Willms & Shier | Environment Aboriginal Energy Law

Report

Special Report: 2014 Year in Review
December 2014

2014 Environmental Law Year in Review

By Jacquelyn Stevens, with the assistance of Giselle Davidian, Student -at-Law.

Canadian environmental case law during the past 18 months gave environmental lawyers much to talk about. Personal liability of directors and officers is more uncertain than ever following the *Baker v Director (MOE)* decision. Nuisance case law deviated from the path set out by *Smith v Inco*. Class action plaintiffs in contaminated land cases faced obstacles in 2014. The following summaries provide a snapshot of notable recent environmental law cases across Canada.

Nuisance and Other Causes of Action

- ***Antrim Truck Centre Ltd. v Ontario (Ministry of Transportation)*** **(2013 SCC 13)**—The Supreme Court of Canada (SCC) held that, to establish a claim in nuisance, the interference with the beneficial use of the property must be both substantial and unreasonable.
- ***TMS Lighting Ltd. v KJS Transport Inc.*** **(2014 ONCA 1)**—The Ontario Court of Appeal found that dust from KJS Transport Inc.'s property caused substantial and unreasonable interference with the use and enjoyment of TMS lands. In finding nuisance, the Court considered the severity of the interferences, the character of the neighbourhood, the utility of the defendant's conduct and the sensitivity of the plaintiff.

2014 News and Achievements

What a year it's been for Willms & Shier! A selection of notable events includes:

- **New *Ontario Water Law* Book—Julie Abouchar's** new book, *Ontario Water Law*, co-authored by Theresa McClenaghan of the Canadian Environmental Law Association was published on December 12, 2014. The book is available through **Canada Law Book/Carswell**.
- **Northern Team**—Willms & Shier's new Northern Team was established in April 2014 with **John Donihee** joining the Willms & Shier fold. John received the Northwest Territories "Premier's Award for Collaboration" on June 4, 2014 for his work on NWT's new *Wildlife Act*.
- **Recognition**—Congratulations once again to **John Willms**, **Donna Shier**, **Marc McAree**, **Julie Abouchar** and **Charles Birchall** for their ongoing inclusion in leading legal directories including *The Best Lawyers in Canada*©, *Who's Who Legal—Canada* and *Who's Who Legal—Environment*, the *Canadian Legal Lexpert* directory and *Martindale Hubbell* as leading environmental lawyers. Julie is also recognized for her excellence in Aboriginal Law and Energy Regulatory Law.

In This Issue…

- ***Smith v Inco*** **(2013 ONCA 724 and 2011 ONCA 628)**—The Ontario Court of Appeal dismissed the defendant's appeal of Justice Henderson's cost award. In the 2011 Ontario Court of Appeal decision, the Court outlined two distinct branches of nuisance. The first involves material physical damage to property. The second is interference with the beneficial use of the property. The Court held that, to constitute nuisance, physical damage must be material, actual and readily ascertainable. The other key issue related to strict liability (as articulated in *Rylands v Fletcher*). The Court concluded that Inco did not present an "abnormal risk" to its neighbours and the refinery did not constitute a "non natural" use of Inco's property. The SCC recently denied a second leave to appeal for reconsideration award.
- ***Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd.*** **(2014 ONSC 288)**—The Ontario Superior Court of Justice awarded millions for historic offsite gasoline contamination that migrated from a neighbouring property. Justice Leitch accepted plaintiff's counsel's summary of current environmental causes of action.
- ***Windsor v Canadian Pacific Railway Ltd.*** **(2014 ABCA 108)**—The Alberta Court of Appeal struck out the claims in *Rylands v Fletcher* for all class members of a trichloroethylene class action and nuisance for homes without sub-slab depressurization systems, finding that the class of claimants had only shown nominal or trivial damages. The Court found that there was no error in allowing the claim by the owners of properties with sub-slab depressurization systems to proceed to trial, because the respondents had demonstrated a genuine issue requiring a trial to determine damage to that category of lands.
- ***Canada (Attorney General v MacQueen*** **(2013 NSCA 143)**—The Nova Scotia Court of Appeal struck out a class action about contamination from the Sydney Tar Ponds and associated steel and coke plants. The Court dismissed claims for trespass, *Rylands v Fletcher* and battery, leaving only negligence, nuisance and breach of fiduciary duty. Plaintiffs can individually purse claims on the three remaining causes of action.

