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Summer 2007

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Inside

Phased Implementation of Ontario Environmental Penalties to Begin August 1, 2007

Waiver of Torts, a Potential Arrow in the Quiver of Climate Change Class-Action Litigants?

Allocating Responsibility for Remediation Costs
Case Comment - *Gehring et al V. Chevron Canada Limited et al*, 2006 BCSC 1639

Climate Change Action in Alberta: What's Happening

What's Happening Around Miller Thomson

PHASED IMPLEMENTATION OF ONTARIO ENVIRONMENTAL PENALTIES TO BEGIN AUGUST 1, 2007

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With little fanfare, in June the Ontario Ministry of the Environment (MOE) promulgated Regulations 222/07 and 223/07 which, beginning August 1, will begin the process of adding environmental penalties (EP's) to the MOE's enforcement tool kit.

In previous issues (November 2004, May 2005, and June 2005), we detailed the legislative framework for EP's. Initially, the MOE will only be able to levy EP's against MISA regulated companies and even then only in the case of major violations (spills and discharge exceedences). Beginning December 1, 2008, the MOE will apply EP's to the additional violations set out in Table 2 of the Regulations (contravention of orders, approvals, etc.).

The Regulations include the factors that should be addressed when assessing the amount of an EP:

- the seriousness of the violation
- the monetary benefit, if any, accruing to the offender for non-compliance
- the length of the violation

If the contravention arises from a spill or discharge of a toxic substance, this necessarily compounds the seriousness of the violation in the assessment (by up to 35%). However, preventative and mitigation measures and the use of an EMS at the time of the violation can diminish the seriousness of the offence by up to 35%.

Major violations, such as spills and discharges, are theoretically subject to the $100,000.00 per day maximum. Other less serious violations such as failing to report a spill are capped at a maximum for $100,000.00 no matter how many days the failure continues. Minor violations are capped at $60,000.00 or the amount arising from a 180-day violation, whichever is less.

In the case of minor violations, an EP can be reduced by up to 100% through the use of settlement agreements with the MOE in which the offender would enter into an environmental project to take it to compliance and beyond. Settlement agreements may also be used for major violations but can only reduce the size of the EP by 75%.

Although the EP regulations apply only to the 148 facilities regulated within the nine MISA sectors, there is nothing preventing the MOE in the future from expanding the application of EP's to other regulated industries within Ontario. If EP's provide for an efficient and economical way for enforcement, that is expected by most.

At the same time the EP Regulations were promulgated, the MOE also released Regulation 224/07 which requires MISA regulated companies to develop and implement spill prevention and contingency plans by September 1, 2008 or the first date the plant is in operation if it is later than September 1, 2008. The MOE also amended its regulation concerning the classification and exemption of spills, formalizing the requirements for spill notification.

With even less fanfare, in May the MOE enacted the *Regulatory Modernization Act* (Bill 69). It provides the framework by which Provincial Officers may be authorized to use the inspection powers in legislation other than that in which they are primarily engaged in enforcing. For example, a duly authorized inspector with the Minestry of Labour may be able to inspect an establishment pursuant to the inspection powers found in the environmental statutes and, in some cases, take steps to address contraventions the inspector observes during the inspection. Regulations are expected later this year which will set out which Ministries may be engaged in the process of "inspector-sharing".

One has to look at the environmental penalty provisions in conjunction with Bill 69. The provincial government is obviously looking for the most cost-effective manner of enforcing its numerous regulatory statutes. If the EPs and "inspector-sharing" work, one can only anticipate to see more of the same in the future.

WAIVER OF TORTS, A POTENTIAL ARROW IN THE QUIVER OF CLIMATE CHANGE CLASS-ACTION LITIGANTS?

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The recent products liability case of *Serhan* v. *Johnson & Johnson* has raised the question of whether the doctrine of waiver of tort can be used as a cause of action in class action climate change litigation.

The theory which underlies waiver of tort is that a defendant should not be allowed to profit from his wrongful actions merely because no direct loss can be proven to have resulted from those actions. The doctrine allows a plaintiff to pursue a claim for disgorgement of profits accrued through a defendant's wrongdoing. The amount claimed need not bear any relationship to the loss of the plaintiff, and in fact, proof of loss is not necessary under the doctrine. This makes the doctrine ideal for situations in which the defendant's profit exceeds the losses of the plaintiff, or, in class action situations, where the losses can be difficult to quantify or complicated for purposes of commonality in class certification.

