Willms & Shier | Environment Aboriginal Energy Law

Report

February/March 2015

Company Fined $185,000 under *Fisheries Act* for Discharge to Municipal Drain

By Julie Abouchar, with the assistance of Mark Youden, Student-at-Law.

On November 6, 2014, the Alberta Provincial Court ordered Norellco Contractors Ltd. (Norellco) to pay $185,000 after Norellco pleaded guilty to one count under the *Fisheries Act*. This case is significant in that it represents a sizable contribution to the Environmental Damages Fund, shows that chlorinated water can be considered a contaminant and is a reminder of the multiple jurisdictions that cover discharges to water.

Jurisdiction

In Canada, municipal, provincial and federal levels of government have overlapping responsibilities for managing discharges to water.

- **Provinces**—Provincial governments regulate discharges to waters within provincial boundaries. This can include discharges to both artificial and intermittent watercourses.
- **Municipalities**—Municipalities have authority to enact sewer-use by-laws to regulate the quality and quantity of substances discharged into their sewer systems. A violation of a municipal sewer-use by-law can result in an inspection by local by-law enforcement officers, compliance program action or prosecution.

In This Issue…

Note: *The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.*

environmentallawmoot

Willms & Shier is delighted to be hosting our third Environmental Law Moot Court Competition on Saturday, March 7, at the Ontario Court of Appeal. This is Canada's first and only national moot court competition devoted to environmental law. This year's Moot promises to be a rich and rewarding experience as 10 law school teams moot the 2011 British Columbia Court of Appeal Decision in ***Susan Heyes Inc. (Hazel & Co.) v South Coast B.C. Transportation Authority.***

Willms & Shier would like to thank all of our sponsors for this year's event:

- **Platinum Sponsors**—Grant Thornton LLP and Maxxam Analytics—A Bureau Veritas Group Company
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- **Federal**—The *Fisheries Act* prohibits discharges of any "deleterious substances" into waters frequented by fish. The federal government has jurisdiction to prosecute discharges into sewers when that discharge ultimately impacts Canadian fisheries waters.

A discharge into sewers could be subject to compliance action under municipal by-laws. A discharge into sewers could be subject to provincial government prosecution when that discharge then flows into waters within provincial boundaries, or depending on the definition of water in the legislation, portions of municipal storm sewer systems. The same discharge could also be subject to federal government prosecution when that discharge flows into waters frequented by fish.

The Case

On November 6, 2014, Norellco pleaded guilty to an offence under the *Fisheries Act* for releasing chlorinated water into local sewer drains. The drains led to the Sturgeon River, which is home to a number of fish species. The company was ordered to pay $185,000 and $180,000 of that penalty was credited toward the Environmental Damages Fund to promote the proper management and protection of fish and fish habitat in Alberta.

Significance of the Penalty

We find three significant aspects of this penalty: (1) it underlines the multiple jurisdictions that regulate and protect water. Here, the discharge was to a municipal drain which resulted in federal charges, (2) it is significant because of the size of the contribution to the Environmental Damages Fund ($180,000 of $185,000), and (3) many may not realize that chlorinated water (including potable drinking water) may be considered a contaminant when discharged into water.

Canada's *Hazardous Products Act* and Regulations To Implement Globally Standardized Rules

By Marc McAree, with the assistance of Giselle Davidian, Student-at-Law.

On February 11, 2015, the federal *Hazardous Products Regulations* (HPR) and the *Hazardous Products Act* (HPA) came into force. The HPR and HPA implement the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) in Canada. GHS is an international initiative to standardize rules for classifying and communicating about chemical hazards. Through the HPR and HPA, Canada modifies the Workers Hazardous Materials Information System (WHMIS) to incorporate the GHS. The key roles and responsibilities for suppliers, employers and workers under the original 1988 WHMIS program will not change.

The amended HPA and new HPR compliance periods establish a three-phase transition approach to update WHMIS. By December 1, 2018, all suppliers and employers are expected to comply with HPR requirements. The updated 2015 WHMIS program will align Canada's hazard classification and communication requirements with those of its trading partners. This should enhance the competitiveness of Canadian suppliers.

