

Brownfields and other Environmental Liabilities

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- ▶ Bill 56, the Brownfields Statute Law Amendment Act, 2001 received royal assent in November, 2001 but is awaiting the many regulations that will apply before being proclaimed
- ▶ This Bill will change much of the applicable law relating to security holders who realize on their security where the land is contaminated

Why the need for reform?

- ▶ The current situation under the Environmental Protection Act is that a broad range of persons can be given “control orders” or “stop orders”, “remedial orders” or “preventive measures orders” in certain circumstances
- ▶ Such persons can include directors and officers of corporations, depending upon the facts of the case

Who is subject to such orders?

- ▶ “an owner or previous owner of the source of contaminant”
- ▶ “a person who is or was in occupation of the source of contaminant”
- ▶ “a person who has had or had the charge, management or control of the source of contaminant” Environmental Protection Act sections 7, 8, 17 and 18

General Prohibition

- ✓ There is also a general prohibition against discharging any contaminant into the natural environment - section 6
- ✓ Section 6 continues: “and no person responsible for a source of contaminant shall permit the discharge into the natural environment of any contaminant from the source of the contaminant . . .”

Examples of Orders

- ✓ The Director may issue a control order directed to an owner or previous owner, a person who is or was in occupation of the source of contaminant, or a person who has had or had the charge, management or control of the source of the contaminant - section 7

What can Director Order?

- ✓ On issuing a control order, the Director may order the person to limit or control the discharge, to stop the discharge permanently or for a time, to comply with directions, install, replace or alter equipment, to monitor and record, to study and report - section 124
- ✓ Director must give 15 days notice of intent to issue order

Stop Orders

- ✓ Similarly stop orders may be issued where the Director is of the opinion that a source of contaminant is discharging into the natural environment at a level that constitutes an immediate danger to human life, health etc.
- ✓ Section 8 orders may be issued to owners, previous owners, person in occupation or who was in occupation, and person who had charge etc. or who did have, of the source of the contaminant

Content of Stop Order

- ✓ May order the person to immediately stop or cause the source of contaminant to stop discharging into the natural environment any contaminant, either permanently or for a specified time - section 128
- ✓ It must contain written reasons for the order

Remedial Orders

- ✓ A person who causes or who permits the discharge of a contaminant into the natural environment such that [environment] or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered may be ordered to repair the injury or damage or to prevent the injury or damage and if it was water supplies, may be ordered to supply alternate

Preventive Measures Order

- ✓ May be issued against person who owns or owned or who has or had management or control of an undertaking or property to do any of a number of things - section 18
- ✓ May be issued where Director of opinion that a contaminant, if discharged, will result or is likely to result in an adverse effect

Preventive Measures Order cont.

- ✓ May require the person to have certain equipment, material or personnel available; or to obtain, construct, install or modify devices, equipment and facilities; or to implement procedures specified; or monitor and record discharges; or study and report to the Director upon measures to control or effects of the discharges

Successors and Assigns

- ▶ The Act also provides that such a Preventive order is binding upon the successor or assignee of the person to whom it is directed - section 19
- ▶ This includes trustees in bankruptcy or receivers but under the new Bill 56 provisions, the trustee may avoid this responsibility by giving notice within 10 days that they have abandoned, released etc.

Spills

- ✓ Part X of the Environmental Protection Act has specific provisions relating to spills
- ✓ A spill is a discharge into the natural environment, from or out of a structure, vehicle or other container, that is abnormal in quality or quantity in light of all of the circumstances of the discharge
- ✓ A substance includes solid, liquid or gas

Spills cont.

- ✓ There are regulations deeming abnormal quantities of certain substances
- ✓ Every person having control of a pollutant that is spilled and every person who spills . . .likely to cause an adverse effect, shall give notice to the Ministry, the municipality, the owner of the pollutant and the person having control of the pollutant

Duty to Act

- ✓ The owner of a pollutant and the person having control of a pollutant that is spilled and likely to cause an adverse effect shall “forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment”. Section 93
- ✓ Duty takes effect immediately the person etc. knows or ought to know

Minister's Orders re Spills

- ✓ Section 97 - may be against the owner of the pollutant, the person having control of the pollutant, the owner or the person having the charge, management or control of any real property or personal property that is affected or that may reasonably be expected to be affected . . . and may require the doing of everything practicable . . .

Financial Assurance

- ✓ Any of the above described types of Orders may include a requirement that the person to whom it is directed provide financial assurance to the Crown for the performance of the action specified, or for provision of potable water supplies or for other purposes
- ✓ Financial assurance could be cash, letter of credit, negotiable securities, bonds etc.

