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ENVIRONOTES!

January 2005

Environmental Solutions for Business

Inside

MILLER THOMSON LLP CONTINUES NATIONWIDE EXPANSION WITH QUÉBEC MERGER

Miller Thomson LLP, Canada's tenth largest law firm, has merged, effective January 1, 2005, with Pouliot Mercure, a 56-lawyer firm based in Montréal. The name of the firm will remain Miller Thomson, except in Québec where the name Miller Thomson Pouliot will be used.

For more information on how Miller Thomson can provide your organization with seamless service across Canada, please contact your Miller Thomson contact lawyer or John Tidball (905.415.6710) or Tony Crossman (604.643.1244), the Co-Chairs of our National Environmental and Regulatory Law Group.

US ENVIRONMENTAL LAWS CAN AFFECT CANADIAN BUSINESSES

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Teck Cominco Limited ("Teck Cominco"), a Canadian company, owns a smelter in Trail, British Columbia, which is about 10 Columbia River miles north of the United States-Canada border. The Trail smelter has been in operation for decades.

On December 11, 2003, the United States Environmental Protection Agency ("EPA") issued an order to Teck Cominco to investigate and determine the extent and nature of contamination in the United States portion of the Columbia River due to metals disposed of into that river upstream by the smelter operations, and in particular Lake Roosevelt in Washington State.

Initially, Teck Cominco sought a cooperative arrangement with the EPA to address the concerns around Lake Roosevelt and sought to deal with the issues through diplomatic channels.

Teck Cominco originally offered to fund independent research at a cost of $13 million and pay for the appropriate clean up attributable to the company's operations. However, negotiations between Teck Cominco and the EPA broke down.

In July, 2004, the Confederated Tribes of the Colville Reservation brought a legal action against Teck Cominco to enforce the order. The state of Washington intervened in the litigation.

Teck Cominco brought a motion to dismiss the legal action, but the US District Court refused to do so on November 8, 2004. Teck Cominco has appealed this decision.

The Court had to address the question of whether the superfund legislation, CERCLA (*Comprehensive Environmental Response, Compensation and Liability Act*) was intended by the US Congress to have extraterritorial application to conduct occurring outside of the United States. Although the Court found that

there was no direct evidence that Congress intended such application, it found that there was no doubt that Congress intended CERCLA to "clean up hazardous substances at sites within the jurisdiction of the United States". That, combined with the fact that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, led the Court to conclude that the extraterritorial application of CERCLA was appropriate in this case. The Court also noted:

1. The site of which the order was made was a domestic site over which the United States had sovereignty and legislative control; and
2. The extraterritorial application of CERCLA did not create a conflict between US laws and Canadian laws.

The Court went out of its way to say that the application of CERCLA is not an attempt to regulate the discharges at the Trail Smelter, but rather simply to deal with the effects of that in the United States. The Court said:

> In other words, plaintiffs are not attempting to tell Canada how to regulate defendant's disposal of hazardous substances into the Columbia River, simply that they expect defendants to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs' use of CERCLA is not intended to supercede Canadian environmental regulation of the defendant. Canada's environmental laws are intended to protect Canadian territory, including the 10 miles from Trail, BC to the US border. Those laws do nothing to remedy the damage that has already occurred in US territory as a result of the defendant's disposal of hazardous substances into the Columbia River.

The Court also noted that the Trail smelter is not and could not be regulated under US statutes. The Court found that the smelter is likely subject to liability under CERCLA to clean up contamination that has been caused within the United States because "Canada's own laws and regulations will not compel the Canadian facility to clean up the mess in the United States which it has created".

The Court concluded that because the fundamental purpose of CERCLA is to ensure the integrity of the US environment, "Congress intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct.

