

2006-2007 Year in Review: Ontario

**Environmental and Energy Conservation
Initiatives**

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Energy and the Environment
CBA National Environmental, Energy and Resources Law Section
Third Annual Summit
Montreal, Quebec
April 28, 2007

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Introduction

In the last year, in the midst of enhanced attention being paid to global warming in particular and the environment in general, the Ontario Government was extremely active in putting forward an array of new legislation, regulations and initiatives in virtually all areas of environmental law, in many cases combining them with energy conservation initiatives. The impact of such initiatives and how much they will actually change the landscape remains to be seen. While neither the particular initiatives nor the cumulative impact of them are expected to be major, they nevertheless amount to progress, and having space for these initiatives on the public agenda is itself a positive sign.

The major initiatives are outlined below. In addition, there were also harbingers of increased environmental litigation in years to come, through a significant court decision on an environmental class action certification case, and increased Ministry prosecution activity.

Environmental Penalties Regulations

Ontario adopted new legislation in 2005 which provided for a system of administrative monetary penalties, called Environmental Penalties (“EPs”) for contraventions of environmental legislation and regulations, in the *Enforcement Statute Law Amendment Act 2005*.¹ Following up on that legislation, the Ontario Minister of the Environment published for consultation in late 2006 draft regulations to govern the imposition of environmental penalties.

The idea behind environmental penalties was to develop prescribed penalties that would be clear, objective and measurable, while taking into account various relevant factors. The draft regulations put forward by the MOE would have it consider the gravity of a particular violation, based on both the type of violation and the seriousness of its impacts, any monetary benefit from non-compliance, the compliance history of the subject company and steps taken to correct the violation. It permits potential reductions to EPs for appropriate prevention and response measures and for having an appropriate environmental management system in place. In addition, a company subject to an environmental penalty could also reduce the gravity component of the environmental penalty by up to 75% by entering into a settlement agreement to invest at least triple the

¹ S.O. 2005, chapter 12, Royal Assent was given June 13, 2005.

amount of the reduction in a project that produces tangible benefits to human health and/or the environment.

Brownfields Legislation Reforms

Under Ontario's existing Brownfields regime², a limited measure of protection from ministerial clean up orders is allowed to former and current property owners when a record of site condition ("RSC") has been filed which contains confirmation from a qualified person (ie. an environmental consultant or engineer) that a site has been assessed and remediated as necessary and meets appropriate site condition standards for its particular property use. RSCs often contain measures to ensure ongoing monitoring and risk management. This Brownfields development protection is subject to various qualifications, referred to as "re-openers", which mitigate the protection in various situations, including:

- a. if the RSC contains false or misleading information;
- b. if historical contamination migrates to another property;
- c. if there is a change in use; and
- d. if a specified risk management measure is not carried out.

These reopening conditions in the 2001 legislation have been criticized as being too restrictive, and in response, the Ontario government has recently announced an intention to narrow the scope of various re-openers, thus enhancing protection from ministerial orders.

The proposed legislation will deal with situations where an RSC is determined or believed to be inaccurate, to allow for removing RSCs or preventing their filing when the Ministry reviews them and finds them wanting. With regard to the off-site migration of historical contamination, it will provide protection for persons who are not responsible for causing or permitting the contamination in the first place, depending on the level of sensitivity of the use for which the RSC is filed. If the property meets standards for sensitive property use (the most stringent level of protection) then protection from orders would continue as long as the migration is not at a concentration that exceeds those standards. The same would apply if there is not a more sensitive property use within the vicinity of the property.

Also being contemplated is a provision that the applicable site condition standards would be those that apply at the time of filing the RSC, meaning that a change in standards would not expose anyone to the risk of losing protection from orders in relation to offsite migration.

In addition, changes are contemplated that would ensure that owners of property are not put at risk of losing their protection from orders for subsequent land use changes that take place after they have sold it as an RSC property.

² *Brownfields Statute Law Amendment Act*, S.O. 2001, chapter 17

At the same time, the re-opener in respect of failing to comply with required risk management measures is proposed to be restricted to those who contravene the risk management requirement, while innocent parties would not lose their protection from ministerial orders.

