COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Skeena Resources Ltd. v. Mill,* 2024 BCCA 249

Date: 20240704
Docket: CA48751

Between:

Skeena Resources Ltd.

Appellant
(Appellant)

And

Richard Mill and The Chief Gold Commissioner of British Columbia

Respondents
(Respondents)

And

Orogenic Gold Corp.

Respondent
(Respondent)

And

Tahltan Central Government and the Mining Association of British Columbia

Interveners

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Harris
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 22, 2022 (*Skeena Resources Ltd. v. Mill*, 2022 BCSC 2032, Vancouver Docket S221884).

Counsel for the Appellant: A.I. Nathanson, K.C.
T.A. Posyniak
E. Madden-Krasnick, Articled Student

Counsel for the Respondent, Richard Mill: K.L.M. Carteri
J.K. Lockhart

Counsel for the Respondent, The Chief Gold Commissioner of British Columbia:	L.D. Lachance M.G. Goodwin
Counsel for the Respondent, Orogenic Gold Corp.:	M.E. Fancourt-Smith J.J. Mayfield
Counsel for the Intervener, Tahltan Central Government:	E. Reimer Ö. Yazar
Counsel for the Intervener, Mining Association of British Columbia:	M.L. Teetaert E.W. Hulshof
Place and Date of Hearing:	Vancouver, British Columbia May 15, 16 and 17, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 4, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Skolrood

Summary:

Second level of appeal of a decision of the Chief Gold Commissioner ("CGC") finding that respondents had mineral rights to some 1.75 million tonnes of waste rock and tailings, deposited at the bottom of Albino Lake by the operators of the Eskay Creek Mine in northwestern BC between 1994 and 2008.

From the outset, environmental regulations required that waste rock and tailings (which are 'chattels personal' of the mine operator) be stored so as to prevent the release of acid into the environment. Albino Lake was chosen as an appropriate place and the government granted the mine operator a surface lease for a 30-year term (ending in December 2024) over the parcel containing the Lake. Some years later, the respondent Mill registered a mineral claim over lands that included the Lake. In 2021, the former operator of the mine (the appellant) decided to drill and test the deposits at the bottom of the Lake. It reported positive findings re the presence of minerals in the waste rock and tailings. Respondents applied to CGC for a determination that their mineral claim included the waste rock and tailings. Section 28 of the Mineral Tenure Act states that a claim holder is entitled to minerals that are "held by the government" and that are situated vertically downward and inside the boundaries of the claim.

CGC ruled that the Respondents had the right to all minerals within the boundary of the appellant's surface lease. CGC reasoned that surface lease had granted a 'single right' to the appellant — the right to dispose of waste. The plain meaning of "dispose" was not consistent with an intention to store chattels indefinitely, and the effect of the Province's grant of the surface lease had been that appellant "relinquished" its ownership of the materials. On appeal to SCBC, the CGC's decision was upheld as consistent with the statutory framework.

On second appeal to CA, appellant asserted chambers judge erred in upholding CGC's finding that the surface lease granted the appellant one right only — to relinquish ownership of the materials to the Crown; that the materials had been "deemed" to have no economic value; and that appellant had "relinquished" ownership of them such that the Province was "holding" them when respondent Mill acquired his mineral claim.

Held: Appeal allowed. The CGC erred in allowing the 'purpose' of the surface lease to override the text of the agreement, which made no other mention of waste materials or any transfer of ownership thereof. Its text constituted an ordinary commercial lease. Contrary to respondents' argument, lease was not a waste disposal contract. As well, ownership of minerals does not change when the minerals are moved. These were clear errors made below, but not "overriding" ones. However, CGC further erred in a palpable and overriding way in finding appellant had "relinquished" or abandoned its ownership of the materials, without regard for the legal principles underpinning the law of abandonment. There was no evidence of any subjective intent to abandon the materials, nor any unequivocal act of abandonment thereof. The deposition of the materials underwater was required by applicable environmental regulations and did not demonstrate intended transfer of

ownership to the Province. Case authorities reviewed. CA remitted the case back to CGC for reconsideration in accordance with CA's reasons.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] For 14 years ending in April 2008, the Eskay Creek Mine, located underground in the rugged interior of northwest British Columbia, produced gold and silver ore and concentrates of remarkable purity, reaching a production rate of 750 tonnes per day from 2002. The Mine was operated first by Prime Resources Group Inc. (which obtained the initial mineral leases and related mining permits from the Province), then by Homestake Canada Inc., then by Barrick Gold Inc., and last by the appellant Skeena Resources Ltd. Like counsel, I will use the term "Skeena" in these reasons to refer to Skeena Resources Ltd. or its predecessors as appropriate in time to denote the operator of the Mine.

[2] In addition to gold and silver minerals, the Mine also produced some 1,750,000 tonnes of mine waste rock and tailings — considerably more than had been expected at the outset of mining operations. Over the life of the Mine, the operator was required to comply with various conditions designed to minimize risks to the environment and public safety posed by such waste materials. Detailed plans for the post-closure phase of the Mine were developed and regularly reviewed and refined by the operator in consultation with government authorities and in accordance with the *Mines Act*, R.S.B.C. 1996, c. 293, the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 ("*MTA*"), the *Environmental Management Act* (now S.B.C. 2003, c. 53) and regulations thereunder.

[3] From the beginning, it was recognized that the waste rock and tailings were likely to generate acid if exposed to the air. The solution eventually arrived at by the operator's consulting engineers and government officials was to deposit (to use a neutral term) the materials in a lake. Two lakes, Albino and Tom MacKay Lake, were nearby. Both were used, but after some time, Albino Lake, located about eight km west of the Mine, was found to be the more appropriate site. In late 1994, Skeena entered into a lease (the "Surface Lease") with the Crown in right of the Province, for

the exclusive use of the Lake and surrounding area. The Lease had a term of 30 years ending in December 2024. Its stated purpose was "for waste rock disposal site purposes." Ultimately, almost 1,500,000 tonnes of waste rock and 258,000 tonnes of (dry) tailings were deposited in Albino Lake.

[4] As the closure of the Mine approached, the Province required that "[a]ll waste rock, tailings, and sludge deposited into Albino Lake shall be permanently covered by a minimum of one metre of water." Regular site inspections, monitoring, sampling and testing programs were put in place, and are still in place, with respect to pH levels, the presence of dissolved lead, zinc, antimony, and copper, and water quality generally in and about the Lake. The evidence before us suggests that both Skeena Resources Ltd. and its predecessors complied with all environmental laws applicable to them, and continue to do so. These obligations are secured by a security deposit of some $13 million.

[5] It is the "deposition" of waste rock and materials into Albino Lake that, 20 years later, forms the subject-matter of the dispute between the appellant Skeena on the one hand and the respondents Mr. Mill and Orogenic Gold Corporation ("Orogenic") on the other. In 2021 Skeena decided to carry out some drilling (through ice) at the "Albino Lake Waste Facility" in order to determine the degree of mineralization of the waste rock. Speaking informally, Skeena explained this proposal to the Ministry of Energy, Mines and Low Carbon Innovation on the basis that when the Mine had been in operation, its "cut-off grades" had been very high, such that "higher grades of minerals than the present resource" might be present. It noted that the Facility was within the permitted mine area for the Eskay Creek Mine and within the area covered by the Surface Lease. Responding informally, the Ministry saw no objection: an official advised that as long as no other regulations applied to the facility, authorization for the drilling work was not required since it would take place on "already disturbed ground (i.e., a dump) and within the [Permitted Mine Area]."

[6] However, the matter proved much more complex than this correspondence suggested. On May 2, 2017, a mineral lease held by a company called Eskay Mining Corp. in respect of District Lot DL 7180, referred to as the "Albino Lake area" had expired, as shown on the Mineral Title Register maintained under the *MTA.* This area includes the land that is the subject of Skeena's Surface Lease. The following day, Mr. Mill became the recorded holder of a claim to that area, also as shown on the Register. There is no evidence as to whether Skeena became aware of this mineral claim prior to its preliminary drilling in Albino Lake. In May 2021, it issued two news releases, as required by securities legislation, publicly reporting the positive results of its drilling.

[7] Having learned of these results, Mr. Mill applied in August 2021 to the Chief Gold Commissioner (the "Commissioner" or "CGC") under s. 13(1) of the *MTA*. He sought an order that *his* mineral claim included the materials deposited by the operator of the Mine at the bottom of the Lake. The Commissioner contacted Skeena and in due course, both parties filed written submissions. These related both to the Commissioner's jurisdiction to determine the issue, and to the merits of their dispute. The Commissioner ruled separately on October 20, 2021 that the dispute fell within the scope of his authority under s. 13(1)(a) of the *MTA.*

[8] On February 7, 2022, the CGC issued his decision on the merits, ruling that the right to (all) minerals within the boundaries of Skeena's Surface Lease was held by Mr. Mill as the recorded holder of his mineral claim and that Skeena had "no right or entitlement to the waste rock and tailings within the boundary of Land Act Lease 634409" (i.e., the Surface Lease.)

[9] Skeena filed a notice of appeal in the Supreme Court from the CGC's order, pursuant to s. 13(7) of the *MTA*. The appeal was heard by a judge in chambers in August 2022. For reasons dated November 22, 2022, she dismissed the appeal as containing no palpable or overriding error: see 2022 BCSC 2032. Skeena now appeals to this court, with leave of a justice, in accordance with s. 13(8) of the *MTA*.

The Statutory Context

[10] Before reviewing the facts in detail, it may be useful to describe in general terms the statutory context in which those facts arose. Both sides emphasized this context in support of their arguments. The relevant provisions of the *MTA*, the *Mines Act*, the *Land Act*, R.S.B.C. 1996, c. 245, the *Environmental Management Act* and the *Health*, *Safety and Reclamation Code for Mines in British Columbia* (adopted by order under s. 34(6) of the *Mines Act*) comprise what Skeena refers to in its factum as the "complex regulatory regime of overlapping statutes dealing with the different stages of the mining cycle." I have attached the relevant provisions as Schedule A to these reasons.

[11] Starting at the most general level, s. 50(1)(a)(ii) of the *Land Act* provides that a disposition of Crown land reserves to the Crown the right to "raise and get out of [the land] any ... minerals, whether precious or base, as defined in section 1 of the *Mineral Tenure Act*" and to "use and enjoy any and every part of the land … for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting in use". Thus as stated at s. 50(1)(b) of the *Land Act,* a grant of Crown land generally conveys no right, title or interest to minerals or placer minerals as defined in the *MTA* that may be found in, on or under the land. This reservation is, of course, subject to any disposition of Crown land that expressly authorizes the disposition on terms different from those referred to in s. 50(1).

[12] The *MTA* governs the granting of rights in respect of minerals by the Crown and associated matters. It defines "mineral" as follows:

> "mineral" means an ore of metal, or a natural substance that can be mined, that is in the place or position in which it was originally formed or deposited or is in talus rock, and includes
>
> (a) rock and other materials from mine tailings, dumps and previously mined deposits of minerals,
>
> (b) dimension stone, and
>
> (c) rock or a natural substance prescribed under section 2 (1),

> but does not include
>
> (d) coal, petroleum, natural gas, marl, earth, soil, peat, sand or gravel,
>
> (e) rock or a natural substance that is used for a construction purpose on land that is not within a mineral title or group of mineral titles from which the rock or natural substance is mined,
>
> (f) rock or a natural substance on private land that is used for a construction purpose, or
>
> (g) rock or a natural substance prescribed under section 2 (2);

Subparagraph (a) was added in 1988, together with various other changes that established a modern electronic-based registry system for mineral claims and leases in British Columbia. The expansion of the definition of "mineral" itself attracted no particular attention or debate in the Legislative Assembly (see British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly*, 34-1 (1 March 1988) at 3192). The Minister of Energy, Mines and Petroleum Resources is reported as explaining that rights to minerals in waste dumps and tailings would be "made available under Bill 66."

[13] Mineral leases, which are issued by the CGC under s 42(4) of the *MTA*, may be issued for an initial term of up to 30 years and are renewable provided the lessee complies with the Act, the Regulations and any conditions of the lease. Under s. 48(2):

> A lease is an interest in land and conveys to the lessee the minerals or placer minerals, as the case may be, within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim or group of claims, but is subject to a valid charge registered against the record of the claim. [Emphasis added.]

Under s. 14, the duly recorded holder of a mineral lease may "use, enter and occupy the surface" of a claim or lease for the exploration and development or production of minerals, subject to requirements imposed by the *Mines Act*. Importantly for our purposes, s. 28(1) of the *MTA* provides:

> Subject to this Act, the recorded holder of a claim is entitled to those minerals or placer minerals, as the case may be, that are held by the government and that are situated vertically downward from and inside the boundaries of the claim. [Emphasis added.]

In addition, s. 16(3) of the *MTA* clarifies that:

> (3) If a disposition is made of surface rights to Crown land, whether surveyed or unsurveyed, and at the time of disposition there is a valid mineral title over the Crown land, the disposition of surface rights does not diminish the rights of the recorded holder except to the extent otherwise determined
>
> (a) by order of the chief gold commissioner under section 13,
>
> (b) by order of the minister under section 17… [Emphasis added.]

[14] I also note s. 13(1), which deals with disputes between recorded holders of mineral rights and others:

> 13 (1) If a dispute arises between
>
> (a) recorded holders on the same mineral lands, or
>
> (b) a recorded holder of a mineral title and a person having a right under another enactment to a mineral substance in the lands to which the mineral title relates,
>
> respecting
>
> (c) whether a substance is a mineral, a mineral substance or a placer mineral, or
>
> (d) the exercise of rights conferred under this Act or any of the former Acts,
>
> the issue must, on application to the chief gold commissioner by a party to the dispute and subject to subsection (2), be decided by the chief gold commissioner, and the chief gold commissioner may make any order the chief gold commissioner considers appropriate.

As mentioned earlier, rights of appeal are provided by ss. 13(7) and (8).

[15] The *Mines Act* deals with the actual operation of mines. It defines "mine" as including:

> (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
>
> (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
>
> (c) <u>all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation</u>,
>
> (d) closed and abandoned mines, and

> (e) a place designated by the chief inspector as a mine; [Emphasis added.]

The phrase “mining activity” is also defined to include the reclamation of a mine.