Directors' and Officers' Environmental Liability

- ***Baker v Director (MOE)*** **(2013 CarswellOnt 9913; [2013] OERTD No 21; 2013 ONSC 4142) and *Northstar Aerospace Inc. (Re)*** **(2013 ONCA 600)**—The Ontario Divisional Court and Ontario's Environmental Review Tribunal (ERT) upheld the Ontario Ministry of the Environment and Climate Change's (MOECC) Order to corporate directors of an insolvent company to clean up the property with the directors' personal funds. The directors and officers were named because of their status as persons having management and control. In the settlement, 10 former corporate directors paid $4.75 million to be released from the MOECC clean up order.
- ***Kawartha Lakes (City) v Ontario (Environment)*** **(2013 ONCA 310)**—The Ontario Court of Appeal held that innocent landowners can be subject to remediation orders. "Fairness" is now a much narrower ground of appeal of an order where the environmental protection objective of the Ontario *Environmental Protection Act* (EPA) is met.
- ***Rocha v Director, Ministry of Environment*** **(2014 CarswellOnt 13113)**—Ontario's ERT found that, where groundwater contamination is present and spreading, the balance of convenience favours requiring the mortgagee and advisor to pay for remediation before hearing his appeal. The ERT's decision of Mr. Rocha's appeal of the Director's Order is imminent.

Statutory Interpretation

- ***Castonguay Blasting Ltd. v Ontario (Environment)*** **(2013 SCC 52)**—The SCC found that the eight adverse effects set out in Ontario's EPA definition of "adverse effects" were independent of each other and were each individually sufficient to trigger the reporting requirement in section 15(1) of the EPA. The SCC found that a broad approach to the reporting requirement was consistent with the "precautionary principle". The decision sends a clear signal that courts should interpret the EPA in a manner consistent with the overarching goal of protecting the environment.
- ***Thornhill v Highland Fuels*** **(2014 ONSC 3018)**—The Ontario Superior Court of Justice determined that the requisite standard of care for the installation of a fuel oil tank is established by reference to the Technical Standards and Safety Authority, Ontario Regulation 213/01 and the *Installation Code for Oil-Burning Equipment* (CAN/CSA B139). The case reinforces the need for tank installers and fuel suppliers to follow statutory requirements set out in the *Fuel Oil Code*. An appeal is expected.

- ***Western Canada Wilderness Committee v British Columbia (Oil and Gas Commission)*** **(2014 BCSC 1919)**—The British Columbia Supreme Court clarified the interpretation of section 8 of the British Columbia *Water Act* and upheld recurrent short-term water use approvals.
- ***J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.*** **(2014 BCSC 1619)**—The British Columbia Supreme Court reinforced the "polluter pays" principle in applying sections 45 and 47 of British Columbia's *Environmental Management Act*. The provisions of the *Environmental Management Act* allow persons incurring remediation costs to recover from responsible persons, including both current and previous owners of a contaminated site. The Court ordered a former landowner (the historic polluter) to compensate the current owner in the amount of $4.75 million for reasonable reclamation costs incurred to remove contaminants caused by the former owner's industrial activities.

Endangered Species

- ***Ostrander Point v Prince Edward County Field Naturalists*** **(2014 ONSC 974)**—The Ontario Divisional 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 Divisional Court provided detailed guidance about how the ERT should apply the test of serious and irreversible harm to endangered species, what evidence on endangered species is needed, its jurisdiction to impose measures to mitigate any harm and the process to be followed before the ERT grants an appeal that terminates a project. The ERT and Divisional Court found that the Alliance to Protect Prince Edward County's expert evidence did not meet the standard of a peer-review or was not otherwise independently verified. Prince Edward Country Field Naturalists appealed the Divisional Court decision to the Ontario Court of Appeal on December 8, 2014. The Court of Appeal's decision is pending.
- ***Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*** **([2014] FCJ No 151)**—The Federal Court found the Minister of Fisheries and Oceans' and the Minister of the Environment's delay in the preparation of recovery strategies under the *Species at Risk Act* unlawful.
- ***Lewis v Director, Ministry of the Environment*** **(ERT Case No 13-044)**—Ontario's ERT found that to prove a wind energy project will cause serious and irreversible environmental harm, an applicant will need an expert and a scientifically solid case. The ERT also concluded that direct bald eagle mortality, or that of other birds or bats, is not likely based on the evidence provided.

Contract

The following two SCC contract law decisions may apply in the environmental law context, for example in agreements of purchase and sale, limitations of liability and contracts of service.

