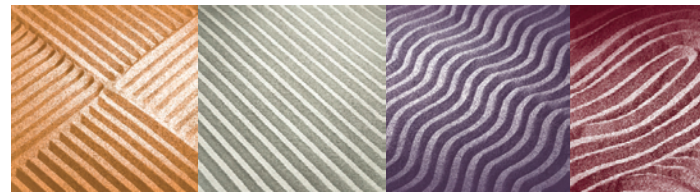


# MILLER THOMSON LLP

Barristers & Solicitors  
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## ENVIRONOTES!

May 2009

*Environmental Solutions for Business.*

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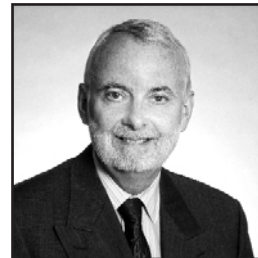
### ONTARIO'S NEW GREEN ENERGY ACT

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In February 2009, Bill 150 (the "Green Energy Act, 2009") was introduced into the Ontario legislature. On May 14, 2009 it received Royal Assent. It is an understatement to say that the changes contemplated by the *Green Energy Act* are sweeping and that they will have a huge impact on all aspects of electricity production and consumption in Ontario.

When Ontario's public electricity system was initiated at the beginning of the 20th century, its conceptual mandate was simple. Facilities would be built normally at public expense, electrical energy would be distributed throughout the province on a publicly-owned, purpose-built grid and local distribution would be accomplished in cities and towns through public utilities and in rural areas directly by the operator of the intra-provincial grid. The system was largely, some would argue hugely, successful in that it delivered increasing electrical capacity to a rapidly expanding Ontario economy and did so at costs which were among the lowest in the world.

Clouds gathered over this idyllic industrial jewel in Ontario's economic crown in the 1970's and 1980's. While Ontario, unlike Québec and British Columbia, had never totally relied on hydro power for its system, the need to greatly expand thermal generation, as symbolized by the construction of the Nanticoke Plant in the 1970's, raised significant environmental issues when emissions from thermal generation from coal interacted with other emissions hotspots in Ontario such as the Sudbury smelters. Even more significantly, the decision to supplement hydro electric generation not only with thermal coal but also large-scale nuclear power generation created new environmental issues and incurred huge costs that had implications for the provincial balance sheet.

Seeking a market solution to the issues confronting the Ontario hydro electric system in the early 1990's, the Government moved to dismantle the centrally planned monopoly and to create an electricity market

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in the province. While some minor gestures to the environmental lobby gallery were made, the overall plan was to bring private capital into the system, to decentralize its operation and to continue to emphasize growth and low-cost production. For a number of reasons, the market experiment was abandoned although some of its residual structures such as the Independent Electricity System Operator (IESO) are with us today.

It is very difficult at this point to predict what the *Green Energy Act* will do to Ontario in the next several years. The only consensus is that its impact will be massive and that fundamental premises of the old regime have been discarded. In the early stages of this analysis and this experience, Miller Thomson LLP thinks it is useful to consider the major changes which have been initiated and try to identify the impact that these changes will have on Ontario's electrical system and the businesses of every type that are involved in that system.

## **The Major Changes**

### *1. Role of the Ontario Energy Board*

In the last legislative iteration, the objective of the Ontario Energy Board was essentially to operate an efficient system. It inherited the original mandate of Ontario Hydro set forth in the early 20th century to build the facilities as were needed at the most economic cost and to ensure that the system grew at a rate that supported industrial and non-industrial development of the province. This mandate was expressed legislatively as follows:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Rather than give the OEB an entirely new mandate, the *Green Energy Act* adds to its mandate the following items:

3. To promote the conservation of electricity.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

The additional mandate items of the OEB will dramatically change its role in terms of economic regulation of the province. It is far from clear how the new mandate items can be integrated with the old and there will be a period of adjustment and perhaps confusion.

