

## ONTARIO BECOMES THE FIRST PROVINCE TO INTRODUCE BROWNFIELD LEGISLATION

By: Ahab Abdel-Aziz, Dan Kirby, Shari Elliott & Sean Love

On May 17, 2001 the Minister of Municipal Affairs and Housing introduced Bill 56, an omnibus Bill entitled the *Brownfields Statute Law Amendment Act, 2001*. This long-awaited legislation would not only significantly amend Ontario's *Environmental Protection Act* and other relevant statutes but will also form the legislative foundation of the province's "brownfields redevelopment" initiative designed to facilitate the revitalization of contaminated lands in Ontario communities in general and the Toronto Waterfront Olympic Lands in particular. The introduction of this Bill coincides with the government's "Smart Growth" initiative, the stated intentions of which are to promote and sustain a strong economy and strong communities, and to enhance environmental protection.

With Bill 56, the government aims to provide more certainty to the remediation process in Ontario by adopting, and also expanding on, several aspects of Ontario's existing "guideline-based" remediation regime. Prior to Bill 56, the guidance on standards available in remediating contaminated lands was in the Ministry of the Environment's 1996 *Guideline for Use at Contaminated Sites in Ontario* (the "Guideline"). Although the Guideline has been generally accepted as the industry remediation standard, cleaning up a property in accordance with the Guideline did not provide property owners with any concrete protection from regulatory actions or civil lawsuits.

Bill 56 seeks to build on the principles and concepts familiar to Guideline users and provide limited immunity from regulatory action in particular circumstances. Bill 56 also provides that future regulations will set standards for phase one and phase two environmental site assessments and specify qualifications to be held by people involved in performing site assessments and related work under Bill 56 regime. The Bill offers no protection from prosecutions for violations under the Act or third-party civil actions. This Bill if passed will certainly have impact on the structure and the factors that have to be considered in real property and other types of commercial transactions.

### 1. Liability Protection in General

The Bill provides immunity under certain conditions from the imposition of control orders, stop orders, remedial orders, pollution prevention orders, spill orders, and provincial officer orders under the Ontario *Environmental Protection Act* (the "EPA") and specified orders under the Ontario *Water Resources Act* and the *Pesticides Act* (collectively, "Ministry Orders"). Any immunity that is offered by Bill 56 is subject to exceptions, some of which are discussed below.

In this discussion we focus on the immunity offered against Ministry Orders under the EPA. The Bill expressly lists the Ministry Orders that cannot be issued to a particular party or class of persons that qualify for protection. For example, when a Record of Site Condition describing the remediation work completed at a property is filed by a property owner in accordance with the provisions of the Bill, immunity from specified Ministry Orders is provided to the property owner and subsequent owners; current and subsequent occupants; and persons who have or in the future will have charge, management or control over the property (collectively “Connected Parties”).

Bill 56 also provides some certainty that if a party such as a municipality, secured creditor, receiver, trustee in bankruptcy or a person involved in the investigation of a property takes specific actions set out in the Bill in respect of a property (e.g. conducting a site investigation), or, alternatively, if certain parties come into ownership or control of a contaminated property, their conduct or position in and of itself will not necessarily make such a party a target for certain specified Ministry Orders. The liability protection offered by Bill 56 to various prescribed parties is discussed below.

## **2. Liability Protection for Connected Parties**

Connected Parties are eligible for protection from orders under ss. 7, 8, 12, 17, 18, 97, 157 and 157.1 of the EPA if two criteria are met: (i) the remediation of contamination at a property in accordance with standards set out in the Bill and future regulations; and (ii) a Record of Site Condition (the “RSC”) containing information required by the Bill is filed by the property owner with the Ministry of the Environment (the “MOE”). It is important to note that Connected Parties have not been exempted from being issued with s. 43 (waste removal) orders. It should be noted that the immunity available to Connected Parties is not extended to past owners, occupants and persons previously in charge, management or control of the property before the RSC was filed unless such persons satisfy requirements provided for in future regulations. Furthermore, the protection available to Connected Parties is only in respect of remediation that is completed at the owner’s property.

