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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

Province of British Columbia Bars Exploration and Development of Uranium Resources

On April 24, 2008, the Province of British Columbia announced that it will not support the exploration and development of uranium in British Columbia and is establishing a "no registration reserve" under the *Mineral Tenure Act* for uranium and thorium. The "no registration reserve" will ensure any future claims do not include the rights to uranium. Government also pledged to ensure that all uranium deposits will remain undeveloped.

Currently, there is no uranium mining in British Columbia, although several exploration projects will be impacted by the policy change. Development and mining of uranium in Canada is regulated by the federal government through the Canadian Nuclear Safety Commission.

Environmental Damage Class Action to Proceed to Trial

In what could be a precedent-setting case, on November 18, 2005, Ontario's Court of Appeal certified a $750 million class-action suit alleging damages from environmental contamination caused by an Inco refinery in a southwestern Ontario community. Inco sought leave to appeal of the Court of Appeal's decision in February 2006. Leave to appeal to the Supreme Court of Canada was denied in June 2006.

This case is believed to be the first class-action certified for long-term environmental damage in Canada. The case arises as a result of a report that was released by the Ontario Ministry of the Environment in September 2000 stating that Inco had discharged contaminants into the natural environment that posed a risk to the environment and to human health for some of the residents of Port Colborne. The claim alleges that the release of this report had a serious impact upon property values in the Port Colborne area.

Following several years of trial preparation and discovery, the two-month long common issues trial is scheduled to take place in September 2008, in Welland, Ontario.

Court Grants Canada Leave to Bring Oppression Claim

In *Yukon and Canada v. B.Y.G. Natural Resources Inc.*, 2007 YKSC 02, the Yukon Supreme Court recently granted the Canadian government leave to pursue the oppression remedy as a mechanism to pierce the corporate veil and hold individuals accountable for mining practices with serious environmental repercussions.

The events leading up to this significant decision unfolded as follows. For a period of three years, an Ontario incorporated mining company called B.Y.G. Natural Resources Inc. ("BYG") operated a gold and silver mine near Whitehorse in the Yukon Territory. Between October 28, 1997 and February 10, 1999, BYG was issued 16 formal directions for breaching the terms of its water license, yet failed to follow the directions to remedy its environmental problems. Finally, on February 19, 1999, operations ceased by order of the government of Canada and between July, 1999 and March, 2006, Canada spent $10.7 million dollars on site remediation. It has been estimated that environmental clean-up costs could reach as high as $23 million dollars.

As a result of the water license violations, three criminal charges were laid against BYG in the Territorial Court of the Yukon. BYG was convicted on all three charges and received the maximum fine of $100,000 dollars on each count, the judge stating that BYG had "demonstrated an attitude consistent with raping and pillaging the resources of the Yukon," and describing BYG as "inept, bumbling, amateurish and possibly negligent."

Section 248 of the *Ontario Business Corporations Act*, .S.O. 1990, c.B16 allows a complainant to make an application to the court in respect of a corporation whose conduct is oppressive or unfairly prejudicial to, among other things, a creditor. From a successful claim of oppression comes a variety of potential remedies, including monetary damages, appointing a receiver, dissolving a corporation or amending the charter documents of the corporation. Further, the oppression remedy allows a court to assess the personal relationships that exist between companies.

In an attempt to recover some of the money spent on repairing the environmental damage, Canada obtained a receivership order which appointed a Receiver Manager and Interim Receiver over all of BYG's assets during bankruptcy proceedings. Two secured creditors, Ellake Services and Cosman, subsequently applied to the Yukon Supreme Court to remove certain shares held by BYG from the receivership, and take action against the Interim receiver in respect of the shares it had already sold. Notably, these secured creditors were in fact companies controlled by the former principals of BYG and their families, and the activity to purchase the security had taken place as the mine was in the process of being abandoned. Accordingly, Canada sought to bring a claim of oppression against BYG and others in order to set aside the claimed security held directly or indirectly by former officers and directors of BYG.

The court first concluded that for the purpose of pursuing the oppression remedy and in light of the costs of environmental remediation, it considered Canada to be a creditor. Then, citing as considerations the non arms-length relationship between Ellake Services/Cosman and BYG, the other competing creditors and the circumstances under which BYG operated the mine, the court concluded there was sufficient evidence to grant Canada leave to bring an oppression application against BYG in Ontario.

Canada Sees First Corporate Conviction under Amended Criminal Code Provisions

In December 2007, Canada saw its first corporate conviction under the 2004 Bill C-45 amendments to the *Canadian Criminal Code*. This case is unique in that past efforts to prosecute corporations for criminal negligence following workplace fatalities have generally been unsuccessful. As previously reported, Bill C-45 amended section 217.1 of the *Canadian Criminal Code* such that corporations and other organizations must take reasonable steps to prevent bodily harm to persons, including workers and the public. There is no limit on the fines which may be imposed on a conviction in the event that the Crown has proceeded by way of indictment.

The events which led to this conviction are as follows. While working for a manufacturer of concrete blocks called Transparé Inc., a 23 year-old worker, attempting to clear a jam from a block-stacking machine, was fatally crushed upon entering the machine's moving area. Investigations revealed that the light curtain guarding system, which should have interrupted power to the equipment when approached, was disabled at the time of the accident. In fact, subsequent investigation revealed that the safety mechanism had been disabled for most of 2004 and 2005, and that a member of management had known the system was disabled but had taken no action to remedy the situation. It was further determined that the employee had not been properly informed of the dangers posed in attempting to un-jam blocks. As a consequence, Transparé Inc. pleaded guilty to a charge under the *Canadian Criminal Code* of criminal negligence causing death.

Bill C-45 came about largely in response to a failed attempt by the police and government of Nova Scotia to secure a corporate conviction in the 1992 Westray coal mining disaster, which killed 26 miners.

NAFTA Case Alleges "Anti-Foreign" Bias Blocked Quarry

Bilcon Inc., an American construction firm, has launched a challenge under the North American Free Trade Agreement ("NAFTA") that claims an environmental review panel had an anti-foreign bias when it recommended against allowing a quarry in western Nova Scotia. Bilcon had proposed a basalt quarry on a 152 hectare site approximately 30

kilometers southwest of Digby at White Point, N.S, which was bitterly opposed by a local citizens group.

The claim seeks $188 million in compensation, and in part alleges that the length of the project approval process compared to the much shorter timelines for approval of similar projects during the same time period is evidence of unequal treatment. Bilcon claims the regulatory and process requirements continually changed during this period, and the environmental panel's "biased, flawed recommendations" were eventually followed without question.

The case will likely focus on whether the company received "fair and equitable" treatment as defined under Section 11 of NAFTA. The trade dispute process can take up to two years to complete.

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