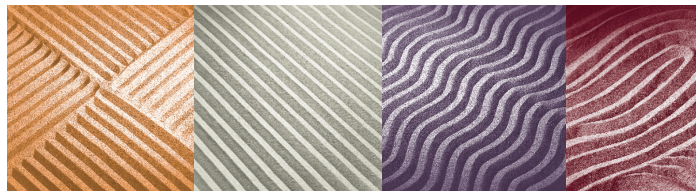


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ENVIRONOTES!

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Inside

Warning Shots Across the Bow - The OSC Takes a Hard Look at Environmental Reporting

Aboriginal Traditional Knowledge

Can Parent Companies be Responsible for Spills Caused by Subsidiaries? Due Diligence and Responsibility for your Emergency Response Contractors: The CPR Glycol Spill

British Columbia Establishes Brownfield Renewal Strategy

Alberta's Cumulative Effects Management Framework: Bold New Step or Brave New World?

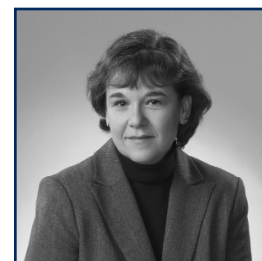
What's Happening Around Miller Thomson

WARNING SHOTS ACROSS THE BOW - THE OSC TAKES A HARD LOOK AT ENVIRONMENTAL REPORTING

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On February 29, 2008, the Ontario Securities Commission (OSC) issued Staff Notice 51-716, which clarifies the obligation on an issuer to disclose environmental matters. The Notice summarizes the result of the OSC's review of the environmental disclosures of 35 issuers governed by the Commission. The resounding findings that the current environmental disclosure boilerplate is inadequate to meet the existing disclosure obligations for many issuers. This is not a novel observation and echoes the comments of investors regarding the inadequacy of most disclosure regarding climate change risks and opportunities in the Carbon Disclosure Project's review of Canada's top 200 companies.

While staff notices are not subject to a statutory notice procedure, they do form part of the regulatory process and illustrate what information the OSC's staff will be looking for in the issuer's filings. Staff Notice 51-716 demonstrates the OSC's recognition that disclosure of environmental matters, particularly its environmental liabilities, is an important part of an issuer's fair representation to the public and its investors of its financial condition and that disclosure needs to be adequate to meet these purposes.

Disclosure is required of issuers where certain events or information is "material". Information is "material" where it significantly affects the market price or value of a security or would reasonably be expected to have a significant effect on the market price or value of a security. An event that is a "material change" must be disclosed if it is a change in a public issuer's business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities. This includes a decision by a public issuer's board of directors or senior management to implement a material change or where confirmation of such a decision by the board of directors is probable.

In terms of environmental risks, OSC Staff Notice 51-716 clarifies that issuers should disclose the following:

- Environmental liabilities in an issuer's financial statements where accrued;
- Disclosure of material potential environmental liabilities in a company's Management Discussion & Analysis Form (MD&A) and Annual Information Form (AIF), regardless of whether the liability has accrued in the issuer's financial statements;
- If a quantification is available on an environmental protection requirement and on the impact or potential impact of these costs on the results of the company's financials

or operations, these numbers should be included in the AIF; if the contravention arises from a spill or discharge of a toxic substance, this necessarily compounds the seriousness of the violation in the assessment (by up to 35%). However, preventative and mitigation measures and the use of an EMS at the time of the violation can diminish the seriousness of the offence by up to 35%.

- An asset retirement liability that is material to the issuer should be disclosed in the financial statement as well as in supplemental disclosure in the MD&A (an asset retirement liability results, for example, when an oil well ceases production and is abandoned and reclaimed);
- MD&A and AIF should include the risks arising from both national and international environmental legislation that are material to a company's operations;
- Environmental policies that have been implemented in an issuer's operations should be disclosed; and
- An evaluation of the impact or potential impact of these policies on a company's operations should be included in the description of the company's environmental policies, such as the impact of environmental contingency planning and "green" commitments.

The Notice also makes it clear that an issuer must provide disclosure on its liabilities and policies with respect to climate change and their effects on business. This move by the OSC is part of the increased awareness of environmental impacts by investors and the business community in general. It reflects both an increased global awareness of these issues and also developing global disclosure requirements fuelled by the investor community. This is also indicative of a transition from voluntary disclosure to disclosure by statutory requirement.

