

Appeal No. MA 015-93

L. Kamerman )  
Mining and Lands Commissioner )

Tuesday, the 8th day  
of February, 1994.

**THE MINING ACT**

**IN THE MATTER OF**

An application for a declaratory order pursuant to section 105 of the Mining Act to have Mining Claims K-721410, 721411 and 721413, situate in the Little Turtle Lake Area, in the Kenora Mining Division, in the Province of Ontario, hereinafter referred to as the "Mining Claims", restaked on July 4, 1984 as K-813878, 813879 and 813880, respectively, situate in the Little Turtle Lake Area, in the Kenora Mining Division, in the Province of Ontario, hereinafter referred to as the "Restaked Mining Claims" and Lease No. 103949, situate in the Bad Vermillion Lake and Little Turtle Lake Areas, in the Territorial District of Rainy River being Part 1 of Plan 48R-2128 registered in the Fort Frances Land Registry Office, hereinafter referred to as the "Lease" vested in the applicant.

**B E T W E E N:**

P.A.R. BROWN

Applicant

- and -

NORTEL COMMUNICATIONS INC.

Respondent

**ORDER**

**UPON HEARING** from Mr. Robert Graham on behalf of the applicant and Mr. John Picken on behalf of the respondent and upon reading the material filed;

**AND UPON FINDING** that the applicant is entitled at law to have the Restaked Mining Claims returned to them due to the breach of an agreement with the predecessor in title of the respondent, the Restaked Mining Claims having been found to be the subject matter of the agreement;

**1. THIS TRIBUNAL ORDERS** that the interest of Nortel Communications Inc. in Restaked Mining Claims K-813878, 813879 and 813880 is hereby vested in the applicant.

**2. THIS TRIBUNAL FURTHER ORDERS** that no order can be made with respect to the Lease, with jurisdiction to do so resting with the Ontario Court (General Division).

**3. THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by either party to the appeal.

**IT IS FURTHER DIRECTED** that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Kenora Mining Division and in the Fort Frances Land Registry Office.

Reasons for this Order are attached.

**DATED** this 8th day of February, 1994.

Original signed by

L. Kamerman  
MINING AND LANDS COMMISSIONER.

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#### **B E T W E E N:**

P.A.R. BROWN

Applicant

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NORTEL COMMUNICATIONS INC.

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#### **REASONS**

The application was received by the tribunal on the 17th day of May, 1993 from Mr. P.A.R. Brown, who indicated that he would be out of the country and all future communication should be with Mr. R.J. Graham, who is his agent for the purposes of the application.

The tribunal issued an Order To File pursuant to clauses 116(1)(b) and (g) of the **Mining Act** on the 9th day of June, 1993. The applicant responded to the Order, but no response was received from the respondent. Mr. Graham informed the tribunal in writing on August 14, 1993 that a registered letter had been sent to the respondent, but no reply had been received.

The tribunal made numerous attempts to reach the respondent, which is located in Salt Lake City, Utah, by telephone. On September 24, 1993, in a telephone conversation between Mr. John Picken, on behalf of the respondent, and Mr. Daniel Pascoe, Registrar for the tribunal, Mr. Picken indicated that he would consult with his partner and have a formal document prepared transferring the Mining Claims and Lease to the applicant. No such document was received either by the tribunal or the applicant.

An Appointment For Hearing was issued on December 13, 1993 and a hearing was conducted by telephone conference call on January 14, 1994, with Mr. Robert Graham speaking for the applicant and Mr. John Picken speaking from Salt Lake City, Utah, on behalf of the respondent. Mr. Picken came on the phone later than the designated hour and pre-empted discussions. He stated that the Mining Claims and Lease should be returned to the applicant. He questioned the **bona fides** of representations made concerning the properties. Mr. Picken indicated that he was unwilling to execute Transfers of the Mining Lands and Lease and that the tribunal should accomplish this by way of an order. Before Mr. Graham could respond, Mr. Picken stated that he would not be staying on the line and hung up.

The tribunal is informed that Mr. Picken is a lawyer, although it is unclear to which Bar he is admitted. Although there is no jurisdiction to do so outside of Ontario, the tribunal is of the opinion that, had Mr. Picken been a member of the Law Society of Upper Canada, his conduct was sufficiently in contempt of its proceedings that he would have been reported to the Law Society.

Mr. Graham stated that he and Mr. Brown, who are partners in the Mining Claims and Lease, notwithstanding the documentation, at all times believed that the lands have sufficiently demonstrated presence of gold that it will be their intention to retain ownership of the Mining Claims and Lease.

