Brownfields Reform in Ontario *

Robert Fishlock
Partner
Blake, Cassels & Graydon LLP

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Chapter 3
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Introduction

On December 29, 2009, the Government of Ontario finalized a set of amendments to its contaminated sites or “brownfields” legislation, which was initially enacted in 2001. The central part of the brownfields legislation is found in Part XV.1 of the Environmental Protection Act (“EPA”),1 entitled “Records of Site Condition”, and in a regulation by the same name (the “RSC Regulation”).2 Most of the amendments are scheduled to take effect on July 1, 2011, and are intended to improve or clarify the regulatory regime that exists in the province for the voluntary (and, in the case of certain proposed land use changes, the mandatory) assessment and remediation of contaminated lands. The RSC Regulation includes, among other things, an important liability protection for those landowners who can attest, by executing and filing with the province’s Ministry of the Environment (“MOE”) a document called a Record of Site Condition (“RSC”), that the subject lands comply with the extensive soil and groundwater standards incorporated by reference in the RSC Regulation. Alternatively, the RSC Regulation provides rules and procedures for the development of acceptable site-specific risk assessment standards.

Many of the recent changes, first initiated in 2007 when Part XV.1 of the EPA was amended (but most provisions not proclaimed in force), have been welcomed by both landowners and municipalities interested in redeveloping older, underutilized industrial or commercial sites, commonly known as “brownfields”. However, there are also those who feel that either the amendments do not go far enough to address longstanding concerns or that many of the new, more stringent soil and groundwater standards will make it unnecessarily expensive to redevelop contaminated lands. The amendments are part of a 20-year process that has culminated in a complex and generally effective regulatory regime that facilitates the assessment and remediation of contaminated sites.

The Government of Ontario’s entire brownfields legislative program includes a number of different statutes, such as municipal tax and planning legislation, in order to ensure consistency between the RSC Regulation and other environmental legislation, or to provide for municipal tax incentives or relief that will encourage brownfields redevelopment. However, this discussion will provide focus on the RSC Regulation and related EPA provisions that provide for the assessment and remediation of contaminated sites, in light of the recent 2009 amendments.3

Traditional Contaminated Site Liability in Ontario

The starting point for understanding Ontario’s regime for dealing with contaminated sites is an examination of the basis and nature of legal liability for the environmental condition of land. Under Anglo-Canadian common law landowners can generally do what they like with their land, as long as that use does not interfere with the rights of others. Over the centuries a number of common law obligations or causes of action have developed that recognize the limits of one’s property rights, in an environmental context. These include the rights or obligations to not trespass the land rights of another; to not permit the escape of dangerous things; to not cause a nuisance or unreasonable interference with another person’s enjoyment of his or her property; and the broad tort law obligation to exercise reasonable care to avoid causing personal injury or property damage to others (negligence law).4 However, prior to

1 R.S.O. 1990, c. E.19. Part XV.1 was added to the EPA by S.O. 2001, c. 17, and has most recently been amended by S.O. 2007, c. 7, Sch. 13. See The Ontario Gazette, Vol. 142-51, December 19, 2009, proclaiming July 1, 2011 as the date on which Sch. 13, ss. 2, 5(1), 6(1) to (3) and (5) to (10), 8(2) and 10 of that amending Act come into force.
2 O. Reg. 153/04. The RSC Regulation has most recently been amended by O. Reg. 511/09 and O. Reg. 245/10. See s. 32(2) and (3) of O. Reg. 511/09, naming July 1, 2011 as the date on which ss. 1(1), (2), (4), (5), (6), (8), (9), (11) and (12), 5, 6, 9, 15 to 18, 20 to 22, 29 and 30 of that amending regulation come into force. See s. 7 of O. Reg. 245/10, naming July 1, 2011 as the date on which the provisions of that amending regulation come into force.
the 1970s, as long as one complied with these common law obligations and confined one’s polluting activities to one’s own property, Ontarians were generally free to pollute their immediate environment.

Furthermore, unless an owner was aware of a hidden environmental condition or defect that made its property unfit or unusable for most purposes, and the defect could be discovered by a purchaser exercising reasonable diligence, the owner was and even today is not obligated to disclose such an environmental defect to a prospective purchaser. This is part of the sale of land legal principle “buyer beware”.5

As a result, after almost a century-and-a-half of industrial activities in Ontario and the rest of Canada, we now face the legacy of extensive land contamination in both the centres of our cities and throughout our natural resource rich northlands where industrial activity took place. Most of this polluting activity was not serious enough at the time to give rise to common law legal proceedings that might have required such activities to stop (by court injunction or more recently, a government pollution stop or control order), but by today’s standards, the resulting soil and groundwater conditions are unacceptable and require remediation before the land can be redeveloped for a new use. Such is the dilemma of brownfield lands: not bad enough to have attracted remedial action at the time, but sufficiently dirty or contaminated to present an obstacle to redevelopment today. Such lands have often fallen into disuse and blight our urban or northern landscapes and in some instances, slowly contaminate their surrounding environment.

Starting in the mid-1950s, with the enactment of the predecessor6 of today’s Ontario Water Resources Act,7 and followed by the enactment in 1971 of the first version8 of today’s EPA, Ontario began to build a regulatory regime that would protect the province’s water, land and air resources. The 1971 EPA consolidated together two earlier statutes dealing with air pollution and waste management: the Air Pollution Control Act, 1967,9 and the Waste Management Act, 1970.10

The basic structure of the EPA in 1971 was surprisingly similar to the current EPA, although lacking much of the detail that exists today, not to mention the many regulations that now exist under the Act. The 1971 EPA prohibited discharge of a contaminant into the natural environment that may cause a number of adverse effects, including property damage, and provided the MOE with the power to issue pollution control, stop, repair and preventative measures orders to address such contaminant discharges. The general prohibition and order making powers are now found in ss. 7, 8, 14, 17 and 18 of the current EPA. These legislative provisions were supplemented in 1985 with the bringing into law of Part X of the EPA, which requires, among other things, the immediate clean-up of pollutant spills and the financial compensation of those who suffer either personal harm or economic loss as a result of the pollutant spill.11

Notwithstanding these statutory obligations and MOE powers addressing contaminating events, the bulk of land contamination still escaped regulatory attention well into the 1980s. This was due to the fact that most land contamination results from the gradual accumulation of chemicals escaping onto and into the ground from small or unseen contaminant spills or leaks (particularly in the case of underground chemical storage tanks) and until the late 1980s, environmental law enforcement was sporadic and the penalties that were available against offenders were relatively small.

