WILLMS & SHIER
ENVIRONMENTAL LAWYERS LLP

Report

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Injunction on gold exploration confirms duty to consult on Crown lands

A recent Ontario Superior Court decision has reaffirmed that neither the Crown nor mining companies may ignore their "duty to consult" before beginning mineral exploration on Crown lands that lie within the traditional territory of First Nations. After weeks of procedural delays – during which drilling continued – Wahgoshig First Nation (WFN) finally won an injunction against Solid Gold Resources Corp. (Solid Gold) to halt all mineral exploration activities on Crown lands south of its reserve on the shores of Lake Abitibi. In its action, WFN said the company's drilling could have an adverse effect on its treaty and Aboriginal rights, disrupt hunting and trapping, and permanently damage burial and other sacred sites. WFN sought to enjoin Solid Gold from further exploration for its failure to consult or accommodate.

In an Ontario Superior Court decision released January 3, 2012, Justice Carole J. Brown granted a 120-day injunction and said that the company and the Crown must now engage with WFN in a process of meaningful consultation and accommodation about any further exploration. She also ordered that if this process is not productive, WFN can go back to court to seek an extension of the injunction. Justice Brown concluded that

> "I am satisfied based on all the evidence that, without meaningful consultation and accommodation regarding the exploratory mining operations of Solid Gold, involving *bona fide* dialogue and information sharing between WFN and Solid Gold, facilitated by the presence of the Crown, there is significant possibility of harm to WFN's Aboriginal and Treaty rights. There has to date been no demonstrated respect for those recognized rights."

Solid Gold's Legacy Project comprises 103 unpatented mining claims covering some 21,790 hectares within WFN's traditional territory south of Lake Abitibi, just a few kilometres west of the Quebec-Ontario border. Drilling was occurring on lands deemed by the Ministry of Natural Resources as an "area of cultural heritage potential" and which WFN says encompass the core of its cultural identity.

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Although the Crown had advised Solid Gold to contact WFN regarding its intended mineral exploration – and offered to facilitate the process – no consultations were undertaken before drilling began in the spring of 2011. Band members discovered the exploration activities by accident and applied for an injunction in November of 2011. Since that time drilling activities increased and a second drill rig was brought in. Drilling involves clearing a series of 25-square metre pads, clearing forest, bulldozing access routes, and transporting/storing fuels and equipment.

Solid Gold argued that granting injunctive relief would essentially "shut down" its operations and jeopardize its financial well-being. "The thrust of the First Nation's action appears to be an effort to establish the power to deny resource companies access to Crown land absent the First Nation's consent," said company president Darryl Stretch. The company argued that the *Mining Act* establishes a "free entry" system whereby all Crown lands are open for prospecting and staking, that it has no legal responsibility or duty to consult and, that if there is such a duty, it resides in the Crown.

The province said it had delegated the "operational aspects" of the duty to consult to Solid Gold, which had not fulfilled that duty. Ontario sought the Court's assistance in fashioning "a consultation remedy that promotes reconciliation by fairly balancing the right of WFN to be properly consulted and the right of Solid Gold to carry out its mining activities." It asked that exploration be permitted to continue while negotiations between the parties proceed.

However, the Court disagreed. Failing to enjoin Solid Gold from further drilling would "send a message that Aboriginal and treaty rights, including the rights to consultation and accommodation, can be ignored by exploration companies," Justice Brown wrote. Such a failure would render the First Nations' constitutionally-recognized rights "meaningless," she concluded, and would not be in the public interest.

"It makes me think of the old days when companies would just walk into our territory and do what they like," says Chief David Babin of Wahgoshig. "It's not the 1900s anymore; we have rights and values in these lands and they need to be respected. We know there are great resource development companies out there and we are happy to work with them, but this company's actions look bad for the entire mining and exploration industry."

– WFN press release, Dec. 9, 2011

"If the First Nations were successful in their action to stop Solid Gold from drilling on its mineral claims it would be a severe blow to economic development in Northern Ontario. It would set a precedent and will have significant ramifications for the relationship between resource development companies, First Nations, and the Crown."

