2014 Nunavut Mining Symposium Stresses Need for Investment, Patience & Diligence

By Charles Birchall, Partner

With temperatures hovering around -20°C coupled with high winds and snow, the Nunavut Mining Symposium Society kicked off its annual two-day conference in Iqaluit, Nunavut. Willms & Shier lawyers John Donihee, Julie Abouchar and Charles Birchall attended to take in Nunavut’s largest mineral sector trade show, network with key government, industry and Inuit Association representatives and meet friends and colleagues. The clear message from the Symposium is that communication, investment, patience and diligence remain the key ingredients to developing Nunavut’s mineral and exploration sector – and to playing a key role in shaping the future of Nunavut.

Delegates were welcomed by VIPs including the Honourable Peter Taptuna, Premier of Nunavut, the Honourable Leona Aglukkaq, Minister of the Canadian energy and resource development matters north of 60°.

John is one of Canada’s foremost experts in environmental, regulatory, administrative and Aboriginal law in Canada’s North, with a particular focus on land claims implementation and modern treaties. John is counsel to administrative tribunals in the NWT responsible for land and water management and environmental impact assessment. He represents the Government of Nunavut as well as Inuit organizations and mining companies in regulatory proceedings and matters relating to land claims implementation. John has extensive experience in wildlife management and law, environmental impact assessment, and land and water regulation. John represents clients at all levels of court in the NWT. Notably, John appeared at the Supreme Court of Canada on behalf of a NWT First Nation in Beckman v. Little Salmon/Carmacks First Nation. John is admitted to the Bars of Alberta, the Northwest Territories and Nunavut.

Welcome John Donihee and the New Northern Team!

We are delighted to welcome John Donihee to the Willms & Shier Environmental Lawyers LLP Northern Team as of April 1, 2014. John brings with him over 30 years of environmental, regulatory, administrative and Aboriginal law expertise in the Northwest Territories and Nunavut.

The new Northern Team comprises John Donihee, Julie Abouchar and Chuck Birchall. The team is pleased to provide expert legal advice on environmental, Aboriginal, energy and resource development matters north of 60°.
Northern Economic Development Agency and Minister of Environment, and James Eetoolook, Vice-President, Nunavut Tunngavik Incorporated.

Speakers discussed projects set to advance and others yet to be fully explored. They acknowledged that the key challenge to resource development in Nunavut is establishing infrastructure to construct and operate mines and to deliver products to markets.

**Nunavut Project Updates**

The Symposium featured updates on projects across the Territory.

- **Meadowbank mine** – Gold production levels are expected to increase at Meadowbank mine – Nunavut’s only currently producing mine, located 70 km north of Baker Lake. The mine set records in 2013, with the mill processing an average of 11,398 tonnes per day in the fourth quarter.

- **Hope Bay gold project** – This project, located 90 kilometres south of Cambridge Bay, has a new owner. TMAC Resources has determined that the mine has a life of 10 years with estimates of recovered gold at 2.25 million ounces. Hope Bay has already received regulatory approvals and TMAC Resources is looking to secure additional funding this year to continue exploration work.

- **Back River Gold project** – Sabina Gold and Silver Corp has filed a draft environmental impact statement for this project, located some 400 km southeast of Cambridge Bay, with the Nunavut Impact Review Board.

- **Mary River iron mine project** – The Nunavut Impact Review Board is expected to release recommendations on the early revenue phase of Baffinland’s Mary River iron mine project, located 160 km south of Pond Inlet. Public hearings were held in the Pond Inlet the last week of January 2014 to give individuals and organizations an opportunity to comment on the phased approach being proposed by Baffinland.

**Regulatory Change and Economic Development**

Willms & Shier lawyers also attended a series of sessions dealing with improvements and changes to Nunavut’s regulatory system. The Northern Projects Management Office and The Mining Association of Canada provided updates. The last day of the Symposium featured sessions focused on community economic development and investment in infrastructure. A detailed session on uranium mining and the Kiggavik Project located 80 km west of Baker Lake was also held.

