



# The Mining and Lands Commissioner Le Commissaire aux mines et aux terres

Russell Yurkow ) Friday, the 10th day  
Deputy Mining and Lands Commissioner ) of August, 1990.

IN THE MATTER OF

An application made under subsection 86(1)(b) of the Mining Act for relief from forfeiture of Mining Claims L-1096945, 1096946 and 1096948, situate in the Township of Mulligan, in the Larder Lake Mining Division;

B E T W E E N:

SKEAD HOLDINGS LTD.

Applicant

- and

FOSTER DAVID MARSHALL

This was a hearing held by an exchange of a written submission and response by each party. Pursuant to section 4 of the Statutory Powers Proceedings Act, both parties waived the right to a hearing. interpret this to mean that, in the circumstances, the parties waived the right to an oral hearing and the right to cross-examination. If the parties do not intend to produce witnesses who will present oral evidence and the need to cross-examine will not arise, this Tribunal feels that it is appropriate, with the consent of the parties, to dispense with an oral hearing.

The application was made under clause 86(1)(b) of the Mining Act for relief from forfeiture of three mining claims.

Lucien Lacasse staked mining claims L-1096945, 1096946, 1096948 on the 12th and 13th days of April, 1989 and recorded the staking on the 1st day of May, 1989 in the Larder Lake Mining Division. On the 9th day of June, 1989 these claims were transferred to the applicant Skead Holdings Ltd.

Subsection 76(1) of the Mining Act provides that, in order to maintain a claim, the claim holder must perform twenty days work in the first year after recording. The Act provides for automatic forfeiture of a claim if the work is not done. Upon a claim being forfeited, it is open for restaking.

Subsection 86(2) of the Act allows a claim holder to apply to the

Commissioner thirty days before the claim would forfeit for an order extending the time to perform the work. The applicant, having performed no work during the first year, applied to the Commissioner on the 12th day of April, 1990 for an order extending the time to perform work. The order was granted on the 27th day of April, 1990 and filed and recorded with the Mining Recorder on the 3rd day of May, 1990.

The respondent, Foster Marshall, restaked the claims on the 2nd day of May, 1990 which was the first day that they were open for restaking. The restaking was recorded on the 3rd day of May, 1990 at which time the Mining recorder cancelled the Commissioner's order extending time. Mr. Marshall has three adjoining claims on which the assessment work required to date has apparently been completed. The restaked claims combine with his existing claims to form a block.

This is the first appeal to be heard under the Mining Act since the retirement of Mr. Ferguson as Mining and Lands Commissioner. Even though the parties did not refer to any previous decisions, I feel that it would be useful to take this opportunity to review the principles that have been applied in the past and to set out the principles that the Tribunal proposes to follow.

The last published case on topic is Garrelts v. Lacasse, 5 M.C.C. 413. In that case Commissioner Ferguson refers to Willroy Mines Limited v. Chisholm 4 M.C.C. 124 and, on page 420, quotes Commissioner McFarland as follows:

It has been the policy of this tribunal to favourably consider applications for reinstatement on terms where a considerable amount has been expended in exploring and developing the property, provided the full complement of the major part of assessment work as required ... has been completed.

Commissioner Ferguson, also on page 420, states:

In this case there has been no significant exploration of the property, no assessment work has been recorded and there is no assurance that assessment work will be completed in the future. Accordingly, I cannot conclude that the mining claims of the respondent (the restaker) should be cancelled.

In MacGregor v. Downey 5 M.C.C. 291 relief from forfeiture was granted where sixty days assessment work had been performed. In returning the claims to the original staker, the Commissioner also considered Trickey v. Hillis 2 M.C.C. 237 which.

stands for the principle that someone who discovers a new field, exploits the mineral wealth and makes a genuine attempt to comply with the Act should have relief against someone who waits for the opportunity to profit from a technical contravention of the Act. The Commissioner noted that in the MacGregor Case the restaker did not appear at the hearing and did not state how he came to know that the claims were open for restaking. The Commissioner concluded that the restaker had been watching the claim and waiting for a technical contravention.

