

## **BROWNFIELDS LEGISLATION**

By: Michael Bowman, Radha Curpen, Dan Kirby and Shari Elliott

Most municipalities have brownfields – lands previously used by heavy industry, but now lying underused or completely dormant. Certainly, many of these properties are located in what would be very attractive areas for redevelopment. And, while municipalities would like to see these properties active again, their historical use has left them contaminated – or perceived to be contaminated – sometimes to the point where it is uneconomical to consider cleaning them up to the generically applicable standards.

### **New Ontario Legislation**

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*. The introduction of this Bill coincided 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 Brownfields legislation forms the legal foundation for Ontario's brownfields development initiative, designed to facilitate the revitalization of contaminated lands in Ontario communities.

The Act was introduced prior to the Olympic Committee's decision that Beijing, and not Toronto, would host the 2008 Olympics. Many are of the view that it was the potential need to redevelop Toronto's waterfront to accommodate an Olympic Village that spurred the introduction of the Bill at that time. However, even though on July 13, 2001, the Olympic bid was awarded to Beijing, the Ontario Government has pushed ahead with the legislation.

The Act was passed by the Legislature on October 31, 2001, but it will not take effect until a date to be determined by proclamation. It seems likely that it will not be proclaimed in force for at least several months, given that many of the regulations necessary for its implementation must still be drafted.

Once declared in force, the Act will:

- Set standards for contaminated site cleanups to which it applies;
- Provide access to environmental information through a public Environmental Site Registry;
- Provide a procedure to protest developers and purchasers from specified ministry orders relating to on-site conditions if a property is cleaned in accordance with the new regime – which can include a site specific risk

assessment (SSRA) as opposed to cleaning up to the generic criteria- and a record of site conditions is filed;

- Offer protection from a narrower range of orders to secured creditors, receivers, trustees and municipalities; and
- Provide a mechanism for municipalities to offer property tax reductions or holidays to developers as an incentive to encourage brownfield development.

While the Act appears to be a positive step in encouraging brownfield development in Ontario, it does not limit potential liability for two of the more significant risks involved in brownfield development. The Act provides no protection from civil liability (either as a result of on-site or off-site issues), nor does it provide any protection from orders relating to off-site conditions.

From the perspective of municipalities, it will be important to fully consider the impact of this legislation once declared in force.

## **Overview**

With the brownfield legislation, 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 this Act, the guidance on standards available in remediating contaminated lands was set out predominantly in the Ministry of the Environment's 1996 *Guidelines 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* does not provide property owners with any concrete protection from regulatory actions or civil lawsuits.

The brownfield legislation seeks to build on the principles and concepts that are familiar to *Guideline* users, and provide immunity from certain regulatory action in particular circumstances. The Act provides that future regulations will set standards for phase one and phase two environmental site assessments, and will specify the qualifications to be held by people involved in performing site assessments and related work under this regime. The Act offers no protection from prosecutions for violations under the Act or third-party civil actions.

## **Protection**

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

The Act 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 (RSC) – describing the remediation work completed and the post-remediation (or post-SSRA) conditions present at a property – is filed by a property owner in accordance with the provisions of the Act, immunity from the 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 referred to as “connected parties”). The Act also provides the power to designate that prior owners may obtain protection in circumstances prescribed by regulation.

Municipalities and municipal representatives (collectively referred to as “municipalities”) are afforded special protection from specified ministry order in situations where a municipality has taken certain specified actions – for example, inspecting the property, ensuring the supply of water and electricity, responding to a danger posed by the presence of a contaminant, or securing (non-municipal property) private property.

### **Non-Municipal Properties**

The Act gives municipalities the power to conduct inspections, including environmental site assessments, in order to determine if it wishes to acquire a property that has been subjected to unsuccessful efforts to sell for tax arrears. Municipalities are deemed not to occupy or have charge, management or control of non- municipal property as a result of any action taken for the purpose of conducting such 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, any action taken by a municipality pursuant to the *Municipal Tax Sales Act*, the *Building Code Act*, the *Fire Protection and Prevention Act* or any other Act to be prescribed by regulation will not attract liability to specified ministry orders. Under these circumstances, municipalities are provided protection from ministry orders under sections 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 orders under sections 17 and 157.

