

Environmental Law Update

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Overview

- ❖ No fault cleanup orders under the EPA;
- ❖ The expanding reach of Ministry orders;
- ❖ The rising cost of contaminated land;
and
- ❖ More stringent remediation standards –
Proposed Excess Soil Regulations.

Kawartha Lakes (City) v Ontario (Environment)

Facts

1. furnace oil leak seeped from private property onto abutting City property – adjacent to lake
2. private property owner's funds were insufficient to cover clean up costs
3. Ministry of Environment and Climate Change (MOECC) issued no-fault remediation order against the City

City's argument on appeal

- order was unfair and contrary to the polluter pays principle

Kawartha Lakes (City) v Ontario (Environment)

Environmental Review Tribunal dismissed appeal

1. no fault orders explicitly authorized by *Environmental Protection Act (EPA)*
2. *EPA's* objective of environmental protection trumps the "polluter pays" principle
3. city failed to address how the environment would be adequately protected if the order were revoked

Appeals to the Divisional Court and the Court of Appeal dismissed

- courts both found evidence of fault was irrelevant

Kawartha Lakes (City) v Ontario (Environment)

What is the Solution?

- 1. Protect your road allowances*
 - Require clean up*
 - Enter indemnity agreements where immediate clean up is not necessary/practical*
- 2. Rely on EPA clean up provisions*

Baker v Ontario (Environment)

Facts

- remediation order was issued against Northstar Aerospace for contamination caused by historical manufacturing operations
- company became insolvent
- assets other than the site were sold, leaving no resources for remediation
- MOECC issued a Director's Order against 13 former directors for violating s. 17, 19 & 196 EPA by permitting the contamination to occur and for failing to provide resources for remediation
- The directors appealed the order
- their motion to stay the order to remediate was dismissed by the Environmental Review Tribunal (ERT)

Baker v Ontario (Environment)

Issues

1. does 145.6(1) permit the directors to appeal the dismissal of the stay application to Divisional Court?
2. would the court judicially review the stay decision?

Appeal and application for judicial review dismissed

1. application for stays are not ERT hearings and s. 145.6(1) only permits appeal of orders made at "hearings"
2. application for judicial review premature
 - efficiency favours judicial review of administrative decisions once they are final
 - incurring irrecoverable remediation costs pending an appeal is not an extenuating circumstance as it was what the legislature intended

McQuiston v Ontario

(Environment)

Facts

- ❖ Former tenant of industrial property was alleged to have caused contamination – tenant ordered to investigate and remediate.
- ❖ In addition, the order named several innocent individuals and companies, including:
 - ❖ A British resident who had recently inherited the property;
 - ❖ That British resident's accountant, who had been assigned a power of attorney to sell the property;
 - ❖ A real-estate brokerage who entered into a listing agreement with the accountant and the listing brokerage's two directors

McQuiston v Ontario *(Environment)*

Issue

- What constitutes management or control?

Placing a lockbox on the door is sufficient!

1. Anyone with “management or control” can be liable, including real estate professionals
2. Includes former or current owners or occupants
3. Extends well beyond “polluter pays” principle

McQuiston v Ontario

(Environment)

What does this mean for municipalities?

- Fact that a municipality had nothing to do with the contaminating activities may have no bearing on exposure to costly regulatory orders
- Before purchasing any property
 - Obtain all environmental reports or other information
 - Obtain representations and warranties
 - Obtain indemnities
 - Contractual right to investigate property
 - Retain independent environmental consultant

McQuiston v Ontario *(Environment)*

What does this mean for municipalities?