### *2. Establishment of New Bureaucracy*

The *Green Energy Act* establishes a new office within the Ministry of Energy and Infrastructure. The new Renewable Energy Facilitation Office will have broad powers to assist or encourage the development of qualifying renewable energy projects. As an office embedded in the Ministry of Energy and Infrastructure, it will inevitably be subject to the political process in a very direct manner.

### *3. The Feed-in Tariff*

The *Green Energy Act* introduces a new feed-in tariff to Ontario's electricity system. This is a huge and significant change. Based on feed-in tariff regimes in Europe, the new feed-in tariff will permit construction, connection and operation of specified classes of renewable energy facilities in Ontario regardless of the availability of comparable additional energy from lower cost sources.

Differentiating renewable energy into different categories such as solar, wind and hydro will dictate the structure of the feed-in tariff itself. The economic imperative for renewable energy to compete with other sources of energy of different classes on a cost-competitive basis will be removed.

#### *4. The Smart Grid*

Ontario's distribution system has matured over time and originated in a period of monopoly operation of all facilities by a centralized government agency. While overall rates may have been maintained at an acceptably low level, many engineering decisions were made that delivered power to remote areas or in other special situations on a high cost basis. The system was large enough that these anomalies could be in effect buried. Large transmission line losses in the system were considered a fact of life. The concept behind the smart grid system is to adjust or rebuild the system in order to minimize transmission inefficiencies. While the Act sets forth this objective, there is no clear indication as to how it will be achieved. Further, the objective of system efficiency may conflict with some of the other aspects of the Act, i.e., the feed-in tariff.

#### *5. Displacement of Municipal Regulation and Facilitated Approval*

The *Green Energy Act* amends no fewer than 25 different provincial statutes. These amendments are in general terms for the purpose of overriding or displacing restrictions and procedures that currently exist when undertaking any industrial project such as the building of a power plant. The intention is to create a "trump card" permitting system in which a single renewable energy approval will address all otherwise applicable permit requirements. In addition to displacing or replacing existing regulatory procedures under provincial legislation, the new provisions "upload" regulatory approvals from municipalities to the province, effectively expropriating municipal powers. With the stated objective of facilitating the construction of new renewable energy facilities and creating consistent treatment of such projects across the Province, these changes will centralize the process of obtaining approvals for new facilities. Further, because the renewable energy approval may be appealed to the Environmental Review Tribunal ("ERT"), the focus of NIMBY ("Not In My Back Yard") forces in Ontario will move from the Ontario Municipal Board ("OMB") to the ERT.

#### *6. Conservation*

The *Green Energy Act* introduces for the first time a number of mechanics directed at improving conservation throughout Ontario. An already unpopular energy audit will be required on sale of residential premises. The concept of "conservation and demand management" ("CDM") targets is introduced for distributors of electricity and CDM targets can be specified as conditions of licences held by the distributors. The targets themselves will be established by the Ministry, another example of centralized control. A system of random inspections of both industrial and residential premises supported by warrants for entry and seizure is also provided.

#### *7. Expanded Distributor Role*

Distributors of electricity are to be permitted for the first time to generate electricity by limited means. The rationale of this extension seems somewhat obscure but significantly includes energy storage facilities that may be important factors in managing overall system demand by particular distributors.

### **What Do These Changes Mean for Business?**

#### *1. Role of the Ontario Energy Board*

The extension of the OEB's mandate to non-economic objectives may have a number of outcomes ranging from delay and confusion to a clearly articulated new vision and new underlying premise for the operation of the entire electrical system in Ontario. While there will inevitably be a period of uncertainty, in the best case the OEB and its staff will move quickly to articulate a clear new vision and to select cases in which such principles may be applied. This will, however, be a huge challenge. The agency has functioned for many years on clear and well understood economic criteria. In fact when social and environmental concerns have been brought before it, it has tended to avoid them. Fulfilling the new objectives in any coherent way may be too great a challenge for the existing agency. In addition to the threat to the Board's functionality, the positive obligations incumbent on the Board to simultaneously promote conservation, investment in the smart grid and generation and consumption of energy from renewable sources may also create a bias towards increased capital expenditure, particularly in the distribution system. These costs would be in addition to the higher costs associated with the feed-in tariff in the generation sector.

