



Box 2400
C.P. 2400
24th Floor, 700 Bay Street
24^e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

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

REFER OUR FILE MA 001-12

L. Kamerman)
Mining and Lands Commissioner)

Thursday, the 29th day
of March, 2018.

THE MINING ACT

IN THE MATTER OF

The Director's Order to File a Certified Closure Plan to Rehabilitate Mine Hazards, Order No. 2011002 ("hereinafter referred to as the "Director's Order") regarding the operations of William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd. and Jubilee Gold Inc. and Gwen Resources Ltd. involving the Upper and Lower Kerr Tailings Area, situate in the Townships of McGarry and McVittie, District of Temiskaming;

AND IN THE MATTER OF

The Requirement of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 147(7) of the **Mining Act**, dated the 6th day of December, 2011, that William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd., Jubilee Gold Inc. and Gwen Resources Ltd. file a certified Closure Plan (as defined in the **Mining Act**) to rehabilitate mine hazards on the Property in accordance with the applicable requirements of the **Mining Act**, including O.Reg. 240/00 and the schedules thereto;

AND IN THE MATTER OF

Bear Lake Gold Ltd.'s Notice to Require a Hearing before the tribunal under Part VII of the **Mining Act**, pursuant to subsection 152(1) of the **Mining Act**, concerning the Director's Order;

AND IN THE MATTER OF

Armistice Resources Corp.'s, and Jubilee Gold Inc.'s respective applications under Part VI of the **Mining Act**, pursuant to sections 105 and 113(b) of the **Mining Act**, (i) for a determination as to whether Armistice Resources Corp., and Jubilee Gold Inc. are "proponents" under the **Mining Act** and with respect to the mine hazards at issue in the Director's Order; and (ii) to quash, or in the alternative vary, the Director's Order;

B E T W E E N:

ARMISTICE RESOURCES CORP.,
BEAR LAKE GOLD LTD. AND
JUBILEE GOLD INC.

Appellants

- and -

THE DIRECTOR OF MINE REHABILITATION
Respondent

ORDER

WHEREAS requests for a hearing pursuant to section 113 of the **Mining Act** were received by this tribunal on the 4th and 6th days of January, 2012, from Armistice Resources Corp. and Jubilee Gold Inc., respectively;

AND WHEREAS the appeal under Part VII of the **Mining Act** (Bear Lake Gold Ltd.) was received by this tribunal on the 20th day of January 2012;

AND WHEREAS neither William Sims Industries Limited or Gwen Resources Ltd. have appealed from, or sought a hearing regarding, the Director's Order;

AND WHEREAS on the 20th day of March, 2012, Mr. Gustavo Camelino, counsel for the appellant, Jubilee Gold Inc., filed preliminary motion materials which raised the issue of the appellant, Jubilee Gold Inc.'s status (e.g. whether they are proponents, or owners) under the **Mining Act**, which decision at the request of the parties is being issued simultaneously with this decision;

1. IT IS HEREBY ORDERED that the motions of Jubilee Gold Inc. and Armistice Resources Corp. that they be permitted to have a parallel hearing pursuant to section 105 and clause 113(b) of the **Mining Act** for a declaration that the Order of the Director , Order No. 2011002, be declared null and void, be and is hereby dismissed.

DATED this 29th day of March, 2018.

REASONS FOR THIS ORDER ARE ATTACHED.



L. Kamerman
MINING AND LANDS COMMISSIONER



Box 2400
C.P. 2400
24th Floor, 700 Bay Street
24^e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

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

REFER OUR FILE MA 001-12

L. Kamerman) Thursday, the 29th day
Mining and Lands Commissioner) of March, 2018.

THE MINING ACT

IN THE MATTER OF

The Director’s Order to File a Certified Closure Plan to Rehabilitate Mine Hazards, Order No. 2011002 (“hereinafter referred to as the “Director’s Order”) regarding the operations of William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd. and Jubilee Gold Inc. and Gwen Resources Ltd. involving the Upper and Lower Kerr Tailings Area, situate in the Townships of McGarry and McVittie, District of Temiskaming;

AND IN THE MATTER OF

The Requirement of the Director of Mine Rehabilitation (the “Director”) pursuant to subsection 147(7) of the **Mining Act**, dated the 6th day of December, 2011, that William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd., Jubilee Gold Inc. and Gwen Resources Ltd. file a certified Closure Plan (as defined in the **Mining Act**) to rehabilitate mine hazards on the Property in accordance with the applicable requirements of the **Mining Act**, including O.Reg. 240/00 and the schedules thereto;