Bill 56 does not extend protection from Ministry Orders to any party that remediates contamination on adjacent properties (i.e. “off-site” contamination). Therefore, if a property owner completes remediation of contamination on its own property and also remediates any contamination that has migrated onto adjoining lands, Bill 56 would offer Connected Parties protection from Ministry Orders in respect of the owner’s property. The only way that a party may benefit and obtain the protection of Bill 56 is if the adjacent property owner files a RSC and the party that completed the off-site remediation somehow qualifies as a Connected Party at the time the adjacent property owner files an RSC.

Notwithstanding its limitations, the liability protection offer by Bill 56 is potentially a significant development. One of the significant barriers to brownfield redevelopment has been the concern of lenders, prospective purchasers and vendors over ongoing environmental liability. The inability to adequately address this concern has often resulted in an unwillingness to sell or otherwise develop a property and in some cases, the potential environmental risks attached to a property have resulted in parties walking away from transactions in order to avoid being saddled with significant exposure to uncertain liabilities.

### **(a) Obtaining Protection**

There are two ways for Connected Parties to qualify for regulatory protection under Bill 56: (i) remediation or (ii) risk assessment.

#### *(i) Remediation and Remediation Criteria*

Under Bill 56, numerical remediation criteria for prescribed substances will be set out in future regulations made under the *Environmental Protection Act*. While not stated on the face of the Bill, the MOE's intention is that these regulatory substance-specific criteria will likely be very similar to, if not the same as, existing criteria listed in Appendix 2 of the Guideline. The substance-specific criteria can then be employed when remediation of a property is undertaken to serve as the threshold that must be achieved in order for the remediation to have been successful in order to qualify for the protection offered by Bill 56.

#### *(ii) Risk Assessment*

The Bill proposes that the Site-Specific Risk Assessment protocol currently found in the Guideline be given statutory recognition as an option for remediation or to be used in conjunction with a partial clean-up. Bill 56 stipulates that the requirements for undertaking a risk assessment will be specified in regulations under the EPA. Upon completion of the risk assessment, the property owner would submit a risk assessment report to an MOE Director for review. Once the Director receives a risk assessment, the Director would be required to provide written notice within a prescribed period of the Director's decision to either accept or reject the risk assessment report. If rejected, the Director is required to provide reasons. There are no consequences if the Director does not provide their decision within the prescribed time period. If the Director rejects the risk assessment, a property owner will not have the right to appeal the Director's decision to the Environmental Review Tribunal. However, Bill 56 allows for regulations to be developed that will establish a dispute resolution mechanism.

## **(A) Certificate of Property Use**

If the Director accepts a risk assessment, he or she has the discretion to issue a “certificate of property use” which can be used to impose terms and conditions that, *inter alia*, direct clean-up activities at the property, impose long-term or short-term engineering controls, and define the nature and extent of the clean-up. In addition, the owner can be required to refrain from using the property for specified uses, prohibited from constructing certain types of buildings and required to post financial assurance as security to ensure that any actions required under the certificate will be completed. The Director also has authority to alter or revoke a certificate of property use at any time. An owner can seek recourse from any terms and conditions imposed by the Director that are perceived to be onerous or from a Director’s decision to alter or revoke a certificate of property use by bringing an appeal before the Environmental Review Tribunal.

The Bill requires that an owner provide a copy of any conditions that restrict the use of the property to every occupant of the property and to “ensure” that every occupant complies with such conditions. This requirement puts a very heavy onus on property owners and an alleged breach of this requirement could lead to charges against the owner.

## **(b) Record of Site Condition**

Under Bill 56, the filing of the RSC with the MOE is the event that initiates the liability protection for Connected Party’s liability protections under the proposed legislation. In order for an RSC to be submitted and accepted a “qualified person” must certify in the RSC that:

- (i) An environmental site assessment was not required by the regulations and in the opinion of the qualified person it is not necessary;
- (ii) An environmental site assessment (either a phase one or a phase two) of all or part of the property has been conducted;
- (iii) If a phase two was conducted, that the property meets the appropriate site condition prescribed by regulation; or
- (iv) A risk assessment was prepared for any contaminants that did not meet the appropriate site standard, that the Director has accepted the risk assessment and as of the certification date the property meets the required standards specified in the risk assessment for the contaminant.

