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Lawson Lundell LLP Mining Law Update

This is Lawson Lundell's web-based publication dedicated to keeping readers informed about developments in Canadian mining law. For more information regarding the articles in this newsletter, please contact Chris Baldwin at 604.631.9151 or cbaldwin@lawsonlundell.com *or Christine Kowbel at 604.631.6762 or ckowbel@lawsonlundell.com*

Federal Court rules data from tailings and waste rock stored inside mining facilities must be collected and reported on by Environment Canada

On April 23, 2009, Mr. Justice James Russell of the Federal Court trial division ruled in *Great Lakes United and MiningWatch Canada v. Minister of Environment and Mining Association of Canada* 2009 FC 408, that the Minister of Environment is required by the *Canadian Environmental Protection Act* ("CEPA") to collect and report in the National Pollutant Release Inventory ("NPRI") data from mining facilities of releases to tailings impoundment areas ("TIAs") and waste rock disposal areas ("WRSAs") from the 2006 reporting year and subsequent years.

According to information provided in the case, Environment Canada previously exempted the industry from disclosure requirements because it viewed waste mining material as held in storage and potentially available for further mineral extraction. In this view, the wastes weren't technically released into the environment. While the Minister has always required the NPRI reporting of NPRI substances that leave a TIA or WRSA, the Minister has never required the NPRI reporting of substances that are deposited to a TIA or WRSA.

In part, the Minister argued that section 46 of CEPA (which sets out that the Minister "may" publish a notice requiring persons to provide information) permitted Environment Canada to use its discretion in using its power to gather information in respect of pollutants. In the Minister's view, this meant there was no legislative duty imposed on the Minister to either use the provisions of section 46 or to require specific data. However, the judge found that the Minister's discretion and power to gather information under section 46 cannot be used to abrogate what he viewed as mandatory obligations on the Minister under section 48 and 50 of CEPA to establish and report on pollutants in the NPRI, "*Simply put, I cannot see how the national inventory that must be established under section 48 can, when the full context of CEPA is examined, be entirely governed by whatever information the Minister may, or may not, choose to collect under section 46.*"

Although the decision is under review by parties to the case, it is not yet known whether any parties to the case will appeal the decision.

Red Chris Appeal to be heard by Supreme Court of Canada

On December 18, 2008, MiningWatch Canada ("MiningWatch") was granted leave to appeal the decision of the Federal Court of Appeal in *MiningWatch Canada, et al. v. Minister of Fisheries and Oceans, et. al* to the Supreme Court of Canada. The decision relates to the environmental assessment that has been carried out to date on the Red Chris Project, a proposed copper and gold mining project in north-western British Columbia. As previously reported in respect of lower court decisions, the basic issue in this case is the ability of the federal authorities to exercise some discretion and flexibility in scoping federal environmental assessments, to focus on those issues within federal authority, and to enable coordination with provincial environmental assessments.

Following the decision by the federal authorities that the Red Chris Project as scoped by them was not likely to cause significant adverse environmental effects, on June 9, 2006 MiningWatch Canada legally challenged the project on a number of grounds, saying in part that the provisions of the *Canadian Environmental Assessment Act* ("CEAA") required that the project undergo a comprehensive study. In September 2009, the Federal Court Trial judge ruled in favour of MiningWatch. The Attorney General of Canada and Red Chris each appealed from the decision of the Federal Court Trial judge.

On June 13, 2008, the Federal Court of Appeal overturned the decision of the Trial judge and found that the federal authorities were authorized to scope the project for which it conducted an environmental assessment, to those components which impacted on fish habitat. The Federal Court of Appeal found it was appropriate to take into account the fact that the provincial assessment office was conducting a review of the entire project, and that the federal authorities participated cooperatively in that larger environmental assessment. In making this ruling, the Federal Court of Appeal upheld the earlier decision of the Federal Court of Appeal in the *TrueNorth* case.

In its factum filed with the Supreme Court of Canada, MiningWatch again argues that, in these circumstances, it is mandatory for the federal authorities to conduct an environmental assessment of the entire mining project, rather than scoping the project to include only those components relating to fish habitat, and avoiding duplication with the provincial environmental assessment.

The appeal is set for hearing before the Supreme Court of Canada on October 16, 2009.

First Nation and Province of British Columbia sign Mining and Minerals Consultation Agreement

On April 7, 2009, the Province of British Columbia announced they have signed a Mining and Minerals Agreement with the Stk'emlupsemc of the Secwepemc Nation (as represented by the Tk'emlúps (formerly Kamloops) Indian Band and the Skeetchestn Indian Band) which will help to develop capacity for the SSN to participate in, and benefit from, mining activities in its territory in the future. The Agreement includes specific terms relating to the communication and information sharing between the Province and the SSN including clearly defining timelines, creating guidelines,

and establishing regular meetings. The Agreement also addresses the establishment of a Joint Resources Committee (SSN and the Province) to address SSN interests.

The Ministry and SSN also announced on April 7, 2009 they have begun negotiations for revenue sharing for the New Afton Mine copper/silver/gold project, located 10 km from Kamloops. The negotiations are purportedly the first of their kind in B.C., and follow from the Province's October 2008 announcement to share revenue on all new major mine projects.

Kitikmeot Inuit Association adopts new Mining Policy

The Kitikmeot Inuit Association (KIA) Board at their meeting of February 9, 2009 unanimously passed a resolution to adopt the Nunavut Tunngavik Inc. ("NTI") Mining, Uranium, and Reclamation Policies as policies for managing surface Inuit Owned Lands in the Kitikmeot and the Article 41 Lands. The NTI Mining, Uranium, and Reclamation Policies were passed by the NTI Board in 1997, 2007, and 2008, respectively. These Policies will also apply to two parcels of land located outside of Nunavut called the 'Article 41' Lands located south of Contwoyto Lake. KIA owns the surface and subsurface of the Article 41 Lands. The KIA Board recently decided to open the Article 41 Lands to exploration.

BC prevents issuance of uranium and/or thorium exploration permits

On March 13, 2009, the lieutenant-governor in council issued an order-in-council to prevent permits from being issued for uranium and thorium exploration and development in B.C. The order-in-council, issued under the Environment and Land Use Act, codifies the policy position issued by the government of British Columbia in April 2008 that it would not support the mining of uranium in British Columbia. This order-in-council will support that position by preventing the issuance of a permit for the exploration of uranium or thorium, or exempting a person from the requirements for such a permit.

Ontario Security Commission more closely scrutinizing environmental disclosure

Reporting issuers have been required for some time to provide environmental disclosure to investors and potential investors pursuant to National Instrument 51-102 Continuous Disclosure Obligations. On February 27, 2008, the Ontario Securities Commission (OSC) published OSC Staff Notice 51-716 *Environmental Reporting* following a targeted review of compliance with environmental reporting requirements by reporting issuers, which provides specific guidance on the type of disclosure securities regulators might expect.

The Notice summarizes key findings following a review of 35 Ontario-based reporting issuers. Overall, staff identified several areas of deficient disclosure, in particular, disclosure of material environmental matters in their annual financial statements, management discussion and analysis, and annual information forms, as applicable.

The Notice provides guidance that reporting issuers should consider when discussing environmental matters in their continuous disclosure documents to ensure their disclosure is in compliance with securities legislation. In particular, the Notice critiques the use of boilerplate disclosure language and calls for more detailed discussion of environmental liabilities, as well as quantitative estimates of those liabilities where they are "reasonably available."

Based on the policy indications set out in the Staff Notice, it is expected that OSC enforcement actions against non-compliant issuers in respect of environmental disclosure will become more frequent in the future.