

2 of 2 DOCUMENTS

Case Name:

**Algoma-Talisman Minerals Ltd. v. Ontario (Minister of Northern
Development and Mines)**

IN THE MATTER OF the interpretation of a certain transfer
registered in the Registry Office of the District of Sudbury
on the ninth day of July 1990, as #683373 whereby Her Majesty
the Queen, in right of the Province of Ontario, as represented
by The Minister of Government Services, transferred to Algoma-
Talisman Minerals Ltd. an interest in the minerals contained
in certain lands in Coppell, Newton, Dale, and
Frater Townships in the Province of Ontario
AND IN THE MATTER OF an assessment for Mining Land Tax
incorrectly made pursuant to The Mining Act in respect of the
interest in the minerals transferred in the said transfer.

RE: Algoma-Talisman Minerals Limited, and
Her Majesty the Queen in right of the Province of Ontario, as
represented by the Minister of Northern Development and Mines,
The Attorney General of Ontario, and
The Minister of Energy and Infrastructure

[2010] O.J. No. 1485

2010 ONSC 2090

Court File No. CV-09-3285-00

Ontario Superior Court of Justice

T.A. Bielby J.

April 14, 2010.

(54 paras.)

Natural resources law -- Mines and minerals -- Taxation -- Application for declaration that lands were not subject to mining land tax dismissed -- Applicant reserved mineral rights in conveyance of subject lands to Crown -- Applicant contended that mineral rights were distinct from taxable mining rights, as the latter required surface access -- Mining rights, by implication, included mineral rights

-- Whether by common law, statute or the wording of the reservation itself, the applicant had the right to access the surface lands for the purpose of realizing the minerals by mining -- In such circumstance, the applicant had taxable mining rights -- Mining Act, ss. 1, 186, 189(1)(e).

Application by Algoma-Talisman Minerals for a declaration that certain lands were not subject to a mining land tax imposed under s. 189 of the Mining Act. Prior to 1968, the subject lands were owned in fee simple by the applicant's corporate predecessor. In 1968, the lands were conveyed to the provincial Crown subject to an option in favour of the applicant reserving the mineral exploration rights associated with the lands. In 1990, the applicant exercised the option and the Crown transferred the interest in the lands as contemplated by the reservation. The applicant submitted that it was conveyed mineral rights in fee simple while the Crown continued to own the surface rights. The applicant submitted that it was exempt from mining land taxes on the basis that s. 189 of the Mining Act was applicable to entities with mining rights rather than mineral rights. The applicant submitted that until access to its mineral rights was sought or granted, its mineral rights could not be considered mining rights.

HELD: Application dismissed. Even if the interest transferred to the applicant was that of mineral rights, it was still subject to the mining land tax. The Mining Act defined "mining rights" as the right to mine on or under any land. The interest conveyed to the applicant was within the scope of that definition regardless of how it was characterized. The plain wording of the transfer provided the applicant with the right to work and exploit ore found on or under the lands. Access to the surface lands was also protected, subject to negotiation of price. The documentation underlying the transfer used the phrases "mining rights" and "mineral rights" interchangeably. In addition, the common law implied a right of entry on the surface rights in order to allow access to mineral rights. Mining rights, by implication, included mineral rights. The applicant, whether by common law, statute or the wording of the reservation itself, had the right to access the surface lands for the purpose of realizing the minerals by mining. In such circumstance, the applicant had taxable mining rights.

Statutes, Regulations and Rules Cited:

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 16

Mining Act, R.S.O. 1990, c. M.14, s. 1, s. 2, s. 4(1), s. 4(2), s. 28, s. 30, s. 186, s. 189, s. 189(1)(e)

Ontario Rules of Civil Procedure, Rule 14.05(3), Rule 14.05(3) (d), Rule 14.05(3)(e), Rule 14.05(3)(g), Rule 14.05(3)(h)

Counsel:

L. Murray Eades, for the Applicant.

Glenn Frelick, for the Respondent, Her Majesty the Queen in right of Ontario as represented by the Minister of Northern Development and Mines.

ENDORSEMENT

[Application made under Rule 14.05(3)(d), (e), (g), & (h)]

1 **T.A. BIELBY J.**:- The applicant has brought this matter before the Courts pursuant to Rule 14.05 (3), requesting a declaration that the subject lands, as defined in this matter, are not subject to the mining land tax imposed by section 189 of the *Mining Act*, R.S.O. 1990, c. M.14.

Overview

2 Prior to 1968, the applicant's predecessor, Algoma-Davis Timbers Limited was the owner, in fee simple, of the lands, which are located in the District of Sudbury, comprising of over 29,000 hectares of land.

