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ENVIRONOTES!

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*Environmental Solutions for
Business.*

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millერთhompson.com.*

Inside

In Brief:
News
Legislation
Court Decisions

In Depth:
Challenging Conditions of
Certificates of Compliance
Coal-Bed Methane in Alberta
What's Happening Around
Miller Thomson

IN BRIEF

NEWS

CANADA

On May 2, 2006, the newly elected Conservative government presented its budget. With respect to the environment, the government's primary commitment is to invest in public transit infrastructure and provide a tax credit to individuals to encourage its use. As expected, there is no discussion of Canada's commitment to the Kyoto Protocol in the Budget. For more information please see: <http://www.fin.gc.ca/budtoce/2006/budliste.htm>

On February 27, 2006, Environment Canada confirmed that charges against the company, Battery Broker Environmental Services Inc., and its president had been dropped. An employee of the company, Mr. Dressler, was sentenced to two 30 day sentences to be served concurrently. For more information please see: http://www.ec.gc.ca/press/2005/050727_n_e.htm

On February 14, 2006, Environment Canada released a discussion document which described the objectives, structure and content of the proposed regulatory provisions for the export and import of non-hazardous waste. For more information please see:
http://www.ec.gc.ca/CEPARRegistry/documents/regs/non_haz_wast/cover.cfm

On February 1, 2006, Environment Canada released an advisory note to inform manufacturers and importers of chemicals and polymers of the administrative procedures that will be followed depending on whether a notification is submitted before, on or after the *New Substances Notification Regulations (Chemicals and Polymers)* come into force. For more information please see: http://www.ec.gc.ca/substances/nsb/html/a200503b_e.htm

On January 30, 2006, the Canadian Council of Ministers of the Environment released the *Five-year review of The Canada-Wide Acid Rain Strategy for Post-2000*. CCME also released the *2003 Progress Report on Acid Rain*. For more information please see
http://www.ccme.ca/ourwork/air.html?category_id=31 and
http://www.ccme.ca/assets/pdf/2003_acidrain_annprog_rpt_e1.0_web.pdf

On January 3, 2006, the Canadian Environmental Assessment Agency proposed new regulations under the *Canadian Environmental Assessment Act* to create a varied environmental assessment process for Crown corporations involved in providing commercial loans. For more information please see: http://www.ceaa-acee.gc.ca/013/nr060103_e.htm

Yukon

On January 31, 2006, the Environment Minister announced a new Special Waste Transportation Permit. The new permit is for all transportation companies or individuals operating in the Yukon which transport dangerous goods no longer used for their original purpose. For more information please see: <http://www.gov.yk.ca/news/2005/06-023.html>

Alberta

On April 10, 2006, the government introduced Bill 29 to amend the *Environmental Protection and Enhancement Act*. The proposed changes include:

- The electricity sector would be allowed to conduct emissions trading in nitrogen oxide and sulphur dioxide;
- Any closed landfill sites which have an adverse effect on the environment would be required to be reported and cleaned up;
- Improve programs for reclamation of coal and oil sands mines, and ensure progressive and ongoing reclamation of these sites is promoted and acknowledged.

For more information please see:

<http://www.gov.ab.ca/acn/200604/1970485B8CD86-F4F6-EB2C-DE6FE81309FDDF2E.html>

On April 6, 2006, the Ministry of the Environment announced that effective May 1, 2006 companies wanting to drill for coalbed methane above the base of groundwater protection must offer to collect baseline testing information on any active water well within a minimum 600 metre radius of new or re-completed coalbed methane wells. For more information please see:

<http://www.gov.ab.ca/acn/200604/196877041CC67-B632-6A83-B4FC4A6C2815ACF0.html>

On March 6, 2006, the Ministry of the Environment announced that it is undertaking two new initiatives as part of its ongoing strategy to ensure drinking water safety. The first is to develop standard procedures and reporting requirements for baseline testing of well water. The second is a two-year program to map groundwater resources in central Alberta. For more information please see:

