fogler rubinoff

October 2013

MINING BLOG

"THE NORTH IS NOT A QUIET PLACE"

Summary

These were the opening words in a decision of a tribunal of the Ontario Mining and Lands Commissioner dated September 10, 2013 involving a dispute between subsidiaries of Cliffs Natural Resources Inc. ("Cliffs") and KWG Resources Inc. ("KWG").

Cliffs had applied for an easement under the *Public Lands Act* (Ontario) (the "Public Lands Act") to build a road over the mining claims held by Canada Chrome Corporation ("Canada Chrome"), a subsidiary of KWG. Canada Chrome, which held the mineral rights but not the surface rights to the mining claims, refused to provide its consent. The matter was accordingly referred to the Mining and Lands Commissioner under section 51(4) of the *Mining Act* (Ontario) (the "Mining Act") to determine if Canada Chrome's consent should be dispensed with.

Cliffs and KWG had at one time enjoyed a congenial working relationship. They were parties, together with a company called Spider Resources Inc., to a joint venture to develop the massive Big Daddy chromite deposit located in the Ring of Fire. In early 2009 Cliffs obtained a 19.9% equity interest in KWG and a representative of Cliffs served on KWG's board of directors.

In addition, KWG established Canada Chrome for the purpose of staking a series of mining claims which ran in a generally unbroken contiguous north-south direction of approximately 340 kilometers. The mining claims were staked in 2009 as part of a specific strategy, initially supported by Cliffs, to build a railway to serve the Big Daddy deposit and the Ring of Fire area generally. The mining claims were carefully chosen as the best route to build a railway because they were on an esker or desirable higher ground in an area dominated by boggy lowlands.

A series of events then occurred which caused Cliffs to change its strategy regarding the development of the Big Daddy deposit and the building of a railway. First, in early 2010 Cliffs acquired Freewest Resources Canada Inc. which had discovered another large chromite deposit called Black Thor in the Ring of Fire. Cliffs then bought out Spider in June 2010, thereby obtaining a majority interest in the Big Daddy deposit. The result was that Cliffs decided to focus in the near term on developing the Black Thor deposit instead of the Big Daddy deposit and determined that a road was a better and less expensive transportation alternative than a railway.

Michael G. Hobart, Partner
mhobart@foglers.com
416.941.8856

Michael Hobart is a partner in the Business Law Group's Securities department.

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Tel: 416.864.9700
Fax: 416.941.8852

foglers.com

fogler rubinoff

Ruling Against Cliffs

The tribunal ruled against Cliffs and dismissed the application. It found that under section 51 of the Mining Act an unpatented mining claim holder has a prior right to surface use for "prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights". In making a decision pursuant to section 51, the tribunal held that both sides have an onus to clearly indicate what their interests in the surface are and how sharing or not sharing surface rights would affect those interests. The tribunal was of the view that in the circumstances of this case the granting of an easement for the building of a road would have a negative impact on the development of the mining claims and lead to interference with any work to be carried out by KWG under the Mining Act.

The tribunal further found that the sand ridge or esker was the most important feature of the mining claims and regardless of whether it is right or wrong for KWG to build a railway over the claims, KWG's ability to access the feature would be negatively affected. The tribunal found that is was unreasonable to expect KWG to accommodate the placement of an easement on the basis that there is enough room for both parties to build their own separate infrastructures. The interests of the parties could not be balanced and because KWG's rights under the Mining Act would be negatively affected, the tribunal ruled that the surface rights did not have to be shared with Cliffs.

A significant factor which influenced the tribunal's decision in this case was the fact that the tribunal had no evidence before it regarding the public benefit that building the road might have produced. In such circumstances, the tribunal felt that it was left with little choice but to rule that the proposed road had no public benefit and that Cliff's actions were confined to protecting its own corporate goals.

Failure of MNR to make submissions regarding the public interest

The tribunal was troubled by the fact that the Ministry of Natural Resources ("MNR"), although considered to be a party to the hearing and who had participated in a pre-trial hearing to determine whether the Neskantaga First Nation should be granted party status to the proceeding, chose to sit on the side lines as an observer and made no submissions regarding whether the road proposed to be built by Cliffs was in the public interest. The tribunal found that Cliffs failed to produce any witnesses from any government agency or ministry to speak to the public's interest in Cliffs' proposed plans or to assert that the road was intended to be a public road. The tribunal further noted that there were no witnesses from the mining industry in general to speak to how dispensing with consent for purposes of granting an easement for a road designed to serve the interests of one particular corporate entity might benefit the industry.

Improper Use of Surface Rights – Section 54 of the Mining Act

The tribunal noted that Cliffs had made comments regarding the validity of the mining claims in such a way as to call into question the legality of Canada Chrome having staked mining claims for the purpose of securing a transportation route. The tribunal was troubled by this "veiled criticism" by pointing out that Cliffs never raised a concern about the validity of the scheme at the time the claims were staked and went so far as to have financed the staking of the claims. The tribunal dryly observed: "The situation brings to mind the idiom of "the pot calling the kettle black". There is no doubt in the mind of the tribunal that Cliffs was quite happy to go along with the scheme until it felt ready to move in and take over."

In any event, the tribunal specifically noted that the Minister did not direct a referral in this case under section 54 of the Mining Act and that it had no jurisdiction to make a ruling regarding the legality or appropriateness of the alleged improper use of the mining claims to build railways. Further, the tribunal noted that no government representative objected on this basis, or any other basis.

First Nation Participation

Another interesting feature of this case is that in an earlier decision, the tribunal denied a request by the Neskantaga First Nation to be made a party to the proceeding. The First Nation took the position that the tribunal's decision under section 51 of the Mining Act was a statutory decision that would advance the regulatory process for the proposed road and consequently directly affect the First Nation's rights. Counsel for the First Nation submitted that the Crown has a constitutional obligation to consult in respect of the road and mine. Counsel for the MNR, on the other hand, submitted that the matter before the tribunal would not result in an easement as that was the MNR's decision under the Public Lands Act. The MNR further submitted that the Minister would take the public interest into account amongst other things and decide whether to grant an easement to Cliffs. That was not a decision for the tribunal.

The tribunal, agreed with these submissions, finding that its decision under section 51 was a discrete determination as to whether the mining claim holder's right to use the surface rights would be affected by the other competing use. It held that the rights of the Neskantaga First Nation would not be impacted by this decision. Once its decision was made, then the parties would be identified and the Aboriginal consultation process could commence.

Conclusion

The tribunal mused that even despite the acrimonious past relationship between the parties, there is still an opportunity for the parties to work out a solution that will prove to be mutually beneficial. This may turn out to be true, but the building of a transportation corridor to the Ring of Fire will involve huge financial costs and will necessarily require comprehensive negotiations with the Neskantaga First Nation and a political will of the Ontario government to make it happen. It is clear that any future transportation development of the Ring of Fire, be it a road or a railway, will require extensive consultation with the affected First Nation communities. Given the stakes involved, it would not be surprising if the Neskantaga expressed an appetite to become a participant in the transportation business. The story is just starting to unfold. The noise from the North may soon be getting louder.