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CV 02964

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

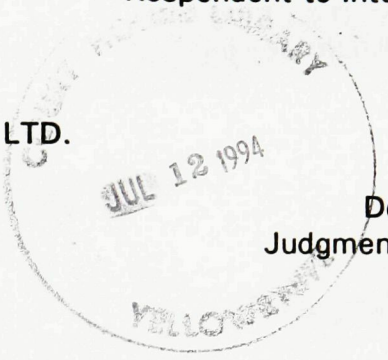
BETWEEN:

JOSEPH L. KELLOGG JR.

Plaintiff
Judgment Creditor
Respondent to Interpleader

- and -

BLACK RIDGE GOLD LTD.




Defendant
Judgment Debtor

- and -

KNUD RASMUSSEN DRILLING & BLASTING LTD.

Applicant by Interpleader

- and -

DAVIS & COMPANY, GORDON KING and
KRISTOFER KING

Respondent to Interpleader

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Interpleader proceedings to determine priority of claims to money paid into Court as royalty proceeds on the sale of ore from mining property.

Heard at Yellowknife on August 30th 1993.

Judgment filed September 7th 1993

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**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT**

| | |
|---|---|
| Counsel for the Plaintiff, Judgment Creditor and Respondent to Interpleader, Joseph L. Kellogg, Jr. | Geoffrey Weist, Esq. |
| Counsel for the Respondents to Interpleader, Davis & Company, Gordon King and Kristofer King | Gerald McLaren, Esq. |

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**REASONS FOR JUDGMENT**

1 A sum in excess of $40,000, now held in court, is claimed by competing parties in these interpleader proceedings. The money was paid into court by Knud Rasmussen Drilling & Blasting Ltd. ("Rasmussen"), pursuant to my order made in Chambers.

Rasmussen seeks only to be relieved of responsibility for payment of the money to whomever is lawfully entitled to it.

2 Joseph L. Kellogg Jr. ("Kellogg") claims that the money is due to him. Davis & Company ("Davis") together with Gordon King and Kristofer King ("the Kings") claim that it should instead be paid jointly to them.

## I. Background

3 Kellogg brought this action in April 1991 claiming over $60,000 as a debt due to him by Black Ridge on a promissory note it had issued to him on August 4th 1989 and due on demand. No defence or demand of notice having been filed following service of the statement of claim on Black Ridge, Kellogg entered a default judgment for $63,174.00 on the debt and court costs, as provided by the **Rules of Court**, and took steps to execute on the judgment which remains, nevertheless, unsatisfied.

4 Kellogg included pleadings in his statement of claim to the effect that Black Ridge had assigned a 40% interest of its interests in certain mining properties under lease from the Crown to Black Ridge, the assignment having been made on August 4th 1989. The properties in question were described as being registered pursuant to the **Canada Mining Regulations**, C.R.C., c.1516 as numbers 3270, 3271 and 3272 in the office of the Mining Recorder at Yellowknife. Kellogg also pleaded that notice of the assignment had been

registered in the office of the Mining Recorder under number 21206 in May 1990. However, Kellogg has taken no further step to obtain the declaratory relief claimed by him in his statement of claim with reference to the assignment or its priority in relation to other interests or claims in (or deriving from) the mining properties. He has instead participated in these interpleader proceedings, claiming that he is entitled to the money in court in priority to Davis and the Kings, pursuant to Black Ridge's assignment to him on August 4th 1989.

Until June 6th 1991, when the Crown's leases to Black Ridge and Cruiser Minerals Ltd. ("Cruiser", as co-tenant in equal shares with Black Ridge) lapsed as provided in the **Canada Mining Regulations**, whereupon Black Ridge and Cruiser ceased to have any legal or equitable interest in the leased properties, Black Ridge had an undivided one half (50%) interest in those properties pursuant to the leases and subject to the terms and conditions of the Regulations. Though Black Ridge at one time appears to have had only a quarter (25%) interest in the properties, I understand that this had been enlarged to a half (50%) prior to 1991.

