

# Torys on Environmental, Health and Safety

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## Ontario

### Court overturns \$36 million award in *Smith v. Inco Limited*

On October 7, 2011, the Ontario Court of Appeal allowed the appeal in *Smith v. Inco Limited* and, in so doing, overturned the July 2010 Ontario Superior Court's [trial decision](#), which had awarded \$36 million in damages to certain property owners in Port Colborne, Ontario. These claimants had argued that Inco Limited was liable for the diminution in property values due to concerns related to the soil on the claimants' properties containing nickel particles that had been emitted from Inco's refinery over the 66 years prior to 1985. The Superior Court had held that, beginning in 2000, concerns about the possible adverse health effects of the nickel in the soil negatively affected the appreciation in the value of the properties (when compared with similar properties in another city). The Superior Court had found Inco liable for this diminution of property value under the tort of private nuisance and the rule in *Rylands v. Fletcher*.

In overturning the Superior Court's decision, the Court of Appeal's significant findings included the following:

- The trial judge erred in holding that the discharge of the nickel particles by Inco on the properties of the claimants constituted an actionable nuisance. In particular, the Court of Appeal held that a mere chemical alteration in the content of soil, without more, did not amount to physical harm or damage to property. To constitute a nuisance, the alteration must be shown to have had some detrimental effect on the land itself or rights associated with the use of land. The Court also observed that there was no evidence that the nickel posed a risk to the health or safety of residents.
- The trial judge erred in holding that Inco was liable for the discharge of the nickel particles under the rule in *Rylands v. Fletcher*. In particular, the Court of Appeal found that Inco's historical operations were not "an exceptionally dangerous or mischievous thing" nor that the circumstances were "extraordinary or unusual." To the contrary, the Court found that Inco operated a refinery in a heavily industrialized part of the city in a manner that was "ordinary and usual" and did not create risks beyond those incidental to virtually any industrial operations.
- In the alternative, even if the claimants showed that Inco was liable under the tort of nuisance or the rule in *Rylands v. Fletcher*, the trial judge erred in holding that the claimants had established a diminution in value of their properties after September 2000. The Court of Appeal indicated that the trial judge's calculation was flawed and that, in fact, the claimants had not suffered decreased appreciation in the value of their properties.

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

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*This bulletin is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this bulletin with you, in the context of your particular circumstances.*

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## Environmental compliance approvals regime to come into force

On October 31, 2011, certain amendments to the *Environmental Protection Act* (EPA), the *Ontario Water Resources Act* (OWRA) and the *Safe Drinking Water Act, 2002* (SDWA) are expected to come into force in order to establish a new system of environmental compliance approvals in Ontario. These amendments were passed in 2010 as part of the *Open for Business Act, 2010* (OBA), and were originally scheduled to come into force on September 19, 2011. These are the most significant amendments:

- The coming into force of Part II.1 of the EPA (Environmental Compliance Approvals) (along with corresponding provisions in the OWRA), which will prescribe the process for applying for an environmental compliance approval. This approval will now be required under the EPA and the OWRA, instead of a Certificate of Approval, before applicants can engage in otherwise prohibited activities. As was reported in our November 2010 [EH&S Bulletin](#), the EPA and the OWRA have been amended so that the process for applying for environmental compliance approvals will be consolidated into one process under the EPA.
- The addition of Part II.2 of the EPA (titled “Registrations”) (along with corresponding provision in the OWRA), which provides for the establishment, maintenance and operation of the Environmental Activity and Sector Registry (EASR). The EASR is an online registry for certain activities that the Ministry of the Environment (MOE) identifies as low-risk and that will no longer require an environmental compliance approval, provided that the activities meet specific requirements and are registered on the EASR. As was reported in our May/June 2011 [EH&S Bulletin](#), on June 14, 2011, the MOE prescribed automotive refinishing (including autobody shop spray booths), heating systems and standby power systems as activities that are eligible to be registered on the EASR.

For further information, please see the [Ontario Gazette](#) and the [OBA](#).

