Appeal No. MA 026-92

L. Kamerman	)	Wednesday, the 17th day
Mining and Lands Commissioner	)	of November, 1993.

THE MINING ACT

IN THE MATTER OF

An application for disposition of surface rights on Mining Claims P-521333, 521335, 521337, 521339, 521341, 521347 and 521355, in the Township of Stock, in the Porcupine Mining Division, being Part of Lots 8, 9, 10 and 11, Concession V and VI, in the Municipality of Black River-Matheson, formerly in the Township of Stock, District of Cochrane, hereinafter referred to as "the Mining Claims";

B E T W E E N:

ONTARIO HYDRO

Applicant

- and -

NAHANNI MINES LIMITED

Respondent

ORDER

WHEREAS a referral from the Minister of Northern Development and Mines of an application under subsection 51(4) of the **Mining Act** for the disposition of surface rights under the **Public Lands Act** was received by the tribunal on February 16, 1993;

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AND WHEREAS a hearing was held in Toronto on the 28th day of September, 1993;

UPON HEARING from Counsel for the applicant and respondent, and upon reading the material filed;

1. THIS TRIBUNAL ORDERS THAT the application for disposition of surface rights in connection with under the Public Lands Act be allowed.

2. THIS TRIBUNAL FURTHER ORDERS THAT no compensation is payable by the applicant to the respondent on account of the surveys undertaken.

3. THIS TRIBUNAL FURTHER ORDERS THAT no costs shall be payable by either party to this application.

IT IS FURTHER DIRECTED that upon payment of the required fees, this order shall be filed in the Office of the Mining Recorder for the Porcupine Mining Division.

Reasons for this Order are attached.

DATED this 17th day of November, 1993.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER.

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NAHANNI MINES LIMITED

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REASONS

Sitting in the Hearing Room of this tribunal, 24th Floor, 700 Bay Street, Toronto, Ontario on September 28, 1993.

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Appearances:

Ms. Laura Formousa	counsel for the applicant, Ontario Hydro
Mr. David Menzel	counsel for the respondent, Nahanni Mines Limited

Witness:

Mr. James Harquail	President, Nahanni Mines Limited

Background

Nahanni Mines Limited (Nahanni) is the recorded holder of the Mining Claims for which it has applied for, but not yet received, a lease.

Ontario Hydro, in the process of construction of a 230 Kv. hydro corridor a distance of 580 kilometres between Timmins and Iroquois Falls, requested that Nahanni execute a Consent to Release Surface Rights (Ex. 7), pursuant to subsection 51(2) of the **Mining Act**. Nahanni has refused to execute the consent without compensation. Ontario Hydro requested that the Minister refer the matter to the tribunal pursuant to subsection 51(4) of the **Mining Act** for determination.

Facts Not in Dispute

Nahanni has been the recorded holder of the Mining Claims since the late 1970's, having acquired the unpatented mining rights subject to two existing easements. Ontario Hydro has a 115 Kv. line, having obtained a license for the surface rights in 1948. Northern and Central Pipeline also has an easement, being a licence for surface rights the date of origin not having been specified, but agreed that it predated Nahanni's interest. Ontario Hydro has not registered its licence, nor is there a survey filed with the registry office.

On October 23, 1989 Nahanni applied for a lease for mining and surface rights in the Mining Claims. The Minister of Northern Development and Mines (MNDM),

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being of the opinion that a survey was necessary, directed that a survey be made, as contemplated by section 96 of the **Mining Act**. Section 96 reads:

> 96. Where, upon an application for a lease or licence of occupation of a mining claim in surveyed territory, the Minister is of the opinion that a survey is necessary, he or she may direct that a survey thereof be made at the expense of the applicant, and the survey, unless otherwise ordered, shall comply with the same requirements as a survey of a mining claim or the perimeter survey of mining claims in unsurveyed territory.

The survey of the Mining Claims was performed by D.S. Dorland Limited, Ontario Land Surveyors. By invoice dated April 19, 1990, Nahanni incurred costs of $15,412.50 (Ex. 30). It is the position of Nahanni that this amount plus a 10 percent administration fee, being a total of $16,954.00, should be paid by Ontario Hydro and Central and Northern Pipeline, with 75 percent allocated to the former. Nahanni has refused to give its consent to release the surface rights under subsection 51(2) without this payment first being made.

