Willms & Shier | Environment Aboriginal Energy Law Report

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Ontario Premier Wynne Mandates Environmental, Energy and Aboriginal Priorities

By Julie Abouchar, Marc McAree and Nicole Petersen, with the assistance of Giselle Davidian, Student-at-Law.

Ontario Premier Kathleen Wynne released mandate letters to her cabinet ministers on September 25, 2014, outlining key priorities for each ministry. Premier Wynne's marching orders include many environmental, energy and Aboriginal priorities. The following is a brief overview of a selection of Premier Wynne's key environmental, energy and Aboriginal priorities.

Environmental Priorities

- **Climate Change**—The Ministry of Environment and Climate Change (MOECC) will lead the development of a new long-term climate change strategy for the province in 2015 that will look forward to 2050 and contain an action plan to achieve greenhouse gas (GHG) reduction targets for 2020. MOECC will work with other key ministries such as Energy (ME), Transportation, and Natural Resources and Forestry (MNRF) amongst others to implement the strategy and achieve targets. Other climate change efforts identified in the mandate letter include public and stakeholder engagement on climate change, developing a Canadian Energy Strategy with coordinated GHG emission reduction efforts, and developing new alternative fuel rules later this year to help energy-intensive industries reduce GHG emissions.
- **Pollution Prevention and Responsibility**—MOECC will place greater emphasis on pollution prevention and the "polluter pays" principle, focusing first on contaminated sites. Premier Wynne also encouraged MOECC to review the legislative framework to ensure a comprehensive approach to hold polluters responsible for decisions affecting the environment.
- **Waste Diversion**—Premier Wynne directs MOECC to build on Ontario's Waste Reduction Strategy and work with industry, municipalities and other stakeholders to reintroduce waste reduction legislation.
- **Drinking Water Quality for First Nations**—Premier Wynne tasks MOECC and the Ministry of Aboriginal Affairs (MAA) to improve drinking water on reserves, focusing on remote communities. These ministries will work with the Ministry of Intergovernmental Affairs and the federal government to achieve measurable, achievable targets and substantive progress.
- **Invasive Species**—MNRF will prepare the *Invasive Species Act* for reintroduction and continue addressing concerns about prevention, early detection and eradication of and rapid response to invasive species.

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Natural Resource Development

- **Ring of Fire Development**—Premier Wynne tasks a number of ministries with supporting project development in the Ring of Fire region in northern Ontario. In particular, various ministries will progress the next phase of negotiations under the Ring of Fire Regional Framework Agreement. MOECC will also work with MNRF and the Ministry of Northern Development and Mines (MNDM) to make decisions about environmental assessments, cumulative and regional environmental impacts, and long-term monitoring in the region. Premier Wynne also asks MNDM to work with key mining companies, First Nations and other parties to establish a Ring of Fire development corporation to construct, finance, operate and maintain infrastructure to support access to strategic resources in the region.
- **Sharing Resource Benefits with Aboriginal Communities**—MAA will work across government to ensure that Aboriginal communities are engaged in resource-related economic development and will benefit from the natural resource industry. MAA is tasked with advancing the province's local and/or sectoral approach to sharing resource benefits.
- **Engagement with Aboriginal Communities on Aggregate and Forest Resources**—MNRF will engage with First Nations to address the recommendations of the Standing Committee on General Government's Report on the Review of the *Aggregate Resources Act*. MNRF will continue to engage with First Nations on forest resources.

Energy Priorities

- **Long-Term Energy Plan Implementation (LTEP) and the "Conservation First" Approach**—ME will continue to implement Ontario's 2013 LTEP. This includes implementing a Conservation First approach to energy planning, approval and procurement. ME will work with the Ontario Power Authority, Independent Electricity System Operator and the Ontario Energy Board to prioritize the Conservation First approach.
- **Renewable Energy**—Premier Wynne tasks Ontario's Energy Minister with advancing the province's policies on renewable energy, including wind, solar, bioenergy and hydro power. Ontario aims to have 20,000 megawatts of renewable energy online by 2025. ME will work with its agencies to implement a new competitive procurement process for renewable energy projects larger than 500 kilowatts and take into account local considerations. It will also work with its agencies and municipalities to ensure that municipalities are able to participate meaningfully and effectively in decision-making to place renewable energy projects.
- **Pipelines**—ME will protect Ontario's interests by continuing intervention in regulatory hearings about major pipeline projects that directly affect the province.

