



MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents



ENVIRONOTES!

May 2005

*Environmental Solutions
for Business*

BILL 133 LIKELY TO BE AMENDED

*Bruce McMeekin
Markham
905.415.6791
mcmeeekin@millerthomson.ca*



There have been a number of recent developments on Bill 133 (on which we reported last fall).

Not surprisingly, the Bill ran into steep opposition from industry concerned with the plan to expand the scope of directors' and officers' liability and the proposed introduction of environmental penalties which would not permit due diligence/all reasonable care as a defence.

In response, the Minister of the Environment released the Report of the Environmental SWAT Team in March 2005 concerning the SWAT Team's Sarnia Inspection Sweep. After a number of chemical spills into the St. Clair River, the Minister directed SWAT to conduct a comprehensive series of inspections of industrial and petro-chemical facilities operating in the Sarnia area. The sweep began in February 2004 and focused on the inspection of areas with the potential for future spills that could pose risks to the natural environment. Thirty-five facilities were inspected, and thirty-four of the thirty-five were found to be in non-compliance, with deficiencies which included:

- No spill contingency and/or spill prevention plans;
- Not having a Certificate of Approval for waste water collection and treatment works or air emission control equipment;
- Altering equipment, systems, processes or structures contrary to the existing certificates of approval; and
- Improper chemical handling, storage and identification.

A number of provincial officer's orders were issued to address these deficiencies. Some matters were referred to the Ministry's Investigation and Enforcement Branch for possible follow-up enforcement action.

The Minister was quick to link the Report and its results to Bill 133. In a speech to the Ontario Chamber of Commerce at its annual meeting in Sarnia on April 30, the Minister made reference to the proposed environmental penalty provisions in Bill 133 as one of a number of avenues the provincial government is pursuing towards the objective of better industrial pollution prevention.

As a further response to industry concerns, the government took the unusual step, prior to second reading, of scheduling the Bill for hearings before the Standing Committee on the Legislative Assembly. In her opening remarks to the Committee on May 12, the Minister stated that the government intended to table amendments to the Bill that will provide for the following:

- Only directors, not inspecting provincial officers, will be able to issue environmental penalties;
- Environmental penalties will be imposed only on corporations and not individuals;

Inside

Bill 133 Likely To Be Amended

Contaminated Sites - Inheriting the Sins of the Past Through Amalgamation

Canada's Kyoto Plan

A Green 2005 Federal Budget

Ontario Ministry of the Environment Releases for Public Comment its Proposed Draft General Air Pollution Regulation

Ontario's Review of the Environmental Regime

- Payment of an environmental penalty will not be admissible in a prosecution as an admission of guilt;
- Spill prevention/remediation will be considered a mitigating factor as to the size of an environmental penalty;
- Payment of an environmental penalty should be considered a mitigating factor on the size of fine imposed in a prosecution; and
- Some industries will be required to prepare spill contingency prevention plans.

The government does not intend to introduce amendments that will permit reasonable care as a full defence on the merits of a notice requiring payment of an environmental penalty. It will be a relevant consideration only to the size or quantum of the penalty.

We understand that motions to amend the Bill will be brought forward very shortly and that the government intends to enact the Bill before the legislature rises in June for its summer recess.

We will report shortly on the details of the amended legislation.

CONTAMINATED SITES – INHERITING THE SINS OF THE PAST THROUGH AMALGAMATION

British Columbia (Hydro and Power Authority) v. British Columbia (Environmental Appeal Board)

Tony Crossman

Vancouver

604.643.1244

tcrossman@millerthomson.ca



The Supreme Court of Canada recently upheld the power of the BC government to issue remediation orders against amalgamated companies, where the past activities of one of companies that later amalgamated, caused contamination. This decision has implications for companies that may be contemplating amalgamation, or for those companies purchasing shares of another company.

