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EnviroNotes!

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It is our pleasure to provide you with the first issue of EnviroNotes! (EN!). EN! is intended to provide a quick and easy method for Miller Thomson LLP's Environmental Law Group to get timely advice to clients and friends of new developments in environmental regulation.

The Walkerton Inquiry has recently caused a great deal of activity in the Ontario Ministry of the Environment. As a result, you will receive more issues of EN! than usual in the next few weeks. Given the infancy of this service, the style and format may change over the short term.

We hope you find EN! to be both timely and informative. Please e-mail Bruce McMeekin with any comments you have at bmcmeekin@millerthomson.ca.

Brownfields Bill Enacted

On November 2, 2001, Bill 56 - the *Brownfields Statute Law Amendment Act,* 2001, received Royal Assent, significantly amending Ontario's environmental and municipal planning legislation to incorporate clean-up and planning tools relating to brownfield redevelopment and revival. The legislation will assist brownfields redevelopment in the following areas:

1. Regulate standards for contaminated brownfield site clean-ups.

2. Provide liability protection from future environmental orders for municipalities, secured creditors, owners and developers involved with brownfield properties.

3. Streamline planning processes to enable municipalities to provide financial support for cleanup costs and expedite brownfield projects.

While the Bill involves amendments to several environmental and municipal statutes, what follows is a summary of the major changes to the Ontario *Environmental Protection Act* (EPA) and the *Municipal Act*, and comments regarding the efficacy of the Bill to impact upon brownfield development in the Province.

Generally, the Bill purports to establish clear rules for environmental liability by affording the following protection or immunity:

- Liability protection from future environmental orders for owners who follow the prescribed site assessment and cleanup process, which includes the filing of a Record of Site Condition in the Environmental Site Registry;
- Liability protection from future environmental orders for secured creditors, receivers and trustees in bankruptcy, while protecting interests in a property;
- Liability protection from future environmental orders from municipalities if taking actions for the purpose of a tax sale or actions related to other municipal responsibilities; and
- Protection from environmental orders for any person conducting an environmental investigation while acquiring interest in a property.

Record of Site Condition

The regulatory protection afforded relates to the introduction, legislatively, of the Record of Site Condition (RSC) and the establishment of the Environmental Site Registry. While the filing of the RSC is optional, there can be no change of land use (from commercial or industrial to residential) without an RSC being filed. Immunity arises from the filing of the RSC, regardless of whether the RSC was filed in respect of a change of use or merely at the option of the property owner. The Registry will facilitate public access to information concerning RSCs.

The filing of an RSC in the Environmental Site Registry triggers immunity after remediation or Ministry approved risk assessment is conducted. The restriction on this immunity is its application to contamination that was discharged into the natural environment before the "certification date" (to be defined by Regulations but not later than the filing date of the RSC) and that was on, in or under the property as of the certification date.

Contaminants present on the property before the certification date, which migrated to other properties would be outside the scope of protection. The Bill provides no treatment of or liability protection for off-site contamination. If there is continuing risk of off-site migration once an innocent purchaser acquires title, the Ministry may still be able to issue preventive measures orders.

When to file an RSC depends upon whether a Phase I or Phase II Environmental Site Assessment (ESA) is necessary and whether the property meets applicable regulated standards. An owner of property may file an RSC if a "qualified person" has certified that:

(i) A Phase I ESA has been conducted;

(ii) A Phase II ESA of all or part of the property was conducted, or that no Phase II is required by the regulations and in the opinion of the qualified person it is not necessary to conduct a Phase II ESA; and

(iii) If a Phase II was conducted, that the property meets the applicable full depth background, full depth generic or stratified site condition standard prescribed by Regulation, or that a risk assessment has been prepared for each contaminant in excess of the standards, and such risk assessment was accepted by the Director and the property meets the standards prescribed in the risk assessment.

The consequences of filing the RSC is liability protection from various orders – control orders, stop orders, remedial or preventive measure orders, contravention orders. The beneficiaries of this regulatory immunity (there is no impact upon civil liability) include the person who filed the RSC and subsequent owners, persons in occupation of the property at the time of the filing of the RSC and thereafter, persons in charge, management or control of the property at the time of the filing of the RSC or thereafter.

The Bill also introduces a new type of order – the certificate of property use – which may restrict property use, require the provision of financial assurance, require the provision of alternative water supplies and may specify the measures appropriate to prevent adverse effects relating to a property.

Liability Protection for Municipalities, Secured Creditors, Receivers and Trustees in Bankruptcy

Liability protection is specifically addressed in respect of municipalities, secured creditors, receivers, trustees in bankruptcy and fiduciaries for their actions in respect of brownfield sites.

