

File No. MA 036-98

L. Kamerman)
Mining and Lands Commissioner)

Thursday, the 6th day
of April, 2000.

THE MINING ACT

IN THE MATTER OF

Mining Claim P-724634, situate in the Township of Deloro, in the Porcupine Mining Division, recorded in the name of Charles Robert Morgan, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

All Mining Rights in, upon or under Mining Lands Patent H.R. 1050, (P. 19142) dated the 11th day of August, 1944, registered as Parcel 8336 South East Cochrane, situate in the Township of Deloro, District of Cochrane, (hereinafter referred to as the "Mining Lands");

AND IN THE MATTER OF

An application under clause 81(2)(c) of the **Mining Act** in respect of the surface rights of the Mining Lands.

AND IN THE MATTER OF

CHARLES ROBERT MORGAN

Applicant

AND IN THE MATTER OF

EMERSON M. GRANT, ERNEST A. R. NEWSON, BERTRAM H. HARPER,
D'ARCY LOVELL

Respondents

ORDER

WHEREAS this application was received by this tribunal on the 10th day of September, 1998, from Charles Robert Morgan, for an Order vesting the surface rights of the Mining Lands in the Applicant;

AND WHEREAS it is the intention of the applicant to bring the Mining Claim to lease which will require an Order of the tribunal indicating that surface rights compensation has been paid, secured or settled, pursuant to clause 81(2)(c) of the **Mining Act**;

AND WHEREAS Emerson M. Grant is an owner in fee simple of an undivided 1/12 interest in the Mining Lands; Ernest A.R. Newson is an owner in fee simple of an undivided 8/12 interest in the Mining Lands; Bertram H. Harper is an owner in fee simple of an undivided 2/12 interest in the Mining Lands; D'Arcy Lovell is an owner in fee simple of an undivided 1/12 interest in the Mining Lands;

AND WHEREAS the Applicant, Mr. Morgan has been either unable to contact or locate any of the respondents, their heirs, successors or assigns, or has otherwise been prevented from dealing with them due to their incapacity;

AND WHEREAS the tribunal was satisfied that, based on its jurisdiction under section 121 of the **Mining Act**, in equity, the Order applied for should be granted;

1. THIS TRIBUNAL ORDERS that the surface rights compensation payable to Emerson M. Grant, Ernest A. R. Newson, Bertram H. Harper, D'Arcy Lovell, up to and including the date of this Order, be and is hereby settled.

2. THIS TRIBUNAL FURTHER DECLARES that the aforementioned Emerson M. Grant, Ernest A. R. Newson, Bertram H. Harper, D'Arcy Lovell, or their heirs, successors or assigns, are not precluded from obtaining compensation for any injury or damage caused hereafter by any mining operations of the Applicant, Charles Morgan, or his successors in title.

3. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings", which is recorded on the abstract of Mining Claim P-724634, to be effective from the 10th day of September, 1998, be removed from the abstract of Mining Claim P-724634.

4. THIS TRIBUNAL FURTHER ORDERS that the time during which Mining Claim P-724634 was under pending proceedings, being the 10th day of September, 1998, to the 6th day of April, 2000, a total of 575 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

5. THIS TRIBUNAL FURTHER ORDERS that the 23rd day of April, 2000, be fixed as the date by which the next unit of prescribed assessment work must be preformed and filed on Mining Claim P-724634, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be April 23 pursuant to subsection 67(4) of the **Mining Act**.

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).

DATED this 6th day of April, 2000.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 036-98

L. Kamerman)
Mining and Lands Commissioner)

Thursday, the 6th day
of April, 2000.

THE MINING ACT

IN THE MATTER OF

Mining Claim P-724634, situate in the Township of Deloro, in the Porcupine Mining Division, recorded in the name of Charles Robert Morgan, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

All Mining Rights in, upon or under Mining Lands Patent H.R. 1050, (P. 19142) dated the 11th day of August, 1944, registered as Parcel 8336 South East Cochrane, situate in the Township of Deloro, District of Cochrane, (hereinafter referred to as the "Mining Lands");

AND IN THE MATTER OF

An application under clause 81(2)(c) of the **Mining Act** in respect of the surface rights of the Mining Lands.

AND IN THE MATTER OF

CHARLES ROBERT MORGAN
Applicant

AND IN THE MATTER OF

EMERSON M. GRANT, ERNEST A. R. NEWSON, BERTRAM H. HARPER, D'ARCY LOVELL
Respondents

REASONS

The facts of this case are quite simple, but their course has been complex. Charles Morgan is the recorded holder of Mining Claim P-724634, situate in the Township of Deloro, in the Porcupine Mining Division, being for the mining rights only. The surface rights over this Mining Claim have been alienated from the crown, being owned in fee simple as the surface rights only of Mining Lands Patent H.R. 1050, (P. 19142) dated the 11th day of August, 1944, registered as Parcel 8336 South East Cochrane, situate in the Township of Deloro, District of Cochrane. The registered fee simple owners of the surface rights are Emerson M. Grant of an undivided 1/12 interest, Ernest A.R. Newson of an undivided 8/12 interest, Bertram H. Harper of an undivided 2/12 interest, and D'Arcy Lovell of an undivided 1/12 interest, respectively.

On September 7, 1995, Mr. Morgan made an application for lease of the mining claim, only to have his application and fee returned on September 19, 1995 by Gary White, the then Mining Recorder for the Porcupine Mining Division, as the matter of surface rights compensation had not been resolved.

