

**MEANING OF ‘IN CONNECTION WITH MINING’ – CONSTRUCTION OF
REGULATION 31 OF THE MINING REGULATIONS 1981 (WA)***

Re his Honour Warden Calder SM & Anor; Ex parte Lee & Anor [2007] WASCA 161

Mining Act 1978 (WA) – Compliance with expenditure conditions – Meaning of ‘in connection with mining’ in reg 31 – Whether includes expenditure subsequent to mining – Meaning of ‘mining operations’ – Mining lease conditions.

Warden's Decision and Judicial Review

Messrs Lee and Flint (Applicants) unsuccessfully claimed before the Warden that Horseshoe Gold Mine Pty Ltd (Horseshoe Gold) had failed to comply with the expenditure conditions of mining lease 52/743 (Mining Lease).¹ Warden Calder found that the Horseshoe Gold Mine had been on care and maintenance since 1994, and was satisfied that Horseshoe Gold had for the purposes of regulation 31 of the *Mining Regulations* expended or caused to be expended in connection with mining on the Mining Lease \$241,000 in the expenditure year. The Warden held that regulation 31 does not require that there be a present and on-going mining operation for there to be allowable expenditure: the work done and expenditure incurred was in connection with a mining operation that ceased in 1994 but in respect of which the tenement holder had ongoing statutory obligations to fulfil.

The Applicants applied to the Supreme Court for judicial review of Warden Calder's decision seeking writs of certiorari and mandamus (and in the alternative declaratory relief) in relation to the Warden's decision as it related to the Mining Lease.

Submissions before the Court of Appeal

The Applicants contended that the expenditure incurred or caused to be incurred by Horseshoe Gold was not incurred ‘on mining’ and could only be incurred ‘in connection with mining’ if at the time it was incurred there was an intention to engage in mining on the mining lease.² It was contended before the Court of Appeal that if as the Warden stated there was no intention to mine,³ expenditure subsequent to mining was outside the scope of regulation 31.

At the hearing before the Court of Appeal the Applicants applied for leave to add an additional ground to the effect that expenditure on the mining lease that was in connection with mining operations conducted on earlier and surrendered tenements (but covering the same ground) could not be expenditure in connection with the mining lease.⁴ Leave was refused by McLure JA (with Pullin JA and Buss JA agreeing) as the parties had conducted the hearing before the Warden on the basis that the mining lease was a consolidation of the earlier tenements and this issue had no impact on the issues arising for determination.

Counsel for Horseshoe Gold contended that the proper construction of regulation 31 and the approach to mining expenditure was as follows:⁵

* Mark Gerus, Partner, and Nathan Bartrop, Articled Clerk, Blakiston & Crabb. Disclosure: Mark Gerus acted for Horseshoe Gold in the proceedings before the Warden and the Court of Appeal.

¹ *Grange Resources Pty Ltd & Horseshoe Gold Mine Pty Ltd v George Francis Lee and Warwick John Flint* [2006] WAMW 8 see (2007) 26 ARELJ 21.

² [2007] WASCA 161 at [40].

³ [2006] WAMW 8 at [97].

⁴ [2007] WASCA 161 at [49].

⁵ [2007] WASCA 161 at [41].

- (a) the expenditure in question must relate to the land (ground) the subject of the mining lease;
- (b) the expenditure must be for the provision of good and services (activities);
- (c) the nature and purpose of the expenditure on activities should be considered in determining whether it is in connection with mining;
- (d) it is not necessary that there be current active mining, or an intention to carry out mining, on the mining tenement for there to be claimable expenditure in the relevant expenditure year;
- (e) if the purpose of an activity is to assist, investigate, assess or facilitate future possible mining and the nature of the activity is reasonable capable of contributing to such assistance, then the purchase and nature will supply the nexus between the expenditure and mining; and
- (f) mining operations do not cease when the process of extraction and processing ends (and therefore managing the consequences of mining operations such as rehabilitation are within the definition of 'mining' or 'in connection with mining').

Court of Appeal's Decision

McLure JA (with Pullin JA and Buss JA agreeing) referred in detail to the evidence and to the findings of the Warden. The findings that Horseshoe Gold had no plans at all concerning the mine were, according to McLure JA, to be seen in light of the Warden's other findings that the approach adopted by Horseshoe Gold in 1994 was reasonable and that the Warden found that Horseshoe Gold had contemplated the possibility of future mining operations.

Following earlier authority, McLure confirmed that under regulation 31, the expenditure must be in mining on the mining lease or be in connection with mining on the mining lease.⁶ What constitutes a sufficient connection with mining depends upon the context of the words used and the scope and purpose of the Act.⁷ McLure JA noted that none of the *Mining Act*, Mining Regulations or conditions of the Mining Lease oblige Horseshoe Gold to carry out mining operations or mining on the Mining Lease.⁸ Regulation 31 sets out the tenement holder's obligation in relation to mining-related expenditure.

McLure JA agreed with the first four points advanced by Horseshoe Gold and considered that the fifth proposition had some merit and, if approved by the court, it would govern the extent or degree of connection required between expenditure and mining. McLure JA considered this case did not require an examination of the outer limits of the degree of connection required between expenditure and mining. In relation to the sixth proposition advanced by Horseshoe Gold, McLure JA found that managing the consequences of a mining operation is not 'mining' for the purposes of regulation 31. McLure JA noted that the Warden found that the activities connected with the fulfilment of the conditions of the Mining Lease justified the employment of full-time staff at the mine site. McLure JA considered that the Warden did not err in concluding that the expenditure satisfied the requirements of regulation 31. The court ordered that the order nisi be discharged.⁹

⁶ *Re Heaney; Ex parte Flint v Nexus Minerals NL* (unreported, 26 February 1997) Kennedy J at 4.

⁷ *Collector of Customs v Pozzolanac Enterprises Pty Ltd* (1993) 43 FCR 280.

⁸ [2007] WASCA 161 at [39].

⁹ The Applicants have sought special leave to appeal to the High Court.