File No. MA 013-98

L. Kamerman) Friday, the 30th day
Mining and Lands Commissioner) of July, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Lands Patents KRL-13521 to 13526, both inclusive, 14115 to 14127, both inclusive, 14109, 14110, 14534 to 14543, both inclusive and 15908, located on Parcels 5976 and 5977, respectively, in the District of Kenora (Patricia Mining Division) comprising surveyed Mining Claims KRL-19096, 19097, 19107 to 19112, both inclusive, 29054, 29055, 29059 to 29076, both inclusive, 30055 to 30058, both inclusive, 31823 to 31832, both inclusive and 33200, situate in the District of Kenora (Patricia Mining Division) hereinafter referred to as the "Mining Lands";

AND IN THE MATTER OF

An application under section 79 of the **Mining Act** in respect of the surface rights located on Werner Lake Property (hereinafter referred to as the "Surface Rights").

B E T W E E N:

WERNER LAKE DEVELOPMENTS LTD. AND ROBERT W. HOPLEY
Applicants

- and -

AEC WEST LTD.
Respondent

(Amended November 25, 1998, March 1, 1999)

DECLARATORY ORDER

WHEREAS this application was received by this tribunal on the 22nd day of April, 1998, and whereas, pursuant to a Notice of Motion filed by Mr. Richard Coburn, Counsel for AEC West Ltd., one of the Respondents in this matter, an Appointment For Preliminary Motion was issued by this tribunal appointing the 26th day of November, 1998, as the date for the preliminary hearing as to jurisdiction;

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AND WHEREAS Mr. Howard J. Alpert, Counsel for the Applicants and Mr. James O'Brien, Counsel for Aquafor Beech Limited, prior to November 26th, 1998, consented to a Declaratory Order that the tribunal does not have jurisdiction in this matter as against Aquafor Beech Limited, to be made with several conditions;

AND WHEREAS in its Declaratory Order of the 25th day of November, 1998, the tribunal determined that it could not determine this issue of jurisdiction on consent, without hearing from the parties on the merits of the motion;

AND WHEREAS upon granting Mr. O'Brien the opportunity to receive instructions from his client and allowing both Mr. O'Brien and Mr. Alpert the opportunity to file factums with supporting documentation on this issue of whether the tribunal has jurisdiction under section 79 of the **Mining Act** as against an agent of a landowner and upon agreement that this matter be heard on the 7th day of January, 1999;

AND FURTHER TO the consent of Mr. Howard Alpert on behalf of, Werner Lake Developments Ltd. and Robert W. Hopley, on the 26th day of November, 1998;

UPON consideration of the various filings in this matter and after hearing from Counsel for Aquafor Beach Limited and for AEC West Ltd.,

1. THIS TRIBUNAL DECLARES that it has no jurisdiction with respect to the Application of Werner Lake Developments Ltd. and Robert W. Hopley against the Respondent, AEC West Ltd., pursuant to subsection 79(2) of the **Mining Act**.

2. THIS TRIBUNAL FURTHER DECLARES that the declaration in paragraph one of this Order, is made without prejudice to the rights of Werner Lake Developments Ltd. and Robert W. Hopley to commence a proceeding claiming damages and/or any other relief with respect to the Surface Rights of Werner Lake Developments Ltd. and Robert W. Hopley against the Respondent, AEC West Ltd., in the Superior Court of Justice of Ontario.

DATED this 30th day of July, 1999.

Original signed by

Linda Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 013-98

L. Kamerman) Friday, the 30th day
Mining and Lands Commissioner) of July, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Lands Patents KRL-13521 to 13526, both inclusive, 14115 to 14127, both inclusive, 14109, 14110, 14534 to 14543, both inclusive and 15908, located on Parcels 5976 and 5977, respectively, in the District of Kenora (Patricia Mining Division) comprising surveyed Mining Claims KRL-19096, 19097, 19107 to 19112, both inclusive, 29054, 29055, 29059 to 29076, both inclusive, 30055 to 30058, both inclusive, 31823 to 31832, both inclusive and 33200, situate in the District of Kenora (Patricia Mining Division) hereinafter referred to as the "Mining Lands";

AND IN THE MATTER OF

An application under section 79 of the **Mining Act** in respect of the surface rights located on Werner Lake Property (hereinafter referred to as the "Surface Rights").

B E T W E E N:

WERNER LAKE DEVELOPMENTS LTD. AND ROBERT W. HOPLEY
Applicants

- and -

AEC WEST LTD.
Respondent

(Amended November 25, 1998, March 1, 1999)

REASONS

Appearances:

AEC West Ltd. Richard Coburn, Counsel

Werner Lake Ltd. and Robert Hopley	Howard P. Alpert, Counsel

Background

On April 22, 1998, the application of Werner Lake Ltd. ("Werner Lake") and Robert W. Hopley ("Hopley"), pursuant to subsections 79(2) and (4) of the **Mining Act**, was received by the tribunal. For purposes of the facts of this case, subsections 79(2) and (4) permit the owner of surface rights to apply to the tribunal for an order for compensation for "damages sustained to the surface rights by ... prospecting, staking out, assessment work or operations." [ss. 79(1)]. Originally, the application was made against AEC West Ltd., Holgo Limited, Aquafor Beech Limited, and the Ministry of Natural Resources ("MNR"). As is the normal procedure in such matters, the tribunal issued an Order To File Documentation on April 20, 1998, requiring the various parties to file documentation on sequential dates as set out.

On October 22, 1998, Ms. Krystine Linttell, Counsel for MNR, filed a Notice of Motion concerning the jurisdiction of the Commissioner (the "tribunal") to hear and determine the application as against MNR. On November 20, 1998, the tribunal was notified that Werner Lake, Hopley and MNR had mutually agreed that the tribunal had no jurisdiction under section 79 of the **Mining Act** with respect to MNR. It was requested that the tribunal issue a declaratory order with the consent of these parties to that effect on condition that such order be made without prejudice to the rights of Werner Lake and Hopley to commence a proceeding for damages and/or any other relief with respect to the applicants against MNR in the Ontario Court (General Division), that no costs be awarded to either party with respect to the motion or application, to remove MNR as a party to this proceeding. The requested Declaratory Order was issued by the tribunal on November 25, 1998, on the basis that, "the Minister of Natural Resources is not a person from whom compensation for damage to surface rights can be claimed under the aforementioned subsection, not having done or performed any of the activities set out in clauses 79(2)(a) through (d) inclusive, and in particular is not an owner of the mining lands within the meaning of clause 79(1)(d), rather being an arm of government empowered to issue permits for certain activities on the Mining Lands", as set out in the first paragraph of the Order.

Similar motions to that of MNR were also filed by Mr. Coburn on behalf of AEC West Ltd. on October 23, 1998 and by Mr. O'Brien, for Aquafor Beech Limited, also on October 23, 1998. The motion by Aquafor Beech Limited resulted in the tribunal being notified on November 24, 1998 that Werner Lake, Hopley and Aquafor Beech Limited had mutually agreed to and were requesting that the tribunal issue a similar Declaratory Order to that affecting MNR, with costs payable to Aquafor Beech in the amount of $750.00. The tribunal determined that it could not issue a consent declaratory order as to its jurisdiction with respect to Aquafor Beech Limited, so that the hearing of the preliminary jurisdictional issue was heard January 7, 1999, in

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common with the AEC West Ltd. jurisdictional issue. The Aquafor Beech Limited matter resulted in an oral decision on January 7, 1999, that the tribunal did not have jurisdiction, as Aquafor Beech Limited was found to not be an owner within the meaning of clause 79(2)(d). The Order with Reasons was issued on March 1, 1999.

