

The Dirt on Excess Soil Across Canada How Will Brownfields Be Affected?

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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **17 lawyers**
 - six are certified by the Law Society of Upper Canada as Environmental Law Specialists
 - lawyers called to the Bar in Alberta, British Columbia, Northwest Territories, Nunavut, New Brunswick, and Ontario



Source: Certified Products Inc.
<http://www.certifiedproductsinc.com/>

Overview

- **Excess Soils and Environmental Liability**
- **Managing Excess Soils Across Canada**
 - Ontario's New Proposed Framework
 - BC, Alberta, Manitoba, Quebec, New Brunswick
- **Challenges and Opportunities**

Environmental Liability

- **Regulatory Liability**

- regulator can issue orders
- regulator can prosecute for offences under environmental statutes
- concept of “adverse effect”

- **Civil Liability**

- contamination on-site (soil, groundwater, indoor air)
- contaminant migration and impact off-site (groundwater)
- concept of “flow through” property
- causes of action and damages

Environmental Liability

- **MOECC has discretionary Orders powers**

EPA, s. 18(1) The Director...by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property ... to reduce the amount of a contaminant that is discharged into the natural environment

EPA, s. 43 Where waste has been deposited upon, in, into or through any land or land covered by water or in any building that has not been approved as a waste disposal site, the Director may issue an order to remove the waste and to restore the site to a condition satisfactory to the Director

- **MOECC has prosecuted companies for contaminated excess soil-related offences**

- Trucking of contaminated soil without an approval
- Depositing contaminated soil at an unapproved site

D.B. Trucking & Excavating Ltd. v United Gulf Developments Ltd. (2007)

- **Trucking co. moved excess fill off-site**
 - ignored geotechnical report showing contamination
- **Fill used for subdivision development**
 - United Gulf tests fill
 - above MOECC Standards
- **Cost of removal \$500,000**
- **Court found parties liable**
- **All parties appealed and settled out of Court**

Township of Uxbridge v Corbar Holdings Inc. et al. (2012)

- **Purchase of property on the Oak Ridges Moraine to accept fill**
 - not a permitted use by the municipality or the Oak Ridges Moraine Conservation Plan
- **Municipality opposed the movement of fill to the property**
- **Corbar claimed addition of soil was “normal farming practice”**
- **Ontario Superior Court disagreed - injunction granted**

Environmental Liability

- **Personal liability (civil and regulatory)**
- **Individuals may be sued, prosecuted and/or ordered**
- **Corporate officers and directors may be charged separately with failing to exercise all reasonable care**

MANAGEMENT OF EXCESS SOILS ACROSS CANADA

ONTARIO'S NEW PROPOSED EXCESS SOIL FRAMEWORK

What is Waste?

- **EPA, Part V - Waste Management**

- “Waste” includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other materials as are designated in the regulations

- **Types of Waste**

- Hazardous waste - includes hazardous industrial waste, severely toxic waste, ignitable waste, PCB waste
- Liquid industrial waste - waste that is both liquid waste and industrial waste
- Municipal Waste - any solid non-hazardous waste, ICI and residential

What is Waste?

- **Also includes,**
 - “residue from an industrial, manufacturing or commercial process or operation, if the residue leaves the site where the process or operation is carried on”
 - “Inert fill” - earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances
 - But, “inert fill” is exempt from the waste management requirements of the EPA

What is Waste?

- **The Courts say**

- “the useless by-products of any industrial process; material or manufactured articles so damaged as to be useless or unsaleable; materials eliminated or thrown aside as worthless after the completion of a process.” (*Re Canadian Pacific Limited and Director of the Ministry of Environment*)
- “It does seem to me that if there is a legitimate and appropriate business purpose in the mind of the possessor of the materials then, vis-à-vis that person, those materials are not waste.” (*Kermecho Co. v Ontario (Minister of the Environment)*)

