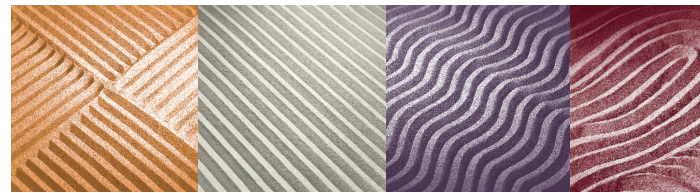


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ENVIRONOTES!

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*Environmental Solutions for
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ST. LAWRENCE CEMENT INC. V. BARRETTE: A CASE COMMENT

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In a case involving the opposition of a cement plant by its neighbours, the Supreme Court of Canada recently ruled that a no fault liability system exists in Québec with respect to private nuisances pursuant to article 976 of the Civil Code of Québec.

"Art. 976 Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom."

In 1952, the Québec Legislature passed a special statute authorizing St. Lawrence Cement Inc. ("SLC") to build a cement plant in the Municipality of the village of Villeneuve. SLC began building its plant the same year. Although many lots were still vacant, some houses had been built on land adjacent to the plant. The plant began operating around 1955. Neighbourhood problems quickly arose between SLC and its neighbours. Meanwhile, the neighbourhood surrounding the plant was populated and eventually, this municipality was integrated into the City of Beauport, a suburb of Québec City. The Ministry of Environment of Québec stepped in several times in the 1980s in response to citizens' complaints about problems with dust, odours and noise. The plant itself produced several environmental incident reports between 1992 and 1996. SLC spent more than \$8 million between 1991 and 1995, mostly on the installation of new dust collectors for the kilns. SLC stopped operating the plant in 1997.

In 1993, representatives of neighbours of the plant filed a motion in the Québec Superior Court for authorization to institute a class action. The motion was granted in 1994 and the action was filed some months later. The representatives alleged various faults in the operation of SLC's plant but also contended that the neighbourhood disturbances caused by the plant were abnormal or excessive. The proposed group was made up of Beauport residents living in areas near the plant.

In 2003, Judge Julie Dutil, of the Superior Court of Québec, held that SLC was liable on the basis that the annoyances suffered by the representatives and the members of the group were excessive. Despite SLC's efforts to comply with the relevant standards in operating its plant, its emissions of dust, odours and noise had caused abnormal annoyances for its neighbours and it was therefore civilly liable under article 976 C.C.Q. Judge Dutil did not find however that SLC had committed a fault. She found that the scheme of liability under article 976 C.C.Q. was available to all SLC's neighbours, both lessees and owners, and that even those who had moved near SLC's plant after it opened were entitled to damage. As a result, she awarded damages that varied from zone to zone and according to years to all physical persons aged 18 or more, who were owners of any immovable or who inhabited an immovable in these zones.

SLC appealed to the Québec Court of Appeal which rejected the theory of no-fault liability in respect of neighbourhood disturbances and instead found SLC liable on the basis of proven fault. The Court also reduced the amount of compensation awarded by Judge Dutil.

SLC appealed to the Supreme Court of Canada with regard to the conclusion that it was liable on the basis of fault. It also appealed the method adopted for determining the quantum of damages, prescription and immunity to which it claimed to be entitled under the special statute applicable to its Beaufort plant. The representatives of the neighbours cross-appealed, seeking recognition of a no-fault liability scheme applicable to neighbours' annoyances that are excessive and of the possibility of instituting a class action under that scheme. They also sought to restore the Superior Court's conclusions on the quantum of damages.

The main issues that arose in the appeal to the Supreme Court related to the legal nature of the regime of civil liability in respect of neighbourhood disturbances in Québec law.

The Supreme Court recognizes two regimes of civil liability in respect of neighbourhood disturbances in Québec law: one, under the ordinary rules of civil liability, is based on the wrongful conduct of the person who allegedly caused the disturbances, while the second is a regime of no-fault liability based on the extent of the annoyances suffered by the victim for the purposes of article 976 C.C.Q.

As for the violation of legislative standard, it will constitute civil fault only if it also constitutes a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in article 1457 C.C.Q.

A scheme of civil liability based on the existence of abnormal neighbourhood disturbances that does not require proven or presumed fault is also consistent with the approaches taken in Canadian common law and in French civil law.

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. It is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

The Supreme Court adds that such a scheme is also consistent with general policy considerations such as the objective of environmental protection and the application of the polluter-pay principle.

