

Appeal No. MA 022-93

L. Kamerman)
Mining and Lands Commissioner)

Wednesday, the 24th day
of November, 1993.

THE MINING ACT

IN THE MATTER OF

Mining Claims TB-1183248, 1183249 and 1183250, situate in the Township of Conacher, in the Thunder Bay Mining Division;

AND IN THE MATTER OF

Mining Claims 1196788 and 1196789, situate in the Township of Conacher, in the Thunder Bay Mining Division marked as "filed only";

AND IN THE MATTER OF

An appeal under section 112 of the **Mining Act** for a declaration that Mining Claims TB-1183248, 1183249 and 1183250 be declared forfeited and for the recording of filed only Mining Claims 1196788 and 1196789;

B E T W E E N:

BAND-ORE RESOURCES LTD.

Appellant

- and -

DANIEL C. CALVERT

Respondent

ORDER

WHEREAS an appeal from a decision of the Mining Recorder for the Thunder Bay Mining Division was filed on June 3, 1993;

AND WHEREAS a hearing on this matter was held by telephone conference call on November 23, 1993;

UPON HEARING from Robert Duess for the appellant and Claude Larouche on behalf of the respondent and upon reading the material filed,

1. THIS TRIBUNAL ORDERS THAT the appeal of Band-Ore Resources Ltd. from a decision of the Mining Recorder in the Thunder Bay Mining Division is dismissed.

2. THIS TRIBUNAL FURTHER ORDERS THAT no costs shall be payable by either party to this appeal.

IT IS FURTHER DIRECTED that upon payment of the required fees this order shall be filed in the Office of the Mining Recorder for the Thunder Bay Mining Division.

Reasons for this Order are attached.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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AND IN THE MATTER OF

Mining Claims 1196788 and 1196789, situate in the Township of Conacher, in the Thunder Bay Mining Division marked as "filed only";

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for a declaration that Mining Claims TB-1183248, 1183249 and 1183250 be declared forfeited and for the recording of filed only Mining Claims 1196788 and 1196789;

B E T W E E N:

BAND-ORE RESOURCES LTD.

Applicant

- and -

DANIEL C. CALVERT

Respondent

2. Each of the mining claims was recorded in the Mining Recorder's Office in Thunder Bay on May 23, 1991.
3. The first anniversary of the mining claims fell on May 23, 1992.
4. George L. Mealey, (169332) transferred all, (100%) of his interest in each of the mining claims to Daniel C. Calvert, (114756) on April 7, 1993.

Current Events

5. The second anniversary of the mining claims fell on May 23, 1993, (a Sunday).
6. No work had been filed against the mining claims to meet the minimum (\$400.00) work requirement up to and including Friday, May 21, 1993.
7. Mr. Michael Leahey, of Thunder Bay, restaked the mining claims **on behalf of Band-Ore Resources Ltd.**, of Kingston, Ontario, on Monday, May 24, 1993, which was also Victoria Day, a holiday in which the Mining Recorder's Office was closed.

(Note: Tag # 1196788 corresponds to lands encompassed by mining claims TB-1183248 and 1183249. Tag # 1196789 corresponds to lands encompassed by mining claims TB 1183250.)

Mr. Leahey commenced staking for Tag # 1196788 on May 24, 1993 at 8:30 a.m. and completed staking for same at 11:55 a.m.

Mr. Leahey commenced staking for Tag # 1196789 on May 24, 1994 at 12:15 p.m. and completed staking for same at 2:30 p.m.

8. Mr. Leahey submitted the claims for recording on Tuesday, May 25, 1993 at 9:57 a.m.
9. Mr. Leahey's application was received in the Mining Recorder's Office on May 25, 1993. The Mining Recorder's Office considered the claims open for staking on Monday, May 24, 1993 at 7:00 a.m. (also see # 13 below)