Laterally, the tribunal was also informed on November 25, 1998 by Mr. Alpert that Holgo Limited was an insolvent company and could therefore be removed from the Style of Cause of these Proceedings, and this was done.

Issues

Subsections 79(2) is set out:

> **79**. (2) Where there is an owner of surface rights of land ..., a person who,
>
> (a) prospects, stakes out or causes to be staked out a mining claim or an area of land for a boring permit;
>
> (b) formerly held a mining claim or an area of land for a boring permit that has been cancelled, abandoned or forfeited;
>
> (c) is the holder of a mining claim or an area of land for a boring permit and who performs assessment work; and
>
> (d) is the lessee or owner of mining lands and who carries on mining operations,
>
> on such land, shall compensate the owner of the surface rights or the occupant of the lands, as the case may be, for damages sustained to the surface rights by such prospecting, staking out assessment work or operations.

1. Does the phrase "mining operations" as set out in clause 79(2)(d) include work done in the course of mine rehabilitation work?

Submissions

Mr. Coburn commenced by stating that he is seeking a finding and corresponding declaration that the application does not fall within the tribunal's jurisdictional parameters as set

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out in subsection 79(2) of the **Mining Act**. If the tribunal agrees with this submission, he would be further seeking a dismissal of the application.

Mr. Coburn indicated that many allegations were made in dispute, but for the purposes of this motion, he asks that the tribunal treat the facts in allegation as proven, for purposes of determining whether there is jurisdiction to hear the matter.

The Mining Lands referred to in the application involve a number of patents in the District of Kenora. Robert Heinrichs, principal of Werner Lake Developments Ltd. ("Werner Lake") acquired the lands in 1981 from the predecessor to AEC West Ltd. ("AEC West"), Consolidated Canadian Faraday Limited ("Consolidated Faraday") (Ex. 1, Tab 11, Agreement of Purchase and Sale). There is no dispute in the application that the claim for compensation relates solely to performance of certain rehabilitation work done by AEC West's predecessor, under government authority, pursuant to competent legislation. There is no dispute that actual mining and milling (ie. the winning of mineral bearing substances) activities on this property ceased in the 1970's, prior to the date when the facts giving rise to this application occurred. Mr. Coburn noted in passing that, filed with the applicant's motion materials at Exhibit 16, Paragraph 4, is the following statement: "During 1994 the Respondent, the Minister of Natural Resources (hereinafter called the "Minister") gave notice requiring AEC to perform mining operations including certain rehabilitation work on the Mining lands comprising the Surface Rights owned by the Applicants (hereinafter called the "Rehabilitation Work"). Mr. Coburn pointed out, referring to his Exhibit 6, Tab 46, Vol. II, that it was in fact a letter from the Ontario Ministry of Northern Development and Mines ("MNDM"), dated August 26, 1992, addressed to Conwest Exploration Company Limited, the successor company to Consolidated Faraday, which set out "additional rehabilitation measures required to minimize any public safety or environmental hazards resulting from the previous mining activities at the site." Mr. Coburn submitted that the requirement was not to perform mining operations, as required by clause 79(2)(d), either literally or figuratively, but involved only rehabilitation. Also, it was MNDM and not MNR which required the work.

Turning again to the applicant's motion factum, at paragraph 7 it states:

> 7. In the course of the activities described in paragraph 6 hereof (the rehabilitation work), AEC and its agents wrongfully damaged the Surface Rights of the Applicants as follows:
>
> (a) by wrongfully damaging the roads forming part of the Surface Rights by removing certain materials, including sand and gravel from such roads;
>
> (b) by failing to perform the Rehabilitation Work in accordance with applicable legislation, guidelines and/or the work permit; and

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> (c) by failing to leave the Mining Lands comprising the Surface Rights in a clean and safe condition and not restoring the Surface Rights as much as possible to their original state in the course of attempting to perform the Rehabilitation Work.

Further in paragraph 10:

> 10. The Applicants believe that at all material times, the materials removed by AEC and its agents from the roads forming part of the Surface Rights were wrongfully used to attempt to facilitation the Rehabilitation Work performed by them, including lining ditches and burying debris on the Mining Lands.

Mr. Coburn submitted that this ownership of sand and gravel is in dispute.

According to Mr. Coburn, in essence what is alleged and claimed is that certain actions by AEC's predecessor, of moving sand and gravel from the road to another place on the property, gives rise to a right of compensation under section 79. By way of argument, Mr. Coburn advanced three alternatives as to the absence of jurisdiction over the subject matter of the application claim. He pointed out that, being in the alternative, one does not hinge on the other and the tribunal may accept one and not deal with the others.

The first ground submitted by Mr. Coburn is that subsection 79(2) does not confer a right to compensation in cases involving rehabilitation. Therefore, subsection 79(4) does not confer jurisdiction from claims which arise through the performance of rehabilitation. Mr. Coburn stressed that the motion regarding jurisdiction is not about whether Mr. Alpert's clients have no remedy. In other words, Mr. Coburn's position is not that there could never be a claim for damages, but rather that the action does not lie before the tribunal.

The second ground submitted by Mr. Coburn is that, the trigger jurisdiction under subsection 79(4) of the **Mining Act** must be found within the context of that subsection. The wording commences, "In default of agreement and upon application made in the prescribed form ...". Mr. Coburn stated that his client's position is that there is an existing agreement with respect to the performance of rehabilitation. Subsection 79(4) confers jurisdiction which allows the tribunal to impose terms on parties where there is no existing contract. It does not confer jurisdiction to remake an existing agreement nor to adjudicate a contract for breach. Those circumstances fall within the civil jurisdiction of the Courts.

The third ground submitted by Mr. Coburn, one which he indicated he was not advancing too strenuously, is that case law and some internal evidence in subsection 79(2) could support the view that it is intended to support the situation where the surface rights were owned prior to the acquisition of the mining rights.

No Right of Compensation Arising From Rehabilitation

Returning to the first ground, Mr.Coburn read the subsection into the record. He submitted that it sets out four classes of activities which give rise to an action under its provisions, including prospecting, staking or assessment work, none of which applies. Mr. Alpert is advancing the position that rehabilitation work falls within clause (d) as being part of carrying on mining operations. Mr. Coburn submitted that this is not correct for several reasons. First, subsection 79(2) does not incorporate, as it easily might have done, rehabilitation into the list of categories giving rise to compensation. Rehabilitate means, "...measures taken in accordance with the prescribed standards to treat the land or lands on which advanced exploration, mining or mine production has occurred ..." [s. 139].

Secondly, Mr. Coburn submitted that it is not good argument to reach or to get to a broader notion of what constitutes mining operation through the definition of mine as a verb (reproduced below, in Mr. Alpert's argument), which would see anything done around a mine include rehabilitation, ergo, rehabilitation constitutes mining operations. As a matter of semantics, it builds and cobbles definitions together to get to the desired end.

Thirdly, if the tribunal takes Mr. Alpert's argument to its logical conclusion, if anything done around a mine is mining, ergo giving rise to a right to compensation, then it means that anything done around amine is within the tribunal's jurisdiction. Following this line of reasoning, laying a trap line, cutting a road, cutting timber, all having nothing to do with winning minerals, could give rise to an action. To be sure, if damage were done, the surface rights owner would have recourse, through breach of contract, trespass and the like. It is not, however, intended for the tribunal to adjudicate such matters, which would lead to a completely indefinite jurisdiction.

Apart from the semantics, section 79 and its antecedents, there are two cases where the tribunal looked at rehabilitation. In **Dzuba v. Grann et al.** 6 M.C.C. 236, at pages 244-5, the Commissioner attempted to distil the principles found in **Smith et al. v. Nelson et al.** 5 M.C.C. 311, and most particularly items 6 and 9:

> 6. Compensation should be fixed keeping in mind that the "miner will practically have the right to destroy almost the whole surface should the property develop great richness".
> ...
> 9. Consideration should be given to the fact that under modern statutory controls, the land will ultimately be rehabilitated.