<http://www.gov.ab.ca/acn/200603/19544D15EA03D-0669-8AE8-8A9184656ADE0130.html>

On January 24, 2006, the government named the advisory group tasked with revising plans for consulting on policy principles for Alberta's oil sands area. The group will deliver its final report to government by March 31, 2006. For more information please see:

<http://www.gov.ab.ca/acn/200601/19330FDA79F82-F937-4425-B7A13D84CBCD5B44.html>

Ontario

On March 8, 2006, the government announced that environmental assessments to expand the McDougall landfill in the District of Parry Sound and the Laflèche landfill in eastern Ontario were approved. For more information please see: <http://www.ene.gov.on.ca/envision/news/2006/030801.htm>

On March 1, 2006, the Ministry of the Environment announced that York Region's proposed Southeast Collector trunk sewer will have to undergo a full environmental assessment before the project can proceed. The Minister approved the Terms of Reference for this key component of the York Durham Sewer System with this requirement. For more information please see:

<http://www.ene.gov.on.ca/envision/news/2006/030101.htm>

On February 17, 2006, the Environment Minister and the Agriculture, Food and Rural Affairs Minister announced the establishment of the Nutrient Management Science-Based Standards Committee to develop measures that will build on nutrient management principles, protect drinking water, and not place undue burden on the agriculture industry. For more information please see:

<http://www.ene.gov.on.ca/envision/news/2006/021703.htm>

On February 15, 2006, the Ontario Government announced that it would harmonize its air emission reporting system with that of the federal government. For more information please see:

<http://www.ene.gov.on.ca/envision/news/2006/021502.pdf>

LEGISLATION

British Columbia

On February 16, 2006, the *Recycling Regulation* made under the *Environmental Management Act* was amended by B.C. Reg. 23/2006 to deal with electronic waste.

On February 9, 2006, the *Reviewable Projects Regulation* made under the *Environmental Assessment Act* was amended by B.C. Reg. 14/2006. For more information please see: http://www.qp.gov.bc.ca/statreg/reg/E/EnvAssess/370_2002.htm

Yukon

On January 16, 2006, the government published in *The Yukon Gazette, Part II* that the *Environmental Assessment Act* was repealed as the *Yukon Environmental and Socio-Economic Assessment Act* had come into force. For more information please see: <http://gazette.gov.yk.ca/issues/2006/jan2006.pdf>

Ontario

On February 16, 2006, O. Reg. 41/06 was filed with the Registrar of Regulations amending O. Reg. 73/94, adding the *Nutrient Management Act* to the list of Acts that are prescribed under the Environmental Bill of Rights for the purpose of posting notice of environmentally significant regulations on the Environmental Registry. For more information please see: <http://www.ene.gov.on.ca/envregistry/025764er.htm>

On February 15, 2006, the *Airborne Contaminant Discharge Monitoring and Reporting Regulation* (O. Reg. 127/01), made under the *Environmental Protection Act*, was amended by O. Reg. 37/06. For more information please see: http://www.e-laws.gov.on.ca/DBLaws/Source/Regs/English/2006/R06037_e.htm

Québec

On April 13, 2006, the Minister of Sustainable Development, Environment and Parks announced the adoption of a new *Sustainable Development Act*. The Act aims to ensure that governmental powers and responsibilities are exercised in a manner consistent with the principle of sustainable development. The Act provides for the appointment of a Sustainable Development Commissioner to assist the Auditor General in sustainable development auditing. A Green Fund is also established to support measures promoting sustainable development. For more information please see: http://www.mddep.gouv.qc.ca/Infuseur/imprimer_communique.asp?no=954

On February 3, 2006, the Minister of Sustainable Development, Environment and Parks announced that the regulation respecting the landfilling and incineration of residual materials came into force on January 16, 2006. For more information please see: <http://www.mddep.gouv.qc.ca/matieres/reimr.htm>