– Solid Gold press release, Dec. 8, 2011

Emergency response plans must cover 41 more substances

It's taken more than four years since the draft amendments were originally published, but Ottawa has finally added 41 additional toxic or flammable substances to the 174 already listed in its Environmental Emergency Regulations (SOR/2003-307), under the *Canadian Environmental Protection Act, 1999*. It is expected that the metal mining, smelting and petrochemical sectors are among those that will be most directly impacted by the amendments.

The regulations originally came into force in November 2003 to minimize potential environmental damage or threats to human health in the event of an accident, vandalism or terrorist attack. Any person who owns or has the charge, management or control of any of the listed substances (in quantities equal to or exceeding the prescribed thresholds) must prepare, implement and test environmental emergency plans. The regulations also require the submission of certain notices and reports to the Minister of the Environment. Approximately

2,400 facilities are currently required to undertake emergency planning.

Under the amendments, styrene and ammonium nitrate (both in liquid and solid form) were added to Schedule 1, Part 1, which lists those substances likely to explode. Acetic acid, dichloromethane and sulphur hexafluoride were added to Part 2, which lists substances that are hazardous when inhaled. And the remaining 35 substances – including arsenic, DEHP, trichloroethylene, cadmium oxide, tetrachloroethylene and nickel sulphate – were incorporated into a new Part 3. This part lists other hazardous substances based on their carcinogenicity, aquatic toxicity, persistence or bioaccumulative characteristics.

A number of amendments were also made to the general regulatory requirements, including the public notification requirements in the event of an environmental emergency. In quantifying the amounts of regulated substances, the amendments exclude

- regulated substances found in slag, waste rock in tailings, solid residues, ores and ore concentrates
- the quantities of anhydrous ammonia and ammonia solution stored by a farmer and to be used as an agricultural nutrient
- quantities of propane in any storage container that has a maximum capacity of less than 10 tonnes and is kept at a distance of at least 360 metres from the boundaries of the property.

Impacts of Great Lakes turbines under review

In related news, officials at the Ministry of Natural Resources say studies into the potential environmental effects of offshore wind turbines may take up to three years to complete. According to a report in the Toronto Star, the Ministry is undertaking research on

- the potential effects of offshore wind power development on natural coastal processes, currents and sediment flow
- weather radar studies of the migratory patterns of birds and bats to better understand how they cross both lakes Erie and Ontario
- the potential electromagnetic impacts of underwater high voltage cables on local fisheries.

In addition, the minister must be notified at least 30 days before the closure or decommissioning of a facility, and any Schedule 6 information related to such a facility must be accompanied by certification that the information in the notice is accurate and complete. The amendments were published in the *Canada Gazette, Part 2* on December 21, 2011 and took effect upon registration.

Expert report gives mixed bill of health to wind turbines in Ontario

An expert report commissioned by the Ontario Ministry of the Environment has concluded that there are generally no direct health risks from the sound produced by wind turbines at the province's regulated setback distance. However, it says that noise in the audible (including low frequency) range will still severely annoy a "non-trivial" number of people and can be expected to produce stress-related health effects. A full copy of the 56-page report, *Low Frequency Noise and Infrasound Associated with Wind Turbine Generator Systems*, as well as other related scientific research, can be downloaded from http://www.ene.gov.on.ca/environment/en/resources/STDPROD_092087

Howe Gastmeier Chapnik Limited (HGC), a consulting firm with an expertise in noise, vibration and acoustics, reviewed more than 100 recent science papers, technical reports and government guidelines/regulations. While the authors say there is no need for the Ministry to change the fundamental approach used in Ontario for the assessment of wind turbine noise, it will need to develop new techniques to measure low frequency infrasonic noise levels, especially indoors. Ontario currently requires a 550 metre minimum setback for turbines, based on a 40 decibel limit, which it says aligns with the limits set by the World Health Organization.

> "In the infrasonic range, at frequencies less than 20 Hz, there is strong evidence that the sound pressure levels produced by modern upwind turbines will be well below the average threshold of human hearing at the setback distances typical in Ontario. Although some authors have concerns, most literature dealing with the subject indicates that infrasonic noise below the threshold of hearing will have no

> effect on health … The audible sound from wind turbines is nonetheless expected to result in a non-trivial percentage of persons being highly annoyed. As with sound from many sources, research has shown that annoyance associated with sound from wind turbines can be expected to contribute to stress related health impacts in some people."