Financial Assurance for certificate of property use

- ✓ Similarly, financial assurance may be required as a condition of a certificate of property use, which will be discussed later

Orders dealing with entry, securing property etc.

- ✓ A justice may issue an order to prohibit entry, prohibit use of or destruction of any thing - grounds are proper administration of the Act or necessary to protect human health, safety or to protect property - section 156.5
- ✓ There are also provincial officer orders - section 157, 157.1

New Provisions from Bill 56

- ✓ “owner” includes a person prescribed by the regulations
- ✓ “Registry means the Environmental Site Registry”
- ✓ The Director shall establish the Environmental Site Registry to allow persons to file records of site condition and to allow public access to those records

Prohibition on Certain changes of Use

- ✓ Section 168.3 prohibits change of use from industrial or commercial to residential or parkland
- ✓ Exception is where a record of site condition has been filed on the basis of [the new] residential or parkland use

Filing record of Site Condition

- ✓ A new Bill 56 provision gives an owner the option to file a record of site condition in the Registry
- ✓ Specified criteria must ALL be met
- ✓ These include that a qualified person has certified in the record of site condition that a phase one environmental assessment has been conducted

Additional Criteria

- ✓ Additional criteria are that a qualified person has certified that a phase two environmental site assessment was conducted or in their opinion no phase two environmental site assessment is required
- ✓ And the qualified person has certified that the property meets the applicable full depth background site condition standards or the generic site condition standards or stratified standards -- all as prescribed in regulation

Exceptions must be specified

- ✓ The qualified person must specify those contaminants which do not meet the background or generic or stratified site condition standards on all or part of the property
- ✓ For all such contaminants, the qualified person must certify that a risk assessment was prepared for each contaminant

Director must accept risk assessment

- ✓ The qualified person must also certify that the Director has accepted the risk assessment and that the property meets the standards specified in the risk assessment

Contents of Record of Site Condition

- ✓ The record includes property description, names of owners, type of property use for which the record is filed, which standards were applied, description of any soil removal or other action taken to reduce contaminants, maximum sampling results as of the certification date, list of reports relied on and other matters - section 168.4

Transitional provision

- ✓ Section 168.4 (6) provides for filing records of site condition prepared according to the 1996 (revised) guidelines where they were filed with the Ministry before Bill 56 sections come into force

Certificate of Property Use

- ✓ Where the Director has accepted a risk assessment, when giving notice to the person that it has been accepted, the Director may require the owner to take any action specified in the certificate that is necessary in the Director's opinion to prevent, eliminate etc. any adverse effect on the property

More on certificate of property use

- ✓ The Director may also require the person to install equipment or to refrain from using the property for any use specified in the certificate or to construct any building specified in the certificate
- ✓ Provisions to refrain from use or building also apply to occupants and the owner must provide copies of the provision

Prohibitions on construction or use

- ✓ If as above discussed the certificate of property use contains a provision prohibiting a use or building, no permit, licence, approval or other [provincial] instrument shall be issued to any person that would otherwise allow that use or construction

What's the Incentive?

- ✓ If a record of site condition is filed, with all criteria in section 168.4 met, no order shall be issued to the following persons: the person who filed the record of site condition, a subsequent owner, a person in occupation at that time or subsequently, a person who has charge management or control of the property after the record was filed

Which orders are precluded?

- ✓ Control orders
- ✓ Stop orders
- ✓ Remedial orders
- ✓ Preventive measures orders
- ✓ Minister's section 97 orders
- ✓ Provincial officer's section 157 orders
- ✓ Provincial officer's preventive measures orders

Certain conditions apply

- ✓ Regarding a contaminant that was discharged into the natural environment before the certification date
- ✓ If the record contains false or misleading information, the protection against orders does not apply
- ✓ If the actual use is different than the certified use, the protection against orders does not apply unless the actual use has less stringent standards [commercial vs. park]

Contraventions

- ✓ Of course, contraventions of terms of certificate of property use or risk management measures described in the record of site condition may result in provincial officer's orders under section 157

Emergencies

- ✓ Despite all of that, even though a record of site condition is filed, the Director may issue an order if the Director believes that there is a danger to health or safety to any person as a result of a contaminant that was on, in or under the property as of the certification date [old contaminants]

Scope of that order

- ✓ Such a section 168.8 order is limited to providing directions to ensure that there is no danger to the health or safety or any person
- ✓ May include securing property, removing contaminants and providing alternate water supplies
- ✓ Such an order must be filed in the Environmental Site Registry

Existing causes of action

- ✓ Section 168.2 provides that the Record of Site Condition Part XV.1 does not affect any cause of action that a person would have in the absence of this new Part (except for the new Crown immunity sections)

Special Provisions Applicable to Secured Creditors and Others

- ✓ New Part XV.2 of the Environmental Protection Act
- ✓ Again, existing causes of action are not affected
- ✓ The scheme is to provide that in certain circumstances, secured creditors are not in occupation or charge or control etc.

