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ENVIRONMENTAL CONTROLS AFFECTING EXPLORATION  
AND DEVELOPMENT OF MINERAL RESOURCES IN THE YUKON

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I. INTRODUCTION

Because most of the land and resources in the Yukon Territory have not been transferred from Federal ownership to the Territorial Government, the majority of the environmental controls that affect Yukon mining come under statutes, regulations, and guidelines enacted by the Federal Government.

The purpose of this paper is to provide an overview of environmental laws that control the exploration and development of mineral resources in the Yukon Territory.

II. DIVISION OF CONSTITUTIONAL JURISDICTION IN THE YUKON OVER ENVIRONMENTAL CONTROL

Unlike the Provinces, which are the owners of most Crown rights to land and other natural resources within their boundaries by virtue of the Constitution Act, 1982 (Canada Act, 1982 c. 11 (U.K.) Schedule B) and other enactments relating to the Western Provinces,<sup>1</sup> almost all of the Yukon Territory remains under the ownership and control of Her Majesty the Queen in Right of Canada. The Federal Crown has, with respect to the northern territories and its territorial waters, the same proprietary rights that the provinces enjoy within their boundaries.<sup>2</sup>

Federal control extends to the ownership of mines and minerals contained on or under Federal Crown lands. There is no territorial ownership of mines and minerals in territorial lands. This distinction is important when one compares the situation of the Yukon to that of the provinces.

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<sup>1</sup>Gibson, Dale, "Constitutional Jurisdiction Over Environmental Management in Canada" Vol. 23 University of Toronto Law Journal p. 54

<sup>2</sup>Gibson, *ibid* p. 55

In 1898, the Yukon Territory was created out of the Northwest Territories by the passage of the Yukon Act, R.S.C. 1985 c. Y-2 as amended. The Yukon Act, to all extents and purposes, is identical to the Northwest Territories Act, R.S.C. 1985 c. N-27, as amended. As the Constitution Act regulates the division of powers between the provinces and the Federal Government, so does the Yukon Act set out the powers of the Territorial legislature.<sup>3</sup>

Among the powers relevant to environmental control given to the Territorial legislature under Section 17 of the Yukon Act are the powers over:

- (a) property and civil rights in the Territory;
- (b) the issuing of licenses or permits to scientists or explorers;
- (c) preservation of game in the territory;
- (d) agriculture;
- (e) all matters of a merely local or private nature in the territory.

The Federal Cabinet may also make regulations under the Yukon Act for the protection, care, and preservation of sites, works, objects, and specimens of archaeological, ethnological, or historical importance, or of interest or significance, and explorers' cairns and explorers' documents.

The power to protect cultural sites is currently being transferred to the Yukon Government, Heritage Branch.

The Federal control limiting the power of the Territorial legislature is set out in a number of statutes, amongst which is the

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<sup>3</sup>For a more detailed review of the Constitutional Status of the Yukon, see Bruce L. Willis, Q.C. "The Crown Grant of the Fiat to Sue: Does Her Majesty the Queen in Right of Yukon Exist" Yukon Law Society, Constitutional Law Conference, Whitehorse, January 1989 (unpublished paper)

Department of Indian Affairs and Northern Development Act, R.S.C. 1985 c. I-6, as amended which states at Section 4:

"The powers, duties and functions of the Minister of Indian Affairs and Northern Development extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other Department, board, or agency of the Government of Canada relating to....(b) the Yukon Territory and the Northwest Territories and their resources and affairs."

Section 5 states:

"The Minister shall be responsible for:

- (a) coordinating the activities in the Yukon Territory and the Northwest Territories of the several departments, boards, and agencies of the Government of Canada; and
- (b) undertaking, promoting and recommending policies and programs for the further economic political development of the Yukon Territory and the Northwest Territories."

Unlike a provincial legislature, the Yukon legislature is required, when passing legislation, that the legislation be subject to the Yukon Act and any other Act of parliament. No such statutory limitation exists with respect to provinces. Provincial legislatures have exclusive authority to enact legislation in areas granted to them under Section 92 of the Constitution Act. Furthermore, any statute passed by the Yukon legislature may be disallowed by the Governor in Council and must be tabled before both Houses of Parliament. No such requirement exists with respect to provinces although there exists certain powers of the Federal Crown to disallow provincial legislation.

Section 32(1)(a) of the Charter of Rights and Freedoms states that the Charter applies to the Parliament and Government of Canada with respect to all matters within the authority of Parliament, including all matters relating to the Yukon Territory and the Northwest Territories.

Section 32(1)(b) states that the Charter applies to the legislature and Government of each province with respect to all matters within the authority of the legislature of each province.

Why did the drafters of the Charter not separate the Yukon Territory and Northwest Territories from the authority of Parliament and consider the Territories as similar to the provinces? It would appear that the consensus of the drafters of the Charter was that the authority of Parliament includes jurisdiction over the Yukon Territory.

To date, the Government of Canada has only transferred a small percentage of land to the administrative control of the territorial government: approximately one percent. Environmental jurisdiction over the majority of the Yukon continues to remain with the Government of Canada by its control water and Federal Crown land, which constitute almost all of the Yukon Territory. As more Federal Crown land is transferred to the Yukon Government, the Yukon Government will take over environmental responsibility in this area. To date, the Yukon Government has enacted some environmental legislation. A new Environment Protection Act is currently being drafted.

### III. THE YUKON PLACER MINING ACT R.S.C. 1985 C. Y-3, AS AMENDED

The most important statutes governing mining in the Yukon are the Yukon Placer Mining Act R.S.C. 1985 c. Y-3, as amended, and the Yukon Quartz Mining Act R.S.C. 1985 c. Y-4, as amended.<sup>4</sup>

The Yukon Placer Mining Act defines "mining" or "placer mining" to include every mode and method of working whatever whereby earth, soil, gravel, or cement may be removed, washed, shifted, or refined, or otherwise dealt with for the purpose of obtaining gold or other precious minerals or stones that does not include the working of rock on the site. "Mine" is

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<sup>4</sup>For a review of Yukon Mining, see Bruce L. Willis, Q.C. "Yukon Mining" in Mining Law: Selected Topics, The Continuing Legal Education Society, Vancouver, April 1989

defined to mean any natural stratum or bed of earth, soil, gravel, or cement that is mined for gold or other precious minerals or stones.

Section 17(2) of the Yukon Placer Mining Act excludes staking claims on the following lands:

- (a) lands under the application of the National Parks Act, R.S.C. 1985 c. N-14, as amended;
- (b) lands used as a cemetery or burial ground;
- (c) lands lawfully occupied for placer mining purposes;
- (d) lands appropriated by the Federal Government under the Territorial Lands Act, R.S.C. 1985 c. T-7, as amended;
- (e) land within the boundaries of a city, town, or village.

A person who receives a grant of a claim or the permission to record a claim under the Act within a period not exceeding 6 months has the right:

- (a) to fish and shoot for his own use, subject to the provisions of any law for the protection of fish and game;
- (b) to cut timber, not otherwise acquired, for his own use and for any purpose incidental and necessary to the operation of his claim;
- (c) to exclusively enter on his claim for the mining-like working thereof, and the construction of a residence thereon.

Section 69 of the Yukon Placer Mining Act states that Sections 53 through to 68 of the Act, which deal with water control and management, cease to have any effect within a water management area established by Cabinet pursuant to the Northern Inland Waters Act, R.S.C. 1985 c. N-25, as amended.

For that reason, sections 53 through to 68 of the Yukon Placer Mining Act no longer apply since water management areas have been established for the Yukon. There are provisions in sections 70 through to 73 for the mining recorder to grant permission to run a drain or tunnel for drainage purposes on occupied or unoccupied land. The procedure for the application for a drain or tunnel is set out at Section 73 of the Yukon Placer Mining Act.