10. Pursuant to section 138 of the **Mining Act**, Mr. Leahey was advised by the Mining Recorder's Office **prior to** staking and upon receipt of his application, that "weekend or holiday" openings were subject to the ability to file after that date.
11. Mr. Daniel C. Calvert, the recorded holder of the mining claims, (see #4 above), submitted a work report on Tuesday, May 25, 1993 at 3:11 p.m. The Mining Recorder's Office received and accepted the work report as meeting the work requirements on the mining claims.
12. On May 26, 1993, Mr. Leahey was advised in person at the Mining Recorder's Office that the Office refused to record claims 1196788 and 1196789.
13. On May 28, 1993, Mr. Leahey advised the Mining Recorder's Office that his application was to be held as a "Filed Only" application pursuant to section 46(2) of the **Mining Act**.
14. Mr. Robert Duess, on behalf of Band-Ore Resources Ltd., filed his Notice of Appeal of the Mining Recorder's Decision on June 3, 1993.
15. Band-Ore's appeal was received in the Office of the Mining and Lands Commissioner on June 11, 1993.
16. Mr. Duess, on behalf of Band-Ore Resources Ltd., stated their position in correspondence dated July 20, 1993 addressed to both the Office of the Mining and Lands Commissioner and Mr. Calvert.
17. Mr. Calvert has stated his position in correspondence dated August 23, 1993 which has been forwarded by the Office of the Mining and Lands Commissioner to Mr. Duess.
18. Band-Ore Resources filed this appeal based solely on their legal interpretation of the Mining Act. Band-Ore Resources is not disputing the work performed by Mr. Calvert.
19. Both parties disagree as to the interpretation of section 73(2) of the **Mining Act**.

Submissions

Mr. Duess submitted that where forfeiture occurs, the recorded holder has an unfair advantage over others wishing to stake the land. Instead, the recorded holder should be put in the same position as anyone else of having to restake the claims. Once the claims have been restaked, the assessment work can be filed.

Based upon the facts of this case, Band-Ore would not have been allowed to stake until Wednesday, May 26, 1993, whereas Daniel Calvert could have re-staked, or applied for an extension and filed the assessment work by Tuesday, May 25, 1993.

At the time when this situation occurred, it had been the interpretation of the Mining Recorder, Michael Weirmeir, that the mining claims would be open for staking on the holiday Monday, with such staking subject to and conditional upon the recorded holder filing the assessment work. Mr. Duess stated that Mr. Weirmeir would have allowed Band-Ore's mining claims to be recorded.

Immediately prior to May 25, 1993, there was no consistent standard of interpretation between the mining recorders, so that the outcome would have been dependent on the Mining Division in which the matter arose.

Mr. Duess submitted that section 138 of the **Mining Act** must be made subject to sections 72 and 73. The relevant sections are set out below.

72. - (1) Except as provided by section 73, all the interest of the holder of a mining claim before a lease has issued ceases without any declaration, entry or act on the part of the Crown or by any officer, and the claim is open for prospecting and staking out,

- (a) if, without the consent in writing of the recorder or Commissioner, or for any purpose of fraud or deception or other improper purpose the holder removes or causes or procures to be removed any stake or post forming part of the staking out of such mining claim, or for any such purpose changes or effaces or causes to be changed or effaced any writing or marking upon any such stake or post;

- (b) if the prescribed work is not duly performed and reported as required by section 65 unless an application and payment for a lease of the mining claim is made under section 81.

(2) No person, other than the Minister or an officer of the Ministry or a person interested in the property affected, is entitled to raise any question of forfeiture except by leave of the Commissioner, and proceedings raising questions of forfeiture shall not be deemed to be or be entered as disputes under section 48.

73.- (1) On application therefor being made to the recorder within thirty days before the expiration of the time for filing a report of assessment work, the recorder may allow an extension of time for performing and filing the report of the assessment work on such conditions as are prescribed.

(2) Where forfeiture or loss of rights has occurred, the land, mining rights or mining claims concerned are not open for staking until 7 o'clock in the forenoon of the day immediately following that upon which forfeiture or loss of rights occurred.

(3) An order made by the recorder under this section comes into effect and shall be deemed to have been recorded at the time that the application was received in the office of the recorder, although the order may not have been immediately entered in the record book.

(4) The recorder, upon a forfeiture or abandonment of or loss of rights in a mining claim, shall forthwith enter a note thereof, with the date of entry, upon the record of the claim and mark the record "Cancelled/Annule", and shall post up forthwith in the recorder's office a notice of cancellation.

138.- Where the time limited for any proceeding or for the doing of anything in an office of a mining recorder or an office of the Commissioner or an office of the Minister or Deputy Minister expires or falls upon a Saturday, the time so limited extends to and the thing may be done on the next following that is not a holiday.