Item 6 serves to underline the point that mining operations can have a destructive effect on the surface. A mining rights holder does have the right to destroy the surface to obtain the minerals. Section 79 gives the surface rights owner the right to compensation. However, in this case, the work is restorative, not having been done through the exercise of mining rights, but rather

through a statutory obligation which has been placed on the owner of the mining rights. It must be considered as a burden or an obligation, not as a right, such as the winning of minerals is to be regarded, and therefore, the rationale for compensation under section 79, in Mr. Coburn's submission, falls away.

The ninth principle in **Dzuba** is consideration that under modern statutory controls, the land will ultimately be rehabilitated. The work done by the owner of the mining rights improves and restores the land and the mining rights owner gets no compensation from the surface rights holder. But for the statutory obligation to rehabilitate, the surface rights owner would have to take the property back as is. Mr. Coburn indicated that he did not wish to be pejorative, but it is not contradictory that, if rehabilitation were to be part of the right of compensation for damages under section 79, must we not also have to look at the obverse, as to the benefit incurred. There is a set-off against the work that has been done, but Mr. Alpert's client has not taken this into account.

In **Noyes v. Ancliff Timber Limited**, 6 M.C.C. 554, at page 559:

> Having regard to the above principles (from **Dzuba**) it is apparent that the item of profit from a cutting operation should not be taken into consideration. Firstly, the owner of the surface rights has not incurred the operating costs of such an operation. Secondly, there is always the possibility, and this word is used advisably as it cannot be said with certainty that mining operations would be carried out on the lands, that the owner of the surface rights would in the future have a full opportunity of harvesting the timber.
>
> Having regard to the fact that the more generous land valuation included a recognition of the "heavy stand of timber" and that the timber valuation, while it may represent the theoretical value of the timber as it stands, does not reflect what a willing purchaser would pay in addition to an amount for the land itself, the tribunal is of the opinion that the sum of $5000 for each mining claim is the appropriate compensation that should be fixed under subsection 92(1) of the *Mining Act*. Such sum is less than the estimated timber value and the higher estimated market value of the land, including the timber, but it must be kept in mind that the surface rights remain the property of the respondent and on rehabilitation after the conduct of mining operations, assuming such operations are ever conducted, the land would be capable of reverting to the production of timber.

This demonstrates that, in the minds of previous Commissioners at least, rehabilitation is distinct from mining operations.

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Fourthly, looking to section 2 of the **Mining Act**, a policy section which sets out the purposes of the legislation, it may be said that miners may find the restorative or rehabilitative provisions as burdensome, but it serves a public purpose, the benefit of which is incidentally enjoyed by the owner of the surface rights. Section 79 has long had a history of balancing rights and in Mr. Coburn's submission, should not be made into an obstacle for the purpose of performing rehabilitation. That is not to say that a surface rights owner has no recourse, but only that this is a claim arising out of the actions of a miner who performs statutory obligations, and such recourse against the Ministry and others belongs in the Civil Courts, involving, tort or some other contract.

The Statutory Underpinnings of subsections 79(2) and (4) - Absence of Agreement

Subsection 79(2) sets out the statutory right for compensation, but it is only in default of an agreement that the tribunal should be setting up terms for compensation. Once an agreement is made it must stand, and if it should be breached, the parties have no choice but to go to Court. There is nothing in the provisions which make the tribunal an arbiter. Looking to the brief **Industrial and Mining Lands Compensation Act**, section 1 provides that it is lawful for the owner or operator of a mine to make an agreement with the owner of the land for payment of compensation for damage or injury, where payment is an answer in complete action for damages.

Mr. Coburn submitted that the agreement which exists is found in the Agreement of Purchase and Sale. Mr. Alpert's client may not like the provisions of that agreement, but the place to work out their differences is not before the tribunal, it is before the Courts.

Section 79 Applies Only Where Surface Rights Acquisition Predates Mining Lands Acquisition

Mr. Coburn's third alternative argument, finds a basis in the wording of section 42 of the Mines Act, R.S.O. 1897, ch. 36, which differs from the current legislation:

> **42.-**(1) Were the surface rights have been granted, leased or located and a patent or lease of mining rights shall thereafter be granted in respect of the same land, in the event of the parties failing to agree upon compensation for injury or damage to the surface rights either in the form of a specified interest in the mineral rights or ore or mineral, to be secured to the owner of the surface rights, or by payment or agreement to pay in money, or the giving of security, the Director of the Bureau of Mines shall order and prescribe the manner in which compensation for the damage or injury to the surface and surface rights shall be ascertained, paid or secured.

In Boyd J.'s decision in **Coniagas Mines Limited v. Town of Cobalt** (1909) 20 O.L.R. 622, at pages 629-30, he stated:

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> ...Section 42 provides for surface rights having been granted, leased or located, and a patent of mining rights shall thereafter be granted in respect of the same land, in which case compensation must be made for injury or damage to the surface rights i.e., occasioned by the working of the mining rights. That section is invoked by the defendants, who claim compensation if the surface is disturbed by the plaintiffs, but it is to me very clear that the section does not apply, and I negative any such claim. It would only arise where the surface rights have first been granted, and subsequently the mining rights. The reverse is the order as to these litigants. ...

Moss, C.J.O. of the Court of Appeal stated at pages 635-6:

> It appears clear that sec. 42 of the Revised Statute (R.S.O. 1897, ch. 36) is not applicable for the reasons pointed out by the Chancellor, and therefore these defendants have no status to claim compensation for anything properly done by the plaintiffs in the exercise of their rights. This is a case in which the ores, mines, and minerals were dealt with separately from the surface of the land, but such dealing was before and not after the surface rights had been granted, leased, or located in the manner contemplated by sec. 42.

Mr. Coburn submitted that, while the wording of the mining legislation has since changed and makes no reference to whether the surface rights were acquired before or after the mining rights, he suggested that a vestige of this intent may still apply. Looking to subsection 79(1), it uses the following definition:

> "owner of the surface rights" means a person to whom the surface rights or land *have been granted*, sold, leased or located [*emphasis added*].

The use of the words, "have been granted" is suggestive of acquisition prior to the mining rights. Moreover, all of the circumstances outlined in subsection 79(2), except clause (b) indicate the present tense. Mr. Coburn invited the tribunal to consider that the interpretation of the Court of Appeal in **Coniagas** may still have a bearing on these matters, such that the surface rights holder is aware of the mining activity and takes the land subject to the rights of the mining rights holder. Therefore, the section should kick in only when the mining rights holder acquires the lands subsequent to the acquisition of the surface rights holder.

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Response to the Motion

Mr. Alpert commenced his submissions by indicating that it would be his intention to not repeat the length of earlier, pertinent arguments in the matter involving Aquafor Beech, but merely to indicate that the arguments would apply in this case as well. The tribunal agreed to this and the test from the earlier arguments has been imported into Mr. Alpert's presentation, at the points he referred to them in his argument.

The Statutory Underpinnings of subsections 79(2) and (4) - Absence of Agreement

Dealing first with the facts presented by Mr. Coburn, Mr. Alpert clarified that paragraph 10 of its Factum (Ex. 16, Tab 1) was not intended to limit the action for damage incurred set out in paragraph 7(a), namely that AEC and its agents wrongfully removed such materials as sand and gravel from the roads which formed part of the surface rights in performing the rehabilitation work, which materials were in turn used to cover debris as well as lining ditches. Mr. Alpert submitted that sand and gravel are excluded from the definition of mines and minerals in the **Mining Act**, and therefore, AEC West and its agents do not have the right to remove them, thereby damaging the surface, in the performance of rehabilitation work.

