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Environmental Solutions for Business.

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Inside

THE "MADE IN CANADA" SOLUTION TO GREENHOUSE GASES AND THE KYOTO PROTOCOL THE *CLEAN AIR ACT* INTRODUCED

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The Federal Government's long awaited "Made in Canada" solution to Canada's Kyoto Protocol obligations arrived on October 19, 2006 in the form of Canada's *Clean Air Act* (Bill C-30) and a *Notice of Intent to Develop and Implement Regulations and other Measures to Reduce Air Emissions* (Notice). The Notice sets out this government's plan to tackle air pollution and greenhouse gases. This article will outline the main issues raised by Bill C-30 and the Notice with a view to providing a general overview of the government's position.

What are "Air Pollutants"?

Under Bill C-30, "Air Pollutants" are defined to include PM10 (particulates), ozone, sulphur dioxide, nitric oxide, nitrogen dioxide, VOCs (volatile organic compounds), gaseous ammonia and mercury (and of course any others that are prescribed at a later date by regulation or otherwise).

What are "Greenhouse Gases"?

Under Bill C-30, "Greenhouse Gases" are defined to include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, some perflourocarbons and sulphur hexafluoride.

What is the Plan?

The government has set short, medium and long-term goals for dealing with air pollutants and greenhouse gases (GHGs) as follows:

Short-term (2010-2015)

For air pollutants: a target-setting approach based on fixed caps.

For GHGs: a target-setting approach based on emissions intensity, that is claimed to yield a better outcome for the Canadian environment than under the plan previously proposed on July 16, 2005.

Medium-term (2020-2025)

For air pollutants: a fixed cap approach to target-setting.

For GHGs:build upon the emissions intensity approach with intensity targets that are ambitious enough to lead to absolute reductions in emissions and thus support the establishment of a fixed cap on emissions during this period.

Long-term (2050)

For air pollutants: continue to employ a fixed cap approach to target-setting.

For GHGs: an absolute reduction in GHG emissions between 45 and 65% from 2003 levels by 2050. The National Round Table on the Environment and Economy (NRTEE) will be asked for advice on the specific target to be selected and scenarios for how the target could be achieved.

There is considerable emphasis on keeping in step with US standards in relation to fuel, engine and vehicle standards for example. The government follows the US Federal Government GHG "intensity" approach, as opposed to looking at the total volume of GHGs emitted.

How does it compare to Kyoto?

Bill C-30 represents a marked departure from the Kyoto Protocol, especially with respect to the timelines set for reducing emissions. The government characterizes its approach as setting "realistic emissions targets", and "timelines that encourage emitters to take into account the coordinated requirements in their capital stock investment decision." The government states that it intends to establish targets and timelines to reduce air pollutants that have an effect on the health of Canadians. Emissions targets will be "at least as rigorous as those in the US or other environmental performance-leading countries".

Compared to Canada's obligations under the Kyoto Protocol, Bill C-60 will reduce base emissions by 45%-65% by the year 2050, as compared to 6% by 2012 under Kyoto. Notably, the applicable base year under Bill C-60 is 2003, and under Kyoto, 1990.

It is uncertain how the government proposes to deal with emissions trading, offset credits and investment credits under Kyoto. Bill C-30 is silent on this issue, except to say that the government will not purchase credits or otherwise participate in the emissions market. Clearly, Canada's Kyoto commitments will not be met through Bill C-30.

Expanded Authority

The Bill sets out expanded authority for the government to make regulations to make this policy a reality. Bill C-30 sets out proposed amendments to the *Canadian Environmental Protection Act, the Energy Efficiency Act* and the *Motor Vehicle Fuel Consumption Standards Act*. The changes are at a macro level, and the specifics will come in the form of regulations which are expected to be rolled out in the coming years. The following however can be surmised from what has been announced so far.

- there is a duty on manufacturers, importers and other to notify the Minister of products that may impact the environment;
- the Minister may require persons to give information and samples and require tests to be conducted, with the results forwarded to the Minister;
- there is a duty to report air pollutants and GHGs released in contravention of the regulations and to a positive onus to take measures to prevent or stop the release. Notably, this duty extends to any person who had "charge, management or control" of the substance prior to the release, and includes any person who *caused or contributed* to the release or *increases the likelihood of a release;*
- the government has provided that it may recover its costs of taking measures to stop or prevent a release; and
- the Minister has broad powers to remedy situations, including requiring a manufacturer, processor, importer, retailer or distributor of the air pollutant or GHG or product to notify the public, replace or accept the return of the air pollutant, GHG, or other product, and broad discretion to take any other measures to protect the environment or human health.

