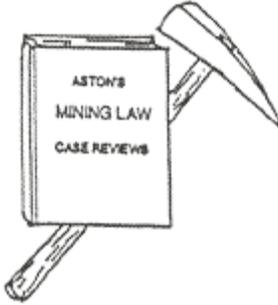


ASTON'S MINING LAW CASE REVIEWS™

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Jurisdiction : Canada

Aston's Complimentary Case No. 8-06-02

CANADIAN JOINT VENTURER HALTS SALE OF PARTNER'S INTEREST

In 1996, Atna Resources Ltd. and the Swedish-owned subsidiary Boliden Westmin Ltd. entered into a joint venture agreement for mineral development of claims known as Wolverine Lake Claims in British Columbia. Boliden owned a 60% interest in the joint venture.

Subsequently, the deposits were found to contain unusually high levels of selenium making the ores unattractive and uneconomic using current metallurgical extraction technology. Boliden had been unsuccessful in attempting to negotiate a sale to Atna of its interest in the Wolverine Lake Claims. In early 1998, Boliden found an interested buyer who, reputedly, was developing hydrometallurgical technology that would make the Wolverine Lake Claim ores commercially feasible to mine. Boliden proceeded to sign two letters of intent for the sale of its Wolverine Lake 60% interests by July 31, 1998, to Expatriate Resources Ltd.

Upon notification to Atna by Boliden of its intended sale to Expatriate Resources, Atna sought injunctive relief from the British Columbia Supreme Court to enjoin Boliden from proceeding with the sale, claiming it had the right of first refusal (or pre-emptive rights) to the sale of Boliden's interests in their joint venture.

The Issues Before the Court :

Before injunctive relief can be granted, the determinative criteria to be considered by a court are :

- (1) there is a serious question to be heard;
- (2) that irreparable harm will result to the applicant if relief is not granted; and,
- (3) that the balance of convenience rests in the applicant's favour.

The injunctive relief question centered on the joint venture's Article 13 of their Agreement which concerned Restrictions on Alienation. The pertinent sections and subsections of Article 13 of the Parties' Joint Venture Agreement considered by the court were :

Restrictions on Alienation

13.1 Except in accordance with this Agreement no party shall transfer, convey, assign, mortgage or grant an option in respect of or grant a right to purchase or in any manner transfer or alienate any or all of its Interest or transfer or assign any of its rights under this Agreement.

13.2 A party shall not sell any of its Interest or transfer or assign any of its rights, which shall include a Net Smelter Return Royalty, under this Agreement except:

(a) pursuant to an agreement which is unconditional, and which does not provide for any retained royalty interest of kind by the selling party;

(b) as a single transaction not directly or indirectly part of some other sale or purchase or agreement for any additional consideration of any nature whatsoever; and

(c) when there is no default of any of the covenants and agreements herein contained such party.

13.3 Nothing in this Article shall prevent:

(a) a sale by a party of all of its Interest of a transfer or assignment of all its rights under this Agreement to an Associated Company provided that such Associated Company first assumes and agrees to be bound by the terms of this Agreement and agrees with each other party to this Agreement in writing to retransfer such Interest to the original party before ceasing to be an Associated Company of such original party;

(b) a joint disposition of the Property or all or any part of the other assets constituting any part of the Assets to a third party by all the Participants;

(c) an amalgamation or corporate reorganization involving a party hereto which has the effect in law of the amalgamated or surviving corporation possessing substantially all of the property, rights and interests and being subject to all the debts, liabilities and obligations of each amalgamating or predecessor corporation; or

(d) a sale, forfeiture, charge, withdrawal, transfer or other disposition or encumbrance which is otherwise specifically required or permitted under this Agreement.

13.4 Subject to the foregoing, any party (in this Article called the "Offeror") intending to sell its Interest or transfer or assign its rights under this Agreement shall first give notice in writing to the other party (in this Article called the Offeree") of such intention together with the terms and conditions on which the Offeror intends to sell its Interest or transfer or assign its rights under this Agreement.

13.5 If any party (in this Article also called the "Offeror") receives any offer to purchase its Interest or rights under this Agreement which meets the requirements of paragraph 13.2 and which it intends to accept, the Offeror shall not accept the same unless and until the Offeror has first offered to sell such Interest or rights to the other Participant (in this Article also called the "Offeree") on the same terms and conditions as in the offer received and the same has not been accepted by the Offeree in accordance with paragraph 13.7.