COURT DECISIONS

Canada

In *A & D Holdings Inc. v. Canada*, a corporate taxpayer deducted capital cost allowance (CCA) for certain buildings and equipment acquired in 1994. The taxpayer paid \$25,000 for the contaminated property which if not contaminated had a fair market value of over \$3 million. The taxpayer deducted the \$25,000 cash payment and \$500,000 land value from the fair market value and deemed the remaining amount to be the cost of clean up and arrived at an allocated building cost of \$1,600,000 and equipment costs of \$1,055,000. The clean up had not been carried out to date. The Minister of National Revenue reassessed. The Court held that there was no evidence that there was any legally enforceable clean-up obligation at the time of purchase and the taxpayer could not deduct CCA for a cost that it had not incurred. For more information please see: [2006] T.C.J. No. 4,

IN DEPTH

CHALLENGING CONDITIONS OF CERTIFICATES OF COMPLIANCE

Tony Crossman
Vancouver
604.643.1244
tcrossman@millerthomson.com



and

Angela Rinaldis (Student-at-law)
Vancouver
604.687.2242 x 3067
arinaldis@millerthomson.com

Petro-Canada v. Assistant Regional Waste Manager, Deputy Director of Waste Management (Appeal No. 2004-WAS-001(a) & 2004-WAS-002(a))

On January 14, 2004 Petro Canada appealed a British Columbia conditional certificate of compliance issued by the Regional Waste Manager. Petro-Canada also appealed a certificate of compliance issued by the Deputy Director of Waste Management for the Ministry. Both of the certificates pertained to lands owned by Petro-Canada that had been remediated to address soil and groundwater contamination. Petro-Canada argued in this preliminary hearing that an indemnity clause in favour of the Crown was void and unenforceable due to a lack of jurisdiction. Petro-Canada was seeking that the Board remove the indemnity clauses or, alternatively, declare them to be void and unenforceable.

Background

The remediated sites in question were both owned by Petro-Canada. One site was located in Golden, BC the other in Sechelt, BC. The Golden site was a former location of a service station and the Sechelt site was the former location of a bulk storage plant for petroleum products. Both sites contained petroleum-based contaminants in excess of prescribed levels. Petro-Canada took steps to remediate both sites and certificates of compliance were issued. Schedule "B" to the certificates contained the following qualification:

The site owners indemnify the provincial Crown, and her employees against loss, damages, costs, actions, suits and claims arising from the contamination remaining on the site.

The certificates also listed substances for which the remediation had been satisfactorily completed. Substances not included in the list were not covered by the certificates of compliance.

The issue to be decided by the Board was whether the respondents had jurisdiction under the *Waste Management Act* ("the Act") or the Regulation to include the indemnity clause in the certificates of compliance. Petro-Canada relied on section 27.6(2) of the Act to argue that any condition or requirement imposed by a manager under this section, must, like those listed in section 27.6 (2) (a), be imposed *prior to or during the course of the remediation* and not *after* the remediation has been completed. Additionally, Petro-Canada argued that the Legislature did not intend to grant a manager the jurisdiction to impose any requirements that he or she saw fit when issuing the certificate. Rather, a manager's authority to impose requirements under section 27.6 of the Act is limited to requirements that relate to the remediation of the site.

The respondents submitted that there was ample authority for them to include the indemnity clauses. The respondents requested that the Board confirm their jurisdiction to include the indemnity clause, or in the alternative refer the matter back to them to review whether or not it is in the public interest to issue a certificate of compliance or conditional compliance. The respondents maintained that deleting sections of the certificates could create harm to both the environment and the public interest.

The Board found no obvious source of express or implied authority in the Act or the Regulation to include the indemnity clauses in the certificate or the conditional certificate. The Board also decided that the indemnity clauses do not assist the respondent in determining whether the conditions or requirements listed in section 27.6(2) and (3) have been met by the applicant. They do not assist managers in determining whether a site has been remediated in accordance with applicable standards, any orders under the Act, any remediation plans approved by the manager, or any requirements imposed by a

manager. In terms of the public policy objectives intended by the indemnity clauses (according to the respondent's submission these included protecting the environment, public health, and shielding the Crown from risks associated with contaminants remaining at the sites) the Board held that the respondents had other means of achieving the same results (the Board relied on section 28.7 to demonstrate this point).