## Lakes and Rivers Improvement Act guidance released

The Ontario Ministry of Natural Resources (MNR) recently released the *Lakes and Rivers Improvement Act Administrative Guide* (Guide) together with a series of supporting technical bulletins. These documents are intended to provide direction to the MNR staff responsible for reviewing and approving applications under the *Lakes and Rivers Improvement Act* (LRIA) for new works and alterations to existing structures in regulated waters.

Among other things, the Guide outlines the basic requirements of the LRIA, summarizes when the LRIA will apply and describes the process for obtaining an LRIA approval for new works and alterations. The technical bulletins describe technical standards and criteria to construct new dams or make alterations to existing dams that the MNR uses in reviewing applications. The MNR has also released accompanying best management practices, which are intended to provide voluntary guidance to dam owners wishing to adopt industry-recognized best management practices for ensuring the safety of their dams and the public around dams.

For further information, please see the [MNR Water Resources information section](#) and the [notice](#).

## Parts of the Safe Drinking Water Act, 2002 come into force on December 31, 2012

Certain provisions of the SDWA will come into force on December 31, 2012. These provisions include those relating to agreements with accredited operating authorities of drinking water systems and provisions for the standard of care for municipal drinking water systems. In particular, section 14 will prescribe the content of an agreement between the owner of a drinking water system and an accredited operating authority that is in charge, but not the owner, of the system. Section 14 provides that the owner

may, in the agreement, delegate a duty imposed on the owner under the SDWA to the accredited operating authority.

Section 19 prescribes the standard of care for owners of municipal water systems and applicable individuals, such as the directors and officers of a corporation that owns a municipal drinking water system. Each individual listed in section 19 must exercise the level of care, diligence and skill in respect of a municipal water system that a reasonably prudent person would be expected to exercise in a similar situation and act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the municipal drinking water system.

For further information, please see the [Ontario Gazette](#) and the [SDWA](#).

## Canada

### Government publishes Greenhouse Gas Emissions Reporting Program

On October 1, 2011, an annual notice regarding the reporting of greenhouse gas (GHG) emissions under Environment Canada's Single Window Reporting system was published in the Canada Gazette. Under the authority of the *Canadian Environmental Protection Act, 1999*, operators of facilities that meet the criteria specified in the annual notice are required to report facility GHG emissions to Environment Canada by the June 1, 2012 reporting deadline. Companies that reported their facility's GHG emissions in the previous year must inform Environment Canada even if their facilities do not meet the current year reporting criteria.

For further information, please see the [Canada Gazette](#) and the [news release](#).

## United States

### Environmental Protection Agency issues Chemical Data Reporting Rule

The United States Environmental Protection Agency (U.S. EPA) recently issued the final Chemical Data Reporting (CDR) Rule under the *Toxic Substances Control Act (TSCA)*. The CDR Rule, which revises the former Inventory Update Reporting (IUR) Rule, requires importers and manufacturers of certain chemical substances listed on the TSCA Chemical Substances Inventory to report information about the manufacturing, processing and use of those chemical substances. The U.S. EPA uses CDR data to support risk screening, assessment, priority setting and management activities.

The CDR Rule revises provisions in the former IUR rule relating to the method used to determine whether a manufacturer or importer is subject to CDR reporting; the frequency with which CDR reports must be submitted; the method of reporting; and the type of information that must be reported. One particularly notable change is the introduction of new production volume thresholds to determine whether a manufacturer or importer is required to submit a CDR report. Under the CDR Rule, manufacturers and importers are required to file a report with the U.S. EPA if the production volume of a chemical substance meets or exceeds 25,000 pounds in any calendar year since the last principal reporting year. In addition, the CDR Rule decreases, from 25,000 pounds to 2,500 pounds, the reporting threshold for chemical substances that are the subject of certain TSCA rules and orders.

The CDR Rule took effect on September 15, 2011. Reporting under the CDR Rule for the 2010 and 2011 calendar years will commence February 1, 2012 and conclude June 30, 2012.

For further information, please see the [CDR Rule](#). 