COPY

APPLICATION TO THE YUKON SURFACE RIGHTS BOARD

APPLICANT'S NAME: _____ COMPANY: *The City of Whitehorse*

CO-APPLICANT(s)(if any) _____

STREET ADDRESS/POST OFFICE NUMBER *2121 - 2ND Avenue* CITY: *Whitehorse*

TELEPHONE: *(867)667-6401* FACSIMILE: *(867)668-8384* EMAIL: _____

DESIGNATED CONTACT PERSON: *D. Shier* COMPANY: *Preston, Willis & Lackowicz*

STREET ADDRESS: *2093 Second Avenue* City/Town: *Whitehorse*

TELEPHONE: *(867)668-5252* FACSIMILE: *(867)668-5251* EMAIL: *dshier@yukonlaw.com*

OTHER PARTY(S) INVOLVED:

1. *Robert Hamel*

   ADDRESS: *Box 5269* CITY/TOWN: *Whitehorse*

   TELEPHONE: *(867)633-3901* FACSIMILE: _____

   EMAIL: *rob_hamel@hotmail.com*

2. *Norwest Enterprises Inc.*

   ADDRESS: *Box 5269* CITY/TOWN: *Whitehorse*

   TELEPHONE: *(867)633-3901* FACSIMILE: _____

   EMAIL: *rob_hamel@hotmail.com*

This is Exhibit " A " referred to
in the affidavit of DEAN PULFORT
sworn before me at WHITEHORSE, YT
this 31 day of JAN 20 00

A Notary Public in and for the
Yukon Territory

3. *Kluane Drilling Ltd.*

ADDRESS: *14 MacDonald Road* CITY/TOWN: *Whitehorse*

TELEPHONE: *(867)633-4800* FACSIMILE: *(867) 633-3641*

4. *Ivan Elash*

ADDRESS: *612 Ogilvie Street, Suite #4* CITY/TOWN: *Whitehorse*

TELEPHONE: *667-7281* FACSIMILE: _____

DISPUTE IS ON: Settlement Land Category "A" ___ Category "B" ___ Non-settlement Land _X_

BRIEFLY EXPLAIN THE ISSUE(S) IN THIS DISPUTE:

On June 10, 1999, the Mining Recorder of the Whitehorse Mining District issued a ruling, pursuant to s. 15(1) of the *Yukon Quartz Mining Act*, requiring Mr. Hamel to pay security of $2,000.00 for claims HAT 1, 3, and 27.

The Mining Recorder made a second ruling on June 16, 1999, that Mr. Elash pay security of $2,000.00 per claim for claims CAT 10, 11 and 12 and $500.00 for claims CAT 9 and 13.

Both rulings were on the basis that, in the opinion of the Mining Recorder, certain titled lands owned and occupied by the City and covering the same ground as the claims for which security was required, "have significant development on them." The amount of security required by the Mining Recorder, in comparison to the value of that development and the potential for damage to it by any mining activity, is so low as to be negligible

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DESCRIBE YOUR PREFERRED SOLUTION TO THE DISPUTE (WHAT DO YOU WANT IN THE BOARD ORDER?):

The City applies to the Yukon Surface Rights Board, pursuant to subs 15(2) of the *Yukon Quartz Mining Act* and subpara. 65(a) of the *Yukon Surface Rights Board Act*, for a ruling that:

1. The Mining Recorder erred in its determination of the appropriate amount of security;

2. The Mining Recorder erred in ruling that only Mr. Hamel, and not Norwest Enterprises as well, was required to post security;

3. The Mining Recorder erred in basing its determination on a cursory examination of the mining claims in question and by failing to examine:

   a) the costs invested by the City of Whitehorse in developing the landfill;

   b) the costs of remedying any damage to the landfill by mining activities; and

   c) the costs of securing and developing an alternative landfill site.

4. The Yukon Surface Rights Board make its own determination of the appropriate amount of security, based on the considerations listed in paragraph 3 above, and substitute that for the amount determined by the Mining Recorder;

5. The City of Whitehorse be awarded its costs on a solicitor and client basis.

REQUIRED ATTACHMENTS

1. A copy of the written notice and proof of service of this application to the "Other Party(s)" listed on page one of this application.

2. Any other information or material which may assist with this application, such as: maps, sketches, photos, letters of correspondence, copies of mining claims, proof of land tenure, etc.

See attached book of documents

Signed this ____ day of January, 2000, at Whitehorse, Yukon.

