Appeal No. MA 019-93

L. Kamerman) Thursday, the 19th day
Mining and Lands Commissioner) of January, 1995.

THE MINING ACT

IN THE MATTER OF

An application under section 105 of the **Mining Act** in respect of Mining Claims TB-1120989 to 1120994, both inclusive and 1121734, situate in the Blair Lake Area and Mining Claims TB-1120995 to 1120999, both inclusive, situate in the Cosgrave Lake Area, in unorganized territory, in the Thunder Bay Mining Division, hereinafter referred to as the "Mining Claims".

B E T W E E N:

COSTY BUMBU and JAMES A. MARTIN

Applicants

- and -

NORANDA EXPLORATIONS COMPANY, LIMITED,
(NO PERSONAL LIABILITY)

Respondent

ORDER

WHEREAS an application received by this tribunal on the 8th day of June, 1993;

UPON hearing from the solicitors for the parties and reading the material filed;

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1. **THIS TRIBUNAL ORDERS** that the application is hereby dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the time during which the Mining Claims were under "pending proceedings" being the 16th day of June, 1993, to the 19th day of January, 1995, a total of 582 days, be excluded in computing time within which work upon the Mining Claims is to be performed.

3. **THIS TRIBUNAL FURTHER ORDERS** that the 27th day of July, 1995 is fixed as the date by which the next unit of assessment work shall be performed and filed on the Mining Claims.

4. **THIS TRIBUNAL FURTHER ORDERS** that the notation "pending proceedings" be vacated from the abstracts of the Mining Claims.

5. **THIS TRIBUNAL FURTHER ORDERS** that no costs are payable by either party in these proceedings.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Thunder Bay Mining Division.

Reasons for this order are attached.

DATED this 19th day of January, 1995.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

The hearing of this matter was held in the Fireside Room, at the Valhalla Inn, 1 Valhalla Inn Road, Thunder Bay, in the Province of Ontario, on October 11 and 12, 1994.

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Appearances:

Steven Walter Lukinuk	Counsel for the applicants, Costy Bumbu and James A. Martin.
Albert C. Gourley	Counsel for the respondent, Noranda Explorations Company, Limited (No Personal Liability).

Opening Remarks:

Mr. Lukinuk characterized the issue before the tribunal as being classically typical, involving an agreement formulated in the bush, involving mining claims for which money was given, the taking possession of and exploration work done on those mining claims, whereupon a subsequent agreement is executed.

It is his clients' position that subsequent agreement does not reflect initial agreement. As such, it should be amended by the tribunal or disregarded in its entirety, the result of which would see, in either case, the vesting of the twelve mining claims which form the subject matter of this application in the applicants.

Mr. Gourley stated that Noranda needs prospectors like the applicants in order to prosper. However, the mining claims brought to Noranda were explored and found wanting. Noranda enters into option agreements every week and assumes that it will be bound by written agreements and not faced with oral agreements in connection with those numerous options.

Asking why the applicants are now suing for the vesting of the subject mining claims, (referred to as the "12 mining claims" or the "mining claims listed in Schedules B to Ex. 10 and 11"), Mr. Gourley stated that the evidence would show that Mr. Bumbu approached Noranda with a third party interested in all of the mining claims. Only this interest can explain the fact that the proceedings were not commenced until two years after the initial eight mining claims were returned.

Mr. Gourley stated that the law requires that the applicants provide clear evidence that Noranda promised them the subject mining claims, which does not exist.

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The outline of the proposed agreement, which Mr. Gourley described as the "letter of intent" states quite clearly that the option is for the eight original mining claims and there is nothing in that document, or the subsequent formal agreement to suggest that the subject mining claims should be vested, should the option not be exercised.

Preliminary Matters:

Mr. Gourley brought a motion that parole evidence should be excluded from these proceedings on the basis of the parole evidence rule, which is set out at paragraph 1 of Part III of his Legal Argument and Case Law (Ex. 26):

> By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract. (Per Denman, C.J., in **Goss v. Lord Nugent** (1833), 110 E.R. 713 at 716);

It was also submitted that it is noteworthy that the agreement (Ex. 11) is also under seal. Mr. Gourley concluded that all parole evidence should be ruled inadmissible.

Mr. Lukinuk submitted that, in the attempt by Noranda to make this matter a pure legal argument, several horrendous things were being attempted. He referred the tribunal to Paragraph 17 (Ex. 11), which sets out that the letter agreement "constitutes the entire agreement ... and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written...", yet in the middle of the second page of the same document, it is the respondent who is acknowledged and agreed as:

> ... entering into this letter agreement relying upon the representations and warranties made to it herein, and the correctness of each such representation and warranty is a

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> condition upon which the Optionee [respondent] is entering into this letter agreement, each of which conditions may be waived in whole or in part solely for the benefit of and at the discretion of the Optionee.

It was submitted that this paragraph is an illustration of where the giant, Noranda, has put up a shield concerning any prior agreements, effectively excluded anything upon which the prospector relied upon, while retaining to itself to determine which representations, warranties or conditions may be waived. Mr. Lukinuk submitted that Noranda was attempting to have the best of both worlds, and posed the question of what the argument might be had Noranda been trying to enforce the contract.

When there is such a conflict between the parties, it is within the power of the tribunal, once the hurdles of the Statute of Frauds and section 58 of the **Mining Act** have been overcome, to rectify the agreement. This is illustrated by the **Thorsteinson** case (**B-B-M v. Thorsteinson**, 5 M.C.C. 228). Mr. Lukinuk reiterated that Noranda took possession of the subject mining claims and that money was paid. He invited the tribunal to examine the abstracts and the date of the agreement from which it must be concluded that they encompass one group of mining claims for purposes of the option. Mr. Lukinuk submitted that there is not a scintilla of factual evidence to suggest that only the agreement (Ex. 11) should be considered.

Mr. Gourley reiterated that the agreement (Ex. 11) was made in reliance on the representations and warranties within the agreement itself and pointed out that the respondents had relied on that statement. He also reiterated that the requirements of the **Statute of Frauds** were considered to be sufficiently significant that provision for an agreement in writing is included in section 58 of the **Mining Act**.

The tribunal found that the agreement (Ex. 11) was sufficiently vague with respect to the status of the subject mining claims that it would allow parole evidence in connection with the application.

Issue:

Ultimately, the issue is whether Messrs. Bumbu and Martin are entitled to

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the twelve mining claims which are the subject matter of this application. The outcome will be based upon determination of the following:

1. Which of the two documents, that of July 11, 1989 or March 15, 1990, is the contract between the parties?

2. Are the requirements of the Mining Act and the Statute of Frauds met in connection with the subject mining claims.

3. Is there a proper case for rectification, variation, unconscionability or mercantile practice as claimed by the applicants?

Evidence:

Costy Bumbu, a prospector, gave evidence that he shares his interest in Jackpine Creek with James Martin, the co-applicant, his son-in-law and partner, each having a 50 percent interest.

Mr. Bumbu described his ongoing interest in and the various transactions involving the original eight mining claims dating back to 1965, as disclosed by the documentation filed. In May, 1989 he approached Bruce Mackie of Noranda, indicating that the property held promise as a copper mine. An inspection was made by Noranda geologists, accompanied by Bumbu, with 40 or 50 assays taken, with copies of the results being provided to Bumbu. Mackie communicated Noranda's interest in the eight mining claims, but indicated that more ground would have to be staked. The first option payment of $3,000 was lower than Bumbu felt it was worth, but he was told that Noranda would provide compensation by giving Bumbu and Martin line cutting and trenching work.

