CHAPTER 4. HAZARDOUS WASTES AND BROWNFIELDS

I. Overview: The Hazardous Wastes-Brownfields Connection

Hazardous wastes and brownfields. As Old Blue Eyes might have crooned, "You [mostly] can't have one without the other." As the generation of hazardous byproducts from industrial production has expanded, the amount of land contaminated with such materials also has increased. Similarly, as the stringency of environmental requirements defining and regulating such materials has increased, so has the amount of contaminated land that has not been reclaimed. Frequently owners, developers, financial institutions and others have abandoned, ignored, turned a blind eye to, or run in fear from such wastelands in favour of new residential, commercial, and industrial development in greener, less-polluted fields outside of major urban population centers.

The result, in today's Ontario as in most other state and provincial jurisdictions in North America, has been a negative environmental and health legacy of increasing problems in managing hazardous wastes, reclaiming contaminated lands and failing to control urban sprawl.

In this chapter, CIELAP examines the Common Sense Revolution's initiatives of the last year that sought to turn the tide on the unhappy hazardous waste-brownfields cycle. The news on this front is not black, white or green, but a muddy shade of gray.

II. Hazardous Wastes

A. The problem: Ontario's open-door policy on hazardous wastes

In CIELAP's *Fifth Year Report* on Ontario's Environment and the Common Sense Revolution we noted that since 1994, the generation of hazardous waste within Ontario had increased sharply.[1]

In this year's review, CIELAP updates the situation in Ontario by considering four matters. First, we examine recent, somewhat contradictory, findings of the Canadian government on the generation and import of hazardous waste in Ontario. Second, we compare the Canadian government's findings to American reports — authored in part by CIELAP — on hazardous waste shipments to Ontario. Third, we review the ongoing problem of the concentration of hazardous waste disposal in the Sarnia area. Fourth, we consider the aftermath of government investigations into the alleged dumping of hazardous wastes at the Taro Landfill.

1. The (conflicting) views of the federal government?

Evaluating the position of the Government of Canada on the generation of hazardous wastes in Ontario is somewhat difficult. The difficulty arises, in part, from the fact that in the period since the publication of CIELAP's *Fifth Year Report*, the federal government has issued two reports on hazardous waste generation that come to virtually opposite conclusions on the state of affairs in Ontario. A further future difficulty surrounds the fact that on March 31, 2001, the definition of what constitutes hazardous wastes was changed under Ontario law. As a result, relying on the federal government's analyses may be a problem during this transitional period. Nonetheless, the federal government findings may contribute at least a snapshot of understanding of the hazardous waste situation in Ontario; albeit a blurry one.

The Government of Canada issued the first report in July 2000. At that time, federal Environment Minister David Anderson released 1999 Canadian statistics on transboundary movements of hazardous waste showing that, nationally, there had been an 18 percent increase in imported hazardous waste for disposal purposes primarily from the United States from 1998 to 1999. Mr. Anderson stated that the "continuing rise in imports of hazardous waste is raising questions of safety and responsibility. Canada does not want to

become a pollution haven."[2] Indeed, the federal statistics for Ontario for this period were even more startling. They showed that imports for disposal in the province over the period increased by 38 percent. Generally, the report attributed the rate of increase in waste imports to Canada to higher American waste pre-treatment standards, stricter environmental-liability obligations, and the weakness of the Canadian dollar.[3]

In contrast, the second report issued by the federal government in August 2001 painted an almost rosy picture of the hazardous waste situation for the period 1999 to 2000. Releasing statistics on the transboundary movement of hazardous wastes for 2000, Environment Canada reported a 29 percent reduction in imports nationally and a 32 percent reduction in imports for landfilling. The numbers for Ontario were even more pronounced: a 44 percent reduction in imports for landfilling in one year.[4] While recognizing that "there is still more work to be done" Minister Anderson stated that: "Progress is being made on establishing an environmentally sound management regime for the management of hazardous waste in Canada."[5]

While it is always fun to play with numbers, is this the same country Minister Anderson said only one year earlier was in danger of becoming a "pollution haven?" What accounts for such a dramatic change in just one year when nothing notable occurred on the legal or regulatory reform front in Ontario for the 2000 reporting period? A more likely factor in the reduction of hazardous waste imports to Ontario during this period was the beginnings of a downturn in the American economy and a corresponding reduction in hazardous waste generation in the United States. In any event, it is a dicey proposition to attempt to discern trends on the basis of only one or two years of data.

2. The view from south of the border

The problem with the approach and conclusions reached by the Canadian government are highlighted by research on hazardous wastes conducted in the United States. In May 2001, a report released in Texas using Environment Canada data for a much longer timeframe (the nine-year period from 1991 to 1999) revealed a 500 percent increase in hazardous waste imports to Ontario from the United States, with over one-half of the increase going to Ontario landfills.[6] The report, co-authored by CIELAP, concluded that the dramatic growth in American hazardous waste exports to Ontario was a function of differences in regulatory requirements for hazardous waste disposal, specifically less stringent standards.[7] In addition, the report pointed to a general demise in the regulatory environment in the province arising from the weakening of environmental laws, dramatic declines in enforcement efforts, and significant budget and staff reductions at the Ministry of the Environment implemented by the Conservative government.[8]

Similarly, in September 2001 a trade association of American companies demanded that the United States Environmental Protection Agency (EPA) block hazardous waste exports to Canada by businesses seeking to evade tough U.S. regulatory standards. The trade association asked the EPA to not allow American companies shipping dangerous wastes to Canada to avoid complying with costly rules at home that required that these wastes be treated before disposal.[9] (The United States does not allow disposal of untreated hazardous waste in chemical landfills, whereas Ontario does allow such disposal.)

