



Innovation, Energy and Mines

MINING BOARD

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IN THE MATTER OF:

**THE MINES AND MINERALS ACT
S.M. 1991-92 c.9-Cap. M162**

AND IN THE MATTER OF:

**HAROLD WESTDAL APPEAL to
THE MINING BOARD
Re: License No. MEL 400 B**

DECISION OF THE MINING BOARD

Participating Board Members:

Harvey J. Slobodzian, Presiding Member

Bill Brant, Deputy Presiding Member

Dr. Norm Halden, Member

Henry Linklater, Member

The within appeal was heard by the Board on April 21, 2015 at which time presentations were made on behalf of the appellant, Mr. Harold Westdal and Mr. Chris Beaumont-Smith, Director of the Mines Branch. The Board is thankful of the parties for their fine presentations regarding the issues surrounding the within adjudication. The Board is also appreciative of the parties' consent to the extension of time for the delivery of a written decision in this matter beyond the statutory prescribed 30 day period of time from the date of the hearing. The Board was able to retain and instruct legal counsel in respect of the legal issues involved in the determination of this appeal.

Background

On January 28, 2011, MEL 400 B, a three year mineral exploration license (the MEL) was issued to Harold Westdal (the "Licensee") pursuant to *The Mines and*

Minerals Act ("The Act") of Manitoba. One of the conditions of the MEL was that the Licensee obtain a work permit from Manitoba Conservation before undertaking exploration under the MEL. On April 6, 2011, the Licensee applied for a work permit under *The Crown Lands Act*. Although historically most such work permits were issued quickly and routinely, in this case, consultation with a First Nation(s) was required before the Crown could issue a work permit.

By letter dated December 19, 2011, the Licensee requested "that [his] obligations respecting required work to be deferred and the term of the license be extended until the required work permit is forthcoming". The Director of Mines (the "Director") approved the Licensee's request on December 29, 2011, indicating that, "[t]he license will be extended for one year and work commitment requirements will be deferred for the same period."

On November 28, 2012, the Licensee applied a second time for a work permit. On May 8, 2011, the Licensee indicated to the Branch that he had been notified that the MEL had been cancelled because he had "failed to do any work". The Licensee requested relief from forfeiture. By letter dated August 1, 2013, the Branch notified the Licensee that relief from forfeiture had been granted. In the midst of these communications involving cancellation of the MEL and relief from forfeiture, on June 12, 2013, the work permit was granted. The Board notes with consternation that it was issued more than two years following the application.

Only July 30, 2013, the Licensee applied for further extension of time. It is the Board's understanding that the extension was granted and that the term of the license was changed from 3 years to 5 years at a subsequent point.

By letter dated December 22, 2013, the Licensee requested that the acting Director "reset the clock" to establish January 2014 as the beginning of the first year for work under the MEL. By letter dated January 16, 2014, the Acting Director stated that the Branch would apply the MEL's existing work credits to years 2011-2012, 2012-2013, and 2013-2014 of the license in order to keep it in good standing until April 28, 2014; and that "work requirements would only be required to the remaining term of the MEL". However, by letter dated April 1, 2014, the Acting Director revised the Branch's previous advice to say that the Licensee only had enough work credits for the first two years; and recommended that the Licensee apply a third year of work credit by the expiry date of April 28, 2014 "to ensure that the MEL is not cancelled".

On December 24, 2014, the Licensee filed his appeal materials with the Mining Board arguing that:

1. Because he was unable to exercise his mineral rights under subsection 52 (3) of the Act until the work permit issued in June 2013, the effective date of the MEL should have been the date that he was "able to conduct exploration"; or alternatively
2. That the Board should interpret the section 15 extension clause to mean that an extension also suspends the obligation to perform required work, and that such an interpretation would retain the "phased approach to work" intended to apply to MELs.

The Board, in a preliminary meeting to consider the within appeal, ordered a full oral hearing requesting the parties to attend to ensure that a full and complete opportunity was afforded to them to present their respective positions. A hearing was conducted by the Board in the presence of the representatives of both parties on April 21, 2015. In the Board's deliberation shortly after the hearing of the Appeal, the Board exercised its power under section 28 (10) of the *Act* to request of the Minister to provide the Board with assistance with regard to the legal issues arising from the within Appeal. It was the Board's desire to retain and instruct legal counsel in respect of obtaining a legal opinion regarding legal issues surrounding the within appeal and the operation of the *Act*. The Minister granted the Board's request and the Board obtained the benefit of external independent legal counsel to assist in the determination of the within Appeal. The Board expresses its appreciation for this assistance.

