

# MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

## ENVIRONOTES!

June 2005

*Environmental Solutions  
for Business*

### CONTROVERSIAL BILL 133 PASSED BY LEGISLATURE



*Bruce McMeekin  
Markham  
905.415.6791  
mcmeein@millerthomson.ca*



*Michelle Fernando  
Markham  
905.415.6716  
mfernando@millerthomson.ca*

Bill 133 received Third Reading on June 9. Portions of the Bill became law on Royal Assent on June 13, amending the *Environmental Protection Act* (the "EPA") and the *Ontario Water Resources Act* (the "OWRA"). Other portions, particularly those dealing with environmental penalties, will come into force once enabling regulations have been promulgated by Cabinet.

In our last EnviroNotes, dated May 2005, we reported that the Bill was on an unusual route through the legislature and had been referred to the Standing Committee of the Legislative Assembly prior to Second Reading. The referral to the Standing Committee resulted in a number of amendments to the enacted Bill, which can be summarized as follows:

#### **Environmental Penalties**

The Bill, as originally introduced, amended the EPA and the OWRA to provide the MOE with a very significant new enforcement tool. If a Ministry inspection identifies any one of a number of potential contraventions, the MOE will be authorized to issue an Order to the inspected party requiring it to pay a penalty of up to \$100,000 for each day the contravention continued or occurred. Regulations will be promulgated setting out the factors to be considered in determining quantum. The penalized party can appeal to the Environmental Review Tribunal on both the Order's merits and quantum, with a further right of appeal to the Superior Court of Justice on questions of law and to the Minister on questions of fact. Payment of a penalty by a party will not be a bar to the MOE commencing a prosecution against the party for the same contravention, although payment will not be admissible in the prosecution as an admission. Failure to pay the penalty could result in the suspension of approvals or the MOE's refusal to issue an approval. The unpaid penalty may also be enforced as civil judgment in the Superior Court.

A number of amendments were made to the Bill prior to its enactment which have the potential to limit the application of environmental penalties. Ordinary provincial officers will not be authorized to issue Orders. Rather, only MOE Directors will have the authority to issue, meaning that the Directors will be in a position to avert unmerited Orders. The MOE will not be authorized to issue Orders to individuals, unless the individual holds an approval or permit and the individual is within a class of persons ("regulated persons") defined by regulation. In a parallel website posting, the MOE advised on June 9 that only industrial sector MISA ("Municipal/Industrial

#### **Inside**

Controversial Bill 133 Passed by  
Legislature

Brownfields Update —  
Mandatory RSC Filing Becomes  
Law on October 1, 2005

Contaminated Sites - Recovering  
your Remediation Costs

What's Happening Around Miller  
Thomson

Strategy for Abatement") dischargers would be liable for penalties. Although this may be the initial intent, nothing prevents the MOE from expanding the class in the future to include other regulated persons.

The legislation also provides for the striking of agreements between the MOE and Ordered parties that can result in Orders being cancelled or the quantum reduced if the MOE is satisfied the party has completed the steps in the agreement to, presumably, remedy the situation that led to the Order's issue.

On the appeal of Orders issued to deal with breaches of the substantial pollution provision in the EPA (section 14) and the obligation to remediate spills (section 93), the onus of proof will be reversed on some issues. For example, for section 14 contraventions, it will be incumbent on the party to disprove what was discharged was not a "contaminant".

One issue left untouched by the legislature prior to the Bill's enactment is the relevance of the defence of all reasonable care. The legislation provides that it will not be a defence to the merits of an Order, although one would think that it will be considered a mitigating factor on quantum by the issuing Director or a factor that may contribute to entering into an agreement with the MOE to cancel payment or reduce the penalty's size. At a minimum, the legislation provides that if the party has in place an environmental management system "specified in the regulations" at "the time of the contravention to which the penalty relates occurred", the regulations must provide for a reduction in the amount of the penalty.

The environmental penalty provisions will not come into force until regulations are ready that formally identify the class of regulated persons and the factors to be considered in calculating the size of the penalty imposed.

Although the amendments to the Bill adopted by the legislature are welcome, no doubt the unavailability of reasonable care/due diligence as a defence will be aggressively litigated before the Environmental Review Tribunal and, subsequently, the courts.