**Ontario’s Proposed Invasive Species Act, 2014**

**By Matthew Gardner**

The Minister of Natural Resources introduced Bill 167, Ontario’s proposed *Invasive Species Act, 2014*, for First Reading on February 26, 2014. The legislation would enable rapid regulatory intervention, backed by strong investigative and enforcement tools, to target and combat invasive species that can cause hundreds of millions of dollars in environmental damage. The Bill sets out the legislative framework for identifying non-native invasive species. It also contains provisions to prevent their entry, control their spread and ultimately eradicate them from the province. The proposed legislation was posted to the Environmental Registry (EBR # 012-1120) for public review. The deadline for comments was April 14, 2014.

Invasive species may be designated by regulation or, if immediate action is deemed necessary, by order of the Minister. Invasive species would be classified as either a “significant threat” or a “moderate threat” to the natural environment based on their biological characteristics, the harm they pose, their dispersal ability, and their social or economic impacts.
Prohibitions and Special Preventive Measures

The legislation would prohibit

- possessing a species designated a significant threat everywhere in Ontario (other than in prescribed areas)
- depositing, releasing, transporting, propagating, buying, selling, leasing, trading or bringing a significant threat invasive species into the province
- depositing or releasing a species designated a moderate threat anywhere in Ontario (possessing members of moderate threat invasive species would be prohibited only in provincial parks and conservation reserves).

In certain circumstances, the Minister may prepare a prevention and response plan for a specific significant threat invasive species, setting out measures for its early detection, prevention, control and eradication. The legislation also gives the Lieutenant Governor in Council power to make regulations designating certain areas as invasive species control areas. These regulations would impose specific control measures to prevent the species from spreading.

Exemptions

The Minister may authorize a person in writing to engage in activities that would otherwise be prohibited by the legislation. These authorizations may be issued only for research or education; the prevention, control or eradication of an invasive species; or another purpose prescribed by regulation.

Inspection Powers

Inspectors would have the authority to enter lands, buildings and structures (although a warrant would be required to enter a dwelling) and to stop and examine a conveyance to determine compliance. They could also survey any area to detect and monitor the spread of invasive species. Inspectors may also issue certain control instruments

- an inspector’s order may prevent persons from carrying out activities that contribute to the spread of the species and may require erecting barriers or signs to prevent accessing the species
- an inspector may declare land, a building, a structure or a conveyance “an invaded place” and require the control, removal or eradication of the species from the place, and/or restrict access to or movement around the place
- a compliance order may be issued to any person who is contravening, has contravened or is about to contravene the Act, regulations, conditions in an authorization or an agreement, or a provision in an order made under the Act.

Enforcement Tools

The penalties for contravening the proposed Act are high

- corporations convicted under the Act would be liable to a fine of up to $1,000,000 for a first offence and $2,000,000 for a second or subsequent offence
- officers, directors, employees or agents of the corporation who “directed, authorized, assented to, acquiesced in or participated in the commission of the offence” are party to the offence, whether or not the corporation has been prosecuted
- individuals would be liable to a fine of up to $250,000 and/or up to one year in jail for a first offence and $500,000 and/or up to one year for a second or subsequent offence.

If the offence involves more than one animal, plant or other organism, the maximum fine is multiplied by the number of organisms involved. The Court can also increase the penalty beyond the maximum to equal any monetary benefit that was acquired by or accrued to the person as a result of the offence.
In addition to imposing a fine or imprisonment, the Court can make any of the following orders:

- order not to engage in any activity that could result in the continuation or repetition of the offence
- order to take any action considered appropriate to remedy or avoid any harm to the natural environment that resulted (or may result) from the offence
- order to pay the Crown or any other person for all or part of any costs incurred to remedy or avoid such harm
- order to take such other steps as are specified in the order to comply with the Act
- order to pay the Crown or any other person all or part of any expenses incurred with respect to the seizure, storage or disposition of anything seized in connection with the offence
- order cancelling or prohibiting the person from holding or applying for an authorization issued under section 10 or any other licence, authorization or permit issued under a statute administered by the Ministry of Natural Resources
- order to publish, in any manner that the court considers appropriate, the facts relating to the commission of the offence.

An appeal of a conviction under the Act would not stay the effect of any of the above orders. A prosecution for an offence under the Act may not be commenced more than five years after the offence was committed.

