NORTHERN TERRITORY

GRANT OF MINING WARDEN'S APPROVAL TO ENTER LAND/PRIORITY RULES/ NATURE OF APPEAL*

McCleary Investments Pty Ltd Ltd v Hudson & Northern Territory (Supreme Court of the Northern Territory, [2007] NTSC 16, 27 February 2007)

Factors to be taken into account in authorising entry to land – Nature of appeal from warden – Priority rules and requirements of marking out

Background

The case involved several proceedings that were heard together. One proceeding involved purported appeals under s 159 *Mining Act 1980* (NT) ("the Act") by the plaintiff of the Mining Warden's decision not to grant it authority to enter land for the purposes of marking out a Mineral Claim. The other two proceedings involved judicial review of these decisions and of decisions by the Principal Registrar under the Act not to accept for lodgment various application for Mineral Claims and Mineral Leases with respect to the same land.

Facts

The Angela and Pamela uranium prospects are located approximately 25 kilometres south of Alice Springs. They have an estimated value somewhat over $2b. In the mid 1970s the land within the prospects lay was gazetted as a Reservation from Occupation (RO1292) under s 178 of the Act. A short distance further north is RO1103. It was gazetted at the same time. In 2006 the Minister for Mines announced his intention to revoke the ROs and to invite applications for Exploration Licences. The Minister announced he intended to revoke the RO by publication of a notice in the Gazette on 6 December 2006. This would have the effect that the land would be available for application from midnight on 7 December 2006. There was significant publicity surrounding this announcement. The publicity also identified that pursuant to s 164(3) of the Act Exploration Licence Applications (ELAs) received on the same day are treated as having equal priority, but that otherwise ELAs over the area subject to an existing ELA could not be received. On 4 December 2006 the plaintiff sought a Mining Warden's approval to enter and mark out, for the purposes of making a Mineral Claim, the land contained in RO1292 from midnight on 7 December 2006. Under s 164(3) an application for a Mineral Claim is deemed to be made at the time the Claim is marked out in the prescribed manner. On 5 December the Warden wrote to the plaintiff expressing doubts as to whether he had jurisdiction to grant the authority to enter while the RO was in place and even if he did whether he should do so in the circumstances. The

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plaintiff's solicitors responded to the Warden's letter on the afternoon of 6 December 2006. The Warden responded to the solicitors later that day refusing to grant the authority.

On the evidence before Riley J, the plaintiff had entered the land the subject of RO 1292 on a number of occasions prior to midnight on the 6/7 December 2006 for purposes such as dropping of concrete blocks and taking GPS readings. At midnight on 6/7 December 2006 the plaintiff's agents drove in star pickets in several locations constituting the north east corner of seven purported mineral claims. At 2.00 am the pegging was complete. The party returned to Alice Springs but came back later on 7 December to complete the flagging of the claims. The flagging was completed at 2.00 pm. In relation to whether the plaintiff (through its principal) believed that it had authority to enter the land Riley J determined (at [16]): "it is plain that Mr McCleary did not believe that he had approval to enter upon the land pursuant to s 83(3) of the Act at any relevant time."

Shortly after midnight that night the plaintiff also lodged by fax and emails Mineral Lease applications over both RO1292 and RO1103. Over the course of 7 December 2006 the Department also received about 30 ELAs over (former) RO 1292 and 1103. Later on during the day of 7 December the plaintiff again sought from the Warden an authority to enter under s 83(3). This was again refused.

On 15 December the plaintiff's Mineral Lease applications were refused by the Registrar on the basis that at the time they were received there were already ELAs over the respective areas. Later on still the plaintiff attempted to lodge Mineral Claim applications in respect of the areas pegged on the morning of 7 December 2006. These were also refused by the registrar on the basis that they were not accompanied by evidence of a Warden's authority to enter

The Warden published written reasons for his refusal by which time the plaintiff had commenced judicial review proceedings in the Supreme Court. The plaintiff subsequently commenced further judicial review proceedings both in respect of the Warden's refusals to grant authority to enter and the Registrar's refusals to accept for lodgment the various applications. The plaintiff also instituted appeals under s 159 of the Act. The matter came on for hearing before Riley J[1] on 12-14 February 2007.

The Plaintiff's Challenges

Warden's decisions

The plaintiff's main challenge went to the Warden's refusal to grant an authority to enter for the purposes of marking out. The Warden's written reasons disclosed two bases for refusing to grant the authority. First, that he did not have jurisdiction to grant the authority in circumstances where an RO was in place. Riley J found that even if the Warden did not have jurisdiction to grant the authority to enter while the RO was in place, he could have granted the authority subject to a condition that entry not take place before the RO was revoked. However, the Warden also stated that if even if he had jurisdiction he still would not of granted the authority. Of this refusal Riley J comments thus (at [34]-35]):

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[1] In an interesting twist, Southwood J, who had carriage of the matter from the institution of proceedings until the week before hearing, excused himself on the application of the plaintiff on the basis that a perception of bias may arise from the fact that his Honour had, a number of years previously when counsel, acted for the plaintiff and various of its witnesses.