While governments talked about developing countrywide, if not North American-wide, standards for hazardous waste disposal to deal with the problem of Canada and, particularly Ontario, receiving increasing quantities of American hazardous wastes,[10] editorialists in the past year continued to condemn the lack of concrete action on the hazardous waste front.[11]

3. The Sarnia area — hazardous waste central

Similar concerns and themes emerge when we examine the picture in Sarnia, Ont., an area that could easily be known as hazardous waste central. During the past year, a draft report prepared for Environment Canada concluded that lax provincial environmental policies that allow disposal of untreated toxic waste make Canada, and particularly the Sarnia area, a magnet for American hazardous waste. The study also found that tough rules in the United States that require

that hazardous wastes be treated before being landfilled encourage many companies to move their waste north to Canada for cheap disposal. Moreover, according to the report 30 percent of American hazardous waste shipped to Canada in 1998 ended up being disposed of or burned in the Sarnia area landfill-incinerator complex owned by Safety-Kleen. According to the report, a significant factor in the decision of generators of American hazardous waste to use the Sarnia area facility was lower disposal costs.[12]

Despite the concerns of Sarnia area residents[13] and calls by area legislators for a ban on the import of American hazardous waste, the Ministry of the Environment believes the situation is improving.[14] MOE optimism appears to be based on the reduced quantity of hazardous waste imported in 2000, which Environment Canada also appears to take some comfort from. The question, however, is whether this optimism is justified or misplaced.

4. *Taro: Aftermath of a hazardous waste scare or gone with the wind?*

Finally, another recent incident that also contributed to pressure for Ontario hazardous waste law reforms appeared to come to a comparatively happy ending in 2001. In CIELAP's *Fifth Year Report*, we reported on allegations in the media that the Taro East Landfill in the Hamilton area was receiving waste that, under the laws of the State of Michigan and the United States, would be deemed hazardous. However, because of differences in Ontario laws defining and characterizing the same waste, such material could legally be disposed of in Ontario as non-hazardous waste. Due to a public and media outcry, the MOE announced a six-point plan of action to address some of the weaknesses in Ontario's laws defining hazardous waste.[15] The results of this law-reform initiative are discussed more fully below.

However, the question remained as to what was the environmental condition of the Taro East Landfill itself? One of the six points of the action plan called for the establishment of an independent expert panel to review the potential for any long-term environmental effects as a result of waste deposited at the Taro East Landfill. Reporting in October 2000, the panel made a number of significant findings. First, the panel accepted the conclusions of MOE investigators that the owners of the landfill had not broken any Ontario laws. Second, the panel noted that there was no evidence that significant or widespread dumping of hazardous wastes had occurred at the site. Third, the panel did not identify any obvious risks to human or ecosystem health posed by the landfill.[16]

The ironic result of this scare is that a site deemed to be in compliance with Ontario hazardous-waste law, became a significant spur to reforming for the first time in 15 years how Ontario defines hazardous waste.

B. The solution: Ontario's new rules for defining hazardous wastes?

When there are many things wrong with a jurisdiction's legal and regulatory regime, it is always best to begin at the beginning with proposed law reforms. In the case of the Ontario Government's six-point action plan on hazardous wastes, the provincial effort focused on how such wastes were defined under Ontario law and the need to make these definitions more compatible with American law. The question that remains, however, is whether a faulty waste definition was all that was wrong with Ontario hazardous waste law and, if it was not, what will follow this initial reform effort? The answer is that there is more wrong than mere definitions, but what the government's next steps will be remains largely unknown.

1. *Origins of the regulatory initiative*

CIELAP's *Fifth Year Report* and the above discussion make it clear that the impetus for the development and implementation of regulatory amendments defining hazardous wastes was at least twofold. First, there was the trend to increasing hazardous waste imports to Ontario for disposal. Second, there was the question of particular waste shipments that, while regarded as hazardous wastes under American law, were not so regarded under Ontario law.[17] To combat these problems, Ontario, following a period of public notice and comment in 2000 on proposed amendments to

provincial hazardous waste regulations, brought into force on March 31, 2001 three key changes to defining hazardous wastes in the province. What these changes do and what they should do was the subject of a CIELAP report released at the time the regulations came into force earlier this year.[18] A summary of the report's findings is discussed below.

2. *What the regulations do*

The regulatory amendments that came into force at the end of March 2001 are designed to improve the identification of hazardous wastes in the province in three ways. First, the regulations adopted a new test procedure for determining when waste is leachate toxic.[19] Second, they adopted a rule for when waste derived from hazardous waste remains hazardous waste,[20] subject to certain exceptions.[21] Third, they adopted lists of what constitutes hazardous wastes under American law so as to harmonize better with American regulatory requirements.[22] Overall, adoption by Ontario of these three changes improves provincial law by correcting key discrepancies that have existed between Ontario and American hazardous waste laws for over a decade. These discrepancies have contributed to making Ontario a magnet for increased hazardous waste imports for disposal and have led to concerns about how these wastes were being managed in the province.

3. *What the regulations should do*

Despite the above changes, a number of key issues remain outstanding regarding each of these reforms and the overall adequacy of hazardous waste regulation in the province. The following summary is based on CIELAP's recent review of the new regulations.[23]

a. *Leachate toxic waste*

The first issue of concern involves the new leachate toxic waste test known as the Toxicity Characteristic Leaching Procedure (TCLP). The new Ontario requirements may allow an MOE director to substitute an "equivalent test method" for the TCLP, but do not set criteria for the application of such a substitute approach. In contrast, American law does not permit substitution of another test method for the TCLP except by petitioning for an amendment to the regulations. Similarly, proposed new federal law reforms in Canada do not authorize any departure from the use of the TCLP. Accordingly, this new discrepancy between Ontario and federal requirements in Canada and the United States could pose problems in future for the transboundary and interprovincial movement of leachate toxic waste.

A further issue related to leachate toxic waste is the number of chemical contaminant parameters that the TCLP applies to as compared to under American law. The new Ontario amendments apply to 88 chemicals, while American regulations apply to 40 chemicals. Accordingly, Ontario believes that its requirements respecting leachate toxic waste now are more than twice as stringent as those of the United States.