In other words, whether you are a manufacturer, processor, importer, retailer or distributor of products that contain air pollutants or GHGs, you must be aware of these changes and the corresponding impact on your business.

Next Steps - Consultation and Engagement

The Notice establishes a 60 day comment period. In the near future, there will be consultation and engagement with the provinces, territories, aboriginal governments, and affected industry sectors which will allow for discussion of issues. Key issues one would expect to see addressed include:

- the form of the targets, including emissions caps, emissions intensity, performance and/or technology-based targets;
- the most appropriate historical baseline where applicable;
- the approach to target-setting: that is., how to establish sector-specific reduction targets, benchmark to adhere to international standards
- how targets will apply to major new facilities, especially in sectors where technology is evolving rapidly; and
- if and how targets will differentiate between existing and new industrial facilities.

Bill C-30 sets out the guiding principles for developing those targets and consultation. The first round of consultation is to be concluded by the spring of 2007, the results of which will result in the setting of air pollutant fixed emission caps and GHG emission intensity targets for 2010 to 2015.

If you have any questions or want to discuss Bill C-30 further, please contact Tony Crossman or Sarah Hansen of our Vancouver office or any member of Miller Thomson's Environmental Group.

ONTARIO: DRAFT ENVIRONMENTAL PENALTY REGULATIONS RELEASED FOR PUBLIC COMMENT

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The draft regulations and guidance documents have been posted on the Environmental Registry (http://www.ene.gov.on.ca/envision/env_reg/er/documents/2006/RA06E0013.htm) and are available for public review and comment until January 12, 2007.

In the November 2004 and May 2005 issues of *EnviroNotes*, we summarized the unproclaimed environmental penalty (EP) provisions contained in Bill 133. The MOE proposes to bring the regulations into force in two phases. In phase one, anticipated for the spring of 2007, EP orders will be issued in relation to unlawful discharges to water or land. The second phase, anticipated for late in 2008, will permit the issue of EP orders for violations relating to constructing works, conditions of operation, sampling, reporting and record keeping. All of the violations subject to enforcement via EP orders will be restricted to activity regulated through the Municipal Industrial Strategy for Abatement (MISA), with the possibility of expansion into other sectors later.

The draft regulations set out the manner in which the amount of an environmental penalty should be calculated. It is proposed that the penalty amount will be a function of the benefit accruing to the offender and the gravity of the violation. Violations involving toxic substances will be considered more serious. Toxic substances will include those listed in Schedule I under the federal *Environmental Protection Act* in addition to those which meet the "ecological" and the "human health" criteria used by Environment Canada and Health Canada under the Domestic Substances List.

The draft regulations provide for the reduction in the size of the penalty if the offender took steps to prevent and/or mitigate the violation and its impacts or it had in place an environmental management system at the time of the violation. Also included are the mechanics of settlement agreements by which a regulated person can obtain a reduction in the size of a penalty if it takes steps to minimize the risk of a future discharge of a contaminant.

CROSS-BORDER INSURANCE JURISDICTION CONFLICTS
LLOYD'S UNDERWRITERS V. *COMINCO LTD. ET AL., 2006 BCSC 1276*

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On August 22, 2006, a decision in environmental insurance coverage was released by the British Columbia Supreme Court ("BCSC") which is likely to have a significant impact on future international insurance coverage decisions.

Background

In *Lloyds Underwriters* v. *Cominco Ltd. et al*., Teck Cominco Metals Ltd. ("TCML") applied to have the BCSC decline jurisdiction to decide an insurance coverage dispute relating to an environmental action that had been commenced against TCML in the United States District Court for the Eastern District of Washington (the "US Environmental Action"). In the US Environmental Action, the State of Washington and numerous private individuals were seeking to hold TCML liable for alleged environmental contamination of the Upper Columbia River and Lake Roosevelt in Washington State. This contamination was caused by discharges into the Columbia River from TCML's smelter in Trail, British Columbia.

TCML's insurance policies required each insurer to defend and/or indemnify TCML in case of alleged liability resulting from an occurrence of "property damage" that took place anywhere in the world during the coverage period. The policies did not contain a "choice of law" provision. TCML believed that the alleged contamination of the Upper Columbia River and Lake Roosevelt constituted "property damage" within the meaning of their insurance policies. The insurers denied that they were obligated to compensate TCML for such environmental pollution due to policy exclusions.