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7 R.S.O. 1990, c. O.40 (“OWRA”).
9 S.O. 1967, c. 2.
10 S.O. 1970, c. 44.
11 These new spill requirements had sat on the government’s books un-proclaimed for almost six years following the 1979 Mississauga train derailment and spill: see The Ontario Gazette, August 17, 1985.
1990-2000

By the late 1980s Ontario recognized that it needed to develop remedial standards and policies for the clean-up of contaminated sites. MOE staff, landowners and municipalities required guidance, whether it be with respect to the remediation of a corner gas station or the decommissioning of a large industrial facility. The first such published standards were set out in the 1989 MOE publication Guidelines for the Decommissioning and Cleanup of Sites in Ontario. This document focused primarily on metal or inorganic substances. It was followed in 1993 by the Interim Guideline for the Assessment and Management of Petroleum Contaminated Sites in Ontario, which as the name suggests, focused on hydrocarbon substances. The rules governing how one went about identifying the extent of contamination at a site at the time were almost exclusively developed through private industry practice.

During the early 1990s, it was common for contaminated site owners and their environmental consultants to discuss their remedial plans with a MOE official responsible for the geographic area in which the site was located and to receive Ministry concurrence with the plan and the final completion of the remedial work. Such concurrence would be documented in a letter from the MOE, which might involve the passage of many months after the work was completed as Ministry officials dealt with other pressing matters, waded through the site owner’s reports and questioned the site owner’s consultants. Once obtained, such MOE concurrence would hopefully assure the site owner that further remedial work would not be required. However, neither the MOE concurrence letter nor the EPA provided any guarantees in this regard at the time.

With the advances of science and the growing concern that the presence of man-made chemical substances in the environment may adversely affect the health of humans, animals and plants, Ontario and other Western governments moved to create more comprehensive contaminated site regulatory regimes. Throughout the mid-1990s Ontario developed a number of different versions of a document entitled the Guideline for Use at Contaminated Sites in Ontario, without the benefit of any specific statutory or regulatory authority. The list of chemical standards grew from 22 chemical and soil condition parameters in 1989 to almost 120 individual parameters in 1996.

In addition, the MOE now recognized the need for different environmental standards for sites where the groundwater was considered potable or non-potable; where full depth remediation was not required or desired; or where site-specific land uses and characteristics did not present any of the human health or environmental risks assumed in the development of generic soil and groundwater standards or criteria. The 1990s guideline documents also went well beyond just listing acceptable soil and groundwater criteria and provided some guidance as to the elements of the pre-remediation site assessment process, which was also being addressed by other institutions such as ASTM International (previously the American Society for Testing and Materials) and the Canadian Standards Association.

During the 1990s it was also becoming increasingly evident to the MOE that it did not have the resources or the inclination to be directly involved in the remediation of each and every contaminated site. MOE concurrence letters eventually disappeared and the official position of the Ministry became — “we have published detailed guidelines for your use, follow them and look to the environmental consulting community for the necessary assurances that you have completed an acceptable remedial program”. The main exception was the approval of site-specific risk based standards and the imposition of any related risk management measures.

Towards the later part of the decade, the MOE also developed a form known as a record of site condition (“RSC”), that a landowner and his or her principal consultant could complete, certifying their compliance with the MOE contaminated site guidelines. Unfortunately, while one could file a RSC with the MOE, the government did not accept any responsibility for the statements contained in the document and was not bound by the fact that the remedial work complied with the Ministry’s standards at the time. In addition, the MOE’s enforcement activities were increasing and during the 1990s it was granted the power to impose remedial liability on past owners, occupiers

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13 Hazardous Contaminants Branch, Ontario Ministry of the Environment (August 1993).
and other persons having “charge, management and control” of contaminated sites. As a result, landowners, developers and their lenders sought legislated liability limits under the EPA and related environmental legislation, before they were prepared to commit large sums of money to clean up contaminated sites.

**The Brownfields Statute Law Amendment Act, 2001**

In 2001, after approximately 10 years of the MOE distancing itself from any direct responsibility for contaminated site remediation, the Government of Ontario made a major step forward with the enactment of a package of statutory reforms intended to facilitate an era of brownfield redevelopment. It took four years to implement the various elements of the *Brownfields Statute Law Amendment Act, 2001*, with the finalization of the RSC Regulation in 2004, but when completed, Ontario had put in place an impressive legislated program that dictated the manner in which contaminated sites should be assessed, remediated and in some cases, managed post-remediation.

The 2001 brownfields program retained the RSC as the central documentation of site remedial work, but added a public electronic registry for their filing. It also provided for the incorporation of soil and groundwater standards into regulation; created a more robust set of rules for conducting and approving site-specific risk assessments; established a mandatory requirement to file a RSC with the MOE before a municipal building permit could be issued for prescribed land use changes; and created liability protections under the EPA and related environmental legislation for landowners who completed remediation projects in compliance with the regulatory standards.

The 2001 brownfields amendments also made changes to municipal legislation in order to authorize municipalities to reduce property taxes for a site during its remediation and to make grants or loans to assist in the remedial and redevelopment work and created liability protections for municipalities, secured creditors and their agents, such as bankruptcy trustees and receivers, who temporarily enter into possession of contaminated sites without causing new contamination.

The following provides an outline of the major elements of the Ontario brownfields or RSC regulatory regime that was fully implemented by October 2005, along with references to the recent 2009 amendments that for the most part, will take effect on July 1, 2011. They are found in Part XV.1 of the EPA and in the RSC Regulation (as amended by O. Reg. 511/09 and O. Reg. 245/10).

**The RSC Regulation in a Nutshell**

As noted earlier, by the late 1990s the MOE had stopped providing concurrence letters to landowners who completed remedial work. However, recognizing the need of both landowners and municipalities, among others, to receive some form of written confirmation that the remedial work met recognized standards, the MOE developed the concept of a record of site condition. The expectation on the government’s part was that municipalities, purchasers and financial institutions would rely upon the statements contained in the RSC to obtain comfort that the remedial work carried out at a site was sufficient and met government standards. However, it soon became clear that more was required. In particular, a significant degree of statutory protection was required from further remedial obligations in the event that in the future MOE officials took a different view of the remedial work or a change in environmental standards occurred.