“TURNING GREEN” IN A GOOD WAY: HEALTH CARE FACILITIES GRAPPLE WITH ENVIRONMENTAL ISSUES

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At a time when climate change discussions and the people presenting these discussions win an Oscar, an Emmy and a Nobel Prize, it is safe to say that environmental issues and climate change in particular, are receiving unprecedented public attention.

Clearly, with a commitment to public health and inordinate cost pressures, health care facilities are also being buffeted by the "green winds of change." Although these trends are not new, what is new is the scope and speed of these changes and the heightened public expectations regarding environmental performance of companies, communities and individuals.

Recognizing the rising expectations, how do managers and key decision-makers in health care settings get a handle on what this means in practical terms? The first thing that must be recognized is that health care settings are unique when it comes to the sources and management of their environmental impacts. In contrast to most industrial facilities where environmental impacts tend to be centralized and associated with a few key processes, emissions sources and waste generation, health care facilities have many hundreds, sometimes thousands of activities occurring throughout the facility on a daily basis that generate waste streams that can vary widely in terms of environmental impacts and volumes. In addition, the rapid changes in technology and medical advances drastically alter the environmental impacts associated with even established health care activities.

For example, with the significant increase in fibre optics and microsurgery techniques, there have been significant

declines in the volumes of biohazard wastes associated with invasive surgical techniques, but increases in the use of various chemicals and radioactive materials associated with higher resolution imaging supporting these procedures. Consequently, an understanding of the facilities' current activities is essential to designing a greening program that works, as is engaging all personnel across roles and functions. An initiative focused on one department or activity may yield short term success, but won't have the kind of lasting impact necessary to support the facilities' overall environmental sustainability.

A second critical difference between going green for health care facilities and other sectors is that several key drivers such as preservation of public health, patient safety, privacy and research integrity can limit the ability of health care providers to choose less environmentally intensive approaches over established practices if any of these drivers will be sacrificed. The good news is that a key driver in public health provision, being controlling spiralling costs, is generally served well by green initiatives such as increasing energy efficiency, enhancing energy conservation and reducing wastes.

So health care facilities can't adopt a "one size fits all" approach formulated by industry, but what specific steps can a health care facility take to get started on a greener track? Based on the lessons learned by health care facilities across the United States and Canada, I would suggest the following:

- Use a simple tool (preferably adapted to apply specifically to health care settings) to take a snapshot of the environmental footprint of your facility.
- Engage all departments and as broad a cross-section of roles and functions within the facility as possible - some facilities have found that you can stimulate interest and find enthusiastic supporters by having an initial launch of the going green initiative in advance of formal steps being taken.
- Based on your initial assessment and your discussions with people at all levels and functions across the organization, identify **a few** key initiatives to pursue first. In most facilities there are "low-hanging fruit" (i.e. simple steps that can yield immediate results), and seizing these opportunities right out of the gate can give you momentum to build on as your program progresses and gains traction.
- Look to the experience of others in your sector to benefit from their lessons learned. Don't be afraid to "phone a friend", you'll not only save yourself from missteps that can kill support for your actions, but sometimes the shared lessons help your organization to take stock and focus on the gains made and pitfalls avoided, and this, in itself, can be a transformative way of looking at your program.
- When setting your priorities for action, establish the metrics you'll be using to measure progress towards your goals. This information can be very powerful in tracking your success, cost savings, reductions in environmental footprint, etc., and is essential in establishing the program as a credible green initiative, not just a "greenwash."
- Remember that this is a continuous process that must adapt and change as the facility activities, personnel and regulatory situation change. To be truly effective and lead to sustained change, the process must lead to continuous improvement over time.

For most health care facilities, the key factors determining the lasting success of their green approach include the extent to which personnel at all levels and functions are aware of what's happening on the green front, are consulted about what they think, understand why the green measures proposed are necessary, have information about what this "greening" will mean to them, receive on-going information about the status and progress of the initiatives, and are invited to share in and celebrate the successes along the way. It may not be easy being green, but most health care facilities who have started on this process have found it to be well worth the effort.

THE CARBON TRADE AT HOME AND ABROAD: AN UPDATE

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The carbon market was created under the Kyoto Protocol to enable countries to meet their emissions targets through three market-based mechanisms, one of which involves emissions trading, also known as cap and trade. The United Nations sets the cap on the amount of pollution that may be emitted by each participating country, with each country granted emission permits and credits representing the right to emit a certain amount of greenhouse gases. The total amount of allowances and credits cannot exceed the cap so countries that need to reduce their emissions levels can buy credit from other countries that have room under the cap. This transfer of allowances constitutes a trade. In this manner, emission reductions or removals can be traded like any other commodity. Since carbon dioxide is the principal greenhouse gas, this trade is known as the carbon trade or the carbon market. Emissions trading is permitted under Article 17 of the Kyoto Protocol, which allows countries to sell unused emission units to countries that are over their targets. The market for trading in carbon emissions is estimated to be in the range of \$60 to \$70 billion USD annually.