AND IN THE MATTER OF

Bear Lake Gold Ltd.’s Notice to Require a Hearing before the tribunal under Part VII of the **Mining Act**, pursuant to subsection 152(1) of the **Mining Act**, concerning the Director’s Order;

AND IN THE MATTER OF

Armistice Resources Corp.’s, and Jubilee Gold Inc.’s respective appeals under Part VI of the **Mining Act**, pursuant to section 113(b) of the **Mining Act**, (i) for a determination as to whether Armistice Resources Corp., and Jubilee Gold Inc. are “proponents” under the **Mining Act** and with respect to the mine hazards at issue in the Director’s Order; and (ii) to quash, or in the alternative vary, the Director’s Order;

B E T W E E N:

ARMISTICE RESOURCES CORP.,
BEAR LAKE GOLD LTD. AND
JUBILEE GOLD INC.

Appellants

- and -

THE DIRECTOR OF MINE REHABILITATION
Respondent

REASONS

Appearances:

Gustav F. Camelino

For the Appellant, Jubilee Gold Inc. &
the Moving Party

Berkley D. Sells
Richard Butler

For the Appellant, Armistice Resources Corp.,
and Respondent to the Motion

Michael Mercer

For the Respondent, Director of Mine Rehabilitation,
Ministry of Northern Development and Mines, and
Respondent to the Motion

INTRODUCTION

The Director of Mine Rehabilitation (the “Director”) issued an Order dated December 6, 2011, made pursuant to s. 147(1) of Part VII of the **Mining Act** in which he ordered five companies collectively to file a certified Closure Plan, as defined in Part VII of the **Mining Act**, to rehabilitate mine hazards on the properties known as the Upper and Lower Kerr Tailings Area situate in the Townships of McGarry and McVittie, District of Temiskaming.

The five companies William Sims Industries Limited (Sims), Armistice Resources Corp. (Armistice), Bear Lake Gold Ltd. (Bear Lake), Jubilee Gold Inc. (Jubilee) and Gwen Resources Inc. (Gwen Resources). Sims and Gwen Resources accepted their fate. Bear Lake filed an appeal in accordance with the procedures contemplated by Part VII for mine rehabilitation purposes pursuant to s. 152(1)(a) [the required filing of a certified closure plan under subsection 147(1)] by serving the Director with a notice to require a hearing before the Commissioner pursuant to ss. 152(2).

Armistice and Jubilee did not accept the situation at all. They did not appeal the Director’s Order within the 30 day period contemplated by Part VII and for which there is no possibility of extension under any circumstances. Instead, on January 4th and 6th, 2012, Jubilee and Armistice respectively requested a hearing pursuant to section 113(b) seeking a declaration that the Director’s order should be quashed.

Whether the Tribunal has power to extend the 30 day appeal period, should their attempt to have this matter heard via s. 113(b) fail, is an alternative argument, but there is no sense wasting time on

it. It is not a power which the tribunal has, under s. 136 or 121 or otherwise. Jubilee and Armistice are taking their chances that their approach will be successful.

Not presenting a united front, Jubilee first brought its own motion on May 8, 2012 in an attempt to have the matter against it dismissed:

Is Jubilee Gold Inc. a person who “receives only a royalty from all or part of a mine, mine hazard or mining lands” within the meaning of subsection 1(3) of the *Mining Act* and therefore not an “owner” or “proponent” as those terms are defined in the *Mining Act*?

The motion was reconvened on May 1, 2013. The tribunal indicated orally that it had made its decision in the initial motion which was not successful. At the end of the hearing, the parties persuaded me, the Commissioner to hold off on issuing this which I have done. That decision will be issued simultaneously with the decision in this motion. It does not have an impact on the outcome.

Jubilee and Armistice did not seek to have an appeal referred to the tribunal by the Director via section 153.2 of the **Mining Act** (under the auspices of Part VII). Each specifically noted in their correspondence (January 6, 2012 and January 4, 2012, respectively) that they do not accept at this time that they are a “proponent” within the meaning of Part VII. Instead, each has requested a hearing pursuant to subsection 113(b), the **Mining Act** for a determination in accordance with their positions.

Issues

1. Can Armistice and Jubilee avail themselves of what they call “the hearing stream” via s. 105 and s 113(b) of the **Mining Act** to have their issue determined, namely to have the Director’s Order requiring the filing of a closure plan by multiple persons over a vast tract of land, involving unspecified, potentially unrelated mine hazards quashed?
2. Once the Director has issued an Order requiring the filing of a closure plan pursuant to s. 147(1) under Part VII of the **Mining Act**, is the only avenue under which it can be challenged by a proponent, as defined under s. 139 pursuant to s. 152(1)(b)?
3. The two approaches above are called the hearing stream and the appeal stream. If Jubilee and Armistice have not preserved their appeal rights in the appeal stream by filing a notice to require a hearing before the commissioner with the Director within 30 days of the issuance of a Director’s order, should the Commissioner find that they have no rights under the hearing stream to have their issue determined, is there jurisdiction to have their right to appeal resurrected or restored?

