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## ENVIRONOTES!

### March 2008

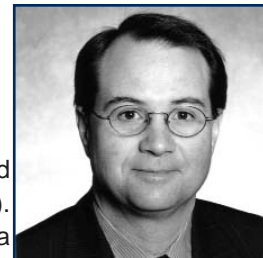
*Environmental Solutions for Business.*

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### FIRST ENVIRONMENTAL PENALTY ISSUED IN ONTARIO

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The Ministry of the Environment announced on March 3 that it had issued its first Order requiring payment of an Environmental Penalty (EPs). CGC Inc. (Canadian Gypsum Company) has been ordered to pay a \$9,000.00 penalty for permitting runoff from its Hagersville plant to enter a tributary of the Grand River in September, 2007.

The EP provisions came into force in August, 2007. In previous editions of EnviroNotes (November 2004, March and June 2005, November 2006 and Summer 2007) we reported on the content of the EP provisions and how they will be applied. Initially, EPs will only be used to enforce compliance within MISA regulated industries which discharge directly into the Great Lakes or the watercourses that flow into them. (The CGC facility in Hagersville is regulated by MISA Regulation 561/94.) In the future, it is expected that EPs will be more widely used throughout the Province.

At press time, it is not clear how CGC intends to respond; whether it will try to negotiate a settlement or require a hearing before the Environmental Review Tribunal on the merits. We will provide an update in a future edition of EnviroNotes.

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### CLIMATE CHANGE LEGISLATION & TRANSPORTATION TRANSFORMATION

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The Minister of Finance for British Columbia recently announced plans to introduce a consumer based carbon tax on July 1, 2008. This has been described as the first substantial levy of its kind in North America. It is expected that a carbon tax or regulations will be introduced in the near future in other jurisdictions across North America. Thus, Canada's transportation sector will soon be affected by new climate change legislation and policy. Federal and Provincial government greenhouse gas reduction legislation regulations and policies are expected to target energy

intensive transport. Transportation businesses should plan now to respond to these new changes. This article provides an overview of current air emissions regulations and discusses how governments are expected to tax or regulate air emissions in the near future in Canada.

### **The Transportation Industry and Greenhouse Gas Emissions**

Studies show that the transportation sector is a leading contributor of greenhouse gases (GHG). Greenhouse gases, such as carbon dioxide, nitrous oxide and methane, are created by the production and combustion of fossil fuels and contribute to climate change when released into the atmosphere. A 2006 study by the World Resources Institute reveals that transportation contributes 14% of global GHG emissions. In Canada, transportation represents the country's largest source of GHGs, accounting for 25% of total GHG emissions and 59% of carbon dioxide emissions.

As a party to the Kyoto Protocol, Canada's federal government is responsible for monitoring and reporting national GHG emissions to the United Nations Framework Convention on Climate Change (UNFCCC). The National Inventory Report reveals that domestic aviation, domestic marine, and railways each contribute between 3-4% of national transportation emissions. Another 20% of emissions come from pipelines, and off-road diesel and gasoline. Finally, road transportation contributes the remaining 67% of GHG emissions. GHG emissions from road transport have increased substantially since the 1990s. One major cause is the trend in personal vehicle use from automobiles to minivans, sport utility vehicles (SUVs) and small pickup trucks. These larger vehicles emit an average of 40% more GHG emissions per kilometre than automobiles. Additionally, emissions from heavy-duty vehicles have almost doubled as a result of just-in-time delivery production systems.

Thus, the transportation sector has been and is expected to be a key target of emission control and climate change legislation. Currently, both the federal and provincial governments regulate GHG emissions. Under the federal *Canadian Environmental Protection Act* ("CEPA"), regulations exist to limit the sulphur content in diesel and gasoline to comply with maximum allowable emissions. Future developments include plans to enact the *Motor Vehicle Fuel Consumption Standards Act* by the end of 2008, and to amend CEPA to allow the federal government to implement regulations requiring 5% average renewable content in gasoline by 2010, and a 2% average renewable content in diesel by 2012.