Daniel S. Shier
Solicitor for the Applicant City of Whitehorse

This application must be filed at the head office of the Board by personal delivery, by registered mail, by facsimile, or as otherwise directed by the Board.

Address to: Yukon Surface Rights Board
Box 31201
Whitehorse, Yukon, Y1A 5P7

Deliver to: Yukon Surface Rights Board
206 - 100 Main Street
Whitehorse Yukon

Fax: (867)668-5892 Tel: (867)667-7695 **Email**: surfacerightsboard@hypertech.yk.ca

NOTE: The Yukon Surface Rights Board will not file incomplete applications nor will they consider accepting any application without significant documented negotiation attempts.

Orders of the Board are based on the best available information. It is the applicant's responsibility to supply the supporting documentation for their application, hence it is in the applicant's best interest to supply the most relevant information possible.

This application is based on the Yukon Surface Rights Board Act and the Rules of Practice and Procedure for the Board. Any information not supplied with your application kit is available from the Board office at the above address.

Numerous discussions have been had with Mr. Hamel and Norwest Enterprises Inc. with respect to resolving this matter, since December 22, 1995 to the present time. Attached is a compendium of relevant correspondence.

Yukon Surface Rights Board

April 06, 2001

Norwest Enterprises Inc.
Mr. Robert Hamel
Box 5269
Whitehorse, Yukon
Y1A 4Z2

Daniel S. Shier
Legal Counsel, City of Whitehorse
PRESTON, LACKOWICZ & SHIER
Suite 300, 204 Black Street
Whitehorse, Yukon
Y1A 2M9

Dear Sirs:

RE: Board Order and Reasons for Decision for YSRB2000-3001

Please find enclosed the Yukon Surface Rights Board order and reasons for decision for application YSRB2000-3001 issued today.

Sincerely,

Stephen J. Mills
Panel Chairperson
Yukon Surface Rights Board

Box 31201 Whitehorse, Yukon Y1A 5P7 Suite 206-100 Main St.
Fax: (867) 668-5892 Phone: (867) 667-7695 surfacerightsboard@hypertech.yk.ca

APPLICATION YSRB NO. 2000-3001

In the matter of the application to the Yukon Surface Rights Board under subsection 15(2) of the Yukon Quartz Mining Act (Canada), R.S.C. 1985, c. Y-4

BETWEEN: City of Whitehorse

(Applicant)

AND: Norwest Enterprises Inc.

(Respondent)

ORDER

On February 22, 2000, the Applicant submitted an application to the Board concerning a dispute about a decision of the mining recorder made pursuant to subsection 15(1) of the Yukon Quartz Mining Act as to security to be given for any loss or damage that may be caused by the Respondent to land owned or lawfully occupied by the Applicant as a result of mining activities undertaken by the Respondent on mineral claims HAT 1, 3 and 27, as recorded under the Yukon Quartz Mining Act.

On November 17, 2000 a panel of the Board convened a hearing on the above matter. After considering the arguments put forward by the Applicant and the Respondent, the panel orders the following.

1. In this order,

‘Active Cell’ means those areas within the Extended Landfill Site

a) in actual physical use by the Applicant or its agents or contractors in the Extended Landfill Site for waste disposal or other related activities, or
b) under physical development, including removal of soil, rock or other related materials, for the purposes of preparing the land for waste disposal or other related activities,

but does not include roadways or cut lines.

‘Closed Cell’ means those areas within the Extended Landfill Site used in the past by the Applicant for landfill;

‘Developed Land’ means

a) land which is an Active Cell or a Closed Cell; and
b) land within the Extended Landfill Site that is used by the Applicant, to access and maintain either an Active Cell or a Closed Cell or for storage;

‘Extended Landfill Site’ means the land comprising Lot 1166 and which is held in fee simple by the Applicant;

'Undeveloped Land' means land within the Extended Landfill Site which is not Developed Land;

2. The Respondent shall not be required to post security in relation to mining activities conducted pursuant to the Yukon Quartz Mining Act on mineral claims HAT 1, 3 or 27 that are carried out on Undeveloped Land.

3. The Applicant shall provide the Respondent with at least one year's notice in writing of its intention to change the designation of land in the Extended Landfill Site from Undeveloped Land to Developed Land.