Ontario's New Proposed Framework

- **Protect human health and the environment from inappropriate relocation of excess soil**
- **Enhance opportunities for the beneficial reuse of excess soil and reduce GHG emissions associated with movement of excess soil**
- **Reduce the amount of excess soil disposed of at landfills**

Ontario's New Proposed Framework

- **MOECC Management of Excess Soil – A Guide for Best Management Practices (2014 / 2016)**
 - addresses best practices at source sites, receiving sites and temporary soil storage sites
 - provides guidance about how to handle excess soil from source site through to transportation to receiving site to be reused for a beneficial purpose (e.g. site alterations, re-grading or filling in excavations)
 - intended to assist in mitigating potential for adverse effects by those generating and receiving excess soils for commercial purposes (not small scale construction or single family residential)
 - does not apply to aggregates from pits and quarries

Ontario's New Proposed Framework

- **MOECC Management of Excess Soil – A Guide for Best Management Practices (2014 / 2016)**
 - proposed
 - Traffic and Transportation Management Plan
 - Soil Management Plan for the Source Site and Fill Management Plan for the Receiving Site
 - BMPs and Possible ECA for Temporary Soil Storage Sites
 - soil placement should not degrade the existing soil condition at the receiving site
 - concentrations of an existing contaminant should not be increased at the receiving site
 - mixture and dilution of contaminated soil to reduce contaminant concentrations should not be undertaken

Ontario's New Proposed Framework

- **MOECC Proposed Excess Soil Management Policy Framework (March 2016)**
 - sought to address gaps in BMP
 - primary focus – source sites
 - sets the stage for new regulation

Proposed Excess Soil Reuse Regulation (April 2017)

- **Targets sites that generate excess soil (source sites)**
- **Imposes requirements on interim (temporary) sites and receiving sites**
- **Proposed complementary amendments to**
 - Reg 153/04 – record of site condition
 - Reg 332/12 – building code
 - Reg 347 – waste management
- **Comment period ended June 23, 2017 and MOECC is considering comments**

Proposed Excess Soil Reuse Regulation (April 2017)

- **Excess soil is excavated soil that leaves a construction or development site**
- **New regulation would define excess soil as:**
 - a) soil or sediment which is to be removed from a property or project area as part of a development project,
 - b) may include mixture with incidental amounts of other finely divided material that is similar to soil (e.g., rock, debris, and other materials) provided, based on visual inspection, the other material is not subject to ECAs or requirements under Part V of the EPA, and the mixture existed pre-excitation of the soil (i.e. not as a result of purposeful mixing), and
 - c) does not include soil or rock removed from a pit or quarry regulated under the Aggregate Resources Act or a pit or quarry that would be so regulated if it was operating in an area to which the Aggregate Resources Act applies
 - d) ceases to be excess soil when it is liquid waste

Proposed Excess Soil Reuse Regulation (April 2017)

- **Excess soil designated as “waste” from the moment it leaves a project area, until it is deposited:**
 - At an *infrastructure project*, if it originates from an infrastructure project belonging to the same proponent
 - At a *receiving site* that is not a waste disposal site that:
 - Is governed by a site specific instrument or by-law, or
 - Is not governed by a site specific instrument or by-law, so long as:
 - A. excess soil complies with MOECC **excess soil reuse standards**
 - B. excess soil has been used for **specified use (e.g., backfill excavation, final grading)**, subject to restrictions
 - C. receiving site not primarily used for depositing excess soil

Proposed Excess Soil Reuse Regulation (April 2017)

- **Excess Soil Management Plans (ESMPs)**
 - must be prepared and certified by Qualified Person:
 1. when more than 1000 m³ (~100 truckloads) of excess soil is removed from a project area, OR
 2. if any part of the project area has or had a potentially contaminating activity that may have affected a planned area of excavation

Proposed Excess Soil Reuse Regulation (April 2017)

- **Contents of ESMPs**

- Characterization of excess soil quality
 - may involve completing a Phase I ESA, developing and implementing a sampling analysis plan, assessing results and completing an excess soil characterization report
- Identification of appropriate receiving sites
- Requirements for tracking excess soil from excavation to delivery at receiving site
- Requirement for registration of ESMP and soil movements carried out under ESMP – confirmation of appropriate receiving sites and tracking system – ensures soil arrives at receiving site
- Requirements for record keeping