While many public companies have taken steps on their own initiative to disclose their environmental policies and liabilities to investors, the clear direction provided in OSC Staff Notice 51-716 is that more remains to be done. Although not creating new obligations, the clarification provided by the Notice is another step towards the standardization of environmental disclosure that requires more and better detail than has previously been provided. It sends a clear signal to issuers, the public and investors that corporate environmental disclosure is not simply hot air and will be subject to increased scrutiny and rising expectations.

ABORIGINAL TRADITIONAL KNOWLEDGE

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Aboriginal peoples' traditional environmental and resource-use knowledge is playing an increasing role in regulatory and administrative decision making in Canada. The incorporation of tradition knowledge into environmental decision-making is said to allow administrative decision-makers the ability to make decisions that better reflect aboriginal rights and interests.

Aboriginal traditional knowledge is difficult to define and has multiple dimensions. It encompasses the often undocumented direct observations and experience of environmental phenomena by a community over generations, a community's knowledge of the use and management of the environment including cultural practices and social activities, land use patterns, and harvesting practices past and current, as well as a community's moral and ethical values about the relationship between humans, animals and the environment.

The use and consideration of Aboriginal traditional knowledge is prescribed in a number of federal environmental and land-use statutes. For example, the *Canadian Environmental Assessment Act* provides for the consideration of community knowledge and aboriginal traditional knowledge in conducting an environmental assessment. The *Species at Risk Act* says that traditional knowledge of the Aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures, as well as in the preparation of stewardship plans. The *Mackenzie Valley Resource Management Act*, which implements regional land claims in the Mackenzie Valley in the Northwest Territories, mandates that the

Mackenzie Valley Environmental Impact Review Board shall consider any traditional knowledge and scientific information that is made available to it.

Administrative environmental boards, along with some governments, are issuing policies and guidelines for the reception of Aboriginal traditional knowledge in public decision-making processes. The first guidelines in Canada were produced by the Mackenzie Valley Environmental Impact Review Board. These guidelines set out, among other things, the process by which traditional knowledge holders may present their knowledge directly to the Review Board and the means by which the Review Board assesses the relevance, appropriateness, reliability and credibility of the material presented.

The increasing reception of Aboriginal traditional knowledge in public decision-making processes not only has the potential to lead to more informed decision making by adding valuable information about resource use and environmental conditions not available elsewhere, but it also may allow for more inclusive Aboriginal participation in environmental and land-use decision-making processes. The Mackenzie Valley Guidelines, for instance, encourage developers and traditional knowledge holders to work extensively together prior to an environmental impact assessment in order to gain the full value of traditional knowledge during the project planning stage. In British Columbia, traditional knowledge studies are often conducted as part of the environmental assessment process. Such early dialogue between developers and traditional knowledge holders is designed to encourage the sharing of knowledge of environmental phenomena that may be unavailable elsewhere and may allow for necessary project design changes to take place even before any environmental impact assessment begins. For developers, it is important to understand the increasing role of Aboriginal traditional knowledge in public decision making in Canada.

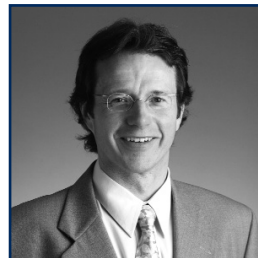
CAN PARENT COMPANIES BE RESPONSIBLE FOR SPILLS CAUSED BY SUBSIDIARIES?

DUE DILIGENCE AND RESPONSIBILITY FOR YOUR EMERGENCY RESPONSE CONTRACTORS: THE CPR GLYCOL SPILL

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The Canadian Pacific Railway Company (CPR) was convicted of depositing deleterious substances into Burrard Inlet as a result of a spill from a derailed glycol tanker truck.

Although CPR was successful in avoiding any conviction of its parent company, the subsidiary that operated the rail line was convicted. The Court accepted the Defence theory that the derailment was caused by a loose wheel moving in the axle, but concluded that CPR had not established that it acted with due diligence either to prevent the derailment or in relation to the continuing spill effect.

The lessons to be learned from this case are that:

1. in certain circumstances, parent companies can be held responsible for the environmental offences of their subsidiaries;
2. keeping records of your environmental due diligence is critical in asserting this defence; and
3. although it is reasonable to hire contractors to respond to emergency situations, you may end up being liable for mistakes that they make — so choose your contractors wisely and ensure they are doing their job properly.

Can Parent Companies be Responsible?

The Crown argued that the parent company owned and operated the railway according to documents on its website and statements the Crown argued were proof that the CPR railroad was owned and operated by both Defendants. The Defence presented evidence that the parent company simply owned shares in the subsidiary, which operated the railway, and not the rail assets. The information on the website did not address the legal liability issues but was simply meant as information to the public and investors.

