File No. MA 005-98

L. Kamerman	)	Friday, the 12th day
Mining and Lands Commissioner	)	of February, 1999.
M. Orr	)	
Deputy Mining and Lands Commissioner	)	

THE MINING ACT

IN THE MATTER OF

An application under subsections 51(1) and 80(2) of the **Mining Act** and an application under section 21 of the **Public Lands Act**, in respect of Mining Claims P-1190575 and 1190576, situate in the Townships of Lisgar and Wadsworth, in the Porcupine Lake Mining Division, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

A referral by the Minister Of Northern Development and Mines to the tribunal pursuant to subsection 51(4) of the **Mining Act**;

AND IN THE MATTER OF

An application for an order under the **Public Lands Act** for a grant of easement in favour of the Applicant over the Mining Claims;

AND IN THE MATTER OF

An application for an order excluding the surface rights from the Mining Claims pursuant to subsection 51(6) of the **Mining Act**.

B E T W E E N:

MINISTER OF NATURAL RESOURCES

Applicant

- and -

MICHAEL YVON C. GAGNE & YVON MICHAEL GAGNE

Respondents

- and -

SPRUCE FALLS INC.

Party of the Third Part

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CONDITIONAL ORDER

UPON HEARING from the parties and reading the documentation filed:

1. THIS TRIBUNAL ORDERS that conditional upon payment by the applicant, the Minister of Natural Resources to the Respondents, Michael Yvon C. Gagne and Yvon Michael Gagne, of $31,000, as compensation for expenditures on the Mining Claims, the application will be granted, consent to disposition of the surface rights of the Mining Claims will be ordered by the tribunal and the Mining Claims will be cancelled, thereby permitting the land exchange for the Missinaibi Provincial Park to proceed.

2. THIS TRIBUNAL FURTHER ORDERS that failure to make the aforementioned payment by the Minister of Natural Resources no later than the 29th day of March, 1999, providing proof of payment to the tribunal, will result in the dismissal of the application.

3. THIS TRIBUNAL FURTHER ORDERS that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act.**

Reasons for this Order are attached.

DATED this 12th day of February, 1999.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by
M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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MICHAEL YVON C. GAGNE & YVON MICHAEL GAGNE

Respondents

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SPRUCE FALLS INC.

Party of the Third Part

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REASONS

This matter was heard on September 15, 1998, in the Larry Brown Room (formerly the Blue Room) of the Royal Canadian Legion, Kirkland Lake, Ontario and reconvened by Telephone Conference Call on January 20, 1999. On September 20, 1998, Mr. Aubrey Kauffman appeared as Counsel on behalf of both the Applicant, the Ministry of Natural Resources ("MNR") and the Party of the Third Part, Spruce Falls Inc. ("Spruce Falls"). Mr. Andre Gagne and Mr. Michael Gagne, the Respondents appeared on their own behalf. On January 20, 1999, Ms. Krystine Linttell appeared as Counsel on behalf of MNR, with information and submissions also being made by Messrs. Doug Johnson and Gerry Daigle. Mr. Kauffman was not in attendance and Mr. David Goss spoke on behalf of Spruce Falls. Messrs. Gagne attended on their own behalf.

Background and Facts Not in Dispute

This matter arises out of a referral by the Minister of Northern Development and Mines (the "Minister") pursuant to subsection 51(4) of the **Mining Act**. Relevant portions of section 51 are reproduced:

> **51.** (1) Except as in this Act is otherwise provided, the holder of an unpatented mining claim has the right prior to any subsequent right to the user of the surface rights for the prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights.
>
> (4) Where an application is made for disposition under the *Public Lands Act* of surface rights on an unpatented mining claim and the holder of the unpatented mining claim does not consent to the disposition and provision for the reservation or exclusion of the surface rights is not otherwise provided for in this Act or any other Act, the Minister may refer the application to the Commissioner.
>
> (5) Where an application under subsection (4) is referred to the Commissioner, he or she shall, upon giving all interested persons at least ninety days' notice and after hearing such interested persons as appear, make an order based upon the merits of the application.
>
> (6) Where surface rights on an unpatented mining claim are required for the use of the Crown or other public use, this section applies with necessary modifications.

This matter arises out of the Missinaibi Park Land Exchange Process, spearheaded by the Ministry of Natural Resources ("MNR"), which has been described as a public planning

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exercise to establish the Missinaibi Provincial Park (the "Park"). The Provincial Parks Council made a series of recommendations to the Minister of Natural Resources, arising out of a process which commenced in 1986, one of which was to acquire up to 200 metres of land on both sides of the Missinaibi River, the title of which was held privately.

Lands owned by Spruce Falls Inc. ("Spruce Falls"), a lumber/forestry company, in the Townships of Stanton, Orkney, Magladery, Caithness and Rykert, were identified as being within the area which the Province wished to acquire for the Park. The boundaries of the lands within these townships were determined through identification of natural features, eliminating the need for a survey by a provincial surveyor, the costs of which are prohibitive. Minimizing the need for financial expenditures has been of paramount concern to MNR throughout.

Spruce Falls was first contacted by MNR in 1992. Crown lands situated within the Townships of Davin, Wadsworth, Belford, Watson, Lisgar, Buchan, Allenby Seaton and Griffin were initially identified as having potential for a straight exchange between Spruce Falls and MNR. By the time this matter proceeded to the negotiation stage of a land swap, the Crown land townships targeted were Wadsworth, Lisgar, Allenby, Buchan and Davin.

In a letter dated December 29, 1992 to C.A. McDonald, Hearst District Area Operations Coordinator for MNR from Mr. Gary Sherman, Co-ordinator, Crown Land Registry (Ex. 1, tab 2, document marked "2") several of the townships held by the Crown were discussed with problems in mind. Wadsworth and Lisgar are listed, with the following comments:

-Wadsworth Township -- there are LUP's which would have to be surveyed in order to be excluded

- Lisgar Township -- there are roads which would have to be surveyed in order to be excluded

In May of 1993, Spruce Falls indicated its willingness to MNR to negotiate a land exchange. It was Spruce Falls' desire to acquire comparable land to enable it to continue with its forest harvesting operation in accordance with its licence with MNR.

Mining Claim P-1190575, a 16 unit claim, was staked on August 11, 1993, and Mining Claim P-1190576, a 6 unit claim, was staked on August 12, 1993, both being recorded on August 13, 1993. A total of $30,577 in assessment work was performed and filed for the two Mining Claims on January 30, 1995, which was sufficient to keep them in good standing until August 13, 1998, but for the commencement of these proceedings, which has resulted in their being placed under "pending proceedings".

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Evidence and Submissions

Mr. Kauffman introduced MNR's and Spruce Falls' case by referring to the actions by MNR to assemble lands for the Park. The importance of acquisition of the privately held lands is that it is in the public interest of Ontario to do so. The details of this is found at Exhibit 1, Tab 2, Document #1, which states:

> **Provincial Parks Council of Ontario**
>
> Recommendation #93 stated "that the Ministry of Natural Resources seek to acquire the lands up to 200 metres and, in the interim, a management agreement between the Ministry of Natural Resources and the private land owner [Spruce Falls] to allow the Ministry of Natural Resources to manage the area for Park purposes
>
> **Minister of Natural Resources response to Recommendation #93**
>
> May 1994 Minister responds to recommendations and his response to recommendation #93 is as follows "I accept councils recommendation. I will direct my staff to work with the landowner to assess options for acquiring or trading this land. A public review will be undertaken as soon as possible to assess proposals.
>
> In addition other private lands within 200 metres of the river in Eilber and Devitt townships (within the Municipality of Mattice-Val Cote) may be considered in accordance with your recommendation (i.e. promote landowners to manage their shorelines for conservation purposes, or where appropriate, acquire on a willing seller/willing buyer basis).

