WILLMS & SHIER ENVIRONMENTAL LAWYERS LLP

Report

ENVIRONMENT • ABORIGINAL • ENERGY

June 2012

MNR sets out it its management plans for renewable energy facilities on Crown lands

Are wind turbines compatible with geese migration flight ways? Should mini-hydro plants be built on spawning streams or lake with lake trout ? On June 15, 2012, the Ministry of Natural Resources (MNR) released its draft *Renewable Energy on Crown Land Policy* to explain how and where the government intends to manage the development of renewable energy projects on Crown lands. The document sets the strategic policy direction for supporting water power, onshore wind and solar facilities.

Under authority of section 2(1) of the *Public Lands Act*, the Minister of Natural Resources has the authority to approve or deny any use of Crown land for renewable energy. From 2004 to 2009, MNR received over 600 applications for renewable energy development on Crown land, while the passage of the *Green Energy Act* in 2009 placed even higher priority on expanding the generation of renewable energy. The new policy will be used to review these existing applications, with the exception of applications with a power purchase agreement (for

(Continued on page 2)

Four Willms & Shier lawyers voted into Lexpert® Directory

Four of our staff members are listed in *The 2012 Canadian Legal Lexpert® Directory*. Donna Shier, John Willms and Marc McAree were recognized for their expertise in environmental law, while Juli Abouchar was recognized for her work in both Aboriginal law and environmental law. All were selected for inclusion based on a survey of more than 10,800 of their colleagues and peers in the Canadian legal profession to determine the top lawyers in various practice areas. This year, the overall national response rate from law firm practitioners exceeded 80 per cent. For more information on the *Legal Lexpert® Directory*, contact the publishers at http://www.lexpert.ca/

In this issue ...

example, a Feed-In-Tariff contract); and applications associated with an off-grid Aboriginal community. These applications will continue to be processed, "consistent with the current policy and procedural direction."

Crown land will generally be made available where generation is enabled by available transmission or distribution capacity, and the project supports the provincial power system or other supply plans or priorities, such as the "Ring of Fire" or the Growth Plan for Northern Ontario. The draft policy encourages Aboriginal communities to take advantage of economic benefits arising from renewable energy development on Crown land. In a key policy shift, renewable energy applications in the Far North would only be accepted from Aboriginal communities and/or their partners. The new criteria-based GEA approvals process prioritizes projects elsewhere with local community or Aboriginal involvements.

The draft policy contains seven objectives for renewable energy development on Crown land

1. Make Crown land available for renewable energy development in a manner that supports government priorities, including Ontario's long-term energy plans and programs.
2. Recognize other provincial priorities for Crown land when making land available for renewable energy development (such as the Crown Land Use Policy Atlas or community-based land use plans approved under the *Far North Act*)
3. Provide a clear process for making Crown land available for renewable energy development using a criteria-based approach.
4. Encourage Aboriginal community economic benefits from renewable energy development on Crown land.
5. Implement Crown land use policy direction for renewable energy in the Far North, Northern Rivers (the basins of the Severn, Winisk, Attawapiskat and Albany rivers), and Moose River basin.
6. Coordinate Crown land renewable energy decision-making (for example, engaging with the ministries of Energy, Environment, Northern Development and Mines, Aboriginal Affairs and other agencies before making Crown land available.
7. Use science and the best available natural resource, ecological and socio-economic information (including Aboriginal traditional knowledge) to support balanced Crown land management decisions for renewable energy development.

The policy provides general direction for the implementation of some of these objectives. In other cases, more specific procedural guidance will be developed. When adopted, the policy will replace the MNR's *Waterpower Site Release – Crown Land* and *Onshore Windpower Development on Crown Land* policies and will be applied to all future renewable energy development on Crown land. During consultation on the draft policy, the existing policies and procedures will

Renewable energy policy promotes Aboriginal projects on Crown lands

Water, wind and solar power applications within the Far North and the "Northern Rivers" area will only be accepted from local Aboriginal communities and/or their partners.

Community economic benefits from water power development will be encouraged where the site is south of the boundaries of the Far North, Northern Rivers and Moose River basin; the site has a capacity of one MW or larger; and the banks of the river are Crown-owned.