- ***Bhasin v Hrynew*** **(2014 SCC 71)**—The SCC recognized a new duty on parties to act honestly in the performance of contractual obligations.
- ***Sattva Capital Corp. v Creston Moly Corp.*** **(2014 SCC 53)**—The SCC confirmed that contract interpretation should include the examination of the "factual matrix". Evidence of surrounding circumstances can deepen the decision-makers understanding of words used in the contract.
- ***Community Mental Health Initiative Inc. v Summit Lounge Ltd.*** **(2014 NLTD(G) 130)**—The Supreme Court of Newfoundland and Labrador held that a vendor's consultant has no privity of contract with the purchaser and owes no duty of care to the purchaser.

Agreement of Purchase and Sale

- ***1828445 Ontario Ltd. v Guerra (2014 ONSC 238)***—The Ontario Superior Court of Justice found that a plaintiff who has waived the condition cannot use the fact that a risk has materialized as a basis for renegotiating an agreement of purchase and sale.
- ***Western Forest Products Inc. v New Westminster (City)*** **(2013 BCSC 1001)**—The British Columbia Supreme Court considered a clause in an agreement of purchase and sale requiring that work be done

"diligently" and in a "timely fashion". The Court held that the wording should be read in the context of the agreement as a whole and in accordance with the parties' intentions at the time they entered into the agreement.

Insurance

- ***O'Bryne v Farmers' Mutual Insurance Company (Lindsay)*** **(2014 ONCA 543)**—Despite a pollution exclusion clause, the Ontario Court of Appeal forced an insurer to pay for a fuel oil cleanup after a spill. The Court held that, on a plain reading of the policy, there had to be another operative exclusion before the pollution exclusion applied.
- ***Mississauga Motors Mart Inc. v Sovereign General Insurance Company*** **(2013 ONSC 6360)**—The Ontario Superior Court of Justice found that a landlord's claim against its tenant arose out of the spill of a pollutant that fell within the policy's exclusion. The decision is a reminder that businesses with pollution risks need to buy insurance that provide pollution coverage that is not negated by a pollution exclusion.

Evidence

- ***Pointe Estates*** **Ontario Municipal Board Case No PL 130890**—In a recent Ontario Municipal Board (OMB) hearing that began on November 18, 2014, the OMB decided not to hear the testimony of a Michigan-based hydrogeologist. The Chair of the OMB ruled that the hydrogeologist lost his objectivity as an expert witness when he expressed his concerns to the Algoma Public Health and City Council. A decision on this matter is expected from the OMB in January 2015.
- ***Brimley Progress v Director (Ministry of Environment)*** **(2013 CarswellOnt 4405)**—Ontario's ERT found that, when seeking leave to appeal an Environmental Compliance Approval, the public has a limited right to access Environmental Compliance Approval documents.
- ***Bovaird v Director, Ministry of the Environment*** **([2013] OERTD No 61)**—Ontario's ERT took a harder approach to assessing the qualifications of witnesses who proposed expert anti-wind energy evidence.

Fracking

- ***Pétrolia inc. c Gaspé (Ville de)*** **(2014 QCCS 360)**—The Quebec Superior Court found that a Gaspé municipal anti-fracking bylaw was invalid as it prevented Pétrolia from fracking authorized by the Province. The Town of Gaspé is appealing the decision.

  Ernst v EnCana Corporation—In September 2014, the Alberta Court of Appeal upheld a ruling of the Court of Queen's Bench of Alberta that held the plaintiff could not include Alberta's energy regulator in her lawsuit. The Court held that the Alberta Energy Resource Conservation Board is immune from private civil claims and certain Charter challenges. The SCC's decision on the Plaintiff's leave to appeal is imminent.

Wind Turbine Noise Annoying But Not Linked to Illnesses and Conditions

By Joanna Vince

On November 6, 2014, Health Canada and Statistics Canada released highly anticipated preliminary findings from their wind turbine noise and health study. The *Community Noise and Health Study* findings indicate that wind turbine noise exposure is associated with annoyances, but there is no direct connection between the exposure to and self-reported illnesses, chronic disease, stress or quality of sleep.

The results will assist decision makers by strengthening peer-reviewed scientific evidence necessary to support decisions about wind turbine proposals, approvals, installations and operations. The study will provide evidence for adjudicative bodies (such as Ontario's ERT) to consider when determining whether wind turbine noise will cause "serious harm to human health" on appeals of Renewable Energy Approvals in Ontario.

The study examined 1,238 adults from Ontario and Prince Edward Island who lived varying distances from wind turbines. The study monitored participants' heart rate, blood pressure and levels of the stress hormone cortisol in hair. The study has received criticism for neglecting to account for those people who lived near wind turbines but moved prior to the study due to serious concerns about health, environmental impacts and property values.

