CITATION:	*Anderson v McCleary & Anderson v McCleary Investments Pty Ltd* [2008] NTMC 077
PARTIES:	THOMAS ANDERSON v NORMAN SYDNEY MCCLEARY THOMAS ANDERSON V MCCLEARY INVESTMENTS PTY LTD
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act (NT) Mining Act (NT) Criminal Code (NT)
FILE NO(s):	20733371, 20735303
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JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

SUMMARY OFFENCES – MINING OFFENCES – INTERPRETATION – WHETHER APPLICATION "LODGED" – CLAIM OF RIGHT

Mining Act (NT) ss 83, 21, 87, 164, 178
Criminal Code (NT) s 30.2
Mining Regulations (NT) r 28

McCleary Investments Pty Ltd v Hudson and Anor [2007] NTLR 196
Hong v Minister for Immigration and Multi Cultural Affairs (1998) 82 FCR 468
Talbot v NRMA Holdings Ltd (1996) 68 FCR 590; 139 ALR 755
Angus Fire Amour Australia v Collector of Customs (NSW) (1998) 19 FCR 477
CIC Insurance Ltd v Bankstown Football Club Ltd (1977) 187 CLR 384 at 408
Walden v Hensler [1987] 163 CLR 561
The Queen v Lopatta [1983] 35 SASR 101 at 121
Molina v Zaknich [2001] 125 A Crim R 401

R v Berhard [1938] 2 KB 264
R v Pollard [1962] QWN 13
R v Shivington [1968] 1 QB 166
The Queen v Langham [1984] 36 SASR 48
Director of Public Prosecutions Reference No 1 of 1999 [2000] 134 NTR 1
R v Bowman (No2) (1987) 48 NTR 48
Margarula v Rose [1999] 149 FLR 444

REPRESENTATION:

Counsel:

Complainant:	Mr T Anderson
Defendant:	Mr Tippett QC

Solicitors:

Complainant:	Solicitor for the Northern Territory
Defendant:	Maleys Solicitors

Judgment category classification:	B
Judgment ID number:	[2008] NTMC 077
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IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20733371, 20735303

[2008] NTMC 077

BETWEEN:

THOMAS ANDERSON
Complainant

AND:

NORMAN SYDNEY MCCLEARY
Defendant

THOMAS ANDERSON
Complainant

AND

MCCLEARY INVESTMENTS PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 4 December 2008)

JENNY BLOKLAND CM:

Introduction

1. Norman McCleary and his company, McCleary Investments Pty Ltd ("the Defendants") are each charged with 14 counts of making an application for a Mineral Claim without obtaining the approval of a Mining Warden to enter land the subject of the application contrary to s 83(3) and 83(5)(a) *Mining Act*. Counts 15 -28 are in the alternative and charge an attempt in each instance. Both Defendants pleaded not guilty to all counts. The offences are alleged to have occurred on 20 and 21 December 2006 and relate to applications titled "Ghan 1" through to "Ghan 7". It is important at the

outset to note that the charge is *not* simply marking out the relevant land without a Mining Warden's approval, but rather not obtaining the approval to enter the land for the purpose of marking it out prior to making the application for a mineral claim. As it is necessary to refer to the section for comprehension of these reasons, s 83 *Mining Act* (NT) is set out as follows:

> **83. Form of application for mineral claim**
>
> (1) In addition to the requirements of section 140D (if applicable) and section 162, an application for a mineral claim –
>
> (a) shall be lodged with the Department;
>
> (b) shall include a description of the land to which the application relates;
>
> (c) shall include concise particulars of the applicant's proposals for initial work and expenditure on the land;
>
> (d) shall state the names and addresses of the owners and occupiers of land that will be, or is likely to be, affected by the grant of the proposed claim;
>
> (e) shall state the percentages into which the proposed claim is to be divided; and
>
> (f) shall be accompanied by an amount of money sufficient to cover the cost of advertising the application as required by this Act.
>
> (2) An application under subsection (1) shall not be made in respect of land the subject of an exploration licence, nor shall a person enter the land for the purpose of marking out the land in the prescribed manner before the application is made, unless the holder of the exploration licence has consented in writing to the application being made.
>
> (3) An application under subsection (1) shall not be made unless the applicant has, prior to making the application, obtained the approval of a warden to enter the land the subject of the proposed application for the purpose of marking out that land in the prescribed manner.
>
> (4) An approval under subsection (3) shall be in the prescribed form and may be subject to such conditions, if any, as the warden thinks fit and specifies in the approval.
>
> (5) A person who contravenes or fails to comply with –

(a) this section; or

(b) an approval granted under subsection (3),

is guilty of an offence.

Penalty: $5,000.

2. Despite contrary indications during the pre-trial management of this matter, a significant number of the facts have not been disputed. After Mr Anderson's (the prosecutor's) opening, counsel for the Defendants, Mr Tippett QC advised the Court that the Defendants would be relying on *honest claim of right* provided in s 30(2) *Criminal Code*(NT). It is still useful to describe the background to the critical events and relevant parts of the *Mining Act* as it bears on the significance of those events.

3. It is not in dispute that on or about 21 November 1990 the relevant Northern Territory Minister gave notification that an area in the Amadeus Basin, was declared *reserved from occupation* pursuant to s 178 *Mining Act* (NT). The relevant Reservation from Occupation ("RO") is number 1292 and that covers the Angela and Pamela uranium prospects. The Court was told those prospects were discovered in about 1970. The area had been actively explored until the early 1980's. When the reservation from occupation was declared in 1990, exploration ceased. Through some of the witnesses and in submissions there has been some discussion on whether that cessation was a consequence of the market conditions but nothing significant appears to turn on that point for the purpose of these proceedings. Following a review of RO's by the Department of Mines, on 2 November 2006 the then Minister announced a number of RO's would be revoked including 1292. Other interests relevant to the land the subject of RO 1292 included the Owen Springs Perpetual Pastoral Lease, a stock route, a Perpetual Crown Lease in favour of the Ghan Preservation Society and the Undoolya Perpetual Pastoral Lease. As a result of the announcement by the Minister an advertisement was placed in the Northern Territory News and a website set up to give public information about the release of land as a result of some 18

RO's being revoked. It was expected there would be significant interest in the Angela and Pamela uranium prospects.

