CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY
L'INSTITUT CANADIEN DU DROIT ET DE LA POLITIQUE DE L'ENVIRONNEMENT

Est. 1970

July 18, 2000

Ms. Norma Thorney
Tribunal Administration Coordinator
Office of the Information and Privacy Commissioner
Suite 1700
80 Bloor St. West
Toronto, Ontario
M5S 2V1

Dear Ms. Thorney,

Please find attached the submission of the Canadian Institute for Environmental Law and Policy regarding Appeal PA – 000002-2. Please contact the Institute's Director of Research, Dr. Mark Winfield, should you have any questions regarding this submission

Yours sincerely,

Anne Mitchell,
Executive Director.

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Submission by the Canadian Institute for Environmental Law and Policy with Regard to Appeal PA-000002-2

Prepared by:

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July 19, 2000

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PART I BACKGROUND

The appellant, The Canadian Institute for Environmental Law and Policy (CIELAP), is an independent, not for profit, environmental law and policy research and education organization. The Institute was founded in 1970 as the Canadian Environmental Law Research Foundation (CELRF), and is incorporated as a not-for-profit corporation under the laws of Ontario, and registered as a charitable organization with Revenue Canada.

The Institute and its predecessor, CELRF, have a long history of research and publication on Ontario environmental law and policy. Its publications include three editions (1974, 1978 and 1993) of *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, which is widely employed as a university level text.

CIELAP has commented extensively on environmental law and policy issues related to mining at the provincial, federal and international levels over the past few years.[1]

PART II THE APPEALLANT'S REQUEST UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

On October 22, 1999, The appellant filed a freedom of information request for the following records from the Ministry of Northern Development and Mines (MNDM):

> "all correspondence, memoranda, briefing notes, analyses, e-mails and commentaries received by the Ministry of Northern Development and Mines regarding the development of the *Mining Act* Part VII Regulation and Mine Rehabilitation Code between January 1996 and the date of receipt of this request from the following Ontario government agencies: The Ministry of the Environment (and Energy); the Ministry of Ministry of Natural Resources; the Ministry of Labour; and the Ministry of Finance."

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[1] M.Winfield, Comments on Metals, Minerals and Sustainable Development (to Natural Resources Canada), March 1995; M. Winfield and P. Muldoon, Submission to the House of Commons Standing Committee on Natural Resources, Mining and Canada's Environment, CIELAP and CELA April 1996; M. Winfield, Waste Prevention and the Front-End of the Materials Cycle: Perspectives from Canada, OECD workshop on Waste Minimization Policy in Support of Sustainable Development, May 1999); C.Chambers and M.Winfield, Mining's Many Faces: Environmental Mining Law and Policy in Canada (Toronto: CIELAP, June 2000).

A decision letter regarding access to the files was provided to the appellant by the Ministry on March 2, 2000. Copies of some of the records to which access had been requested were received on March 31, 2000. However, access to some of the responsive records was denied to the appellant on the basis of sections 13 and 17 of the *Freedom of Information and Protection of Privacy Act.*

On March 31, the appellant filed an appeal with the Information and Privacy Commissioner, stating that it had reason to believe that some of the documents to which access had been denied may not fall under these exemptions, or may contain elements which do not fall under these exemptions which may be severed from the original documents. In addition, the appellant stated that it believed that there may be a compelling public interest in the release of the records in question, as provided for by section 23 of the Act.

A Mediator's report with respect to the appeal was filed on May 24, 2000. This narrowed the scope of the appeal to the issues of: 1) the denial of access to pages 2, 5, 7, 30, 31, 48 and 57 of the records in question on the bases of sections 13(1) and 17(a)(b) and (c) of the Act, and 2) whether denials to these records on the basis of ss.13 and 17 of the Act should be overridden by the Commission on the basis of s.23 of the Act, as there exists a compelling public interest in the disclosure of the records at issue which clearly outweighs the purpose of the exemptions.

PART III THE ISSUES

Records Denied Under s.13(1) of the Act

Access was denied to all of the records in contention on the basis of section 13(1) of the Act. Under section 13(1) of the Act, a Head may refuse to disclose a record whose disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution, or a consultant retained by an Institution.

In previous decisions, the Commission has concluded that a record disclosing "concerns" of a civil servant does not constitute "advice or recommendations." [2] The records sought by the appellant specifically relate to the expression of concerns by the Ministry of Finance with respect to the Ministry of Northern Development and Mine's proposals regarding financial assurances and mine closure.

However, determinations regarding the contents of records can only be made upon examination of the records in question, and the appellant will accept

[2] PIC Order No. P-160.

the Commission's determinations regarding the applicability of section 13 exemptions.

Records Denied Access Under s.17 of the Act

Section 17 of the Act states that a Head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to: prejudice significantly the competitive position or interfere significantly with negotiations of a person; result in similar information no longer being supplied to the institution; result in undue loss or gain to any person, group, etc; or interfere in the resolution of a labour relations dispute.

