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COURT OF APPEAL FOR ONTARIO

CARTHY, ROSENBERG and O'CONNOR JJ.A.

B E T W E E N :	)	
	)	**Guy A. Wainwright,**
LEO ALARIE AND SONS LIMITED and DON FUDGE	)	**for the appellants**
	)	
Applicants (Respondents in Appeal)	)	**Peter J. Doucet, for the respondents**
- and -	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by THE MINISTER OF NATURAL RESOURCES, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the MINISTER OF NORTHERN DEVELOPMENT AND MINES, 782900 ONTARIO LIMITED and ROGER LACHANCE carrying on business as LACHANCE CONSTRUCTION	)	**Heard: May 18, 2000**
Respondents (Appellants)	)	

On appeal from the order of the Honourable Mr. Justice R. P. Boissonneault dated December 14, 1999

ROSENBERG J.A.:

[1] This appeal concerns an application under s. 107 of the *Mining Act* R.S.O. 1990 c. M.14. Section 107 provides that a party to a proceeding before the Mining and Lands Commissioner may at any stage of the proceedings apply to the Ontario Court (General Division) (now the Superior Court of Justice) for an order transferring the proceeding to

that court. The respondents, having launched an appeal under s. 112 of the Act to the Commissioner from the decision of the Mining Recorder, became convinced that they could not obtain the relief they hoped for from the Commissioner. Accordingly, they brought the application under s. 107 to transfer proceedings to the Superior Court. Boissonneault J. granted the application. The appellants, 782900 Ontario Limited and Roger Lachance, who were parties to the s. 112 proceedings, now appeal from that decision. For the reasons that follow, I would allow the appeal and remit the matter to the Commissioner.

THE FACTS

[2] In February and March 1998, the respondent Don Fudge applied on behalf of the respondent Leo Alarie and Sons Limited to record two mining claims. The applications were made pursuant to s. 44 of the *Mining Act* to the Mining Recorder at Sudbury. In May 1998, the Mining Recorder issued a decision recording the claims, but made a notation in the record that the claims were subject to a prior aggregate permit issued under the *Aggregate Resources Act*, R.S.O. 1990, c. A.8 as amended by S.O. 1996, c. 30, s. 39. The aggregate permits had been issued to the appellants, allegedly as a result of applications made in October 1997. The *Mining Act* is administered by the Minister of Northern Development and Mines (MNDM). The *Aggregate Resources Act* is administered by the Ministry of Natural Resources (MNR).

[3] As I understand it, if a mining claim is recorded prior to any aggregate permit being issued in relation to the same lands, the mining claim includes the rights to remove the surface aggregate (sand and gravel). However, if an aggregate permit has been issued first, that permit has priority over the mining claim in respect of the aggregate. It appears that the respondents became suspicious about the validity of the aggregate permits granted to the appellants and they complained to the MNR. The MNR launched an investigation and the report of that investigation, which was completed in June 1998, was provided to the respondents. At the very least, the report shows some irregularities in the process by which the aggregate permits were issued. In the meantime, the respondents had launched an appeal under s. 112 of the *Mining Act* to the Commissioner. In the appeal, the respondents allege that the Mining Recorder erred in law in subjecting their mining claims to the aggregate permits. The two ministries and the appellants were made parties to the appeal.

[4] In a series of orders, Commissioner Kamerman defined some of the issues and asked the parties to address certain preliminary questions. In particular, she asked the parties to "discuss the jurisdiction of the Tribunal … particularly as it may concern a review or finding concerning the actions of staff of the Ministry of Natural Resources". That order was made on August 14, 1998.

[5] On August 28, 1998, Commissioner Kamerman released her decision in a different case, *Nordic Group v. Marcell J. Labelle, Minister of Natural Resources and Minsiter of Northern Development and Mines*. That case also concerned aggregate permits and mining claims. The Commissioner held that the staking of the mining claims was only tangentially at issue and that the real question concerned the actions of the MNR staff, a matter over which she had no jurisdiction.

[6] The respondents in this case, foreseeing that their case would suffer the same fate, brought the application under s. 107 to transfer the proceedings to the Superior Court. Their hope is that the Superior Court would be able to look at all of the circumstances and determine the priorities.

THE REASONS OF BOISSONNEAULT J.

[7] The core of the applications judge's decision for transferring the proceedings to the Superior Court is found in this paragraph of his reasons:

> Issues are raised alleging procedural errors and negligence. There are allegations that the Ministry of Natural Resources employees acted deliberately. The sequence of the registration of documents is to be examined in view of the dates they were submitted to the respective Ministries. In my view, the jurisdiction of the Mining Court has been exceeded as a conflict has arisen between two Ministries purporting to grant the same rights over land. [Emphasis added.]

[8] Thus, the applications judge transferred the proceedings to the Superior Court because he was of the view that the Superior Court, unlike the Commissioner, would have jurisdiction to deal with the competing claims under the two different pieces of legislation administered by two different ministries.