[16] Under s. 10 of the *Mines Act*, the “owner” of a mine (which term includes a lessee or occupier of a mine) must obtain a permit before starting any work in, on or about the mine. The permitting officer may impose various terms and conditions, including terms for environmental protection and reclamation and public health and safety: see now s. 10(2.01)(d) and (e), which replaced the earlier s. 10(4)(a) and (b) of S.B.C. 1989, c. 56. Inspectors appointed under the statute inspect the mine or a site where the inspector considers mining activity is taking place, and may issue various orders including orders for remedial action, suspension of work, or closure of the mine.

[17] Section 34 of the *Mines Act* contemplates the establishment by the Minister of Energy and Mines of a health, safety and reclamation code committee, to be tasked with the preparation of a code dealing with “all aspects of health, safety and reclamation in the operation of a mine”. I understand that the first Code was produced in 1990. In February 2017, two years of work on the part of the committee resulted in a revised Code in which the Minister acknowledged that the failure of the tailings storage facility at Mount Polley in 2014 had been a “wake-up call,” not just for British Columbia but for governments throughout Canada and elsewhere. The most recent Code in evidence was revised in April 2021. Like its predecessors, it contains complex and detailed rules for the reclamation and closure of mines and for mines that include tailings storage facilities. Schedule A to these reasons contains excerpts from s. 10.4.1 to 10.7 of the Code.

Chronology

[18] Against this background, I turn to a more detailed review of the facts that led to the parties’ dispute in 2021. Neither the Commissioner nor the Supreme Court judge who heard the appeal from his decision was provided with every document referred to in this chronology; but most of the items appear not to be controversial.

November 1993 Prime Resources Group Inc. (“Prime”) applied to the Minister of Energy, Mines and Petroleum Resources to develop the Eskay Creek Mine. The initial application (which was not in evidence) contemplated that waste rock and tailings (referred to as the “Mined Materials”) extracted from the Mine would be placed into Albino Lake into what counsel referred to as the “Albino Waste Facility”, or “AWF”. In January 1994, a supplemental information report prepared by Knight Piésold Klohn Crippen, referred to as the “Knight Klohn Report”, proposed an alternative site for “waste rock deposition” if Prime were unable to use Albino Lake. The report estimated that approximately 380,000 metric tonnes of mine waste rock would be produced in total — a figure that, as we have seen, proved to be much lower than the actual amount. The report quoted the following from the initial application report regarding Albino Lake:

> Waste would be end dumped and dozed [i.e., bulldozed] out into the lake from the north end of the lake toward the central basin, forming a gradually expanding crescent shaped platform from which to place the waste rock under water. Waste, which will be retrieved from a temporary storage site at the mine portal, will be continuously or campaign hauled to Albino Lake and end dumped at the advancing front of the waste storage platform and then dozed under water. At closure, the exposed portion of the waste platform will be dozed 1.0 m below water level.

1991–1994 The Commissioner granted three mineral leases to Prime under the *MTA,* covering the Mine and surrounding areas, but not including Albino Lake. We were not provided with copies of these but under s. 42(4) of the *MTA*, mineral leases may have terms of up to 30 years.

March 29, 1994 The Minister, with the concurrence of the Minister of Environment, issued Mine Development Certificate 94–01 to Prime, authorizing development of the Mine. The third recital of the Certificate stated:

> WHEREAS, the Development, inter alia, will consist of an underground mine, ore loadout facility, temporary waste rock and ore stockpiles and ancillary facilities including food

> preparation, … waste rock storage, treatment plant, and run off storage and collection facilities, an access road from the mine to Highway #37, and a process plant at Houston, British Columbia, which includes a tailings storage facility, reclaim pond, polishing pond, run off collection facilities, effluent treatment plant, and ancillary facilities, including maintenance and administration …

One of the many conditions of the Certificate was that the Mine would be operated in accordance with the original application and the Knight-Klohn Report.

August 1994 — The Inspector of Mines granted a permit for Prime to commence construction of the Albino Lake Haul Road.

December 24, 1994 — Reference date of the Surface Lease granted by the Ministry of Environment in favour of Prime Resources over an area (D.L. 7180) that included Albino Lake "for waste rock disposal site purposes". As lessee, Prime covenanted to pay an annual "fee", "keep the Land in a safe, clean and sanitary condition", "use and occupy the Land in accordance with the provisions of this lease", and on expiration of the term, to "restore the surface of the Land to the satisfaction of the Lessor AND ... to remove any improvements that the Lessor may ... direct or permit to be removed." The Lease was also expressly stated to be subject to all subsisting grants to or rights of any person made under the *MTA* or in the *Land Act*. For its part, the Ministry covenanted for quiet enjoyment. Mineral rights were reserved to the Crown by the usual terminology. As I understand it, the rights and obligations of Prime Resources under the Lease were assigned over ensuing years to its successors as operators of the Mine.

September 6, 1996 — We are told that on this date, a company called Eskay Mining Corp. became the recorded holder of a mineral lease covering, amongst other

areas, Albino Lake. We are also told that Eskay Mining Corp. was not related to any of the operators of the Mine.

January 17,1997 The Ministry of Environment issued a permit to Prime authorizing the discharge of mine water treatment system sludge and fines into Albino Lake, and the discharge of lake water from Albino Lake that came into contact with the waste rock.

December 1998 Homestake Canada Inc. (“Homestake”) purchased all the outstanding shares of Prime Resources, thus increasing its ownership of the Mine to 100%. The assignment of the Surface Lease was duly recorded in the office of the CGC.

February 2000 Homestake applied to use Tom MacKay Lake as an additional location for waste rock and tailings disposal. This application was granted in June 2000 and construction of a pipeline to Tom MacKay Lake was completed in the fall of 2001. Concurrent with this, the “routine” disposal of tailings at Albino Lake was temporarily discontinued.

2003 Homestake merged with Barrick Gold Corporation and the name of the merged company was changed to Barrick Gold Inc. (“Barrick”.)

March 22, 2004 The Chief Inspector of Mines approved amendments to Barrick’s reclamation project. One amendment rescinded, during operation of the Mine, the previous requirement for the “immediate submersion of all waste rock deposited into Albino Lake under one metre of water.” The Inspector advised, however, that this condition would resume upon completion of mining such that “all waste rock, tailings, and sludge deposited into Albino Lake shall be permanently covered by a minimum of one metre of water.”

2007 According to a presentation made by Barrick to provincial officials, concerns arose out of regular tests regarding high pH levels in discharge from the flushing of exposed waste rock, the generation of acid from “subaerially exposed waste rock”, and the potential for alkalinity and Sb (antimony) to be released from submerged wastes at Albino Lake. Since the Mine was approaching closure, various solutions were considered. Finally, a “control structure” (essentially a dam) was constructed on the Lake to permit water levels to be raised and lowered. A drawdown of water in the Lake began in August 2007, permitting Barrick to regrade the waste rock and tailings in the Lake so that the waste materials were submerged beneath 1–2 metres of water after the drawdown was reversed. The control structure was then removed. Similar drawdowns, regrading and flooding of the Lake took place in 2008 and 2009.

April 2008 The Mine ceased commercial operations.

September 30, 2011 The Mine became a “Recognized Closed Mine” for purposes of the *Metal and Diamond Mining Effluent Regulations*, SOR/2002-222.

March 2017 In its 2016 annual reclamation report to the Ministry, Barrick noted, *inter alia,* that:

> The Eskay Creek ore bodies were contained in the west flank of an anticline structure at the contact. Between 1995 and 2001 waste rock and tailings were discharged to Albino Lake. From 2001 through to mine closure in 2008, tailings were deposited below the water surface of Tom Mackay Lake, and waste rock continued to be deposited into Albino Lake. A total of 1,493,235 tonnes of waste rock and of 257,420 tonnes of tailings were deposited within Albino Lake, all of which has been accounted for as potentially acid generating waste (See Figure 2.5.1). Included in the waste rock total is low grade ore, [coarse] rejects and other mine wastes that include sludge from the settling pond system located within the foot print of the Eskay Creek Mine Site.
>
> …

3.5. Water Quality Prediction/Mitigation and Treatment

> Since production ceased in 2008, water quality issues have been treated using the use of a lime addition for elevated dissolved Zinc, and low pH and in the event of elevated pH results a sulfuric drip is utilized.
>
> Eskay Creek is currently not utilizing any water treatment as the water quality results from all permitted discharge locations continue to show limited variability and metal concentrations are consistently below compliance criteria. Trending of the historic water quality were similar to or lower than concentrations observed in previous post closure years and are reflective of the mine closure and cessation of production as shown in the *Eskay Creek 2016 Water Quality Summary* submitted with this report….
>
> In the event that the water quality appears to be diminished, or annual trending indicates the potential for ARD conditions, Barrick has retained the ability to treat the effluent to ensure an acceptable discharge and can augment the sample collection frequency.

3.6. Water Management

> Figure 3.6.1 - 1993 Pre-mining drainage and Figure 3.6.2 – 1993 Pre-mining drainage/Preliminary Sample Locations show pre-mining drainages and the water sheds surrounding the Eskay Creek Mine. There have been no changes to these drainages and water sheds through production, closure and reclamation. (See Figure 3.6.3 – Post Production Drainages)

May 3, 2017 The respondent Mr. Mill was granted a mineral claim to an area that included *inter alia* Albino Lake, the previous lease granted to Eskay Mining Corp. having expired without renewal on May 2.

October 2020 Skeena Resources Ltd. purchased the Mine from Barrick.

2020–March 2021 Skeena carried out drilling in Albino Lake (from the ice surface) and on May 25, 2021, issued a news release that contained *inter alia* the following:

> Via the initial drill-based investigation in Q1 2021, the Company has now empirically demonstrated that significant Au-Ag mineralization was in fact deposited at Albino. The area of the AWF [Albino Lake Waste facility] measures 128,900 m^2, of which the Company has only tested a small portion measuring 5,200 m^2. As such, only 4% of the entire AWF has been investigated to date. This first phase of drilling was performed on staggered 50 m centers from the frozen ice surface. Although more

> drill holes were planned, ice conditions deteriorated, and the program was terminated early for safety reasons.
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> ...
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> About Skeena
>
> Skeena Resources Limited is a Canadian mining exploration company focused on revitalizing the past-producing Eskay Creek gold-silver mine located in Tahltan Territory in the Golden Triangle of northwest British Columbia, Canada. The Company released a robust Preliminary Economic Assessment in late 2019 and is currently focused on infill and exploration drilling to advance Eskay Creek to full Feasibility by Q1 2022.

The promising news was confirmed in a second release dated May 31, 2021 which indicated that "analytical results for the eight drill holes indicate excellent downhole as well as hole to hole Au-Ag grade continuity."

May 21, 2021 SRK Consulting (Canada) Inc., retained by Skeena, issued a technical report to provide an estimate of capital and mineral resources in the Eskay Creek area, including both pit and underground domains. The data indicated mineralization in the overall area as having "reasonable prospects for economic extraction." The executive summary to the report stated:

> Despite the substantial precious metal grades and potential base metal credits of the 21A Zone it was historically uneconomic to mine. High smelter penalties and prevailing low commodity prices were factors that halted mining ambitions. In addition, antimony was treated as a penalty element which contributed to the unfavourable economics of the 21A Zone at the time.
>
> In the Pit constrained resource, on a tonnage weighted basis, approximately 12% percent of the contained metal at a 0. 7 g/t AuEQ cut-off grade is classified as Inferred. It is reasonable to expect that the Inferred Mineral Resource could be upgraded to an Indicated Mineral Resource with continued drilling.

August 27, 2021 Mr. Mill applied to the Commissioner under s. 13(1)(b) of the *MTA* for a determination of entitlement to the minerals in the waste rock and tailings deposited in Albino Lake.

The Gold Commissioner's Decision

[19] The Commissioner issued his reasons on February 7, 2022, having decided in separate reasons that he had jurisdiction under s. 13(1)(a) of the *MTA* to determine the matter. He interpreted the reference in s. 13(1)(a) to disputes between "recorded holders on the same lands" to include disputes concerning "mineral rights on the same mineral land" even where the mineral titles do not relate to that land. The ruling has not been challenged.

[20] After reviewing and quoting from the relevant legislation, and briefly summarizing the submissions of Skeena and Mr. Mill, he stated his conclusion that "the waste rock and tailings located in Albino Lake are minerals to which Mr. Mill has exclusive rights as the recorded holder of mineral claim 1051761 pursuant to the *Mineral Tenure Act*."

[21] The Commissioner began his main analysis, which was six pages long, with the observation that waste rock from the Mine had been "dumped" in Albino Lake because it was "deemed to have no economic value to be processed to recover any valuable minerals contained in it. It was deemed to be a waste by-product from the Eskay Creek Mine and had to be disposed of as a requirement to operate the mine." He noted there was no evidence that demonstrated Skeena's predecessors had ever intended to *store* the waste rock in order to await a future opportunity to process it when it might be more valuable. Both Albino Lake and Tom MacKay Lake had been chosen as "ideal sites" to guard against acid rock drainage or the leaching of toxic compounds that could adversely affect the environment in the long term. The crucial paragraphs of the Commissioner's reasoning then followed:

> The *Land Act* lease 634409 [the Surface Lease] over Albino Lake grants only one right, which is to dispose of waste. It does not grant a right to store private property indefinitely or otherwise. Lease 634409 demises to the Lessee the land, save and except those portions of the land that consist of trails, roads, highways, for the term of the lease, for waste rock disposal site purposes. Lease number 740715 over Tom Mackay Lake, first issued in 2004, grants a lease of land for waste rock and tailings disposal site purposes. In any event both leases use the term "disposal".
>
> The Oxford English Dictionary definition of "disposal" includes: "the action of disposing of or getting rid of, the action of bestowing, giving or making over,

> bestowal, assignment, sale, arrangement, disposition, or (noun) a waste disposal unit." The plain meaning of "disposal" is not consistent with the indefinite right to store proposition that Skeena asserts.
>
> The Province, by granting the right to dispose of waste rock and tailings in the *Land Act* lease area, Skeena, and its predecessors relinquished ownership to the waste rock and tailings that have been disposed in Albino Lake. If Skeena or is predecessors had wished to store minerals over which they assert ownership, they could have applied to use Crown land for such a purpose. They did not do this. [Emphasis added.]

I note that the underlined sentence in the last paragraph quoted above seems to lack a predicate for the subject "The Province". All counsel seemed to agree that the sentence was intended to mean that 'The grant by the Province of the right to dispose of waste rock and tailings in the area covered by the Surface Lease effected or resulted in Skeena's relinquishment of its ownership of the waste rock and tailings that have been disposed of in Albino Lake.' Or, as Orogenic put it more succinctly in its factum, "The effect of the Surface Lease was that Skeena's Predecessors relinquished ownership in the Waste Rock to the government upon disposal in Albino Lake".