With respect to the reference to the Agreement of Purchase and Sale (Ex. 1, Tab 11), Mr. Alpert drew the tribunal's attention to the second page, paragraph 3(b), which states:

> (b) The 31st day of July, 1981, provided however that in the event of closing taking place on the date specified in (b) herein, the Vendor shall have a right of access at all times to carry on such works and undertakings as may be required by the appropriate environmental authorities to rehabilitate the Lands with respect to any mining operations which have heretofore been conducted upon the Lands. It will be the Vendor's sole responsibility to carry on and complete such works and undertakings as may be required by the appropriate environmental authorities to rehabilitate the land with respect to any mining operations which have heretofore been conducted upon the land and this obligation and responsibility shall not merge with the execution of this agreement or transfer of the land to the Purchaser. This right shall apply for a maximum of twenty-one years from the date of possession of the property by the purchaser.

Mr. Alpert pointed out that the wording clearly sets out that the mine was not operative, and further that the Vendor would have the right to enter onto and carry out rehabilitation "with respect to any mining operations" which had been conducted. Mr. Alpert submitted that Mr. Coburn's reference to this agreement must necessarily include these provisions, but nowhere

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did it indicate that there is a contract as to compensation, as provided for in subsection 79(4). Mr. Alpert submitted that there is no such agreement in the Agreement of Purchase and Sale, nor does that document allude to an agreement as to payment for damages and moreover, it cannot be construed as a carte blanche to come in and destroy the surface rights. Mr. Alpert submitted that the respondents could have easily come onto the lands and affected their rehabilitation work without causing damage to the surface rights. He argued that the agreement simply provided that there was a purchase of the surface rights along with a right of entry.

No Right of Compensation Arising From Rehabilitation

Mr. Alpert stated that there is correspondence in the filings which points to the mistaken belief on the part of AEC West that, after the sale of the surface rights, it still owned the sand and gravel as part of the minerals. The definition of minerals under the **Mining Act** specifically excludes sand and gravel. Mr. Alpert submitted that it is very clear that sand and gravel formed part of the surface rights, which are defined to include every right except minerals [s. 1]. Mr. Alpert stated that the respondent, AEC West did not own the sand and gravel, but used them and caused damage to the surface as a result.

Mr. Alpert submitted that subsection 79(2) does confer jurisdiction on the tribunal with respect to damage caused by performance of rehabilitation work, through its use of the term "mining operations". Rehabilitation work is now carried on by the owner of the mining lands, so there is no question as to ownership. Mr. Coburn has attempted to draw a distinction by submitting that the mine currently and at the relevant dates, was not active.

The definition of "mine" found in section 1, was referred to. It states:

"mine", when used as a noun, includes,

(a) any opening or excavation in, or working of, the ground for the purpose of winning any mineral or mineral bearing substance,

(b) all ways, machinery, plant, building and premises below or above the ground relating to or used in connection with the activity referred to in clause (a),

(c) any roasting or smelting furnace, concentrator, mill, work or place used for or in connection with washing, crushing, grinding, sifting, reducing, leaching, roasting, smelting, refining or treating any mineral or mineral bearing substance, or conducting research on them,

(d) tailings, wasterock, stockpiles of ore or other material, or any other prescribed substances, or the lands related to any of them, and

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> (e) mines that have been temporarily suspended, rendered inactive, closed out or abandoned,
>
> but does not include any prescribed classes of plant, premise or works;
>
> "mine", when used as a verb, means the performance of any work in or about a mine, as defined in its noun sense, except preliminary exploration;

Mr. Alpert submitted that it was clear from paragraphs (a) and (e) of the definition of "mine" that mining includes **any opening**, including those that are temporarily suspended or abandoned. He suggested that the definition when used as a verb, extends to the performance of any work, including rehabilitation work. Mr. Coburn has attempted to argue that, since the rehabilitation work was done on a closed mine, subsection 79(2) could not apply. However, in Mr. Alpert's submission, this runs contrary to the definitions of "progressive rehabilitation" and "project" found in section 139 of the **Act**, which states"

> "progressive rehabilitation" means rehabilitation done continually and sequentially, within a reasonable time, during the entire period that the project continues;
>
> "project" means a mine or the activity of advanced exploration, mining or mine production;

Mr. Alpert submitted that, from the definitions used in the legislation, it was obvious that the mining activity at this mine, in the manner defined, is continuing and ongoing, because the legislation requires ongoing rehabilitation work. According to Mr. Coburn, rehabilitation cannot occur on a mine which is not producing; however, Mr. Alpert submitted that is clearly wrong, given the definitions. In Mr. Alpert's submission, mining work is continuing and is ongoing because rehabilitation work continues to be carried out as required under the legislation. In his submission, AEC West continues to be liable for rehabilitation work. Otherwise, based upon any other interpretation holding that mining ceases before rehabilitation commences, would render the phrases used in Part VII and section 139 futile. Mr. Alpert submitted that this would be an incorrect interpretation.

Mr. Alpert stressed the very broad definition of "mine", emphasizing that it does not allow for the absurd extension suggested by Mr. Coburn. The rehabilitation work was done in connection with the mining activity and not for some unrelated activity. This cannot, in his submission, be regarded as an absurd extension of logic, but rather, of a specific definition.

Section 79 Applies Only Where Surface Rights Acquisition Predates Mining Lands Acquisition

Mr. Alpert submitted that the **Coniagas** case is irrelevant. It is being advanced upon an old version of the **Mining Act** which has been repealed. The current version makes it no

longer relevant to the timing of the acquisition of the surface rights. The older version was repealed long ago and in Mr. Alpert's submission, has no continuing relevance to the current matter.

In reference to the principles in the **Dzuba** case and in particular those items listed by Mr. Coburn, Mr. Alpert submitted that the specific references were upon which damages are awarded. However, Mr. Alpert wished to draw the tribunal's attention to several others, at page 244:

> 2. The amount of compensation should be a reasonably liberal one analogous to one payable on expropriation.
>
> 3. The benefit of any doubt is to be given to the surface owner.
>
> 5. The surface owner is entitled to the present value of any enhanced or prospective value the land may have to building purposes.

Mr. Alpert submitted that, just because the mining rights owner has a right of entry and is obliged under statute to rehabilitate the mining lands, does not entitled him to grab anything on the surface which does not belong to him. Taking into account the benefit of rehabilitated mining lands back to the surface rights owner does not answer this issue. By stating that rehabilitation work was or was not done at one location, but at the expense of destroying the surface rights' owners property in accomplishing such work, does not entitle the mining rights owner to any congratulations for fulfilling their statutory obligations.

Mr. Alpert submitted that the **Noyes** case has no application to the current circumstances as to whether rehabilitation work constitutes mining operations. The findings in that case are limited to assessment of damage where only assessment work had been done on adjacent lands and actual post-exploratory mining was only a possibility.

As to Mr. Coburn's assertion that rehabilitation work is for the benefit of the public, which in turn benefits the surface rights owner, Mr. Alpert suggested that this was a ludicrous position, that the obligation to rehabilitate does not extend to the destruction of the property of the surface rights holder. Nowhere does the Agreement of Purchase and Sale indicate the mining rights owner can come in and grab what is there to its own benefit without some form of compensation. Looking to the agreement (Ex. 1, Tab 11), the only reference to property on the surface is with respect to the buildings, which are specifically stated to remain the property of the mining rights owner, which allows for subsequent entry and removal. Although entry is also allowed, sand and gravel are not mentioned.