### **Federal Regulations respecting Aviation, Marine and Rail**

The federal government shares responsibility for the environment, but it is also able to regulate transportation under other heads of power such as navigation and shipping. Under this head of power, the federal government has enacted legislation regulating the aviation, marine, and rail sectors. For example, emissions from the shipping sector are governed by the Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals made under the *Canada Shipping Act*. Rail transportation is governed by the *Canada Transportation Act*, however, there are no regulations specifically dealing with rail emissions.

The aviation sector is governed, in part, by a voluntary compliance program. It has been suggested that aviation is responsible for 2% of global carbon dioxide emissions and 4% of national emissions. Airline travel is expected to expand over the next 20 years, which will result in an increase in emissions. In anticipation of this expansion, the federal Minister of Transport entered into a memorandum of understanding with the Air Transport Association (ATA) of Canada to reduce greenhouse gas emissions. This voluntary agreement requires ATA members to improve their fuel efficiency by an average of 1.1% per year. It is expected that the federal government will impose aviation emissions regulations pursuant to the federal *Aeronautics Act*.

### **Provincial Air Emission Regulations**

Although the federal government regulates fuel content, the provinces have played a much more predominant role in the emission regulation field. Provincial air emissions regulations have been in place for years. Ontario regulates air emissions under its *Environmental Protection Act*. Ontario's Drive Clean Program allows inspectors to ensure motor vehicles do not exceed the prescribed maximum emission standards. The province is also discussing investing in cleaner and more efficient forms of transportation and cleaner fuels. Other regulations govern local air quality and Nitrogen Oxides and Sulphur Dioxide emissions from industry. Trading of industrial emissions is also regulated, but does not apply to the transportation sector.

Like Ontario, British Columbia has established various emissions regulations under its *Environmental Management Act*. These include the Cleaner Gasoline Regulation; the Gasoline Vapour Control Regulation;

the Motor Vehicle Emission Reduction Regulation. Respectively, these regulations establish gasoline standards to reduce emissions of volatile organics, nitrogen oxides and sulphur oxides; prevent the escape of gasoline vapours; and prohibit the sale of vehicles that do not meet emission standards.

Provincial legislation specifically addressing climate change is also being created. In 2003, Alberta introduced its *Climate Change and Emissions Management Act*. This Act uses an intensity based approach to reduce emissions per unit of production. It does not provide an aggregate cap on emissions. In 2007, B.C. enacted the *Greenhouse Gas Reduction Targets Act* which commits the province to reducing emissions by 33% below 2007 levels by 2020 and requires government travel to be carbon neutral. Unlike Alberta's legislation, B.C. does set a cap on emissions. Manitoba is expected to enact legislation similar to B.C.'s in the near future.

More legislative developments are expected. British Columbia will be Canada's first province to enforce California's low carbon fuel content standard to reduce carbon usage in passenger vehicles by 10% by 2020. This spring, British Columbia is expected to enact tailpipe emission standards for all new passenger and light duty vehicles sold in the province, with regulations to follow in fall 2008. This initiative is expected to reduce personal vehicle GHG emissions by 30%.

As noted, the Minister of Finance for B.C. has just announced a new carbon tax scheme in its 2008 Budget. Carbon taxes serve the dual-purpose of reducing carbon fuel consumption and generating funds to finance "green" initiatives. Whether this theory proves valid is questionable given that the staggering increase in the price of gas over the past few years has not been accompanied by a radical decrease in emissions. In October 2007, Quebec became Canada's first jurisdiction to introduce a direct carbon tax on fuel to finance its GHG emission reduction plan. B.C. is now following with a revenue-neutral carbon tax on all fossil fuels starting at a rate of \$10 per tonne of associated carbon or carbon equivalent. The rate is scheduled to increase by \$5 per year for the next four years. This translates to a tax of 2.14 cents per litre of gasoline, as of July 1, 2008, increasing to 7.24 cents per litre by 2012. To address the concern that lower income families will be disproportionately affected by a carbon tax, the government will issue annual Climate Action Credits in the amount of \$100 for adults and \$30 for children. The government of British Columbia has suggested that the policy underlying this tax is to provide an incentive to individuals, businesses and industries to choose more fuel efficient alternatives.