The Court was satisfied that the parent company was not responsible at law for the operation of the rail business, which was operated by the subsidiary. The Court determined that there was no evidence, apart from ownership and perhaps overlapping members of the Board of Directors of each entity, that would allow the Court to conclude that the parent company had assumed responsibility for its subsidiary's operations to such an extent that the parent company could be held liable. Although the documents which the Crown sought to rely on to prove its theory may have been intended to be read by the public, including investors, they were not intended to be read for the purpose of fixing legal liability for the operation of the railway business, including being held liable for these pollution offences as either party or principal.

Due Diligence – The “Loose Wheel” Theory

The Crown's theory was that the derailment was caused by poor track structure, (the distance between the rails was greater than was acceptable) combined with a lack of track inspections. On the other hand, CPR's theory was that the derailment was caused by a “loose wheel” slipping on its axle, and not due to poorly maintained tracks. The rail wheels are held on their axles by friction alone, and although wheels can “fall off” rail cars, it is an exceedingly rare occurrence.

However, to complicate the situation was the fact that despite the derailment, no mechanical inspection was done on the rail car and no record existed to determine if the wheels were in gauge or not. Further, there had been an Early Warning Bulletin from the maker of a brand of wheel sent to the mechanical department of CPR advising that several out of gauge wheel sets had been found which were at risk of falling off. All wheel sets affected by the Early Warning Bulletin were to be inspected pursuant to the maintenance advisory. There was no record showing that the car's wheels had been inspected according to the recommendation, and no means for CPR to show whether the wheels were subject to the Early Warning Bulletin.

The Court considered the seriousness of the risk of harm expected from a loose wheel. Not only could there be damage to the surrounding environment if trains were carrying environmentally hazardous materials, but there was also a real danger to the rail employees who operate the train and a possibility of loss of life or risk of serious injury given that the derailment in this case left cars obstructing adjacent rail lines which normally carry commuters into work each day.

The wheels in question were scrapped after the derailment, and were not assessed to determine if they were in fact subject to the Early Warning Bulletin. Because the Defendant could not demonstrate that the wheels were not subject to the recall, the Court concluded that the degree of foreseeability of the car's wheels coming loose was higher than if there was some means of proving the wheels were not covered by the maintenance advisory. The Court assumed that the Early Warning Bulletin applied to the wheels in question. The Bulletin required the Defendant to actively look at the wheels of all of its tank cars in order to determine if any of them were defective. This meant that an employee would have to inspect the bearing cover of each wheel set to determine if they should be removed. There were no records showing the origins of the loose wheel or evidence that the wheel set was inspected prior to the derailment.

The Court highlighted the fact that there was no evidence that a program of inspections was carried out by the Defendant to determine if any cars were covered by the Bulletin. As a result, the Court found that it would have been quite easy for a company the size of CPR to keep a record of cars inspected in light of the Bulletin, and it would have been prudent for CPR to do so due to the severity of the problem they were trying to prevent.

The Court found that the Defendant failed to meet the burden of proving the defence of due diligence because it failed to establish compliance with the Early Warning Bulletin.

Due Diligence – Clean-up Contractors

CPR had its employees on site soon after the derailment and engaged an emergency clean-up contractor to manage the clean-up efforts. The Court found this was satisfactory.

However, the Crown's criticism related to the belated discovery of a culvert that discharged the glycol into Burrard Inlet. The entrance to the culvert was outside the immediate containment area.

Initially, the emergency responders identified an immediate containment area, but they did not know about a culvert which connected the spill area to Burrard Inlet, even though they walked the site.

The Court found that, although it was dark and that the liquid was clear, the emergency responders did not make the appropriate decision when establishing methods to contain the spill and areas to concentrate their clean-up efforts. The emergency responders should have seen the culvert that had a pool of standing liquid in it, which would have alerted them to the risk of the glycol discharging into Burrard Inlet, and concluded that the liquid by the culvert may be contaminated by the spill. Further, the emergency responders failed to reassess at a later time the clean-up strategy, especially after first light, when they should have realized the necessity of dealing with this culvert and ensured that the proper parameters were drawn around the boundaries of the spill to prevent disastrous environmental consequences.

Accordingly, CPR failed in its due diligence defence both on the derailment itself and on the continuing clean-up of the spill.

BRITISH COLUMBIA ESTABLISHES BROWNFIELD RENEWAL STRATEGY

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British Columbia is quickly becoming one of the most progressive provinces in terms of contaminated sites regulatory policy and strategy. However, brownfield development in the province still has numerous impediments. In order to address this issue and encourage redevelopment of many brownfield sites, Agriculture and Lands Minister Pat Bell announced the new “Brownfield Renewal Strategy” the goal of which is “to support projects that create efficient, revitalized, green communities that are sustainable for future generations.”