As a result of these concerns, the RSC Regulation was developed based upon a number of key concepts:

1. There must be a standard document wherein the site owner and a person qualified in environmental site assessment and remediation certify, for the benefit of interested third parties, that a property meets government environmental standards with or without the benefit of clean-up or remedial work.

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17 S.O. 2001, c. 17.
18 See Parts II, III and VI of S.O. 2001, c. 17.
19 See Part XV.2 of the EPA.
(2) There must be regulatory standards for acceptable concentrations of contaminants that can be present in land (soil, groundwater and water sediments).

(3) There must be recognized qualifications for those persons engaged in environmental site assessment and remedial work, and rules dictating the manner in which such work is carried out.

(4) There must be certainty for those persons who successfully complete environmental site assessment and remedial work and for those persons who rely upon such work, such as subsequent owners, lenders and municipal land use approval agencies, that they will not be subject to future remedial obligations.

The RSC Document

The RSC document provided for by the RSC Regulation contains some powerful statements by both the site owner and the principal environmental professional or “qualified person” that is prescribed by the Regulation, that the site meets Ontario’s regulatory requirements and standards. Before a completed RSC has any regulatory effect, it must be filed in the public electronic registry maintained by the MOE and known as the Environmental Site Registry.20 Both the civil and criminal consequences of filing a RSC containing false information provide an assurance that the RSC and the work documented in the RSC have been properly completed.21 In its essence the RSC is a public declaration and certification that the landowner and his or her consultant have investigated, assessed and if necessary remediated the subject site in accordance with the RSC Regulation and that the site comply with one of the acceptable sets of soil and groundwater standards incorporated by reference in the Regulation. Its filing may be voluntary or where a prescribed land use change is proposed, mandatory.

In order to file a RSC, an owner must utilize a “qualified person” as defined by the Regulation. A qualified person for the purposes of conducting or supervising a phase one or phase two ESA and making the required certifications in a RSC, are those people having one of the Ontario professional designations specified in s. 5 of the RSC Regulation, which include persons holding a licence or certificate under the Ontario Professional Engineers Act22 or Professional Geoscientists Act, 2000.23 They must also possess a minimum of $1 million in prescribed professional liability insurance. As a result of the 2009 amendments, qualified persons are prohibited from holding a direct or indirect interest in a RSC property for which they conduct site assessment work or complete a RSC.24

These requirements are summarized in Section 5 and Table 1 of the MOE publication Records of Site Condition: A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Condition25 (the “RSC Guide”). This document provides a good overview of the RSC Regulation and process as they existed prior to the 2009 amendments.

So what exactly does a RSC say? The contents of the form are prescribed by s. 16 and Sch. A of the RSC Regulation. An example of a RSC can be viewed on the Environmental Site Registry at http://www.environet.ene.gov.on.ca/besr-public/rscView.do?searchId=num&rscId=71319&formatId=html. The key elements of a RSC are as follows:

Part 1

· Description of the site, site ownership and land use.

· Site owner’s signed certification acknowledging, among other things, that:

  (a) the RSC will be filed in the Environmental Site Registry;

  (b) the RSC will be available to the public for examination;

  (c) the owner has conducted reasonable inquiries to obtain all information relevant to the RSC;

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21 Section 184(3) of the EPA states: “No person shall include false or misleading information in any document or data required to be created, stored or submitted under this Act”.
24 RSC Regulation, s. 6.1 (as amended by O. Reg. 511/09, s. 3).
(d) the owner has disclosed all such information to the “qualified person” named in the RSC; and
(e) to the owner’s knowledge, all statements contained in Part 1 of the RSC as of the certification date are true.

Part 2
- Identification of the principal consultant or “qualified person”, as defined in the Regulation.
- Statement that a phase one ESA was performed and, if necessary, a phase two ESA or risk assessment was performed; a list of site reports and a summary of site conditions.
- Profile of the final site conditions or contaminant concentrations in relation to the applicable soil and groundwater standards.
- Description of the remedial action and mitigation or risk management measures conducted or required at the site.
- Qualified person’s signed certification statements saying, among other things, that:
  (a) a phase one ESA was performed in accordance with the regulations by or under the supervision of a qualified person;
  (b) whether a phase two ESA was required and if so, that it was conducted or supervised by the qualified person in accordance with the regulations;
  (c) as of the certification date, based on the site assessment work, there is no evidence of any contaminants in the soil, groundwater or sediment on the site that would interfere with the site property use specified in the RSC, and the site meets the applicable site condition standards prescribed by the RSC Regulation (excepting any listed that are subject to risk assessment standards);
  (d) if non-potable groundwater standards were used, that the local municipality was notified and did not object to their use;
  (e) if risk assessment standards are referenced in the RSC, that they were determined through a risk assessment accepted by the MOE pursuant to the EPA and the RSC Regulation and the relevant contaminants comply with such standards;
  (f) he or she is a qualified person as required by the s. 5 of the Regulation;
  (g) the qualified person has in place an insurance policy that satisfies s. 7 of the Regulation;
  (h) it is acknowledged that the RSC will be filed in the Environmental Site Registry and is available for examination by the public;
  (i) to the best of his or her knowledge the certifications and statements contained in Part 2 are true as of the certification date.

As can be seen from the foregoing, the RSC serves as a fairly powerful public statement by its signatories, particularly the environmental consultant, that a site meets one or more of the soil and groundwater standards available under the RSC Regulation. Over the years the wording of the RSC has been the subject of considerable debate among engineers, other environmental professionals and their liability insurers. One concession which is recognized in both the RSC form and on the entrance window to the Environmental Site Registry is the following qualification statement:

Users of the Registry who have dealings with any property are advised to consider conducting their own due diligence with respect to the environmental condition of the property, in addition to reviewing information in the Registry.

The intent of the RSC filing is to ensure that persons who have any dealings with a former contaminated site have an opportunity to avail themselves of any RSC information relating to the site, along with other environmental information that they would reasonably be expected to consider, particularly more current information concerning the site’s environmental condition. In practice, any person who is considering to acquire an interest in land that has been the subject of a RSC would be well advised to have their own environmental consultant review the RSC, request
copies of the reports listed therein and any other reports in the possession of the vendor, and conduct a fresh phase one ESA.