[22] The Commissioner went on to note that Skeena's permit M-197, issued under the *Mines Act*, had authorized it to haul and dispose of waste rock and tailings into the Lake, subject to terms and conditions aimed at ensuring that the material is covered with sufficient water to prevent the release of acid into the atmosphere. Although the permit allowed Skeena to undertake the drilling on the Lake in 2021, the *Mines Act* permit did not, in the CGC's analysis, "*grant*" Skeena any *right of ownership* to the waste rock and tailings. And, although Skeena was the holder of the Surface Lease, that instrument did not grant it the right to occupy the surface in order to explore for and develop minerals. In the CGC's opinion, the latter right was held by Mr. Mill as the recorded holder of the mineral claim in respect of the Albino Lake area. Thus the rights to minerals within the boundaries of Skeena's Surface Lease were held by Mr. Mill under claim number 1051761, and Skeena had "no right or entitlement to the waste rock and tailings within the boundary of *Land Act* lease 634409."

Appeal to Supreme Court

[23] By notice of appeal filed March 7, 2022 in the Supreme Court of British Columbia, Skeena appealed the CGC's decision, asserting the following grounds:

> 1. The Commissioner failed to properly interpret provisions of the *MTA*, including, but not limited to, sections 1, 28, and 48;
> 2. The Commissioner failed to properly interpret provisions of the *Land Act*, including, but not limited to, sections 38 and 50;
> 3. The Commissioner failed to consider and properly interpret the other relevant and applicable statutes and provisions, including, but not limited to, *Escheat Act*, R.S.B.C. 1996, c. 120;
> 4. The Commissioner made factual findings of fact in the absence of any evidence;
> 5. The Commissioner failed to consider the evidence before him;
> 6. The Commissioner failed to properly consider and apply the common law principle of abandonment;
> 7. The Commissioner's reasons for decision are insufficient and procedurally unfair;
> 8. The Commissioner made a finding on an issue not advanced by Mr. Mill, and without reasonable notice to Skeena, thereby denying Skeena an opportunity to respond to the same; and
> 9. Such further and other grounds as the Appellant shall advise and may be proven at the hearing of the Appeal.

The notice was served not only on Mr. Mill and Mr. Messmer (the Commissioner), but also on Orogenic, which was described as an "interested party" in the style of cause by the chambers judge. She noted that Orogenic holds a beneficial interest in Mr. Mill's mineral title to the Albino Lake Land. The two respondents were (very ably) represented separately in this court and advanced slightly different arguments in favour of the dismissal of Skeena's appeal.

Chambers Judge's Reasons

[24] The judge began her reasons by providing a brief overview of the facts, the leases and permits held by Skeena, the mineral claim held by Mr. Mill and the relevant sections of the *MTA* and *Land Act*. She then quoted the "substance" of the Commissioner's decision. In addition to Skeena's grounds of appeal, she noted that questions also arose concerning the applicable standard of review. As well, Skeena

asserted that the Commissioner had "overstepped" his role in the appeal, while the respondents objected that the Tahltan Central Government ("TCG"), an intervenor, had overstepped its role as a public interest intervenor.

[25] The chambers judge correctly stated the standards of review applicable to the statutory appeal before her, which had been confirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, and applied recently in *Cassiar Jade Contracting Inc. v. Messmer* 2021 BCSC 1963 at para. 43. These indicate that the standards enunciated in *Housen v. Nikolaisen* 2002 SCC 33, apply. These are correctness with respect to (extricable) questions of law, and "palpable and overriding error" for questions of fact or mixed law and fact. It need hardly be said that the latter is a highly deferential standard.

[26] In the chambers judge's analysis, there was really only one substantive issue in the appeal — whether Skeena had "lost its rights" to what she called the "Material" by "putting it on land covered by the Mill Claim." She saw this issue, correctly in my view, as one of mixed fact and law because answering it involved the application of legal principles to a particular set of facts. Although statutory interpretation was also involved, the question of who owned or owns the Material turned on inferences to be drawn from the facts. Accordingly, the standard of review was one of 'palpable and overriding' error. (At para. 22.)

[27] Skeena advanced three arguments based on procedural fairness in addition to its substantive arguments. These concerned the Commissioner's findings on Skeena's authority to conduct exploratory drilling in 2021 and on the "chain of title" to mineral rights over the Albino Lake area. Skeena contended that it had been denied notice of these issues and an opportunity to be heard on them. Skeena's third fairness argument challenged the adequacy of the CGC's reasons — an argument the chambers judge found was "misplaced", given that the adequacy of reasons is not seen as a matter of procedural fairness: see *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)* 2021 BCCA 67 at para. 68. The judge ruled that the standard of review applicable to the adequacy of reasons was one of

palpable and overriding error. Skeena did not advance any argument based on inadequate reasons in this court.

[28] As to whether the Commissioner had overstepped his "limited role" by defending his decision, the judge found he had done so by making written submissions on the meaning of "disposal" beyond what was contained in the decision itself. She therefore disregarded those submissions to that extent. (At para. 30.) The judge also found that TCG had gone beyond its role as a public interest intervenor. Accordingly, she also disregarded the offending portion of its submission. (At para. 35.)

[29] The chambers judge then turned to the substantive question of whether the decision was "sustainable on its merits." (At paras. 36-58.) The starting point for her analysis was that Skeena had had a "chattel interest" in the waste materials when they were "located" on the land covered by Skeena's leases. The judge continued:

> ... It was common ground before the Commissioner and in this appeal that in order for Mr. Mill to acquire mineral rights to the Material, Skeena would have had to have first lost its chattel interest in the Material to the government. In other words, the mineral rights would have had to have passed from Skeena to the government. If they were held by the government, Mr. Mill would have acquired them as part of the Mill Claim. [At para. 36; emphasis added.]

[30] As I understand it, counsel in this court remain in agreement that this is correct — i.e., that Skeena owned the waste material as "chattels personal", or personal property, when minerals were being extracted from the Mine; and that Mr. Mill could have acquired the mineral rights to those materials *only from the government* as minerals "held by the government" in accordance with s. 28(1) of the *MTA*. The issue, then, was whether ownership of the chattels personal passed to the government at some point — the latest being, in the respondents' analyses, at the time the materials became submerged in water — such that the government was the 'holder' thereof and such that Mr. Mill became entitled to them as minerals "situated vertically downward from and inside the boundaries of [his] claim." (*MTA, s.* 28.)

[31] The chambers judge summarized the Commissioner's reasons for reaching the conclusion he had, as follows:

> a) When the Material was put into Albino Lake, Skeena considered it to be waste material, not material that it intended to store for some potential future use;
>
> b) The Surface Lease did not grant Skeena any right over the Material other than the right to dispose of it as waste in Albino Lake;
>
> c) In its ordinary use, "disposing" of something means getting rid of it, not storing it indefinitely for future use;
>
> d) The effect of the Surface Lease was that Skeena relinquished ownership in the Material to the government when it disposed of it in Albino Lake; and
>
> e) The Mine Permit does not grant Skeena any ownership rights in the Material.
>
> f) Skeena does not take issue with the last proposition. [At para. 37.]

[32] Skeena submitted that the CGC's decision interpreted the definition of "mineral" and s. 28 of the *MTA* to mean that the disposal of mine waste would result in the *escheatment* of title to waste rock to the government — a result that in its submission would conflict with s. 48(2) of the *MTA* and Skeena's Surface Lease. (At para. 38.) The judge did not comment on this argument, and escheat was not pursued by Skeena in this court. Instead, the judge went on to observe that the crux of Skeena's argument was that the reservation of minerals by the Crown in the Surface Lease could have reserved only those minerals that were *already* located in Albino Lake when the Surface Lease was granted — i.e., in December 1994. Since the deposits of waste materials did not begin until after Skeena obtained the Surface Lease, it contended that the mineral rights to the materials were not reserved to the Crown, and that Skeena continued to 'hold' them.

[33] Mr. Mill disagreed: he submitted that that Surface Lease did not reserve to the Crown only those rights to minerals already in the Lake, but also reserved the right to minerals that "subsequently arrived there." This meant, the judge said, that "when Skeena put the Material into the Albino Lake land, the mineral rights to it reverted to government and then became part of the Mill Claim." (At para. 40; my emphasis.)

[34] As I understand her reasons, the chambers judge read the Commissioner's decision as agreeing with Mr. Mill's position on the basis that the effect of Skeena's moving the waste material onto the Albino Lake land was to "relinquish its chattel interest in the Material." (My emphasis.) On this point, she cited the CGC's 'difficult' sentence quoted at para. 21 above, where it was said that that Skeena had "relinquished ownership" of the materials "disposed" in Albino Lake, although the CGC seemed to say in that sentence that this had occurred when the Surface Lease was granted. The judge continued:

> That conclusion is consistent with the statutory framework. The definition of "mineral" includes previously mined material; ss. 28 and 48(2) both refer to where material is *presently* situated (within the boundaries of and below a mineral claim or lease). The statutory language signifies that mineral ownership rights do not travel with "minerals" if they are moved from one location to another. Skeena lost its mineral rights to the Material because they reverted to government when Skeena removed the Material from the land subject to its Source Leases and deposited them on the Albino Lake Land. Mr. Mill acquired the mineral rights to the Material from government when he acquired the Mill Claim.
>
> The Decision does not explicitly engage in statutory interpretation as I have done in the preceding paragraph. However, an administrative decision-maker is not required to write reasons in the same way that a court would. The Decision contains the elements of a rational and logical analysis: it cites the relevant statutory provisions, comments on them (albeit very briefly), and gives reasons in support of its conclusion.
>
> The Commissioner reviews the Surface Lease, finding that it authorizes Skeena only to "dispose" of the Material in Albino Lake, not "to store private property". This is another way of saying that the Surface Lease (and s. 50 of the *Land Act*) did not preserve or convey mineral ownership rights. The Commissioner references the Permits as imposing positive and continuing obligations on Skeena to dispose of the Material in Albino Lake and monitor it for environmental hazards. The distinction between ownership rights to minerals and obligations tied to mining activity are implicit in his analysis. The fact that this aspect of the Decision could have been more explicit does not make it illogical or irrational. Still less does it demonstrate palpable and overriding error. [At paras. 47–9; emphasis added.]

[35] The Court commented at para. 50 that that the CGC's "focus" on Skeena's intentions in "disposing" of the waste materials was understandable in light of the arguments made to him. Skeena had submitted that it obtained the Surface Lease in order to "maintain control" over the deposited materials and to comply with its environmental obligations in respect thereof. In her analysis, the Commissioner's

decision did not "evince such an intention". The judge regarded this argument as inconsistent with the fact that, in her words, the "legislative regime ties ongoing environmental obligations to previous mining activity, regardless of present ownership rights." (At para. 51.) This may have missed the point that Skeena and any other predecessor bound by the environmental regulations would need access to the Lake and its environs to perform those obligations.

[36] The judge found that the Commissioner's focus on Skeena's intentions and on the ordinary meaning of "disposal" was also understandable, given that Mr. Mill had referred in his initial argument to escheatment and abandonment. Both of these, she stated, "require an element of intent to end ownership." (With respect, this is not true of escheat, which is triggered on upon a failure of title, most commonly where a person dies leaving property without heirs or where a company is wound up without disposing of property: see *Escheat Act*, R.S.B.C. 1996, c. 120, ss. 3(1) and 4(1) and *Mercer v. Attorney General for Ontario* (1881) 5 S.C.R. 538.) In any event, Mr. Mill had later clarified that he was not relying on escheat or the common law of abandonment. I will return to the law relating to abandonment later in these reasons.

[37] The chambers judge did not accede to an argument made by Skeena based on the "strong presumption" that the Legislature does not intend to deprive persons of their rights (here, property rights) unless expressly stated (citing *Li v. Rao* 2019 BCCA 265). The judge found that the presumption did not apply in this case; in her words:

> ... As Skeena's rights to the Material are statutory, interpreting the statute does not take away any right that had previously been accrued to Skeena. It clarifies that Skeena never had the right it now asserts. [At para. 53; emphasis added.]

She also rejected Skeena's challenge to the adequacy of the Commissioner's reasons and concluded:

> I have found that the Commissioner's reasons for finding that Skeena lost its ownership interest in the Material when it put it in Albino Lake do not constitute palpable and overriding error. His reasons are adequate on the applicable standard of review [At para. 55.]

[38] Finally, the chambers judge considered Skeena's argument that it had been denied notice of, and an opportunity to be heard, on two matters, namely:

> a) the Commissioner's conclusion that the Surface Lease did not authorize Skeena to conduct the exploratory drilling of the Material in the Albino Lake Land [in 2021], and
>
> b) the Commissioner's characterization of Mr. Mill's position as stating that throughout the period of the Surface Lease, a mineral title has always been registered over the lands covered by the Surface Lease. [At para. 60.]

She found that the second argument was without foundation. Mr. Mill's submissions to the Commissioner had set out the history of prior recorded holders of mineral title to Albino Lake dating back to 1989 and the sentence complained of did not represent a *finding* on his part. As for the conclusion that the Surface Lease had not authorized Skeena's exploratory drilling in 2021, the judge reasoned:

> It was Skeena's exploratory drilling that led to Mr. Mill's request to the Commissioner to decide who owns the Material. The issue of its authority to do so was raised before the Commissioner when he was considering the issue of jurisdiction. It was not addressed by the parties at the hearing on the ownership dispute.
>
> Despite that, the Commissioner found that Skeena's *Mines Act* permit M-197 gave it the authority to conduct exploratory drilling, but that neither it nor the Surface Lease gave it any ownership interest in the Material:
>
> > A condition of the *Mines Act* permit M-197 allows Skeena to make a "Notice of Departure". Skeena's notice of departure has allowed them to undertake exploration drilling on Albino Lake to assess the mineralized quality and content of the waste rock and tailings. The *Mines Act* permit however does not grant Skeena any right of ownership to the waste rock and tailings. Neither Skeena nor Mr. Mill have made assertions to the contrary.
> >
> > *Land Act* Lease 634409 does not authorize occupation of Albino Lake for the purposes of exploratory drilling to assess the quality and content of the waste rock and tailings. The only right to occupy the surface of Lease 634409 for the purposes of exploring for and developing minerals is held by Mr. Mill, the recorded holder of the overlapping mineral claim 1051761.
>
> Read in the context of the Decision as a whole, this finding is implicit in the Commissioner's earlier conclusion that the Surface Lease "grants only one right" to Skeena, which is to dispose of the Material in Albino Lake. In my view, the passage is more of a consequential observation than a finding. Importantly, a finding on the authority to conduct exploratory drilling was irrelevant to the ownership issue and could not affect the outcome of the case before the Commissioner. [At paras. 64–6; emphasis added.]

