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## **ONTARIO'S NEW BROWNFIELD RULES**

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### **1. OVERVIEW OF BROWNFIELDS REGULATIONS**

The third phase of Ontario's Brownfields Regulations came into effect on October 1, 2005. The new regulations require, among other things, that records of site condition be filed prior to changes in property use of "brownfields".

Brownfields are pockets of abandoned or underused land, often former industrial and commercial properties, that are contaminated or potentially contaminated. As these lands are often located in urban cores, close to municipal services like transportation, sewers, and water, they have great potential for revitalization and growth. However, the development of brownfields has been stalled by a fear of liability for clean-up orders as well as significant costs associated with investigation and remediation efforts. The Ministry of the Environment's broad authority to issue orders against anyone dealing with contaminated lands has historically discouraged lenders, developers, owners, and investigators from initiating redevelopment, even though in many cases existing contamination can be managed in such a way as to remove substantial risks to human health and the environment on a cost-effective basis. However, the looming possibility of Ministerial action to require costly clean up of a previous property owner's legacy of

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contamination, combined with cost advantages of development on uncontaminated suburban “greenfields” has resulted in the historical neglect of brownfields in Ontario’s urban cores.

Focusing efforts on brownfields cleanup is an efficient, effective and environmentally-friendly way to encourage development using existing infrastructures, services and resources. Accordingly, in response to the potential environmental and economic benefits of brownfields redevelopment, and following the lead of several other North American jurisdictions, Ontario introduced amendments to the regulatory scheme.

The *Brownfields Statute Law Amendment Act, 2001*<sup>2</sup> (“*Brownfields Act*”) is intended to encourage the remediation and redevelopment of former industrial and commercial lands, and at the same time ensure the protection of human health and the environment. The general scheme of the legislation is that by filing a Record of Site Condition and committing to restrictions on the use of property, boundaries are permitted to manage environmental risks in a reasonable manner. While the legislation provides some limited protection from Ministry of the Environment orders, parties dealing with contaminated lands must be aware of the exceptions associated with that protection. In particular, the legislation only gives protection for the extent to which disclosure of existing conditions was accurately and adequately made. Second, there is an exception for contamination which poses a threat to human health and safety. Third, there is no protection from civil suits or even ministerial action arising from continuing migration of existing contamination. Nonetheless, the new provisions clarify when parties may be held liable for clean-up orders and can help parties assess the risks associated with the development of potentially contaminated property.

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<sup>2</sup> *An Act to encourage the revitalization of contaminated land and to make other amendments relating to environmental matters*, S.O. 2001, C. 17.

## **2. PHASE-IN OF REGULATIONS**

The amendments contained in the *Brownfields Act* came into force over a period of three years, with the last phase of changes coming into force on October 1, 2005. The *Brownfields Act* is composed of eight parts, the most significant being Part II which amends the Ontario *Environmental Protection Act*<sup>3</sup> (the “Act”) by adding two new parts: Part XV.1, which provides for the creation of an Environmental Site Registry and the filing of Records of Site Conditions, and Part XV.2, which limits the liability of specific parties involved in the redevelopment of brownfields.

The first phase came into effect on December 1, 2002. At that time, Part XV.2 of the *Act* came into force and introduced limited liability for municipalities, secured creditors, receivers, trustees in bankruptcy, fiduciaries, and property investigators.

On October 1, 2004, most of the provisions in Part XV.1 of the *Act* came into force, including limited liability for property owners who are in compliance with site condition standards and have filed a Record of Site Conditions. Changes to property tax law were also implemented.

The final phase of changes, in force as of October 1, 2005, introduce mandatory filing requirements for Records of Site Conditions prior to certain changes in property use, as well as exemptions to mandatory filing. Changes to the building permit process were also introduced prohibiting municipalities from issuing permits for a prohibited change in property unless a Record of Site Conditions has been filed. In addition, municipalities are not to issue permits that may result in a breach of a restriction contained in a Certificate of Property Use issued by the Ministry of the Environment.

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<sup>3</sup> R.S.O. 1990, c. E.19.

