



Excess Soil Regulation Impacts On Reasonableness Of Damages



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EXCESS SOIL REGULATION IMPACTS ON REASONABLENESS OF DAMAGES

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Excess Soils Regulation Background

- Province no longer wants lands to be backfilled with waste soils
- concept is to manage soils and re-use them rather than take them to landfills
- first of legislation enacted in January 2021
- two subsequent legislative enactments forthcoming
- staged introduction of full legislative program
- new legislation introduces new damage claims and assessment issues



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Brief Overview of Mechanics of Soil Regulation System

- concept of “excess soil”
- new regulations cover excess soil, its measurement, transportation, utilization and disposal prohibitions
- substantial reporting and assessment needed to manage excess soils
- grandfather clause from January 1, 2021 to January 1, 2026 where work to be done with respect to excess soils is already stipulated in a contract
- BRAT regulations allow site specific standards



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Concept of “Reasonableness”

- explanation of reasonableness in context of environmental litigation
- concept has many facets:
 - cost/value of site
 - proposed use of site
 - remediation vs. diminution in value
 - to what extent will remediation costs be relevant to use of site or adjacent sites?
- factors to be considered in assessing reasonableness:
 - type of soils
 - type/location of contamination
 - alternate treatment technologies
 - quantity of excess soils
 - Potential of alternate cases
- how these factors play out in excess soil regulations is a complex interaction of competing methodologies/costs/valuation calculations



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Impact of Excess Soil Regulations on Reasonableness

- analysis of costs at present and with implementation of future regime on remediation strategy
- time frame for potential remediation can be an issue by itself
- need to weigh all costs
- environmental engineering costs need to be considered against other disposal alternatives
- new alternatives mean stakeholders will not only have to evaluate their own site, but potentially other sites for soil handling issues



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Importance of Excess Soil for Damage Claims

- thorough knowledge of regulations and their use will be mandatory in choosing remedial options
- critical that least expensive alternative is used for dealing with excess soils
- concept of reasonableness of damage – [Tridan v. Shell, 2002 Carswell Ont 1, 154 O.A.C. 1, 57 O.R. \(3d\)](#)
- heightened requirement of least expensive alternative where claim being made for reimbursement by contaminating party
- present regime of tipping fees not reasonable in the context of newer potentially less expensive alternatives



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Practical Considerations for Excess Soil Handling

- use on site
- transport to alternative site
- importing of impacted soils
- transport of impacted soils to alternate site
- complex reporting and assessment requirements prior to soil being moved
- larger projects will require excess soil consideration prior to work being undertaken



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Practical Considerations for Plaintiffs

- remediation technologies will have to be carefully addressed
- weighing costs of differing remediation technologies
- weighing costs of handling excess soils and reporting and assessment requirements against alternatives
- need to choose the most reasonable and economic way of dealing with excess soils in order to recover from the Defendant
- need to know what alternate sites might be available for disposition or treatment and disposition
- what about diminution in land value as a method of compensation in this new regime



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Considerations for Defendants

- time frame for execution of work
- is a tight time frame necessary?
- have alternative technologies been adequately canvassed?
- what are the total costs going to be?
- has the Plaintiff utilized the most economical method of dealing with site contamination?
- are all of the assessment engineering costs recoverable from the Plaintiff or are they simply part of the development costs?
- changing requirements as regulations evolve



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Considerations for Environmental Consultants

- assessment of various remedial options
- full appreciation of all engineering costs to be associated with preparing reports and assessments to qualify with the present and future excess soil regulation
- weighing the time frame for remediation
- careful consideration of all potential savings
- potential E&O claims
- work needs to be transparent to demonstrate proposed remedial options are the most reasonably costed
- consideration needs to be given by uses of site, value of site and potential impact on adjoining lands



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Conclusions

- “dig and dump” no longer the appropriate alternative
- do alternative remediation technologies become more acceptable as soil handling costs increase?
- substantial work for engineers/lawyers navigating through the new system
- need to know present arrangements and date and context of future amendments to regulations



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