Costs Before Tribunal

- ***Seaspan ULC v Director, Environmental Management Act* ([2014] BCWLD 6784)**—In a rare decision, the British Columbia Environmental Appeal Board awarded costs against an appellant. The Environmental Appeal Board found that Seaspan's conduct was irresponsible and deserved reprimand. The Environmental Appeal Board considered that Seapan's expert report was discredited in cross-examination and that the expert purposely omitted dealing with evidence contrary to his opinion. Tribunals generally view costs as punitive in nature, and not compensatory.

Rocha v Director, Ministry of the Environment—ERT Refuses Mortgagee's Stay Pending Appeal

By Donna Shier, with the assistance of Giselle Davidian, Student-at-Law.

On September 23, 2014, Ontario's ERT released its interlocutory decision in *Rocha v Director, Ministry of the Environment* (2014 Carswell 13113). The ERT refused to issue a stay pending appeal of a Director's Order issued to a mortgagee and advisor under section 157.3(5) of the Ontario EPA. The ERT found that it did not have jurisdiction to grant a stay of the work items set out in the Director's Order.

The ERT decided that, even if it had jurisdiction to stay any of the work items, it would not exercise its discretion to do so. Mr. Rocha failed to demonstrate that it would suffer irreparable harm. The ERT held that the balance of convenience did not warrant a stay.

Most interesting was the ERT's finding that "where groundwater contamination is present and spreading", the balance of convenience test directs a mortgagee with management or control to conduct work on the property before hearing an appeal.

Contamination at the Property

Mr. Rocha was a real estate advisor and mortgagee of a property in Oakville that was the site of trichloroethylene (TCE) contamination. A Director's Order required Mr. Rocha to conduct off-site indoor air sampling and TCE plume delineation.

Mr. Rocha appealed the Director's Order under section 140 of the EPA, asserting that the Order should not apply to him. Mr. Rocha denies exercising management or control either as advisor or by virtue of having a financial interest in the property. He submits that his interest in the property is as a lender and that he is not in control of the property. The Director of the MOECC disagrees:

> The Provincial Officer's Report and the information above provide significant details which lead me to believe that you are the person making decisions regarding the TCE contamination [at the property]. I believe you are not only a lender, but you are the person making decisions and exercising charge, management or control of the property either as an advisor to [the owner], or as a person who has a financial interest in [the property].

The work required under the Order is expected to cost Mr. Rocha $80,000 to $150,000. Even if the Order is struck down on appeal, Mr. Rocha will not be able to recover the funds he spends to comply with the Order.

Mr. Rocha applied to the ERT for a stay pending the hearing of his appeal. The ERT considered whether it has jurisdiction to grant a stay and, if so, whether any of the work ordered should be stayed. On September 23, 2014, the ERT denied Mr. Rocha's application for a stay, pending appeal.

ERT Has No Jurisdiction to Grant Stay

The ERT found that it has no jurisdiction under section 143(2) of the EPA to stay an order to "monitor, record and report" findings to the MOECC. The ERT determined that each of the work items set out in the Order constituted "monitoring, recording or reporting" under the EPA or were ancillary to same.

Despite the ERT's determination that it lacked jurisdiction, the ERT considered the common law stay analysis set out in *RJR MacDonald Inc. v Canada (Attorney General)*. The three-part test considers whether:

- there is a serious issue to be decided by the tribunal
- irreparable harm will ensue if the relief is not granted and
- the balance of convenience, including effects on the public interest, favours granting the relief requested.

The ERT concluded that even if it had jurisdiction, it would not have allowed a stay of the Order. The reasons are summarized below.

Issue is Serious But Appellant Did Not Demonstrate Irreparable Harm

The ERT found that the issue of whether or not Mr. Rocha has or had "management or control" of the property is serious. Nevertheless, the ERT concluded that Mr. Rocha did not demonstrate that he would suffer irreparable harm. The ERT decided that in order to satisfy the irreparable harm requirement, Mr. Rocha must prove that he would be unable to recover the costs of satisfying the order from the property owner and its associated companies.

Balance of Convenience Does Not Warrant a Stay

The ERT found that "where groundwater contamination is present and spreading," the balance of convenience test directs a mortgagee with management or control to conduct work on the property before the ERT hears an appeal. The ERT considered that the public interest of completing environmental work immediately often outweighs ordering a person with undecided management or control of the property to pay.

ERT May Expand "Management or Control"

In *Baker v Director (MOE)* (2013 ONSC 4142), the Ontario Divisional Court held that former directors and officers must remediate while an MOECC Director's Order against them is under appeal. In the *Baker* case, the directors and officers ultimately settled the Order against them by payment of settlement funds.