THE STATUTORY PROVISIONS

[9] The relevant provisions of the *Mining Act* are the following:

> **44.** (1) A licensee who has staked out a mining claim shall, not later than 31 days after the day on which the staking out was completed, make an application to record the claim to the recorder for the mining division in which the claim has been staked out.
>
> (1.1) The application shall be in the prescribed form and be accompanied by proof of payment of the required fee to any

recorder and a sketch or plan showing the prescribed information.

(1.2) The recorder or the Commissioner may, after a hearing, cancel the recording of a licensee or holder who knowingly made a false statement in the application to record the claim.

(2) Priority of completion of staking shall prevail where two or more licensees make application to record the staking of all or a part of the same lands.

(3) Where one of the applications made by two or more licensees to record the staking of a mining claim is entitled to priority under subsection (2), the recorder shall cancel the other application or applications and shall by registered letter mailed not later than the following day notify the other licensee or licensees of the recorder's action and the reason therefor.

(4) Despite subsection (3) and section 46, if the other application or applications to record a mining claim cover any land that is not part of the mining claim that is entitled to priority under subsection (2), the recorder may record a mining claim with respect to that part of the land and shall amend the application or applications with respect to the land covered by the previously completed claims.

105. Except as provided by section 171, 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, except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner, and 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 effectual and enforce compliance with his or her decision.

107. A party to a proceeding under this Act brought before the Commissioner and involving any right, privilege or interest or in connection with any patented lands, mining lands, mining claims or mining rights, may, at any stage of the proceeding, apply to the Ontario Court (General Division) for an order transferring the proceeding to that court.

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.

(2) Where, in the opinion of the Minister, the public interest is affected by a decision, act or thing mentioned in subsection (1), an officer or employee of the Ministry designated by the Minister for that purpose may,

(a) be added as a party to an appeal taken under subsection (1); or

(b) take an appeal under subsection (1), in which case no fee in respect of the appeal is payable.

(3) An appeal to the Commissioner shall be by notice in writing in the prescribed form, filed in the office of the recorder from whom the appeal is being taken and served upon all parties interested within fifteen days from the entry of the decision on the books of the recorder or the doing by the recorder of the act or thing appealed from, or within such further period of not more than fifteen days as the Commissioner may allow, but if the notice of appeal has been filed with the recorder within such time and the Commissiner is satisfied that it is a proper case for appeal and that after reasonable effort any of the parties entitled to notice could not be served within such time, the Commissioner may extend the time for appealing and make such order for substitutional or other service as he or she considers just, or if a person affected has not been notified as provided in sections 76 and 110, and appears to have suffered substantial injustice and has not been guilty of undue delay, the Commissioner may allow such person to appeal.

(4) The notice of appeal shall contain or have endorsed upon it an address in Ontario at which the appellant may be served with any notice or document relating to the appeal, and the notice or document is sufficiently served upon the appellant if it is left with a grown-up person at that address or, where no grown-up person can be found there, if sent by registered mail addressed to the appellant at that address.

> (5) If no address for service is given as provided in subsection (4), the notice or document may be served upon the appellant by posting it up in the recorder's office.

[10] The relevant provisions of the *Aggregate Resources Act*, are as follows:

> **36.1** No aggregate permit shall be issued for sand and gravel if the sand and gravel has been included in a placer mining claim under the *Mining Act*, unless the non-aggregate mineral has been removed from the placer deposit.
>
> **37.** (4) No aggregate permit shall be issued for sand and gravel where the sand and gravel has been included in a mining claim as a placer deposit under the *Mining Act* until the non-aggregate mineral has been removed from the placer deposit.

ANALYSIS

[11] In my view, the applications judge erred in transferring the proceedings on the assumption that the Superior Court would have a broader jurisdiction than the "Mining Court". The only proceeding before the Commissioner, and therefore the only proceeding transferred to the Superior Court, is the s. 112 appeal. That appeal is restricted to determining issues under the *Mining Act*. Transferring the appeal to the Superior Court could not vest a greater jurisdiction in the Superior Court to permit an investigation of matters under different legislation, such as the *Aggregate Resources Act*. To the extent that the respondents' real complaint is with the granting of the permit under the *Aggregate Resources Act,* and not the conduct of the Mining Recorder, the matter is one for judicial review, if possible, in the Divisional Court. The validity of the aggregate permit is not a matter to be determined under the *Mining Act* whether the s. 112 appeal proceedings are before the Commissioner or the Superior Court.

[12] The respondents argued that the appeal before the Commissioner involves a dispute between the two sets of claimants and therefore private civil and property rights matters outside the jurisdiction of the Commissioner. They rely upon some of the language in *Dupont v. Inglis*, [1958] S.C.R. 535. Before turning to that decision, it will be helpful to briefly review the history of s. 107—the section relied upon by the respondents as authority for transferring the proceedings to the Superior Court.