However, there are some potential problems with this conclusion. First, as noted above, the Ontario amendments authorize substitution of an "equivalent test method" for the TCLP, whereas American law, the *Resource Conservation and Recovery Act (RCRA)*, permits no such substitution, except by regulatory amendment.

Second, threshold concentrations for determining that a contaminant in waste makes the waste leachate toxic are sometimes higher and sometimes lower for certain chemicals under the Ontario regulations than under American law. As a result, where the Ontario thresholds are higher, the same waste would need a higher concentration of the contaminant to be regarded as hazardous waste under Ontario law than under *RCRA*.

Third, at least one chemical (alachlor) was deleted from the final version of the Ontario amendments because there was no "published health based rationale" to justify retention of the contaminant in the amendments. However, the federal minister of agriculture banned the use of alachlor in Canada in the 1980s because it represented "an unacceptable risk of harm to public health." Because the United States continues to approve the use of alachlor in agriculture, there would appear to be the potential for problems to arise in future to the extent that alachlor-contami-

nated waste is not regulated as leachate toxic waste in either country and is subject to transboundary movement.

b. Derived from rule

Ontario's adoption of a derived-from rule still leaves the following issues of concern. First, the province's reform exempts four broad hazardous waste streams from the rule and therefore from being regarded in law as hazardous waste in Ontario. While this initiative may be intended to encourage recycling in a manner similar to requirements in the United States, the American waste-class exemptions from the derived-from rule operate in a far stricter regulatory context than Ontario. Therefore, Ontario's adoption of the *RCRA* exemptions without adoption of a comparably strict regulatory framework may be problematic.

Second, Ontario's derived-from rule also authorizes site-specific exceptions from the application of the rule if the waste is produced in accordance with a certificate issued by the MOE stating that the waste does not have characteristics similar to characteristics of the hazardous waste "from which it was derived." This provision appears less rigorous than Ontario's existing hazardous waste de-listing procedure (the procedure that permits removal of a hazardous waste from a schedule of such wastes and therefore makes it no longer subject to being regulated as a hazardous waste under Ontario law). The provision also appears less rigorous than American regulations that require a de-listing petitioner to demonstrate that the waste does not meet any of the criteria for which it was listed or have other attributes that might result in the waste being hazardous.

Third, Ontario's new derived-from and mixture rules also are not intended to apply to wastes generated from contaminated-site decommissioning; a potentially significant omission in the context of future cleanups of brownfields. The Ontario rationale for this position is that these "remediation wastes" are not waste streams created during industrial or manufacturing operations and often pose little actual health or environmental threat (although there is the possibility they could be considered as leachate toxic waste using the TCLP). The MOE policy decision not to regulate contaminated soils as listed hazardous waste appears, at a minimum, to be contrary to American law (in particular the "contained in policy" regulating contaminated soil, groundwater, and sediments and rules regulating debris as hazardous wastes).

Fourth, the new Ontario regulations also make it clear that the derived-from rule applies to listed but not characteristic hazardous wastes. That is, waste derived from a characteristic hazardous waste is not deemed to be hazardous waste under Ontario law. In contrast, American law requires that the waste must be shown to no longer have characteristics that would require that it continue to be regulated as hazardous waste and, even then, such waste still may be subject to "land ban" requirements (i.e. required to be treated before disposal).

c. Harmonized hazardous waste lists

There are three issues of concern regarding harmonized hazardous waste lists. The new Ontario regulations are not retroactive, which, from a fairness perspective, is appropriate where facilities accepted American hazardous waste as non-hazardous waste in Ontario when it was legal to do so. However, there is the potential for future environmental problems with these sites. If a non-hazardous waste facility in Ontario has been receiving any of the up to 129 waste streams that the United States has been regulating as hazardous wastes for over a decade (but Ontario has not), there are potential concerns about whether the Ontario landfills were ever adequately designed or built to handle the waste they received. The new Ontario amendments do not address what should be done to ensure that the province and the public will not face future problems arising from the past disposal of hazardous wastes at these facilities.

Second, some sites that in the past have received certain waste as non-hazardous waste will no longer be allowed to do so because the materials would now be regarded as hazardous waste under the new Ontario amendments. However, these facilities could continue to do so in future if they obtain a site-specific certificate exception from the

derived-from rule from MOE. The standards for obtaining an amendment to a certificate are not set out in the new regulations and may well be less stringent than existing MOE requirements for de-listing wastes as hazardous.

Finally, it is unclear the extent to which *Basel Convention* and OECD lists of hazardous wastes — often relied on by Canada — are reflected in lists under *RCRA,* which the province is now more closely tied to as a matter of law as a result of the recent regulatory amendments.

d. Future reforms necessary

While reforming Ontario law on hazardous waste definition and identification is important, it is just the first step. For Ontario to avoid a continued rapid increase in hazardous waste imports, the province will need to pursue a more comprehensive approach to hazardous waste regulatory reform. Adoption of a variety of measures may be necessary. These should include:

- rigorous standards for the treatment, storage and disposal of hazardous wastes;
- restrictions on the land disposal of untreated hazardous waste;
- comprehensive liability for hazardous waste mismanagement;
- fees on industrial generators of hazardous wastes based on the per-tonne generation of such wastes; these fees could encourage waste reduction and be used for a variety of regulatory activities including remediation of contaminated or abandoned sites; and
- incentives, if not requirements, to reduce hazardous waste generation.

Initiatives such as these would also help Canada meet its domestic legal and international obligations on control of the transboundary movement of hazardous wastes and the protection of the Great Lakes.

