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The Mining and Lands Commissioner Le Commissaire aux mines et aux terres

Appeal No. MA 038-93

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 7th day
of October, 1994.

THE MINING ACT

IN THE MATTER OF

Mining Lease 105934, comprising Mining Claims K-475272, 475273, 475274, 475275, 475276 and 475277, registered in the Fort Frances Registry Office;

AND IN THE MATTER OF

Unpatented Mining Claims K-1079415 to 1079417, both inclusive, 1079419 to 1079424, both inclusive, 1082231, 1082251 to 1082253, both inclusive, 1085503 to 1085507, both inclusive and 1092740 to 1092747, both inclusive, situate in the Bad Vermilion Lake Area, in the Kenora Mining Division;

AND IN THE MATTER OF

Rights-of-way or passage through land described as Mining Locations K-74 and K-75, Rainy River District, Fort Frances Registry Office;

AND IN THE MATTER OF

An Application under section 175 of the Mining Act.

B E T W E E N:

NIPIGON GOLD RESOURCES, LTD.

Applicant

- and -

GEORGE ANSLEY ARMSTRONG, KIRSTI ALICE ARMSTRONG
and CORPORATE OIL AND GAS LIMITED

Respondents

INTERLOCUTORY ORDER

WHEREAS the hearing of this application was scheduled for September 20 through 22, 1994 in Thunder Bay, Ontario, with the Appointment for Hearing dated Friday, the 17th day of June, 1994 having been served on counsel for the applicant and the respondents by registered mail;

AND WHEREAS Stephen Lukinuk, counsel for the applicant, having failed to diarize the hearing and to notify his client, was not prepared to proceed with a hearing on the merits;

AND WHEREAS, with the exception of Stephen Lukinuk and his client, this tribunal and Jennifer Le Dain, counsel for the respondents, George Armstrong and Kirsti Armstrong, were prepared to proceed with a hearing;

UPON application by Jennifer Le Dain, counsel for the respondents, George Armstrong and Kirsti Armstrong and upon hearing from Jennifer Le Dain and Stephen Lukinuk;

1. THIS TRIBUNAL ORDERS THAT costs in the amount of \$3,800 be paid by the applicant within 30 days of the making of this order.

Reasons for this Order are attached.

DATED this 7th day of October, 1994.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER



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REASONS

The hearing of this matter was scheduled to commence at 10:00 o'clock a.m. on September 20, 1994 in the Fireside Room, Valhalla Inn, 1 Valhalla Inn Road, Thunder Bay, Ontario. At the appointed time, only Jennifer Le Dain, counsel for George and Kirsti Armstrong, two of the respondents in this matter, and George Armstrong were present.

Telephone calls were made to the office of Stephen Lukinuk, counsel for Nipigon Gold Ltd., the applicant, but his whereabouts were unknown, other than to indicate that he had left his office. On the assumption that he was en route, the tribunal waited until 10:30 a.m. and then 11:00 a.m. before commencing the hearing.

Moments after the hearing was convened at 11:00 a.m. Mr. Lukinuk appeared. He stated that he had been ill, had failed to diarize the hearing and was not prepared to proceed. Mr. Lukinuk asked the tribunal for an adjournment.

Ms. Le Dain submitted that the Appointment for Hearing was issued in June, 1994 and Mr. Lukinuk had known of the hearing since that time. She submitted that his failure to diarize the hearing is not sufficient reason to ask for an adjournment, pointing out that he was also one hour late in arriving prior to asking for the adjournment. Ms. Le Dain pointed out that her client was present and that she had flown from Toronto in anticipation of the proceedings.

Mr. Lukinuk stated that his witnesses were not present and that he was unable to proceed. He suggested that a dismissal of the application, followed by a new application, would not be to anyone's advantage.

Ms. Le Dain submitted that, should the application be dismissed, it would be **res judicata** and therefore, there could not be a new application.

Mr. Lukinuk pointed out that the dealings between parties under the **Mining Act** represent an ongoing industry and as such the strict doctrine of **res judicata** would not apply. Whereas an action involving an automobile accident may involve one event which can only be considered once, the application in this instance can be distinguished. As Mr. Lukinuk cannot put his full case in front of the tribunal, the case which would be presented in the future would not be the same case.

Findings:

The tribunal found that the matter would be adjourned to a date to be determined.

The issue of the adjournment causes great inconvenience and monetary consequences for both the respondents and the tribunal. In addition to those costs mentioned by Ms. Le Dain, the tribunal is aware that her client incurred costs in travelling to the hearing, having required that he stay overnight in Thunder Bay. Similarly, expense has been incurred by the public purse, both through the travel expenses of the tribunal, comparable to those of Ms. Le Dain, travel costs for a court reporter from Toronto, the cost of the services of the court reporter and the cost of the hearing room rental. All these factors have been taken into consideration by the tribunal.

The tribunal finds that it accepts the submissions of Ms. Le Dain that her client should receive full recovery for costs thrown away in preparation for and attendance at the hearing. Based on her calculations of 30 hours at \$100 per hour, air fare of \$700 and accommodation of \$100, the tribunal determined pursuant to section 126 of the **Mining Act**, that costs thrown away would be fixed at \$3,800.

Ms. Le Dain asked that costs be payable forthwith. Mr. Lukinuk submitted that payment of costs should be forestalled to the conclusion of the hearing. The tribunal determined that costs would be payable within 30 days from receipt of the written Order and Reasons.