The implications of this decision include:

1. Canadian companies that cause pollution/contamination in the United States, whether through transboundary routes or directly, may be held responsible and subject to US EPA orders to investigate and clean up the mess.
2. Pollution liabilities for Canadian companies may need to be re-assessed in light of this decision (as to whether these are liabilities to be reported on the balance sheets of the Canadian company).
3. Canadian companies will generally need to assess the environmental impact of their operations, not only from a Canadian legal perspective but also from a US perspective. For example, what may be permitted in Canada, may not be in the US. What is the impact not only in Canada but in the US?
4. Will the order have teeth? That is, how will the EPA enforce the order against a Canadian company who is not operating in the US? Will the EPA call on Canadian courts to enforce the order, and if so, will Canadian courts do so?
5. If the decision is upheld, US businesses that may cause environmental impacts in Canada may also expect similar action from Canadian regulators.

NOTICE REQUIREMENTS FOR EXPORTING AND IMPORTING HAZARDOUS WASTES IN CANADA

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Exporters and importers of materials which are considered to be hazardous wastes under Canadian legislation need to be aware of the restrictions which apply to the export and import of hazardous wastes, and their obligations to file documentation with the requisite authorities.

The federal *Export and Import of Hazardous Wastes Regulations* ("Regulations"), passed pursuant to the *Canadian Environmental Protection Act* ("Act"), define what is considered to be "hazardous wastes". The definition includes such substances as corrosive or poisonous flammable solids or liquids, lead acid batteries, and certain oils, treated woods and asphalt cement. To determine whether a particular substance falls within the definition, the Regulations need to be reviewed carefully.

Under the Act, no person can export or import a hazardous waste unless he/she complies with the requirements specified in the Regulations.

Those requirements include the following:

- The import of the hazardous waste must not be prohibited under Canadian law. Some research will be required in order to determine whether the particular substance is prohibited from being imported under the Regulations or other federal or provincial laws.
- The importer of the hazardous waste must be the disposer, or recycler, of the hazardous waste in Canada. In other words, the party who is purporting to import the material into Canada, must also be the party who is disposing of, or recycling the waste in Canada.
- The country of export must be a signatory to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes* or the *Canada-U.S.A. Agreement on the Transboundary Movement of Hazardous Waste*. Some research may be required to make this determination.
- There must be a signed, written contract between the importer and the person who is exporting the hazardous waste, and the contract must include the information specified in the Regulations. The importer must send this contract to Environment Canada.
- The importer and any agent acting on the importer's behalf must be Canadian residents.
- The importer and the carrier of the hazardous waste must be insured.
- The importer must obtain confirmation that the hazardous waste is allowed under the laws of the province where it will be disposed of, or recycled.

In addition, the importer must complete a manifest, which must at all times accompany the hazardous waste. Copies of the manifest must be sent to Canadian Customs and to Environment Canada. The exporter is also obliged to fill in portions of the manifest, as is the carrier of the materials. Both the importer and the carrier must retain copies of the manifest at their principal place of business in Canada for at least two years following the date of import.

It is critical that importers and exporters of hazardous wastes in Canada comply with these statutory requirements. There are also other requirements applying to the transportation of hazardous wastes and dangerous goods in Canada under the federal *Transportation of Dangerous Goods Regulations* and provincial environmental legislation which should be considered if goods will be transported within Canada. The *Dangerous Goods Shipping Regulations* will also apply if the goods are being carried aboard a vessel in Canadian waters.

ONTARIO'S NEW WATER TAKING AND TRANSFER REGULATION (O. REG. 387/04)

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On December 18, 2003, the Ontario government placed a moratorium on new and expanded permits to take water ("PTTW"). The moratorium expired on December 31, 2004, with the coming into force on January 1, 2005 of the new *Water Taking and Transfer Regulation* (O. Reg. 387/04) made under the *Ontario Water Resources Act* ("OWRA"). The new Regulation makes a number of significant changes to the water taking regime in Ontario.

Matters for the Director's Consideration

Section 4 of the new Regulation sets out the matters that a Director must consider when he/she is considering an application for a PTTW or considering whether to cancel, amend or impose conditions on a PTTW under section 34 of the OWRA. The Director must consider the natural functions of the ecosystem; water availability; and the use of water (section 4(2)).