The tribunal indicated to Mr. Graham that it would issue an order transferring the Mining Claims to Mr. Brown. However, the tribunal was uncertain as to

how transfer of the Lease could be accomplished. Further research and discussions held with the Land Registrar for Fort Frances and the Legal Services Branch of the Ministry of Consumer and Commercial Relations has confirmed the opinion of the tribunal that it does not have jurisdiction over the Lease. Evidence of this is also contained in subsection 81(12) of the **Mining Act**, which refers to a notice by the Minister of cancellation of a mining lease, where upon notice to the proper office, the **Land Titles Act** or the **Registry Act** cease to apply. Subsection 29(1) of the **Land Titles Act** refers to actions instituted for specific performance of a contract relating to registered land, which is brought before a judge of the court which, through section 1 of that **Act** means the Ontario Court (General Division).

In light of the above, the tribunal finds that it has no jurisdiction in respect of the Lease, recourse for recovery of which will have to be had to the Ontario Court (General Division).

The tribunal reviewed the evidence filed in support of the application for the transfer of the Mining Claims to the applicant. A Mining Claim Assignment Agreement dated November 9, 1983 between Mr. Philip Brown, the applicant, and Federal Kirkland Mines Ltd. sets out that the subject matter of the agreement concerns Mining Claims K-721410, 721411 and 721413. The agreement sets out at paragraph 2.03 as follows:

2.03 The Assignment shall be subject to the following provisions:

- (a) Brown shall retain and preserve unto himself in respect of the Claims, the right to a royalty (the "Royalty") equal to ten (10%) percent of all net proceeds (the "Net Proceeds" paid by any smelter for Ore processed by it, and to the extent as may be done, any smelter receiving Ore for processing by it shall be instructed to pay the Royalty directly to Brown and if such direct payment arrangement may not be effected then all such Net proceeds shall be paid to Federal from which Federal shall pay to Brown the Royalty.

Paragraph 2.03 (b) (iii) states:

- 2.03. (b) If Federal delivers to Brown a notice in writing of its intention to terminate its rights under the Assignment, then the

Assignment shall terminate (the "Termination") and upon the Termination:

- (iii) Brown shall be entitled to receive the royalty for the month in which the Termination becomes effective.

The applicant alleged that all required payments had been made until 1992. The 1993 payment was not received. Mr. Picken did not deny this fact.

The abstracts for the Mining Claims indicate that they were all staked on May 30, 1983. On March 27, 1984 all interest in the Mining Claims was transferred to Federal Kirkland Mines Ltd. The Mining Claims were cancelled on July 9, 1984 for failure to perform adequate assessment work.

Abstracts for Mining Claims K-813878, 813879 and 812880, all of which were staked on July 4, 1984 and recorded on July 9, 1984, indicate that they constitute restaking of Mining Claims K-721410, 721411 and 721413 respectively. On the basis that the Restaked Mining Claims currently in good standing are a restaking of the Mining Claims referred to in the Mining Claim Assignment Agreement between the applicant and respondent, the fact that both parties have dealt with the Restaked Mining Claims as if the Mining Claim Assignment Agreement was applicable, the fact that Mr. Picken demurred to the tribunal's jurisdiction to deal with the Restaked Mining Claims in place of the Mining Claims, and general contract law principles, the tribunal finds that the Mining Claim Assignment Agreement applies to the Restaked Mining Claims. The general contract principles referred to are those enunciated in **Lawrence v. Errington** (1874), 21 Gr. 261, as to the conduct of the parties demonstrating their intent as to the subject matter of the agreement and **Mark London Ltd. v. Granwest Indust. Ltd.** (1981), 18 R.P.R. 61 (B.C. S.C.), as to the requirement that ancillary property rights not needing to be set for in the memorandum to satisfy the requirements that all terms be cited in the agreement.

The abstracts filed indicate that 100 percent of the Restaked Mining Claims were transferred to Federal Kirkland Mines Ltd. on June 17, 1985. On November 23, 1987, the interest of Federal Kirkland Mines Ltd. was transferred to Coldspring Resources

Ltd. On April 10, 1990, the name of Coldspring Resources Inc. was changed to Isleshaven Capital Corporation. On February 28, 1992, the name of Isleshaven Capital Corporation changes its name to Nortel Communications Inc.

Paragraph 3.04 of the Assignment Agreement sets out:

3.04 This Agreement shall enure to the benefit of and shall be binding upon the Parties hereto and their respective heirs, executors, trustees, administrators, successors or assigns.

Based upon the evidence of the applicant that payment had not been received during 1993, the position of the respondent that the Mining Claims should be returned, the finding of the tribunal that the failure to make payment breaches the terms of the agreement, which it finds to be binding on the respondent, Nortel Communications Inc., as assignee and successor to Federal Kirkland Mines Ltd., the tribunal finds that it will order that the Restaked Mining Claims be transferred to the applicant.