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Mining in the Courts
Year in Review
Vol. IV – March 2014

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Table of Contents

Table of Contents

All decisions that are reported in *Case Law Summaries* are accessible in full by clicking on the titles. An Internet connection is required.

About the McCarthy Tétrault Mining Litigation Group

Mining in the Courts is published by the McCarthy Tétrault Mining Litigation Group. This resource provides an overview of key Canadian case law involving and impacting the mining industry in 2013 and offers valuable insights on issues of interest to mining companies.

At McCarthy Tétrault, we understand the complex and ever-changing environment of the mining industry. The Mining Litigation Group offers strategic approaches and innovative strategies to resolve complex disputes through any means available, including mediation, arbitration and litigation. We regularly advise our clients on a full range of issues affecting them, including property ownership concerns, environmental matters, Aboriginal issues and the interpretation of mining agreements.

The Mining Litigation Group draws from one of Canada's largest and longest-standing litigation groups involved in some of the most high-profile, precedent-setting cases in Canadian legal history. We actively listen to our clients to understand their needs and to help achieve results that are important to them.

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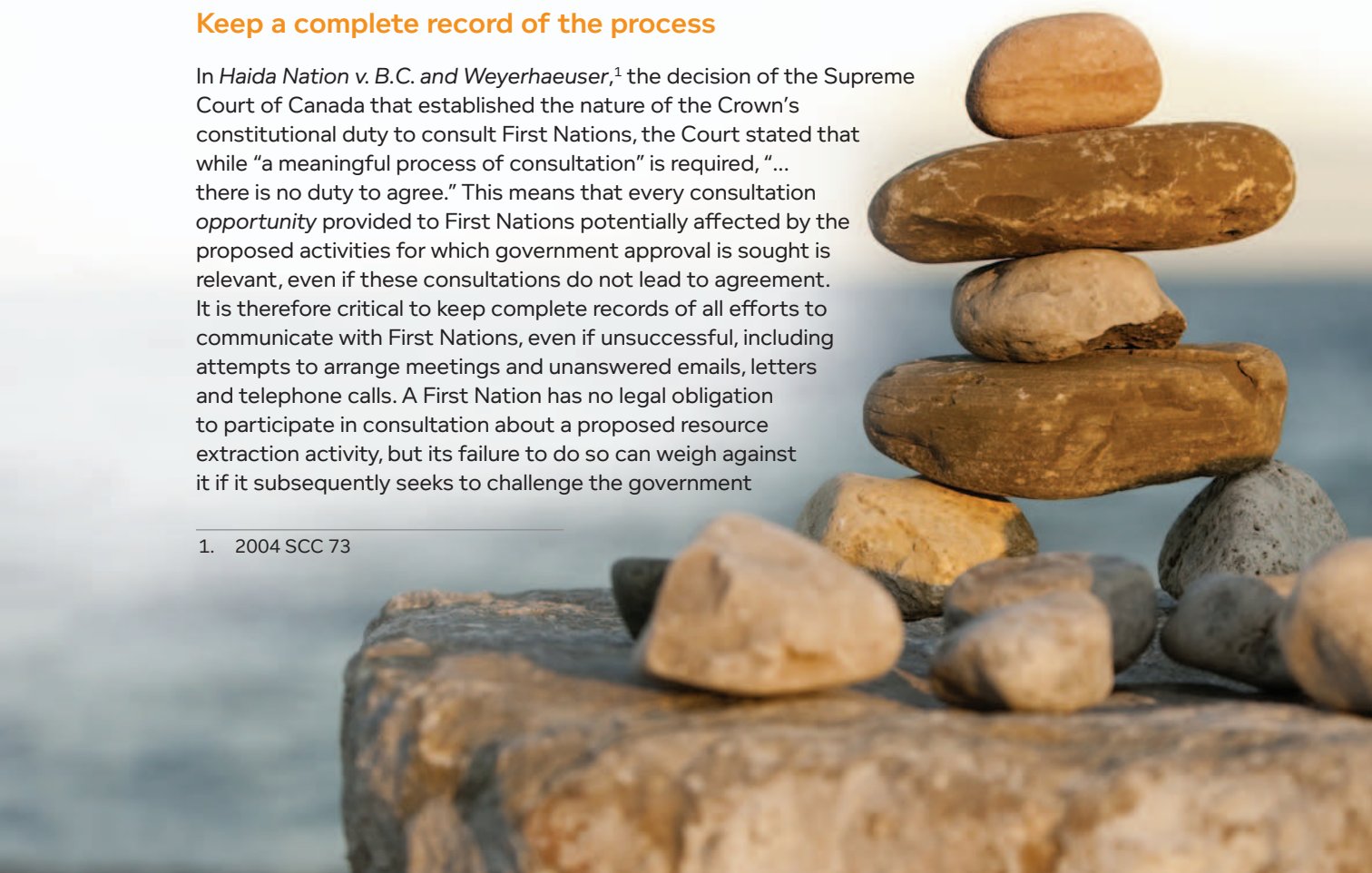
Stuck in the Middle: Managing Litigation with First Nations

Challenges by First Nations of resource project approvals have become part of the legal landscape facing the mining industry in Canada. Project proponents find themselves stuck in the middle of a dispute that is legally between First Nations and the Crown. Such litigation is typically based on the allegation that the government (i.e. the "Crown") has breached its constitutional duty to consult a First Nation(s) whose interests may be affected by the government approval in issue. The government is often the primary defendant in the litigation, with the resource company named as a secondary party (or in a position to insist that it be named as a party) simply on the basis that its rights would be affected by the relief sought (which is generally to cancel, or suspend the effect of, the approval granted). While the company will have the right to introduce evidence and make legal arguments, the approval generally stands or falls based on the Court's assessment of whether the Crown's duty to consult has been satisfied.

The question then becomes: what can a resource company whose government approvals are caught up in litigation brought by a First Nation do to uphold approvals that, ultimately, have to be defended by the Crown?

Keep a complete record of the process

In *Haida Nation v. B.C. and Weyerhaeuser*,[1] the decision of the Supreme Court of Canada that established the nature of the Crown's constitutional duty to consult First Nations, the Court stated that while "a meaningful process of consultation" is required, "... there is no duty to agree." This means that every consultation *opportunity* provided to First Nations potentially affected by the proposed activities for which government approval is sought is relevant, even if these consultations do not lead to agreement. It is therefore critical to keep complete records of all efforts to communicate with First Nations, even if unsuccessful, including attempts to arrange meetings and unanswered emails, letters and telephone calls. A First Nation has no legal obligation to participate in consultation about a proposed resource extraction activity, but its failure to do so can weigh against it if it subsequently seeks to challenge the government



1. 2004 SCC 73

decision.[2] Where the company can provide evidence of its own efforts to provide consultation opportunities to First Nations in addition to those offered by the Crown, this can be of real assistance in responding to allegations that the government approval has been issued in breach of the First Nations' rights to be consulted.

All communications with First Nations can form part of the consultation record before the Court in litigation. Retain copies of formal written correspondence providing information about the proposed project, documenting concerns raised by the First Nation and how the company responded. Informal communications can also form part of the evidence. Keeping track of emails and good contemporaneous notes of telephone calls and in-person meetings is also essential in order to ensure that a complete history of the consultation process can be provided.

Keep an eye on the Crown

Because the outcome of the litigation will depend to a significant extent upon the sufficiency of the consultation process, the project proponent has a vested interest in doing whatever it can to ensure that the Crown is in the best possible position to defend the adequacy of its engagement with First Nations. It is generally a good idea for the proponent to find out what steps have been taken by the Crown to consult with First Nations that claim rights in the area of the proposed activities, and where these seem to fall short, prompt the Crown to do more. Sometimes, it may be necessary to escalate matters to more senior government officials who can direct that further consultation be carried out and/or allocate more resources so that government staff on the front line are able to increase efforts to engage with potentially affected First Nations. In addition, current best practice is for the proponent to try to engage with First Nations to inform them about the proposed activities and to explore what might be done to address any concerns they have. Within the litigation, it may be appropriate for the project proponent's counsel to take a lead role in making submissions and presenting the case to the Court.

PROPONENTS' INTERESTS ARE SERVED BY ENSURING CROWN COMPLIES WITH ITS OBLIGATIONS.

Tell the proponent's story

As a matter of law, the duty to consult is a constitutional obligation of the Crown alone. However, there is no question that a record of positive efforts on the part of a resource company vis-à-vis First Nations will assist if litigation arises. A proponent who is seen to have acted honourably towards First Nations (even if no agreement is reached) will fare better

2. See for example, *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2013 BCCA 412 (summarized on page 8).

in Court. The Court's perception of the company is important because, even where the Crown's consultation efforts are found to have fallen short of what is legally required, there is a discretion to grant a remedy that does not affect the project or activities in issue. A Court can order more consultation while leaving the approval under challenge intact. Evidence of respectful communications with First Nations, efforts to elicit and accommodate First Nations' concerns, and provision of capacity funding by the proponent to assist First Nations to participate in the consultation process, can all assist in persuading the Court not to penalize the proponent even where it is held that the duty to consult was not fulfilled. Proponents who are seen to have acted fairly are more likely to be treated fairly by the Courts.

Making the case for the rights of proponents

Sometimes, through no fault of its own, a resource company will find itself in a situation where the Crown has not handled its dealings with affected First Nations well and the company's planned activities cannot proceed, either due to litigation brought by a First Nation or an unstable situation on the ground. In such circumstances, some hold the view that the resource company ought to be able to claim compensation from the government for the loss of the value of its investment.

In October 2013, Northern Superior Resources Inc., an Ontario-based junior mining company, sued the Ontario government to recover the value of the mineral property it walked away from after demands from local First Nations led it to conclude that it could not continue its exploration program.[3] The company alleged that the situation was created by the failure of the Ontario government to discharge its duty to consult with First Nations and to provide an adequate framework for dealings between mining companies and First Nations in Ontario. It claimed $110 million in damages (the appraised value of its mineral claims). Whether or not this case proceeds to court, it provides an interesting precedent for Canadian companies whose projects founder over inadequate government processes. The process for reconciliation of Crown and First Nations' interests is an important issue in Canada, but so is what happens to business interests in the meantime. The time may be ripe for proponents whose approvals are tied up in consultation processes to consider seeking remedies from the courts to protect their own legitimate interests.

PROPONENTS WHO ARE SEEN TO HAVE ACTED FAIRLY ARE MORE LIKELY TO BE TREATED FAIRLY BY COURTS.

3. *Northern Superior Resources Inc. v. Her Majesty the Queen in Right of Ontario*, Ontario Superior Court of Justice, Court File No. CV – 13 - 491444

Aboriginal Law

LOUIS V. BRITISH COLUMBIA (MINISTER OF ENERGY, MINES AND PETROLEUM RESOURCES), 2013 BCCA 412

In this decision, the British Columbia Court of Appeal determined that Crown consultation with a First Nation with respect to a mine expansion does not have to encompass impacts of the existing mine.

Thompson Creek Metals Company Inc. and its joint venture partners (Thompson Creek) owned and operated an open-pit molybdenum mine in northeastern British Columbia that had been in operation since 1965. Thompson Creek sought to expand and modernize the mine by, among other things, constructing a new mill, combining three existing pits into one "superpit," and consolidating tailings ponds. The applicable regulations did not require Thompson Creek to obtain overall approval of the expansion; rather, Thompson Creek needed discrete permits and amendments to existing permits for certain aspects of the expansion.

The Stellat'en First Nation (First Nation) claimed Aboriginal title to the land on which the mine was located. The provincial government therefore attempted to enter into consultations with the First Nation about aspects of the mine expansion; however, the parties had different views on the proper scope of consultation. The First Nation insisted that the province conduct an overall review of the mine expansion project on the basis that the effect of the expansion would be to extend the life of the mine beyond its previously projected closure date. The province was only prepared to consult on each of the discrete permit applications required for the expansion as they were submitted by Thompson Creek and took the position that the closure date for the mine was for the company, not the province, to determine. The First Nation refused to participate in the consultation process as envisaged by the province and eventually commenced litigation.