IV. THE YUKON QUARTZ MINING ACT, R.S.C. 1985 C. Y-4, AS AMENDED

"Minerals" is given a very broad definition in this Act and includes all deposits of gold, silver, platinum, iridium or any of the platinum group of metals, mercury, lead, copper, iron, tin, zinc, nickel, aluminum, antimony, arsenic, barium, bismuth, boron, bromide, cadmium, chromium, cobalt, iodine, magnesium, molybdenum, manganese, phosphorus, plumbago, potassium, sodium, strontium, sulphur or any combination of those elements with themselves or with other elements, quartz, metallic oxides and silicates, and the ores of radium, tungsten, titanium and zirconium, asbestos, emery, mica, mineral pigments, corundum and diamonds, but does not include limestone, marble, clay, gypsum or any building stone when mined for building purposes, earth, ash, marl, gravel, sand, or any element that may, in the opinion of the Minister, form a portion of the agricultural surface of the land. "Mining property" includes every mineral claim, ditch, mill-site, or water right used for mining purposes and all things belonging to a mine or used in the workings of a mine.

Anyone eighteen years of over may enter, locate, prospect, and mine for minerals as defined on any vacant territorial land in the territory and any lands in the territory in respect of which the right to enter, prospect, and mine for minerals is reserved to the Federal Crown. Among the restrictions on Federal Crown land available for mineral development and exploration, is any land valuable for water power purposes. In addition, the Government of Canada may reserve land to be exempt from mineral exploration and development.

An owner of a mineral claim must give notice to the mining recorder of the owner's intention to abandon or relinquish a mining claim. The Yukon Quartz Mining Act does not make it mandatory that an owner who relinquishes a claim or abandons it must take all machinery and all personal property placed on the claim. It merely gives the owners the right to take from the claim their machinery and personal property.

The Yukon Quartz Mining Act not only gives the owner of the claim the right to explore and develop minerals on the claims, but also the right to remove all minerals found on the claims. The right to enter on and use and occupy a mining claim is limited to such extent as the Minister of Indian Affairs and Northern Development considers necessary for the efficient and mining-like operation of the claims. A holder of mineral claims also has the right to cut timber on the claims as may be necessary for the working of the claim.

A lease of a mineral claim reserves to the Crown such rights or rights-of-way and of entry as may be required under any law or regulation in force on or after July 19, 1924 in connection with the construction, maintenance, and use of works for the conveyance of water for mining operations.

Inspectors have the right to enter on claims for the purpose of inspection and obtaining information respecting the amount and value of the output of the mine. The Act permits the grant for a mill-site of a lease of a tract of available unoccupied and unreserved Crown land not known to contain mineral of commercial value and not exceeding five acres in area. The Act specifically restricts the use of a mill site where the lands are valued for water purpose except by authority of the Governor-In-Council.

The holder of a claim may, at the discretion of a Mining Recorder, obtain permission to run a drain or tunnel for drainage or any other purpose connected with the development or working of the claim or mine. Security will be required by the Mining Recorder for any possible damage that may be done as a result of the drainage.

Since water management areas have been established in the Yukon, Section 126 of the Yukon Quartz Mining Act, dealing with water rights, no longer applies.

V. TERRITORIAL LANDS ACT, R.S.C. 1985 C. T-7, AS AMENDED

The purpose of the Territorial Lands Act is to control the use of Federal Crown lands in the Yukon Territory and the Northwest Territories. Subsection 3(3) states that nothing in the Territorial Lands Act shall be construed as limiting the operations of the Yukon Quartz Mining Act, the Yukon Placer Mining Act, the Dominion Water Power Act, R.S.C. 1985 c. W-4, as amended or the National Parks Act. Section 4 of the Territorial Lands Act permits the Federal Government to set apart and appropriate any territorial lands as a land management zone where it is deemed necessary for the protection of the ecological balance or physical characteristics of any area. The Act defines territorial lands to mean lands in the Yukon Territory that are vested in the Crown or of which the Government of Canada has power to dispose.

The Government can also make regulations respecting:

- (a) the protection, control, and use of the surface of land; and
- (b) the issuance of permits for the use of the surface of the land in a land management zone including setting out the terms and conditions of the permits, and the fees that will apply.

The Territorial Lands Act establishes certain offences for contravention of regulations respecting land management zones or failure to comply with the terms or conditions of a permit issued under the Act. One of the purposes of the Territorial Lands Act is to reserve to the Federal Crown the mineral rights and the rights of fisheries in connection with, or

adjacent to lands that are transferred to the Territorial Government.

The Federal Government may make regulations with respect to timber cutting, quarries, land use, coal mining, and dredging.

Section 23 of the Territorial Lands Act describes the powers of the Governor in Council under the Territorial Lands Act, including the power to make further regulations respecting the protection, control and use of the surface of territorial land, and to make such orders and regulations as are deemed necessary to carry out the purposes and provisions of the Act.

VI.

THE NORTHERN INLAND WATERS ACT,  
R.S.C. 1986 C. N-25, AS AMENDED ("N.I.W.A.")

N.I.W.A. applies to the Yukon and Northwest Territories. The Act establishes two administrative tribunals, the Yukon Territory Water Board ("the Board"), and the Northwest Territories Water Board. The appointments to the Board are by the Minister of Indian Affairs and Northern Development.

Section 4 of N.I.W.A. states that subject to any rights, powers, or privileges granted pursuant to the Dominion Water Power Act, the property in and the right to the use and flow of all waters are for all purposes vested in Her Majesty in Right of Canada. Except as authorized pursuant to the Dominion Water Power Act, no person shall alter or divert the flow or storage of waters within a water management area or otherwise use waters within any such area except pursuant to a license issued by the Board.

N.I.W.A. does not apply to the use of any waters for domestic use by a person owning or occupying land adjacent to the waters, for the purpose of extinguishing a fire, or, on an emergency basis, controlling or preventing a flood so long as such use does not exceed the maximum amount specified. Any diversion of waters from a water course, whether the water course is seasonal or otherwise, or obstruction of any such water course shall be deemed to constitute a use of waters.

N.I.W.A. defines waters to mean waters in any river, stream, lake, or other body of inland water, on the surface or underground, in the Yukon Territory and the Northwest Territories. Section 7 of N.I.W.A., states that, except in accordance with the conditions of a license or as authorized by the regulations, no person shall deposit or permit the deposit of waste of any type in any waters or in any place under any conditions where the waste or any other waste that results from the deposit of the waste may enter the waters. Waste is defined as:

- (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to its use by man or by any animal, fish or plant that is useful to man; and
- (b) any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a).

The Board may issue licenses for the use of waters. Licenses approved by the Board are subject to the approval of the Minister of Indian Affairs and Northern Development. The term of a license cannot exceed 25 years and requires the payment of water use fees. A water use license is subject to the conditions imposed by the Board.

The Board cannot issue a license until the Board is satisfied that:

- (a) the proposed use of waters by the applicant will not adversely affect the use of waters, within the water management area, for someone already entitled to use those waters by another licensee, and that appropriate

compensation will be paid to the other licensee;

- (b) the financial responsibility of the applicant for a license is adequate for the undertaking for the proposed use of the waters.

The Board, in imposing license conditions for the use of waters that form a part of a water quality management area designated pursuant to the Canada Water Act, R.S.C. 1985 c. C-11, as amended, cannot vary from the standards and restrictions passed under the Canada Water Act and its regulations.

The Board also cannot include license conditions concerning waste that vary the restrictions on the deposit of deleterious substances prescribed under the Fisheries Act, R.S.C. 1985 c. F-14, as amended, except by the authorization of the Minister of Fisheries and Oceans under the Yukon Fisheries Protection Authorization.<sup>5</sup>

Subject to the restrictions on the Board to not permit conditions in water use licenses that conflict with the waste discharge conditions under the Canada Water Act or the Fisheries Act other than those permitted by Ministerial Authorization under the Yukon Fisheries Protection Authorization, the Board may impose conditions on the licenses that it considers appropriate, including conditions relating to the manner of the use of waters, and conditions based on water quality standards prescribed pursuant to N.I.W.A. and the regulations passed under N.I.W.A.

Section 13 of N.I.W.A. requires an applicant for a water use license to provide the Board with such information and studies concerning the use of waters proposed in order for the Board to evaluate the effects of the proposed use on the water management area.

The Board may also require an applicant to furnish security in a

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<sup>5</sup>Discussed in the section on Yukon Fisheries Protection Authorization

form and on terms and conditions prescribed by regulations passed under N.I.W.A.

The Board will authorize the assignment of a water use license if the Board is satisfied that the disposition of the water use license will not result in a contravention of N.I.W.A. and its regulations.