## II. The Source of the Money

In 1988 Black Ridge and Cruiser jointly entered into an agreement in writing (described by them, in the agreement, as a "lease" of all their rights, title and interest in the mining properties) with Cameron Mining Ltd. ("Cameron"). No question has been

raised in the present proceedings as to the validity or effect of that agreement. The parties appear to accept, and I therefore assume, that the agreement required Cameron to pay a royalty on all mineral product obtained by or under it from the properties (during the term of the Crown leases,) that royalty being due to Black Ridge and Cruiser in equal shares.

7 Early in 1990 Cameron entered into a mining agreement with Rasmussen under which Rasmussen produced ore from the properties prior to the leases lapsing. That ore was sold; and a total of $86,779.17 thereupon became due as royalty payable to Black Ridge and Cruiser under their agreement with Cameron. Half that amount has in fact been paid to Cruiser by consent of all concerned. It remains then to determine who is entitled to the other half, the proceeds of which are now in court, as paid in by Rasmussen.

## III. The Kellogg Assignment

8 Black Ridge in fact did issue a promissory note as pleaded by Kellogg in his statement of claim. The note included the following assurance of security:

> **As security for the above stated note, Black Ridge Gold Ltd. agrees to assign to Joseph L. Kellogg Jr., a forty percent (40%) (non-assessable) interest in the twenty-five percent (25%) interest held by Black Ridge Gold Ltd. in the property located on Gordon Lake, N.W.T., Canada, further described as the "MQ-AUR-JAL-MCC" claim groups.**
>
> **Furthermore, Black Ridge Gold Ltd. agrees that it shall further execute such documents necessary to establish the above stated security interest upon the request of Joseph L. Kellogg.**

In addition, as pleaded by Kellogg in his statement of claim, the following document was registered as an assignment in the office of the Mining Recorder at Yellowknife in May 1990:

> **For the sum of $1.00 and other valuable consideration, in hand received, Black Ridge Gold Ltd. agrees to assign to Joseph L. Kellogg a forty percent (40%), non-assessable interest in its mining leases numbers 3270, 3271 and 3272 on the south side of Gordon Lake, Mackenzie Mining District, Northwest Territories, as securities for the promissory note dated August 4, 1989, between Black Ridge Gold Ltd. and Joseph L. Kellogg.**
>
> **"Mark D. Bantz"**
> **Signature of Transfer**
> **Mark D. Bantz, President**
> **Black Ridge Gold Ltd.**
>
> **" illegible"**
> **Witness**
>
> **August 9, 1989**
> **Date**
>
> **The document is endorsed as follows:**
>
> **I HEREBY CERTIFY that the within Instrument was duly entered and registered in the Book of Assignments of the Mining Lands Division, Department of Indian and Northern Affairs,**
>
> **Yellowknife, N.W.T. on this 4th day of May 1990. Time -**
> **In liber G as number 21206**
>
> **A/Chief, "K. Klassen"**

## IV. The Assignment to Davis and the Kings

On May 17th 1991 Black Ridge entered into an agreement in writing with Davis and the Kings reciting that Black Ridge then owned "50% of the right, title and interest in and to three mining leases" (which, for the sake of brevity, are the self-same leases as

are mentioned in the Kellogg assignment). The assignment also recited the contract ("lease") between Black Ridge and Cruiser, of one part, and Cameron, of the other part, stating that Black Ridge is entitled to receive a royalty from Cameron pursuant to that contract and referring to the mining agreement between Cameron and Rasmussen. And there were additional recitals referring to certain judgments obtained by Davis and the Kings against Black Ridge.