Late in December 2001, the province announced a number of new initiatives. These included:

1. adoption of amendments to the primary provincial waste regulation, scheduled to go into effect on January 1, 2002, which would require all hazardous waste generators to register their hazardous wastes annually rather than the current one-time-only basis,[24] and require hazardous waste generators to pay annual fees to cover MOE costs related to the management of hazardous wastes in the province;[25]

2. release of a discussion document on possible pre-treatment requirements for hazardous wastes prior to land disposal;[26] and

3. draft regulations that would phase-out the use of hospital incinerators, set requirements for the handling, transportation, and treatment of biomedical waste, and require the destruction of 99,000 tonnes of PCBs currently in storage.[27]

These initiatives will be discussed more fully in future by CIELAP. Suffice to say at this time that, in principle, these initiatives are welcome additions to hazardous waste regulation in the province. Nonetheless, there may be potential problems with several of the initiatives that will become law in early 2002.

In the case of the annual generator registration requirement, the amendments do not specify the contents of annual reports that must be filed with MOE, such as total waste quantities generated and on-site and off-site disposal by quantity of these materials. Nor is such information apparently intended to be publicly available.[28]

In the case of the cost-recovery initiative, it is unclear whether the $12 million in fees to be collected annually under this regime for MOE's management and tracking of hazardous wastes[29] will have a material effect on reducing hazardous waste generation. Nor is it clear whether the funds generated through annual fees under this program will be available, let alone sufficient, to address remediation of contaminated or abandoned sites.[30] This appears especially to be the case if funds generated under the program are reduced proportionately through future MOE budget cuts.

Taking the first step of defining hazardous wastes is important. However, it is unclear what Ontario's long-term strategy for hazardous waste management is in the province. The failure to develop a comprehensive strategy may create problems for the province in future as it tries to deal with the back-end of the hazardous waste problem — contaminated lands.

III. Brownfields

A. The nature and sources of the problem

Brownfields are abandoned, idled or under-used industrial and commercial lands where expansion or redevelopment of infrastructure is complicated by real or perceived environmental contamination.[31] They exist, in part, because of environmental laws that impose liability on owners, operators or persons in charge, management, or controllers of a source of contamination. The barriers created by these laws can include:

1. Concern about future environmental liabilities;
2. Uncertainties about cleanup costs;
3. Complexity and delay in undertaking remedial action;
4. Difficulty in obtaining financing;
5. Concern regarding the enforceability of contracts assigning or allocating environmental liabilities.
6. Lack of data on the environmental condition of land;
7. Absence of clear scientific standards for cleanup; and
8. Existence of orphaned sites (where no responsible parties can be found).

Properties that may become brownfields range from large unused rail yards and steel mills that can occupy hundreds of hectares to the relatively small sites occupied by local dry cleaning shops and corner gas stations.

B. Past initiatives to address the problem

Over the years MOE has undertaken a number of initiatives to address the problems posed by contaminated lands. These initiatives have included development of contaminated-site guidelines to foster redevelopment and negotiation of agreements with lenders to facilitate conducting environmental investigations and otherwise protect the value of real property without attracting environmental liability. In addition, the courts and administrative tribunals have addressed the issue of contaminated lands and the MOE initiatives. On the whole, these initiatives have had mixed success in addressing the problems posed by contaminated lands.

1. Ministry of Environment contaminated site guidelines

Generally, under provincial law MOE has the authority to address any situation where there could be an adverse effect arising from the presence of a contaminant in the environment, including air, land or water. Remediation is legally required under Ontario law when the MOE has issued an order for that purpose.[32]

Since 1989, the MOE has had guidelines for use by property owners involved in cleaning up or redeveloping contaminated property. The latest version of the contaminated-site guidelines dates from 1997.[33] The importance of the guidelines in 2001 and a reason to summarize their content in this year's CIELAP report is that they likely will become enshrined in future brownfields law proposed by the current government. The guidelines provide advice and information to property owners and consultants to use when assessing the environmental condition (e.g. soil or groundwater) of a property when determining whether or not restoration is required, and in determining the kind of restoration needed to allow continued use or reuse of a site. However, the guidelines do not create new legal obligations or otherwise change the legislative powers or regulatory mandate of the MOE. Nonetheless, a landowner that wants to sell, finance or develop contaminated lands has always been well advised to ensure that he or she has met the applicable provisions of the guidelines.[34]

The guidelines identify three approaches for addressing site contamination. The first approach calls for restoring a site to background conditions, the most stringent clean-up levels under the guidelines. These levels were developed by MOE through soil sampling at parks across the province.

The second approach involves use of generic soil and groundwater cleanup criteria designed to protect human health or the environment from adverse effects from exposure to more than 100 different contaminants. The generic soil cleanup criteria are most stringent where the land use is or will be for residential or related purposes and least demanding where the land use is or will be for industrial or commercial purposes. The generic soil cleanup criteria also may be stratified (i.e. may be less stringent the deeper the soil). Different generic groundwater cleanup criteria also are applicable depending on whether the groundwater is intended as a source of drinking water.

The third approach involves use of site-specific assessment criteria for human health and environmental risks. This approach may be substituted for the background and generic approaches where the latter criteria are not adequate or do not exist for particular contaminants on the site.[35]

The guidelines also set out a four-step process of investigation and restoration (site assessment, sampling and analysis, remedial work plan and completion). The guidelines further provide for a mechanism for the property owner and consultants who perform or supervise the site assessment or restoration work to indicate that the work has been completed in accordance with the guidelines. The mechanism, known as a Record of Site Condition (RSC), normally is provided to MOE when a stratified generic approach or certain risk management measures are undertaken.

Use of these approaches creates a need for notification of those who may have a future interest in the restored property. The guidelines provide a mechanism for public notice that may be issued as an MOE order under the *Environmental Protection Act*. The order directs the property owner to register a Certificate of Prohibition under other provisions of the *Environmental Protection Act* on the title of the property. The Certificate of Prohibition requires that information about the restored site be provided to persons who may wish to acquire an interest in the site.[36]

Generally, the guidelines have not been viewed as encouraging owners of contaminated sites or prospective owners, lenders, or developers to voluntarily clean them up because of the threat of exposure to environmental orders or quasi-criminal liability under the *Environmental Protection Act*.[37] At the same time, MOE's role in the process has been primarily advisory, as it largely does not approve, review or "sign-off" on cleanups.[38] Some groups believe the guidelines have essentially created a system of self-regulation.[39] Consequently, there are concerns about the adequacy of the clean-ups performed.