[13] Until 1908, the Department of Mines dealt with disputes about mining claims. In 1908, the Legislature amended the legislation to create the position of Mining

Commissioner. The jurisdiction to deal with all disputes concerning mining claims was vested exclusively in the Commissioner, a provincially appointed official. The relevant provision of the *Mining Act*, R.S.O. 1914, c. 32, s. 123 purported to exclude the jurisdiction of the courts. In particular, the Commissioner had jurisdiction and power to determine all claims before the granting of the patent, "As to the existence, validity, or forfeiture of any mining claim, quarry claim, mining lands or mining rights or any right, title or interest therein".

[14] In 1921, the legislation was amended to expressly give the Commissioner jurisdiction to deal with any disputes arising after the granting of a patent. At the same time, the predecessor to s. 107 was added to the legislation. In *Re McLean Gold Mines Limited and the Attorney-General for Ontario* (1923), 54 O.L.R. 573, this court held that it was *ultra vires* the province to vest jurisdiction in the Commissioner to determine the validity of the forfeiture of a patented claim. The effect of the legislation was to invest the Commissioner with the powers of a superior court judge in violation of s. 96 of the [now] *Constitution Act, 1867*.

[15] In response to the *McLean* case, the province enacted the *Mining Court Act, 1924*, S.O. 1924, c. 21 and created the Mining Court. This court was presided over a judge appointed by the federal government, but the judge's salary was paid by the province. Interestingly, the legislation nevertheless retained the predecessor to s. 107, allowing a party to apply to the Supreme Court of Ontario to transfer a proceeding "involving any right, privilege or interest in, or in connection with any patented lands, mining lands, mining claims or mining rights" from the Mining Court to the Supreme Court.

[16] In 1956, apparently in response, in part, to the imminent retirement of the long-serving judge of the Mining Court, the province amended the *Mining Act* to abolish the Mining Court and again create the office of Mining Commissioner. The legislation retained the right in a party to apply to the Supreme Court for an order transferring the proceedings to the Supreme Court. This set the stage for the *Dupont* case.

[17] Under the 1956 amendments to the *Mining Act*, a party could appeal from the decision of the Mining Recorder to the Commissioner, rather than to a judge. It was argued that the provisions were unconstitutional because the province had purported to create a tribunal exercising jurisdiction of a court within the meaning of s. 96 of the [now] *Constitution Act, 1867*. Rand J., speaking for the court, rejected that argument, but in doing so at p. 544 referred to s. 119 [now s. 107] of the Act:

> Section 119 contemplates proceedings which involve private civil and property rights and provides that a party may apply

> for an order transferring the proceedings to the Supreme Court. I should say that once that situation appears an order should go unless the party applying is willing to accept the Commissioner as an arbitrator. By reason of its terms s. 119 is clearly a severable provision and would be so apart from the provision for transfer. [Emphasis added.]

[18] The core of the dispute in the *Dupont* case and the earlier *McLean* case lies in the tension between the province's need to have an efficient and expeditious means of resolving disputes concerning mining claims and the constitutional provisions that have the effect of reserving jurisdiction over certain matters to the federally-appointed judges. The province has attempted to deal with this issue by creating an administrative tribunal to handle the vast majority of disputes and, to circumvent the s. 96 problem, it has built into the legislation a mechanism, s. 107, to allow the parties to take certain types of disputes to the superior court. However, s. 107 does not purport to alter the procedural and substantive law of judicial review.

[19] The core of the dispute between the respondents and the appellants may be a matter of civil and property rights, but that is not a dispute the Superior Court could resolve when a proceeding has been transferred under s. 107 any more than could the Commissioner on an appeal under s. 112. The applications judge exercised his discretion under s. 107 solely on the basis that the Superior Court could consider the conduct of the MNR in granting the permit under the *Aggregate Resources Act*. Since this was not a proper basis for the exercise of the discretion, I would set aside that decision and remit the matter to the Commissioner. The s. 112 appeal is a statutory appeal to a specialized tribunal. It is preferable that this tribunal, rather than the court, determine issues within its jurisdiction. As Rand J. held in *Dupont*, at p. 541:

> The adjudications by the recorder and the Commissioner are not to be treated in isolation; the special elements of experienced judgment and discretion are so bound up with those of any judicial and ministerial character that they make up an inseverable entirety of administration in the execution of the statute. To introduce into the regular Courts with their more deliberate and formal procedures what has become summary routine in disputes of such detail would create not only an anomalous feature of their jurisdiction but one of inconvenience both to their normal proceedings and to the expeditious accomplishment of the statute's purpose. [Emphasis added.]

DISPOSITION

[20] Accordingly, I would allow the appeal, set aside the Order of Boissonneault J. and remit the s. 112 appeal to the Commissioner. The appellants are entitled to their costs of the appeal. It appears that the applications judge made no order for costs of the proceedings before him and I would therefore not make any order for the costs of the application.

(signed) "M. Rosenberg J.A."
(signed) "I agree J. J. Carthy J.A."
(signed) "I agree Dennis O'Connor J.A."

RELEASED: September 13, 2000