misrepresentations" made about the property. A seller is required to disclose "latent defects" which are defects that cannot be revealed through a careful inspection of the property by a buyer. Any other defects do not have to be disclosed, which is why it is so important that you complete your due diligence by inspecting the property and reviewing documents relating to the property.

If disclosure was required and was not given, a seller and real estate agent can be held liable for breach of contract or negligent misrepresentation. You should contact a lawyer to determine how the law may apply to your specific circumstances.

Where can I get more information?

For general information on land contamination and real estate transactions, contact the Environmental Law Centre. As noted below, the Centre has a publication on this topic called *Get the Real Dirt: Contaminated Real Estate and the Law in Alberta*, which is available from our library or for purchase. Further resources are included below.

Environmental Law Centre Library Resources and Online Catalogue:

Armstrong, James E. *et al.* *Contaminated Site Solutions* (Toronto: Insight Press, 2002).

Chiasson, Cindy. *Get the Real Dirt: Contaminated Real Estate and the Law in Alberta* (Edmonton: Environmental Law Centre (Alberta) Society, 2000).

Coburn, Frederick, & Garth Manning. *Toxic Real Estate Manual*, looseleaf (Aurora, ON: Canada Law Book, 1994).

Saxe, Dianne. *A Buyer's Guide to Contaminated Land* (Toronto: Emond Montgomery, 1994).

Online Articles:

Chiasson, Cindy. "Contaminated land – minimizing the buyer's risk" (2001) 16:2 *Environmental Law Centre News Brief* 11, online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=713>>.

Kruhlak, Ron. "Contaminated land: when should we tell?" (1999) 14:2 *Environmental Law Centre News Brief* 11, online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=642>>.

A word of caution about your use of this material

The information provided in this fact sheet is current to July 31, 2006. While every effort has been made to ensure the accuracy and timeliness of the information, the information provided is of a general nature and is not a substitute for legal advice. The Environmental Law Centre encourages individuals to seek specific advice on matters of concern and not to rely solely on the information in this document.

The Environmental Law Centre

The Environmental Law Centre (Alberta) Society is a registered charitable organization that was incorporated in 1982 to provide Albertans with an objective source of information on environmental and natural resources law. The Centre, which is staffed by four full-time lawyers, a librarian and a small support

ENVIRONMENTAL LAW CENTRE



staff, provides services in environmental law education, assistance, research and law reform. The Centre maintains an extensive library and an online catalogue of environmental law materials that is accessible by the public free of charge.

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