

**IN THE MINING WARDEN'S COURT  
AT LIGHTNING RIDGE  
J A BAILEY, CHIEF MINING WARDEN  
THURSDAY 4<sup>TH</sup> MARCH 1999**

**CASE NO. 1999/89**

**VLADA LIPOHAR (Applicant)**

**v.**

**MINING REGISTRAR (Respondent)**

**APPLICATION FOR REVIEW OF A DECISION OF A MINING REGISTRAR**

**HEARING DATE: 2<sup>nd</sup> March 1999**

**DECISION**

This matter concerns an application by Vlada Lipohar, for a review of a decision of a mining registrar to cancel claim No. 29973 (Lightning Ridge).

## **THE FACTS**

The facts are mainly not in dispute. Mr. Lipohar was granted MC 40552 on 28 May 1997. On 4 December 1997 MC 29973 was transferred to him. That latter claim has been renewed until 30 June 1999. Following a conviction on 11 June 1998 for an offence under Section 12B Mining Act 1992, Mr. Lipohar appealed to the District Court. The District Court heard his appeal on 26 August 1998, at which time Mr. Lipohar commenced his gaol sentence for the offence.

Mr. Lipohar also appealed against an “exclusion order” imposed by the Local Court. The District Court made the following order in that respect:

- *Order under s.175b(ii) of Mining Act 1992 for a period of 2 years from 11/6/98 be excluded from any mineral claim within the mineral claims area of Lightning Ridge with the exception of those upon which he has claims those being # 29973 & 40552.*

On 13 October 1998, the Mining Registrar forwarded a letter to Mr. Lipohar advising him of an intention to cancel MC 29973 and 40552 (letter exhibit 5). The deadline for submissions was extended. Mr. Lipohar’s submission as to why his claims should not be cancelled was marked exhibit 6. In essence, he indicated that he sold up his residence at Inverell, moved to Lightning Ridge with his new wife and children of his former marriage and put his life savings into mining at Lightning Ridge.

The Registrar dealing with the matter, Mr. Hatch, forwarded a request to the Mining Registrar Lightning Ridge, for comment on the submissions of Mr. Lipohar. That comment is before the court and marked exhibit 7. The Registrar at Lightning Ridge indicated that claim 40552 was given residential status on 28 May 1997, presently there is a “house” and shed on the claim, although he doesn’t know who occupies the same. He further indicated he had received notification from a firm of solicitors that claim 40552 is subject to a Family Law dispute.

Following the information from the Registrar at Lightning Ridge, Mr. Hatch notified Mr. Lipohar on 8 December 1998 that MC 29973 had been cancelled, effective from 15 December 1998. Mr. Lipohar subsequently lodged his application for a review of that decision.

His grounds for review were stated as follows:

1. *The cancellation of the claim is an added penalty for an offence for which Mr. Lipohar has already been dealt with by the District Court*
2. *The Mining Registrar has not taken into account all factors, nor has Mr. Lipohar been given a chance to be heard.*
3. *The loss of the claim would cause insurmountable financial hardship for Mr. Lipohar.*

Sections 203 and 204 of the Mining Act 1992 are relevant to this matter. The pertinent portions of those sections are:

### **203 Grounds of cancellation**

(1) A mining registrar may cancel a mineral claim, as to the whole or any part of the land to which it relates:

.....

(e) if the holder of the claim is convicted of any offence relating to mining or minerals, or

....

(3) The mining registrar may defer cancellation of a mineral claim that is the subject of legal proceedings, or of an inquiry under this Act, pending the outcome of those proceedings or that inquiry.

### **204 Cancellations**

(1) Before canceling a mineral claim on a ground referred to in section 203

(1)(c), (d) or (e), the mining registrar:

(a) must cause written notice of the proposed cancellations, and of the grounds of the proposed cancellation, to be served on the holder of the claim, and

- (b) must give the holder of the claim a reasonable opportunity to make representations with respect to the proposed cancellation, and
- (c) must take any such representations into consideration.

.....

.....

### **THE HEARING**

Under cross examination, Mr. Hatch indicated that he did not take action upon the cancellation until a decision had been made on the appeal to the District Court. He indicated he was aware that the Local Courts exclusion order upon Mr. Lipohar had been modified by the District Court; there was no longer total exclusion from the Lightning Ridge mineral claims district, but an exclusion from any mineral claim other than those upon which he was the claim holder, that is, mineral claims 29973 and 40552.