The ERT heard Mr. Rocha's appeal of the Order against him on August 6, 2014. The decision is awaited with interest and concern. A finding that Mr. Rocha as mortgagee had sufficient management or control of property will expand the scope of personal liability introduced by *Baker*. The ERT's decision will have many ramifications.

Ontario Regulatory Amendments to Strengthen Protection of Great Lakes-St. Lawrence River Basin

By Julie Abouchar, with the assistance of Giselle Davidian, Student-at-Law.

Companies and entrepreneurs wishing to divert water from one Great Lake watershed to another should note stricter requirements, the last of which will come into force on January 1, 2015 by way of regulatory amendments made on October 22, 2014. O. Reg. 225/14 amends the *Water Taking Regulation* (O. Reg. 387/04) under the *Ontario Water Resources Act* and renames it the *Water Taking and Transfer Regulation*. O. Reg. 226/14 amends the *Classification of Proposals for Instruments Regulation* under Ontario's *Environmental Bill of Rights, 1993*.

Once in force, the regulatory amendments will fully implement Ontario's commitments under the 2005 Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement.

Key Provisions of the Water Taking and Transfer Regulation (O. Reg. 387/04)

Anyone wishing to divert water between Great Lakes watersheds, or to increase the volume of water being diverted must apply to the MOECC for a permit.

Amendments to O. Reg. 387/04 require that, before granting a permit, the Director of MOECC consider (1) the amount of water that will be lost through consumptive use; (2) issues related to the return of water after use; and (3) any applicable laws or international agreements.

The Regulation does not apply to:

- existing exemptions for watering livestock or for domestic purposes continue to apply, unless there is a new or increased transfer of 379,000 L/day or more, and
- water transferred between a Great Lake watershed and the watershed of its connecting upstream and downstream channels is not considered an intra-Basin transfer. Similarly, water transferred from the immediate outlet of Lake Ontario to the St. Lawrence River is not considered an intra-Basin transfer.

Proposals to divert intra-Basin water transfers should demonstrate that the diversion cannot be avoided by enhancing water conservation efforts and that the hydrological integrity of the watershed that will supply water will not be negatively impacted.

Proposals are posted on the Environmental Registry as Class I instruments. Members of the public and governments will be given an opportunity to comment on the application. Ontario residents who have commented on the permit application will be able to seek leave to appeal the permit to the ERT.

Quebec and jurisdictions of the eight Great Lakes states have the right to appeal a decision to the ERT or to bring an application for judicial review of a decision that involves a new or increased consumptive use of 19 million L/day or more or a new or increased intra-Basin transfer.

Certain regulatory amendments came into force upon filing on November 27, 2014. On January 1, 2015 the remaining provisions will come into force.

Key Amendments to the Classification of Proposals for Instruments Regulation (O. Reg. 681/94)

Amendments to O. Reg. 681/94 replace section 3 of that Regulation. The amended section 3 classifies a proposal for a permit under the *Ontario Water Resources Act* authorizing a new transfer or an increased transfer or water taking as a Class I proposal. The classification excludes a proposal for a permit for irrigation or agricultural crops and/or watering livestock or poultry. Class I proposals also exclude a proposal to issue or amend a permit to respond to a request made under a deemed current transfer and a proposal for a permit authorizing water taking or transfer for less than 365 days from the date the taking or transfer began.

The regulation amending O. Reg. 681/94 comes into force on January 1, 2015.

The 2005 Agreement

The amendments to O. Reg. 387/04 and O. Reg. 681/94 implement the 2005 Agreement signed by Ontario and Quebec Premiers and the Governors of Great Lakes states Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. The agreement parties commit to: prohibit new or increased out-of-Basin water transfers, except by strictly regulated exceptions, determine water conservation goals in each jurisdiction and implement customized programs, improve science and information on Great Lakes water and water use to assist in making decisions, manage water takings, and regulate new or increased intra-Basin transfers.

Extractive Sector Transparency Measures Act Enacted

By Julie Abouchar and Nicole Petersen.

Mandatory disclosure of payments made to Aboriginal communities from companies in the oil, gas and mining sectors will soon become a reality. On October 23, 2014, the federal government tabled the *Extractive Sector Transparency Measures Act* as a measure under omnibus Bill C-43. The Bill received Royal Assent on December 16, 2014. The *Extractive Sector Transparency Measures Act* alters the current practice of confidential negotiated agreements between resource companies and Aboriginal communities about exploration and resource extraction in

their traditional territories. The Act requires extractive companies in Canada to begin reporting payments made to Aboriginal governments two years after the legislation comes into force.