### **Other Measures**

The ultimate success of a carbon tax depends heavily on the existence of fuel efficient alternatives. In the transportation sector, taxing gas at the pump will not reduce the number of drivers on the road unless safe, efficient and convenient public transportation is available. In this regard, British Columbia has announced plans to make substantial investments in alternative transport. B.C. recently pledged \$14 billion to fund a Provincial Transit Plan, which is intended to double transit ridership by improving and expanding the public transit system. The Union of B.C. Municipalities has also allocated \$50 million to help communities build a safe network of bicycle paths. B.C. is also investing in alternative fuel sources and fuel cells to advance the development of a hydrogen highway.

Another measure being considered by British Columbia to reduce GHG emissions is the implementation of a so-called "cap and trade" system. A cap and trade system involves setting a cap on allowable emissions and trading emission allowances. Persons who reduce emissions below the cap must sell their excess quota. Persons whose emissions exceed the cap must purchase emission credits to bring them within their allowable limit. Emissions registries and trading systems already exist. These include the voluntary Chicago Climate Exchange and Montreal Climate Exchange, and the compulsory European Climate Exchange. Members of these climate exchanges who exceed their allowable emission limit must pay a fine for each excess unit.

British Columbia, and other members of the Western Climate Initiative (Arizona, California, Montana, New Mexico, Oregon, Utah and Washington), are expected to participate in a market-based cooperative approach to reduce GHG emissions. However, there are unresolved issues relating to the implementation of a cap and trade system. Even if B.C. and Manitoba adopt a cap and trade system to regulate industrial emissions, it is unclear how this system could be applied to the transportation sector and individual vehicle users.

### **Conclusions**

This article has provided a brief outline respecting current air emissions regulations and plans for future regulations in Canada. The British Columbia government's announcement that it intends to impose a new

consumer based carbon tax is expected to form part of a pattern of new regulations. The revenue neutral carbon tax to be imposed by the British Columbia government may be a model for other jurisdictions to follow in North America. All revenue generated by the carbon tax is expected to be returned to individuals through a reduction of other taxes. However, the tax policy underlying climate change regulations is generally expected to make fuel dependent transportation related activities more expensive in the near future. Businesses in the transportation sector should monitor the situation and plan to deal with the expected costs associated with climate change legislation.

## TWO CAN PLAY AT THIS GAME: CROSS BORDER POLLUTION ENFORCEMENT

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In 2004 the U.S. District Court sided in favour of the United States Environmental Protection Agency (EPA) against Teck Cominco Ltd. on the application of U.S. law to this Canadian company. Teck Cominco had been ordered by the U.S. EPA to clean up contamination in the U.S. caused by Teck Cominco's Canadian operations. Teck Cominco's lead and zinc smelter complex in Trail, B.C. is 15 km north of the U.S. border. It has operated for over 90 years discharging slag into the Columbia River. In 2006 the Company's appeal to the U.S. Federal Court failed as the court upheld the original decision.

The company then asked the U.S. Supreme Court to overturn the ruling arguing that Superfund law does not apply to a Canadian company unless it specifically intended for contamination to end up in the U.S. The argument attempted to combat prior statements from the Court of Appeal that CERCLA (the *Comprehensive Environmental Response Compensation and Liability Act* (also known or referred to as Superfund legislation) could apply on an extra territorial basis.

U.S. and Canadian governments, including the Federal government, the Province of B.C. and the Chambers of Commerce of both Canada and the U.S. urged the U.S. Supreme Court to take the case to correct the federal ruling, fearing the prior ruling would complicate internal relations and open the floodgates for ignoring US foreign policy.