Mr. Morgan applied to the tribunal on September 10, 1998, at which time, a notation of "pending proceedings" was placed on the abstracts for the Mining Claim. In his application, Mr. Morgan purported to have an unregistered and perhaps unregistrable transfer of the interest of Emerson Grant, from Mr. Grant's wife, which is reproduced:

To Whom it May Concern:

This is to certify that Mining Claim P-1050 (p. 19421) located in Deloro Township was purchased from Mr. Emerson Grant by Chas. R. Morgan in 1975. The receipt for payment in full has been lost and I hereby certify that I have knowledge of the sale to Mr. Morgan of this property.

Signed at Kirkland Lake, Ont. this 1st day of February, 1994
(signed by) Mrs. Emerson Grant ("Margaret Grant") Witness
("Betty Ann Laberge")

On February 7, 2000, the tribunal contacted Mr. Morgan and upon determining that Mrs. Grant was still alive, strongly recommended that he seek to obtain a transfer of the interest of Emerson Grant in registerable form. The tribunal was informed that Mr. Morgan had been paying the municipal taxes on this property since 1980. As he could be considered the beneficial owner of the property, the tribunal was prepared to consider an application under section 196 for a vesting order of the remaining interests in the property. As the remaining registered owners whereabouts are unknown, and indeed, it is not known whether they are alive, publication of notice of an application for a vesting order would have to be undertaken.

Mr. Morgan advised that he had retained Mr. Francis Yungwirth as his lawyer to act in this matter. On March 30, 2000, Mr. Yungwirth wrote to advise the tribunal that he had attempted to contact Mrs. Margaret Emerson, and although still alive, in his opinion and based upon their conversation, she lacked the capacity to enter into a transfer of the property. Specifically, she could not say whether she was the daughter of Emerson Grant or his widow. Mr. Yungwirth concluded by recommending that the application under clause 80(2)(c) of the **Mining Act** be allowed, on the basis of diligent search.

In an unrelated matter, the tribunal came across the case of **Re McKinnon**, 5 M.C.C. 79, a decision of Commissioner McFarland, which concerned an application for a certificate of record under section 66 of the **Mining Act**, R.S.O. 1970, c. 274. The facts in that case were that the mining recorder had refused to issue a Certificate of Record, as McKinnon had not paid the surface rights compensation, if any, nor provided security for payment. In that case there were upwards of 400 surface rights owners. Commissioner McFarland states at page 80:

... Ordinarily, this requirement provides no problem when there is a limited number of owners, but in this case, there are approximately 400 different owners, to obtain such consent is almost impossible. Certainly, the cost alone of preparing legal notices to 400 people would be tremendous and entirely out of proportion to the known value of the property at the present time.

Commissioner McFarland goes on to state at page 81:

Under the provisions of section 66 of the *Mining Act*, the Mining Recorder was quite within his rights in refusing to issue a Certificate of Record. However, section 152 of the *Mining Act* requires this tribunal to give its decision upon the real merits and substantial justice of the case. In view of the multitudinous number of owners of lots, it is felt that in equity, the appellant should be issued a Certificate of Record, and I direct the Mining Recorder at Kirkland Lake to issue the same forthwith, provided the prescribed fees therefore have been paid.

It is further provided that nothing in this order shall in any way prevent any surface owner of a lot within the limits of the said Mining claim L.71901, applying for and obtaining compensation for any injury or damage caused hereafter by any mining operations of the appellant or his successors in title.

The tribunal finds that Mr. Morgan's situation is similar. The cost of requiring him to advertise for surface rights owners, their heirs, successors or assigns, is prohibitive, given the current value of an unpatented mining claim of mining rights only. There is nothing to prevent such surface rights owners in future from coming forward under the **Mining Act** in future, should they chose to. However, the tribunal finds that, in equity and pursuant to its jurisdiction under section 121 of the **Mining Act** to make its decisions on the real merits and substantial justice of the case, Mr. Morgan should not be put to this expense for the sake of bringing an unpatented mining claim to lease. Its value is uncertain at this time.

Also, the tribunal finds that nothing is gained by either allowing this mining claim to remain in abeyance indefinitely, nor would Mr. Morgan be any further ahead in his desire for a lease, should he have no other choice but to perform annual prescribed units of assessment work indefinitely.

The tribunal finds that it shall grant the order requested under clause 81(2)(c), and declare that the issue of surface rights compensation for past damage is settled. Nothing in this declaration prohibits any of the surface rights owners or their successors in title from coming forward and claiming compensation in future for damage sustained after the date of the order.

Exclusion of Time

Pursuant to subsection 67(2) of the **mining Act**, the time during which Mining Claim P-724634 was pending before the Tribunal, being the 10th day of September 1998, to the 6th day of April, 2000, a total of 575 days, will be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c.1, Sched. O, s.18, April 23, 2000, is deemed to be the date for the performance and filing of the next unit of assessment work in Mining Claim P-724634.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for Mining Claim P-724634 are deemed to be April 23.

Conclusions

The application is granted.

Unfortunately, Mr. Morgan is no closer to obtaining a legal interest in the surface rights, notwithstanding that he continues to pay taxes. It is hoped that at some future date, the legislature will provide the means for owners of mining rights to apply for the surface rights when such rights have been severed. However, this avenue does not exist at this time, with the exception of an application to the Courts.