However, if at the end of the day the consultants responsible for the RSC fail to discover or remediate contamination at the site that ought to have been discovered or remediated at the time, they and their employers may be liable for any injuries or damages suffered by future owners and occupants of the site, depending on all of the relevant facts.26

Environmental Site Registry

As noted earlier, the Environmental Site Registry is an electronic internet-based registry that can be accessed for the purpose of filing a RSC and related notices or for viewing filed RSCs. To file a RSC one must be a qualified person as prescribed by the Regulation. The qualified person must obtain a user name and password from the MOE to input site information and file a RSC in the Registry. An electronic version of the RSC form is completed online and a printed version of the completed RSC is signed by the owner and qualified person and then delivered to the registry office. Upon receipt of an electronically submitted RSC, the signed paper copy of the submitted RSC, the supporting documentation required for the submitted RSC and any applicable fee, the Registry Office carries out an administrative review of the RSC submission for completeness. If complete, the Ministry currently allows the electronic filing of the RSC in the Registry to proceed and a written acknowledgement of the filing date is sent to the property owner and qualified person.

As of July 1, 2011, when the recent amendments to the RSC Regulation take effect, the filing of a RSC will involve a two-step process. First, a notice of receipt of the RSC will be issued by the MOE, followed within 30 days by one of the following:

(a) an acknowledgement of filing in the Registry;
(b) a notice of a defect in the RSC; or
(c) a notice that the MOE intends to conduct a detailed review of the RSC.

These changes are intended to provide the MOE with an opportunity to conduct a more in-depth review of a RSC prior to its filing. Currently, only an “administrative” review is performed, i.e., ensuring all of the required boxes of information on the RSC form are complete. In addition, from time to time, RSC spot audits have been conducted by the MOE, which have discovered a number of errors that have brought the integrity of the system into question.

For further details, see s. 10 of the RSC Guide,27 s. 168.4 of the EPA, and s. 16 of the RSC Regulation (as amended by O. Reg. 511/09).

Mandatory Filing of RSCs

While there is a considerable demand in the Ontario marketplace to see RSCs filed on a voluntary basis, it was decided by the Government of Ontario that RSC-compliant environmental site assessment and remedial work was required whenever certain land use changes take place. As a result, the RSC Regulation mandates the filing of a RSC when the proposed land use change is from industrial, commercial or community use to agricultural, institutional, parkland or residential use. “Institutional use” is defined as a day-care centre or a school. “Community use” is defined as including indoor recreational activities, transportation purposes such as a railway station and civic, religious or social indoor gatherings. Under the Building Code Act, 1992,28 a municipality is prohibited from issuing a building permit that would legalize such a change of use unless a RSC has been filed with the MOE for the proposed change in the site’s use.

A number of exceptions from this mandatory filing requirement exist, such as a permit to allow excavation and shoring activities; a change from a railway line to a recreational trail or a change in a mixed use building that already includes residential or institutional use.

26 See Ontario (Attorney General) v. CH2M Gore & Storrie Ltd. (2002), 48 C.E.L.R. (N.S.) 145, 117 A.C.W.S. (3d) 167 (Ont. S.C.J.), where an environmental consultant was found liable for a negligent environmental site assessment of a former retail gasoline site.
28 S.O. 1992, c. 23.
For more details see Section 11 of the RSC Guide, s. 168.3.1 of the EPA and ss. 11 to 15 of the RSC Regulation (as amended by O. Reg. 511/09).

**RSC Liability Protection and its Limitations**

Once a RSC is filed in the Environmental Site Registry, the site owner named in the RSC, any subsequent owner of the site, and a previous owner who sold the site to the site owner named in the RSC and made it a condition of the sale agreement that a RSC be filed, are protected from liability for future environmental orders under the EPA and the *Ontario Water Resources Act* with respect to the contamination that existed at the site prior to the certification date of the RSC. This protection also extends to the other classes of persons liable to environmental orders under the EPA and the OWRA, being site occupants and persons having “charge, management or control” of the site. However, this protection is subject to a number of limitations.

Not surprisingly, there is no protection from environmental orders with respect to contamination that occurs after the RSC certification date. Also, one is not protected where the RSC contains false or misleading information; contamination has moved from the RSC site to another property after the certification date; the actual use of the site by a person is more sensitive than the use specified in the RSC; the person contravenes a term arising from an approved risk assessment contained in a certificate of property use or risk management order (discussed below); or where the MOE has reasonable grounds to believe that the presence of a contaminant at the site presents a danger to the health or safety of any person.

With respect to situations where site contaminants move off-site, the original version of the 2009 amendments to the RSC Regulation included provisions that recognized that one should not lose the EPA liability protection when migrating contaminants do not exceed the applicable RSC standards for the site or for any “sensitive property use”, if such a use exists in the vicinity of the site. However, the definition of a sensitive property use for the purpose of these provisions has not yet been added to the RSC Regulation and a proclamation date for the amendment has not yet been published.

Without these changes, the protection promised by the filing of a RSC is left in jeopardy simply due to the fact that contaminants migrate off of a RSC site, typically via the groundwater, notwithstanding that the contaminant concentrations comply with the applicable groundwater standards for the site. This is almost impossible to avoid, since groundwater is continually moving and groundwater remedial work will rarely achieve background concentrations. Presumably, if one remediates an entire site to meet a RSC standard it will be impossible for groundwater contaminants to exist off-site in sufficient concentrations to attract a MOE control or remediation order in the first place. However, this does not provide site owners with the level of comfort they expect.

**Continuing Civil Liability to Private Persons**

Another major limitation to the RSC liability protection is that it does not extend to the landowner’s liability to private persons, such as his or her neighbours. This makes a good deal of sense, since the RSC only deals with the owner’s site and if one is concerned about the escape of site contaminants to neighbouring lands, one will be required to investigate those lands and conduct any necessary remedial work. However, even if one is prepared to do that and remediate to the appropriate RSC standards, there is no mechanism in the RSC Regulation to compel the neighbouring landowner to accept a RSC-compliant remediation.