TCML wanted Washington law to apply to the coverage determination, as the major area of pollution was in Washington State (and also because they believed that Washington law would provide them with a more generous insurance policy interpretation). The insurers, in contrast, wanted British Columbia law to apply, as the alleged wrongful actions occurred in British Columbia (and also because they wanted to take advantage of British Columbia insurance legislation).

To these ends, TCML and two of its insurers engaged in a "race to the courthouse" to get declaratory judgments on the availability of insurance coverage. TCML brought their claim in the Washington State Superior Court (the "Washington Court Action") at one second past midnight by delivering the action to a judge of that Court at his home. The insurers commenced their own action in the BCSC 9 hours later, when the Vancouver courthouse opened for business at the usual time (the "BCSC Action").

The insurers then brought an application in TCML's Washington Court Action seeking to have it dismissed for both a lack of jurisdiction and on the basis of *forum non conveniens* (i.e. that there was another more appropriate forum in which to hear the dispute). Judge Suko of that Court dismissed the insurer's application and accepted jurisdiction over the parties and their insurance coverage disputes.

The BCSC Decision

Three days after Judge Suko's decision in the Washington Court Action, TCML brought an application in the BCSC Action seeking to have it dismissed in favour of the Washington proceeding.

At the BCSC, Judge Davies considered but decided not to decline jurisdiction even though TCML won the "race to the courthouse" and Judge Suko had already accepted jurisdiction in Washington State. He further rejected TCML's argument that Washington law should be preferred because "it is more developed", saying this claim was "a thinly disguised ruse to obtain interpretation of coverage issues under a system of law that none of the parties to the Policies ever intended or expected would govern that interpretation". As a result, Judge Davies refused to decline jurisdiction over the insurance coverage issues in favour of the Washington Court Action.

In matters involving cross-border environmental pollution, judges in the different jurisdictions now seem more willing to accept overlapping jurisdiction. This in turn leads to uncertainties relating to what country's law will be applied and who will hear the dispute. As a court seeking to decide these issues will look to the law that the contracting parties intended to govern their relationship, an explicit choice of law clause is therefore an essential component of any agreement where such jurisdictional issues may arise.

GONE BUT NOT FORGOTTEN - ENVIRONMENTAL OBLIGATIONS IN O&G TRANSACTIONS

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A recent decision in the Alberta Court of Queen's Bench, *Anadarko Canada Corporation* v. *Canadian Natural Resources Limited*, 2006 ABQB 590, considers the effect of environmental liability indemnities in a purchase and sale agreement. Specifically, the Court addresses whether the vendor or purchaser is responsible for conducting new clean-up work at a site that had been previously reclaimed.

The vendor had cleaned up an oil battery site almost 40 years ago and surrendered the surface lease. There were no wells located on the site. The vendor then sold the mineral interests, wells and related operating facilities to the purchaser with the usual contractual indemnities for abandonment and reclamation obligations related to the Assets (defined in the purchase and sale agreement as "Petroleum and Natural Gas Rights", "Tangibles" and "Miscellaneous Interests"). As was typical, the purchaser was to assume responsibility for environmental issues arising from the Assets. Subsequent to the sale, the regulatory authorities issued an order compelling the old battery site to be cleaned up, as salt contamination still affected the land. A dispute arose between the vendor and purchaser as to which was responsible for the clean-up costs of about $800,000.

The Court ruled that the old battery site was no longer useful for production, and therefore was not a Tangible, a term that means property that is "used or intended to be used in the producing ... of the Leased Substances". Further, while an operating battery is an Asset because it is an integral part of the means by which the petroleum substances are produced, the old battery site was not. Finally, although the purchase and sale agreement assigned, and made the purchaser responsible for, Miscellaneous Interests including surface leases, the former battery site was not the responsibility of the purchaser as the surface lease no longer existed.

In the result, the Court ruled that the vendor was responsible for the clean up costs, as the former battery site was not necessary for production from the lands and it did not otherwise fall within any of the defined assets or interests that were transferred in the sale and subject to the indemnification provisions.

This decision may give reason, in future agreements for purchase and sale of oil and gas assets, to more fully define what locations are and are not subject to indemnification for environmental liabilities.

ONTARIO CASE COMMENT: *NEWMARKET (TOWN)* V. *HALTON RECYCLING LTD.*

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Section 433 of the Ontario *Municipal Act* allows a municipality to apply to the Superior Court of Justice for an order requiring that all or part of a premises within the municipality be closed for any use for a period not exceeding two years because the activities on or in the premises constitute a public nuisance. The section came into force in December 2001, and provides an interesting means for a municipality to apply the tort of public nuisance, which has traditionally required an action to be taken by the Attorney General unless some special damage can be demonstrated to a specific group. Section 433 enables the municipality to take on this responsibility, albeit with the prior consent of the Attorney General and the local police.

