File No. MA-017-02

M. Orr)
Deputy Mining and Lands Commissioner)

Thursday, the 17th day
of October, 2002.

THE MINING ACT

IN THE MATTER OF

Mining Claim SO-1246263, situate in the Township of Bedford, in the Southern Ontario Mining Division, recorded in the name of Graphite Mountain Inc., (hereinafter referred to as the "Mining Claim");

AND IN THE MATTER OF

An application for leave of the Commissioner to file a dispute, pursuant to clause 48(5)(c)(i) and (ii) of the **Mining Act**;

AND IN THE MATTER OF

An Order of the Commissioner pursuant to subsection 110(2) of the **Mining Act.**

B E T W E E N:

TRACEY L. GRIESBACH

Applicant

-and-

GRAPHITE MOUNTAIN INC.

Respondent

ORDER ON COSTS

1. THIS TRIBUNAL ORDERS that the application for costs by the respondent be and is hereby dismissed.

THIS TRIBUNAL FURTHER ADVISES that pursuant to subsection 129(4) of the **Mining Act**, as amended, a copy of this Order shall be forwarded by this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 17th day of October, 2002.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

At the conclusion of the hearing held on July 23, 2002, the respondent indicated that a request for costs would be made pending the tribunal's decision. In reasons that were delivered on August 23, 2002, written submissions from counsel for the respondent and the agent for the applicant on the issue of costs were invited and received. This matter came before the tribunal after leave was given to the applicant to have the tribunal hear this specific matter on May 2, 2002. The background is described in detail in the reasons for decision issued by this tribunal on August 23, 2002. Briefly, the hearing before the Provincial Mining Recorder (dealing with section 32 of the **Act**), was delayed by the Provincial Mining Recorder pending a determination by this tribunal as to the location of the lands open for staking. In making that determination, the tribunal was to answer five questions posed by the applicant and re-framed by the tribunal. The applicant had requested the delay after the Provincial Mining Recorder had made a decision upholding the validity of the mining claim staked by the respondent.

Costs

(a) Respondent's Submission Requesting Costs

Counsel for the respondent began his submission with a reference to the Rules of Civil Procedure and specifically Tariff A, Part 1, Costs Grid, which came into force on January 1, 2002. Rule 57.01(1) lists the general principles that a court may consider when exercising its discretion with respect to costs. Section 131 of the **Courts of Justice Act**, R.S.O. 1990, Chap. C.43, is the authority for that discretion.

The respondent took the tribunal through each of the principles, describing how it was that the applicant had caused the respondent to incur unreasonable and unnecessary costs. In summary, the respondent sought costs of an indeterminable amount of money relating to the mining and marketing of the resource at some time in the future; costs for the trouble its counsel was put to in having to prepare for and address an appeal made complex (unnecessarily) by the applicant (for example, the applicant's reference at the hearing to the issue of property rights), and costs related to the importance of the issue to the respondent in the sense that it wanted to retain rights to the claim in order to explore and bring it to lease. The respondent also asked for costs because "the entire process of the application before the Tribunal was unnecessary". The respondent claimed to have made the 1951 forfeiture of mineral rights known to the applicant prior to the hearing before the Provincial Mining Recorder. The respondent also relied on the Provincial Mining Recorder's reference to the forfeiture in his decision of December 21, 2001 and claimed that the applicant had ignored the opinion expressed by the Ministry of Northern Development and Mines that the forfeiture was valid. In referring to principle (f), the respondent claimed costs for the fact its counsel had to prepare for an eventuality that never occurred, namely that the applicant had indicated (through her agent) that she would be seeking the attendance of two witnesses. When the time came for the hearing, no request was made for either person. (The principle being referred to here was that relating to unnecessary, improper or vexatious steps in the proceeding.) The respondent also asked for costs associated with having to read statutes and documents that the applicant included in a preliminary list of documents but never used at the hearing. Costs were requested resulting from the fact that this was the third

proceeding brought by or on behalf of the applicant associated with her section 32 application before the Provincial Mining Recorder. The respondent said that another was scheduled thereby precluding any dealings with the mineral rights. The respondent asked for costs arising out of the fact that the applicant's agent took up hearing time to present what amounted to argument as opposed to evidence. The respondent also based its request for costs on the refusal of the applicant's agent to agree to the admission of certain evidence into the book of documents presented at the hearing (the book purporting to contain documents agreed to by both parties).