4. The Respondent shall post security in relation to mining activities conducted pursuant to the Yukon Quartz Mining Act on mineral claims HAT 1,3 or 27 that are undertaken on Developed Land as follows:
   a) where the Respondent engages in a Class I exploration program, as described in the Yukon Quartz Mining Land Use Regulations, as these regulations applied on the date of this order,, the Respondent shall post $5,000 for each claim affected by the exploration program;
   b) where the Respondent engages in a Class II exploration program, as described in the Yukon Quartz Mining Land Use Regulations, as these regulations applied on the date of this order, the Respondent shall post $25,000 for each claim affected by the exploration program;
   c) where the Respondent engages in a Class II exploration program, as described in the Yukon Quartz Mining Land Use Regulations, as these regulations applied on the date of this order which, pursuant to subsection 137(1) of the Yukon Quartz Mining Act the Chief of Mining Land Use determines is to be treated for the purposes of Part II of the Yukon Quartz Mining Act as if it were a Class III or Class IV exploration program, the Respondent shall post $25,000 for each claim affected by the exploration program; and
   d) where the Respondent engages in a Class III or Class IV exploration program as described in the Yukon Quartz Mining Land Use Regulations, as these regulations applied on the date of this order, the Respondent shall post $75,000 for each claim affected by the exploration program.

April 6, 2001

Stephen J. Mills
Panel Chairperson
Yukon Surface Rights Board

Date

In the matter of an appeal to the Yukon Surface Rights Board under subsection 15(2) of the *Yukon Quartz Mining Act (Canada),* R.S.C. 1985, c.Y-4.

BETWEEN:	City of Whitehorse	**APPLICANT**
AND:	Norwest Enterprises Inc.	**RESPONDENT**

BEFORE: A Panel of the Yukon Surface Rights Board

Stephen J. Mills, Chair
Brian L. MacDonald, Member
F. Bruce Underhill, Member

DATE OF HEARING: November 17, 2000
Concluded in writing on December 13, 2000

PLACE OF HEARING: Whitehorse, Yukon

APPEARING:	For the Applicant:	Daniel S. Shier, Counsel Wayne Tuck, City of Whitehorse
	For the Respondent:	Robert Hamel, Norwest Enterprises Inc.
	Intervenor:	Jim McFaull, Yukon Chamber of Mines

Part A - Nature of the Dispute

This decision concerns an application submitted by the City of Whitehorse (the 'Applicant') on February 22, 2000 to the Yukon Surface Rights Board (the 'Board'). The application was made pursuant to s.15(2) of the *Yukon Quartz Mining Act*, R.S.C. 1985, c.Y-4 (the '*Act*') and involves a dispute respecting a decision of the mining recorder made under s.15(1) of the *Act* as to the security to be given for any loss or damage that may be caused by Norwest Enterprises Inc. (the 'Respondent) to land owned or lawfully occupied by the Applicant as a result of mining activities undertaken by the Respondent on mineral claims HAT 1, 3 and 27, as recorded under the *Act.*

Part B - Preliminary Matters

In the course of resolving this dispute, the Board was required to address two preliminary matters. The first of these involved the statutory sections pursuant to which the Board would make its decision; the second was the proper identification of the parties to the dispute. These matters are discussed below.

1. Statutory Authority for Making the Board's Decision

In its application, the Applicant applied for a ruling from the Board pursuant to subsection 15(2) of the *Act* and paragraph 65(a) of the *Yukon Surface Rights Board Act*, S.C. 1994, c.43. Paragraph 65(a) of the *Yukon Surface Rights Board Act* states:

> 65. On application by
>
> (a) a person, other than Government, who has an interest or right in the surface of non-settlement land, or
> (b) a person, other than Government, who has a mineral right with a right of access under subsection 5.01(1) of the *Canada Oil and Gas Operations Act*, section 17 of the *Yukon Placer Mining Act* or section 12, as restricted by section 14, of the *Yukon Quartz Mining Act* on that non-settlement land,
>
> the Board shall, in relation to a dispute between a person referred to in paragraph (a) and a person referred to in paragraph (b), make an order interpreting a provision referred to in paragraph (b) in relation to the right of access.

It is the view of the Board that this section is not relevant to the dispute as described in the Applicant's application as the dispute does not involve the interpretation of a provision of one of the statutes referred to in paragraph 65(b). As such, the Board did not

rely upon this provision in making its decision. The Board has, however, relied upon s.15(2) of the *Act* in makings its decision on the application submitted.