### 3. MANDATORY RECORDS OF SITE CONDITION

A Record of Site Condition summarizes the environmental state of a property and certifies that the property meets the regulatory standards for a proposed land use as of the certification date.<sup>4</sup> Part XV.1 of the *Act* prohibits a change in the use of property in certain circumstances unless a Record of Site Conditions has been filed in the Registry. As of October 1, 2005, a Record of Site Conditions is mandatory before a change in the use of property from industrial, commercial or community use (less sensitive uses) to agricultural, institutional, parkland or residential use (more sensitive uses).<sup>5</sup> This requirement also applies to mixed-use properties, including a change from a less sensitive use to a mixed-use property that includes a more sensitive use<sup>6</sup> and a change to all or part of a mixed-use property.<sup>7</sup> A Record of Site Conditions is also mandatory before construction of a building to be used in connection with a prohibited change of use.<sup>8</sup> It should be noted that a change in zoning does not constitute a change in the use of property requiring the filing of a Record of Site Conditions.<sup>9</sup>

A Record of Site Conditions may be filed on the Environmental Site Registry (“Registry”), located on the Ministry of the Environment website, if it contains the information required by the *Act*<sup>10</sup> and a “qualified person” (typically an environmental engineer) certifies that the required criteria have been met. In addition, the qualified person must certify that a phase one environmental assessment has been conducted, and that a phase two environmental assessment

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<sup>4</sup> Section 17 of O. Reg. 153/04 defines “certification date” for the purpose of a Record of Site Condition.

<sup>5</sup> *Environmental Protection Act*, s. 168.3.1

<sup>6</sup> O. Reg. 153/04, s. 14.

<sup>7</sup> O. Reg. 153/04, s. 14.

<sup>8</sup> *Environmental Protection Act*, s. 168.3.1(1)(c).

<sup>9</sup> O. Reg. 13/04, s 11(2).

<sup>10</sup> *Environmental Protection Act*, s 168.4(2).

was either conducted or is not required. If a phase two environmental assessment was conducted for either all or part of the property, there are additional certification requirements.<sup>11</sup>

The “qualified person” must meet certain educational and professional requirements set out in the Regulation, hold insurance coverage of at least \$1 million, and register with the Ministry of the Environment in order to post the Record of Site Conditions on the Registry.

#### **4. EXEMPTIONS TO MANDATORY FILING**

The Regulation sets out various exemptions for which a Record of Site Conditions is not mandatory despite a prohibited change of use. A Record of Site Conditions is not required in the following circumstances:

- if the building permit only authorizes construction for the purposes of making an excavation, or for creating a support structure for the excavation, assisting in an investigation, or collecting information required to file a Record of Site Conditions;<sup>12</sup>
- if the change in the use of property relates to a mixed-use building and the change in use is substantially restricted to the part of the property where the building is located or for the construction of a building to be used in connection with the change in use.<sup>13</sup>

This exemption would allow the expansion of residential or institutional use of a building without the requirement of a Record of Site Conditions, even if part of the building is used for industrial, commercial, or community purposes.

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<sup>11</sup> *Environmental Protection Act*, s. 168.4(1), paragraphs 3 and 4.

<sup>12</sup> O. Reg. 153/04, s. 12.

<sup>13</sup> O. Reg. 153/04, s. 15.

- if the change in use is from a railway line to a recreational trail,<sup>14</sup> unless a portion of the property will be used as a playground, playing field, day camp, or overnight camping facility;<sup>15</sup> and
- if the change in use is from a landfill site approved under the *Act* to any property use.<sup>16</sup>

In circumstances that do not fall within the mandatory filing requirements, a Record of Site Conditions remains voluntary. However, the filing of a Record of Site Conditions provides protection from future clean-up orders with respect to historic contamination on the site.

## **5. PROTECTION FOR PROPERTY OWNERS**

In order to encourage the cleanup and redevelopment of Brownfield sites, Part XV.1 of the *Act* provides property owners with limited protection from Ministry of the Environment orders upon the filing of a Record of Site Conditions in the Registry. Protection is granted to the following individuals:

- the person who filed the Record of Site Conditions or a subsequent owner;
- a person who is or was in occupation of the property at any time after the Record of Site Conditions was filed; and
- a person who has or had charge, management or control of the property at any time after the Record of Site Conditions was filed.<sup>17</sup>

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<sup>14</sup> O. Reg. 153/04, s. 13(1).

<sup>15</sup> O. Reg. 153/04, s. 13(2).

<sup>16</sup> O. Reg. 153/04, s. 13(3).

<sup>17</sup> *Environmental Protection Act*, s. 168.7(1).

Individuals who owned, occupied, or had charge, management or control of the property before the certification date may also receive immunity if the property was sold to the current owner on the condition that a Record of Site Conditions be filed and the Record of Site Conditions was in fact filed, or if the past owner was the owner at the time a Record of Site Conditions was submitted under the previous “Guideline for Use at Contaminated Sites in Ontario.”<sup>18</sup>

Upon filing a Record of Site Conditions and receiving an acknowledgment from the Director, the above-mentioned individuals receive protection from specified orders regarding contaminants that were discharged before the certification date and were on-site as of the certification date.<sup>19</sup> The relevant orders contained in the *Act* include:

- control orders (section 7);
- stop orders (section 8);
- program approvals (section 12);
- remedial orders (section 17);
- Director’s orders re preventative measures (section 18);
- Minister’s orders re spills (section 97);
- orders by provincial officer re contraventions (section 157); and
- orders by provincial officer re preventative measures (section 157.1).