4. The information package (Exhibit P12) includes an invitation to lodge "Exploration Licence Applications" in accordance with the *Mining Act*. The *Mining Act* (NT) regulates rights and obligations in relation to exploration and may lead to the application and potential granting of a Mineral Lease under part VI *Mining Act* (NT). In terms of Exploration Licences, if lodged on the same day, those Licences are of equal status. Part IV *Mining Act* (NT) regulates "Exploration Licences". The relevant applications under scrutiny in this case however are dealt with by Part VII *Mining Act* (NT) "*Mineral Claims*". A *Mineral Claim* involves what has been colloquially referred to in these proceedings as "pegging a claim" with the appropriate documentation. The Mineral Claim has been explained as something of a hybrid interest under the *Mining Act* (NT) as if the Mineral Claim is granted, it may in turn allow exploration and mining: (s 87 *Mining Act* (NT)).

5. The issue of staking the claim becomes significant as in general where two or more applications are lodged under the *Mining Act* (NT) for the same land, the applicant who lodges first receives priority in the consideration of their application: s 164(2). Where the applications are lodged on the same day they have equal priority: s 164(2) *Mining Act* (NT). An application for a mining tenement other than a mineral lease is deemed to be lodged at the time *when the area of land which is the subject of the application is marked out in accordance with the regulation:* s 164(3) *Mining Act* (NT). Under s 164(4) *Mining Act* (NT) an application for an Exploration Licence received by the department after close of business on a particular day is taken to be lodged on the next day the department is open for business. The prosecution case is that it was evident that Mr McCleary was motivated by his view that he could mark the claim at midnight (or just after) once the revocation of the RO was in effect and by operation of the *Mining Act* (NT) he could be deemed to have priority under 164(3) *Mining Act* (NT) over Exploration

Licences. To proceed in this manner meant the Defendants would need the permission of a Mining Warden. As mentioned above, the offence charged is *making the application* without the prior approval of the Warden to enter the land and mark it.

6. Section 83(5) *Mining Act* (NT) is the offence creating provision, making it an offence for anyone to contravene or fail to comply with the section. As noted at the stage of the prima facie case ruling (referred to later in these reasons), that provision is difficult to apply literally to the whole of s 83. For instance, it is difficult to envisage that the intention of the section is to create an offence that inculpates a person who has merely completed an application for a Mineral Claim but has not within the contemplation of s 83(1)(a) "lodged it with the department". Similarly, it would seem perverse that it was intended that every failure to comply with each part of 83(1)(a) to (f) would amount to an offence. For the offence under s 83(3) *Mining Act* (NT) to be complete, the requirements listed in 83(1)(a) to (f) must be proved.

7. As indicated above, the Defendants apparently became aware of the revocations and the consequent opening up of the land in question for exploration or claim. Mr McCleary engaged Sandra Johnson of Capricorn Mapping and Mining Title Services to make an application for Mining Warden's approval filed on 4 December 2006: (Exhibit P1). Mr McCleary travelled to Alice Springs on the 3rd and 4th December 2006 to prepare for the pegging; on 6 December he spoke to an officer of the Department of Primary Industries, Fisheries and Mines (Mr Whitfield) to ascertain the outcome of an approval application to enter the land and peg it. The Defendants' solicitors also became engaged in the process. On 7 December 2006 the Defendants and persons engaged by them for that purpose commenced pegging at or just after midnight.

8. On or about 18 December 2006 Mr McCleary instructed Ms Johnson to prepare seven Mineral Claim applications with instructions that they be lodged on behalf of the Defendants. Ms Johnson queried that she thought there would be a problem with obtaining the Warden's approval and she forwarded the claims to Ward Keller. It is alleged Mr Parnell of Ward Keller took the applications to the Department on behalf of the Defendants on 20 December 2006. They were viewed and returned to him. On 21 December the Mineral Claims were forwarded again to the Department. Mr McCleary has maintained that the approval should have been given to him. He litigated the issue in the Northern Territory Supreme Court: (*McCleary Investments Pty Ltd v Hudson and Anor* [2007] NTLR 196). There is no issue about the corporate liability of the Defendant Company being on the same terms as Mr McCleary as it appears to be accepted that Mr McCleary is the mind and will of the company to the extent required to attribute criminal responsibility to the company. In this context the prosecution submit that it is not relevant whether approval from the Mining Warden *should* have been given but rather it is whether an application was *lodged* without obtaining the approval to enter the land.

9. The prosecution has submitted that the Defendants' motive was to exploit a "loophole" in the legislation to obtain an advantage over others and that the Defendants were trespassing on the Pastoral Lease when involved in pegging the claim. As noted, the Defendants have challenged the legitimacy of the Mining Warden's refusal in the Northern Territory Supreme Court, were not successful and it was common ground before me that the Defendants had settled with the Northern Territory prior to an Appeal. Similar beliefs as to the legitimacy of the Warden's decision were expressed in this Court on behalf of the Defendants albeit in the context of the excuse of *honest claim of right*. There is of course a different burden of proof in these proceedings in that the prosecution must negative the claim of right to the criminal standard once it is legitimately raised on the evidence.