[39] Accordingly, even if she were wrong and the CGC had breached the duty of procedural fairness by deciding an issue not before him, that error would not warrant setting the decision aside and remitting it back to him. No useful purpose would be served by doing so. (Citing *Chu v. British Columbia (Police Complaint Commissioner)* 2021 BCCA 174 at paras. 114–8, in turn citing *Vavilov* at para. 142.) In the result, the chambers judge ruled that the Commissioner's decision contained no palpable and overriding error. The appeal was dismissed.

On Appeal

Standard of Review

[40] As stated by Skeena in its factum, it is common ground that appellate (as opposed to administrative law) standards of review apply to this second statutory appeal from the Commissioner's decision. Thus as the majority reasoned in *Vavilov*:

> It should … be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute. [At para.37.]

[41] As to how these standards are to be applied by a second appeal court, the most helpful reference I have found is that of the Manitoba Court of Appeal in *Jhanji v. The Law Society of Manitoba* 2020 MBCA 48. There the Court stated:

> Except for grounds related to questions of procedural fairness, the appeal to this Court is a second-level appeal from a statutory appeal of a decision from an administrative tribunal. ...

> In the administrative law context, a second-level appeal raises a two-part question of law:
>
> 1. whether the reviewing judge correctly identified the applicable standard of review, and, if so;
> 2. whether the reviewing judge applied that standard properly.
>
> (See *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 43; and *Pollock et al. v. Human Rights Commission (Manitoba) et al*,. 2019 MBCA 110 at paras. 40-42).
>
> To answer whether a reviewing judge applied the appropriate standard of review correctly, the appellate court must step "into the shoes" of the reviewing judge and consider the decision of the administrative tribunal (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 at para. 14, leave to appeal to SCC refused, 31370 (20 July 2006)). [At paras. 36–8; emphasis added.]

I also note on this point para. 46 of *The College of Physicians and Surgeons of Saskatchewan v. Leontowicz* 2023 SKCA 110:

> In assessing this argument, I begin by reminding myself of the role this Court plays in sitting as a secondary appellate court. In that regard, an appellate court is to determine whether the judge chose the correct standard of review and applied it properly. This is a question of law, reviewable on the correctness standard: *Dr. Q v. College of Physicians and Surgeons of British Columbia* .... In practice, once the appellate court has identified the correct standard of review, it "steps into the shoes" of the reviewing court and reviews the decision of the administrative tribunal in accordance with that standard (*Teamsters Canada Rail Conference v. Canadian National Railway Company*, 2021 SKCA 62 at para. 41 ...). [At para. 46; emphasis added.]

See also *Mason v. Canada (Citizenship and Immigration)* 2023 SCC 21 at para. 36.

Preliminary Points

[42] Our "focus", then, should be on the Commissioner's decision rather than that of the chambers judge below. That said, I am compelled to say that some of the chambers judge's statements of law are problematic. First, I note her acceptance of the principle that when minerals are extracted from the ground pursuant to a mineral lease, the owner of mineral title (here, predecessors of Skeena) acquires a "chattel interest" in them. (At para. 10.) On this point, counsel referred us to Gary Barton,

Canadian Law of Mining (2nd ed., 2019), where the author states the converse of the principle, namely that minerals that have *not* been extracted are *not* yet chattels:

> Because land includes minerals, it is not legally possible to give a bill of sale of ore that remains in the ground unextracted. Until severed from the land, the ore is not a chattel, but remains an indivisible part of the land. [At 42–3.]

Similarly, in *Anyox Metals Ltd. v. Morod* [1950] 1 W.W.R. 769 (B.C.C.A.), the majority stated that "Until severed from the land the ore is not a chattel, but remains as much an indivisible part of the land as standing timber …." (At 774.)

[43] The other side of the coin also follows — once it is severed from the land, ore or related material becomes a chattel personal. Author Rodney A. Stone, in ch.12 of *Canadian Mining Law,* states the proposition directly: "Ores and minerals, once extracted from the land, become personal property" (at s. 212.04); as does Robert Chambers in *The Law of Property*, who writes that "Rocks, minerals and soil become goods when they are removed from the land." (At 6.) This principle is reflected in the definitions of "goods" in both the *Sale of Goods Act*, R.S.B.C. 1996, c. 410, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359.

[44] While recognizing this principle, however, the judge stated at para. 53 of her reasons that:

> Skeena argues, citing *Li v. Rao*, 2019 BCCA 265, that interpreting the statutory regime as the Commissioner did violates the strong presumption that the legislature does not intend to deprive citizens of existing rights. The presumption does not apply here. As Skeena's rights to the Material are statutory, interpreting the statute <u>does not take away any right that had previously been accrued to Skeena. It clarifies that Skeena never had the right it now asserts</u>. [Emphasis added.]

The suggestion that Skeena "never had" any right in respect of the waste material is simply incorrect. In addition, the judge's apparent endorsement of the Commissioner's finding (at p. 6) that Skeena's permit to operate the Mine did not "grant Skeena any right of ownership in the waste rock" ignores the fact that the operator of the Mine had acquired ownership of the waste rock as chattels personal upon removing the waste rock and tailings (which, as seen above, come within the definition of "mineral" in the *MTA*) from the Mine. Skeena did not, as indicated by the

chambers judge at para. 65, need to look to its *Mines Act* permit, nor to a "grant" in the Surface Lease, for this purpose.

[45] Respectfully, the judge also erred, or misspoke, in stating at para. 47 that "mineral ownership rights do not travel with 'minerals' if they are moved from one location to another." No one in this case has contended that placing minerals in a truck, for example, to transport it to a smelter or other facility results in a change in ownership. As Skeena observes in its factum, it is inherent in the mining process that mineral products must be moved to another location after they are extracted. In the case of the Eskay Creek Mine, minerals were regularly transported to smelters in Trail and Quebec, among other locations. They remained the property of the Mine operator until they were sold.

[46] Again, however, our focus must be on the Commissioner's decision rather than that of the lower court. Since the chambers judge correctly stated the standard of review at para. 18 of her reasons (although Skeena asserts that certain references, at paras. 47 and 48, might suggest otherwise), I turn to the question of whether the standards of appellate review as described in *Housen* were properly applied.

Three Grounds of Appeal

[47] In its factum, Skeena asserted that the chambers judge erred in law by applying an incorrect standard of review as follows:

> i. in concluding there was no error in the Commissioner's conclusion that the Surface Lease granted only one right to Skeena: the right to relinquish ownership of the Mined Minerals to the Crown;
>
> ii. in concluding there was no error in the Commissioner's implicit interpretation of the *MTA* and in the judge's conclusion that ownership rights under the *MTA* do not travel with extracted minerals if they are moved; and
>
> iii. in concluding the Commissioner made no error in finding that Skeena "relinquished" the Mined Minerals the moment they were placed into Albino Lake, which is inconsistent with the test for abandonment of property.

[48] I have already indicated my opinion that the judge misspoke when she stated that ownership rights under the *MTA* do not "travel with" extracted minerals when they are moved. Mr. Mill agrees in his factum that "Clearly, chattel property rights to mined minerals travel with those minerals and there are means for parties to protect and preserve those rights." He contends, however, that "mineral rights as provided for by the *MTA* do not travel — i.e., that they are "tied to the specific claim area, and cover all of the minerals held by the government in that area." Further, he says that nothing in this interpretation causes the *MTA* nor the *Land Act* to 'reach up and grab' mined minerals extracted by miners." This reasoning might possibly avail if s. 28 of the *MTA* (quoted above at para. 13) did not contain the phrase "held by the government". But since it does, those words must be given effect, and in my respectful view, they can only mean that the government could not grant mineral rights over "minerals" it did not own.

[49] With respect to the first asserted error above, I also agree that the Commissioner erred in stating that that the Surface Lease granted "only one right", being the right to dispose of waste. The Lease conferred many "rights" on Skeena, including rights to quiet enjoyment and exclusive possession and the right to build improvements on the property, subject to removing them at the end of the term as directed by the Lessor. In short, it created a tenancy relationship on ordinary commercial terms. As I will explain below, it is also reasonable to infer that the lessee would be entitled to store waste rock and tailings on the Land during the term, contrary to the CGC's suggestion.

The Question on Appeal

[50] The foregoing are clear errors, but in my view not "overriding" ones in the sense that they would necessarily change the result in this case. The real question for us is encapsulated in the third ground of appeal — whether the judge was correct in finding that the Commissioner did not err in a palpable and overriding way in ruling that:

> The Province, by granting the right to dispose of waste rock and tailings in the *Land Act* lease area, Skeena, and its predecessors relinquished ownership to

> the waste rock and tailings that have been disposed in Albino Lake. If Skeena or [its] predecessors had wished to store minerals over which they assert ownership, they could have applied to use Crown land for such a purpose. They did not do this. [At page 6; emphasis added.]

[51] The Commissioner treated this issue primarily as one of interpreting the word "disposal" in the statement of purpose in the Surface Lease — "for waste rock disposal site purposes." As we have seen, he noted that the *Oxford English Dictionary* defines "disposal" to include "the action of disposing of or getting rid of, the action of bestowing, giving or making over, bestowal, assignment, sale, arrangement, disposition, or (noun) a waste disposal unit." From this he found that the plain meaning of "disposal" was not consistent with an indefinite right to store waste rock as asserted by Skeena. (It appears he considered over 30 years to be "indefinite".)

[52] In Skeena's submission, the CGC here made two extricable errors of law. First, he failed to read the Surface Lease as a whole and in its context, instead fixing unduly on the dictionary definition of "disposal". This is said to have led him to reduce Skeena's leasehold rights to only a negative "right to lose its property". Second, Skeena submits that he failed to consider whether his interpretation of the Surface Lease was consistent with "commercial common sense". On both points, Skeena cites *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53, where Mr. Justice Rothstein stated for the Court:

> Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly

> right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115] [At paras. 47–8; emphasis added.]

[53] Counsel also referred to *Sutter Hill Management Corporation v. Mpire Capital Corporation* 2022 BCCA 13, where this court observed that while it is certainly legitimate when interpreting a contract to look to other cases for assistance (and, I would add, to look to dictionary meanings), "the question must always be asked, is that interpretation consistent with what the parties to this agreement intended in the particular circumstances of this case? Context is key." (See also *Ledcor Construction Ltd v. Northbridge Indemnity Insurance Co.* 2016 SCC 37 at para. 38.)

[54] As with many legal rules, this principle should not be taken too far, such that context is allowed to overwhelm the meaning of the words of a contract. As stated by this court in *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* [1996] 25 B.C.L.R. (3rd) 285:

> In my respectful opinion, [the trial judge below] properly kept the contextual facts in the background and the text of the agreement in the foreground as he examined the picture. The words of the contract must not be overwhelmed by a contextual analysis, otherwise there is little point in writing things down. No certainty could be achieved in choosing words to express a bargain. Contract disputes would have to be resolved by lengthy inquiries into what was fair in light of what happened before, during and after the making of a contract. [At para. 19; emphasis added.]

This principle was also applied in *Water Street Pictures Ltd. v. Forefront Releasing Inc.* 2006 BCCA 459 at para. 24.

[55] The Court in *Water Street* also reproduced at para. 23 the following passage from *Geoffrey L. Moor Realty Inc. v. Manitoba Motor League* 2003 MBCA 71 concerning contractual interpretation generally:

> In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered. [*Manitoba Motor League* at para. 26.]

[56] If the Commissioner had followed the rules of contractual interpretation, Skeena says, he would have appreciated that the Surface Lease was not a contract to dispose of waste to a third party, but was a lease to allow Skeena to use the Albino Lake lands as a "waste rock disposal site." Skeena says further that if the Commissioner had considered the Lease as a whole in order to determine, *objectively*, the "intent of the parties and the scope of their understanding" (*Sattva* at para. 48) in the context of all the surrounding circumstances, he would have realized that "waste rock disposal" referred to the process of transferring the waste rock from the place where it had been extracted, to the site of the Albino Lake Facility, where it was to be deposited and monitored as the Crown and Skeena's permits required.

[57] Consistent with this, Skeena emphasizes that the Knight-Klohn Report, while using the word "disposal", also used the phrases "transported and deposited", and "waste rock deposition". At para. 1.1, it stated that "Disposal of the waste rock in an environmentally secure manner will be achieved by storing it permanently under water to prevent oxidation." (My emphasis.) Skeena also notes that the dictionary definitions of "dispose" and "disposal site purposes" are broader than the Commissioner suggested. The *Oxford Canadian Dictionary* (2nd ed., 2004), for example, defines "dispose" to include "the arrangement, disposition, or placing of

something; control or management (of a person, business, etc.)". Thus, Skeena submits, "disposal" does not necessarily refer to "getting rid of" something.

[58] In Skeena's analysis, the relevant contextual factors also included the Crown's regulation of the Mine and the Albino Lake Facility. Skeena's enduring environmental obligations contemplated that it would have to enter the Facility to "manage" the waste materials once placed there. During the term of the Surface Lease, Skeena obviously had the ability to deal with the waste materials as required, but, Skeena asks, if the waste materials were no longer owned by it, how could the government continue to regulate them? Here, Skeena seems to suggest that the Province and Skeena expected that the waste materials had to remain owned by Skeena so that it could continue to perform its obligations of monitoring, testing and reporting on water quality. This context, it is said, is inconsistent with the "relinquishment" that the Commissioner found had occurred upon the Crown's grant of the Surface Lease.

[59] The respondents point out, of course, that in accordance with the "polluter pay" principle, the *Environmental Management Act* imposes enduring obligations on both current and previous operators of mines: see especially Part 4: Division 3 – Liability for Remediation at paras. 45, 47. Further, Orogenic submits that although Skeena needed to "manage, maintain, move and manipulate" the waste rock when it transported it to Albino Lake, this has not been the case since at least 2010. From that time, the waste rock has sat "permanently" one meter under the surface of the Lake in accordance with strict environmental requirements. Nevertheless, the evidence is that Skeena Resources and/or its predecessors remain subject to regular monitoring and testing obligations. It is unclear whether Skeena will be able to perform these after the Surface Lease expires, without some licence or permit from the Province.