Certain offences and penalties for contraventions of the Act and Regulations are described at Section 35 of N.I.W.A. The regulations passed under N.I.W.A. set out the water management areas by boundary definition. Section 16 of the regulations permits the deposit of waste by person using water for domestic purposes if the waste is of a type and in a quantity and is deposited under conditions authorized by or under the Public Health Act R.S.Y. 1986 c. 136, as amended.

VII.

CASES UNDER THE NORTHERN INLAND WATERS ACT,  
R.S.C. 1986 C. N-25, AS AMENDED ("N.I.W.A.")

R v. Canadian Industries Limited<sup>6</sup>

Between 9:15 and 9:30 in the morning of August 26, 1976, 2,400 gallons of copper sulfate solution spilled from the accused's plant into Rose Creek. The spill was caused by an improper hose connection that caused a tanker truck to fill up and overflow. The overflow drained into a sump, and instead of filling up the sump flowed through a drain line leading out of the sump into the creek, as a valve on the drain line was corroded into the open position. The accused notified the appropriate government authorities by 11:00 a.m. that morning and a sample was taken 5 miles downstream showing a concentration of 15 milligrams of copper sulfate per litre of water. The accused's operating licence issued pursuant to N.I.W.A. allowed for a maximum of 0.2 milligrams per litre before the effluent was released into the stream. Thus the actual concentration in the stream would be normally much lower than

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<sup>6</sup>R v. Canadian Industries Limited (1977) 8 C.E.L.R. 121 (Y.T. Magistrate's Court)

0.2 milligrams per litre. A test showed that 50% of the fish exposed to the 15 milligrams per litre solution died within 48 minutes and all died within 2 hours.

Magistrate Pearce ruled that the accused was negligent for allowing the initial error that resulted in the spillage into the sump, for failing to inspect the sump and ensure that it was in a operable condition, and for failing to supervise the pumping of the overflow to ensure that it was safely dealt with. With respect to mitigating factors, the Magistrate held that the accused was inescapably caught by the provisions of N.I.W.A. and that a guilty plea could not be a mitigating factor. However, since the accused reported quickly to government officials and was "extremely cooperative" in assisting them, these factors were taken into account and the Magistrate stated:

"It is heartening to see a company such as Canadian Industries acting in such a responsible fashion and in my view any penalty that the Court imposes should not be so as to deter other companies from responding in like manner." (p. 124).

Accordingly, the Magistrate adopted the reasoning of Mr. Justice Morrow in Canadian Tungsten Mining Corporation Limited v The Queen<sup>7</sup> in which Mr. Justice Morrow, on appeal, imposed a fine of \$1,000.00 for each count. Mr. Justice Morrow reduced the fines levied by the Magistrate on the basis that, although it was necessary to impose a penalty that was not so small "as to invite breaches as to make it worthwhile to gamble on not being detected" (p. 11), the accused had acted responsibly and with alacrity from the first moment of discovery.

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<sup>7</sup>Canadian Tungsten Mining Corporation Limited v. The Queen (unreported N.W.T.S.C. decision dated March 6, 1976)

R v. Goldmark Minerals<sup>8</sup>

The accused was charged with two counts of altering the flow of water contrary to subsection 3(2) of N.I.W.A. With respect to the first count, the accused was found guilty of allowing overburden stripped off the underlying gravel to slide into a creek, thereby altering the flow of the creek for approximately 200 feet. The Magistrate found subsection 3(2) to be a strict liability section and that the accused in piling the stripped overburden on the banks of the creek essentially took a chance "although it was a calculated risk that the flow of the water would not be altered, and they made a mistake."

With respect to the second count, which involved a movement of a tractor through a stream bed for some distance and the alteration of the stream's bank in order to facilitate the movement of the tractor, the accused was found not guilty. Magistrate Kimmerly found that although the flow of water through the stream bed was altered, it was not altered in any significant way and therefore did not come within the meaning of subsection 3(2) of N.I.W.A.

The current wording of subsection 4(2) of N.I.W.A., which is identical in wording to subsection 3(2) of N.I.W.A. in force at the time of Magistrate Kimmerly's judgment, does not refer to significant or insignificant alterations of the water. Similarly, nowhere else in the Act is there any reference to the degree of alteration necessary to constitute a contravention of subsection 4(2). It can be argued that the judgment of Magistrate Kimmerly is not a correct reading of N.I.W.A. N.I.W.A. is structured so as to provide a blanket provision in subsection 4(2) and for exceptions to be made by regulation pursuant to paragraph 29(g). As no such regulations have been made, the judgment of Magistrate Kimmerly is not to be relied upon.

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<sup>8</sup>R v. Goldmark Minerals (unreported decision of Magistrate Roger S. Kimmerly of the Magistrate's Court of the Yukon Territory dated October 13, 1978)

" THE DECISION WAS NOT A RESULT OF NEGLIGENCE, RATHER IT WAS AN ACT OF GOD - (HIMSELF?) THEN WHAT.

- 17 - NATURAL DISASTERS ARE NOT PROSECUTABLE; - ONLY WITFULLY OR NEGLIGENTLY CREATED ACTS FALL TO PROSECUTABLE CATEGORY.

Regina v. United Keno Hill Mines Limited<sup>9</sup>

The Defendant pleaded guilty to a charge under then subsection 6(1) of N.I.W.A. (now subsection 7(1)) with respect to the discharge of waste with a higher level of concentration of contaminants than allowed under the terms of its licence. The accused had spent \$370,000.00 and diverted key personnel in an attempt to remedy the problem. The only issue before the Court was the appropriate sentence to be imposed. In a very wide ranging decision, Judge Stuart considered the nature of pollution offences and special considerations to be taken into account in sentencing corporations.

Commenting "that the majority of pollution offences are negotiated, not prosecuted" (p. 46) Judge Stuart held that "pollution is a crime...each offence must be sentenced in accordance with its specific facts - but pollution offences must be approached as crimes, not as morally blameless technical breaches of a regulatory standard." (p. 46-47). Two specific considerations to be taken into account are the nature of the environment and the extent of the injury suffered by the environment. The Crown should therefore place before the Court "any evidence touching upon the special nature of the environment affected, the degree of damage inflicted, the consequential or peripheral adverse impacts, the prospects and costs of repairing the damage, the duration of the damage and the potential damage that might have been caused by the actions if the offenders had been allowed to continue." (p. 47). In the case before him, Judge Stuart noted that the Crown had not done so and therefore the uncontradicted evidence of the accused indicating minimal environmental damage ought to be considered and that a substantial penalty would therefore be inappropriate.

The Judge then went on to consider the special circumstances in which a large corporation is being sentenced and prefaced his remarks with the following:

"the size, wealth, nature of operations and power of a corporation necessitate a

<sup>9</sup>Regina v. United Keno Hill Mines Limited (1980) 10 C.E.L.R. 43 (Y.T.C.)

special approach in sentencing. The activities of one corporation can reach into the lives of people and communities in many parts of the world. The scope of corporate activities has a multiplier effect on the extent and severity of risk potential flowing from corporate action." (p. 48)

The specific considerations identified by Judge Stuart were the criminality of conduct, the extent of attempts by the accused to comply, any remorse shown by the corporation, the size of the corporation, any profits realized by the offence, and the criminal record of the accused corporation. <sup>a</sup>

Judge Stuart surveyed the sentencing tools available to him and decided that "fines alone will not mould law abiding corporate behaviour" (p. 52) and that they are inadequate mainly on the grounds that they do not affect the true source of the illegal behaviour:

"Sentencing, to be effective, must reach the guiding mind - the corporate manager: be they directors or supervisors. They are the instigators of the illegality either through willfulness, willful [sic] blindness, or incompetent supervisory practices." (p. 52)

"Society is abruptly learning of the potentially dire consequences of some environmental regulatory violations. The authors of such environmental catastrophes, if criminally responsible, should be prosecuted with the full force of the law. A corporate veil should never afford the slightest measure of special protection for anyone for criminal conduct...this practice can only engender a public perception of bias and unjustifiable discrimination." (p. 54) <sup>2.</sup>

N.I.W.A. does not provide for individual liability on the part of directors or officers of the corporation except where they are found directly or indirectly responsible for a breach of N.I.W.A. or its regulations. Judge Stuart could therefore not impose a fine upon the directors or officers of United Keno Mines in the case before him. The resulting penalty was a fine

of \$1,500.00 against the corporate defendant. The following factors were taken into account:

1. the previous criminal record bore little relevance to the present sentencing as the prior violation was dissimilar to that before him.
2. the corporation was a major national corporation with substantial assets.
3. - there was no evidence of illegal gain.
4. there was no evidence adduced by the Crown with respect to the damage to the environment.
5. the corporation was cooperative throughout its dealings with government officials in attempting to remedy the situation and pursued every reasonable government recommendation, spending a great deal of money and time in doing so.
6. corporate officials appeared at Court demonstrating contrition and good faith.
7. no supervisory order was requested by the Crown pursuant to section 34 (now 35) of the N.I.W.A.