One example of emissions trading is the Chicago Climate Exchange, Inc. (CCX), which began trading in 2003 as the world's first and North America's only legally binding rules-based greenhouse gas emissions allowance trading system, as well as the world's only global system for emissions trading based on all six greenhouse gases. Members of the CCX make a voluntary but legally binding commitment to meet annual greenhouse gas emissions reduction targets. Those who reduce below their targets have surplus allowances to sell or bank. Those who emit above the targets comply by purchasing CCX Carbon Financial Instrument (CFI) contracts. Thus the commodity that is traded on the CCX market is the CFI contract, each of which represents 100 metric tons of CO₂ equivalent. Reductions achieved through CCX are the only reductions made in North America through a legally binding compliance regime, providing independent third party verification by the Financial Industry Regulatory Authority (formerly NASD). Current members of the CCX include Rolls-Royce, Ford Motor Company, Dow Corning, DuPont, Potash Corporation, Manitoba Hydro, Motorola, Inc. and Sony Electronics Inc.

A second market-based mechanism that enables countries to meet emissions targets is the Clean Development Mechanism (CDM), defined in Article 12 of the Kyoto Protocol. Countries that are committed to emissions-reduction or emission-limitation can implement an emission-reduction project in developing countries. Such projects can earn certified emission-reduction certificates (CERs), each equivalent to one tonne of CO₂, which can in turn be sold and counted towards meeting Kyoto targets. A credit currently trades for 19 euros (\$26 USD).

On January 28, 2008, the Multi Commodity Exchange (MCX), an electronic multi-commodity futures exchange based in Mumbai, India, launched futures trading in carbon credits in India. Since that time, 195 million credits have been issued through the program's 1,170 projects. About 2,800 projects are in the application or registration process, with 155 projects applying for admission in September. In September 2005, the MCX entered into a strategic alliance with the CCX. According to the MCX, India has generated approximately 30 million carbon credits and is one of the largest beneficiaries in the carbon credit trade.

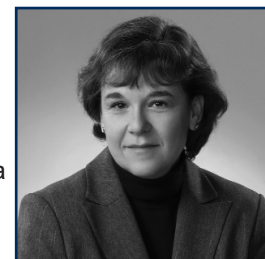
As Canada is a party to the Kyoto Protocol, the Government of Canada has an interest in ensuring that Canadian emissions are reduced. In March 2008, the Government of Canada published the final version of the Regulatory Framework for Industrial Greenhouse Gas Emissions to reduce emissions starting in 2010. In this context, the federal government has chosen to adopt intensity-based greenhouse gas emissions reduction targets. In addition to internal reduction through the development of new technologies, key regulated industrial emitters will be able to choose from several compliance measures in order to ensure compliance with their reduction obligations. One of these measures is trading on the carbon market. To this end, on May 30, 2008, the Montréal Exchange and the CCX formed a joint venture called the Montréal Climate Exchange (MCeX), the first public market for environmental products in Canada. The operating rules of the MCeX provide that Canada carbon dioxide equivalent (CO₂e) units futures contracts trade on the Montreal Exchange electronic trading platform, SOLA®. The Montreal Exchange settles and guarantees contracts through its clearing house, the Canadian Derivatives Clearing Corporation. The derivative instruments that are traded on the MCeX are futures contracts on CO₂e units. There are two types of contracts, those with a cash settlement with daily,

monthly, quarterly or annual expiries and those with a physical settlement, involving the delivery of CO₂e units with annual expiries. The first futures contracts on CO₂e units that were listed on the Montreal Exchange on May 30, 2008 were contracts with physical delivery which expire at the end of the 2010 and 2011 to coincide with the compliance years provided by Environment Canada in its April 2007 publication "Regulatory Framework for Air Emissions". As for the futures contracts on CO₂e units with cash settlement, they will not be listed for trading on the MCEX immediately. The Montreal Exchange takes the position that such a cash market does not exist in a significant way in Canada and will not be able to demonstrate material growth until the federal government establishes a regulatory framework.