A “qualified person” means a person who meets the qualifications to be prescribed by regulations in order to perform various functions set out under the Bill. The Bill sets out that among other things, an RSC is to contain a description of the property, the name of the owner, and the standards and actions taken to remediate the property. Other requirements will be set out by regulation. Amendments or additions to the RSC requirements could significantly impact on the effectiveness of this whole regime.

In keeping with the Guideline, Bill 56 gives the property owner who has undertaken and completed remediation or a risk assessment, the option of filing a RSC with the MOE, but as stated, the liability protection for Connected Parties only materializes when the RSC is filed which is now a significant incentive to file an RSC. Once filed, the MOE will provide a simple acknowledgment of receipt of the RSC. The Bill proposes that any RSC received by the MOE once the Bill becomes law will be posted on an Environmental Site Registry. The Registry will be accessible to the public.

### **(c) Registration on Title**

Under this Bill, a property owner who submits an RSC that contains details on the completion of a stratified site remediation or a risk assessment will be required to register a certificate on title to the property within 30 days after completion of the work. The certificate will likely contain a general statement about the type of contamination and remediation conducted at the property or it may simply provide for a reference to the RSC posted on the Environmental Site Registry.

If at a later date further remediation work was conducted at the property which resulted in a qualified person being able to certify that the appropriate generic criteria had been met, a new RSC could be filed in the Registry. On request, the Director shall issue a notice to the owner of the property attesting to the fact that the prior registration on title is no longer required. When this notice is registered under the *Registry Act*, the land registrar will delete the previous entries in the title abstract that referred to the certificate.

### **(d) Specified Exceptions to the Protection**

Bill 56 stipulates various conditions and circumstances that will strip away the protection granted by the proposed amendments and “re-open” the issue of liability. These circumstances include:

- (i) The making of false or misleading representations on an RSC;
- (ii) The violation of a term or condition of a certificate of property use;
- (iii) The violation of future soil management or disposal regulations;
- (iv) The occurrence of any new contaminant discharge on, in or under the property after the remediation work is completed and the RSC is accepted;
- (v) Contamination that is on, in or under property other than the property to which the RSC relates;
- (vi) A change in the use of the property to a more sensitive use (e.g. from a commercial to a residential use) unless the remediation standards that apply to the actual use are less stringent than those that apply to the pre-existing use; and
- (vii) An emergency relating to “old” contamination. An emergency is deemed to exist when the Director has reasonable grounds to believe that, as a result of the presence of a contaminant that was on, in or under the property before the certification date, there is a danger to the health or safety of any person,

including a danger to any existing water supply. If an emergency order is issued it will be made publicly accessible by the requirement that it must be filed on the Environmental Site Registry. The application of an emergency order cannot be stayed by the Environmental Review Tribunal.

### **(e) Retroactivity**

A property owner may obtain liability protection under Bill 56 as a result of an RSC that complied with Guideline criteria and was submitted to the MOE before Bill 56 was passed into law. The property owner will be required to certify in the RSC that the requirements prescribed by regulations have been complied with. While this appears to be nonsensical, it is possible that the requirements prescribed by regulation will simply incorporate the current Guideline criteria and no additional requirements will be added.

Even if a property owner is successful in obtaining retroactive liability protection, such protection is only effective from the date that the RSC was filed and not the date on which the RSC was completed. Another potential problem with this provision is that it is only the property owner that can submit the RSC. Therefore, prior owners who completed, but did not submit an RSC may not potentially receive the benefit of liability protection if they have subsequently sold the property to a new owner and it is the new owner that files the RSC.

## **3. Liability Protection for Municipalities**

Municipalities and municipal representatives (collectively “municipalities”) are afforded special protection from Ministry Orders in two ways:

- (1) In respect of non-municipal properties (i.e. private property) that the municipality has taken certain specified actions e.g. to ensure the supply of water and electricity; or responding to danger posed by the presence of a contaminant; and
- (2) A two year period of immunity against Ministry Orders being issued against a property that vests with a municipality pursuant to a municipal tax sale.