#### *2. Establishment of New Bureaucracy*

While the Minister of Energy and Infrastructure would probably not admit this, the establishment of the

Renewable Energy Facilitation Office will have a huge impact on the way development is conducted in Ontario. One is tempted to think in terms of Soviet-style five year plans. Early indications of how functional or dysfunctional this office may become will be the appointments that are made to the office, the level of staffing and the relations it establishes with other organizations, in particular the OEB. At the point of writing, there is no guidance or indication of any of these moves.

### *3. The Feed-in Tariff*

The feed-in tariff is perhaps the aspect of the *Green Energy Act* that will have the greatest economic impact in Ontario. Not only will the feed-in tariff establish a stratified pricing system for different types of energy, the feed-in and connection-as-of-right features of the tariff will inevitably mean that inefficient generation will increasingly become a feature of the system. Further, the feed-in tariff structure is expected to significantly change the average cost structure for electricity in the province of Ontario. This will have ramifications for industrial competitiveness as well as overall consumption levels. Nevertheless, properly designed, constructed and financed new projects will be able to take advantage of the feed-in tariff. In particular, the long lead times required under the prior regime to accomplish the certainty of a long-term power purchase agreement backed by the full faith and credit of the province of Ontario will be significantly reduced or eliminated. This will provide an opportunity for many entrepreneurs to bring forward projects that would not otherwise have been feasible. These opportunities for entrepreneurs will, of course, create opportunities in turn for equipment suppliers, financing and legal and accounting services. It is not clear at the point of writing what the overall allocation mechanism for the feed-in tariff is likely to be. As the tariff rates for some of the classes of renewable energy and in particular solar are significantly higher than for others, the new regime runs the risk of overbuilding the highest cost options.

An additional risk associated with the announcement of the feed-in tariff relates to the Government's desire to incentivize community groups, co-operatives and other smaller economic actors to create distributed generation in the Province. Since the introduction of the new legislation, representatives of the Ministry of Energy and Infrastructure and of the Ontario Power Authority, as well as the members of the Green Energy Act Alliance, have been explaining the need for the *Green Energy Act* in part as a method of correcting mistakes that took place in the development and execution of the Renewable Energy Standard Offer Contract ("RESOP") program. According to these parties, the RESOP program failed to create the incentives necessary to have small economic actors enter into electricity generation projects, and instead resulted in project development by mid-to-large sized businesses. There is a legitimate concern that when the feed-in tariff is released, the rules will operate to the detriment of those mid-to-large businesses, further increasing the burden on the ratepayer in favour of satisfying the desire of the Government to increase project development by smaller community groups.

### *4. The Smart Grid*

While largely an engineering exercise initially, the Smart Grid could become the Achilles' heel of the new "trump card" permitting system. Notwithstanding the willingness of the Renewable Energy Facilitation Office to get new facilities up and running, the re-engineering of the grid may make stable system management a challenge even without the addition of new facilities or at least the addition of new facilities on an expedited basis. Any sponsors of new generation capacity will have to familiarise themselves with this process in order to assess the impact, if any, on their particular project.

### *5. Displacement of Municipal Regulation and Facilitated Approvals*

While the trump card permitting system provides developers a clear advantage on paper, replacing numerous processes with a single process, there is no indication that the burden of documents, plans and information to be submitted will be any less. Further, the centralisation of decision making will mean that significant resources will have to be deployed to actually make the process work. Unfortunately, this may not happen and so there is a "black box" risk that the Ministry in fact will not staff up or be transparent on the processing procedure but will simply consult on the applications with the various departments that previously issued their own permits. While this would provide some minor convenience to applicants in only dealing with one office, the chances that it would be actually faster are remote. The same processes might go on but simply be evidenced differently.