Noranda indicated that it would require the staking of an additional 12 mining claims, which are the subject mining claims, which were staked in the name of James Martin on July 11 and 12, 1989 for which Messrs. Martin and Bumbu were paid $1,800.

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Mr. Bumbu identified the July 11, 1989 document (Ex. 10), which was signed by him and Mr. Martin on July 14, 1989, with the signature of Garth Pierce appearing on behalf of Noranda, Northwestern Ontario Division. At the hearing, Mr. Bumbu acknowledged receipt of $3,000 and that at the time of signing he was aware that the document was subject to head office approval.

The subject mining claims were transferred to Noranda on August 22, 1989, which immediately began work on all twenty mining claims. Referring to the abstracts of the subject mining claims (Ex. 29), Mr. Bumbu read details of work done by Noranda into the record. On November 3, 1989, 704 days of geotechnical work was filed; on June 14, 1990, 908 days of geotechnical work was filed; on June 18, 1990, 176 days of geotechnical work was filed. All the aforementioned work was approved in due course. According to Mr. Bumbu, in 1990, diamond drilling was performed, with 90 percent having been done on the original eight mining claims.

Other than the staking of the subject mining claims, Messrs. Bumbu and Martin were not asked to perform any of the work. In fact, an additional 28 mining claims which tied onto the original eight claims, which were initially included in the application, were staked on behalf of Noranda by James M. Lariviere.

Noranda provided the applicants with the results of assessment work from the original eight mining claims, although Mr. Bumbu was told that the two cores taken missed the potential showing. In total, Mr. Bumbu believed that Noranda had drilled 500 feet, but he saw only one piece of core which was not good. He did not receive copies of all assay results nor was all of the core accounted for. His attempts to obtain results from the subject mining claims met with no cooperation, his having been told by Mr. Mackie that the cores had been left in the bush while John Sullivan told him they had been lost. It is Mr. Bumbu's belief that Noranda filed assessment work on four holes only, while a fifth hole for which there are no reports exists.

In the spring of 1990, Messrs. Bumbu and Martin received the March 15, 1990 document (Ex. 11), which arrived by courier already signed by Noranda. Mr. Bumbu stated that he did not go through the document, as he did not expect it to be different from the earlier agreement, nor did he expect to be fooled by Noranda. He signed it and took a copy back to the Noranda office, leaving it with the secretary. Mr. Bumbu stated that he did not receive additional money with the March 15, 1990 document.

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Upon termination of the option agreement, evidence of which was introduced under cross-examination as having occurred on June 7, 1991 (Ex. 36) the original eight mining claims were transferred to Messrs. Bumbu and Martin, each obtaining a 50 percent interest. Mr. Bumbu stated that he had fully expected to be getting 20 mining claims, and could not understand why the subject mining claims had not been transferred, if Noranda was not interested in the option any more. Noranda would consider a transfer of the subject mining claims if he were willing to give Noranda 2 percent NSR ("net smelter royalty") and two million dollars. Mr. Bumbu indicated that he was never told why Noranda refused to transfer the subject mining claims.

Referring to the July 11, 1989 document (Ex. 10), Mr. Bumbu stated that the words in Schedule B, which state, "Area of influence where Optionors retain a production royalty" mean nothing to him, that as far as he was concerned, the eight original mining claims and twelve subject mining claims were part of the same agreement and the same deal from start to finish. He stated that no one from Noranda explained to him the difference between a "letter of intent" and a "letter of agreement" or why it was necessary to execute two letters. Notwithstanding that it had been subject to head office approval, no one from Noranda ever told him whether it had been approved or not. However, the first option payment had been made and Noranda had conducted assessment work which was applied to the 20 mining claims prior to March 15, 1990.

With respect to the listing of the eight mining claims in Schedule A of exhibit 11, Mr. Bumbu explained that he had assumed that the original mining claims were listed in Schedule A and the subject mining claims which were staked later were listed in Schedule B. The word "may" which appears in Schedule B was, in his understanding, not part of the deal which was negotiated. Rather, in his understanding, all 20 of the mining claims would be part of the same agreement. He emphatically indicated that Noranda never told him that the subject mining claims would not be part of the deal and he had no reason to be suspicious.

Mr. Bumbu stated that he has been involved with Noranda on more than one occasion. In another deal, he had staked 25 additional claims to those originally brought in under an option agreement, and at the termination of the option, Noranda transferred back all of the mining claims, including the 25 additional ones, notwithstanding that Noranda had paid for the staking and recording of those additional mining claims.

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Under cross-examination, Mr. Bumbu stated that while it might not be contained in the documentation, it was the law of the land that he be able to see the results of the cores taken, which he did not. Mr. Bumbu stated that he told Mr. Mackie that he had someone who was interested in all of the mining claims, a David Petrunka of Tandem Resources.

Mr. Bumbu denied that Mr. Mackie had explained to him the difference between a "letter of intent" and the "formal agreement". He stated that in other deals with Noranda, such as the Melchett Lake property, Sand Lake claims and Kabaigon Lake claims, he had only ever signed one agreement.

Documents were introduced into evidence, over the objections of Mr. Lukinuk.

Exhibit 31 is a letter involving the Sand Lake claims, similar in form to the July 11, 1989 document, addressed to Messrs. Bumbu and Martin, dated November 24, 1989 involving 11 unpatented mining claims. The first paragraph sets out that it is an option proposal being "subject to head office approval" and the final paragraph sets out that, "... we will arrange for head office approval and have a more formal agreement drawn up." Exhibit 30, involving the same property, is a letter addressed to James Martin dated January 10, 1990, which encloses payment and sets out, "As Bruce explained to you, these monies are to be held in trust pending the signing of a formal agreement." On re-direct, it was established that no extra ground was staked.

Exhibit 32 is a letter involving the Kabaigon Lake claims dated May 3, 1990, addressed to Messrs. Bumbu and Martin involving 108 mining claims, proposing a 5 percent NPI royalty as a finders fee in exchange for the transfer of the mining claims to Noranda. Mr. Bumbu characterized this as a straight sale.

Exhibit 33 is a letter involving the Melchett Lake property dated October 8, 1991, addressed to Mr. Bumbu and Ms. Reta Atkinson, involving 120 unpatented mining claims, changed to 123. Reference to senior management approval is contained in the document. Exhibit 34, dated October 1, 1991, which is prior to Exhibit 33, appears to be the formal agreement involving the 123 mining claims. On re-direct, Mr. Bumbu indicated that no extra ground had been staked.

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Mr. Bumbu stated that he had staked thousands of claims had entered into many deals with mining companies. In those cases, all mining claims are returned. Based upon this past practice, he assumed this would happen with the Jackpine claims and Noranda. Asked to consider the wording of paragraph 5 of Exhibit 11, he responded that had he read the document or taken it to a lawyer at the time of signing, he would have raised a fuss because of what he considered a double cross.

James Alan Martin has been Mr. Bumbu's partner in prospecting since 1987. It is Mr. Bumbu who takes the lead and does most negotiating concerning their interests. Mr. Martin has dealt only with Noranda in conjunction with Mr. Bumbu. He became aware of the Jackpine property when Bumbu showed it to him. Mr. Martin did not attend when Noranda visited the property.