MNR is committed to collaborating with Aboriginal communities and organizations, government agencies and the renewable energy industry to review the mechanism(s) by which Aboriginal communities can economically benefit from water power development on Crown land, and how to determine which Aboriginal communities benefit economically from water power development on Crown land.

remain in effect, although subject to amendment where necessary to facilitate implementation of the *Green Energy Act* and energy procurement.

Offshore wind power, and renewable energy development in provincial parks and conservation reserves (south of the Far North), are outside the scope of this policy. The draft policy was posted to the Environmental Registry (# 011-6005) on June 15, 2012, for 120 days of public comment. The deadline for submissions is October 13, 2012.

Castonguay decision: Appeal Court clarifies and broadens Ontario's spill reporting requirements

Is a flying rock that hits a house an "adverse effect" that must be reported to the Ontario Ministry of the Environment's Spill Action Centre? The ministry thinks so and, according to a recent decision, so does the Ontario Court of Appeal. In *Ontario (Environment) v. Castonguay Blasting Ltd.* (2012 ONCA 165), the Court ruled that discharges that damage property or compromise human health must be reported to the MOE, even if there is no obvious or significant damage to the natural environment.

First a little background. On November 26, 2007, Castonguay Blasting Ltd. was widening a deep highway cut through the Canadian Shield in the town of Marmora, Ontario. In the course of its blasting work, some fly-rock travelled 90 metres through the air, punching through the roof of a home and damaging a vehicle on neighbouring private property. The mishap was reported to the contract administrator, who informed the Ministry of Labour and the Ministry of Transportation. No one was hurt and the property owners were fully compensated. But that's not the end of the story.

MOE did not learn of the incident until May 2008, and 18 months later charged Castonguay with failing to report the discharge of a contaminant into the natural environment contrary to section 15(1) of the *Environmental Protection Act* (*EPA*). The company was initially acquitted by the Ontario Court of Justice, but MOE appealed, the acquittal was reversed and a conviction entered in the Superior Court on January 28, 2011. The company was fined $25,000 plus a victim fine surcharge, which it paid.

The company launched a further appeal. Although the flying debris had caused damage to private property, its counsel argued that there was no harm to or impairment of the natural environment, namely, the "air, land and water" as defined in the *EPA*. Therefore, they claimed, Castonguay was not under an obligation to report the discharge under s. 15(1).

In a split decision released March 16, 2011, the Appeal Court disagreed. It ruled that the fly-rock was obviously a "contaminant" that was "discharged" into the environment through the air. However, the three justices did not

Ottawa and Ontario pass omnibus budget bills

Despite widespread calls for further review or amendment, the federal government's omnibus budget bill received third and final reading on June 18, 2012, Bill C-38, the *Jobs, Growth and Long-term Prosperity Act,* makes radical revisions to a host of federal environmental statutes, including those governing environmental assessments and fish habitat. Two days later, Ontario's Bill 55, *Strong Action for Ontario Act (Budget Measures), 2012,* also passed Third Reading and received Royal Assent. Of course, this isn't the end of either story.

The implementation of the new regulatory regimes mandated under both statutes will depend on the new federal and provincial regulations we expect will start to appear over the next few months. The federal process has already begun. On May 3, 2012, the Canadian Environmental Assessment Agency posted an invitation for interested parties to submit comments on

- the information to be included in a project description
- cost recovery from the proponents of a project undergoing an environmental assessment by a review panel

The deadline for submissions closed less than three weeks later on May 23! As we learn more, we will cover developments in future issues of this newsletter.

agree on whether this release resulted in an "adverse effect." Writing for the minority, Justice R.A. Blair wrote

> [I]f the notion of "adverse effect" carries with it some element of impairment to the natural environment that is more than transient or trivial – an "environmental event", in the words of the trial judge – the discharge of the fly-rock here did not … cause or was it likely to cause, in the circumstances here, an "adverse effect".

However, Justice J.C. MacPherson, writing for the majority, said that interpretation is inconsistent with both *Ontario v. Canadian Pacific Ltd.*, 1995 and *R. v. Dow Chemical Canada Inc.,* 2000. The *EPA* defines an "adverse effect" as "one or more of" eight kinds of listed damages, including those to the natural environment, plants and animals, human health, and various kinds of property and business impacts. The fact that the damage to the natural environment may be trivial is not enough to disqualify the event as an adverse effect. Significant harm to human health or property would still trigger the reporting requirement.

