Cash was candid about his lesson

By JANE GAFFIN

Keno, the venerable old gentleman mine, refuses to die a natural death as long as a probable hundred million ounces of silver keep its heart beating. Yet, the federal government is bent on subjecting the mine to euthanasia.

I believe the mine deserves a dignified burial.

In a series of articles being published in the *Star* each Friday, I'm saying last rites and farewell to a great mine that served as the Yukon's lifeblood off and on for more than 80 years.

Here's part 13.

United Keno Hill Mines went to auction in 2001.

Creditors could sell at their pleasure. But only a masochist would consider purchasing the assets which technically belonged to a nebulous United Keno Hill Mines.

It was no surprise that the potential bidders wanted *legal security* before entering into a purchase arrangement.

They wanted the court to block any possibility of a resuscitated United Keno rolling up to the door after the fact with a fat poke that might satisfy creditors and allow the original Toronto-based owners to regain control over the sold assets.

But how would any junior company turn the property into a successful venture?

The enterprise hinged on water licences, operating licences, production licences, development licences and whatever other licence the federal minister may or may not sign.

Everything looked swell at first blush.

The miners' rights to enter, locate, prospect and mine were still intact in the Yukon Quartz Mining Act, without qualification, except to say the person must be at least 18 years old.

Further, sec. 50 still granted "a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year..."

Yet the government had overthrown its own mining laws by inserting a discretionary licencing system that cancelled legal secure tenure in the same act that granted miners their mineral leases.

In leading court case histories found in the Yukon law library, judges have ruled on the practical importance of clearly distinguishing between a lease and a licence.

Words alone do not suffice for parties to turn a tenancy into a licence merely by calling it one, says the English decision of *Street v Mountford*, 1985.

A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful, stated the ruling.

There is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession.

To constitute a tenancy, the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.

The grant may be expressed or may be inferred where the owner accepts weekly or other periodic payments from the occupier (e.g., annual mineral claim assessments).

"(O)ne comes to the conclusion that the rights of the occupier are those of a leasee, (and) the parties cannot turn it into a licence by saying at the end 'this is deemed to be a licence,' " wrote the judge.

In the Province of *New Brunswick v Gordon and Walton*, 1979, the defendants were arguing that a mining claim – or the rights incident thereto — represented a substantial interest in land as "an interest in the nature of property", "a possessory interest in the staked lands" and "a valuable interest capable of assignment of transfer."

The judge found that a mining claim came within the scope of "land" as defined in the Expropriation Act and therefore was capable of being expropriated.

It was pointed out (per Halsbury, a definitive encyclopedic treatise on the laws of England, 3rd Ed.) that the parties could not make a lease a license merely by describing it as such; the converse is also true, the ruling continued.

If minerals are vested in the owner of the surface of the land, then the owner's interest in the minerals and the interest of anyone he has given mining rights would be taken away by an expropriation, concluded the judgment.

Respected lawyers and jurists contend those being governed must have the highest respect for the law governing them, and a willingness to force the government to subject the thorniest issues to the tests of reason, common sense, fairness and just law.

This premise went off-plumb with respect to mining in the Yukon

The Vancouver-based Minto Explorations was an example of a company mauled by over-regulations when trying to bring the DEF/Minto copper-gold-silver project to production 80 kilometres northwest of Carmacks.

The mine was scheduled for production by November 1998. Minto's file bulged with 50 permits and approvals. But permitting delays and licences not signed for three years resulted in financial and budgetary constraints that killed the project.

Likewise, in British Columbia, Redfern Resources Ltd. was battle-fatigued trying to revive the historical underground workings of the Tulsequah Chief copper-silver-zinc deposit located 100 kilometres south of Atlin.

The Vancouver company had become a headline grabber since its initial environmental assessment commenced in September 1994.

By late 1999, more than $9 million had been spent obtaining 40 permits and approvals in an open-ended regulatory process that only a bureaucrat could love. Obtaining present and future permits was a horror show. "Streamlining" the process a bit did nothing for advancing the project.

Regardless, Redfern's parent company, Redcorp, was one of two parties contending for the United Keno properties.

Yukon Supreme Court Justice Ron Veale had brought forth an order in late April in which interested parties were invited to submit sealed bids to the court no later than Thursday morning, May 3.

On May 8, 2001, eight lawyers trailed into the courtroom to divide the spoils.

Redcorp offered to pay $2.81 million and wanted six months to conduct due diligence.

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The final $1.1-million payment would be contingent on a commercial production schedule. Six months to do research was a standard practice in upholding fiduciary responsibility to its owners, the shareholders.

Another bid came from Advanced Mineral Technology, Inc. (AMT) of Fairfield, Idaho. Although the secured creditors knew nothing about the privately-owned American firm, they unanimously embraced its offer.

AMT topped Redcorp by promising to pay $3.6 million. It planned to take possession of the assets after conducting a 60-day due diligence to determine whether to cinch the deal or withdraw.

The lien holders' lawyer, Tim Preston, told the court the federal government's maintaining the water treatment systems at the Elsa minesites was costing up to $100,000 a month.

Since the feds would cream the environmental liability reimbursement dollars off the top of the sale, the creditors liked AMT's 60-day due diligence period rather than Redcorp's more thorough one.

The delay would increase the water treatment bill to $600,000, thus sucking more money away from the creditors than necessary, they thought.

They liked AMT's proposal that would only take $200,000 from what was owned the creditors, they thought.

It sounded good in theory. Yukon Supreme Court Justice Ernest Marshall approved AMT's bid and instructed the battery of lawyers to put their collective heads together and decide who would get paid what if they ever saw the intangible moola.