Mr. Kauffman summarized the many attempts by MNR and Spruce Falls to obtain the consent of the Gagnes to the disposition of surface rights under the *Public Lands Act*. The nature of the agreement, as characterized by Mr. Kauffman, was to guarantee the Gagnes the same rights to enter and work on, or otherwise develop their Mining Claims, the lands for which the surface rights would become privately owned, thereby allowing the Gagnes similar rights to their Mining Claims as they currently enjoy under the **Mining Act**.

Mr. Kauffman pointed out to the tribunal that section 51 of the **Mining Act** does not give guidance as to the type or order which can be sought. Therefore, he is seeking an order withdrawing the surface rights, but one which would preserve the rights of the Gagnes, being conditional on any subsequent conveyance by Spruce Falls being obliged to give an access agreement in the form provided. The end result of the application and order, if granted, would

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be that MNR and Spruce Falls could achieve the land exchange to facilitate establishment of the Park, while the Gagnes would still be able to prospect and develop their mining claims. Through provision of the access agreement, the Gagnes would have the same rights of access they currently enjoy under the **Mining Act**.

It was pointed out that the Gagnes are not the owners of either the mining rights or the surface rights. Subsection 50(2) was read into the record:

> **50.** (2) The holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right to enter upon, use and occupy such part or parts thereof as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein.

David Robert Goss, Vice President and General Manager of Spruce Falls Inc., having been with the company for 22 years, was called to give evidence. Mr. Goss was personally involved in the process of the land swap since early 1992. He summarized the events in the process leading up to the recommendation that Ontario should acquire those lands through which the Missinaibi River flows, involving four townships, which Spruce Falls owns. In some cases, the company even owns the land under the river itself. The public interest rationale behind the acquisition of these lands is the world famous historic fur route which it housed.

In 1992, MNR began discussions on how to acquire lands of the park. Three options were generated for discussion, being 1) the purchase by the Crown of a 200 metre strip on either side of the river; 2) swap a 200 metre strip on the either side of the river; or 3) the swap of a 200 metre strip on the east side of the river along with all lands to the west of the river, in exchange for productive land of equal value. The problem with the first option is that purchase of the lands is seen as too costly for the government to undertake. The second option, similarly, would be fiscally impossible to undertake the necessary surveys to carve out those specific areas of interest. The third option, which would follow natural features on the lands, would allow the exchange to take place without necessitating expensive survey costs.

The next step in the process was to select crown lands with the least amount of conflicting holders, such as remote tourism operators, bait operators, mining claim holders and the like. The identification process took place throughout 1992, and was completed in 1993. An Agreement in Principle was signed by MNR and Spruce Falls for the land swap, involving the townships described at the commencement of these Reasons.

The problem with the Gagne Mining Claims was not discovered until early 1995. At that time, MNR sent a letter to the Gagnes dated March 16, 1995 (Ex. 1, Tab 3, Document #4, under the signature of Wayne Parkes, Area Resource Technician for Hearst District) which explains that the proposed Crown land disposition involves acquisition of private lands along the Thenaibi River. The letter makes reference to the mining claims held by the Gagnes, which at

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that time were P-1190575, 1190576 (the subject Mining Claims) as well as P-1200304, 1200305, 1200672, 1200673, 1201071 and 1201072. Enclosed was a Consent to Disposition of Surface Rights form and Messrs. Gagne were requested to complete the form and submit it to the Mining Recorder's Office for the Porcupine Mining Division in Timmins no later than March 31, 1995. The status of the mining rights and access to roads are addressed in the letter, which is reproduced:

> The disposition will involve only the surface rights of the present Crown land, all mineral rights will remain with the Crown. This will allow mineral exploration to continue after the transfer of the property.
>
> Spruce Falls Inc. and/or it's agent, are willing to discuss the use of the access road in Lisgar and Wadsworth Township with you.

As is evidenced by his letter in response, dated March 23, 1995 (Ex. 1, Tab 3, Document #5), Yvon M. Gagne, he indicated that he was unwilling to consent. The relevant portions of the text state:

> ...The Ministry's exchange for a large tract of public land as per your letter has no bearing to my being a tenant at will of the Crown <u>on my</u> mining claims. I have no interest in the exchange lands; my only interest being in the claim I currently hold. Should I proceed to develop a viable mineral deposit of any nature, I would require the full and complete use of the surface rights. I do not even contemplate relinquishing any rights I have acquired subject to the Mining Act, R.S.O. 1990, c. M.14.

MNR completed a Request for Withdrawal Order for submission to the Ministry of Northern Development and Mines, dated March 9, 1995 (Ex. 1, Tab 3, Document #7). The purpose of this request was to ensure that no further mining claims would be staked on the Crown lands which were proposed to be swapped with Spruce Falls.

Attempts to obtain the consent to disposition were once again made in 1997. On February 17, 1997, Mr. Parkes once again wrote to Yvon M. Gagne (Ex. 1, Tab 3, Document #9), pointing out that negotiations for the land exchange were once again moving forward, and that there remained one mining claim unit still in existence in Lisgar and Wadsworth Townships [note: this was not corrected or clarified in the documentation, but indeed, the number of units was 22, comprised of 2 mining claims, as set out in the Title of Proceedings.] Mr. Parkes mentions in his letter the ongoing concerns of the Gagnes, as had been communicated in their 1995 correspondence, of access to their mining claims. Again, Mr. Parkes indicated a willingness on the part of Spruce Falls to work this out.

In response to the latest attempts to resolve this matter, Yvon Gagne wrote a letter dated July 22, 1997 (Ex. 7), which states in part:

> Message: - I have received an offer to purchase these mining units over a 4 year option agreement period and have more exploratory work performed.
>
> With regard to this offer I feel I cannot presently represent that I own 100% of the mining units pursuant to the Mining Act. The rules under which I accrued these lands in 1993 and performed diamond drilling and other work are presently being threatened by the expropriation of the surface rights.
>
> I have not discussed this with the representatives of the group that offer to option these lands as it has not been resolved yet.
>
> The mining exploration field is difficult enough presently without any extra hurdles or impediments.
>
> - I feel that the issue could best be resolved by Spruce Falls purchasing the mining units outright and reserving a Net Smelter Return on the units for my son and myself for the period of time that the mining lands are maintained.

Mr. Goss responded to this last letter by his own dated July 23, 1997 (Ex. 8) wherein he states that Spruce Falls is not interested in the purchase of the Gagne Mining Claims. He reiterates that, should an access agreement be required to increase the marketability of the mining claims, the company is prepared to meet and discuss terms.

By response dated July 28, 1997 (Ex. 9), Mr. Gagne requested a rough proposal of an access agreement so that he would be able to compare it with conditions under the **Mining Act**. Mr. Goss responded in writing on August 5, 1997 (Ex. 10) wherein he stated that Spruce Falls is prepared to provide the same access opportunities over freehold land as exist for Crown lands under the **Mining Act**, but indicated that he is not familiar with such an agreement and that Spruce Falls does not have access to a generic agreement. He asked to be referred to the appropriate sections of the **Mining Act** so that such a document could be drafted. Mr. Goss stated that the position outlined in the August 8, 1997 letter remains the position of Spruce Falls, being one for which no response has been received.