13.6 Any communication of an intention to sell pursuant to paragraphs 13.4 or 13.5 shall be in writing delivered in accordance with Article 19 and shall:

(a) set out fully and clearly all of the terms and conditions of any intended sale;

(b) if it is made pursuant to paragraph 13.5, include a true copy of the offer received; and

(c) if it is made pursuant to paragraph 13.5, clearly identify the offering party and , include such information as is known by the Offeror about such offering party: and such communication will be deemed to constitute an offer (the "Offer") by the Offeror to the Offeree to sell the Offeror's Interest or transfer or assign its rights under this Agreement to the Offeree on the terms and conditions set out in such Offer. If the Offer refers to any non-cash consideration then it shall also contain the Offeror's estimate of the cash equivalent of such non-cash consideration. If the Offeror and the Offeree have not within 30 days after delivery of the Offer agreed upon the cash equivalent of the non-cash consideration then the question shall be determined by arbitration pursuant to Article 18. (For the purposes of this paragraph any consideration not requiring at the date of sale payment in lawful money of Canada or the United States shall be deemed to be a "non-cash consideration"). The time for acceptance of the Offer pursuant to paragraph 13.7 shall be extended for the time required to complete the arbitration, which shall be deemed complete when the arbitration award is rendered...'

The Court's Analysis

The Court noted that "An 'Associated Company' to which clause 13.3(a) refers is defined as being a company in which the party seeking to transfer its interest in the properties owns more than 30% of the voting rights." and that "Boliden presently held 17% of the voting rights of Expatriate. On May 26th those two companies signed two letters of intent which on their face are stated to be non-binding. In the first, they agreed that Boliden will transfer its interest in two partly-owned subsidiaries engaged in the development of a certain hydrometallurgical technology to Expatriate for treasury shares that would increase its voting rights in Expatriate to just over 30% by July 15th. It is said that the technology may, with further development, make the extraction of the mineral deposits in the Wolverine Lake Claims commercially viable."

"In the second letter of intent, they agreed that by July 31st (1998) Boliden will transfer all of its interest in the Wolverine Lake Claims, as well as its interest in some other claims, to Expatriate for treasury shares (allocated as 4.8 million and 200,000, respectively) that would increase its voting rights to 53%. They agreed as well that Boliden would have a first right of refusal over any mining claims owned by Expatriate that it may wish to sell. Thus, Boliden maintains that it intends to sell its interest to what will be an Associated Company within the meaning of the Agreement as contemplated by clause 13.3(a)."

As early as May 7th 1998, Boliden advised Atna of its contemplated sale to Expatriate. And , Boliden sent a copy of the second letter of intent as a matter of courtesy to Atna. Based on clause 13.4 of the Joint Venture Agreement with Boliden, Atna assumed and argued that it was entitled to a right of first refusal for Boliden's interest in the joint venture. Atna's solicitors advised Boliden that the Boliden-Expatriate letter of intent was non-binding and treated the Expatriate offer as one that Atna then accepted in accordance with clause 13.6. Atna adopted the position that it was entitled to meet Expatriate's offer and acquire Boliden's interest for the cash value of 4.8 million Expatriate shares to be determined by arbitration. Atna was seeking a decree of specific

performance to enforce its alleged right of acquisition of Boliden's 60% interest for the arbitrated amount. Boliden adopted the position that it intended to sell to what will become, as a result of the contemplated transaction, an "Associated Company".

Consequently, with regard to whether there is a serious question, the court found that a serious one of contract interpretation existed to be heard.

As to the issue of irreparable harm to the complaining party, the Court found that "the greatest harm that Atna will suffer if Boliden sells its interest to Expatriate by July 31st (1998) is the loss of the business opportunity associated with being denied the right of first refusal... and its loss will not be a loss for which it could be properly compensated in damages."

The Court's Decision

The Court stated that "Atna has established that it will have suffered a lost business opportunity amounting to irreparable harm if the sale of Boliden's interest to Expatriate is completed ... at the end of July (1998) before the uncertainty associated with is resolved." Justice Lowry of the Supreme Court of British Columbia found that the "balance of convenience favours the granting of the injunction to Atna.

In *Atna Resources Ltd. v. Boliden Westmin Limited* [1998] Docket No.C983168, S.C.B.C, Vancouver Registry, the Supreme Court held that "Boliden will be enjoined from transferring any of its interest in the Wolverine Lake claims that are the subject of the Agreement to Expatriate until the trial of the action."