In the *Serhan* case, a group of diabetics who had used defective blood glucose meter and/or testing strips sought class certification. One of the difficulties faced by the plaintiffs in *Serhan* was demonstrating that they had suffered a loss. The plaintiffs had received the meters for free through hospitals and diabetes clinics and the strips had been paid for by Ontario's Drug Benefit plan. Cullity J. granted the motion for certification and held that, though waiver of tort had not been pleaded, that the facts were sufficient to support a cause of action in waiver of tort. The defendants' appeal was dismissed on the basis that, while the plaintiffs faced difficulties with their claim, this was a new and developing area of the law and the claim was not certain to fail. The court held that this area of the law was not settled and was best left to be determined at a trial of the matter. Leave to appeal to the Supreme Court was denied without reasons in April 2007. The implications to both the plaintiffs and defendants in the *Serhan* case are that waiver of tort is on its way to becoming a major toe hold for class action litigants.

The plaintiff's theory of waiver of tort in *Serhan* is that it constitutes a distinct cause of action which is founded on the wrongdoing and the resulting enrichment of the defendant. Counsel for the proposed class pleaded that a constructive trust had been created of the profits from the meters and strips, and that the defendant had been unjustly enriched by its wrongful conduct. In order for a constructive trust based on wrongdoing to be found, four criteria must be met.

1. The defendant must be under an equitable obligation to the plaintiffs
2. The assets gained by the defendants must be derived by actual or agency activities of the defendant in breach of that obligation,
3. The plaintiff must show a legitimate reason for seeking a proprietary remedy over damages
4. That there are no factors in existence which would make the imposition of a constructive trust unjust.

Cullity J. considered waiver of tort again in the 2007 case of *Heward* v. *Eli Lilly.* In *Heward* the plaintiffs were a class of people who had taken an anti-psychotic medication manufactured and marketed by Eli Lilly. The drug had known side-effects which included an increase risk of diabetes of which the defendant manufacturer failed to warn. Some of the class seeking certification had developed diabetes after taking the drug.

Cullity J. reviewed the authorities and found that there were two competing theories of waiver of tort: a wide view - all the principles which apply to unjust enrichment also apply to waiver of tort, and a narrow view - waiver of tort is a distinct cause of action, separate and apart from unjust enrichment and may be founded on the wrongful conduct of the defendant. Cullity J. again held that whichever theory applied, the matter was not appropriate to decide on a motion for certification. He certified the class.

Would-be classes in climate change litigation still have the challenge of showing that the plaintiff class was owed an equitable obligation by the defendant polluter. The court in Serhan was prepared to accept the possibility that the court would find that an equitable obligation existed between the manufacturer of a defective health care product and the ultimate users of those products. The Supreme Court of Canada seems similarly prepared to recognize a broader range of circumstances under which "equitable" obligations will be recognized to the "broad umbrella of good conscience" for wrongful acts such as fraud and breach of the duty of loyalty.

Canadian case law on other topics, as well as the current early success of class action climate litigation in the U.S. creates the potential for class action litigants to take the position that large emission sources should not be allowed to profit from their wrongful acts which contribute to global warming, and that the profits derived from these wrongful acts should be held in a constructive trust for the benefit of the citizens who suffer from the effects of global warming. A class action suit for climate change would face a host of hurdles related to certification; however, Ontario seems to be amenable to novel causes of action when veiled under the doctrine of waiver of tort. The mere existence of such claims, whether ever adjudicated upon, is likely to raise some concern. It is likely only a matter of time before Canada sees its own share of claims being submitted for certification given the impracticality of individual plaintiff actions.

ALLOCATING RESPONSIBILITY FOR REMEDIATION COSTS
CASE COMMENT - *GEHRING ET AL V. CHEVRON CANADA LIMITED ET AL*, 2006 BCSC 1639

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Passive owners of real property who fail to do their environmental due diligence early on may be faced with hefty cleanup costs down the road. In a recent case out of British Columbia, this was a costly lesson.

The facts in *Gehring v. Chevron Canada Limited* were as follows: The Plaintiffs, Mr. Gehring and Mr. Robertson, owned property in Salmon Arm, B.C., which they had purchased 14 years earlier. In March 2004, an assistant regional waste manager determined that the property was a contaminated site. The Plaintiffs spent over $100,000 removing contaminated soil from the property. They then started a legal action asking that the remediation costs be allocated among seven defendants.

Long before the Plaintiffs had purchased the property, it had been used as a retail gas station, complete with underground storage tanks ("USTs"), gasoline pumps, and lines from the USTs to the pumps. This lasted for about 38 years, until the previous owner removed the USTs and piping, and sold the property to the Plaintiffs.

The seven defendants were two companies and their directors who sold gasoline from the property to retail customers; Chevron Canada, who sold gasoline to the operators for two of those years; and the property owner and its director who had removed the USTs and piping.