Once the matter was referred to the tribunal, a telephone conference call was held on February 11, 1998, involving the parties and Mr. Daniel Pascoe, Registrar of the tribunal. This resulted in a letter dated February 17, 1998 (Ex. 1, Tab 3, Document 11) with an enclosed Rights of Access Agreement. The terms of the proposed agreement provide for free access, that there be no requirement to maintain the road, and in the event that mineral development were to occur necessitating heavy equipment, Gagne would sign a road maintenance agreement similar to other such agreements in the area, and that Gagne would maintain $1,000,000 in general

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liability insurance with Spruce Falls named as an additional insured. Mr. Goss explained that the proposed road maintenance agreement is a common feature with the licence with MNR, which requires that anyone using Spruce Falls roads held under a land use permit under the **Public Lands Act** must get a road maintenance agreement.

Mr. Goss stated that the agreement provides that Gagne would be notified prior to any road construction, harvesting or silviculture taking place on the Mining Claims. Also, should any claim lines or workings be harmed, Spruce Falls would re-establish them, meaning that any damage which might occur would be fixed.

Mr. Gagne did not respond to the proposed terms of the agreement, but instead by letter dated February 26, 1998 (Ex. 1 , Tab 3, Document 12) indicated that the only solution at this juncture would be a monetary one.

Mr. Goss stated that if the surface rights are not withdrawn from the Mining Claims, it would impact on the establishment of the proposed park. Indeed, since 1997, this outstanding issue has prevented the people of Ontario from enjoying these lands as a park. Once this matter is settled, the exchange of two freehold parcels can take place, and the park could be established for the use and enjoyment of all. Mr. Goss stated that there would be no prejudice to the Gagnes, as they would not be precluded from prospecting in their Mining Claims once the exchange has taken place and the terms of the proposed Agreement have been ordered.

Under cross-examination, Mr. Gagne asked why there is even a hearing, if the Gagnes do not own the surface rights. At the time of staking, a potential park was never discussed in connection with these lands, and the Gagnes have now spent considerable sums on assessment work. The tribunal clarified for Mr. Gagne what would be required by way of cross-examination, indicating that he would still be able to make final submissions.

Mr. Goss stated that under section 51 of the **Mining Act**, a mining claim holder does not own the surface rights, but merely has a right prior to any subsequent interest in title to use the surface rights for prospecting, and the efficient exploration, development and operation of any mines. Mr. Goss stated that, while the Gagnes have this right to use the surface rights, in the event the Crown should need the surface rights for public purposes, the **Mining Act** provides that the surface rights can be given to someone other than the mining claim holder through a disposition under the **Public Lands Act**.

Mr. Goss explained that the land swap entails the same number of productive hectares and would not prevent the cutting of timber on the Mining Claims, should it proceed. Mr. Gagne reiterated that without the surface rights, he would be unable to option the Mining Claims to a mining company because the surface rights are required to do so. He stated that he would have to show 100 percent ownership of the Mining Claims. Mr. Goss countered by stating that Spruce Falls wishes to work with the Gagnes to guarantee marketability of the Mining Claims, as mineral deposits take precedence over private lands.

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Wayne Noel Parkes, an employee for MNR, provided clarification of one matter for the tribunal. Should the application to remove surface rights be granted, and the land swap were to go ahead, it would be MNR's intention to throw open staking the lands for which Spruce Falls receives the surface rights. In other words, the reason for removing the lands from staking was to ensure that additional third party interests would not arise during the time it took to complete the land swap.

Michael Gagne gave evidence on his own behalf. Mr. Gagne stated that, in seeking to obtain option agreements with mining companies, 100 percent ownership of the mining claims is necessary. A prospector generally, and himself in particular, cannot option ground without ownership of the surface rights.

On August 11, 1993, assessment work was performed on the Mining Claims in the form of trenching and blasting. In 1994, diamond drilling of 5 holes took place. He was searching for base metals. He had planned on doing more work in 1996 through 1998, but stated that it would not make a difference to sink more money into the Mining Claims without having the surface rights issue resolved.

Prospectors try to get mining claims in good standing and raise the interest of mining companies. With respect to the access issue, Mr. Gagne stated that he has access to the Mining Claims now. Assessment work was due on the Mining Claims in 1998, which he could not undertake with this matter resolved. Mr. Gagne concluded by stating that he had done everything correctly and should be allowed to proceed unhampered.

Under cross-examination, Mr. Gagne stated that the two Mining Claims were staked and recorded in August, 1993. He agreed that he never purchased the surface rights, but stated that mining claims automatically come with the surface rights. Mr. Kauffman, in referring to the definition of "surface rights" under section 1 of the **Mining Act** stated that the rights of a mining claim holder is to enter upon, use and occupy them. He stated that this is not ownership, but rather a first right to use, stating that Mr. Gagne does not own the surface rights of the Mining Claims. Mr. Gagne stated that he doesn't actually own the Mining Claims, but has the right to bring them to lease after 10 years.

In 1995, Mr. Gagne first became aware of this issue when he received a letter from MNR asking for the consent to dispose of the surface rights. Mr. Kauffman suggested that he was told by MNR that they were reserving the mineral rights from this land swap, so that title to the minerals would not pass to Spruce Falls. Mr. Gagne agreed. Mr. Kauffman stated that all mineral rights in fact remained in the Crown, which would allow for the continued mineral exploration after the transfer.

Mr. Kauffman went on to refer to the issue of access, stating that Spruce Falls was willing to discuss the issue of access with the Gagnes, but their response was a flat "no". There was no discussion of how to protect their rights as prospectors to develop any potential

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minerals found. Mr. Kauffman referred to a letter of Mr. Parks addressed to Mr. Gagne dated February 17, 1997, with the consent attached (Ex. 1, Tab 3, Document 9), wherein MNR indicated that Spruce Falls was willing to discuss access, although no such discussion took place. Mr. Gagne's attention was brought to a letter of Mr. Goss dated August 5, 1997 (Ex. 10) where Mr. Goss stated,

> Spruce Falls is prepared to provide you the same access opportunities as if our freehold lands were crown lands covered under the Mining act. Would you please provide me the applicable sections of the Mining Act, as I am not familiar with it and we don't have a generic access agreement. This will enable us to put together the proper wording.

Mr. Kauffman suggested that Mr. Gagne was not prepared to accept or negotiate an agreement with MNR or Spruce Falls granting the same access as before. Mr. Gagne was only interested in monetary compensation.

Mr. Gagne produced copies of two option agreements for other lands, one with Maude Lake Exploration Limited and one with Prospectors Alliance Corporation (Ex. 11 & 12). He referred to the recitals in the former, where it states, "WHEREAS Optionor owns a 100 % undivided interest in ten mining claims..." and the second full paragraph of the latter, where it states, "You have represented that you own and/or represent the owners of and are fully authorized to dispose of a one hundred percent (100%) interest in and to the mining claims ..." In response to Mr. Kauffman's question, Mr. Gagne indicated that he does own the surface rights to the Mining Claims, which are of the same nature as those in the two option agreements. Through an ensuing discussion, Mr. Gagne indicated that if he were to "sign over" the surface rights it would impede what he would be able to do with the Mining Claims, in terms of optioning them off. Mr. Kauffman showed the consent to disposal of surface rights form (Ex. 13) and indicated that what it means is that the mining claim holder is willing to give up his first rights to use the surface rights. In the terms of the exchange proposed in this case, Mr. Kauffman indicated that the Gagnes would receive the access agreement with Spruce Falls in return.