The enactment of the *Extractive Sector Transparency Measures Act* reflects a commitment made by the federal government in Britain in June 2013. The move is also supported by groups such as the Prospectors and Developers Association of Canada (PDAC), Publish What You Pay Canada and the Revenue Watch Institute. The proposed legislation has, however, raised concerns among First Nations, which question the federal government's failure to consult them before introducing Bill C-43.

Potential Impact of the Legislation

This legislation will likely affect legally binding impact benefit agreements and memorandums of understanding between Aboriginal communities and extractive sector companies. These agreements up until now have been largely confidential. Requiring disclosure of these agreements could have both positive and negative impacts. Managing the impact of this legislation will be a project for all stakeholders during the two-year transition period.

A serious concern is that making these royalty figures public could encourage the federal government to reduce funding for infrastructure and social services in those communities.

The potential for the federal government to rely on private companies to discharge its funding obligations is troubling. Financial agreements compensate the First Nation for impacts to their territories; they do not serve as replacement source of public infrastructure funding.

A potential benefit from this legislation is that it may level the playing field among parties who seek to negotiate financial compensation agreements. Those negotiating may benefit by having precedent agreements and financial figures available.

Please refer to our article *Canada Tables Extractive Sector Transparency Measures Act* for a useful summary of key provisions of the Act, including when reporting obligations start, who has to report, what must be reported, and penalties for failure to comply.

2014 Northern Team Year in Review

By Julie Abouchar, Charles Birchall, John Donihee and Nicole Petersen.

Willms & Shier's new **Northern Team** had a tremendous year. Our lawyers took on exciting challenges and built lasting relationships across Canada's North, from coast to coast to coast. A few highlights follow….

- **Administrative Tribunals**—2014 presented special legal challenges and opportunities in the North as the Canada Northwest Territories devolution agreement came into effect. We assisted administrative tribunals and boards across the North to address devolution and other issues. Our team assisted a northern administrative body with jurisdictional issues related to land use planning. We provided advice to boards about several water licence applications and an environmental impact assessment. We provided advice and training to a board about process to handle upcoming large natural resource projects.
- **Legal Advice to Government**—Devolution also impacted and influenced our work with government clients. We assisted the Government of the Northwest Territories with drafting its *Wildlife Act*. We provided advice about land, water and resource management laws interacting with the devolution process. We also provided advice about caribou management concerns in relation to northern land claims.
- **Impact Benefit Agreement Drafting**—We assisted with negotiations and drafted an innovative area-wide Inuit Impact Benefit Agreement, a Commercial Lease and an Exploration Agreement in relation to a mining project in the Kitikmeot Region of Nunavut. Once finalized, these agreements will provide land tenure certainty for the project and training, employment and business opportunities for Inuit.

- **Impact Benefit Agreement Dispute Resolution**—As communities and companies are implementing Impact Benefit Agreements (IBA), questions of interpretation arise. We have assisted parties to develop implementation plans and terms of reference to move forward with their relationship. We assisted a community in northern Ontario resolve a dispute with a major mining company through mediation under the Dispute Settlement provisions of an IBA. The result was to avoid resort to blockades and the costs of court actions, improve the implementation of the IBA and mend the parties' relations.
- **Aboriginal Corporate Matters**—This past year, federally incorporated non-profit corporations transitioned to the *Canada Not-for-profit Corporations Act*. We assisted a number of Aboriginal non-profit corporations in Northern Ontario with the transition process, including meeting with various board of directors of First Nation non-profits, advising on the updating of their by-laws to comply with the new Act and completing Articles of Continuance.
- **Aboriginal Consultation**—While the last couple of years have been slow for mining, with an uncertain global market and volatile commodity prices, there has been some activity in Northern Ontario, and companies are endeavouring to consult with First Nations. We have drafted several exploration agreements in relation to projects in Northern Ontario. These Agreements commit the parties to negotiate resource sharing once the feasibility of a mine is certain.
- **Major Pipeline Application**—TransCanada Energy East filed its Application for the Energy East Pipeline project with the National Energy Board in October 2014. The proposed pipeline would run from Hardisty, Alberta to Saint John, New Brunswick, crossing the territory of many First Nations. We have assisted First Nations in Northern Ontario to respond to TransCanada's requests for consultation, consider the issues of ownership, consent, access and possession of traditional knowledge, and get ready to apply for Intervenor status at the upcoming National Energy Board hearings.
- **Mining Litigation**—We appeared before the Mining Recorder and successfully argued that staking from a helicopter is legal under the *Mining Act* and regulations.