In addition, it appears from the Act that any person resident in Ontario may require a hearing at the ERT with respect to the issue of a renewable energy approval simply by alleging that the renewable energy project in question will cause either harm “serious to human health” or “serious and irreversible harm to plant life, animal life or the natural environment”. While the onus of proof rests with the party alleging the harm, there appears to be no ability of the ERT to reject the necessity of such a hearing based on the validity of the claim. The net result is that project proponents will need to prepare for a full hearing on the facts, notwithstanding that there may be little or no substance to the claim. If the number of renewable energy projects ending up at the OMB over the past several years is any indication, a substantial increase in the membership of the ERT will be necessary.

#### **6. Conservation**

The measures under the *Green Energy Act* for conservation are broad in the sense that the tools to enforce significant conservation are provided. The actual effectiveness of these tools has yet to be demonstrated. Further, there is an inherent conflict between the construction of new electrical generation capacity pursuant to the feed-in tariff portions of the Act and conservation for its own sake. There may be limited business opportunities in the conservation area in terms of engineering or consulting studies.

#### **7. Expanded Distributor Role**

The ability of distributors to acquire their own renewable energy and energy storage facilities is not likely to have a huge impact on the system in the near term. Feasibility studies for renewable energy production will have to be conducted and the small scale of these facilities, i.e., 10 megawatts or less, would suggest that they will not receive a lot of attention. Energy storage facilities, on the other hand, are probably not worthwhile unless they have some minimum critical mass. A typical energy storage facility such as pumping water during a period of low electricity cost and generating electricity from the pumped water in periods of high cost is capital intensive and therefore unlikely to be undertaken by any but the largest distributors.

## **CONTAMINATED SITES REGULATION IN BRITISH COLUMBIA: STAGE 6 AMENDMENTS IN EFFECT**

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On January 1, 2009, Stage 6 amendments to the *Contaminated Sites Regulation (CSR)* came into effect. These amendments were first introduced in fall 2008 through an Order-in-Council and a Minister’s Order made under sections 62 and 63 of the *Environmental Management Act*.

The amendments include several key changes, including:

1. Expanded and amended environmental quality standards (for example, new matrices for barium, chloride ion, and new provisions for wildlands and vapours);
2. Site profile regime amended for clarity and expanded;
3. Expanded provisions for Summaries of Site Condition, including an updated Summary of Site Condition added as Schedule 1.1; and
4. Soil Relocation Agreement requirements expanded.

These changes are discussed in further detail below.

### **1. Environmental Quality Standards**

*New vapour standards:* With the addition of vapour standards, sites must now be assessed for vapours in addition to soil, water and sediment. Vapour standards are outlined for three categories of uses: (1) agricultural, urban park, and residential; (2) commercial; and (3) industrial.

*New wildlands land use and standards:* The amendments adopt and expand a Ministry of Environment policy, announced in April 2008, regarding a “wildlands” definition and procedures for establishing wildlands environmental quality standards based on the standards for the existing land uses in the CSR.

In addition, sections 11, 12, and 17 of the CSR are expanded to include wildlands standards for the oil and gas drilling sector and wildlands in other parts of the province.

*New and amended numerical soil, water and vapour standards:* A number of schedules are amended, including:

- Schedule 4 (Generic Numerical Soil Standards): The entry for barium is deleted to accommodate a new barium matrix in Schedule 5;
- Schedule 5 (Matrix Numerical Soil Standards): New matrices are added for barium, chloride ion, and sodium ion (all key to the remediation of oil and gas drilling sites in northeast B.C.);
- Schedule 6 (Generic Numerical Water Standards): Amended in accordance with amendments to the Canadian Drinking Water Guidelines, and several corrections made to the previous version;
- Schedule 7 (Standards Triggering Contaminated Soil Relocation Agreements): The environmental quality standards for barium are lowered to 400 ug/g for all land uses, and new standards are added for chloride and sodium ions;
- Schedule 10 (Generic Numerical Soil and Water Standards): Simplified by elimination of the Practical Quantification Limits (PQLs), several errors corrected, and requirement that responsible person assert that ecological receptors will not be significantly impacted is removed; and
- Schedule 11 (Generic Numerical Vapour Standards): Provides numerical standards for vapour.