## **6. EXCEPTIONS TO IMMUNITY FOR PROPERTY OWNERS**

Even if a property owner files a Record of Site Conditions, there are numerous situations in which liability for clean-up orders may still be applicable. Orders may be issued in the following circumstances:

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<sup>18</sup> *Environmental Protection Act*, s. 168.7(1) and O. Reg. 153/04, s. 20(2).

<sup>19</sup> *Environmental Protection Act*, s. 168.7(1).

- if the Record of Site Conditions contained false or misleading information;<sup>20</sup>
- if the contaminants move off site after the certification date;<sup>21</sup>
- if the use of the property is different than the use specified in the Record of Site Conditions;<sup>22</sup> or
- if an individual contravenes a restriction contained in a Certificate of Property Use or risk assessment order.<sup>23</sup>

The *Act* also includes an emergency provision that enables the Director to impose liability for orders when there is a danger to the health or safety of any person.<sup>24</sup> The Director must have reasonable grounds to believe that the danger is a result of a contaminant that was on-site as of the certification date. Further, the owner of the property can only be ordered to comply with directions that are reasonably necessary.<sup>25</sup> This may include an order to control or monitor the discharge of contaminants, an order requiring the removal or disposal of the contaminant, a direction to secure land, or a direction to provide alternate water supplies if the contaminant has or is likely to damage the existing water supply.<sup>26</sup> The Director must file a notice on the Registry when an emergency order is issued, and when the order has been fulfilled.<sup>27</sup>

## 7. **PROTECTION FOR THIRD PARTIES CONTROLLING BROWNFIELDS**

Part XV.2 of the *Act* provides special provisions relating to the protection for certain activities of various third parties taking over contaminated property , including secured creditors,

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<sup>20</sup> *Environmental Protection Act*, s. 168.7(2).

<sup>21</sup> *Environmental Protection Act*, s. 168.7(3).

<sup>22</sup> *Environmental Protection Act*, s. 168.7(4).

<sup>23</sup> *Environmental Protection Act*, s. 168.7(5).

<sup>24</sup> *Environmental Protection Act*, s. 168.8(1).

<sup>25</sup> *Environmental Protection Act*, s. 168.8(2).

<sup>26</sup> *Environmental Protection Act*, s. 168.8(3).

<sup>27</sup> *Environmental Protection Act*, s. 168.8(5) and (6).

receivers, trustees in bankruptcy, municipalities, fiduciaries, and investigators. The provisions are intended to provide more certainty with respect to potential liability in order to encourage parties to contribute to brownfields redevelopment.

a) Secured Creditors, Receivers, Trustees in Bankruptcy

Secured creditors are protected from environmental orders for certain actions taken in respect of secured property in order to:

- conduct, complete or confirm an investigation;
- preserve or protect the secured property, including action to ensure the supply of utilities, secure the property, ensure the property is insured, or pay taxes and collect rents;
- respond to a danger to the health or safety of any person, or an impairment of the quality of the natural environment or any injury or damage to property, plant or animal life resulting from contamination on the property.<sup>28</sup>

If an order is issued, it must be limited to what is reasonably necessary<sup>29</sup> and may include an order to:

- control or stop the discharge;
- remove or dispose of the contaminant;
- secure any land, place or thing; or
- provide temporary or permanent alternate water supplies, if the existing water supplies have been damaged by the contaminant.<sup>30</sup>

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<sup>28</sup> *Environmental Protection Act*, s. 168.17(2).

<sup>29</sup> *Environmental Protection Act*, s. 168.20(4).

<sup>30</sup> *Environmental Protection Act*, s. 168(5).