Climate Change Tops Federal Environmental Agenda

By Charles Birchall

Canada announced progress with greenhouse gas (GHG) reduction initiatives following the United Nations Climate Summit in New York in September.

Lowering GHGs from Vehicles

Canada announced developments in four new regulatory initiatives to lower vehicular GHG emissions.

On September 27, the federal government published proposed amendments to the *On-Road Vehicle and Engine Emission Regulations* and the *Sulphur in Gasoline Regulations*. These amendments will bring Canada's permissible levels of emissions from light vehicles and sulphur content in gasoline in line with U.S. Tier 3 standards.

On October 8, 2014, the federal government published the finalized *Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations.*

Canada also intends to further regulate fuel efficiency for post-2018 model year heavy-duty vehicles.

Regulation of HFCs

Environment Minister Leona Aglukkaq announced that Canada will regulate hydrofluorocarbons. The aim is to reduce and limit these GHG emissions through regulations that align with recently proposed U.S. regulations.

- **Remote Transmission Projects**—MAA will create an Aboriginal Economic Development Fund for Aboriginal communities and businesses to improve opportunities for employment and business development. Specifically, MAA will partner with the Minister of Energy to create the Remote Electrification Readiness Program. This will position Aboriginal communities to benefit from remote transmission projects.
- **Aboriginal Participation in Energy Projects**—ME will continue to consult with First Nations about energy projects that could adversely affect their Aboriginal or treaty rights. ME will continue to support First Nations participation in generation and transmission projects through programs such as the Aboriginal Energy Partnerships Program. ME will seek funding and cooperation from the federal government and MAA to connect Aboriginal communities to the electricity grid.
- **Aboriginal Community-Level Energy Planning**—ME will support First Nations community-level energy plans through the Municipal Energy Plan Program and the Aboriginal Community Energy Plans Program.

Aboriginal Land Claims, Treaties and Consultation

- **Moving Forward on Land Claims and Treaties**—MAA will continue to negotiate land claims, including moving forward from the Algonquin Agreement-in-Principle. MAA will move forward with a new Treaty Strategy to build better relationships with Aboriginal peoples.
- **Fulfilling the Duty to Consult**—MAA will continue to work with all ministries to fulfill Ontario's duty to consult.
- **Northern Priorities and the Growth Plan for Ontario**—MNDM will continue to consult with First Nations on the priorities for the North and the Growth Plan for Ontario.

Thornhill v Highland Fuels Reinforces Need for Tank Installers and Fuel Distributors to Follow Statutory Requirements and Fuel Oil Code

By Matthew Gardner, with the assistance of Mark Youden, Student-at-Law.

On May 15, 2014, the Ontario Superior Court of Justice released its decision in *Thornhill v Highland Fuels*. Highland Fuels, the tank installer and fuel oil distributor, was found not negligent in its tank installation and supply of fuel to Thornhill's aboveground fuel oil storage tank. This is notwithstanding that the tank leaked two years after Highland Fuels installed it and just a few months after Highland Fuels refilled it. The Court found that Highland Fuels installed the tank in accordance with statutory requirements. The Court found there was no breach of the standard of care by the tank installer. The Court determined that the requisite standard of care for the installation of a fuel oil tank is established through reference to the *Technical Standards and Safety Act*, associated Ontario Regulation 213/01 and the Installation Code for Oil-Burning Equipment (CAN/CSA B139). The Court commented extensively on Thornhill's damages claim. The Court highlighted the difficulty that environmental contractors often face in estimating remediation costs at the outset of a clean up and the too-often-seen situation where actual remedial costs have no resemblance to initial estimates.

Most interesting is the Court's finding that "…the EPA creates a statutory obligation to remediate, in the circumstances of this case and in the absence of evidence of prior spills, to a non-detect basis".

On June 12, 2014, the homeowners filed their Notice of Appeal.