2. Environmental agreements

Development of guidelines was not the only MOE initiative in the 1990s addressing contaminated lands. For a number of years, MOE had been entering into individual agreements with lenders to facilitate the cleanup of contaminated lands and to minimize environmental liability. However, the business and financial communities have had continuing concerns about the potential liability of lenders for cleanup of contaminated property, as well as concerns about inconsistencies in agreements. As a result, in 1993 the MOE created a multi-stakeholder working group to provide advice on ways to achieve greater certainty for lenders.[40]

Reporting in 1995, the working group produced a discussion paper that recommended development of a standard or global agreement between MOE and lenders. The purpose of the global agreement would be to provide lenders with assurances about the scope of their potential environmental liability for all properties on which they hold security and want to realize on that security. Generally, the global agreement was designed to facilitate the ability of lenders to conduct environmental investigations and otherwise protect the value of — and prepare for sale — real property on which they held security without attracting environmental liability or reaping windfall profits.

In practice, however, concerns developed with the global-agreement process as well. Although the global agreement appears to exempt lenders from liability for cleanup, subject to certain exceptions, the global agreement also contained a provision that MOE interpreted as requiring lenders to enter into site-specific supplementary agreements that were more onerous for lenders than the global agreement. For example, MOE used the global agreement to prohibit the management or sale of property unless a lender would agree to provide a reserve fund through a supplementary agreement not otherwise referred to in the global agreement.

Consequently, there was concern in the financial community that the consistency sought by MOE in developing a global agreement applicable to all lenders that would help prevent further abandonment of contaminated sites would be lost if MOE sought more onerous supplementary agreements in each case. This was of particular concern because there was no authority for the agreement process under any statute administered by MOE.

3. The response of the courts and administrative tribunals

Over the years, both the courts and administrative tribunals have had the opportunity to consider issues related to the cleanup of contaminated lands in Ontario. In doing so, these bodies often enunciated principles that clarified the nature and extent of obligations of both owners and lenders and, at the same time, limited MOE authority to act in certain circumstances.

In *Appletex*, the Divisional Court upheld an Environmental Appeal Board decision that applied fairness principles to relieve two owners of a mill from much of their liability under an MOE cleanup order because the owners had not added to the environmental problems on the site.[41] MOE was concerned that the *Appletex* decision, relied on in subsequent cases, could open the door to the creation of more orphaned sites, foster poor environmental practices by owners, lenders, and others and have a chilling effect on MOE's issuance of orders.[42]

In *Re Karge*, a decision also relying on *Appletex*, a panel of the Environmental Appeal Board commented critically on the MOE practice of attempting to compel a lender to enter into a supplementary agreement that is more onerous than the global agreement. The Board was particularly concerned about this practice because the former agreement was not otherwise referred to in the latter and the entire exercise was occurring in the absence of any type of legislative framework authorizing such arrangements.[43]

C. The government's response: Bill 56 — The Brownfields Statute Law Amendment Act, 2001

Given the Conservative government's general antipathy to environmental regulation, one would not have necessarily expected the province to address the subject of cleaning up contaminated lands. Instead, one would have expected the government to leave the problem to the private sector to resolve under existing arrangements, however inadequate. On the other hand, one also could expect that if the province did decide to intervene legislatively on the subject of contaminated lands, the environment might be neither the primary reason for, nor beneficiary of, the initiative.

Both of these observations may be accurate in assessing the government's Bill 56 - the *Brownfields Statute Law Amendment Act, 2001*.[44] Economic, commercial and political factors appear to have driven the decision of the province to address brownfields legislatively. In particular, the City of Toronto's bid for the 2008 Olympic Games would have required cleanup of up to 800 hectares of contaminated Toronto waterfront lands to allow the city's bid to be competitive.[45]

Other Toronto and area redevelopment needs, as well as a desire on the part of the province to reduce the pressure for greenfield development particularly in the Oak Ridges Moraine-905 region, also appear to have been factors in the government's decision to address the brownfields problem.[46] Given the government's increasing political vulnerability in the 905 region, trading away greenfield development for brownfield redevelopment may have looked attractive in the circumstances.

The following review examines the background,

components, opportunities, and limitations of the current Government response to the brownfields dilemma.

1. Preliminary steps: Provincial and municipal task forces on brownfields

The government's first step in developing a strategy for reclaiming brownfields involved establishing a panel of experts to advise it on the subject. The panel was made up of representatives from the legal, financial, real estate, municipal, construction and environmental sectors. Established in September 2000, the panel was charged by the province with providing advice on several matters. These included how to:

1. address liability concerns under the *Environmental Protection Act*;

2. increase municipal-finance incentives under the *Municipal Act* and the *Planning Act*;

3. streamline land-use planning processes under the *Planning Act*, and

4. promote public-private partnerships.[47]

Reporting in November 2000, the panel identified a number of key issues. First, the panel noted that under the *Environmental Protection Act*, liability for contaminated sites is shared widely by the original polluter, subsequent owners, municipalities, lenders and others. The panel noted that the resulting "liability chill" for these groups is the most significant obstacle to the voluntary cleanup and redevelopment of brownfields.

Second, the panel noted that the costs to assess, cleanup and insure brownfields can be high, making brownfields redevelopment less competitive than developing greenfields.

Third, the panel observed that because municipal-site identification and land-use planning approaches vary from municipality to municipality, the result is confusion and uncertainty as to how they should mesh with the MOE's contaminated-site guidelines process.