#### **Section 14/EPA Amended**

The legislature also amended section 14 of the EPA to prohibit discharges that may cause an adverse effect. This compares to the prior wording which dealt with situations where there was at least the likelihood, as opposed to the possibility, of an adverse effect resulting from a discharge. The duties to report pollution, however, remain fixed to situations when there is at least the likelihood of an adverse effect. In addition, the MOE will be authorized to issue Control Orders only where there is, at the least, the likelihood of an adverse effect. Before an Order issues requiring payment of an environmental penalty for an alleged breach of section 14, the MOE will have to be satisfied that the discharge created the likelihood of an adverse effect.

This amendment greatly expands the application of section 14. Although, historically, the possibility of an adverse effect from a discharge required the discharger to obtain a Certificate of Approval, theoretical contamination, as opposed to the likelihood of contamination, was not offensive to section 14.

There are a whole host of situations where discharges may result in an adverse effect. The amendment will generate a great deal of uncertainty within industry as to whether a number of industrial operations offend section 14.

The amendments to section 14 did not become effective on Royal Assent but rather will be proclaimed into force on a date to be named by Cabinet.

#### **Directors' and Officers' Liability**

Bill 133 has also amended the directors' and officers' liability provisions in both statutes. Historically, these provisions created a duty of care, independent of those found in common law, requiring executives to take reasonable steps to ensure that their employers' operations did not create the risk of pollution. Bill 133 has expanded this duty to include the requirement that executives take all reasonable care to ensure compliance with a number of specific regulatory provisions in both the EPA and OWRA for example, ensuring compliance with issued certificates of approval. These duties also operate independently, meaning, that the mere failure to ensure compliance attracts liability regardless of whether or not the corporation has actually contravened the provision in issue. Moreover, the amended provision now provides that in a prosecution of an executive for a breach, it is incumbent on the executive to establish meeting the applicable duty. To repeat our observation from the May 2005 edition of EnviroNotes, this "reverse onus" has the unusual effect of creating a presumption that an executive is in breach of the independent duty of care as soon as the executive has become a corporate officer or director.

#### **Spills Prevention**

Bill 133 requires that every person who belongs to a class of persons prescribed by regulations develop and implement a spill prevention plan to prevent or reduce the risk of spills. In addition, the Bill requires that the same class of persons also develop and implement a spill contingency plan to prevent, eliminate or ameliorate any adverse effects that result or may result from spills, including plans to notify the MOE, other public

authorities and members of the public who may be affected and plans to ensure that appropriate equipment, material and personnel are available to respond to a spill.

### Deemed Impairment/OWRA Amended

Bill 133 has also amended the substantial pollution offence in the OWRA, section 30, to incorporate the concept of "deemed impairment". At a minimum, in order to establish a breach of section 30, the MOE will only have to prove that the material discharged may cause injury to or interference with a living organism that comes into contact with or consumes the water or soil, or sediment in contact with the water or, that the material may cause a degradation in the appearance, taste or odour of the water. Impairment may also be established if there are peer reviewed scientific publications indicating that the material or its derivative causes injury to or interference with organisms that are dependent on aquatic ecosystems. This may include just about any imaginable living organism.

### Increased Fines

Bill 133 has also amended the EPA's and OWRA's sentencing provisions to expand substantially the fines available on the more minor offences, incorporate minimum fines for the more serious offences, and to increase jail time for individuals. The new fines are summarized below:

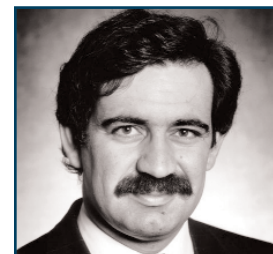
General Offence	Individuals			Corporations		
	1 <sup>st</sup> Conviction	Subsequent Conviction		1 <sup>st</sup> Conviction	Subsequent Conviction	
<b>Maximum Penalty</b>	\$50,000 per day	\$100,000 per day and/or up to 1 year in jail		\$250,000 per day	\$500,000 per day	
Serious Offence	1 <sup>st</sup> Conviction	2 <sup>nd</sup> Conviction	Subsequent Conviction	1 <sup>st</sup> Conviction	2 <sup>nd</sup> Conviction	Subsequent Conviction
	<b>Minimum Penalty</b>	\$5,000 per day and/or up to 5 years in jail less a day	\$10,000 per day and/or up to 5 years in jail less a day	\$20,000 per day and/or up to 5 years in jail less a day	\$25,000 per day	\$50,000 per day
<b>Maximum Penalty</b>	\$4 million per day and/or up to 5 years in jail less a day	\$6 million per day and/or up to 5 years in jail less a day	\$6 million per day and/or up to 5 years in jail less a day	\$6 million per day	\$10 million per day	\$10 million per day