Both the chambers judge and the Court of Appeal found that the Crown's efforts at consultation met the requirements of *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.

The Court of Appeal found that the Crown had repeatedly attempted to engage with the First Nation, but that the First Nation effectively refused to do so unless past infringements were recognized as part of the process. In addition, the First Nation failed to identify which of its rights would

be impacted by any part of the expansion. While the Court of Appeal found that the First Nation was not under a "duty" to participate in the consultation process, its refusal to participate and its failure to identify specific impacts meant that it could not now complain about the adequacy of the process. The Court of Appeal found that the consultation was "as deep as it could be" in the circumstances and adequate in respect of each of the discrete permit applications.

DUTY TO CONSULT DOES NOT EXTEND TO IMPACTS FROM PREVIOUS APPROVALS.

On the issue of whether consultation should encompass the effects of the existing mine, the Court of Appeal found that consultation process could not be used as a means of eliminating rights already held by Thompson Creek pursuant to the existing permits. No consultation was required in regard to the change in the projected closure date of the mine and the province had correctly focused on the novel impacts of those aspects of the expansion project for which new approvals were required. There was no requirement to consult in respect of past infringements.

Although the Court of Appeal did not find in favour of the First Nation, the Court did remark on the lack of engagement in the consultation process and encouraged (though did not order) the parties to engage in further discussions with a view to identifying any adverse effects of the mine expansion on the First Nation.

The First Nation has sought leave to appeal to the Supreme Court of Canada.

WAHGOSHIG FIRST NATION V. SOLID GOLD RESOURCES CORP., 2013 ONSC 632

In this case, the Ontario Superior Court of Justice considered when an issue becomes moot such that it need not be heard. The case involved an appeal of an interim injunction granted to the Wahgoshig First Nation (First Nation) enjoining Solid Gold Resources Corp. (Solid Gold) from conducting exploration activities for a period of 120 days, and ordered Solid Gold and the Crown to consult with the First Nation. By the time the appeal was heard, the 120-day time limit had expired.

On November 1, 2012, Ontario's *Mining Amendment Act, 2009* came into force, which, among other things, required holders of mining claims to file exploration plans and apply for exploration permits before commencing activities where Aboriginal interests may be involved.[1] While the mandatory consultation section was not effective until new regulations were in

1. For further discussion on this topic, see "New Early Consultation Regulations Released Under Ontario's Mining Act Modernization" in *Mining in the Courts*, Vol. III.

place, there was a transitional provision that gave the Director discretion to require compliance with the consultation provisions. The Director instructed Solid Gold to consult with the First Nation about its proposed mineral exploration, but Solid Gold began exploration without doing so. The First Nation then obtained the injunction.

Solid Gold appealed, arguing that the injunction should not have been granted. The Crown argued that the appeal was moot because the 120-day period had expired and new regulations had since come into force. The Court accepted the Crown's argument. The appeal had become an academic exercise and the public interest did not require it to be heard.

WHITE RIVER FIRST NATION V. YUKON (MINISTER OF ENERGY, MINES AND RESOURCES), 2013 YKSC 66

In this case, the Yukon Supreme Court determined that the Crown breached its duty to consult the White River First Nation (First Nation) by failing to give the First Nation an opportunity to respond to the Crown's decision to reject a recommendation that a mining project not proceed due to impacts on a caribou herd.

Tarsis Resources Ltd. (Tarsis), an early stage exploration company, applied for a five-year Class III Mining Land Use Approval Permit for the White River–Quartz Exploration Project in the Yukon. Tarsis' proposed activities under the permit included the use of heavy machinery, drilling, clearing, trenching, and ongoing reclamation and decommissioning activities.

Under the *Yukon Environmental and Socio-Economic Assessment Act* (Act), the proposed exploration activities were required to undergo an environmental assessment (Assessment). The Assessment in this case — a comprehensive 79-page document — recommended that the project not be permitted to proceed as it would have significant adverse effects on wildlife, wildlife habitat, and traditional land use and culture that could not be mitigated. After receiving the negative Assessment, the Director of Mineral Resources (Director) recommended that Tarsis' applications proceed to the regulatory approval stage.

The Court determined that the Director's duty to consult and accommodate the First Nation was at the more stringent end of the spectrum, requiring "deep consultation" because, among other things, the Crown was contemplating a decision that was "completely at odds" with a recommendation rendered after an in-depth consultation process. The First Nation should have been given the opportunity to respond to the data that was used to reject the Assessment. Having breached the duty to consult and accommodate, the Court quashed the Director's decision and ordered that there be further "deep consultation."

THOMAS V. RIO TINTO ALCAN INC., 2013 BCSC 2303

In this decision, the British Columbia Supreme Court struck an action for injunctive relief brought by two First Nations against Rio Tinto Alcan (Rio Tinto). The First Nations had advanced claims in private nuisance and breach of riparian rights. In striking the claims, the Court held that they had no reasonable chance of success because:

1. in order to succeed on their claim in nuisance, the First Nations needed a proven interest in land and not merely an asserted, but unproven, claim to aboriginal rights and title; and
2. the First Nations' interests in Reserve lands did not confer on the First Nations sufficient riparian or property rights to support a claim in nuisance or breach of riparian rights.

This case also provides a cautionary tale for industry in that the Court imposed significant restrictions on the availability of the defence of statutory authorization.

ASSERTED BUT UNPROVEN CLAIMS TO ABORIGINAL RIGHTS AND TITLE CANNOT SUPPORT A CLAIM IN PRIVATE NUISANCE.

The claim was commenced by the Saik'uz First Nation, Stellat'en First Nation, and their respective Chiefs (Plaintiffs). The Plaintiffs claim aboriginal rights and title along the Nechako River, including rights and title to the riverbed and its banks. They sought an interim and permanent injunction to restrain Rio Tinto from continuing the alleged nuisance resulting from its water diversion activities in connection with its operation of the Kenny Dam (in operation since 1952). The First Nations alleged that their claimed aboriginal rights and title or alternatively their interests in Reserve lands amounted to proprietary interests sufficient to ground a claim in private nuisance and their claim that the water diversion impacted their common law riparian rights. Both propositions were rejected by the Court.

In addition to its application to strike the Plaintiffs' claims, Rio Tinto sought to have the claims dismissed on summary judgment on the basis that it was entitled to rely on the defence of statutory authorization, because its water diversion operations were carried out in accordance with the terms of a license issued by the Province. The Court rejected this argument on the basis that there was no evidence before it that the alleged impacts were the inevitable result of authorization or that there were no practical alternatives that may be available for operating the dam to avoid the alleged impacts.

Foreign Affairs: Extra-Territorial Jurisdiction of Canadian Courts in Mining Cases

Introduction

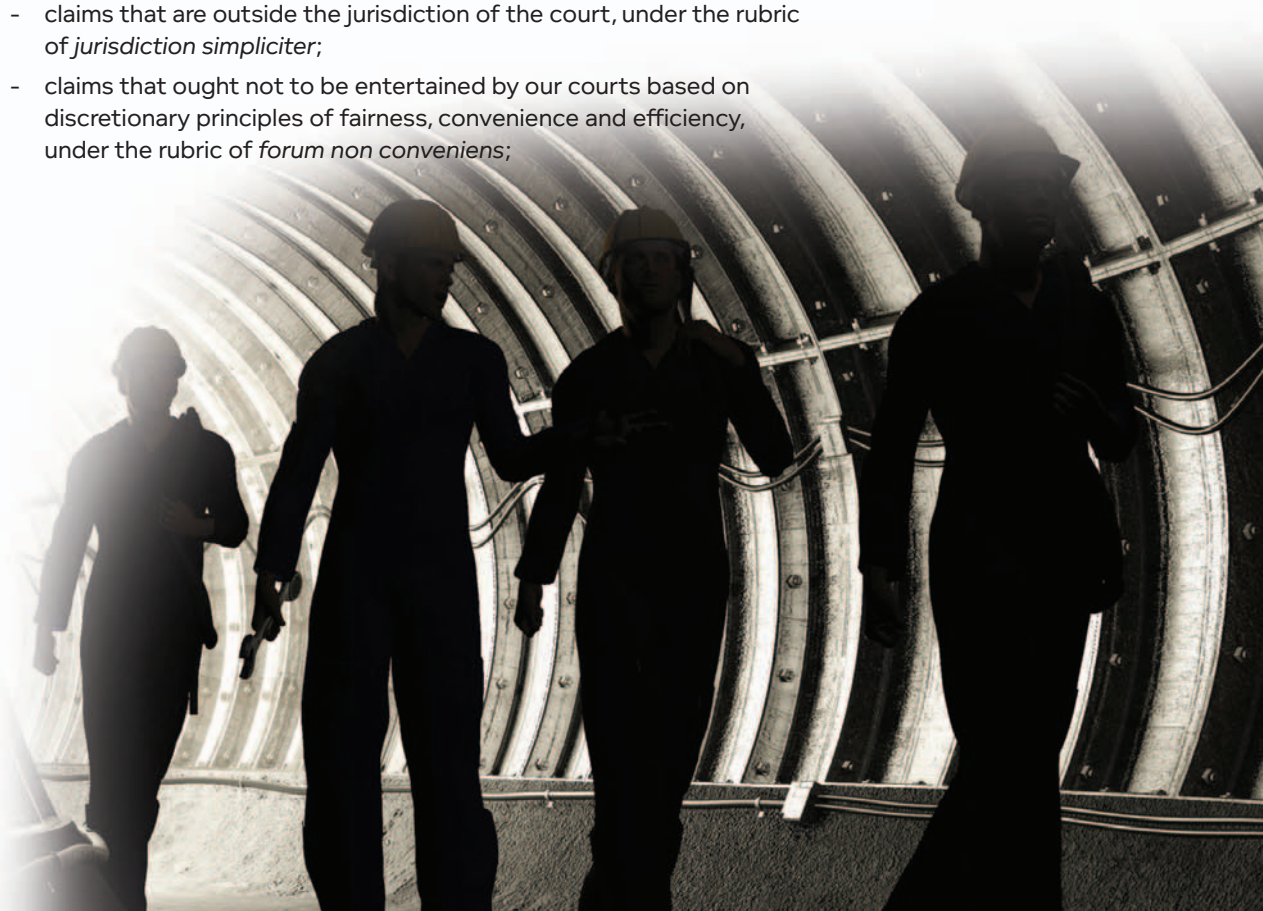
Mining companies have traditionally viewed Canada as a jurisdiction of choice for the resolution of their disputes — no matter where the claims arose, and sometimes even when the law of a foreign country applied to the dispute.

However, in a number of recent cases involving high-profile allegations of complicity in serious human rights abuses abroad, major resource companies have found themselves in the vanguard of challengers to the jurisdiction of Canadian courts. Their efforts to challenge jurisdiction have met with mixed success and the true impact of some of the decisions remains to be seen.

In parallel with these developments, companies have become proactive in addressing alleged overseas abuses to mitigate reputational and social-licence risks, even when the alleged abuses were committed by others.

Challenges to the jurisdiction of Canadian courts typically arise in four types of claims:

- claims that are outside the jurisdiction of the court, under the rubric of *jurisdiction simpliciter*;
- claims that ought not to be entertained by our courts based on discretionary principles of fairness, convenience and efficiency, under the rubric of *forum non conveniens*;



- claims that the parties have agreed by contract to have disputes adjudicated in a particular jurisdiction and adjudicative process, under the rubric of choice of forum; and
- claims that the parties have agreed by contract to be governed by the law of a particular jurisdiction, under the rubric of choice of law.