Issues

Does subsection 51(4) of the **Mining Act**, which allows the Minister of Northern Development and Mines to refer an application for disposition of surface rights under the **Public Lands Act** to the Mining and Lands Commissioner (the "tribunal"), where the holder of unpatented mining claims does not consent to such disposition, contemplate compensation in connection with such a disposition?

If compensation is not contemplated, is the disposition warranted?

If compensation is contemplated, what test must Nahanni satisfy to justify receipt?

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Submissions

On behalf of Hydro

Ms. Formousa submitted that the issue before the tribunal is whether, as a condition of obtaining consent under subsection 51(2) of the **Mining Act**, Hydro should be required to pay a proportionate share of a survey which was deemed necessary by section 96 of the **Mining Act**.

Referring to Orders in Council 1237/87 and 8702/87 and a Decision of the Minister of Energy dated January 30, 1987 (Ex. 2, 3 and 5 respectively), Ms. Formousa submitted that Hydro has the authority to acquire by purchase, lease or other manner, and with or without the consent of the owner, or to expropriate whatever land for purposes of transmitting, transforming and distributing power on the lands described, which includes the Mining Claims. This is contrary to paragraph 5 at page 2 of Nahanni's Statement of Issues, Documentary Evidence and List of Witnesses of the Respondent which reads:

> 5. The Applicant now wants an additional right-of-way but no survey is required for this additional right-of-way by reason of the survey provided and paid for by the Respondent.

That the survey by Hydro of its 230 Kv. easement was registered, is shown on Plans 6R-6387 and 6R-6388, both dated March 12, 1990 (Ex. 25 and 26). Each Plan bears the surveyor's certificate, dated March 12, 1990, and is signed by Talson Rody. Both have, at the upper right corner, a signed statement of P.L. Finor, Surveyor General for the Ministry of Natural Resources, dated June 16, 1992, which sets out, "I REQUIRE THIS PLAN TO BE DEPOSITED UNDER THE LAND TITLES ACT." The Plans bear a statement to the effect that they were received and deposited on June 26, 1992, signed by G.M. Goldrick, Deputy Land Registrar for the Land Titles Division of Cochrane (No. 6).

Ms. Formousa submitted that where the lands are owned by the Crown, Hydro is required to obtain a licence pursuant to the **Public Lands Act**, which will permit safe operation of the hydro lines and prevent incompatible uses. Where the owner of the unpatented mining claims does not consent to this disposition of surface rights, the Minister may refer the application to the Mining and Lands Commissioner, under subsection 51(4). Where the holder of the surface rights does consent to the disposition,

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the Minister may require a survey of the surface rights, the expense of which is borne by the person who has acquired the surface rights.

The only prior case which deals with this issue is **Kamiscotia Ski Resorts Limited v. Lost Treasure Resources Ltd.** 6 M.C.C. 460. In **Kamiscotia**, the company seeking the licence of occupation had been operating a facility for downhill and cross-country skiing well in advance of the application. It was discovered that garages used in connection with the ski operation were on lands held by Lost Treasure Resources which was not willing to give its consent, but was proposing to sell the mining claims in question. Kamiscotia Ski Resorts Limited was not able to afford the purchase, nor did it want or need the mining claims. The Commissioner noted that Lost Treasure Resources did not attend the hearing and had not performed required assessment work, despite two extensions of time to do so. The Commissioner stated at page 462:

> The present section 61 (now 51) was added to the **Mining Act** by section 17 of **The Mining Amendment Act, 1962-1963** with substantially the same wording as it appears today. These provisions were enacted after the report of the Public Lands Investigation Committee, 1959 which recommended a number of principles related to multiple use of Crown lands. They set out a method of resolving, if feasible, conflicting uses or the prevention in a proper case of the subsequent acquisition of surface rights through a hearing before the Commissioner. With the failure of the respondent to appear and provide evidence as to the nature of the mineral potential of the mining claim or the methods of exploration or the compatibility or otherwise of the proposed use of the surface rights, the tribunal was provided with no evidence to come to a finding that the disposition under the **Public Lands Act** should be refused.
>
> On the other hand, the applicant did not seek an absolute title to the surface rights and merely sought a licence of occupation. The use of the public lands under such documents is usually prescribed and limited to a named use. The proposed use is seasonal and does not contemplate the construction of major buildings and structures. The tribunal

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> can only conclude, with the default of appearance, that there would be no serious interference with the exploration program of the respondent and that it is a proper case for an order to issue. ...