Brownfields are abandoned, vacant or underutilized industrial and commercial properties where past actions have resulted in actual or perceived contamination. Brownfield sites are unique in that they hold active potential for redevelopment, as opposed to other contaminated sites.

Left as they are, brownfields can pose threats to environmental quality, but when returned to productive use, brownfield sites can generate significant environmental, economic and social benefits.

The Strategy will identify opportunities to create policy, regulatory, tax, funding and education tools which are in line with the National Round Table on the Environment and the Economy.

Specifically, the Strategy will:

- fast-track green developments waiting for provincial approvals;
- implement a \$10 million fund to create green opportunities for communities as they revitalize inactive or unused lands; and
- broaden brownfield tools for local governments, including allowing communities to vary development costs for eligible projects.

The Province is also:

- creating tax incentives and disincentives to attract more investment in brownfield projects and to discourage brownfields from being kept idle;
- providing enhanced flexibility in liability allocation so that brownfield owners will be encouraged to either sell or redevelop idle properties;

- developing a virtual brownfield office, a partnership between the Ministry of Agriculture and Lands and the Ministry of Environment, to assist local governments with brownfield renewal;
- developing a Certificate in Brownfield Entrepreneurship; and
- implementing direct expert assistance, on a project-by-project basis, for municipal staff involved in redevelopment pilot projects.

The Province is consulting with a wide range of stakeholders on the Strategy. Representation will come from the development community, UBCM, the Urban Development Institute, and the Ministries of Agriculture and Lands, Community Services, Environment, Finance and Advanced Education.

ALBERTA'S CUMULATIVE EFFECTS MANAGEMENT FRAMEWORK: BOLD NEW STEP OR BRAVE NEW WORLD?

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October 2, 2007 ushered in a new era in environmental regulation in Alberta with the introduction of the new Cumulative Effects Management Framework. As presented in the discussion paper supporting the announcement, entitled “Towards Environmental Sustainability”, the Cumulative Effects Management Framework is intended to shift environmental regulation from the traditional command and control model that limits and mitigates impacts associated with individual projects and specific resources (e.g. facility specific air emission limits, water withdrawal or wastewater discharge limits) to a more results-based and area-specific approach. The discussion paper suggests that the legislation supporting the Cumulative Effects Management Framework will: “establish an environmental management system that sets desired objectives for environmental quality for defined parts of the province and ensures human activity is managed to achieve these objectives.” At its core, the Cumulative Effects Management Framework involves developing specific environmental performance objectives and implementation strategies for an entire planning area (an area defined by the Minister such as a landscape, watershed or airshed) rather than facility-by-facility regulation.

The Cumulative Effects Management Framework is not the only piece in Alberta's new regulatory puzzle; it is part of a larger integrated approach to land-use planning. The initial draft of Alberta's Land-use Framework was introduced on May 21, 2008, with the following stated purpose: “to manage growth, not stop it and to sustain our growing economy, but balance this with Albertans' social and environmental goals.” A key strategy to accomplish the promise of the Land-use Framework will be managing the cumulative effects of all development via the Cumulative Effects Management Framework.

So what exactly will the Land-use Framework and the Cumulative Effects Management Framework mean to Alberta's existing and planned industrial operations? In the near term, the answer is that it depends on the part of the Province where the facility is located. The first area affected by the new model in 2009-2010, will be Alberta's Industrial Heartland. The area has more than thirty heavy and medium industry players, with eight bitumen upgrader facilities potentially planned for the area and additional announcements expected. Consequently, managing cumulative effects on the air, water and land bases in the area is a central issue for residents, regulators and industry alike.

In support of the Cumulative Effects Management Framework in the Industrial Heartland, the Province introduced, in December 2007, water quality limits on 100 parameters and limits to maintain in-stream flow needs for the North Saskatchewan River under the “The Water Management Framework for the Industrial Heartland and Capital Region.” In addition, regional air emission limits have been set for NO_x (nitrogen oxides) and SO_x (sulphur oxides), with these limits to apply in 2009. It is anticipated that Alberta Environment will include emitters of 100 tonnes or greater of these substances in the overall airshed planning mechanisms used to achieve the limits, but the details of how this will be accomplished have not yet been disclosed.

On this basis, we speculate that for projects being planned for the Industrial Heartland and currently in the regulatory queue, the Air Framework will likely inform the facility-specific NO_x and SO_x limits. In addition,

the water quality and withdrawal limits noted in the Water Framework will limit the extent to which new water withdrawal and discharge infrastructure are approved and will also likely affect the discharge limits prescribed in the approvals issued under the new regime.