Mr. Hatch indicated he has not read the judgment of the District Court Judge, concerning the orders made upon Mr. Lipohar, he merely is aware of the orders made; he did not give consideration as to what might have been going through the judge's mind when the order was made.

Under cross examination Mr. Hatch indicated the criteria he adopted to decide to cancel the claim was solely the fact that Mr. Lipohar had been convicted under S.12B Mining Act 1992. He sent the letter then to Mr. Lipohar, giving him an opportunity to make representations as to why the claim should not be cancelled. It was after he gave consideration to those representations, together with input from the Mining Registrar Lightning Ridge, that Mr. Hatch cancelled one only of the two claims.

Mr. Hatch indicated that he only cancelled claim 29973, and that he held the question of cancellation on claim 40552 in abeyance. His concern at the time was the fact that a camp site was on claim 40552 and the representations from Mr. Lipohar were such that the camp site may have been the only residence for his family.

Mr. Hatch clarified on re-examination that his letter to Mr. Lipohar on 13 October 1998 was not his final decision on the matter and that he saw it as a preliminary step. He said that at the point of time he had not made his decision as to cancellation.

Mr. Lipohar in giving evidence indicated nothing much has changed since his letter of submission to Mr. Hatch dated 6th November, 1998; other than he is now released from prison and is residing on claim 40552. He said one son is in Albury, the other in Toowoomba and will return back to Lightning Ridge within the month. He paid \$20,000 for the claim which is subject to the cancellation, his only source of income currently is the pension. He is of the opinion that the claim is valuable and that it is worth what he paid for it.

Mr. Lipohar indicated that upon receipt of his letter from Mr. Hatch, he had no opportunity to gain legal advice before replying.

## **SUBMISSIONS**

Mr. Brown, solicitor representing Mr. Lipohar, submitted that to cancel this claim is a further penalty to Mr. Lipohar. On 17 March 1997, amendments to the Mining Act 1992 commenced. These amendments incorporated new sections, such as 12B and 175B, providing harsh penalties for the theft of mineral from a claim, known locally as "ratting". Mr. Brown stated that when the harsh penalties were included in the Act, no amendments were made to S. 203. That section still leaves a discretion with a mining registrar to cancel a claim when a person is convicted of "ratting". The thrust of that aspect of Mr. Brown's submission, as I take it, is that if Parliament also intended "ratters" to have their claims cancelled as well as penalties imposed under S.12B and exclusion orders made against them under S.175B, then Parliament would have amended section 203 to make cancellation mandatory.

Perhaps reference should now be made to the second reading of the amending Bill, which was submitted to the court by Mr. Fitzgerald, solicitor for the mining registrar. In that reading, the Minister for Mineral Resources and Minister for Fisheries stated, *inter alia, I am pleased to say that agreement has been reached that the penalties should be serious and they are serious. Ratting often leaves the workings of mines in*

*an unsafe condition for the miners. The penalties will deter criminal activity and reduce the incidence of unsafe workings left by ratters.*

After indicating to Parliament the penalties for breached S.12B, the Minister went on to say: *A further penalty for the offence of ratting is that a court in convicting a person may make an exclusion order prohibiting that person from entering the whole or any part of the mineral claims district concerned, or any other mineral claims district, for a period not exceeding two years.*

It is clear from the Minister's speech and from the wording of S.175B(2) of the Act, that any "exclusion order" is discretionary and not mandatory. The same applies to any decision made by a mining registrar under S.203(1)(e) of the Act. It is clear that Parliament intended that such discretion ought to be available as it would be aware that following a conviction under the Act, there may very well be some subjective factors which exist which would persuade a court in exercising its discretion under S.175B, or a mining registrar in exercising a discretion under S.203, not to impose an exclusion order or cancellation as the case may be.

In questions put by Mr. Brown in cross examination and in submissions, it is suggested by the applicant that Mr. Hatch had made his decision before hearing from Mr. Lipohar and without obtaining the reasons for the District Court Judge's decision. Mr. Brown relied upon Mr. Hatch's letter, wherein he said, inter alia, *"I propose to cancel your mineral claims in accordance with Section 203 of the Mining Act 1992"*. Mr. Brown submitted that Mr. Hatch did not say *"I am considering cancellation"*.

