Willms & Shier | Environment Aboriginal Energy Law

# Report

June 2013

### City of Kawartha Lakes Case:

## Municipality loses fight over 'unfair' clean-up Order

The Ontario Court of Appeal has ruled that the necessities of spill containment and environmental protection can take precedence over the "polluter pays" principle and the rules of natural justice. In assessing the validity of a Director's clean-up order for a 2009 oil spill in the City of Kawartha Lakes, the Court deemed questions of who was at fault were "irrelevant." The City, which bore no responsibility for the original spill, was ordered to clean up oil that had spread onto municipal lands and threatened to recontaminate nearby Sturgeon Lake (see sidebar on page 2).

Since then, the City of Kawartha Lakes has fought a series of legal battles to correct what it considers "a breach of natural justice." While the City did not dispute the jurisdiction of the Ministry to issue such a 'no fault' Order, it argued that "the MOE must have regard to principles of fairness including the 'polluter pays principle' as part of its exercise of discretion to issue such an Order." The City maintained that the MOE should only issue a 'no fault' Order in the event that the polluter(s) cannot or will not comply with a fault-based Order.

*(Continued on page 2)*

### In this issue ...



## Willms & Shier welcomes new staff, opens a new office and sports a new look!

There have been some big changes at Willms & Shier Environmental Lawyers LLP since last we spoke. First, we welcomed new partner **Charles (Chuck) Birchall** to the firm. With 23 years of legal practice devoted exclusively to environmental law, Chuck focuses on environmental assessment and compliance, energy law, and Aboriginal consultation and economic development. He has served as executive assistant to the Attorney General of Ontario, an adjunct professor at University of Ottawa's Faculty of Common Law, and past chair of several prominent non-governmental organizations. He currently chairs the Canadian Bar Association's National Environmental, Energy and Resources Law Section.

Chuck Birchall heads our **new Ottawa office —** in suite 700 of the World Exchange Tower at 45 O'Connor Street, just steps from Parliament Hill **—** providing ready access to federal developments, including joint EA panels, rapidly evolving environmental legislation, and Parliamentary committees in the Senate and House of Commons. You can contact Chuck at 613-761-2424 or by e-mail at cbirchall@willmsshier.com

We've also welcomed aboard new associate **Richard Butler**. With degrees in earth sciences and experience in environmental consulting, Richard practices in our environmental and energy law groups. Before joining Willms & Shier, Richard spent seven years with a large multi-national law firm, involved in environmental matters, complex commercial

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The Appeal Court did not agree. In its decision released May 10, 2013, Justice Goudge writes that

> Evidence of the fault of others says nothing about how the environment would be protected and the legislative objective served if the Director's order were revoked. Indeed, by inviting the Tribunal into a fault finding exercise, permitting the evidence might even impede answering the question in the timely way required by that legislative objective. (*Kawartha Lakes (City) v. Ontario (Environment)*, 2013 ONCA 310).

The Ministry had issued a preventative Order under section 157(1) of the *Environmental Protection Act* to ensure prompt remediation and minimize any adverse effects. The Ministry had already issued a remediation Order on the responsible parties, but the spilled oil had spread onto City property. Therefore, a second Order could rightfully be issued to the City as the party that "owns or has management and control of an undertaking or a property," even though it bore no fault for the original spill.

The Order against the City was appealed to the Environmental Review Tribunal. However, the ERT refused to consider fault, arguing that the overwhelming purpose of EPA s.157(1) is to protect the environment and that "questions of ultimate liability, fault and other issues are generally left to arenas other than this Tribunal."

On May 28, 2012, the Divisional Court upheld the ruling of the ERT, and the appellants appealed the decision to the Ontario Court of Appeal. While the issues were winding their way through the legal system, the City completed the clean-up of its property at an estimated cost of $470,000.

Justice Goudge of the Appeal Court writes

> I agree with the Tribunal and the Divisional Court that evidence that others were at fault for the spill is irrelevant to whether the order against the appellant should be revoked. That order is a no fault order. It is not premised on a finding of fault on the part of the appellant but on the need to serve the environmental protection objective of the legislation.