Mr. Martin's first contact with Noranda was when he came in to sign the July 11, 1989 document. Mr. Martin reiterated Mr. Bumbu's testimony that, due to the low payment on the original eight mining claims, he was asked to stake an additional 12, the subject mining claims, for payment of $1,800. Mr. Martin clarified that payment had been $150 per mining claim, not the $125 initially indicated by Mr. Bumbu. He identified his invoice and a duplicate copy of the cheque, payable to him, and counterfoil (Ex. 28 A and B). According to Mr. Martin, the subject 12 mining claims were added to the initial agreement to compensate for the low down payment, this having been discussed before anything was signed originally. The period of time elapsed between Noranda's interest in the Jackpine option and the July 11, 1989 document being signed was, according to Mr. Martin, one week. Mr. Martin reiterated Mr. Bumbu's assertions that the 20 mining claims had been one deal, for which they received money from two sources, $3,000 for the original eight mining claims and $1,800 for staking a further 12 claims.

Asked to explain the changes marked in pencil to Schedule B of Exhibit 10, Mr. Martin stated that it was his understanding that the royalty was payable on all 20 mining claims, and if the arrangement were terminated, all 20 mining claims would be returned to him and Mr. Bumbu.

Mr. Martin stated that Noranda did not explain what he was signing. He understood Exhibit 11 to be a formal version of the July 11, 1989 document. There was never an explanation from Noranda as to why the subject mining claims were not returned.

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Mr. Martin stated that he did not get any additional work resulting from the Jackpine property, although he did do other work for Noranda for which he never heard any complaints.

Under cross-examination, Mr. Martin stated that he has staked mining claims on behalf of various mining companies. The practice varies as how mining claims are recorded depending on the companies' wishes. He agreed that it was not uncommon to have staked in his own name, record the mining claims and then transfer them to the company, such as was done with the subject mining claims.

Mr. Martin was asked to consider the exact wording of the July 11, 1989 document. It was pointed out that the subject mining claims were not included in the definition of "property" in paragraph 3. Referring to the words, "Other than the claims outlined in Schedule B, there shall be no area of influence." it was suggested that this referred to mining claims in addition to the original 8 and the subject 12 which would not be encompassed by the agreement. Mr. Gourley drew Mr. Martin's attention to the references to head office approval.

David Franklin Petrunka, a mining consultant for 35 years, has no formal training, but has a great deal of experience. Messrs. Bumbu and Martin and Noranda are known to him, having been involved in contracts and mining arrangements with them.
Mr. Petrunka is connected with Tandem Resources, having done work with them.

Mr. Petrunka was shown the Jackpine property by Mr. Bumbu and indicated that, if all 20 of the mining claims could be offered as an option package, the property would be highly regarded. However, the splitting of the property does not make them viable, as the eight mining claims are surrounded by Noranda.

Mr. Petrunka offered his opinion over the objections of Mr. Gourley that a normal "bush" agreement between prospectors and a mining company would be that any additional mining claims which tie onto the original mining claims in an option agreement would be returned to the optionor(s) upon termination. He indicated that he would expect that of Noranda.

Under cross-examination, Mr. Petrunka indicated that he is a friend of the applicants, but has no interest in and no dealings concerning the mining claims, nor is he employed by them at this time.

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Bruce Wayne Mackie, currently of South Delta, British Columbia, is a senior research geologist with Noranda. In 1989 he was employed at Noranda's Thunder Bay office as the district geologist for the Lakehead District, reporting to Garth Pierce. He was in charge of project generation, project control and claims control, among other responsibilities.

Mr. Mackie testified that during his tenure in Thunder Bay he had authority to negotiate but not to finalize agreements. Documents which Noranda calls its "letter of intent", of which Exhibit 10 is an example, are written by Denis Francoeur, while the formal agreement, of which Exhibit 11 is an example, are drafted by the legal department and signed by John Harvey.

Mr. Mackie stated that his authority to enter into negotiations was only for the Lakehead area. According to him, it is well known among prospectors that all agreements had to go to Toronto for final approval. It was part of his practice to inform all prospectors of the need to obtain approval from head office in Toronto.

Describing what took place with Messrs. Bumbu and Martin, Mr. Mackie stated that discussions were protracted over several weeks. Noranda was shifting its exploration activities to the Nipigon Basin to look for copper. When approached by the applicants, Mr. Mackie was interested in seeing the eight mining claims. He did see a potential problem, however. Eight isolated mining claims were not of interest to Noranda, which was interested in developing a mine and not just locating a showing. Also, Mr. Mackie stated that he wished to ensure that any potential conflict of interest were avoided, as was encountered in the **Hemlo v. Lac Minerals** problem. It is Mr. Mackie's evidence that he ensured that Mr. Bumbu was prepared to show him only eight mining claims.

A field crew visited the site and took samples. Not only was there potential for copper, but there was a showing of gold. Mackie arranged to see the property with Mr. Bumbu, at which time they discussed what to do about the problem of too few mining claims. Mackie stated that he told Bumbu that the chances of getting a deal through based upon eight mining claims was minimal. Mr. Bumbu indicated that it was not worth his while to stake additional mining claims without knowing whether a deal would result.

Mr. Mackie stated that he put a proposal forward to Garth Pierce. Mr. Lukinuk objected to this evidence, as there was no disclosure of such a proposal and

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submitted that its introduction was precluded at this stage of the proceedings. Mr. Gourley indicated that he had not known of the existence of the proposal until it was mentioned at the hearing. He submitted that the new tribunal guidelines contemplate productions, and if Mr. Lukinuk is prepared to request production, the proceedings could be halted until the proposal is produced. Mr. Lukinuk stated that he is precluded from forcing production, as the respondent has, by its documentation, indicated that it will be relying on no documents other than what had been produced. He submitted that any reference beyond Exhibits 10 and 11 are beyond the tribunal's ability to enter into evidence. [c.f. page 6, paragraph V]. The tribunal directed that the questioning should continue without reference to the proposal.

Mr. Mackie stated that he suggested various ways in which to deal with the problem of eight mining claims. If Bumbu was not prepared to stake the additional mining claims at his own expense, then Noranda could give to Bumbu an area of interest to stake for Noranda, in which Bumbu could retain an interest. As Bumbu was not prepared to stake further claims at his own expense, Noranda was willing to pay one and a half times the going rate to stake the subject claims and, in the event that the subject mining claims would become productive, the applicants would retain a royalty. That royalty, according to Mr. Mackie, was the extent of the applicants' interest. This matter was not discussed by Mr. Mackie with head office, but only with Mr. Pierce.

Asked whether it was Noranda's practice to pay a contractor to stake mining claims for which it also grants a royalty, Mr. Mackie stated that the only two typical forms used by Noranda were either a straight contractual relationship involving a transfer of the mining claims without any rights retained or acquiring an interest in the mining claims through the avenue of an option agreement through which a royalty would be payable.

A termination form, dated June 7, 1991 (Ex. 36) was introduced by Mr. Gourley and identified by Mr. Mackie and described as an internal form by which Noranda can keep track of the mining claims which have been terminated for the information of its lands person. According to this document, eight of the Jackpine mining claims were terminated, with the remainder belonging to Noranda.

As the district geologist, Mr. Mackie stated that it was his practice to explain the difference between an initial agreement and a formal agreement. He can specifically recall doing it with Messrs. Bumbu and Martin.

There were no questions on cross-examination.

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John Reynolds Sullivan, is the district geologist for the west precambrian district. He has authority to negotiate contracts on behalf of Noranda, but does not have the authority to bind, which is reserved to John Harvey. Mr. Sullivan stated that he knows Messrs. Bumbu, Martin and Petrunka.