The general law applicable to each of these types of claims is relatively well developed, especially since the Supreme Court of Canada's *Van Breda* trilogy of decisions issued in 2012.[1] However, as illustrated by recent challenges to our courts' jurisdiction, a multitude of complex factual circumstances and competing policy goals have resulted in outcomes that may not have been readily predicted and have left a number of important corporate law matters to be decided upon at a later date.

Jurisdiction Simpliciter

An extreme example of a case decided on the basis of *jurisdiction simpliciter* is found in *Association canadienne contre l'impunité v. Anvil Mining Limited*, in which at the end of 2012 the Supreme Court of Canada refused leave to appeal from a decision of the Québec Court of Appeal.[2] The Court of Appeal had decided that a Québec court did not have jurisdiction over claims sought to be brought by five NGOs against an Australian-based mining company for alleged complicity in the military repression of an insurrection in the Democratic Republic of Congo. The Québec proceedings followed earlier litigation over the same events in both the DRC and Australia.

The proposed claims in Québec were to be (i) brought on behalf of foreign nationals, (ii) against a foreign-based defendant, (iii) on the basis of alleged wrongdoing committed exclusively outside Québec at a time when the foreign defendant neither had an establishment nor carried on any activities in Québec, and (iv) to remedy harm suffered entirely abroad. The only "connection" with Québec was the fact that the mining company had opened a small office in Montreal some six months *after* the subject events.

In effect, the case stands for the proposition that Canadian jurisdiction over an offshore mining company cannot be based on connections that are established in Canada only after the events giving rise to the underlying dispute.

A more complex issue of *jurisdiction simpliciter* was decided by the Ontario Court of Appeal in October 2013 in *Central Sun Mining Inc. v. Vector Engineering Inc. et al.*[3] Central Sun was an Ontario company with

1. *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 (Van Breda) (companion cases *Breeden v. Black*, 2012 SCC 19 and *Éditions Écosociété Inc. v. Banro Corp.,* 2012 SCC 18). See *Mining in the Courts,* Vol. III.
2. 2012 QCCA 117, leave to appeal to SCC dismissed with costs (2012 CanLII 66221). See also *Mining in the Courts,* Vol. III.
3. 2013 ONCA 601. The defendants have sought leave to appeal to the SCC.

its head office in Toronto. It retained various global engineering firms to assist with the siting and the design of a proposed open pit gold mine and heap leach operation to be built in Costa Rica. The individual consulting engineers were based in various American states and Central and South American countries. They prepared various geotechnical and mine engineering reports, some of which were sent to Central Sun technical staff in Vancouver (others were sent to Ontario directly). The Vancouver staff then made recommendations to the head office in Toronto, where the strategic investment decisions were made. The mine and heap leach pad were constructed in Costa Rica. In 2007 a catastrophic landslide occurred at the mine that led to the shutdown of the mine, significant remediation costs and the plummeting of Central Sun's stock price on the Toronto Stock Exchange. Central Sun sued the engineers in its home jurisdiction of Ontario for negligently misrepresenting the stability of the project site (among other causes of action). Directly after the case was commenced, Central Sun was obliged to allow itself to be taken over by a Vancouver-based intermediate mining company.

The engineers sought to stay the Ontario action, claiming that Ontario courts did not have jurisdiction at all, or that in any event, Ontario was not a convenient forum in which to litigate the action. A motions judge granted the stay as requested, and Central Sun appealed.

The essence of the engineers' argument was that the tort of misrepresentation did not occur in Ontario (but rather in Vancouver or Costa Rica), or that only a minor part of the tort occurred in Ontario. The Court of Appeal disagreed, ruling that the site of a misrepresentation is the place where it is received and relied upon. The misrepresentations here, the court concluded, were received and relied upon in Toronto. The controlling mind of the company was in Ontario, even though the misrepresentations were first sent in some cases to Vancouver. The commission of the tortious misrepresentation gave rise, in the court's view, to a presumption of jurisdiction in the Ontario courts, under principles recently laid down in the *Van Breda* trilogy.[4] Furthermore, the presumptive jurisdiction was not rebutted within the meaning of *Van Breda*. The receipt of, and reliance upon, a misrepresentation are "core" aspects of a misrepresentation and such receipt and reliance had occurred in Ontario. The engineering companies had every reason to expect to be called to account in the courts of the jurisdiction where their client was based. As the court noted, "In the modern world where corporations have various offices in various locations, corporate defendants should not escape liability simply because they send their studies to an office of the plaintiff outside Ontario with the clear understanding that it will be acted on in Ontario."[5]

Once jurisdiction over the tort of negligent misrepresentation had been properly established, the Court of Appeal went on to conclude that the

4. *Supra* note 1.

5. *Central Sun, supra* note 3, at para. 33.

Ontario courts had jurisdiction over all of the other causes of action advanced in the statement of claim, since splitting claims up for litigation in various jurisdictions would plainly be inefficient.

Central Sun's jurisdictional battles are not over yet, as the engineers' claim that Ontario is not a convenient forum remains to be adjudicated, having been left by the Court of Appeal for future decision by another motions judge below. The arguments there will focus on the law applicable to *forum non conveniens*.

"CORPORATE DEFENDANTS SHOULD NOT ESCAPE LIABILITY SIMPLY BECAUSE THEY SEND THEIR STUDIES… OUTSIDE ONTARIO…"

The decision in Central Sun demonstrates that negligent professional misrepresentations that cause harm to a mining company will be deemed, for jurisdictional purposes, to have been committed in the jurisdiction in which the misrepresentation was ultimately relied upon by the controlling mind of the company, even if it is received in an office elsewhere first, particularly when this is in the reasonable contemplation of the party making the misrepresentation.

Similar conclusions to those in *Central Sun* were reached in *Avanti v. Argex*,[6] in which a dispute over the termination of a mining services agreement was held to be subject to Ontario jurisdiction. This result was based on a finding that the Québec-domiciled defendant mining company was carrying on business in Ontario by virtue of its majority ownership of an Ontario patent-holding company, its efforts to market the patented technology in Ontario, and its listing on the Toronto stock exchange — this notwithstanding the fact that the defendant's resource properties were all located in Québec.

Claims Against Canadian Affiliates for the Actions of Related Companies Overseas

In 2013, the courts in Ontario were called upon to address two cases arising from extra-territorial human rights allegations: *Choc v. Hudbay Minerals Inc.*[7] and *Yaiguaje v. Chevron Corporation*.[8] The decision in *Hudbay* raises the possibility that a Canadian company may have liability imposed on it arising out of alleged human rights abuses for which its foreign subsidiary is implicated. The decision in *Chevron* raises the possibility that a foreign judgment against a parent company that has no assets in Canada may be enforced against its Canadian subsidiary. Neither of these possible outcomes has yet come to fruition, but if they do they could have significant implications for the bedrock principle that a company is an entity separate and apart from its shareholder(s).

6. 2012 ONSC 4395. See also *Mining in the Courts*, Vol. III.
7. 2013 ONSC 1414 *(Hudbay)*.
8. 2013 ONCA 758 *(Chevron)*.

Hudbay has received much media attention as raising the spectre of piercing the corporate veils that separate Canadian-based parent companies from their offshore project companies. That commentary overstates the current implications of this case, as adjudicated so far. The sole question decided by a motions judge in July 2013 was whether certain pleadings of the plaintiff should be struck out as against a Canadian parent company. In deciding not to strike the pleading, the motions judge ruled that pleading an offshore subsidiary was merely the agent of the Canadian parent in committing torts abroad was sufficient to frame a cause of action that was not 'patently ridiculous or incapable of proof.'[9] It remains to be proven at trial whether such an agency relationship actually existed in fact or law. Further, the motions judge held that a Canadian parent *may* become subject to a 'novel' duty owed *directly* to offshore communities that are affected by an offshore subsidiary; the specific duty being to take care to ensure that the subsidiary's security personnel do not engage in acts of violence. The allegation was that the parent company had direct liability arising out of its own conduct, and not simply an allegation that the parent was liable for the acts of its subsidiary. The question of whether such a direct duty of care could be owed by the parent company in the circumstances was a matter left to be determined at trial. All that has been decided so far in this case is that the pleading, if true, is not 'clearly unsustainable or untenable.'[10]

COURTS MAY IMPOSE LIABILITY ON PARENT COMPANIES FOR HARM CAUSED BY FOREIGN SUBSIDIARIES.

The only true jurisdictional point decided in *Hudbay* was that if the pleading against the Canadian parent was not struck out as failing to disclose a reasonable cause of action, then the Guatemalan subsidiary would be a necessary or proper party to the action and hence properly subject to Ontario jurisdiction.[11] This is of limited precedential value because the defendants conceded the point.

The second, and more significant case in the pair is the Ontario Court of Appeal's decision in *Chevron*. This clarifies the test by which Ontario courts will enforce foreign judgments, and for now allows enforcement actions to proceed in Ontario where the only hope of recovery is from the Canadian subsidiary of the foreign corporation.

The Ontario case stems from the long-running legal battle between Chevron US and the US-based attorney representing the indigenous peoples of the Sucumbíos and Orellana provinces in Ecuador. In 2011, that attorney sued Chevron US in Ecuador on behalf of the Ecuadorians, alleging that between 1972 and 1990, Texaco (which Chevron US acquired

9. *Hudbay, supra* note 7, at para. 49.
10. *Hudbay, supra* note 7, at para. 75.
11. *Hudbay, supra* note 7, at para. 85.

in 2001) caused significant environmental damage to the indigenous peoples' lands, waterways, and way of life. Chevron US was found liable for US$18 billion, an amount later reduced on appeal to US$9.5 billion. Chevron refused to pay the award, contending that the judgment was obtained through fraud, bribery, and other illegal means. Chevron US no longer has assets in Ecuador and US courts have been sympathetic to Chevron's allegations of fraud against the Ecuadorian court. Counsel for the Ecuadorians have accordingly sought to have the Ecuador judgment recognized and enforced in Ontario against Chevron Canada, a wholly-owned subsidiary of Chevron US. Chevron Canada had no involvement in the initial judgment or its underlying facts.

At first instance, the motions judge acknowledged that Ontario has jurisdiction to recognize and enforce the judgment, but exercised his discretion to stay the enforcement action. He noted that Chevron US had no assets in Canada, Chevron Canada is a separate legal entity from Chevron US, and there was therefore no practical reason to continue with the enforcement action. It would be preferable, the motion judge held, for the Ecuadorians to pursue their enforcement action against Chevron US in the United States.

The Ontario Court of Appeal agreed that Ontario has jurisdiction over the enforcement action, but disagreed that the action should be stayed. To recognize and enforce a foreign judgment in Ontario, an Ontario court must be satisfied that the foreign judgment-granting court had a real and substantial connection to the initial claim. Ontario courts are not required to also be satisfied that there is a real and substantial connection between Ontario and the original dispute in the foreign country. Jurisdictional ties to Ontario are only required when determining if the Ontario court should hear an action at first instance, not an enforcement action.

Having recognized the judgment against Chevron US, the Court of Appeal also found Ontario had jurisdiction over Chevron Canada, which carries on business in Ontario. This was necessary for the plaintiffs because Chevron US did not directly own any assets in Canada; the assets all belong to Chevron Canada. Although jurisdiction over Chevron Canada was easily established by virtue of physical presence in Ontario, the Court of Appeal went further and found that Chevron Canada's "economically significant relationship" with Chevron US was an additional reason to take jurisdiction over Chevron Canada. It appears then, that the Court of Appeal's decision

to assume jurisdiction over Chevron Canada may have been based implicitly on some sort of piercing of the corporate veil between the foreign judgment debtor and its Canadian subsidiary.