*Multiple land uses:* Section 12(1) now recognizes a protocol under section 64 of the Act which provides for more than one land use at a site. Previously there could be more than one water or sediment use at a site, but only one land use.

*Conflict with Hazardous Waste Regulation:* The former section 13 of the CSR, which dealt with conflicts between the CSR and the *Hazardous Waste Regulation*, has been repealed. The conflicts arose from federal *Transportation of Dangerous Goods Regulation* provisions in the *Hazardous Waste Regulation*. The section in the federal regulation causing the conflict has been repealed, making section 13 of the CSR unnecessary.

*Site-specific numerical remediation standards:* Deleted from the CSR in 2004, these standards will be restored in section 17(2)(a) as a result of stakeholder requests.

## **2. Site Profile Regime**

The provisions for site profiles in the CSR are amended for clarity and expanded in certain respects.

The section 4(1)(f) exemption from the requirement to submit a site profile is expanded to encompass situations in which the Director of Waste Management makes a “negative determination” (i.e., the site is not contaminated). Formerly, the exemption only applied to cases in which the Director of Waste Management made a “positive determination” (i.e., the site is contaminated).

Various changes are made to the Site Profile Form (Schedule 1), including: section II is reorganized; providing latitude and longitude information is necessary; the section VI waste disposal heading is amended to specifically include spillage; and the section VII heading is amended to specifically include residential heating fuel tanks.

Changes are also made to the Industrial and Commercial Purposes and Activities schedule (Schedule 2), including: the generic reference to pharmaceutical products and manufacturing is replaced with a reference to the federal *Controlled Drugs and Substances Act* in order to expand the scope to include illegal drug operations; power generation operations are added to section B; compressed gases are excluded from section F; maintenance and paint removal from boat hulls is included in section G; and asphalt and concrete are included in section H.

### 3. Summary of Site Condition

The provisions for Summaries of Site Condition in the CSR are expanded:

Part 2.1 of the CSR is amended to require a Summary of Site Condition submission with any contaminated sites service request. Formerly, proponents were only required to submit Summaries of Site Conditions with non-high risk site service applications.

A new Summary of Site Condition form appears in Schedule 1.1. This form is updated to reflect the new generic numerical vapour standards.

Additional minor clarifications are made.

### 4. Soil Relocation Agreements

In addition to amendments to Schedule 7 (Standards Triggering Contaminated Soil Relocation Agreements), section 40(2) is expanded to include substances in Schedule 10 (Generic Numerical Soil and Water Standards) and Schedule 11 (Generic Numerical Vapour Standards).

## ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE IN BC – AN UPDATE

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The British Columbia Ministry of Environment recently released its quarterly compliance and enforcement summary outlining that it had issued 13 orders to prevent or stop impacts to the environment, human health or safety, 14 administrative licencing sanctions, 727 tickets and that it had obtained 6 court convictions.

The Minister also announced a \$1 million investment in 2009 in the Conservation Officer Service Commercial Environmental Investigations Unit, which was launched in 2008. This unit has 8 senior investigators and a manager located in each of Prince George, Kamloops, Nelson, Surrey and Nanaimo. As a result of a recent unit investigation into outstanding charges, penalties of \$150,000 were issued.

In addition, 5 new conservation officers have been hired to enhance the capacity of the Conservation Office Service.