11 No mention is made of any interest of Kellogg in the mining properties or in any mineral product from them. The final recital simply states:

> **H. The Assignor has agreed to assign the Royalty to Davis and King pro rata, according to the amounts owed by the Assignor to each of them pursuant to, and in the amount of, the Davis Judgment and the King Judgment, respectively, with a reversion to the Assignor.**

12 Paragraph 2.01 of the agreement appears as follows:

> **PART II**
>
> **2.01 Assignment - The Assignor hereby assigns to Davis and King, pro rata according to their interests set out in Section 2.03, the Royalty and all other moneys from whatsoever source to be received by the Assignor under the terms of the Cameron Lease, but only for such period of time as may be required to pay the amounts owed by the Assignor pursuant to the Davis Judgment and the King Judgment at which point the Royalty shall revert to the Assignor. The assignment of the Royalty by the Assignor also includes the rights of action or other rights accruing to the Assignor under the Cameron Lease and the Knud Agreement to do and perform all acts, matters and things to recover the sums referred to in this Section 2.01 and to enforce the Cameron Lease.**

It appears from the agreement that the relationship between Davis and Black Ridge at the time of the agreement was one of solicitor and former client. Davis then acted also, it appears, as solicitors for the Kings pursuant to instructions from the King's Seattle attorneys. As the Assignor, Black Ridge executed the agreement in partial satisfaction of its obligations to Davis or, perhaps more accurately, to enable Davis to obtain partial satisfaction in respect of Black Ridge's financial obligations to Davis. There is nothing in the material before me to indicate that Davis or the Kings had actual notice of the Kellogg assignment at the time of this agreement with the Kings and Black Ridge. However, no step appears to have been taken to vacate the registration of the Kellogg assignment in the office of the Mining Recorder or to obtain a judicial declaration of invalidity of that registration or of the Kellogg assignment until now.

## V. Discussion

Kellogg's position is quite simple. He asserts that he is entitled to the money in court as being proceeds of the sale of ore mined from the lands leased by the Crown to Black Ridge and Cruises, in which Black Ridge had, at the time in question, a half (50%) interest, a portion of which (40% of the whole) Black Ridge had assigned to Kellogg.

The position taken by Davis and the Kings is also quite simple. They say that neither the promissory note nor the registered assignment was sufficient to transfer any interest in the Crown's lease from Black Ridge to Kellogg. They contend that Kellogg

could not acquire any such interest by transfer from Black Ridge, since Kellogg was not licensed under the **Canada Mining Regulations** for that purpose. And the documentation did not include a transfer in the required form under the Regulations.

16 Davis and the Kings rely on the fact that the mineral claims subject to the leases in question have lapsed along with the leases. They say that there is consequently nothing left to which the Kellogg assignment may attach. Since I understand that the ore in question was mined and removed for sale before the leases lapsed, I see no merit in that submission with reference to the issues before the Court. On the material in evidence, the first, and main, issue is whether the Kellogg assignment had legal effect to give Kellogg any interest in the proceeds of sale of the ore.

17 The **Canada Mining Regulations** contain the following definitions, among others:

> **2. In these Regulations, ...**
>
> **"claim" means a plot of land located or acquired in any manner prescribed by these Regulations;**
>
> **"lease" means a lease of a recorded claim granted to the holder of the claim pursuant to section 58;**
>
> **"licence" means a license to prospect issued under section 8;**
>
> **"licensee" means a person who holds a licence;**
>
> **"recorded claim" means a claim recorded with the Mining Recorder in the manner prescribed by these Regulations.**

Turning to section 58, one finds the requirements governing the application for a lease by the holder of a recorded claim. Subsection 58(9) states:

> **(9) The Chief shall notify the Mining Recorder of the granting of a lease of a recorded claim and of any assignment of the lease or any interest therein.**

This suggests that the assignment of a lease or interest therein may not be known to the Mining Recorder when the lease is granted, but that any such assignment known to the Chief is to be notified to the Mining Recorder upon the granting of the lease. The term "Chief" is defined as being an official of the federal government with responsibilities for mining matters whose title is not important for present purposes. Section 59 of the Regulations declares the term of a lease to be 21 years subject to renewal; and it makes provision for partial surrender at the time of a renewal. Sections 60 and 61 govern rent and, among other things, the lapse or cancellation of a lease. It need only be added, without entering into detail, that the position of a lessee is clearly quite different from that of a locater or holder of a recorded claim for which no lease has been granted.