From 1920 to 1957, BC Electric Railway Company, which later merged into BC Electric, transported coal tar to site where roofing materials were manufactured. The coal tar used in the roofing manufacturing operations caused contamination. BC Electric amalgamated with and became BC Hydro through an amalgamation agreement which was ratified by statute. Those named on a remediation order in relation to the site sought to add BC Hydro to the order, as an historic producer and transporter of the contaminants.

The Supreme Court of Canada upheld an appeal from the BC Court of Appeal, accepting the dissenting reasons of Justice Rowles, of the Court of Appeal. Justice Rowles would have held BC Hydro liable for the pre-amalgamation actions of BC Electric by reason of the amalgamation agreement, which was ratified by statute. Accordingly, BC Hydro became fixed with the liabilities to which BC Electric would have been subject had it not amalgamated with the other entities. It was agreed by the parties that if BC Electric was still around, it would be liable under the *Waste Management Act*, as a responsible person.

It was held that the language of the amalgamation agreement, which was said to be standard amalgamation language, conveyed an intention that the newly amalgamated entity would possess all of the assets and be subject to all of the *liabilities* of the amalgamating entities, without restriction or exception. BC Hydro argued that the amalgamation agreement limited obligations of the amalgamated entity to those that existed when the agreement took effect, thereby creating a gap which would prevent BC Hydro from being a responsible person for the contaminating activities of BC Electric. Rowles J held that the use of the words “immediately before the amalgamation” did not limit the liabilities assumed by the amalgamated company, but simply established that from the time of amalgamation, the new enterprise, for all purposes, replaces the old. Those words are no different than using “thereafter”.

The Court referred to the previous Black and Decker decision and the now famous words of Dickson J, as he then was:

The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and weaknesses, their perfections and imperfections, and their sins, if sinners they be.

Justice Rowles closely examined whether the wording of the amalgamation agreement could be interpreted to limit future liability of the continuing entity, but did not find this to be the case. The agreement could have used

techniques to limit the liability but it did not. Although the issue of whether an amalgamation agreement can limit future liability may be an open question at the moment, Rowles J noted that the suggestion that the amalgamation agreement could unilaterally absolve the future company from past actions is a “startling proposition”. No authority was provided to support such a proposition.

The lesson from this case is that companies should carefully consider if amalgamation is in fact the right decision in the circumstances. If amalgamation is proposed for other legal or business reasons, you will need to do your environmental due diligence to assess the risk and to ensure that the other company is not one of those “sinners” that the court refers to. The same can be said for the case where one company is buying the shares of another.

CANADA'S KYOTO PLAN

Michelle Fernando
Markham
905.415.6716
mfernando@millerthomson.ca



On April 13, 2005, the Government of Canada released *Moving Forward on Climate Change: A Plan for Honouring our Kyoto Commitment*. The Government pledges to spend \$10 billion over seven years to help Canada cut its average greenhouse gas (GHG) emissions by 270 megatonnes (Mt) a year from 2008 to 2012. The Plan is built on six key elements:

1. Competitive and Sustainable Industries for the 21st Century

Canada's large final emitters (LFE) include companies in the mining and manufacturing, oil and gas and thermal electricity sectors. These sectors contribute just under 50% of Canada's GHG emissions. The LFE target is to reduce GHG emissions by 45 Mt annually from 2008 to 2012. The Plan outlines a number of options for compliance including investment in in-house emission reductions; purchase of emission reductions from other LFE companies; purchase of domestic offset credits; and purchase of “green” international credits.

The Government proposes to implement the LFE system through the *Canadian Environmental Protection Act, 1999* (CEPA, 1999) first by listing GHGs in Schedule 1 of the Act and second by regulating those substances under Parts 5 and 11 of the Act. The Government plans to release a draft protocol setting out how CEPA, 1999 can be used to implement the LFE system in spring 2005 and publish the draft LFE regulation for public review and comment in fall 2005.