Analysis

The relevant statutory frame work in respect of the issues involved in this Appeal are set out at Appendix "A" hereto.

The Board wishes to express the sentiment that it is sympathetic to the Licensee's position in that section 52(3) of the *Act* provided to the Licensee a right to enter, use, and occupy the surface of the land which is the subject of the license for the purpose of prospecting or exploring minerals on, in, or under the land. In theory, this should occur on or shortly after the "effective date" being the date the MEL is issued by the Director of the Branch pursuant to Section 51(3). Section 53(1)

also imposes obligations on the Licensee to ensure that the required amount of prescribed work is performed in the area covered by the license and to submit a report of that work to the Recorder in accordance with the regulations. The uncontradicted evidence presented before the Board was that work permits were typically issued within a fairly short period of time from the effective date of the MEL, subject only to a minor systemic delay which the Board understands caused little or no prejudice or inconvenience to the rights of a licensee. The more recently imposed requirements to consult with First Nation(s) has resulted in delays in the granting of the work permits far beyond the periods of time historically experienced.

The *Act* does not appear to contemplate any significant delays in allowing a licensee to exercise his/her rights pursuant to Section 52(3) with the concurrent obligations being imposed on him or her attached thereto pursuant to Section 53(1). The *Act* appears to contemplate that a licensee will be in a position to exercise his or her rights as a licensee pursuant to Section 52(3) and will incur the obligations pursuant to Section 53(1) during the same period of time. In the within Appeal, the Licensee has not been afforded the exercise of his rights under Section 52(3), yet he has been subject to the obligations under Section 53(1). The Board agrees with the Licensee that the operation of the *Act* appears to be unfair and works to his prejudice. A licensee should only have obligations imposed upon him or her in the event that he or she has the rights afforded to a licensee under Section 52(3). The Board does not agree with the Branch that the *Act* in affording the Licensee an opportunity to make a cash payment in lieu of performing prescribed work in order to maintain the license in good standing is an adequate remedy for a licensee. The *Act* contemplates the making of a cash payment by a licensee where in a year the licensee performs work or incurs expenditure for the performance of required work and the value of the work, in the opinion of the Director is less than the prescribed required work minimum value. In the case of the Licensee herein (Mr. Westdal), he was not permitted to perform the work required due to no fault of his own as he was unable to obtain a work permit to do any work in relation to his MEL when he so desired.

However, the real question for the Board in this Appeal is the matter concerning the Board's jurisdiction under the *Act*. In respect of the Board's jurisdiction to grant the remedy sought by the Licensee in this Appeal, the following questions of statutory interpretation come into play:

- (1) What is a reasonable interpretation of the provisions of the *Act* that govern the effective dates of MELs and accompanying required work timelines?
- (2) Is it a reasonable interpretation of section 15(1) of the *Act* to find that the required work obligations are suspended until a licensee obtains a work permit?

Section 51(3) of the *Act* states that “the effective date of a mineral exploration license is the date on which it is issued...”. The MEL was issued in this case on January 28, 2011. The *Act* leaves little room for interpretation other than that the effective date of the MEL is the date it was issued. Accordingly, in the Board’s view, sections 29(1) and (2) do not grant the Board the authority to find that the term of the license did not become effective until after the Crown had fulfilled its duty of consultation, and was able to issue the work permit.

Section 29(2)(a)(ii) grants the Board authority to determine questions and disputes between the holder of an MEL and the Director. The Licensee and the Director dispute the interpretation of Section 15(1). The question for the Board is whether on a reasonable interpretation of the enabling legislation, the Board may grant the Licensee the remedy he seeks, namely a declaration that when the Director ordered an extension same acted to “stop the clock” or suspend the obligation to do the required work. Put another way, is it reasonable to interpret Section 15(1) as not only extending a term of an MEL, but also correspondingly suspending the required work, particularly where, as here, the inability of the Crown to issue the work permit in a timely way thwarted the Licensee’s ability to do the work?