Updated 2015 WHMIS Transition

To allow suppliers, employers and workers ample time to comply with the new system, transition to the updated 2015 WHMIS program will follow a three-phase approach. The phased compliance periods will facilitate provinces and territories harmonizing their WHMIS legislation. By December 1, 2018, all manufacturers, importers, distributers and employers across Canada must comply with HPR requirements.

Changes to WHMIS

Below is a summary of major changes to the updated 2015 WHMIS program:

- **Classification Rules**—WHMIS continues to apply to both physical hazards and health hazards groups. Some new classes are added to the classification criteria. Additional hazard classes required under physical hazards include combustible dusts, simple asphyxiants, pyrophoric gases and physical hazards not otherwise classified.

New hazard classes required under health hazards include biohazardous infectious materials and health hazards not otherwise classified. Each hazard class is assigned a category that describes the severity of the hazard.

- **Supplier Labels**—Supplier labels are standardized to include product identifiers, initial supplier identifiers, pictograms, signal words, hazard statements, precautionary statements and supplemental label information. The new WHMIS continues to require bilingual supplier labels.
- **Safety Data Sheets (SDS)**—The GHS-prescribed format for SDS includes 16 sections with specific information requirements. Sections include hazard identification, information on ingredients, first aid measures, accidental release measures, exposure controls, physical and chemical properties and toxicological information. HPR specifies the required SDS sections and content.

WHMIS Roles, Responsibilities and Duties

The responsibilities imposed by the original 1988 WHMIS program on suppliers, employers and workers continue to apply:

- Suppliers will continue to identify hazardous products, prepare labels and SDSs for products, and provide them to customers.
- Employers will continue to ensure that all hazardous products are properly labelled, updated SDSs are available for workers, and appropriate control measures are in place to protect the health and safety of workers. Employers must also provide workers with education and training about the use of hazardous products.
- Workers will continue to participate in WHMIS training programs, take steps to protect themselves and their co-workers, and identify and control hazards.

Directors' and Officers' Environmental Regulatory Liability in the Mining Sector

By Richard Butler and Nicole Petersen.

Mine operators across the country let out a collective gasp on August 4 last year after a breach of the tailings storage facility dyke at the Mount Polley mine. On August 5, 2014, the B.C. Ministry of the Environment issued a Pollution Abatement Order to the Mount Polley Mine Corporation, ordering the corporation to undertake an environmental assessment and clean-up.

What will happen if a mine accident like Mount Polley occurs in Ontario? How will the Ministry of the Environment and Climate Change (MOECC) respond?

It often comes as a surprise to corporate directors and officers (D&Os) that the Ontario Government can and does issue Orders pursuant to the *Environmental Protection Act* (EPA) against D&Os directly and personally for environmental investigation and remediation.

Regulatory Authority

The MOECC regulates spills and discharges from mines pursuant to its powers under the EPA. Ontario's *Mining Act* forms the regulatory framework for mine operations, closure and rehabilitation, but the *Mining Act* does not explicitly impose personal liability on D&Os. In contrast, the MOECC has the authority to target D&Os directly for environmental offences committed by the company.

That authority is not new. Numerous examples of D&O prosecutions and convictions exist in the mining, waste and industrial sectors. What is new, however, is the MOECC's assertiveness in issuing remedial and preventive Orders against D&Os. The MOECC can issue clean-up Orders against any person who "has or had management or control of an undertaking or property." A "person" may include the corporation, the D&Os of that corporation and managers and employees. The Order can require costly environmental monitoring, reporting and remediation.

The *Baker* Case—An Example of D&Os Personally on the Hook

The MOECC's willingness to issue clean-up Orders against D&O was recently highlighted in the case of *Baker v MOECC*. The end result: former D&Os of a bankrupt company paid $4.75 million of their own money to settle litigation.

