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This is Lawson Lundell's quarterly 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.

BC Supreme Court Restricts Duty to Consult with First Nations to Consultation with Elected Representatives

Recent Canadian court decisions have established there is a duty held by the federal and provincial governments to consult with First Nations. The Supreme Court of British Columbia's decision in *Red Chris Development v. Quock et al* 2006 BCSC 1472 provides direction for project proponents regarding the identification of the appropriate aboriginal groups with which to consult, and also shows that where there has been good faith consultation, the courts are unlikely to grant immediate enforcement orders stopping blockading of public roads.

In the case, Red Chris Development Co. Ltd., a subsidiary of bcMetals Corporation, sought an injunction to restrain blockade by members of the Iskut First Nation of a public road used to transport exploration equipment. The Red Chris Project had already obtained an Environmental Assessment Certificate, a regulatory process which included extensive consultation with the Tahltan and Iskut First Nations as well as rigorous environmental review.

Members of the Iskut First Nation argued that consultation with elected representatives was not sufficient to satisfy the duty to consult and that in addition, local users of the land should be consulted. If the court had accepted this position, those granting permits for development in areas in which there exist land claims could have been required to consult with First Nations down to the individual level (e.g. all persons using the lands which may be affected should be consulted). Instead, the decision clarifies that this is not required and that consultation must take place with elected representatives.

Brad Armstrong, Q.C. and Kinji Bouchier of Lawson Lundell LLP represented Red Chris Development Co. Ltd. in the decision.



BC Supreme Court Provides Comment on Fiduciary Obligations in Negotiation of Joint Venture Agreements where a Confidentiality Agreement is in Place

In *Novawest Resources Inc. v. Anglo American Exploration (Canada) et al.*, 2006 BCSC 769, the British Columbia Supreme Court considered fiduciary obligations in the context of the negotiation of a joint venture agreement where a confidentiality agreement is in place.

In the case, the plaintiff Novawest Resources Inc. (“NRI”) alleged that the defendant Anglo American Exploration (Canada) Ltd. (“AA”) staked mineral claims in an area of northern Quebec in breach of a common law duty of confidentiality. The plaintiff alleged that AA owed it this duty as a result of a disclosure of information at meetings held between the parties while they discussed jointly pursuing further exploration of mineral claims NRI had staked in northern Quebec. In order to pursue the joint venture, NRI had to disclose confidential information to AA about these claims. The information was protected by a confidentiality agreement between the parties. Counsel for NRI placed considerable reliance on the decision of the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574, in which there was no such agreement between the parties.

Mr. Justice Edwards quoted *Lac*, “*When the parties have reduced their understandings to writing, it is obviously the proper course for courts to be extremely circumspect in adding to the bargain they have set down,*” and held that in order to succeed in this case, NRI needed to demonstrate that AA based its decision to stake its Quebec claims based on the confidential information it obtained from NRI, and that AA was under a legal duty at common law not to use such confidential information when it staked those claims. In determining the answer to this question, the court undertook an analysis of the terms of the confidentiality agreement to determine whether it expressly permitted AA to use the confidential information to stake outside the area of influence defined in the confidentiality agreement (all claims staked by AA were outside the area of influence).

The court found that to have any practical effect the confidentiality agreement must permit AA to receive confidential information, without the risk that receiving it would preclude AA from staking outside the area of influence if no option or joint venture agreement was concluded by the parties. Part of the basis for this was that the commercial purpose of the confidentiality agreement was to avoid disputes about which party had what information and what information could be used in deciding to stake outside the area of influence.

The confidentiality agreement supplanted any common law duty of confidentiality AA owed the plaintiff with respect to land outside the area of influence. As the claims staked by AA were all outside the area of influence AA acted in conformity with the confidentiality agreement and was not in breach of a common law duty of confidentiality.

The decision in *Novawest Resources* further underscores the importance of careful drafting of confidentiality agreements such as the one in this case.

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