File No. MA 038-93

L. Kamerman)
Mining and Lands Commissioner)

Thursday, the 21st day
of December, 1995.

THE MINING ACT

IN THE MATTER OF

Mining Lease 105934, comprising Mining Claims K-475272 to 475277, both inclusive, registered in the Fort Frances Registry Office ("the McKenzie-Grey Group");

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 ("the West Rock");

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 and
KIRSTI ALICE ARMSTRONG

Respondents

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ORDER AS TO COSTS

WHEREAS the tribunal issued an Interim Order on the merits of the application on the 17th day of October, 1995;

AND WHEREAS the tribunal directed in its Order that counsel for the parties make submissions on the issue of costs on account of the preliminary motion and on account of the hearing of the merits by the 1st day of December, 1995;

AND WHEREAS written submissions and submissions in reply dated the 24th day of November, 1995 and the 1st day of December, 1995, respectively, were received from counsel for the respondents and submissions dated the 28th day of November, 1995 were received from counsel for the applicant;

UPON READING the submissions filed;

1. **THIS TRIBUNAL ORDERS** that costs in the amount of $3,763.75 be awarded to the respondents, George Ansley Armstrong and Kirsti Alice Armstrong, forthwith on account of the preliminary motion held by telephone conference call on the 29th day of November, 1994.

2. **THIS TRIBUNAL FURTHER ORDERS** that no costs are payable by either the applicant, Nipigon Gold Resources, Ltd. or the respondents, George Ansley Armstrong and Kirsti Alice Armstrong on the hearing of the merits.

Reasons for this Order are attached.

DATED this 21st day of December, 1995.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

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Respondents

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REASONS

In its Interim Order of October 17, 1995, the tribunal directed that counsel for the parties make submissions on the issue of costs on account of the preliminary motion and on account of the hearing of the merits by December 1, 1995. Written submissions and submissions in reply dated November 24, 1995 and December 1, 1995, respectively, were received from Ms. Le Dain, counsel for the respondents, and submissions dated November 28, 1995 were received from Mr. Lukinuk, counsel for the applicant, in compliance with the tribunal's direction. The tribunal has reproduced these submissions in their entirety below.

Submission of Applicant:

SUBMISSION OF APPLICANT RE COSTS

A. The Applicant's position is that no costs whatsoever should be awarded to the Respondents.

B. The Applicant states that in this particular case that this Tribunal order and adjudge that the Respondents do pay to the Applicant their costs of the Application forthwith after the same have been set by the Tribunal.

BASIS FOR SUBMISSION

1. This Tribunal has the absolute discretion under the Mining Act, to award or withhold costs, including Counsel fee.

2. Costs mainly follow the event. In this case:

   i) the Applicant was completely successful in the Application and;

   ii) the Respondent was completely unsuccessful in the Application.

3. The following comments from a previous Commissioner in the Mining Commissioner's cases volume III, page 133, should be considered in this case: "Section 195, well conceived by the Legislature and meticulously worded by the draughtsman to meet the exigencies of mining and

frustrate selfish interests impeding development of mining lands into a mine of value to the benefit of the owner, its employees and those commercially benefiting and indirectly the Crown."

4. It is clear that having regard to the prior dealings between the parties and the attempt of the Respondent to use this Act for self benefit, an exemption exists in that no Order of costs in favour of the Respondent should be made.

5. The Armstrong's have been fully compensated for all damages.

6. The Mining Act in Section 175 gives certain rights to operating mines so that mining will not be hindered by the actions of obtuse neighbours attempting to hold a said mine up to ransom. In the normal situation where lands adjacent to a mine are required for the operation of the mine the function of the Tribunal in effect is to determine the level of damages and compensation and since the adjacent land owner in effect is an innocent party costs would follow the event. Having regard to the circumstances of this case, the prior dealings between the parties and the attempt of the Respondent to use the Act for self benefit, no Order of costs in favour of the Respondent should be made.