Mr. Sullivan stated that he is familiar with the subject mining claims, and upon examining the abstracts, stated that the work done on the mining claims in dispute, specifically on Mining Claim TB-1120998, refers to geotechnical work without much detail and ground geophysical. It is his evidence that the mineralization found was not significant. In his opinion, the subject mining claims are not currently significant, but with changing circumstances they could be important tomorrow.

Mr. Sullivan explained the reason why Noranda proceeded on the basis of the initial agreement (Ex. 10). Faced with constraints owing to the weather and end of year. The money was in place, so it was difficult to justify not proceeding. However, the other party is always consulted prior to entering onto a property. There are considerable risks involved in entering into a property before a final agreement is reached.

Mr. Sullivan first learned that the applicants wanted the return of the subject mining claims in November of 1993, when Wayne Reid informed him that he had suggested Bumbu to him. Bumbu told him that he thought the subject mining claims should be returned and why.

Mr. Sullivan testified that he told Bumbu that had read the July 11, 1989 and March 15, 1990 documents and it was clear that should not go back to him. He recalls telling Mr. Bumbu that he could have the subject claims back for a one percent NSR ("net smelter royalty"), but does not recall mention of a two million dollar payment, unless it was in the context of a buy out clause.

Mr. Lukinuk did not have any questions.

Submissions:

Mr. Lukinuk commenced his submission by stating that the outcome of this application before the tribunal will have considerable impact on how business is conducted between mining companies and prospectors.

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Initially, eight mining claims were offered and pursuant to an investigation by Noranda, it was determined that their acquisition would not be possible without additional ground. The deal struck on a handshake was that the applicants would stake 12 additional claims at one and a half times the going rate.

The first document in question is dated July 11, 1989 with the staking of the subject mining claims having taken place on July 14, 1989 [the tribunal notes that in fact, they were staked on July 11 and 12 and were recorded on July 14, 1989]. By the time the agreement was signed by the applicants, the numbers of the subject mining claims were known and shown correctly on Schedule B of the document.

Money changed hands, assessment work was done, reports were provided, certain assay results were not given and the subject mining claims were transferred. In all, three-quarters of the work done on the subject mining claims was performed prior to the execution of the March 15, 1990 document. This work was done on the basis of the July 11, 1989 agreement, having been made without independent legal advice on the part of Messrs. Bumbu and Martin, but done on trust.

Upon termination of the option agreement, when it became clear that the subject mining claims would not be retransferred, discussions of settlement ensued. Only then were the proceedings before the tribunal commenced.

For the applicant to succeed, the **Statute of Frauds** must be overcome. In addition by virtue of the **Mining Act**, there are tests which can be applied to overcome the requirements of the former. Additional corroborative items are possible under the **Mining Act**, which in Mr. Lukinuk's submission have been fulfilled.

The authority of the respondents to enter into agreement was contained in the July 11, 1989 document. In the evidence of Messrs. Sullivan and Mackie, both indicated that they routinely exceeded their jurisdiction. There is no question of who the parties are. Similarly, there is no question of payment of money, although the law states that equivalent to money is possible. In this case the payment was made in two segments although the parties knew that it was in fact one with the $3,000 in the option and the $1,800 in connection with the staking. Mr. Lukinuk suggested that more than the going rate was paid to stake the subject mining claims because Noranda knew it was next to good ground. There is no question of applicable dates or the payment of a royalty.

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Therefore, in Mr. Lukinuk's submission, any question of the **Statute of Frauds** and section 58 of the **Mining Act** has been met, because there is complete corroboration, in the form of taking possession, payment of money and performance of assessment work. He submitted that the tribunal should find that the fulfilment of both tests is complete.

Mr. Lukinuk submitted that the subsections of the **Mining Act** are peculiar. They are intended to protect a **bona fide** purchaser for value, but even if the tribunal finds otherwise, the requirements are fully met.

The July 11, 1989 agreement stipulates the royalty payable. Examining the last words of the first page of the agreement, the "area of influence" can easily be confused as between royalty payable and right of reconveyance. Nowhere in the agreement is this "area of influence" defined. Based on the evidence of four witnesses, it is clear that there is no unanimity on the implications of these words to the reconveyance of the mining claims.

In trying to determine where the "area of influence" fits within the terms of the contract, Mr. Lukinuk submitted that it does not fit at all. He submitted that there is no need for the tribunal to define it as it is not defined in either the July 11, 1989 or March 15, 1990 documents, but rather, is only intended at some future stage to mean that a royalty will become payable. Mr. Lukinuk submitted that the tribunal should not become hung up on it.

Mr. Lukinuk submitted that the requirement for head office approval is similar to making an agreement subject to review by one's lawyer. There is considerable law on this issue. However, in a transaction between business men, it does not mean that a lawyer can change the price, terms or any other substantive aspects. Rather, he or she will refine it to conform with legalese. The input from the lawyer has nothing to do with whether an agreement was made or not. In the case of the July 11, 1989 agreement, it means that something must come from someone else, even though an employee has the power to exceed his or her authority. It is noteworthy that the agreement does not stipulate a time limit for acceptance.

The only way to obtain an agreement in these circumstances is by the conduct of the parties, namely that the mining claims were transferred, work was done, crews were hired and physical possession was affected. In Mr. Lukinuk's opinion, approval was simultaneous with the issuance of the second cheque.

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Mr. Lukinuk invited the tribunal to look carefully at the documentation in connection with Melchett Lake (Ex. 33 and 34), where it is clear that the "formal agreement" is predated. These things happen. However, in the case before the tribunal, there was immediate action after the July 11, 1989 agreement, which must be construed as head office approval.

The schedules in the July 11, 1989 agreement are absolutely paramount to confirm this. First, Schedule A lists the 8 original mining claims. Schedule B lists the subject 12 claims in connection with the royalty, with the original 8 having been listed and struck. Mr. Lukinuk submitted that it would be inconceivable that there would be no production royalty on the original eight mining claims. If there was no intent to merge the 8 and 12 mining claims, they would not have been stipulated in Schedule B. The fact is that an additional 28 mining claims have been staked which were also in the area of influence.

Mr. Lukinuk submitted that there is no need for the tribunal to determine what is meant in the industry by area of influence and, in any event, there is no evidence on this question. The outcome of finding for the respondent is to allow it to hide behind the phrase "subject to head office approval", which he submitted should not be allowed by virtue of their conduct.

The applicants admit to signing the March 15, 1990 document, which was indicative to them of head office approval. However, the document does not say so. Mr. Lukinuk submitted that if the respondent wishes to take advantage of its legal department, it must do something more, such as listing and appending the July 11, 1989 agreement and specifically listing the changes, which, had this been done, would be evidence of the respondent's **bona fides**.

The pleadings and witnesses suggest that there is a problem with prospectors understanding contractual dealings and that they had to explain the way Noranda operated. The effect of the March 15, 1990 agreement on the understanding of the unsophisticated should be noted in light of the fact that at the time of signing 75 to 80 percent of the work had been done. Therefore, the question becomes, what was being approved by the March 15, 1990 agreement and could the applicants have been taken to understand this.

Mr. Lukinuk submitted that the status of the parties should also be considered a factor, in that Mr. Martin stated that the March 15, 1990 document took only two minutes to sign and he did not even know the witness to his signature.