> Where blasting causes the discharge of a contaminant, such as fly-rock, into the natural environment, blasting may harm people, animals or property. That is what happened in this case. A blasting activity gone wrong … may not have caused more than trivial or minimal harm to the air, land or water. However, the fly-rock generated by the blasting did cause significant harm to property, a different adverse effect under the Act.

The appeal was dismissed, the conviction stands, and costs were not awarded.

What the *EPA* says about spill reporting ...

EPA Section 15(1) – Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment shall forthwith notify the Ministry if the discharge is out of the normal course of events, the discharge causes or is likely to cause an adverse effect and the person is not otherwise required to notify the Ministry under section 92 [which requires reporting of spills].

City of Kawartha Lakes appeals clean-up order: Natural justice and "fairness" are secondary to priorities of environmental protection

Owners of property that have been contaminated through no fault of their own can still be on the hook for substantial clean-up costs, costs they may never be able to recover. *The Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment* (2012 ONSC 2708) reaffirms that innocent victims of pollution may be forced to remediate their property and then attempt to seek recompense from the responsible parties through civil litigation. On May 28, 2012, the Divisional Court upheld a 2009 decision of the Environmental Review Tribunal (ERT) that the protection of the environment is paramount and must be ensured regardless of who is at fault.

In December 2008, several hundred litres of furnace oil leaked from the basement of privately owned property in the City of Kawartha Lakes, entered the municipal storm sewers and was seeping into nearby Sturgeon Lake. The Ministry of the Environment (MOE) ordered the private property owners to remediate the damage, but their insurance funds ran out before the

contamination on City property could be cleaned up. MOE then issued a Provincial Order under section 157.1 (1) of the *Environmental Protection Act*, requiring the City to take all reasonable steps to prevent the discharge of oil to the lake and to remediate its property.

The City appealed to the ERT, which upheld the ministry's clean-up order. The City appealed that decision to the Divisional Court. The City did remediate preventing further damage to Sturgeon Lake before it had a chance to fully argue its appeal.

The City alleged the ERT had erred in law and breached the rules of natural justice when it refused to allow the City to call evidence proving its innocence and to determine who was actually at fault. The ministry countered that in this situation, the Tribunal's primary mandate is to protect the environment, and that would be stymied by engaging in fault-finding.

Despite finding that the case was now "moot," the Court did consent to rule on the underlying dispute. It noted that all parties had agreed that the City was an innocent owner and was in no way responsible for the contamination; therefore, evidence of fault was not relevant to the ultimate decision the ERT had to make. The City was seeking to have the ERT consider evidence about the fault of the fuel provider, fuel tank manufacturer, insurance company, insurance adjuster and the MOE itself. The Court noted that a provincial officer can only make s.157.1 orders against a "person who owns or who has management or control of an undertaking or property." "[S]uch a determination of fault becomes much more irrelevant when the parties against whom the findings of fault are sought are not even potential orderees under s.157.1," the Court ruled.

The decision to issue the Order to prevent further contamination was "clearly reasonable," the Court said, and was consistent with the MOE's Compliance Policy, designed to guide officers in exercising their discretion under the *EPA*.

> In this case, the provincial officer was faced with a situation where the contaminant on the owner's property was starting to cause damage to other parts of the environment. Left uncontrolled, that damage would only get worse … The owner of the adjoining property, where the contaminant had come from, was financially unable to remediate the damage. The provincial officer exercised her discretion and ordered the innocent owner to do the clean-up. The Tribunal, in refusing to revoke the clean-up order, found that the MOE had exercised its discretion in a purposive manner consistent with the purpose of the Act.

The appeal was dismissed, and the parties were invited to make written submissions on the question of costs. The City of Kawartha Lakes subsequently has given notice that it will seek leave to appeal the Divisional Court's decision.