#### **SECTION 204**

Certainly Mr. Hatch denied that he had made his mind up finally about cancellation at the point of time of writing the letter which is exhibit 5. Furthermore, it would appear, in writing the letter, that Mr. Hatch was following his obligation under Section 204 of the Act, which states in part, *"...must cause written notice of the proposed cancellation..."* If Mr. Hatch had written *"I am considering cancellation"*, it could be argued that he has failed to comply with his mandatory obligation under S.204, because he has not given written notice of the *"proposed cancellation"*.

The word *proposed* is perhaps an unfortunate choice of words for the section. The Shorter Oxford Dictionary cites many meanings to the word *propose*. One being *To put forward for consideration, discussion, solution, etc.* another being, *To put before one's own mind as something that one is going to do;* or *To put forward as something to be attained.* The most common use of *proposed* generally gives an impression that a decision has been made that one is going to do something. However, if one considers the wording of Section 204(1)(b): *must give the holder of the claim a reasonable opportunity to make representations with respect to the proposed cancellation,* the only meaning that can be attached to the expression *proposed cancellation,* as it appears in section 204(1)(a), is that the question of cancellation was being put forward for consideration.

I do not, on the evidence before me, consider that Mr. Hatch had made a final determination as to the cancellation of the claims at the point of time when he wrote to Mr. Lipohar on 13 October 1998. This is also borne out by the fact that Mr. Hatch had not cancelled claim 40552; that decision is held in abeyance as the result of matters that were raised with him by Mr. Lipohar after 13 October 1998.

### **THIS COURTS JURISDICTION**

If Mr. Hatch had made a decision as to cancellation as at 13 October 1998, would that have made a difference to this application before me? If the decision in **Cummins v. Mackenzie & Anor** ([1979] 2 NSWLR 803) is applicable in this case, and in my opinion it is, then the jurisdiction of this court is original, not appellate. Consequently, the Warden's Court is not only reviewing the exercise of the Mining Registrar's discretion, but, in addition, is considering all matters of relevance occurring to the point of time when the matter comes before the court. In other words, if there had been a denial of natural justice by the mining registrar by making a decision without hearing from the claim holder (I have found factually that there was not a denial of natural justice) it is incumbent upon this court to ensure that the applicant claim holder has the opportunity to present all matters before this court. Mr. Lipohar, being legally represented, has had that opportunity.

## **THE EXCLUSION ORDER OF THE DISTRICT COURT**

Reference was made by the applicant to the fact that Mr. Hatch did not bother to ascertain the reasons for the decision of the District Court Judge in altering the exclusion order made by the Local Court, to allow Mr. Lipohar to go onto his two claims. The applicant wishes the court to draw an inference that the District Court Judge had in mind that the mining registrar should not cancel the claims of Mr. Lipohar.

I have difficulty in drawing that inference. If that was the intention of the judge, whether it was stated by inference or expressly in his decision when imposing the exclusion order, then the applicant has had the opportunity to place before this court the reasons put forward by the judge. This has not been done. I can only assume that the question of cancellation of the claims was not a matter which was placed in the mind of the judge at the time of hearing the appeal against the total exclusion order that was imposed by the local court. Indeed it could be said that it is not the role of the District Court Judge to attempt to fetter the discretion of the mining registrar as to the obligations under Section 203. However, nothing, other than the result of the District Court appeal, was placed before the mining registrar and similarly nothing, other than the result, has been placed before this court. Consequently, consideration can only be given to the totality of matters placed before me.

## **GROUND OF APPEAL**

The first ground of appeal is that cancellation of the claim is an added penalty for the offence committed by Mr. Lipohar for which he has already been dealt with by a court. Mr. Fitzgerald cited **Health Care Complaints Commission v. Litchfield** [(1997) 41 NSWLR 630] as the authority for the principle of double jeopardy not applying to situations of a civil nature such as this. In that case, although a medical practitioner was acquitted of criminal charges, the Medical Tribunal was able to take disciplinary action against the practitioner. The court stated, at pg 635 G, "Disciplinary proceedings consequent upon a conviction in criminal proceedings are not barred by autrefois convict or any wider principle of double jeopardy". It further stated at pg 637D "Disciplinary proceedings against members of a profession are



intended to maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession.”