In a separate case before the Ontario Superior Court, the City is taking steps to recover its clean-up costs (under s.100.1 of the EPA) from the oil company, the insurer, the adjuster, the homeowners, the firm that undertook the site clean-up, the tank manufacturer, the Technical Standards and Safety Authority and the MOE.

### No one disputes the basic facts of the case ...

On December 18, 2008, an estimated 500 litres of fuel oil were spilled into the basement of the home of Wayne and Liana Gendron. By the time an insurance adjuster visited the property some 12 days later, the oil had already migrated through the storm sewers under the adjoining city road and into nearby Sturgeon Lake.

The Ministry of the Environment (MOE) immediately issued a Provincial Officer's Order requiring the Gendrons to prevent, eliminate and ameliorate the adverse effects of the spill. Remediation efforts continued "around the clock" until March 20, 2009, when the Gendrons' insurer refused to fund further off-site work, while continuing with the on-site excavation of contaminated soil and the complete demolition and reconstruction of the Gendrons' home.

Although the lake pollution had already been cleaned up, the ministry issued a preventive Order against the City, requiring it to undertake the remediation of any oil remaining in the culverts and sewers that could recontaminate Sturgeon Lake.

## Northstar Aerospace (Canada) case:
## Directors and officers liable for contamination that occurred before their tenure

The Ontario Ministry of the Environment is appearing at the Environmental Review Tribunal (ERT) and in Court to defend its position that the directors and officers (D&Os) of a bankrupt aerospace company are personally responsible for a multi-million dollar groundwater clean-up project around one of the firm's former plants in Cambridge, Ontario. On November 14, 2012, the Ministry issued a Director's Order to continue remediation work against 13 former D&Os of Northstar Aerospace (Canada) Inc. and its parent company Northstar Aerospace, Inc. under sections 17, 18 and 196(1) of the *Environmental Protection Act* on the grounds that they had "management or control" of the contaminated site between 2003 and 2012. However, it is likely that most or all of the groundwater contamination occurred prior to the tenure of any of the named D&Os. The outstanding site monitoring and clean -up is expected to cost some $15 million over the next 10 years.

In turn, 12 of the former D&Os have appealed the Director's Order to the ERT, challenging both the jurisdiction of the Director to issue the Order and the reasonableness of that Order (Case Nos. 12-158 to 12-169). The ERT has already dismissed a motion to stay the Order, and a full hearing is scheduled for 16 days in October through December this year. In the interim, the former D&Os must continue to pay the clean-up costs, estimated at $100,000 per month.

In May, the ERT began hearing motions from a number of former D&Os who are looking for detailed information on the "theory of legal liability and all material factual allegations [the ministry] is relying on to justify the Director's Order" against them. Essentially, they want to know exactly what they have done wrong and what the ministry expected them to do in order to avoid personal liability for the clean-up? .

The former D&Os also filed a motion in the Ontario Superior Court requesting the Court determine the validity of the Director's Order under the bankruptcy proceedings and permanently stay the appeals made by the former D&Os to the ERT. The hearing was held April 18, 2013, and the Court has reserved judgment.

The Northstar companies, which supplied components and services to the commercial and military aerospace markets, owned or leased operating facilities in the US and Canada, including one in Cambridge, Ontario. Closed since April 2010,

### Environmental fines up again in Ontario in 2012

In 2012, the Ministry of the Environment posted details of some 112 successful prosecutions on its Court Bulletin webpage, with fines totalling just over $5 million. In 2011, the Ministry registered some 104 prosecutions and $3,256,875 in fines. Among the notable convictions

- In January 2012, the director and employee of an auto garage were fined a total of $170,000 for Drive Clean related offenses.
- In March, a company that applied anaerobic digestate on farmland in Niagara on the Lake was fined $105,000 for allowing a discharge to nearby Six Mile Creek.
- In August, a number of waste disposal companies in Vaughan were fined a total of $1,100,000 for emitting smoke and odour into the natural environment from a 2004 fire.
- In December, two waste hauling companies and their directors were fined $239,999 for the illegal disposal of construction and demolition wastes on a Mississauga property and failure to comply with a ministry clean-up order.