This liability risk was highlighted by the 2002 Ontario Court of Appeal decision in *Tridan Developments Ltd. v. Shell Canada Products Ltd.*, where the neighbour to a former Shell gasoline station sued the company for compensation for contamination that escaped onto the neighbour’s lands. At trial the neighbour was awarded $550,000 for the cost of the remedial work required to restore the property to its pre-contamination condition. The court specifically rejected Shell’s argument that restoration need only be to acceptable MOE standards. The trial court also awarded the plaintiff landowner an additional $350,000 in damages for loss of property value due to the

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29 EPA, s. 168.7; RSC Regulation, s. 20 (as amended by O. Reg. 511/09); OWRA, ss. 89.1 to 89.3.
30 EPA, ss. 168.7(2) to (7) and 168.8; OWRA, s. 89.3.
31 EPA, s. 168.7.1 (not yet proclaimed in force).
negative stigma associated with the contamination. As the trial judge put it, the plaintiff was entitled to the return of its property to “pristine conditions”.

On appeal the Court of Appeal disallowed the award for negative stigma, as this was seen as double counting the effect of the contamination. One could not obtain both an award for cleaning up the contamination to pristine levels and negative stigma, since there would not be any contamination left to create such a stigma. However, the Court of Appeal did uphold the trial court ruling that the neighbour did not have to accept financial compensation based on the cost to remediate the site to MOE standards, which was estimated to be about $100,000 less than what was required to achieve pristine conditions.

Environmental Site Assessment Standards

Critical to the integrity of any contaminated site remediation regime is the quality of the site assessment work that is performed prior to carrying out remedial work. This was recognized in the original RSC Regulation made in 2004 and advanced significantly with the recent 2009 amendments. The current RSC Regulation incorporates by reference the Canadian Standards Association (“CSA”) standards for phase one and two environmental site assessments (“ESA”) and applies them with some modification, in ss. 22 to 33 of the RSC Regulation.33 As of July 1, 2011, the specific requirements for phase one and two ESAs will be found in the RSC Regulation itself.

Phase One ESAs

As noted earlier, a RSC cannot be filed with the MOE without stating that a phase one ESA has been completed in accordance with the Regulation. Such an assessment must include a records review, site visit, interviews and an evaluation of the information gathered, all in accordance with the CSA phase one standard. While that standard provides considerable guidance on how these elements of a phase one ESA must be carried out, the 2009 amendments which take effect on July 1, 2011, incorporate a detailed list of specific rules in Sch. D to the Regulation. They include mandatory language so that there is no doubt that the qualified assessor must meet their requirements in order for his or her conclusions to form the basis of a phase two assessment, or where no such assessment is determined to be necessary, a RSC. Schedule D to the RSC Regulation includes tables listing the “minimum requirements” for phase one ESA reports and the “potentially contaminating activities” that must be identified and evaluated. As little as possible is left to independent judgment.

The new s. 24 of the RSC Regulation sets out the general objectives of a phase one ESA as follows:34

1. To develop a preliminary determination of the likelihood that one or more contaminants have affected any land or water on, in or under the phase one property.
2. To determine the need for a phase two environmental site assessment.
3. To provide a basis for carrying out any phase two environmental site assessment required.
4. To provide adequate preliminary information about environmental conditions in the land or water on, in or under the phase one property for the conduct of a risk assessment following completion of a phase two environmental site assessment.

There are too many specific requirements to repeat in this discussion and the reader is directed to the new ss. 23 to 31 and Sch. D of the amended RSC Regulation. Some of the new provisions include the requirement that the assessor identify any impediments to the conduct of his or her investigations and ensure that they do not preclude meeting the objectives of the assessment; that the phase one report be based upon current work, not more than 18 months old; that where the RSC qualified person intends to rely on a phase one ESA prepared by another qualified person, he or she be satisfied that the assessment meets the requirements of the RSC Regulation; and that all reasonably accessible environmental site assessment reports be used. Schedule D also requires that the assessment report include a table of areas of potential environmental concern, a table of current and past uses of the site, and a "phase one conceptual site model" that includes the figures and narrative descriptions described in the schedule.35

33 CAN/CSA Z768-01 and Z769-00.
34 O. Reg. 511/09, s. 14.
35 O. Reg. 511/09, ss. 14 and 31.
Phase Two FSAs

Subject to a few limited exceptions, a phase two ESA is required in order to file a RSC if the site has been used in whole or in part for an industrial use or as a garage, bulk liquid dispensing facility, gasoline outlet or for the operation of dry cleaning equipment. With the amendment of the RSC Regulation there is an added trigger for a phase two ESA where a “potentially contaminating activity” is discovered on the site, being one of 72 uses or activities set out in Table 2 of Sch. D that were to be identified during the phase one ESA.36

As was the case with phase one ESA requirements, the new amendments now require that a very lengthy and detailed list of rules be followed, which are set out in Sch. E to the RSC Regulation. The analysis of soil, groundwater and sediment samples is governed by s. 47 of the RSC Regulation and the published MOE analytical protocol incorporated by reference in the Regulation.37 A new s. 33.1 of the RSC Regulation sets out the general objectives of a phase two ESA as follows:38

1. To determine the location and concentration of contaminants in the land or water on, in or under the phase two property.
2. To obtain information about environmental conditions in the land or water on, in or under the phase two property necessary to undertake a risk assessment, in accordance with this Regulation, with respect to one or more contaminants of concern.
3. To determine if applicable site condition standards and standards specified in a risk assessment for contaminants on, in or under the phase two property were met as of the certification date.

It further requires that:39

(2) The qualified person shall ensure that the general objectives of a phase two environmental site assessment are achieved by,

(a) developing an understanding of the geological and hydrogeological conditions at the phase two property; and

(b) conducting one or more rounds of field sampling for all contaminants associated with any area of potential environmental concern identified in the phase two sampling and analysis plan and for any such contaminants identified during subsequent phase two activities and analyses of environmental conditions at the phase two property.

The new Sch. E to the RSC Regulation includes rules for:

(a) planning and conducting a phase two site investigation;
(b) developing standard operating procedures and quality assurance programs;
(c) soil vapour investigations and contaminant delineation (both lateral and vertical);
(d) field investigation methods, including sampling locations, groundwater monitoring well development and sampling depths;
(e) soil sampling collection and analysis protocols; and
(f) documentation of the field investigation and the content and form of the final report.

As was the case with phase one ESAs, ss. 33.3 to 33.6 of the RSC Regulation require that the qualified person identify any impediments to the conduct of his or her investigations and ensure that they do not preclude meeting the objectives of the assessment; that the phase one report be based upon current work, not more than 18 months old; and that all reasonably accessible environmental site assessment reports be used.