The ordinary dictionary definition of an extension is “[a]n additional period of time given to someone to ... fulfil an obligation”.¹ While Section 15(1) can be interpreted as extending the required term, notwithstanding the fact that no work could be done, the legislation does not afford the Board the jurisdiction to suspend the required work obligations. Moreover, Section 15(1) clearly provides for a ministerial discretion; the exercise of which is not open for a review by the Board.

Section 53(1) requires a licensee to complete a prescribed amount of required work in each one-year period of the license. Section 53(3) provides that if a licensee performs less than the prescribed amount of required work “in respect of the year”, in order to avoid revocation, the licensee may make a cash payment.

¹ The Oxford Dictionary

As the *Act* applies the required work provisions to each year of a license, regardless of any impossibility to perform the work, absent a dispensation by the Minister, the suspension of a licensee's obligations during the term could be in conflict with the Section 53 requirement.

The extension previously granted to the Licensee by the Director on December 29, 2011 indicated that license would be extended for one year and that work commitment requirements will be "deferred" for the same period. Clearly, the Minister, under Section 15(1) had the discretion to extend the term of the MEL. It is the Board's view that the Minister would also have the discretion to issue an accompanying order to suspend or "defer" the work requirements, based on the wording of the *Act* in order to achieve a balance between the rights of a licensee and his or her obligations.

This interpretation of the Minister's discretion under Section 15(1) also accords the Board's understanding of the modern principle of statutory interpretation which mandates a purposive and contextual analysis. It is now accepted that statutory interpretation must be attempted within a purposive and contextual approach. Such an interpretation cannot be limited to the words used by themselves. Instead, the words of an Act are read in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act and the intention of the Legislature/Parliament. [See *Lei vs. Kwan*, 2010 MBCA 108; and *R. v. Loscerbo (A.)* 1994, 92 Man.R. (2d) 263 (C.A.)].

The Board is of the view that the decision of the Minister through the Director of the Mines Branch in approving the Licensee's request on December 29, 2011 to extend the license for one year and to defer the work commitments for the same period of time was a proper exercise of the Minister's discretion under Section 15(1). However, it is the Board's view that the Minister's decision in this respect would not be subject to review by the Board.

The Licensee quite properly argued that the object and purpose of the *Act* includes "facilitat[ing] exploration, development and production". Section 29(1) of the *Act* obliges the Board to make its decisions in accordance with this purpose. Nonetheless, Section 29(1) cannot be interpreted as allowing the Board to disregard, overrule, or contradict the specific provisions of the *Act*. The Board does not have any inherent jurisdiction to decline to apply the *Act* in the interest of fairness. The *Act*, however, does afford the Minister certain discretionary

powers, in particular Section 15(1), that are reserved solely to the Minister which the Board assumes would be exercised upon principles of fairness and with a view to the object and purpose of the *Act* in the administration of the rights and obligations pertaining to individuals in the position of the Licensee.

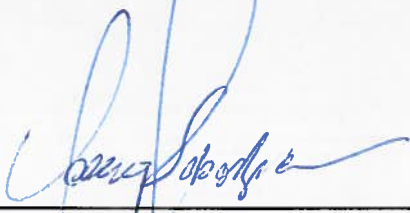
Decision

The Board regretfully finds that the *Act* does not afford it the jurisdiction to grant to the Licensee the remedy which he is seeking. However, the Board does not agree with the position of the Director of the Mines Branch that the Minister is "hand tied" from deferring the work requirements pursuant to Section 15(1) of the *Act* as an accompaniment to the extension of time for compliance, or potentially even independently of the extensions. In the Board's view, the Minister would have the discretionary authority to provide the Licensee the remedy he is seeking, in whole or in part.

However, as stated above, the Branch's decision not to suspend the work requirements is not reviewable by the Board nor is this otherwise within the Board's jurisdiction. The Board does not have any inherent jurisdiction that permits it to deviate from the strict application of the *Act* based upon its reasonable interpretation. The Board must therefore dismiss the within Appeal.

DATED this 26th day of June, 2015.