Fourth, the panel further noted that even when site remediation has been performed, there is uncertainty in confirming that the remediation has been completed according to the MOE's contaminated-site guidelines.[48]

To remedy these and related deficiencies, the panel proposed a three-pronged strategy focusing on reforms respecting environmental liability, financing, and planning matters.

a. Environmental liability

The panel characterized environmental liability as a "cornerstone impediment" to reuse and revitalization of brownfield sites due to the MOE's ability to issue orders and prosecute those associated with contaminated properties. Accordingly, the panel noted that the objective of its recommendations was "to spur redevelopment and productive use of brownfields by clarifying liability rules and assuring the quality of site cleanups."

The panel recommended modifications to the *Environmental Protection Act* and the *Ontario Water Resources Act* to "limit liability for non-polluters such as owners, lenders, municipalities, and others, and provide clarity to polluting owners." As part of these proposals, a non-polluting party would be protected as a matter of law upon taking certain remediation actions and meeting certain environmental standards. As part of this proposal, there would be a clearer, more accountable process of site assessment and cleanup conducted by certified professionals.[49]

The panel urged a number of principles upon the government. These included:

1. maintaining current environmental standards, particularly for sites proposed for residential use;

2. differentiating between polluters and non-polluters, with the former remaining on the hook, but the latter (e.g. non-polluting owners, lenders, and municipalities) obtaining immunity from liability for pre-existing contamination, but not for contamination they themselves create;

3. overriding environmental immunity for owners in emergency situations;

4. encouraging voluntary cleanups by polluters;

5. increasing public reporting on sites and accrediting consultants that supervise remediations;

6. prohibiting the imposing of liability for minor involvement with a contaminated site such as conducting investigations;

7. clarifying processes and criteria for cleanups; and

8. limiting municipal exposure for issuing planning or building approvals and ensuring that the adequacy of cleanups is determined through provincial processes.[50]

Not surprisingly, many of the panel's recommendations would have the effect of enshrining in Ontario law the principles of the MOE's global agreements with lenders and its contaminated-site guidelines.

b. Financing

The panel identified several financial impediments to redevelopment of brownfields. These included uncertain and often prohibitive cleanup costs that make brownfields less attractive to developers than greenfield properties, tax arrears, and federal and provincial liens that limit the ability of purchasers to acquire and redevelop brownfield sites.[51]

Accordingly, the panel recommended generally that governments provide more and better financial tools to encourage remediation and reuse of brownfield properties. In particular, the panel suggested five tools and policies to achieve these goals:

1. enhance municipal tax planning to assist in projects that otherwise are not viable.

2. provide clearer rules on municipal tax arrears forgiveness.

3. lift provincial and federal liens on brownfield properties.

4. provide provincial sales tax and federal goods and service tax rebates on specific costs associated with soil remediation to help level the playing field with greenfields.

5. expand Superbuild and other provincial-funding programs, to address brownfields redevelopment alone and in conjunction with the federal government and the private sector.[52]

Several of these recommendations were highly controversial. In particular, some panel members disagreed with the recommendation to merely level the playing field between brownfield and greenfield development rather than provide a clear financial advantage to brownfield redevelopment, as the latter was viewed as environmentally and socially superior to greenfield development.[53] As well, the panel recommendation to involve the province in active funding of brownfield redevelopment would prove to be a highly controversial issue when it largely disappeared from the government's new brownfields bill.

c. Planning

The panel further found that the land-use planning process frustrates development of brownfields. In the panel's view, current provincial policy seeks to prevent harm from use of contaminated sites, but does not balance this with the need to encourage their cleanup and redevelopment. This, in turn, causes municipalities to treat contaminated lands as a barrier to redevelopment, rather than an opportunity to revitalize such areas.[54]

Accordingly, the panel recommended that provincial-policy statements in the *Planning Act* be introduced to encourage brownfield redevelopment as part of community-improvement initiatives and that municipalities be free to treat the cleanup of contaminated sites under the *Planning Act* as matters for which municipalities can offer development density incentives.[55]

d. The views of municipal interests

While the province was establishing the panel,

municipalities, through the Association of Ontario Municipalities (AMO), set up their own task force to examine the brownfields problem. Reporting in October 2000, the AMO task force identified many of the same problems as the province's expert advisory panel. In particular, the AMO task force identified three matters as representing the greatest obstacles to municipal involvement in redevelopment of brownfields: potential liability; lack of private-sector interest in the majority of brownfields; and the absence of financial support for remediation efforts.[56]

The AMO task force made recommendations respecting three primary matters:

1. environmental responsibility (the need for protection of municipalities from liability, training and certification of site assessment consultants, and provincial responsibility for issuing approvals);

2. financial aspects (municipal ability to offer financial incentives, removal of federal and provincial liens, creation of provincial funding regime for site remediation work), and;

3. process concerns (building of municipal capacity and training, certification of environmental site-assessment consultants, municipal ability to control "as-of-right" developments [i.e. developments where no change in land use is involved], and municipal access to information and right-of-entry).[57]

In addition to its recommendations for revitalizing brownfields, the AMO also urged the province not to lose sight of the longer-term need to prevent the further creation of brownfields; to ensure such sites are not abandoned; and to devote sufficient resources to preventive measures and enforcement.[58]

2. *The government's rationale for Bill 56: Smart Growth — brownfields vs. greenfields*

The province regards Bill 56, its proposed brownfields law, as part of a broader strategy called "Smart Growth." According to the province, smart growth seeks to promote and manage growth in ways that "sustain a strong economy, build strong communities and promote a healthy environment." The role brownfields legislation plays in this strategy is to encourage environmental cleanup of contaminated lands, thereby revitalizing them and surrounding areas, make more efficient use of existing infrastructure like roads, sewers, and schools, and provide an alternative to developing green space and farmland, thereby protecting these areas.[59] This sounds like a "win-win" situation for the urban and rural environment, which should mean much to applaud and little to complain about. But considering the competing factors behind the initiative, we would be remiss in not investigating Bill 56 a little closer. And so we did. The following is what we found.