7. The Armstrong's have received payment for all previous damages which has been determined as more than sufficient compensation under the Mining Act.

8. A careful reading of the correspondence will show that Nipigon consistently was a good neighbour. Once it became clear that no Agreement could be reached and that litigation under the Mining Act was inevitable an offer was made by Steven W. Lukinuk agreeing that Nipigon would pay an additional Five Thousand ---($5,000.00)---Dollars to the Armstrong's for the continued use of the road. This offer was rejected. Shortly thereafter the Armstrong's commenced a Division Court claim for damages in complete abuse of the overall legal system of the Province of Ontario.

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9. The decision of this Tribunal confirms that they held $2,237.00 as a credit from the Applicant and to settle this matter they would have received an additional $5,000.00 making their recovery in all $7,237.00 more than they have now received under Order of the Commissioner. Please note that any payment to Armstrong from Nipigon calls for Armstrong to expend work and effort in order to receive a payment.

10. Accordingly, on a party and party basis no costs whatsoever should be paid to the Respondents and in view of the conduct of the Respondents case, costs on a Solicitor and his own client basis should be awarded against the Armstrong's for the following reasons:

    a) The Application was totally un-necessary and the Armstrong's should have accepted the $5,000.00 settlement offer;

    b) The action itself and the appearances were un-necessarily complicated by virtue of an abuse of process whereby the Armstrong's commenced an action against Nipigon for damages and proceeded to Discovery and have taken no further steps under the said process. Nipigon bore Solicitor and client costs of the said abusive process in that the action was defended and the attendances were required in the said action. In abusing both processes, Armstrong's thereby attempted to obtain an advantage in this action, which this Tribunal should in now way condone and should award costs in this instance to the Applicant;

    c) The action was un-necessarily prolonged by the failure of the Respondent to openly and forthrightly lead all the evidence held by Mr. Armstrong. The cross-examination had to be very prolix with much detail wherein the only witness for the Respondent made numerous conflicting claims and then denied the same and blamed everything on his lawyer, on misunderstandings or others. The Commissioner should particularly note that Mr. Armstrong confirmed openly that he had no objection to the use

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of the road and that all he wanted was unspecified amounts of money;

d) The Conduct of the Trial

I particularly point out to the Commissioner that during the Argument of the Applicant, the writer was interrupted during Argument by the Solicitor for the Respondent. In the normal course of a Court Trial if this conduct, even as a slip, had occurred it would result in a non-suit, the dismissal of the offending party, or possible retrial of a jury action. No costs could ever be awarded in any case where argument of any party is ever interrupted by opposing Counsel and this should be made abundantly clear by the Tribunal.

e) Some considerable time of the parties and the Commissioner were part of this Application in connection with the determination of who were the parties. The Act and the various cases are quite clear that if there is the slightest possibility of any person being adversely affected by the performance of the rights applied for that the widest possible number of persons should be part of the Application until it is determined that such party was not affected. This is particularly the case in that unless included in any Order, once the extent of compensation is determined the same is binding in relationship to the lands affected for ever after. Thus the name of Corporate Oil and Gas Limited as a Respondent was necessary and justified by the Applicant in that it is clear that Armstrong's title to ownership was far from clear.

f) As to the quantum of costs the best estimate of the time involved by Steven W. Lukinuk in preparation of the initial Notice to the Commissioner, the further preparation of the formal Application and attendance upon the witnesses and preparation for the Hearing was over 90 hours. The time at the initial Hearing to determine the parties and issues and the length of the Hearing can best be determined from the Commissioner's records.

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g) Steven W. Lukinuk is quite experienced in Mining Commissioner's cases as is evidenced from the Mining Commissioner's reports of the same and has been awarded Counsel fee at the top rates in such cases.

h) The primary disbursements for witnesses was that incurred by Nipigon for Mike Sjursen as shown on Schedule affixed hereto in the amount of $1,876.14. The miscellaneous disbursements for numerous searches and the copies of various sets of abstracts was incurred by Nipigon in its normal operating costs and the precise details of the substantial disbursements necessary in this case is not available.

i) In conclusion the Applicant indicates that no costs should be allowed to the Respondents and in view of the considerations involved herein this case was entirely un-necessary and costs should be awarded to the Applicant.