### **(a) Non-Municipal Properties**

With respect to the first protection, municipalities are deemed not to occupy or have charge, management or control of non-municipal property as a result any action taken for the purpose of conducting an investigation or responding to any danger or impairment of human health or any damage or injury or risk of damage or injury to property that results from the presence of a contaminant under a property. As well as any action taken by a municipality pursuant to the *Municipal Tax Sale Act*, the *Building Code Act*, the *Fire Protection and Prevention Act* or any other Act prescribed by regulation does not attract liability from Ministry Orders. Under these circumstances municipalities are provided protection from Ministry Orders under ss. 7(1), 8(1), 12, 18(1), 43, 97(1), and 157.1 of the EPA. It is important to note that municipalities have not been exempted from s. 17 and s. 157 orders.

## **(b) Tax Sale**

Municipalities are given the ability to inspect a property subject to a tax sale, are granted partial protection from future Ministry Orders for a two year period, and also have the option, but not the obligation, to acquire title to the property after a municipal tax sale under the *Municipal Tax Sales Act*. If the municipality registers a notice of vesting and acquires title to a property under the *Municipal Tax Sales Act*, Bill 56 provides liability protection from any order under the EPA, except for circumstances that arise from the gross negligence or wilful misconduct of the municipality. However, if the municipality does not sell the property within two years it would be caught in the group of persons who we have referred to as Connected Parties and therefore be subject to the requirements and specific exemptions set out above.

## **(c) Specific Exception**

Additionally, the MOE retains the jurisdiction to issue an order against a municipality under so-called “exceptional circumstances” if the municipality is the owner of property by virtue of the registration of a notice of vesting under the *Municipal Sales Act*. The grounds for issuing an exceptional circumstances order are broader than those for an emergency order and include a danger to human health or safety, a risk of harm to the quality of the environment and the actual or serious risk of injury or damage to property, plant or animal life. The application of an exceptional circumstances order cannot be stayed by the Environmental Review Tribunal.

## **4. Liability Protection for Secured Creditors**

The essential involvement of lenders to provide capital is assisted by protections similar to municipalities being afforded to secured creditors. Secured creditors are afforded special protection from Ministry Order in two ways:

- (1) In respect of properties that the secured creditor has taken certain specified actions e.g. to ensure the supply of water and electricity; or responding to danger posed by the presence of a contaminant; and
- (2) A two year period of immunity against Ministry Orders being issued against a property owned by the secured creditor by virtue of a foreclosure.

### **(a) Secured Creditor not in Possession**

Secured creditors are deemed not to occupy or have charge, management or control as a result of any action taken for the purpose of conducting, investigating, responding to any danger or impairment or any damage or injury or risk thereof and any other action to be prescribed by regulation. Under these circumstances secured creditors are provided protection from Ministry Orders under ss. 7(1), 8(1), 12, 18(1), 43, 97(1) and 157.1 of the EPA. Just as with the municipalities, secured creditors have not been exempted from s. 17 and s. 157 orders.

## **(b) Secured Creditor in Possession**

Secured creditors are deemed not to occupy or have charge, management or control of the property as a result of foreclosure for up to two years and the term of this protection can be extended by the Director. Therefore, secured creditors are given similar protection as is afforded to municipalities, however, if the secured creditor does not sell the property within two years it would be caught in the group of persons who we have referred to as Connected Parties and subject to the requirements and specific exemptions set out above.

## **(c) Specific Exception**

Additionally, the MOE retains the jurisdiction to issue an order against a secured creditor under the exceptional circumstances exception noted above if the secured creditor is the owner of property by virtue of a foreclosure. The application of an exceptional circumstances order cannot be stayed by the Environmental Review Tribunal.

## **5. Liability Protection for Receivers and Trustees in Bankruptcy**

Receivers and trustees in bankruptcy (collectively “receivers”) are protected from any Ministry Orders under any provision of the EPA for property held or administered by a receiver unless the order arises from the gross negligence or wilful misconduct of the receivers or from circumstances prescribed by the regulation. The exceptional circumstances exception noted above is applicable to receivers as well. If an order or certificate of property use relates to a property being administered by a receiver, Bill 56 limits the obligation of the receiver to incur costs to comply with the order or certificate up to the value of the assets held, less the receiver’s reasonable costs for administering the property.