Where the RSC Qualified Person Differs From the ESA Qualified Person(s)

While the current version of the RSC Regulation does not prohibit a qualified person who did not supervise the phase one or two ESA work at a site from signing a RSC for filing with the MOE, the 2009 amendments now

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36 RSC Regulation, s. 32 (as amended by O. Reg. 511/09, s. 14).
38 RSC Regulation, s. 33.1(1) (as enacted by O. Reg. 511/09, s. 14).
39 RSC Regulation, s. 33.1(2) (as enacted by O. Reg. 511/09, s. 14).
specifically address the issue in ss. 30 and 33.7. Before relying upon the ESA work of others, the qualified person must review the ESA reports to determine whether:

(a) they meet the requirements of the RSC Regulation;
(b) the conceptual site models accurately reflect the environmental condition of the site; and
(c) there is no new or materially changed area of potential environmental concern at the site.

If the new qualified person determines any deficiencies with respect to the foregoing, he or she must conduct or supervise such work as is necessary to achieve the general objectives of phase one and two ESAs set out in the Regulation, including the preparation of new assessments and reports.

**Generic Site Condition Standards**

The RSC Regulation incorporates by reference a set of detailed generic site condition standards that must be met at a site for the purposes of filing a RSC. Published by the MOE and entitled the *Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act*, the current standards are dated March 9, 2004, and as of July 1, 2011, they will be replaced by a new version, dated July 27, 2009. Over 120 individual parameter limits are provided for in a series of tables that contain different criteria that apply depending upon the use of the site (for example industrial, residential or agricultural land use); whether the groundwater is considered potable or non-potable; and whether the soil texture is coarse or fine. They are often referred to as the generic site condition standards as they were designed to apply to a site without regard to any other site-specific characteristic other than the variables noted in the tables. As a result of the 2009 amendments, many of the individual standards were changed to reflect new scientific information. Some became more stringent and some were relaxed.

**Table 1 — Full Depth Background Site Condition Standards**

Currently sites that qualify as environmentally sensitive areas, such as land located within or near a water body; sites located in areas of natural significance, such as a provincial park; and sites having shallow soils or unusual pH conditions in the soil, must comply with more rigorous standards than would otherwise be the case. Prior to the 2009 amendments taking effect on July 1, 2011, all such sites were subject to the criteria contained in Table 1 — “Full Depth Background Site Condition Standards”. These standards represent non-contaminated values that are considered representative of the province’s natural background concentrations or protective of sensitive ecosystems.

After July 1, 2011, sites having shallow soils or located close to water bodies may utilize the less stringent standards found in Tables 6 to 9 discussed below. This will leave only sites located in areas of natural significance subject to Table 1 standards.

**Tables 2 to 5 — Generic Full Depth and Stratified Site Condition Standards**

For the majority of brownfield sites, the most applicable standards are those contained in Tables 2 to 5 of the *Soil, Ground Water and Sediment Standards*. They provide generic standards for full depth and stratified remediation or certification of a site. Either approach is available under the RSC Regulation. The difference between the two is that higher chemical concentrations are tolerated in the subsurface soils (less than 1.5 m below the surface) at a stratified site. Two tables are provided for each type of site, depending on whether the groundwater at the site is potable or non-potable.

- Table 2 — “Full Depth Generic Site Condition Standards — Potable Ground Water Condition”
- Table 3 — “Full Depth Generic Site Condition Standards — Non-Potable Ground Water Condition”
- Table 4 — “Stratified Site Condition Standards — Potable Ground Water Condition”
- Table 5 — “Stratified Site Condition Standards — Non-Potable Ground Water Condition”

**Tables 6 to 9 — Shallow Soils and Water Body Site Condition Standards**

Four new sets of standards have been added with the 2009 amendments that will apply to shallow soil sites and sites that include, are adjacent to or are located within 30 m of a water body. A shallow soil site or property means a property of which one-third or more of the area consists of soil equal to or less than two metres in depth beneath the

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surface, excluding any non-soil surface treatment such as asphalt, concrete or aggregate. These new standards are specifically tailored to the risks presented to the environment by these two types of site conditions.

- Table 6 — “Generic Site Condition Standards for Shallow Soils in a Potable Ground Water Condition”
- Table 7 — “Generic Site Condition Standards for Shallow Soils in a Non-Potable Ground Water Condition”
- Table 8 — “Generic Site Condition Standards for Use within 30 m of a Water Body in a Potable Groundwater Condition”
- Table 9 — “Generic Site Condition Standards for Use within 30 m of a Water Body in a Non-Potable Groundwater Condition”

In order to use the non-potable site condition standards for RSC purposes, the site and all other properties located within 100 m (250 m as of July 1, 2011) of the site must be supplied with municipal drinking water (and have no wells on-site as of July 1, 2011); the site must not be located in an area designated by a municipality for the protection of groundwater, unless the municipality consents to the use of non-potable standards at the site; the site cannot be used for agricultural use or any defined property uses; and the site owner must give notice to the local and any regional municipality with jurisdiction over the site that he or she intends to use non-potable groundwater standards at the site and the municipality(s) fails to object in writing within 30 days or if it does, it subsequently withdraws its objection and provides written consent.

For further details, see Section 6 of the RSC Guide, ss. 34 to 43.1 of the RSC Regulation (as amended by ss. 15 to 21 of O. Reg. 511/09), and the Rationale for the Development of Soil and Ground Water Standards for Use at Contaminated Sites in Ontario.

**Site-Specific Risk Assessment Standards**

Where it proves to be too onerous for a site to meet the generic standards set out in Tables 1 to 9 noted above, the RSC Regulation provides an owner and the RSC qualified person the option to develop and rely upon site-specific risk assessment standards. These are standards based upon the results of an assessment of the human health and ecological risks associated with the actual site conditions, all in accordance with the detailed rules and procedures prescribed by the RSC Regulation and after having received MOE approval or acceptance of a risk assessment report. As stated in the MOE’s RSC Guide:

> The use of the risk assessment under Part XV.1 of the EPA and Ontario Regulation 153/04 includes: an assessment of potential risks; the setting of site-specific, risk-based site condition standards; and, identification of any risk management measures that may be required.