The correspondence of Mr. Zurowski (Ex. 1, Tab 10) stated,

> **1. Use of Sand and Waste Rock Material**
>
> At the time of the sale of the surface rights to you,

. . . . 14

> described in the agreement dated March 23, 1981, clauses 2(a) and 2(b) clearly define Consol. Faraday's (now Conwest) obligations to the mining lands. I have discussed this with one of the Faraday officials responsible for drafting this agreement and I am advised that it was their understanding that Faraday had the right of access and the use of all materials, contained within the lands comprising the Gordon Lake mine operations, placed there by nature or by Faraday during the life of the mining operation. The specific mining lands included the old and new shaft areas, the trailer townsite area and all waste dumps. These materials would b used to restore the disturbed areas to standards as dictated by the respective government agencies and more particularly the Ministry of Natural Resources (MNR), Ministry of Environment and more recently the Ministry of Northern Development and Mines. (MNDM)
>
> . . .
>
> None-acid generating waste rock was required for the spillways in the tailings area. The most readily accessible material was only available for the fill sections of the road between Gordon Creek and the east end of Gordon Lake (No. 1 Shaft Area). These sections of road were shaved for our requirements and then levelled and topped with sand and graded. The road presently provides adequate access to the east end of Gordon Lake. The road is a convenience to you as you part your aircraft at this location and commute by vehicle between this base and your lodge on the peninsula of land on claim #31823.
>
> . . .
>
> I have always considered that Conwest had the right to utilize any surface materials placed by nature or accumulated from the mining operation to assist it in the reclamation of the mining lands. Never once did we discuss to the contrary, and no offer of restitution was ever volunteered by us.

Mr. Alpert submitted that statements made in this correspondence demonstrate that AEC West found the use of the road sand and gravel as expeditious, as it would have cost a great deal of money to get it from elsewhere. He suggested that they "didn't give a damn". They were at the site, with bulldozers and essentially, Mr. Heinrichs could either get run over or permit it to be taken.

Headings

Mr. Alpert pointed out that the headings under Part VII of the **Act** is "Operation of Mines". Mr. Alpert reiterated his earlier comments on the importance of headings, relying on

Driedger and **Re African Lion Safari**, in stating that they are an integral part of the legislation, which are to be relied upon as an indicator of meaning. Excerpts from pages 268 to 271 of E.A. Driedger, *Construction of Statutes* (Toronto: Butterworths, 1983) were highlighted:

HEADINGS

> ...To any person reading legislation, headings appear to be as much a part of the enactment as any other descriptive component. They form an obvious part of the context in which the provisions of an Act are read.
>
> . . .
>
> The view favoured in recent judgments from the Supreme Court of Canada is that for purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual feature. In *Law Society of Upper Canada v. Joel Skapinker*,[94] speaking of headings in the Charter, Estey J. wrote:
>
> > The Charter, from its first introduction into the constitutional process, included many headings including the heading now in question.... It is clear that these headings were systematically and deliberately included as an integral part of the Charter for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter.[95]
>
> This approach to headings in the Charter has been applied to ordinary federal legislation[96] and, despite the Interpretation Acts, to provincial legislation as well.[97] These cases make it clear that headings are a valid indicator of legislative meaning and should be taken into account in interpretation.
>
> **Uses of Headings**. The arrangement of headings and subheadings within an enactment helps reveal the overall scheme of an Act. In well drafted

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[94] (1984), 9 D.L.R. (4th)

[95] *Ibid.*, at 176.

[96] See *Skoke-Graham v. R.* (1985), 16 D.L.R. (4th) 321, at 332 (S.C.C.), where Dickson J. quotes the passage from *Skapinker* with approval. He goes on to point out that the federal Interpretation Act "refers only to marginal notes and preambles and therefore does not preclude the use of headings as an aid for statutory construction". See also *R.v. Wigglesworth*, [1987] 2 S.C.R. 541, at 556-58 and *R. v. Kelly* (1992), 92 D.L.R. (4th) 643 (S.C.C.).

[97] See, for example, *Re African Lion Safari & Game Farm Ltd. v. Ont. (Min. of Natural Resources)* (1987), 59 O.R. (2d) 65, at 72-75 (C.A.); *Phillips v. Robinson* (1982), 133 D.L.R. (3d) 189, at 194-96 (P.E.I.C.A.).

> legislation, headings, together with the titles and marginal notes, operate as an outline of the legislation. The chief use of headings, however, is to cast light on the meaning or scope of the provisions to which they relate. They function much as titles do in relation to these provisions.
>
> . . .
>
> ***Grouping of provisions under headings***. Where provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions. ...

Mr. Alpert referred to **Re African Lion Safari & Game Farm Ltd. v. Ontario (Minister of Natural Resources)**, (1987), 59 O.R. (2d) 65, at commencing at page 73, where Blair, J.A. states,

> The recent decision of the Supreme Court of Canada in *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161, 11 C.C.C. (3d) 481, [1984] 1 S.C.R. 357, has removed all doubt about the use of headings in the interpretation of statutes. It is established by that decision that headings can be used as an aid to interpretation especially where the language of the statute is ambiguous. There is strong support for this conclusion in the textbooks: see Driedger, *Construction of Statutes*, 2nd ed. (1983), at pp. 138-41 and at p. 147; *Craies on Statute Law*, 7th ed. (1971), at pp. 207-10; Bennion, *Statutory Interpretation* (1984), at p. 590, and Cote, *The Interpretation of Legislation in Canada* (1984), at pp. 44-5.
>
> The former hesitancy about the use of headings reflected the concern of some judges that they were added by parliamentary officials after the statute was enacted: see *Director of Public Prosecutions v. Schildkamp*, [1971] A.C. 1. This is not a problem for statutes enacted by the Parliament of Canada or the Legislature of Ontario.

continuing on pages 74 and 75:

> The heading in *Skapinker* was of assistance in reconciling paras. (a) and (b) of s. 6(2) of the Charter of Estey J. stated at pp. 176-7 D.L.R., p. 377 S.C.R.:
>
> > At a minimum the heading must be examined and some attempt made to discern the intent of the makers of the document from the language of the heading...
> >
> > For the purpose of examining the meaning of the two paragraphs of s. 6(2), I conclude that an attempt must be made to bring

> about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document.

> ... In that case Estey J. described the factors which would determine the importance of the heading in interpreting a provision in a statute as follows at p. 176 D.L.R., pp. 376-7 S.C.R.:

> > At the very minimum, the court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the Charter; and the relationship of the terminology employed in the heading to the substance of the headlined provision.

Mr. Alpert submitted that the headings are material in attempting to ascertain the meaning of the phrase, with the tribunal having jurisdiction to deal with such matters. The tribunal pointed out that the new Part VII had not, to its knowledge, been given Royal Proclamation, and counsel confirmed that this was the case.

Purposive Analysis

Section 2 demonstrably goes through the various states from prospecting, through the mining operation to the rehabilitation of the mining lands, as found in Part VII.

In Mr. Alpert's submission, subsection 79(2) is to be regarded as remedial legislation which intends that there be compensation to the owner of the surface rights for damages sustained. The tribunal is entitled to grant compensation where the damage is caused by the owner of mining lands who carries on mining operations. It is submitted that rehabilitation work is clearly included in the definition of mining operations, according to the definition set out in the **Act**.