*Fisheries Act Regulations Authorize Deposits of Deleterious Substances into Water Frequent by Fish*

By Julie Abouchar, Partner and Certified Environmental Law Specialist

Regulations made on April 11, 2014 create a policy framework enabling the federal government to make regulations exempting certain activities from the general *Fisheries Act* prohibition against polluting water frequented by fish. The *Regulations Establishing Conditions for Making Regulations under Subsection 36(5.2) of the Fisheries Act* (SOR/2014-91) will bring certainty to some industries whose discharges are regulated provincially and authorized by Provincial permit yet do not comply with the broad *Fisheries Act* prohibition.

The regulations permit future ministerial regulations to be made in three circumstances:

1. to manage aquaculture, aquatic pests and aquatic invasive species
2. to enable aquatic research on pollution prevention for water frequented by fish
3. to manage activities, waters and deleterious substances already effectively controlled by other federal and/or provincial instruments.

The regulations also allow federal authorities to effectively delegate, in certain cases, oversight over discharges to water bodies to provincial and territorial authorities. The Government states that the risk to water frequented by fish is expected to be “negligible” and that the regulations allow “for a more effective and efficient management of responsibilities under the Act.”

*Managing Aquaculture, Aquatic Pests and Aquatic Invasive Species*

The Minister of Fisheries and Oceans may make regulations authorizing the deposit of deleterious substances for the purposes of aquaculture, aquatic pests and aquatic invasive species. This provides the Government with a policy tool to manage deposits of deleterious substances that are already well managed, including substances already regulated at the federal level (for example, through the *Pest Control Products Act* and the *Food and Drugs Act*).
Enabling Aquatic Research

The Minister of the Environment may make regulations authorizing the deposit of deleterious substances to enable aquatic research contributing to the development of knowledge around pollution prevention for water frequented by fish. Processes must be in place to

- verify that the research contribute to the development of knowledge around pollution prevention for water frequented by fish and be supervised by a qualified person
- make research findings available to the public
- avoid harmful effects (other than what is required to obtain valid scientific results) and contain waters within boundaries, and
- if relevant, ensure remediation within 20 years of project completion.

Managing Deposits of Deleterious Substances Already Managed Federally/Provincially

The Minister of the Environment may make regulations authorizing the deposit of deleterious substances already managed by provincial and/or federal regulating authorities. The deposits or source of the deposits must

- meet or exceed certain conditions relating to the Canadian Water Quality Guidelines for the Protection of Aquatic Life (CWQG), their site-specific application, or science-based guidelines that offer protection similar to the CWQG
- be subject to an enforcement and/or compliance regime, and
- the whole of the deposit must not be acutely lethal to fish.

Additionally, the effects on fish, fish habitat and the use by man of fish associated with the deposit must be documented or evaluated.

Draft regulations were published in the Canada Gazette Part I on February 15, 2014 for a 30-day public comment period. Following the receipt of over 4,000 comment submissions, a number of changes were made to the Regulatory Impact Assessment Statement published with the regulations, clarifying terms and the process for developing ministerial regulations. Additional regulations concerning the deposit of deleterious substances in aquaculture facilities will be published in the Canada Gazette, Part I for public comment.

Ontario’s New Air Standard for Pulp and Paper Operations and Guidelines for Large Wood-Fired Combustors

By John Georgakopoulos, Partner

The Ontario Ministry of Environment has finalized the technology-based air pollution standard for pulp and paper mills (the Standard) and a proposed guideline for large wood-fired combustors (the Guideline). The new Standard and Guideline aim to control air emissions of key contaminants including total reduced sulphur, chlorine, PAHs, particulate and carbon monoxide.

- **Pulp and Paper Industry Standard under O Reg 419/05 (Air Pollution – Local Air Quality)**—covers the performance, operational practices, operational optimization assessments, monitoring, and records and reporting requirements for pulp, paper and paperboard mills (but not facilities using an acid-sulphite process)
- **Guideline for Control of Air Emissions from Large Wood-fired Combustors**—sets out updated technical requirements for the design and operation of existing, modified and new wood-fired combustors (with a heat input capacity of 3 megawatts or greater).
Both the Standard and the Guideline were posted to the Environmental Registry on March 6, 2014. The deadline for comments on the Guideline is May 5, 2014.