Other proposed reforms include protections for those carrying out remediation work at a property, to ensure that they are not automatically considered a person in occupation or in charge, management or control of a property, which would make them subject to further orders.

Clean Water Act

In October 2006, the Ontario legislature passed the *Clean Water Act*³ consequent to recommendations of the judicial inquiry into the Walkerton, Ontario tainted water tragedy. The legislation provides for municipalities to create source water protection plans to ensure the safety of municipality drinking water supply. The Act provides for a process to identify and assess risks, develop a source protection plan and carry out the plan through existing planning and regulatory requirements or approvals or voluntary initiatives, and for ongoing monitoring and reporting to measure the effectiveness of the plans.

Waste Management Initiatives

The Ontario Government continued to encourage recycling initiatives and the development of alternative energy sources. In order to make it easier to recycle certain wastes that did not meet existing exemption criteria, the Ontario Government amended its regulations to make it easier for recyclers to operate, by removing requirements that they obtain Ministry approval for the storage, processing or transfer of waste from an intermediate site prior to recycling, and removing the requirement that a recycler must wholly use all the waste from a process in order to be exempt from approval requirements. The environmental assessment process has also been streamlined for small rural landfills, with various exemptions for recycling facilities. Also streamlined the approval process for converting certain types of waste into alternative fuels in order to keep them out of landfills, although air emission approval requirements remain in place. In particular, the use of ethanol and bio-diesels and the burning of wood wastes had certain regulatory obstacles removed and the approval processes were changed to permit and encourage pilot projects for the testing and development of new and emerging energy-from-waste technologies.

A significant waste management issue in Ontario has been finding a place for the disposal of garbage generated in Toronto and other municipalities. For the past several years, this garbage has been trucked to a landfill site in Michigan, but state and local resistance to it

³ S.O. 2006, chapter 22, Royal Assent, October 19, 2006.

and various legislative initiatives in Michigan threaten to prevent the continued disposal of Toronto waste in Michigan. As a result, the municipalities in the Toronto area have committed to eventually eliminating the disposal of Toronto's municipal waste in Michigan by the end of 2010, and in furtherance of that goal, the City of Toronto has purchased a landfill site in western Ontario about half the distance to the Michigan state.

Stewardship Ontario is an industry funded organization established under the *Waste Diversion Act*, whereby industries are required to pay 50% of the costs of the residential Blue Box recycling program. In the past year, it has been actively enforcing its mandate, requiring registration and fee payment from various businesses, and in one instance a company was convicted and fined \$35,000 for late registration under the program.

Air Quality Initiatives

The Ontario Government made a number of initiatives to better protect the quality of air in Ontario, including implementation of its late 2005 comprehensive rewrite of its General Air Pollution Regulation.⁴ These initiatives included new and updated standards for 40 air pollutants, a requirement for the inclusion of 5% ethanol in gasoline, and more stringent regulations for the emission of smog causing particulates, through the Industry Emission Reduction Plan.

Ontario's International Initiatives

In the last year or so, the Ontario Government has made several high-profile forays into the international environmental arena, partly in response to perceived federal government foot-dragging.

In particular, the Ontario Government has:

- entered into a letter of intent to co-operate with the Northeast States for Coordinated Air Use Management (NESCAUM), committing itself to the sharing of information, cooperation in studies and the sharing of technology and information, along the model of previous international cooperation in dealing with acid rain.
- announced its intention to enter into discussions with northeastern states about joining their regional greenhouse gas initiative, an agreement of the northeastern states to enact global warming control legislation involving cap-and-trade systems.

⁴ O.Reg. 346, as amended by O.Reg 419/05

- Submitted an amicus curiae brief in a United States Court of Appeal, 7th Circuit appeal of an order requiring Cinergy Corp. to install modern pollution equipment in its coal-fired plants.⁵
- Filed official comments with the United States Environmental Protection Agency in respect of a proposed EPA rule to allow higher emissions from coal-burning plants.
- Circulated for public review and comment a draft Canada-Ontario Agreement Respecting the Great Lakes Basin Eco-System. The proposed agreement, to run from 2007 to 2010, would “clean up areas of concern, eliminate or significantly reduce harmful pollutants and protect and restore biodiversity”. The draft agreement is open for comments until May 16, 2007.

