

File No. MA 003-95

B. Goodman )  
Deputy Mining and Lands Commissioner )

Wednesday, the 20th day  
of December, 1995.

**THE MINING ACT**

**IN THE MATTER OF**

Lands staked as mining claims 1198039 and 1198046, the recording of which was refused by the Mining Recorder;

**AND IN THE MATTER OF**

Mining Claims S-1198050 to 1198054, both inclusive, situate in the Townships of Scadding, Davis, Loughrin and Street, in the Sudbury Mining Division, hereinafter referred to as the "Mining Claims";

**AND IN THE MATTER OF**

An appeal under subsection 112(3) of the **Mining Act** from the decision of the Mining Recorder for the Sudbury Mining Division for a declaration that the Mining Claims be declared invalid, that the refused claims be recorded as Mining Claims S-1198039 and 1198046 and compensation in the amount of \$2,366.20 be awarded for costs incurred by the appellant during the second staking of the Mining Claims.

**B E T W E E N:**

KEN PYE

Appellant

-and-

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

-and-

WMC INTERNATIONAL LIMITED

Party of the Third Part

**ORDER**

**WHEREAS** an appeal to the Mining and Lands Commissioner was received by the tribunal on the 14th day of January, 1995;

**AND WHEREAS** a hearing was held by telephone conference call on the 13th day of December, 1995 to hear and determine whether this tribunal has jurisdiction to hear an appeal from a decision of a mining recorder under subsection 112(1) of the **Mining Act** where the appellant has failed to perfect the right of appeal as required by payment of the prescribed fee and request that the mining claims be marked as "filed only" as set out in subsection 46(2) of the **Mining Act**, or whether the appellant is estopped by his failure to comply with the **Act** from proceeding with the appeal;

**UPON** hearing from the parties and reading the documentation filed;

**1. THIS TRIBUNAL ORDERS** that the appeal from the decision of the Mining Recorder for the Sudbury Mining Division is hereby dismissed.

**2. THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by any party to the appeal in respect of this appeal.

**IT IS FURTHER DIRECTED** that upon payment of the required fees, that this Order be filed in the Office of the Mining Recorder for the Sudbury Mining Division.

Reasons for this Order are attached.

**DATED** this 20th day of December, 1995.

Original signed by

B. Goodman  
DEPUTY MINING AND LANDS COMMISSIONER

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## REASONS

The preliminary issues were heard by telephone conference call on December 13, 1995.

### Appearances:

Ken Pye                      Appearing on his own behalf.

John Norwood              Counsel for the Ministry of Northern Development and Mines.

Pamela J.C. Scarrow      Agent for WMC International Limited.

### Issues:

Does the Mining and Lands Commissioner have jurisdiction to hear an appeal from a decision of a mining recorder under subsection 112(1) of the **Mining Act** ("the **Act**") where the appellant has failed to perfect the right of appeal as required by the payment of the prescribed fee and request that the mining claims be marked as "filed only" as set out in subsection 46(2) of the **Act**? Is the appellant estopped by his failure to comply with the **Act** from proceeding with the appeal?

### Legislative Scheme:

Sections 44 to 47 of the **Act** deal with "Applications to Record". Subsection 44(1) provides as follows:

**44.--(1)** A licensee who has staked out a mining claim shall make an application in the prescribed form to the recorder accompanied by the prescribed fee and a sketch or plan showing the prescribed information to record the claim not later than thirty-one days after the day on which the staking was completed.

Subsections 46(1) and (2) addresses what is to be recorded.

**46.--(1)** The recorder shall forthwith enter in the proper book in the recorder's office the particulars of every application to record a mining claim that the recorder considers to be in accordance with

this Act, and he or she shall file the application, sketch or plan and affidavit with the records of his or her office, and every application proper to be recorded shall be deemed to be recorded when it is received in the recorder's office, if all the requirements for recording have been complied with, although the application may not have been immediately entered in the record book.

(2) If an application is presented that the recorder considers to be not in accordance with this Act or that is for lands or mining rights which or any substantial part of which are included in a subsisting recorded claim that has priority under subsection 44(2), the recorder shall not record the application, but shall, if desired by the applicant, upon receiving the prescribed fee, receive and file the application, and any question involved may be adjudicated as provided in this Act, but such filing shall not be deemed a dispute of the recorded claim nor shall it be noted or dealt with as such unless a dispute verified by affidavit is filed with the recorder by the applicant or by another person on the applicant's behalf as provided in section 48.

Subsections 46(3) and (4) provide as follows:

**46.--(3)** An application received and filed under subsection (2) is invalid and of no effect sixty days after the receiving and filing unless in the meantime an action is commenced before the recorder or the Commissioner or unless in the meantime the recorder or the Commissioner orders a continuation of the application.