In 2012, the Ministry issued 16 environmental penalty orders, totaling $216,457.40. The 2012 penalties were assessed, primarily, against a number of large power producers and mining companies, including CM Greenfield Power ($67,500 in penalties), Wesdome Gold Mines ($23,390), Bruce Power ($23,734.70), Ontario Power Generation ($22,750), Vale Canada ($25,100) and ArcelorMittal Dofasco ($37,986.70). Since August 1, 2007, the Ministry has issued 78 penalty orders with a total value of $995,939.85.

the Cambridge facility used a number of industrial solvents, including trichloroethylene (TCE), and hexavalent chromium in its operations. These chemicals had polluted the groundwater and migrated from the property, contaminating more than 500 nearby homes. Since the problem was first identified in 2004, Northstar Canada spent more than $20 million on environmental testing and remediation at and around the site.

Concerned about the company's financial health, the Ministry issued an Order on March 15, 2012, "to ensure the potential adverse effects from TCE and hexavalent chromium impacted groundwater to human health and the environment continues to be monitored, mitigated and remediated where necessary." A second Order, issued in May 2012, required the company to provide financial assurances of more than $10.3 million to fund the measures outlined in the March Order.

To reduce TCE vapour intrusion to acceptable levels, subslab depressurization systems have been installed at 59 homes, and 93 homes are serviced by soil vapour extraction units. Northstar also installed a groundwater pump and treat system to reduce TCE contamination in the groundwater beneath the community.

In June 2012, Northstar Inc., Northstar Canada and two related companies were granted protection under the federal *Companies' Creditors Arrangement Act*, and certain of its US subsidiaries commenced "Chapter 11" insolvency proceedings under the *United States Bankruptcy Code*. In July 20, 2012, the Superior Court of Justice approved the sale of the companies' Canadian assets – but not the Cambridge facility – to Heligear Canada Acquisition Corporation.

The Court also ruled that "the MOE is not entitled to attempt to use the March 15 Order to create a priority that it otherwise does not have access to under the legislation." The MOE has appealed that decision to the Ontario Court of Appeal, seeking a priority claim on the marketable assets of the Northstar companies over those of the secured creditor. The case is scheduled to be heard this June.

Northstar Canada was adjudged bankrupt effective upon the closing of the Heligear transaction in August 2012. On August 15, 2012, in accordance with a Minister's Direction, the Ministry engaged a contractor to undertake the operation, monitoring and maintenance of the existing indoor air mitigation systems in the effected residences, the soil vapour extraction systems, and the groundwater pump and treat system on the Cambridge site. Effective March 1, 2013, a corporation controlled by the former D&Os retained the same contractor to perform the required remediation work in accordance with the Director's D&O Order.

### Diversion efforts "stalled"

## Ontario shifts focus from eco-fees to individual producer responsibility

Ontario has abandoned its 10-year experiment with "extended producer responsibility" in favour of an "individual producer responsibility" (IPR) approach that will make waste generators individually responsible and environmentally accountable for diverting designated wastes from landfill. New legislation will set IPR requirements for the diversion of designated end-of-life products and wastes, and enable the setting of standards related to waste diversion and services. Paper and packaging supplied into the industrial, commercial and institutional (IC&I) sectors are expected to be the first wastes to be designated, likely followed by new recycling standards for end-of-life vehicles and organics.

Bill 91, the new *Waste Reduction Act*, was introduced for First Reading on June 6, 2013, and would repeal and replace the current *Waste Diversion Act, 2002*. Together with an accompanying Waste Reduction Strategy, the proposed legislation has been posted on the Environmental Registry for a 90-day public review and comment period.

Producers could either set up "producer-controlled intermediaries" or deal with third party intermediaries who would broker, arrange for, or facilitate the provision of waste reduction services for them. (Service agreements would spell out the duties and responsibilities of producers and intermediaries.) This would allow producers greater flexibility in deciding how to meet the forthcoming waste diversion standards in the most economical and cost competitive manner. The goal is to ensure recycling costs are included in the cost of the product as part of the "cost of doing business."