Having assumed jurisdiction over Chevron US and Chevron Canada, the court held that there should be a hearing on the merits to determine whether the foreign judgment should be enforced against Chevron Canada. It refused to stay the enforcement action under s. 106 of the *Courts of Justice Act*.[12] The court held that since both Chevron US and Chevron Canada had contested jurisdiction, neither had attorned to the jurisdiction. Having refused to attorn, they could not then raise a substantive defence and ask the Court to stay the action.

The decision in *Chevron* has several implications for Canadian and foreign corporations. First, it clarifies that Ontario courts will assume jurisdiction over a foreign judgment if there was a real and substantial connection between the foreign country granting the judgment and the legal dispute, regardless of the strength of the connection between Ontario and the legal dispute. Second, it suggests that, in the context of enforcing a foreign judgment, Ontario courts may assume jurisdiction over a related corporate entity that has ties to Ontario and an "economically significant relationship" with the related foreign entity over which it has jurisdiction. This aspect of the decision may be of particular concern for Canadian subsidiaries of multi-national corporations involved in activities that can lead to significant liability, such as resource extraction in foreign countries. Third, corporate defendants that are affiliates of foreign, judgment debtor corporations may now re-think the strategy of challenging Canadian jurisdiction. Depending on the nature of the dispute, it may be more prudent to forgo jurisdictional challenges and raise substantive defences at the outset in opposing enforcement attempts.

SOMETIMES IT MAY BE PRUDENT TO FORGO CHALLENGING JURISDICTION WHEN OPPOSING ENFORCEMENT OF FOREIGN JUDGMENTS.

This decision may not have a long shelf life. If Chevron Canada and Chevron US attorn to the Canadian jurisdiction and thereafter raise the substantive defence that Chevron Canada is corporately distinct from Chevron US, they should, as the law currently stands, have a strong argument that Chevron Canada's assets cannot be executed on to satisfy the judgment against Chevron US.

Choice of Law and Forum

The third and fourth types of jurisdictional issues listed at the outset of this article arose in an unpublicized way in the *Barrick Gold Corp. v. Xstrata Copper et al* case[13] decided by an Ontario Commercial List judge in 2012.

12. R.S.O. 1990, c. C. 43.

13. Summarized in *Mining in the Courts,* Vol. III.

The underlying dispute in that case over the propriety of a right of first refusal (ROFR) exercise was compounded at the outset by jurisdictional issues arising from choice of law and choice of forum clauses that existed in the three overlapping contracts giving rise to the dispute. The original El Morro shareholders' agreement (which contained the subject ROFR) between Xstrata as operator and New Gold Inc. as junior partner called for any disputes to be arbitrated in Toronto in accordance with Chilean law, but under Ontario's *International Commercial Arbitration Act*.[14] The conditional agreement between Xstrata and Barrick for the sale of Xstrata's majority interest in the project required any disputes to be arbitrated in Santiago, Chile, under Chilean law. Finally, the Acquisition and Funding Agreement between New Gold and Goldcorp, under which New Gold exercised its ROFR and transferred on the former Xstrata interest to Goldcorp, thereby defeating Barrick's attempted purchase, called for court litigation under Ontario law in Ontario.

When Barrick decided to sue all parties over the New Gold ROFR exercise, the litigation immediately stalled in the face of these conflicting provisions. Barrick briefly took steps to initiate an arbitration against Xstrata in Santiago, and then days later decided to sue Xstrata along with its already initiated lawsuit in Ontario against Goldcorp and New Gold. Some weeks later, Barrick formally abandoned its steps towards a Chilean arbitration, but maintained the position that it would retain the right to arbitrate in Chile later if, for some unspecified reason, the Ontario litigation did not resolve all issues satisfactorily. All other parties to the Ontario litigation immediately offered to agree that the Ontario court should have exclusive jurisdiction over all issues arising from the ROFR exercise and sale, including binding their offshore subsidiaries to abide by and execute the final Ontario result.

Barrick declined for many months to accept and Xstrata accordingly brought a formal motion to stay the Ontario proceedings as against it, relying on its strict rights under the broadly worded arbitration clause it had with Barrick. Both sides adduced Chilean law evidence from Chilean lawyers going to the merits of the jurisdictional dispute. Eventually, through lengthy discussions with a case management judge, Barrick was persuaded to consent to exclusive Ontario jurisdiction. In a case that took approximately 18 months from initiation to completion of the trial, some seven months were consumed by the jurisdictional issue.

Non-Judicial Approaches to Rectifying Claims of Human Rights Abuse

On December 20, 2013, African Barrick Gold announced that it had concluded a two-year investigation, through independent experts, into potential sexual assaults by police and site security personnel at its North Mara Mine in Tanzania. After a process of victim interviews and advice to

14. R.S.O. 1990, c. I.9.

the women from a retired judge of the High Court of Tanzania, 14 women were provided with remediation packages that variously included cash compensation, sponsored employment to learn new skills, financial and entrepreneurial training, education expenses for dependents, relocation expenses, home improvements, health insurance for the women and families, and counselling services.

The case stands as an example of how a global mining company has chosen to manage reputational and social-license challenges through early recognition of claims and non-adversarial approaches to them, thereby avoiding many of the formal legal intricacies outlined in the cases that occupy most of this comment.

Case Law Summaries

Conflicts and Jurisdiction

CENTRAL SUN MINING INC. V. VECTOR ENGINEERING INC., 2013 ONCA 601

The decision deals with, among other things, the location (for jurisdiction purposes) of negligent misrepresentations which were alleged to have been made in various studies conducted by engineers in connection with the site, design and construction of a gold mine in Costa Rica. The Ontario Court of Appeal determined the tort occurs where the misrepresentation was received and relied upon, which in this case was Ontario. For more discussion on this decision, see "Foreign Affairs: Extra-Territorial Jurisdiction of Canadian Courts in Mining Cases" on page 12.

CHOC V. HUDBAY MINERALS INC., 2013 ONSC 1414

In this case, the Ontario Superior Court of Justice declined to strike a pleading which alleged that a Canadian parent company was liable in negligence for failing to prevent alleged human rights abuses for which its foreign subsidiary was implicated. The defendants sought to have the claim struck on the basis that it disclosed no reasonable cause of action and was an improper attempt to "pierce the corporate veil." For more discussion on this case, see "Foreign Affairs: Extra-Territorial Jurisdiction of Canadian Courts in Mining Cases" on page 12.

PEACHLAND (DISTRICT) V. PEACHLAND SELF STORAGE LTD., 2013 BCCA 273

In this decision, the British Columbia Court of Appeal (BCCA) upheld the lower court's decision that a municipal bylaw was invalid because it frustrated the terms of a *Mines Act* permit issued by the British Columbia Ministry of Energy, Mines and Petroleum Resources.

Peachland Self Storage Ltd. (Self Storage) obtained a permit (Permit) from the province to extract 100,000 cubic metres of material from its aggregate mine located in the District of Peachland (District). After Self Storage applied for the Permit, but before it was obtained, the District had amended its Earthworks Control Bylaw (Bylaw) to impose an annual 200-cubic-metre limit on soil removal from land within

the District. The Permit expressly said that "[o]ther legislation may be applicable to the operation, such as bylaws established by Municipalities or regional Districts and [Self Storage] may be required to obtain approvals or permits under that legislation."

It was not possible for Self Storage to operate its aggregate mine in a commercially viable manner within the 200-cubic-metre limit, and so Self Storage challenged the Bylaw as being outside the District's jurisdiction.

The BCCA agreed with the lower court that the Bylaw must be characterized as a prohibition on soil removal which was invalid because it was enacted without ministerial approval as required by section 9 of the British Columbia *Community Charter* (Charter). In considering section 9 of the Charter, the BCCA confirmed that the requirement for ministerial approval was to safegaurd the "Provincial interest", and in particular, "the Provincial interest in extraction industries, which are a key component of British Columbia's economy."

The British Columbia Supreme Court's decision in this matter (indexed as 2012 BCSC 1872), was reported in *Mining in the Courts*, Vol. III.

YAIGUAJE V. CHEVRON CORPORATION, 2013 ONCA 758

This Ontario Court of Appeal decision suggests that, in the context of enforcing a foreign judgment, Ontario courts may assume jurisdiction over a related corporate entity (in this case the Canadian subsidiary of a US parent company) that has ties to Ontario and an "economically significant relationship" with the related foreign entity over which it has jurisdiction. For more discussion on this case, see "Foreign Affairs: Extra-Territorial Jurisdiction of Canadian Courts in Mining Cases" on page 12.

Deal or No Deal? The Importance of Knowing When You Have an Agreement

When negotiating a deal, it is critical for parties to know when they have reached an agreement. This issue frequently arises in the commercial context and has been litigated in several mining cases.

In the well-known dispute between International Corona Resources Ltd. (Corona) and Lac Minerals Ltd. (Lac),[1] Corona alleged that Lac acquired mineral claims to the exclusion of Corona in breach of a joint venture agreement (and Lac's fiduciary duty and duty of confidence). The trial judge determined that the parties had not entered into a binding contract. Although Lac sent Corona a written proposal with options to jointly develop the subject property, and Corona expressed interest in Lac's proposal, the Court found that "[t]he most that can be said is that the parties came to an informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement."[2]

Fast-forward 20 years to an Alberta Court of Appeal case involving the plaintiff Klemke Mining Corporation (Klemke) and various defendants, including Shell Canada Limited and Chevron Canada Resources Limited.[3] The Court agreed that there was a binding contract for Klemke to perform mining and consulting work for the defendants despite the absence of a formal signed agreement, or an agreement as to the final price or precise scope of work to be completed under the project.

1. *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1986] O.J. No. 2372 (H.C.J.).
2. *Ibid.* at para. 149.
3. *Klemke Mining Corporation v. Shell Canada Limited*, 2008 ABCA 257.

The Court considered the "commercial and industrial context, which was known to all the participants" when determining whether the terms of the agreement were "sufficiently certain."[4] For instance, the Court determined that it was not essential for the final price to be precisely established when the agreement formed because the parties referred to "cost" and to "market rates" in various documents, which provided "for an effective mechanism to determine the price, namely benchmarking."[5]

Last year, in *Proton Energy Group SA v. Public Company Orlen Lietuva*,[6] the English High Court grappled, in a preliminary motion, with facts involving rapid back-and-forth email correspondence relating to the sale of crude oil mix culminated in a "firm offer" email from the seller, and a reply email from the would-be purchaser stating "confirmed." The seller argued that the real-time exchange indicated that a binding agreement had been reached on the essential terms of the sale, subject to the negotiation of other (minor) terms. The Court determined that an agreement was "plausible" and placed emphasis on the email exchange and subsequent conduct of the parties (the seller sent the buyer a draft contract for the sale and the parties corresponded about remaining terms in the contract).

A BINDING AGREEMENT CAN EXIST BEFORE THERE IS A FORMAL WRITTEN CONTRACT.

In Canada, the legal test for determining whether two parties have made a binding contract that is to be reduced to writing at a later time, as opposed to an unenforceable "agreement to agree," has been summarized as follows by the Ontario Court of Appeal:

> The parties may "contract to make a contract," that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to

4. *Ibid.* at para. 18.
5. *Ibid.* at para. 19.
6. *Proton Energy Group SA v. Public Company Orlen Lietuva,* [2013] EWHC 334 (Comm.).

> be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract.[7]

How this plays out in any given negotiation will depend on the specific facts and circumstances of the case. However, in an age where fluid and rapid negotiations over electronic devices is increasingly the norm, negotiating parties would be well-advised to consider the state of the negotiation — the existence of a deal or no deal — and the extent of potential liability to the counterparty in circumstances where all terms of the agreement may not be finalized. Parties may be able to protect their interests by advising the counterparty that they do not consider a binding agreement to exist yet, or by making use of letters of intent that clearly stipulate whether a deal has, or has not, been finally made.

