

ONTARIO BROWNFIELDS BILL PASSED WITH MIXED OPINIONS

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Property owners, developers, municipalities and other stakeholders did get some of the changes they requested in the final version of Bill 56 passed on October 31, 2001. But the limited protection provided, the broad reopeners threatening that protection, the paucity of economic incentives and other shortcomings make it a mixed bag indeed.

The Ontario government has taken another step in its campaign to encourage brownfields redevelopment with the Legislature's passage of the *Brownfields Statute Law Amendment Act, 2001* (Bill 56) on October 31, 2001. However, the legislation will not take effect until the legislation is declared in force. It seems likely that this will not happen for several months, given that many regulations necessary to its operation must still be developed.

The statute was first introduced by the Minister of Municipal Affairs and Housing on May 17, 2001. When declared in force, it will:

- Set standards for contaminated site cleanups to which it applies;
- Provide access to environmental information through a public Environmental Site Registry; and ,
- Once a property is cleaned in accordance with the new regime and a record of site condition is filed, exempt developers and purchasers from specified Ministry orders.

In addition, the new law will offer protection from a narrower range of orders to secured creditors, receivers, trustees and municipalities. But the statute still provides no liability protection with respect to civil liability, nor does it address regulatory or civil liability for off-site contamination.

Bill 56 received second reading on June 28, 2001. It was then sent to a standing committee. Over the summer months, this committee received comments and heard oral submissions from a variety of stakeholders. Subsequently, the standing committee conducted a clause-by-clause review and submitted its report to the Ontario Legislature on October 16, 2001. The report prompted several amendments to the Bill, which were ultimately included in the statute passed on October 31. Most of these amendments were made for the sake of clarity and most do not substantively change the principles contained in the first reading version.

In this article, we discuss the main amendments that were adopted subsequent to the first reading version which was previously reviewed by Osler's Environmental Group on May 25, 2001.

Overview of the Act

The *Brownfields Statute Law Amendment Act, 2001*, provided immunity to certain categories of persons under certain conditions from the imposition of specified orders under, among other laws, The Ontario *Environmental Protection Act (EPA)*. The immunity is subject to specific exclusions and is limited to the four corners of the property remediated, to the contaminants present at the time of the remediation and to the property use (to a more sensitive land use e.g. from a commercial to residential use) specified in a Record of Site Condition (RSC).

The protection or immunity is triggered upon the filing of a RSC in the Environmental Site Registry under circumstances set out in the *Act* and after remediation (meeting remediation standards to be prescribed by regulation) or a risk assessment is conducted.

Major Amendments

Definitions

The concept of "danger to existing water supplies" was used in the original Bill in conjunction with the concept of "danger to human health or safety" as the criteria to "re-open" the issue of a property owner's liability in the event of an emergency. Although the criteria to "re-open" the issue of liability of municipalities and secured creditors did not expressly make reference to "danger to existing water supplies" it was probably included by implication in the concept of "impairment of the quality of the natural environment for any use that can be made of it". The legislation adds a subsection to Section 1 of the EPA, which provides that, by definition, a "danger to human health or safety" includes a "danger to existing water supplies that are used for human consumption".

Part XV.1, which is added to the EPA by Bill 56, contains a new definition of "owner". The new definition gives flexibility in determining who is an owner for the purposes of the *Act*, but it is not clear why such flexibility was required in light of the provisions of section 168.7 and the scope of persons granted protection under that section. It seems likely that the intent was to enable protection, for example, for the beneficial owners of property where the legal owner of a property is a trust. However, the open-ended power to further define additional persons as "owners" leaves room for the Ministry to act on the results of future debates over which persons are deserving of protection under this regime.

Record of Site Condition

Significant amendments were made to the wording of the new Section 168.7, which relates to the consequences of filing an RSC, but little substantive change appears to have resulted. There is still not protection regarding contaminants that migrate off-site either before or after the certification date (to be determined in accordance with the Regulations) and there is no protection for discharges occurring after the certification date.

This is the key section that will provide protection from specified clean up orders after the filing of an RSC. In the original version of Bill 56, the fact that it did not provide off-site protection and protection for discharges occurring after the certificate date was clearly stated in what were then proposed as subsections (3) and (4) of Section 168.7.

In this legislation as passed, the wording of Section 168.7(1) has been changed to ensure that by the wording of Section 168.7(1) the same result is accomplished. Section 168.7(1) now provides that the protection afforded is applicable only to contamination that was both “discharged into the natural environment before the certificate date” and that was “on, in or under the property as of the certification date”.