In response to several questions by the tribunal, it was indicated that the Gagnes would not have to pay for the right of access to their Mining Claims. The road in question was not built recently, but has been there for years. Mr. Gagne indicated that he has maintained the road, put a days work in to fix it in places to ensure access, and generally look after it. Mr. Gagne indicated that he has had occasion to use heavy machinery, as for example, with the diamond drill where a half ton truck and trailer were used, but the weight was nowhere near the 6,800 kilograms indicated in the proposed access agreement. Mr. Gagne indicated that he does carry insurance on his vehicles, but nothing with respect to personal injury of himself or his son. Mr. Gagne indicated that he has additional concerns, not only to required work on the road, but on the cost of maintaining the $1,000,000 liability insurance. He stated that the road is 80 kilometres long, and would be expensive to maintain.

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Additional Evidence

Not discussed at the hearing, but found as Exhibit 4 is an executed Letter of Intent (Re: Option to Purchase) and Acceptance between Yvon Gagne, Michael Gagne and Roy Newman & Associates ("Newman"), dated July 7, 1997, which involves optioning of the Mining Claims. Within 90 days of signing, Newman is to pay $20,000 plus 100,000 shares in a company whose name is not disclosed; within one year, pay $30,000 and 100,000 shares of the company; within two years pay $50,000 and 100,000 shares of the company; and within three years pay $100,000 and 100,000 shares of the company. Not entered as an exhibit, but found in the tribunal's correspondence file is a letter of Yvon Gagne dated February 5, 1998 which states in part:

> Message: Please find attached a statement of Costs (Assessment Work) and a copy of a proposed option agreement that was cancelled because of the surface rights problem.

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> Under the proposed option agreement the total value of the first two payments that we would have received (the stock value was 50 [cents] per share) would have been $150,000.
>
> The proposed option agreement was cancelled because these people had numerous bad experiences operating on timber lands. (Insurance Costs and timing of access etc.)
>
> Also, these people wanted to expand the land picture for exploration to my original group of about 100 units but declined here also because of the surface rights problem and the timber company.
> Mediation from our viewpoint should centre on compensation for our monetary loss and the fact that we acquired the lands and spent time and money under the original rules and regulations and would not have started at all in the area under the new rules & regulations.

Final Submissions

Mr. Kauffman reiterated that this is an application by MNR, and not by Spruce Falls. In reading the **Mining Act** one can see that a scheme emerges in which the Ministry of Northern Development and Mines ("MNDM") grants certain rights to prospectors, where by one can stake and record a claim. There is no cost to this right, excepting the cost of required assessment work which maintains the claims in good standing. The **Mining Act** has a balancing mechanism to take back some of those right, however. Where the Crown requires them back to convey to another, or needs to take them back to convey to another for Crown purposes, the **Mining Act** provides that consent to this can be obtained from the mining claim holder, failing which one can apply to the tribunal for an Order.

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The tribunal is required to balance the rights of all of the parties to the application. The Crown wishes to take back the surface rights to complete a land swap which would provide for a public park. The public interest favours allowing this to happen. Eliminating the surface rights of the Gagnes will be impaired, but there is a strong public interest reason for doing so.

Mr. Kauffman submitted that Mr. Gagne misapprehends exactly what his rights are. The **Mining Act** creates a situation whereby the prospector has the right to enter into and use the land. He does not have ownership of either the mining or the surface rights, although he does have the right to acquire a more secure interest in the mining rights, such as a lease.

Since 1995, if there surface rights had been conveyed to Spruce Falls, the right of Mr. Gagne to the minerals would not have been impaired, as they would have remained in the Crown. What would have changed, absent an access agreement, is his free right of access. This contemplates the freehold situation, namely that compensation be made for damage to mine workings under subsection 79(3) of the **Mining Act**, failing which the tribunal may order such compensation after a hearing, pursuant to subsection 79(4). The position taken by Spruce Falls is that it is prepared to agree to rectify any damage which may occur, so that if problems occur through the use of heavy equipment in their forestry operation, Spruce Falls would assume liability. Questions asked by the tribunal suggests that it recognizes the obligations which would be imposed on the Gagnes. The requirement that there be general liability insurance is something which the Gagnes should have in any event.

Spruce Falls is proposing to give unimpeded access. In return for this, the Gagnes are not being asked to give up anything of significance. However, throughout efforts to settle this matter directly from 1995 to 1998, the Gagnes have never responded to what the terms of a proposed access agreement should be. Rather, they have maintained that monetary compensation is all they would accept. With respect, Mr. Kauffman submitted that if the tribunal were to make the order requested, the Gagnes would be in the same position that they were prior to the requested Order, with some modifications. The benefit would be that the public purpose of the establishment of a provincial park could proceed.

The tribunal asked whether the terms of the proposed access agreement were still negotiable, and Mr. Kauffman indicated that they were.

Mr. Gagne stated that they staked the Mining Claims in 1993, and did sufficient assessment work to keep them in good standing for five years. It is their intent to keep them for another few years. As matters now exist, the Gagnes have access to their Mining Claims and there have been no problems. Michael Gagne stated that diamonds have been discovered in the area, so that there will be enhanced interest in their potential.

Mr. Gagne stated that if a mining company were to act on an option and bring the Mining Claims to lease, they would want to have the surface rights as well. Mr. Gagne

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indicated that the issues of third party liability insurance were not significant. While concerned about gates on the road, he is certain that their vehicles are not of the size to cause maintenance problems. His greater concern is with respect to the surface rights. Falconbridge and BHP have indicated that additional assessment work should be performed before these companies could make an option decision. If the surface rights are withdrawn, there is no way that they would be interested in optioning the ground.

Mr. Goss reiterated that there was no requirement during the exploration stage that the Gagnes maintain the road. However, if a mine were developed, these provisions of the proposed access agreement would be triggered. Mr. Goss finished by stating that Spruce Falls wants to encourage the marketability of the Mining Claims to facilitate the lands swap moving ahead.

Supplementary Hearing - January 20, 1999

The tribunal found that it required further evidence and submissions from the parties concerning several issues. On October 30, 1998, the tribunal issued a Notice advising the parties that the matter would be reconvened by Telephone Conference Call to hear evidence and submissions on the following points:

> 1. Exhibit 4, entitled "Letter of Intent (Re: Option to Purchase) and Acceptance" between Messrs. Gagne and Roy Newman & Associates ("Newman"), executed July 7, 1997, was not referred to at the hearing. Not labelled as an exhibit, but sent to the tribunal was a letter of Yvon Gagne dated February 5, 1998, a copy of which is enclosed with this Notice, wherein it states that the "proposed option agreement was cancelled".
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> The tribunal requires direct evidence from Mr. Gagne concerning these documents. The Gagnes were first asked to consent to disposition in 1995 (Ex. 1, Tab 3, Document #4), and the Letter of Intent is dated 1997. Was Newman advised of the situation involving the surface rights in 1997? When was the Letter of Intent agreement actually cancelled?
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> 2. Exhibit 7 is a letter of Yvon Gagne dated July 22, 1997, wherein he states that the issue could be best resolved by Spruce Falls purchasing the Mining Claims outright, reserving a net smelter royalty to the Gagnes. Spruce Falls has indicated clearly that it has no need of any mining claims.