New NWT *Wildlife Act* In Force

By John Donihee and Nicole Petersen.

On November 28, 2014 the new Northwest Territories *Wildlife Act* was called into force. The new Act sets out a comprehensive framework for the management of wildlife in the Northwest Territories and will affect all harvesters, including Aboriginal people, residents and non-residents using the services of Outfitting businesses. In addition, the statute's framework for wildlife and habitat management includes new provisions which will be of interest to resource developers operating or planning projects in the Northwest Territories.

The result is a new statute and regulations which have been unanimously endorsed by all participants in the legislative development process. Most importantly, the legal framework resulting from this effort is consistent with Aboriginal rights, including land claims, and promises to accommodate the rights and interests of Aboriginal people in the future management of Northwest Territories wildlife.

This legislative event, years in the making, is the culmination of collaboration between the Government of the Northwest Territories, Aboriginal organizations including those with settled land claims, Métis and First Nations which are still in the negotiation process, and wildlife co-management tribunals which play a central role in wildlife management in the Northwest Territories. Work on the details of the regulations is ongoing, but the Act and most regulations came into effect on November 28, 2014. This legislative effort also enacted the Northwest Territories *Species at Risk Act* in 2009.

Key Aims and Effects of the Act

The new Act sets out a comprehensive modern framework for the management of wildlife in the Northwest Territories. It ensures that wildlife management will integrate Aboriginal rights and interests while contributing to the sustainability of northern wildlife.

The new Act will:

- integrate and ensure recognition and respect for Aboriginal rights in the wildlife management process
- encourage conservation and stewardship or wildlife and habitat
- enhance local control in the management of wildlife
- promote harvester training to improve safety and wildlife conservation
- permit better management of conservation areas
- establish a framework for wildlife and habitat management planning and monitoring in concert with resource development, and
- modernize enforcement provisions and increase penalties for offences.

Integration of NWT Land Claims and Collaborative Development Process

This new legislation is unique. It fully integrates the four existing land claims in force in the Northwest Territories and accommodates the Aboriginal rights and interests of Métis and First Nations which are still in the negotiating process. The Act was drafted through an open and inclusive process which involved direct collaboration between government officials, Aboriginal leaders, co-management tribunals and their counsel. The Government of the Northwest Territories underwrote extensive consultation with Aboriginal rights holders and the public throughout the process.

The First Nation of Nacho Nyak Dun v Yukon—Interpretation, Reconciliation and the Land Use Planning Process in Modern Treaties

By Charles Birchall, John Donihee, Julie Abouchar and Nicole Petersen.

On December 2, 2014, the Yukon Supreme Court released its much anticipated decision in *The First Nation of Nacho Nyak Dun v Yukon*. The decision centred on interpreting land use planning process provisions in the Umbrella Final Agreement (Agreement)—the land claim agreement between the Crown and Yukon First Nations. The Court's decision is of considerable interest in other northern territories where land claim-based land use planning processes form a key element of the resource management framework. To further the process of reconciliation between Yukon and the affected First Nations, the Court confirmed the application of the land use planning process set out in the Agreement.

The Court's decision centered on the interpretation of provisions contained in Chapter 11 of the Agreement, which outlines a detailed process for land use planning in Yukon. The Government of Yukon (Government) argued that the correct approach to interpreting the Agreement was a plain reading of individual provisions in Chapter 11. This approach would have allowed it to substantially modify the final Recommended Plan developed by the Peel Watershed Planning Commission (Planning Commission). The final plan was the result of extensive public consultation, research and hearings over a five-year period.

The Court disagreed with Yukon's approach. The Court held that any interpretation of the Chapter 11 process should be contextual, uphold the Honour of the Crown and promote reconciliation between the Crown and First Nations. The Court issued an order quashing the Peel Watershed Regional Land Use Plan (Land Use Plan) as modified by the Government. The Court determined that the Government had not properly followed the consultation and review process specified in Chapter 11 and remitted the matter back to an earlier stage in the process, with restrictions on the Government's ability to propose new modifications. Specifically, the Court order preserves the Planning Commission's Recommended Plan, which proposes that approximately 80% of the planning region be given a high degree of protection as designated Special Management Areas.

The Planning Process

The Peel Watershed is an undeveloped area in northeast Yukon. Currently, there are no mines in the Peel Watershed, although there is considerable interest in mineral exploration. The land use planning process in Yukon is guided by Chapter 11 of the Agreement, which works in concert with individual self-government treaties between First Nations in Yukon and the Crown, once negotiated. As required by Chapter 11, a Peel Watershed Planning Commission was established to draft the Land Use Plan for this area.