In short, the Board found that imposing the indemnity clauses did not result in a defect in acquiring the jurisdiction to issue the certificate and the conditional certificate. According to the Board the defect occurred in exercising discretion over the content of Schedule "B", and not in deciding whether to issue the certificate and the conditional certificate under section 27.6 of the Act. This defect was not found to go to the heart of the jurisdiction to issue the certificates. Furthermore, the Board pointed to the fact that Petro-Canada had not questioned the content of the certificates, nor the respondent's authority to issue the certificates in general. Therefore, the error did not occur in acquiring jurisdiction, but rather in exercising discretion as part of an otherwise valid exercise. The certificates were not in their totality void and null, but the indemnity clauses were invalid.

The Board ordered that the certificate and conditional certificate be varied and that the indemnification clauses be deleted.

COAL-BED METHANE IN ALBERTA

By Duncan Milne, University of Calgary Law Student

Coal-bed Methane (CBM) in Alberta has been touted as a vast source of natural gas that holds promise of replacing conventional reserves of natural gas in the province. The Canadian Association of Petroleum Producers (CAPP) make reference to 160 trillion cubic feet of natural gas being associated with coal beds. However, the potential of this gas comes with the threat of environmental impact. Historically, CBM production has had an adverse effect on water resources because of the potential for communication with ground water sources and the disposal of water produced with methane.

In regions that have had significant CBM production other than Alberta, the coals have contained large quantities of associated water. This water was usually brackish or saline, which is defined by Alberta Environment as having total dissolved solids exceeding 4000 milligrams per litre of water. Such water is not suitable for normal use or consumption. In Alberta, however, the nature of the coal bearing formations is different.

CBM reserves in Alberta are made up of roughly four formations (Mannville, Horseshoe Canyon, Belly River and Scollard) each with different characteristics. These different formations either produce methane without associated water, with useable or potable water or in other instances unusable saline water. Any water associated with production is subjected to different regulatory oversight, regardless of its salinity.

Because of the Alberta government's commitment to water quality and quantity, there are technical and regulatory regimes in place to govern the disposal of produced water. Aside from CAPP, Alberta Environment, the Energy and Utilities Board (EUB) and Alberta Energy have guidelines in place to support the provisions of the *Water Act*.

Produced water that is non-saline and usable may be discharged at surface, into irrigation systems or into useable aquifers resulting in a benefit to the environment. However, to ensure that the water is in fact useable, a series of tests must be conducted on the water to verify that its quality is consistent with the proposed use.

Conversely, saline water must be disposed of by injection into deeper formations. This is to ensure that saline water does not contaminate surface or ground water sources. Regulations state that this water must be disposed of significantly below the base of ground water protection in the area. Both the EUB and Alberta Environment regulate these activities.

Another potential source of water contamination during the drilling of CBM wells is communication between saline water zones and ground water aquifers. Even non-saline waters must be kept apart from other distinct aquifers in order to prevent co-mingling of different waters. The EUB also looks at the drilling fluids and completion practices for wells that are shallow and have not taken steps to isolate and protect the other useable aquifers. Despite these steps there have been anecdotal claims of water containing methane in sufficient concentrations to burn skin or to be combustible. However, Alberta Environment has not

determined that these occurrences are a result of CBM activity.

The Horseshoe Canyon and Belly River Formations, to date, have been typically free of associated water and have (with few exceptions) not resulted in water handling problems.

Contamination of ground water during drilling can be a result of communication between formations containing drinking water and those containing saline water. Typically the water found in association with CBM that is saline, is from the Mannville and Scollard formations.