Subsection 15(2) of the *Act* states:

> 15. (2) Any dispute respecting a decision of the mining recorder under subsection (1) as to the security to be given shall be heard and determined by the Yukon Surface Rights Board in accordance with the *Yukon Surface Rights Board Act* on application by the person who is to give the security or the owner or lawful occupant of the land.

2. Parties to the Dispute

In its application, the Applicant identified the parties to this dispute as being the City of Whitehorse, Robert Hamel and Norwest Enterprises Inc.[1] Mr. Hamel, in statements at the hearing, argued that he should not be named as a party as the claims in question are not in his name but are owned by Norwest Enterprises Inc. The Applicant agreed at the hearing that Norwest Enterprises Inc. is the registered owner of the claims.

The abstract of record of mineral claims, maintained by Indian and Northern Affairs Canada pursuant to the *Act*, verified that Norwest Enterprises Inc. owns 50% of each of the HAT 1, 3 and 27 claims, with Kluane Drilling Ltd. holding the other 50% interest.

At the hearing, the Board agreed with the submissions made by the Respondent and ruled that the parties to the dispute are the City of Whitehorse and Norwest Enterprises Inc.

Part C - Facts

The facts are as follows.

1. The Applicant has developed a municipal refuse, waste disposal and landfill site (the 'landfill') at the War Eagle and Son of War Eagle site in the City of Whitehorse.

2. In January 1988, the Applicant became the registered owner, in fee simple, of Lot 1144, Quad 105 D/14, Yukon Territory, Plan 81167 LTO. The Applicant has operated the landfill on Lot 1144 since 1985.

3. On February 11, 1994, the Applicant, in writing, forwarded a request to the Yukon Government respecting the transfer of 20.6 hectares of land, held by the Yukon Government as Commissioner's Land, to the Applicant for the purpose of

[1] For clarity, the Applicant identified in its application the City of Whitehorse, Robert Hamel, Norwest Enterprises Inc. and Kluane Drilling Ltd. The dispute between the Applicant and Kluane Drilling Ltd. was resolved by these parties through mediation initiated by the Board. As a result, Kluane Drilling Ltd. was not a party to the hearing and is not in any way subject to the order of the Board respecting this dispute.

constructing a new landfill cell. The Applicant further requested permission to access the land to perform a geotechnical study and topographical grid survey.

4. On September 12, 1994, the Yukon Government authorized the Applicant to survey 20.6 hectares (more or less) of Commissioner's Land adjacent to Lot 1144, Quad 105D/14. The parcel included vacant, unsurveyed Commissioner's Land as well as portions of Lot 109, Group 5, FB 9191 CLSR and Lot 75, Group 5, FB 9171 CLSR.

5. On May 15, 1995, mineral claims HAT 1 and 3 were located by Robert Hamel and recorded in the Whitehorse mining recorder's office on May 23, 1995. Mineral claim HAT 27 was located by Robert Hamel on August 22, 1995 and recorded on August 23, 1995. Ownership of the HAT 1, 3 and 27 mineral claims were transferred to the Respondent on January 30, 1996.

6. On June 29, 1995, the Applicant requested permission from the Yukon Government to access the lands referred to in paragraph 3, prior to the finalization of the land transfer, for certain clearing activities and to construct a cell for the landfill, identified as Cell #3. On July 6, 1995, the Yukon Government granted the Applicant permission to clear and construct Cell #3. Cell #3 was subsequently developed by the Applicant.

7. On or about June 27, 1997, the Respondent undertook mining activities on HAT 1 and in the course of doing so excavated portions of Cell #3. Shortly thereafter, the Applicant restored the portion of Cell #3 that had been affected by the mining activity by backfilling trenches excavated by the Respondent.

8. The Applicant became the registered owner, in fee simple, of the lands referred to in paragraph 3 on February 3, 1998. This land is identified as Lot 1362, Quad 105 D/14, Yukon Territory, Plan 97-107 LTO.

9. The HAT claims are located, in part, on Lots 1144 and 1362. HAT 1 and 3 lie primarily on Lot 1362; HAT 1 and 27 are located, in part, on Lot 1144.

10. On February 6, 1998, the Applicant notified the Yukon Government of its desire to obtain ownership and establish control over a minimum 450-metre buffer zone surrounding the landfill. On January 25, 1999, the Yukon Government authorized the Applicant to proceed with the execution of the survey of Commissioner's Land within the proposed buffer zone.

