



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
*L'Association canadienne du droit de l'environnement*



February 14, 2007

Ms. Marcia Wallace  
Brownfields Coordinator  
Ministry of Municipal Affairs and Housing  
Planning and Development Division  
777 Bay Street, 16<sup>th</sup> Floor  
Toronto, Ontario  
M5G 2E5

*Via fax (416) 585-6467*

Dear Ms. Wallace:

**Re: EBR Registry No AF07E0001 – Potential Components of Brownfield Reform.**

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. We are also a member of the Ministry of Municipal Affairs and Housing's Brownfield Stakeholder Group and have actively participated in consultations relating to brownfield redevelopment.

The Canadian Institute for Environmental Law and Policy ("CIELAP") was founded in 1970, with the mission of providing leadership in the research and development of environmental law and policy that promotes the public interest and sustainability.

CIELAP has researched and reported on the connections between brownfield redevelopment and hazardous wastes in Ontario within the context of our ongoing work on hazardous wastes. We are also a member of the Ministry of Municipal Affairs and Housing's Brownfield Stakeholder Group.

CELA and CIELAP are generally supportive of many of the proposed provisions in the proposal and believe they will facilitate brownfield redevelopment in Ontario. However, we would caution that such development should not be achieved at the expense of increasing contamination in Ontario

or potentially increasing taxpayers' liability for abandoned contaminated sites. In this regard, we are extremely concerned about the proposed provision which addresses off-site migration from a Record of Site Condition (RSC) property, and about horizontal severances.

### **Off-site Migration from RSC property**

The off-site migration provision provides protection to a party who has filed an RSC if, after the certification date set out in the RSC, historical contamination moves from the RSC property to another property, provided the contamination is not at "a concentration that exceeds the site condition standards" of the other property.

We are concerned that this provision will allow a relatively pristine property adjacent to the RSC property to become contaminated, even though the property was in a less contaminated condition relative to the RSC property. The innocent landowner of the other property would likely incur a diminishment in property value as a result of the increase in contamination. Moreover, in the event an innocent landowner wants to redevelop the property for a more sensitive use than that for which it was zoned when the contamination occurred, he or she would be responsible for bearing the clean-up costs for the migration of contamination from the RSC property.

We are firmly of the view that as a matter of public policy it is unacceptable for the Ontario government to provide protection from Ministry orders to a party who has filed an RSC, if contamination moves from the RSC property to another property. Such a move is fundamentally at odds with the traditional common law rights which have held that property owners are responsible for ensuring that contamination from their property does not cause off-site contamination onto neighbouring properties. Moreover, such a provision would undermine the incentive for parties undertaking a clean-up to take the appropriate measures to prevent off-site contamination. Although this provision may indeed promote brownfield redevelopment, it would be at the expense of allowing the increase of off-site contamination in Ontario. We therefore strongly recommend against the government adopting the proposed off-site migration provision.

### **Horizontal Severances**

We are very much in favour of the government amending the *Planning Act* to prohibit horizontal severances in relation to contaminated sites. We are extremely concerned that the use of horizontal severances will allow parties to avoid the responsibility for clean-up of a contaminated site. We understand that horizontal severances have been recommended as a means of severing a parcel of land to avoid liability for undertaking a full clean up. This is achieved by transferring the contaminated portion of the severed parcel to a corporation with no assets, and allowing the corporation to become bankrupt, thus escheating the contaminated property to the Crown. In turn, owners would be able to develop the upper parcel without dealing with the contaminated portion below. The result would be that the taxpayers of Ontario will ultimately be burdened with the contaminated portion of the site. In our view, unless the horizontal severance loophole is addressed, there is a significant potential for parties to avoid a full clean-up of a site. It would also place future generations at risk, since the contamination could potentially migrate onto the surface and adjacent property or the subsurface and groundwater. The government needs to take prompt and effective measures to close off this loophole.

CELA and CIELAP are supportive of proposals which would promote brownfield redevelopment in Ontario but we caution the government to avoid introducing provisions such as the off-site migration provision which would lead to an increase of contamination in the province. We also request the government move promptly to close off the loophole created by horizontal severances so that current and future Ontarians will not bear the burden of clean-up costs from the failure to remediate the lower portion of the severed parcel. We thank you for the opportunity to provide our comments and look forward to working with you on this important initiative.

Yours truly,

**Canadian Environmental Law Association**



Ramani Nadarajah  
Acting Executive Director and Counsel

**Canadian Institute of Environmental Law  
and Policy**



Maureen Carter-Whitney  
Research Director

cc: The Hon. John Gerretsen, Minister of Municipal Affairs and Housing  
The Hon. Laurel Broten, Minister of Environment  
Gord Miller, Environmental Commissioner of Ontario

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