Summary of Evidence called by the Prosecution

10. In her capacity as agent for Defendants and proprietor of Capricorn Mapping and Mining Titles Services, Ms Sandra Johnson, (obviously a very experienced business person in the mining industry), received instructions from the Defendant Mr Norman McCleary; she recalls she was contacted about the issue of approval for the Angela and Pamela area; an area was selected and she spoke to Mr McCleary about obtaining Warden's approval; she said she thought there would be a problem getting Warden's approval. Ms Johnson said she told Mr McCleary that she thought the Warden's approval was refused and may take more than one day in this instance. When it came to lodging the Mineral Claim applications she said she told Mr McCleary that she would prefer not to actually lodge his application because they didn't have Wardens approval. She said she thought a "legal person" should lodge the applications and in response Mr McCleary told her he was instructing Ward Keller. She identified the seven applications (Exhibit P3) noting her signature at Part 12 and Mr McCleary's credit card details. She said she created the documents and her assistant hand delivered them to Ward Keller. She said that from the time of pegging there is 14 days to lodge the claim, otherwise the claim lapses. She also gave evidence that the Angela and Pamela deposits had been explored extensively for twenty years and that fact was well known in the industry. She agreed there was effectively an invitation by the Northern Territory Government to make claims on those two prospects. She said she thought it was unlikely that the claims would be accepted.

11. Mr Augustine Parnell, a legal practitioner was at the relevant time working for Ward Keller and acting for the Defendants. Mr Parnell received the letter of 18 December 2006 from Ms Johnson (Exhibit P2) confirming instructions for Ward Keller to lodge the applications with the Department. It is confirmed in that letter that the mineral claims were all pegged at "1 second past midnight on the 7th December 2006".

12. Previously (on 7 December 2006) Mr Parnell wrote to the Mining Warden requesting reasons for refusal of permission (Exhibit P7) to enter the land. On 7 December the Mining Warden responded to Mr Parnell (Exhibit P8) stating "I am aware that due to applications for exploration being received pursuant to section 21 of the *Mining Act* (NT) that there is no land available within the subject area that is requested by McCleary Investments Pty Ltd, accordingly the request for approval to Enter on Land is refused".

13. On 18 December 2006 Mr Parnell wrote to the Chief Executive of the Department of Primary Industry and Fisheries and Mines suggesting that given the refusal of the Mining Warden it would be inappropriate to grant any licence under the *Mining Act* (NT) prior to giving reasons for refusal to the Defendants.

14. Mr Parnell said he received documents from Capricornia Services in a box and took them as instructed by the Defendants to the Department on 20 December 2006; that "a lady" stamped them; that she consulted someone he believed to be the Registrar, Mr Whitfield and was then advised that the applications would not be taken as no approval to enter the land had been given. He said he might as well have been told to take them away. He took the documents back to Ward Keller. On 20 December he sent the mineral applications again, this time by registered post to the Department (Exhibit P10), as instructed. He said he was not instructed to seek Warden's approval.

15. Mr Whitfield, the Principal Registrar of Department of Primary Industries, Fisheries and Mines (as it was then known "the Department") gave evidence that he had some 30 years in the mining industry as well as formal qualifications. He was aware of RO 1292 as he was involved with the request of the then Minister to review ROs. He said a decision was made by the Minister in November 2006 and it was publicly announced that RO 1292 would be revoked. The Department was then tasked to deal with the legal

process of the revocation and deal with the consequences of the revocation as it was anticipated there would be many applications and the department wanted to accommodate those applications. He referred to the information package (Exhibit P12) including the guidelines.

16. He confirmed the revocation was published on 6 December 2006 to be effective from 7 December 2006. On 6 December 2006 he said he spoke to Mr McCleary as he received a message from him and phoned him later that day. He said Mr McCleary asked whether the Warden's approval was forthcoming and he advised that the Warden was preparing a response. Mr Whitfield said he told Mr McCleary that he understood the Warden would not be approving the application and he understood that the Warden was typing a response. Mr Whitfield said he did approach the Warden as he was not sure if the Warden was aware of the information in the package or aware of the release of the ROs (see Exhibit P13).

17. He said that on 20 December 2006 Mr Parnell attempted to lodge the applications and a staff member brought those applications to his attention. He went to the front counter and he and Mr Parnell introduced themselves to each other. There was some discussion about lodging mineral claims and there was a bundle of papers; Mr Whitfield said he didn't take them all out of the box but picked up the first bundle and in that conversation said that they could not be accepted as the Warden's approval was a pre-requisite. He said it appeared Mr Parnell did not know about the necessity for approval and on the applications the Warden's approval to enter the land was not ticked. He said he was told Mr Parnell had not personally drafted the applications; he was told they came from Capricorn Mapping; Mr Parnell stated he didn't know anything about Warden's approval and he took Mr Whitfield's business card. Mr Whitfield said he next saw the applications the next day being 21 December 2006 as they were delivered to his office.

18. Mr Whitfield wrote to Mr Parnell on 15 January 2007 (Exhibit P14) giving his reasons for being "unable to accept lodgement of the applications" and pointing out s 83(3) *Mining Act* (NT). He also advised the applications could be collected from the Minerals and Energy Titles Division. He said he didn't think the Department retained original copies of the applications.

