

How is your Environmental Indemnity?

Business Law | Corporate & Commercial | Corporate Law | Environmental Protection Act | Ontario | Real Estate

18 October 2023

In Ontario, commercial mortgage lenders can be held liable for environmental issues under certain circumstances, especially if they have taken possession of the property or are deemed to be in control of the property. In such instances, the courts have sometimes found that the lender had a duty of care or responsibility to ensure that the property met environmental standards. This liability can arise under various federal and provincial environmental laws, such as the *Environmental Protection Act* and the *Ontario Water Resources Act*. To avoid such liability, commercial mortgage lenders should conduct thorough due diligence, including environmental assessments, before financing a property. Additionally, they should include specific provisions in the mortgage documents, commonly via an Environmental Indemnity Agreement, that require the borrower to comply with all environmental laws and regulations. Creating clear contractual obligations and monitoring the property's environmental compliance can help mitigate potential liability risks for commercial mortgage lenders in Ontario. It is imperative for lenders to stay updated on the evolving environmental regulations and maintain a proactive approach to risk management in their lending practices.

A mortgage lender should include specific provisions in their environmental indemnity agreement to safeguard against potential environmental liabilities. Some key elements to consider including are:

1. **Acknowledgment of Environmental Compliance:** The borrower should acknowledge and warrant their compliance with all relevant environmental laws and regulations.
2. **Indemnification Clause:** The agreement should clearly state that the borrower indemnifies the lender against any losses, costs, or damages arising from environmental contamination on the property.
3. **Duty to Notify:** The borrower must agree to promptly inform the lender of any environmental claims, violations, or incidents that may affect the property.
4. **Access and Inspection Rights:** The lender should secure the right to access the property for environmental assessments and inspections to ensure compliance with environmental laws.
5. **Remediation Obligations:** The agreement should outline the borrower's responsibility for any necessary environmental remediation and cleanup in the event of contamination.
6. **Insurance Requirements:** The lender can require the borrower to maintain adequate environmental liability insurance to cover potential risks.
7. **Event of Default Clause:** Clearly define the environmental violations or events that would constitute a default, allowing the lender to take appropriate actions as necessary.
8. **Governing Law and Dispute Resolution:** Specify the governing law for the agreement and outline the procedures for resolving any disputes related to environmental indemnification.

It's important for the language in the agreement to be comprehensive and clearly outline the responsibilities and liabilities of both parties to protect the lender from potential environmental risks associated with the mortgaged property.

If you would like your Environmental Indemnity reviewed or if you have any other questions regarding commercial mortgage lending, please do not hesitate to contact me below. To see my previous 1-Minute Reads for Commercial Mortgage Lenders, please visit the Blog portion of my profile at <https://grllp.com/zzlotnick#media-insights>. A PDF version is available to download [here](#).

For more information please contact: **Zev Zlotnick** at **416.865.6601** or zzlotnick@grllp.com

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Zev Zlotnick

Partner

416.865.6601

zzlotnick@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com