Relying on section 10 of the **Interpretation Act,** R.S.O. 1990, c. I 11 and E.A. Driedger, *Construction of Statutes (2nd ed.)*, (Toronto: Butterworths, 1983), Mr. Alpert submitted that "every Act is deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good and to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall according receive

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such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the **Act** according to its true intent, meaning and spirit" [Ex. 20, Supplementary Factum, para 33]. Portions of pages 35 to 40 were highlighted and read into the record:

PURPOSIVE ANALYSIS

INTRODUCTION

> Basis of *purposive approach*. The purposive approach to statutory interpretation is much favoured by modern courts. It is based on a distinctive conception of legislation and the role of courts in interpretation.
> ...
>
> ... Under a purposive approach, the court defers to the legislature not by decoding its language but by ensuring that its plans are carried out.
>
> ***Propositions comprising purposive analysis***. The purposive approach to statutory interpretation may be summarized by the following propositions.
>
> > (1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.
> > . . .
> >
> > (3) Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.
> >
> > (4) The ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose if the preferred interpretation is one of the words are capable of bearing.
> >
> > . . .

EVOLUTION OF THE MODERN PURPOSIVE APPROACH

> ***Heydon's case***. Historically, purposive analysis is associated with the so called mischief rule or the rule in *Heydon's Case*.[98] Although this rule did not originate in Heydon's Case, it was there where it received its most famous and influential formulation:

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[98] (1584), 3 Co. Rep. 7a, 76 E.R. 637.

> for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:-
>
> . . .
>
> 2nd. What was the mischief and defect for which the common law did not provide.
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the common-wealth.
> And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.[99]

Judges are here advised to not only interpret legislation to promote its purpose but also suppress measures designed to avoid the impact of the legislation and add to the scheme, if necessary, to ensure that the legislature's true intent is accomplished.

Doctrine of equitable construction. *Heydon's Case* is an expression of the doctrine of equitable construction which dominated interpretation in the sixteenth century. The hallmark of equitable construction is its elevation of the spirit or intent of a statute over its literal meaning. As explained in one sixteenth century case:

> [E]very thing which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter ....[100]

Under the doctrine of equitable construction judges have jurisdiction to recast legislation in effect, in an effort to promote which the judges took to be Parliament's true intent. ...

. . .

Even in the heyday of literal construction, the purpose of legislation was often taken into account. Under the literal construction rule, purpose could be considered when the literal meaning of the words to be interpreted was unclear. If these words were susceptible of more than one interpretation, the courts could choose the interpretation which best advanced the purpose. As Viscount Simon said in *Nokes v. Doncaster Amalgamated Collieries, Ltd.*:

. . . . 20

[99] *Ibid*., at 638(E.R.).

[100] See *Stowel v. Lord Zouch* (1569), 1 Plowd. 353, at 366, 75 E.R. 536, at 556.

> [I]f the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[5]

Legislative purpose was also taken into account under the golden rule. It would be absurd for a legislature to adopt a provision that conflicted with the purpose of legislation or was likely to render it futile. To avoid this absurdity, the courts could reject the ordinary meaning of the provision in favour of a more reasonable alternative.[6]

Modern purposive approach. Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews J.A. recently wrote in *R. v. Moore*:

> From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.[7]

. . .

In the Supreme Court of Canada purposive analysis is a staple of statutory interpretation. In *Clarke v. Clarke*, Wilson J. wrote:

> In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.[9]

. . .

In *R. v. Z.(C.A.)*, Lamer C.J. wrote:

> In interpreting ... an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and the purpose of the legislation ...[T]he Court of Appeal properly proceeded on this basis when it stated that the best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction.[11]

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[5] [1940] A.C. 1014, at 1022 (H.L.).

[6] For discussion and authorities on avoiding absurdity, see *infra*, Chapter 3.

[7] (1985), 67 N.S.R. (2d) 241, at 244 (C.A.).

[9] (1990), 73 D.L.R. (4th) 1, at 10 (S.C.C.).

[11] [1992] 2 S.C.R. 1025, at 1042.

REASONS FOR MODERN ADOPTION OF PURPOSIVE APPROACH

> *Overview.* A number of factors have contributed to the emphasis put on purposive analysis in modern statutory interpretation. First, there is the remedial construction rule found in the Interpretation Acts of all Canadian jurisdictions. Starting with the first statute on interpretation enacted by the Parliament of Canada in 1849, Canadian Interpretation Acts have contained a provision that directs courts to give every enactment "such fair, large and liberal construction and interpretation as best ensures that attainment of its objects"[13]. Although this provision has not been central in the evolution of purposive analysis in Canada it has been cited on occasion to justify a broad purposive approach particularly in the criminal law context.[14] It is partly responsible for the widespread assumption, challenged below,[15] that purposive analysis goes hand in hand with a broad or expansive interpretation of language.
> . . .
>
> Other factors contributing to the modern emphasis on purposive analysis are mentioned by Côté.[19] ...

Mr. Alpert submitted that where the language used in legislation lends itself to two meanings, analysis of the legislative purpose can be used to resolve the meaning. He referred to pages 66 to 67 of Driedger, *Construction of Statues, supra*:

> ***Resolving ambiguity***. Where the language to be interpreted lends itself to two plausible readings, legislative purpose may be relied on to resolve the ambiguity. This method of resolving ambiguity has been used in numerous cases involving both semantic and syntactic ambiguity.
>
> In **Clark v. Fairvale (Village)**,[93] legislative purpose was relied on to resolve a syntactic ambiguity. Section 23(2) of a by-law passed pursuant to New Brunswick's Municipalities Act was in the following terms:

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[13] Interpretation Act, R.S.C. 1985, c. I-21, s. 11. This language is very close to that found in the original provision, appearing as x. 5(28) of the Interpretation Act of 1849 (12 Vict., c. 10). For comparable provisions in provincial Interpretation Acts, see ... R.S.O. 1990, c. I.11, s. 4 ... .

[14] See, for example, *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at 412-13.

[15] See ***infra***, at pp. 69-73.

[19] P. A. Cote. *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Editions, Yvon Blais Inc., 1991).

[93] (1987), 46 D.L.R. (4th) 376 (N.B. C.A.).

> 23(2) All water supplied to premises used for any purpose other than residential or commercial and dual-use consumers *with estimated volumes of consumption not greater than single-family domestic consumers,* shall be paid for on the basis of measured quantities determined by a meter....
>
> [Emphasis added]

The appellant owned an apartment building which the municipality serviced with water. The charge for this water was determined on a flat rate basis. The appellant claimed that under s. 23(2) he was entitled to be charged on a measured quantity basis. This claim turned on whether the underlined phrase in s. 23(2) modified "residential" as well as "commercial and dual-use" consumers. The rules of grammar and punctuation provided no solution to this problem; the provision could be read either way.

To resolve the deadlock the New Brunswick Court of Appeal looked to the purpose and scheme of the by-law. It found that the purpose was to dispense water to consumers and to recover the costs of this service on a uniform, fair and reasonable basis. The municipality had determined that this goal could be best achieved through the use of meters except in those cases, referred to in s. 23(2), where the modest level of consumption would not justify the costs of installing and monitoring a meter. This was the underlying rationale, the reason why some premises were metered and others were charged on a flat rate. As the court noted, it made sense to tie meter installation to the volume of water consumed; it did not make sense to tie it to the nature or purpose of the consumption. In light of this understanding, the court easily concluded that the phrase relating to volume of consumption by a single family must apply to all consumers, including residential ones:

> To limit the interpretation of the section [so as to exclude residential consumers would] disregard the object and scheme of the act. The criterion to exclude the installation of a meter at a service connection is the flow equivalent to the estimated consumption of a single-family domestic consumer. The prime concern of a water rate ought to be the quantity of water which goes through its service connection, not its ultimate use. Therefore, ... it is necessary to read the words "estimated volume of consumption not greater than single-family domestic consumer" as qualifying all the premises enumerated.[94]

Since the rationale applied to all premises, it would defeat the purpose of the legislature if some premises were excluded...