The respondent focused its request for costs on three main points. They were; that the hearing was unnecessary and the Provincial Mining Recorder could have dealt with the issue(s); that the applicant had introduced extraneous and irrelevant material (material the respondent had to prepare to address) despite the fact that the tribunal had been asked to answer five pre-set questions and finally, that the applicant had abused the processes of the **Mining Act** "in going far beyond the protection granted to the holder of the surface rights thereunder to the severe detriment of the respondent's rights and economic interests." The respondent also claimed for costs on the basis that the applicant had introduced two cases without giving reasons, but which the respondent's counsel was compelled to read for the hearing. (This tribunal notes that the applicant submitted one case at the hearing.) In concluding his written submission, the respondent's counsel referred to his lengthy career (called to the Bar in 1963) and his experience in mining law as part of the reason for requesting costs to be awarded "at the substantial indemnity level".

(b) <u>Applicant's Response to Respondent's Submission</u>

In disagreeing with the respondent's submission, the applicant cited the **Statutory Powers Procedure Act**, R.S.O. 1990, Chap. S.22, sections 4.6 and 7.1(2), and said that the tribunal is governed by that legislation. (The tribunal notes that the latter section should read section 17.1(2).) The applicant seemed to view the issues as relating to the rights of a surface owner. The Provincial Mining Recorder's statutory powers were either not strong enough to deal with such an issue, or the authority had not been granted in the legislation. On the other hand, the **Mining Act** looked to the Mining and Lands Commissioner to hear matters relating to among other things, third party interests. The applicant claimed to quote from a ministry memorandum. The tribunal notes that no ministry memorandum was entered as an exhibit at the hearing.

The applicant also noted that a failed mediation attempt (that the applicant claimed to initiate) led to adjudication by the tribunal.

In summary, the applicant rejected the respondent's arguments because material considered "extraneous" by the respondent was introduced "in order to allow the issues to evolve prior to the hearing". The applicant claimed to have not requested the **Wallbridge** case (which the respondent's counsel claimed he had to read in preparation for the hearing). The applicant said that the matter was not frivolous or vexatious and this was evident in the tribunal's granting leave to hear it. The issue was novel and the matter had to be resolved in order to allow the Provincial Mining Recorder to carry on with the hearing of the dispute under section 32 of the **Act**. While the Provincial Mining Recorder had initially accepted the respondent's arguments on

the issue of forfeiture, he also postponed that hearing in order to await the outcome of this hearing. The applicant claimed to have taken the "high road" in view of the fact that she did not wait until the Provincial Mining Recorder had issued a decision before raising this issue. As for the economic value placed on the lands by the respondent, the only value is that associated with the right to prospect those areas not exempted by section 32. The applicant questioned the respondent's ability to make a claim of this nature at this time. As for the respondent's claims with respect to abuse of process, the applicant referred to the respondent's reaction to matters prior to the hearing. The respondent's request for "substantial indemnity" was met with the argument that recent assessments put the applicant's efforts to settle in a more favourable light than the respondent's rejection of those efforts. The applicant cited both the recent **Wallbridge** decision on costs as well as the case of **Palu v. Graf** as examples of the type of behaviour the tribunal frowned on and then distinguished the applicant's efforts claiming that the applicant had "made offers to settle that went unanswered". The applicant categorized her actions and her requests as "conciliatory" and pointed to the experience of respondent's counsel as something that should have made him aware of property law. The applicant also claimed that the respondent's counsel was listed in 1999 as a director and shareholder of a company that the applicant said was a parent to the respondent, the applicant's point being that "[a]ll of [counsel's] time spent was to benefit his own financial position." The applicant concluded by saying among other things that the steps she took to litigate the matter were reasonable; she worked to the schedule set by the tribunal for the hearing; she did not act in bad faith, and "[s]he … merely brought a matter to the first venue available in the administration of the **Mining Act**."

Findings

The following sections of the **Mining Act** are applicable to this matter. The Mining and Lands Commissioner's discretion to award costs is found in section 126 of the **Mining Act**. Subsection 127 (1) states that costs and disbursements are payable according to the tariff of the Superior Court of Justice. Subsection 127(2) says that the Commissioner has the same powers as an assessment officer of the Superior Court of Justice with respect to counsel fees.

While the **Statutory Powers Procedure Act** has a role to play in terms of some of this tribunal's procedures, it has no role to play in this instance. Likewise, section 4.6 of that **Act**, which deals with the dismissal of a proceeding without a hearing, has no bearing on this matter.

The tribunal finds that any costs incurred by the respondent are not recoverable against the applicant for the following reasons.