Driven in part by the lack of a federal regulatory framework, four Canadian provinces (Ontario, Quebec, British Columbia and Alberta), representing 73% of Canada's economy, and seven western U.S. states (California, Washington, Arizona, Oregon, Utah, New Mexico and Montana) representing 20% of the U.S. economy, have proposed a carbon trading program plan designed to reduce global warming pollution by 15% from 2005 levels by the year 2020. The goal of the Western Climate Initiative (WCI), as this coalition is known, is to establish in 2012 the biggest carbon market in the Western Hemisphere. Under the WCI plan, trading of emission allowances would set a price for carbon to encourage energy conservation and the use of cleaner technologies. The WCI proposal would require states to auction off at least 10% of tradable carbon credits to power companies and other polluters. The plan would also allow up to 49% of emissions cuts through financing green efforts such as planting forests that soak up carbon, thereby requiring only 51% of emissions cuts to be achieved at the source. The WCI's first three-year phase starting in 2012 will focus on power plants and by 2015 will expand to fuels for transportation, residential and commercial uses. The initiative would cover six main greenhouse gases, including carbon dioxide and methane. The WCI, designed to stand alone or to be integrated into larger federal efforts in Canada or the United States, is the second cap-and-trade carbon market in the United States. The first, a ten-state region of the U.S. northeast and mid-Atlantic, held its first auction in September 2008 and will trade carbon allowance credits related only to power plants.

ALBERTA MOVES FORWARD WITH RAPID DEVELOPMENT OF CARBON CAPTURE AND STORAGE CAPABILITIES

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In January 2008, as part of the updated Alberta *Climate Change Strategy*, the Alberta Government made a commitment to developing significant carbon capture and storage ("CCS") capability as a key mechanism to reduce greenhouse gas ("GHG") emissions by 2020. Essentially, CCS involves the capture of concentrated CO₂ emissions from large industrial facilities and transportation of the concentrated stream to an "injection site" where the CO₂ is injected into deep underground geological formations. The *Climate Change Strategy* recognized that with oil sands development, coal-fired power production and a growing economy, Alberta's emissions were projected to grow under a "business as usual" (i.e. no mitigation measures) scenario from the 2006 levels of 234 million tonnes (Megatonnes or "Mt") of GHG emissions to 305 Mt by 2020 and 400 Mt by 2050 (more than double the Province's 1990 emissions of 172 Mt).

Although economic uncertainties may change these projections in the short term, the long term projections under business as usual remain significant. Against this backdrop, the 2008 *Climate Change Strategy* signalled the Province's clear intention to invest heavily in CCS technology to achieve significant reductions in GHG emissions. Accounting for more than 70% of Alberta's projected GHG emissions reductions under the *Climate Change Strategy* by 2050, CCS was heralded as essential to reducing emissions while allowing for continued economic growth and prosperity in the Province.

Noting that Alberta is ideally situated for the implementation of large scale CCS due to the close proximity of concentrated CO₂ sources and underground geological formations in the Western Canadian Sedimentary Basin that are ideal for deep storage, the ecoENERGY Carbon Capture and Sequestration Task Force ("the CCS Task Force") looking into these issues and reporting in early 2008 suggested that CCS in Canada could sequester up to 600 Mt on an annual basis by 2050. To put that amount in perspective, Canada's total GHG emissions were 721 Mt in 2006.

However, the CCS Task Force also identified that key obstacles to effective and rapid development and deployment of CCS technology existed, including the following:

- the absence of proven integration of CCS technologies of scale;
- a lack of regulatory clarity and adequate market price signals for GHG emissions (i.e. no “price” on emissions); and
- solely relying on private financing of projects does not encourage the scale and scope of early project construction required in the short term to rapidly develop the technology.

In an effort to eliminate CCS project obstacles in Alberta, the Province appointed the Alberta Carbon Capture and Storage Development Council (“CCS Development Council”) in April 2008, with an ambitious mandate, including developing “recommended approaches to kick-start large-scale CCS projects as soon as possible” and developing “a coherent mid- and longer-term work plan or blueprint for implementing CCS in Alberta.”

While the CCS Development Council continues with their work, a key funding recommendation from the CCS Task Force has been adopted by the Province. The Province has clearly indicated their support for the CCS Task Force recommendation that CCS capacity development proceed in a phased approach that results in the development of three to five operating projects by 2015, accounting for 5 Mt of sequestration on an annual basis. This action included a call for an immediate infusion of \$2 billion in new public funding to be used to support these first few projects. In response, in July 2008 Alberta created a \$2 billion fund to advance CCS initiatives and, at the same time, the Province issued a request for expressions of interest for those projects that could be built quickly and result in 5 Mt of sequestration by 2015.