11. On June 10, 1999, the mining recorder for the Whitehorse Mining District notified Robert Hamel that pursuant to subsection 15(1) of the *Act*, and based upon an inspection of the area which indicated significant development on the claim sites, he was required to post security in the amount of $2,000 per claim for the HAT 1, 3 and 27 claims.

12. On February 22, 2000 the Board received an application from the Applicant with regard to the matter presently before the Board.

13. On April 11, 2000 the Board accepted the application by the Applicant.

14. The Applicant continues to use a portion of Cell #3 for the disposal of waste. Future activities at the landfill are to be phased over a 25 year time period. Over this period of time, an estimated seven cells will be constructed, used for waste disposal and closed so as to effectively seal the contents within the cell walls.

15. On November 20, 2000, three days after the hearing convened into this matter, the Applicant became the registered owner, in fee simple, to Lot 1166, Quad 105D/11, Plan 2000-0042 LTO. This Lot encompasses the landfill and the buffer zone referred to in paragraph 10 and has subsumed Lot 1144 and Lot 1362.

16. The HAT 1, 3 and 27 mineral claims are located fully within Lot 1166.

Part D - Arguments of the Parties

1. Applicant

The Applicant identified seven cells that are either existing or intended for use at the landfill over an approximate 25 year period. They stated that any mining activity carried on by the Respondent will affect their ability to use land that they lawfully own or have lawfully occupied during the relevant time period. The Applicant's stated primary concern was that the activities of the Respondent, regardless of the scope or type of activities undertaken, would disrupt the landfill and thereby cause loss or damage to the Applicant.

The Applicant argued that the level of security set by the mining recorder on June 10, 1999 was not sufficient to protect the Applicant from any loss or damage that may arise out of the activities of the Respondent. They argued that security must take into consideration all possible activities that could occur on the land and could affect their ability to operate a landfill at that site. The Applicant maintained that s.15(1) of the *Act* was a 'forward-looking provision' that must contemplate any and all possible future damage or loss that may occur. The Applicant also maintained that the security must reflect any potential damage, not just physical damage.

The Applicant stated that in determining adequate security, the Board must consider the costs incurred by the Applicant in developing the landfill and the cost that would be incurred by the Applicant in relocating the landfill if the activities of the Respondent become such that the Applicant was prevented from using the land as the landfill.

With respect to the level of security, the Applicant suggested that the level of mining activity carried out by Respondent must be reflected in the security levels set by the

Board. They further submitted that a regime of graduated security was appropriate. Such a regime would see different security levels set in relation to the use of the cells (i.e. active, closed or future cells) by the Applicant and the level of activity undertaken by the Respondent. The regime should also address development costs incurred to date and those anticipated if the Applicant was required to relocate the landfill.

2. The Respondent

The Respondent took the position that at the time it staked HAT 1 and 3, in 1995, the Applicant was the owner of only Lot 1144; it was not the owner of the land that became Lot 1362. The Respondent argued that since the mineral claims were there first, the Respondent's right to explore and undertake mining activities should not be lost.

With respect to security, the Respondent argued that there should be no requirement for the Respondent to post security for the claims that are located under Lot 1362 because the claims were staked before the Applicant became the owner of this land. With respect to the claims under Lot 1144, the Respondent agreed that some level of security was warranted.

The Respondent argued that it was required to, and would, comply with all requirements of the *Yukon Quartz Mining Land Use Regulations,* SOR/99-10. Because of this, there should be no impact caused to the Applicant. With regards to the level of security, the Respondent contended that the Applicant's $8.5 million estimated cost of building a proper landfill is irrelevant to the amount of security. The Respondent agreed that a higher level of security than that determined by the mining recorder was justified with regards to those mineral claims located upon Lot 1144 because the Applicant was there first. It also stated that it has no plans to work on Lot 1144. Finally, the Respondent argued that the Applicant's submission on graduated security does not provide justification for the security requested and the levels proposed are excessive.

Finally, in the course of presenting its submissions, the Respondent argued that the Applicant is conducting an illegal operation at the site for a number of reasons. The Respondent raised concerns about the fact that the Applicant erected a fence at the landfill, did not have a land use permit and that the Applicant is operating without a water license.

Part E – Discussion and Analysis

1. Preliminary Matter

As noted above, in the course of making its submission, the Respondent raised a number of concerns about the legality of the operations of the Applicant at the landfill, including erection of a fence, not having a land use permit and operating without a water license. The Board has determined that these matters are beyond the jurisdiction of the Board. Therefore, these issues shall not be discussed further and form no part of this order.