High Use Watersheds

Under section 5 of the Regulation, the Director must determine whether an application for a new or expanding PTTW is located in an area of high water use. Water use in all Ontario watersheds has been assessed and mapped under two scenarios: average annual conditions and summer low flow conditions. If a watershed is identified as high use on the Average Annual Flow Map, applications will be refused (section 5(3)). If a watershed is identified as high use on the Summer Low Flow Map only, a PTTW may be granted, provided that it includes a prohibition on water taking during at least the period from August 1 to September 11 (section 5(4)).

High use watershed restrictions only relate to water taking for the following purposes: beverage manufacturing, including bottled water; fruit or vegetable canning or pickling; ready-mix concrete manufacturing, except for portable facilities; aggregate processing, if the water is incorporated into a product in the form of a slurry; product manufacturing or production, if more than 50,000 litres of water in a day is incorporated into the products (section 5(5)). Existing PTTW for the previously noted purposes will be allowed to continue, provided that at the time of application the applicant holds an unexpired PTTW and the application is for the same or lesser amount of water at the same location and for the same purpose (section 5(3)(b) and section 5(4)(b)).

In addition, high use watershed restrictions do not pertain to:

- Water takings from Lake Ontario, Lake Erie, Lake Huron, Lake Superior or any of their connecting channels; the Welland Canal; the St. Lawrence River; or the Ottawa River (section 5(2));
- Water taken by a municipality (section 5(2)(a)); for washing in the course of canning or pickling (section 5(6)); for extraction of aggregates where the water taking is incidental (section 5(7)); for manufacturing or production of pulp and paper or ethanol (section 5(8)); and for agricultural purposes, including aquaculture, nurseries, tree farms and sod farms (section 5(9)).

Notice and Consultation

A Director who is considering an application must give notice of the application to the appropriate municipality and conservation authority (section 7(1)). The Director is not required to give notice if the application is for a PTTW for less than one year or only for irrigation of crops or if in the Director's opinion the delay in giving notice may result in danger to the safety of persons, the environment or property (section 7(2)).

Data and Reporting

All PTTW holders must collect and record data on the volume of water taken daily and report the data to the Ministry on an annual basis (section 9(1)). The data collection and reporting requirements will be phased in over three years depending upon the category within which the PTTW holder falls (section 9(5)):

- Starting July 1, 2005, the following PTTW holders must collect and report the data annually on or before March 31, beginning in 2006: municipal water supplies for small and large municipal residential systems (O. Reg. 170/03); industrial discharges regulated by the MISA regulations; and water takings pursuant to section 5 of the Regulation.
- Starting January 1, 2006, the following PTTW holders must collect and report the data annually on or before March 31, beginning in 2007: all other industrial and commercial purposes; and wildlife and conservation.
- Starting January 1, 2007, the following PTTW holders must collect and report the data annually on or before March 31, beginning in 2008: all other drinking water systems regulated by O. Reg. 170/03; agriculture; and all other purposes.

AN UPDATE ON THE DEFENCE OF DUE DILIGENCE

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Most regulatory offences in environmental law are strict liability offences. The prosecution must prove beyond a reasonable doubt that the defendant actually carried out the offence in question. However, the defendant may establish on a balance of probabilities that it undertook reasonable care in carrying out the activity. This

defence is termed the "due diligence defence". Recently, there have been significant development of this defence. The following is a summary of the some of these noteworthy cases.

R. v. MacMillan Bloedel Ltd.

MacMillan Bloedel was charged with depositing deleterious substances in waters frequented by fish, contrary to section 36(3) of the *Fisheries Act*, when an underground fuel pipe leaked at its Skidegate factory in the Queen Charlotte Islands.

A due diligence defence to a charge under section 36(3) can be made out where the accused reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent, or where the accused exercised all due diligence to prevent the commission of the offence. At issue in this case was the scope of foreseeability under the defence of due diligence for the strict liability offence contained in section 36(3).