[60] Orogenic contends that in entering into the Surface Lease, Skeena "contracted for the right to access a disposal site and to dispose of [its] waste, in exchange for a fee paid to the Crown." Indeed, Orogenic goes further and

characterizes the Surface Lease simply as a "*waste disposal contract*" under which the Lessee paid a "fee" in the context of a "regulated activity that required [Skeena] to not only dispose of the Waste Rock but to access Albino Lake to ensure disposal occurred safely. [Skeena] contracted for the right to access the disposal site and to dispose of [its] waste, in exchange for a fee paid to the Crown." Orogenic says that it is not necessary for our purposes to determine precisely when "disposal" occurred "as contemplated by the Surface Lease", but that it occurred "years before Skeena Resources acquired the Mine" (2017.)

[61] Aside from its stated purpose, however, the Surface Lease itself makes *no mention of the deposit of waste or other materials on land or under the Lake or ownership thereof.* As already mentioned, the Lease appears to be an unremarkable commercial lease. The annual fee payable under the Lease did not vary depending on the amount deposited; nor was Skeena entitled to terminate the Lease (except to negotiate a longer term) once all the material had been placed underwater. There was no suggestion that the lessee sought to terminate the Lease after the cessation of mining. Presumably it has continued to pay the annual fee under the Lease.

[62] If Skeena had decided to pile rock of any kind — waste or otherwise — that remained identifiable as such on the Albino Land, I think it unlikely as a matter of law that Skeena would have been in breach of the Lease or that it would not have remained the owner of the material. (See, e.g., *Ross Cromarty Developments Inc. v. Arthur Bell Holdings Ltd.* [1994] 3 W.W.R. 142 (B.C.C.A.).) Certainly, this is not a case that engages a question of "illegal use" of the premises — a situation that arises when a tenant uses demised premises contrary to some other law, often a zoning by-law. (See, e.g., *McCulloch v. Nocair* 2023 BCSC 154.) Nor is this a case where the tenant has derogated from the purpose of the lease in such a way that it could be viewed as a breach of contract — a situation that often arises in the retail context, where, for example, a mall leases a unit on terms that specify the kind of business that the tenant may operate and the tenant materially departs from operating that particular business. (See, e.g., *Cavalier Enterprises Ltd. v. Country Style Donuts Ltd. and Copeland et al.* 42 Sask. R. 256 (Q.B.).) At the least, Skeena

was entitled to do all things reasonably connected to the stated purpose of the lease. In my view, that entitlement would include placing its chattels on the Land during the term of the Lease.

[63] In any event, I am unable to agree with Orogenic's submission that looked at objectively, the Lease was in reality a disguised waste disposal contract that somehow resulted in a transfer of ownership of the waste materials to the Crown. To ignore all the terms of this agreement except for its statement of purpose would indeed permit context to overwhelm the text. To 'read in' to the agreement a series of covenants it did not contain — most importantly, a transfer of ownership of chattels to the Province — would amount to pure fabrication. The Surface Lease did not purport to transfer anything to the Province, nor to deprive Skeena of its ownership in some other way, least of all by moving the waste material from one location to another. Nor can it be said a transfer of ownership can be implied as something that "goes without saying", or that such a term was necessary in order to give the Surface Lease business efficacy. (See generally *Athwal v. Black Top Cabs Ltd.* 2012 BCCA 107 at para. 48.) No suggestion has been made as to why the parties' arrangement would have been disguised, or by whom.

[64] In the circumstances, I find that the chambers judge erred in finding, or in endorsing the CGC's finding, that the Surface Lease granted "*only one right*", namely to "dispose of waste." Moreover, his observation that the Lease did not "grant" Skeena any right to store private property on the site during the term of the Lease missed the point: Skeena did not require a "grant" of this kind when it was already the owner of the waste materials.

[65] The more difficult question, to which I now turn, is the crux of Orogenic's submission — whether by reason of its placement of the waste materials in the bed of Albino Lake, Skeena *relinquished, abandoned or otherwise effectively transferred title to its chattels personal, to the Province*. This is clearly a question of mixed fact and law.

"Relinquishing" and "Abandoning"

[66] The words "relinquish" and "abandon" are very closely related. According to the *Oxford Dictionary of Word Origins* (3rd ed., 2021), the origin of "abandon" is the old English word "ban", which meant "to summon by popular proclamation." The word "ban" also passed into the French, where it connoted "proclamation, summons, banishment". In old French, the phrase "*à bandal*" meant "at one's disposal, under one's jurisdiction". As for "relinquish," the *Dictionary* refers the reader to "derelict," which originated in the Latin word *derelictus*, the past participle of *delinquere*, or "to abandon". *Black's Law Dictionary* (2004) confirms the closeness of the two terms: it defines "relinquish" as "the abandonment of a right or thing" and "abandonment" as "the relinquishing of a right or interest with the intention of never reclaiming it."

[67] In *Ziff's Principles of Property Law* (8th ed., 2023), authors E. Kaplinsky, M. Lavoie and J. Thomson write that:

> Whether one acquires personal property through possession, purchase or otherwise, under Canadian law these entitlements can be relinquished through abandonment. Abandonment is, in essence the reverse of possession-taking: there must be an intention (*animus relinquendi*) to renounce title; that is, an indifference as to the fate of a chattel. Accordingly, if one misplaces some item, and all efforts to locate it proved fruitless, merely giving up the search in despair is not abandonment. Losing all hope of recovery is not equivalent to the *animus* of abandonment. Sufficient acts of divestment are also required. It is sometimes offered that unilateral (or 'divesting') abandonment is not possible, or alternatively is not effective until the chattel is taken by someone else. Canadian courts have not been so demanding, nor have they delved into the abstruse and convoluted learning on point. …. There is case law to support the proposition that garbage placed for pick up and disposal is abandoned property. However, a contrary view is that the goods are relinquished conditionally, not absolutely, because a householder leaving the trash out is not completely indifferent as to what will occur next. Rather, it is being disposed of on the understanding that the collection service will haul it away. [At 162–3; emphasis added.]

[68] The distinction between being indifferent as to who acquires the property and leaving it, for example, for pickup by local authorities is discussed at length by Professor Saw Cheng Lim in "The Law of Abandonment and the Passing of Property

in Trash," (2011) 23 SAcLJ 145. It need not concern us here. In more general terms, however, the author says this about "abandonment":

> The word "abandonment" may, in law, assume a number of different meanings, depending on the context in which it is used. It is important, at the outset, to distinguish between an abandonment of ownership of property (or title to property) and an abandonment of possession of (or control over) property. It has been said that the mere relinquishment of "possession" of a thing is not an abandonment in a legal sense, since such an act is not wholly inconsistent with the idea of continuing "ownership". The act of abandonment must be an overt act (or some failure to act) which carries the implication that the legal owner neither claims nor retains any interest in the subject matter of the abandonment. ...
>
> From a brief survey of US and Canadian case law, it is apparent that two requirements must be satisfied in order to effect a proper abandonment of property. According to the Ontario Court of Appeal in *Simpson v Gowers*, [(1981) 121 D.L.R. (3d) 709 at 711] "[a]bandonment occurs when there is 'a giving up, a total desertion, and absolute relinquishment' of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property ... ". There must therefore be, in addition to the *overt act* of abandonment itself, a specific *intention/motive* on the part of the original owner to completely relinquish all rights of ownership — voluntarily and, more importantly, without regard as to who may subsequently take possession of the property. It bears repeating that such relinquishment must be to the extent where the former owner is *completely indifferent* as to the fate of the discarded object (*ie*, as to what/who may await the abandoned property). In other words, if anyone else takes and uses the abandoned property in whatever manner, that is a matter of no consequence to him.
>
> Proof of "intention" is, of course, a question of fact. Clearly, an intention to abandon property will not ordinarily be presumed. There must, generally, be some direct or affirmative evidence of subjective intent. Alternatively, intention may be established objectively, through the process of inference, from the overt acts and conduct of the proprietor — *e.g*, from the circumstances surrounding the proprietor's treatment of the property, the manner and location of abandonment, as well as the nature and value of the property. There must, in other words, be some explicit conduct which can be taken to indicate, clearly and objectively, that the owner no longer wants his or her property. [At 147–8; emphasis added; footnotes omitted.]

[69] One of the leading Canadian cases is *Stewart v. Gustafson* [1999] 4 W.W.R. 695 (Sask. Q.B.). There, Klebuc J. summarized the basic principles relating to abandonment:

> R.A. Brown in *The Law of Personal Property*, 2nd ed. (Chicago: Callaghan, 1955) defined "abandonment" as follows:
>
> > Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property . . . .
>
> *Black's Law Dictionary*, 5th ed. (St. Paul Minn.: West Publishing Co., 1979) provides the following definition:
>
> > The surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it.
> >
> > . . .
> >
> > "Abandonment" includes both the intention to abandon and the external act by which the intention is carried into effect.
>
> ...
>
> The act of abandonment is essentially a question of fact to be proven by the party relying on the principle of abandonment [citations omitted]. The burden of proof is an onerous one where the owner's actions do not clearly manifest an intention to surrender ownership of the chattel in issue. In the result, intention often must be inferred by using the approach commonly employed in criminal law where intention is of paramount importance.
>
> The authorities reviewed suggest that the following factors in the appropriate factual context support an inference of intention to abandon: (1) passage of time; (2) nature of the transaction; and (3) the owner's conduct. I am of the view the nature and value of the property also may be an indicator of intent. [At paras. 13, 14, 16 and 17; emphasis added.]

See also *Chieftain Metals Inc. v. Tulsequah Wilderness Adventures Inc.* 2014 BCSC 1251 at para. 72, *Dean v. Kotsopoulos* 2012 ONCA 143 at para. 18; and Michael Bridge, Louise Gullifer, Gerard McMeel and Sarah Worthington, *The Law of Personal Property* (1st ed., 2013) at § 2-059.

[70] Applying the foregoing principles of law, can it be said that the CGC was correct, or was not clearly and palpably wrong, in ruling that by virtue of being granted the right to deposit waste rock and tailings in Albino Lake, Skeena "relinquished ownership to the waste rock and tailings" that were so deposited?

Skeena says not. In Mr. Nathanson's able submission, the requirement that a person be "indifferent" as to the fate of his or her property is inconsistent with the reality of regulatory obligations attaching to property created by an undertaking. In counsel's words, complying with regulatory obligations is not "indifference". Moreover, the decision to put a chattel in a mandated place for "disposal" is hardly an unequivocal expression of an intention to abandon ownership of it. The measure may simply be a necessary step for waste to be handled in a lawful and environmentally safe way. Rather than asking whether Skeena did anything to *preserve* its property in the waste materials, Skeena says the CGC should have asked whether it demonstrated an intention to *give up* its property unequivocally and voluntarily, and whether it engaged in an act of divestment in relation thereto. The burden lies on the person alleging abandonment: *Simpson v. Gowers* (1981) 121 D.L.R. (3d) 709 (Ont. C.A.) at 712; *R. v. Shearing* 2002 SCC 58 at para. 160 (*per* L'Heureux Dubé J. in dissent, although not on this point).

Case Authorities

[71] In response, Mr. Mill and Orogenic rely on a line of cases dealing variously with implied transfer, abandonment, affixation and accretion. The first of these is *Peterson Lake Silver Cobalt Mining Co. v. Dominion Reduction Co*. (1917) 41 O.L.R. 182 (S.C.), ***aff'd*** (1918) 46 D.L.R. 724 (Ont. C.A.), ***aff'd*** (1919) 50 D.L.R. 52 (S.C.C.). (The latter judgment is more complete than that found at 59 S.C.R. 646.) The facts of *Peterson Lake* bear some similarity to those of the instant case. The plaintiff "Peterson" owned the bed of a lake and associated land in Coleman, Ontario. In 1910, a company referred to as the "Nova Scotia company" acquired the land adjacent to the east arm of the lake and erected a reduction mill on that land, and began depositing its tailings in the lake. The Nova Scotia company later made an assignment for the benefit of its creditors and sold its "real estate, goods and chattels" to a Mr. Steindler. He in turn sold this property to the defendant ("Dominion") in 1912.

[72] In 1914, Dominion wrote to Peterson, acknowledging that in the past, Peterson had made no objection to the tailings being deposited in the bay of the

lake. Dominion's directors, however, felt that Dominion should have some written confirmation of this arrangement, so that no question of "encroachment" could arise. Peterson replied that its directors were content for the residues to be "discharged" in the lake, on the understanding that the practice would be discontinued on one month's notice from Peterson. (At para. 9.) In May 1915, however, Dominion's solicitors went further. They requested an acknowledgment that if the tailings should ever prove to have value, Dominion would be free to remove them from the lake at any time. Peterson's directors passed a resolution reciting the letter and instructed its secretary to tell Dominion that "this would be satisfactory if [Peterson] had the right to direct the point of deposit of the tailings."

[73] Further correspondence led eventually to litigation as to who owned the tailings that had been deposited before July 2, 1915, when an arrangement was agreed upon. Before that date, "There was no bargain or understanding save such as may be inferred from a request upon the one side for permission to dump the tailings in the lake". Middleton J. found that the tailings so deposited had become the land of Peterson, adopting the words of the Court in *Boileau v. Heath* [1898] 2 Ch. 301 that:

> They could not sell it and did not want to sell it, and when they piled it on the earth their intention was that it should once more form part of the earth out of which it had been produced, and should no longer be, if ever it was, of the nature of a chattel. [At 305; emphasis added.]

(The deposited material in *Boileau* consisted of "refuse" from the manufacture of iron which had been deposited in heaps by a previous tenant and left at the expiry of the lease.) Middleton J. in *Peterson* observed that the holding in *Boileau* was that although the original tenant might have taken the refuse during his tenancy, the refuse became a part of the freehold when he had left it behind at the end of the lease "and did not pass to the defendants as stores and effects, nor were they "minerals which the defendants might take under the mining lease". (At para. 30.) (In the case at bar, of course, the Surface Lease has not yet expired, and the waste materials *are* "minerals" under the *MTA*.)