The U.S. Supreme Court determined the issue on January 7, 2008 holding that it will not intervene in a Court ruling holding Teck Cominco Ltd. subject to U.S. Superfund legislation. No reasons were given but the EPA had reached an agreement with Teck Cominco in the interim period between appeals withdrawing the original order in exchange for an agreement for Teck Cominco to complete a \$20 million voluntary Remedial Investigation and Feasibility Study to determine human health risks.

Two can apparently play at this game. In a decision released January 17, 2008, the Superior Court of Justice in border city Sarnia, Ontario issued an order directing a lower court to summon DTE Energy to face charges in Ontario for polluting the St. Clair River with mercury. DTE Energy operates in Michigan but is being charged in Ontario under a private prosecution for violating *Canada's Fisheries Act*.

Despite the process of prosecuting the action through private citizen action, the quasi-criminal nature of the prosecution, and the lofty fines if found guilty, remain the same.

Both cases demonstrate an ever increasing move of private citizens to realize the environmental implications of operations along country borders can be significant and should not simply be ignored or left to "diplomatic processes". If diplomatic processes are not being engaged fast enough or persuasively enough, private citizens can and will take measures into their own hands. In Teck Cominco, it was the lack of enforcement of an earlier EPA order that led 2 members of a reservation (Colville Reservation) to file a private action to enforce the order. In DTE Energy, the private citizens who started the prosecution may have the burden of continuing to prosecute, despite an ability of the provincial Ministry of Environment to take it over.

The involvement of neighbours in community education, planning, and remedial plans can have a major beneficial effect on whether regulatory prosecution or civil litigation is engaged as a tool. Where that community extends over borders, those that operate under environmental controls need to consider the potential for cross-border impacts. Whether the relevant regulating authority should accept some part in the thinking process remains to be seen.

## CONSULTANT LIABILITY FOR CONTAMINATION UNDER THE *FISHERIES ACT*: THE GEMTEC APPEAL

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Recently, the New Brunswick Court of Queen's Bench confirmed the conviction of Gemtec Limited ("Gemtec"), an environmental consulting firm, and Robert Lutes, the project director at Gemtec, of two charges of violating section 36(3) of the *Fisheries Act*. Their "crime" was to recommend and implement a landfill closure plan for the City of Moncton landfill which allowed leachate to continue to flow from the landfill, and for recommending and installing a pipe that deposited the leachate into a small creek.

For consultants, and their employees and project managers, this decision has serious implications, and potentially "chilling" effects.

At trial in the New Brunswick Provincial Court, Gemtec and Lutes were found guilty of depositing or permitting the deposit of leachate into Jonathan Creek in contravention of section 36(3) of the *Fisheries Act*.

The former Moncton landfill was opened in 1971 and decommissioned in 1972. Greater Moncton area residents and businesses deposited residential, construction and commercial waste, petroleum products, contaminated soil, liquid animal waste, asbestos, medical waste and other waste in the landfill.

In 1993, the City of Moncton retained Gemtec to conduct a study of the closure of the landfill. Gemtec's 1995 closure report acknowledged the landfill was producing leachate which exceeded the Canadian water quality guidelines. The report identified two options:

1. Limited remedial measures with a projected cost of \$2.3 million (this allowed leachate to continue to flow into waterways);
2. A more comprehensive remediation plan including the collection of leachate with an estimated cost of \$5.63 million.

Gemtec recommended option #1.

A peer review was completed for the City that raised concerns with option #1 not complying with the *Fisheries Act*. Despite this, the City of Moncton accepted Gemtec's recommendation to adopt option #1 and retained Gemtec to implement the closure plan.

Gemtec implemented the closure plan over the next 5 years. Part of that plan included installing a pipe or drain to take some of the leachate to Jonathan Creek. In 2000, the local "riverkeepers" lodged a complaint with Environment Canada in relation to the leachate. Tests found the leachate acutely lethal to aquatic life.

On appeal, the facts were not in issue.

The Appeal Court confirmed the following:

### **Gemtec and Lutes "Committed" the Offence**

It had been argued that Gemtec and Lutes had no involvement in the creation of the landfill in that they did not deposit the garbage and did not exercise control over the landfill. They were only retained as consultants as to how to close the landfill.