Secured creditors who become property owners as a result of foreclosure are protected from orders unless the order is a result of gross negligence, wilful misconduct, or a contravention of the *Act*, Regulation, or other permit that occurs more than 90 days after becoming the owner of the property.<sup>31</sup> Protection is provided for a period of five years, but may be extended.<sup>32</sup> Similarly, receivers and trustees in bankruptcy receive protection from orders, unless the order resulted from gross negligence, wilful misconduct, or a breach of the *Act*, Regulation or other permit that occurs more than 90 days after taking possession of the property, with some exceptions.<sup>33</sup>

In “exceptional circumstances,” an order may nonetheless be issued against a secured creditor, receiver, or trustee in bankruptcy. The Director must have reasonable grounds to believe that the presence or discharge of a contaminant on the property is the cause of danger to the health or safety of any person, an impairment of the natural environment, or injury to any property or plant or animal life.<sup>34</sup> However, if a Record of Site Conditions has been filed for the property, a higher threshold is applied and an order may only be issued if there are reasonable grounds to believe that a contaminant that was on the property as of the certification date is the cause of danger to the health or safety of any person<sup>35</sup> (but still excludes the issuance of an order where there are reasonable grounds to believe the contamination caused an impairment of the natural environment or injury to any property, plant or animal life). If an order is issued in relation to property for which a Record of Site Conditions has been filed, the Director is obligated to file a notice of the order and a notice of compliance on the Registry.<sup>36</sup>

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<sup>31</sup> *Environmental Protection Act*, s. 168.18(1) and O. Reg. s. 298/02, s. 4(1).

<sup>32</sup> *Environmental Protection Act*, s. 168.18(3) and (4).

<sup>33</sup> *Environmental Protection Act*, s. 168.19(1) and O. Reg. s. 298/02, s. 7.

<sup>34</sup> *Environmental Protection Act*, s. 168.20(1) and (2).

<sup>35</sup> *Environmental Protection Act*, s. 168.20(3).

<sup>36</sup> *Environmental Protection Act*, s. 168.20(9) and (10).

There is an additional exception for receivers and trustees in bankruptcy who are protected under the federal *Bankruptcy and Insolvency Act*. A receiver or trustee in bankruptcy is not obligated to comply with an order if it did not arise as a result of gross negligence or wilful misconduct and if they gave notice that they abandoned, disposed, or released their interest in the property.<sup>37</sup>

b) Municipalities

Similar provisions as above apply to municipalities. Municipalities that take specified actions with respect to non-municipal property will not be held liable for MOE orders regarding historic contamination at the site. Actions which give rise to this protection include:

- conducting an investigation of non-municipal property;
- ensuring the supply of utilities;
- securing property;
- ensuring the property is insured;
- responding to a danger to the health or safety of any person, an impairment of the natural environment, or an injury to property or plant or animal life; or
- exercising a right to collect rent or levies; any action under Part XI of the *Municipal Act, 2001*, *Building Code Act, 1992*, *Fire Protection and Prevention Act, 1997*; or any other *Act* or action prescribed by the Regulations.<sup>38</sup>

Municipalities are also protected from certain orders if they become the owner of non-municipal property due to a failed tax sale, unless the order is a result of gross negligence or

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<sup>37</sup> *Environmental Protection Act*, s. 168.20(7).

<sup>38</sup> *Environmental Protection Act*, s. 168(12)(2).

wilful misconduct by the municipality.<sup>39</sup> Protection is provided for a period of five years after the day the municipality became the owner of the property, but may be extended.<sup>40</sup> However, this protection does not extend to emergency orders issued by the Director when there are reasonable grounds to believe that the contaminant on the property is causing a danger to the health or safety of any person, an impairment of the natural environment, or injury to any property or plant or animal life.<sup>41</sup> If an order is issued under such exceptional circumstances, it must be limited to what is reasonably necessary.<sup>42</sup> If a Record of Site Conditions for the property has been filed, an order may be issued only if there are reasonable grounds to believe that there is a danger to health or safety.<sup>43</sup>

Under Part XV.2 of the *Act*, secured creditors, receivers and trustees in bankruptcy and municipalities all have specific reporting obligations if they become aware of circumstances prescribed by the regulations.<sup>44</sup>

c) Fiduciaries and Investigators

Fiduciaries<sup>45</sup> who hold or administer property are also sheltered from liability. If an order is issued against property that is held or administered by a fiduciary, the fiduciary's obligation to incur costs is limited to the value of the assets held or administered on the date the order is served, unless the order is a result of the fiduciary's gross negligence or willful misconduct.<sup>46</sup>

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<sup>39</sup> *Environmental Protection Act*, s. 168.13(1).

<sup>40</sup> *Environmental Protection Act*, s. 168.13(4) and (5).

<sup>41</sup> *Environmental Protection Act*, s. 168.14(1).

<sup>42</sup> *Environmental Protection Act*, s. 168.14(3).

<sup>43</sup> *Environmental Protection Act*, s. 168.14(2).

<sup>44</sup> *Supra* note 3, s. 168.15 and s. 168.21.

<sup>45</sup> A "fiduciary" is defined as "an executor, administrator, administrator with the will annexed, trustee, guardian of property or attorney for property, but does not include a trustee in bankruptcy or trustee in bankruptcy representative," s. 1(1) of the *Act*.