[74] The crucial part of Middleton J.'s reasoning was that:

> I am not quoting these words because the decision governs this case, but because they express aptly the principle that governs. The ore here was not mined from the lands to which it was returned — the property in it was undoubtedly vested in the defendant, under the agreements with the mine-owners — it was the defendant's to deal with as it saw fit — the defendant might regard it as of value, and store it for treatment in the future, or might cast it away as refuse. The defendant's property in it could not be lost without its consent; the whole question is, whether, when the defendant returned this ore, won from the earth and earthy in its nature, to the bosom of the earth, the right to regard it as chattel property was lost, and it became part of the land owned by the plaintiff. I think this is the effect of what was done.
>
> When a building is erected on the land of another, or a fixture is made to realty, there is a presumed intention that that which once was a chattel should become part of the realty; and, similarly, when earth is placed upon the land of another by his permission, the presumption would be that it became part of the land. Though the deposits are now found to be of value, when they were placed in the lake they were regarded as mere waste. The case is analogous to that of an owner building a house who asks permission to dump the earth from the excavation for the cellar in a hollow upon his neighbour's ground. He cannot afterwards go upon the ground and remove it.
>
> I am not losing sight of the statement that there had been for many years in the minds of chemists the hope and expectation that tailings might be re-treated in such a way as to yield profit, but by many this was regarded as a thing remote and visionary; and in the meantime there was the ever-present difficulty of getting rid of the vast quantity of material discarded in the operation of the known mining processes. Actions speak louder than the words of interested witnesses who, many years afterwards, say, "I thought," or "It was understood;" and the facts that the assignee of the Nova Scotia company and its creditors did not regard this heap as an asset, that Steindler did not include it in his purchase, and that the only permission sought until 1915, when the deposit was thought to be of value, was the right to dump, all go to shew that until then this was regarded as waste material, to be got rid of as easily as was possible.
>
> I have refrained from using the word "abandonment," because it has a technical meaning. "Abandonment of goods takes place when possession of them is quitted without any intention of transferring them to another:" 12 Co. Rep. 113. Here, if I am right, there was an intention of transferring the title to these tailings to the plaintiff. [At paras. 23–6; emphasis added.]

[75] On appeal, the Appellate Division formulated the question before the Court as one of fact:

> That there was no express agreement between the parties as to the reclaiming of the tailings is clear, and the question therefore is, what, in the circumstances of the case, is the proper inference to be drawn as to the intention of the parties?

> That the appellant is not entitled to any of the tailings which were discharged into the lake by the Nova Scotia company, is clear. No transfer of them was made by the company, and, if it was the owner of them, it still owns them.
>
> With regard to some things the inference to be drawn would be clear. If they had been lumber or coal or ore of commercial value, the proper inference would be that they remained the property of the person who deposited them on the land of, another; while, on the other hand, if they had been earth or débris which was discharged into a hole or depression on the land of another, the contrary inference would be drawn.
>
> In my opinion, the tailings in question, when discharged into the lake, ceased to be the property of the appellant. I refer of course only to the tailings which were so discharged before the 3rd July, 1915, when the arrangement was made that the appellant should have the right to remove them.
>
> The tailings were of no commercial value, and it was problematical whether they would ever have any such value.
>
> It is quite consistent, I think, with the testimony of the appellant's witnesses that it was not in the contemplation of the parties, or either of them, that the tailings which were discharged into the lake should be reclaimed by the appellant, but that the true position was that the appellant was finally getting rid of them, though it was thought that in the future tailings might have some commercial value and was contemplated that when that time should arrive persons who had tailings produced in the course of their operations would dispose of them otherwise.
>
> No witness ventured to say that it would be commercially practicable, even if at all practicable, to take the tailings from the lake without pumping out the waters of the lake or otherwise draining it. The lake was of considerable depth, and if, after dumping into it sufficient to cover the bottom of it to the depth of 8 or 10 feet, the tailings would be many feet below the surface of the lake, the difficulty that there would be of removing them is obvious. The tailings went into the lake in the form of sludge, consisting of water and particles of rock and earth, and much of this would probably spread for a considerable distance beyond the point at which it was discharged into the lake.
>
> The arrangement that was proposed in 1917 affords reasonable ground for concluding that it was only by draining the lake that it would be practicable to remove the tailings except those on, above, or very little below the surface of the lake-when I say practicable, I mean commercially practicable. [At paras. 39–46; emphasis added.]

The appeal was dismissed.

[76] On further appeal to the Supreme Court of Canada, the trial judgment was again affirmed. Like the Court of Appeal, Mr. Justice Idington for himself placed considerable emphasis on the lack of evidence regarding any value that might be ascribed to what he called the “rubbish heap”. He observed:

> I cannot see why, when it dawned on someone interested in the appellant that this *quandum* rubbish heap might be made productive of wealth, that he and others shrank from putting their claim in plain language if designed to make the title of their company clear, unless perhaps it had dawned on respondent at or about the same time and hence it would be useless to set up such retention.
>
> It would have been interesting to have had a little more enlightenment on the progress of scientific discovery which made it manifest that there are possibilities in the rubbish heap, and the date on which that became known to those concerned in this litigation. [At 53–4.]

Anglin J., speaking for the majority, could find nothing in the written evidence, including resolutions of Peterson's directors, that could be said to support the inference of a 're-transfer' of the tailings to Dominion. Anglin J. commented near the end of his reasons:

> If the inference of abandonment and accretion (using these words in a non-technical sense) unanimously drawn by the Judges below was not clearly right, as I incline to think it was, the evidence at all events fall short of what would be necessary to enable us to say that it was wrong. [At 55; emphasis added.]

Middleton J. reached a similar result in *La Rose Mines Ltd. v. Mining Corporation of Canada Ltd.* for reasons summarized at 22 O.W.N. 61 (S.C.).

[77] *Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd.* (1978) 91 D.L.R. (3d) 283 (Ont. C.A.) is a more modern case to which we were referred. At para. 1 of its reasons, the Court there stated the issue for determination — "whether tailings, consisting of the powdered residue after the refining and processing of ore, which have come from other properties and have been deposited on the surface of the appellant's property, belong to the appellant as owner of the surface rights or to the respondent as owner of the mining rights." At the time, the *Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85, stated that "mining rights" shall be "construed to convey or reserve the ores, mines and minerals on or under the land" and the necessary right of access. The phrase "surface rights" on the other hand was to be read as reserving "the ores, mines and minerals on or under the land" and rights of access. The registered owner of the subject land had "severed" the surface rights from the mining rights in 1936.

[78] It was common ground that the respondent company had acquired the mining rights in 1973 and operated a silver refinery near Cobalt, Ontario. Lacourciere J.A. for the Court recounted:

> At the date of trial before Boland, J., without a jury, the tailings had flowed onto the appellant's property along an old stream bed, as a result of being sluiced down by mine operators and by forces of nature. They consisted of a very fine sandlike material and were mostly deposited on the lands between 1905 and 1922, many years before the severance of the surface from the mining rights. The tailings became, in effect, the new surface, with an average depth of five to nine feet. During this period, the tailings were viewed as waste material without economic value, and as a hindrance to the growth of vegetation and to building. At the date of trial, because of technological advances and a dramatic increase in the price of silver, it had become economically feasible to process the tailings for their content of that metal. [At para. 3; emphasis added.]

[79] The trial judge had found that the tailings were composed of *particles* of silver and other minerals and reasoned that "*a mineral is always a mineral regardless of its size, economic value or change in character."* She continued:

> The wording in the conveyances is of paramount importance in this case. In the absence of strong evidence of intention to the contrary, I cannot see how a conveyance of the 'mines, minerals and mining rights, in, upon and under the lands' … can mean anything other than an exhaustive right to mine all minerals upon or under the lands, including the minerals contained in the tailings. Such a conveyance carries rights on the surface where minerals exist and owners of the surface are not entitled to compensation. [At para. 10; emphasis added.]

[80] The Court of Appeal noted that the words "mine" and "minerals" had received different meanings in the various cases dealing with them, depending on the particular statutes or on the wording of conveyancing documents reserving mines or minerals. Most of the cases, it was said, "approached the problem whether a substance is a mineral as a question of fact to be determined by the use, character and value of the substance, in the light of the common understanding of mining engineers, commercial men and landowners at the time of the conveyance." (Citing, *inter alia*, *Seymour Management Ltd. v. Kendrick* [1978] 3 W.W.R. 202 (B.C.S.C.), *per* Munroe J.) Lacourciere J.A. for the Court in *Mastermet* continued:

> To understand the vernacular of mining engineers and other mining people, it is of great practical assistance to turn to the definitions of the noun and the

> verb “mine” and the word “mining” contained in s. 1, paras. 15 and 16 of the *Mining Act* and its predecessor, and quoted above.
>
> I would give substantial weight to this provincial statute governing the mining industry in determining the meaning of the language of mining engineers and other persons engaged in mining -- the definition of its words -- in the same way that the meaning of the language of other trades and professions is influenced by relevant legislation. This proposition, rooted in common sense, finds confirmation in the evidence of the witness Halstead, a professional engineer.
>
> The definitions in the Act make it abundantly clear that in the mining industry in Ontario a conveyance containing the words in the 1936 transfer of mining rights above quoted confers an exhaustive right to mine all minerals, including the silver contained in the tailings. In my view, the acquisition of mining rights was never intended to be limited to the acquisition of valuable minerals in place, and in sufficient concentration to be extracted at a profit, as contended by a mining engineer called at trial to give evidence on behalf of the appellant. The definition of mining in s. 1, para. 16, to include any method whereby a mineral-bearing substance may be dealt with "... for the purpose of obtaining any mineral therefrom, whether it has been previously disturbed or not" (emphasis added), necessarily includes the removal, by any process, of silver from tailings accumulated on the surface. [At paras. 13–15; emphasis added.]

[81] Lacourciere J.A. also referred to *Peterson Lake* and *La Rose Mines* and again to *Seymour Management*, in which the issue was the true construction of a reservation clause of “minerals precious or base” in Crown grants. Munroe J. had treated the meaning of those words as a question of fact “to be decided on what they meant ‘in the vernacular of the mining world, the commercial world and the landowners at the time they were used in the Crown grants’. He had concluded that it could not have been the intention of the parties to reserve title to minerals in the tailings which were not then regarded as having practical value.” (At para. 22.)

[82] Lacourciere J.A. found that the foregoing cases supported the proposition that “additional earth or substances containing minerals which *accrete to the land by the forces of nature* become part of the land.” (My emphasis.) They were not helpful in the circumstances of *Mastermet* because of the severance of mining from surface rights in the subject lands and the statutory definitions noted earlier. In the result, the Court of Appeal ruled that the appellant’s predecessor as owner of the surface rights had *not* acquired “the ownership of the right to mine the mineralized tailings which had accreted on the surface at the time of the severance of surface rights.” (At

para. 24; my emphasis.) This judgment was affirmed by the Supreme Court of Canada at [1980] 2 S.C.R. 119 for the reasons of the Court of Appeal.

[83] The respondents in the case at bar contend that the case law, although not decided under the current statutory regime in British Columbia, is based on common law principles that apply equally to the waste rock and tailings in this case. They referred us to a passage from Mr. Barton's book, *supra*, to the effect that tailings may be regarded as "part of the soil" rather than as chattels, although it is open to a person depositing tailings and the owner of land to agree otherwise. (At 63.) After describing *Peterson Lake*, the author continues:

> The only inference that could be drawn [in *Peterson Lake*] as to the intention of the parties was that the tailings were waste material to be disposed of as easily as possible. In doing so, the Dominion company lost the right to regard the material as a chattel property, and the material became part of the land. It was a different matter when the parties had agreed to regard deposits as chattels in storage pending their reclamation.
>
> It is appropriate to rely on the intention of the parties in a case like *Peterson Lake* … and is certainly in accordance with the general law on fixtures, where the purpose of annexation is relevant. It would be less appropriate after a greater lapse of time and between parties other than the original participants. Greater reliance would then have to be placed on the degree of annexation of the tailings to the land.
>
> Where tailings are part of the land, and where mineral rights have been severed, do they belong to the mineral owner or the landowner? Just as with naturally deposited substances, the question must be answered by interpreting the instrument of severance. [At 63; emphasis added.]

Barton then goes on to refer to the same passage from *Seymour Management* as that noted in *Mastermet*:

> The intention of the parties to the Crown grants could not have been to reserve title in the Crown to minerals in tailings which were then regarded as of no practical value, placed on the land by man, and which later may have become practicable to treat at a profit by a new process resulting from technological advances. [At para. 8.]

[84] It is not clear to me whether the author has taken the expanded definition of "minerals" in the *MTA* into consideration. Barton acknowledges that the Court in *Mastermet* went in the "opposite direction" from *Peterson Lake* after construing the statutory definitions of "mine" and "mining" using the "vernacular test". In the author's

analysis, the two cases were not necessarily inconsistent even though the two severances were similar. (At 65.) Arguably, *Seymour Management* would have been decided the same way as *Mastermet* if a similar statutory definition had been applicable. On the other hand, he continued, it was plain that in *Seymour Management* "artificially deposited tailings were considered an exceptional case and called for express words to make them minerals." Express words were, of course, provided in this province by the amendment of the *MTA* in 1988 when the definition of "minerals" was expanded to include "rock and other materials from mine tailings, dumps, and previously mined deposits of minerals". If nothing else, this amendment suggests a recognition in the mining industry more than 30 years ago that waste materials from mining operations should not to be presumed to have "no practical value".

[85] All the foregoing cases, of course, depended on their own facts, including the wording of particular instruments and of particular statutes at particular points in time. The trial court in *Peterson Lake* found there had been an intention to 'transfer title' to the tailings, mainly because they were seen as "mere waste". The tailings had been placed on "the land of another" without the express permission of that other — a feature not present in the case at bar. On appeal, reliance was placed both on the fact that the ore was "earthy in its nature" and had returned to the "bosom of the earth" (see para. 37), and on factual inferences concerning the parties' intentions, gleaned from their correspondence. No comparable evidence was adduced in this instance. (See para. 39.) In the Supreme Court of Canada, the lower courts were said to have drawn inferences of "abandonment and accretion (used in the non-technical sense.)" The paucity of evidence on the "possibility" that the "rubbish" might become valuable was lamented. In *Mastermet*, the particular wording of the statute obviously governed, although the Court characterized the question before it as a question of fact to be determined "by the use, character and value of the substance, in the light of the common understanding of mining engineers, commercial men and landowners at the time of the conveyance" in question. Even though the statute did not expressly include mining waste rock in the definition of "minerals" or "mining rights", the Court endorsed the lower court's

reasoning that “a mineral is always a mineral regardless of its size, economic value or change in character.”

[86] In the end, no one rule or principle that is clearly applicable to the case at bar emerges from these cases, whether one approaches the issue in terms of “abandonment”, “relinquishment” or accretion, or seeks to draw a factual inference concerning an intention on the part of the parties to transfer ownership. The fact that in this province, the statutory term “mineral” now includes waste rock and tailings is surely part of the statutory context that would seem to point to the *Mastermet* reasoning as opposed to that in *Peterson Lake* and *La Rose*. As far as the law relating to fixtures is concerned, I do not consider that it would be appropriate to adopt that law in the case at bar, given the lack of evidence concerning the physical nature of the waste rock and tailings, including any tendency to become “part of the earth” or to accrete to the earth.