(4) As soon as an application is invalid and of no effect under subsection (3), the recorder shall mark the application cancelled and by registered letter shall notify the applicant at the applicant's last known address in the recorder's office of his or her action and the reason therefor.

Part VI of the **Act** deals with the Mining and Lands Commissioner. Subsection 112(1) provides that:

**112.--(1)** A person affected by a decision of or by any act or thing, whether ministerial, administrative or judicial done, or refused or neglected to be done by a recorder may appeal to the Commissioner.

**Background:**

On January 19, 1995, the Mining and Lands Commissioner received a Notice of Appeal under subsection 112(3) of the **Act** signed January 10, 1995 and a document signed by Mr. Pye entitled "Statement of Particulars" dated January 14, 1995.

Following her review of the documentation, the Commissioner sent the parties a Notice of Appointment dated February 6, 1995 for Hearing by Telephone Conference Call upon at least seven days notice. The Notice indicated that the Commissioner had decided that a hearing by telephone conference call should be held to determine the above-noted jurisdictional issues and any other matters raised by the parties. A facsimile from Mr. Pye was received on November 28, 1995. A facsimile was also received from Ms. Scarrow on behalf of WMC International Limited on November 29, 1995. The written submission of the Ministry of Northern Development and Mines dated November 28, 1995 and signed by Mr. Norwood was received by the Commissioner on December 1, 1995. On December 5, 1995, the Deputy Commissioner sent a Notice of Appointment fixing December 13, 1995 as the date for the hearing by telephone conference call.

**Facts:**

On January 6, 1995, Mr. Pye submitted a total of 150 applications to record representing 159 mining claims. Of this submission, 150 mining claims were accepted and recorded. The nine other mining claims were refused by the Acting Mining Recorder, Kim Giroux, at that time. Of the nine claims refused, Mr. Pye requested that seven be filed in accordance with subsection 46(2), and the prescribed fee was paid. The remaining two mining claims (1198039 and 1198046) are the subject of this appeal and were not requested to be filed.

In his evidence, Mr. Pye stated that he did not recall being told to put in the applications as "filed only" and to pay the prescribed fee. He testified that he was told to restake the claims, which he did. Mr. Pye restaked the same ground on January 7, 1995 as Mining Claims S-1198050 to 1198054, both inclusive, and the applications were recorded on January 9, 1995 when the prescribed fee was paid.

On cross-examination by Mr. Norwood, Mr. Pye indicated that he did not recall the issue of paying the prescribed fee being raised concerning these two applications, although he admitted that he was aware that he could do this, as he had done in the case of the other seven applications. He testified that he could not recall much of what happened in the recorder's office, since so much was happening that day and he spent two hours in the recorder's office, where he first dealt with Ms. Giroux, and then with Roy Denomme and Mark Hall.

**Roy Anthony Denomme** is the Mining Recorder for the Sudbury Division. He gave evidence concerning the process of recording an application under section 44 of the **Act**. He testified that if an application is not accepted, it cannot be recorded. The application will be

returned to the client, and the recorder will indicate why the application is not acceptable. The client will determine whether to file the application, in which case the prescribed fee is paid under subsection 46(2). The applicant has 60 days to commence an action under subsection 46(3). According to Mr. Denomme, the filing of the application and the payment of the fee are important under the statutory scheme, because this starts the running of the 60 day period in which to commence an action, as set out in subsection 46(3). If no action is commenced within this timeframe, the recorder is to mark the application cancelled and notify the applicant accordingly under subsection 46(4).

According to Mr. Denomme, when the two subject claims were refused for recording on January 6, 1995, Mr. Pye gave no indication that he wished to file the applications and pay the prescribed fee. Instead, Mr. Pye sent other men out to restake the claims. It would be inconsistent to file the applications and pay the fee, and restake the claims. The restaking is consistent with fact that Mr. Pye did not wish to file the applications and pay the fee and commence an action.

**Mark Dixon Hall** has been the Chief Mining Recorder for the Province of Ontario since 1991. He recalled having spoken with Mr. Pye on a couple of occasions on January 6, although he did not recall the specifics. He did not recall Mr. Pye asking what his options were when Ms. Giroux refused to record the claims. Typically, the recorder would be asked to indicate the options: file and pay the fee and commence an action to have the claims recorded, restake, or do nothing.

Mr. Pye testified that he felt that he was being "held over a barrel" and "pressured" to restake. Even if he paid the fee, the recorder would not have accepted the claims. He felt that he was forced to restake because there was no other option if he wished to be paid in full for his work under his contract with WMC International Limited ("WMC"). Although this contract was not produced, according to Mr. Pye, WMC would have the right to withhold 20 percent of the stipulated contract price, if claims were not recorded due to his fault. This could amount to \$20,000. In the case of the seven claims that Mr. Pye asked be "filed only" and paid the fee, Mr. Pye stated his belief that the responsibility for the refusals lay with WMC, rather than himself. Mr. Pye said he decided to restake the two claims and pursue the first refusal and the recovery of his costs in connection with the first staking at a later time.