The law pertaining to this issue varies by jurisdiction and may be highly fact-driven. Legal advice is strongly recommended.

7. *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* 1991 CanLII 2734 at paras. 20-1 (Ont. C.A.). This summary has also been cited with approval by the British Columbia Court of Appeal. See, for example, *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365.

Contracts

AMERICAN CREEK RESOURCES LTD. V. TEUTON RESOURCES CORP., 2013 BCSC 1042

This mid-trial ruling in the context of a breach of contract case serves as a reminder that, at least in British Columbia, mining companies may not be able to rely on their own employees to provide opinions about specialized mining processes. Barring exceptional circumstances, independent experts should be obtained.

In 2007, American Creek Resources Ltd. (American Creek) and Teuton Resources Corp. (Teuton) entered into an option agreement related to Treaty Creek, a property in northwestern B.C. that was owned by Teuton. Under the agreement, American Creek would earn a 51% interest in the property if it spent a specified amount on exploration expenditures. Teuton agreed that American Creek had spent more than the specified amount, but disagreed that all amounts should qualify as exploration expenditures. In support of its position, Teuton's president attempted to give evidence on a number of technical subjects, including his opinion that certain drill patterns used by American Creek did not amount to "exploration" as that term was used in the agreement, such that related expenditures could not qualify. American Creek challenged the admissibility of much of the witness's evidence on the grounds that it was inadmissible opinion.

The Court reviewed the applicable law, confirming that since the witness was an employee of a party he could not be qualified as an expert. It may still be possible to receive lay opinion evidence from the witness, but only if a four-part test was satisfied: (1) the witness had personal knowledge of the relevant facts, (2) the witness was in a better position than the judge to draw the inferences he did, (3) the witness had the "experiential capacity" to form the opinion he did, and (4) the witness could not as accurately describe the facts without stating his opinion.

In the circumstances of this case, the four-part test was not satisfied and Teuton's president was precluded from providing opinion evidence. The Court noted that the evidence sought to be adduced did not consist of "everyday inferences from observed facts," but rather, concerned matters of specialized, technical expertise. To be admissible, this type of evidence must come from a qualified expert who certifies that he is not an advocate for either party.

BOSS POWER CORP. V. BRITISH COLUMBIA, 2013 BCSC 638

This decision illustrates the importance of ensuring that all essential terms of a settlement offer are agreed upon by all parties to an action.

The plaintiffs (Boss) sued the province of British Columbia alleging that the province had expropriated mineral claims by enacting certain regulations. Boss sought compensation for the loss of the claims, and the parties agreed to a settlement of $30 million. Before the province paid out the settlement, it was determined that an individual, Mr. Beruschi, was the beneficial owner of some of the claims. The province then circulated a draft application for "interpleader relief," in which the province sought to pay the $30 million into court in exchange for acquiring legal and beneficial title to the claims, leaving Mr. Beruschi and other interested parties to prove their entitlement to the settlement funds according to their interests. Ultimately, after some back and forth and proposed revisions to the form of order, the province and all interested parties except Mr. Beruschi agreed to the terms of the order sought.

Boss applied for an order directing that a consent order be entered, arguing that the order sought contained all the essential terms sought by Mr. Beruschi. In response, Mr. Beruschi took the position that an agreement on all essential terms had not been reached. The Court was left to determine whether the alleged settlement agreement was in fact valid and enforceable.

In determining whether or not a settlement is binding, a court first asks whether the parties have agreed on all essential terms. If so, the next question is whether the agreement was "completed." Completion could involve an exchange of documents, such as releases or proposed forms of court order. A party is not discharged from its initial agreement on essential terms unless it has "demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in [the] circumstances."

In this case, which the Court characterized as "complex" and not "routine," the Court concluded that the parties had not reached agreement on all essential terms and the application was dismissed.

On a similar point, see "Deal or No Deal? The Importance of Knowing When You Have an Agreement" on page 23.

MERIDIAN GOLD HOLDINGS II CAYMAN LTD. V. SOUTHWESTERN GOLD, 2013 ONSC 342

In this appeal from an arbitrator's award, the Ontario Superior Court of Justice (ONSC) looked at whether a right of first offer had been breached,

and in so doing shed some light on the question of when an interest has been "disposed."

In 2004, Minera Meridian Peru S.A.C. (Meridian) and Minera Del Suroeste S.A.C. (Misosa) simultaneously applied for two mining concessions being auctioned by the Peruvian government. Instead of bidding against each other, they entered into letters of understanding (LOUs), which provided if either was the successful bidder, then it would hold the concessions 50% for itself and 50% for the other party. The LOUs also detailed the terms of ownership and development of the concessions and contained a right-of-first-offer clause, effective if either party wanted to "dispose" of its interest in the concessions. Ultimately, Meridian was the successful bidder and became the registered owner of the concessions.

In 2009, Meridian's ultimate parent company announced that it was offering the shares of Meridian for sale. A third party, Concorcio Minero Horizonte S.A. (Horizonte) was the successful bidder and Meridian's parent companies entered into an Options and Operations Agreement (Agreement) with Horizonte pursuant to which Horizonte was granted an option to acquire shares in Meridian's parent company by, among other things, making payments and performing work on the concessions. The Agreement also contemplated that Horizonte would enter into a 36-month "cesión minera" with Meridian (a type of assignment of a mining concession) in order to provide it with the right, under Peruvian law, to perform its obligations as operator. The parties entered into the cesión minera on December 22, 2009.

Misosa's parent company viewed the cesión minera as a breach of the LOUs, since Misosa had not been given a right of first offer on Meridian's interest in the concessions.

The dispute initially went to arbitration. The arbitrator found, among other things, that Meridian's decision to enter into the cesión minera did trigger the right of first offer, and ordered that Misosa be offered the rights that were "disposed of" to Horizonte on substantially equivalent terms as in the Agreement. He also ordered that the cesión minera be cancelled.

Meridian and its parent company appealed to the ONSC, arguing that the term "dispose of" in the right of first offer required an element of finality to it, and that the temporally limited cesión minera did not qualify. The Court rejected this submission, finding the relevant question to be whether entering into the cesión minera amounted to ceding control of the concessions. Relying on a finding of fact by the arbitrator that the cesión minera assigned all rights and obligations in the concessions to Horizonte on an exclusive basis, the Court determined that Meridian had, in fact, ceded total control over the concessions, such that the right of first offer had been breached. While the Court upheld that aspect of the arbitral award, it found that the arbitrator's remedy was not rationally connected to the breach and remitted the matter back to the arbitrator for determination of the terms on which the cesión minera alone had been offered to Horizonte.

Defamation

MERIT CONSULTANTS INTERNATIONAL LTD. V. CHANDLER, 2012 BCSC 1868

In this decision, the British Columbia Supreme Court determined that it is not defamatory for a company to tell its shareholders how it intends to respond to a lawsuit, even if it does not end up responding that way.

In April 2007, Merit Consultants International Ltd. (Merit), an engineering firm, entered into a contract with Redfern Resources Inc. (Redfern), a mining company, under which Merit would become the construction manager at Redfern's site in northwestern B.C. Redfern terminated the contract in March 2008 and Merit sued, seeking damages for breach of contract. Redcorp Ventures Ltd. (Redcorp), Redfern's parent company, issued a news release stating that Redfern would "vigorously defend" Merit's lawsuit and would counterclaim to allege, among other things, negligence by Merit. Redfern eventually did file a counterclaim, but it did not allege negligence.

Both Redfern and Redcorp went bankrupt before the breach of contract claim could be decided. Merit then sued former directors of Redcorp alleging, among other things, that the news release was defamatory. Merit argued that an allegation of negligence against professional engineers was a serious attack on their reputation.

The directors applied for summary dismissal of the defamation claim, arguing that the news release was protected by qualified privilege, which protects communications made by a person who has an interest or duty to make it to a person who has a corresponding interest or duty to receive it and by absolute privilege, which protects communications that take place during, incidental to, and in the processing and furtherance of court proceedings.

The Court found that the communication was protected, whether the occasion was one of qualified privilege or absolute immunity, and dismissed the claim. In so doing, the Court noted that it would be untenable if Redfern was only entitled, at law, to report the fact that the claim had been commenced without also advising its shareholders that the action would be defended and on what basis.

In a related decision, the Court found that the defendants were entitled to special costs because, among other things, Merit had pursued a defamation claim that was not viable. See 2013 BCSC 582.

Last Directors Standing: Expanding the Scope of Directors' and Officers' Environmental Liability in the Northstar Aerospace Case

In carrying out their corporate responsibilities, directors and officers can attract potential personal liability for wrongful conduct. What would happen if directors and officers were held personally liable for the consequences of corporate decisions they did not make? In *Baker et al. v. Director, Ministry of the Environment (Baker)*, a case that serves as a cautionary tale to corporate directors and officers across all industries, the Ontario Environmental Review Tribunal (ERT) considered this very issue.

In *Baker*, a number of former directors and officers of Northstar Aerospace, Inc. (Northstar) and its parent Northstar Aerospace (Canada) Inc. (Northstar Canada) found themselves as the last line of defence between the Ontario Ministry of the Environment (MOE) and a contaminated property located at the site of the now insolvent company's former manufacturing and processing facility in Cambridge, Ont. (Site).

For this group of former Northstar directors and officers, the uncertainty about their personal liability for environmental contamination at the Site ended when the ERT accepted the Minutes of Settlement on October 28, 2013 between the directors and the MOE. This settlement involved, among other things, the payment of $4.75 million to the MOE by the group in exchange for the withdrawal of an MOE order, which required them to personally carry out the remediation of the Site.

Under the broad sweep of environmental legislation, it is generally understood that directors and officers are subject to potential liability for the environmental remediation of contaminated sites, particularly where they have had management of, or control over, contaminants or where they have made decisions that resulted in contamination. However, *Baker* highlights the willingness of regulators to seek out all potentially responsible parties to recover the costs of remediation where a company is no longer able to continue financing remediation activities, even where the directors and officers did not cause or were not involved in the decision-making that led to the contamination.

Background

The environmental contamination at issue resulted from Northstar's industrial activities at the Site, where the company operated a manufacturing and processing facility for aircraft parts from 1981 to 2009. Trichloroethylene (TCE), a human carcinogen, was used by Northstar in its operations and caused contamination under the Site, which then migrated beneath approximately 652 residential properties within the Bishop Street Community.

Timeline of Events

- In October 2004, Northstar notified the MOE that it had identified soil and groundwater contamination on the Site, which was possibly migrating to adjacent properties. The primary contaminants were identified by Northstar as TCE and hexavalent chromium.
- In 2005, Northstar further confirmed with the MOE that the contamination had migrated from the Site to the adjacent Bishop Street Community. Under MOE's supervision, Northstar commenced a voluntary remediation plan.
- In 2008, 2009 and 2010, Northstar released annual reports that estimated the future cost of remediation of the Site in the millions of dollars. However, at no time did it secure the funding for such work in the form of a trust account or other means.
- On March 15, 2012, amidst growing concern about Northstar's financial difficulties, the MOE issued a remedial order to secure the continued performance of the remediation work.
- On June 14, 2012 Northstar, Northstar Canada and two other related companies sought and obtained protection from creditors pursuant to the *Companies' Creditors Arrangement Act* (CCAA). Subsequently in July 2012, the Ontario Superior Court of Justice approved the sale of substantially all of the operating assets of Northstar and Northstar Canada, other than the Site, leaving no personnel or resources to carry out the remediation work. Substantially all of the proceeds of sale were distributed to Northstar's secured lender.
- In August 2012, on the basis of human health concerns, the MOE stepped in to continue the remedial work on the Site.
- On October 21, 2012, when the stay of proceedings under the CCAA proceedings expired, the MOE issued a remediation order against the directors and officers of Northstar on the basis that they were directors and officers from 2004 to 2012 and as such had management and control of the Site and the remediation systems (Order).