**Pulp and Paper Industry Standard**

The new Standard is a technical standard for facilities in the pulp and paper sector that might not meet one or more of the generic air standards due to unique technical or economic limitations. Instead of making the air standard less stringent, O Reg 419/05 allows facilities to exceed the air standard as long as they work to reduce their air emissions with technology-based solutions and best practices. The new Standard

- contains detailed requirements relating to the operation of 23 sources of contaminants (including digester and evaporator systems, tank vents, combustors, wastewater treatment, air pollution control equipment, lime kilns and thermal oxidizers)
- provides for performance limits, assessment reports, optimization updates, and testing and monitoring requirements.

The key contaminants for the pulp and paper sector include total reduced sulphur compounds, chlorine dioxide, chlorine, chloroform, benzo-a-pyrene (PAHs) and acrolein. The Standard also includes an additional 52 contaminants for which representative facilities of the sector were below the air standards or guidelines.

Any facility in the Pulp and Paper sector (that may or may not meet the air standards) may apply to be registered under this technology-based compliance approach. Some facilities may also register under the technical standard for contaminants where they meet the air standards. This allows them to be excluded from the modelling requirements of O Reg 419/05 and reduce their regulatory burden.

**Proposed Guideline for Control of Air Emissions from Large Wood-fired Combustors (A-13)**

The proposed Guideline covers

- design criteria for residence time and temperature (for new units)
- fuel management (for existing and new units)
- combustion air requirements (for existing and new units)
- air pollution control devices (for existing and new units) and
- tune-up of wood-fired combustors every two years.

The Guideline includes limits on carbon monoxide in flue gas and in-stack limits on suspended particulate, nitrogen oxides, and total dioxins, furans and dioxin-like PCBs. These technical requirements represent the “minimum expected requirements”. The requirements will be considered as conditions during the preparation of an Environmental Compliance Approval (issued under s. 20.3 of the Environmental Protection Act) or as part of an abatement or enforcement order.

The requirements will apply to applications for new combustors received after July 1, 2014, and would be phased-in for existing and significantly modified combustors over time (as set out in Appendix A of the Guideline). Also, proponents of ECA applications can request that the phased-in requirements become applicable at an earlier date.

**Ontario Court Overturns ERT Decision Revoking Ostrander’s Wind Farm Approval**

**By Charles Birchall, Partner**

On February 20, 2014, the Ontario Divisional Court set aside the Environmental Review Tribunal’s (ERT) revocation of Ostrander Point GP’s (Ostrander) renewable energy approval for a wind farm near Picton. In July 2013, the ERT had revoked the approval on the grounds that the project would cause “serious and irreversible harm” to a population
of Blanding’s turtles, a threatened species in Ontario. In *Ostrander Point GP Inc. (and another) v. Prince Edward County Field Naturalists (and another)* (2014 ONSC 974), the Court found the ERT’s prior decision to be “unreasonable” on the basis of several errors of law which, both individually and collectively, were fatal to the ERT’s conclusions. The decision clearly signals that it will be difficult to overturn a renewable energy approval on the basis that the wind farm will cause “serious and irreversible harm to plant life, animal life or the natural environment.”

**The ERT’s July 2013 Revocation of Ostrander’s Renewable Energy Approval**

The renewable energy approval issued by the MOE related to a nine turbine wind farm located on Crown land about 15 km south of Picton.

As we previously reported, the ERT revoked the approval in July 2013 under section 145.2.1(4) of the Ontario Environmental Protection Act (EPA), on the grounds that the project would cause “serious and irreversible harm” to a population of Blanding’s turtles—a threatened species in Ontario. The ERT concluded that traffic on access roads to the project, together with an increase in poaching and predators, would cause serious and irreversible harm to the turtles on site. Ostrander and the MOE appealed the ERT’s decision. The Prince Edward County Field Naturalists (PECFN) also appealed, claiming that the ERT had erred in not finding that the project also posed the same threat to migratory birds and alvar plant life. The Alliance to Protect Prince Edward County (APPEC) appealed as well, on the grounds that the project would cause serious harm to human health.

