

**CHIEF MINING WARDEN'S COURT**

held at

**MUSWELLBROOK COURT HOUSE**

on

**TUESDAY 18 AUGUST 1998**

**BEFORE MR J BAILEY, CHIEF MINING WARDEN**

**MINING LEASE APPLICATIONS NUMBERS 95 AND 96**

**KAYUGA COAL PTY LIMITED**

- v -

**J AND M DUCEY AND G AND A CASEY**

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**APPEARANCES:**

- ◆ Mr J Connors, solicitor  
of Fitzgerald White Talbot, solicitors  
for Kayuga Coal Pty Limited
- ◆ Mr M Hallett, solicitor  
of Hallett and Associates, solicitors  
for G and A Casey and J and M Ducey

MINING LEASE APPLICATIONS 95 AND 96  
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DECISION

1 **HIS WORSHIP:** In respect to mining lease applications 95 and 96, last month I  
2 had an inquiry here concerning the matter. In accordance with clause 23B of  
3 schedule 1 of the Mining Act, at the conclusion of the inquiry into objections I  
4 must announce in open court my finding and the purport of my report and then  
5 transmit that finding and report to the Minister, and that is what I am here for  
6 today. I should explain that my report to the Minister is indeed a confidential  
7 document to the Minister. As to whether or not parties are able to obtain  
8 copies of my report at some point of time is ultimately up to the Minister. As to  
9 whether the Minister follows my recommendations is a matter for the Minister,  
10 but to comply with clause 23B I propose to shortly indicate to the parties what  
11 my report contains.

12 The situation is that having regard to the fact that the mining company no  
13 longer maintain their objections in relation to the claims made by Mr and Mrs  
14 Wilkinson, that matter is put aside. There was a letter received that Mr J A  
15 Lonergan wished to withdraw: that matter was put aside. Mr Hallett is  
16 representing both the Duceys and the Caseys, and they were the only matters  
17 that were in dispute.

18 I suppose it is relevant to just read out section 62 because so much hinged  
19 upon that. "A mining lease may not be granted over any land..." and sub-  
20 section (i)(c) says "... on which is situated any improvement, being a substantial  
21 building, dam, reservoir, contour bank, graded bank, levee, water disposal area,  
22 soil conservation work, or other valuable work or structure other than an  
23 improvement constructed for use for the mining purposes and for no other  
24 purposes except with the written consent of the occupier, in the case of private  
25 land, the owner of the land on which the dwelling house, garden or  
26 improvement is situated."

27 There is no need to go through Schedule 1 with 23A and B, that got the matter  
28 before the court.

1 The issues that really were to be determined in the inquiry were whether a  
2 dam, a contour bank and fences on the Ducey property are in fact improve-  
3 ments under section 62, and whether fences and power lines on the Casey  
4 property are improvements under the Act.

5 As the parties are aware, evidence was received and I do not propose to go  
6 through that. There were submissions on the second day as to really the  
7 meaning of section 62, and the majority of my report to the Minister goes  
8 through that and goes through various cases, and I do not want to particularly  
9 go through every aspect of that. A couple of the questions were to whether the  
10 word "substantial" in section 62 also referred to a substantial dam or a  
11 substantial contour bank, whether the phrase "valuable work or structure" ought  
12 to be construed ejusdem generis with the words immediately preceding that.

13 In going through various decisions that I researched as to interpretation,  
14 certainly I came to a conclusion that I could not accept, particularly in relation  
15 to the phrase "or valuable work or structure", that it created a disjunctive  
16 phrase there and that it should be isolated from those other specific words  
17 which preceded it. So in relation to the question of whether it be a substantial  
18 dam or a substantial contour bank, I reached a conclusion that the word  
19 "substantial" does not apply to other words following building, so it did not apply  
20 to a dam or a contour bank. It was my opinion that if a dam or contour bank is  
21 of such standing that they fulfil the intention for which they were designed, that  
22 they are to be considered improvements under provisions of section 62, and I  
23 did find that the dam and contour bank was of such standing that it fulfilled the  
24 intention for which it was designed.

25 As to fencing per se, fencing, as to whether it is a valuable work or structure  
26 really depends upon the merits of each individual case. I concluded that so far  
27 as the fencing on the Ducey and Casey properties, I accepted that the  
28 presence of the fencing does increase the value of the land and the fencing  
29 does in fact perform the task for which it was constructed and that is the control  
30 of stock entering or leaving the land or paddocks which are incorporated within  
31 that fencing.

32 There was another aspect which perhaps I should refer to as to whether or not  
33 there was no qualified surveyor's report in respect to some boundary fences. I  
34 informed the Minister that they have been considered to be boundary fences by  
35 the landowner for many years and in the absence of any evidence to the  
36 contrary for the determination to be made as to whether or not they are  
37 boundary fences, I found that indeed there was sufficient evidence in front of  
38 me to make a determination that those particular fences, including the  
39 boundary ones, were indeed a valuable work or structure as described in

1 section 62.

2 The power lines were another aspect and certainly a submission by Mr Hallett  
3 that the section does not refer to the owner of any improvement therefore it  
4 must be incorporated here. After a lot of consideration in respect to that it  
5 would appear that if that submission was correct, my concern was that the  
6 section then allowed an occupier or landowner to give consent to a mining  
7 company to operate a mine which may possibly affect the structure which  
8 belongs to a third person and I didn't see that when enacting that section that  
9 was the intention of Parliament, and consequently it can be inferred that section  
10 62 applies only to those improvements over which a landowner or occupier has  
11 owner-ship or control. I haven't said that a power line is not a valuable work or  
12 structure, but what I have said that Mr and Mrs Casey cannot claim that the  
13 power lines are a valuable work or structure in accordance with section 62. I  
14 know there is a fine line there but that is my decision.

15 I make the following recommendations to the Minister:

16 that he processes MLA 95 on the basis that the mining company no  
17 longer objects to the claim made by Mr and Mrs Wilkinson concerning  
18 valuable works and structure on their property;

19 that he process MLA 96 on the following basis: that the dam, contour  
20 bank or graded bank and fences on the property of Mr and Mrs Ducey are  
21 improvements under the provisions of section 62 of the Mining Act;

22 the claims and objections raised by Mr Lonergan are withdrawn;

23 the fences on the property of Mr and Mrs Casey are improvements under  
24 the provisions of section 62 of the Mining Act and finally;

25 Mr and Mrs Casey are not able to make a claim that the set of power  
26 lines and the pole supporting those lines on their property is a valuable  
27 work or structure under the provisions of section 62.

28 My report to the Minister will be forwarded to the Minister today and as to when  
29 a decision is made is completely out of my hands.

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