Launching an Unsuccessful Appeal

The former directors and officers appealed the Order and brought a motion before the ERT to stay the Order claiming that the they would

suffer irreparable harm if the Order was not stayed as they would have to incur remediation costs of approximately $1.4 million per year. In addition, the directors and officers submitted that they could not recover any costs from the insurance policy intended to indemnify former Northstar directors and officers as it excluded environmental remediation costs. The ERT did not grant the stay and it ordered the former directors and officers to immediately pay for the continuation of the requisite remedial work regardless of whether the Order was appealed and until any such appeal process was completed.

DIRECTORS AND OFFICERS MAY BE COMPELLED TO PERSONALLY FINANCE REMEDIATION COSTS.

On appeal, the directors and officers claimed a range of defenses, including that some of them were not on the board during the time of the contamination and had no specific responsibility for environmental matters. The MOE's view was that the directors had allowed the company to file for CCAA protection and stop remediation activities at the Site, which made them responsible for remediation under the *Environmental Protection Act* (Ontario).

The defenses were unsuccessful, and liability was imposed immediately resulting in the payment of approximately $800,000 for the completion of interim remedial work until the results of the appeal were determined. The financial burden of having to fund the interim remediation work was likely a key motivator for the former directors and officers to reach a settlement with the MOE.

An Uncertain Path Forward

Baker introduces uncertainty to the role of directors and officers as it relates to their responsibility for environmental contamination. In particular, *Baker* serves as a cautionary tale that even if the MOE has a weak case, directors and officers may be expected to personally finance significant remediation costs (regardless of whether they had knowledge of, involvement in, or oversight of the work being completed) until the appeal of a remediation order has run its course.

Now that the parties have reached a settlement, it is unclear whether the facts of *Baker* would have supported the MOE's assertion that the former directors and officers were liable for the remediation of the Site. In another recent case, the Ontario Court of Appeal upheld an MOE order issued against an innocent landowner in *Kawartha Lakes (City) v. Ontario (Environment)*. These cases show the MOE's willingness to seek out and issue orders to all potentially responsible parties in order to recover remediation costs, notwithstanding fault.

It is too early to tell whether *Baker* will have a chilling effect on the ability of companies to recruit talented board members for their organizations, and to what extent other provincial regulators will follow the MOE's

lead in expanding the scope of director and officer liability for cleaning up environmental contamination, especially where a company runs into financial trouble. A possible implication of *Baker* is that regulatory authorities may seek increased security as part of the regulatory approval process in order to ensure that environmental obligations will be satisfied in the event that a proponent seeks CCAA protection; this particularly in light of the 2012 Supreme Court of Canada (SCC) decision in *Newfoundland and Labrador v. Abitibibowater Inc.,*[1] where a majority of the SCC determined that remediation orders issued by the province against Abitibibowater in respect of contaminated sites could be stayed and subject to a claims procedure order under the CCAA (Newfoundland and Labrador had sought a declaration that the CCAA proceedings did not bar the enforcement of the remediation orders).

Risk Mitigation Strategies

For individuals who currently serve on boards or are considering taking up a board position, it is important to ask the right questions, particularly if the company operates in an industry that is at higher risk for environmental contamination, such as mining. To mitigate the risks of environmental liability not only for directors and officers, but also for companies, the following actions should be considered:

- reviewing the organization's environmental policies and practices;
- ensuring sufficient protection for directors and officers in indemnity agreements;
- determining whether insurance policies cover environmental remediation liability and if not, acquiring such coverage if the company conducts high-risk activities;
- establishing a fund or setting aside money in a trust that is dedicated to covering any potential environmental costs;
- regularly consulting with the company's environmental managers to address any issues of concern and ensuring that issues are reported to senior management in a timely way;
- ensuring that employees are aware of their responsibilities to comply with requirements under environmental legislation (e.g., spill-reporting obligations);
- ensuring that remedial and preventative measures are in place to respond to environmental incidents; and
- ensuring that environmental audits are carried out at regular intervals.

In the aftermath of *Baker*, it is more important than ever for directors and officers to manage environmental issues proactively and implement policies to help minimize their risk exposure. This will go a long way in ensuring that directors, officers and their companies are able to manage and respond appropriately to risks arising from constantly evolving environmental liabilities.

1. 2012 SCC 67. See also *Mining in the Courts*, Vol. III.

Environmental Law

BAKER ET AL V. DIRECTOR, MINISTRY OF THE ENVIRONMENT

In this case, a number of former directors and officers of Northstar Aerospace, Inc. (Northstar) and its parent company Northstar Aerospace (Canada) Inc. found themselves as the last line of defence between the Ontario Ministry of the Environment and environmental contamination resulting from Northstar's industrial activities at a former manufacturing and processing facility in Cambridge, Ont. For more discussion, see "Last Directors Standing: Expanding the Scope of Directors' and Officers' Environmental Liability in the Northstar Aerospace Case" on page 30.

PACIFIC BOOKER MINERALS INC. V. BRITISH COLUMBIA (ENVIRONMENT), 2013 BCSC 2258

This judicial review decision highlights the importance of procedural fairness in the environmental assessment process. The British Columbia Supreme Court quashed a decision not to issue an environmental assessment certificate in circumstances where the proponent had not been given an opportunity to respond to concerns.

Pacific Booker Minerals Inc. (Pacific Booker) had been pursuing an environmental assessment certificate under British Columbia's *Environmental Assessment Act* (Act) for several years, so that it could construct an open pit copper/gold and molybdenum mine. The proposed mine was expected to extract 30,000 tonnes of ore daily over a lifespan of about 21 years.

In August 2012, the Ministers of Environment and Energy, Mines and Natural Gas (Ministers) received a "final assessment report" from the executive director of the Environmental Assessment Office (EAO). While the report concluded that the project would not result in any significant adverse effects if mitigation measures were properly implemented, the executive director recommended that the Ministers refuse to issue the certificate due to what were described as "additional factors" that had been raised during the assessment process. In September 2012, the Ministers followed the recommendation and refused to issue a certificate. Although Pacific Booker had participated

in the lengthy process from the beginning, it was not made aware of the executive director's recommendations before the Ministers made their decision and it was not afforded an opportunity to respond to the "additional factors."

Pacific Booker sought to have the Ministers' decision quashed on the grounds that the executive director's recommendation was *ultra vires* the Act, and that Pacific Booker had not been given notice of, or any opportunity to respond to, the executive director's concerns and ultimate recommendation.

Although the Court rejected the submission that the Ministers' decision was *ultra vires* the Act, it agreed that the Ministers' decision failed to comport with the requirements of procedural fairness. In coming to its conclusion, the Court considered the factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1] including the legitimate expectations of Pacific Booker. As noted by the Court, Pacific Booker had been encouraged to participate at every step of the process, had been kept informed of concerns, and had been given a full opportunity to respond to them. As a result, Pacific Booker had a legitimate expectation that it would be given the opportunity to be heard when serious concerns were expressed. It was entitled to know at least the essence of the adverse recommendations and ought to have been given the opportunity to provide a written response.

COURT UPHOLDS PROPONENT'S LEGITIMATE EXPECTATION THAT IT COULD RESPOND TO GOVERNMENT'S CONCERNS.

1. [1999] 2 S.C.R. 817.

Injunctions

FIRST MAJESTIC SILVER CORP. V. DAVILA, 2013 BCSC 1212 AND 2013 BCSC 1704

These decisions reviewed the appropriate terms for a post-judgment, worldwide Mareva injunction following a successful suit by First Majestic Silver Corp. (First Silver) against a former corporate director (director)[1] for breach of fiduciary duty in connection with a lost corporate opportunity to acquire a mining property in Mexico known as "Bolaños." The director indirectly acquired the Bolaños property when he purchased shares in Minerales y Minas Mexicana, S.A. de C.V. (MMM), the Mexican company that owned the property. Damages were awarded against the director and MMM (Defendants), jointly and severally, in the amount of US$93.84 million.

After trial, First Silver applied for a Mareva injunction to freeze the assets of the Defendants within and outside British Columbia in order to secure payment of the judgment. Prior to delivering reasons, the Court issued a *status quo* order, which imposed a Mareva injunction for 10 days and prohibited the Defendants from diminishing the value of the mine "save and except in the ordinary course of business" (the caveat) unless $79 million was first deposited into trust. On the tenth day of the *status quo* order being in effect, the Court granted the Mareva injunction "in substantially the same terms" as the *status quo* order.

The parties returned to court when they could not agree on the injunction terms. First Silver argued that the caveat should be deleted to prevent the Defendants from reducing the mine to a mere shell. In First Silver's submission, the Defendants could to come to court as necessary, explain what they wished to do, and seek to have the order varied accordingly. The Court disagreed, ruling that if the Defendants operated the mine so as to diminish its value beyond the de minimis level, First Silver could apply to vary the terms of the injunction (2013 BCSC 1212).

Three months later, First Silver sought to have the caveat removed again, this time presenting evidence suggesting that the Defendants were extracting up to 800 tons per day of ore, which could deplete two of the mine's key veins in two years. The Court refused to remove the caveat, but ordered the Defendants to produce monthly reports about the mine's operations and to limit mining to 500 tons per day (2013 BCSC 1704).

First Silver and the Defendants were each denied leave to appeal. See 2014 BCCA 11.

1. Mr. Davila was a director of, *inter alia,* a subsidiary of First Majestic which assigned the claims to First Majestic.

Labour & Employment

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1611 V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2013 FC 512

In this case, the Federal Court upheld a decision made under Canada's Temporary Foreign Worker Program (TFWP) to issue positive Labour Market Opinions (Opinions) under s. 203 of the Immigration and Refugee Protection Regulations, SOR/2002-227 (Regulations). The Opinions were necessary for HD Mining International Ltd. (HD Mining) to obtain 201 temporary foreign worker permits in order to bring skilled labourers from China to work at its coal properties near Tumbler Ridge, B.C. Two trade unions representing mining workers in B.C. (but not at HD Mining's project) were granted public interest standing to challenge the decision.

In seeking judicial review, the unions argued that the decision-maker's discretion was fettered and his finding that the offers of employment would likely result in "a neutral or positive effect on the labour market in Canada" was unreasonable. With respect to the latter, the unions argued, among other things, that contrary to the Regulations, having Mandarin as the predominant language in the mine would not allow for the recruitment, training or retention of Canadians. HD Mining intended to employ interpreters and foremen who spoke both English and Mandarin and had a long-term plan to train and transition to a 100% Canadian workforce.

The Court reviewed the decision on a standard of reasonableness and dismissed the application on all grounds.

UNITED STEELWORKERS LOCAL 9346 (ELKVIEW OPERATIONS) V. TECK COAL LIMITED, 2013 CANLII 82541 (BC LA)

In this decision, a labour arbitrator refused to prohibit the implementation of a random drug and alcohol testing policy pending a decision on the merits of a grievance filed by the employees' union.

In December 2012, Teck Coal Limited (Teck) introduced a policy of

random drug and alcohol testing at its coal mining operations, replacing its previous policy of "reasonable cause" testing. A union (Union) representing employees at two of Teck's operations filed a grievance over the new policy and the parties went to arbitration. At the arbitration, the Union sought a pre-hearing order prohibiting Teck from continuing to implement the policy until the grievance was decided on its merits.

BALANCE OF CONVENIENCE FAVOURS RANDOM DRUG AND ALCOHOL POLICY REMAINING IN PLACE.

Teck conceded that there was a serious question to be tried, which left the arbitrator to focus on the "balance of convenience," and, in particular, whether issuing the order or refusing the order was most likely to result in "irreparable harm." "Irreparable harm" denoted harm that could not be adequately compensated by damages.