The Spill

During the Labour Day weekend in 2006, Kevin Thornhill and Jackie Normore (the homeowners) discovered that their oil burning furnace would not turn on. As a result, the homeowners contacted their heating fuel oil supplier, Highland Fuels Dundalk Ltd. (Highland Fuels). Highland Fuels had installed the homeowners' outdoor and aboveground fuel oil tank in 2004 and supplied the homeowners with fuel oil on a regular basis. Highland Fuels discovered that the tank was empty and oil in the tank had leaked through a broken valve. Highland Fuels replaced

the valve and advised the homeowners to contact their insurer, Peel Maryborough Mutual Insurance Company (Peel Maryborough). Peel Maryborough told the homeowners that Peel Maryborough would cover the entire clean up costs so long as D L Services (DLS) conducted the clean up. On September 17, 2006, DLS began remedial work at the property. One month later, DLS provided the homeowners and Peel Maryborough with an estimate of $179,900 (with a contingency of plus or minus 15%) to clean up the fuel oil contamination. DLS' ultimate cost came to $1,195,269.

The homeowners issued a civil claim against Highland Fuels alleging that Highland Fuels negligently installed and supplied fuel oil to the fuel oil tank and that the negligence caused the spill. Highland Fuels denied that it negligently installed the fuel oil tank and, in the event Highland Fuels was held liable, alleged contributory negligence against the homeowners. Highland Fuels also pleaded that the remedial costs were grossly disproportionate to the gravity of the spill.

Standard of Care for Fuel Oil Tank Installers

The Court cited the Ontario Superior Court of Justice's decision *Maddock v McRobert Fuels Ltd.* in swiftly establishing that "an oil technician or supplier of fuel oil to the consumer" owes that consumer a duty of care. The Court held that there was "no question that Highland Fuels owed a duty of care" to the homeowners, and focussed the majority of its analysis on whether Highland Fuels breached the standard of care when installing the fuel oil tank at the homeowners' property. The Court heard from seven experts on this issue. All seven experts agreed that the installation of fuel oil tanks in Ontario is governed by the *Technical Standards and Safety Act*, Ontario Regulation 213/01 and the national code embodied in CAN/CSA B139 (better known as the "Fuel Oil Code"). The Court referred to these documents collectively as the "Code".

The Court reviewed whether a tank must be installed by a qualified technician who followed "certified instructions". The Court grappled with the word "certified", and the experts disagreed about its meaning and application. Highland Fuels admitted that it did not follow the tank manufacturer's installation instructions, but argued that such instructions were not "certified" and were simply "guidelines". Despite similarities to the Code, the manufacturer's instructions for installation of the tank were neither verified nor tested by a regulatory body. Therefore, the Court held that the tank manufacturer's instructions were not certified. The Court concluded that the manufacturer's instructions were helpful as a guideline, but were not determinative of the requisite standard of care. That Highland Fuels did not follow the manufacturer's instructions when installing the tank did not mean that Highland Fuels' conduct fell below the standard of care, but constituted one factor to be considered in the overall analysis.

The Court relied on the expert opinions of two licensed Oil Burning Technicians who testified that Highland Fuels met the standard of care for fuel oil tank installations in 2004 by following the Code. Specifically, the Court accepted that Highland Fuels installed the tank in accordance with six steps set out in the Code, and by doing so, complied with the Code and met the standard of care of a tank installer in 2004.

Notwithstanding that the Court found that Highland Fuels did not breach the standard of care and was therefore not negligent, the Court analyzed causation for completeness. The Court found that there was no causal connection between the cracked valve and Highland Fuels' installation method. Rather, it accepted Highland Fuel's expert's opinion that the tank tilted as a result of natural subsurface erosion, which put stress on the valve and caused it to crack.

Standard of Care for Fuel Oil Distributors

The Court relied on Highland Fuels' unchallenged testimony in summarily deciding that Highland Fuels did not breach the standard of care when it delivered fuel to the homeowners. The Highland Fuels employee who had last delivered fuel to the homeowners' tank in April 2006 (less than five months before the homeowners detected the oil spill) testified that he had not noticed anything unusual about the tank, including any tilting. He also testified that "he would not have delivered fuel if there were any issues with the tank."

Costs of Remediation

Highland Fuels objected to a number of aspects of DLS' remedial work. Highland Fuels argued that DLS should have been held to its cost estimate and that DLS' remediation methods were inappropriate, which led to the exorbitant costs.