Committee walks line between development and protection in review of Aggregates Act

It's been 15 years since the Ontario government last modernized the complex and controversial *Aggregate Resources Act* (*ARA*). In the interim, the demand for new sources of aggregate continues to grow in booming southern Ontario, while preservationist groups and rural communities become more vocal in their opposition to new or expanded quarry operations. In March 2012, the Standing Committee on General Government was charged with the task of reviewing the *ARA*. The Committee has been directed to focus on

- the Act's consultation process
- how siting, operations and rehabilitation are addressed in the Act
- best practices and new developments in the industry
- fees and royalties
- aggregate resource development and protection, including conservation/recycling.

Over May and June, the Committee has held a series of public meetings and heard deputations from more than 30 groups and individuals, including the Environmental Commissioner of Ontario, aggregate producers and industry associations, municipalities, and numerous environment and community groups (see what some of the stakeholders are saying about the *ARA* on page 6 of this newsletter).

(Continued on page 7)

Here's what some of the stakeholders are saying about the *ARA* …

"When the *ARA* was introduced in the Legislature in 1989, it was hailed as leading-edge, environmentally focused legislation. While it may be time to undertake a review, please don't lose sight of what is working well. The *ARA* isn't broken, but it does need updating."

– Ontario Stone, Sand and Gravel Association

"We estimate the real cost of heavy vehicle traffic associated with aggregate production on local roads, bridges, and culverts to be about 12 times greater than the 7.5 cents a tonne we are paid in royalties each year. Any review [of the ARA] must begin to align these royalty payments with the real costs of aggregate production to local taxpayers."

– Greater Toronto Countryside Mayors Alliance

"[F]or economic prosperity and environmental sustainability, it is essential that aggregate supply is sourced close to aggregate demand. Ontarians consume large quantities of aggregates. Each citizen annually consumes less than one tonne of food but consumes 13.5 tonnes of aggregate."

– Lafarge Canada

[T]he argument that we must extract close to markets is moot anyway, because most, almost all, the stuff has been extracted or is under licence and will be gone in a decade or two. The new resources of significant quantity are further away, and we need to get the discussion back to how we are going to get that material into the urban centres with minimal energy use and greenhouse gas emissions, and that might involve something different than trucks."

– Environmental Commissioner of Ontario

"All recyclable aggregate-based materials that cannot be properly reprocessed and reused on a construction site should come back to a licensed pit or quarry on the returning truck. These facilities have all the necessary equipment to reprocess the material and add it to the virgin aggregate … Reuse and conservation: Everybody wins."

– Eastern Ontario Aggregate Producers

"These things seem very mundane, but simple things like washing truck wheels before they go off the site; road sweeping; methods of computer phasing of blasting so that it has less impact; rubber screens for sizing the material, instead of metal—it's a lot less noisy—a lot of these practices could go into the provincial standards that aren't there now."

– Ontario Professional Planners Institute

"[T]he time it will take to achieve the rehabilitation [of abandoned pits and quarries] ranges from about 90 years to 335 years, based on the current annual rate of rehabilitation. By any benchmark, a program the potential success of which can only be measured in centuries is not a program either the Legislature, the public, the regulated community or regulators can have any confidence in."

– Canadian Environmental Law Association

"In the past three years alone, we've fought alongside four citizens' groups, opposing over 100 million tonnes of new aggregate operations … All told, these four licence appeals required 46 months of hearing time – almost a year each, on average. It bears repeating here that your average criminal trial, your average murder trial, seldom runs more than three months, so something is clearly out of whack with the *ARA*."

– Environmental Defence

"[T]he OFA recommends that aggregate extraction be prohibited on prime agricultural land, classes 1 through 4, including specialty crop areas. We see little solid evidence of widespread rehabilitation of former aggregate extraction sites ... back into agricultural uses. Too often rehabilitation means the creation of new recreational uses—for instance, parks and golf courses etc., residential developments and/or woodlots, grasslands and wetlands—not that any of those are bad, but they're not agriculture."

– Ontario Federation of Agriculture

(Continued from page 5)

The Committee will have to walk a fine line, ensuring access to aggregate resources while protecting sensitive environmental areas, aquifers, woodlands and wetlands.