However, the Court found that the Gemtec design and recommendation allowed leachate to continue to be deposited into the waterways around the landfill, and the consultant implemented this plan.

By designing the plan with the understanding that leachate would continue to be deposited into the waterways around the landfill, Gemtec was found to "deposit" and knowingly "permit" the deposit of leachate. In addition, the recommendation and installation of the 400 metre long pipe designed to collect leachate from the landfill and drain directly into the creek was a "deposit".

### **Due Diligence**

Gemtec argued that it was diligent and this was a defence to the charges.

However, the Court disagreed. The evidence was that Gemtec either, at best, did not know, or at worst, was "wilfully blind" as to the requirements of the *Fisheries Act*. Further, Gemtec was forewarned via the peer review that the closure option that it recommended may not comply with the *Fisheries Act*. There was no evidence presented that Gemtec consulted Environment Canada or the Department of Fisheries and Oceans ("DFO") to determine whether the closure plan complied with the federal regulatory requirements.

Further, Gemtec neither recommended nor implemented any reasonable measures to prevent the toxic leachate from being deposited into the waterways. In fact, they oversaw the installation of the Jonathan Creek pipe.

### **Officially Induced Error**

Gemtec had argued that it had a defence of officially induced error on the basis of a telephone call that Mr. Lutes had with an unidentified person at Environment Canada, who advised him that the closure of the landfill site was handled by the Province and approved by the New Brunswick Department of the Environment. Gemtec also argued that the annual monitoring reports of the leachate was referred to the environmental monitoring working group, which included officials from Environment Canada and the DFO; and that there was uncertainty over the interpretation of section 36(3) of the *Fisheries Act*.

The Appeal Court confirmed that the defence of officially induced error had not been made out. In particular, the Court referred to the findings by the trial judge that:

- Gemtec had been forewarned by the peer reviewer that the closure plan may contravene the *Fisheries Act*, and Gemtec took no action to submit the plan to Environment Canada or DFO for review, sought no legal advice, and failed to review the *Fisheries Act*.
- there was no evidence to establish that the person contacted by Mr. Lutes was an "appropriate official" with any responsibility or authority for the administration or enforcement of section 36(3) of the *Fisheries Act* or that the person offered any opinion or advice with respect to section 36(3) as it related to the landfill.
- the submission of the annual monitoring reports to Environment Canada and DFO was not sufficient because there was no evidence to establish that these officials were vested with the responsibility, duty or authority to enforce section 36(3) of the *Fisheries Act*.
- there was no evidence that Gemtec sought or obtained any legal advice regarding the *Fisheries Act*, despite the warning.

### **Sentence**

Although the Crown appealed the sentences as being inadequate, the Appeal Court upheld that the penalties were appropriate. Specifically, Gemtec was fined \$25,000 and Mr. Lutes was fined \$3,000.

### **Conclusion**

It is clear from this decision that consultants will have to be very careful in dealing with and managing environmental issues/conditions generally, and the *Fisheries Act* in particular. The failure to comply with the *Fisheries Act* by consultants can lead to corporate and personal liability and penalties. In order to prevent this, it will be important for consultants to seek legal advice on whether what they are doing will contravene environmental laws.

## CARBON DISCLOSURE - DO INVESTORS WANT TO KNOW HOW COMPANIES ARE ADDRESSING CLIMATE CHANGE ISSUES?

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Climate change presents a broad range of business risks. Effective response requires an integrated approach that includes recognizing and responding to these risks and creating opportunities while providing appropriate disclosure to their stakeholders. So how are Canadian companies dealing with the uncertainty, risks and opportunities presented by climate change challenges, and how do we measure up in comparison to other nations? Although the picture remains incomplete, the information provided in The Carbon Disclosure Project Report 2007: Canada 200 Report ("Canada 200 Report") gives us a glimpse into how some of Canada's 200 most valuable companies (by market capitalization as listed on the Toronto Stock Exchange) are managing.