The Court scrutinized DLS' inaccurate estimate of the remedial costs:

> It concerns me that after DLS had conducted a detailed assessment of the site for approximately one month, the estimate contained in the Preliminary Report was so inaccurate when compared to the final costs.

Nevertheless, the Court found that the preliminary estimate was not a contract that bound DLS to its cost estimate.

The Court faced opposing submissions as to the appropriate "level of remediation". Highland Fuels argued that the remediation should ensure that the soil and groundwater meets the applicable Ontario Ministry of the Environment Site Condition Standard pursuant to Ontario Regulation 153/04. However, the Court sided with the homeowners and held that the homeowners were entitled to be put in the position they were in prior to the spill, which required complete removal of the fuel oil from their property.

Finally, the Court assessed the cost of remediation and the steps taken by DLS. The Court commented on the lack of supervision by Peel Maryborough despite its awareness of the increasing costs as the process continued. The adjuster at Peel Maryborough only visited the site twice during the remediation process. Several experts critiqued many aspects of DLS' invoices. The Court noted that factors such as delays and improper charges associated with travel time contributed to the high costs of remediation. After calculating the total costs of assessment and remediation, the Court concluded that DLS' total invoice should not have exceeded $685,737, almost half of its actual cost of $1,195,269.

Conclusion and Appeal

The decision in Thornhill provides some comfort to fuel oil tank installers (and fuel oil distributors) that following the statutory requirements when installing and delivering fuel oil to tanks will reduce their exposure to liability in negligence.

Thornhill shows that in the absence of prior spills, insurance companies obliged to cover spill clean up costs might expect to pay for remediation of the fuel oil contamination to 'pristine', not just to the applicable Ontario Ministry of the Environment Site Condition Standards. Thornhill demonstrates that without proper oversight, costs for remediation can get out-of-control.

The plaintiff homeowners have filed their Notice of Appeal.

Alberta Court of Appeal Upholds Regulator's Immunity in Fracking Case

By John Georgakopoulos, with the assistance of Mark Youden, Student-at-Law.

On September 15, 2014, Alberta's Court of Appeal dismissed Jessica Ernst's appeal of the lower court decision holding that Alberta's Energy Resource Conservation Board (the Board) is immune from private civil claims and certain *Charter* challenges.

Jessica Ernst owns land near Rosebud, Alberta. In 2007, Ms. Ernst brought claims against EnCana Corporation, the province of Alberta and the Board. Ms. Ernst sued EnCana for damage to her water supply allegedly caused by EnCana's hydraulic fracturing (fracking) activity. Ms. Ernst also sued the province of Alberta alleging that through its department of Alberta Environmental and Sustainable Resource Development (now replaced by the Alberta Energy Regulator) it owed Ms. Ernst a duty to protect her water supply and failed to adequately respond to her complaints about EnCana's fracking.

This Appeal dealt with Ms. Ernst's claim against the Board (now also replaced by the Alberta Energy Regulator) for "negligent administration of regulatory regime" related to her claims against EnCana. The Board has regulatory jurisdiction over the activities of EnCana. Ms. Ernst also had claimed damages for breach of her freedom of expression under the Canadian *Charter of Rights and Freedoms*. She alleged that the Board refused to accept communications from her during regulatory proceedings.

Alberta's Court of Appeal held that the Board does not owe a private law duty of care to protect individual landowners. The Court of Appeal stated that "any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry." Further, even if there was a private law duty of care, any action against the Board was barred by the immunity clause under section 43 of the *Energy Resources Conservation Act* (ERCA). The Court of Appeal dismissed Ms. Ernst's argument that the Board failed to respond "reasonably" to Encana's activities and held that a tortious claim alleging an omission to act was barred by section 43 of the ERCA. The Court of Appeal also held that section 43 barred Ms. Ernst's Charter claim for a "personal remedy". The Court of Appeal concluded that even if the Board effectively breached Ms. Ernst's freedom of expression, that "protecting administrative tribunals and their members from liability for damages is constitutionally legitimate."

The decision upholds the Alberta Energy Regulator's blanket legal immunity against tortious claims from landowners.