**The Ontario Divisional Court’s Decision**

In its decision of February 20, 2014, the Court found the following errors of law to be both individually and collectively fatal to the ERT’s conclusions

1. **Failure to separately identify and explain reasons**—the ERT failed to separately identify and explain its reasons for concluding that, if serious harm would result from the project, that serious harm was irreversible.

2. **Evidence of “irreversibility” not to EPA standard**—the Court found a lack of evidence demonstrating “irreversibility” since the ERT did not know (a) the size of the Blanding’s turtle population on the site, in the surrounding area or in the rest of the province; (b) the magnitude of the mortality rate for the species; and (c) the data for existing or projected vehicular traffic at the site.

3. **Failure to consider permit issued under *Endangered Species Act***—Considering the issue of irreversible harm, the Court held that the ERT did not take account of the fact that Ostrander had obtained a permit from the Ministry of Natural Resources under the *Endangered Species Act* (ESA). This permit allowed Ostrander to harm the Blanding’s turtle and its critical habitat when constructing and operating the wind farm. The ERT was obliged to apply its statutory mandate in a manner that would avoid any conflict with the ESA regime.

4. **Parties not given opportunity to address appropriate remedy**—After determining that the Blanding’s turtle population would be subject to serious and irreversible harm, the ERT (for reasons of natural justice and procedural fairness) should have given the parties an opportunity to address the appropriate remedy to be adopted by the ERT.

5. **Error in finding that ERT not able to amend or alter MOE decision**—The ERT erred in finding that it was not in a position under the EPA to alter the decision of the Director of the MOE pursuant to section 145.2.1(4) of the EPA.

The Court went on to deny the appeals made by the PECFN (respecting serious and irreversible harm to migratory birds and alvar plant life) and the APPEC (respecting serious harm to human health).

Based on media reports, it is expected that the PECFN will seek leave to appeal the Divisional Court’s decision.
Ontario Approves Mattagami Region Source Protection Plan  
By Julie Abouchar, Partner and Certified Environmental Law Specialist

Ontario approved the Mattagami Region Source Protection Plan under the *Clean Water Act, 2006* on April 10, 2014. The Plan will take effect on October 1, 2014. This is the third source protection plan (SPP) to receive provincial approval, with 16 others currently under consideration.

Municipalities and companies should take note of this development to help prepare for their potential responsibilities and opportunities under Ontario’s evolving source protection planning regime. Municipalities are the primary implementers and enforcers of SPPs. Those with SPP responsibilities will need to prepare by employing and training risk management officers to oversee plan implementation. Alternatively, they may hire a body approved under the *Clean Water Act, 2006* to provide the necessary services. Companies operating in a region covered by an SPP will need to determine whether they are affected by SPP policies and, if so, how.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Speaker(s)</th>
<th>Discussion Topic</th>
</tr>
</thead>
</table>
| May 13, 2014 | Land & Development – Contaminated Sites  
Real Estate Forum’s 10th Annual Land & Development Conference | John Georgakopoulos  
*“Developing Challenged Sites: The Need for Innovative Strategies and Patience”* |
| May 29, 2014 | Vapour Intrusion  
2014 CBA National Environmental, Energy and Resources Law Summit | Marc McAree  
*“Vapour Intrusion: What you can’t see, smell, hear, taste or feel can hurt you!”* |
| June 5, 2014 | Aboriginal Law – Real Estate & Land Development  
OBA’s Aboriginal Property Issues for the Real Estate Practitioner | Julie Abouchar  
*Aboriginal law and Aboriginal land issues that impact real estate transactions.* |
| June 7, 2014 | Fabricare Sector – Environmental Management  
Ontario Fabricare Association and ECLDA Conference | Jacquelyn Stevens  
*“Best Practices in Environmental Management”* |
| June 10, 2014 | Cross-Border and Inter-Provincial Environmental Disputes  
2014 CBA National Environmental, Energy and Resources Law Section Webinar Series | Marc McAree  
*Discussions on important questions on whether and to what extent the laws of another jurisdiction reach across international and inter-provincial boundaries* |
| June 20, 2014 | Aboriginal Law – Nation Building  
*“Resource Management: Change and Adaptation to Change”* |

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