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The tribunal requires additional information from Mr. Gagne concerning his desired outcome. In particular, should the tribunal determine that payment is ordered, what is the position of the Gagnes concerning the Mining Claims? Are the Gagnes willing to continue as recorded holders, working and attempting to option the Mining Claims? Should the tribunal order payment; or do they wish to be put in the same position as they were in prior to the staking and recording of the Mining Claims, through the cancellation of the Mining Claims and the reimbursement of money actually expended; or are they seeking a third alternative, in which case the terms sought should be specified?

3. Evidence given at the hearing, and accepted by the tribunal, indicates that in December, 1992, inquiries to the Crown Land Registry showed that there were no mining claims within the Townships of Lisgar and Wadsworth (Ex 1, Tab 3, Document #2). MNR requested that the lands within the Townships of Lisgar and Wadsworth be removed from staking on March 9, 1995 (Ex. 1, Tab 3, Documents #7 and #8). Although the actual date is unclear, having been cut off on the tribunal's photocopy, the Minister of Natural Resources issued approval for the proposed land swap during July, 1997 (Ex. 1, Tab 4).

What is the position of MNR regarding the timing of the request to remove the lands involved in the proposed land swap from staking? What is MNR's position concerning the date when the lands should properly have been removed from staking? What is MNR's position concerning any compensation to be paid by MNR to the Gagnes for having failed to request that the lands be removed from staking within a similar timeframe to their 1992 verification of the third party interests in the lands, thereby avoiding the situation where the Gagnes made the decision to stake and work lands of which, at the date of staking, both surface and mining rights were vested in the Crown?

4. What would be the cost to MNR to have the Mining Claims surveyed, should the application be denied?

5. What is the position of the parties on two possible outcomes considered by the tribunal at this time, namely:

i) to refuse the application, thereby requiring that the Mining Claims be surveyed and excluded from the proposed land swap; or

ii) to allow the application, upon payment to the Gagnes for giving up not only their current rights under the **Mining Act** to their prior right to use the surface rights, which can be reasonably dealt with through ordering of access in accordance with the terms proposed, but also payment for the lost opportunity to obtain a lease of the surface rights at such time and if the Mining Claims are brought to lease? This assumes that any prospective optionee will have to acquire the surface rights directly from Spruce Falls or its successor on title.

Yvon Gagne, who was still under oath, answered the questions of the tribunal. Mr. Gagne believed that he knew that the surface rights were in jeopardy, but was not sure whether Newman knew. Newman viewed the subject claims in the spring of 1997, in July, 1997 the agreement was reached, and it was verbally cancelled in the fall of 1997. Newman advised that he and his associates were not willing to go through with it, but no reasons were given.

In answer to the second matter raised, Mr. Gagne stated that the whole situation had become too much of a headache for him. To clarify the outcome sought, he indicated that his preference would be for the third option, namely the cancellation of the Mining Claims and granting of the application, in exchange for the money expended on staking and assessment work, a total of $31,000.

Doug Johnson explained the timing of MNR's request that the remaining lands in the area be removed from staking on March 9, 1995. He stated that the land exchange had not been secured when the process began in December of 1992. At these preliminary stages, there were many options to be considered and it had been unforeseen as to which option would be selected. In February, 1995, MNR reached an Agreement in Principle with Spruce Falls. Mr. Johnson acknowledged that the lands should have been removed from staking at this time. The removal was not done, however, until March 9, 1995.

Mr. Johnson explained that, due to the complexity of the proposed exchange, and until the Agreement in Principle was signed, MNR could not act until it actually knew that the matter would proceed, and which lands would be affected.

Mr. Johnson stated that MNR did not foresee the need for any compensation to be owing as a result of the surface rights lands exchange. He reiterated the position put forth by Mr. Kauffman, that the Gagnes would be able to work the lands on the terms and conditions which had been proposed. Mr. Johnson once again referred to the public purpose for which the land exchange exercise was undertaken.

At this juncture, the tribunal asked Ms. Linttell whether she had any submissions on the matter of compensation. The tribunal explained that Mr. Kauffman had earlier stated that he was unsure of what kind of an Order was contemplated by section 51. Ms. Linttell did not have an immediate response to the question posed.

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Mr. Goss stated that the lands affected by the land exchange should have been removed from staking two years before it actually occurred. In 1992, when the lands were first considered, one of the reasons for their consideration had been the fact that there were no existing mining claims, along with other alienations from the Crown, which would add to the cost of the proposal.

Mr. Gagne pointed out that he had been performing assessment work for two years, even going so far as to get work permits from MNR. Mr. Johnson replied that it was at that time premature to know which lands would ultimately be involved. It would be difficult to stop prospecting over large areas until a decision was made.

Asked about the cost to MNR of conducting a survey, should the application be refused, Mr. Johnson undertook to provide this information. Through some discussions, $30,000 was suggested as a possible figure, although it could not be confirmed.

Further discussions on the fifth series of questions ensued. Mr. Johnson submitted that the cost of the survey plus legal costs would be MNR's best option. The second option considered by the tribunal, that of compensation for lost opportunity to obtain a lease for the surface rights, along with concern that the value of any prospective option to the Gagne's would be impacted by the need to acquire surface rights elsewhere, appeared too expensive and entailed too many hidden costs, according to Mr. Johnson. He stated that, if forced to pay the Gagnes, MNR would have to back out of the deal, which would impact on the public purpose behind the application. While the cost of the survey was anticipated to be $30,000, it might well come in under $15,000, and he regarded that as the best option.

Mr. Gagne indicated that they would like compensation for all of the work they had done, and posed the rhetorical question, "why would we stake the lands if no one wants them without the surface rights?"

Mr. Goss stated that, although he did not know the legalities involved, it seemed to him that the cleanest option would be to reimburse the Gagnes for their costs, let them walk away, cancel the claims, so that the Crown could once again acquire an unencumbered right to do with the surface rights what it was intending.

Mr. Daigle sought confirmation that payment of the sum of $31,000 would, indeed, result in cancellation of the claims and granting of the application. He asked for several days to look into the financing of the matter to give his answer. The tribunal gave until January 29, 1999.

Findings

The relevant dates in this matter are set out below.

1986 Public planning exercise to develop a management plan for establishment of the Missinaibi Provincial Park, resulting in 105 recommendations by the Provincial Parks Council of Ontario to the Minister (date of recommendations unknown)

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1992 Meetings between MNR and Spruce Falls to discuss alternatives.

1992 December: identification of a number of potential Townships with least impact to other resource users. Crown Land Registry involved.

1993 February: Correspondence with Spruce Falls listing the names of townships within which land exchange would be located.

1993 May: Spruce Falls indicates willingness to negotiate a land exchange. The area boundaries for the exchange were determined using natural features to eliminate the cost of survey.

1993 August 11 & 12: Mining Claims were staked by Michael Gagne and recorded on August 13. 50% in each transferred to Yvon Gagne.

1994 Public Consultation began

1995 January: $22,238 + $8,339 = $30,577 of assessment work filed (from the assessment work report, there is $10,800 in labour involved for three individuals who did the work. It would not be outside the realm of probability to determine that the actual work was done in 1994)

1995 January/February: Hearst district of MNR became aware that the lands involved in the swap had not been withdrawn from staking. Request for withdrawal of the remaining lands made during this time frame.