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Even if the July 11, 1989 document is found by the tribunal to be unenforceable, what does the March 15, 1990 document mean? It is up to the tribunal to interpret it. Mr. Lukinuk submitted that paragraph 6 referring to the area of influence is not critical to its meaning. Paragraph 10, midway through the paragraph at the top of page 6 states, "Should this agreement be terminated, the Optionee shall retransfer the mining claims in its possession which comprise the Property at the date of termination...". According to the respondent's position, the mining claims referred to mean after their number has been reduced to the original eight. However, the wording does not say that the Property, as defined, would be returned. Mr. Lukinuk submitted that this is strictly legalese designed to obfuscate the true meaning, having no regard to what goes on in the field.

Mr. Lukinuk submitted that this type of agreement favours Noranda no matter what happens. Noranda can indicate that it does not want the original eight or it can indicate that it does not want any of the mining claims. There is no standard in the industry which states that after acquired mining claims will be retained only if there is an agreement. The "add ons" were in the area of influence, and one must question why this clause is even included if it has no effect upon the subject matter of the agreement.

As the March 15, 1990 document was drafted by Noranda, at law, any ambiguity reasonably capable of more than one meaning must be construed against them. Mr. Lukinuk submitted that it is a poorly drawn document, with definitions which are not carried through. Mr. Lukinuk asked the tribunal to find the agreement offensive both to the industry and to itself.

The March 15, 1990 agreement goes on to say that should Norex [Noranda] exercise its option to the eight mining claims and retain a 100 percent interest, then a royalty will be payable. Mr. Lukinuk submitted that this clause should be stricken as offensive, asking who Noranda thinks it is to decide when it will give a prospector his royalty. Mr. Lukinuk submitted that he doubted whether Noranda shareholders would agree that this should be a policy of the company. He submitted that no such contract should be allowed in the industry, especially when goodwill is such an integral part of the dealings between the parties.

Mr. Lukinuk asked that the tribunal look closely at the March 15, 1990 agreement and submitted that it is a departure from the normal situation, which is the

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retransfer of the mining claims as a group. The tribunal was invited to look at several Mining Commissioner Cases, in particular, the Thorsteinson case (B-B-M v. Thorsteinson, 5 M.C.C. 228), where the tribunal did distinguish between the "bush" aspects and legal aspects of the dealings between the parties. In the current application, he submitted, the contract law is all over the place. Based on the facts and an interpretation of the wording, the July 11, 1989 document should be upheld as the agreement in which case the wording would be interpreted in such a manner as to return all of the mining claims.

Mr. Lukinuk posed the question of why the respondent was even before the tribunal, postulating that it does not even care about the property. In preparation for this case, there have been no productions, which Mr. Lukinuk suggested was deliberate. He submitted that in his position as solicitor for the applicants, he would not force production of whatever document might have existed when the respondent says they will not be used. It has been the position of the respondent all along to say that there is a contract in place and there can be no further discussions.

Mr. Lukinuk suggested that the application is a test case on the part of the respondents to determine whether their tactics are any good.

On the matter of a procedural issue, Mr. Lukinuk invited the tribunal to carefully read and comment on the position of the respondent outlined in its Statement of Particulars (Ex. 21) and in particular the italicized portions, where each and every point in the applicants Statement of Particular (Ex. 20) was specifically denied and then pleaded in the alternative. He invited comment on this type of conduct, submitting that it should be struck down completely.

In conclusion, Mr. Lukinuk submitted that the agreement of July 11, 1989 is silent as to the return of the subject mining claims, although the area of interest is mentioned. Based upon the industry standard, the subject mining claims should be returned to the applicants.

In the event that the second agreement dated March 15, 1990 is found to be binding, Mr. Lukinuk submitted that its terms are precatory, if termination of the option is extended from the mention of the royalty.

Mr. Lukinuk submitted that the 12 mining claims should be vested in the applicants and that costs should follow the event.

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Mr. Gourley submitted that the July 11, 1989 document should be characterized as nothing more than a letter of intent, which has been defined by **Black's Law Dictionary** as reducing "... to writing a preliminary understanding of parties who intend to enter into contract ... ". The final clause is that a formal agreement will follow. The July 11, 1989 document contemplated on its face that an agreement would follow and it did.

Section 5 of the March 15, 1990 document (Ex. 11) states what will happen if terminated. Mr. Martin stated in his evidence that had he read it, he would not have signed. By virtue of Exhibits 28A and B, there is evidence of another agreement to stake the subject mining claims.

Mr. Gourley invited the tribunal to consider the fact that Mr. Bumbu testified that he had only signed one document in other dealings with Noranda, but the contrary was shown in cross-examination. Also, his memory proved to be poor, as was illustrated by his evidence that he had been paid $125 to stake each of the subject mining claims, only to agree later that it was $150 per claim. Nor was he sure whether he in fact spoke with Mr. Sullivan in 1989. It is for the reason illustrated by these examples that Noranda enters into written agreements with prospectors.

Mr. Gourley submitted that the applicants must prove their case and since there was nothing to corroborate their right to the subject mining claims, the application must fail. He referred to the case of **Rosenblat v. Nabigon et al.** 6 M.C.C. 375, where there was no note or memorandum in writing to corroborate an oral contract, it was held to be unenforceable under what was then subsection 69(2) of the **Mining Act**.

With respect to the letters of July 11, 1989 and March 15, 1990, Mr. Gourley submitted that there must be an intention to create binding legal obligations, which, pursuant to the evidence of Mr. Mackie, there was not as he did not have the requisite authority. As for the March 15, 1990 agreement having been made with no consideration, it had been held by the Supreme Court of Canada that a document under seal does not require consideration.

Noranda is not attempting to hide behind the agreement. There is adequate evidence to support the respondent's case.

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Mr. Gourley asked the tribunal to consider the procedural confusion which has resulted from its June 1993 Order To File documentation. In the course of the hearing, Noranda was not allowed to produce a document which came only to Mr. Gourley's knowledge in the course of Mr. Mackie's evidence, having been held to strict rules of production and disclosure in accordance with the Rules of Civil Procedure. Mr. Gourley submitted that the tribunal's guidelines to the hearing process were not indicative of having documentary evidence ruled inadmissible by virtue of failure to disclose prior to the hearing.

In the course of his evidence, Mr. Mackie referred to a document not intended for production the existence of which was unknown by counsel. The tribunal ruled that the hearing should proceed. Mr. Gourley submitted that he had understood the rule to be that if a party is not intending to rely on a document, there is no need to produce it.

Having accepted that there is an obligation to produce or disclose all documents in connection with the subject matter of the application, Mr. Gourley submitted that there are normally three categories of production and disclosure, namely the documents to be relied upon, those against one's interest and other documents.

Costs:

Mr. Lukinuk submitted that, on the basis that costs follow the outcome, in the event that the decision will enforce the return of the subject mining claims, he asked that his client be compensated for the time spent in preparation and at the hearing. Owing to the fact that there was not much time spent by him, that his research was in large part based upon cases in which he had been involved, he had spent 60 hours in preparation at a cost of $100 per hour.

Mr. Lukinuk repeated that the respondents pleadings are not the type of material which should be encouraged. Therefore, even if the outcome was a finding against the applicants, costs should not be found against his clients. He requested that the tribunal comment on the precatory wording of the pleadings.

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Mr. Gourley submitted that he had similar comments with respect to the pleadings of the applicants. However, owing to the determination by the tribunal that the application is not vexatious, and that the March 15, 1990 document is ambiguous with respect to the subject mining claims, he asked that his client be compensated for travel expenses only. Invoices were submitted amounting to $2,036.19 for airline costs.