In announcing the release of the report, the Ministry says it will continue to monitor emerging scientific developments and any changes to regulatory policies in other jurisdictions. It will also seek a proven measurement procedure that can be used to quantify noise at infrasonic frequencies to aid in investigation of complaints and public concerns, as recommended by the report. However, this will not replace the Ministry's current compliance guidelines designed to assess sound outdoors.

Anti-wind group appeals approval to ERT

It hasn't taken long for opponents of wind power to take up the next legal challenge, using a new set of health-related arguments. On November 15, 2011, the Middlesex-Lambton Wind Action Group Inc. filed its appeal of the Renewable Energy Approval (REA) issued to Zephyr Farms Limited for a four-turbine wind farm near Watford in southwestern Ontario. In the summer of 2011, the Environmental Review Tribunal (ERT) dismissed the first appeal of a REA for a wind turbine project in *Erickson v. Director, Ministry of the Environment* (see the full story in the November issue of our newsletter). The ERT noted that the appellants presented evidence about the risk of wind turbines in general, but did not provide enough evidence about the risks posed by the project in question. However, the ERT left the door open for future appeals, ruling that wind turbines MAY cause harm to humans if situated too close to human receptors.

In this new appeal, Middlesex-Lambton Wind Action Group Inc. claims that industrial wind turbines cause a range of serious health effects in certain individuals at sound levels "lower than levels prescribed and at distances greater than the set-backs prescribed" in the REA. These effects are "more likely than not caused by exposure to infrasound and/or low frequency noise and/or audible noise and/or visual impact and/or shadow flicker produced by industrial wind turbines." Further, the appellant says that the approval authority has no reliable method of predicting, measuring or assessing exposure to these emanations or effects.

In addition to the potential health effects, the appeal claims that the Ministry of the Environment did not consider the economic impacts of the project on property values, nor did it use "a precautionary, science-based approach in its decision-making to protect human health and the environment" in accordance with its Statement of Environmental Values (SEV). The hearing is scheduled to begin in January 2012, and the ERT must issue its decision within six months of the date the appeal was filed.

Environmental penalties on the upswing

In 2010 (the last year for which statistics are available), the Ontario Ministry of the Environment issued 33 environmental penalty orders, totaling $430,112.90, related to 74 separate violations. The 2010 penalties ranged from a low of $950 imposed on St. Marys Cement Inc. in Bowmanville, for a single violation of the limit on suspended solid concentrations in O. Reg. 561/94, to a high of $56,604.40 imposed on Suncor Energy Products in Sarnia for nine violations of various effluent limits contained in O. Reg. 537/93. Since August 1, 2007, the Ministry has issued 52 penalty orders with a total value of $611,839.50.

Monetary penalties issued by MOE 2007-2010

Year	Orders issued	Violations in orders	Total penalties	$/0rder
2007	0	--	$0.00	--
2008	6	7	$ 69,583.40	$ 9,940.48
2009	13	19	$ 112,143.20	$ 8,626.40
2010	33	74	$ 430,112.90	$ 13,033.72
Total	52	100	$ 611,839.50	$ 11,766.14

Ontario launches two-year review of green energy program

The use of Feed-in Tariffs (FIT) to promote renewable energy in Ontario featured prominently during the recent provincial election. Following reelection, the

government initiated the planned two year review of the FIT program, including the rates available under the program. In the meantime, the development of future renewable energy projects has ground to a halt until future pricing schedules are announced sometime in the new year.

On October 31, the Ministry of Energy launched a review of the FIT and MicroFIT programs. Aimed at ensuring the long-term sustainability of clean energy procurement, the review will consider a range of issues, including reducing FIT prices, adding new technologies and fuel sources to the program, and considering outreach techniques to complement the province's Renewable Energy Approval (REA) process. As part of the review, the Ministry established an on-line survey to collect feedback from individuals and stakeholders; the deadline for comments was December 14, 2011.