In summary, Judge Stuart held that the Crown could not request the Court to impose a substantial penalty based merely on the simple fact of a violation. It is incumbent upon the Crown to adduce sufficient evidence with respect to the factors outlined by Judge Stuart as considerations to be taken into account on sentencing.

A reading of the decision shows a growing frustration with current sentencing tools as a means of deterring corporate risk-taking, in which the cost of doing business includes a calculation for potential fines of such a nominal nature that they can only be considered slaps on the wrist to a substantial corporation. This thesis has its initial development in judgments of Mr. Justice Morrow in Regina v Keneston Drilling (Arctic) Ltd.<sup>10</sup>

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<sup>10</sup>Regina v. Keneston Drilling (Arctic) Ltd. (1973) 12 C.C.C. (2d) (383) N.B.S.C.

and R v. Canada Tungsten Mining Corporation.<sup>11</sup>

The proposed amendments to N.I.W.A. seek to address some of these concerns, most notably with respect to imposing liability upon the directors and officers of the corporation.

*BUT NOT THE CORRECT WAY.*

VIII. THE YUKON TERRITORY WATER BOARD

The powers and duties of the Board have been discussed previously in the section on N.I.W.A. Under Section 12 of N.I.W.A., the Board may include in conditions it considers appropriate for a water use license a requirement that an applicant for a water use license file an abandonment plan including the method of financing the abandonment plan. This jurisdiction to require an abandonment plan is not free from doubt.

The Board may require a public hearing in connection with any matter relating to its objects. Its objects are to provide for the conservation, development, and utilization of the water resources of the Yukon Territory in a manner that will provide the optimum benefit for all Canadians and residents of the Yukon Territory where the Board is satisfied that such a hearing would be in the public interest. The Board must hold a public hearing:

- (a) in connection with each application for a license or renewal of a license;
- (b) in connection with each application pursuant to Section 27 of N.I.W.A. for permission to enter on, use, occupy, take, and acquire any lands or any interest therein; and
- (c) where it considers an amendment or cancellation of a license.

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<sup>11</sup>R v. Canada Tungsten, *ibid* (unreported)

The public hearing does not have to be held where (a) the application is merely for a license, renewal of a license, amendment, or cancellation of a license; and (b) the applicant consents in writing to the disposition of the matter without a public hearing; and (c) notice of a public hearing in connection with the matter has been published pursuant to N.I.W.A.; and (d) the Board receives no notice within 10 days prior to the date of the proposed hearing that any person intends to appear and make representations in connection with the matter.

N.I.W.A. also permits the Board to amend a license with the consent of the Minister of Indian Affairs and Northern Development where the amendment is required on an emergency basis.

Where the Board holds a public hearing, the Board is required to:

- (a) complete the hearing not later than 60 days after the day on which the hearing commenced; and
- (b) render a decision not later than 45 days after the day on which the hearing was completed.

There is a right of appeal from a Board decision to the Federal Court of Canada on either a question of law or a question of jurisdiction. To do so, leave must be obtained within 30 days from the decision of the Order sought to be appealed from, or within such other time as the Federal Court permits under special circumstances.

Pursuant to N.I.W.A., the Board has enacted its own Rules of Procedure. Under the Rules a person who wishes to make representations in connection with the matter to be considered at a public hearing shall file with the Board, as soon as possible but not later than 10 days before the date fixed for the hearing:

- (a) a signed notice of the person's intent to intervene setting out the person's interest in the matter, a clear statement

of that person's position, and whether or not the person intends to appear and make representation;

- (b) a copy of any authorization appointing a representative to act on the person's behalf; and
- (c) a list of such information and supporting documents that may be useful in explaining the person's representation.

An intervener, after filing a notice of intent to intervene with the Board, must deliver a copy of the notice to the applicant or the licensee.

The Rules permit an intervenor at a public hearing to appear and make representations, notwithstanding that the intervenor's notice to intervene stated an intention not to appear and make representations. The Rules establish a policy for confidential information, and the right of a party for production of documents. The Board may hold a pre-hearing conference. At the hearings, the order of appearance of participants, unless otherwise determined by the Chair, will be the applicant, intervenors, any other persons, and the applicant in reply.

The Board, in hearing applications for licenses, performs a quasi-judicial function. The Federal Court held in Yukon Conservation Society et al., "it is quite evident, and also fully conceded by all parties, that the Board, in hearing applications for a license, is performing a quasi-judicial function and must govern itself accordingly. Each adjudicator thus has a duty to not only decide matters before the Board without bias, but also to avoid being involved in situations which might create a substantial possibility or a real likelihood of bias, or even a reasonable apprehension of bias on the part of the parties involved with the public generally".<sup>12</sup>

Over the years, the Board has provided written decisions and

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<sup>12</sup>Federal Court of Canada unreported decision January 27, 1982, The Yukon Conservation Society and The Yukon Territory Water Board et al.

rulings, both of which are available at the Board's office in Whitehorse. In the Cypress Anvil decision, October 1985,<sup>13</sup> the Board held that where an applicant sought an amendment to a water license on an emergency basis, there was a legal duty on the Board to consider that application. In the Board's decision on Water Use Conflicts in the Bear Creek and Hunker Creek area,<sup>14</sup> the Board held a public hearing under Section 15(1) of N.I.W.A. in response to requests from the member of the Legislative Assembly for the area and from a group representing the residents of a sub-division. Under the general objects of the Board, the Board felt that it was their mandate to hold a public hearing to allow the local residents to air their concerns regarding their domestic water supply and to provide a public forum for a general exchange of facts and information regarding those concerns. The Board has also ruled on its power under N.I.W.A. to license the "non-use" of waters. The Board held that it did not have jurisdiction to license the "non-use" of waters.

The Board has held that it has no jurisdiction to decide if an Indian Band has aboriginal title to the waters.<sup>15</sup> The Board described itself as a creature of statute having only the express power and authority given to it under N.I.W.A. and such implied power and authority as is deemed to be essential to carry out its express functions.

In a recent decision,<sup>16</sup> the Board dealt with issues surrounding its powers. Two of the issues were:

- (a) did the Board have authority to compel production of the applicant's financial

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<sup>13</sup>Yukon Territory Water Board, Reasons for Decision in the Matter of an Application by Cyprus Anvil Mining Corporation October 1985

<sup>14</sup>Yukon Territory Water Board, Report on Water Use Conflicts in the Bear Creek and Hunker Creek Areas, February 10, 1986

<sup>15</sup>Yukon Territory Water Board, Reasons for Decision in the Matter of a Water Use Application by Canamax Resources Inc. March 1987

<sup>16</sup>Yukon Territory Water Board, Reasons for Decision in the Matter of Water Use Application by Curragh Resources June 1987

statements and cash flow productions; and

- (b) if the Board had such authority, should the applicant be compelled to produce such documents and should they be treated in a confidential manner.

The Board reviewed its powers under N.I.W.A., including the powers given to it by N.I.W.A. to have the powers of Commissioners under the Inquiries Act, R.S.C. 1985 c. I-11, as amended. The powers of Commissioners under the Inquiries Act include the power to summon witnesses and to produce such documents and things as the Board believes necessary for a full investigation. The Board ruled it had the power to enforce the attendance of witnesses and to compel them to give evidence.