As a result, contaminants that had been present on the property before the certification date but which had migrated to other properties before the certification date would not be included in the protection afforded since they would no longer be present at the property on the certification date. Similarly, discharges that occur subsequent to the certification date would not be included since the discharge to the natural environment would not have occurred before the certification date. A revised subsection (4) was added to clarify that the protection does not apply if contaminants that were on-site as of the certificate date subsequently migrated to a neighbouring property. It should be noted that even if the owner is an innocent owner, where any migration occurs after the filing of the RSC, the protection granted under Bill 56 with respect to the migrating contaminant will be lost.

Some commentators have suggested that the addition of off-site protection under the new Section 168.7 is essential to shield innocent purchasers of brownfield properties from liability related to migration of contamination. Others have said that such liability protection already exists: if the purchaser truly is “innocent”, that purchaser cannot be ordered to execute a cleanup under Section 17 of the EPA since they would not have caused or permitted the contamination.

It has also been said that if no further migration of contaminants to neighbouring properties is occurring or is likely, then there is no basis for an order under Section 18 of the EPA, which deals with preventive measures. From this, it is concluded 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. It would seem that a Section 18 order against an

innocent owner is still possible if there is a continuing risk of off-site migration of contaminants after the innocent owner acquires the property.

Moreover, although explicitly cautioned over the need to provide protection from orders arising under Section 43 of the EPA (relating to the removal of waste), the Ministry failed to include appropriate changes to Bill 56. In the regime as adopted, the simple characterization of a substance that may be present in the ground as either “waste” or “non-waste” may determine whether or not protection from orders is afforded. This result seems unfair since such a characterization may have no actual bearing on the environmental risk posed by such a substance.

A new transitional provision has been added at Section 168.4(6). This provision provides that, if an RSC is submitted before this section of the Bill comes into force, the owner of the property may file the RSC in the Environmental Site Registry (and obtain the protections offered under the statutory scheme) once the Minister has, in writing, acknowledged receipt of a copy of the RSC and the owner files a notice in the Registry certifying compliance with the requirements yet to be prescribed by regulation.

The potential problems with the provision are largely self-evident. However, if the requirements prescribed by the regulations simply incorporate the current Ministry of Environment’s 1996 *Guideline for Use at Contaminated Sites in Ontario*, and no additional requirements are added, this provision could have the intended effect of allowing owners who previously submitted RSCs to the Ministry under the Guidelines regime to obtain the protection provided under the new statutory regime.

Certificate of Property Use

A certificate of property use may be issued by the Director once a risk assessment (RA) is accepted. This certificate may impose, among other things, conditions on remedial activities and land use restrictions.

A welcome limitation on the powers of the Director to cause work to be performed when accepting an RA and issuing a certificate of property use has been added. Under the original draft, the Director had unfettered discretion to require that work be performed to “prevent, eliminate or ameliorate” any “adverse effects on the property”. While the section granting that power has remained, a new subsection has been added that prohibits the Director from requiring an owner to take any action needed to reduce the concentration of a contaminant below the level specified in the risk assessment submitted by the owner. The scope of the limitation on the Director’s powers in this respect is unclear when one considers that the limitation only applies to “concentrations of contaminants” while the power to require action applies to “adverse effects”. Still, it is clearly a step in the right direction.

Risk Assessment

In the first reading version of the Bill, Section 168.9 provided that where a stratified clean up or a risk assessment approach was used, the owner was required to register on title a certificate regarding the property's condition. This section also provided that transactions relating to properties where a risk assessment was performed, would be voidable if a copy of the record of site condition were not given to a party to the transaction. In response to critical comments from the stakeholders, the Ministry removed this section.

Notice Obligation

Certain categories of persons, such as municipalities, secured creditors, receivers and trustees, have an obligation to give notice to a provincial officer if they become aware of circumstances prescribed by the yet-to-be-promulgated regulations.

Where appropriate throughout the Bill, the wording has been changed to specify that it is the principals and not the various defined representatives who are obligated under the new regime to give notice to a provincial officer if he/she becomes aware of circumstances prescribed by the regulations. The result is that the municipality or the secured creditor or the fiduciary is the party responsible for giving notice – not their representatives. However, this obligation is triggered if any circumstances prescribed by the regulations, becomes know by either a representative or the principal. Once again this amendment was made solely to specify which party bears the notice burden; it does not change the circumstances in which the obligation to notify arises.

Municipalities

One of the two types of protection afforded to municipalities occurs when a municipality becomes an owner by virtue of a notice of vesting as a result of unpaid taxes. In this scenario, the municipality is protected from future administrative orders for a period of time, without having to file a record of site condition as an owner. Subsection 168.14(4) is amended to extend the period of protection provided to a municipality in this scenario from two years to five years. Ontario municipalities requested this amendment to ensure they would have protection from liability for a period sufficient to enable them to investigate and, if appropriate, remediate a property to enhance the probability of its sale.