On September 29, 2006, the Ontario Superior Court of Justice undertook its first judicial consideration of s. 433, ordering the closure of a waste processing facility in Newmarket due to noxious odours.

Halton Recycling Ltd. (Halton) purchased the organic waste processing facility in question in November 2003. Between November 2003 and September 2004, Halton spent $7 million modifying the physical plant and processes and undertaking equipment and process changes to reduce emissions and odours, but only began to take actual remedial action in September 2005 - fourteen months after it had commenced operations. Between July 2004 and July 2006, the Town of Newmarket (the Town) received more than 1100 odour complaints.

The Town had two main responsibilities in the action: first, to prove that a public nuisance existed, and second, to provide evidence that Halton knew or ought to have known that the public nuisance existed.

The court held that operation of Halton facility "unreasonably interfered and continues to interfere with the comfort and convenience of persons working or residing within its sphere of influence." The effect of the emissions was held to be so widespread and indiscriminate in effect that it would be unreasonable to expect an individual to commence an action in private nuisance. Although "odours" are not specifically enumerated public nuisances under s. 433, the court interpreted the section purposively, determining that the exclusion of odours from the list did not preclude an order for closure on that basis.

Halton was held to have been aware that odours related to the waste processing were an issue even prior to purchasing the facility. They did undertake some remedial action, but the court felt that the action was too little, too late to address the scale and magnitude of the problem.

Ultimately, the court imposed a 9 month closure order, with a 90 day stay (on limited terms) at the outset of the 9 months to allow Halton to take initial steps to abate the nuisance. The option will thereafter be open for Halton to apply to the court for a suspension of the order or to reopen the facility in advance of the expiry of the 9 months, if it is able to satisfy the court on a balance of probabilities that the public nuisance has ceased or been remedied.

Section 433 of the *Municipal Act* promises to be a useful enforcement tool for municipalities, although it will most likely only be used as an extraordinary remedy, given that it enables the courts to interfere with private property rights. Whether the case will be appealed remains to be seen, but *Newmarket* v. *Halton* is certainly an interesting first effort by the courts to allow municipalities greater control over local environmental protection.

ENVIRONMENTAL LITIGATORS BEWARE - WHAT YOU DON'T ASK FOR IN DISCOVERIES MIGHT COME BACK TO BITE YOU IN THE CONTAMINATED ZONE!

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No, it's not a trivia category on Win Ben Stein's Money; it's a discussion of litigation privilege in environmental litigation cases. No environmental case goes to trial without an expert report or expert testimony. However, few cases have dealt with the scope of privilege between the expert and counsel. Confusion has surrounded the status of correspondence between counsel and expert, given the ability to claim, in certain circumstances, litigation privilege over such documents. Last month, the Supreme Court of Canada clarified the characteristics of litigation privilege in *Blank* v. *Canada (Minister of Justice)*. While not restricted to environmental litigation, the recent decision in *Conceicao Farms Inc. et. al*. v. *Zeneca Corp*. seeks to clarify how the general concepts of litigation privilege outlined in *Blank* relate to Ontario's disclosure rules.

In *Blank*, the Court set out the scope and duration of litigation privilege. In contrast to solicitor-client privilege, *Blank* clarified that the policy considerations behind solicitor-client privilege and litigation privilege are quite different. Typical differences include the following:

SOLICITOR-CLIENT PRIVILEGE	LITIGATION PRIVILEGE
Solicitor-client privilege recognizes that the justice system requires full, free and frank communications between those who need legal advice and those who are best able to provide it.	Litigation privilege is intended to create a "zone of privacy" within which an adversarial advocate can investigate and prepare for a case.
Solicitor privilege is perpetual.	Litigation privilege is temporary and expires with the litigation to which it is attached.
Solicitor-client privilege applies to all confidential communication between the solicitor and client, and applies regardless of whether the communication occurs in the context of litigation.	Litigation privilege applies to communications between counsel and his or her client or third parties. It also applies to material of a non-communicative nature prepared for the dominant purpose of litigation.

So where does litigation privilege end in the context of the Ontario *Rules of Civil Procedure* disclosure provisions? Rule 31.06(3) is an expression of the broad disclosure obligations in Ontario's justice system. Litigation privilege operates as an exception to these obligations. *Conceicao* addresses the tension between Rule 31.06(3) - which compels the disclosure of "the findings, opinions and conclusions of an expert" - and litigation privilege.