## GREEN BUILDING CAN “LEED” TO LIABILITY

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At the risk of raining on the green parade, for the past two years legal commentators have warned that the interest and boom in green construction has far outpaced the development of the legal and regulatory structures necessary to identify and manage the associated liabilities. Despite the identification of several key issues with the potential

to change the liability of all those engaged in the green procurement and construction process, most early projects proceeded with little or no consideration of the changing rules of the game. Bids, tenders and requests for proposals contained uncertain criteria against which green construction claims would be assessed, very seldom was there any mention of performance criteria that must be met once initial construction was completed, and in most cases, little regard was paid to the allocation, verification and tracking of green credits generated by a project (such as carbon credits for the reduction of carbon dioxide emissions).

Given this approach, perhaps it is not surprising that the industry has recently seen its first green building lawsuit. The case, *Shaw Development, LLC v. Southern Builders, Inc.*, 2007, Cir. Ct. Somerset County, MD, Case No.: 19-C-07-011405 (“the *Shaw* case”) is a cautionary tale illustrating that green construction raises unique risks that ought to be addressed within project-specific documentation and that parties failing to consider these issues may unknowingly be subjecting themselves to significant liabilities.

The *Shaw* case involved a dispute arising between Shaw Development, the owner, and Southern Builders, the general contractor, during the construction of condominiums adjacent to a marina in Chesapeake Bay. According to court documents, in the Project Manual and Scope of Work, executed by the parties in April 2005, Southern Builders agreed to: “...construct an environmentally sound ‘Green Building,’ [apparently an undefined term] in conformance with a ‘Silver Certification level according to U.S. Green Building Council’s Leadership in Energy & Environmental Design (LEED) Rating System.”

Although the contract documents do not appear to have identified this fact expressly, Shaw Development required the LEED® Silver Certification to access green building tax credits available from the State of Maryland (stated by Shaw Development to be a credit worth a percentage of the estimated \$7.5 million construction cost and valued at approximately \$635,000). The credit-granting program also imposed a timeline by which a certificate of occupancy and a statement regarding the project’s LEED® Silver Certification had to be provided in order for the credits to be issued to Shaw Development. Failure to comply with this timeline would cause the credits to lapse and would essentially result in Shaw Development receiving nothing. It appears that the regulator’s timeline was not expressly set out in the contract documentation nor communicated to Southern Builders.

By June, 2006 (the original date for project completion under the contract), Southern Builders had not completed the work, and there was neither a certificate of occupancy issued nor any indication that the project was eligible to receive LEED® Silver Certification. In late 2006, Southern Builders commenced an action against Shaw Development by filing a mechanic’s lien against the property for unpaid work. In February, 2007, Shaw Development commenced a counter-suit alleging, amongst other deficiencies, that Southern Builders’ failure to construct a Green Building that complied with LEED® Silver Certification requirements by the June 2006 completion date cost Shaw Development \$635,000 in green building tax credits.

Although an original trial date was set for August, 2007, settlement talks ensued, and it was recently reported that the case has been settled. In the absence of a trial, we are without the benefit of direction from the courts on several salient points. Nonetheless, the questions raised by the *Shaw* case continue to reverberate for contractors, engineers, architects and owners involved in green building projects.

Firstly, in the absence of specific statements regarding the standard of construction the general contractor was required to meet, was the general statement requiring “...construction of a ‘Green Building,’ in conformance with a ‘Silver Certification level according to U.S. Green Building Council’s Leadership in Energy & Environmental Design (LEED) Rating System” sufficiently clear to ground a claim for breach of contract when certification was not obtained? This is a particularly relevant question when one considers that according to the Canada Green Building Council, Canada’s LEED® certification agency, typically green building projects have a two year timeline from initial registration to final certification, and that between 25-30% of projects registering their intent to comply with the standard do not ultimately achieve certification.

In addition, ask any engineer, architect or general contractor experienced with the LEED® certification process, and they will suggest that many of the failures to achieve LEED® certification are attributable to circumstances beyond their control, such as failure to get the materials, suppliers, installers, technology, etc. that enables a specific building to meet all the LEED® criteria. Without providing the general contractor with veto power over the myriad of choices arising during construction, is it fair that an owner’s choice of bathroom fixtures, heating systems, proximity to public transportation routes, etc. could significantly decrease the likelihood

the project will achieve certification, but the general contractor may be subject to penalties or a claim for damages if certification is not obtained?