2. A Question of Competing Rights

The Board is satisfied that the Applicant is the lawful owner of the surface of the land upon which all of the HAT claims are located.[2] As such, the Applicant has the right to the use and enjoyment of their land and the right to use that land for any purpose that it wishes, subject to any limitations that may be imposed by law. Therefore, if the Applicant chooses to establish a landfill on Lot 1166, it has the right to do so, subject to any laws applicable to this land use.

The Board is also satisfied that the Respondent, by virtue of the *Act*, has rights that flow from the staking of mineral claims HAT 1,3 and 27 that affect the land owned by the Applicant. Subject to s.15(1), these rights include the right to enter onto the lands for mining purposes and to mine.

The staking of the HAT claims occurred in 1995. Lot 1144, which overlays part of the land subject to the mineral claims, became the property of the Applicant in 1988; Lot 1362, which overlays the vast majority of the land subject to the mineral claims, became titled to the Applicant in 1998. The Applicant was given permission to use, and thereby occupy, the land that is now considered to be Lot 1362 by the Yukon Government in 1995. It is evident from this that the staking of the claims occurred both before and after the Applicant either acquired title to the surface or obtained permission to occupy the lands.

However, the *Act* does not draw any distinction *vis a vis* the requirement to pay security on the basis of whether the mineral claims are staked before or after the land becomes lawfully owned or occupied. As a result, the Board is of the view that although the respective rights of the Applicant and the Respondent were obtained at various times, this does not affect whether security should be required or the level set for the security.

[2] It was noted by the Board that at the time the Applicant submitted its application and at the time the Board convened a hearing into this dispute, the Applicant lawfully owned part of the land subject to the HAT claims and was the lawful occupant of other lands subject to the HAT claims. The Applicant, at the hearing, indicated that the final transfer of ownership from the Yukon Government to the Applicant was pending and that when this transferred was completed the Applicant would own the entire landfill area and that Lots 1144 and Lots 1362, amongst others, would be consolidated into one lot. Record of this transfer, which occurred on November 20, 2000, was provided to the Board on January 5, 2001.

Security to be paid is to be determined solely as provided for in s.15(1) of the *Act*, which states:

> 15.(1) No person shall enter on for mining purposes or shall mine on lands owned or lawfully occupied by another person until adequate security has been given, to the satisfaction of a mining recorder, for any loss or damage that may be thereby caused.

Considering the above, the issue becomes solely one of whether the amount of security determined by the mining recorder was adequate in the circumstances and if not, what level of security is adequate to meet the objectives of s.15(1)?

3. The Nature of Security

To answer the question of whether the security determined by the mining recorder was adequate or not, the Board must determine, with some level of certainty, what the loss or damage is that may be incurred by the Applicant as a result of the lawful activities of the Respondent. Once this question has been answered, the Board must then determine the appropriate amount of security to be given in light of the loss or damage that may be caused.

Before addressing these questions, it must be stated that this is a dispute concerning security, not compensation. At the hearing, the Board heard the two terms used almost interchangeably by the Applicant, the Respondent and the Intervenor. The Board has determined that 'security', as used in s.15(1) of the *Act*, refers to the funds to be posted by the holder of the mineral rights in recognition of the potential loss or damage incurred by the landowner or lawful occupant of the land in relation to the landowner or occupant's potential decreased ability to use and enjoy their property. It is separate and distinct from compensation which is designed to recompense for actual loss or damage caused. Compensation for such losses is the subject of s.15.1 of the *Act.*

4. Potential Mining Activity of the Respondent

Subsection 15(1) of the *Act* refers to the "loss or damage that may be thereby caused". To determine what these losses or damages may be, the Board has concluded that it first must determine what the activities are that the Respondent may undertake. With this information in hand, the Board can determine what the possible impacts are and what losses and damage may be suffered by the Applicant.

Information provided by the Respondent indicated that the level of exploration proposed would be of a scale that would not exceed a 'grassroots' to 'modest' level of exploration. The Board accepts that this is the level of mining activity anticipated by the Respondent to be undertaken in the foreseeable future. However, the Board cannot limit its decision to these levels of activity as the Respondent, individually or with support of others, could expand its exploration program beyond the scale of activities undertaken to date.