Sections 62 to 65 of the Regulations read as follows:

> **62.(1) A recorded claim or any interest therein may be transferred at any time to any licensee.**
>
> **(2) No transfer of a recorded claim or any interest therein is valid unless it is**
>
> **(a) in Form 17 of Schedule III; and**
>
> **(b) signed by the holder of the claim.**

**(3) Subject to subsection (5) and subsection 63(2), any document relating to a recorded claim may be registered in the office of the Mining Recorder upon payment of the applicable fee set out in Schedule I.**

**(4) Failure to register any document referred to in subjection (3) shall not invalidate the document as between the parties thereto but notice shall not be deemed to be given to third parties until the date of registration of the document.**

**(5) A transfer of a recorded claim or lease or any interest in the claim or lease shall be subject to all liens and encumbrances that are registered pursuant to subsection 63(1), against the claim or lease at the time of the registration of the transfer.**

**63.(1) Subject to subsection (2) and subsection 62(5), a Mining Recorder shall**

**(a) register every judgment or order that relates to a claim filed with him and is made by a judge of a court of competent jurisdiction, the Minister, the Supervising Mining Recorder or a Mining Recorder; and**

**(b) on payment of the applicable fee set out in Schedule I, register every other document relating to a claim filed with him.**

**(2) No notice of a trust, either express or constructive, relating to a recorded claim shall be entered on the record of the claim by the Mining Recorder.**

**64.(1) A transfer of a lease shall be filed with the Chief together with**

**(a) the applicable fee set out in Schedule I; and**

**(b) the original copy of the lease.**

**(2) and (3) (Repealed).**

21 Although the heading above these sections refers to leases as well as claims, it is plain from the language of the provisions themselves that only claim transfers are subject to subsections 62(1) and 62(2), whereas lease transfers are subject only to subsection 64(1). Thus, as was held under the equivalent Saskatchewan regulations in **Frobisher Ltd. v. Canada Pipelines and Petroleums Ltd.** (1959), 21 D.L.R. (2d) 497 (S.C.C.), only a licensee can be the transferee of a mineral claim, where that is a regulatory requirement, as in the Northwest Territories under the **Canada Mining Regulations.** But there is no such

requirement here with respect to the transfer of a lease. Nor is there anything in the Regulations restricting the transfer of any interest in a lease short of a transfer of the whole. Subsections 62(3), (4) and (5) contemplate that quite clearly. These provisions, and those of section 63, ensure that such interests may be brought to the notice of the public.

2 The Kellogg assignment is plainly not intended as a transfer of any "recorded claim" as contemplated by subsections 62(1) and (2) of the **Canada Mining Regulations**. It follows that its departure from the requirements of Form 17 is immaterial, as is the fact that Kellogg was not a licensee. Nor was it the transfer of any "lease", in the sense intended in subsection 64(1) of the Regulations. It may be noted that this provision, unlike subsection 62(5), makes no mention of "any interest" in a lease, which is the most that can be said to be the subject matter of the Kellogg assignment.

23 On behalf of Davis and the Kings it is argued that the transfer of a "non-assessable" interest in a lease is contrary to the requirements of the **Canada Mining Regulations**. If so, the common usage of the industry over many years must have given rise to a great many invalid transactions. What is ordinarily intended by the expression "non-assessable" is that the holder of such an interest is entitled to look to the assignor of that interest to perform any required work under the Regulations; it cannot, of course, exempt the parties from the performance of such work; nor is it meant to defeat the requirements of the Regulations.

