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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*

## Yukon Supreme Court Considers the Duty to Consult on Settled Treaty Lands

Canadian case law continues to refine the principles of the duty to consult and accommodate Aboriginal peoples, and the May 2007 decision of the Yukon Supreme Court in *Little Salmon/Carmacks First Nation* v. *The Government of Yukon (Minister of Energy, Mines and Resources)*, 2007 YKSC 28 considers the extent of its application on recently settled treaty lands in the Yukon.

The decision involved a challenge of a land disposition of 65 hectares for agricultural purposes made by the Director of the Agriculture Branch, Department of Energy, Mines and Resources for the Yukon Government which the First Nation argued was located in its traditional territory and in the area of one of its member's traplines. The Director gave notice of the proposed land disposition and gave all interested parties, including the First Nation, the opportunity to provide information and comments. The land in question was Crown land within the boundaries of the Little Salmon/Carmacks First Nation Final Agreement, a comprehensive land claim agreement with the Government of the Yukon and the federal government finalized in 1997 (the "Final Agreement"). Despite the existence of the Final Agreement and notice provided, the First Nation sought to have the Director's decision set aside on the basis that the Crown had failed to comply with its common law duty to consult and accommodate.

The Yukon Supreme Court concluded that the duty to consult and accommodate is an "implied term of every treaty", historical or modern day, and held that in the circumstances the Yukon Government failed to comply with the duty. The Yukon Government has appealed this decision to the Yukon Court of Appeal. The appeal is expected to be heard in June 2008.

## Federal Court Casts Uncertainty on Federal Environmental Assessment Process

On September 25, 2007, a Federal Court Trial Judge in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2007 FC 955 allowed an application by MiningWatch Canada challenging the legality of decisions/actions taken by the Department of Fisheries and Oceans ("DFO") and Natural Resources Canada in conducting the environmental assessment of a proposed copper and gold mining project in north-western British Columbia. The court made this ruling despite the relatively recent ruling in the *TrueNorth* case, in which the Federal Court of Appeal upheld the validity of federal authorities using their discretionary authority under the *Canadian Environmental Assessment Act* ("CEAA") to scope an oil sands project down into those components which fell within federal jurisdiction and which required federal authorization.

The Federal Court Trial Judge ruled that in this case, the scoping of that mining project to those components within federal jurisdiction and requiring federal authorization was not valid. The court issued a declaration that the DFO had correctly determined in the initial tracking decision that the project would require a comprehensive study level review based on the proposed ore production capacity threshold under the *Comprehensive Study List Regulations*, and that in later re-scoping the project the responsible authorities acted beyond the ambit of their statutory powers. The Court further declared that the responsible authorities were under a legal duty to ensure public consultation with respect to the proposed scope of the project, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of a comprehensive study to address issues relating to the project.

The Federal Court Trial Judge set aside the screening decision and ruled that the federal authorities were required to go back and conduct a comprehensive study of the project under the *Comprehensive Study List Regulations* before issuing federal permits and authorizations.

The decision has resulted in uncertainty for federal authorities respecting the scoping and environmental assessment of mining and other major projects. The decision is under appeal to the Federal Court of Appeal, and it is expected that a date for hearing the appeal will be set this year.

## Aboriginal Title Declaration Dismissed, for Now: *Tsilhqot'in Nation v. British Columbia*

On November 21, 2007, the Supreme Court of British Columbia released its decision in *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700. The decision dealt with a claim brought by Chief Roger William of the Xeni Gwet'in First Nation, on behalf of the Xeni

Gwet'in First Nation and the Tsilhqot'in Nation. Initially, the Tsilhqot'in's claim, against the Province and a number of forest companies, was brought to stop timber harvesting in their traditional territory (located in the Cariboo-Chilcotin region of British Columbia). The proceedings evolved over time, so that the issues before the Court focused on the Tsilhqot'in's claim for aboriginal title and rights in a portion of their traditional territory (referenced as the "Claim Area"). The trial took over five years to complete, occupying 339 days of court time.

Vickers J. declined to make any declaration granting the Tsilhqot'in aboriginal title over the Claim Area, but went on at length to provide his non-binding opinion that the evidence put before him proved aboriginal title to a significant portion of the Claim Area (amounting to approximately 200,000 hectares, slightly less than ½ of the Claim Area). Vickers J. did grant a declaration that the Tsilhqot'in had aboriginal rights to hunt and trap birds and animals in the Claim Area; to capture wild horses in the Claim Area; and to trade skins and pelts from the Claim Area. Vickers J. further decided that these aboriginal rights had been unjustifiably infringed by forest harvesting activities authorized by the Province. However, Vickers J. declined to award any damages for this infringement on the basis that the Tsilhqot'in's claim for damages had been framed as compensation for infringement of aboriginal *title,* not aboriginal *rights*.

The Tsilhqot'in Nation does not have aboriginal title to any land yet. No declaration has been made, and given the significance of the decision, it is likely to be appealed, despite the fact that Vickers J. devotes a significant portion of his reasons for judgment urging the parties to engage in the process of reconciliation outside the courtroom.

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