In *Baker*, Northstar Aerospace (Canada) Inc., a Canadian subsidiary corporation, voluntarily remediated trichloroethylene (TCE) contamination at its Cambridge, Ontario property. Northstar encountered financial difficulty during the lengthy remediation. The MOECC issued Orders requiring Northstar to continue remediation, and to post $10 million in financial assurance. Northstar later obtained creditor protection and eventually declared bankruptcy, at which time the MOECC took over the remediation due to neighbouring human health concerns.

In November 2012, the MOECC issued a new Order against Northstar, its U.S. parent corporation, and 13 former D&Os (including D&Os from the U.S. parent). The Order required the D&Os to continue costly groundwater monitoring and remediation. A number of the directors named were appointed after contamination took place, but MOECC took the position that Northstar's D&Os failed to set aside adequate remediation funds prior to bankruptcy.

The corporate directors appealed the Order to Ontario's Environmental Review Tribunal (ERT). The ERT denied an interim stay and held that interrupting the remediation program posed serious ongoing risks to human health and the natural environment. The directors unsuccessfully appealed this decision to the Superior Court and mounting litigation and remediation costs forced Northstar's D&Os to pursue settlement.

In October 2013, 10 of Northstar's former D&Os resolved the matter by paying $4.75 million in exchange for a release from the MOECC's Order.

Implications for Mining Sector Directors and Officers in Ontario

Baker showed that MOECC's willingness to turn to D&Os for remediation funding may hinge on:

- the significance of the pollution event
- the degree of control of the D&Os
- the degree of control/involvement of the corporate parent
- financial (in)stability of the responsible company
- availability (or lack) of others to pay for remediation (e.g. insurance).

In the event of a tailings discharge in Ontario, the mine operator should expect to receive monitoring and remediation Orders similar to those issued against Mount Polley Mine Corporation. Depending on the extent of its management and control, the corporate parent may be named in the Order and, similar to the Mount Polley incident, D&Os may (initially) escape being named in a regulatory Order.

Ontario Source Water Protection Plan Approval Update

By Julie Abouchar and Nicole Petersen

Ontario has now approved 15 new Source Water Protection Plans (SPPs) under the *Clean Water Act, 2006*. The latest SPP to be approved on January 26, 2015 is the South Georgian Bay Lake Simcoe SPP. It includes the First Nation drinking water system at Rama First Nation.

Municipalities and companies should prepare for their potential responsibilities and opportunities under Ontario's evolving drinking water source protection regime. In particular, holders of environmental compliance instruments may have to take additional steps to come into compliance under this regime.

Municipalities that have SPP responsibilities will need to employ and train risk management officers to oversee plan implementation. Alternatively, they may hire a body approved under the *Clean Water Act, 2006* to provide the services.

Companies operating in a region covered by an SPP should determine if and how they are affected by SPP policies. For example, if a company conducts activities that impact an SPP-identified vulnerable area, it should find out whether those activities will be permitted to continue and may need to negotiate a risk management plan with the responsible municipality.

Amendments to O. Reg. 287/07 include three First Nations drinking water systems in regional SPPs. First Nations may also choose to develop their own community-based SPPs by following the federal First Nation On-Reserve Source Water Protection Plan: Guide and Template.

For junior mining companies with a single operating property, an underfunded project or lacking appropriate environmental insurance, one substantial incident can throw the company into dire financial straits. In Ontario, failing to undertake remediation, or failing to set aside funds for remediation, incentivizes the MOECC to look to D&Os to make up the shortfall.

Imperial Metals recorded $67.4 million in costs, including $20.3 million incurred for response and recovery. Production at the income-generating mine has stalled. In contrast to *Baker*, however, Imperial Metals is weathering the storm. Imperial Metals continues to actively monitor and remediate. Importantly, Imperial Metal has been able to allocate the remaining $47.1 million in future costs.

Even so, the Mount Polley story is not over: The B.C. Government released its findings about the accident on January 30, 2015. Further Orders and prosecutions are pending.