The tribunal does not agree that the hearing was unnecessary. The questions raised by the applicant regarding certain discrepancies in the acreage values for the subject lands assigned in public documents were reasonable questions given that the answers had a bearing on the mining claim's root of title. The tribunal, in giving leave, determined that settling the matter would be worthwhile and that the procedures before this office would be well-suited to a determination of this type of question. Since the issue was a contentious one, had the Provincial Mining Recorder made a decision, it might very well have been appealed to the tribunal. A step in the process was saved and this benefited both parties.

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As for the "complexity" of the hearing, the tribunal disagrees with the respondent's characterization. The issue itself was somewhat complex, and was important to both sides in the matter. The applicant's efforts to address the issue by way of documentary evidence and case law were no more than what would be expected from someone representing him or herself in such a matter. The tribunal does not agree that the hearing itself was made more complex by the applicant's actions or submissions. Indeed, the amount of time spent by the applicant in referring to issues that did not relate to the five questions asked of the tribunal was minimal. The respondent pointed out incidents that related to the applicant's lack of knowledge regarding procedural matters (for example, the applicant's handling of the issue of witnesses and the applicant's attempt to bring up the issue of property rights). The respondent referred the tribunal to that section of the Rules dealing with vexatious behaviour when addressing this issue. The tribunal notes that parties who choose to represent themselves sometimes add to the length and cost of a hearing and this is a source of frustration to a party represented by counsel. The tribunal has on occasion, (when the circumstances warrant it), awarded costs against a self-represented litigant. The tribunal expects all litigants (represented and otherwise) to conduct themselves in a responsible manner. However, the tribunal is also cognizant of its history and the words of previous Commissioners who espoused an informal and expeditious approach to conducting hearings under the **Mining Act**. The balance is a fine one, but the tribunal is of the view that some allowance has to be given to those who make an effort to represent themselves. The applicant's participation in this instance was useful and while the applicant's agent sometimes had a tendency to wander off the path in terms of his presentation, the tribunal is of the view that the length of the hearing was reasonable.

The respondent's counsel drew the tribunal's attention to the preparatory work that he was compelled to carry out for the hearing, claiming that some of it was unnecessary. This preparatory work included reviewing cases, statutes and documents that apparently were never used by the applicant at the hearing. Presumably, both parties engaged in discussions relating to hearing preparations and indeed the tribunal notes that they presented an agreed statement of facts and document book. The tribunal can also take notice of the fact that both parties would have had opinions as to what documents and facts they could agree to submit. The tribunal is not persuaded that respondent's counsel had to do anything out of the ordinary in terms of case preparation for the hearing. Preparing for a hearing includes reviewing material that might never be used and the tribunal is of the view that this is not an unusual occurrence. Every hearing presents different strategic challenges. The tribunal notes from reading the decisions of the Provincial Mining Recorder that the forfeiture issue seems to have arisen in some form at the hearing before the Provincial Mining Recorder and the tribunal believes that respondent's counsel would have familiarized himself to some extent for that hearing. The tribunal is not persuaded that counsel's preparation was made any more onerous by the applicant's pre-hearing actions, nor by the applicant's occasional reference to documents not included in the document book during the hearing before the tribunal.

With respect to the respondent's reference to Rule 57.01(1) and asking the tribunal to consider in part the awarding of costs under this section, the tribunal has this to say. The rule appears to be designed to provide some basis for quantifying a cost award. However, the successful party has to have made a claim for a sum of money and been awarded either the sum sought or another amount. An example that comes to mind is a claim for a sum of money for services rendered. The tribunal does not agree that this rule applies to the case at hand.

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The respondent also asked for costs claiming that the applicant was abusing the processes permitted under the **Mining Act** by bringing this matter before the tribunal – it being the third proceeding by the applicant on the issue of the Crown dealing with mining rights under the applicant's surface rights. The respondent claimed that this had a negative impact on the respondent's rights and economic interests. The tribunal notes that the Provincial Mining Recorder has issued at least four orders between the parties dealing with the subject lands. In referring to these rulings, it appears that the parties have appeared before the Provincial Mining Recorder on at least one occasion. The tribunal is unaware of the exact number of appearances. This is the first time the parties have appeared before the Mining and Lands Commissioner. After considering the **Mining Act** and the Rules of Civil Procedure, the tribunal is of the view that it is unable (even if it were inclined) to award costs for matters that occur outside this proceeding. Also, the tribunal is of the view that the respondent's rights and economic interests (whatever those may be) are not a proper subject for costs in this hearing.

Conclusions

For the reasons given above, the respondent's request for costs is dismissed.