IX. PROPOSED AMENDMENTS TO THE NORTHERN INLAND WATERS ACT

1. Purpose of Amendments

The proposed amendments to N.I.W.A. currently under discussion (the "Amendments") are an attempt to bring N.I.W.A. in to line with the current Fisheries Act and the new Canadian Environmental Protection Act, R.S.C. 1988 c. 22, as amended. In addition, a separate Act for the Yukon to be entitled Yukon Territory Inland Waters Act and a separate Act for the Northwest Territories entitled Northwest Territories Inland Waters Act have been proposed. If the split into two separate Acts is accepted, it would be seen as a recognition of the emerging status of both Territories to accept further devolved powers. An acknowledgement of this emergence may be seen in a proposed new section allowing the Minister of Indian Affairs and Northern Development, who is responsible for administering N.I.W.A., to delegate certain powers to his counterpart in the Yukon Government responsible for water resources.

Apart from the creation of two separate Acts, the Amendments address, amongst other things; four areas of specific interest to the resource and environmental community. These are as follows:

- a. recognition of different uses and priorities.
- b. new compensation principles and priority principles.
- c. harsher penalties.
- d. abandonment of undertakings.

A. Recognition of Different Uses and Priorities

The Amendments specifically recognize that they do not apply to "in stream users" (defined as anyone not diverting or restricting waters, altering the flow of waters, or altering the bed or banks of a river stream, lake or other body of water). Furthermore, the Amendments do not apply to "domestic users" (defined as persons using waters for household requirements, the watering of domestic animals, or the irrigation of gardens joining dwelling houses not ordinarily used in the growth of produce for a market). Therefore the existing scope of N.I.W.A. has been refined so it applies only to substantial undertakings that have a substantial impact upon the waters in question.

In addition to the exclusion of domestic and in stream users, the Amendments propose a two-tier licensing system consisting of Type A and Type B licences. The criteria for the different licenses are to be prescribed by regulation. Type A licences are anticipated to be those for substantial undertakings whereas Type B licences are anticipated to be for minor undertakings. The issue of Type A licences is to be by the Water Board with final approval by the Minister, whereas the issue of Type B licences may be done in certain circumstances by a person designated by the Minister.

Public hearings will be held for the issue, renewal, and amendment of a Type A licence (with respect to the use, flow, or quality of waters) and for cancellation upon request by the licensee. Public hearings will also be mandatory for the cancellation of a Type B licence for any reason except for cancellation at the request of the licensee. A public hearing is optional for the issue, renewal, or amendment of a Type B licence, or the amendment of a Type A licence if the amendment does not refer to altering the use, flow, or quality of water provisions of the licence. However, a hearing is not mandatory in any event where the applicant or

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licensee has consented to the Water Board making its decision without a public hearing and, after the required notice has been given to the public, no person or body has notified the Water Board of an intention to appear and make representations.

The two-tier system will therefore streamline the issue, renewal, amendment and cancellation of licences. The Water Board's efforts will be directed mainly toward Type A licences, which by their very nature will be of greater concern to the public and the environment.

B. Priorities and Compensation

Under N.I.W.A., the priorities between licensees is set by regulation. In the absence of such regulations, all water use users and purposes are to be on an equal footing and the policy "first come, first served" applied. The Amendments seek to address this problem by specifically setting out that the first come, first served principle applies where there are no regulations and that, where there are regulations, the priorities specified in the regulations are to apply. The Amendments still allow for priority conditions to be written into the individual licence.

With respect to injury to other licensees, the Amendments contain two separate applications of compensation principles. First, in reviewing an application for a license, the Board must satisfy itself

- (i) if there will be a significant adverse effect upon the use of waters by an existing licensee or a current applicant having priority either by regulation or by the terms of a licence, that a compensation agreement acceptable to the Board has been entered into;
- (ii) if the adverse effect upon existing licensees or applicants will not be significant, that an adequate compensation agreement has been entered into;
- (iii) if there are regulations establishing priorities of use for the area, that

adequate compensation has been or will be paid to:

- a) licensees of lower priority, whether the effects upon them will be adverse or not,
  - b) authorized and licensed waste-depositors, domestic and in-stream users, and owners and occupiers of property whose uses will be adversely affected;
- (iv) that any waste produced will be tested and disposed of according to water quality and effluent standards prescribed by regulation or, in the absence of such regulation, as determined by the Board;
- (v) the applicant has the financial responsibility to maintain and restore the site in the event of future closing or abandonment.

These conditions on an application are specifically directed toward ensuring that the Board has satisfied itself that any current or proposed user will be compensated for any adverse effect upon its use of the waters in question. They are an attempt to avoid having existing users or applicants halt or delay the application process until their potential or existing concerns are dealt with. The principle of compensation is directed at allowing the maximum use of the water resources for the maximum benefit.

Secondly, the Amendments also address potential interference with existing users after an application has been granted and a license issued. If the interference in question has not been dealt with in a compensation agreement, compensation must be made to the other users for adverse effects upon their use of waters or depositing of waste. The right to sue for compensation in a court of competent jurisdiction is expressly provided for.

C. ENFORCEMENT

The penalties for offences have been greatly increased and, as may be expected, are generally harsher for Type A licencees than for Type B

licensees. A maximum \$100,000.00 fine together with the possibility of a maximum one year prison term is prescribed for: a) the use of waters contrary to a license or to an order authorizing use without a licence, b) a deposit of waste contrary to a licence or regulation, c) disobeying a direction given by an inspector, and d) failure to restore a water to its original channel following an emergency. In addition, Type A licensees are generally liable to the maximum penalty for any other contravention of a license. Except for the specific offences as listed above, Type B licensees are generally subject only to a maximum fine of \$15,000.00 and/or imprisonment up to six months.

A further enforcement provision of special concern to corporations is the proposed amendment that any officer, director or agent of the corporation who "directed, authorized, assented to, acquiesced in or participated in the commission of the offence is liable to the punishment provided." This amendment appears directed toward the concern raised by Judge Stuart R v. United Keno Hill Mines with respect to penalties being considered the cost of doing business and a mere slap on the wrist.

D. ABANDONMENT

A completely new element of the Amendments is the provision for compensation for abandonment. As outlined above, the Board in considering an application must take into account the applicant's financial ability to pay for the satisfactory maintenance and restoration of the site in question in the event of any future closing or abandonment. In addition, the Board may include, in any license, conditions relating to the abandonment of the undertaking in question. The Board may also demand that security be posted by the applicant to be applied toward reasonable costs incurred by the Crown upon abandonment.

Where the Minister upon reasonable grounds believes that a temporary or permanent abandonment has taken place, or there has been a contravention of a licence, the Amendments or a regulation, (whether or not that contravention relates to the contravention or abandonment), and that a

significant danger, immediate or not, to persons, property or the environment may result, the Minister may direct reasonable measures to "prevent, counteract, mitigate or remedy any resulting adverse affect on persons, property or the environment." The Crown's costs may be recovered by application of the security given or charged to the person responsible.

Under N.I.W.A., there is some question of the Board's powers to impose conditions with respect to future abandonment. These provisions in the Amendments therefore create an entirely new area of statutory control of water use. They reflect the overall theme of the Amendments, which are directed toward long-term preservation of the water resources and greater concern for the environment in general. A further example of this philosophy is found in the definition of "waste", which is defined as being detrimental to "people or any animal, fish, or plant." In N.I.W.A., the definition refers only to "man or any animal, fish or plant that is useful to man". Furthermore, the remedial provisions of the Amendments permit an inspector to direct any person to take reasonable measures to prevent adverse affects occurring from the use of waters and/or the deposit of waste in contravention of a licence or the regulations. They include reference to "significant and immediate danger to persons, property or the environment." It is apparent from these and other provisions that the Amendments are not merely directed toward protecting and preserving human use of the water resources, but toward protecting and preserving the environment itself.