19. In cross-examination Mr Whitfield confirmed that his view was that for Mineral Claims to be lodged, they needed to show there was Warden's approval. He said the applications of 20 December 2006 and 21 December 2006 were not "lodged". Mr Whitfield essentially agreed that it was Exploration Licences that were expected following the revocation of the RO applicable to the Angela and Pamela prospect. He said he was aware that there was some published data in relation to these prospects but he had only limited data in the Department. He said he had received correspondence from a number of companies with interests in the area including some major companies in a joint venture. He disagreed with a proposition that the Department had "favourites"; he agreed that McCleary Investments was small compared to other companies involved. He agreed the information package had no stated restriction involving other forms of mining tenement other than Exploration Licences. He did not agree that it was a "*disaster"* that the revocation exposed the subject land to other interests other than exploration. Mr Whitfield said he didn't see the application for pegging as a significant problem; he did not tell the Minister about it and he was not aware that anybody else had told the then Minister. He said he did realise it was a problem that the Minister had approved a process for the orderly release of land and the Defendant's applications were a problem in that context.

20. He agreed the Defendants had a right to make an application consistent with the *Mining Act* (NT), however he said this was on the proviso that he had approval. He said he didn't speak to the Mining Warden to stop the Defendants' application but to inform the Warden of the process of the

release of land. He disagreed that it would have been *"cringingly embarrassing"* for the Defendants' application to be accepted. He agreed he became aware of the application to "peg" most likely late on 4th December 2006 and he realised it was inconsistent with what was planned. He agreed he was told of the contents of the application to peg. He maintained he spoke to the Warden to give him the information package and ensure he was aware of the process. He said it was up to the Warden to make further enquiries and he left those materials with him, although he agreed he mentioned to the Warden that he had a call from Norm McCleary that he felt obliged to take. He said he understood the Warden had to determine whether he had the power to give approval prior to the revocation of the ROs. He said he advised Mr McCleary that the application would be refused as he had been informed by the Warden of that fact. He said he didn't advise Mr McCleary *not* to go onto the land as it was up to the Warden to approve or not approve. He agreed he had a meeting on 5 December 2006 in relation to obtaining legal advice concerning the matter.

21. The Mining Warden, Mr Hudson also gave brief evidence in these proceedings indicating in relation to RO 1292 there were no other applications to enter the land at the relevant times. In cross-examination he said he believed that he was present at a meeting at the Department of Justice with Mr Matthew Storey and another legal officer. He agreed he spoke to Mr Whitfield and was provided with the information package. He agreed he received the request for approval to enter land on 4 December 2006 (attached to Exhibit P6). He agreed when the revocation took place it did not come with a condition that only Exploration Licences would be permitted. He said as a result of the response by Ward Keller he had sought further legal advice. He said he made up his mind to refuse, typed up the letter and faxed it to Ward Keller. He sought further legal advice on 6 December 2006. He agreed the refusal was made on 6 December 2006 and there was a second request for approval on 7 December and he responded

that there was no land available. Mr Hudson maintained that he acted independently of Mr Whitfield save that Mr Whitfield provided him with information. He said he was not advised of any particular government policy over 4th, 5th and 6th December 2006.

22. Tendered also in the prosecution case by consent are affidavits sworn by the Defendant Mr McCleary in support of the action brought by McCleary Investments Pty Ltd in the Northern Territory Supreme Court (Exhibit P16) and an extract of transcript of evidence given by Mr McCleary before the Northern Territory Supreme Court (Exhibit P17). Most of this material is repeated in the evidence Mr McCleary gave before this Court and it is unnecessary for me to set out the material in the affidavit here and it is referred to where relevant in other parts of these reasons.

Evidence Given by the Defendant Norman McCleary

23. Mr McCleary confirmed he had read his affidavits from the previous proceedings in relation to the Angela and Pamela uranium deposits. He said there was an announcement that a group of RO's were going to be opened up; that prior to December 2006 he hadn't physically been to the land but had done research over many years of thousands of "occurrences" in the Territory. He had read about it but had "put it on the back burner" because of the *three mines policy*. In relation to the information available on government files about the prospect he said it wasn't fully comprehensive but it indicated "without a doubt" that there was something of great significance in the area. Mr McCleary set out his experience as a miner commencing with "pegging claims" in the 70's or 80's and developing his first company, "Arafura Resources", now a medium sized company working on projects. He said he has seeded about six or seven Northern Territory companies in the stock exchange and Pamela and Angela opening up was seen as an opportunity to increase his position; it was seen as an interesting deposit and the Territory Government "were pumping it like mad".

24. He said he looked at the web and also applied to the Department for the information package. He noted what was on the web initially and the information package were different. He said when he looked at it closely he could see that under a s 178 reservation the Government had two ways of releasing the land. He said the Government had the right to call for expressions of interest, take all the application in and then choose the best applicant. He noted that in this particular case they chose not to do this. He said they chose to extinguish the RO and "by extinguishing the RO as at one second past midnight on the morning of 7th the land appeared to fall open for all types of applications". He contacted Sandra Johnson to assist with an application. He said he was interested in Mineral Leases and Mineral Claims as they give a priority in time whereas an Exploration Licence is only a priority for a day.

25. He agreed that on 2 December 2006 he completed the application for approval (Exhibit P1) and sent it to Sandra Johnson to make sure that all the searches were completed. They decided that 4th December would be appropriate to file it with the Department. He said it was his "total belief that the Warden would grant approval as had always happened before and I would peg my Mineral Claims and lodge them in the fullness of time". The reason he thought this was "the Department had made it clear that they wanted and expected mining interest over this area. They invited people and advertised for it to take a mining interest in this area and after looking at the documents I took an interest in it ok". He said he believed approval would be automatic. He said on every other occasion he needed to speak to a Warden they had been helpful.

26. He went to the site on 5th or 6th December "to have a look", in preparation for pegging. He flew people from Darwin and the USA to assist. The cost was between $25,000 and $30,000. He outlayed this money as he expected approval as the Government had invited applications and hadn't excluded the use of Mineral Claims of Mineral Leases.