Actions taken by secured creditors

- ✓ Section 168.17 - Secured creditors may conduct an investigation relating to the secured party; may preserve or protect the secured property including ensure the supply of water and other services; may ensure the property is insured; may pay taxes or collect rents

Other actions by secured creditors

- ✓ Other actions that secured creditors may take include responding to any danger to health or safety of any person that results from the presence or discharge of a contaminant on, in or under the property; responding to an impairment of the quality of the natural environment or any use; responding to any injury or damage to property, plant or animal life

Secured creditor not thereby
person responsible etc.

- ✓ All of the actions listed above do not by themselves render a secured party a person in occupation of the source of a contaminant (section 7, 8 orders); nor a person who has or had the charge, management or control of a source of contaminant (section 7, 8 orders); a person responsible (section 12 orders); a person who has or had management or control of an undertaking (section 18 orders)

More exceptions

- ✓ In addition, that list of activities does not render the secured party a person with charge and control of land and building or occupant for section 43; nor having control of a pollutant for section 97; nor having charge, management or control for sections 97 or 157.1 (1) (provincial officer's and Minister's orders)

Foreclosure

- ✓ If the secured party becomes owner by foreclosure, orders shall not be issued against the secured party for five years after the date of foreclosure (which may be extended)
- ✓ Unless the order arises from the secured party's gross negligence or wilful misconduct or circumstances listed in regulation

Receivers and trustees in bankruptcy

- ✓ The same provisions apply to receivers and trustees in bankruptcy (section 168.19)

Exceptions for foreclosures and trustees / receivers

- ✓ Despite these protections, the Director may issue an order to a secured creditor who became an owner by way of foreclosure if the Director believes as a result of a contaminant in, under or on the property, there is a danger to health or safety of any person; or impairment of the quality of the natural environment for any use; or injury or damage to any property, plant or animal life.

Same for trustee/receiver

- ✓ The same provisions apply to a receiver or trustee in bankruptcy

Incentive to file record of site condition

- ✓ If a record of site condition has been filed on the Environmental Site Registry, then no order under section 168.20(1) can be issued unless there is also danger to health or safety of any person
- ✓ And the scope of the order is limited to ensure there is no danger to health or safety of any person (section 168.20(4)(b))

Trustees and Receivers can escape

- ✓ Trustees and Receivers can notify the Director within 10 days of receiving the Order that they have abandoned, disposed of or released their interest

Proviso - must disclose

- ✓ When taking actions listed in section 168.17(2) (investigating property, securing property etc.), a secured creditor or its representative must give notice to a provincial officer of any circumstances prescribed in regulations
- ✓ Similarly if becoming owner by foreclosure or if receiver, trustee in bankruptcy or their representative

Providing reports

- ✓ The Director may require a secured creditor, receiver or trustee to provide the Director with a copy of any report that is in the possession or control of the secured creditor that was prepared in the course of an investigation to determine whether a contaminant is present or is being discharged on, in or under property.
- Section 168.22

Investigators

- ✓ There are also provisions that a person who conducts an investigation relating to property is not for that reason alone a person in occupation, in charge, management or control etc. Section 168.26

Regulations

- ✓ There are several regulations under preparation and the provisions of Bill 56 will only be in force on proclamation, presumably after the main regulations are ready.
- ✓ Regulations will govern the Registry, qualifications of qualified persons, conduct of phase one and phase two environmental site assessments and much else

Offences

- ✓ Every person who contravenes this Act or the regulations is guilty of an offence - section 186
- ✓ Every person who fails to comply with an order under this Act is guilty of an offence.
- ✓ Penalty for individuals is \$20,000 per day on first conviction and \$50,000 per day subsequently and imprisonment of up to one year or both [theoretically]

More on offences

- ✓ Penalties may be higher where there was an adverse effect etc.
- ✓ There are also fines on profits and restitution orders and many other enforcement provisions

Notice to purchasers

- ✓ The Director, Minister etc. may order that a copy of any order or decision be provided to any person acquiring an interest in the property
- ✓ A prohibition on dealing with the property without such disclosure may be registered on title
- ✓ Purchaser may have transaction voided if disclosure was not provided