## **6. Liability Protection for a Person who Investigates a Property**

A person who conducts, completes or confirms an investigation in relation to the property (the “investigator”) is deemed not to occupy or have charge, management or control as a result of any action in relation to their investigation. Under these circumstances investigators are provided protection from orders under ss. 7(1), 8(1), 12, 18(1), 43, 97(1), and 157.1. As with municipalities and secured creditors, an investigator has not been exempted from the operation of s. 17 and s. 157 orders.

## **7. Liability Protection for Fiduciaries**

A person who is an executor, administrator, administrator of a will annexed, trustee, guardian, or attorney of property (the “fiduciary”) are not protected from any Ministry Orders issued in respect of fiduciary property under administration. However, the Bill limits the obligation of the fiduciary to incur costs to comply with the order or certificate

up to the value of the assets held, less the fiduciary's reasonable costs for administering the property unless the order arises from the gross negligence or wilful misconduct of the fiduciary.

## **8. Related Amendments**

Bill 56 would also amend the *Ontario Water Resources Act* and the *Pesticides Act*. The amendments to these Acts are analogous to, or complementary to, some of the amendments to the *Environmental Protection Act* pertaining to the liability protection available to various parties.

The proposed amendments to the *Planning Act* require special mention because these amendments will assist with the revitalization of the Toronto waterfront lands that are earmarked for Olympic venues in conjunction with Toronto's bid for the 2008 Olympics.

The proposed amendments to the *Planning Act* provide that municipalities may make grants or loans to tenants, as well as property owners, for the purpose of carrying out community improvement projects. Community improvement project areas are defined to mean a municipality or an area within a municipality that in the opinion of the council is desirable because of age, dilapidation, overcrowding, faulty arrangement, unsuitability of buildings or for any other environmental, social or community economic development reason.

Municipalities are given authority to make grants or loans to registered owners, assessed owners and tenants of lands and buildings within the community improvement project area, and to any person to whom such an owner or tenant has assigned the right to receive a grant or loan towards the costs of rehabilitating the lands/buildings to conform with the community improvement plan to a maximum of the full cost of rehabilitation (including any tax assistance provided under the *Municipal Act*). Pursuant to the proposed amendments, the Minister of Municipal Affairs and Housing would no longer be required to approve the community action plan unless the plan provided for grants, loans or tax assistance.

## **9. Financial Incentives**

Bill 56 would also amend the *Municipal Act* to enable a municipality to provide an incentive to owners in the form of municipal tax relief, which could permit the cancellation of property taxes for the period that remediation is undertaken and, if authorized by the Minister of Finance, school tax relief. The amount of tax assistance can also be shared between local and regional governments. The eligibility requirements that a property owner must satisfy in order to qualify for these incentives will be set by the municipality.

What is noticeably absent from Bill 56 is the establishment of a provincial fund or any other form of provincial economic incentive similar to financial incentives available in U.S. jurisdictions to promote brownfield redevelopment. A significant barrier to redevelopment is the need for developers to have sufficient funds and project financing in order to undertake and complete what can be lengthy remediation programs. Large corporations with significant revenues are capable of such undertakings without necessarily turning to outside sources for funding. However, smaller developers are not as fortunate and may not be able to take advantage of some of the brownfield opportunities that may be available.

## **10. Conclusion**

Bill 56 is a very significant first step. If adopted, Ontario will be the first province to implement a specific brownfield program in Canada. However, the limited extent of protection afforded (particularly the lack of protection for off-site remediation conducted in conjunction with on-site remediation), the potential for liability protection to be lost and the lack of protection against prosecutions and civil actions are concerns. The current form of the Bill only provides a brownfield owner with limited economic incentives and liability protection which, while encouraging, does not adequately address the funding hurdles that brownfield developers need to overcome in order to undertake remediation, particularly at sites that require extensive remediation before value can be realized.

*This memorandum is a general overview of the subject matter and cannot be regarded as legal advice.*

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