Ultimately, the arbitrator found that the possibility of industrial accident (if the testing policy was prohibited in the interim) carried greater potential for irreparable harm than the invasion of privacy that would result from unwarranted drug and alcohol testing, and that the drug and alcohol testing was more amenable to being compensated in damages. As a result, the Union's application for a pre-hearing order prohibiting implementation of the policy was dismissed.

Regulatory Offences

R. V. PROCON MINING AND TUNNELLING LTD., 2013 YKTC 21

This decision of the Territorial Court of Yukon resulted in a $150,000 fine being issued to the operator of a mine pursuant to the *Yukon Occupational Health and Safety Act*, R.S.Y. 2002, c. 159 (Act) following the death of an employee. The same fine, which was the maximum penalty available under the legislation, was also imposed on the mine owner pursuant to similar charges.

Procon Mining and Tunnelling Ltd. (Procon) operated Wolverine Mine, an underground polymetal mine owned by Yukon Zinc Corp. (Yukon Zinc). In April 2010, William Fisher, a Procon employee, was killed when approximately 70 tonnes of rock fell from a wall. The rock fall was the fourth fall in six months and Mr. Fisher was the second person killed at the mine in less than a year.

Investigations conducted after the incident revealed that there was essentially no ground support plan in place, despite the fact that a 2007 feasibility study commissioned by Yukon Zinc recommended that such a plan be developed due to the mine's particular susceptibility to ground failures. A ground control plan was also required by s. 15.06 of the *Occupational Health and Safety Regulations*, O.I.C. 2006/178.

In a related case, Yukon Zinc was charged under the Act for failing to ensure that the health and safety of workers was protected. Yukon Zinc entered a guilty plea and was fined $150,000, based on an agreed statement of facts and a joint submission on sentence.

Procon was also charged under the Act and regulations, and entered a guilty plea to the charge of failing to ensure, as far as was reasonably practicable, that the workplace under its control was safe and without risk to the health of the employees. While the Director sought another fine of $150,000, Procon contended that $100,000 would be sufficient, arguing that it was primarily the mine owner's responsibility to provide a ground support plan and to supervise its design and placement. Procon also relied on the fact that it alerted Yukon to the lack of a ground support plan two months before the fatal rock fall.

Procon's defence was rejected by the Judge, who found that Procon chose

to put its employees in harm's way despite its knowledge that there was no oversight of ground support. The fact that Procon alerted Yukon Zinc to the lack of a ground support plan two months before Mr. Fisher's death did not change the fact that it knew of the shortcomings and still sent workers into the mine. Moreover, Procon had been at the mine for nearly a year before bringing the shortcomings to the owner's attention.

The maximum find was imposed on Procon, together with a victim surcharge of 15%.

RE CANACO RESOURCES INC., 2013 BCSECCOM 310

This decision of a panel of the British Columbia Securities Commission (Panel) sheds some light on when drill results will be considered a "material change" requiring the issuance of a material change report. In this particular case, the Commission determined that the infill drilling results merely added to the understanding about the continuity of the deposit and were not material.

Canaco Resources Inc. (Canaco) had drilled approximately 100 drillholes at the Magambazi gold deposit in Tanzania. The drill hole assay results in question were from eight holes drilled in the Fall of 2010, and were disclosed in news releases dated December 6, 9, and 22, 2010. Canaco and its president were found to have known about the results by no later than November 29, 2010. The press releases that were ultimately issued by Canaco described some of the results as "spectacular" and "fantastic news."

The executive director alleged that Canaco and certain of its directors had contravened s. 85 of the *Securities Act,* R.S.B.C. 1996, c. 418 (Act) by failing to disclose the results immediately as a material change, and that the directors had failed to act in the best interests of Canaco and acted contrary to the public interest when they issued stock options with knowledge of the undisclosed drill results. To prove either set of allegations, the executive director needed to establish that the drill results would reasonably be expected to have a significant effect on the market price or value of Canaco's securities. As noted by the Panel, this was to be assessed objectively from the perspective of a reasonable investor.

In support of its position that the results were not material, Canaco relied upon two reports from expert geologists, who asserted that the infill holes did not expand on the known boundaries of the deposit or change Canaco's understanding of the continuity of the deposit. The Panel ultimately found this evidence relevant and determined that because the boundaries and quality of the deposit had already been disclosed, disclosing the results of the eight infill holes would not have significantly affected the market value or price of Canaco shares and were not a material change.

New Amendments to Québec *Mining Act*

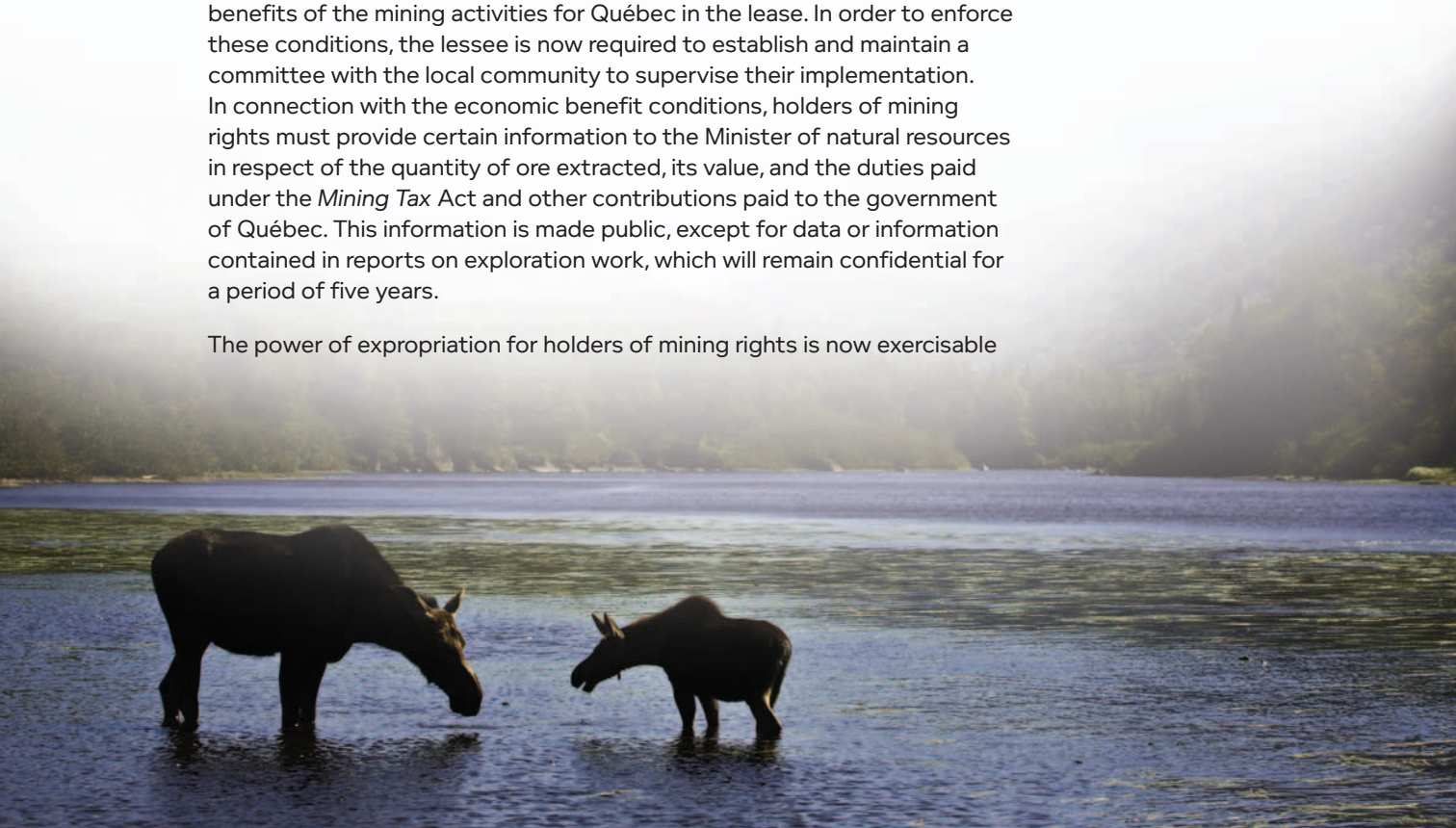
On December 10, 2013, new amendments to Québec's *Mining Act* were adopted by the Québec National Assembly. This is the fourth attempt by the Québec government in recent years to reform Québec's mining legislation. The newly amended Québec *Mining Act* significantly modifies the original *Mining Act* rather than replacing it entirely. Amendments to the *Mining Tax Act* were also proposed in 2013, however these amendments have yet to be made law.

What's New?

The amendments to the *Mining Act* significantly change the Québec mining regime. Changes pertain mainly to rights and authority for municipalities, increased environmental oversight, and additional public interest considerations, economic benefit measures and consultation requirements.

In addition, the granting of a mining lease is now subject to the filing or submission of a rehabilitation and restoration plan, together with a market study on the feasibility of mineral processing in Québec. Metal mining projects with a capacity over 2,000 metric tons per day, other than rare earth minerals, are now subject to a public consultation process before a mining lease can be granted by the government. The government may impose conditions to be established by regulation regarding the economic benefits of the mining activities for Québec in the lease. In order to enforce these conditions, the lessee is now required to establish and maintain a committee with the local community to supervise their implementation. In connection with the economic benefit conditions, holders of mining rights must provide certain information to the Minister of natural resources in respect of the quantity of ore extracted, its value, and the duties paid under the *Mining Tax* Act and other contributions paid to the government of Québec. This information is made public, except for data or information contained in reports on exploration work, which will remain confidential for a period of five years.

The power of expropriation for holders of mining rights is now exercisable



only during the mining stage, and mining rights holders are required to provide financial support to property owners during negotiations for the purchase of their homes.

It should be noted that the changes to the *Mining Act* have no retroactive effect and therefore apply from the date upon which the newly amended Act came into force.

Municipalities

The amended Québec *Mining Act* grants new rights and authority to municipalities. For instance, a claim holder is now required to notify a municipality that it had acquired a right on municipal lands and to inform the municipality prior to carrying out work on the claim.

MINE OPERATORS REQUIRED TO POST FINANCIAL SECURITY FOR COSTS OF RESTORATION.

The amended Act has also modified the *Act respecting land use planning and development* to allow regional county municipalities to designate portions of their lands as "incompatible" with mining activity or subject to specified conditions. Under the amended *Mining Act*, the regional county municipalities would set these conditions and the Minister would only be allowed to establish them only to the extent that the regional county municipalities had not done so. The Minister may not exempt a holder of mining rights from these conditions.

These amendments would likely apply to land under the jurisdiction of the Cree First Nations governments, which covers more than 300,000 square km in Northern Québec. The Québec government is currently required to notify First Nations governments, on a monthly basis, of the grant of any new mining claims on land below the 55th parallel.

Environmental Considerations

The newly amended Québec *Mining Act* requires that mining operators provide a financial security to the government to cover the entire anticipated cost of rehabilitating and restoring a mining site. This security must be given at the same time as the mining operators' site rehabilitation and restoration plan and is subject to conditions established by the government through regulations under the *Mining Act*.

The grant of a mining lease is also subject to a certificate of authorization under the *Environmental Quality Act*, as well as the approval of the mining operators' site rehabilitation and restoration plan. The formalities for obtaining such certificate of authorization may be streamlined, however, if the Minister deems them unreasonable or detrimental to the realization of the mining project under consideration.

Metal mines projects involving a projected daily production of 2,000 metric

tonnes or more are now subject to an environmental assessment. Projects with lower projected daily production are subject to public consultations co-ordinated by the project developer.

Public Consultation and Public Interest

Under the amended *Mining Act*, the grant of any mining lease for surface mineral substances for peat, industrial activity or commercial export is subject to prior consultation. The Act allows the Minister to refuse or cancel such a lease for reasons of public interest. Mining claim holders now have to declare when they have found uranium.