The Government has adopted a voluntary approach to emission reductions in the case of the automobile industry. The industry has agreed to reduce GHG emissions by improving vehicle technology and producing more alternative fuel and hybrid vehicles. The industry's target is to reduce GHG emissions by 5.3 Mt per year between 2008 and 2012.

The Government also proposes to provide funding to support emerging renewable energy. Budget 2005 allocates \$200 million to the Wind Power Production Incentive (WPPI) and \$97 million to the Renewable Power Production Incentive (RPPI) over the next five years.

2. Harnessing Market Forces

Budget 2005 proposes to establish the Climate Fund, a market-based mechanism to encourage emission reduction initiatives on behalf of the Government of Canada. The Climate Fund will purchase emissions reduction and removal credits including domestic credits and international credits that are recognized under the Kyoto Protocol and that are in Canada's national interest.

The Plan estimates that the Climate Fund could yield between 75 and 115 Mt of emission reductions annually in the 2008-2012 period at a cost of \$4 billion to \$5 billion.

3. A Partnership among Canada's Governments

The Plan proposes a Partnership Fund to support Memorandums of Understanding (MOU) between the Government of Canada and the provinces and territories to invest in technologies and infrastructure development that are important to both levels of government. The Plan estimates that with federal funding in the order of \$2 billion to \$3 billion, the Partnership Fund could yield GHG emissions reductions of 55 to 85 Mt annually between 2008 and 2012.

The Plan also proposes to ensure that the Government's internal operations are the “greenest” in the world, and thereby, lead by example. The Government proposes to implement a new Green Procurement Policy to govern its purchases by 2006. The Government estimates that it will be able to reduce its emissions by 1 Mt annually between 2008 and 2012.

4. Engaged Citizens

The One-Tonne Challenge was launched to challenge Canadians to reduce the average 5 tonnes of GHGs each citizen produces annually to 4 tonnes. The Government has allotted \$120 million to encouraging the Canadian public to collectively generate 5 Mt in reductions annually over the 2008-2012 period.

5. Sustainable Agricultural and Forest Sectors

The Kyoto Protocol recognizes carbon sequestration, whereby carbon is sequestered in forests and agricultural soils, towards a country's Kyoto target. The Plan anticipates that improved agricultural practices will generate a carbon sink of 10 Mt in the period 2008-2012. Improved forestry practices will generate a carbon sink of 4 Mt during the same period.

6. Sustainable Cities and Communities

The Government of Canada's *New Deal for Cities and Communities* includes a targeted gas tax transfer of \$5 billion of federal funds over five years to support environmentally sustainable infrastructure including public transit.

With the Liberals in a minority position, it maybe unlikely that the Government's Plan will be implemented as currently articulated. In fact, Stephen Harper has already vowed to kill the Plan if the Martin government falls and the Conservatives form the next government. We'll keep you updated in upcoming issues of EnviroNotes!

A GREEN 2005 FEDERAL BUDGET

Steven McLeod
Toronto
416.595.7906
smcleod@millerthomson.ca



The 2005 federal budget that recently squeaked through a second reading in the House contains several new spending and tax measures designed o promote a cleaner environment.

Specifically, the spending measures target environmental preservation and climate change. The tax measures are incentives designed to promote the production of efficient and renewable energy.

Green Spending

The proposed spending measures are projected to total \$5 billion over the next five years, over \$3 billion of that amount will be new funding.

The new spending will allocated as follows:

- \$1 billion over five years for a "Clean Fund" to stimulate private sector action to reduce greenhouse gas emissions in Canada. The Clean Fund would purchase emission credits from industry to encourage emission reduction initiatives.
- \$225 million over five years to expand the EnerGuide for Houses Retrofit Incentive program. This program is an evaluation service which provides homeowners with advice and information on making energy efficient improvements to their homes. Where a certain level of energy savings is achieved the homeowner is eligible for a grant.
- \$200 million to support the development of a Sustainable Energy Science and Technology Strategy. This program would concentrate on the research and development of environmental technologies that promote the efficient production and use of energy.
- \$200 million over five years and a total of \$920 million over 15 years to stimulate the use of wind power to generate energy. This will promote the Liberal government's initiative to quadruple the Wind Power Production Incentive to 4,000 megawatts (the amount of power needed to by approximately 1 million homes).The Wind Power Production Incentive provides for an incentive payment of 1 cent per kilowatt-hour of production to eligible projects for the first 10 years of operation.
- \$250 million over five years to create a Partnership Fund for projects with the provinces and territories. The Budget Plan document identifies potential projects that would have access to this fund as including "carbon dioxide capture and storage pipeline, clean coal, cellulosic ethanol