Mr. Duess submitted that the recorded holder can file assessment work only if there is no intervening adverse interest which had arisen between the date of forfeiture, Sunday, May 23, 1993 in this case, and the end of the first business day, being Tuesday, May 25, 1993.

Mr. Larouche submitted that the recorded holder, Mr. Calvert, operated on the premise that when mining claims become due on a weekend or holiday, he would have until the end of the first following business day to file the assessment work. Mr. Calvert had taken advantage of this provision and used the long weekend to better complete his assessment work report.

Mr. Larouche submitted that there is no possibility of filing assessment work on a Sunday, as the offices of the Mining Recorder are closed. In this case, as Monday was the Victoria Day holiday, the first business day following the weekend was Tuesday, May 25, 1993.

Mr. Larouche submitted that the provisions of the **Mining Act** are the same for everyone. A mining claim which would normally be forfeited on a weekend or holiday does not forfeit until the end of the first business day following. Mr. Calvert had until the end of Tuesday, May 25, 1993 to file his assessment work, which is what he did. This cannot be construed as an unfair advantage over Band-Ore or any other potential stakers.

Mr. Duess submitted that the interpretation which Mr. Larouche has advanced suggests that the ground would not have been open for staking until Wednesday, May 26, 1993, had no assessment work been filed. The **Mining Act** states, in his submission, that the ground is open for staking at 7 am. on the next day after the assessment work was due, which in this case would have been Monday, May 24, 1993.

Mr. Duess submitted that, due to this particular case having arisen, the Ministry changed its policies with respect to forfeitures which occur on a weekend or holiday. Had the policy been in place at the time this matter arose, the parties would have been proceeding on a common interpretation and would have governed themselves accordingly.

Mr. Larouche submitted that he and Mr. Duess were saying the same thing. The weekend and holiday do not count, so that the next business day would be the day by which assessment work should be filed or staking could take place.

Mr. Duess concluded by pointing out that the Mining Recorder's office had advised prior to staking by Band-Ore that the ground would be open for staking on Monday, May 24, 1993 at 7 am. and would be subject to the ability to file assessment work after that date.

Findings

Section 138 of the **Mining Act** does not contain wording which would serve to limit its applicability. Where this is the case, it is found to be a section of general applicability. In order that section 138 not apply to a section of the **Mining Act**, that section must contain specific exclusionary wording, such as "Despite any other provisions of this Act" or "Despite section 138".

Similarly, sections 72 and 73 do not contain specific wording that would preclude section 138 from governing.

Giving the section a broad interpretation would mean that for every section of the **Mining Act**, where there is a requirement which falls on a weekend or holiday, the day upon which the requirement falls is extended to the next business day.

Sections 72 and 73 operate to provide the conditions upon which a mining claim becomes forfeited and the day and time when the mining claims come open for staking. It should be noted that clause 72(1)(b) and subsection 73(2) anticipate the forfeiture and opening of the lands for staking as occurring sequentially. Forfeiture will occur on the day the work is due, if the assessment work is not filed by the completion of the business day. Where the work is filed, no forfeiture occurs. Where the mining claims have been forfeited, the lands are open for staking at 7 am on the next day.

The sequential operation of these sections has the result that situations of competing interests will not arise, where forfeiture has occurred during the week. There is no reason for section 138 to impact upon these sections to create a situation which would not otherwise arise, had it been during the week and not on a weekend or holiday. The application of section 138 resulted in an extension of the time for filing assessment work to the end of the business day on Tuesday, May 25, 1993. As no forfeiture can result until after that time, the lands could not have come open for staking until 7 am. on Wednesday, May 26, 1993. As the assessment work was filed on May 25, 1993, the ground was never open for staking.

Concerning the submission of Mr. Dues that the recorded holder obtains an unfair advantage over others interested in acquiring rights in the land, the tribunal finds that this is not the case. To accept Mr. Dues' interpretation, Mr. Calvert would have been deprived of the opportunity to bring his mining claims into good standing for the last two days of the statutory two year period after the mining claims had been recorded, with the Mining Recorder's offices being closed. The tribunal finds that this interpretation is not contemplated in sections 72 and 73.

There were no submissions made with respect to costs. The tribunal finds that no order will be made for costs payable by either party.

Conclusion

The application of Band-Ore Resources Limited is dismissed.

There will be no order as to costs.