For all of these entities, any action taken to protect or preserve the property does not thereby convert their status to a person in occupation of a source of contaminant or a person with charge, management or control of a contaminant. Further protection specific to each status is afforded as follows:

(a) Municipalities

For municipalities, protection is offered for actions taken to respond to environmental impairment or unrelated actions taken in regard to municipal servicing of water, gas, heat, sewage, electricity, maintenance or rent collection. In the event of a vesting of title to the municipality under the *Municipal Tax Sales Act*, the Bill provides protection from orders for five years. There is an exception for orders relating to gross negligence or wilful misconduct by the municipality.

(b) Secured Creditors

As with municipalities, secured creditors are offered protection for five years in the event of foreclosure until they will be required to file an RSC (again, subject to the exception for gross negligence or wilful misconduct). Secured creditors not in possession may also take certain actions with immunity including payment of taxes and rent collection.

(c) Receivers and Trustees in Bankruptcy

Special consideration is given in the event an order is issued, offering receivers and trustees in bankruptcy 10 days to decide whether to abandon or otherwise dispose of their interest in the property. If an order is issued, it can only require that the receiver or trustee in bankruptcy deal with a danger to human health or safety.

(d) Fiduciaries

Fiduciaries are defined under the Bill as executors, administrators, trustees, guardians of property or attorneys for property. While fiduciaries do not gain liability protection from orders, their obligations to incur costs to comply with environmental orders are limited to the value of the asset they hold or administer, less their own reasonable costs for such administration.

(e) Investigators
Investigators include persons who conduct, complete or confirm an investigation on a property. Such action does not convert their status to persons in occupation of a source of contaminant, nor a person in charge, management or control of contaminant.

There is the possibility of exceptional cases where orders may be made against any of the above in cases where the Director has reasonable and probable grounds to believe there is a danger to health and safety, impairment or serious risk of impairment to the quality of the environment, or injury, damage or serious risk of injury or damage to any property, plant or animal life. Emergency provisions further enable the MOE an override exception in respect of a water supply in danger. In such case, orders may be issued requiring the provision of alternate water supplies – clearly a post-Walkerton sensitivity.

It should also be noted that liability protection does not apply to past owners, or people in previous charge, management or control before the RSC was filed, and it only applies to the property that is the subject of the RSC, and the use specified in the RSC. Hence, for a change of use, the new use must be the one specified in the RSC in order for the liability protection to become effective.

The possibility exists for transitional protection for owners that have filed RSCs under the *Guideline for Use at Contaminated Sited in Ontario* (the "Guideline"), although it is somewhat equivocal. The RSC must have been submitted to the MOE, receipt acknowledged by the MOE, and the owner must file a notice in the Registry certifying compliance with requirements prescribed by regulation (which are yet to be prescribed). If the regulations simply adopt and incorporate the *Guideline*, owners who previously filed RSCs may be able to obtain the protection under the new Bill. If there are additional provisions to the regulations, the provision is somewhat problematic.

Municipal Legislation Amendments

Municipal tax amendments under the *Municipal Act* enable municipalities to offer tax incentives to stimulate redevelopment of brownfield sites. Clean-up expenditures - "costs for any action to reduce the concentration of contaminants on, in or under the property to permit an RSC to be filed or the costs of complying with any certificate of property use" - are eligible for tax recovery. The requirement is that the work must have been undertaken, and the concentration of contaminants must be reduced, not simply managed. Therefore, costs of a risk assessment (whether alone or coupled with clean up) may not be entirely recoverable.

The period for cost recovery includes both the rehabilitation and redevelopment period. The former is capped at 18 months. The latter will be defined in each case, with no maximum.

The realm of incentives is still fairly limited, including the passing of by-laws suspending municipal and education property taxes for a specific period or freezing tax increases during the rehabilitation and redevelopment period.

Additional amendments on the planning side relate to the ability of municipalities to make grants or loans to property owners to carry out "community improvement plans" under the *Planning Act*. As above, loans and tax assistance may not exceed the cost to rehabilitate the property. Such improvement plans require ministerial approval.

Closing Remarks

Many of the details of the Bill are to be set out in Regulations, yet to be drafted, including establishing the various clean-up standards (whether by adoption of the *Guideline* or creation of new standards), creation of the Environmental Site Registry, establishing the credentials necessary for "qualified persons" who are to sign the RSC, establishing the content and form of the RSC, and under municipal legislation, implementing tax relief structures.

Although the Bill will have the effect of clarifying the required standards for cleanups, Phase I and II ESAs and risk assessments, creating a more transparent process by requiring the filing of RSCs in the Environmental Site Registry, and it has the potential for significant implications for brownfield redevelopment in Ontario, its implementation remains uncertain. While municipalities can now offer planning and tax incentives, many say there are insufficient measures to facilitate revitalized brownfield development.