In his statement of particulars dated January 14, 1995, Mr. Pye indicated that the two claims were staked in good faith, with no attempt to mislead either on the application or in the field. Both claims were staked with the #1 post being in a surveyed township and then each claim crosses a township line into unsurveyed territory. The territory consists of 16 hectare units, and therefore crossing these township lines has no effect on the method of staking. Mr. Pye claimed that administrative error was the reason why the recorder's decision should be reversed. He wanted the original claims to be recorded and compensation in the amount of \$2,366.20, equal to \$60 per line and recordings.

**Submissions:**

In his written submission dated November 28, 1995, Mr. Pye said, in part:

I did not realize that I did not pay "filed only" fee.

Hopefully I can be forgiven!

If payment is required I will be more than willing to pay it.

At the hearing, Mr. Pye referred to his failure to ask that the first two applications be filed and pay the fee, as a "technicality".

Mr. Norwood, in his written submission, also dated November 28, 1995, summarized the Crown's position that the appeal could not proceed because of the failure of the appellant to request that mining claims 1198039 and 1198046 be filed and because of his failure to pay the prescribed fees, as set out in the provisions of subsection 46(2) of the **Act**.

The Crown argued that there was a failure by the applicant to request that the application be filed, and in not paying the prescribed fee as required, on January 6, 1995 or within the 31 day period as set out in subsection 44(1). This filing and the paying of the prescribed fee was pivotal to the eligibility of the application to be further considered and adjudicated. Without the document being properly filed, there was no application to consider and adjudicate. The Crown further argued, based on the facts, that the applicant was fully aware of the requirements and processes involved with subsection 46(2) of the **Act**, and made a conscious decision, not to proceed with the filing of the applications and the paying of the prescribed fee. The Crown contended that Mr. Pye, by exercising his option under subsection 46(2) of the **Act** for seven mining claims was fully cognizant of the process and chose not to exercise those same rights with regard to the claims which are the subject of this appeal. Mr. Pye chose to restake the grounds, rather than have the original claims taken as filed only. At the hearing, Mr. Norwood argued from the facts that Mr. Pye had made a conscious business decision to restake, rather than risk a holdback from WMC under the terms of the contract. Too much money was on the line. If Mr. Pye felt pressured to restake and resubmit, it was due to the terms of the contract, rather than any actions of the mining recorder.

Mr. Norwood further submitted that, as Mr. Pye already holds the land in question, he cannot have his claims and his "filed only" claims too. The issue of compensation should have been raised at an appeal hearing pertaining to the original claims, had they been filed and the prescribed fees paid.

He contended that the application to record for the two mining claims involved in this appeal is no longer eligible for filing. He asserted that the validity of the application cannot be considered without it being filed, and that the Commissioner therefore had no jurisdiction to hear this matter.

**Findings:**

The tribunal finds that the Mining and Lands Commissioner has no jurisdiction to proceed to hear this appeal on the merits on the substantive issue. The legislative scheme is clear. If an applicant wishes to preserve his or her rights to start a proceeding to have a refused claim ultimately accepted and recorded, he or she must ask the recorder to receive and file the application, and pay the prescribed fee, in accordance with subsection 46(2). These requirements are not mere technicalities. It is this receiving, filing and payment which starts the 60 day clock running within which to commence an action under subsection 46(3). An applicant cannot circumvent the requirements of subsection 46(2) by simply appealing a refusal to file to the Commissioner under subsection 112(1) of the **Act**.

On the facts, the tribunal finds that Mr. Pye knew that he had the option to ask that the Recorder receive and file the applications and pay the prescribed fee, because this is precisely what he did with the other seven applications that were refused. The tribunal further finds that Mr. Pye made a business decision to proceed to restake the claims so that the applications to record would be accepted by the Recorder, rather than contesting the original refusal, which would have taken some time and may have resulted in a substantial financial holdback by WMC under the terms of its contract with Mr. Pye.

Since Mr. Pye did not ask that the two applications be received and filed, and did not pay the prescribed fee by February 6, 1995 (31 days after the day on which the staking was completed), the tribunal lacks the requisite jurisdiction to hear this appeal. It is not now possible for Mr. Pye to pay this fee and have the appeal heard, particularly since the same ground has been restaked and the claims have been recorded.

As a result, the tribunal must dismiss this appeal. No costs of this appeal were sought and none shall be ordered.