Access has been denied to two pages of records (29, 57) on the basis of this exemption. The appellant notes that certain types of third party information relevant to the issue of financial assurances and mine closure, such as the credit status of individual companies, are already in the public realm, and their release would therefore not prejudice significantly the position of the affected firms or persons.

However, specific determinations regarding the likely impact of the release of third party information contained in records can only be made upon examination of the records in question. The appellant will accept the Commission's determinations regarding the applicability of the section 17 exemptions in this regard.

Section 23 Public Interest Override

The appellant has requested that the Commission consider the applicability of section 23 of the Act to the records to which access has been denied under sections 13(1) and 17. Section 23 of the Act states that an exemption from disclosure of a record under these sections does not apply where a compelling public interest in disclosure clearly outweighs the purpose of the exemption.

The Commission has defined a "compelling" public interest as rousing strong interest or attention. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to it to make effective use of the means of expressing public opinion or making political choices.[3]

[3] IPC Order No.P-1363.

It is the submission of the Appellant that the section 23 exemption should apply to the records to which access has been denied under sections 13 and 17 of the Act for a number of reasons.

The records in question relate to the Ministry of Northern Development and Mine's proposed regulatory changes regarding the provision of financial assurances in relation to mine closure plans by mine operators under the *Mining Act*.

Bill 71 and the Mine Closure Provisions of the Mining Act

Major amendments were made to the *Mining Act*[4] through Bill 71, enacted by the Ontario Legislature in 1989. The Bill 71 contained numerous provisions to strengthen the *Mining Act* by ensuring that mining companies carried out programs of environmental protection and reclamation. In particular Bill 71 imposed, for the first time in Ontario, a requirement for mining companies to post realizable securities in support of mine closure plans. These provisions were intended to ensure that in the event that a mine operator were to go bankrupt, or to abandon a facility, funds would be available to carry out mine closure and remediation work without cost to the taxpayer.[5] The imposition of the financial assurance requirement was regarded as an example of the adoption by the province of the "polluter pays" principle.[6]

The Bill 71 amendments were implemented in the aftermath of the October 1990 breach of a tailing disposal dam at a mine site, once operated by Matachewan Consolidated Mines in Northern Ontario. The facility had been closed since 1956. The spill resulted in the contamination of the drinking water supply of three northern communities with lead and other toxic substances. The provincial government incurred approximately two million dollars for clean up costs in relation to the event. Ministry officials have commented that the legislative amendments made through Bill 71 were intended to prevent the kind of incident which occurred in the Matachewan case, from taking place again.[7]

The Bill 26 Amendments to the Mining Act

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[4] S. Q. 1989, C.62.

[5] Bill 71, An Act to Amend the Mining Act.

[6] In 1975 the Council of Ministers of the European Economic Community recommended approval of the polluter pay principle. The Canadian government endorsed the principle in 1992. The "polluter pays" principle shifts the responsibility for cost of remediating pollution from society at large to those who profit from creating the pollution.)

[7] H.Frawley, Environmental Law Development Affecting Ontario's Mining Industry 2 J.E.L.P. at pg. 115.

On November 29, 1995 the government introduced Bill 26, *An Act to achieve Fiscal Savings and to Promote Economic Prosperity, Public Service Restructuring, Streamlining and Efficiency and to implement other aspects of the Government's Economic Agenda.* The Bill made major changes to more than 40 provincial statutes, including the *Mining Act.* The amendments to the *Mining Act* seemed designed to reverse many of the elements of the Act regarding mine closure added through Bill 71. The specific changes to the mine closure requirements of the Act included the following:

- The addition of provisions giving mining companies the option of simply filing closure plans without obtaining the acceptance from Director of Mines Rehabilitation, removing the requirement that MNDM review and approve closure plans with a view to assessing the adequacy of the environmental protection provided by these plans;

- The removal of annual reporting requirements to MNDM on steps taken to fulfill rehabilitation requirements;

- The exemption of information regarding financial assurances with respect to mine closure from the *Freedom of Information and Protection of Privacy Act*;

- The exemption of mining companies who voluntarily surrender mining lands to the Crown after reclamation activities are complete from future environmental liability; and

- The permitting of mining companies that pass a "corporate financial test" to escape the requirement that they post a realizable financial security in support of their closure plans.

The Bill 26, including these amendments to the *Mining Act*, was enacted in January 1996.

The Proposed Mine Closure Regulation and Mine Rehabilitation Code

The proposed Mine Closure Regulation and Mine Rehabilitation Code, were posted on the *Environmental Bill for Rights* public registry for public comment in August 1999.[8] The Regulation and Code were intended to implement the Bill 26 amendments to the *Mining Act.* The draft Regulation was founded upon two basic principles: 1) that mining companies will be able to approve their own mine closure plans; 2) the requirement for the posting of a realizable financial assurance in relation to closure plans would be replaced with requirements that companies meet a "corporate financial test." The Regulation and Code were adopted by the Lieutenant-Governor in Council on March 2000.

[8] EBR Registry No.RD9E001.