The Committee has received a wide range of detailed recommendations and suggestions. Rural municipalities have asked for their royalties to be raised to cover the onerous cost of maintaining rural roads, bridges and infrastructure being degraded by heavy trucks. Aggregate producers have called for red tape to be cut and the complex licence approval process to be made "more efficient, more transparent, more understandable." The industry has said that recycling aggregate is feasible but municipal engineers must be convinced that the recycled product is reliable. Several commenters have called for changes to the *Ontario Building Code* to support recycling markets. Producers insist that supplies must remain close to consumers; the cost of shipping aggregate from Northern Ontario, for instance, would be crippling.

Perhaps surprisingly, both Environmental Defence and the industry group Socially and Environmentally Responsible Aggregate (SERA) suggested that the public and the industry are both ready to accept a voluntary industry standard that incorporates a proper (perhaps self-regulating) certification system. Voluntary standards on social and environmental issues for the aggregate sector in Ontario would complement regulatory requirements while encouraging companies to exceed the public's expectation on some 'hot button' issues.

A number of commenters have also asked that aggregate levies be raised and, rather than disappearing into general revenues, the funds be dedicated to Ministry of Natural Resources aggregate programs, compliance and enforcement activities and the management of abandoned aggregate properties. Various environmental groups have also called for a moratorium on new or expanded aggregate operations in sensitive areas, including the Niagara Escarpment. They have also called for fixed terms to the licences of all new aggregate quarries in other areas. We will follow-up on this story when the Committee concludes its hearing and issues its recommendations.

Ontario moves to ensure geothermal wells don't pose gas explosion hazard

On April 20, 2012, a contractor drilling a borehole for a geothermal system outside an Oakville client's home struck a pocket of pressurized natural gas 120 metres below the surface. Unfortunately, nobody noticed the release of the colourless, odourless gas for several days until a gas alarm went off in the basement of neighbour's home 100 metres away. The local gas utility discovered high levels of the flammable gas both inside and outside the home and were able to eliminate the risk with proper ventilation.

Although disaster was averted, the event triggered a call by fire officials and local politicians for a moratorium on the installation of vertical closed loop geothermal systems. In response, Ontario moved quickly to revoke and replace Ontario Regulation 177/98 (Ground Source Heat Pumps), under the *Environmental Protection Act*, with a new regulation that will require installers to monitor for gas and be prepared to take effective action in the event of a release. According to the Canadian GeoExchange Coalition (CGC), the government has overreacted and should immediately repeal the new regulation.

Under the new regulation, anyone constructing a new (or altering, replacing or extending an existing) vertical closed loop geothermal system that extends more than five metres below the surface must obtain an Environmental Compliance Approval (ECA) from the Ministry of the Environment. These systems (except for those using methanol as a heat-transfer fluid) had previously not required MOE approval. ECAs are Class II instruments and are subject to a minimum 45-day posting on the Environmental Registry. The regulation effectively suspended installation work until at least August.

As part of an ECA application, the installer would be required to submit a work plan prepared by a licensed engineering practitioner or a professional geoscientist. This plan must include measures to be taken if hazardous gas is encountered. The approval requirements in the new regulation do not apply to horizontal geothermal systems and open loop systems, which are not installed deep enough to encounter

natural gas. Open loop systems, however, are regulated by Regulation 903 (Wells) and the *Ontario Water Resources Act*, and also require a sewage works ECA.

Over the next few months, the ministry intends to increase inspections and implement other measures to ensure effective oversight of both open and closed loop geothermal systems. It will also review the qualifications and requirements for the licensing of geothermal installers. Any future regulation would be posted for public consultation.

MOE "Best Practices" for the management of excess soil lack much needed detail and regulatory 'oomph'

As brownfield redevelopment accelerates across the province, there has been growing concern about the final destination of all that potentially contaminated soil being stripped from former industrial properties. Rural communities across southern Ontario are worried that "compromised" soil is being dumped in abandoned quarries and may contaminate both groundwater aquifers and surface water sources. In an attempt to calm these fears, the Ministry of the Environment has revised and re-circulated the draft *Soil Management – A Guide for Best Management Practices*. An earlier draft was distributed for stakeholder consultation and comment in June 2011.