The court found that the contamination - up to 20,000 litres of petroleum and hydrocarbon - resulted primarily from long, slow leaks from the UST valves and piping. The existing contamination continued to spread right up until the Plaintiffs began remediation.

In apportioning liability for clean up costs, the court acknowledged that there is no precise formula for allocating responsibility. The primary factors at play were a person's degree of involvement in the conduct which contributed to the contamination, and the relative due diligence of the responsible persons, "bearing in mind the increasing public awareness of environmental concerns over time".

The court held that the Defendant L&L Motors and its director were responsible for 66% of the contamination of the property during their 14.5 years of operation, which included most of the 1970's where "the public was increasingly aware of the problems of gasoline contamination". The court also found that L&L Motors' inventory system was inadequate to detect minor slow leaks, given that it did not compare purchases with inventory plus sales. Given these factors, the court held that L&L Motors and its director were responsible for 50% of the total remediation costs.

While the Defendant Fireside and its director did not cause any of the contamination, the court considered that during Firestone's 13.5 years of ownership, it knew that the property had been used for the retail sale of gasoline, and that there had been gasoline odours while removing the previously drained USTs and piping, but it did not investigate or remediate the contamination. On that basis, combined with the fact that public awareness of the problems of gasoline contamination was increasing, the court held that Firestone was responsible for 25% of the total remediation costs.

The Plaintiffs, surprisingly, were also held 25% responsible. The court considered that while they did not know until 1996 that the property had been used as a gas station, they could have found out years earlier had they been more diligent when purchasing the property. The court again emphasized that the problems with gasoline contamination were well known by the time the Plaintiffs became owners of the property.

In future, purchasers and owners must pay closer attention to the purchase and sale agreement and who is to be responsible for contamination. As well, potential purchaser simply must complete appropriate and timely environmental due diligence.

CLIMATE CHANGE ACTION IN ALBERTA: WHAT'S HAPPENING?

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The Alberta government has recently passed new climate change legislation aimed at reducing the emissions **intensity** of facilities that produce over 100 000 tonnes of specified gases per year. The *Climate Change and Emissions Management Amendment Act* ("*CCEMAA*"), and its accompanying regulation, the *Specified Gas Emitters Regulation*, ("*Emitters Regulation*") provide the framework for reduction beginning in July, 2007.

The prior statute governing emissions, the *Climate Change and Emissions Management Act,* S.A. 2003, c. C-16.7 set the intensity reduction target at equal to or less than 50% of 1990 levels relative to the GDP by December 31, 2020. This is in contrast to the new emissions intensity reduction targets set by the *Emitters Regulation* which bases the targets on whether a facility is established or new, and its year of commercial operation.

The Emitters Regulation

Established facilities that have been in commercial operation for 8 years or have completed their 1st year of commercial operation before January 1, 2000 are subject to a 12% emissions intensity reduction, calculated based on the average of the facility's baseline emissions intensity from 2003 - 2005.

New facilities that have been in commercial operation for less than 8 years, or have completed their 1st year of commercial operation by December 31, 2000 are subject to a 6 year phase-in of emissions intensity

reductions at 2% per year until a reduction of 12% is reached. The reduction is based on the baseline emissions intensity taken in the facilities 3rd year of commercial operation, and the reductions do not begin until year 4.

Facilities can meet their intensity reduction targets either by actually reducing emissions to below the limit, or by choosing from 3 alternative options.

- **Fund credits** may be obtained from the Climate Change and Emissions Management Fund by paying $15 for a 1 tonne reduction credit;
- **Emissions offsets** may be purchased from facilities located in Alberta that have reduced their specified gas emissions after January 1, 2002;
- **Emission performance credits** may be purchased from facilities governed by the Emitters Regulation, whose actual emissions intensity is less than their net emissions intensity limit for that period.

These options operate as revocable licences which authorize the amount of specified gas represented by the licence to be emitted. Failure to comply with the emissions limits constitutes an offence, subject to a penalty of not more than $200 for every tonne of specified gases emitted which exceeds the limit. Due diligence is available as a defence.

Orders may be issued by the director if: (1) an emissions intensity limit is exceeded, (2) the net emissions intensity was calculated incorrectly or based on inaccurate, incorrect or false information, or (3) if the value used to calculate the net emissions intensity is no longer valid because specified gases represented as not being released have subsequently been released into the atmosphere.

Such orders may issue even if an offence or administrative penalty has been made out with respect to the subject matter of the order. They may require remedial measures to be undertaken, whether in the form of obtaining emissions or performance credits, making contributions to the Fund, or taking any other measures the director considers advisable. Contravention of such an order itself is also an offence, subject to a penalty of not more than $50 000 for an individual, and $500 000 for a corporation. Due diligence is available as a defence.