According to the Ministry, more than 2,900 Ontarians responded to online survey questions and sent in over 150 written submissions. The province also met with more than 80 stakeholders. The Ministry says that together with the Ontario Power Authority it will carefully review the submissions and "use this input to drive the success of the ongoing review." More information will be provided early in 2012.

"New prices for FIT contracts will be carefully developed to balance the interests of ratepayers with the need to encourage investments in new clean energy in Ontario," the Ministry says. Going forward, all future clean energy contracts will be subject to the new price schedule.

Ottawa funds clean air program for 5 years

While facing both domestic and global censure from environmentalists over its recent decision to withdraw from the Kyoto Protocol, the federal government has announced it will invest $600.8 million over five years to renew the Clean Air Regulatory Agenda (CARA). Since 2006, CARA has provided the framework for Ottawa's greenhouse gas emission reduction efforts and air quality programs. The funding will be used to

- align greenhouse gas (GHG) regulations with the United States where appropriate
- finalize and implement a national air quality management system
- strengthen commitments to reduce transboundary air pollution under the Canada-U.S. Air Quality Agreement
- improve indoor air quality
- implement on a nation-wide basis the Air Quality Health Index.

According to federal Environment Minister Peter Kent, Ottawa will work with the provinces and territories, industry and non-governmental organizations "to finalize and implement a new national air quality management system that will include new ambient air quality standards, industrial emissions standards and active management of local air quality."

Environment Canada releases 2011 NPRI requirements

On December 24, 2011, Environment Canada released the National Pollutant Release Inventory (NPRI) reporting requirements for releases that took place in 2011. The only substantive changes are to the mass and concentration thresholds for selenium (and its compounds). Previously, selenium had a 10-tonne mass threshold with a 1% concentration threshold. Beginning in 2011, the mass threshold has been changed to 100 kilograms of selenium contained in other materials at a concentration of 0.000005% or more (the concentration threshold).

In addition, a number of provisions have been reordered or combined. Environment Canada says these changes are largely editorial and do not entail substantive amendment to the criteria for reporting or the information to be provided for 2010 and 2011. Complete details of the 2011 reporting requirements were published in the *Canada Gazette Part 1* of December 24, 2011 (Vol. 145, No. 52). NPRI data and corrections are being collected through Environment Canada's single window reporting system. Note, if a facility met one of more of the reporting criteria for 2010, but no longer meets any of the criteria for the 2011 reporting period, notification must still be filed with the Minister of the Environment no later than June 1, 2012. For more information, including NPRI guidance documents, annual summary reports and NPRI databases, visit the NPRI website at www.ec.gc.ca/inrp-npri.

OEB denies CCC motion that conservation levy is an indirect tax

The Ontario Energy Board (OEB) has ruled that a $4 levy on hydro bills used to support conservation efforts is a legitimate "regulatory charge" and supported by the regulatory regime under the *Ontario Energy Board Act, 1998* (*OEB Act)*. A motion brought before the OEB by the Consumers Council of Canada (CCC) questioned the special assessment on constitutional grounds, claiming that the levy was an indirect "tax" imposed on licensed electricity distributors and the Independent Electricity System Operator. In turn, the distributors collected the assessment from consumers, while the IESO collected its portion from market participants (in accordance with O. Reg. 66/10). In 2009-10, the assessment raised $53.7 million, which was used to support the Ontario Solar Thermal Heating Initiative (OSTHI) and the Home Energy Savings Plan (HESP).

Section 26.1(1) of the *OEB Act* requires the Board to issue assessments to recover specific costs of the Ministry of Energy in respect of energy conservation programs or renewable energy programs. The Board's role is essentially administrative: it does not set the total amount of the charge, decide against whom it should be levied, or play a role in developing or administering the HESP or the OSTHI. Since the Board exercises little real control over the assessment and the two programs it supports, the CCC argued that the levy is, therefore, not a regulatory scheme, but an indirect tax.

In support of its position, the Council argued that there is no complex or detailed code of regulation and that the conservation programs are merely manifestations of government policy. Since they are voluntary, the programs do not attempt to affect behaviour, and there are no proper estimates of the cost of regulation. Finally, the CCC claimed that the ratepayers, against whom the charge is ultimately levied, do not benefit from the programs.