According to the Ministry of the Environment, the proposed *Waste Reduction Act* and strategy would

"protect consumers from surprise eco-fees by making sure that recycling costs are included in the advertised price of a product." The new Act would require "all-in pricing" for designated wastes. If a seller opts to display the waste diversion costs embedded in the price of a product, they must be stated in "a transparent and accurate manner." False or misleading representations would be an offence.

Waste Diversion Ontario would be transformed into the new Waste Reduction Authority to oversee the compliance and enforcement of the new IPR regime, undertake inspections and enforcement, and issue monetary penalties for non-compliance. It would operate a Waste Reduction Registry on which producers, intermediaries and municipalities would register, and which would provide public notice of orders and compensation formulas issued under the Act. The Authority would be financed by fees and administrative penalties to be determined through future regulations. The Minister of the Environment is allowed to appoint only a minority of the members of the board of directors of the Authority.

The four currently operating waste diversion programs – covering used tires, waste electrical and electronic equipment, municipal hazardous or special wastes, and municipal Blue Box materials – and their respective industry funding organizations would be continued through re-enacted provisions under Part VII of the new Act. According to the background strategy, the Waste Reduction Authority would be responsible for ensuring "a timely transition of existing diversion programs in a way that is easy and convenient for residents."

Producers would still be required to reimburse municipalities for the collection and handling costs of designated Blue Box recyclables (see sidebar). The proposed framework would also support an increase in steward funding for the existing Blue Box program beyond the current 50 per cent. However, when and how any increase is to be implemented will be subject to "an extensive consultation process."

Ontario's efforts to divert waste from disposal had stalled under the current regulatory and policy regime. Of the approximately 12 million tonnes of waste generated in Ontario every year, only 25 per cent is being diverted. While an estimated 46 per cent of the residential waste is recycled, Ontario's IC&I sectors, which are collectively generating 60 per cent of the province's wastes, are recycling only 13 per cent.

**Fines can be substantial**

Part V of the proposed Act covers enforcement provisions, including powers of inspection and seizure, compliance orders and orders imposing administrative penalties of up to $100,000 per occurrence. Compliance orders and administrative penalty orders could be appealed to the Environmental Review Tribunal. Contraventions of listed statutory or prescribed regulatory provisions are punishable, on conviction, by fines of up to $100,000 per day for individuals and $500,000 for corporations. A director, officer, employee or agent of the corporation who failed to take all

### New formula to fund Blue Box programs

Section 44 of the proposed *Waste Reduction Act* covers the collection of designated wastes by municipalities and the reimbursement of those costs by producers.

A producer must collect the designated waste from the municipality, unless: (1) the producer and the municipality have agreed otherwise in writing; (2) the municipality chooses not to make the producer responsible for collection and has indicated the choice (in its registration); or (3) an Act or regulation requires the municipality to collect and process the designated waste.

If an intermediary of the producer has agreed to fulfil any part of the producer's duty, the matter must be dealt with in the service agreement.

The producer must pay the reimbursable part of the municipality's costs related to its collection, handling, transportation and storage of the designated waste, as well as its processing and disposal of the designated waste (if an Act or regulation requires the municipality to collect and process the designated waste).

The amount of the payment shall be determined by agreement between the producer and the municipality. If there is no agreement, the amount shall be determined in accordance with the compensation formula established by the Authority or an amount determined in accordance with the regulation.

reasonable care to prevent the commission of the offence, or who participated in its commission, is also guilty whether the corporation has been prosecuted for the offence or not.

## Ottawa rewrites list of projects subject to federal environmental assessment

Environment Canada has proposed a series of amendments to the list of projects subject to federal environmental assessment. The government proposes to add several categories of major projects – such as diamond mines, international bridges and tunnels, and offshore exploratory oil wells – that have a high potential "to cause significant adverse environmental effects in areas of federal jurisdiction." At the same time it will drop a number of project categories – including heavy oil and oil sands processing facilities, a wide variety of industrial operations, and potash, gypsum and asbestos mines – all of which are considered to have "minimal impacts on areas of federal jurisdiction."