The answer to this third question is an unequivocal no. I don’t think there was any issue with anyone on this.

Flowing from this:

If there is a s. 105 and 113(b) hearing in conjunction with the s. 152 appeal, what process should be followed? Mr. Camelino referred the tribunal to a well-known passage, stating that it will all come down to whether there can be a Part VII process or s. 113(b) application. Although attributed to the Supreme Court of Canada, it was originally stated in as the tripartite test in Driedger, Elmer, (*Construction of Statutes* (2nd ed. 1983), p. 87, as the Modern Principle of Construction:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. ...

Jubilee maintains that that section 105 provides the Commissioner¹ with its overarching jurisdictional powers. S. 152 with its appeal powers under Part VII.

Legislation:

1. “mine hazard” means any feature of a mine, or any disturbance of the ground, that has not been rehabilitated to the prescribed standard; (“risque minier”)
“owner”, when used in Parts VII, IX and XI, includes, (a) every current owner, lessee or occupier of all or part of a mine, mine hazard or mining lands,
(b) an agent of the current owner, lessee or occupier, or a person designated by the owner, lessee, occupier or agent as being responsible for the control, management and direction of all or part of a mine, mine hazard or mining lands, and
(c) subject to subsections (4) to (13), a secured lender who enters into possession of all or part of a mine, mine hazard or mining lands pursuant to the security it holds with respect to the mine, mine hazard or mining lands; (“propriétaire”)

Jurisdiction

105 (1) No action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner except as otherwise provided in section 171 or elsewhere in this Act and except for matters relating to

¹ I am going to use Commissioner instead of “tribunal” and the first person “I” for the remainder of this decision. It is the final decision that I will issue prior to proclamation of S.O. 2017, c. 8 Sched. 17, s. 7, which will change the Mining and Lands Commissioner to the Mining and Lands Tribunal. The Ministry of Natural Resources Act, R.S.O., 1990, c. M. 31, as amended by S.O. 2017, c. 8 Sched. 17, s. 1 is similarly amended. Nothing turns on it, except that this is an interlocutory proceeding and will be continued before the Mining and Lands Tribunal, where use of the term “Tribunal” will mean both the vernacular and the name of the adjudicative body.

consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights.

Same

(2) In the exercise of the power conferred by this section, the Commissioner may make such order or give such directions as he or she considers necessary to make effective and enforce compliance with his or her decision.

Rehabilitation of Mining Lands

Definitions

139 (1) In this Part, “proponent” means the holder of an unpatented mining claim or licence of occupation or an owner as defined in section 1; (“promoteur”)

Mine hazards, closure plan

147 (1) The Director may, in writing, order any proponent of any lands on which a mine hazard exists or any prior holder of an unpatented mining claim on any such lands, other than a current or prior holder of an unpatented mining claim with respect to a mine hazard that was created by others prior to the staking of the claim and that has not been materially disturbed or affected by the current or prior holder, as the case may be, since the staking of the claim, to file within the time specified in the order a certified closure plan to rehabilitate the mine hazard, and the proponent or prior holder shall file the certified closure plan within that time or any extension of time granted by the Director.

(1.1) Despite subsection (1), if an unpatented mining claim referred to in that subsection was staked and recorded on a day before the day section 22 of Schedule 2 to the *Aggregate Resources and Mining Modernization Act, 2017* came into force and then converted from a legacy claim under section 38.2 and deemed to have been registered under subsection 38 (2), any reference in subsection (1) to the registration of the claim shall be deemed to be a reference to the staking of the claim.

Crown intervention

(2) If the proponent or prior holder of an unpatented mining claim does not comply with an order of the Director under subsection (1), the Director may, after having given notice to the proponent or prior holder in the prescribed time and manner, have the Crown or an agent of the Crown enter the lands to rehabilitate the mine hazard.

Recommendation that lease be voided

(3) If the proponent does not comply with the Director’s order under subsection (1) and is a lessee of the lands on which the mine hazard exists, the Director may recommend to the Minister that the lease be

declared void on condition that the Director indicate in the notice referred to in subsection (2) the intention to make such a recommendation

Declaration that lease void

(4) On the recommendation of the Minister, the Lieutenant Governor in Council may declare the lease void, in which case subsections 81 (11), (12) and (13) apply with necessary modifications.

