



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

June 15, 2001

Report No. 416

Mr. Brian Nixon
Ministry of Environment
Land Use Policy Branch
135 St. Clair Avenue West, 6th floor
Toronto, Ontario
M4V 1P5

Via fax (416) 314-7200

Dear Mr. Nixon:

Re: Bill 56 An Act to Encourage the Revitalisation of Contaminated Land and to Make Other Amendments in relation to Environmental Matters.

The Canadian Environmental Law Association ("CELA") is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

CELA has been involved with the issue of brownfield redevelopment for many years and previously participated in the Ministry of Environment's ("MoE") Lender Liability Working Group. At the multi-stakeholder meeting, CELA consistently took the position that with respect to environmental liability and the redevelopment of brownfields, the allocation of liability, the establishment of clean-up standards and the avoidance of future problems are closely linked and should be addressed in a comprehensive policy framework, rather than in a piece meal fashion.

However, the trend in Ontario in recent years has been the granting of exemptions from liability for the clean-up of contaminated sites to specific sectors or classes of potentially responsible parties. For example, the Government of Ontario has granted exemption from liability for prospector's work on unremediated mine sites. In addition, the government weakened statutory provisions that have served to curtail the creation of brownfields by weakening requirements that mining companies post financial assurances up front for remediation purposes.

We continue to hold the firm belief that the Ontario government needs to develop a co-ordinated response to all aspects of the contaminated site issue, including the liability of potentially responsible parties, the funding of the remediation for "orphan sites," as well as government oversight and the provision of financial assurances for activities that are likely to produce

brownfields. Subject to these concerns, we have the following specific comments with respect to Bill 56:

Section 168.3 (3) provides for a crown immunity clause, barring civil action against the government for any inaccurate information contained in the Registry. We would recommend that a provision be included that provides that in the event that the Director has reason to believe that the information that was provided in a record of site condition is inaccurate or misleading, the Director will ensure that notice is provided to the public through the Registry.

Section 168.6 (2) allows the Director, on application by the owner of a property in respect of which a certificate of use has been issued, to alter any terms and conditions in the certificate of use, add new terms, or revoke the certificate. We would recommend that this provision be broadened to allow third parties who have information about a site to also be able to make an application to the Director. We believe that such an approach would ensure that the public has the right to participate in decisions related to protecting the environment and would be consistent with the underlying principles of the *Environmental Bill of Rights, 1994*.

Section 168.7 (1) does not include a Section 43 EPA order as one of the orders that will not be issued once a record of site condition is filed in the Registry. We are not recommending that a section 43 order be included, however it would be helpful if the MoE could provide a policy rationale to explain why a Section 43 order was not included in the list of potential orders that will not be issued.

Section 168.7 (2) provides that the protection afforded by section 168.7 (1) from the issuance of an order does not apply if the record of site condition contains false or misleading information. We would also recommend, as a matter of procedure, that in the event that the MoE becomes aware that false or misleading information was provided to the MoE in a record of site condition, that the MoE turn the matter to its Investigations and Enforcement Branch to determine if there has been a violation of section 184 of the *Environmental Protection Act* ("EPA") and whether charges are warranted.

Section 168.8 (1) allows the Director to issue an order in emergency circumstances to an owner of a property who has filed a record of site condition, if there is danger to the health and safety of any person including danger to existing water supplies. Section 168.8 (2) allows the Director to issue direction to ensure that there is no danger to the health or safety of any person, including danger to existing water supplies.

However, section 168.8 (2) fails to define harm or risk to the natural environment as constituting emergency circumstances for which an order may be issued by the Director. This glaring omission is fundamentally at odds with the MoE's statement of environmental values which stipulates that the Ministry will adopt an ecosystem approach to environmental protection and the management of resources.

We note that the criteria for emergency circumstances pertaining to an owner of a property are more narrowly prescribed than those that apply to municipalities and secured creditors under sections 168.15 and 168.21, respectively. We note that these provisions allow the Director to

issue an order in exceptional circumstances where there is impairment or risk of serious impairment of the quality of the natural environment for any use that can be made of it, or injury or damage, or serious risk of injury or damage to any property, or to any plant or animal life.

We see no valid policy rationale for the MoE to impose a more restrictive set of criteria for defining "emergency conditions" in section 168.8 (2) for owners of property than the criteria applied to municipalities and secured creditors. We would, therefore, recommend that the MoE adopt the same test for determining emergency conditions for property owners as is provided for municipalities and secured creditors.

Section 168.3.1 prohibits a person from changing the use of a property from industrial or commercial use to residential or parkland use unless a record of site condition has been filed in the Registry. However, it is unclear whether this provision will apply retroactively to capture commercial or industrial use before this section comes into force. We believe this needs to be clarified and would recommend that the MoE ensure that this provision applies retroactively.

We understand from a recent article in the *Toronto Star* dated May 21, 2001, that recommendations have been made that the MoE provide limitation from civil liability and prosecutions for the discharge of contaminants for which a record of site condition has been filed. As a matter of policy, CELA is strongly opposed to the inclusion of any statutory provision that curtails the right of an injured person to commence a civil action in relation to any harm suffered due to contamination on property. Nor would we support any restrictions on the MoE's ability to prosecute or a citizen's right to initiate a private prosecution in relation to contaminated property.

The opportunity for a citizen to take his or her case before the court where there has been environmental harm is a matter of fundamental importance to ensure redress to injured parties and also provides for a means of citizen participation in environmental protection. We would also note that immunity from civil liability does not appear to be the trend in other jurisdictions that have enacted brownfield statutes. Accordingly, we fail to see the merit in including any such provision that would curtail or remove the right of citizens to commence civil action or undertake private prosecutions in relation to environmental harm caused by contamination on brownfields.

The Bill has left many significant issues relating to brownfield redevelopment to be addressed through regulations. For example, the definition of "qualified person" and the "circumstances" when a fiduciary is obliged to give notice to a provincial officer are matters to be prescribed through regulations. Consequently we are unable to conclusively assess the adequacy of Bill 56 until we have had an opportunity to review the proposed regulations.

We would request that the MoE consult with the public on the regulations and provide CELA with the opportunity to participate in any multi-stakeholder consultation or advisory group in relation to these regulations. We also reserve the right to make further submissions on the adequacy of Bill 56 once we have had an opportunity to review the regulations.

We are pleased to see that the MoE is taking the initiative to address the issue of brownfield redevelopment and thank you for the opportunity to provide our comments on Bill 56.

Yours truly,

Ramani Nadarajah
Counsel

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