According to reporter Chuck Tobin (*Star*, May 8, 2001), the creditors' lawyer thought AMT's offer should sufficiently cover preferred creditors, the government interests and some of the creditors who loaned United Keno money.

"While the debt to the preferred creditors was estimated at over $3 million, the court was told the total outstanding debt owed by United Keno is between $12 million and $15 million," wrote Tobin.

"In the wake of any sale, the unsecured or non-preferred creditors will still have rights to a claim against United Keno, the company, but it will be a company without its Elsa-based assets."

AMT president Phillip Cash, a metallurgical engineer by training, was familiar with the Yukon through a goldfield operation near Dawson City.

But he became disenchanted quickly. In late July 2001, he began expressing frustrations about the federal Department of Indian Affairs and (what I call) No Development (DIAND). Following his 60-day property research, he faced a court-imposed deadline to decide if he wanted to fish or cut bait.

Under the original agreement, he paid a non-refundable, $25,000-deposit to the court. If he continued with the $3.6-million purchase, he would make a $175,000-deposit to be held in trust and pay $1.7 million to the court on Dec. 31, 2001, and pay the outstanding balance of roughly $1.7 million by the end of 2002.

After consultations with the federal officials, he expressed apprehension they would show up on the property and ding him for every real or imagined environmental sin committed by other people over the last 100 years.

No doubt. And they might date the "environmental liability" back millions of years to when the minerals were first deposited during the extensive glacial activity.

On July 7, the court granted AMT an extension to think about things. On July 27, another extension gave him until Aug. 24 to make a decision.

The federal government had ostensibly denied Cash's request to do some limited work on the property without assuming the total environmental liabilities.

After 10 months, Cash quit the project. He either saw the futility of a junior company trying to operate a mine in the Yukon, or he had bitten off more than he could chew financially.

United Keno Hill Mines had been delisted by the Toronto Stock Exchange on May 3, 2002. And there was no indication that Advanced Mineral Technology was listed for trading with New York's NASDAQ, an acronym for National Association of Securities Dealers Automated Quotations, a system for quoting over the counter securities.

On Aug. 12, 2002, Cash told the *Star* that AMT couldn't continue spending money on the property without knowing when to expect the government to give its blessing with a production date.

If Cash deviated from his "approved" operating plan, he would have to submit another one. And, yes, the federal authorities could have changed their minds about whether an amendment was needed to his water licence.

Nevertheless, he was labouring under the assumption that he had the federal agents' assurances he wouldn't need an amendment. But was it in writing? Later, he told the *Star* the authorities indicated he may require an amendment that could take up to three years to obtain. Yeppers!

In a brief chat with an enthusiastic Cash early in the project, he sounded forthright, encouraged by friends and consultants, but hazy about legalities and realities.

Besides, local mining people had warned Cash what to expect for consequences if he went into the United Keno property under a licencing regime that negated his legal security of tenure.

Cash's learned lesson was expressed in the form of a candid letter to the *Star* on Aug. 9, 2002:

"It is with deep regret that AMT Canada has to announce that it is ceasing all operations at its Elsa Project (Keno Hill) as of 5:00 p.m., Monday, August 12, 2002," it said.

"This time and date have been selected to provide sufficient time for the Department of Indian Affairs and Northern Development (DIAND) to arrange for the resumption of its environmental monitoring.

"AMT Canada assumed these responsibilities when it undertook to reactivate the long-closed mining operation.

"In February of this year (2002), subsequent to many meetings regarding the issuance of a water licence, DIAND gave its permission to AMT Canada to proceed with its long-term plan to reestablish the Keno Hill mine as a vibrant operation and contributor to the Yukon economy.

"Shortly thereafter, DIAND issued the necessary production licence and the company received a letter, signed by Minister (Robert) Nault, wishing it good luck in the reprocessing of the (tailings) and 'a good environmental clean-up'.

"Regrettably, this was immediately followed by a surprising change of policy by DIAND regarding the water licence, making it impossible for this, or any other company, to operate.

"Such inconsistency from DIAND has precluded the completion of the necessary financing for the project with the reluctant decision to cease operations.

"AMT Canada cannot continue to support the significant monthly costs of keeping the site in compliance while DIAND continues to prevaricate.

"Since it assumed responsibility for the site, the company has spent in excess of $700,000 keeping it in compliance and addressing the ongoing environmental issues with outside consultants.

"It should be noted that AMT had already hired 25 employees and this number was expected to increase to approximately 50 during the first year of operation.

"The 'ripple effect' of Keno Hill operations would have further significantly increased employment in an area of high unemployment.

"The company would like to thank the territorial government for its efforts on behalf of the company and the residents of the Yukon but regrettably, together, we have not been able to overcome the intransigence of the Department of Indian Affairs and Northern Development."

The letter's tone sounded like H. Phillip Cash felt betrayed. So, why would any other purchaser expect to receive any different treatment?

It was a sad commentary that by now, after a string of court hearings, court orders, a bankruptcy and a failed purchase, nobody was clear on who actually owned the assets and who had authority to sell them.

Roughly 223 one-year mineral leases and 574 21-year surveyed leases were still registered in the name of a defunct company at the mining recorder's office until the claims were transferred to a government-appointed receiver in 2004.

The property's worth was diminishing as claims lapsed out because nobody took responsibility for keeping them in good standing.

The government's hide was somewhat protected. A year's amnesty was granted on expiry dates for filing assessment fees while Ottawa devolved mining administration to the Yukon government in April 2003.

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Jane Gaffin is author of ***Cashing In****, a definitive history of the Yukon's hardrock mining industry, 1898 to 1977.*

Next week: prosecuting a dead company ad nauseam is a strain on the taxpayers' limited resources.