The nature of CBM projects requires a higher number of wells to be drilled than traditional gas development programs. According to the EUB while there have been approximately 5000 CBM wells drilled in Alberta, the EUB expects that an additional 4500 CBM wells will be drilled in 2006. Further, the EUB issued *Bulletin 2006-05* which summarizes that well-spacing requirements for wells targeting gas in the Mannville formations and shallower zones is reduced from 2 wells per section, rather than the 1 well per section normally held.

WHAT'S HAPPENING AROUND MILLER THOMSON

On April 24, 2006, **Bruce McMeekin** spoke on a panel considering the topic of "The Criminalization of Environmental Liability" during the *CCCA National Spring Conference: Leading Change in a Brave New Regulatory World* held in Ottawa on April 24 and 25.

On April 28, 2006, **Tony Crossman** spoke on a panel entitled "International Dispute, Extraterritoriality and Enforcement" during the *CBA Second Annual National Environmental, Energy and Resources Law Summit: Canada-U.S. Cross-Border Issues* held in Toronto on April 28 and 29.

Bryan Buttigieg, Tony Crossman and John Tidball, of our environmental practice group, were profiled in the inaugural edition of *The Best Lawyers in Canada 2006* (Woodward White Inc.).

MILLER THOMSON LLP ENVIRONMENTAL LAW PRACTICE GROUP

Markham

Rod M. McLeod, Q.C. 905.415.6707
rmcleod@millerthomson.com
John R. Tidball 905.415.6710
jtiddball@millerthomson.com
J. Bruce McMeekin 905.415.6791
bmcmeekin@millerthomson.com
Michelle Fernando 905.415.6716
mfernando@millerthomson.com

Toronto

Franklin T. Richmond 416.595.8180
frichmond@millerthomson.com
Andrew J. Roman 416.595.8604
aroman@millerthomson.com
Bryan J. Buttigieg 416.595.8172
bbuttigieg@millerthomson.com
Tamara Farber 416.595.8520
tfarber@millerthomson.com

Vancouver

Tony Crossman (Chair) 604.643.1244
tcrossman@millerthomson.com
Wendy A. Baker 604.643.1285
wbaker@millerthomson.com
Daniel L. Kiselbach 604.643.1263
dkiselbach@millerthomson.com
Rosanne M. Kyle 604.643.1235
rkyle@millerthomson.com
Charles W. Bois 604.643.1224
cbois@millerthomson.com
Robin Bajer 604.643.1295
rbajer@millerthomson.com
Peter Macdonald 604.643.1231
pmacdonald@millerthomson.com
Katherine Xilinas 604.643.1233
kxilinas@millerthomson.com

Whitehorse

André W.L. Roothman 867.456.3302
aroothman@millerthomson.com
Drew W. Pearson 867.456.3303
dpearson@millerthomson.com

Calgary

Brian J. Evans, Q.C. 403.298.2454
bevans@millerthomson.com
Kathleen J. Kendrick 403.298.4455
kkendrick@millerthomson.com

Edmonton

Debra Curcio Lister 780.429.9763
dcurciolister@millerthomson.com
Kent H. Davidson 780.429.9790
k davidson@millerthomson.com

Guelph

Robin-Lee Norris 519.822.4680 x.238
rnorris@millerthomson.com
Scott J. Galajda 519.822.4680 x.274
sgalajda@millerthomson.com

Montréal

Luc Gratton 514.871.5482
lgratton@millerthomsonpouliot.com
Brent J. Muir 514.871.5478
bmuir@millerthomsonpouliot.com
Éric Couture 514.871.5489
ecouture@millerthomsonpouliot.com
Louis Coallier 514.871.5488
lcoallier@millerthomsonpouliot.com
Pierre Paquet 514.871.5427
ppaquet@millerthomsonpouliot.com
Mathieu Turcotte 514.871.5492
mturcotte@millerthomsonpouliot.com

Our Associate Counsel

Prof. Alastair R. Lucas 403.220.7111
alucas@ucalgary.ca

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