Offence

(5) Failure to comply with an order under subsection (1) constitutes an offence that continues for each day during which the failure continues.

Appeal to Commissioner

152 (1) A proponent may appeal to the Commissioner,

(a) an order requiring the filing of a certified closure plan under subsection 147 (1);

(b) an order requiring changes to a certified closure plan or to amendments to a certified closure plan under subsection 143 (3); or

(c) an order for the performance of rehabilitation measures under subsection 145 (2).

(d) Repealed: 2009, c. 21, s. 62.

Notice

(2) The proponent may appeal an order or action under subsection (1) if, within 30 days after receiving the Director's order or being informed of the Director's action, the proponent serves the Director with the prescribed notice requiring a hearing before the Commissioner.

Hearing

(3) The Director shall refer the matter to the Commissioner for a hearing within 30 days after being served.

Automatic stay unless removed

(4) Upon service on the Director of the notice under subsection (2), the Director's order is stayed until the Commissioner disposes of the appeal unless the Director applies, upon notice, for a removal of the stay.

Grounds for removal of stay

(5) The Commissioner may remove the stay if the matter being appealed relates to changes to a closure plan or to amendments to a closure plan, or to the performance of rehabilitation measures.

Refusal by Commissioner

(6) Despite subsection (4), the Commissioner shall refuse to hear an appeal of an order for changes to a closure plan or to amendments to a closure plan that require an increased amount of financial assurance

unless the proponent has provided the Director, along with the notice of appeal, with the increased amount of financial assurance required, which amount shall be held by the Crown pending the outcome of the appeal.

Waiver

(7) The Commissioner upon application with notice by the proponent may waive the requirement under subsection (6) if the Commissioner considers it just to do so.

Power of Commissioner on appeal

(8) Upon hearing the proponent's appeal, the Commissioner may confirm, alter or revoke the Director's order or action that is the subject-matter of the appeal.

Procedure

(9) Sections 114, 115, 116 and 118 to 131 of this Act apply to appeals under this section with necessary modifications.

Appeal to Divisional Court

(10) An appeal lies to the Divisional Court on a question of law from any decision of the Commissioner under subsection (8) in accordance with the rules of court.

Appeal to Minister

(11) A party to a hearing before the Commissioner may, within 30 days after receipt of the Commissioner's decision or within 30 days after final disposition of an appeal, if any, under subsection (10), appeal in writing to the Minister on any matter other than a question of law, and the Minister shall confirm, alter or revoke the decision of the Commissioner as to the matter in appeal as the Minister considers to be in the public interest.

Parties

(12) The person requiring the hearing, the Director and any other person specified by the Commissioner are parties to the hearing.

Director's powers regarding transfers, etc.

153.2 (1) If a proponent is subject to a court order or an order of the Director, the Commissioner or the Minister under this Part, the Director may,

(a) register the order against the land or lands comprising the site in the proper land registry office prohibiting any person with an interest in the land from dealing with it without the Director's consent; and

(b) may apply to a judge of the Superior Court of Justice for an injunction preventing the sale of the land or lands comprising the site, including any buildings, structures, machinery, chattels or personal property on the site.

Transfer of lease, licence

(2) If the proponent who is subject to an order referred to in subsection (1) is a lessee or the holder of a licence of occupation, the Director may recommend that the Minister not consent to the transfer of the lease or licence.

No abandonment of mining claim

(3) Despite section 70, if the proponent is the holder of a mining claim on which a mine hazard has been created by the proponent or a mine hazard created by others prior to the staking of the claim has been materially disturbed or affected by the proponent after the staking of the claim, and the Director has reasonable grounds for believing that the proponent has failed to rehabilitate such a mine hazard in accordance with a closure plan or, where no closure plan has been filed, with the prescribed standards for rehabilitation, the Director may order the proponent to comply with the closure plan or to rehabilitate such a mine hazard in accordance with the prescribed standards, as applicable, and the proponent shall not abandon the mining claim.

Realization of security

(4) If a proponent fails to comply with an order referred to in subsection (3), the Director may,

- (a) realize on the financial assurance under section 145 if the proponent is subject to a closure plan;
- (b) have the Crown or an agent of the Crown carry out rehabilitation measures in accordance with the prescribed standards if the proponent is not subject to a closure plan.

Continuing offence

(5) Failure to comply with an order of the Director, Commissioner or Minister constitutes an offence that continues for each day during which the failure continues.

No assignment of closure plan

(6) A closure plan filed under this Part is binding on the heirs, assigns and successors of the proponent who filed it and may not be assigned without the Director's consent.