“Relinquishment”

[87] In any event, the Commissioner used the word “relinquish” in the crucial part of his reasoning in the case at bar, and it is that finding that we must address. As we have seen, it may be considered for our purposes that “relinquish” in this context is synonymous with “abandon”. As we have also seen, the common law requires a “giving up, a total desertion, and absolute relinquishment of private goods by the former owner” for abandonment to be shown. (See *Simpson v. Gowers*, *supra*, at 711.) This requires not only a “casting away” but a specific intention on the part of the owner to “completely relinquish all rights of ownership.” (See Saw, *supra*, quoted above at para. 68.) As stated more succinctly by Bridge et al., *supra*, “an abandonment sufficient to divest the owner of both possession and ownership requires both an intention to abandon and ‘some physical act of relinquishment’.” (At §2–059, citing *Robot Arenas, Ltd. v. Waterfield* [2010] EWHC 115 (Q.B.) at para. 14.) Further, the law distinguishes between the abandonment of *possession* and the abandonment of *ownership*. The two should not be confused.

[88] In my respectful opinion, the CGC did not consider these principles. Instead he inferred from the fact that the Province and Prime entered into the Surface Lease that Prime had "relinquished" its ownership of the waste rock and tailings. It is clear that the Lease itself exhibited no such intention; and I cannot agree that the placing of the waste material in Albino Lake, over which Prime had exclusive possession, was proof of such an intention. As Professor Saw emphasizes, *supra*, proof of such an "intention" is a question of fact and will not normally be presumed. If it is not possible to prove it in the subjective sense, it may be established "objectively, through the process of inference, from the overt acts and conduct of the proprietor."

[89] In support of his finding of relinquishment, the Commissioner relied on the fact the waste materials had been "deemed to have no economic value." Indeed the materials were referred to as "waste" in reports prepared by Skeena's consultants, in governmental certificates and permits and in Skeena's annual reclamation reports. It is reasonable to infer, however, that the operators of the Mine over the years were aware that waste rock and mine tailings might become more valuable as technology and ore values changed in future years. In this sense, references to "waste rock" should not necessarily be interpreted as meaning "garbage" but simply as referring to materials not worth processing as ore at a given point in time. Obviously, the expansion of the term "mineral" in the definition in the *MTA* confirms that market changes and new technologies may turn "waste" into worthwhile raw material.

[90] The waste rock here was deposited at the bottom of Albino Lake because of the Province's environmental requirements — otherwise, it might have been placed in a pile on the Mine property itself or on the Albino Lake property over which Skeena had, and still has, the Surface Lease. (Again, this fact distinguishes this case from *Peterson Lake,* where waste rock was simply left by Dominion on the property of a neighbour without consultation.) If the materials had been piled on the Albino Lake land, there would be no argument that Skeena had abandoned it — whether as a result of entering the Lease or otherwise. To the contrary, the Lease allowed the operator to access the material from time to time. Nor is the fact the waste rock and tailings had to be deposited underwater something from which an

unequivocal intention to abandon ownership could be inferred. Skeena had no choice but to comply, and it was still possible to drain the Lake and access the materials when necessary.

[91] Applying the "palpable and overriding" standard of review to the Commissioner's decision, can it be said he was clearly wrong in finding that Skeena had "relinquished ownership" to the waste rock and tailings *as a necessary consequence* of the Province's grant of "the right to dispose of waste rock and tailings in the *Land Act* Lease"? With respect, I am of the view that the Commissioner was clearly and palpably wrong in this reasoning and in his conclusion. Aside from the statement of purpose of the Lease — an important factor to be sure but one that in my view is not unequivocal — there is simply nothing in the text dealing with waste rock and tailings, much less amounting to evidence of an intention on Skeena's part to abandon ownership of those materials (as opposed to an intention to comply with the Minister's environmental requirements). Even if there had been such evidence, the CGC made a number of legal errors in his analysis which undermine his conclusion. Nor is there evidence of an intention on the part of the Province, which has not participated in this litigation, to acquire or accept ownership of the waste rock and tailings. I can think of no reason why it would do so and counsel suggested none.

[92] Looking forward, Skeena Resources and/or its predecessors will continue to have various statutory obligations with respect to the waste materials, whether or not the Surface Lease is renewed. Presumably, the Province would ensure Skeena continues to have access to the Albino Lake area to carry out its testing and monitoring; there is certainly no suggestion the respondents regard themselves as bound to assume such obligations. In this regard, I note the point made by the Central Government of the Tahltan First Nation, whose traditional territory includes the Mine and Albino Lake, to the effect that granting to "third parties" (here, the respondents) rights in respect of "actively-managed, toxic mine wastes" is likely to introduce "additional uncertainty and volatility into the mine closure and remediation process, and endorses an interpretation of the *MTA* that would undercut prior

consultations on a mine project and regard for Indigenous interests.” The Mining Association of British Columbia made a similar point in its argument.

[93] At the end of the day, there simply was no overt act of abandonment or evidence of an intention on Skeena’s part to abandon the waste materials and tailings. In all the circumstances, I am driven to the conclusion that on the record before us, Skeena did not “relinquish” the materials and that the CGC was clearly and palpably wrong to hold otherwise. It follows that it cannot be said the Province was ‘holding’ the waste materials from the time of the granting of the Surface Lease or from the time the waste material was covered by water for the protection of the environment. It also follows that the Province cannot be said to have granted ownership rights to Mr. Mill in the waste material upon his receipt of the mineral claim over the Albino Lake area in 2017.

Disposition

[94] I would allow the appeal and set aside the Commissioner’s decision. Being mindful of the expertise of the Commissioner (as to which, see *Dupras v. Mason et al.* (1994) 120 D.L.R. (4th) 127 (B.C.C.A.) at paras. 16–18), I would refer the matter back to the CGC for rehearing and reconsideration in light of our reasons.

[95] We are indebted to all counsel for their very able arguments.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Justice Skolrood"

Schedule A

Excerpts from the Land Act, R.S.B.C. 1996, c. 245

50 (1) A disposition of Crown land under this or another Act

(a) excepts and reserves the following interests, rights, privileges and titles:

…

(ii) a right in the government, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any geothermal resources, fossils, minerals, whether precious or base, as defined in section 1 of the *Mineral Tenure Act*, coal, petroleum and any gas or gases, that may be found in, on or under the land, and to use and enjoy any and every part of the land, and its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;

…

(b) conveys no right, title or interest to

…

(ii) minerals and placer minerals as defined in the *Mineral Tenure Act*,

…

that may be found in or under the land,

Excerpts from the Mineral Tenure Act, R.S.B.C. 1996, c. 292

Disputes

13 (1) If a dispute arises between

(a) recorded holders on the same mineral lands, or

(b) a recorded holder of a mineral title and a person having a right under another enactment to a mineral substance in the lands to which the mineral title relates,

respecting

(c) whether a substance is a mineral, a mineral substance or a placer mineral, or

(d) the exercise of rights conferred under this Act or any of the former Acts,

the issue must, on application to the chief gold commissioner by a party to the dispute and subject to subsection (2), be decided by the chief gold commissioner, and the chief gold commissioner may make any order the chief gold commissioner considers appropriate.

…

(7) A party to a dispute who is aggrieved by the decision of the chief gold commissioner under subsection (1) may, within 30 days after service of the notice under subsection (3), appeal the decision to a judge of the Supreme Court.

(8) An appeal lies from a decision of the court under subsection (7) to the Court of Appeal with leave of a Justice of the Court of Appeal.

…

Surface rights

14 (1) Subject to this Act, a recorded holder may use, enter and occupy the surface of a claim or lease for the exploration and development or production of minerals or placer minerals, including the treatment of ore and concentrates, and all operations related to the exploration and development or production of minerals or placer minerals and the business of mining.

(2) Despite subsection (1), no mining activity may be done by the recorded holder until the recorded holder receives the permit, if any, required under section 10 of the *Mines Act*.

(3) Subject to the terms and conditions set by the issuing authority under the *Forest Act*, a recorded holder of a mineral title that is not in production must on request be issued either a free use permit or an occupant licence to cut under that Act at the option of the government.

(4) The recorded holder of a mineral title that is in production or being prepared for production must on request be issued an occupant licence to cut under the *Forest Act*, subject to terms and conditions set by the issuing authority.

(5) Unless the location is one of the following, a land use designation or objective does not preclude application by a recorded holder for any form of permission, or approval of that permission, required in relation to mining activity by the recorded holder:

(a) an area in which mining is prohibited under the *Environment and Land Use Act*;

(b) a park under the *Park Act* or a regional park under the *Local Government Act*;

(c) a park or ecological reserve under the *Protected Areas of British Columbia Act*;

(d) an ecological reserve under the *Ecological Reserve Act*;

(d.1) an area of Crown land if

(i) the area is designated under section 93.1 of the *Land Act*, for a purpose under that section, and

(ii) the order under that section making the designation, or an amendment to the order, precludes the application by the recorded holder;

(e) a protected heritage property.

…

Priority of rights on Crown land

16 (3) If a disposition is made of surface rights to Crown land, whether surveyed or unsurveyed, and at the time of disposition there is a valid mineral title over the Crown land, the disposition of surface rights does not diminish the rights of the recorded holder except to the extent otherwise determined

(a) by order of the chief gold commissioner under section 13,

(b) by order of the minister under section 17,

(c) by order of the Surface Rights Board in a settlement under section 19 (4), or

(d) by a quit claim agreement between a recorded holder and a subsequent holder of the surface rights.

…

Entitlement of minerals and nature of interest

28 (1) Subject to this Act, the recorded holder of a claim is entitled to those minerals or placer minerals, as the case may be, that are held by the government and that are situated vertically downward from and inside the boundaries of the claim.

(2) The interest of a recorded holder of a claim is a chattel interest.

…

Issue of a mining lease

42 (1) A recorded holder of a mineral claim who wishes to replace the mineral claim with a lease must do all of the following:

(a) comply with section 6.32 and pay the prescribed fee;

(b) if required to do so by the chief gold commissioner, have the mineral claim over which the mining lease will be issued surveyed by a British Columbia land surveyor and have the survey approved by the Surveyor General;

(c) post a notice in the prescribed form in the office of the chief gold commissioner stating that the recorded holder intends to apply for a mining lease;

(d) publish promptly in one issue of the Gazette, and once each week for 4 consecutive weeks in a newspaper circulating in the area in which the mineral claim is situated, a copy of the notice referred to in paragraph (c).

…

(4) If the chief gold commissioner is satisfied that the recorded holder has met all of the requirements of subsection (1), the chief gold commissioner must issue a mining lease for an initial term not longer than 30 years on conditions the chief gold commissioner considers necessary.

…

Effect of leases

48 (2) A lease is an interest in land and conveys to the lessee the minerals or placer minerals, as the case may be, within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim or group of claims, but is subject to a valid charge registered against the record of the claim.

Excerpts from the Mines Act, R.S.B.C. 1996, c. 293

Permits

10 (2.01) Without limiting subsection (1.1) or (2), terms and conditions imposed under those subsections may include terms and conditions respecting any or all of the following:

…

(d) environmental protection and reclamation;

(e) public health and safety.

…

Health, safety and reclamation code committee

34 (1) The minister must establish a health, safety and reclamation code committee consisting of the members the minister appoints.

…

(3) The committee must prepare a code dealing with all aspects of health, safety and reclamation in the operation of a mine and may amend the code from time to time as required.

…

(6) The code and any amendments to it come into force on approval of the Lieutenant Governor in Council.

(7) If there is a conflict between a provision of the code and a provision of the regulations, the regulations apply.

Excerpts from the Health, Safety and Reclamation Code for Mines in British Columbia

Permitted Sites

Updated Plans

10.4.1 (1) After commencement of operations, mine plans, including programs for reclamation and closure, shall be updated, at a minimum, every 5 years.

(2) Reclamation plans shall outline progressive reclamation activities for the 5 years following the date on which the plans are updated in accordance with subsection (1).

(3) After commencement of operations, the water balance and water management plans under section 10.1.12 of this code shall be reconciled annually and updated as required.

Governance

10.4.2 (1) The manager of a mine with one or more tailings storage facilities shall

(a) develop and maintain a Tailings Management System that considers the HSRC Guidance Document and includes regular system audits,

(b) designate a TSF qualified person for safe management of all Tailings Storage Facilities,

(c) establish an Independent Tailings Review Board, unless exempted by the chief inspector,

(d) review annually the tailings storage facility risk assessment to ensure that the quantifiable performance objectives and operating controls are current and manage the facility risks,

(e) maintain tailings storage facility emergency preparedness and response plans integrated into the Mine Emergency Response Plan required under section 3.7.1 of this code, and

(f) ensure document records for key information are maintained and readily available for tailings storage facilities.

(2) The composition of an Independent Tailings Review Board established under subsection (1) (c) shall be commensurate with the complexity of the tailings storage facility in consideration of the HSRC Guidance Document.

(3) The manager shall submit the terms of reference for the Independent Tailings Review Board including the qualifications of the board members to the chief inspector for approval.

(4) The terms of reference for the Independent Tailings Review Board shall be developed or updated as required in consideration of the review under subsection (1) (d).

Register of Tailings Storage Facilities and Dams

10.4.3 (1) The manager of a mine with one or more tailings storage facilities shall maintain a Register of Tailings Storage Facilities and Dams.

(2) The register shall be reviewed and updated at least annually.

Annual Reporting

10.4.4 The owner, agent or manager shall submit one or more annual reports in a summary form specified by the chief inspector or by the conditions of the permit by March 31 of the following year on the following:

(a) reclamation and environmental monitoring work performed under section 10.1.3 (e) of this code;

(b) tailings storage facility and dam safety inspections performed under section 10.5.3 of this code;

(c) a report of the activities of the Independent Tailings Review Board established under section 10.4.2 (1) (c) of this code that describes the following:

(i) a summary of the reviews conducted that year, including the number of meetings and attendees;

(ii) whether the work reviewed that year meets the Board's expectations of reasonably good practice;

(iii) any conditions that compromise tailings storage facility integrity or occurrences of non-compliance with recommendations from the engineer of record;

(iv) signed acknowledgement by the members of the Board, confirming that the report is a true and accurate representation of their reviews;

(d) a summary of tailings storage facility and dam safety recommendations including a scheduled completion date;

(e) performance of high-risk dumps under section 10.5.5 of this code;

(f) updates to the tailings storage facilities register as required;

(g) other information as directed by the chief inspector.