Commencing in 2000, the Carbon Disclosure Project ("CDP") is a voluntary survey conducted by investors to request information about climate change and carbon risk management strategies from companies around the globe. The fifth CDP report, prepared and released in 2007 requested information from 2,400 companies worldwide, including Canada's top 200. Over 300 institutional investors managing over US \$41 trillion in assets are the driving force behind the CDP, including 30 of Canada's largest investors.

The CDP provides a forum for investor and corporate collaboration on climate change issues. The CDP reports function as a window on both the corporate perception and response to the risks and opportunities presented by climate change, as well as an impetus to enhance the level of consistent and comparable disclosure of greenhouse gas emissions for global companies. Based on answers to the CDP survey, the investment community has gained valuable insight into the greenhouse gas ("GHG") emissions of corporations and the responses have highlighted those companies adopting effective climate change management strategies.

In 2007, 88 out of 200 Canadian companies that received the request responded to the CDP, compared to 78 companies in 2006. The companies that participated in the 2007 CDP survey represent approximately 70 percent of the total market capitalization of the 200 companies that received the questionnaire. More than 75 percent of the top 50 companies responded this year, which is one of the highest response rates among all CDP regions and sectors surveyed globally.

According to the Canada 200 Report, companies recognize that climate change represents not only risks, but also opportunities, with 88 percent of respondents stating climate change presents business risks and 86 percent seeing opportunities. The responsibility for managing both risks and opportunities is beginning to be assumed at the upper levels of the corporate management structure with 53 percent of respondents identifying that the board of directors has responsibility for addressing climate change. However, there is currently a lack of information on which to base corporate strategy, as only 10 percent of respondents have undertaken a climate change risk assessment.

The data gap is also evident when attempting to compare GHG emissions inventories amongst companies because not all companies use an internationally-recognized GHG reporting protocol. Reporting is characterized by high variability in the scope and content of emissions inventories, quantification methods and measures, as Canadian publicly traded companies report GHG emissions data through various voluntary

and regulatory reporting mechanisms, including their own versions of voluntary corporate reports, the Climate Change Registry, the National Pollutant Release Inventory (NPRI), facility-level GHG reporting in Alberta and Ontario, Statistics Canada reporting for large industrial emitters, and reporting with industry associations. In addition to varied industrial, provincial and federal requirements there are also varying international GHG reporting frameworks, such as the World Resources Institute *GHG Reporting Protocol* and the ISO 14064 *GHG Quantification Standard*. Consequently, although 70 percent of respondents provided annual GHG emissions data it remains challenging to compare the carbon profiles of companies based on these varied approaches.

Interestingly, sixty-four percent of respondents have a formal GHG emissions management system, which directly target emissions, or indirectly target emissions through energy efficiency and conservation. Other emissions reductions strategies revolve around operational improvements, including asset turnover and waste minimization. Corporate emissions reduction opportunities increasingly include renewable fuels and clean technologies. Thirty eight percent of respondents have invested in renewable energies, such as hydro, wind, solar, geothermal, and biomass. In addition, carbon capture and clean coal are two other technologies cited by energy producers.

The Canada 200 Report notes that voluntary emissions reduction targets are the exception, not the rule. Twenty-five per cent of respondents have a formal target, which is a slight increase over the 2006 survey. Numerous companies are waiting to see the nature, timing, and limits imposed by regulatory requirements. Continued lack of regulatory clarity is viewed as a major impediment to implementing a carbon emissions reduction strategy and to assessing potential compliance costs. Respondents also cited several other barriers such as limited regulatory guidance, newness of regulation and the need to audit and establish base-year emissions as uncertainties limiting action.

Although this reaction is understandable, it is becoming clear that regulatory risk is but one of the climate change impacts that companies must address. In fact, the global responses under the 2006 CDP, indicated that only 36 percent of companies identified regulatory risks as a driver influencing the development of their climate change strategy, with commercial risks (e.g. reputational risk, business partner and shareholder requirements, etc.) exercising considerably greater influence. Consequently, companies that demonstrate a broad and integrated management response to the risks of climate change have the opportunity to differentiate themselves from their competitors and to be rewarded in the financial marketplace.