Proposed Excess Soil Reuse Regulation (April 2017)

- **ESMP Exemptions include excess soil**
 - leaving project area in response to emergency (e.g. a spill or an infrastructure failure) so that work can be completed promptly
 - resulting from regular infrastructure maintenance and repair
 - projects generating $< 100 \text{ m}^3$, if excess soil sent directly to waste disposal site
 - transfers between infrastructure projects with the same proponent, or
 - that is removed from a project area located on Crown land

HOW HAVE OTHER PROVINCES ADDRESSED EXCESS SOIL?

British Columbia Framework

- **Primary tool is Soil Relocation Agreement, required where**
 - soils to be relocated exceed trigger values Contaminated Sites Regulation, Schedule 7 and
 - receiving site is not authorized to receive soil under *Environment Management Act*
- **Uses standards and traceability protocols**
- **Process recently reviewed – amendments will come into effect November 1, 2017**

British Columbia Framework

- **Key differences between proposed and existing soil relocation provisions**
 - simplified triggering of Soil Relocation Agreements
 - Soil Relocation Agreements required in fewer circumstances
 - Director approval no longer required for all soil relocation
 - compliance ensured through Ministerial audits
 - Local Municipal and Indigenous governments notified when soil relocated

Alberta Framework

Environmental Protection and Enhancement Act

- **Prohibits disposing of waste (hazardous and non-hazardous) except at an approved waste management facility or in accordance with the written authorization of the designated Director (s. 176)**
 - hazardous waste is tracked through PIN numbers and a manifest system (ss. 188, 191)
- **Waste Control Regulation**
 - prohibits deposit of non-hazardous waste for disposal in any place other than a waste management facility authorized in accordance with the EPEA and the regulation (s. 23). Exceptions to this rule are:
 - the depositing of **earth**,
 - **inert waste** used for reclamation

Alberta Framework

- **Final Report – Updating Alberta’s Hazardous Waste Regulatory Framework (2006)**
 - recommends regulating contaminated soil and beneficially using soil
 - recommendations not implemented
- **The Beneficial Use of Waste (2006)**
 - AMEC Earth & Environmental report waste that could be beneficially used
 - recommendations for tracking, identify secondary activities to promote use, Alberta Environment involvement, central location for information, involvement with industry associations
 - Recommendations not implemented

Manitoba Framework

- **Guideline: criteria for acceptance of contaminated soil at waste disposal grounds**
- **Contaminated soil is either:**
 - treated in accordance with Manitoba guidelines or
 - shipped to licensed or permitted Waste Disposal Ground: soil must meet acceptance criteria in:
 - CCME Canadian Environmental Quality Guidelines
 - Canada-Wide Standards for Petroleum Hydrocarbons (PHC) in Soil

Quebec Framework

- **Regulation respecting contaminated soil storage and contaminated soil transfer stations**
 - requires documents confirming receipt of soil and completion of soil log books in certain circumstances
- **Section 6 states that a person who excavates soil must store soil on site of origin or site of contamination**
- **Contaminated soils can only be shipped to particular sites**

New Brunswick Framework

- **Regulates fill via guidelines**
 - province does not regulate “clean” fill
 - “Clean” fill includes uncontaminated rocks and soil, bricks, untreated wood, metal, fiberglass
 - some types of demolition debris can be buried on site so long as 30 m away from wetlands or watercourses

Challenges and Opportunities

- **Excess soil should be treated as a resource and not a waste**
- **Relocation of excess soil can be complicated**
- **Mismanagement of excess soil has consequences**
- **Ontario's new regulation requires tracking, characterization of soil, and management planning**
- **BC is re-developing a comprehensive regulation for soil relocation**
- **Other provinces have minimal regulation of excess soil or only provide guidance on its management**

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