BILL OF COSTS OF THE APPLICANT
PARTY AND PARTY SCALE

Filing of initial information	
Preparation of Application	
Production of documents	
Preparation for Preliminary Motion and Hearing of same November 29, 1994	
Preparation for Hearing of the Merits heard January 23, 24 and 25, 1995	
Steven W. Lukinuk (1956) 90 hrs. @ $200/hr	$ 18,000.00
Counsel fee for attendance at Hearing of the Merits on January 23, 24 & 25/95	

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Steven W. Lukinuk (1956) 3 days at $3,000/day	9,000.00
Witness (M. Sjursen) travel & expenses	1,876.14
G.S.T. on fees of $27,000. (7%)	1,890.00
TOTAL FEES, EXPENSES and G.S.T.	$ 30,766.14

Submission of Respondent:

. . . .

Pursuant to Sections 126 and 127 of the *Mining Act*, you have discretion to award costs to any party and may fix such costs to be paid as a lump sum in lieu of assessment. Such costs and disbursements are to be according to the tariff of the Ontario Court (General Division).

In this application, a right-of-way was asked for by the applicant which affected the respondents' interest in their lands. The respondents were therefore before the Mining Commission as of necessity. The respondents were represented by counsel throughout the proceeding and presented evidence.

It is usual for the Mining and Lands Commissioner to exercise his or her discretion in favour of awarding costs of an application under Section 175 of the *Mining Act* to a respondent who appeared throughout the application: *Howes v. Estate of M.E. Manderson* (1977) 5 M.C.C. 348; *Great Lakes Nickel Limited v. Wallenius* (1973) 5 M.C.C. 101; *Marmoraton Mining Company, Limited and Lake Surprise Mines, Limited* (1954) 3 M.C.C. 126; *Kerr Addison Gold Mines* (1938) M.C.C. 100. Costs of the application have been awarded to the respondent notwithstanding that an order was made against it and even where no award of compensation was made: *Marmoraton*, supra at 142. The *Marmoraton* decision was more recently relied upon by the Mining and Lands Commissioner in determining costs in *Dominion Foundries and Steel Limited v. New Athona Mines Limited* (1984) 6 M.C.C. 510 at 522.

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The respondents are not seeking any costs of the hearing which was adjourned on September 20, 1994, as those costs thrown away were already awarded to the respondents in your order dated October 7, 1994. The respondents are seeking costs for both the preliminary motion heard on November 29, 1994 and the main hearing on the merits held on January 23, 24 and 25, 1995.

The preliminary motion was held to determine whether the respondents were the actual owners of the property over which the right-of-way was sought. The respondents were forced to prove their ownership of the surface and mining rights to the property. Difficult legal issues respecting the chain of title to the property, the effect of a tax deed on that chain of title and the application of the *Tax Sales Confirmation Act*, the *Municipal Tax Act* and the *Conveyancing Law of Property Act* were argued in the preliminary motion. The respondents filed lengthy written submissions and a brief of law and documents. The hearing took place by way of a conference call of forty minutes duration.

The main hearing on the merits took 2½ days. A number of witnesses were called. Again, difficult legal issues were argued. For example, in addition to the usual issues under Section 175 of the *Mining Act*, the applicant raised the issue of whether a portion of the right-of-way sought is a public road due to the expenditure of public funds and whether the applicant had rights to pass over the road at common law or pursuant to the *Road Access Act*.

We are enclosing a draft bill of costs outlining the respondents' party and party costs, based on docketed time and allowable disbursements, in accordance with the tariff of the Ontario Court (General Division). We have not included in the bill of costs the 30 hours of docketed time and the airfare and accommodation disbursements which were awarded to the respondents as recovery for costs thrown away in connection with the September 20, 1994 adjourned hearing.