The facts are as follows: in 1993 MacMillan Bloedel received a complaint of a possible leak of its underground fuel pipe in Skidegate from the Ministry of Environment. As a result of the complaint, the pipes, which had been installed in the 1960s, were dug up and tested. No leakage was discovered, and the pipes appeared to be perfectly sound.

In September 1995, one of MacMillan Bloedel's own environmental inspectors prepared a report which concluded that the use of underground fuel lines posed a significant environmental problem due to corrosion. He recommended that underground pipes either be installed above ground or in a secondary sleeve to allow early detection of leaks. MacMillan Bloedel replaced some of its underground lines, but considered the Skidegate pipes to be last in priority for replacement, partly due to the favourable 1993 inspection, and partly because the company was considering closing its Skidegate operation entirely.

In May 1997, a fuel leak occurred in the Skidegate line. This leak was traced to a micro-biological process that was a result of the pipes being dug up in 1993. MacMillan Bloedel admitted that the leak had occurred, but argued the defence of due diligence.

The majority of the Court of Appeal accepted MacMillan Bloedel's defence. It had honestly believed that the pipes were sound, and such belief was reasonable. The Court found that the deleterious substances in the water which gave rise to the charge was not reasonably foreseeable because the leak itself was not reasonably foreseeable. The fact that the leak occurred as a result of an unforeseeable cause was determinative of the issue in favour of MacMillan Bloedel.

The effect of this decision is to narrow the issue of foreseeability in the defence of due diligence to encompass only the specific cause of the particular event giving rise to the charge, and not the foreseeability of a more general cause (in this case, leakage). Some analysts have stated that this decision broadens the defence of due diligence such that if an accused was aware of only some potential environmental hazard, but not the cause of the hazard, the accused should not be convicted.

R. v. BHP Diamonds Inc.

BHP, which operates a diamond mine in the Northwest Territories, was charged with an offence under section 36(3) of the *Fisheries Act*, and section 35(1) of the same Act, which states:

> No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

The Act's definition of "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

As in *MacMillan Bloedel*, the defence of due diligence here was successfully argued. The charges against BHP arose out of its construction of a mining project in 1994 to 1997, one aspect of which involved diverting water around two lakes by way of a 3.5 km channel. During the spring run-off, large quantities of sediment entered the completed channel, and a huge quantity of sediment was deposited into Kodiak Lake, a fish habitat.

The Supreme Court held that the construction of the channel and the harmful alteration of fish habitat was authorized by an agreement between BHP and the Minister of Fisheries and Oceans. Moreover, it found that BHP had acted reasonably in the construction of the diversion channel, the eventual design of which was to accommodate fish habitat enhancement and creation, and that BHP took special care to reduce the impact on the surrounding environment.

The Court noted that a successful due diligence defence does not require perfection on the part of the accused. All that is required under this branch of the test is that the accused prove on a balance of probabilities that it acted diligently and took all reasonable steps to avoid the harm.

R. v. Canadian National Railway

In this case, a CNR crew dismantled two beaver dams on a creek, which immediately decreased the water level. This had wide ranging and significant harmful effects including the loss of fish habitat. At trial, CNR was acquitted on the basis of its due diligence defence. The appeal was dismissed. The tests set out in *MacMillan Bloedel* were applied by the Court in this case.

The judge found that:

1. CNR exercised all due diligence to prevent the commission of the offence as the trial judge found that CNR had carried out its beaver dam removal with reasonable care and due diligence. CNR was found to have had a high standard of awareness and decisive and continuing planning and action. The beaver crew was trained in the slow release method, a method approved by DFO, and that this method was a reasonable response to meet the need of CNR to ensure transportation safety, while at the same time preventing unnecessary harm to the environment and fish habitat.
2. There was a reasonable and honest belief in the mind of a CNR employee in the existence of facts that if true, would render CNR's conduct innocent. The beaver crew believed that the use of the slow release method would not result in the harmful alteration of fish habitat.