The latest feature of the Canada 200 Report is the Climate Disclosure Leadership Index, which recognizes sixteen Canadian companies as climate disclosure leaders based on the quality of their responses to the CDP information request. These companies have distinguished themselves through the reporting of GHG and assessment of climate change strategies and their transparency relating to reporting on programs established to lower overall emissions.

Although Canada's leading companies have increased awareness of the business risks and opportunities of climate change, and are more responsive to investor requests for information about their carbon risk strategies, this is not yet the norm for Canadian companies. Generally, larger companies and companies with higher levels of GHG emissions provided more complete responses compared to small and mid-capitalization companies and low GHG emitting companies. The responses of many companies are still lacking important financial data such as contingent emissions liabilities, abatement costs and revenue projections. Consequently, the CDP indicates that despite improvements over the four previous reporting periods much of the information disclosed in 2007 remains insufficient to meet investor requirements. Only four percent of companies provided financially relevant information, such as the cost of lowering emissions and achieving mandatory emissions reductions targets.

Stakeholders are becoming progressively more interested in the ways that companies are identifying and managing climate change risks. Last fall, litigation was commenced in the United States to compel better and more complete corporate disclosure of these risks. Consequently, investors, shareholders and the public are asking companies not only to disclose their GHG emissions, but also to disclose the risks and opportunities that climate change presents for the company. As more information becomes available, investors will assert themselves and reallocate their capital accordingly. As such, companies will need to evaluate their participation in voluntary disclosure initiatives and prepare for the adoption of mandatory requirements in the future.

With the advent of the Climate Disclosure Leadership Index in the Canada 200 Report, the high-profile Conference Board of Canada support for the CDP and the demands for further and better disclosure on the horizon, the CDP has increased relevance for institutional investors and shareholders alike. The days of ignoring the CDP disclosure requests are waning for all companies as the consequences for doing so become more obvious and onerous.

## **CANADIAN NATIONAL RAILWAY COMPANY V. IMPERIAL OIL LIMITED: A TENANT'S RESPONSIBILITY TO CLEAN UP CONTAMINATION**

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In 1914, CN leased land near the Prince Rupert harbour to Imperial Oil, who used it as a bulk storage and distribution centre. Imperial Oil terminated the lease and found that the land was contaminated with hydrocarbons and metals. At trial, CN was partially successful in recovering some of the estimated remediation costs, pursuant to the lease. Although the lease did not specifically deal with contamination, the Court implied a term that the lands were to be returned uncontaminated.

### **Returning Land in a "Clean and Neat Condition"**

There were a number of successive lease agreements going back to 1914. The most recent lease, effective in 1989, contained a provision requiring Imperial Oil on termination of the lease, to "...restore the Demised Premises to the satisfaction of the Lessor leaving the Demised Premises in a clean and neat condition." [emphasis added]

One of the issues before the court was whether, on termination of the lease, Imperial Oil was required to restore the site to its condition at the commencement of the 1989 Lease, or at the time of Imperial Oil's initial occupation of the property many years earlier. The Court rejected Imperial Oil's argument that under the doctrine of surrender by operation of law, an act or omission of a tenant under a prior consecutive lease with the same landlord is not a breach of the current lease, unless the parties have expressly agreed that it should be. The Court referred to a number of cases which identified concerns about a strict application of the doctrine where its application would relieve a tenant of liability under the previous lease agreements, and where it was held that a new lease that was an extension of previous leases did not legally wipe out the tenant's obligations to repair arising from the earlier leases. Applying similar reasoning, the Court concluded that Imperial Oil's obligation was to restore the site to its condition at the commencement of its occupation of the property, and not merely at the commencement of the 1989 Lease which contained the "clean and neat" provision.