1995 March 16: first letter to Gagnes requesting consent to dispose of surface rights.

1997 Minister's approval of recommendation for land exchange to acquire the Spruce Falls lands.

The sequence of events was troubling in that it is unclear at what point MNR was actually committed to a given course of action involving specific lands. Also seemingly problematic is the date when MNR should have committed itself in seeking to have the lands to be used in the proposed swap removed from staking. Section 30 of the **Mining Act** sets out a number of instances when lands are to be considered not open for staking, but none of these instances apply to the facts of this case. Therefore, resort must be had to clause 35(1)(a), whereby the Minister of Northern Development and Mines orders that the lands be withdrawn from staking, which could be done once MNR notifies MNDM that this is desirable.

Initially there had been no explanation as to why lands were not removed from staking at the same time as or immediately following the time when inquiries were made in December, 1992 to the Crown Land Registry to ascertain what interests there were in the various townships involved. The was clarified on January 20, 1999, when Doug Johnson

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explained that too many lands were considered as potential candidates for the land swap, and it would not be possible to have them all removed from staking. Also, according to Johnson, there was no certainty as to which lands would be involved until the Agreement in Principle was signed.

Mr. Johnson's explanation is not altogether satisfactory, even though the tribunal can appreciate his reasoning. It is noted that, although discussions with Spruce Falls commenced as early as 1992, the Minister's Approval was not obtained until 1997 [see Exhibit 1, Tab 4). Nonetheless, the date when the lands surrounding the Mining Claims were removed from staking is March, 1995, which is neither at the commencement of this matter, nor coincidental with the Agreement in Principle. Furthermore, what was the purpose of the "search" of the Crown Land Registry, undertaken in 1992, if not to ascertain the existence and extent of third party interests. Aside from suitability for forestry purposes, it would appear from what came after that selection of candidate areas was based in part upon the fact that the alienations from the Crown could be handled without undue expense. The fact that the selection process flowed from the 1992 search is suggestive of December 1992 being the proper time to have requested that the lands of all the areas of interest be removed from staking.

Notwithstanding the uncertainty of the lands which would ultimately be selected, the tribunal finds that the time for having any potentially affected lands removed from staking must be when all potential lands have been identified. This was the point at which criteria governing alienation from the Crown had been applied, and to fail to remove the lands from staking at this time would render such a selection process meaningless. Even if Ministerial approval of the swap was not forthcoming until 1997, the purpose in removing the lands from staking was to ensure that new mining claims would not have to be dealt with through proceedings such as this one.

The importance of this is illustrated by the fact that within six or so months of the initial inquiry to the Crown Land Registry, the Gagnes acquired their Mining Claims in August, 1993. This points to a missed opportunity on the part of MNR to prevent the very situation which now exists with the Gagnes and their Mining Claims. More will be said below as to whether there can be an accommodation between the various users of Crown lands, notwithstanding that a Crown lands disposition pursuant to the **Public Lands Act** may take place.

At the hearing, much was made of the fact that Spruce Falls could provide the same quality of access to explore and potentially develop the Mining Claims as exists on mining claims located on Crown lands. The whole series of arguments by the Gagnes and Spruce Falls does not address the issue of whose responsibility it was to have allowed this situation to occur.

Also, although Mr. Kauffman touched on the issue of the nature of the interest held by the Gagnes, the picture presented was far from complete.

Mining Rights - What right to the Surface?

The tribunal will determine the nature of the interest the Gagnes are being asked to relinquish. Mr. Gagne has passionately argued that he cannot option the Mining Claims to a mining company without the surface rights.

The **Mining Act** recognizes situations where surface are held by someone other than the Crown. Notice in the prescribed form to the holder of the surface rights prior to performance of assessment work is required prior to entering on the land to perform such work [s. 78(1)]. The permission of the surface rights holder is not required. Clarification of the mining rights holder's interest in the surface rights is set out in subsection 50(2).

> **50.** (2) The holder of a mining claim does not have the right, title or claim to the surface rights of the claim other than the right to enter upon, use and occupy such part of parts thereof as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein.

The **Act** provides for compensation to be paid for "damages sustained to the surface rights" in connection with any prospecting or development work [ss. 79(1)]. It should be understood that a mineral rights holder does not require an access agreement for the surface rights under which the mining rights are located; rather, it is access over adjacent, privately held surface rights for which access may have to be negotiated.

The mining claim holder is required, however, to provide notice to the owner of the surface rights owner in the prescribed form of the intention to perform ground assessment work, specifying which portion of land will be affected. The mining claim holder may thereafter enter upon the surface rights on the day following the giving of the notice, to perform such work. Any assessment work done will not be accepted by the Provincial Mining Recorder unless a certificate setting out that the required notice had been given is filed. These provisions are set out in section 78 of the **Act**.

The matter of rights to the surface of adjoining lands is addressed in section 175 of the **Mining Act**, where, "for or in connection with the proper working of a mine", the mineral rights holder (either patentee or licensee) may seek to acquire certain rights of way or easements over adjacent lands. The extent to which rights in adjacent lands may be vested may be surprising. Included are the right to collect and dam back water, which may overflow other land, the right to drain or divert water from any lake or waterbody, the right to discharge water over any land, the right to open or construct ditches and the like, the right to transmit utilities over such land, construct roads, and the right to deposit tailings on other land.

Mr. Gagne indicated that one prospective optionee did not wish to encounter the trouble of dealing with a surface rights holder who was involved in the timber harvesting industry. While this does not constitute proof of the reluctance of mining companies to option

unpatented mining claims whose surface rights have been alienated from the Crown to forestry companies, it is seen as greatly changing the position of the Gagnes from the date of their staking to the date when they were asked to consent to disposal of the surface rights. As was seen at the conclusion of the proceedings, there was no manner of access which would satisfy the Gagnes when, given the situation they found themselves in, it became clear that, had they known what was coming, they would not have staking the Mining Claims in the first place.

In his book **Canadian Law of Mining** (Barton, Barry J. Canadian Resources Law Institute, Calgary, 1993), the practical aspects of locating minerals on lands for which the surface rights are privately held rather than by the Crown is summarized as follows at page 192:

> In the ordinary surface rights case, a miner wishes to enter private lands in order to explore for Crown-owned minerals and perhaps stake a claim. Surface rights provisions control that activity and continue to apply as work progresses unless and until the miner (perhaps at the point of developing a mine) purchases the surface from the owner.

Part of the position of the Gagnes in this application is summarized by this last phrase - namely that at some point in the future, a mining company which options the Mining Claims may have to acquire the surface rights from Spruce Falls at a cost which may be reflected in the option price negotiated with the Gagnes.

When the Mining Claims were staked, the Gagnes had selected Crown lands which, if their ongoing assessment work efforts bore the desired results, could be optioned and ultimately brought to lease, at which time both the mining and the surface rights could have been leased. In the situation as is proposed by the application, should the Mining Claims ultimately be brought to lease, it will be a lease of the mining rights only. Any mining company optioning the Mining Claims would have to seek out Spruce Falls to attempt to acquire the surface rights. This potential cost to the mining company would necessarily have to be factored into the option price which would ultimately be agreed upon between the mining company and the Gagnes. Therefore, by allowing the application, the result to the Gagnes **might be** a loss in value. Whether this will be the case, and the value of this loss, would not be known for some time.

The tribunal finds that it does not accept Mr. Gagne's submission that he would not be able to interest any mining company in the Mining Claims, should the application be granted. Clearly, mineral exploration takes place for Crown-owned minerals on lands the surface rights of which are held privately all the time. The evidence of Wayne Parks on behalf of MNR was that the mining rights of the lands involved in the land swap would be reopened for staking once the transaction is completed, which supports the principle of multiple uses of such lands. The principle of multiple uses of Crown lands, upon which section 51 of the **Act** is based, recognizes that there may be concurrent uses which may occur on Crown lands, or that mineral exploration can take place on lands the surface rights of which are privately held.