Climate Change and Emissions Management Amendment Act

The *CCEMAA* provides a framework for the director to issue compliance orders or administrative penalties for contraventions of the Act or Regulation. It also sets out offences, and defines the powers of investigators to look into contraventions of the Act and Regulation.

Compliance orders specify measures to be taken in order to comply with the Act or Regulation, and may include reporting requirements, maintaining records, preparing audits, submitting information, proposals or plans, or taking other measures.

Administrative penalties are fines for contravening the Act or Regulation, and may be a one-time amount or daily fee. Administrative penalties are mutually exclusive from offences, such that if a person pays a penalty, she cannot be charged with an offence under the Act. Appeals from administrative penalties and offences go to the Environmental Appeals Board for review.

Offences such as providing false or misleading information, and contravening a compliance order render individuals liable for up to $100 000 and/or imprisonment for not more than 2 years, and corporations liable to not more than $1 000 000 if done knowingly; otherwise, the fines cannot be more than $50 000 and $500 000, respectively. No due diligence defence is available for offences committed knowingly. Failing to provide required information, and interfering with or not assisting inspectors also carry the latter penalty, along with the due diligence defence.

Investigations under the Act or Regulation may be triggered by any 2 persons ordinarily resident in Alberta of at least 18 years of age. The director must investigate all matters she considers necessary and report to the applicants within 90 days, but may also discontinue the investigation and provide reasons for doing so. The Act contains extensive detail on the powers of investigators in and procedures to be used in conducting investigations under the Act and Regulation.

Where to from here?

The *Emitters Regulation* and *CCEMAA* provide a framework for reducing emissions intensity of specified gases for large emitters. This strengthens and adds to Alberta's greenhouse gas reporting program under the *Specified*

Gas Reporting Regulation and the *Specified Gas Reporting Standard*, which establish reporting requirements on emissions data to calculate intensity levels and targets.

Emitters not governed by the *Emitters Regulation*, who do not emit 100 000 tonnes of specified gases but who wish to participate in specified gas reduction may create emissions offset projects. Reduction credits from such projects can then be sold to facilities attempting to meet their emissions intensity reduction limits under the Regulation.

At present, approximately 100 facilities have reported subject to the *Emitters Regulation*, and the first reduction date will be July 1, 2007 for those that emitted over 100 000 tonnes during any calendar year from 2003 - 2006. Reduction for all other new and established facilities will be required in 2008 and subsequent years, until the Regulation is re-evaluated upon its expiry on September 1, 2014 to ensure its continued relevance and necessity.

The first date for submission of compliance reports under the *Emitters Regulatio*n will be March 31, 2008, where we will begin to see how effective the Act and Regulation are at addressing actual reduction of specified gases. Since there is no prohibition on expanding facility operations, simply reducing intensity emissions may not actually lead to a decrease in emissions. Thus, the effectiveness of Alberta's new statutory framework at reducing specified gases, given its focus on emissions intensity reduction rather than on absolute caps, remains to be seen.

WHAT'S HAPPENING AROUND MILLER THOMSON

27 Miller Thomson lawyers have been profiled in the *Best Lawyers in Canada* Directory. This recognition represents the firm's excellence in a wide range of legal areas. **JohnTidball**, **Tony Crossman**, **Bryan Buttigieg** and **Sandra Gogal,** were listed as leading practitioners in Environmental Law. This special report was featured in the July/August 2007 edition of the *Financial Post Business* Magazine.

Tony Crossman gave a legal case law update and particpated in other panels at the Pacific Business & Law Institute (PBLI) Contaminated Sites Update conference in Vancouver.

On November 26 and 27, **Luc Gratton** will be presenting at the Forum Québécois sur l'énergie (Quebec Energy Forum) on windmill development in Quebec.

Rosanne Kyle and **Fred Fenwick** will be presenting on "Impact Benefit Agreements and Taxation Considerations in Negotiating Major Business Agreements" at Insight's Aboriginal Financial Management and Economic Development conference in Calgary on September 10 and 11, 2007. **Rosanne** will also be speaking on "Engaging Aboriginal Communities: Laying the Groundwork for a Sustainable Relationship" at the Canadian Institute's Negotiating with Aboriginal Communities conference in Toronto on September 18 and 19, 2007.

Sandra Gogal is co-chairing the Canadian Institute's Negotiating with Aboriginal Communities conference in Toronto on September 18 and 19, 2007 and will be speaking on "Negotiating and Implementing Impact Benefit Agreements: Lessons Learned".

Tamara Farber will be presenting on environmental issues in real estate development. at Lorman's "Real Estate Development from Beginning to End - Managing Environmental Risk".conference on September 18, 2007.