Risk assessment is the technical, scientific examination of the nature and magnitude of risk to define potential contaminant effects in site specific situations. Risk assessment involves estimating the likelihood of an event and providing an estimate of what that event might be. Protection of both human health and the health of the natural environment must be considered in the risk assessment.

Section 44 of the RSC Regulation requires that risk assessments be prepared and submitted for acceptance by the MOE in accordance with Sch. C to the Regulation, which existed prior to the 2009 amendments. Section 168.5 of the EPA requires that a MOE Director designated for such purposes provide notice to the site owner of whether he or she accepts the risk assessment within the time period prescribed under s. 46 of the Regulation, which varies from 8 to 22 weeks, depending on the type of risk assessment. These time periods may be extended by the MOE Director.

Section 6 of the RSC Regulation requires that for the purposes of performing a risk assessment, a qualified person must have specific qualifications, including at a minimum a bachelor's degree in science, engineering or applied technology and five to eight years' experience, depending upon the level of one's post-secondary education.

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41 RSC Regulation, s. 43.1 (as amended by O. Reg. 511/09, s. 21).
42 See definition of “agricultural or other use” in the RSC Regulation, s. 1(2).
43 RSC Regulation, s. 35 (as amended by O. Reg. 511/09, s. 15).
45 Section 7.0 of the RSC Guide.
in conducting or supervising environmental site assessments and, within that period, at least two years' experience in the assessment of human health and ecological risks associated with the presence of contaminants at a site.

Schedule C of the RSC Regulation sets our numerous mandatory requirements for the contents of a risk assessment report, including, among other things, statements or discussions of: 46

(a) the risk assessment's objectives and approach;
(b) the proposed standards and assumptions used in determining each standard;
(c) applicable risk management measures, ongoing monitoring, maintenance or contingency plans;
(d) human health and ecological site models;
(e) exposure, toxicity, hazard and risk assessments; and
(f) interpretation of off-site health or ecological risks.

Pre-Submission Form

Before one can submit a risk assessment report to the MOE for acceptance, one must prepare and submit to the MOE a “pre-submission form”. 47 Among other things, the form must identify the types of risk assessment approaches and computer models the qualified person intends to use; a proposed conceptual site model that includes a description and assessment of areas of the environmental concern, distribution of contaminants, stratigraphy and hydrogeological characteristics (including diagrams and cross-sections); and the identification of release mechanisms, transport pathways, human and ecological receptors, and routes of exposure.

For further guidance see the Technical Update — Preparation and submission of a Pre-Submission Form for a risk assessment to be submitted under the new Record of Site Condition Regulation (O. Reg. 153/04). 48

Alternative Risk Assessment Procedures

The manner in which the mandatory risk assessment requirements may be met vary according to the situation for the development of a property specific standard. Certain approaches based on variations to the standard procedures are provided for in the RSC Regulation which may result in a risk assessment of less or greater complexity and either a shorter or longer time requirement for review by the MOE. All regulatory requirements must be followed when conducting every risk assessment. However, certain risk assessment procedures may be modified to result in shorter or longer timelines.

Alternative risk assessment procedures are provided for situations where one cannot practically meet Table 1 background standards due to naturally elevated background conditions or where there is no Table 1 standard. In such a case one may carry out a soil sampling and analysis program to “estimate” local background conditions specific to the site, which cannot exceed the applicable generic site condition standards. The required sampling procedures are set out in s. 8 of Sch. C of the RSC Regulation.

One may also carry out a “new science” risk assessment where:

- a contaminant of concern is identified during a phase two ESA for which there is no applicable site condition standard;
- the risk assessment uses a computer (risk assessment) model that is not publicly available or is unfamiliar to the Ministry of the Environment; or,
- the risk assessment uses a probabilistic model for exposure assessments. 49

Where the risk assessment site is identified by the MOE to be located within a “wider area of abatement”, such as an off-site contaminant plume, the assessment must include consultation with the local MOE office and the development and implementation of a public communication plan. The results of such consultation must be documented in the risk assessment report. 50

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46 RSC Regulation, Sch. C, Table 1 (as amended by O. Reg. 511/09).
47 RSC Regulation, Sch. C, s. 3(1). The pre-submission form is available online at http://www.ene.gov.on.ca/environment/en/resources/STD01_076527.html.
49 See Section 7.4 of the RSC Guide and Sch. C, s. 9 of the RSC Regulation.
50 See Sch. C, s. 10 and Sch. C, Table 1, Item 8, both of the RSC Regulation.
Finally, and likely most importantly, there is what is known as a “limited scope risk assessment”, including a modified generic risk assessment. Examples of situations in which a limited scope risk assessment might be considered appropriate include, but are not limited to, the following:53

- Contaminated groundwater is “flowing through” the property from a source of contamination on another property. Therefore, the qualified person believes that the property owner is not responsible for the contamination, but must demonstrate that it does not interfere with the proposed use of the site.
- The qualified person believes the full depth generic standards are appropriate as site condition standards due to specific characteristics of the site, even though the site qualifies as an environmentally sensitive area according to s. 41 of the RSC Regulation (e.g., due to proximity to a surface water body).
- The qualified person believes only minor changes to the generic conceptual site model are appropriate to account for specific characteristics of the property. The generic conceptual site model is described in the document Rationale for the Development and Application of Generic Soil, Groundwater and Sediment Criteria for use at Contaminated Sites in Ontario52 as updated from time to time, and was used in the development of the full depth generic site condition standards. Therefore, the qualified person intends to use the MOE full depth generic standards model, with modification, to develop property specific standards. This is known as a “modified generic approach”.

These limited scope risk assessments can often provide major remedial cost savings for what may amount to relatively minor adjustments of the assumptions built into the generic standards. As a result they have attracted considerable interest from risk assessment and other environmental professionals. This interest led to one of the more important 2009 amendments to the RSC Regulation, which will make available a web-based generic risk assessment, known as the streamlined or “modified generic risk assessment”.

The new s. 7(3) of Sch. C to the RSC Regulation recognizes the modified generic risk assessment as a specific form of risk assessment, where it is based upon the use of an approved model, currently the October 19, 2009 Modified Generic Risk Assessment Model. The risk assessment must be submitted in a template provided by the MOE and modify an assumed value for an assumption used by the MOE to develop the full depth generic standards, as described in the subsection. The model can be adjusted to take into account site-specific conditions, such as soil type and incomplete exposure pathways, by incorporating, for example, MOE approved risk management measures.