plants and the construction of Canada's east-west electrical transmission infrastructure to bring hydro power to provinces that rely on fossil fuels.”

- \$97 million over five years and a total of \$886 million over 15 years to stimulate the development and use of forms of renewable energy other than wind, such as small hydro, biomass and landfill gas.
- \$300 million provided to the Green Municipal Funds (established by Canadian municipalities), which make investments in “green” municipal projects. Half of this amount will be targeted to the cleanup of brownfields.
- \$85 million to minimize the risk of invasive alien animal and plant species damaging to the environment.
- \$40 million to improve the environmental health of the Great Lakes Basin.
- \$28 million over two years to improve the health of Canada's oceans and \$15 million per year ongoing for the conservation of our fisheries in the Northwest Atlantic.
- \$90 million to Health Canada to conduct health risk assessments and research under the Canadian Environmental Protection Act, which is aimed to reduce exposure to potentially harmful substances.
- \$209 million for the maintenance and acquisition of capital assets in national parks and \$60 million to restore the ecological integrity of parks.

Tax Incentives for Green Energy

The budget proposes a significant capital cost allowance (CCA) rate increase to 50% for certain highly fossil-fuel-efficient and renewable energy generation equipment. The increased rate of 50% will apply to qualifying equipment that is acquired after February 22, 2005.

The assets that will be able to take advantage of the increased CCA rate have been selected from CCA class 43.1. The current capital cost allowance rate for class 43.1 is 30%.

The 50% CCA rate will apply to the following equipment:

Renewable Energy Generation Systems:

- Wind turbines;
- Electrical generating equipment that uses only geothermal energy;
- Small hydroelectric facilities;
- Stationary fuel cells;
- Photovoltaics and "active" solar equipment used to heat a liquid or gas;
- Equipment powered by certain waste fuels (e.g. wood waste, municipal waste, biogas from a sewage treatment facility);
- Equipment that recovers biogas from a landfill; and
- Equipment used to convert biomass into bio-oil.

High-Efficiency Cogeneration Systems

- Cogeneration systems (also called combined heat and power or CHP systems) produce heat and power simultaneously by capturing the waste heat from the electrical generation process and using it for another purpose, such as manufacturing or space heating.
- The budget proposes that cogeneration equipment would be entitled to a 50 per cent CCA rate if the equipment is part of a high-efficiency cogeneration system with a total system efficiency of approximately 72% (meaning the cogeneration equipment converts approximately 72% or more of the energy value of the input fossil fuel into electricity and usable heat).

Another tax incentive proposed in the 2005 budget to promote environmentally friendly energy production is expanding the assets in class 43.1 that are eligible for the 30 per cent CCA rate. Class 43.1 will be expanded to include certain distribution equipment used in district energy systems that rely on efficient cogeneration and biogas production equipment.

District Energy Systems that Rely on Efficient Cogeneration

District energy systems that rely on efficient cogeneration are community energy systems that transfer heat between a central generation plant and a group or district of buildings by continuously circulating steam, hot water or cold water through a system of underground pipes. Assets forming part of the internal heat and cooling system of the host building will not be eligible for the favourable 30% CCA rate.

Biogas Production Equipment

Currently only above-ground equipment used primarily to collect biogas (landfill gas and digester gas sewage treatment facility) is eligible for the favourable 30% CCA rate. This rate will be extended to equipment used to produce biogas. Collection equipment, buildings and other structures, and equipment used to process the residue after digestion or to treat recovered liquids, will not be included.