The ministry encourages the reuse of excess soil as fill, where appropriate, "provided that the use of the excess soil does not have a potential to cause an adverse effect to the environment, human health or impair water quality." The draft guidelines contain a series of general recommendations for the characterization, testing and removal of excess soils, as well as a site plan for source sites, all to be prepared by a "qualified person". The brief, eight-page document also recommends similar soil management practices for commercial fill and other large receiving sites, as well as temporary soil banks. The policy does not include specific soil criteria or sampling protocols.

It's unlikely that the new guidelines will meet the expectations of either the development industry or the environmental community. The Ontario Waste Management Association (OWMA) was characteristically blunt in its assessment of the "irrelevance" of the proposed policy. It says the best management practice document has no enforcement status, lacks clarity on who and how it applies, and offers no solutions for tracking materials or ensuring proper sampling protocols are in place.

> As set out, the OWMA does not foresee this guideline having any substantive impact on the current situation. We would urge the government to look at a coordinated approach with affected stakeholders that seeks to address the current situation through regulatory means and thus setting an overall strategy for the management of excess soil in the province.

Industry group asks province to put geothermal reg on hold

The Canadian GeoExchange Coalition (CGC), which represents over 130 geothermal designers, installers and equipment suppliers in Ontario, has asked the Premier to suspend the "ill-conceived and hastily-written regulation [that] hurts Ontario's green energy industry, hurts Ontario's small business and unfairly targets geothermal drilling." The Coalition says the regulation was drafted without industry consultation or public comment, and it recommends geothermal companies follow long-established safety guidelines used for comparable drilling activities within Ontario while a "more thorough and fair" regulation is prepared.

The Residential and Civil Construction Alliance of Ontario says the cost of managing excess soil is rapidly escalating and can constitute as much as 18 per cent of the capital cost of the overall construction project. In its brief on the draft guidelines, the Alliance says the document needs to be much more specific on what the ministry would consider appropriate abatement actions to ensure no environmental impairment at receiving sites. The Alliance suggests the ministry extend the maximum storage time for so-called "temporary soil banks" from two to five years through a performance-based type of approval with an extension capability of up to ten years.

Bill 100 would "empower communities" to protect and restore the Great Lakes basin

On June 6, 2012, the Ontario government introduced Bill 100, *An Act to protect and restore the Great Lakes-St. Lawrence River Basin*, for First Reading. If adopted, the Bill would authorize the Minister of the Environment to set qualitative and quantitative targets and to require "public bodies" to develop and implement initiatives to address site-specific Great Lakes problems, such as excessive algae, habitat loss or degraded beaches. Public bodies include municipalities, conservation authorities, provincial agencies and source protection committees.

The province argues that legislation is needed to "provide new legal tools for action at different scales – from setting broad direction to support the long-term ecological health of the lakes, to enabling more immediate targeted action in priority areas under stress."

The Bill would create a Great Lakes Guardians' Council, with representation from a wide range of government and non-governmental stakeholders, to share information and to identify priorities for action, potential funding measures and partnerships. Although the press release announcing the draft legislation mentions "a new Great Lakes community action fund to help grassroots community groups," the Bill provides no further details on the funding of public bodies for their allocated protection and restoration initiatives.

Initiatives would contain either a legally enforceable policy (such as one that affects government permits and approvals) or a proposal for a shoreline regulation, or both. Initiatives could also include voluntary policies designed to promote good stewardship, pilot projects, best management practices, research, and education and outreach.

After consulting with the other Great Lakes ministers, the Minister of the Environment has published a draft of *Ontario's Great Lakes Strategy* to complement the work to be done under the draft Act. The Strategy includes a summary of environmental conditions in the basin, and outlines six primary goals to empower communities, protect water, improve wetlands, beaches and coastal areas, protect habitats and species, enhance understanding and adaptation, and ensure environmentally sustainable economic opportunities and innovation. According to Bill 100, the Minister must issue progress reports on the Strategy "from time to time," and undertake a full review of the Strategy at least every nine years.

Both the draft *Act to protect and restore the Great Lakes -St. Lawrence River Basin* and *Ontario's Draft Great Lakes Strategy* have been posted on the Environmental Registry (# 011-6461 and # 011-6418, respectively) for review and public comment. The deadline for submissions on both postings is August 07, 2012. We will report more fully on this complex draft legislation in a future issue of the newsletter.