### **Implied Term to Return the Property Uncontaminated**

In addition, the Court accepted CN's argument that there was an implied term of the 1989 Lease that, upon its expiry, Imperial Oil would return the property uncontaminated. The Court based its decision on the reasoning in *O'Connor v. Fleck*, 2000 BCSC 1147, which held that there was an implied term that the premises would be returned uncontaminated in a lease which stipulates that the tenants would return the premises "clean, free of industrial waste, and in good repair".

### **Surface v. Subsurface Contamination**

Imperial Oil argued unsuccessfully that its restoration and cleaning obligation should only extend to the surface of the lands and not the subsurface.

The Court held that the absence of an explicit reference to the subsurface of the site in the 1989 Lease did not excuse Imperial Oil of an obligation to remediate subsurface contamination that it caused.

## **Be Careful to Delineate the Extent of Contamination**

Only part of the lands had been fully investigated and the extent of contamination delineated. For this area, CN was awarded the estimated cost of remediation.

The other part of the lands was not fully investigated, primarily due to the \$400,000 cost to do so. However, this lack of delineation proved fatal to CN's \$2.5 million remediation cost claim, because the Court did not have evidence to link Imperial Oil to this contamination.

## **Remediation Costs and Future EMA Claims**

The court awarded \$724,000 for remediation costs. CN had asked that the award be made without prejudice to any future claim CN might wish to bring under the *Environmental Management Act*. The Court held that it was not open to it to seek to limit or qualify the basis on which a possible future claim under the *EMA* may be brought, and that any future *EMA* claim must be determined by the provisions of that legislation.

## **Conclusions**

A lessee may be found contractually liable for damages for remediation costs quite apart from the workings of the *EMA*, and prior to any remediation work being carried out. Leases requiring property to be returned in a "clean and neat" or similar condition may be given a broad meaning to mean the condition of the property at the time of the lessee's initial occupation. It is no defence that the lease contains no explicit wording to that effect, or that the phrase was absent in any of the previous concurrent leases leading up to the current lease. In addition, courts may imply a term in leases that the property be returned uncontaminated. Finally, the absence of specific references in a lease to subsurface contamination may not excuse the lessee from its obligation to remediate the subsurface contamination it may have caused.

## **WHAT'S HAPPENING AROUND MILLER THOMSON**

Congratulations to **John Tidball**, **Tony Crossman** and **Bryan Buttigieg** who were each identified by *LEXPRT* as leading practitioners in environmental law for 2007.

On December 6 and 7, 2007, **Teresa Meadows** and **Kathy Kendrick** instructed at the EPIC seminar "Understanding Environmental Regulations - Due Diligence" held in Edmonton.

**Teresa Meadows** taught the environmental law component of the Environmental Reclamation Methods Course at the University of Alberta in January 2008.

On January 31, 2008, **Rosanne Kyle** spoke at the Canadian Institute's BC Power - Implementing Change & Maximizing Opportunities to Establish Clean, Green Power. Her topic was "Partnerships with First Nations: Forming Strategic Relationships to Ensure Future Power Project Development".

On February 20, 2008, **Teresa Meadows** and **Kathy Kendrick** spoke on developments in the "greening" of construction projects at a "New Developments in Construction Law" seminar held in Fort Saskatchewan.

**Bryan Buttigieg** co-authored an article with Danny da Silva of Golder Associates on Ontario's new Noise Regulations which was published in the February 29 edition of *Lawyers Weekly*.

On March 26, 2008, **Bruce McMeekin** will be speaking at the Federated Press' Directors' & Officers' Liability Conference on the topic of "Directors' & Officers' Criminal Liability".

On April 9, 2008, **Bryan Buttigieg** will be speaking on the "Future of Brownfield Liability" at the Canadian Brownfield Urban & Industrial Land Development Conference.

On April 28, 2008, **Rosanne Kyle** and **Sandra Gogal** will be speaking at Insight's 7th Annual Aboriginal Oil and Gas Forum in Edmonton. Their topic is "Updates on Consultation Litigation Development across Canada".

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