The proposed amendments to the Regulations Designating Physical Activities, under the new *Canadian Environmental Assessment Act* (*CEAA 2012*), were published in the *Canada Gazette, Part 1* on April 20, 2013. They are intended "to increase certainty and predictability for proponents," as well as to improve the clarity of the Regulations and their internal consistency. Interested parties were given 30 days to submit any comments to the Canadian Environmental Assessment Agency.

The regulations list those physical activities that constitute the "designated projects" that may require an EA at the discretion of the Canadian Environmental Assessment Agency, or will require an EA by either the Canadian Nuclear Safety Commission (CNSC) or by the National Energy Board (NEB). The following projects have been added to the schedule of designated projects in the regulations

- diamond and apatite mines
- railway yards
- international and interprovincial bridges and tunnels, including bridges that cross the St. Lawrence Seaway
- the first offshore exploratory wells in Exploration Licence areas
- expansions to oil sands mines.

In addition, the Minister of the Environment can designate specific projects not on the list for federal EA under the *CEAA*.

At the same time, the following projects would now be excluded from federal EA (unless designated by the Minister):

- groundwater extraction facilities
- heavy oil and oil sands processing facilities
- pipelines and electrical transmission lines not regulated by the NEB
- potash mines and other industrial mineral mines, such as salt, graphite, gypsum, magnesite, limestone, clay and asbestos
- industrial facilities, including pulp and paper mills, steel mills, metal smelters, leather tanneries, textile mills, and facilities for the manufacture of chemicals, pharmaceuticals, pressure-treated wood, particle-board and plywood, chemical explosives, lead acid batteries and respirable mineral fibres.

The thresholds that would trigger an EA have been adjusted for several types of facilities, including in-stream tidal power generating facilities, liquefied natural gas storage facilities, and rare earth element mines. Limits have also been raised for the expansion of certain mines, oil and gas processing and storage facilities, water diversion structures, stone quarries and gravel pits, hazardous waste disposal facilities, and military bases or stations. Amendments have also been made to reflect the current licensing practices of the CNSC and those pipeline activities regulated by the NEB.

Finally, a number of modifications were made to improve the clarity and consistency of the wording, several definitions will be added, revised or deleted, and a number of transition provisions were made to accommodate situations that may arise during the coming into force of the amended regulations.

## Recent rulings address duty to consult and treaty rights

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| ***Behn v. Moulton Contracting Ltd.*** (2013 SCC 26)<br>The Supreme Court of Canada rules that the blockade of a logging road was an "abuse of process." In this case, only the band council, not individual band members, have standing to assert collective treaty rights, including the duty to consult. The appeal was dismissed.<br><br>Hearing: Dec. 11, 2012<br>Decision: May 9, 2013 | On June 27, 2006, the British Columbia Ministry of Forests granted licences to Moulton Contracting Ltd. to harvest timber in two areas on the territory of the Fort Nelson First Nation (FNFN). In October 2006, a number of members of the Behn family, all but one from FNFN, erected a camp and blocked the company's access to one of the logging sites (both of which fell within the Behn family's allocated trapline area). The company brought action against the Behns, who argued that the licences were void because they had been issued in breach of the constitutional duty to consult and because they violated their treaty rights. The BC Supreme Court and BC Court of Appeal held that the individual FNFN members did not have standing to assert collective rights and that a challenge to the validity of the licences amounted to a collateral attack or an abuse of process.<br><br>Although certain Aboriginal and treaty rights may have both collective and individual aspects, the SCC held that the FNFN had not authorized the Behns to represent it for the purpose of contesting the legality of the licences. Given the lack of authorization, the Behns could not assert a breach of the duty to consult on their own.<br><br>Neither the FNFN nor the Behns had legally challenged the licences when the Crown granted them, and the logging company believed that it was free to plan and start its operations. By blocking access to the logging sites, the Behns forced the company to either go to court or forego harvesting timber after having incurred substantial costs. To allow the members to base their defence on treaty rights and on a breach of the duty to consult at this point "would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations." The appeal was dismissed with costs to the respondent Moulton Contracting. |
| ***Conseil des innus de Ekuanitshit c. Canada (Procureur général)*** (2013 FC 418)<br>Federal Court deemed the review of the Crown's consultation premature, but nonetheless found that Aboriginal consultation during the assessment of the Lower Churchill Hydroelectric Generation Project to that point in time to be adequate.<br><br>Hearing: Jan. 22, 2013<br>Decision: April 23, 2013 | This was an application for judicial review, filed on April 16, 2012, of the Order in Council approving the federal government's response to the *Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador*, which was issued by a Joint Review Panel (JRP) following its environmental assessment of the project under the *Canadian Environmental Assessment Act*. Among other remedies, the applicant was seeking a declaration that the responsible authorities did not fulfill their duty to consult the Innus d'Ekuanitshit on the elements of the project that could adversely affect their traditional rights, as well as an order quashing the Order in Council.<br><br>The Court found that judicial review of the federal government's consultation to be premature. While preparatory work for the project has begun, "the acts that truly put the applicant's rights and interests at risk" are those which require permits issued by Transport Canada and Fisheries & Oceans, and consultation will continue till the permits are issued.<br><br>Nonetheless, the Court reviewed the adequacy of consultation undertaken to the point when the application was filed. The Court found that the Applicant was entitled to "more than minimum consultation." The Court was satisfied that the consultations conducted by the JRP during the EA met this standard; the Applicant was involved early and throughout the process, had Agency funding to review studies, and made oral submissions to the JRP. The Court found that the Applicant's concerns were taken seriously: mitigating measures proposed by the proponent and the JRP to minimize negative impacts on the Ekuanitshit's rights "substantially satisfy the federal government's duty to consult and accommodate within its jurisdiction." The federal government confirmed that these measures will be made an integral part of the project; should it fail to implement the mitigation measures, the Applicant may have that decision judicially reviewed. |