In addition, when attempting to allocate liability for obtaining certification, how far into the project lifecycle should that liability extend? With proposed changes to LEED® certification that will include evaluation of buildings throughout their lifecycle (i.e. from design to disassembly) the question of what happens if a building is constructed to meet LEED® certification, but later loses certification because it does not meet operational environmental performance criteria remains open.

The case also raises the question of how risks and benefits associated with obtaining credits for green construction granted by government-funded programs should be allocated. In the *Shaw* case, should Southern Builders be liable to reimburse the owner for the loss of tax credits that occurred because they failed to achieve LEED® certification in accordance with a regulatory timeline of which they apparently had no specific knowledge?

With the potential for infrastructure projects arising in the context of local, provincial and federal stimulus packages to be increasingly linked to green requirements, the lessons of the *Shaw* case may have particular relevance in the hoped for “green rush” in the upcoming year. So how can you avoid being the next green construction test case?

1. Recognize that standard forms have not yet caught up with these unique risks, so if you will be participating in green procurement, design, construction or operation, get specific advice regarding these unique risks and address them directly in the project documentation.
2. If your project is premised on compliance with specific government-funding programs, seek specialized advice and direction regarding program requirements, eligibility criteria, timelines and potential changes to the program that could affect your project. Then expressly address what will happen to the project if the program requirements cannot be met by the project and allocate liability accordingly.
3. Assess your current approach to managing risks on the project and determine whether these particular liabilities and contingencies are adequately addressed by your existing measures (including a review of your existing disclaimers, whether your insurance coverage includes or excludes these types of risks, etc.).
4. If you intend to continue to undertake green projects, commit the time and resources necessary to monitor developments and maintain an up to date knowledge of the area—to say this area is dynamic is an understatement, and what worked for a similar project last year may not be sufficient for this year’s projects.

The *Shaw* case confirms what legal advisors having been saying for months; glossing over the new liabilities associated with green building projects can create costly and damaging traps for the unwary. However, with specialized knowledge and advice, these risks can be allocated and managed in a manner that ensures the laudable goal of sustainability (including economic sustainability) is met for all the parties involved in the green building process.

## **STEWARD FEES & ONTARIO’S NEW WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT PROGRAM PLAN**

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On April 1, 2009, the Ontario Electronic Stewardship introduced Phase 1 of the Waste Electrical and Electronic Equipment Program (WEEE). Phase 1 will have an impact on manufacturers, importers and brand owners of computer equipment sold in Ontario. However, consumers may also feel the effect when purchasing computer and related equipment.

### **What is WEEE?**

WEEE was created under Ontario’s *Waste Diversion Act* and Regulation 393/04 in order to handle electrical and electronic waste items such as household appliances, computers, and other forms of electronic equipment.

One of the program's main objectives is to promote the reduction, reuse and recycling of electronic waste, such as through take-back programs and electronic equipment collection sites.

The Ontario Electronic Stewardship was designated by the Ontario government as the industry funding organization for WEEE. Under WEEE, the source of funding for the disposal of electronic waste has been transferred from the government and taxpayers to the suppliers of electrical and electronic products. The suppliers of electrical and electronic products are deemed to be "Stewards", and are defined as brand owners, first importers and/or assemblers of non-branded products listed under WEEE for sale and use in Ontario.

Stewards are required as of April 1, 2009 to register with the Ontario Electronic Stewardship by completing an online registration form. Stewards are also required to report to the Ontario Electronic Stewardship on the type and quantity of electrical and electronic equipment they supply into the Ontario marketplace, and pay a fee for each unit of certain types of equipment supplied for sale or use in Ontario.

### **Products Affected**

Phase 1 of WEEE affects the following materials: analog computers, automatic teller machines, bar code scanners, calculators, CD-ROM drives, televisions, typewriters, printers, copiers, scanners and computer accessories (computer disk drive, computer keyboard, computer mouse, computer terminal, joystick, point-of-sale (POS) terminal, computer router).