The Planning Commission spent five years developing a land use plan through a collaborative process that included considerable input at all stages by stakeholders and First Nations. The Court summarized the Planning Commission's activities:

The Commission met its obligation in s. 11.6.1 to forward a Recommended Plan to the affected First Nations and the Government of Yukon. That document was a substantial and comprehensive report based on extensive research and hearings over a period of approximately five years. In generating the Recommended Plan, the Commission worked within the framework of the unanimously agreed-on General Terms of Reference, utilized a consultative and consensus-driven approach, and took sustainable development as its cornerstone principle, as it was required to do by the Final Agreements themselves.

The Planning Commission released a Final Recommended Land Use Plan in 2011. In 2012, the Government announced plans to modify and complete the Land Use Plan. The Government released its final version of the Land Use Plan in January 2014. This version was significantly different than the Planning Commission's Final Recommended Plan. In the Government's version, it unilaterally reduced the percentage of regional designated conservation lands from 80% to 29%.

The Judicial Review

Two First Nations, two environmental organizations, and two residents of Whitehorse, Yukon (Plaintiffs) sought judicial review of the Government's Land Use Plan. The Plaintiffs sought a declaration quashing the January 2014 Land Use Plan and to have consultation under the Planning Commission process re-conducted from the point where the Government proposed its modifications, with specific limits on the Government's powers to propose further changes going forward. The Court granted the relief sought by the Plaintiffs. The Court order essentially preserves the Commission's Recommended Plan.

The Court found that the provision upon which the Government relied for its authority to unilaterally modify the Land Use Plan needed to be read in the context of the framework of the Final Agreements as a whole. Although the Government may propose modifications within the land use planning framework, it must remain responsive to preceding consultation and provide written reasons for any proposed modifications. Proposed modifications and written reasons should be sent back to the Planning Commission for review. By not following this process, the Government effectively usurped the planning process and the role of the Planning Commission.

The Government's modifications did not flow from valid proposed modifications earlier in the process. The Court found that any interpretation of the process contained in the Final Agreements must be read in a manner that promotes reconciliation between the Crown and First Nations.

Conclusion

The Government is considering whether to appeal, and at the date of writing has not announced a decision. This decision provides valuable guidance on interpreting modern treaties. The Court confirms that the Honour of the Crown requires that treaties be interpreted within their entire framework. In this case, there was a process set out in the Final Agreements that was misinterpreted and misapplied by the Government. In doing so, the Government undercut key principles of consultation, and the objective of reconciliation. This decision confirms protection for process as well as substantive rights. It also emphasizes the Court's continuing focus on reconciliation as a key objective in guiding the actions of the Crown in future consultation and planning processes.

Willms & Shier | Environment Aboriginal Energy Law

Join Willms & Shier at these Upcoming 2015 Events		
Feb. 4	Ontario Bar Association: **Institute 2015**—Toronto, ON	**Marc McAree** will be speaking at the Institute's Environmental stream about "**Avoiding Litigation Pitfalls"** on February 4, 2015.
Feb. 27	The Commons Institute: **240 Minutes on Environmental Law**—Toronto, ON	**Marc McAree** will be speaking on the topic of "**An Environmental Litigator's Reflections about the Importance of Experts in Environmental Litigation"**.
Apr. 27-29	**CANECT 2015**—Mississauga, ON	Willms & Shier's lawyers will once again be key speakers at the waste management, air, and water and wastewater programs of the ever-popular **Canadian Environmental Conference and Tradeshow**. Details about the program will be announced in a subsequent newsletter and on our website.
June 5-6	Ontario Fabricare Association **Conference 2015**—Port Credit, ON	Join **Jacquelyn Stevens** for her presentation, **"Environmental Update: Directors' and Officers' Environmental Liability"**.

Follow Us For Timely, Regular Updates!

Do you enjoy this newsletter but wish you could receive more frequent updates? You can!

Follow Willms & Shier Environmental Lawyers LLP on **LinkedIn** for regular environmental, Aboriginal and energy law updates and other news!

Also, watch for our new **blog**, coming soon in 2015!

Wishing all of our colleagues and readers a very happy holiday season and a healthy, happy and prosperous 2015!

Willms & Shier Environmental Lawyers LLP

4 King Street West, Suite 900, Toronto, Ontario, M5H 1B6

World Exchange Tower, 45 O'Connor Street, Suite 700, Ottawa, Ontario, K1P 1A4

Tel: 416 863 0711 (Toronto) / Tel: 613 761 2424 (Ottawa) / Website: **www.willmsshier.com**