And to P.A. Coté, **The Interpretation of Legislation in Canada,** Second Edition, (Quebec: Yvon Blais Inc. at page 279

> Paragraph 2: Uniformity of expression

. . . . 23

[94] *Ibid*, at 379.

Legislative drafters are supposed to respect the principle of uniformity of expression. Each term should have one and only one meaning, wherever it appears in the statute or regulation. An idea should be expressed in the same terms throughout the enactment.[104]

This rule of drafting leads to a principle of interpretation deeming a word to maintain the same meaning throughout.[105] Similarly, a different expression implies a different concept: different terms, different meanings.[106]

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REMOVING UNCERTAINTY

The most common and least controversial uses of the purposive method involve clarifying the meaning of a vague term, choosing between two possible meanings, or removing some other source of uncertainty.

Undoubtedly the aim of an enactment is relevant in selecting the most suitable of a number of possible meanings, where the written expression is ambiguous. Justice Pigeon, dissenting in *R. v. Sommerville*,[59] stated that he could not depart from the clear meaning of an enactment simply because it was inconsistent with the overall goals of the legislation. But, he added:

> ... it is otherwise if the enactment is not clear. Then it is perfectly proper to look at the general purpose and intent in order to choose among several possible meanings that which appears more consonant with the general intent.[60]

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[104] Louis-Philippe Pigeon, *Rédaction et interprétation des lois*, 3rd ed., Quebec City: Les publications du Québec, 1986, pp. 78-80

[105] *Edwards v. A.G. for Canada*, [1930] A.C. 124, 141; *MacMillan v. Brownlee*, [1937] S.C.R. 318, 333; ***Ballantyne v. Edwards***, [1939] S.C.R. 409, 411; *Freed v. Rioux*, [1964] Que. Q.B. 796, 798; *Shore v. Silverman*, [1977] Que. S.C. 1044, 1045; *Giffels & Vallet of Canada Ltd. v. The King*, [1952] 1 D.L.R. 620 (Ont. H.C.), 630; *Architectural Institute of B.C. v. Lee's Design & Engineering Ltd.* (1979), 96 D.L.R. (3d) 385, 408 (B.C.S.C.).

[106] *Edwards v. A.G. for Canada*, [1930] A.C. 124, 141; *Canadian Pacific Railway Co. v. James Bay Railway Co.* (1905), 36 S.C.R. 42, 77; *Frank v. The Queen*, [1978] 1 S.C.R. 95, 101; *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, 747; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 331; *R. v. Barnier*, [1980] 1 S.C.R. 1124, 1135-6; *P.G. du Canada v. Riddell*, [1973] Que. C.A. 556, 558; Banque *Canadienne Nationale v. Mercure*, [1974] Que. C.A. 429, 430; *Commission scolaire de Rouyn-Noranda v. Lalancette*, [1976] Que. C.A. 201.

[59] [1974] S.C.R. 387.

[60] *Id*., p. 395. Similarly, Lord Herschell in *Brophy v. A.G. for Manitoba*, [1895] A.C. 202, 216.

and at page 329:

> Justice Spence referred to the aim of the provision, the mischief it sought to remedy ([of Laidlaw v. Metropolitan Toronto, [1978] 2 S.C.R. 736] at pages 742-3):
>
> > I think I should first state that the choice between the two interpretations advanced cannot be made by the reference to the plain words of the paragraph. The work "reflected", in my view, is a most difficult word and one which may only be understood by considering all of the sections and, I have concluded, also by considering the legislative history and the mischief which the legislators sought to remedy.

Mr. Alpert submitted that **African Lion Safari** was followed in **Re Sparling v. Royal Trustco Ltd.** (1984), 6 D.L.R. (4th) 682, at pages 693 to 694 (Ont. C.A); affd [1986] 2 S.C.R. 537:

> Where a statute provides a remedy, its scope should not be unduly restricted. Rather, the courts should seek to provide the means to effect that remedy. For the Director to seek compensation on behalf of aggrieved shareholders would not lead to absurd results. It is to be noted that the Act vests complete control of the proceedings in the court for it may act by making "any order it things fit". ...
>
> It is argued that the statute should have been much clearer in its provisions if it contemplated the commencement of "class" actions. Yet it would be almost impossible for a federal statute to spell out the specific procedure to be undertaken in each province in an action such as this. Indeed, objections might be raised if the statute were to attempt to detail the proposed procedure.

Relying on the foregoing authorities and cases, Mr. Alpert submitted that all legislation is deemed to have a purpose and the interpretation of provisions should be consistent with that purpose rather than serve to undermine it. As stated in his Supplementary Factum at paragraphs 35 and 36, "Where the usual meaning of the language falls short of the whole object of the legislature, a more expanded meaning may be attributed to the words if they are fairly susceptible of it. The most important use of purposive analysis in modern interpretation is to help establish the scope of the powers and the discretions conferred by statutes on government officials and on a wide range of independent bodies and tribunals."

By applying the purposive analysis to determine the scope and powers of the discretion, Mr. Alpert submitted that the tribunal is to apply this in determining whether a more narrow or more broad interpretation should be given. Where the broader interpretation is more consistent with the purpose, this should be found to be its meaning. Mr. Alpert submitted that section 79 of the **Mining Act** is remedial and taking into consideration the broader purpose of rehabilitation, extending the section to include an agent involved in rehabilitation would be to give effect to that purpose. This is consistent with a fair and liberal construction of the objects of the legislation.

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In this manner, any ambiguity can be resolved as was done in **Sparling v. Royal Trustco Ltd.**, where the Court made a determination of the scope of the discretion of the Director appointed pursuant to the *Canada Business Corporations Act*, who is empowered to bring a civil action. The Court held that the wording should not exclude an action on behalf of aggrieved shareholders. Where the legislation has provided a remedy and there is an interpretation which can give effect to that remedy, that would be the preferable interpretation over one which restricts or disallows the remedial provisions.

Referring to several excerpts from **Sparling**, found at pages 18 and 19, Mr. Alpert pointed out that the Court found that it was preferable to provide a remedy rather than to interpret the provisions as restrictive. In considering whether a statute should have been made clearer, the Court stated that it would be impossible for a federal statute to specify all procedures to be undertaken in each province. Mr. Alpert submitted that the legislation cannot detail every item, that there will be ambiguities, but that the Courts and this tribunal, have the interpretive tools to resolve those ambiguities.

Where a new remedy is introduced by legislation, the Courts will not limit its operation, rather they will take steps to ensure that it is properly applied. Given this, the fact that words used in a statute are to have the same meaning throughout to ensure consistency, that terms are to have only one meaning and that those provisions dealing with the same subject should be read together, where possible, so as to avoid conflict and to ascertain the intention behind the wording, lends support to the principle of uniformity of expression. At page 273 of Cote:

EXTENDING THE MEANING OF A PROVISION

To ensure fulfilment of the legislature's purpose, a judge may interpret provisions more liberally than the literal meaning might suggest:

> Where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words if they are fairly susceptible of it.[72]

Mr. Coburn reiterated earlier arguments in reply, including responding to Mr. Alpert's assertion that the Agreement of Purchase and Sale merely gave a right of access. However, this right of access demonstrates that there was an agreement and therefore determination of damages rests with the Courts. As to the use of sand and gravel, taking of such substances, in Mr. Coburn's submission, does not constitute mining operations. Mr. Coburn suggested that Mr. Alpert does not understand the nature of rehabilitation work, which takes place after mining operations. Sections 79, he submitted, deals with mining operations. As to whether progressive rehabilitation may be captured, Mr. Coburn submitted that one may mine a portion, rehabilitate and mine the next portion, but these are still discrete acts of mining and rehabilitation. Mining, he submitted, is destructive, while rehabilitation is designed to improve or restore, thereby being conceptually very different.