As of July 1, 2011, the modified generic risk assessment model will be available for online submission to the MOE. Inputs and results would be linked directly to the online submission template. The risk assessment pre-submission form will also be completed online and submitted at the same time as the risk assessment report. The two documents will be reviewed by the MOE in parallel and have a regulated review timeline of eight weeks.53 In the interim, the MOE will allow the use of the new modified generic spreadsheet model under the RSC Regulation, provided that existing risk assessment rules and requirements are followed.54

**Risk Management Measures and Certificates of Property Use**

In cases where human health or ecological risks cannot be eliminated through merely an assessment of site-specific conditions, the addition or incorporation of risk management measures of one form or another may eliminate

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the risk. Risk management may involve engineered or institutional controls or barriers that will prevent the exposure of sensitive receptors to the contamination of concern. Schedule C, Table I, Item 7 of the RSC Regulation, which sets out the mandatory requirements for risk assessment reports, requires, among other things, that the report identify:

- the exposure pathways and reductions requiring risk management measures;
- the proposed risk management measures or land use restrictions designed to prevent, eliminate or ameliorate adverse effects;
- the implications of the risk management measures for off-site health and ecological receptors;
- the duration of the proposed risk management measures;
- any ongoing procedures for the ongoing maintenance, monitoring and replacement of the risk management measures; and
- a contingency plan for meeting the risk management objectives if the risk management measures fail.

In the event that a risk assessment requiring risk management measures is accepted by the MOE, the landowner should expect to be issued and required to register on title to the RSC property a “certificate of property use”. Such certificates are provided for by s. 168.6 of the EPA and can require an owner to do any of the following things:

- Take any action that is specified in the certificate and that, in the Director’s opinion, is necessary to prevent, eliminate or ameliorate any adverse effect that has been identified in the risk assessment, including installing any equipment, monitoring any contaminant or recording or reporting information for that purpose.
- Refrain from using the property for any use specified in the certificate or from constructing any building specified in the certificate on the property.

Where the certificate of property use contains a land use or building construction restriction, s. 168.6 of the EPA requires that the owner ensure that a copy of the certificate is provided to every occupant of the property, that the owner ensure that the restrictions are complied with by the occupants of the property and that the occupants who receive a copy of the certificate comply with the restrictions set out in the certificate. The section also requires that the MOE provide notice of issuing the certificate to those persons prescribed by the RSC Regulation, being the chief building official and clerk of the local municipality and any upper-tier municipality (or, where the site is located in an area without municipal organization, a person appointed to inspect sewage systems under the Building Code Act, 1992, the medical officer of health, and the secretary-treasurer of the planning board or conservation authority). Section 186(3) of the EPA makes it an offence for any person to violate the terms of a certificate of property use.

In addition to stating the various risk management measures required at a RSC site, a certificate of property use will typically require the owner to register a notice on title to the RSC lands that sets out the certificate’s requirements and provide a copy of the certificate to any person with whom the owner of the site has any dealings who may acquire an interest in the site. An example of a certificate of property use that describes a number of risk management measures and requirements for a site to be used for commercial or industrial uses, including the capping of site soils, installation of a vapour barrier and extraction system, and a groundwater monitoring system, may be viewed online at http://www.environet.ene.gov.on.ca/besr-public/rscViewSite.do?searchId=num&rsclid=71319&formatId=html.

Importing Soil to a RSC Site

The 2009 amendments to the RSC Regulation introduce a new section dealing with the importation of soil to a RSC site for use as backfill in an excavation or for final grading. This practice had been followed in the past, but always under some legal uncertainty where the soil did not meet background criteria or was otherwise not considered “clean”. MOE policy has varied over time with respect to the practice and even where the new soil met the same soil standards applicable to the RSC site, such soil might have been considered a waste material under the EPA and therefore prohibited from deposition at any site not subject to an EPA waste site approval.57

55 S.O. 1992, c. 23.
56 RSC Regulation, s. 50.
As of July 1, 2011, s. 55 of the RSC Regulation will specifically authorize the use of imported soil at any RSC site for filling excavations or final grading where the soil meets the Table 1 background soil standards. Otherwise, imported soil that meets the RSC site soil standards may only be imported where the RSC site is an industrial site that experienced a potentially contaminating activity and has a contaminant of concern present that exceeds an applicable site standard (i.e., already contaminated). In addition, the qualified person must ensure that the soil importation requirements of Sch. E have been met (ss. 30 to 36). These requirements include that the imported soil meet the RSC site soil standards; that the Regulation’s sampling and analytical protocols are followed; and that representative samples of the foreign soil are tested, including at least one sample for each 160 m³ of soil for the first 5,000 m³ for each source, followed by at least one sample for each additional 300 m³.

**Transition to the 2011 Implementation Date**

As stated earlier, the majority of the new 2009 amendments to the RSC Regulation will become law as of July 1, 2011. In order to facilitate the transition of ongoing and complex brownfield development projects to the new standards and requirements, the amendments provide a grandfathering process. In order to complete a RSC-compliant remediation under the old standards after July 1, 2011, s. 21.1 of the amended RSC Regulation requires that the owner of the RSC site submit an approved notice to the MOE and receive its acknowledgement of receipt before January 1, 2011. The notice must certify that a phase one ESA has been completed and remediation has begun and/or a completed risk assessment has been submitted to the MOE. In such a case, the site owner shall have until January 1, 2013, to submit a RSC for filing, along with the MOE’s acknowledgement of having received the grandfathering notice.58

**Conclusion**

Ontario’s brownfields or contaminated sites regime has clearly come a long way over the past two decades. It now provides a considerable amount of certainty to those who seek it. While it remains to a large extent a voluntary remediation program, where a change is proposed from an industrial or similar use to a more sensitive use, the RSC Regulation’s environmental assessment and remediation rules must be followed. There are some landowners that may not need or value the legal protections gained from filing a RSC with the Government of Ontario, as they may not wish to take the time or incur the expense involved in complying with all of the RSC requirements. However, there appears to be a growing appetite in the Ontario marketplace for RSC protection and one can expect that it will become a key document required in any commercial real estate transaction involving contaminated lands. No doubt the MOE will continue to update and refine the RSC Regulation in the future.

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58 The approved notice form is available online at http://www.ene.gov.on.ca/environment/en/resources/STD01_076516.html.