In our submission, the respondents should recover their party and party costs against the applicant, fixed in the amount of $20,428.00.

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BILL OF COSTS OF THE RESPONDENTS
PARTY AND PARTY SCALE

	Fees	Disbursements
Pleadings including review of Notice of Application; preparation of Reply and serving and filing same		
Laurence A. Pattillo (year of call 1974) (12.6 hrs. x $175/hr.)	$ 2,205.00	
Student (2.1 hrs. x $50/hr.)	105.00	
Production and Filing of Documents		
Jennifer Le Dain (year of call 1990) (5 hrs. x. $120/hr.)	600.00	
Copies of Documents (3 copies x (40 pages x .25/page))		$ 30.00
Preparation for Preliminary Motion heard November 29, 1994, including preparation of written submissions and brief of documents and authorities and attendance by conference call		
Jennifer Le Dain (1990) (10 hrs. x $120/hr.)	1,200.00	
Student (50 hrs. x $50/hr.)	2,500.00	
Brief for Preliminary Motion (3 copies x (85 pages x .25/page))		63.75
Preparation for Hearing of the Merits heard January 23, 24 and 25, 1995		
Laurence A. Pattillo (1974) (2.5 hrs. x $175/hr.)	437.50	
Jennifer Le Dain (1990) (61 hrs. x $120/hr.)	7,320.00	

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Student (20 hrs. x $50/hr.)	1,000.00	
Counsel Fee for Attendance at Hearing of the Merits on January 23, 24 and 25, 1995		
Jennifer Le Dain (2.5 days x $1,000/day)	2,500.00	
Travel and Accommodation Expenses		1,033.88
Photocopies (3 copies x (244 pages x .25/page))		183.00
Subtotal	17,867.50	1,310.63
GST on Fees (7%)	1,250.73	
TOTAL FEES AND DISBURSEMENTS	$20,428.86	

Reply to Submissions of the Applicant:

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First, the applicant is incorrect in stating that the respondents were completely unsuccessful in the application. Although a right of way was granted in favour of the applicant, compensation for past and current injury and damage suffered by the respondents was awarded to the respondents. The fact that you held that this award should be set-off against monies already paid by Nipigon to Armstrong does not detract from the fact that compensation was awarded. Further, in view of the fact that annual compensation for grading of the road in the amount of $1,500 was also awarded, the award will represent a net recovery to the respondents, even after the set-off.

Second, it is quite incorrect to state that the respondents were attempting to use the *Mining Act* for their own selfish benefit. The respondents did not initiate the application under Section 175. They were content to have the applicant's ability to use the road continue to be governed by the contract between the parties. Instead, the respondents were forced to appear

before the Mining and Lands Commissioner in order to contest an application which affected the respondents' interest in their lands.

Third, the action brought by the respondents in the Ontario Court of Justice against Nipigon Gold Resources Ltd. and Maxmillan Reiter was not brought to obtain an advantage in the *Mining Act* application and was not an abuse of process. That action was brought to obtain relief that was not available to the respondents in an application under Section 175 of the *Mining Act*, namely damages for breach of contract and trespass and an interim and permanent injunction preventing the defendants from crossing the plaintiffs' property.

Fourth, the settlement offer referred to by the applicant would not have represented a greater recovery for the respondents than the compensation awarded. That offer was for a one-time payment of $5,000 for all use by the applicant of the road over an indefinite period. The award of annual compensation of $1,500, when viewed over a period of years, will represent a value to the respondents which is significantly greater than the applicant's settlement offer.

The other rationales advanced by the applicant in support of its request for solicitor and client costs (such as length of Mr. Armstrong's cross-examination) have nothing whatsoever to do with justifying an award of solicitor and client costs. We have no idea what Mr. Lukinuk is referring to when he states that he was "interrupted during argument by the solicitor for the respondent".