Other Reporting

10.4.5 The owner, agent or manager shall submit the following periodic reports with the annual reporting in a form specified by the chief inspector or by the conditions of the permit by March 31 of the year following their completion:

(a) mine plan, reclamation plan and closure plan updates under section 10.4.1 of this code;

(b) dam safety review reports performed under section 10.5.4 of this code;

(c) "as built" reports for tailings storage facilities and dams under section 10.5.1 of this code.

Operations

Construction of Tailings and Water Management Facilities

10.5.1 (1) The manager shall submit issued for construction drawings, specifications and quality assurance/quality control plans as well as a summary construction schedule to the chief inspector prior to commencing construction of a tailings storage or water management facility.

(2) The manager shall ensure that the initial operation of a tailings storage or water storage facility does not commence until an "as built" report under subsection (3) certifying that the facility was designed in accordance with this code and constructed according to design has been submitted to the chief inspector and a permit has been received.

(3) The manager shall prepare “as built” reports for each stage of construction of a tailings storage or water storage facility that include, as a minimum, the following:

(a) geotechnical foundation conditions;

(b) geometry;

(c) quality assurance/quality control data prepared by a Professional Engineer.

(4) The manager shall ensure that the engineer of record has certified that the tailings storage facility or dam has been constructed in a manner consistent with the design and specifications and that the structures are suitable for the intended use.

Operations, Maintenance and Surveillance (OMS) Manual

10.5.2 (1) An Operations, Maintenance and Surveillance Manual shall be prepared by one or more qualified person and submitted to the chief inspector prior to operation of the Tailings Storage Facility or dam.

(2) The Operations, Maintenance and Surveillance Manual shall be reviewed by the engineer of record and approved by the manager prior to implementation.

(3) All employees involved in the operation of a tailings storage facility or dam shall be trained and qualified, based on the OMS requirements, prior to commencing work at the facility.

(4) The Operations, Maintenance and Surveillance Manual shall be reviewed annually and revised as required during operations of a tailings storage facility or dam.

Annual Dam Safety Inspection

10.5.3 Tailings storage and water management facilities and associated dams shall be inspected annually and a report shall be prepared by the engineer of record in consideration of the HSRC Guidance Document

Dam Safety Reviews

10.5.4 A Dam Safety Review Report on the tailings storage, water management facilities and associated dams shall be prepared by an independent Professional Engineer in consideration of the HSRC Guidance Document at least every 5 years or as directed by the chief inspector.

Major Dumps

10.5.5 Major dumps shall be operated and monitored in accordance with the Interim Guidelines of the British Columbia Mine Waste Rock Pile Research Committee.

Spontaneous combustible material

10.5.6 Material with a high probability of spontaneous combustion shall be placed in a separate dump.

Materials Inventory

10.5.7 (1) Where required for the control of metal leaching and acid rock drainage, the owner, agent or manager shall maintain an inventory of identified material that includes

(a) composition, mass, volume, surface area, and storage locations,

(b) history and timing of excavation,

(c) monitoring data, and

(d) any other information required by the chief inspector.

(2) Upon closure, the manager shall submit the material inventory to the chief inspector.

Excavations Near Property Boundaries

10.5.8 The excavation of soil material such as clay, silt, earth, sand or gravel, in a surface mine shall not be carried on within a setback distance of at least 5 metres horizontal from the vertical plane of the property boundary, and

(a) there shall be no excavation of soil material below a surface sloping downwards into the property from the inside edge of the setback no steeper than 1.5 horizontal to 1 vertical, and

(b) material that sloughs from within this distance shall not be removed without the written approval of the inspector.

Excavation before April 1, 1997

10.5.9 The chief inspector may direct that any excavation that exists in soil materials on or before April 1, 1997 will not be considered to be out of compliance for not meeting setback requirements providing that all further excavation is conducted in a manner consistent with the requirements of section 10.5.8 of this code.

Alternative setbacks and slopes

10.5.10 Notwithstanding sections 10.5.8 and 10.5.9 of this code, the chief permitting officer may approve a mine plan, prepared by a Professional Engineer, with alternative setbacks and slopes that ensure that the property boundary will be adequately protected.

Rock excavation

10.5.11 Rock shall not be excavated within a distance of 5 m from the property boundary.

Waiver by adjoining property owners

10.5.12 The owners of adjoining properties may, by agreement in writing, waive the provisions of sections 10.5.8, 10.5.9 and 10.5.11 of this code.

Mine Closure

Notice Required

10.6.1 The owner, agent, or manager shall provide written notice of not less than 7 days to an inspector of intention to stop work in, on, or about a mine.

Cessation of operations

10.6.2 (1) If a mine ceases operation, the owner, agent, or manager shall

(a) continue to carry out the conditions of the permit, and

(b) carry out a program of site monitoring and maintenance.

(2) If a mine ceases operation for a period longer than one year, the owner, agent, or manager shall

(a) apply for an amendment to the permit setting out a revised program for approval by an inspector,

(b) identify the hazards and provide detailed engineered plans and drawings respecting the hazards to local emergency agencies, and update the drawings as required, and

(c) if practicable, make the plans and drawings available on site in a conspicuous location.

Filing of Plans

10.6.3 (1) On the closure of a mine, the owner, agent or manager shall, within 90 days, file with the chief inspector accurate drawings, on a scale consistent with good engineering practice, showing

(a) on a plan view

(i) the surface and underground workings of the mine up to the time of closure and the boundaries of the mineral claims, licenses, or leases in which the workings are situated, and

(ii) identification of underground workings that come to within 25 meters of the surface,

(b) a general long section and several cross section views of the surface and underground mine workings, and

(c) any other plans that may be requested by the chief inspector.

(2) The filed plans shall be preserved as a permanent record in the office of the chief inspector.

Securing of Openings

10.6.4 When a mine is closed for an indefinite period, or otherwise left unattended for any length of time, the owner, agent or manager shall take all practicable measures to prevent inadvertent access to mine entrances, pits and openings that are dangerous by reason of their depth or otherwise, by unauthorized persons and ensure that the mine workings and fixtures remain secure.

Major Dumps

10.6.5 The long-term stability of exposed slopes of any major dump shall meet the criteria provided in the Interim Guidelines of the British Columbia Mine Waste Rock Pile Research Committee at the time of permitting or as amended by the chief inspector.

Impoundments

10.6.6 (1) The long-term stability of exposed slopes of impoundments shall meet the criteria provided in the design at the time of permitting or as determined by the engineer of record.

(2) Impoundments not operated for a period of 12 or more months may be declared as closed by the chief inspector.

Closure of a tailings storage facility or dam

10.6.7 (1) Prior to closure or upon declared closure of a tailings storage facility or dam, the manager shall submit a final detailed closure plan to achieve the approved end land and water use objectives.

(2) The closure plan shall include a detailed construction cost estimate, schedule and monitoring plan for implementation.

(3) The closure plan shall be prepared by one or more qualified professionals in consideration of the HSRC Guidance Document.

Tailings Storage Facility Closure OMS Manual

10.6.8 (1) The manager shall submit a Tailings Storage Facility Operations, Maintenance and Surveillance Manual for closure and review and update the plans regularly to reflect significant ongoing changes during closure.

(2) The Tailings Storage Facility Operations, Maintenance and Surveillance Manual shall include requirements for monitoring and shall define appropriate resources and staffing to carry out the works and monitoring associated with closure.

On-going Management Requirements

10.6.9 Where a mine requires on-going mitigation, monitoring or maintenance, the owner, agent, or manager shall submit a closure management manual that

(a) describes and documents key aspects of the ongoing mitigation, monitoring and maintenance requirements, and

(b) tracks important changes to components of the system that effect long-term mitigation, monitoring and maintenance requirements.

Permanent Spillways

10.6.10 Permanent spillways shall be designed by a Professional Engineer in consideration of the HSRC Guidance Document and installed prior to the completion of closure of the tailings storage facility or dam.

Permit amendment or variance after closure

10.6.11 The manager of a tailings storage facility or dam that has completed closure but not achieved the release of permit obligations may apply for permit amendments or variances including but not limited to reduced frequency of monitoring, dam safety inspections and dam safety reviews.

Landforms

10.6.12 The manager of a tailings storage facility or dam that can be considered a landform may apply to the chief permitting officer for the release of permit obligations under the *Mines Act*.

Reactivation of impoundment

10.6.13 The owner, agent or manager may make an application for a permit to reactivate a closed or abandoned impoundment.

Decommissioning of Water Structures

10.6.14 A water reservoir or pond which is closed or declared inoperative by the chief inspector shall be breached or otherwise disposed of in accordance with the license under the *Water Sustainability Act* or permit under the *Environmental Management Act*.

Security

10.6.15 On the closure of a mine, and on the chief inspector being satisfied that some or all the conditions of the permit have been complied with, the person who deposited a security under section 10 (4) or 10 (5) of the *Mines Act* shall be entitled to refund of some or all of the security and any accumulated interest, less any amount paid out under section 10 (8) of the *Mines Act*.

Application for security release

10.6.16 An application for security release or a partial security release, that details the reclamation activities that have been completed under the requirements of the act, the code, and approved reclamation plan, shall be submitted to the chief inspector.

Reclamation Standards

Reclamation Defined

10.7.1 It is the duty of every owner, agent, and manager to institute and, during the life of the mine, to carry out a program of environmental protection and reclamation, in accordance with the standards described in section 10.7.4 to 10.7.21 of this code.

Pre-legislation Disturbances

10.7.2 Where environmental disturbance occurred at a site prior to the enactment of reclamation legislation in 1969, and has remained inactive since this time, the portion of environmental disturbance, which occurred before the enactment of reclamation legislation in 1969, is exempt from the re-vegetation provisions.

Exclusions

10.7.3 A reclamation standard prescribed under section 10.7.4 to 10.7.21 of this code does not apply where

(a) a mine is specifically excluded by a condition of its permit from complying with a particular standard, or

(b) a disturbance created by a mining activity has been reclaimed, inspected, and found to be satisfactory to an inspector.

Land Use

10.7.4 The land surface shall be reclaimed to an end land use approved by the chief permitting officer that considers previous and potential uses.

Capability

10.7.5 Excluding lands that are not to be reclaimed, the average land capability to be achieved on the remaining lands shall not be less than the average that existed prior to mining, unless the land capability is not consistent with the approved end land use or compromises long-term physical and/or geochemical stability.

Long Term Stability

10.7.6 Land, watercourses and access roads shall be left in a manner that ensures long-term physical and geochemical stability.

Re-vegetation

10.7.7 On all lands to be re-vegetated, land shall be re-vegetated to a self-sustaining state using appropriate plant species.

Growth Medium

10.7.8 On all lands to be re-vegetated, the growth medium shall satisfy land use, capability, and water quality objectives. All surficial soil materials removed for mining purposes shall be saved for use in reclamation programs unless these objectives can be otherwise achieved.

Landforms

10.7.9 Where practicable, land and watercourses shall be reclaimed in a manner that is consistent with the adjacent landforms.

Structures and Equipment

10.7.10 Prior to abandonment, and unless exempted by the chief inspector,

(a) all machinery, equipment and building superstructures shall be removed,

(b) concrete foundations shall be covered and re-vegetated, and

(c) all scrap material shall be disposed of in a manner acceptable to an inspector.

Dumps

10.7.11 Dumps shall be reclaimed to ensure long-term stability, and long-term erosion control.

Watercourses

10.7.12 Watercourses shall be reclaimed to a condition that ensures

(a) drainage is restored either to original watercourses or to new watercourses that will sustain themselves without maintenance, and

(b) the level of productive capacity shall not be less than existed prior to mining, unless the owner, agent or manager can provide

evidence which demonstrates, to the satisfaction of the chief inspector, the impracticality of doing so.

Open Pits

10.7.13 (1) Pit walls constructed in overburden shall be reclaimed in the same manner as dumps unless an inspector is satisfied that to do so would be unsafe or conflict with other proposed land uses.

(2) Pit walls including benches constructed in rock, or steeply sloping footwalls, are not required to be re-vegetated.

(3) Where the pit floor is free from water, and safely accessible, vegetation shall be established.

(4) Where the pit floor will impound water and it is not part of a permanent water treatment system, provision must be made to create a body of water where use and productivity objectives are achieved.

Blocking Access Roads

10.7.14 All access roads to surface areas of the mine that may be dangerous shall be effectively blocked to prevent inadvertent vehicular access.

Securing openings

10.7.15 (1) All shafts, raises, stope openings, adits, or drifts opening to the surface shall be either capped with a stopping of reinforced concrete or filled with material so that subsidence of the material will not pose a future hazard.

(2) In the case of shafts or raises, the stopping shall be secured to solid rock or to a concrete collar secured to solid rock and capable of supporting a uniformly distributed load of 12 kPa or a concentrated load of 24 kN, whichever is greater.

(3) Where there is evidence or a potential for use by wildlife, mine openings may be fitted with a barrier that allows wildlife passage but prevents human entry.

Drains

10.7.16 When mine openings are permanently closed and where it may be possible for mine water to build dangerous pressures and cause a blow-out of the fill or concrete with sudden and dangerous force, a permanent and effective drain shall be installed.

Metal Uptake

10.7.17 When required by the chief inspector, vegetation shall be monitored for metal uptake.

Ecological Risk Assessment

10.7.18 (1) When required by the chief inspector, the owner, agent or manager shall commission an ecological risk assessment.

(2) Where there is a significant ecological risk, reclamation procedures shall ensure that levels are safe for plant and animal life and, where

this cannot be achieved, other measures shall be taken to protect plant and animal life.

Disposal of Chemicals and Reagents

10.7.19 Chemicals or reagents, which cannot be returned to the manufacturer, shall be disposed of in compliance with municipal, regional, provincial and federal statutes.

Water Quality

10.7.20 If water quality from any component of the mine results in exceedance of applicable provincial water quality standards in the receiving environment, when required by the chief inspector, remediation strategies shall be implemented for as long as is necessary to mitigate the problem.

Monitoring

10.7.21 The owner, agent, or manager shall undertake monitoring programs, as required by the chief inspector, to demonstrate that reclamation and environmental protection objectives including land use, productivity, water quality and stability of structures are being achieved.

Release of Obligations

10.7.22 If all conditions of the Act, code and permit have been fulfilled to the satisfaction of the chief inspector and there are no on-going inspection, monitoring, mitigation or maintenance requirements, the owner, agent or manager will be released from all further obligations under the *Mines Act.*