Although factually this case has nothing to do with the present matter before me, the general principles of law are applicable. I do not see the actions of the mining registrar in canceling the claim as being an imposition of a further penalty upon Mr. Lipohar. It is an action designed to maintain a proper and ethical standard within the mining industry, in particular the mineral claims district of Lightning Ridge. All claim holders have conditions placed upon a mineral claim. Claim 29973 has some 24 conditions (a copy of the same is exhibit 3). These conditions are to ensure good order is maintained on all minerals claims within the district. A breach of any of these conditions leaves a claim holder liable to cancellation [see S.203(1)(c)]. Condition 24(iv) specifically relates to convictions under the Mining Act 1992.

Another ground of the application for review is that *“the mining registrar did not take into account all factors, nor has Mr. Lipohar been given a chance to be heard”*. True it is that the mining registrar did not conduct a hearing before making his decision and did not have the benefit of legal argument from Mr. Brown. However, Mr. Lipohar has now given evidence under oath and been subjected to cross examination and the court has received submissions from Mr. Brown. This court must now make a decision upon all the matters before it and in accordance with S.206(4), give a decision to the effect as if it were the decision of the mining registrar. Other than the legal submissions, no other additional factual matter has been placed before the court that was not placed before the mining registrar.

The final ground concerned the financial hardship to Mr. Lipohar. The registrar was aware, as is this court, of the expense said to have been incurred by Mr. Lipohar in having the claim transferred to himself. As to whether or not there is a fortune in opals in that claim is merely speculative. It may very well be that he could expend a large amount of money extracting opal dirt for no return whatsoever.

## **DISCRETION**

I note that a mining registrar also has a discretion under S.190 of the Act to refuse an application for a mineral claim on the grounds, inter alia, that the applicant has been convicted of an offence against the Act. It is clear that the legislature is concerned about persons who have convictions under the Act being claim holders. The legislature, however, left a discretion with the mining registrar.

In considering the registrar's discretion, it would appear the seriousness of the offence committed would assist the registrar in determining whether or not a person should be a claim holder. It may very well be that a person who, to the knowledge of a registrar, has a lengthy and excellent record of complying with all rules, regulations and conditions in respect of claims that have been held, finds himself or herself being convicted under S.5 for a minor technical breach of prospecting, say one metre outside the area of authority. In considering all factors, a registrar, in exercising discretion, may decide not to cancel or not to refuse to grant a claim. On the other hand, if a serious breach is involved, a registrar may adopt a different view.

It has been put to this court that "ratting" is one of the most serious of breaches of the Mining Act, 1992, so far as Lightning Ridge Mineral Claims District is concerned. I have already made reference to what was said in Parliament about it and to the action taken by Parliament in an attempt to deter people from being involved in this type of illegal activity.

Mr. Brown was critical of exhibit 8, a letter from the Lightning Ridge Miners' Association Ltd to the Mining Registrar at Lightning Ridge. That letter expressed an opinion that the Association believed "the legislation will be ineffective unless conflicted (sic) ratters claims are cancelled". I cannot accept that this had an influence upon the decision of either Mr. Inman (who requested Mr. Hatch to take some action), nor Mr. Hatch who took the action to cancel the claim of Mr. Lipohar. This letter merely indicates, from an Association of Miners in the area, the seriousness of "ratting" within the district. It adds nothing to what has been said in Parliament.

A conviction under S.12B is clearly one of the more serious offences to be convicted of under the Mining Act. The mining registrar had to consider that when exercising his discretion under S.203.

### **REGISTRAR'S DECISION**

Having regard to the seriousness of the offence for which Mr. Lipohar has been convicted, having regard to subjective factors put forward by Mr. Lipohar as to why his claim should not be cancelled and notwithstanding the District Court has imposed an exclusion order which permits Mr. Lipohar to go onto his claims, it is my opinion that claim 29973 ought to be cancelled, in other words, the decision of the mining registrar was valid.

THE APPLICATION FOR REVIEW OF THE DECISION OF THE MINING REGISTRAR IS DISMISSED.

THE DECISION OF THE MINING REGISTRAR TO CANCEL MINERAL CLAIM 29973, EFFECTIVE FROM 15 DECEMBER 1998 IS CONFIRMED.