<sup>46</sup> *Supra* note 3, s. 168.23.

Fiduciaries are also under an obligation to report circumstances prescribed by the *Act*<sup>47</sup> and to provide copies of investigations or reports regarding the presence of contaminants to the Director upon request.<sup>48</sup> In order to ensure that investigators are willing to conduct, complete or confirm investigations into potentially contaminated land, investigators are also protected from liability for orders.

## **8. RISK ASSESSMENTS: LATEST DEVELOPMENTS**

Site condition standards for various contaminants are set out in *Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act* (“Standards for Use”). If it is not possible to clean-up a contaminant to the required level, a property owner may submit a risk assessment in order to determine a site-specific standard for the contaminant. A risk assessment is an assessment of the human health and ecological risks of a specified contaminants. It must be prepared by a “qualified person” who meets the educational and professional requirements of the *Act*<sup>49</sup> and holds insurance coverage of \$1 million.

If the risk assessment is accepted, the Director may issue a Certificate of Property Use. A Certificate of Property Use will outline conditions for the use of the property in order to prevent risks from contamination remaining on the site. For example, the Certificate of Property Use may require the owner to take any action to prevent, eliminate or ameliorate any adverse effect on the property, or prohibit certain uses of the property or building construction.<sup>50</sup> This may include the installation of equipment or the monitoring of contaminants. However, the Director cannot

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<sup>47</sup> *Supra* note 3, s. 168.24.

<sup>48</sup> *Supra* note 3, s. 168.25.

<sup>49</sup> O. Reg. 153/04, s. 6 defines “qualified person” for the purpose of risk assessments.

<sup>50</sup> *Environmental Protection Act*, s. 168.6(1).

require the property owner to reduce the concentration of the contaminant to a level lower than that required by the risk assessment.<sup>51</sup>

On October 1, 2005, two provisions with respect to Certificates of Property Use were introduced. First, the Director is required to give notice to certain individuals if a Certificate of Property Use is issued, altered, or revoked.<sup>52</sup> Notice must be given to the chief building official of the municipality, the clerk of the local and upper-tier municipalities, and other individuals if the property falls under the jurisdiction of a board of health, planning board or conservation authority.<sup>53</sup> Second, the *Act* prohibits the issuance of any permit, licence, approval or other instrument if it would result in a use of property or the construction of a building in contravention of a restriction contained in a Certificate of Property Use.<sup>54</sup>

## **9. THE ENVIRONMENTAL SITE REGISTRY**

The Environmental Site Registry established in the legislation is located on the Ministry of the Environment website, and facilitates public access to some information regarding sites where Records of Site Conditions have been filed. As more and more sites gradually come to be registered, this Registry will likely become more and more useful. However, while interested parties should consult the Registry, other forms of due diligence must still be conducted, since by the legislation the Ministry of the Environment is not liable for mistakes contained within a Record of Site Conditions.<sup>55</sup> Given this limit on the ability of third parties to rely on Records of Site Conditions, there is uncertainty as to whether or not it is even necessary to check the

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<sup>51</sup> *Environmental Protection Act*, s. 168.6(2).

<sup>52</sup> *Environmental Protection Act*, s. 168.6(5).

<sup>53</sup> O. Reg. 153/04, s. 50.

<sup>54</sup> *Environmental Protection Act*, s. 168.6(6).

<sup>55</sup> *Environmental Protection Act*, s. 168.3(3).

Registry with respect to due diligence. It will be interesting to watch as standards of practice develop in the Real Estate bar.

## **10. CONCLUSION**

The *Brownfields Act* and Regulations afford to parties dealing with contaminated property, such as property owners, municipalities, developers and lenders, a degree of immunity from liability for cleanup of historic contamination. However, the protection from orders contained in the *Act* is limited and there is potential to make matters worse by making public (through a Record of Site Conditions) otherwise private information regarding contamination on a site that could result in civil lawsuits and public pressure for Ministerial action. While Records of Site Conditions are now mandatory for a change in use to a more sensitive use, there is no across the board requirement of filing a Record of Site Condition in respect of a contaminated property. Whether or not a Record of Site Conditions is filed, the *Act* does not provide any immunity from civil actions brought by neighbouring property owners or other individuals. These limitations suggest that the impact of the new brownfield rules will be modest.

In many circumstances, however, the new regime will be helpful for brownfield owners and developers, putting into place a framework for creating a baseline of information regarding the levels and extent of contamination and formalizing a degree of immunity for that existing contamination. It is reasonable to expect that the new legislative regime will somewhat encourage brownfields redevelopment, albeit to a very modest degree.