Ms. Ernst has requested leave to the Supreme Court of Canada.

Mining Claim Staking in Remote Areas—Mining Recorder Order Confirms Helicopter Use

By Richard Butler

On June 24, 2014, the Ontario Provincial Mining Recorder released reasons for his decision in *Noront Resources Ltd. (Disputant) v Canada Chrome Corporation and KWG Resources Inc.* (Respondents). In his reasons, the Mining Recorder dismissed Noront's dispute against KWG's mining claims, which KWG staked using helicopters.

The Mining Recorder's decision is one in a line of cases recognizing the challenges of mining claim staking in remote areas, such as the Ring of Fire region of northern Ontario. The decision also provides a pragmatic and modern interpretation of the *Mining Act* and its claim staking regulations. Willms & Shier acted for the Respondent and successful party KWG.

Background

Noront Resources is a junior mining company developing the Eagles Nest Mine and Black Bird chromite project, both located in the Ring of Fire. KWG Resources is an exploration stage company participating in the discovery, delineation and development of chromite projects in the Ring of Fire, including the Black Horse and Big Daddy deposits.

The Ring of Fire is a region of significant mineral concentration in central and northern Ontario. It is located approximately 540 km northeast of Thunder Bay, encircling McFaulds Lake in the James Bay lowlands area. While the crescent shape of the Ring of Fire covers approximately 5,000 km^2, most of the significant discoveries have been made in a 20 km long strip in the south east, near Koper Lake. The mining claims at issue in this dispute are located in this area of focused exploration. Prospecting in the Ring of Fire is highly competitive. The logistics of mining claim staking in the Ring of Fire is a challenging exercise, due to topography and distance.

Staking Rush and Helicopter Protocol

Crown lands located near Koper Lake opened for staking on June 17, 2011. The mining claim staking proceeded pursuant to the 24 Hour Rule – special rules under O Reg 43/11 applied to the staking rush. Noront hired two men to

stake the Crown land on foot. By contrast, KWG used two helicopters and more than a dozen stakers in a coordinated effort to stake the claims as quickly and efficiently as possible.

At 9:00 a.m., KWG's recording licensee, Ken Pye, inscribed the first mining claim post (with tags), erected the post in the ground and immediately proceeded to the helicopter. Mr. Pye was strapped into the back of the helicopter, which followed the mining claim boundary. He inscribed additional line posts and corner posts in the helicopter. He dropped the posts at predetermined locations along the mining claim boundary. Mr. Pye dropped posts from the helicopter at a height of approximately 10-30 metres (depending on surrounding tree tops). The posts entered the ground vertically, and stuck into the muskeg environment, remaining upright.

Mr. Pye placed team members at key locations around the mining claims. The team commenced "blazing" the mining claim boundaries (marking trees and attaching flagging tape) after the 9:00 a.m. start time, and only after Mr. Pye erected the first post. Mr. Pye and all team members travelled in a clockwise direction. Mr. Pye finished at the number 1 post, where he started, and inscribed his finish time (the Helicopter Protocol). KWG completed the Helicopter Protocol for two additional mining claims and completed three mining claims before Noront was able to complete its first. Noront's witness at the hearing admitted that they were "caught off-guard" by KWG's Helicopter Protocol. Mr. Pye completed the Applications to Record Mining Claims and filed them with the Mining Recorder's office on June 21 and June 23, 2011.

Alleged Defects in Staking

During the hearing, Noront alleged that the mining claims should not be recorded and should be disqualified on the basis that the Helicopter Protocol did not comply with the *Mining Act*. Noront argued that KWG's staking was illegal because Mr. Pye was not present "on the ground" during staking. Noront also argued that KWG's staking was void because it used multiple team members blazing the claim boundary in multiple locations. The Mining Recorder dismissed both arguments.

- **"On the Ground"—**The Mining Recorder held that having the recording licensee's feet on the ground at all times is not a requirement of the *Mining Act* or its staking regulations. The previous version of the claim staking regulation (O Reg 7/96) required the licensee to be present on the ground during staking. However, the current version (O Reg 43/11) does not contain that language. The updated regulation states that the licensee must be present in the area under staking at the time of staking the area. The Mining Recorder found that Mr. Pye was indeed in the area, even though he did not have his feet on the ground at all times.