Findings:

The argument of counsel focused on which of the July 11, 1989 or March 15, 1990 documents constituted the contract between the parties. It has been suggested that central to this issue is whether the contract is brought under the auspices of subsection 58(1) of the **Mining Act**, or subsection 58(2) and the **Statute of Frauds**. If the former, Mr. Lukinuk seeks to have corroborating evidence in the form of the actions of the parties support the position that the subject mining claims should form part of the agreement. If the latter, Mr. Gourley seeks to have the tribunal find that the document should speak for itself, asserting that it is a document under seal, so that adequacy of consideration cannot be considered. Any attempt to add the subject mining claims to its terms would not meet the requirement of the **Statute of Frauds** that such a change be in writing.

The need to distinguish between the application of subsections 58(1) and (2) of the **Mining Act** may, in the end result, be misleading for purposes of this application. The chronology of events shows that the subject mining claims were staked prior to July 14, 1989, being the date upon which the applicants accepted the terms the earlier document and signed it back to Noranda. Therefore, arguably acceptance of the "contract" alleged by Mr. Lukinuk did not occur until July 14, 1989, with the result that the subject mining claims, having already been staked would no longer fall under subsection 58(1) of the **Mining Act**.

Statute of Frauds

By the same token, requiring that the inclusion of the subject mining claims, having been previously staked and falling under subsection 58(2) must be reduced to

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writing does not apply where there is an existing contract. In the case of **United States of America v. Motor Trucks Ltd.** [1923] 3 D.L.R. 674, at page 687 the Earl of Birkenhead states:

> ...It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual mistakes implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument, on which the other insists, does not represent the real agreement. The Statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when written instrument is rectified there is a writing which satisfies the Statute, the jurisdiction of the Court to rectify being outside the prohibition of the Statute.

Parole Evidence

At the hearing, the tribunal found that the terms of the March 15, 1990 document were sufficiently ambiguous with respect to the subject mining claims that it would entertain parole evidence. In fact, this ambiguity or complete absence of dealing with the ownership of the subject mining claims was manifested from the beginning, at the time the July 11, 1989 agreement was signed.

The July 11, 1989 document clearly identifies the property on the first page as being "8 unpatented mining claims located near Nipigon as listed on Schedule A attached." This definition of "property" is carried forward in the March 15, 1990 document

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wherein it states in the first paragraph:

> This letter will document our agreement with respect to the eight (8) unpatented mining claims located in Jackpine Lake area near Nipigon, Ontario which are more particularly described in Schedule "A" attached hereto and are hereinafter called the "Property".

In considering parole evidence in connection with what was meant in the documents in relation to the subject mining claims, the tribunal relies on **Alampi v. Schwartz et al.** [1964] 1 O.R. 488 (Ont. C.A.) at page 492, where McGillivray, J.A. states:

> The rule as to the admissibility of parol evidence in connection with written contracts is well settled, namely, that where there is no ambiguity in the words of a contract, no explanation contrary to the words is to be allowed.
>
> As a consequence where no ambiguity exists as to the terms expressed, the terms themselves as they appear in the instrument provide the only test as to the intention of the parties. The rule is applied both in the administration of law and of equity through in cases were in a Court of equity an extraordinary remedy, such as specific performance, or correction of a document in writing is sought and a defendant pleads mistake parole evidence of extrinsic circumstances indicating the intention of the parties may be heard. Except in such last-mentioned instances parol evidence is not to be admitted to vary the words of the written document. It is, however, admitted for the purpose of explaining terms of the contract and to prove the facts upon which the interpretation of the written document depends and so is admissible to establish the validity of the document or the identity of the parties, to explain technical terms or commercial usage, and in all other places where the admission of such evidence is necessary to enable the Court to construe the document before it: Shore v. Wilson (1842), 9 Cl. & Fin. 355 at p. 565, 8 E.R. 450.

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Contract

Based on the form and content of the first document, the tribunal agrees with Mr. Gourley that it is a letter of intent, designed to reflect whatever agreement had been reached at prior meetings between the applicants and Noranda. The tribunal finds that it relies on the words, "proposal" and "(subject to head office approval)" in the first paragraph and "When we receive the signed letter, we will arrange head office approval and we will draw up a formal agreement" in the last paragraph of Exhibit 10 in reaching this conclusion.

The tribunal finds that it accepts the practice of Noranda that a letter of intent is signed to ensure that there is agreement concerning the terms to be put to Noranda for inclusion in a formal option agreement. It further accepts that this "letter of intent" was put to Messrs. Bumbu and Martin upon whose agreement to the terms contained therein, Noranda was able to proceed to have a formal agreement drafted. This type of procedure is not uncommon with large corporations, or government for that matter. Perhaps ironically, it is designed to avoid drafting an agreement which does not accurately reflect what has been agreed upon. It becomes necessary to state that the tribunal finds that there was no acting in excess of authority by Mr. Mackie in reaching an agreement.

The tribunal finds that the subsequent transfer of mining claims by the applicants and the allowing of assessment work to be performed is evidence of
Messrs. Bumbu's and Martin's good faith in reaching an agreement. The fact that Noranda paid $3,000, be it in trust or otherwise, there being insufficient evidence upon which to make a finding on this issue, is evidence of Noranda's good faith. The tribunal finds that neither of these activities amounts to evidence of a binding contract. Nor does either of these activities prove conclusively in law what the effect of the documents or the actions of the parties must be held to mean.

Intention

Messrs. Bumbu's and Martin's evidence is that it was their belief at all times in their contractual dealings with Noranda that the option agreement would include the 12 subject mining claims. The evidence-in-chief of Messrs. Mackie and Sullivan supports the conclusion that Noranda had the contrary intention. While it was suggested by Mr. Lukinuk that the internal memorandum, whose introduction into evidence he opposed on the basis of rules of practice and inadequate disclosure, would have shown that Noranda

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also had the intention of returning the subject mining claims, the tribunal does not agree. To suggest otherwise would be to accuse Messr. Mackie and Sullivan of not being truthful in their evidence. Mr. Lukinuk has not established this as a fact, and his failure to cross-examine either witness has led the tribunal to conclude that Noranda did not manifest any intention at the time of negotiations to transfer the subject mining claims if the option agreement were terminated.

Rectification and Variation

Rectification and variation are available in situations where there is mutual mistake in the terms of a contract when the parties reduce the terms to writing.

In considering whether a proper case has been made for rectification, the tribunal has considered the explanation of Brooke, J.A. in **H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.** (1973), 22 D.L.R. (3d) 13 (Ont. C.A.), at pp. 20-1:

> When may the Court exercise its jurisdiction to grant rectification: In order for a party to succeed on a plea of rectification, he must satisfy the Court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote them down incorrectly. It is not a question of the Court being asked to speculate about the parties' intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement.

The facts in this case do not support a finding that the parties were in agreement at the time the terms were committed to writing. It is clear that the intentions of the appellants was to have the subject mining claims form part of the agreement. The evidence in chief of Messrs. Mackie and Sullivan, upon which there was no cross-examination, supports the conclusion that Noranda had the contrary intention. Based upon the fact that the application for rectification is not unopposed, that the oral evidence given on behalf of the respondent denies that the parties intended to include the subject mining claims in the contract the tribunal finds that the application does not meet the requirements of law to support rectification of the contract on the basis of mutual mistake.