As was clear from Jubilee's motion in which it attempted to have itself declared to not be an owner to which s. 1 applied and therefore not a proponent, the facts in this case are highly complicated. The parties were quite clear that they did specifically did not wish to place the facts before me and did not want me to make findings with respect to individual hazards or with respect to those hazards in respect of the named persons in the Director's order, let alone to which lands the hazards would attach.

Mr. Sells on behalf of Armistice called this a shotgun approach. He submitted that the Director's order was vague as to what were the mine hazards, what specific lands were involved with each

unnamed hazard and did not attach to a specific named person as a ‘proponent’ in the purported order, the named five entities listed in the title of proceedings. As such, it should be struck, quashed, as being bad.

This alone is a compelling argument. When one looks to s. 175 in which an owner seeks an easement or right over the lands of a third party in connection with the proper working of a mine for any of the enumerated purposes, what must be supplied with the application to the Commissioner is very specific. Looking to subsection 175(4), the land or property must be ascertained, definite and detailed plans and specifications of the works provided, a map showing of the locality showing the land and water involved, specifications, provision for a right to enter onto the property in order that what amounts to surveys or proper engineering reports may be prepared all may be required. The requirements were so rigorous that on a recent application, the applicant was forced to return several times before it had what was considered a proper and adequate application.²

Similarly, O.Reg. 240/00 is very detailed and rigorous. Reading through, one obtains greater information than is provided in the **Act** as to what constitutes a mine hazard, not to mention what is required for its rehabilitation. At the very least, this information, along with the quality of information required in s. 175(4), should be required of the Director, when specifying the land(s) and the hazard(s) to which a proponent must be responsible for filing a closure plan.

Lands covering two townships, such as appear to be the case in this matter – appeal and application – doesn’t even begin to cover the overly general nature of what one, or more properly five ones are being called on to file closure plans in relation to.

However, with the greatest respect to the position of Armistice and Jubilee, the Commissioner is not a court of inherent jurisdiction. It cannot carry out what in effect would be a judicial review of what was done by the Director in issuing his/her s. 147 Order. The extent of the Commissioner’s power is to confirm, vary or rescind the order in accordance with ss. 152(8). It cannot entertain an entirely different “stream” during this appeal.

Mr. Mercer suggested that Jubilee and Armistice would have to avail themselves of the authority of the Superior Court of Justice to obtain the relief they seek. I cannot see any other alternative but to agree. I do not have power to extend time, absurd as it may seem, since they were unable to exhaust this particular attempt within the thirty day statutory time frame required for commencing a s. 152 appeal and enabling them to file an appeal of the Director’s Order.

As counter-intuitive as it may appear from a strategic perspective, if a person is called a proponent by the Director in an order and seeks to have that Order revoked, there is no alternative but to use the specific provision in the Part under which the Director’s powers to act arise. Part VII was ‘dropped in’ to the **Mining Act** effective June 3, 1991, pursuant to amendments found in S.O. 1989, c. 62. They are stand-alone. The Director does not exist elsewhere in the legislation. His authority is limited to Part VII. Any challenge of his actions, his requirements, his orders, must take place within that framework.

² **Trelawney v. Sanatana** M A 008-13, unreported

Insofar as the Commissioner does have exclusive jurisdiction under s. 105, and it is broad, no question, it is not unlimited. It cannot and should not be confused with a superior court's inherent jurisdiction.

This is underscored by the specific reference in subsection 152(9) to limited powers within Part VI which apply to Part VII Mine Rehabilitation matters. The appeal and judicial review provisions to Divisional Court are not the same as they are elsewhere – where sections 134 and 135 apply to decisions of the Commissioner. There is, in Part VII, provision to appeal to the Minister on question other than a question of law. This does not exist under any other part of the **Mining Act**.

The tribunal has no authority to permit either Armistice or Jubilee to file an appeal being outside the 30 day statutory time frame for filing an appeal from the Director's Order.

Conclusions

The application of Jubilee and Armistice to pursue a hearing stream pursuant to s. 113(b) and 105 of the **Act** is denied as the Commissioner has no jurisdiction to grant this request.

There will be no need to consolidate the matter with the Bear Lake appeal.

Bear Lake opted to appeal pursuant to s. 152 on 3 grounds:

1. the Director incorrectly asserted that the properties identified in the order are one property
2. the Director incorrectly asserted that the proponent is required to do the work ordered such that a certified closure plan must be provided for mining lands for which the proponent is not in fact a proponent under the Mining Act
3. The Director incorrectly asserted that some or all of the features/disturbances owned by the proponent constitute a mine hazard.

The Title of Proceedings for the Order to File for the Bear Lake appeal will be amended accordingly.