FOR AND ON BEHALF OF THE MINING BOARD



Harvey J. Slobodzian
Presiding Member, on behalf of Board

APPENDIX "A"

STATUTORY FRAMEWORK - *THE MINES AND MINERALS ACT*

Mineral Exploration Licenses

The statutory provisions governing MELs are as follows:

- 51(3) The effective date of a mineral exploration licence is the date on which it is issued by the director.
- 52(3) Subject to Part 9, the holder of a mineral exploration license may enter, use and occupy the surface of the land that is the subject of the license, for the purpose of prospecting or exploring minerals on, in or under the land.
- 53(1) In each one-year period in the term of a mineral exploration licence, the holder of the licence must
- (a) ensure that the required amount of prescribed work is performed in the area covered by the licence; and
 - (b) submit a report of that work to the recorder in accordance with the regulations.
- 53(3) Where in a year the holder of a mineral exploration licence performs required work or incurs expenditures for the performance of required work and the value of the work, in the opinion of the director, is less than the prescribed required work minimum value, with the result that there is a deficiency of required work in respect of the year, the holder may, to maintain the licence in good standing and avoid suspension or revocation of the licence under section 57, make a cash payment to the recorder equivalent to the amount of the deficiency.

"Required work" is defined in the Act as:

- 1(1) ... in respect of a mineral disposition or mineral lease, work of a prescribed kind and minimum value that must be performed by the holder or lessee;
- 147(1) Subject to subsection (2), a person may enter upon, for the purpose of exploring for, staking out and recording a claim or developing a quarry mineral disposition, Crown land that..

- (d) is set aside or reserved for a public purpose under The Crown Lands Act and delineated on claim maps under clause 18(2)(c) of this Act.

147(2) Before entry upon land under subsection (1), a person shall obtain such approvals or authorizations as are required under the applicable statute in clause (1)(a), (b), (c) or (d) and shall comply with such terms and conditions as are provided in the applicable statute.

The Regulation addresses the license term, required work, and work report requirements:

- 8(1) Unless it is surrendered under subsection 54(1) of the Act or suspended or revoked under section 57 of the Act, a mineral exploration licence has a term of
 - (a) three years if the area covered by the licence is located in Zone A;
 - (b) five years if the area covered by the licence is located in Zone B.
- 8(2) The holder of a mineral exploration licence shall ensure that:
 - (a) required work of a type described in Schedule B is performed in the area covered by the licence; and
 - (b) expenditures incurred to perform the required work shall be as set out in Schedule A.
- 8(3) Within 90 days after each anniversary date of the issuance of the mineral exploration licence, the holder of the licence shall, in accordance with Schedule B, provide the recorder with a report setting out:
 - (a) all required work performed in the area covered by the licence during the preceding year; and
 - (b) the expenditures associated with the performance of the required work.

Schedules A and B more precisely define the scope of the requirements set out in subsections 8 (2) and (3).

Mineral Disposition and Mineral Lease Regulation, 1992

Procedural Matters, Minister's Discretion and the Board's Jurisdiction

The Appellant relies on subsections 2(1) and 15(1) of the Act:

2(1) The object and purpose of this Act is to provide for, encourage, promote and facilitate exploration, development and production of minerals and mineral product in Manitoba, consistent with the principles of sustainable development.

15(1) Where, in the opinion of the minister, sufficient cause is shown, the minister may, upon application being made for the purpose, grant an extension of time for compliance with this Act.

Relief from forfeiture may be granted by the discretion of the Minister under section 16 of the Act:

16(1) Where a person suffers a forfeiture or loss of rights by reason of a failure of the person to comply with this Act, the person may apply to the minister for relief from the forfeiture or loss of rights and the minister may, by order, upon such conditions as the minister deems just, relieve the person from the forfeiture or loss of rights.

Act: The scope of the Board's jurisdiction is dealt with in section 29 of the

29(1) In accordance with the object and purpose of this Act as set out in subsection 2(1), the board shall perform, execute and carry out the duties, powers and functions assigned to it under this Act or any other Act, including such duties or functions that the Lieutenant Governor in Council or the minister assigns to it and may, for such purposes, make such orders as it considers necessary and do any act or thing that is necessary for, or incidental to, the performance, execution or carrying out of a duty, power or function of the board.

29(2) Without restricting the generality of subsection (1), the board shall... hear and determine questions, disputes, matters or claims arising under this Act that are referred to it, including

(a) a question, dispute, matter or claim between...

(ii) a holder of a lease or a mineral disposition and the minister, the director, the recorder or an officer of the department,

Section 29(2)(a)(ii) is applicable because MELs fall under the umbrella term "mineral disposition" defined in subsection 1(1) of the Act.