Planning for Liability Exposures

The Mount Polley incident will spur heightened regulatory oversight of tailings storage facilities and mine operations. D&Os of mining companies active in Ontario, whether the D&Os reside in Ontario or not, need to plan for increased scrutiny of mine operations and environmental safety. D&Os would be wise to confirm whether their company offers D&O indemnification as well as a policy of D&O insurance with high coverage limits and no environmental exclusions.

NWT Supreme Court Grants Tłı̨chǫ Government Injunction To Delay Elimination of Wek'èezhìi Land and Water Board

By John Donihee, Julie Abouchar, Charles Birchall and Nicole Petersen, with the assistance of Giselle Davidian, Student-at-Law.

On February 27, 2015, the Supreme Court of the Northwest Territories (NWTSC) released its interlocutory decision in *Tłı̨chǫ Government v Canada (Attorney General)*. The Tłı̨chǫ Government sought an injunction, alleging that Canada had failed to adequately consult and that legislative changes to the *Mackenzie Valley Resource Management Act* (MVRMA) violated the Tłı̨chǫ's land claim agreement. The decision grants the Tłı̨chǫ Government an injunction to delay the elimination of the Wek'èezhìi Land and Water Board (WLWB) pending final determination of the litigation. This has the result of also delaying the federal government's plans to consolidate the Gwich'in Land and Water Board (GLWB) and the Sahtu Land and Water Board (SLWB) in favour of a restructured Mackenzie Valley Land and Water Board (MVLWB) as part of the devolution process.

The various land and water boards, including the WLWB, had originally been created under land claims agreements with indigenous governments. Under the devolution process, these boards are to be consolidated under the amended MVRMA. The MVLWB will then regulate activities over which the other three land and water boards have jurisdiction. A full trial on these issues is expected in 2015.

Background

In December 2014, the NWTSC heard the Tłı̨chǫ Government's application for an injunction to prevent the Governor-in-Council from issuing an order bringing the second phase of the MVRMA amendments into force. The primary effect of the MVRMA amendments prescribed by the *Northwest Territories Devolution Act* (*Devolution Act*) includes eliminating the WLWB, GLWB and SLWB.

Currently, two of the four WLWB members are appointed by the Tłı̨chǫ Government—a requirement under 22.3.3(*b*) of the Land Claims and Self-Government Agreement Among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada, 2003 (Tłı̨chǫ Agreement). This means that, at present, the operation of the legislative framework guarantees a certain level of Tłı̨chǫ participation in issues respecting land and water use in Wek'èezhìi. Under the MVRMA amendments, the WLWB will be eliminated and the Tłı̨chǫ Government will only appoint one out of 11 of the MVLWB members. Furthermore, the Chairperson of the MVLWB would have the discretion whether or not to allow the Tłı̨chǫ-appointed member to participate in any hearing affecting the Wek'èezhìi.

Issues

The Tłı̨chǫ Government asserts that the MVRMA amendments are unconstitutional because they violate treaty rights under the Tłı̨chǫ Agreement. The Tłı̨chǫ Government also claims that Canada failed to properly discharge its duty to consult about the MVRMA amendments. Canada maintains that it fulfilled all of its procedural and substantive obligations, including consultation. These issues are central to the suit and will be decided later at a full trial.

In this interlocutory decision, the Court considered two key issues: (1) whether the Court had authority to grant interlocutory injunctive relief in the circumstances; and (2) if so, whether the injunctive relief was appropriate.

Court Has Authority To Grant Interlocutory Injunctive Relief

The Court found that section 22 of the *Crown Liability and Proceedings Act* and applicable case law do not bar it from issuing interim injunctive relief against the Crown. Justice Shaner, presiding over the Court, held that the courts are entrusted with the responsibility for determining whether laws, once enacted, comply with the *Constitution Act, 1982* and the rights protected under it. If constitutional protection of those rights is to be meaningful and not just an "academic exercise", the Court must have the authority to issue interim injunctive relief against the Crown.