For projects in the Industrial Heartland that are not yet in the regulatory queue and for facilities operating under current approvals, the practical effect of the Cumulative Effects Management Framework is even less clear. For example, we do not yet know whether proposed new facilities will be required to participate in regional environmental impact assessments involving several developments, exactly how regional limits will be allocated and enforced at the facility level and whether existing approval limits established at the older facilities in the area will be reduced or otherwise affected by the regional limits. In the Province's "Draft Land-use Framework Public Questions and Answers" the approach to existing approvals and licences was summarized as follows:

*Existing contractual commitments such as approvals and licenses will be honoured
However, planning decisions on future development will need to be aligned with
provincial policie decisions on future dorward requires some hard decisions and some
trade offs.*

Exactly what form those decisions and trade offs will take remains unclear. Questions also remain regarding inconsistencies that may arise between regional limits for some substances and the federal air quality limits prescribed under the federal Clean Air Framework for those same substances.

Notwithstanding the considerable uncertainty, what is becoming apparent is that with the tight timelines of 2009-2010 for the initial implementation phase, new regulatory approvals for industrial facilities in some areas will not be governed by the business-as-usual processes that have developed over the last 15 years. A new focus on cumulative effects, regional impacts and surrounding and incompatible land uses should be anticipated by project proponents. In addition, new regulatory tools such as tradeable "disturbance units" for activities on public lands, carbon offsets and greenhouse gas emission intensity targets and in-stream flow needs holdbacks in water approvals will significantly alter the regulatory landscape as well.

With the potential to result in sweeping changes across the Province, the progression of the Land-use Framework, the Cumulative Effects Management Framework and associated regulatory initiatives will be watched with more than a passing interest on the part of the public, project proponents and regulators in other jurisdictions. To monitor the progress of the Land-use Framework, consult <http://www.landuse.alberta.ca/> and updates on the Cumulative Effects Management Framework are available at: <http://www.environment.alberta.ca/1930.html>. Specific updates for the Industrial Heartland are available at: <http://www.environment.alberta.ca/1933.html>. Stay tuned, this summer and fall promise to be busy ones as Alberta moves forward with these bold new initiatives.

WHAT'S HAPPENING AROUND MILLER THOMSON

Sandra Gogal, Rosanne Kyle and **Fred Fenwick** spoke at Insight Information's Aboriginal Oil and Gas Forum in Edmonton on April 28 and 29.

On April 30, **Teresa Meadows** presented "Putting Green into the Black: Environmental Issues in Construction" at the Miller Thomson Construction Seminar 2008 held in Edmonton.

Tony Crossman moderated a panel entitled "North America's Climate and Clean Air Regulatory Framework" at the 2008 CBA NEERLS Climate Change and Air Quality Summit in Ottawa, a joint event of the CBA and ABA. **Teresa Meadows** presented her paper "Carrots, Sticks, Taxes, Caps and Trades: Canada's Provinces and Territories Tackle Climate Change" at that Summit.

Rosanne Kyle co-chaired Insight Information's Western Canada's Aboriginal Law Forum in Vancouver on May 13 and 14.

Sandra Gogal spoke to the Council for Corporate and Aboriginal Relations (a sub-committee of the Conference Board of Canada) on May 22, in Calgary, on the Interplay between Aboriginal Consultation and Environmental Assessment.

Tony Crossman recently attended the Cambridge Forum on Environmental Law and Globe 2008.

Tony Crossman recently hosted and chaired a roundtable discussion in conjunction with the Australian High Commission and Tim Flannery, Australian climate change scientist and policy advisor.

Tony Crossman's recent publications include an article in *Canadian Consulting Engineer* on the liability of consultants under the *Fisheries Act* (Canada). Tony also updated chapters on environmental law in British Columbia and the Yukon for *Canadian Environmental Law*, a publication by Lexis-Nexis Canada. With respect to this last publication, **Teresa Meadows** co-authored the chapter on environmental law in Alberta with University of Calgary Dean Alastair Lucas, Q.C.

On May 29, **Teresa Meadows** will be presenting "Navigating the Alberta Upgrader Regulatory Approvals Process" at the 2nd Annual Heavy Oil Refining: Business Case & Environmental Sustainability Conference in Edmonton.

Aaron Atcheson and **Sandra Gogal** are both speaking at the 7th World Wind Energy Conference on "Community Power: Energy Autonomy for Local Economies" in Kingston, Ontario on June 24 and 25.

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