Phase 2 of WEEE will deal with, among other items: cellular telephones, personal digital assistants, cameras, video recorders, and radios. The subsequent phases of WEEE will handle household appliances, such as air conditioners and refrigerators, as well as medical devices and electronic tools.

### **Fees**

The Ontario Electronic Stewardship has the authority to set the amount of fees to be paid by stewards. As of April 1, 2009, the designated Stewards will have to pay the following fees on each of the following items:

Desktop Computers:	\$13.44/unit
Portable Computers:	\$2.14/unit
Computer Peripherals:	\$0.32/unit
Monitors:	\$12.03/unit
Televisions:	\$10.07/unit
Printing Devices:	\$5.05/unit

### **The Effects**

Although the registration, reporting and fee requirements placed on Stewards are mandated by the Ontario Electronic Stewardship, Stewards are free to decide how to recuperate their fees. Stewards may choose to internalise the fees or to pass them onto their customers. As a result, customers should be prepared to see an increase in the prices of computer electronics and televisions, or an environmental handling charge on their invoices. Although PST does not apply to this fee, the Canada Revenue Agency has not yet determined whether GST is applicable. Until the determination is made, the Ontario Electronic Stewardship will be collecting GST on the fees.

More details about WEEE can be found on the Ontario Electronic Stewardship website at:  
<http://www.ontarioelectronicstewardship.ca/index.html>

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

**Bruce McMeekin** spoke on "Regulatory Investigation Preparedness" at the Canadian Corporate Counsel Association's 2009 National Spring Conference, entitled "Corporate Counsel: Regulatory Advisor, Compliance Officer, Governance Gatekeeper" held from April 5 to 7 in Montreal.

**Tamara Farber** spoke on "Unique Issues in Environmental Actions: Process, Evidence and Settlement" at the OBA's program entitled "An Exploration of Emerging and Critical Issues in Environmental Civil Litigation" held in Toronto on April 6. Tamara specifically addressed the issue of the admissibility of expert evidence in environmental litigation cases.

**Aaron Atcheson** spoke at the OBA breakfast seminar “Dirty Deals - Addressing Environmental Issues in the Purchase and Sale Transaction” in London, Ontario on April 29, 2009.

**Sandra Gogal** spoke on “Aboriginal Consultation and Effective Processes” at Insight’s Aboriginal Oil, Gas and Energy Forum in Edmonton on April 30 to May 1.

Miller Thomson sponsored, and **Tony Crossman** co-chaired, the CBA’s National Environment, Energy and Resource Law Summit: “Vancouver and the 2010 Olympic and Paralympic Winter Games: Sustainability, Brownfields and Five Other Hot and Emerging Topics” on May 1 to 2 in Vancouver. Tony presented a paper on climate change on May 1 and chaired a panel on Brownfields, Sustainability and the 2010 Olympic winter games on May 2.

**Aaron Atcheson**, national leader of Miller Thomson LLP’s CleanTech Group was successful in having amendments made to Ontario’s new *Green Energy Act* which received royal assent on May 14, 2009. Working on behalf of one of the firm’s clients and in association with the Environmental Section of the OBA and the Ontario Caucus of CanWEA, the amendments will help make the process less difficult for developers of renewable energy projects to test and gather the data necessary to secure renewable energy approvals for new projects.

On May 14, **Teresa Meadows** presented her paper on “Triggers, Tracks and Trends: A Basic CEAA Primer” at the University of Calgary seminar on “The Law of Environmental Impact Assessment”.

**Teresa Meadows** and **Tony Crossman** will be presenting their paper “A Tale of Two Provinces: Imposing Greenhouse Gas Emissions Constraints through Law and Policy in Alberta and British Columbia” at the Canadian Petroleum Law Foundation Conference on June 18 to 20 in Jasper.

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