The *Conceicao* Motion

In *Conceicao*, farmers sued a manufacturer for defective pesticide that allegedly caused crop damage. The manufacturer's counsel had originally retained an expert to assist with litigation. At some point following the retainer of the expert, counsel had a conversation with the expert which was reduced to writing in the form of an extensive 24 page memo to file. Counsel for the manufacturer maintained privilege over the memo as part of an overall assertion of privilege over all documents or memos prepared for the purposes of litigation.

The expert subsequently prepared a report, which was provided to the plaintiffs well in advance of trial. The manufacturer won at trial, with the trial judge relying in part on the expert evidence presented by the manufacturer. It was only subsequent to trial, during cost submissions, that the existence of the original memo of the expert came to light.

The plaintiffs brought a motion seeking production of the document on the basis that the 24 page memo must have contained a preliminary opinion of the expert or foundational information for his final opinion, and was therefore producible under the Rules. The Respondents argued that notes, letters, memoranda and other materials prepared by counsel in anticipation of, or during the course of, litigation are protected by litigation privilege and that privilege is not waived by production of a related expert report.

The motions Court ordered production of the memo on the basis that it should not be seen as solicitor work product protected by litigation privilege because it contained foundational information for the formation of the expert's opinion.

Appeal of the *Conceicao* Motion

The Respondents appealed the motion judge's decision. In overturning the decision, the appeal court emphasized that Rule 31.06 applies to the discovery stage of litigation. The Appellants were attempting to avail themselves of the Rule after the trial had taken place, which was long after the close of the discovery process. The fact that the Appellants were not aware of the existence of the memorandum until after trial was of no consequence, since the Rule entitled them only to discover the "foundational information" underlying the expert's opinions, and not to discover the memorandum itself.

The Rule compels the production of information, as opposed to the production of specific documents. In other words, the Rule is concerned with fact disclosure, not document disclosure. Consequently, a party that is compelled to produce information contained in a document under the Rule is not compelled to produce the actual document. The Court clarified that production of the information contained in a document does not constitute waiver of the litigation privilege attached to that document. The document will remain privileged. Often, of course, the actual document is produced because it is the practical method for conveying the producible information, but this decision will lie with the party producing the information.

One might question what would be left to hide in the document that would be worthy of such expense - perhaps counsel's own commentary on the implausibility of success based on the opinion?

The Court agreed with the motions judge that Rule 31.06(3) entitles a party to examine the "foundational information" underlying an expert opinion. The Court declined to define or delineate the parameters of what constitutes "foundational information" however, since they decided that the Appellants were no longer in a position, timing wise, to take advantage of Rule 31.06(3).

The Court concluded by stating that there was no doubt that litigation privilege, as described in *Blank*, applies to the memo, and continues to apply as long as the litigation in question continues. The memorandum was prepared by counsel as a part of her preparations for defending the action, and therefore meets the "dominant purpose" test for litigation privilege. If Rule 31.06(3) had been properly relied upon during the discovery process, the "foundational information" contained in the memorandum could have been produced to the Appellants, while maintaining the privileged status of the memorandum.

Consequences for Environmental Litigation

The *Conceicao* decision demonstrates the balancing of disclosure obligations and privilege within the justice system. Environmental litigators invariably deal with experts and expert reports in the course of their work, and to be effective advocates they must be cognizant of what the Courts require them to disclose to opposing parties. The substance and foundation of an expert's opinion, as well as any revisions to it, are all open fodder for the disclosure phase of litigation. Perhaps the value of these cases lies in improving the quality of discovery queries, and ensuring proper follow up on discovery subsequent to delivery of an expert report - which can occur sometimes years after discovery has been completed. If sufficient questions are not canvassed on discovery, is there any requirement on the basis of ongoing disclosure obligations for a litigant to answer questions following delivery of an expert report? Perhaps *Conceicao* opens the door on this a little, especially in expert intensive cases like environmental matters. Perhaps the opposite is true. From a practical perspective, prudence rules - be careful what you don't ask for; 20-20 hindsight comes with experience at a price!

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Tony Crossman of our Vancouver office, is the incoming Chair of for the CBA NEERLS section.

The National Environmental Law Group at Miller Thomson will be hosting a complimentary breakfast seminar on "Contaminated Sites and Land Transactions" on November 14, 2006 in Vancouver and on November 23, 2006 in Toronto.

Bryan Buttigieg published and article on "Landowners as Developers of Contaminated Lands: Examining Assessment, Site Characterization and Standard Selection, Remediation and Development "in *Corporate Liability Journal* Vol X1 no 4 2006.

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