3. *What Bill 56 proposes: Is this the road to smart growth or the exit ramp?*

Bill 56, introduced for first reading in the Ontario legislature on May 17, 2001 by the Minister of Municipal Affairs and Housing, is described by the government as encouraging the revitalization of contaminated lands. According to government news releases, Bill 56 will promote the cleanup of such sites, protect surface and groundwater resources, improve soil and land quality, help reduce urban sprawl and reduce threats to human health and safety posed by these sites.[60] However, in actual fact, we do not know if these are the purposes of the bill because Bill 56 contains no purpose section setting out explicitly that any of the above are its purposes, goals, requirements or intended outcomes. This is important, because when courts and administrative tribunals seek to enforce the provisions of a law, they prefer to rely on statutory purpose sections as a guide to a law's purpose, rather than on a press release.

In the absence of a purpose section, one has to examine the particulars of individual sections of a law to determine what the overall legal and policy effect of the legislation may or may not be. The absence of a purpose section in Bill 56 absolutely demands such a section-by-section analysis.

Accepting for the moment that the purposes, goals, and objectives of the government's proposal are what the government has stated, what measures does Bill 56 propose to achieve these ends? The Bill appears to focus on five areas of concern:

1. Rules on the assessment and cleanup of contaminated sites.
2. Rules for environmental liability.
3. Quality assurance measures.
4. Planning tools.
5. Financing tools.

Each of these measures is reviewed briefly below.

a. Rules for contaminated site assessment and cleanup

Among the authorities contained in Bill 56 are the following relating to contaminated site assessment and cleanup. The Bill would amend the *Environmental Protection Act* to do three things. First, where necessary, it would make environmental site assessment and cleanup to prescribed standards mandatory where there is a change in land use from industrial/commercial to residential/parkland or other prescribed changes. Second, it would authorize regulations to provide clear rules for site assessment, cleanup and standards for contaminants based on proposed land use (for example, the current cleanup criteria in the MOE's contaminated site guidelines would become regulated standards). Third, it would require the acceptance of a site-specific risk assessment by the MOE as prepared by a certified professional and allow for conditions to be placed on the use of a property.[61]

As noted above, these measures largely adopt the current MOE contaminated-site guideline process. Perhaps the key to the success of these Bill 56 provisions is the extent and frequency with which MOE will be actively involved in the review of a site's assessment, as opposed to passively accepting an assessment prepared by a certified professional retained by the site owner or developer. In other words, do these reforms establish substantive and systematic approval regimes for the cleanup of contaminated lands or are they merely self-regulation by another name? If MOE staff resources are not increased significantly to oversee the process - and Bill 56 does not speak to this issue - then this package of reforms may prove to be largely business as usual.

b. Rules for environmental liability

The Bill also proposes to amend the liability rules under the *Environmental Protection Act* in a number of key respects. First, Bill 56 would provide liability protection from future environmental orders for municipalities if they take actions for the purpose of a tax sale or take actions related to other municipal responsibilities.

Second, the Bill would provide liability protection from future environmental orders for secured creditors while they protect their security interests in a property.

Third, Bill 56 also would provide liability protection for a fiduciary acting in a personal capacity.

Fourth, the Bill also would provide protection from environmental orders for any person conducting an environmental investigation while acquiring interest in a property.

Fifth, Bill 56 further would provide liability protection from future environmental orders for owners who follow the prescribed site assessment and cleanup process that includes filing a record of site condition with the Bill's new proposed site registry and using a certified consultant.

Sixth, Bill 56 also would propose to maintain the Ministry's power to issue an order in response to an environmental emergency.[62]

These measures largely adopt the current MOE global environmental agreement protections for lenders and expand them to other actors in the process, such as municipalities.

c. Quality assurance mechanisms

Bill 56 also proposes to amend the *Environmental Protection Act* to authorize new quality-assurance measures. First, the Bill would introduce a number of measures, including sign-off by certified professionals, mandatory reporting to a site registry and an auditing process to ensure compliance with the legislation and regulations. Second, the Bill would authorize regulations to establish the standards for certification and to support the site registry.[63]

These measures are meant to enhance the integrity of the site-assessment process, which has

come under fire in recent years.[64] However, the proposed measures contained in Bill 56 also raise more questions than they answer about exactly the intended oversight role for MOE in the quality-assurance process. Is the certification of, and sign-off by, professionals a form of self-regulation substituting for prior approval of cleanups by MOE? Are the certified professionals to be surrogates for MOE inspectors in reviewing completed cleanups?

d. Planning tools

The Bill also proposes amendments to the *Planning Act*. These amendments would do the following. First, clarify the definition and scope of "community-improvement project area" by including environmental, social or community economic development as reasons to consider an area for community improvement. Second, provide for criteria-based community improvement plans to address brownfield properties on a site-by-site basis. Third, streamline the planning approval process for community improvement plans by not requiring the minister's approval, except where the powers of a municipal council involve providing financial assistance. Fourth, increase municipal flexibility in the provision of grants and loans by including not only owners but tenants and the assignees of owners and tenants as well.[65]

Bill 56's planning proposals mostly adopt those recommended by the province's expert advisory panel. However, it is not clear whether the panel's recommendation that municipalities be obligated to require evidence of site cleanup as a condition of development approval in "as-of-right" zoning situations has been adopted.

e. Financing Tools

Finally, Bill 56 would amend municipal legislation to assist in the financing of brownfields redevelopment in the following ways. The Bill would amend the *Municipal Tax Sales Act* to provide that a municipality may choose not to take ownership of a property when a tax sale is unsuccessful and provide that municipalities may enter and inspect land that is the subject of an unsuccessful tax sale for the purpose of conducting an environmental site assessment.[66] In addition, Bill 56 would amend the *Municipal Act* to allow municipalities to cancel or freeze the municipal and education taxes on brownfield properties for the purposes of site remediation.[67]

The expert advisory panel recommendation to involve the province in active funding of brownfield redevelopment was not included in Bill 56. This became a highly contentious issue in the ensuing legislative debates on the Bill, discussed below.