> [34] The warden went on to say that he sought to exercise his discretion in a manner that he considered would enable the value of the mineral resources to be maximised and also in a manner that was efficient and responsible as required by s 3A(2)(f) of the Act. He stated that he was entitled to consider and take into account the announced government policy but noted, correctly, that the policy was not binding upon him. It was a relevant consideration.
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> [35] The reasons of the warden make it plain that he did not regard himself as being obliged to give effect to government policy. Rather, he concluded for himself that the objects and purposes of the Act would be furthered by adopting the approach he followed. In particular he concluded that to grant approval to enter upon the land which, in turn, would lead to the plaintiff lodging an application for a mineral claim over the land, would be inconsistent with the object of enabling the value of mineral resources in the Territory to be maximised and would not promote an "efficient and responsible" approach to the release of the land.

His Honour is thus endorsing the Warden's view that a statutory decision maker in a mining context can legitimately take into account government policy, at least in circumstances where this policy is further the objects and purposes of the Act.

Nature of appeal

In relation to the s 159 Appeals his Honour referred to a long line of authority including *Wade v Burns*[2] to find (at [27]) that decisions such as the grant of an authority to enter are administrative in nature and not susceptible to a *stricto sensu* appeal such as contemplated by s 159. His Honour refers to *Enterprise Gold NL v Mineral Horizons NL (No 2)*[3] on this point.

Mineral claim applications

In relation to the Mineral Claim applications his Honour held (at [47]) that the Registrar was correct to refuse these as pursuant to s 83(3) of the Act it was mandatory to have a Warden's approval to enter prior to making the applications. While noting that it was not strictly necessary to do so, his Honour also responded to the plaintiff's suggestions that s 164A of the Act (the substantial compliance section) would operate to remedy the defective marking out of the mineral claim as it stood at 2.00 am and allow priority to be gained at that time. His Honour notes (at [63]) that the purpose of s 164A is to allow the Minister to ignore technically irregular marking out when an application is made, not to foreshorten the marking out process.

Mineral lease applications

His Honour found the Registrar was correct to refuse the plaintiff's Mineral Lease application over RO1292. His Honour found (at [60]) that some minutes before the Mineral Lease application was received there was received (also by email and facsimile) an ELA. The combined operation of s 21(1) and s 164(2) of the Act meant that the Mineral Lease application could not be received and that all other ELAs received that day over (former) RO1292 were deemed to have equal priority.

However, with respect to the Mineral Lease application over (former) RO1103 there was a different factual scenario. In this case an ELA had been received, but it had been received before midnight on 6/7 December 2006. The Department had considered that the terms of

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[2] (1966) 115 CLR 537.
[3] (1988) 52 NTR 23.

s 164(4)[4] operated such that this ELA was deemed received after midnight on 7 December 2006. His Honour found (at [61]) two errors in this approach. First, the terms of s 178A (which prohibited applications being made over ROs) operated to prevent receipt of the ELA. Second, the terms of s 164(4) only operated with respect to assessment of priority as amongst ELAs (if they could otherwise be made) but not as against an ELA and a competing Mineral Lease application. Accordingly, his Honour found the plaintiff's Mineral Lease application over RO1103 should have been accepted as lodged for the purposes of consideration by the Minister.

As the plaintiff's application was for a productive title and not for an exploration title and as the area is prospective for a prescribed substance under the *Atomic Energy Act 1953* (Cth), pursuant to s 175 of the Act the Territory Minister in considering the plaintiff's application is obliged to seek and follow the advice of the Commonwealth Minister.

The outcomes of these considerations are not yet known. However, the plaintiff has indicated in the media that it intends to appeal. The grounds of appeal are not clear at the time of writing.

Commentary

In many respects the outcome of the case is unremarkable and often determined by the specifics of Northern Territory legislation; however, there are two issues that may be of general interest. The first is the acceptance of the role of government policy in the exercise of statutory discretions relating the management of mineral resources. This notion was recognised in *Hot Holdings v Creasy*[5] with respect to a Minister's decisions. The notion is also apparently accepted in the context of a Mining Warden exercising an administrative function by the Full Court of the Supreme Court of Western Australia in *Re Calder; Ex Parte St Barbara Mines Ltd & Anor*[6] although the recognition here is somewhat unclear. The instant case provides a much more explicit statement of the notion.

The second matter of some general application concerns the overall factual scenario. The situation of having a known highly valuable uranium prospect suddenly "released" is unusual and clearly places strains on the normal titles application process. The instant case highlights some areas that may need refinement. In particular the basis for the continuation of marking out titles given the advent of GPS and other technology must be questioned. So to must any perceived benefit to the resource owner in requiring potential resource developers to submit applications in a single day between the hours of midnight and 4.00 pm.

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4 "For the purpose of ascertaining priority under subsection (2), an application for the grant of an exploration licence that is received by the Department after close of business on a particular day is to be taken to be lodged on the next day the Department is open for business."

5 (2002) 210 CLR 438 per Gaudron, Gummow and Hayne JJ at 455.

6 [1999] WASCA 25 at [26] per Malcolm CJ (with whom Pidgeon and Ipp JJ agreed).