27. When he commenced pegging at one second past midnight on 7th December he said he had received no information from the Warden at all; "we were acting blind". He said he was always of the opinion that the Warden's approval would automatically come so he progressed on the basis that the approval was definitely forthcoming; he said there was no reason to refuse him. He said he rang Mr Whitfield because he had no firm decision. He said Mr Whitfield told him the Warden intended to refuse the application and he thought "this guy is pulling my leg". He tried his agent and Ward Keller and couldn't get onto them. Despite this he said he is "still of the belief unfortunately that it should have been automatic. I should have had approval". He said he received news of the Warden's refusal at approximately 9 or 10 o'clock on the morning of the 7th December 2007. He said he did not understand, he knew that the Warden was wrong, "this has never happened before". He said he still maintained this belief even after the Supreme Court decision ruling against him.

28. He said he pegged 7 leases that morning and Sandra Johnson was on standby to receive information to prepare the applications for the Mineral Claims. He confirmed he instructed Ward Keller on 20th December to take the applications that Sandra Johnson had prepared to the Mines Department (Exhibit P3). He agreed he was aware at the time he put these Mineral Claim applications in that the Warden had refused permission, both concerning the request for approval on the 4th and the 7th December. In relation to his knowledge of the status of the applications the following exchange occurred:

> *Mr Tippett:* And you were aware that these application forms required the Warden's approval to be granted and the approval attached to the application, well why did you put in these applications?
>
> *Mr McCeary*: It was my belief that the warden was in error. All of the indications that came before this such as the opening of the RO's, the advertising by the Government, gave me the belief that I had the right to do what I did.

Mr Tippett: Assuming that the Warden's approval had been granted was there anything you can see in these application forms that would deprive you of a registration of the Mineral Claims?

Mr McCleary: No Sandra does good work and I trust her explicitly.

Mr Tippett: Assuming these application forms were processed and registered with the Department what would you receive as a result of that?

Mr McCleary: I believed that the department would grant in the fullness of time valid Mineral Claims.

Mr Tippett: Did you believe at the time that you made those applications that you had a valid Mineral Claims?

Mr McCleary: Very much so.

Mr Tippett: As a result of your belief did you subsequently take proceedings in the Supreme Court to strike out the Warden's refusal to grant you approval?

Mr McCleary: I did.

Mr Tippett: And those proceedings were unsuccessful?

Mr McCleary: Very painful.

Mr Tippett: Did it cost you a lot of money?

Mr McCleary: Approximately $400,000.

29. Mr McCleary was cross-examined on the context of some evidence he gave that Pastoral Leases were not private land until recent legislative amendments. He said that his memory at the time was that the Wardens approval was not required apart from private land. He agreed if he wanted to peg a claim on freehold land he had to apply to the Warden. He said he had never been required to obtain consent of the freeholder by the Mining Warden. He agreed he had no experience of the Warden seeking the consent of a freeholder in the case of any application he made for approval. He was referred to his own and Ms Johnson's evidence that he made a first application for approval in relation to Angela and Pamela on 17th November

2006. He agreed he was informed that application was rejected because it was too broad. He was asked by Mr Anderson:

> "You were therefore aware that in certain circumstances that an application for approval would he rejected by the Warden".
>
> *Mr McCleary:* "I was aware that the application that we made was seen by the processing officer whether that was the warden, in fact we were dealing with a lady by the name of Ms Denise Turnbull and I didn't know that she was a warden, I was dealing with my application with Denise Turnbull".
>
> *Mr Anderson*: "You understood that she wasn't even prepared to put it before a Warden".
>
> *Mr McCleary*: "No I never heard about that, that is new evidence".
>
> *Mr Anderson:* "I am just asking do you know whether if a warden considered that one".
>
> *Mr McCleary*: "No I don't".
>
> *Mr Anderson*: "In any event you accepted that application was inappropriate and you effectively withdrew it right".
>
> *Mr McCleary:* "No I was told that the application was too broad and I should put in a more precise application that was what I was directed to do by Denise Turnbull".
>
> *Mr Anderson:* "So you accepted in that case that there was no automatic right to approval of that application that you put in".
>
> *Mr McCleary*: "No as far as I knew Denise Turnbull was just an office jockey and the office jockey had said hey listen you need to bring your application down, we want a different application from you so that is what I did".

30. In relation to Ms Johnson's discussion with him, Mr McCleary agreed she had said something like "you will require the Wardens approval" and "Norm you do realise that you will require the Wardens approval". He said he couldn't remember her saying that she foresaw trouble with the approval. He agreed it was his understanding at the time that Exploration Licences received on the same day were given equal priority and once an Exploration

Licence application has been made over certain land it is not possible to make a further application over the same land the following day. He also agreed that once a Mineral Claim application is made it is deemed by virtue of the Act to be made at the time that the pegging is done. He agreed his thinking was that by pegging the land as soon as the land became released from occupation and before any Exploration Licence applications were made he would gain priority for consideration of his claims over any Exploration Licence applications. On whether he was aware that by obtaining approval he would disrupt the anticipated process he said: "I was there complying with the *Mining Act*, nothing more, nothing less, the Act was very plain and very straight forward and gave me the right to do what I did and I did what the Act said I could do". On whether he was intending to undermine the process in the information package he said: "No, I never thought about it because if that was the governments objective at the time it would have called for expressions of interest and released the land under the mechanism of a section 178, it didn't choose to do that so therefore it was opening the land for anyone and everyone to make an application or to progress their claim as the Act allowed us".