The Crown argued that CNR should have conducted a joint inspection with the DFO and sought the DFO's advice on the appropriate amount of water reduction. The Court disagreed saying that it was reasonable for CNR to rely on its track inspections, Beaver Risk Management Program and past consultations with the DFO. Although there was a "breakdown" in the usual consultation process with the DFO, this was not fatal to CNR's due diligence defence.

R. v. Simmons

This was a case of a licensed fisher who exceeded her crab quota. She knew the amount of her remaining quota. Although she believed that she had caught 1600 pounds, she in fact caught 2100 pounds. She admitted it was difficult to keep track because of the busy and hectic activities on the boat. She had made a tally on paper but it got wet. No one was in charge of keeping track.

The Court found that the accused was not reasonably careful or diligent in her efforts to avoid going over her quota. She did not hold an honest but mistaken belief with regards to the amount of crabs she caught, but instead had a cavalier and careless attitude. Although the Court took into account the conditions under which the crab fishery operates, and that estimation is not an exact science, the discrepancy was significant given the experience of the accused.

FEDERAL COURT PROHIBITS REVIEW OF BENNETT ENVIRONMENTAL FACILITY

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On May 21, 2004, the eve of the recent federal election, the then Federal Minister of the Environment, the Honourable David Anderson, announced through a news release that he had decided to refer a substantially completed soil decontamination facility constructed and owned by Bennett Environmental

Inc. ("Bennett") in Belledune, New Brunswick, to a review panel for an environmental assessment under sections 46 and 48 of the *Canadian Environmental Assessment Act* ("Act"). Specifically, he sought to have a review panel assess potential transboundary environmental effects of the facility in Quebec and on federal lands and waters. The facility had already been through the provincial environmental assessment process in New Brunswick, a process in which federal scientists had participated.

The news release went on to say that although federal experts were of the view that the High Temperature Thermal Oxidizer facility, which is intended to rid contaminated soil of pollutants, was not likely to cause significant transboundary environmental effects, the Minister decided further assessment was needed because Health Canada was of the view that available data was too limited to state with "absolute confidence" that there were no human health concerns for transboundary communities.

Bennett's application for judicial review was filed on July 13, 2004, and was heard by Justice Harrington of the Federal Court of Canada in Ottawa on August 13, 2004. On August 19, 2004, Justice Harrington granted the judicial review, quashed the decision of the Minister, declared it null and void, and prohibited the Canadian Environmental Assessment Agency ("CEAA") from proceeding with a review of the matter, on the ground that the facility was no longer a "project" under the Act and that, therefore, the Act did not apply.

This is the first reported decision to consider sections 46 and 48 of the Act. While several issues were considered, the judgment turns on the issue of whether or not the facility is a "project" within the Act. In his Reasons, Justice Harrington states that the "Act only permits environmental assessments of 'projects', be they mandatory pursuant to section 5 and following or discretionary arising from transboundary considerations as set out in sections 46 and following". He concludes that as the facility was more than 90% complete at the time the Minister ordered the review panel, it "was no longer a 'project'", the Minister "was acting without legal authority", and, therefore, "the review panel cannot proceed".

In reaching this determination, Justice Harrington relies on the Federal Court of Appeal decision in *Tsawwassen Indian Band v. Canada (Minister of Finance)*, where Linden J.A. said that "once a project is approved and construction has legally begun, that approval cannot be reopened... [E]nvironmental assessments must only be done of proposed construction which is still in the planning stages". In his Reasons, Justice Harrington does not determine at what precise moment the facility went beyond the "project" stage. His Reasons state, however, that "it had certainly gone beyond that stage when construction began on September 15, 2003". Justice Harrington emphasizes that the purpose of the Act is to project *ahead*, to prevent works that may be environmentally detrimental from first taking place. He further states that the facility was past the point of no return, "even when the Minister was petitioned to establish a review panel".