Senate's *Safe Drinking Water for First Nations Act* introduced into Commons

While every province has enacted standards governing the quality, testing, treatment and protection of drinking water, these standards have not been applied to First Nations reserves. To fill the regulatory gap, Bill S-8, the *Safe Drinking Water for First Nations Act*, was introduced in the Senate on February 29, 2012. Essentially a piece of enabling legislation and very similar to legislation that died in the Senate last year, the Bill would allow the Minister of Aboriginal Affairs and Northern Development to make a wide variety of enforceable regulations related to the provision of drinking water and the disposal of wastewater on First Nations lands. These could include regulations covering

- the training and certification of operators
- the protection of sources of drinking water from contamination
- the location, design, construction, modification, maintenance, operation and decommissioning of drinking water and wastewater systems
- the distribution of drinking water by truck
- the collection and treatment of wastewater
- the monitoring, sampling and testing of wastewater and the reporting of test results
- the handling, use and disposal of products of waste water treatment.

It is likely that at least some of these regulations and standards will be adopted by reference from individual provinces and territories. In addition, the Minister of Health could recommend regulatory standards for the quality of drinking water on First Nation lands, including the monitoring, sampling and testing of drinking water, reporting of test results, issuing remediation orders, and implementing emergency measures.

While the Bill's preamble states that the ministers are "committed to working with First Nations to develop proposals for regulations to be made under this Act," it does not include a formal method of obtaining First Nations consent. Nor does the Bill provide for such consent before implementing new regulations. During committee hearings, Bill S-8 received conditional support from four regional First Nation organizations (representing the Yukon, Alberta, Quebec and Labrador, and the Atlantic region). The rest of the First Nations witnesses were strongly against the Bill.

The Bill would also permit the Minister of Aboriginal Affairs and Northern Development to "confer on any person or body any legislative, administrative, judicial or other power … consider[ed] necessary to effectively regulate drinking water systems and wastewater systems." This could include the power to issue stop orders, enforce compliance, and audit records and accounts. Regulations could vary from province to province and, within any province, could be restricted to or exempt any First Nations specified in the regulations.

Although the Bill failed to gain the full support of Aboriginal leaders, it received Third Reading and was passed by the Senate on June 18. The following day, it was introduced for First Reading in the House of Commons by the Minister of Aboriginal Affairs and Northern Development John Duncan. The Minister calls the legislation "a crucial element" in ensuring First Nations have the same health and safety protections for drinking water in their communities as other Canadians.

Following passage, the government says it will collaborate with First Nations to address gaps in infrastructure and expertise, establish plans to close these gaps and commit to clear goals and deadlines. Minister Duncan told the Senate committee reviewing the Bill that "multi-year investment plans will support effective roll-out of regulations … I have no intention of making First Nations communities subject to laws that they cannot abide by, and I will not allow that to happen."

Will Bill S-8 infringe on constitutionally protected Aboriginal rights?

Bill S-8 Section 3 reads "For greater certainty, nothing in this Act or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, *except to the extent necessary to ensure the safety of drinking water on First Nation lands"* (our emphasis).

During Third Reading debate, Senator Dennis Glen Patterson said the codicil restricting section 35 rights was "narrow" and its inclusion in Bill S-8 was "a direct result of the government collaborating with First Nations to come up with a solution to a very contentious issue. It embodies the balance which must be struck by First Nations between Aboriginal and treaty rights and the larger community's need to set rules to help guarantee that everyone has access to safe, reliable and clean drinking water." We'll see.

Court rules City has no duty to consult with First Nations on development permit

The Supreme Court of British Columbia has ruled that a municipality has no legal or constitutional duty to consult with First Nations over a controversial land use development permit on traditional lands claimed by the Band. In *Neskonlith Indian Band v. Salmon Arm (City)* (2012 BCSC 499), the Court ruled that no express or implied statutory language in the province's *Local Government Act* requires or empowers the City to engage in such consultation. It rejected arguments that the duty to consult vests automatically with whomever is empowered to make decisions affecting Aboriginal rights. The judgment was issued April 4, 2012.