Proposed Modifications to Soil, Groundwater and Sediment Standards

The Ontario government has also recently announced its intention to make changes to the existing Soil, Groundwater and Sediment Standards for Use under Part XV.1 of the *Environmental Protection Act* (Site Condition Standards).⁶ This document governs the generic standards used for clean-ups and assessments of contaminated sites in Ontario and were last updated in 1996. The proposed changes include updates to standards, lowering the permitted levels of various contaminants.

Notable Cases

There were a number of significant court decisions in Ontario during the past year.

In *Pearson v. Inco Ltd. et al*⁷, the Ontario Court of Appeal was called upon to consider whether a class proceeding was a suitable vehicle for an environmental case, following the Supreme Court of Canada decision in *Hollick v. Toronto*,⁸ which had dismissed an application to certify an environmental class action relating to the effects of the Keele Valley Landfill Site, in so doing deterring the growth of environmental class actions.

The *Pearson v. Inco* case involved an old Inco refinery in Port Colbourne, Ontario that spewed nickel into the environment over a period of 1918 to 1984, contaminating the environment, and in particular, a low income area adjacent to and downwind from the refinery. The case management judge refused to certify it as a class action, but subsequent to that decision, the appellant narrowed his claim to be restricted to damages for the devaluation of real property values arising from the announcement of high levels

⁵ *U.S. v. Cinergy Corp. et al*, USCA (7th) Cir., on appeal from an order of the US District Court for the Southern District of Indiana, Case No. 1:99-CV-01693

⁶ Part of Ontario Regulation 153/04

⁷ 2006 CanLII 913 (Ont.C.A.), leave to appeal denied 2006 CanLII 22456 (S.C.C.)

⁸ (2001) S.C.C. 68, 205 D.L.R. (4th) 19

of soil contamination, excluding claims for damages from alleged adverse health effects from the contamination.

The Court of Appeal for Ontario permitted the case to proceed as a class action. In doing so, it noted that in *Hollick*, the Supreme Court of Canada made clear that certification requirements in environmental cases should be considered on a case by case basis depending on the facts of the case, and cited another Ontario Court of Appeal decision on class actions⁹ signaling that a more liberal approach should be taken to class certification.

While the language favours a liberal approach to class certification, the particular class action in issue is actually quite limited, since questions relating to health effects of the contamination and individualized property value were excluded from the class action going forward.

*Peacock v. Norfolk County*¹⁰ involved a clash between a local by-law and the requirements of the *Nutrient Management Act* with regard to the siting of a hog raising facility, in the context of an application for expansion. The expansion was approved under the *Nutrient Management Act*, but Norfolk the County had by-laws which prohibited siting of livestock operations within certain sensitive areas. The pork producer argued that the *Nutrient Management Act* superseded the county by-law and that only the Act needed to be complied with and its position was upheld by the Ontario Court of Appeal.

*Johnston v. Shell Canada Products Ltd.*¹¹ involved the interpretation of a settlement between the parties addressing Shell's remediation obligations for a former service station owned and operated by the plaintiff. Minutes of Settlement had provided for an acceptable consultant to conduct appropriate testing of the property. The consultant issued a report adopting industrial land criteria contained in the Guideline for Use at Contaminated Sites in Ontario, and the land owner objected, asserting that the obligation to do appropriate testing was Shell's and had not been delegated to the consultant. Ontario's Superior Court disagreed with the land owner, and the Ontario Court of Appeal dismissed the land owner's appeal.

⁹ *Cloud v. AG Canada* (2004) 247 D.L.R. 4th 667

¹⁰ 2006 CanLII 21752 (Ont.C.A.)

¹¹ 2006 CanLII 30213 (Ont.C.A.)