X. FISHERIES ACT, R.S.C. 1985 c. F-14, AS AMENDED

We do not intend to do an exhaustive review of the Fisheries Act since it is adequately covered elsewhere.<sup>17</sup> Under N.I.W.A., the Board cannot vary from the regulations passed under the Fisheries Act relating to the deposit of deleterious substances prescribed by regulations when it issues water use licenses under N.I.W.A. However, under the authority of Section 35(2) of the Fisheries Act, the Minister of Fisheries and Oceans may

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<sup>17</sup>See Robert Franson and Alastair R. Lucas, Canadian Environmental Law

authorize conditions to permit the carrying on of any work or undertaking that results in the harmful alteration, disruption, or destruction of fish habitat. Fish habitat is defined to mean spawning grounds and nursery, rearing, food supply, and migration areas on which fish depend directly or indirectly in order to carry out their life processes. Pursuant to the Fisheries Act, the Minister has given authorization to alter fish habitat on selected Yukon streams. This matter is discussed in more detail in the section dealing with the Yukon Fisheries Protection Authorization.

There are draft proposals now prepared by the Department of Fisheries and Oceans for placer mining in the Yukon Territory. These guidelines are for the design and construction of fish habitat compensation and stream channel restoration for placer mined streams in the Yukon. To date, they have not been enacted, but it is anticipated that they will come into force shortly. The purpose of the guidelines is to assist placer miners to design and construct stable stream channels providing productive fish habitat in situations where existing fish habitat will be lost under the Yukon Fisheries Protection Authorization.

It is anticipated that these guidelines and the approval of the Department of Fisheries and Oceans will be in accordance with the Yukon Fisheries Protection Authorization discussed below. The guidelines anticipate a requirement that when a placer miner applies to the Board for a water use license, the applicant, as part of the licensing process, will submit a fish habitat compensation/restoration plan for all effective water bodies at the placer mining site. The guidelines apply to type II, III, and IV streams as classified in the Yukon Fisheries Protection Authorization.

XI. CASES UNDER THE FISHERIES ACT

Canada Tungsten Mining Corporation Ltd. v. The Queen<sup>18</sup>

Upon Appeal from the decision of Deputy Magistrate L.S. Eckhart finding the Appellant Canada Tungsten Mining Corporation Ltd. guilty on three counts of breach of Section 33(2) (now section 36(3)) of the Fisheries Act, the Appellant sought to raise the defense of due diligence pursuant to then Section 33(8) of the Act.

The defense of due diligence is no longer available, as subsection 42(4) of the present Act provides that liability is absolute and does not depend on proof of fault or negligence. However, the judgment of Mr. Justice Morrow is important today for its treatment of sentencing principles. Mr. Justice Morrow turned to the English decision of Sweet v. Parsley<sup>19</sup> and adopted the reasoning of Lord Diplock:

"Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety, or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sentences, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care." (p. 163)

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<sup>18</sup>Canada Tungsten ibid (unreported)

<sup>19</sup>Sweet v. Parsley (1970) A.C. 132 (p. 163)

Mr. Justice Morrow went on to consider the question of an appropriate sentence and made the oft-quoted ruling,

"It is important as well, however, to keep in mind the deterrent effect of convictions and resultant consequences in the present type of offence. The magnitude and impersonal nature of present day industrial, mining, and similar operations makes it doubly important that the penalty not be so small as to invite breaches as to make it worth while [sic] to gamble on not being detected" (p. 11)

For support in this ruling, Mr. Justice Morrow turned to his earlier decision in Regina v. Kenaston Drilling (Arctic) Ltd.<sup>20</sup> In Kenaston, the accused was charged with a breach of paragraph 3.3(1)(a) of the Territorial Lands Act R.S.C. 1970, c. T-6 as amended by R.S.C. 1970 (1st supp), c. 48 and the regulations made pursuant thereto. Specifically, the accused had operated a machine over tundra in a land management zone after expiry of a permit to do so, in contravention of the regulations. In considering an appropriate sentence, Mr. Justice Morrow stated,

"... the test to apply in approaching the question of sentence should be less a concern of what the damage was but more a concern of what the damage might have been.

In cases of this kind to fine a corporation such as the present one a mere \$100 is to in effect, invite breaches, to invite the gamble. Where the economic rewards are big enough persons or corporations will only be encouraged to take what might be termed a calculated risk. It seems to me that the Courts should deal with this type of offence with resolution, should stress the deterrent, viz., the high cost, in the hope that the chance will not be taken because it is too costly." (p. 386)

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<sup>20</sup>Regina v. Kenaston *ibid*

R. v. Cyprus Anvil<sup>21</sup>

The Appellant had pleaded guilty in Magistrate's Court to a charge under then Section 33 of the Fisheries Act and was sentenced to pay the maximum fine of \$5,000.00. The offence involved the release of between 70 million and 150 million gallons of tailings into Rose Creek near the Appellant's mine site. Mr. Justice Maddison on appeal held that because of the large quantity of deleterious substance involved the case "came into the category of what one may call 'the worst case category'" (p. 3). He went on to consider any mitigating circumstances, particularly the guilty plea and the benefit to the community derived from saving the cost of a long trial to prove guilt. With respect to the guilty plea, Mr. Justice Maddison held that the Appellant knew that it was inescapably caught by the Fisheries Act and therefore a guilty plea was not a mitigating factor.

However, in considering that the release was not deliberate but a mere error in judgment, that the company was cooperative throughout and responded promptly to effect the necessary repairs as soon as the spillage was discovered, and that the company was generally shown to be a good corporate citizen, Mr. Justice Maddison reduced the penalty from the maximum \$5,000 to \$4,500 and conceded that he might have been inclined to reduce the fine to \$2,500 had the Appellant not recommenced the mill and continued to run it when there continued to be substantial leakage. The maximum penalty, Mr. Justice Maddison held, was to be reserved for "deliberateness, recklessness, cavalier disregard for the regulations and the instructions of the various environmental authorities." (p. 5)

The approach taken by Mr. Justice Maddison in this case is parallel to that taken by Mr. Justice Morrow in the Canada Tungsten and Kenaston Drilling cases, in that Mr. Justice Maddison expressly adopts in ruling that the Magistrate made no error in considering the wealth and size of the Appellant when determining the appropriate penalty. By combining the

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<sup>21</sup>R. v. Cyprus Anvil (unreported Y.T.C.A. decision of Mr. Justice Maddison dated March 26, 1976)

factors of conduct and size of the corporation involved, Mr. Justice Maddison has clearly set the stage for future decisions to come down very heavily against large corporations as opposed to smaller enterprises, even though the actions and conduct of the two are of similar natures.

R v. Placer Development Ltd.<sup>22</sup>

The most comprehensive consideration to date of the principles to be applied in determining liability under then Section 33 (now section 36) of the Fisheries Act is to be found in Judge Stuart's judgment in Placer Development. In this case, the accused was charged with a breach of then subsection 33(2) (now subsection 36(3)) of the Fisheries Act with respect to the spill of diesel fuel into the Don River sometime between November 23, 1980 and May 7, 1981. The accused raised, inter alia, the following defences:

1. no spill occurred.
2. in the alternative if a spill did occur then the spill was not deleterious.
3. no fish frequented the water where the spill occurred.
4. the accused was not responsible for the activities at the mining camp.

The first two defences were dealt with swiftly, and it was found that the Crown had proved beyond a reasonable doubt that the spill had occurred and that it was deleterious. With respect to defence number 3 under paragraph 33.4(3)(v) of the Fisheries Act then in force, the defendant was given the opportunity to raise the defense that "at all times material to the proceedings, the water is not, has not been, and is not likely to be frequented by fish". Now, this defence has been removed. However, Mr. Justice Stuart's ruling is important with respect to the onus placed on the Crown under subsection 36(3). The Court held that the Crown must prove

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<sup>22</sup>R v. Placer Development Ltd. (unreported Y.T.C. decision of Mr. Justice Stuart dated December 12, 1983)

beyond a reasonable doubt that the water in question was inhabited by fish. The Crown's case is easy to establish as "proof that fish in some time within the year frequented the immediate receiving water or water affected by the receiving water, will suffice." (p. 6) In this case, the Crown had adduced sufficient proof.

With respect to the fourth defence, that being that the accused was not responsible for the spill, the special facts of the case are important. The accused had contracted with a second company to do an exploratory audit on a mineral deposit that the accused owned. A third company delivered the diesel fuel in question to the mineral deposit from whence it escaped into the neighbouring Don River. The Court found that the accused had the ability, and therefore the responsibility to influence the offending conduct for the following reasons:

1. the accused was in an influential position with respect to its contractual relations with the second company and no evidence was adduced to show that the accused could not have expressly contracted to impose responsibility to exercise care and attention in storing fuel upon the second company.
2. the evidence adduced to show the practice of the parties revealed an intent that the contractual responsibility that was imposed upon the second company was insufficient.
3. the accused was required to possess and in fact did possess sufficient expertise to be aware of the risks to the environment of the storage fuel oil in a remote mining camp.