31. He agreed Ms Johnson convinced him that the warden may need more than one day to make a decision in this case. He didn't agree the Warden needed to consider matters other than detriment of a landholder. He disagreed with suggestions that his pegging would interfere with the Perpetual Crown Lease or the Darwin to Adelaide railway. He said if there were any issues the Department would exclude it in its vetting process, but those types of interests are not excluded by the Warden. On whether he became aware that the Warden had expressed concerns on the 5th of 6th about his authority, Mr McCleary said: "No he was wrong". He said the Warden was wrong in stating he was taking into account the information package. Mr McCleary said that even after the conversation with Mr Whitfield, (his recollection differed from Mr Whitfield), he still believed that the approval would come

to him automatically. He agreed that he knew at the time of the application that he didn't have approval from the Warden. He said Ms Johnson said: "there is bad feeling in the Department and I feel I am under attack and I don't want to have any further dealings with the Department on your behalf and I said give the applications to Austin, he can drop them down". He said he couldn't remember Ms Johnson telling him that she didn't think they would be accepted by the Department because of the lack of approval by the Warden. He said: "I thought I was entitled to these Mining Claims so it was always my aim to give them to the Department to further my claims which I think are totally legal and I still believe that that is what I wanted to do". He was asked:

> "But your knowledge of the Mineral Act is that you can't make an application for a Mining Claim unless you obtain the prior approval of the Mining Warden to peg your land".
>
> *Mr McCleary*: "That was my understanding correct".
>
> *Mr Anderson*: "Your view at this time was that you had one of two tickets in a billion dollar lottery, do you remember using those words"?
>
> *Mr McCleary*: "Quite possibly".

Proof of the Physical Elements of the Charges

32. Save for one issue of controversy, (and of course subject to *claim of right*) it appears to be accepted that the physical elements of the charge have been proven. There was no Mining Warden's approval to enter the land for the purpose of marking out the land prior to the applications of 20 and 21 December 2006 being made. It is important however to record here that I made a ruling that there was a prima facie case despite an argument that the applications of 20 and 21 December 2006 could not be said to be "lodged" within the meaning of s 83(1)(a) *Mining Act* (NT) as the applications had been rejected by the Registrar, Mr Whitfield. The argument was put that the Mining Warden's approval was a condition precedent to "lodgement" in the

terms of s 83 *Mining Act* (NT). As indicated at the time of the ruling, the submission is consistent with the Registrar's view. Over objection from the prosecutor I allowed the Registrar to give evidence of his practice and understanding of the operation of the *Mining Act* (NT). At the same time, it is accepted that it is for the Court to determine whether the applications were "lodged" as that term is understood as a matter of law.

33. Although at a number of levels the argument put on behalf of the Defendants is an attractive argument, the prosecution has argued the line of authorities culminating in *Hong v Minister for Immigration and Multi Cultural Affairs* (1998) 82 FCR 468 – (Full Federal Court) that stands for the proposition that a document is "lodged" (in that setting with a court or tribunal) when it is physically deposited with the court or when it comes into possession of the court by some other means, (including in that case, facsimile). There is no requirement according to that decision that there be conduct by court staff signifying acceptance of the document.

34. At 471 the Court states:

> "What will suffice to satisfy that requirements that a document be "lodged" with a registry? The word "lodge" appears to us to have no special or technical meaning. It is then to be given its ordinary meaning. A reference to the *Oxford English Dictionary* shows that the word has a number of meanings but two appear but two appear apposite. They are:
>
> > "c Deposit in a specified place of custody or security
> >
> > e Deposit in court or with an official a formal statement of (a complainant, objection, etc); bring forward, allege, (an objection etc)"
>
> In accordance with these meanings an application to review will be "lodged" when it comes into the possession of a Registry or the staff of a Registry. The means by which possession is obtained does not matter. It could come about when an application is delivered into the hands of the Registry Staff or, if the application is posted, when it is received by the Registry. When an application to review is sent by facsimile transmission to a facsimile machine that is located in the

> Registry the application will be in the possession of the Registry when the transmission is complete; compare *Talbot v NRMA Holdings Ltd* (1996) 68 FCR 590; 139 ALR 755".

35. Essentially, physical receipt of the document, no matter how brief appears to suffice. In contrast the Court notes that the word "filing" or "file" takes on quite a different meaning that requires an act of the Court or the body in receipt of the document. Reference is also made to *Angus Fire Amour Australia v Collector of Customs* (NSW) (1998) 19 FCR 477 where an application was sent to the AAT and returned because it was not accompanied with the prescribed fee, nevertheless it was held to be "lodged" if it was received by an officer. In *Hong*, the Full Court rejected an argument to the effect that there had to be some conduct of Registry staff signifying acceptance.

36. It will be recalled the evidence is that Mr Parnell took the documents to the Department on 20 December 2006 – the Registrar picked up at least the first bundle and said they would not be accepted. Mr Parnell left with the documents. On 21 December 2006 they were posted to the Department and although received, the Department returned them.

37. Certainly the way the Registrar conceives the matter assists the Defendants' submission, however I accept I have to determine this question according to the statute.

38. The practice of the Registrar and the Department would appear to be that they reject lodgement of applications where the approval of the Mining Warden has not been given.

39. The Registrar is of course entitled to reject the applications. Given the legal authorities of what constitutes "lodgement" however, rejection of the application, even if described in terms of "rejection of the lodgement" as the Registrar has put it, does not alter the legal effect of what has occurred. The Registrar is entitled to reject an application under s 83(3) if it does not

comply with that fundamental requirement. If it has physically reached the Department however, as a matter of law it is "lodged". In the case at hand, it is true the "lodgement" was extremely brief – as indicated at the prima facie case level I could describe the application as having "bounced", but it was "lodged" in terms of the meaning of that word derived from case law discussed.