24 There is a good reason for the differences, as between claims subject to lease and those not so, in the requirements of the **Canada Mining Regulations**. A lease is necessary to engage in the mining and removal of ore. Before that, the claims are acquired and held for purposes of mineral prospecting and exploration only. Mining, by its nature, frequently requires considerable capital. This may be obtained in various ways, not the least obvious of which is by borrowing against the security of an interest in the property under lease or (as often expressed in the vernacular) "an interest in the lease". The relatively simple and restrictive requirements governing mineral claims prior to lease must therefore yield to the exigencies of mining, in contrast to those of mineral prospecting and exploration. The resulting financial transactions are illustrated in a number of the reported cases, of which an example in this jurisdiction is provided by **Isaac v. Cook and Woodward**, (1983) N.W.T.R. 11 and 27, 43 A.R. 1 **(sub nom Re Northern Mines; Isaac v. Cook and Woodward** (S.C.).

25 I therefore reject the contentions advanced on behalf of Davis and the Kings to the effect that the Kellogg assignment is invalid and without legal effect except as against Black Ridge.

26 In the course of these reasons I have referred to the Kellogg assignment as being just that, an assignment of an interest in the property to which it relates, namely the property leased by the Crown to Black Ridge and Cruiser. No attempt has been made to argue that no such assignment was, in law or in equity, made by Black Ridge in favour

of Kellogg. On the contrary, the arguments have all assumed that to be so. On behalf of Davis and the Kings it was argued, in the alternative, that even if the Kellogg assignment is legally valid, it is nevertheless devoid of any effect with reference to the money in court because the leases in question lapsed on June 6th 1991. In other words, any interest acquired by Kellogg in the leased property ceased as of that date. But that argument ignores that the interest assigned to Kellogg attached to the ores already mined from the property and hence extends to any royalty thereon payable to Black Ridge under its agreement with Cameron, notwithstanding that the leases themselves have since lapsed.

I agree with the submission made on behalf of Davis and the Kings that the subsequent assignment made by Black Ridge to them was an assignment of another sort, namely an assignment only of a share of the royalty payable to Black Ridge under the Cameron agreements. This subsequent assignment by Black Ridge to Davis and the Kings did not create any interest in the property under lease form the Crown. But it could not in any way supersede or negate Kellogg's interests in that property, or in the ore mined from it before the leases lapsed. Black Ridge, having assigned that interest to Kellogg, was no longer able to deal with the property so as to unilaterally displace or prejudice his interest.

A question remains as to exactly what was assigned to Kellogg in terms of the percentage share of Black Ridge's interests under the leases. On behalf of Davis and the

Kings, it is submitted that Kellogg's interest is no more than 10%. This is derived by taking 40% of 25%, the percentage mentioned in the promissory note. On behalf of Kellogg, it is submitted that since Black Ridge assigned "a forty percent (40%) non-assessable interest" in the leases (i.e. of the entire property subject to the leases) then Kellogg is entitled to just that. Black Ridge was entitled to a 50% interest and, as I understand the submission, Kellogg is entitled to a 40% interest from out of that 50%, or 80% of the total sum of money in court. The figures used in the promissory note were not carried forward into the Kellogg assignment, which is clearly an assignment of a 40% interest in the entirety of the leased property and not merely 40% of Black Ridge's 50% interest. That is, of course, equivalent to 80% of the money in court, leaving 20% (i.e. Black Ridge's remaining 10% after Cruiser and Kellogg have received their 50% plus 40%, or 90% in total) for Davis and the Kings.

29 I accept the submission made on behalf of Kellogg in that respect. The money in court shall be divided: 80% to Kellogg and 20% to Davis and the Kings.

30 Costs shall be paid as follows. The costs of Rasmussen as between solicitor and client, shall be paid by Kellogg, Davis and the Kings in proportion to their respective shares of the money in court. Davis and the Kings shall pay Kellogg 80% of Kellogg's party and party costs less 20% of their own party and party costs, calculated as inclusive of their respective costs payable to Rasmussen.

M. M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
September 7th 1993

Counsel for the Plaintiff, Judgment Creditor and Respondent to Interpleader, Joseph L. Kellogg, Jr. — Geoffrey Weist, Esq.

Counsel for the Respondents to Interpleader, Davis & Company, Gordon King and Kristofer King — Gerald McLaren, Esq.

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