The Court went on to find that it had jurisdiction to enjoin the Governor-in-Council from promulgating an Order-in-Council that would bring the second phase of the MVRMA amendments into force. The federal government argued that the Governor-in-Council acts in a legislative capacity when promulgating Orders-in-Council. Accordingly, the courts could not interfere with the legislative process. Justice Shaner confirmed that courts cannot interfere with the legislative process where Royal Assent is not yet achieved. However, where Royal Assent is achieved but legislation is not yet in force, as in this case, the Court can decide to grant injunctive relief.

Tłı̨chǫ Government Entitled to Interlocutory Injunctive Relief

The Court applied the three-part test for an interlocutory injunction application described in *RJR MacDonald Inc. v Canada (Attorney General)*. The test requires the applicant to demonstrate that: (1) there is a serious question to be tried; (2) irreparable harm will result if the injunction is not granted; and (3) the balance of convenience favours granting the injunction.

- **Serious Constitutional Issue To Be Tried**—The Court confirmed that the standard for determining whether there is a serious constitutional issue to be determined generally has a low threshold. The Court found that the Tłı̨chǫ Government's concerns are serious and, given the history and the procedure through which the MVRMA amendments came about, could not be considered vexatious or frivolous. Questions about the interpretation of the Tłı̨chǫ Agreement itself and the constitutional issue to be tried are also serious. As a result, the Tłı̨chǫ Government satisfied the first branch of the test.

- **Irreparable Harm if Interim Injunctive Relief Not Granted—**The Court accepted the Tłı̨chǫ Government's argument that absolute certainty of irreparable harm is not always necessary. A reasonable likelihood of irreparable harm applies to any case involving an alleged breach of a constitutional right.

  Justice Shaner held that the loss arising from a later finding of the breach of the duty to consult would be unquantifiable and would constitute irreparable harm. The Court considered that consultation that occurs following a challenged activity will likely be meaningless and non-compensable through damages. If the full trial ultimately determines that the federal government failed in its duty to consult, the Tłı̨chǫ Government would lose the opportunity to engage in meaningful negotiations and reach a solution.

  The Court also determined that the new structure of the super board would necessarily diminish the role of the Tłı̨chǫ Government in managing the Wek'èezhìi area:

  > "Decisions affecting the area pending determination of this suit will no longer be entrusted to a board where it is guaranteed that half the members are chosen and appointed by the Tłı̨chǫ Government. Instead... the Tłı̨chǫ Government appointee will be able to appoint one member to a panel of eleven."

In reaching this determination, the Court relied heavily on the Alberta Court of Appeal decision in *Whitecourt Roman Catholic Separate School District No. 94 v Alberta* (*Whitecourt*). In *Whitecourt*, the Court determined that dissolving a school board through regulation would cause irreparable harm because others could make decisions instead of the board's school trustees pending determination of whether the dissolution violated constitutionally protected denominational education rights.

- **Public Interest and Balance of Convenience Favours Granting Injunctive Relief**—In the final branch of the test, courts must determine which party will suffer more harm if the injunction is granted or denied. Courts also consider public interest in cases such as this where the constitutional validity of legislation is challenged.

  The Tłı̨chǫ Government argued that, as a public government, its burden of demonstrating a benefit to the public interest flowing from the injunctive relief is less onerous than it would be for a private party. The Tłı̨chǫ Government expressed its preference for the relief that the WLWB be exempted from the application of the legislation, allowing the Governor-in-Council's order to take effect in other respects. According to the Tłı̨chǫ Government, this would serve to minimize the importance of the public interest consideration. The Tłı̨chǫ Government submitted that, in any event, public interest would clearly benefit from preserving the status quo of the WLWB continuing to exercise its authority as contemplated in the Tłı̨chǫ Agreement pending resolution of the litigation.

  The Court found that the Tłı̨chǫ Government, although an order of government, still had an obligation to demonstrate the public interest benefit of the injunctive relief. Justice Shaner confirmed that this requirement arises from the presumption that a validly enacted but challenged law will produce a public good, regardless of who is challenging the law.