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Turning to the issue of whether, on the facts, there should be a variation of the contract, the tribunal refers to the decision of Grange, J. in Tudale Explorations Limited v. Bruce et al., (1978), 20 O.R. (2d) 593; 88 D.L.R. (3d) 584; 5 M.C.C. 283, wherein he states commencing at page 286:

> ... In **Central London Property Trust Ltd. v. High Trees House Ltd.** [1947] 1 K.B. 130, Denning, J. traced the principle first to justify an oral variation of a written contract including one required to be in writing to a representation without consideration and to a representation not just of an existing fact but to one as to the future. The essential features are an unambiguous representation which was intended to be acted upon and indeed was acted upon. The present rule is now expressed by Snell in his work on Equity, 27th ed. p. 563 as follows:
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> > Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.
>
> It will be seen that the rule as so stated depends in no way upon consideration or formality and it matters not at all whether the effect of the promise is to create a variation of contract nor whether the original contract was within or without the Statute of Frauds.

Mr. Lukinuk has suggested that the conduct of Noranda supports his clients' position that the subject mining claims form part of the subject matter of the agreement. With the greatest respect, there is nothing in the facts as presented which is inconsistent with the proposition that Noranda contracted with Mr. Martin to stake and transfer the subject mining claims. Noranda did not provide assay results from the subject mining claims, which might be consistent with the applicants' position. However, it is clear that, but for the insistence of Noranda that it required more mining claims to have a viable area to explore, the subject mining claims would not have been staked by either party.

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McGillivray, J.A. discusses the requirements to succeed in a plea for unilateral mistake in **Alampi v. Swartz et al**. [1964] 1 O.R. 488 (Ont. C.A.) commencing at page 494:

> To succeed on a plea of unilateral mistake the defendant must establish:
> (1) that a mistake occurred;
> (2) that there was fraud or the equivalent of fraud on the plaintiff's part in that she knew or must be taken to have known when the agreement was executed that the defendant misunderstood its significance and that she did nothing to enlighten the defendant: **Blay v. Pollard & Morris,** [103-] 1 K.B. 628; **Farah v. Barki**, [1955] 2 D.L.R. 657, [1955] S.C.R. 107.
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> It is hardly necessary to add that an allegation of fraud should be pleaded. In **May v. Platt**, [1900] 1 Ch. 616 (in **Blay v. Pollard, supra**), Farwell, J. states at p. 623:
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> > In my judgement, in order to get a rescission after conveyance, the allegations would have had to be very different. I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud. It is true that Lord Romilly in **Harris v. Pepperell**, L.R. 5 Eq. 1 and **Garrard v. Frankel**, 30 Beav. 445 and perhaps Bacon V.-C. in **Paget v. Marshall**, 28 Ch. D. 255, appear to have shrunk from stigmatising the defendants' conduct in terms as fraud, but they treated it as equivalent to fraud, and in my opinion would have had no jurisdiction to grant the relief that they did in the absence of fraud. Rescission after conveyance of land can only be obtained on the ground of unfair dealing: **see Brownlie v. Campbell**, (1980) 5 App. Cas. 937, per Lord Selborne; Soper v. Arnold, 37 Ch. D. 102, per Lord Cotton L.J. It is only necessary to say this in the present case, in

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> consequence of the defendant's argument. If it were a case of fraud, which unravels everything, there would be no difficulty in looking into the evidence to see how the contract was induced, as well as how it was carried out. but in the absence of fraud, of which there is no suggestion, I cannot see how the evidence could be admitted for any purpose whatever.
>
> In the present case there is no allegation of fraud and no indication in the pleadings that fraud is suggested. Even, however, were an amendment to the pleadings to be allowed I am of the opinion that the evidence falls short of establishing the equivalent of fraud on the plaintiff's part. There were, of course, no actual representations made by the plaintiff, fraudulent or otherwise, but if proved to the Court's satisfaction that the plaintiff was aware of an error on the defendants' part and by her silence she deliberately allowed them to be misled, the Court might treat such silence as the equivalent of fraud and grant relief. ...

Unconscionability, Fraud or Sharp Business Practices

Upon bringing the original eight mining claims to Noranda, the applicants stated that they were not in a financial position to stake the additional mining claims which would make the property of interest in an option agreement. There was no evidence introduced at the hearing as to the status of the original eight mining claims, when they had been staked, whether assessment work had been done on them or whether they were due to go into forfeiture. In other words, the applicants introduced no evidence as to the seriousness of their situation at the time they approached Noranda, and the tribunal can conclude none.

Messrs. Bumbu and Martin did give evidence that the amount of money received in the bargain was well below what they thought this property, constituting all of the Jackpine mining claims, was worth. However, the substance of both documents indicates that the amount agreed upon was a total of $110,000, with $3,000 payable upon signing, with the former amount being received if the option was fully exercised.

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Undoubtedly, Noranda must appear to many self-employed prospectors as having deep pockets and the applicants would have liked to have received more in the initial payment. However, there is no independent evidence as to the value of the original eight mining claims if they had turned out to be the key to a potential find in the Jackpine property. Had Noranda been willing to option only the eight original mining claims, Messrs. Bumbu and Martin gave no evidence of the amount which would have been necessary as a first payment to close the deal. Indeed, Exhibit 31, involving eleven Sand Lake mining claims, with the applicants as optionors, shows an initial payment of $4,000; Exhibit 33, involving 120 Melchett Lake mining claims, with Mr. Bumbu and another as optionors, shows an initial payment of $8,000. In fact, if $3,000 is considered by the applicants to be inadequate consideration for eight mining claims, how could it logically be considered adequate consideration for 20?

While Mr. Lukinuk expressed strong language in connection with Noranda's conduct, there is no evidence upon which the tribunal can support a finding of fraud or deliberately allowing the applicants through Noranda's silence to be misled concerning the subject mining claims. The tribunal finds that there is no evidence that the applicants were under duress in agreeing to the amounts ultimately arrived at in their bargain with Noranda, nor is there adequate evidence that Noranda took advantage of the applicants' situation. This being the case, the tribunal finds that Noranda did not act in an unconscionable manner.

While it is unfortunate that Messrs. Bumbu and Martin did not obtain independent legal advice, it is not found to be fatal to the agreement reached. The applicants should realize, notwithstanding past dealings with Noranda and a firm belief that it had always acted honourably, Noranda is not in the business of protecting and promoting anyone's interests but its own. This is in the nature of commerce, and in the absence of statutory provisions, such as have been proposed by the Ontario Law Reform Commission in its **Report on Amendment of the Law of Contract** (Toronto: Ministry of the Attorney General, 1987), the tribunal has no authority to review the fairness of a bargain.

Mercantile Practice

To the extent that there is any latent ambiguity in the March 15, 1990 document with respect to title in the subject mining claims, the tribunal considered the suggestion made on behalf of the applicants that the tribunal should recognize a practice

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within the mining industry of adding after-acquired mining claims to any pre-existing option agreement. The evidence of Mr. Petrunka was relied upon in this regard. With the greatest respect to Mr. Petrunka, the tribunal finds that it cannot accept that there is adequate evidence of such a practice. Relying on the words of Commissioner Ferguson in B-B-M Investments Limited v. Thorsteinson et al., 5 M.C.C. 228 at page 232:

> ...In the view I take of B.B.M's position it is unnecessary to pursue this argument but if an appellate tribunal finds it necessary or advisable to do so, I would find on the issue of facts in conflict in favour of Thorsteinson with the exception that I am not prepared to find that there is a universal practice respecting option agreements. In my opinion each option agreement stands on its own provisions and the practice is not sufficiently uniform to imply a provision respecting after-acquired mining claims into every option agreement based on a theory of mercantile practice, let alone construe two a agreements with two different parties as one agreement.