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The tribunal does find, however, that the Gagnes are being asked to "give up" the future right to acquire a lease to those surface rights. The Gagnes staked the Mining Claims in good faith without this knowledge at a time when additional facts were known to MNR. The Gagnes invested considerable time and money based upon their analysis of the potential of the Mining Claims. They did so without knowledge that the Crown had other plans for the surface rights and that MNR further failed to have all the lands which at that date had the potential to be included in the land swap withdrawn from staking.

An interesting note on exploration costs (or costs to have lands staked by third parties), whether on Crown lands or privately held surface rights, is that the costs will not differ materially. The type and quality of exploration work will be dictated by what the ground requires for a proper analysis of mineral potential. Similarly, assessment work requirements, after the first year after staking, will be $400 worth of work for each 16 hectare unit, regardless of how the surface rights are held. The choice of which lands to stake, while often secret to the individual prospector or mining company, will be based upon poring over public information filed with the regional geologists office, applying theoretical or practical geological knowledge, attempting to find information which is suggestive of geological anomalies known to house the sought-after mineralization.

The choice of which lands to stake may or may not be predicated on whether the surface of the lands are Crown or privately held, although if a promising anomaly is spotted in a region, the prospector may prefer to explore that area which is Crown-held for the very reason that ultimate development costs will have to factor in acquisition of surface rights.

Also, it is recognized that not all prospectors wish to work side by side with the forestry industry. Ground work may be at risk, when trees used as posts, or for marking grids are harvesting. While such occurrences are not deliberate, they nonetheless have been known to occur, and may be a factor in determining whether to stake such lands.

What is the Nature of the Right Acquired by the Gagnes?

The Gagnes currently have the right to enter upon the surface of the Mining Claims to conduct whatever assessment work they wish to attempt to determine the mineral potential of these lands. The tribunal will examine the nature of this right.

Perhaps the best explanation and description of the rights attached to a mining claim is found in *Bucknall v. British Columbia Power Co.* (1912), 3 O.W.N. 1138; reversed 4 O.W.N. 164 (C.A.). The case involved damage to a mining claim caused when the Crown permitted a dam to be constructed on adjacent lands, which caused the claim to flood. Middleton, J. states at page 1139:

> The Mining Act recognises a mining claim as a property right. It is true that this right is in a sense inchoate [incipient, recently begun, partially but not fully in operation or existence]; but upon compliance with the

> requirements of the statutes, it ripens into a full title; and I think that the destruction of the value of the mining claim, although the title is inchoate, is an injury for which an action will lie. The title of the owner of the mining claim had its inception in the discovery and the recording of the discovery.

Upon appeal, Riddel, J. states at page 165:

> We recently had in Re Clarkson and Wishart ... to consider the position of the owner from a somewhat different point of view in that case, and it may be that some of the conclusions arrived at were not necessary for the judgement. I have, however, reconsidered the question with the assistance of the very able arguments advanced in this case, and I am unable to depart from the opinion expressed in that case. The result is, that the plaintiffs had no rights as against the Crown, and the act of the Crown was not ultra vires. The Crown had the right to give and did give the defendants the right to overflow the claims as they have done.

Re Clarkson and Wishart (1912), 27 O.L.R. 70, 3 O.W.N. 1645, referred to in the *Bucknall* case, is a decision of the Divisional Court on appeal from three decisions of the Mining Commissioner. These decisions were the refusal by the Commissioner to declare an execution creditor to be entitled to the interest of a mining claim holder, the refusal by the Commissioner to allow the recording of the purchase of the mining claims which were seized by the Sheriff and the refusal to have the transfer of the mining claims by the execution debtor set aside. Riddel, in J. states at page 1646:

> Up to this time he has no right, title, interest, or claim in or to the mining claim other than the right to proceed to obtain a certificate of record and ultimately a patent ... , and he is a mere licensee of the Crown; but after the certificate, he is a tenant at will of the Crown until he procures his patent ....
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and at p. 1648:

> There is, however, to my mind, no inconsistency - no necessary repugnancy. The intention of the Act is to leave the paramount power of dealing with the land in the Crown until the issue of the patent; and it, consequently, makes the certificate holder a tenant at will. So long as the Crown does not exercise its paramount power, the certificate-holder is not liable to have his position

> attacked. So, too, while he has the right to work the mine, this right is subject to the same limitation - and I see nothing in this inconsistent with a tenancy at will ...[1]

Multiple Use Principle

There have been few applications before the tribunal under section 51(4) of the **Mining Act**. Of those three which have been heard, all involved disposal of only a small portion of the surface rights of the mining claims (for an easement [*Ontario Hydro v. Nahanni Mines Limited*, M.L.C. November 17, 1993, MA-026-92, unreported]; for existing garages on an adjacent ski area which predated the claim [v. Lost Treasure Resources Ltd. 6 M.C.C. 460; and for a portion of a one of a group of patented and unpatented mining claims for purposes of a municipal park [*The Improvement District of Gauthier v. Egg*, 7 M.C.C. 283, involved the proposed establishment of a park under the *Parks Assistance Act*, R.S.O. 1980, c. 367].

In *Kamiscotia*, the respondent offered to "sell" the mining claims to the applicant which had no need of mining claims in its operation of a resort. Interestingly, the respondent valued the mining claims at $18,300 despite having performed no recorded assessment work and having received two extensions of time for the performance of such work. The tribunal discusses and applies the following considerations, balancing the multiple use principal with the mining potential of the claims, in its discussion at page 462:

> The present section 61 [now 52] was added to the *Mining Act* by section 17 of *The Mining Amendment Act, 1962-62* 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 of come to a finding that the disposition under the *Public Lands Act* should be refused.

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[1] Early mining legislation in the province required a discovery before the staking of a claim or a mining location. This requirement was disposed of in 1922. Furthermore, prior to June 3, 1991, it was necessary to obtain a Certificate of Record within 60 days from the mining recorder, such that the provisions found in 50(1)(a) of licensee correspond to prior to the certificate and tenant at will correspond to performance of the first unit of assessment work.

Similarly, the matter was discussed in *The Improvement District of Gauthier* at page 286:

> ... The tribunal is satisfied that the provisions of sections 97, 98 and 99 relate to provisions of leases issued to the mining industry under the *Mining Act* and are not designed for the purpose of creating a sole use of the lands for the mining industry. The restriction in the provisions is part of the amendments added to the act following the work of the Public Lands Investigation committee (circa 1958) which report and subsequent legislative amendments recognized a concept of multiple use. Similarly subsection 61(1) [now 51(1)] recognizes a concept of multiple use and it is through hearing such as the present hearing that the multiple use principle is to be applied where the holder of the unpatented mining claim does not give his consent.
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> In weighing the interests of the applicant and the interests of the respondent, the evidence of the respondent has failed to convince the tribunal that the programs or the nature of the holdings by the respondent are such that the multiple use principle should not be applied in this case. The public interest in the use and management of a municipal park is an essential aspect of the multiple use concept and in the view of this tribunal should be given priority where there is a dearth of evidence to establish any future expectation of need of exclusive use of the surface rights of the part of the mining claim in issue. The application is limited in respect of the nature of the title sought to a licence of occupation. Such a title may be terminable and if the public interest in the future requires the termination of the licence of occupation consideration in the future may be given to that possibility. In addition the respondent, through the process of the issue of a licence of occupation is not deprived of the incidental rights that arise in situations involving split ownership and accordingly, the tribunal is of the opinion that the application should be granted.

