

# Torys on Environmental, Health and Safety

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## Ontario

### OSC to provide environmental disclosure guidance in 2010

The Ontario Securities Commission (OSC) has indicated that in 2010 it plans to issue a staff notice providing guidance on compliance with existing environmental disclosure requirements under National Instrument 51-102, *Continuous Disclosure Obligations*. In response to a resolution of the Ontario Legislature (which is described in [Torys' EHS Bulletin 2009-7](#)), the OSC conducted a review of corporate governance and environmental disclosure reporting requirements that included consultations with various stakeholders. The OSC indicated that the feedback suggested additional guidance for issuers (of securities) on certain topics, including the disclosure of climate change risk. In developing guidance for issuers regarding existing environmental disclosure requirements, the OSC intends to consult stakeholders and invite staff at other Canadian Securities Administrators to participate. The OSC plans to publish its guidance by December 2010.

For further information, please see [Notice 51-717, Corporate Governance and Environmental Disclosure](#).

### Court clarifies negligence analysis for historical releases of contaminants

In overturning a trial decision in *Berendsen v. Ontario*, the Ontario Court of Appeal recently clarified when a person is negligent for a historical release of a contaminant. The decision also clarified the Ontario government's obligation to remediate other contamination that it caused. In this case, in the mid-1960s, the Ontario Ministry of Transportation deposited asphalt and concrete road waste on a dairy farm with consent of the owner at the time. Subsequently, the Berendsens purchased the dairy farm and their cattle suffered ill health and were unproductive as dairy cattle. The Berendsens claimed that the cattle were unwilling to drink the farm's water because the deposited road waste had contaminated the farm's wells. They brought an action against the government for its alleged negligence and failure to remediate the contamination. They were successful at trial and were awarded nearly \$2.4 million in damages and legal costs.

Overturning the trial decision, the Court of Appeal reviewed whether there had been a breach of the standard of care (which is a necessary element to a finding of negligence) and indicated that to "succeed in showing a breach of the standard in this case, the Berendsens had to show that back in the 1960s when Ontario deposited asphalt and concrete waste on the dairy farm, harm to the cattle from this buried waste material was a reasonably foreseeable risk." The Court found that the harm was not foreseeable at the time the waste was deposited due to several considerations, including that the deposit of waste was not regulated in the 1960s, the field of toxicity did not even begin to develop until the 1970s and there was no evidence at trial to indicate that soil

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geologists in the 1960s understood that chemicals in buried waste material could migrate to well water 60 feet away.

At the request of the Berendsens, the Ontario government agreed (prior to the litigation) to undertake an investigation of the farm to determine whether it was contaminated. Upon doing so, the Court of Appeal affirmed that the government owed a duty to the Berendsens to undertake the investigation properly. The trial judge found that the government had negligently performed the investigation and that, under the *Ontario Water Resources Act* and the EPA, the government was obligated to remediate the contamination at the Berendsens' farm. The government did not challenge on appeal the finding that it had performed its investigation negligently, but did submit that regardless of the negligent investigation, the government had no duty to remediate the contamination (although the EPA does grant discretionary power to the government to order remediation). The Court of Appeal agreed with the government's submission on this.

For further information, please see the [Court of Appeal's decision](#).

### **Amendments to record of site condition regime**

In December 2009, the Ontario government amended O. Reg. 153/04, which requires, among other things, that when a property changes to more sensitive uses, a record of site condition must be obtained. The amendments to O. Reg. 153/04 generally implement the balance of the reforms that the government had proposed in 2008 (which is described in [2008 proposed amendments](#)), including more stringent standards and, in a few cases, new standards for certain contaminants. These standards are expected to come into force on July 1, 2011. For certain ongoing remedial projects, the application of the existing standards may be extended to January 1, 2013, provided that specified requirements are met, including that the owner of the property provides the requisite notice to the MOE between July 1 and December 31, 2010. The amendments to O. Reg. 153/04 also include a streamlined risk-assessment process that is intended to provide an alternative to the more involved traditional risk assessment.

For more information, please see [O. Reg. 153/04 amendments](#).

### **New workplace violence and harassment policy requirements coming**

On December 15, 2009, amendments to the *Occupational Health and Safety Act* regarding violence and harassment in the workplace received royal assent and are expected to come into force on June 15, 2010. Under these amendments, an employer would be required to prepare a written policy regarding workplace violence and harassment, to develop and maintain a program to implement the policy and to review it as often as necessary — and at least annually. The policy must be posted in a conspicuous location in the workplace. The program is to include procedures to control risks that are likely to expose the worker to physical injury; procedures for workers to report incidents of workplace violence and harassment; and an explanation of the way the employer will investigate and deal with incidents or complaints of workplace violence and harassment.

In addition, an employer is required to assess the risks of workplace violence that may arise from the nature of the workplace and the type or conditions of work, and to reassess the risk of workplace violence as often as necessary to ensure the continued protection of the workers. Workers are to be advised of the results of the assessment or reassessment either indirectly (through the health and safety committee or representative, as the case may be) or directly (if no such committee or representative exists).

The Act also imposes obligations on an employer with respect to domestic violence. An employer who becomes aware, or should reasonably be aware, that domestic violence may occur in the workplace is obligated to take every reasonable precaution to protect the worker.

For further information, please see [amendments to Occupational Health and Safety Act](#). 