### Sentencing Factors

Both statutes have also been amended to incorporate factors that the courts must consider when determining the appropriate disposition for a conviction. The factors include whether the offence caused an adverse effect, whether the defendant committed the offence intentionally or recklessly, and whether the defendant was motivated by a desire to increase revenue or decrease costs. The greater the number of aggravating factors, the greater the penalty. If the court decides that an aggravating factor does not warrant a more severe penalty, it has to give reasons. The legislation now specifically provides that compliance with an order cannot be considered a mitigating factor on sentence. Payment of an environmental penalty, however, should be considered a mitigating factor.

## BROWNFIELDS UPDATE — MANDATORY RSC FILING BECOMES LAW ON OCTOBER 1, 2005

Bryan Buttigieg  
 Toronto  
 416.595.8172  
 bbuttigieg@millerthomson.com



The final sections of the Brownfields Statute Law Amendments will become law in Ontario on October 1, 2005.

When the Brownfields amendments and regulations were proclaimed in force in the fall of 2004, two important sections governing mandatory filing of Records of Site Condition and Certificates of Property Use were not

proclaimed in force. However, at the time, as reported in the November 2004 edition of *EnviroNotes*, the sections were expected to come into force in the fall of 2005. The sections in question are s.168.3.1 and 168.6(5) of the *Environmental Protection Act*. Also affected are Parts IV and X of the *Records of Site Condition Regulation* (O. Reg. 153/04) which come into force on the same day.

As a result, it will now become mandatory to file a Record of Site Condition in the Environmental Registry whenever there is a change in the use of a property to a "more sensitive" use (such as from commercial use to residential). The Record of Site Condition will have to be signed by the Owner of the Property and a "qualified person" (an environmental consultant) and will serve as a publicly accessible record of the statement by the owner and the QP that the property meets the regulatory prescribed remediation standards for the intended use.

A related provision which will also come into force on the same day will prohibit municipalities and others from issuing building permits, licences or other approvals if doing so would result in authorizing the construction of a building or use of the property in a way that conflicts with an existing Certificate of Property Use. At present, sections 8 and 10 of the *Building Code Act, 1992* are prescribed for the purpose of this section, thus preventing municipalities from issuing building permits to allow such construction or change of use.

As a result of this announcement, Parts IV and X of the *Records of Site Condition Regulation* will also come into force. Part IV provides detailed definitions of the changes in use that are affected by s.168.3.1 of the Act, as well as some changes in use that are exempt from the RSC obligation. Part X specifies who must be notified of a Certificate of Property Use. The list includes a chief building official of the municipality where the property is located, the clerk of the local and any upper tier municipality, as well as, in certain circumstances, the medical officer of health or the secretary treasurer of the planning board or conservation authority.

Use of the Environmental Registry will now become much more prevalent. There will be an increased demand on consultants to act as Qualified Persons and a greater demand on the resources of the Ministry to accept the filings of RSCs. Owners will need to plan ahead and allow sufficient time for preparation and filing of an RSC to ensure that the new regime does not cause any unexpected delays. Municipalities will have to ensure that they have adequate systems in place to ensure that they do not issue permits that conflict with the Act, Regulations or any existing Certificate of Property Use.

## CONTAMINATED SITES - RECOVERING REMEDIATION COSTS

Tony Crossman  
Vancouver  
604.643.1244  
tcrossman@millerthomson.com



The BC Supreme Court recently clarified the somewhat murky issue of recovery of remediation costs under the BC *Environmental Management Act* statutory cause of action known as the "cost recovery" action. The court declared that:

- (1) reasonably incurred costs of remediation are to be judged by an objective standard;
- (2) a property owner cannot be faulted for adopting a careful and cautious approach when it comes to remediation;
- (3) the *legal* costs recoverable in seeking contributions from responsible persons are all legal costs (not just party-party costs) which are objectively reasonable in the circumstances of the case.

The case arose from a CN property that was contaminated by its neighbour, ABC Recycling. After an initial partial "dig and dump" clean up by ABC, CN took over the remediation and completed additional investigative and remediation work as it questioned the work that had been completed by ABC. CN's remediation was to enable it to sell the industrial parcel.