As the accused did not contract out of its responsibility, Judge Stuart held that the Crown had established its case.

XII. YUKON FISHERIES PROTECTION AUTHORIZATION

The Yukon Fisheries Protection Authorization (the "Authorization") was enacted April 7, 1988 and reissued in May 1989 with revised and additional stream classification maps. The background to the Authorization and the policy issued by the Minister of Indian Affairs and Northern Development, the Minister of the Department of Fisheries and Oceans, and the Minister of the Department of the Environment was the desire to have a regime of environmental review and control under one agency and not three. Formerly, placer miners in the Yukon Territory were forced to deal with several different bureaucracies, including the Department of Indian Affairs and Northern Development ("D.I.A.N.D.") and the Department of Fisheries and Oceans. The purpose of the Authorization is to reduce the bureaucracy so that Yukon placer miners are dealing with a single agency for inspection and control. These guidelines resulted from a memorandum of understanding between the three Ministers dated April 1988 (the "Memorandum").<sup>23</sup> The purpose of the Memorandum was:

- (a) to meet the requirements and ensure consistency in the administration of N.I.W.A., the Fisheries Act, and the Yukon Placer Mining Act;
- (b) to minimize duplication of inspection and monitoring activities;
- (c) to provide optimum support to the Minister of Fisheries and Oceans in respect of the Policy Directive on the protection of fish and fish habitat in the Yukon from placer mining activity (Policy Directive), and the Yukon Fisheries Protection Authorization (Authorization) pertaining to Yukon placer mining; and
- (d) to provide optimum support to the Minister of Indian Affairs and Northern Development in respect of N.I.W.A. and

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<sup>23</sup>The Memorandum of Understanding, Authorization and Guidelines are set out at Appendix A

the Yukon Placer Mining Act.

The agreement reached under the Memorandum focuses on the role of D.I.A.N.D. inspectors. In essence, all routine inspection for compliance with conditions of water licences issued pursuant to N.I.W.A., and for compliance with the Yukon Placer Mining Act, the Authorization, and the Policy Directive will be conducted by D.I.A.N.D. inspectors. These inspectors are designated as inspectors for the purposes N.I.W.A. and the Fisheries Act. Therefore, rather than having two sets of officials conducting independent inspections of the mines, there will be one set of officials given all of the necessary powers to ensure compliance with the three Acts. A further element of the agreement is the manner in which inspections are to be conducted. A specific agreement was entered into whereby D.I.A.N.D. inspectors will inspect all placer mines at least once per season and more often if necessary or if specific circumstances so require. Appropriate water and effluence samples will be collected and analyzed in a timely manner, and reports maintained by D.I.A.N.D. Where it is found that a discharge exceeds levels set out in the Authorization then the miner in question will be notified and a discussion held as to how to appropriately reach compliance. The officials of the Department of Fisheries and Oceans and the Department of the Environment will be notified of the non-compliance and the site inspected after an agreed time in order to ascertain whether or not compliance has been achieved. Charges under N.I.W.A. may be laid by the inspectors. Charges under the Fisheries Act are to proceed through existing Department of Fisheries and Oceans and Department of Environment Mechanisms following consultation between officials of all three departments.

The third integral document of this new framework expressly recognized under the Authorization is the Policy Directive signed by all three Ministers on March 28, 1988, the same date as the Authorization. The impetus behind the Policy Directive is expressed as "the desire to foster cooperative resource development in the Yukon." The express purpose of the policy directive is to ensure legal certainty for operators of placer mines in the Yukon Territory with respect to the Fisheries Act. With this focus in mind, the Policy Directive addresses itself only to discharge of sediments

(not toxins) and to fish habitat disturbances caused by placer mining activity. Compliance with the Authorization is specifically seen as compliance with subsections 35(2) and 36(3) of the Fisheries Act. It is not surprising that the Policy Directive seeks to expedite inspections and resolve conflicts in a timely manner and particularly recognizes the "short operating season and potential financial loss" to placer miners as a result of an inability to operate following a determination of non-compliance.

The central element of the Policy Directive is the classification of streams pursuant to the Authorization, which sets out four classes of streams and the sediment levels acceptable therein. In the Policy Directive, these classifications are defined as follows:

1. salmonid spawning streams (lowest level of acceptable sedimentation).
2. salmonid rearing streams (next lowest level of acceptable sedimentation).
3. streams with fish of significant value to sport, commercial or domestic fisheries. This category is further broken down into the following categories:
  - 3a. anadromous salmon migration;
  - 3b. fresh-water species other than grayling;
  - 3c. Arctic Grayling.

These streams are where non-salmonids of potential or significant value to sport, commercial or domestic fisheries spawn or reside for summer feeding over-wintering. They may also serve as migratory routes for anadromous salmon without providing rearing or spawning habitat.

4. streams with no fish or with fish of no significant value to sport, commercial or domestic fisheries. (Streams in which historic Yukon placer mining activities have changed the nature of streams to such an extent that fish habitats have been destroyed).
5. unclassified streams (all others).

The purpose of classification is maintain water quality, levels of sediment set out in the Authorization, and habitat quality as developed through Department of Fisheries and Oceans policies for maintaining significant fisheries resources. The principle to be applied is that of "no net loss". In essence, every action by a placer miner to preserve fish habitat pursuant to the Department of Fisheries and Oceans policies must be approved by the Department of Fisheries and Oceans or by the Yukon Territory Water Board pursuant to N.I.W.A. Approval is to be based on a "hierarchy of preferences" based on the following steps:

1. a mining plan shall be assessed regarding its potential impact on fish habitat and various options to avoid impact are to be assessed.
2. if habitat will be lost then options to replace it shall be investigated and a plan developed.
3. if no compensatory plan can be developed then options shall be investigated for the development of artificial means of production as a replacement for lost habitat. The long term costs of this process shall be paid by the placer miner in question.
4. type 4 streams (those of limited or no value) are exempt from the "no net loss" principle, but habitat restoration measures shall be incorporated into a mining plan as an integral part of a "multi-year process that results in habitats being restored to the productive potential as a mine operation progresses."

It appears that the final directive will be the most difficult to implement. It will mean requiring the placer miner undertake or pay for restoration measures in order to restore the habitat to a condition better than that existing prior to the commencement of operations.

Under the Policy Directive, and pursuant to the Authorization, a Yukon Placer Implementation Review Committee has been established and charged with the responsibility of reviewing the classification of streams and considering applications by placer mine operators who are unhappy with the classification imposed upon them. Recommendations by the Committee are to be

forwarded to the Ministers of Department of Fisheries and Oceans and D.I.A.N.D. Ultimately, the Minister of Fisheries and Oceans will have the final say in any change to stream classifications. In addition, the Committee may consider a request by a placer miner to have "site-specific authorization" for those cases in which the operator finds it impossible to comply with the discharge standards set out in the Authorization. Again, the Minister of Fisheries and Oceans is to make the final ruling.

It remains to be seen whether or not the streamlining and efficiency principles behind the Authorization, Memorandum and Policy Directive bear the anticipated fruit or merely create greater friction between placer mine operators and government officials. The scheme seems genuinely directed toward avoiding confrontation and balancing various concerns while still allowing economic activity to continue. The Yukon Placer Implementation Review Committee is required by the Authorization to review the conditions embodied in the Authorization and suggest any changes that may be necessary. A workable compromise may eventually be established.

XIII.