### **Tax Sales**

Protection from specified orders is also afforded where a property vests in a municipality pursuant to a notice under the *Municipal Tax Sales Act*. During the five year period (which may be extended by the ministry) following vesting the municipality has protection from the issuance of specified ministry orders ‘with respect to the property’ unless the order results from gross negligence or wilful misconduct of the municipality (or from circumstances to be specified by regulation). However, if the municipality does not sell the property within five years, it would be caught in the group of persons we have referred to as “connected parties”, and therefore subject to the requirements and specific exemptions set out in the regime for property owners. Of course, during that five-year period, the municipality could comply with the regime relating to registration of

an RSC (described under “Protection” above) and obtain those protections that are afforded to property owners in general.

Note that the protection from orders is only afforded to orders “with respect to the property”. This wording appears to limit the protection to the four corners of the property. Therefore no protection is offered with respect to orders regarding “off-site” properties if, for example, contaminants have migrated from the property before the vesting, or they continue to migrate from the property after the vesting.

The changes made under the Act give municipalities the power to inspect (which includes an environmental site assessment) a property subject to a tax sale without attracting regulatory liability. They are also given the option, but not the obligation, to acquire title to a property after an unsuccessful municipal tax sale under the *Municipal Tax Sales Act*.

Despite the protection described above, the ministry retains the power to issue an order against a municipality under so-called “exceptional circumstances”, if the municipality is the owner of the property by virtue of the registration of a notice of vesting under the *Municipal Sales Tax Act*. The grounds for issuing an exceptional circumstances order are broader than those for an emergency order, which applies to owners receiving protection under the RSC regime described above. The grounds include the existence of 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. With such broad circumstances under which an exceptional circumstances order can be issued, the efficacy of the protection afforded with regard to properties vesting in municipalities under the *Municipal Tax Sales Act* may be largely illusory.

### **Civil Liability**

Despite the fact that the ministry has provided itself with protection from civil liabilities arising from any inaccuracies in an RSC, the brownfield legislation does not provide any specific protection from civil liability for municipalities who may be forced to rely on RSCs in permitting and approval matters.

The fact that the ministry thought it necessary to provide itself with such protection from liability suggests that the ministry felt that it would be exposed to liability in the absence of that provision. If the apparent ministry conclusion in this regard is correct, it seems likely that municipalities relying on the accuracy of RSCs could be similarly exposed. It seems inconsistent that the ministry would not have provided similar protection to the municipalities.

In light of this inconsistency, municipalities that receive RSCs prior to approving development applications should determine whether they have a duty to consider the accuracy of the RSCs submitted. If such an obligation does exist, municipalities must assess how far they must go to properly discharge that duty.

This issue of the extent of a municipality's responsibility is exacerbated in circumstances where an SSRA is included as part of the RSC process, and where the ministry review and accepts the risk assessment. Presumably, the ministry's protection from liability arising from inaccuracies still applies, but no similar protection is offered to municipalities that rely on both the RSC and the fact that the ministry has reviewed and accepted the SSRA. If the RSC/SSRA contains inaccuracies, and the property in question is inappropriate for the development approved by a municipality after reliance on an SSRA approved by the ministry, then the municipality, but not the ministry, might be exposed to a regulatory negligence type action.

### **Financial Incentives**

The 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 improvements projects. Community improvement project areas are defined to mean a municipality or area within a municipality that, in the opinion of the council, it is desirable to so designate 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, 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*). The Minister of Municipal Affairs and Housing would no longer be required to approve the community action plan unless the plan provides for grants, loans or tax assistance.

The brownfields legislation would also amend the *Municipal Act* to enable a municipality to provide an incentive to owners in the form of municipal property tax relief, which could permit the reduction or cancellation of property taxes for the costs of remediation (remediation in this context effectively excludes the costs associated with the completion of an SSRA) 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 of these incentives will be set by the municipality.

One of the loudest and most common criticisms of the brownfields initiative is the lack of financial incentives. Many stakeholders requested that the provincial government establish a provincial fund or other form of provincial economic incentive, similar to the financial incentives that have been made available in the U.S. to promote brownfield redevelopment. A significant barrier to brownfield redevelopment is the need for developers to have sufficient funds and project funding to undertake and complete what can be lengthy and expensive remediation programs.

### **Important First Step**

While the new legislation has been highly criticized by many as not going far enough most are willing to acknowledge that this is a significant first step. Once proclaimed, Ontario will be the first province to implement a specific brownfield program.

However, the limited extent of protection afforded (particularly the lack of protection from 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 significant concerns. Moreover, the limited economic incentives and liability protection, while encouraging, do 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.

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