Economic Benefits

The amended *Mining Act* contains several provisions aimed at increasing local and regional economic benefits. For instance, mining leaseholders must create and maintain a follow-up committee to maximize local employment and procurement. The majority of the committee must be comprised of independent stakeholders from the region affected by the mining activity. The committee must remain in place until the completion of the leaseholder's site rehabilitation and restoration plan.

The application process for a mining lease under the amended *Mining Act* requires the applicant to submit a market study on the feasibility of mineral processing in Québec. Based on the conclusions of the study, the Minister could require the mining operator to enter into an agreement to ensure maximum economic benefits for Québec in exchange for the mining lease.

LONG-TERM IMPACTS OF NEW LEGISLATION REMAIN UNCERTAIN.

Mining leaseholders are also required to provide detailed information on extraction tonnage and royalty payments in order to comply with recent proposed changes to the Québec mining tax regime. The changes to the *Mining Tax Act*, if made law, would mean that mining operators in Québec would pay the higher of (i) a minimum mining tax based on the total output value at the mine shaft head for each mine operated, and (ii) a progressive mining tax on profits based on the profitability of the annual output of all of an operator's mines (ranging from 16% to 28%).

First Nations Consultations

In its introductory provisions, the amended *Mining Act* incorporates the government's general obligation to consult with Aboriginals. In addition, at least one Aboriginal representative must sit on the follow-up committee mentioned above for projects that would affect First Nation communities. The modified Act also prohibits the expropriation of Aboriginal burial grounds. The Minister is also now required to adopt and publish a specific policy for the consultation of First Nations.

Other Changes Under the Amended Québec *Mining Act*

The newly amended Act provides for the following:

- Claim holders must report all exploration work carried out with respect to the claim;
- Work credits now expire after 12 years;
- Certain information obtained through the application process under the *Mining Act* is rendered public; and
- Fines under the Act's penal provisions have been increased.

Looking Ahead - What Will the Amendments to the Mining Act Mean for the Mining Industry?

The amendments to the *Mining Act* have been met with mixed reaction from industry stakeholders, municipalities and First Nations. Although the amended *Mining Act* has been adopted, mining industry representatives are quick to point out that the regulatory framework for the *Mining Act* has yet to be laid out by the government. For instance, neither the economic benefit requirements of a mining project nor the municipal zones that are incompatible with mining has been articulated through regulation.

In addition, the Québec mining industry is closely monitoring the above-mentioned proposed changes to the province's *Mining Tax Act* tabled by the Québec government in May 2013. The new regime would be effective as of Jan. 1, 2014. Due to the fact that Québec currently has a minority government and that there are rumours of a 2014 election, however, it is not certain whether the changes to the regime will be adopted by the government.

Last year (2013) represented another down year for mining investment in Québec and much of the world. Regardless of the changes brought on by the amendments to the *Mining Act*, economic projections for the Québec mining industry for 2014 have not been overly positive either. It remains to be seen whether the impending regulatory developments will help or hinder mining development in Québec.

Case Law Summaries

Royalties

SASKATCHEWAN (ENERGY AND RESOURCES) V. AREVA RESOURCES CANADA INC., 2013 SKCA 79

This decision of the Saskatchewan Court of Appeal (SKCA) clarifies that a court will only intervene to overturn a determination by the Ministry of Energy and Resources (Ministry) with respect to royalty calculations under *The Crown Minerals Act*, S.S. 1984-85-86, c C-50.2 (Act) where such a determination is unreasonable.

Areva Resources Canada Inc. (Areva) mined uranium in Saskatchewan. Under the Act, Areva was required to pay annual royalties to the Crown, calculated as a percentage of the fair market value of Areva's gross uranium sales in that year. For arm's-length transactions, the fair market value was the actual sale price. For non-arm's-length transactions, the fair market value was deemed to be the average sale price of all arm's-length sales in that year.

The issue in this case was the manner in which the Ministry had calculated the average sale price of the arm's-length transactions, which Areva sought to have judicially reviewed. The judge in the court below provided an example of the difference between the Ministry's calculation methodology and that proposed by Areva:

> …The parties' approaches can be illustrated using an example in which a producer, in a given year, has arm's-length sales of uranium under three contracts as follows:
>
> - Contract 1 is for the sale of 1,000 pounds of uranium at $50 per pound.
> - Contract 2 is for the sale of 2,000 pounds of uranium at $40 per pound.
> - Contract 3 is for the sale of 3,000 pounds of uranium at $60 per pound.
>
> Areva calculates the average sale price by adding $50, $40 and $60 and dividing by 3 ($150/3 = $50). Areva says that the result, $50 per pound, is the average sale price of all arm's-length sales - the average of the three contract sale prices.
>
> The Ministry calculates the average sale price by first determining the total revenue for the uranium sold ($50,000 + $80,000 + $180,000 = $310,000). The Ministry then divides that total by the number of pounds sold ($310,000/6,000 = $53.33). The Ministry says that the

result, $53.33 per pound, is the average sale price of all arm's-length sales.[1]

The SKCA first reviewed the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*,[2] to determine whether a "correctness" or "reasonableness" standard of review applied. Of particular significance to a majority of the SKCA in selecting a standard of reasonableness was the fact that the Act explicitly denied a right of appeal from the Ministry's determination.

The SKCA went on to find that the Ministry's calculation methodology was a reasonable interpretation of the complex royalty scheme that fell within the acceptable range of possibilities.

ANGLO PACIFIC GROUP PLC V. ERNST & YOUNG INC., 2013 QCCA 1323

In this case, the Québec Court of Appeal considered the nature of a net smelter return (NSR) royalty granted by the holder of mining claims to a lender and the legal publicity regime applicable to such a royalty. It provides a reminder of the complexity of creating enforceable NSR royalties in Québec and underscores that particular attention that needs to be paid in drafting NSR royalties relating to Québec properties if the parties intend the royalty to constitute an ownership or property right. For more discussion, see "Recent Developments in Québec Mining Royalties" on page 47.

1. 2012 SKQB 205, paras. 4-6.
2. 2008 SCC 9

Recent Developments in Québec Mining Royalties

In Québec, as elsewhere in Canada, mining royalties are often granted, along with cash and/or share consideration, to sellers in property option transactions. Mining royalties are payments made to the holder by the owner of a mineral project. The most common types of mining royalties are the net smelter return (NSR) royalty — which is based on proceeds of production from a mineral project less smelting, refining and transportation fees paid by a smelter or refiner to the owner — and the net profit interest (NPI) or net proceeds (NPR) royalty, which are both based on profits after deducting costs relating to production.

Until recently, the established view in Québec had been that a mining royalty did not create an ownership or property right, but rather a personal right. This is an important distinction because a royalty holder with a personal right only has a recourse against the grantor of the royalty. As a personal right, the royalty could effectively be worthless if the underlying mining claim is transferred to a third party and such new holder of the claim did not contractually assume the obligations of the grantor under the royalty agreement or if the grantor becomes insolvent. In order to protect against these risks, the best practice that has evolved in Québec has been to secure the obligations under the royalty agreement with a hypothec and to include in it restrictive covenants with respect to transfers to third parties and registration.

In a notable recent development, however, the Québec Court of Appeal held in *Anglo Pacific Group PLC* v. *Ernst & Young Inc.* ("*Anglo Pacific*") that it was possible for the holder of a mining claim to grant a property right, not only in the mining claim itself, but also in the minerals underlying the claim that the holder becomes entitled to extract upon the issuance of a mining lease with respect to the claim. In other words, it is possible for the holder of a Québec mining claim to grant a royalty in minerals that is a property right, though the right would be subject to the issuance of a mining lease and would only become effective or "attach" to the minerals at the earliest when the mining lease is issued and, more likely, when the minerals have been extracted.

Property Rights or Personal Rights?

All things being equal, a royalty holder would prefer to have a royalty that gives rise to a property right rather than a personal right largely because the right is enforceable directly against the property, it is not affected by any subsequent security granted by the owner to third parties (including its lenders) and it is not subject to loss if the underlying mining claim is transferred to a third party or if the grantor becomes insolvent.

One of the main practical difficulties with trying to create royalties contemplated by *Anglo-Pacific* that constitute property rights may be that the royalty holder must be granted a direct right in one or more of the ownership attributes of the property (the right to use, enjoy the products from or dispose of the property) and these rights must be capable of being exercised directly over the property. While this is clear enough in principle, in practice royalty agreements are rarely drafted with a view to providing a royalty holder with property rights that are this broad. There is also the question of whether the grant of property rights may require the holder to assume certain obligations or liabilities of an owner, such as environmental liabilities, which would evidently be problematic from the royalty holders' perspective.

Unfortunately, while *Anglo Pacific* establishes that it is theoretically possible to create a royalty that gives rise to property rights, the decision contains very little information as to how this should be done in practice. Accordingly, one of the biggest challenges in drafting a royalty that creates property rights may be that, although it will likely be more complicated and costly than a typical royalty agreement, there is no certainty the parties will have "met the threshold" of creating a property right unless it is contested and a court ultimately makes that determination.

The main advantage of drafting royalty agreements to create personal rights is that it provides a predictable level of comfort with respect to enforceability. The disadvantage is that the royalty holder is always dependent on the agreement with the owner to enforce its rights. If the covenants in the agreement are breached, the royalty holder may not be made whole and even the hypothec securing the obligations may not provide protection if other secured debt has a preferential ranking. In theory, a royalty holder with leverage may be able to negotiate with the owner to ensure that its hypothec is not subordinated to the hypothec(s) securing project financing though, in practice, this is rarely an option.

Drafting Québec Royalty Agreements

Surprisingly, even though it has long been generally accepted that mining royalties in Québec create personal rights, many people incorrectly assume that royalty agreements create real rights and fail to request the necessary contractual protections (such as obtaining from the grantor of the royalty a hypothec to secure those rights). While there are a number of important

provisions to consider from a royalty holder's perspective in drafting a good agreement, the inclusion of the following are particularly important:

- defining the property with respect to which the royalty is payable as encompassing the mining claims and any mining lease issued pursuant to those claims;
- a clause requiring the royalty holder's consent to a transfer of the underlying claims or mining lease or a novation clause that makes the transfer conditional on the assumption by the purchaser of all royalty obligations;
- a clause requiring registration of the royalty agreement at the Public Register of Real and Immovable Mining Rights available through GESTIM and the hypothec on the RPMRR and, once a mining lease is granted, the Land Registry; and
- a clause requiring notice to the royalty holder of any third-party transfer or the issuance of a mining lease.

ALL THINGS BEING EQUAL, A ROYALTY GIVING RISE TO A PROPERTY RIGHT IS PREFERABLE.

It is also important from the perspective of a royalty holder in this context to obtain a hypothec from the owner to secure the obligations under the royalty agreement. Hypothecs entered into to secure royalty rights should, amongst other things:

- not only charge the claims in question but also the universality of all present and future immovable assets and mineral rights (such as a mining lease) relating to the mining claims in question (which will avoid having to obtain a new hypothec from the owner once a mining lease is issued, for example);
- charge the universality of all present and future movable assets relating to the charged immovable and mineral assets; and
- include a covenant on the grantor's part to advise the royalty holder in writing of any newly acquired immovable or mineral assets in order for the royalty holder to assure that its hypothec is perfected against such assets.

The decision in *Anglo-Pacific* means that there are now more possibilities than ever in drafting Québec royalty agreements. Regardless of which road parties choose to go down, it is important that agreements be drafted correctly and take into account the peculiarities of Québec's civil law, in order for the parties to obtain the benefits of their bargains.

*This article is a condensed version of an article on Québec contractual royalties that was originally published in Le Point: Natural Resources magazine (Volume 2: Number 1).

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