THE DEPARTMENT OF THE ENVIRONMENT ACT  
R.S.C. C. E-10, 1985 AS AMENDED  
AND THE ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS GUIDELINES

Section 4(1) of the Department of the Environment Act ("DEA"), sets out the powers, duties, and functions of the Minister of the Environment under the DEA. These include all matters over which Parliament has jurisdiction not assigned by law to any other department, board, or agency of the Government of Canada, and relating to:

- (a) the preservation and enhancement of the quality of the natural environment, including water, air, and soil quality;
- (b) renewable resources, including migratory birds and other non-domestic flora and fauna;
- (c) water;

- (d) meteorology;
- (e) notwithstanding paragraph 4(2)(f) of the Department of National Health and Welfare Act, R.S.C. 1985 c. N-10, as amended, the enforcement of any rules or regulations made by the International Joint Commission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States and Canada, in so far as they relate to the preservation and enhancement of the quality of the natural environment;
- (f) the coordination of the policies and programs of the Government of Canada respecting the preservation and enhancement of the quality of the natural environment;
- (g) national parks; and
- (h) national battlefields, historic sites and monuments.

Section 4(2) of the DEA states that the powers, duties, and functions of the Minister also extend to and include such other matters relating to the environment and over which Parliament has jurisdiction, as are by law assigned to the Minister.

Under Section 6 of the DEA, the Minister may establish guidelines. The present guidelines, called the Environmental Assessment and Review Process Guidelines (the "Guidelines") were enacted in 1984.

Section 6 of the Guidelines state that they apply to any proposal (being any initiative, undertaking, or activity for which the Government of Canada has a decision-making responsibility):

- (a) that is to be undertaken directly by an initiating department;
- (b) that may have an environmental effect on an area of Federal responsibility;

- (c) for which the Government of Canada makes a financial commitment; or
- (d) that is located on lands, including the offshore, that are administered by the Government of Canada.

Section 10(1) of the Guidelines states that every initiating department shall ensure that each proposal for which it is the decision-making authority shall be subject to an environmental screening or initial assessment to determine whether, and to what extent, the proposal may have potentially adverse environmental effects.

The importance of the Guidelines to mineral exploration and development in the Yukon Territory is significant and far-reaching. "Department" has been defined under the Guidelines to mean, subject to Sections 7 and 8 of the Guidelines, any department, board, or agency of the Government of Canada, and any corporation listed in Schedule D to the Financial Administration Act, R.S.C. 1985 c. F-11, as amended, and any regulatory body. "Initiating department" is defined as any department that is, on behalf of the Government of Canada, the decision-making authority for a proposal. Since "department" has been given a very wide meaning for the Government of Canada, and since almost all legislation involving mineral exploration and development in the Yukon Territory involves a department, board, or agency of the Government of Canada dealing with Federal Crown land, the Guidelines apply to almost all mineral exploration and development in the Yukon with one possible exception. It appears that they may not apply to an applicant who is only asking the Yukon Territory Water Board for a water use license. The reasons are as follow.

First, Section 8 of the Guidelines states that where a board or an agency of the Government of Canada, or a regulatory body has a regulatory function with respect to the proposal (defined previously), the Guidelines apply to that board, agency, or body only if there is no legal impediment or duplication resulting from the application of the Guidelines.

includes the Yukon Territory). Will the Guidelines also apply to the same Minister under the Indian Act and all lands currently being set aside under land claims that are not transferred from the Federal Crown? There is no doubt that the Guidelines will continue to have a significant impact on Yukon development, not merely in mining and exploration, but in all facets of day-to-day life involving developments that have an environmental impact in areas of Federal jurisdiction in the Yukon Territory.

XIV.

CANADIAN ENVIRONMENTAL PROTECTION ACT.  
R.S.C. 1988 C. 22, AS AMENDED

A comprehensive treatment of the Canadian Environmental Protection Act (C.E.P.A.) is beyond the scope of this paper, but the potential impact of this statute necessitates a few observations.

Like N.I.W.A., C.E.P.A. is directed toward the controlled release of substances into the environment. However, the substances to be controlled by C.E.P.A. are to be listed by regulation pursuant to section 29, and as yet none of the substances listed is of specific application to the mining community. It therefore remains to be seen which substances are to be added to the list and therefore governed by regulation.

Part IV of C.E.P.A. deals with federal lands and works and is therefore of specific interest. Federal lands are described in section 52 as including "lands that belong to Her Majesty in Right of Canada or in respect of which Her Majesty in Right of Canada has the power to dispose of, and all waters on any or above such lands." The vast bulk of the Yukon Territory would therefore fall within this definition. Section 54 provides:

"54(1) Where no other Act of Parliament expressly provides for the making of regulations that result in the protection of the environment and apply to federal works or undertakings or federal lands, the Governor in Council may, on the recommendation of the Minister and with the concurrence of the Minister of the

Crown who has the administration and control of or duties and functions in relation to those works, undertakings or lands, make regulations applicable thereto for the protection of the environment."

Section 57 further provides that where there is a reasonable likelihood of a release into the environment of a substance in contravention of a regulation made under section 54, certain persons are required to report the release, take emergency precautions, and make reasonable efforts to notify the public who may be adversely affected. Essentially, those persons having charge of the substance, or causing or contributing to the initial release or increasing the likelihood of the initial release, are those persons charged with taking direct action. As no regulations have been enacted pursuant to section 54 it remains to be seen what the effect of C.E.P.A. will be upon the mining community in the Yukon. It may be argued that the field is already filled by N.I.W.A. and the Fisheries Act, but sections 54 and 57 of C.E.P.A. are broader than the provisions contained in either N.I.W.A. or the Fisheries Act. The relevant sections of C.E.P.A. are not restricted to deleterious substances, waste or the destruction of fish habitat or the altering of water quality.

If the provisions of C.E.P.A. are to be brought to bear upon mining activity in the Yukon, it is important to note that the offence and punishment provisions are much stricter and harsher than those contained in N.I.W.A. or the Fisheries Act and are more closely related to the proposed amendments to N.I.W.A. Maximum fines are to range up to \$1,000,000.00 and section 122 specifically addresses the liability of an officer, director, or agent of a corporation who "directed, authorized, consented to, acquiesced in, or participate in the commission of the offence."

As stated above, it remains to be seen what the effect of C.E.P.A. will be in the Yukon. As regulations are promulgated and further substances are added to the schedule of toxic substances, the application of C.E.P.A. will become more clear.

XV. CONCLUSION

Today in the Yukon, the twin forces of partial emergence from the Federal jurisdictional shadow on the one hand and changes to the statutory infrastructure regulating resource exploitation activity on the other are greatly changing the way in which economic activity is and will be carried on in the Yukon. This change is especially evident in the resource sector. New and amended legislation is changing the rules under which the players operate, and the Territorial Government has begun flexing its legislative muscles in an effort to exert some control over mining, which is the largest contributor to the economic pie.

At the same time, the legal foundation for environmental controls over exploration and development of mineral resources continue to form the primary sources of environmental regulations. The Fisheries Act and N.I.W.A., together with the Guidelines under the D.E.A. retain their status as the key regulatory statutes. The Yukon Placer Mining Act and the Yukon Quartz Mining Act continue to govern mining and mineral rights.

The new or changed regulatory statutes are as yet unproven as to their application. There appear to be tougher environmental controls, but there also appears to be a greater willingness to work together with the mining community to reach workable and enforceable standards. The nature of the changes is still being refined and as they are applied over the next few years, a greater sense of familiarity will emerge.

The Government of Yukon, for its part, has begun enacting its own legislation, most notably a proposed Environmental Protection Act still in the drafting stage. As further powers are devolved to the Territorial Government, its regulatory control over mining will become greater. As yet, the Territorial Government's administrative control over the land is small, and until the transferring process accelerates, the rôle of the Government of Yukon will continue to be relatively minor.

Perhaps the greatest area of uncertainty is that concerning the Yukon Territory Water Board. As discussed, the application of the Guidelines to the Water Board is unclear, as is the Board's relationship to R.E.R.C. established under the Guidelines. To date, the Board has been the most influential regulatory body. Now, with expanded powers given to D.I.A.N.D. inspectors pursuant to the Authorization, and uncertainty with respect to R.E.R.C., the regulatory jungle may be more confusing than ever.

As the powers of the Territorial Government become greater, the effect and application of the new and proposed legislation become clearer, and the roles of the various regulatory agencies are sorted out, perhaps the desire for efficiency and expediency expressed in the Authorization will be realized. The next few years promise to be interesting as the legislative framework is integrated and developed into a comprehensive system of environmental control over mineral exploration and development in the Yukon.