Court Of Appeal Rules Waste Rock And Tailings From Historic Mine Belong To Mine Operator

Erin Reimer and Özge Yazar, lawyers in MT+Co.’s Litigation and Dispute Resolution Group, recently represented the Tahltan Central Government as an intervenor in the British Columbia Court of Appeal.

The matter before the Court was a second-level appeal of a decision of the Chief Gold Commissioner (“CGC”) regarding property rights to approximately 1.75 million tonnes of acid-generating waste rock and tailings deposited in Albino Lake within Tahltan Territory by the operators of the Eskay Creek Mine between 1994 and 2008. Crucially, the waste rock and tailings were deposited in Albino Lake pursuant to the operators’ environmental obligations, which continue to this day and are intended to prevent the release of acid into the environment.

The CGC determined that the prior operators were only entitled to “dispose of” their mining waste in Albino Lake – not to store it for future use – and had not demonstrated an interest in further developing the waste rock and tailings, and therefore had “relinquished” their rights to the waste rock and tailings to the Crown upon depositing them in Albino Lake. The CGC further determined that Richard Mill, an individual

who later staked a mineral claim to the area of Albino Lake, held the mineral rights to the waste rock and tailings. The Supreme Court of British Columbia upheld the CGC's determination and, in doing so, interpreted the *Mineral Tenure Act* as meaning that "mineral ownership rights do not travel with 'minerals' if they are moved from one location to another".[1]

Tahltan Central Government, the governing and representative body of the Tahltan Nation, intervened in both levels of appeals to ensure that the Supreme Court and Court of Appeal heard its perspective on the impact of these decisions on Indigenous interests. Specifically, Tahltan Central Government argued before the Court of Appeal that:

1. A mineral claimholder's rights to actively-managed waste rock and tailings would be fundamentally incompatible with a miner's ongoing environmental obligations, thus creating legal uncertainty and risk of ineffective or incomplete remediation of the Indigenous territories where mines are located; and
2. Indigenous Nations stand to be negatively impacted by this severance of rights from responsibilities, not only by the potential environmental degradation of their territories and consequential impacts on their Aboriginal rights and title, but also because it would undermine the consultation that initially occurred between the Crown and the Nation on the mine project.

Applied to the facts of this case, Tahltan Central Government argued that Skeena's environmental obligations to secure the mine site and keep the waste rock and tailings permanently covered by a minimum of one metre of water could not co-exist with Mr. Mill's alleged bundle of rights conferred by his mineral claim, including rights to access, explore, and bulk sample the waste rock and tailings.

The appellant, Skeena Resources Inc. ("Skeena"), successor of

the operators of the Eskay Creek Mine, was successful in its appeal against Orogenic Gold Corp. and Mr. Mill regarding the ownership of the waste rock and tailings in Albino Lake. The Court of Appeal released its reasons for judgment on July 4, 2024, indexed as *Skeena Resources Ltd. v. Mill*, 2024 BCCA 249. A summary of the lengthy judgment is provided below.

On appeal, Skeena argued that the Supreme Court judge erred:

1. in concluding there was no error in the CGC's conclusion that Skeena's surface lease over Albino Lake only permitted it to dispose of its waste rock and tailings – not store them for later use;
2. in concluding there was no error in the CGC'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
3. in concluding the Commissioner made no error in finding that Skeena "relinquished" (i.e. abandoned) the Mined Minerals the moment they were placed into Albino Lake.

The Court of Appeal agreed with Skeena, concluding that the CGC, and therefore the lower court, erred in all three respects. The Court of Appeal further concluded that that the CGC's error on the "relinquishment" issue was palpable and overriding, and therefore that his decision ought to be set aside.

In approaching the "relinquishment" issue, the Court of Appeal first set out the legal principles regarding abandonment of property before determining that the deposit of waste rock and tailings into Albino Lake did not mean that Skeena's predecessors relinquished ownership to those materials. The Court explained that the common law of abandonment requires a "giving up, a total desertion, and absolute relinquishment of private goods by the former owner" or "an indifference as to the fate of a chattel"[2], and reasoned that Skeena could not be "indifferent" to the fate of waste rock and tailings over

which it holds environmental management obligations. On this point, the Court acknowledged the potential impact on Indigenous interests, citing Tahltan Central Government's submissions, as follows:

[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.

As a result of the Court's decision, this issue will now be sent back to the CGC for reconsideration.

Footnotes

1. *Skeena Resources Ltd. v. Mill*, 2022 BCSC 2032 at para. 47.

2. *Skeena Resources Ltd. v. Mill*, 2024 BCCA 249 at paras. 67 and 69.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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