Under this accelerated development process, the expression of interest stage was only the first step in ensuring CCS project funding. Proponents who submitted expressions of interest by September had their submissions reviewed by an evaluation team who in November issued a request for full project proposals to proponents who may be eligible to receive funding support. The list of twenty project proponents invited to submit a full proposal by January 31, 2009 is available on-line at: <http://www.energy.alberta.ca/Org/pdfs/CCSFPPlist.pdf>. Once the full proposals are submitted, the Province will make the final funding decision and the successful projects will receive the go ahead by March 31, 2009.

In addition to Alberta’s significant funding initiatives and drive to move these projects forward, the CCS Development Council Interim Report (released in October) identified that significant gaps in the regulatory structure that would govern CCS projects need to be addressed as these projects proceed. The issues include property issues (such as clarification of ownership of disposal rights in split mineral title situations and pore space ownership); regulatory issues (such as expressly authorizing CCS schemes under legislation and establishing environmental assessment requirements); and liability issues (such as remediation liability, post-decommissioning liability and liability regimes for third parties).

In the Interim Report, the Province is advocating the use of several existing regulatory structures including the granting of tenure under the *Mines and Minerals Act* and specific Crown agreements to grant the CO₂ disposal rights for the projects currently contemplated, with specific regulations to be drafted after the existing projects are underway. With respect to the regulatory steps required to prepare and submit an application for a CCS project, the ERCB is currently working on a guide that will provide project proponents with specific guidance on the contents of sequestration applications. This new guide is slated for release by the end of 2008.

The Interim Report also identified that the existing regulatory structure governing liability for industrial plant sites has a key gap for CCS projects in terms of the long-term liability framework once CCS projects have been decommissioned. Given the time scales and public interest in maintaining sequestration, the Interim Report suggests that it may be appropriate to contemplate the transfer of long-term liability to the government once injection sites have been decommissioned and the focus shifts from operational concerns to long-term monitoring and maintenance. The Province is considering government and other sources of funding, including participation from project proponents (perhaps based on a levy per tonne of CO₂ injected) to address the post-closure liability costs.

As indicated in the Interim Report, the CCS Development Council will continue to grapple with these regulatory issues as the first few projects move forward. As one of the first jurisdictions to consider large scale CCS projects, the Province must proceed with little to no guidance from others, and the aggressive timelines for the

first few projects leaves only limited time for public review and comment. Needless to say, the CCS Development Council blueprint is anxiously awaited and most of the CCS “devil in the details” remains to be seen.

WHAT’S HAPPENING AROUND MILLER THOMSON?

Bruce McMeekin will be speaking at the Federated Press' Directors' and Officers' Liability program on March 10, 2009.

Teresa Meadows and **Kathleen Kendrick** will be presenting at a seminar titled "The Fundamentals of Construction Contracts: Understanding the Issues in Alberta". The seminar will be held on January 16, 2009, in Edmonton.

Daniel Kiselbach will be speaking at IE Canada's conference on "Trade Matters: Redefining Your Cross Border Trade Practices" on February 23-24, 2009 in Calgary.

Teresa Meadows will be teaching a course titled "Understanding Environmental Regulations" in Winnipeg on February 9-11, 2009.

An article by **Tony Crossman** and **Angela Rinaldis** entitled “The CPR Glycol Spill: A Lesson in Due Diligence and Responsibility for Emergency Response Contractors” appeared in the October 2008 edition of Canadian Bar Association's Eco-Bulletin.

Tony Crossman presented at the AESAC Phase I Environmental Training course held in Vancouver from November 14th to 15th, 2008.

On November 20 and 27, **Teresa Meadows** presented a Miller Thomson Lunch and Learn Seminar on “Hot Button' Topics in Environmental Law for Alberta Lenders and Receivers”.

Miller Thomson hosted cross-country seminars on “Understanding Aboriginal and Environmental Issues in Project Development”. The seminars were held in Vancouver on November 19, in Calgary on November 24, in Slave Lake on November 25, in Waterloo on November 26 and in Toronto on November 27, 2008.

On December 1 to 3, **Teresa Meadows** and **Kathy Kendrick** taught a three day EPIC (Educational Programs Innovation Centre) course on “Understanding Environmental Regulation in Alberta”.

John Tidball spoke at the Waste-Based Energy Conference in Toronto on December 3.

Teresa Meadows' article entitled “Green Claims: Environmental Reporting has Gone Mainstream” will be published in the upcoming December issue of Canadian Consulting Engineer magazine.

Tony Crossman will chair the Canadian Bar Association's National Environmental, Energy and Resources Law Section (NEERLS) Annual Summit in Vancouver in May, 2009.

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