The facts of this case do not lend themselves directly to the issue of the multiple use principle. While the application is made for a decidedly public purpose, the establishment of the Missinaibi Provincial Park, the lands in question which encompass the Mining Claims are not strictly necessary for that public purpose, but title to the surface rights of Crown lands are to pass to private hands so that other lands will be obtained, and it is the latter which will have a public purpose. The land comprised of the surface rights surrounding and including the Mining Claims were selected as being comparable to the lands which Spruce Falls is being asked to give up, and which were initially believed to involve no additional third party. Due to the lack of action by MNR in seeing that no staking were to take place pending the conclusion of the swap, there is now an intervening third party interest which needs to be addressed.

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As to the issue of multiple use, again, the facts of this case do not lend themselves to that principle directly. There is no proposed multiple use of the lands surrounding and including the Mining Claims. Rather, it is proposed that Spruce Falls obtain title to the surface rights, so that the lands would be privately held. There is no requirement that multiple use be permitted with respect to the privately held surface rights. There is merely provision that mining and exploration be able to take place where the mining rights remain with the Crown.

Gagne Mining Claims

The tribunal finds that the Gagnes interest in the Mining Claims would materially change if the application was allowed. While it has not been conclusively shown that no mining company would option the Mining Claims where the surface rights have been alienated from the Crown, the tribunal finds that the situation will have sufficiently changed to affect the interest in acquiring the Mining Claims by some potential mining companies. More determinative, however, the tribunal finds that, had the surface rights originally been alienated from the Crown in a timber harvesting company such as Spruce Falls, the Gagnes would not have staked these Mining Claims and others adjacent, in the first place. They are quite clear in their comments that granting the application would change the situation and thus the applicable law under which they made their decisions.

While much has been made of the fact that the Gagnes were not interested in negotiating an access agreement, preferring to have a monetary settlement by way of compensation, nothing has been said by or on behalf of MNR concerning its role in landing the Gagnes in this position. It cannot be stated strongly enough. Where there is a possibility of a disposition under the **Public Lands Act** or any other Act where the surface rights on Crown lands may be disposed of, MNR has a duty to ensure that it informs the Provincial Mining Recorder of the pending matter, so that the lands involved can be removed from staking. Otherwise, third parties such as the Gagnes will make uninformed decisions concerning their livelihood which they might otherwise not make involving those lands. In this case, the Gagnes have spent considerable money pursuing their interests in the Mining Claims.

Considerable submissions were made concerning the public interest in allowing the application, to assist in the establishment of the Park. However, consideration must be given to weighing and balancing the interests of the mining sector as well. The mining community provides a valuable contribution to the industry and economic well-being of the province. While section 51 is predicated on the multiple-use principle of Crown lands, such multiple use is not a given in all circumstances. The needs of all of the competing uses must be weighed before a determination will be reached. It cannot be taken for granted that applications for ordering consent to surface rights dispositions will be issued automatically.

It is not suggested that the mining and forestry communities cannot operate within the same lands. However, it is recognized that logging can have an impact on mining claims, such as through accidental cutting of corner posts or grid posts. Moreover, it needs to be recognized that in choosing an area to prospect and explore, the mining community will balance

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known technical information with inconvenience or economic detractors in determining whether to proceed and stake mining claims. Prospectors do not make such decisions lightly, as considerable time and assessment work dollars must then be invested to keep mining claims in good standing, let alone bring them to lease. They mining community is entitled to make informed decisions regarding the lands they may wish to acquire in this manner. On the facts of this case, the tribunal finds that the Gagnes were needlessly caught up in activities leading up to the proposed land exchange, when it is clear that they would not have chosen to do so.

The Gagnes have persuaded the tribunal of their strong belief that they are less likely to be able to option the Mining Claims than they would have been if the surface rights were to remain in the Crown. To be clear, the tribunal is not persuaded conclusively that such mining claims could not be optioned, but is persuaded that the Gagnes believe that they cannot be optioned, and they have proven reluctant to perform additional assessment work. This leads to the conclusion that the Gagnes, if properly informed of impending disposition, would not have staked the Mining Claims. Moreover, it is quite clear that, should an option be contemplated on lands, the surface rights of which have been alienated from the Crown, the purchase price would be less than where the surface rights remain in the Crown. This would be owing to the fact that surface rights would have to be acquired from Spruce Falls or some other third party.

Of those decided cases based upon section 51 or its predecessor, the tribunal has examined the viability of mining operations. In *Kamiscotia*, the tribunal concluded that the respondent had done little to show the viability of the claims, let alone that the particular lands applied for, were required to such an operation. In *The Improvement District of Gauthier*, the nature of potential mining was such that it would likely have been conducted on lands other than the small tract which was the subject of that application. It was noted in that case that, should the facts change, the licence of occupation for the park could be revoked at a later date.

Compensation

Prior to the reconvened hearing, the tribunal developed concerns regarding its jurisdiction to award compensation in an application pursuant to section 51. By that time, Mr. Kauffman indicated that he would not appear and Ms. Linttell, having had no prior warning of this issue, did not make general submissions as to the nature of a section 51 Order. The issue of whether section 51 authorizes the tribunal to award or order compensation was not put to the parties. It is an issue which will remain to be determined in any future application pursuant to this section.

It appeared at the conclusion of the reconvened hearing, that the parties were in agreement that, if payment of $31,000 as reimbursement for their expenses were made by MNR to the Gagnes, then the Gagnes were agreeable to have the Mining Claims cancel. In other words, they would not be seeking to pursue their interest in the Mining Claims further.

The tribunal finds that it does have jurisdiction where the parties consent or are in agreement to consider payment of compensation. Therefore, as MNR has indicated a

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willingness to pay $31,000 as compensation and the Gagnes to accept this amount and see their Mining Claims cancelled, it would appear that upon fulfilment of the condition of payment by MNR, the matter could be completed. An Order could then be granted, allowing the application, ordering the consent to the disposition of the surface rights pursuant to the **Public Lands Act**, and ordering that the Mining Claims be cancelled.

However, failure to make the payment would result in the application being refused, as MNR failed to ensure that the Gagnes did not take actions contrary to their best interests, when MNR was in a position to do so. In this circumstance, the denial of the application would necessitate a survey of the Mining Claims to have the surface rights excluded from the land exchange.

A comment regarding Mr. Johnson's belief that all of the lands under consideration in 1992 could not be removed from staking, because they were so vast, and no conclusions had been made as to which group would be proceeded with. It is recognized that this may be the case, but the selection of those lands by MNR was based upon the fact that there were sufficiently few adverse interests involved. Not only does having to contend with adverse interests which might arise after lands have been selected on a preliminary basis require some or considerable expenditures, by way of surveys or other means, but it also puts mining licensees in an untenable position of potentially basing their future livelihood on circumstances where all the available facts are not known or not adequately communicated. It is the very fact that by selection of an area, MNR had the responsibility to ensure that others wishing to use those lands be fully informed of the potential final disposition of the lands.

Conclusions

Conditional upon the payment of $31,000 by MNR to the Gagnes, the application will be granted, and an Order will be issued, ordering the disposition of the surface rights pursuant to the **Public Lands Act** and that the Mining Claims be cancelled.

If the payment is not made within the time provided, the tribunal will dismiss the application.