The CCC's position was substantially supported by a number of intervenors, including the Canadian Manufacturers & Exporters, the Vulnerable Energy Consumers Coalition and Union Gas. However, the OEB determined that the assessment met the four criteria of the "Westbank test" used by the Supreme Court of Canada to differentiate between regulatory charges and taxes. Further, in its written decision, released December 8, 2011, the Board found that

- the assessment and the programs it supported were part of a "complete, complex and detailed" regulatory scheme
- the programs provide incentives to encourage consumers to reduce their energy usage
- the government engaged in a "thorough and rigorous cost estimation methodology" to determine the costs of the OSTHI and HESP programs in advance.

The persons being regulated (i.e., consumers, the IESO and distributors) derive a benefit from the conservation programs in the form of improved grid reliability, reduced overall costs, and environmental benefits. Despite the favourable OEB ruling, the Minister of Energy announced in November 2010 that the government has no plans to reintroduce the assessment for future years.

Ontario offers tax breaks for green energy

On January 4, 2012, the Ontario Ministry of Finance announced property tax incentives to encourage property owners to install solar panels, wind turbines and other renewable energy technologies. In addition, Ontario Regulation 282/98 was amended to ensure that the installation of an active solar heating or cooling system or a ground-sourced geothermal heating or cooling system will not increase the assessment of that property. According to the announcement, the changes "will provide greater clarity by creating additional categories for property tax assessment based on the size and location of energy generation."

Rooftop installations: the assessment and tax classification of property will not change due to the addition of a renewable energy installation on the rooftop of a building.

Ground-mounted installations: the property tax treatment will depend upon the size and location of the facility. Small-size ground installations with a generation capacity up to 10 kW will not experience an increase in assessment or a change in tax classification. Medium-size ground installations with a generation capacity over 10 kW and up to 500 kW will be taxed based on the

surrounding land use (e.g. residential, farm, multi-residential, commercial). Large-size ground installations with a generation capacity over 500 kW will be taxed based on the surrounding land use for the proportion of assessment up to 500 kW, and at the industrial rate for the proportion over 500 kW.

On-farm anaerobic digestion or biogas facilities of any size that are located on a farm and are operated by the farmer will be taxed at the farm rate.

Wind turbine towers will continue to be assessed at the rate of $40,000 per MW of installed capacity, except in the two situations noted above (rooftop installations and ground-based installations up to 10 kW) where the assessment would not be affected by the installation.

The tax breaks only apply to persons who are not ordinarily in the business of generating, transmitting or distributing electricity, and where the generation is ancillary to another activity on the same property. Corporate power producers will continue to be taxed at the industrial rate.

Court upholds Treaty rights in Grassy Narrows lawsuit, but legal fight goes on

The 11-year odyssey through the courts by three Ojibway trappers from Grassy Narrows First Nation seemed destined to continue for years. Despite a recent ruling in the Superior Court (*Keewatin v. Minister of Natural Resources,* 2011 ONSC 4801) that Ontario cannot unilaterally act in a manner that may significantly interfere with hunting and fishing rights in Keewatin without authorization from Ottawa, the Ontario Ministry of Natural Resources has already filed an appeal that's likely to go all the way to the Supreme Court of Canada. In addition, the Superior Court has still to rule on the question of whether or not the forestry activity Ontario is proposing will significantly interfere with Treaty harvesting rights. If proposed forestry activities are determined to benefit the Ojibway, they would be less likely to be held in breach of the Treaty.

On August 16, 2011, Ontario Justice Mary-Anne Sanderson ruled that aboriginal rights to hunt and trap are enshrined in the Treaty 3 agreement signed in 1873 with the federal government. According to the 312-page judgment, Ontario does not have the right to unilaterally limit Treaty Rights by "taking up lands under the Treaty" for forestry, mineral development, settlement or other purposes. The Court said that before the province can issue land authorizations that would substantially interfere with Treaty harvesting rights to hunt, trap and fish, it must obtain the approval of the federal government.