In Leliever v. Ross 5 M.C.C. 237 relief from forfeiture was granted where the original staker had performed 200 days assessment work.

Ramsay v. Yellowknife Bear Mines, No. 3 went to the High Court of Justice and the decision of Osler J. is reported in 5 M.C.C. 208. On page 219, Mr. Justice Osler states:

I have been referred to a large number of Mining Commissioners' cases and it is quite apparent from a perusal of these cases that the Commissioner has developed a deliberate practice of granting relief where forfeiture has occurred by reason of technical or clerical slips and especially where the required work has been done and forfeiture occurred only because of negligence.

On page 220, Mr. Justice Osler goes on to say:

In the present case the required work has clearly been done, ... and it seems to me inequitable that the right of Yellowknife to proceed to lease with respect to these claims should be irrevocably forfeited by virtue of a lapse in judgement by a relatively minor employee.

In concluding, Justice Osler also considered which party is more likely to develop the claims. He concluded that the restaker did not have the financial resources to proceed with further development in the immediate future. On page 221 he makes a statement that this Tribunal endorses, namely, "the object of the Act ... is to provide for the finding and development of bodies of ore".

The last case that I will refer to is Kondrat v. Prieston, 5 M.C.C. 29. In this case relief from forfeiture was granted even though no assessment work was done. However, the original staker had set up a tent, was preparing carry out a geophysical survey and had the necessary equipment to carry out exploration work. On page 30,

Commissioner McFarland states the accepted principle:

It is the usual practice of this tribunal not to grant relief from forfeiture unless considerable exploration work has been performed on the claims involved. However, in this instance, I am satisfied that the equities lie with the applicant.

This concludes a review of sufficient cases to set out the general principles that have been followed. The principles that this Tribunal intends to follow are not, in my opinion, a departure from those previously established. They are set out so that parties before the Commissioner may have a clearer sense of the guiding principles.

The following are the principles that the Tribunal proposes to follow in considering applications for reinstatement on terms under section 86 of the Mining Act:

1. An applicant who has expended a considerable amount in exploring and developing the property will tend to receive favourable consideration for reinstatement on terms.
2. An applicant who has invested little work in a property will not receive favourable consideration unless the applicant establishes a strong commitment to develop the property with the Kondrat case being an example of the type of commitment required.
3. An applicant who has invested little work will not be able to rely on the argument of "opportunism" or "watching". The principle in Trickey v. Hillis will be applied, as in the original case, to provide an equitable remedy to someone who is making a genuine attempt to comply with the Act and has a considerable investment in the property.
4. An applicant who delays, without good reason, in applying for an order extending time and then argues that there were delays in processing the application will not receive favourable consideration on that issue.
5. A restaker who has adjoining land that is being actively explored or developed will receive favourable consideration.
6. The degree of commitment and the ability of competing parties to explore and develop the property will be a consideration.

In the application before me, I find that there has been no assessment work recorded. The applicant, having invested little or nothing in the claims, is not in a position to require equitable redress.

The applicant argues that, through no fault of the applicant, there was a

delay in processing the original application for an extension of time. The delay, however, was not one that could not have been reasonably anticipated and, if the applicant had made the application as permitted by law, the resulting order could have been filed in time to prevent forfeiture.

The applicant further argues that the respondent could easily have ascertained that an application for an extension of time was being processed. The respondent staked the claims immediately they became open. He could have checked with the Mining Recorder to see if an application for an order extending time had been made. However, the respondent was entitled by law to stake when he did and I can not see that he had any moral obligation to enquire if an application was being processed or, even if aware of such an application, any obligation to refrain from restaking the claims.

The respondent has adjoining claims that he is developing.

I do not see that a licensee who has expended no time or effort on a claim and does not apply for relief in a timely fashion suffers a hardship or inequity in losing the claim to a restaker who is actively developing adjoining claims. It appears to be perfectly consistent with the purpose of the Act and with equity to give the opportunity to develop the claims to the respondent.

Application is dismissed without costs.

SIGNED this 10th day of August, 1990.

Original signed by  
R. Yurkow

R. Yurkow  
DEPUTY MINING AND LANDS COMMISSIONER