

ENVIRONMENTAL LAW

COURT OF APPEAL REVIVES ENVIRONMENTAL CLASS ACTIONS

Environmental class actions were given new life by the recent win by Port Colborne landowners at the Ontario Court of Appeal. The Court certified the contaminated land class action in *Pearson v. Inco* where thousands of residents are seeking compensation for loss of property value allegedly caused by Inco. When the landowners' claims were slapped down (with a huge cost award against them) by the Ontario Superior Court, followed by the Ontario Divisional Court, it seemed like class actions based on environmental were dead in the water in Ontario.

The plaintiff landowners still have hurdles to jump. The Court of Appeal held that the case meets the rules to proceed as a class action against Inco. However, landowners must go to trial to prove that the contamination caused a real loss in property value, and that they launched their lawsuit in time.

Over more than 60 years, Inco's refinery
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ONTARIO'S SWAT TEAM GETS AN IMAGE MAKEOVER

If you get a call from the MOE's Sector Compliance Branch (SCB), don't hang up! The MOE's SWAT Team has a new name to go with its new image. While SWAT connoted a bust-in-with-guns-drawn approach, the SCB will continue in-depth, province-wide inspection sweeps of entire industries, such as last year's blitz of Sarnia's "Chemical Valley".

SCB staff members are empowered to issue tickets and Provincial Officer Orders. However, requests for prosecution must be sent to Investigations and Enforcement Branch (IEB).

OTTAWA DECLARES SIX GREENHOUSE GASES TO BE "TOXIC"

Ottawa has added six greenhouse gases (GHGs) to Schedule 1 (Toxic Substances) of the *Canadian Environmental Protection Act 1999*. The six listed substances are carbon dioxide, methane, nitrous oxide, sulphur hexafluoride, hydrofluorocarbons, and perfluorocarbons. This declaration authorizes Environment Canada (EC) to set regulatory targets and enforce emission reductions for Canada's large industrial GHG sources and to establish a regulated domestic offset credit system.

Ottawa dismissed objections by governments and industry groups including Alberta Environment and the Canadian Chemical Producers' Association. EC asserted that there is sufficient and compelling evidence to conclude that "these GHGs constitute, or may constitute, a danger to the environment on which life depends," thus meeting the definition of "toxic" under *CEPA 1999*.

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UNDERSTANDING ONTARIO'S AIR POLLUTION REGULATION

Ontario has completed a comprehensive rewrite of its General Air Pollution Regulation 346.

O. Reg. 419/05 replaces the content, but the regulation is still referred to as O. Reg. 346.

The new regulation requires facilities to report to MOE and prepare abatement plans when dispersion modelling indicates non-compliance. Immediate reporting and forthwith action is mandated if model results suggest the threat of exceeding "upper risk thresholds".

New facilities will have to meet new standards and use new US EPA models right away. For existing and expanding facilities, compliance with new standards and use of US EPA models will be phased in over 4, 7 or 14 years, depending on the sector.

The regulation does not stand alone. MOE has published new and vital technical and policy references for anyone who needs to comply or advise others.

New MOE Policy References

Available from the MOE website (Publications – Forms, Manuals and Guidelines) are:

Guide to Applying for Approval (Air & Noise) – Version 2.0, November 2005.

Acoustic Assessment Report Check-List

Emissions Summary and Dispersion Modelling (ESDM) Report Check-List.

FAQs: MOE continues to develop policies and interpretations of O. Reg. 419/05 in consultation with stakeholders. It is communicating with users in a series of Internet FAQs and compliance tables. The first FAQ (December 20, 2005) is posted on the MOE website at www.ene.gov.on.ca/envision/AIR/regulations/FAQ-round1.htm.

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REGULATORY AND POLICY UPDATE

VIRGINIA MACLEAN RECEIVES OBA VOLUNTEERISM AWARD

Congratulations to W+SEL lawyer Virginia MacLean, Q.C., the 2006 recipient of the Linda Adlam Manning award for volunteerism. The award recognizes outstanding commitment to the Ontario Bar Association of a member who has advanced the interests of the OBA's membership and promoted the role of the legal profession in Ontario.

ONTARIO'S BILL 133 ENVIRONMENTAL PENALTIES

Ontario is preparing to bring its controversial Environmental Penalties (EP) regime into force. In December 2005, the MOE released a consultation paper to guide public and stakeholder consultations in early 2006. These consultations will inform drafting of the EP regulations.

Bill 133, the *Environmental Enforcement Statute Law Amendment Act, 2005*, was passed in June 2005, but the EP provisions will not take effect until implementing regulations are in force, probably in late 2006.

The regulations will establish rules for what contraventions may be subject to EPs, calculation of penalties, and factors that will reduce penalties (such as due diligence, existence of an environmental management system, settlement). Additional regulations will regulate who will divvy out the penalty funds to the public, embellish spill reporting rules, and set rules for mandatory spill prevention/spill contingency planning.

EPs are administrative fines, imposed by MOE Director's order, following spills or other contraventions. Due diligence is not a defence (but may reduce the fine).

There is no right to trial and limited rights to appeal to the ERT. Despite an EP, MOE can still prosecute for the same contravention. EPs will only apply to facilities subject to MISA regulations: primarily large manufacturers, mining and refining companies, and power generators.

Table with 2 columns: Regulatory/Policy Update Title and Description. Rows include Clean Water Act 2005, Proposed Growth Plan for the Greater Golden Horseshoe, Planning and Conservation Land Statute Law Amendment Act, 2005, and Land Disposal Restrictions.

(Class Action, continued from page 1)

in Port Colborne emitted some 20,000 tonnes of nickel oxide into the air. This contaminated a large swath of property downwind from the stack. The risks to human health and the environment were detailed in an MOE report released in September 2000. The landowners allege that, as a result, property values in the area dropped precipitously. They asked the courts to allow them to consolidate their claims into a class proceeding on behalf of the former and present property owners of much of Port Colborne. Both the Superior Court of Justice and the Divisional Court disagreed.

By the time the case reached the Court of Appeal, the plaintiffs had abandoned sweeping assertions of adverse human health effects. The lawsuit is now limited to claims for property value loss. Claims against the local school board, municipality, region and the provincial crown were either settled, dismissed or dropped before the Court of Appeal hearing. The

only remaining defendant in the class action is Inco Limited.

The Court of Appeal ruled that the MOE's Community Based Risk Assessment process (CBRA) does not displace the right of property owners to sue for their lost property value from past contamination. Stay tuned for further appeals, and for conflicting valuation evidence at trial.

(GHG Gases, continued from page 1)

EC posted a draft "cross-cutting" regulation on the CEPA Registry in November, 2005. This regulation sets ground rules for all regulated sectors that will be subject to mandatory emissions caps, and defines acceptable credits.

EC plans to publish both the cross-cutting regulations and individual sector target regulations this year in Canada Gazette 1. It is unclear whether the change in federal government will stall this regulatory process.

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