Justice Harrington further states that "approval of a project is not a licence to pollute. If the facility does in fact pollute, Bennett must pay and the facility could be shut down. Common law and statutory remedies remain intact." Therefore, in the event that significant transboundary environmental effects of the facility are discovered, other measures are available at common law, and through statute. The Act deals only with *proposed* projects, and not substantially completed ones.

Therefore, a project that is substantially constructed, has received the necessary provincial approvals, and has undergone a provincial environmental assessment process, should not then be subject to a federal environmental assessment review panel.

On September 28, 2004, the Federal Minister of the Environment and the CEAA filed a notice of appeal on the grounds that Justice Harrington erred in concluding that the proposed operation, decommissioning or abandonment of the Belledune facility was not a "project" for the purposes of sections 2, 46 and 48 of the Act.

THE DUTY TO CONSULT: THE SUPREME COURT OF CANADA'S DECISIONS IN THE *HAIDA NATION* AND *TAKU RIVER TLINGIT FIRST NATION* CASES

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On November 18, 2004, the Supreme Court of Canada released its much-anticipated decisions in *Haida Nation v. British Columbia (Minister of Forests) ("Haida Nation")* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) ("Taku River Tlingit")*. These important decisions provide clarification of a number of key issues relating to the duty to consult with and accommodate aboriginal groups affected by land and resource development.

In these cases, a unanimous Supreme Court of Canada set out the basic principles applicable to the duty to consult. The Court found that only government, and not industry, has a duty to consult and seek accommodation with First Nations. It also held that an aboriginal group is not required to first prove its asserted rights or title before government has a duty to consult. The government's duty to consult arises when it has real or constructive knowledge of the *potential* existence of the aboriginal right or title, and contemplates conduct that might adversely affect that right or title.

It appears from the decisions that if a First Nation in British Columbia is participating in the Treaty Commission process, government will have a duty to consult with the First Nation about any projects affecting claimed rights or title in traditional territories asserted at the treaty table. In the words of the Court, government "cannot cavalierly run roughshod over aboriginal interests where claims affecting those interests are being seriously pursued in the process of treaty negotiation". Arguably, the same rule will apply outside British Columbia, in other parts of Canada where First Nations are involved in treaty or land claims negotiations.

The extent of the duty to consult will depend upon the circumstances of the case. The Court was clear in stating that the duty to consult does *not* provide First Nations with a veto right - government is not required to obtain aboriginal consent to a project before it approves it. Aboriginal groups also cannot attempt to frustrate the government's reasonable good faith efforts to consult.

The stronger the asserted right or title, and the more serious the potential adverse effect of the proposed project on the right or title, the broader the scope of the duty to consult. Where the claim is weak or the potential impact of the proposed project is minor, the only duty may be for the government to give notice, disclose information and discuss any issues raised in response. Where there is a strong claim and there is a risk of a significant impact, "deep" consultation may be required, which could include providing the First Nation with an opportunity to make submissions, having a formal decision-making process in which the First Nation can participate, and providing written reasons.

Where there is a strong rights or title claim that is likely to be adversely affected by the proposed project, government may be required to accommodate the aboriginal group by taking steps to avoid irreparable harm or to minimize the impacts on the aboriginal group's rights. In these situations, government must balance aboriginal concerns reasonably with, on the one hand, the potential impact of the project on the asserted rights or title and, on the other hand, other societal interests. Consultation must be *meaningful* and *responsive*, and government must be willing to make changes to its plans based on information received through the consultation process.

The Court also noted that the duty to consult is a *process*, and not necessarily a one-time endeavour. Government may be required to continue to consult with an affected First Nation as a project proceeds and additional licences and approvals are sought at various stages.

Of particular note for business interests is the Court's finding in the *Haida Nation* case that industry does not have a duty to consult with First Nations. Nonetheless, in most cases, industry would be well-advised to become involved in consultation and accommodation efforts, ideally early in the process, and to try to address concerns raised by affected First Nations. Although the *legal* responsibility for consultation and accommodation is that of government, industry has real and substantial interests in the outcome of government's efforts to consult and accommodate. If government fails to adequately consult with aboriginal groups potentially affected by a company's proposed project, the project may ultimately be delayed, or prohibited, by a court.