The records sought by the appellant relate specifically to the aspects of the Regulation dealing with the "corporate financial test." The regulation permits companies to meet the financial assurance requirements in relation to mine closure plans by satisfying credit rating criteria,[9] rather than posting a realizable financial security, as required by the Bill 71 amendments to the *Mining Act*. The use of credit rating has been described as a "soft security instrument" since it provides less assurance the funds will be available. Hard securities, on the other hand, ensure that funds (which are reasonably liquid and of defined value) will be available for remediation upon termination of mining operations, should the operator be unable to pay for the implementation of a closure plan, go bankrupt, or abandon the site.

These provisions give rise to a number of compelling questions from a public interest perspective. Currently, there are over 6,000 known abandoned mine sites in the province, 40 percent of which belong to the Crown.[10] Published estimates of the costs of remediating existing abandoned mines in Ontario range from $300 million[11] to $3 billion. [12] The use of a "corporate financial test" in lieu of hard security has the potential to increase the public's financial risk for the cleanup costs of additional abandoned mining sites in the future.

It is important to note that the financial position of mining companies and the value of the reserves they may hold is almost entirely contingent on the international commodities market. This is unpredictable, volatile and may be affected by political and economic events far beyond the control of the governments of Ontario or Canada .[13]

In contrast, hard security instruments such as cash, bonds or letters of credit ensure that funds, which are reasonably liquid and certain in value, will be available for clean up cost, in the event of financial distress, bankruptcy or abandonment on the part of the operator. Ontario's shift in its financial assurance policy is at odds with the trend in other provinces, such as British Columbia. The B.C Ministry of Energy, Mines and Petroleum has been gradually amending reclamation permits to increase the security required from existing mines.[14]

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[9] Sections 15, 16 and 17 of the draft regulation made under the Mining Act, Mine Development and closure under Part VII of the Act.

[10] J. Ibbetson, The Globe and Mail, Potholes, Creaky buildings to cost $40-billion, October 7, 1999.

[11] A. Robinson, "Ontario to shut mine closing arm" The Globe and Mail, October 25, 1995.

[12] T. Spears, "Waste clean-up will need $3 billion and 20 years, The Ottawa Citizen, October 25, 1990.

[13] P. Kennedy and A. Robinson, "A gold bonanza" The Globe and Mail, September 19, 1999.

[14] Mine Reclamation Security Policy in British Columbia – A Paper for Discussion (British Columbia Ministry of Energy Mines, and Petroleum Resources, February 1995 at pg. 27).

British Columbia's experience with the 1992 bankruptcies of Cassiar Asbestos Corporation and Westar Mining Limited served as a warning to the government of the risks of having unsecured funds for mine rehabilitation.[15] As noted earlier, Ontario's experience with abandoned mines under the pre-Bill 71 mine closure regime is not significantly different. In September 1999 the Minister of Northern Development and Mines announced that Ontario will provide $27 million to rehabilitate abandoned mine sites.[16]

MNDM's September 1999 announcement noted that "some of Ontario abandoned mines are more than a century old and while companies may not have closed the site in a manner which meets today's standard, the land had already reverted to the Crown. Other privately held land *may become the Crown's responsibility in extreme circumstances such as business failure or receivership*" (emphasis added.)

Other recent events, such as the assumption of the remediation costs for the Giant Gold Mine in Yellowknife, Northwest Territories, by the federal and territorial governments, following the bankruptcy of Royal Oak Mines Ltd., highlight the potential scale of the remediation costs which may have to carried out at public expense in the absence of adequate financial assurances by mine operators. The remediation costs with respect to the Giant mine have been estimated to be as high as $1 billion.[17]

The records sought by the appellant specifically relate to the views and concerns of the Ontario Ministry of Finance regarding the Ministry of Northern Development and Mine's proposals with respect to the use of a "corporate financial test" in lieu of the realizable financial assurance requirements contained in the original Bill 71 amendments to the *Mining Act*. The Ministry of Finance is the agency charged with management of the province's finances. Evidence of concern on the part of the Ministry of Finance with respect to the Ministry of Northern Development and Mines' proposals, particularly in terms of the potential for large-scale public liabilities for the remediation of abandoned mines would be a matter of high public interest. Such liabilities may have the potential to be of such a scale that they may affect the province's overall fiscal situation, and draw resources away from other priority areas for public spending.

In particular, records of the views of the Ministry of Finance on this matter would assist members of the public in understanding the implications and

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[15] Mine Reclamation Security Policy in British Columbia – A Paper for discussion (British Columbia Ministry of Energy Mines, and Petroleum Resources, February 1995 at pg. 25)

[16] Ontario Provides $27 million to Rehabilitate Abandoned Mine Site. http:/www.gov.ca/MNDM/Newrel/nr99/e221_99.htm

[17] A. Robinson, "Taxpayers may face giant cleanup bill" the Globe and Mail, April 29, 1999.

potential consequences of the recent changes to Ontario's mine closure regime. This would strengthen the public's ability to make effective use of the means of expressing public opinion and make informed political choices.

PART IV ORDER SOUGHT

It is respectfully requested that the records to which access is sought through this appeal be ordered disclosed.