Finally, the quantum of costs claimed by the applicant is excessive. The 90 hours claimed by Mr. Lukinuk for preparation for the Preliminary Motion and Hearing on the Merits is highly excessive in comparison to the time claimed by counsel for the respondents, particularly in view of the fact that the vast majority of the effort of establishing the ownership of the surface and mining rights to mining locations K-74 and K-75 for the purpose of the Preliminary Motion was expended by counsel for the respondents in considerable research and lengthy written submissions. It is inconceivable to us that Mr. Lukinuk actually spent the 90 hours claimed in preparation. In our submission, he should produce his dockets for review if he intends to maintain this claim. In addition, the rate claimed for preparation of $200/hr. is

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> excessively high, as is the counsel fee claimed of $3,000/day for three days. Our records indicate that the Hearing on the Merits lasted for $2^1/_2$ days rather than the 3 days claimed by Mr. Lukinuk.
>
> Accordingly, the applicant has clearly failed to establish any entitlement to solicitor and client costs or to party and party costs and in fact has failed to establish that your discretion to award costs should not be exercised in favour of the respondents. In our submission, for the reasons expressed in our letter of November 24, 1995, you should award party and party costs in favour of the respondents, so that they may be fully compensated for past injury and damage, including legal costs, in connection with the right of way granted to the applicant.
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Findings:

Section 126 gives the tribunal the discretion to award costs to any party. The issue to be determined is how this discretion should be exercised in the context of an application under section 175 of the **Mining Act** for a right of way and the right to transmit electricity over the lands of the respondents.

No right of way or right to transmit can be obtained by the person seeking it in connection with the proper working of a mine without an Order of the tribunal. Therefore, the tribunal finds that this application was necessary.

A review of prior cases under section 175, as provided by Ms. Le Dain, indicates that costs of the application are normally awarded to the owner of the adjacent lands if he or she appears on the return of the application. This makes sense when one considers that the respondent is named as a party by the applicant. The tribunal is unaware of any case where the costs of the application were ordered paid by the respondent.

In the matter of the preliminary motion, the tribunal received considerable assistance from the title search and written submissions of Ms. Le Dain. Therefore, it is determined that it would be proper to allow the respondents costs of the preliminary motion, heard November 29, 1994, including preparation of written submissions, preparation of brief of documents and authorities and attendance at the telephone conference call. The total costs awarded to the respondents on the preliminary motion is $3,763.75.

On the hearing of the merits, the tribunal encountered considerable difficulty with the evidence as presented. Nipigon placed the tribunal at a disadvantage in failing to call as a witness either a principle of Nipigon to speak to the negotiations which occurred after the making

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of the contract, or Mr. Quaker, who did the road improvement on Nipigon's behalf. No expert was called on the question of cost involved in building of a road suitable for mining purposes. Similarly, the evidence of Mr. Armstrong was not entirely useful in making its determination of damages and the failure to present an expert in road building who did not have an interest in the outcome impeded the tribunal in making its findings.

In the decision of **Brown v. Green** (1985), 7 M.C.C. 102, on an application for determination of compensation for injury or damage to surface rights and other injunctive relief, neither party was awarded costs. A number of claims for compensation were dismissed for lack of evidence, and total compensation was fixed at $100. Commissioner Ferguson stated the following at page 109:

> Considerable submissions were made to this tribunal regarding costs. While it is normal in these matters to compensate the owner of the surface rights at least to the extent of party and party costs, the tribunal is satisfied in this case that the actions of both of the parties, whether or not they were taken with legal advice, do not warrant the issue of an order granting costs to either of the parties.

The tribunal finds that it will adopt the reasoning of Commissioner Ferguson in **Brown** in finding that it is not appropriate in the circumstances of this case to make an award of costs on the hearing of the merits to either the applicant or the respondents.

Conclusion:

Costs in the amount of $3,763.75 are awarded to the respondents on the preliminary motion. No costs will be awarded to either the applicant or respondents on the hearing of the merits.