In light of the above, the Board has determined that security should be considered in relation to all levels of exploration activities that could be undertaken. For simplicity, the Board has adopted the classification system for exploration programs set out in the *Yukon Quartz Mining Land Use Regulations* (the 'MLUR'). The MLUR establishes four classes of mining activity that could potentially occur as part of an exploration program. Class I involves basic exploration with minimal anticipated impact to the area explored, while Class IV, at the other end of the spectrum of exploration programs, involves more intensive exploration activity and, as a result, is anticipated likely to cause significant impact to the area explored.

5. Loss or Damage to the Applicant

The Board has considered the four mining activity levels described in the MLUR in relation to the type of impacts that could be caused at the landfill and the resultant effect that these impacts could have in terms of loss or damage suffered by the Applicant. The impacts can broadly be grouped into two categories:

a) those that potentially cause adverse environmental effects; and

b) those that could potentially disrupt the planned activities of the Applicant at the landfill.

In reference to the first of these, the Board has noted that the posting of security in relation to the risk of adverse environmental effects is the subject of s.143 (1) of the *Act.* Section 143(1) of the *Act* provides that either the Chief of Mining Land Use or the Minister, depending upon the class of exploration program to be carried out, may require the person undertaking the exploration program to furnish and maintain security with the Minister where there is a risk of significant adverse environmental effect for a planned Class II, III, IV exploration program.

The Board further notes that s.15(1) of the *Act* does not specify the nature of the loss or damage that may be caused by mining activities. Thus it is possible that security could be collected under either s.15(1) or s.143(1) in relation to loss or damage that may be caused *vis a vis* adverse environmental effects. To avoid this situation from occurring, and in recognition of the specificity of s.143(1) regarding security in relation to the risk of adverse environmental effects of mining activities, the Board has determined that it will not consider the loss or damage to the Applicant that are environmentally related as these matters should be addressed under s.143(1) of the *Act.*

In contrast to the above, the Board has determined that the loss or damage referred to in s.15(1) must address any loss or damage incurred as a result of the disruption of activities that the lawful owner or occupant can engage in as a result of the mining activities. In the context of the Applicant's activities at the landfill, the Board has determined that the key loss or damage that may be suffered by the Applicant is disruption to the Applicant's scheduled use of the landfill over the next 25 years.

Crucial to the above conclusion is the word 'disruption'. The Board has concluded that mining activities undertaken by the Respondent may disrupt the activities of the Applicant and as a result, may cause loss or damage to the Applicant.

When attempting to determine security for this possible disruption, the Board has concluded that it will consider only short-term disruptions to the Applicant's use. Where disruption is of a long-term or permanent nature, it is the Board's opinion that such disruptions are more properly considered matters of compensation.

Bearing in mind the above, the Board accepts the Applicant's position that their primary concerns respecting loss or damage are related to the fact that the activities of the Respondent will disrupt the management and operation of the landfill such that the Applicant will be prevented from effectively and efficiently operating the landfill. More specifically, the Applicant has indicated that it is concerned about

a) damage to existing cells and the areas already prepared for use as a result of the exploratory activities of the Respondent;

b) interruption to the day to day activities at the landfill that may be caused by the Respondent; and

c) loss of use of the land, whether this be temporary or permanent.

Each of these concerns is discussed below.

a) *Damage to Active and Closed Cells*

The landfill is divided into cells that overlay portions of the three mineral claims of the Respondent. The Applicant has identified seven cells which are either existing or intended for use for landfill purposes over the next 25 years. Of the cells that have been identified by the Applicant, one is actively in use (i.e. waste is being deposited into the cell) ('Active Cell'). Two cells that have been used in the past are presently closed ('Closed Cells') although some materials, such as waste metal, are stored on top of these cells. Beyond the Active Cell and Closed Cells, the land is not used for landfill purposes, but is primarily providing a buffer zone for the actively used landfill site.

The Applicant stated that it was concerned that any exploration work undertaken by the Respondent within an Active Cell or a Closed Cell will compromise the integrity of the cell. Of particular concern to the Applicant is the uncontrolled dispersal of waste materials that may occur if cell contents are 'released' through mining activities and leaching of liquids if cell liners are penetrated as a result of mining activity.