3 In 1968 Algoma-Davis conveyed the lands to the Province of Ontario, but the conveyance was qualified by the following clause (the "Reservation").

RESERVING to the Transferor, its successors and assigns, for a period of twenty-one years from the date hereof the right to enter on the lands for the purposes of carrying out exploration and development work thereon and thereunder, and an option to acquire, upon payment of the sum of \$1 per year, mineral rights in whole or in part from time to time in or under the subject property and to work and exploit any ore bodies found on or under the lands in accordance with usages customary to mining and/or placer mining operations from time to time, including the right to acquire, from time to time, at a price to be negotiated with the transferee, her successors and assigns, surface rights necessary for carrying out of exploration and exploitation of ore bodies found on or under the lands including, without limiting the generality of the foregoing, the use of such surface rights for the erection of a surface plant and town site if required.

4 The applicant exercised the option and the Crown conveyed to the applicant, by transfer, signed on January 9, 1990, the interest in the lands as contemplated in the Reservation.

5 The applicant submits that what was conveyed to it was the "mineral rights in fee simple." It is argued by the applicant that the Crown continued to own the surface rights in fee simple.

6 The applicant argues that section 189 of the *Mining Act* is applicable to those entities with mining rights, not mineral rights and therefore, it is exempt from mining land taxes or rather its interest is not subject to said taxes.

7 The applicant argues that to date access to those mineral rights have not been sought or granted and until then, mineral rights cannot be considered to be mining rights.

8 Section 189(1)(e) states, "*Except as provided in this Part, all mining rights howsoever patented or acquired which are severed from or held apart or separate from the surface rights, are liable for, and the owner thereof shall pay, the tax.*"

9 The motion, argued over 3 hours, dealt with, among other things, the history of the transactions and the intention of the parties as to the interest that was to be transferred to the applicant. The applicant argued that it received or was to receive, mineral rights not mining rights, and that this result was the intention of the parties which this court should honour.

10 The answer to me however seems much more simple.

11 Even if the interest transferred to the applicant was that of mineral rights, the interest is still subject to the mining land tax.

12 The *Mining Act*, section 1 defines "mining rights" as meaning, "*the right to minerals on, in or under any land.*"

13 In my opinion, this definition catches any and all "mineral rights" conveyed to the applicant.

14 Nowhere in his argument, either written or verbal did counsel for the applicant speak to this definition.

15 What the applicant's counsel did argue was that section 189(1)(e) does not apply to its mineral rights which have not been accessed. At paragraph 38 of his factum he states: "*Had the Legislature intended to tax ownership of minerals i.e. mineral rights whether they can be accessed or not, it could easily have done so; but it did not.*"

16 With respect, the Legislature did just that, by the definition of mining rights; whether or not access is or can be exercised is irrelevant.

17 With respect to section 189(1)(e), in order to attract taxation, the mining rights have to be severed or separate from the surface rights. Notwithstanding the right of access, the mining rights have been severed, by the 1990 transfer and are separate from the surface rights held by the Province.

18 However, regardless of the definition of mining rights as set out in the *Mining Act*, in my opinion, what was transferred to the applicant in 1990 was in fact, mining rights.

19 The original Reservation provided to the applicant the right to access to explore for minerals and the right to mine the minerals. This is evident from the plain wording of the Reservation. The applicant was granted the mineral rights, and the right "*to work and exploit any ore bodies found on or under the lands in accordance with usages customary to mining ...*"

20 Access to the surface lands in order to "exploit" the ore bodies was also protected, subject to a negotiation of price.

21 When the applicant gave notice of its intention to exercise the option, documents and correspondence were exchanged wherein the phrases, "*mining rights*" and "*mineral rights*" were used interchangeably.

22 In 1970 by agreement the applicant's predecessor assigned the Reservation and option to the applicant. The Province of Ontario also signed the assignment, as evidence of its consent to the assignment.

23 The assignment has four enumerated paragraphs and three of those refer to "*Mining Lands*" as the subject of the assignment.

24 In 1989, the applicant gave notice that it wished to exercise the option and that it wished to acquire the "*mineral rights.*"

25 By Order in Council, dated November 30, 1989 the Provincial Cabinet authorized the Minister of Government Services to convey to the applicant the "*mining rights*". In fact, the phrase "*mining rights*" was used at least four times in the Order and there is no reference to "*mineral rights.*"

26 A copy of the Order was delivered to the applicant and its lawyers in December, 1989. No objection was raised. In April 1990, the Order was registered on title by way of a registry office document called a Document General. The actual order was attached to this document.

27 The Document General was prepared and executed by the applicant's solicitors, and in Box 6 and 8 of the document reference was made to "*mining rights*." There was no reference to "*mineral rights*."