Ms. Formosa made two submissions. First, she submitted that Nahanni had to do a survey to pursue its own interests to obtain a lease of the Mining Claims. It is at the Minister's discretion under section 96 that a survey will be required. The section makes it quite clear that it is at the expense of the applicant. There is no statutory requirement for Hydro to subsidize the cost of the survey.

The issuance of a lease would be subject to two sets of pre-existing rights, those of the Ontario Hydro 115 Kv. easement granted in 1948 and of the pipeline easement. As Nahanni could only acquire that which is still available and the Minister has the right to require a survey to determine what could be obtained by lease, the expense should be borne by Nahanni.

At the time the survey was made, the 230 Kv. line was not proposed. In Nahanni's application for lease, the same lands as required for the new Hydro easement have been included. As these lands are required by Ontario Hydro, it is entitled to seek disposition under section 51. Section 51 is not drafted to provide for a ransom; it is intended to resolve competing interests. The applicant must bear the cost of the survey which was done to further its own purposes. There is no provision within the **Mining Act** to require compensation.

Ms. Formousa submitted that Nahanni's survey is of no use to Hydro. There is also no evidence that Nahanni's survey could have saved Hydro money. The only thing which Nahanni could survey were the existing alienations.

Ms. Formousa's second submission was that there is no statutory authority enabling the Mining and Lands Commissioner to order compensatory payment in a section 51 application. Nothing in the **Mining Act** makes the giving of consent subject to payment for a survey made for a different purpose. Subsection 51(3) specifically sets out that the Minister may require a survey at the expense of the person acquiring the surface rights. This subsection is only applicable if the consent is given and would only apply to Hydro. The requirement of the Minister is a separate consideration from the application before the tribunal.

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Referring to **Kamiscotia**, Ms. Formousa submitted that there is no evidence of competing uses and that Hydro's application should be granted.

On Behalf of Nahanni

As part of his summary of facts not in dispute, Mr. Menzel stated that in practice, the Ministry of Northern Development and Mines does not require a survey in connection with an application for lease in unsurveyed territory unless some portion of surface rights have been disposed of. Section 96 of the **Mining Act** is not normally relied upon for applications for lease in surveyed territory. Mr. Harquail gave evidence concerning another lease which he obtained in connection with ten mining claims in the Township of Wilke, which is in surveyed territory, no survey having been required. Ms. Formousa objected to the evidence of Mr. Harquail, not being the issue before the tribunal. However, the tribunal found that it would allow the evidence, and consider the weight it should be given.

Mr. Menzel stated that he was in agreement with Ms. Formousa that subsection 51(3) was not applicable to these proceedings. He also agreed that there was no statutory requirement for Hydro to pay compensation for the requirement to survey the easements.

Mr. Menzel submitted that, had Hydro registered its survey, even though there is no requirement by law to do so, the requirement on Nahanni to conduct a survey might not have been necessary or Nahanni might have been able to use the existing surveys.

Instead, Nahanni was required by the Minister to obtain a survey to describe the lands for which Nahanni could not obtain surface rights. Mr. Menzel submitted that the issue is one of equity and morality.

Findings of Fact

The chronology of events in this application are of importance in attempting to understand Nahanni's refusal to consent to disposition of surface rights. Prior to staking by Nahanni, Ontario Hydro had a 115 Kv. easement and TransCanada Pipelines had a pipeline easement over the Mining Claims.