The Board is of the opinion that where no Active Cells or Closed Cells are located, any loss of use or enjoyment that may be caused by exploration activities will be minimal. However, the Board is of the opinion that where the Respondent engages in

mining activities in areas where Active Cells or Closed Cells are located or if mining activities are carried on the roadways permitting access to the Active Cells and Closed Cells, the potential for loss or damage occurring is significant and should attract security.

b) *Interruption to Day-to-Day Activities*

The Board has determined that where the day-to-day activities of the Applicant occur at the same time and location as mining activities are undertaken by the Respondent, the potential for interruption to the Applicant may be substantial and loss or damage may be incurred as a result of this conflict. This situation should attract security.

c) *Potential for Loss of the Use of the Land*

The Applicant has stated that it is concerned that the activities of the Respondent may ultimately prevent the Applicant from using the landfill and that if this were to happen then the Applicant would have to incur significant cost to secure a new site for municipal waste disposal. The Board has concluded that if the mining activity of the Respondent proceeded such that the Applicant did have to relocate the landfill, this would amount to actual loss or damage to the Applicant and would be matter of compensation.

However, the Board recognizes that depending upon the nature and scope of the mining activity undertaken by the Respondent, the Applicant may be required to develop and use its cells in an order other than that which the Applicant has presently planned. Further, it may have to temporarily suspend the use of a cell and develop a new cell until mining activities are concluded. In either situation, the Applicant would have to incur capital costs outside of its original plan. Any losses or damages resulting from these events occurring could potentially be significant. Security levels should reflect this possibility, particularly where the disruption will or may occur over more than one year.

6. Level of Security

As noted in the previous section, the Board has identified a number of situations where the potential for loss or damage occurring as a result of mining activities is significant and for which security should be posted. These are summarized below in relation to the determined security levels.

a) *Undeveloped Land*

Where mining activities are conducted on land other than that used as an Active Cell, a Closed Cell, land used to access and maintain either of these cell types or for storage, the Board is of the opinion that the impact on the Applicant's use and enjoyment would be so low as not to warrant security.

b) *Developed Land*

i) Class I Exploration Program – Although the MLUR requires completion of a Class I exploration program in a 12 month period, which would include such things as backfilling trenches, the exploration activities of the Respondent may result in the Applicant incurring costs to remediate the land in order to exercise its right to use the land in advance of the end of a Class I exploration program. Security levels should reflect this potential situation as it may result in loss or damage to the Applicant.

For comparison purposes, the Board has considered the backfilling that the Applicant undertook in response to the mining activities conducted by the Respondent in 1997. The Applicant indicated that it spent $6,200 for the backfilling. In considering these figures, the Board notes that the issue before them is security and not compensation. Further the Board is of the view that Class I exploration activities are of a short term and should not result in significant impact on the Applicant and that the security level should reflect this reality.

On the basis of the foregoing, security of $5,000 shall be posted by the Respondent when it engages in Class I exploration activities on land used by the Applicant as an Active Cell or a Closed Cell or on land used for storage or to access either of the cell types.

ii) Class II, III and IV Exploration Programs – The Board has concluded that where the Respondent engages in more intensive exploration activities, the need for security is greater. Exploration activities of the Respondent beyond Class I mining activities may result in the Applicant having to suspend operations in an Active Cell and possible to develop a new cell.

The Applicant provided information regarding the cost of developing new cells. With respect to the most recently developed cell, Cell #3, the Applicant indicated that between $250,000 and $300,000 were expended to develop the cell.

The Board considers that any suspension of the Applicant's operations in an Active Cell is of a temporary nature and does not result in a loss of the Applicant's original investment. However, it is likely that the Applicant will

incur additional costs associated with financing new infrastructure in advance of proposed timelines and the security level should reflect this. These costs are anticipated to increase, and the risk of loss or damage similarly rise, the longer the displacement occurs.

On the basis of the foregoing, security of $25,000 is to be posted by the Respondent where it engages in a Class II exploration program or where a Class II exploration program will be treated as a Class III program pursuant to s.137(1) of the *Act* on land used by the Applicant as an Active Cell or a Closed Cell or on land used for storage or to access either of the cell types.

Security of $75,000 is to be posted by the Respondent where it engages in either a Class III or Class IV exploration program on land used by the Applicant as an Active Cell or a Closed Cell or on land used for storage or to access either of the cell types.

In conclusion, to facilitate communication between the parties respecting the posting of security and in recognition of the changes to land status that will occur over the life span of the landfill (i.e. from 'Undeveloped' to 'Developed'), the Board has concluded that the Applicant must provide the Respondent with at least one year's notice in writing of its intention to change the designation of land at the landfill from 'Undeveloped' to 'Developed'.

April 6, 2001

Stephen J. Mills
Panel Chairperson
Yukon Surface Rights Board

Date