The Neskonlith Indian Band had sought to quash an environmentally hazardous area development permit issued by the City of Salmon Arm for a proposed Smart Centres shopping mall on private land on the floodplain of Salmon River. The Band also sought a declaration that the City owes a constitutional and legal duty to consult with the Band in good faith before the issuance of any development permit that could adversely affect its aboriginal rights or title. Both the City and shopping centre developer denied that the City has any such constitutional obligation. For its part, the province declined to join the case as a party.

The Band's Reserve borders on and lies downstream from the proposed development. Its lawyers had argued that flood control measures that might be necessary to protect the shopping centre will do damage to the environment and to the interests of the Band. The Band raised concerns about possible sedimentation of the river, noise and light pollution, and a lack of consideration of traditional uses of the land. The Band is part of the Secwepemc Nation whose traditional territory spans over 180,000 square kilometers in the south central interior of BC, including the Salmon River delta and floodplain.

The Band maintained that where a province delegates to the City the authority to make land use decisions which may potentially negatively impact on aboriginal rights and title, that delegated authority must be exercised in a manner consistent with the honour of the Crown and the City would be constitutionally obliged to consult with First Nations.

The City argued that a municipal council has no discretion to withhold a development permit once an applicant has complied with the guidelines under an official community plan. Consultation would have placed the City in breach of its statutory obligations to the permit applicant. The City also said that existing case law makes it clear that a local government cannot 'stand in the shoes of the Crown' for the purposes of a *Haida* duty to consult and accommodate a First Nation. Ultimately, the Court sided with City's arguments and ruled that

> First, the honour of the Crown is non-delegable and rests at all times with the province. Second, procedural aspects of the duty to consult can be delegated to third parties, but for this to be done, the authority must be expressly or impliedly conferred by statute. Third, a municipality has no independent constitutional duty to consult … The final responsibility for ensuring that adequate consultation occurs, rests with the Crown.

U.S. EPA approves Tribe's air permitting program

The US Environmental Protection Agency has named a First Nations community to operate an EPA-approved Clean Air Act program for large sources of air emissions. The Southern Ute Indian Tribe, located near Ignacio, Colorado, will issue operating permits under the Act and perform inspections of large stationary sources of air emissions, primarily oil and gas production facilities, located on their 1000 square mile Reservation. The EPA will continue to work with the Tribe in an oversight capacity. It took nearly a decade of training, communication and outreach with industry to obtain the permitting authority, the first for an Aboriginal group in the US.

Meet Willms & Shier Legal Experts at These Upcoming Events		
July 19-20	Ontario's Feed-in Tariff 2.0: 2012 and Beyond	**Cherie Brant** will speak about the role of First Nations in the next phase of Ontario's FIT program.
Sept. 15	Ontario Fabricare Association – Annual Conference	**Jacquelyn Stevens** will speak about reporting obligations (Federal, Provincial and Municipal) specific to the dry cleaning industry in Ontario.
Sept. 20	The Anatomy of an Environmental Civil Action	**Marc McAree** is co-chair and a speaker at this three-part series, organized by the Ontario Bar Association, Environmental Law Section. On September 20, Marc will present on the role of experts and experts' reports, and 'junk science' in environmental civil litigation.
Sept. 25	Mini-MBA for Mining	**Juli Abouchar** will present a workshop at this mining conference titled "Environmental Considerations and Consulting with Aboriginal Communities: Legal Issues."

McAree and Vince write (at least part of) the book on brownfields

Marc McAree and Joanna Vince of Willms & Shier Environmental Lawyers LLP are co-authors of a chapter on Ontario developments for the Second Edition of *Implementing Institutional Controls at Brownfields and other Contaminated Sites* recently published by the American Bar Association (ABA). The chapter reviews the brownfields regulatory regime in Ontario, including an overview of related statutes and regulations, such as the *Planning Act* and the *Clean Water Act*. A discussion of environmental clauses for agreements of purchase and sale and leases is also included. The chapter is the only Canadian contribution to the book, which provides an overview of contaminated land regulations throughout various jurisdictions in the United States. The book, published in June 2012, includes extensive supporting materials on an accompanying CD-ROM. For more information, visit the ABA website at http://apps.americanbar.org/abastore/

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*