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Nahanni was required to perform a survey at the time of applying for lease by Ron C. Gashinski, then Manager, Mining Lands, Northeast Region, Ministry of Northern Development and Mines, pursuant to section 96 of the **Mining Act**, R.S.O. 1990, c. M14 through an untitled document dated October 25, 1989 (Ex. 28), being made on the basis of delegation of Authority pursuant to subsection 7(1) of the **Ministry of Northern Affairs Act**, R.S.O. 1980, c. 286. This requirement was also set out in the letter to Nahanni dated November 7, 1989 from Gary White, Mining Recorder, (Ex. 27). Based upon the evidence of Mr. Harquail, the tribunal has been asked to find that the only reason for requiring a survey was because of the existing easements and that a survey would not be required where there were no such easements. While this may have been the experience of Mr. Harquail based upon other mining claims which Nahanni took to lease, it is not conclusive on the practice of the Ministry of Northern Development and Mines in connection with applications for lease in surveyed territory. In fact, the Ministry is well within its rights to require a survey if only to ensure that there are accurate and up to date records for the survey fabric of the Province.

It is clear that Nahanni's rights in the Mining Claims are subject to pre-existing rights in the two existing easements. This is not the case, however, with respect to the third easement, the 230 Kv. hydro line, for which the application to dispose of surface rights is made in this case.

In providing a survey of the Mining Claims including the pre-existing easements, Nahanni would not have to be concerned with the 230 Kv. line proposed by Hydro. The tribunal finds that nothing in the survey of the 230 Kv. line would be of any assistance to Nahanni. There is no evidence that a combined effort would save any money as there is little or no overlap between the two surveys.

The date(s) during which Nahanni's survey was done are not contained in the evidence filed. However, D.S. Dorland Limited billed for the work on April 19, 1990 (Ex. 30). It is quite evident that Nahanni knew of the easements as of November 7, 1989, if not earlier. However, no evidence was provided on how D.S. Dorland went about the task of attempting to locate surveys from Hydro and TransCanada Pipelines. There was no evidence that either Hydro or TransCanada Pipelines were approached for copies of their pre-existing surveys nor of their refusal to do so. More particularly, there was no evidence introduced at the hearing as to how copies of the earlier surveys could have dramatically decreased the expense incurred by Nahanni or obviated the need completely. Notwithstanding that existing easements would have to be surveyed at a cost, there was no evidence introduced as to the cost of a perimeter survey, which would form part of the total survey cost.

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Nahanni first heard from Hydro on August 13, 1991 on the issue of a Consent to Release Surface Rights as evidenced by the letter to Mr. Harquail from D.C. (Chuck) Adams (Ex. 6), and the telephone conversation of that same date referred to in the letter. Up until this time, there was no evidence that Nahanni was seeking compensation from Hydro or the pipeline company in regard to the expense incurred for the survey. Mr. Harquail responded to the letter and telephone call with his letter dated September 11, 1991 (Ex. 9). He encloses a copy of the Mining Recorder's letter of November 7, 1989 and the invoice from April 19, 1990. The last paragraph of his letter states:

> We expect to receive compensation from Ontario Hydro before we would consider "Consent to Release Surface Rights" or any portion of this Mining Lease (application pending for surface and mining rights.)

Nahanni relies on the fact that Hydro did not register its easements with Land Titles, notwithstanding that there was no requirement to do so, pursuant to subsection 48(2) of the **Power Corporation Act**. There was no evidence at the hearing that Nahanni had attempted to contact the Crown Land Registry, within the Office of the Surveyor General of the Ministry of Natural Resources to locate surveys of the easements. This would have been the most logical place to look, as the Crown Land Registry would be required to keep track of activity on crown lands.

Section 51 of the **Mining Act** is designed to provide a method of disposing of conflicts which arise in the use of crown lands, as set out in the **Kamiscotia** case. The tribunal finds that Nahanni has introduced no evidence of conflicting use. To defend an application for release of surface rights, the respondent must show that the granting of the release would interfere with its exploration or extraction of minerals or other activity on the Mining Claims. Rather, Nahanni is attempting to use a requirement of a Ministry of the Crown, as set out in section 109(2) of the **Mining Act** to recover its costs, in an application made under section 51.

Without commenting on its likelihood of success, the opposition of the respondent in the current application appears to be a means of introducing a separate cause of action into a simple matter of multiple uses, the introduction of which, reviewing the dates, appears to be a result of the proximity in time between the receipt of the

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surveyor's invoice by Nahanni and the request for consent to Dispose of Surface Rights from Hydro.

Conclusion

The application for disposition of surface rights under the **Public Lands Act** will be allowed without conditions attached.

There will be no costs payable by either party to this application.