In addition, Bill 56 appears to attempt merely to level the playing field between brownfield and greenfield development rather than provide a clear financial advantage to brownfield redevelopment, even though the latter was viewed by some members of the panel as environmentally and socially superior to greenfield development.

4. The debates in the Ontario Legislature

Debate in the Ontario legislature identified both positive and negative attributes of Bill 56. Typical of views in support of Bill 56 were those expressed by the Hon. Chris Hodgson, Minister of Municipal Affairs and Housing who tabled Bill 56, and the Hon. Brad Clark, Minister of Transportation who supported it during second-reading debate in the legislature. Both ministers focused on many of the same themes identified by the provincial advisory panel. They also emphasized the importance of Bill 56 in the government's overall smart-growth strategy.

The ministers repeated three themes in their statements to the legislature in support of Bill 56. First, the need to remove existing obstacles to the cleanup and redevelopment of contaminated lands such as those posed by liability provisions under provincial environmental laws. Second, the environmental, social and economic gains expected in the communities where brownfields are cleaned up and redeveloped. Third, the corresponding reduction of development pressures on farmland and greenfields, thereby preserving these areas.[68] Interestingly, the Minister of the Environment neither introduced Bill 56 nor participated in the legislative debate. This is a surprising absence considering the dramatic effect Bill 56 will have on existing environmental laws.

Opposition party members praised the principles but not the particulars of Bill 56. Their concerns focused on four matters. First, there was concern that Bill 56 would achieve little because of the lack of a provincial funding commitment in the legislation to assist in the cleanup of brownfields. Other jurisdictions such as Quebec and New York have established funding programs in the tens, if not hundreds of millions, of dollars as part of their legislative efforts to restore brownfield properties.[69]

Second, there was concern that the Bill's emphasis on municipalities foregoing tax revenues on these properties as the primary fiscal incentive to owners, developers or lenders investing in such sites would be insufficient encouragement where site cleanup would be expensive. Moreover, because municipalities already face major budgetary squeezes from provincial downloading of other responsibilities, opposition members argued that this was the wrong financial approach to rely on for brownfield cleanup and redevelopment.[70]

Third, given major staff and budget cuts within the MOE over the past six years, there was concern about the availability or the intention of MOE staff to inspect the adequacy of clean ups of brownfield sites conducted under the Bill.[71]

Fourth, there was concern about the failure of the Bill to require the development of an inventory of sites that need priority clean up.[72]

There also was some disagreement amongst opposition members about the strengths and weaknesses of Bill 56. Some opposition members felt that the Bill 56 provisions for protection from liability might go too far in exempting the private sector from paying for cleanup costs. This concern related to both past owners who created the problem and then abandoned the site, and prospective owners who could obtain municipal tax breaks while acquiring a property, the value of which is enhanced at taxpayer expense.[73] Other opposition members pointed to the possibility that the Bill 56 protections from liability might not go far enough in encouraging the private sector to invest in cleanup and redevelopment of brownfield sites. They pointed to the failure of the Bill to protect innocent purchasers from prosecution and civil suits; failure of the Bill to protect owners from liability for off-site problems, such as groundwater; and lack of protection for corporate officers and directors.[74]

Despite the many concerns identified, Bill 56 received Royal Assent on November 2, 2001.

5. What needs to be avoided in facilitating brownfield redevelopment: Second-class environmental health protection

The primary things that can be said in favour of Bill 56 are that the provincial government recognizes the need for a multi-pronged strategy that addresses cleanup standards, the scope of environmental liability, quality-assurance, planning, and fiscal measures. However, the problem is the content the government actually gives to these components of the strategy. In particular, there is at least a three-fold concern with the price that will be paid for brownfield redevelopment by the Ontario public and the communities where these properties are located. First, environmental cleanup standards are likely to become (or remain) more lenient. Second, cleanup processes are likely to speed-up but with less governmental and community oversight. Third, the liability of owners and developers will be limited, with the corresponding potential for them to reap windfall profits while the taxpayer may end up footing a large, if indeterminate, portion of the cleanup bill.[75] In short, we may be in store for faster, dirtier, cheaper (for owners/developers), but more expensive (for the public) environmental cleanups.

It is quite possible that the fewest benefits from Bill 56 will flow to those living in the shadow of Bill 56 cleanups. Sound environmental law should seek to relieve communities of the environmental and health burdens created by brownfields in their midst; not leave them with potentially second-class environmental protection. Environmental protection should be about the equitable application of environmental rules. It is a vital question whether a community's long-term interests are served by brownfield redevelopment achieved on the basis of reduced environmental liability rules, potentially less stringent environmental-cleanup standards and an MOE that may be nowhere to be found.

IV. Conclusions

As we noted at the outset, hazardous wastes and brownfields are connected at the hip. Addressing questions of reduction in hazardous-waste generation through stronger regulatory standards, restrictions on land disposal of untreated wastes and fees on per-tonne generation to cover the clean-up costs for abandoned contaminated sites can go a long way toward solving questions of brownfield liability, clean-up standards and abandoned site remediation. However, to date the province has failed to view the two issues as connected.

The province has rightly started at the beginning on some initiatives, such as the need to improve the definition of what constitutes hazardous wastes for regulatory purposes. However, other provincial initiatives, such as providing relief from liability and loosening cleanup standards for contaminated sites, may, by themselves, make the problem of brownfied sites worse in the long-term. A contaminated-sites fund financed in part by fees imposed on hazardous waste generators could go a long way toward solving both the need to remediate contaminated sites and to reduce hazardous-waste generation in the province. It remains to be seen whether the provincial government will connect the dots to solve both of these problems in the future.