  The Mining Recorder further relied on a decision by the Mining and Lands Commissioner that held that the staking regulation does not require a licensee to proceed on foot at all times during staking. In the matter of *Estate of Carl Forbes, et al. v Michael Tremblay et al.*, the Commissioner held that the use of a vehicle is not prohibited by the wording of the Act. The Commissioner held that it is increasingly clear that those engaged in competitive staking are now using every available means by which to save precious seconds. In this case, Mr. Pye's mode of transportation was a helicopter, and although he was not on the ground at the time each post was erected, the posts were properly erected by dropping them from the helicopter and having them land vertically into the ground.
- **Multiple Team Members** – The Mining Recorder also found that it was not fatal to the KWG's claim staking to have Mr. Pye's team members stationed at key locations around the claims. The team members commenced blazing the claim boundary only after Mr. Pye erected the first post. All team members proceeded in a clockwise direction. Consistent with the decision in *Royal Oak v Strike Minerals*, the Mining Recorder found that having multiple claim blazers acting in concert does not offend the claim staking regulation.

Conclusion

The Mining Recorder found that there is nothing in the *Mining Act* that prohibits erecting mining claim posts by dropping them directly from a helicopter. The recording licensee need not be "on the ground" during every step of claim staking, and the wording of the regulation now permits the recording licensee to be present in each area under staking, as Mr. Pye was at all times. The Mining Recorder upheld the Helicopter Protocol and dismissed Noront's dispute.

Join Willms & Shier at these Upcoming Events		
Nov. 3-4	Insight Information: **Aboriginal Law Forum**—Toronto, ON	**Charles Birchall** will be speaking about the "**Implications of Tsilhqot'in and Keewatin Cases on Environmental Assessment Processes"** on November 4.
Nov. 4	Canadian Corporate Counsel Association: **Maneuvering Through Troubling Times for Directors and Officers**—webinar	**Donna Shier** and **John Georgakopoulos** are joined by Canexus General Counsel **Dianne Pettie, Q.C.** and **Jay Cassidy** of Marsh Canada Limited in this webinar discussing the latest troubling updates on corporate directors' and officers' liability.
Nov. 5	Ontario Bar Association: **Cold Truths: Infrastructure Development in the Ring of Fire**—Toronto, ON	**Joanna Vince** is co-chairing this timely program about Ontario's recent establishment of the **Right of Fire Infrastructure Development Corporation.**
Nov. 6-7	Canadian Bar Association: **26th Annual NEERLS & Department of Justice Meeting**—Ottawa, ON	**Charles Birchall** and **John Donihee** will both be speaking on November 7. Chuck will be speaking about **"Confidentiality in the Regulatory Process from the Perspective of the Government and Private Bar".** John will be discussing the **"Giant Mine EA and Remediation Project"**
Nov. 14	Ontario Bar Association: **Advancing Aboriginal Rights and Interests: Choosing the Right Forum**—Toronto, ON	**Charles Birchall** will be speaking about "**Navigating Environmental and Energy Boards**" in a panel discussion exploring administrative Board and Tribunal authority.
Nov. 24-26	**Envirogate 2014**—Toronto, ON	**John Georgakopoulos** will be co-chairing and speaking about **"Dealing with Air, Noise, Odour and GHG Emissions"** on November 25. Other Willms & Shier "air day" speakers include **Jacquelyn Stevens** and **Joanna Vince** . **Julie Abouchar** will be chairing and speaking about "**Water and Wastewater: Compliance and Due Diligence"** on November 26. Julie will be joined from Willms & Shier by **Richard Butler**.
Nov. 25-27	**42nd Annual Yellowknife Geoscience Forum—**Yellowknife, NWT	**Charles Birchall** and **John Donihee** will be presenting on **corporate directors and officers environmental liability North of 60°**. John will also be addressing the key northern issue of mining companies providing **security for remediation and reclamation**.

This decision confirms the validity of the modern practice of claim staking using helicopters. In remote and inaccessible environments, helicopter staking has become more and more common. The decision will help to advance mineral development in remote regions, including the Ring of Fire and the far north. The matter is currently under appeal to the Office of the Mining and Lands Commissioner.

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