40. There is the broader question of the construction of s 83 *Mining Act* (NT). Despite s 83(5) creating offences for non-compliance, as mentioned at the outset, it would be wrong to interpret every act of non-compliance as capable or amounting to an offence. For example, s 83(1) states an application "shall be lodged with the Department". It seems highly unlikely that the legislative intent is to create an offence of "non-lodging". Indeed, most of the requirements in 83(1)(a) – (f) appear more in the nature of formal requirements not necessarily resulting in an offence being committed for breach. If applicable in a given case, the requirements of s 162 must also be complied with and are requirements of a similar character to those listed in s 83(1). The character of s 83(2), (3) and (4) are quite different, clearly capable, of forming the basis of offences if not complied with.

41. The modern approach to statutory interpretation insists that context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise and uses context in its widest sense to include such things as the existing state of the law and the mischief if any sought to be remedied. (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1977) 187 CLR 384 at 408). I appreciate also the principle that the objects of the section and the legislation as a whole need to be borne in mind when construing s 83(3). Clearly the section seeks to ensure that relevant issues are considered by a Mining Warden before applications are processed. It is instructive to consider what would happen if there were not immediate rejection of an application where no Mining Warden's approval has been given – for instance, a person could lodge a claim, if the Registrar hadn't

noticed for example that a Mining Warden hadn't given approval, the application could proceed much further down the track of being processed than in this case. Perhaps if the lack of Mining Warden's approval wasn't noticed for some months – when noticed the application may well be rejected or presumably sent back as in this case. On the Defendant's argument it would not be considered to be "lodged" because the Wardens approval was not given. Clearly that would defeat the purpose of the section. If the Defendant's argument is correct there could never be an offence committed under s 83(3) – save for attempts.

42. In my view s 83(3) creates a mandatory pre-condition that is different in character to the requirements under s 83(1). Although an application without Warden's approval may well be rejected at any stage administratively by the Department, that does not prevent it, as a matter of law from being "lodged". To adopt the view urged on behalf of the Defendant does require a reading that is endlessly circular, hence I rejected the submission that there was no prima facie case and confirm the view that all external elements of the charges have been proved.

Claim of Right

43. I accept a large part of what the Defendant has said of his belief as to the state of affairs concerning his involvement at Angela and Pamela prospects. I accept that he saw an opportunity with the revocation of the ROs and he noted there was a no restriction in the revocation or the information package in terms of the types of claims that could be made. I accept his submissions for approval to enter the land were made in the expectation that approval could be granted in this situation, based on his previous experience and the fact he is an experienced miner and holder of a Miners Right. I don't accept however, he could have possibly thought that in this situation it would be automatic. Even though there is some dispute on the content of a number of relevant conversations, overall there is evidence from Ms Johnson and Mr

Whitfield that there would be problems with approval in this instance, probably due to the fact there was so much interest in those prospects. Mr McCleary also was aware that his first application for approval had some problems given its breadth. In my view the prosecution have negated beyond reasonable doubt a belief that Warden's approval would in this case be automatic. I accept also that the Departmental Officers were not expecting submissions for permission to 'peg' would be made in relation to these prospects as they had taken all steps to ensure an orderly process primarily through *Exploration Licence* applications. The part of the information package dealing with Angela and Pamela Uranium Prospects refers to applicants addressing "all relevant statutory requirements for exploration licence applications……" It would appear it was not envisaged that Mineral Claims would be made over the Angela and Pamela Prospects. The Defendant became aware of the possibility of staking out the Mineral Claim given the apparent omission. Given that omission it appears reasonable that the Mining Warden had the information package drawn to his attention by the Registrar. Mr McCleary appears to be suggesting that the Mining Warden rarely has anything to consider and effectively was expected to automatically approve access in this situation. That belief on his part is part of his evidence I can't accept.

44. The fact that Mr McCleary thought he could prove the Warden's decision of refusal was wrong doesn't in my respectful view meet the criteria for the requisite belief for *claim of right* over the Angela and Pamela Prospects in defence of this charge. The *claim of right* asserted in respect of the Crown Lease that he believed was being opened up for claim is one thing. Depending on other facts, it is conceivable that may lead to successfully raising claim of right in defence of a charge of (say) trespass, but that doesn't correspond to an element of a charge against s 83(3) *Mining Act* (NT). The claim of right asserted is that Mr McCleary took steps to secure his interest over the property by way of pegging and marking it out. He

asserts there was no basis for the approval not being forthcoming; he couldn't believe he was being refused as he could see no legal impediment and the regulations permit 14 days from pegging or such other time as set by the Secretary of the Department to lodge the claim. Reg 28 of the *Mining Regulations* provides:

> **28. Manner of lodging applications**
>
> (1) A person making an application for a mineral claim must before making the application mark out the area that is the subject of the application.
>
> (2) The person must lodge the application for the mineral claim with the Department –
>
> (a) within 14 days after completing marking out of the area the subject of the application; or
>
> (b) within any longer period allowed by the Secretary.

45. I have come to the view that it is more wishful thinking on the part of Mr McCleary than genuine belief that the Warden would be corrected and hence his rights as a miner to the Crown lease validated without need for compliance with the *Mining Act* (NT). That is partly as a result of the evidence I have mentioned of Ms Johnson and Mr Whitfield. Even if Mr McCleary proved the decision of the Warden was wrong at a later time, he acknowledges he knew that at the time of filing the applications he needed Warden's approval. I appreciate he believed the Warden's decision was wrong and has taken significant steps to prove that to be the case, but it doesn't help him with asserting claim of right concerning this charge.

46. Section 30(2) *Criminal Code* is relied on and provides:

> "A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, properly in the exercise of an honest claim of right and without intention to defraud".