28 In July 1990, a transfer was prepared, executed, and registered conveying the interest in issue to the applicant. The description of property began with the phrase "*Mining Rights Only*."

29 Box 7 of the transfer is entitled "*interest/estate transferred*." It was originally filled out to say "*fee simple, mineral rights*." When the agent for the applicant went to register the transfer, he changed this entry to read: "*fee simple, mining rights*." It was alleged that the land registry office noted the discrepancy and requested a change.

30 The Land Titles Tax Affidavit, attached to the transfer was signed by counsel for the applicant, and the description at the top was again entitled "*Mining Rights Only*." In paragraph 6 of the affidavit, an exemption from land transfer tax was claimed and the conveyance is referred to as a conveyance of "*mineral rights*."

31 Counsel for the applicant in reviewing the documents and the history of the interest in land submits that the interest conveyed was mineral rights and not mining rights. He submits the 1990 Deed was correct as drafted and the change ought not to have been made.

32 However, the change was made by the agent for the applicant and the fact is the description states "*Mining Rights Only*."

33 The Order in Council only speaks to "*mining rights*."

34 On the basis of the documentation before me, I would rule that the interest conveyed was a mineral right and the right to mine those minerals.

35 Further even if the documentation had not mentioned "*mining rights*" such rights could still be implied.

36 The respondent provided, as an authority, the text *Canadian Mining Law* by Barry J. Barton. He quoted this text as authority for the common law proposition that if the estates, surface and mineral, are severed, the law will imply a right of entry on the surface rights in order to allow access to the mineral rights.

37 The Privy Council in *Borys v. Canadian Pacific Railway and Imperial Oil Limited*, [1953] J.C.J. No. 6 (P.C.), at paragraph 35, make it clear that a reservation for mineral rights is useless without the right to work it. Such a reservation provides a right to recover the interest and the right to work it. Mining rights by implication included mineral rights.

38 Section 16 of the *Conveyancing and Law of Property Act*, R.S.O. 1990 c. C.34, states:

Unless the contrary appears to be the intent of the instrument, where in a conveyance the "*mining rights*" in respect of any land are granted or reserved, the grant or reservation shall be construed to convey or reserve the ores, mines and minerals on or under the land, together with such right of access for the purpose

of mining the ores, mines and minerals as is incidental to a grant of ores, mines and minerals.

39 In my opinion, the applicant whether by common law, statute, or the wording of the Reservation itself had the right to access the surface lands for the purposes of realizing the minerals by mining.

40 The conclusion can only be that the applicant has mining rights.

41 The applicant also asserts that even if it has mining rights the *Mining Act* does not apply to it because of the manner in which it obtained the mining rights.

42 The conveyance to the applicant was made pursuant to an Order in Council and was executed by a representative of the Ministry of Public Services.

43 The applicant asks the Court to review sections 2, 4(2), 28 and 30 of the *Mining Act* and submits that the only conclusion that can be reached is that the *Act* was not intended to apply.

44 Section 4(2) provides that all instruments of titles relating to mining rights shall be signed and executed by the Minister or by the Deputy Minister, which in 1990 meant the Minister of Northern Development and Mines.

45 Counsel for the respondent submits that subsection 2 of section 4 must be read in conjunction with subsection 1 which references "public lands." He submits that "public lands" means unpatented land or land not recorded in the land registry system. He offers no authority for his definition but his definition was not challenged by the applicant.

46 Counsel for the applicant did not argue that the conveyance of the mining interest to his client was invalid because it did not comply with section 4(2) of the *Mining Act*. He argued that the manner of the conveyance is evidence that the *Mining Act* has no application to his client's interest.

47 I respectfully disagree. The *Mining Act* is made up of a number of enumerated parts. Part XIII commences at section 186 and is entitled Mining Land Tax.

48 Section 186 states that tax means a tax under this Part.

49 Section 189(1)(e) states "*except as provided for in this part ... all mining rights howsoever patented or acquired which are severed from or held apart or separate from the surface rights are liable for and the owner shall pay, the tax.*" (emphasis added)

50 The plain reading of these sections are that mining rights, held separate from the surface rights regardless of how they were acquired or created, are taxable.

51 In my opinion these sections of part XIII are not dependent or connected to other sections of the *Act*, apart from the definitions.

52 The applicant's interest is not exempt from Part XIII of the *Mining Act*.

53 For the reasons stated, the applicant's rights in the land, for the purpose of the *Mining Act*, are mining rights and subject to taxation.

54 The application is dismissed. I will accept submissions at to costs within 14 days of the release of this endorsement.

T.A. BIELBY J.