Criticism of the Bill centres upon a lack of provincial funding to support the Bill and a concern as to the potential downloading of costs onto other taxpayers. In addition, properties abutting the contaminated properties have no liability protection unless owners of such properties also follow the prescribed procedures which would include filing their own RSC. Historical concerns such as MOE staffing to enforce the legislation and regulations, and concerns regarding the prohibitive large financial costs spurring revived development still remain. Finally, there are other municipal financial assistance programs that could be implemented (such as tax increment financing or leases under fair market value) that are not provided for in the Bill. It will be of interest to see what law develops on the financial assistance side in the future. Until then, we eagerly await the drafting of the regulations.

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Court of Appeal Releases Decision in *Tridan v. Shell*

On January 3, 2002, the Ontario Court of Appeal released its decision in Shell's appeal of the damages assessment made by the trial judge in *Tridan v Shell*. The decision provides some important guidance on how to assess damages in cases involving land contaminated by the activities of a neighbour. Naturally, it also raises a number of questions.

Tridan was the owner of a car dealership in Ottawa. Its land had been contaminated following a gasoline spill at the neighbouring Shell site. Shell did not think Tridan should receive any damages since the contamination was at some depth and was not interfering with Tridan's use of the property in any significant way. Tridan and the trial judge disagreed. The trial judge found that cleanup to the MOE guidelines was not sufficient. Shell was ordered to pay for the cost of remediating the land to a "pristine state". In addition, the trial judge found that even after cleanup to pristine, there would still be a residual diminution in value of the land and awarded additional damages for "stigma".

The Court of Appeal made three key findings on the assessment of damages in such cases. First, the Court affirmed the trial judge's view that cleanup to guidelines in this case was not sufficient and that Tridan was entitled to damages equal to the cost of cleanup to a pristine state. Second, the Court found that the trial judge was wrong in ordering damages for stigma in addition to the cost of cleanup to "pristine" levels. The court found that the evidence did not support such a finding and that there would be no stigma attached to the land once it was cleaned to a pristine level. Third, and potentially of most significance, the Court made it clear that its decisions that cleanup to guidelines was not sufficient, that there was no stigma after clean up to pristine and the choice between compensation for cleanup beyond guidelines and stigma damages were based on the trial evidence and as such future cases raising these issues would all have to be determined on a case-by-case basis. The key passages of the decision are as follows:

> "*The trial judge might have relied upon those expert witnesses supporting the MOE guidelines as a reasonable measure of reparation and thus the damages suffered*. This is a commercial property on a busy thoroughfare and unlikely to ever be a site for residential use. It might be concluded that in a practical sense Tridan is not likely to need or want to clean its soil at depth of every particle of pollutant. However, *in the circumstances of this case* I cannot say the trial judge erred in deciding that Tridan was entitled to reparation to a pristine state." (Emphasis added)

This passage leaves open the suggestion that, in some cases, it would be open to trial judges to conclude that cleanup to guidelines might be sufficient and no damages beyond the cost to clean up to guidelines would be awarded, whether that be the cost of cleanup to pristine or a measure of stigma. No guidance is given on when this might happen, though it would appear that the Court would not have disagreed with the trial judge in this case had he made such a finding. Apparently, it remains open to trial judges to accept expert evidence that cleanup to guidelines alone is a reasonable measure of damages especially in cases of commercial properties where a future change to residential use is unlikely. Unfortunately the Court did not elaborate further and as such the implications of this passage will have to wait further judicial interpretation.

A similar fate awaits future cases in which plaintiffs and defendants disagree on whether damages should be the cost of cleanup to pristine levels or the cost of cleanup to guidelines plus stigma. The Court of Appeal tells us it cannot be both on the evidence of this case, but can the following passage be relied upon to support the position that the cheaper of the two options should always be chosen?

> "In sum, *the evidence compels me to conclude that there is no stigma loss at the pristine cleanup level*. This conclusion also makes sense of the trial judge's holding that cleanup to the pristine standard was justified in this case. If the trial judge's assessment of stigma damage at $350,000 is taken as the diminution in value at cleanup to the guideline standard, *then the more economical route* is to proceed to the pristine level at an additional cleanup cost of $250,000 with no stigma damage." (Emphasis added)

Should the "more economical route" always be the correct choice? Will there ever be persuasive evidence that a stigma will still exist even after clean up to a pristine level? While the Court of Appeal has given litigants some guidance, fundamental questions on how to assess damages for contaminated land remain unanswered. Their decision in *Tridan v. Shell* will obviously not be the last word on this topic.

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