47. Honest *claim of right* is widely accepted to apply in circumstances where the existence of any state of mind which is an element of an offence, may be negated by an honest belief in the existence of a circumstance (fact or law or both) which, if true would make the impugned act innocent. The honest belief may relate to a circumstance that involves a "mistake of law"; *Walden v Hensler* [1987] 163 CLR 561 at 581; *The Queen v Lopatta* [1983] 35 SASR 101 at 121. His Honour Justice Deane in *Walden v Hensler* at 581 states:

> "It should be apparent from the foregoing that the answer to the question whether an honest belief of entitlements to act in a particular way with respect to property constitutes a defence or honest claim of right under s 22 of the Code can only be ascertained by reference to the elements of the alleged offence. If actual knowledge of criminality is an element of the offence, a defence of claim of right will be available to negate that element of the offence if the claim of right results in the absence of such knowledge. In the ordinary case where knowledge of the criminal law is assumed however, a defence of claim of right will not be well founded unless what was claimed or believed would, if it were the fact, have negatived an element of the actual offence or provide a good defence to it".

48. His Honour's reasoning when applied to this case has the result that even if the Defendants were correct that the Mining Warden was wrong, that does not negate an element of the charge under s 83 *Mining Act* (NT). Mr McCleary knew he needed the Warden's permission to proceed in the way that he did. At times in his evidence he has said he thought he could continue to assert his claim – that doesn't assist as he still knew he needed the Warden's permission to proceed with a Mineral Claim application. He is obviously aggrieved at not being given approval by the Warden especially given the outlay of expenses and noting he took significant steps to challenge the decision, however, he still knew of the statutory requirement and I cannot accept he thought that by proving the Warden wrong would lead to him being excused from compliance from a regulatory aspect of the *Mining Act* (NT).

49. I agree with the submission that claim of right is available in a wide range of circumstances. In submissions a wide range of cases, some very striking were referred to, for example: trespass: *Molina v Zaknich* [2001] 125 A Crim R 401; demanding property with intent to steal and extortion: *R v Berhard* [1938] 2 KB 264 and *R v Pollard* [1962] QWN 13; robbery: *R v Shivington* [1968] 1 QB 166 and *The Queen v Langham* [1984] 36 SASR 48; breaking and entering: *R v Lapatta* (cited above). I accept the relevant belief can be wrong-headed, provided it is genuinely held.

50. The claim of right must be with respect to …(etc) "property". There was some argument based on *Director of Public Prosecutions Reference No 1* of 1999 [2000] 134 NTR 1 that the asserted claim of right could not be said to be in respect of property or at least the particular property over which the claim is made as stipulated by the Court of Appeal in that Reference. Their Honours stated at paras [40] and [41]:

> [40] "So far as the malicious damage to property offence is concerned, Y would have been entitled to be acquitted in the circumstances of this case if the prosecution failed to prove beyond reasonable doubt at least one of the following elements:
>
> (1) that Y's act was not made with respect to property;
>
> (2) that the act was not done in the exercise of an honest claim of right with respect to that property; or
>
> (3) that Y had an intention to defraud.
>
> It is not suggested that the Crown had proven elements (1) or (3); the area of contention is element (2).
>
> [41] It will be noted that in spelling out the second element, we have added the words "with respect to that property", which do not appear in s 30(2). Nevertheless, it is clear from *Walden v Hensler* that the honest claim of right in the unlawful damage case, is a belief held with respect to the property damaged: see Dean J at CLR 580-1, Dawson J at 592-3; Gaudron J at 608".

51. With respect the Court of Appeal on that occasion were particularly concerned with the charge of criminal damage and how claim of right would apply in that circumstance of damaging property over which there was no assertion of right in itself. I note Stephen Gray, in his commentary on the lower court decision in that same matter interprets *Walden v Hensler* (1987) 163 CLR 561 as indicating that offences related to damaging or destroying property to be generally outside the ambit of the claim of right defence. ((1998) 23 Alternative Law Journal 97, "An honest claim of right"). I would respectfully take the view that neither *DPP Reference No 1* of 1999 nor *Walden v Hensler* stand for the proposition that the claim of right must be in respect to the property the subject of the charge, save for specific instances such as criminal damage.

52. It is not for that reason that claim of right fails herre and indeed, *R v Bowman* (No2) (1987) 48 NTR 48 specifically deals with other circumstances where the claim may be related to property other that the original property the subject of an entitlement, however, *R v Bowman* acknowledges the need for the claim to be specific or particular to the Defendant (at 54). This stipulation of special entitlement is recognized in *Margarula v Rose* [1999] 149 FLR 444 at 459 where His Honour Justice Riley applies in Deane J in *Walden v Hensler*:

> "The phrase 'honest claim of right' has no defined meaning for the purposes of the Code. It's connotation in s 22 must be determined in the context of the opening provision of that section that ignorance of the law does not of itself afford any excuse for an action or omission which would otherwise constitute an offence and against the background of general common law principle to that effect. Plainly, the fact that a person can honestly say that he thought that he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law does not suffice to provide him with a defence of honest claim of right under s 22. Nor does an honest belief of some special entitlement to do the particular act with respect to property, such as belief of ownership, will only constitute a defence under s 22 of the Code if that entitlement would, if well-founded, preclude what was done from constituting breach of the relevant criminal law which an accused is assumed to know…in other

> words, it is not to the point to establish an honest belief of a special relationship with property which, even if it existed, would not constitute an answer to the offence charged."

53. In my view, the Defendant's belief that the Warden was wrong or that he may later obtain the appropriate permission does not operate to form the basis of a claim of right to provide an excuse to the charges that relate to 20 and 21 December 2007. I intend to make orders finding those charges proven and will dismiss the alternative counts of attempt.

54. I will forward these reasons to the parties today, noting the matter is listed on 5 December 2008.

Dated this 4th day of December 2008.

_____

Jenny Blokland
CHIEF MAGISTRATE