## Meet Willms & Shier Legal Experts at these Upcoming Events

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| June 20 & 21 | **2013 Annual National Environmental, Energy and Resources Law Summit**, hosted by the Canadian Bar Association, at The Explorer Hotel, Yellowknife, NWT | **Charles Birchall** is co-chair of this not-to-be missed legal conference. Hear about the hottest issues in environmental, energy and resources law spanning both north and south of 60. **Julie Abouchar** will discuss Impact Benefit Agreements, and financing Aboriginal businesses and projects. **Marc McAree** will moderate a panel of five leading legal experts who will discuss "Hot Topics North of 60". **Joanna Vince** is attending the conference as the representative for the Ontario Bar Association Natural Resources and Energy Law Section. |

*(Continued from page 1)*

and contractual disputes, product liability, mining and exploration rights, electricity transmission and generation, insurance disputes and negligence actions. You can reach Richard at 416-862-4837 or by e-mail at rbutler@willmsshier.com

Finally, take a look at our masthead and you'll see Willms & Shier has adopted **a fresh new logo** that graphically symbolizes the intersection of our firm's three primary practice areas – environmental law, Aboriginal law and energy law. The three overlapping organic shapes are centered around a shining ray of light symbolizes clarity and insight. With the recent opening of our new Ottawa office, together with our increased business presence across Western Canada, the Near-North and Far North, we thought it was time to update our look and present a 'new face' to the legal world.

## Willms & Shier a "Top 5" environmental law firm

Once again, *Canadian Lawyer* has named Willms & Shier Environmental Lawyers LLP one of Canada's "Top 5 Environmental Law Boutiques for 2013-14." A special report in the magazine's January issue quotes a senior litigator, who says W&SEL is "one of, if not the, best enviro law firm in the country." Over the past 30 years, the editors write, "partners Donna Shier and John Willms have developed reputations as two of Canada's foremost counsel in the specialty area, and their firm now consists of a stable of 12 lawyers including five certified environmental law specialists." The list of top boutique law firms was compiled from online surveys and confidential interviews with in-house counsel and large-firm lawyers who refer work to these boutique firms. The story notes that most of the firm's clients are from the private sector, with many involved in negotiations or disputes with the Ontario Ministry of the Environment. "Brownfields and contaminated lands work also helps keep Willms & Shier one of the country's busiest environmental law shops," the editors write.

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