ONTARIO MINISTRY OF THE ENVIRONMENT RELEASES FOR PUBLIC COMMENT ITS PROPOSED DRAFT GENERAL AIR POLLUTION REGULATION

Bruce McMeekin
Markham
905.415.6791
mcmeeekin@millerthomson.ca

On May 5, 2005, the province posted on the Environmental Registry the draft Regulation it proposes to repeal and replace aged Ontario Regulation 346.

Regulation 346 was promulgated over 30 years ago as the province's primary means for regulating air emissions. The proposed Regulation will replace the Regulation 346 air dispersion models with a number of U.S. EPA air dispersion models.

The draft Regulation also proposes to introduce new emission standards, in addition to a risk based decision-making process to address implementation issues.

As a companion to the new Regulation, the province proposes to introduce three new guidelines:

- Guideline for the Implementation of Air Standards in Ontario;
- Air Dispersion Modeling Guideline for Ontario; and
- Procedure for Preparing an Emission Summary and Dispersion Modeling Report.

The draft Guidelines were released for public comment in 2004.

Written submissions on the proposed Regulation may be submitted until June 4, 2005.

ONTARIO'S REVIEW OF THE ENVIRONMENTAL ASSESSMENT REGIME

Michelle Fernando
Markham
905.415.6716
mfernando@millerthomson.ca

In March 2005, the Environmental Assessment Advisory Panel – Executive Group released “Improving Environmental Assessment in Ontario: A Framework for Reform”. The Report was in response to the Ontario Minister of the Environment's request that the Executive Group develop recommendations that would revitalize, rebalance and refocus environmental assessments in the province.

The Executive Group concluded that the *Environmental Assessment Act* (“Act”) is fundamentally sound, but that there are significant policy gaps, procedural inconsistencies and administrative shortcomings in the current regime. The Executive Group recognized the need for a regime that strikes an appropriate balance between being expeditious and rigorous. The following are the Executive Group's principal recommendations:

1. Develop Principles, Policies and Procedures

- (a) Develop a policy guideline which includes guiding environmental assessment principals that give effect to the purposes of the Act.

- (b) Establish sector-specific (especially energy, transportation and waste) working groups to develop (a) sector-specific policies to identify and prioritize “green projects” and (b) sector-specific environmental assessment procedures.

2. Establish Expert Bodies

- (a) Establish a provincial advisory body to provide impartial expert advice and solicit public views on various environmental assessment matters.
- (b) Establish a green project facilitator to facilitate approval of green projects through the environmental assessment process.

3. Enhance Public Participation

- (a) Revise the draft consultation guideline to more effectively involve the public.
- (b) Organize workshops to ensure that parties understand public participation rights and responsibilities under the Act.
- (c) Develop protocols, procedures and collaborative agreements to facilitate meaningful participation by First Nations and aboriginal communities.
- (d) Request that the provincial advisory body review and report on options for obtaining or confirming community acceptance of undertakings.

4. Hearings, Alternative Dispute Resolution and Mediation

- (a) Revise the draft mediation guideline to include criteria when it may be prudent to refer matters to alternative dispute resolution or mediation.
- (b) Ensure that certain undertakings are referred to the Environmental Review Tribunal for public hearings.
- (c) Amend regulations under the *Consolidated Hearings Act* to facilitate one hearing for matters requiring a number of approvals.

5. Ensure Integration

- (a) Ensure that the Act refers to Ontario’s Provincial Policy Statement.
- (b) Develop guidelines that explain how the Act will be harmonized with the *Canadian Environmental Assessment Act* in relation to undertakings that are subject to both.
- (c) Develop collaborative protocols with other ministries and agencies to ensure that reviews are undertaken by qualified persons.

6. Establish a New Environmental Assessment Website

- (a) Establish a new environmental assessment website to facilitate transparency, clarity and timely access to information.

