

PROPOSED 'BROWNFIELDS' LAW AIMED AT REVITALIZING LANDS

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On May 17, Ontario's Minister of Municipal Affairs and Housing introduced Bill 56, 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 also form the legislative foundation of the province's "brownfields redevelopment" initiative, designed to facilitate the revitalization of contaminated lands generally and the Toronto Waterfront Olympic Lands in particular.

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.

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.

At present, the guidance on standards available in remediating contaminated lands is 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 has not provided 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 provided limited immunity from regulatory action in particular circumstances. It 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 the Bill 56 regime. The bill offers no protection from prosecutors for violations of the Act or third-party civil actions. This bill, if passed, will certainly have impact on the structure and 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 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 offered by Bill 56 is subject to exceptions, some of which are discussed below.

This article focuses 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 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 (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 to various 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 the 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 (MOE).

It is important to note that Connected Parties have not been exempted from being issued with s. 43 (waste removal) orders. The immunity available to them is also 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 order to any party that remediates contamination on adjacent properties (ie. “off-site” contamination). Therefore, if a property owner completes remediation on its own property and also remediates any contamination that has migrated onto adjoining lands, Bill 56 would offer Connected Parties protection from Ministry Order 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 a RSC.

Notwithstanding its limitation, the liability protection offered is potentially significant. One significant barrier 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.

The authors are members of the Environmental Law Group at Osler, Hoskin & Harcourt LLP. This article is taken from a longer discussion of the topic which can be found in the MEDIA section of the osler.com website, under "News from Osler".