Mr. Sullivan's evidence was the most helpful in regard to after-acquired mining claims which tie onto those covered by an option agreement. He indicated that typically staking was done by a contractor who retained no interest in the mining claims staked, or that option agreements generally covered what the tribunal has taken to be a viable number of mining claims with no additional rights granted to tie on staking. This is clear from the formal agreement involving the Melchett Lake property (Ex. 34) where in the **"BUSINESS OPPORTUNITY CLAUSE"** at page 6, it is specifically stated that the parties each have the unrestricted right to engage in the mining business outside the boundaries of the property involved. Mr. Sullivan gave evidence that the current situation is unique and the tribunal relies on this evidence in its determination that there can be no industry practice attributable to a situation where an option agreement initially contemplating so few mining claims as to not be viable on their own.

The tribunal finds that it will adopt the reasoning of Commissioner Ferguson in finding that there is no uniform practice within the mining industry upon which the applicants may rely in successfully asserting their entitlement as a matter of extension to the original option agreement to encompass the subject mining claims.

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Interpretation of Documents in Light of Parole Evidence

The tribunal notes with interest Mr. Lukinuk's comment that Schedule B of the July 11, 1989 document is characterized as the "Area of influence where Optionors retain a production royalty". The original eight mining claims were written in by hand and then deleted from the schedule which, if interpreted strictly, would mean that no production royalty would be payable on the eight original mining claims. He submitted that this would be an unfair result. The tribunal finds that the drafting does not support such an outcome. The last two lines of paragraph 3 on the first page appear to answer this problem, wherein they state:

> ... The Optionors would also retain the above royalty on the adjacent claims as outlined on Schedule B. Other than the claims outlined in Schedule B, there shall be no area of influence. [emphasis added]

Schedule "B" to the March 15, 1990 document does characterize the subject mining claims somewhat differently from the July 11, 1989 document. The schedule reads:

> The claims which may become subject to the Optionors' Royalty should Norex [Noranda] acquire a 100% interest in the claims listed in Schedule A are located in the Jackpine Lake area near Nipigon, Ontario, listed as follows:
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> . . . .

Mr. Lukinuk suggested that it was not necessary for the tribunal to determine what was meant by "Area of influence" in the July 11, 1989 document. However, it becomes clear, on the basis of evidence presented at the hearing, that this term is used in relation to a royalty which would become payable upon the condition that Noranda acquires a 100 percent interest in the mining claims listed in Schedule A. The "may" does not denote the exercise of some arbitrary powers on the part of Noranda, but simply indicates the existence of a condition which must be satisfied before the royalty will become payable on the subject mining claims.

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Disclosure

Mr. Gourley raised the issue of disclosure and production of documents in the course of the hearing and in his final submissions. The procedures involved, specifically in the Order to File issued by the tribunal and generally by the Procedural Guidelines, are quite clear. The parties are to produce all documents which they seek to rely upon in the hearing. Experience has shown that, particularly in the course of cross-examination, documents will be introduced which have not been previously disclosed. Parties are encouraged to produce and file all documents arising in their dealings with the other, including internal memoranda. While Mr. Lukinuk took a very narrow approach to the situation which arose, relying on practice before the Courts, in fact the tribunal is not precluded from allowing the introduction of evidence not previously disclosed.

In this case, the tribunal weighed the evidence likely to be disclosed by the production in question with the cost of adjourning the hearing, in light of travel costs for the respondent, its witnesses and the tribunal. In the end, nothing turned on the production of the internal Noranda memorandum, as it is quite clear that Noranda and the applicants were not at idem concerning the subject matter of their negotiations. At no time was the tribunal persuaded that Noranda was anything but forthright in its evidence concerning its belief of what was agreed to. There is no evidence that Noranda was trying to cheat the applicants nor is the tribunal of the opinion that Noranda was anything but honourable in its dealings with the applicants. Rather, it is a situation where Noranda's employees focused on its manner of arriving at an agreement, involving a letter of intent followed by a formal agreement, whereas the confusion lie in what was the subject matter of either document.

Costs

The need for this application arose because, at the time the contract was committed to writing, the parties were not ad idem as to the subject matter of their agreement. Different degrees of responsibility on the part of either the applicants and respondent led to this confusion.

The applicants did not seek independent legal advice to ensure that their interests were protected. It is no answer to place the responsibility for their interests at the feet of Noranda, notwithstanding their belief that Noranda had always acted honourably in the past. Nothing in the findings of the tribunal lead to the conclusion that

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Noranda did not act honourably in this case. Rather, it is a situation where the parties were confused as to the meaning of their agreement. This is evidenced by the title of proceedings, which originally reflected an additional 28 mining claims staked by James Lariviere.

Noranda is responsible for the drafting of the agreement which gave rise to this application. Notwithstanding that the result is in its favour, it bears much of the responsibility for the problems which arose.

While Noranda has attempted to show that it has properly informed the applicants of its manner of dealing, how the formal contract would be arrived at and the need for signing of two documents, the tribunal finds that similar effort was not made in attempting to ensure that the applicants understood that they would receive only the original eight mining claims in the event the option agreement is terminated. Proper and full discussion of this very crucial piece of information in a manner which would be clearly understood by Messrs. Bumbu and Martin could have brought this matter to light at the time of negotiations, well before it became an issue after termination of the option agreement. At all relevant times, the parties were not ad item as to the subject matter of the option agreement. This is so, notwithstanding the fact that the tribunal finds that Mr. Mackie was forthright in his explaining the manner in which Noranda would enter into an agreement requiring the signing of a letter of intent which, if acceptable to Noranda, would result in the drafting of the formal agreement. However, the tribunal finds that Mr. Mackie did not adequately stress in his discussions, as evidenced by the ambiguous nature of the July 11, 1989 document and the fact that there was inadequate separation of the two groups of mining claims to impress upon the applicants the nature of the bargain as it was understood by Noranda.

Not only did Noranda's employees concentrate their energies in attempting to justify the use of a letter of intent followed by a formal agreement in preference to concentrating on and drawing the attention of Messrs. Bumbu and Martin on what the subject matter of the agreement would be. Noranda also drafted an agreement which is confusing by its complete absence of dealing with ownership of the subject mining claims not to mention other after acquired claims resulting from whatever might be discovered on the 20.

Noranda did have legal advice in this regard and while no malicious intent can be assumed from the drafting, the tribunal finds that it will place somewhat greater responsibility for the gaps in drafting, not to mention the obfuscating quality of those references to the subject mining claims, on Noranda.

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Notwithstanding the practice of costs following the event, and Mr. Gourley's request that the respondent be awarded travel expenses only because of ambiguity in the contract, owing to the responsibility that is attributable to either party in these proceedings for the confusion which arose, no costs will be awarded.

Exclusion of Time

Notations of "pending proceedings" have been placed against the subject mining claims. The tribunal finds that these notations of "pending proceedings" should be vacated from the abstracts.

Pursuant to subsection 67(1) of the **Mining Act**, the tribunal has jurisdiction to exclude time during which assessment work should be performed and filed where there is a proceeding before the tribunal, so long as the delay in settling the matter is not the fault of the recorded holder. Notwithstanding its findings that Noranda should pay the applicants' costs, there is no suggestion that the delay in settling this matter is the fault of Noranda. Therefore, the time during which these proceedings were before the tribunal will be excluded and a new date for performing the next unit of assessment work will be fixed in accordance with subsection 67(2). The dates are set out in the order.

Conclusions:

The application is dismissed. No costs will be paid by either party in this application.