  Justice Shaner decided that, regardless of the Tłı̨chǫ Government's preference for characterizing the case as only exempting the WLWB from the ambit of the Governor-in-Council, it is a "suspension" case, rather than an "exemption" case, according to the way in which the legislation is drafted. Justice Shaner considered that Part 4 of the Devolution Act replaces large portions of the MVRMA in a general manner, frustrating the Court's ability to exempt the WLWB. Attempting to carve out an exemption for the WLWB would see the Court "going beyond interpretation and into the realm of drafting legislation, something that is beyond its scope of authority."

  Justice Shaner considered that granting an injunction would delay but not disrupt the current regulatory system because the legislation is not yet in force. The Court found a public interest benefit arising from protecting the status quo where irreparable harm may result from breaching a constitutionally protected right. Furthermore, if the legislative amendments are ultimately determined to be invalid, the legitimacy of the decisions made by the super board in the interim period could be in question. The results of the regulatory uncertainty and challenges to already decided applications would be contrary to public interest and easily avoided by suspension of the legislation.

  In light of this, the Court held that the balance of convenience and public interest favoured granting the injunctive relief to avoid violating the constitutionally protected rights of the Tłı̨chǫ Government. Denying the injunction would mean potentially violating the Tłı̨chǫ Government's constitutionally protected rights and causing irreparable harm, even if the Tłı̨chǫ Government were to succeed in the main litigation. The Court found that ordering injunctive relief would only delay Canada in implementing the new regulatory system if the federal government should be successful in the main litigation.

Conclusion

The new restructured MVLWB was expected to come into effect on April 1, 2015. Accordingly, we understand that preparations to wind up the other land and water boards were already underway. Much may have changed in relation to the status quo from when the injunction application was first heard.

Canada has thirty (30) days to appeal the injunction to the Northwest Territories Court of Appeal.

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Join Willms & Shier at these Upcoming Events

March 7	**Willms & Shier Environmental Law Moot Court Competition**—Toronto, ON	Willms & Shier is hosting our third Environmental Law Moot Court Competition at the Ontario Court of Appeal. This year's Moot promises to be a rich and rewarding experience as 10 law school teams moot the 2011 British Columbia Court of Appeal Decision in ***Susan Heyes Inc. (Hazel & Co.) v South Coast B.C. Transportation Authority***.
March 10-12	Canadian Water Network's **Connecting Water Resources—From Knowledge to Action 2015**—Ottawa, ON	**Julie Abouchar** will be a panel speaker at a Breakout Session about **"Small & Aboriginal Communities: Solutions that fit"**. This event brings together the private sector, public sector and academia in a forum where leading water thinkers and doers collaborate on how to impact water management.
April 11	American Bar Association's **24th Annual Spring CLE Meeting: Cutting-Edge Scientific and Legal Trends in Toxic Torts and Environmental Law**—Phoenix, Arizona	Join **Marc McAree** at the ABA's Annual Spring CLE Meeting for his presentation about "**GreenBiz and Getting to Market: What it Takes To Go Green and Limit Liability"**.
April 13-16	**Nunavut Mining Symposium**—Iqaluit, NU	Network with **Julie Abouchar**, **Charles Birchall** and **John Donihee** at this important annual northern mining and exploration event.
April 27-29	**CANECT 2015**—Mississauga, ON	Willms & Shier lawyers **Julie Abouchar**, **John Georgakopoulos**, **Jacquelyn Stevens**, **Richard Butler** and **Joanna Vince** will once again be key speakers at the waste management, air, and water and wastewater programs of the ever-popular **Canadian Environmental Conference and Tradeshow**. Details about the program will be announced in a subsequent newsletter and on our website.
June 5-6	Ontario Fabricare Association **Conference 2015**—Port Credit, ON	Join **Jacquelyn Stevens** for her presentation, **"Environmental Update: Directors' and Officers' Environmental Liability"**.

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