New energy conservation reporting regulation now in effect

On January 1, 2012, Ontario Regulation 397/11 (Energy Conservation and Demand Management Plans), made under the *Green Energy Act, 2009* last August, comes into effect. Under the regulation, prescribed "public agencies" must report annually on energy use and greenhouse gas emissions related to heating, cooling and the pumping/ treatment of water and sewage for each of its operations. Submissions for 2011 using the Ministry of Energy's reporting template are due July 1, 2013. The data must also be made available to the public.

A public agency is defined as every municipality, municipal service board, post-secondary educational institution, public hospital and school board in the province. These agencies will also need to develop five-year energy conservation plans starting July 1, 2014. A public agency's energy conservation and demand management plan is composed of two parts:

1. A summary of the agency's annual energy consumption and GHG emissions for its operations.
2. A description of previous, current and proposed measures for conserving and otherwise reducing the amount of energy consumed by the agency's operations and for managing the agency's demand for energy, including a forecast of the expected results of current and proposed measures.

According to Justice Sanderson

> "[T]he evidence in this case amply supports the conclusion that the Treaty 3 Ojibway were and are vitally concerned about being able to continue and maintain the traditional harvesting activities I have found were promised to them during the Treaty 3 negotiations. Traditional harvesting was and is closely linked with their identity and fundamentally important to them culturally, economically and spiritually."

In reviewing the detailed historical record both preceding and following adoption of the Treaty, the Court determined that the Treaty promises made to the Ojibway in 1873 remain unaffected by subsequent legislation that annexed Keewatin to Ontario. The Court said that Treaty harvesting rights are at the core of the federal jurisdiction. Provincial attempts to infringe such Treaty rights "are ineffective" due to a combination of Canada's jurisdiction over Indians under section 91(24) of *The Constitution Act, 1867* and the special protection afforded to Treaty rights under section 88 of the *Indian Act*.

The province had argued that a ruling in favour of the Grassy Narrows plaintiffs would "dramatically change the balance of Canadian federalism as it applies in the Keewatin Lands and has been so applied for over a century" and would "represent a marked, massive and unwarranted incursion into provincial proprietary and legislative jurisdiction." The Court disagreed, saying that Ontario was not "being excluded from the bargaining table." However, the province will be required to respect the harvesting rights clause "as mutually intended by the parties to the Treaty."

The Court said that the next stage of this litigation will involve a complicated impact assessment, including: the scope of the area affected; the practical effect of the proposed land use on harvesting rights; the consultation (or lack thereof) between Ontario and the Ojibway; and the ability of the Ojibway and Ontario to simultaneously use the land.

"Ontario by and large already has the ability to control the way in which future forestry development will occur and to pursue the objective of promoting compatibility and/or preventing or minimizing interference with Treaty 3 harvesting rights. In my view, pursuing that objective can only further reconciliation," Justice Sanderson concludes.

Willms & Shier Environmental Lawyers LLP welcomes Cherie Brant as Partner

Called to the bar in 2003, Cherie has successfully built a broad aboriginal commercial and renewable energy law practice. She is Mohawk from Tyendinaga Reserve and Ojibway from Wikwemikong, Manitoulin Island, Ontario.

Cherie commenced her practice in commercial real estate at a leading Bay Street firm. She is in her third year of practice at Willms & Shier.

Willms & Shier partners make "*Best Lawyers*" list for 2012

John R. Willms, **Donna S. K. Shier** and **Marc McAree** are included again this year in the field of environmental law in the 2012 edition of *Best Lawyers in Canada*®. **Juli Abouchar** is listed for the first time in the field of energy regulatory law. More information is available at BestLawyers.com

Widely viewed as the definitive guide to legal excellence, the listings are based on a rigorous national survey involving more than 373,000 detailed evaluations of lawyers by other lawyers. Because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a singular honor.

Willms & Shier Environmental Lawyers LLP
4 King Street West, Suite 900, Toronto, Ontario, M5H 1B6
Tel: 416 863 0711 / Fax: 416 863 1938 / Website: www.willmsshier.com

If you would like to receive Willms & Shier's Environmental Law Report, email your name, title and organization to *jhardacre@willmsshier.com*