Industry is also often in the best position to try to address aboriginal groups' concerns through modifications to the project or involvement of aboriginal people in project design, implementation or operation. For these reasons, it makes sense for industry to be an active participant in consultation.

The decisions in *Haida Nation* and *Taku River Tlingit* are landmark decisions which provide much-needed guidance on many issues relating to the duty to consult. However, a number of issues remain unresolved, such as the precise requirements of the duty to consult in any given situation and when a duty to accommodate will be triggered. It is likely that some of these issues will spark additional litigation as First Nations and governments attempt to implement the Supreme Court of Canada's decisions. As the Supreme Court itself notes in the decisions, it is through the case law that the parameters of the duty to consult will continue to be drawn.

R. v. KINGSTON (CITY): DEPOSIT OF DELETERIOUS SUBSTANCES, SECTION 36(3) OF THE *FISHERIES ACT*

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The City operated a municipal dump site on the shore of the Cataraqui River from the 1950s to the early 1970s. Afterward, the site was transformed into a municipal golf course. Groundwater and surface water testing of the site revealed that ammonia had seeped into the river from the site. At trial, the Court found the City guilty because fish died during tests conducted in accordance with established testing protocols.

The main issue on appeal was the interpretation of section. 36(3) of the *Fisheries Act*. The Ontario Court of Appeal held that a substance is deleterious if, when added to any water, it alters the quality of the water such that it is likely to render the water deleterious to fish, fish habitat or to the use of fish that frequent the water. The Court found that:

> The focus of section 36(3) is on the substance being added to water frequented by fish. It prohibits the deposit of deleterious substances in such water. It does not prohibit the deposit of a substance that causes the receiving water to become deleterious. *It is the substance that is added to water frequented by fish that is defined, not the water after the addition of the substance.* A deleterious substance does not have to render the water into which it is introduced poisonous or harmful to fish; it need only be likely to render the water deleterious to fish. The *actus reus* is the deposit of a deleterious substance into water frequented by fish. There is no requirement that the receiving waters are deleterious to fish. [emphasis added]

The Court disagreed with cases cited for the proposition that when a substance is not inherently deleterious, the substance's nature and concentration must be proven to be deleterious at the point it enters the receiving environment.

The Court went on to say that the prosecution did not have to prove which component of the leachate was responsible for the degradation or alteration of the quality of the water, such that the water was likely to be rendered deleterious to fish, nor was it obliged to show that fish living in the vicinity of the landfill were harmed.

The Court did not agree with the City's argument that the phenomenon known as "pH shift" caused fish deaths in the bioassays rather than the leachate itself because the argument was entirely "theoretical" and "scientific experts who wish to overturn accepted science…have to do more than testify in court". As to the City's argument that the samples would not have been acutely lethal had they been tested *in situ* rather than in accordance with Environment Canada protocols on acute lethality testing, the Court concluded that the test methodology was fair and impartial.

Recently, some analysts have noted that the LC_{50} test protocol is flawed. It appears that in laboratory conditions where ammonia is present, a pH shift can turn a non-toxic effluent toxic. The City is seeking leave to appeal to the Supreme Court of Canada.

The following are implications of the Court of Appeal decision:

1. Charges under the *Fisheries Act* may be laid not only by the government regulator but by *private citizens*;
2. Charges may be laid not only against the owner and operating entity (such as the municipality, in this case), but also against *corporate representatives* (in this case, the City's Director of Environmental Services and Engineering);
3. It is not necessary to show actual impairment to the receiving waters or fish but simply that a deleterious substance was deposited into waters and that the substance was harmful to fish; and
4. The government regulator's protocols and testing methodologies are acceptable as being both reliable and accurate.

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