- What about tax sale properties?
- What about enforcing property standards?
- What about enforcing development agreements?
- What about vesting tax sale property?
 - No orders for 5 years, unless risk to the environment

Salt and Property Damage

Lambton

- Farmer suffered soil and crop damage as a result of excessive salt application on adjacent road
- \$45,000 in crop loss over 15 years and \$56,000 in diminution in land value
- The finding of liability is consistent with cases as far back as 1987
- Loss of value is concerning
 - Land not irreparably damaged
 - No mitigation of damages

Midwest v. Thordarson

Court of Appeal

- Midwest purchased property
- After closing determined the property was contaminated by the neighbouring property owned by Thordarson
- Thordarson and its principal found liable in nuisance, negligence and section 99 of the EPA
- Fault and/or intent were not relevant to findings of liability
- Finding a duty of care was not necessary – owning contaminated land that contaminates others is, in and of itself, sufficient
- Cost was awarded based on the cost to restore (fully remediate) the property
- Even if costs to remediate exceed the value of property, those costs may be awarded by the court
- The principal was also found liable; the court pierced the corporate veil given that he was effectively controlling the day-to-day operations

Proposed Excess Soil Management Policy Framework

The Problem

- ↗ Massive piles of fill deposited on sites in the GTA with minimal control and possible environmental impacts.
- ↗ Outside of the GTA, soils with minimal environmental risk being disposed of as waste rather than being re-used.
- ↗ Inert fill is defined as, “soil or rock fill or waste of a similar nature and contains no putrescible materials or soluble or decomposable chemical substances”
- ↗ It is up to the generator of fill material to determine if it treats the material as waste, or soil – the characteristics of the site that will receive material is relevant to the consideration, but the Ministry has no regulations and reverts to characterizing soil as waste as a default

Proposed Excess Soil Management Policy Framework

Overview

- ❖ Proposes to increase oversight of excess soil management through enforcement provisions and a new regulation.
- ❖ Suggests both "generic" and "specific" risk based standards based on specific use and/or circumstances.
- ❖ Suggests standards will assist in determining when excess soil becomes "waste".
- ❖ Proposes required soil management plans *before* building permit may be issued.
- ❖ Proposes prosecution and order mechanisms for failure to prepare and/or comply with management plans or regulation.

Proposed Excess Soil Management Policy Framework

Scope

- ❖ Largest proposed impact on source sites; smaller changes to current permitting and approval requirements for receiving sites.
- ❖ Requires source sites to characterize excess soil, then track and verify excess soil reaches "appropriate destination."
- ❖ Municipalities and conservation authorities responsible for oversight of receiving sites, unless they are waste disposal sites or Environmental Compliance Approval is required.
- ❖ MOECC responsible for prosecutions and Orders.

Proposed Excess Soil Management Policy Framework

Standards

- ↻ “Generic” risk based standards based on land use
 - ↻ Allow soils with minimal impacts to be used on “like” sites
- ↻ “Specific” risk based approaches developed in relation to specific uses or circumstances
 - ↻ infrastructure projects, sound and sight berms, flood control structures, former aggregate sites etc.
 - ↻ salt-impacted excess soil
- ↻ Site specific risk assessments may be imposed where RSC is required
 - ↻ Is this any different than what happens on Brownfield sites now?



Proposed Excess Soil Management Policy Framework

Soil Management Plans

- ❖ Requires larger source sites to create and implement soil management plans, certified by a “Qualified Person”.
- ❖ The source site must characterize the soils.
- ❖ The soil management plan must include a tracking plan to ensure and verify excess soil arrives at the receiving site.
- ❖ The receiving site is regulated by the municipality
- ❖ The Province is considering making compliance with the soil management plan “applicable law” for building permits

Proposed Excess Soil Management Policy Framework

Penalties and Enforcement

- ❖ Expect prosecution - and Orders against - Owners or Operators who fail to prepare/comply with soil management plan or who deposit excess soil at unacceptable sites under EPA.
- ❖ Proposes using by-laws, approvals and permits to manage excess soil, including:
 - ❖ Use of municipal by-laws to require receiving sites to prepare and comply with fill management plans.
 - ❖ Requiring excess soil plan before building permit could be granted.
 - ❖ Municipalities will be left with the task of overseeing receiving sites.

Who am I?

Tony Fleming is a Partner in the Land Use Planning, Development and Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including prosecuting and defending by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer. Tony has defended large and small corporations and municipalities against Ministry of the Environment orders and manages regulatory investigations and prosecutions (Environment, Labour and Fisheries and Oceans).

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