The issue in dispute was the extent of costs recoverable by CN pursuant to the cost recovery action, which allows a person "who incurs costs in carrying out remediation at a contaminated site" to recover those *reasonable* costs from a responsible person. "Costs of remediation" is defined to include "all costs of remediation".

The Court held that:

- (a) the onus was on CN, the party incurring the costs, to show that the costs were reasonable;
- (b) it was not necessary for CN to call independent expert evidence to prove the cost of the work was, in fact reasonable, as long as there was evidence from which the court could infer that the costs were necessary and reasonable;

- (c) it is a fundamental principle underlying the contaminated site provisions of the EMA that "polluters pay the full cost of environmental damage that their activities produce and that those who benefit economically from the pollution be held responsible for the remediation of the pollution";
- (d) the principle of "speedy remediation" also underlies the EMA - this means that owners are encouraged to spend less time second-guessing the steps taken in the remediation and more time on speedy remediation;
- (e) not all remediation costs are recoverable - only those that, on an objective basis, are reasonable;
- (f) a court must examine whether the owner acted reasonably with respect to the remediation of the contamination and whether those costs were themselves objectively reasonable;
- (g) if "prompt payment" discounts are available, then costs should be paid promptly to take advantage of these. Otherwise, the remediation costs will be discounted by the amount of the discount that was available;
- (h) Ministry fees for obtaining regulatory instruments (such as a certificate of compliance) are recoverable;
- (i) the costs of remediation must be related to contamination caused by the party being sued;
- (j) a property owner cannot be faulted for adopting a careful and cautious approach to remediation (ABC had argued that costs should have been 20-40% lower and that CN had opted for a "Cadillac" remediation);
- (k) CN was entitled to recover all of its legal costs (ie, on an indemnity basis) rather than on party-party basis (a reduced portion of the actual fees paid by CN to its lawyers) in seeking contribution.

Although this case does not answer all of the questions associated with the recovery of remediation costs, it goes a long way in doing so, and signals that courts will side with owners who clean up to ensure that they are not out of pocket.

### **What's Happening Around Miller Thomson**

**Bryan Buttigieg** spoke on insurance issues related to oil spill claims at an Insurance Institute of Ontario seminar held in Toronto in January, 2005.

On February 25, 2005, **Bryan Buttigieg** spoke on "Damages in Environmental Cases" at a Canadian Institute seminar on Damages in Commercial Litigation held in Toronto.

**Rosanne Kyle** spoke on "Consultation in British Columbia in the Post Haida Nation and Taku River Tlingit Era" at the CBA's National Environment, Energy and Resources Law Summit's first annual conference in Calgary on May 6 and 7, 2005.

**Rod McLeod** and **Bruce McMeekin** spoke to the Markham Board of Trade on May 10, 2005 on Bill 133.

In May, **Bruce McMeekin** and **Michelle Fernando** had an article published in *Corporate Liability* entitled "Remedies for Destroyed or Missing Evidence".

**John Tidball** was elected to the Board of Directors of the Municipal Waste Integration Network in June, 2005.

**Bryan Buttigieg** and **John Tidball** spoke on "Responding to Oil Spill Claims" at a seminar sponsored by the Ontario Mutual Insurance Association in Cambridge in May, 2005. They will speak on the same topic at an Insurance Law Seminar to be held in Toronto on June 23, 2005.

## MILLER THOMSON LLP ENVIRONMENTAL LAW PRACTICE GROUP

### Markham

Rod M. McLeod, Q.C. 905.415.6707  
rmcleod@millerthomson.ca  
John R. Tidball 905.415.6710  
jtiddball@millerthomson.ca  
J. Bruce McMeekin 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

Tony Crossman (Chair) 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

### Calgary

Brian J. Evans, Q.C. 403.298.2454  
bevans@millerthomson.ca

### Edmonton

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

### Waterloo-Wellington

F. Stephen Finch, Q.C. 519.579.3600 x.310  
sfinch@millerthomson.ca  
Richard J. Trafford 519.579.3660 x.330  
rtrafford@millerthomson.ca  
Robin-Lee Norris 519.822.4680 x.238  
rnorris@millerthomson.ca  
James D. Bromiley 519.579.3660 x 385  
jbromiley@millerthomson.com

### Montréal

Éric Couture 514.871.5489  
ecouture@millerthomsonpouliot.com  
Luc Gratton 514.871.5482  
lgratton@millerthomsonpouliot.com  
Brent J. Muir 514.871.5478  
bmuir@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](http://www.millerthomson.com)