7. Require Payment of Fees

- (a) Authorize the making of regulations that prescribe fees, which are directed towards environmental assessment program delivery and efficiency, for certain matters under the Act.

8. Enhance Monitoring, Reporting and Training

- (a) Revise the draft environmental assessment compliance strategy, especially in relation to cumulative impacts.
- (b) Amend the Act to enhance the role of provincial officers; increase fines; empower courts to impose creative sentencing; impose a “reasonable care” duty of officers and directors; and prescribe a two-year limitation period.
- (c) Develop environmental assessment compliance programs and procedures.
- (d) Develop training and educational programs to accompany the compliance strategy.

We will keep you informed in subsequent editions of EnviroNotes! on whether the Ministry acts to implement the Executive Group’s recommendations.

MILLER THOMSON LLP ENVIRONMENTAL LAW PRACTICE GROUP

Markham

Rod M. McLeod, Q.C. (Chair) 905.415.6707
rmcleod@millerthomson.ca
John R. Tidball 905.415.6710
jtiddball@millerthomson.ca
J. Bruce McMeekin (Co-Chair) 905.415.6791
bmcmeekin@millerthomson.ca
Michelle Fernando 905.415.6716
mfernando@millerthomson.ca
Patrick Greco 905.415.6782
pgreco@millerthomson.ca

Toronto

Franklin T. Richmond 416.595.8180
frichmond@millerthomson.ca
Andrew J. Roman 416.595.8604
aroman@millerthomson.ca
Bryan J. Buttigieg 416.595.8172
bbuttigieg@millerthomson.ca
Derek J. Ferris 416.595.8619
dferris@millerthomson.ca
Tamara Farber 416.595.8520
tfarber@millerthomson.ca
Erin M. Tully 416.595.8651
etully@millerthomson.ca

Vancouver and Whitehorse

Tony Crossman 604.643.1244
tcrossman@millerthomson.ca
Wendy A. Baker 604.643.1285
wbaker@millerthomson.ca
Daniel L. Kiselbach 604.643.1263
dkiselbach@millerthomson.ca
Rosanne M. Kyle 604.643.1235
rkyle@millerthomson.ca
Katherine Xilinas 604.643.1233
kxilinas@millerthomson.ca

Calgary

Brian J. Evans, Q.C. 403.298.2454
bevans@millerthomson.ca
Heidi A. Telstad 403.298.2456
htelstad@millerthomson.ca

Edmonton

Bryan J. Kickham 780.429.9713
bkickham@millerthomson.ca
Kent H. Davidson 780.429.9790
kdavidson@millerthomson.ca
Mark R. Gollnick 780.429.9712
mgollnick@millerthomson.ca

Kitchener

F. Stephen Finch, Q.C. 519.579.3600 x.310
sfinch@millerthomson.ca
Richard J. Trafford 519.579.3660 x.330
rtrafford@millerthomson.ca

Guelph

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

Montréal

Luc Gratton 514.871.5482
lgratton@millerthomsonpouliot.com
Louis Coallier 514.871.5488
lcoallier@millerthomsonpouliot.com
Brent J. Muir 514.871.5478
bmuir@millerthomsonpouliot.com
Pierre Paquet 514.871.5427
ppaquet@millerthomsonpouliot.com
Louise Tremblay 514.871.5476
ltremblay@millerthomsonpouliot.com
Mathieu Turcotte 514.871.5492
mturcotte@millerthomsonpouliot.com
Jeremy Wisniewski 514.871.5475
jwisniewski@millerthomsonpouliot.com
Our Associate Counsel
Prof. Alastair R. Lucas 403.220.7111
alucas@ucalgary.ca

Note:

This newsletter is provided as an information service to our clients and is a summary of current legal issues. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their unique circumstances. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by our privacy policy and other rules. Your comments and suggestions are most welcome and should be directed to bmcmeekin@millerthomson.ca.

www.millerthomson.com