Subsection (1.1) has been added to Section 168.15 and subsection 92) has been revised. These sections limit the Director's powers to issue orders against municipalities under the "exceptional circumstances" re-opener where an RSC has been filed on a property. This re-opener is broader than the "emergency order" re-opener for owners. These new revisions effectively provide that the protection from orders that is provided to municipalities parallels the protection provided to owners where an RSC has been previously registered by an owner.

Secured Creditors

One of the two types of protection afforded to secured creditors arises when a secured creditor forecloses on a property. The creditor will be deemed not to occupy or have charge or control for five years and is thereby protected without having to file a record of site condition. Therefore, secured creditors now have five years' (it was two in the original Bill) immunity from any orders under any provisions of this Act with respect to the property unless the order arises from the gross negligence or wilful misconduct of the secured creditor (or its representative) or as a result of circumstances prescribed by the regulations.

The second type of protection given to secured creditors, deals with the ability of secured creditors not in possession to take certain actions without attracting liability under most administrative orders. The actions that have been specifically listed as not subjecting a secured creditor to the specific orders listed have been expanded to include the paying of taxes and collection of rent.

Furthermore, revisions to section 168.21 relating to the "exceptional circumstances" re-opener where an RSC has been filed on a property correspond to similar ones noted above for municipalities.

Financial Incentives

The portion of the legislation dealing with municipal tax amendments empowers municipalities to provide owners with municipal tax relief in certain instances. The definitions of what constitutes a development period and a rehabilitation period have been changed in Section 442.7(1).

Specifically, the changes clarify the expenses that are eligible for recovery through real property tax holidays. The wording describing eligible expenses has changed from "the costs of rehabilitating the property" to "the costs of any action taken to reduce the concentration of contaminants on, in or under the property". The change is meant to clarify that the costs of a site investigation and site assessment are recoverable if a cleanup is required and actually implemented.

This change makes it clear that spurring redevelopment of brownfields is not the only goal under this legislation. To qualify for the financial incentives available under the legislation, the environment must also be improved. Before the costs are eligible for recovery, concentrations of contaminants must have been reduced – not just managed or controlled. This requirement significantly limits costs eligible for recovery. For example, the cost of a risk assessment, without achieving some form of reduction in the concentrations of contaminants, would not qualify. In addition, it does not appear that the intent is to permit the costs of a risk assessment, conducted in conjunction with a

reduction in concentration of contaminants, to qualify. The result is that careful segregation and tracking of costs may be required.

Nor has the amendment in any way extended in the length of time that expenses can be claimed. The maximum length of the rehabilitation period is still capped at 18 months. However, it is important to note that the eligibility period for cost recovery includes the development period as well as the rehabilitation period. The development period will be defined on a case-by-case basis and implemented by the passing of a municipal by-law. There is no cap on the maximum length of the development period.

The extent of financial assistance potentially available during the eligibility period has been expanded in section 442.7(3). The potential real property tax relief available has been expanded to include the provincial component of school taxes along with the municipal portion of taxes. However, the school tax relief is still subject to the approval of the Minister of Finance.

During the clause-by-clause review, a representative of the Ministry of Finance was questioned on whether the government considered the recommendations made by many stakeholders for the creation of a monetary fund similar to those created by many American states. The Finance representative advised that the government did not contemplate developing a fund at this time because the number, size and state of contamination of sites in the province are currently unknown. Until the information referred to above is available, the government believe it would be impossible to develop a fund that would be meaningful.

Significant First Step

As mentioned at the outset of this article, proclamation of Bill 56 is not expected to occur for quite some time – until many regulations are formulated and adopted. These include regulations to adopt the Clean-up Guideline, delegation and implementation of the Environmental Site Registry, the designation of qualified persons, and the definition of the “certification date”.

This article has reviewed many, but not all, of the amendments adopted as a result of the clause-by-clause review of Bill 56. While we have not reviewed the changes to other, related legislation, it should be noted that these statutes have been amended to reflect the changes outlined above.

It is still our view that Bill 56 is a very significant first step toward facilitating brownfields redevelopment. However, the amendments adopted have not allayed the concerns expressed by the authors and others when this Bill was first introduced in May of this year. The limited extent of protection afforded, the broad re-openers threatening that protection, and the lack of protection against civil action are concerns that have yet to be addressed. Most importantly, the amended Bill continues to come up short, as it provides a few economic incentives to developers. The funding offered does not come close to adequately relieving the financial burdens borne by brownfield developers.

Finally, take note that, to the extent compliance with the procedure for RSC registration is mandatory, the *Act* represents a significant change to the regulatory controls imposed in regard to contaminated lands in Ontario. Viewed in that light, the *Brownfields Statute Law Amendment Act, 2001* may have been packaged as beneficial for businesses dealing with contaminated lands in Ontario – but to some it may be considered a step back.

Note: All reference to section numbers are to the first reading version and not the *Act* which will have been renumbered.

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