

## **BROWNFIELDS' LAW AMENDMENT POTENTIALLY UNFAIR**

By: Radha Curpen, Dan Kirby and Shari Elliott

On May 17, the Minister of Municipal Affairs and Housing introduced Bill 56, an omnibus Bill entitled the *Brownfields Statute Law Amendment Act, 2001*.

After second reading on June 28, the Bill was sent to a standing committee, which received comments and heard oral submissions from a variety of stakeholders over the summer months.

The next phase was the clause-by-clause review earlier this month, which resulted in a considerable number of amendments. On October 16, the standing committee reported to the Ontario Legislature.

We'll discuss just one of the many amendments, the proposed addition of s. 168.7 to the *Environmental Protection Act* (EPA). This section deals with the consequences of filing a record of site condition (RSC).

The changes to this section by the amendments are very subtle and meant to address one of the most controversial issues. This is the key section that provides protection from specified orders if a RSC is filed in respect of a contaminant that was discharged into the natural environment before the certification date and that "was" on, in or under the property "as of" the certification date.

The change from contamination that "is" to "was" on the property and the timing change from "before" the certification date to "as of" the certification date is meant to clarify the protection afforded to ensure that no migration of contamination off-site is covered.

Some commentators had suggested that the addition of off-site protection was an essential element to protect the innocent purchasers. Some have said that there is liability protection in any event, because a truly "innocent" purchaser cannot be ordered to clean up under s. 17 of the EPA since the innocent purchaser would not have caused or permitted the contamination.

Additionally, it has been said that if the property is cleaned up and there is no migration, there is no basis for an order under s. 18 of the EPA. Therefore it is said that the innocent purchaser would have protection from orders regarding past migration. Whether this argument gives sufficient comfort to developers and lenders will only become clear as time passes.

The liability protection from orders provided in the section discussed above will also not apply if, after the certification date (a date that is not later than the date the RSC is filed), any of the contaminant moved from the property to which the RSC relates to another property.

This section serves to clarify that no migration will be tolerated after the RSC is filed.

Even if you are an innocent purchaser, if migration occurs after filing of the RSC, all protection granted under Bill 56 will be lost to all.

Additionally, in s. 168.7, although it has been explicitly pointed out to the Ministry on several occasions, the amendments fail to include protection from orders under s. 43 of the EPA.

If the Bill is left as it is now drafted, the characterization of a substance that may now be present in the ground as either waste or contaminant may determine whether or not an order would be possible despite having gone through the process proposed in the Bill.

This seems unfair, since such a characterization should have no effect on the environmental risk posed by such substances.

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