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[72] Per Locke J., *Canadian Fishing Co. v. Smith*, [1962] S.C.R. 294, 307.

Findings

Upon attempting to discern the meaning of the phrase "mining operations" as used in clause 79(2)(d), the tribunal has encountered seemingly contradictory provisions within the **Mining Act** itself which require resolution.

Subsection 79 is found in Part II of the **Mining Act** entitled "Mining Claims". Given that this Part includes all steps up to and including the issuance of patents and leases, perhaps a better title would have been "Mining Lands". However, this appears to be overcome by the various sub-headings employed, including the one which applies to section 79, namely "Surface Rights Compensation".

Use of the phrase "mining operations" is very limited in the **Act**. Subsection 51(1), also in Part II, uses an inverted version of this phrase, in stating:

> 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 prospecting and the efficient exploration, development and *operation of the mines, minerals and mining rights*.

This subsection provides for the right of access to surface rights prior to the leasing or patenting of the mining lands, at which time the use of the surface is understood as part of the mining rights insofar as it is used in connection with the working of the mining rights. However, the phrase, "operation of the mines, minerals and mining rights" when preceded by the words, "exploration, development" are sufficiently different from the term, "mining operations" to afford little assistance in determining the meaning of the phrase in clause 79(2)(d).

The definitions of "mine" as a noun and as a verb are found in section 1 is set out in full in Mr. Alpert's submission. The following analysis is considered. Under clause (a), any opening and the like for the purpose of winning minerals is a mine. The action of opening or excavating, for such purposes, constitutes mining. Under clause (b), the infrastructure and machinery attached to or for use in the openings are recognized as part of the mine. The action of using the same will constitute mining. Under clause (c) all of the infrastructure used for the processes undertaken with the extracted rock, from the various stages of research through refining, is considered a mine. The actions involved in the processing constitutes mining. Under clause (d), the physical presence of tailings, wasterock and stockpiles are considered part of the mine as are the lands related to them. The work performed in relation to same constitutes mining.

Does the same relationship hold true for clause (e)? The definition, as a noun, would include lands where advanced exploration, mining or mine production activities have occurred but now sit idle and encompasses lands upon which remediative measures have been undertaken, as well as those for which no rehabilitative measures are in place. Therefore, does the action following cessation of advanced exploration, mining or mine production, whether or not involving remediative measures, constitute mining? It would be absurd to consider the act of abandonment as mining, as there is no activity, but the definition would imply that it does. However, the remaining activities under clause (e) involve remediative measures, and the performance of work on those rehabilitative measures, according to the definition, could likely constitute mining.

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This is an awkward extension of the meaning of mine for the definition to take. It implies that once any kind of activity related to mine production has ceased, everything that takes place thereafter, including no activity at all, constitutes mining. Indeed, all lands upon which extraction and production have ceased, whether or not rehabilitative measures are in place, arguably are being "mined".

Upon a closer examination of the terms used in clause (e), it is noted that all are defined terms, the definitions of which are limited in their applicability to Part VII of the **Act**, entitled "Operation of Mines" and dealing with mine rehabilitation. The term "temporarily suspended" is also found in the regulation provision contained in section 176. Subsection 139(1), which sets out the definitions, commences with the words, "In this Part,". The definitions are set out:

> "abandoned" means that the proponent has ceased or suspended indefinitely advanced exploration, mining, or mine production on the site, without rehabilitating the site;
>
> "closed out" means that all the requirements of an accepted closure plan have been complied with and is the final stage of closure;
>
> "inactivity" means that advanced exploration, mine production and mining operations on a site have been suspended indefinitely in accordance with a closure plan, and although protective measures are in place on the site, the site is no longer being monitored by the proponent on a continuous basis;
>
> "temporary suspension" means advanced exploration, mining or mine production have been suspended, in accordance with an accepted closure plan, on either a planned or unplanned basis, but the site is being monitored on a continuous basis by the proponent and protective measures are in place."

Coincidentally, the only other place the term "mining operations" is used is in the definition of "inactivity". It appears to state that mineral recovery activity has ceased with remediative measures in place which do not require monitoring. The implication is that activities involving mineral recovery are separate from remediation.

Taking a look at the definitions of "progressive rehabilitation" "project" and "rehabilitate" serves to offer some potential insight into the meaning of the various phrases quoted above. Read together:

> "progressive rehabilitation" means measures taken to treat the lands ... **on which** advanced exploration, mining or mine production has occurred, ... , being done continually and sequentially , within a reasonable time, during the entire period that the mine continues or that the activity of advanced exploration, mining or mine production continues;

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This reading of the various definitions, and in the context of Part VII, leaves little doubt as to the purpose of Part VII, namely the various statutory provisions governing the taking of measures to treat lands **upon which** some form of mining activity has either occurred or is occurring. The rehabilitation can clearly be ongoing as extraction/production related activities are taking place, or it can occur after such activities have ceased, but it is clearly a distinct activity from what is meant by mining for purposes of Part VII. Upon reflection, this would make sense, as the exact point in time which distinguishes between extraction-related activities and remediation activities would need to be set out in order to give rise to the Part VII rehabilitation measures obligations.

As to the applicability of the section 139 definitions to understanding what is meant by the terms used in clause (e) in section 1, there is no direction provided in the **Act**. One approach would be to give the terms their ordinary meaning. For this purpose, the following, cursory definitions are taken from **Webster's Third New International Dictionary**, Springfield: 1993, Miriam-Webster Inc.:

> **Abandon**, to cease to assert or exercise an interest, right or title to, esp. with the intent of never again resuming or reasserting it;
>
> **Close out**, to bring to a rapid or abrupt conclusion; Terminate: to withdraw from operation: dismantle and discontinue;
>
> **Inactivity** : the quality or state of being inactive: idleness, sluggishness.
>
> **Temporary**: lasting for a time only; existing or continuing for a limited time, impermanent, transitory.
>
> **Suspension**: the act of suspending or the state or period of being suspended, interrupted, or abrogated.

If applied to the terms in clause (e), would mean mines which are no longer in operation, for either short-term reasons or permanently. The ordinary meaning of these phrases do not imply rehabilitative measures having been undertaken, but only that extraction/production activity has ceased. The tribunal has trouble finding that such definitions could have been intended. There is seemingly a less than perfect marriage between the definitions for "mine" in section 1, using terms which are defined in and only for use in Part VII. To interpret the definition of "mine" to include rehabilitation would only be possible through a very liberal application of rules of statutory construction, disregarding altogether rules of legislative drafting.

Upon first considering the meaning of clause 79(2)(d), the tribunal was inclined to find that rehabilitation work done on mining lands was not included, for indeed, it was open to the legislature to clearly and specifically include such work through specific mention of it, had that been the intent. However, by not specifically including it, the tribunal is required to determine whether the particular use of the phrase "mining operations" serves to include or exclude rehabilitation work.

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A brief history of the relevant provisions is considered. A number of changes were made to the **Mining Act** through the **Mining Amendment Act, 1989**, S.O. 1989, c. 62, made effective June 3, 1991. There were two definitions of "mine", one for use generally, excepting Part XI [s. 1] and one for use exclusively in Part XI [s. 160], which was the predecessor to the current Part VII and was repealed in its entirety. As between the two definitions found in the earlier version, they vary in that plants and works were eliminated from the Part XI definition.

The notable differences between those definitions and the one currently found in the Act are the removal of sand, gravel and quarries, as well as the addition of the phrasing referring to activities covered under the new Part VII, including not only the changes now found in clause (e), but also wasterock, tailings, ore stockpiles and other materials, found in clause (d).

Section 79, formerly section 92, also was changed significantly. Subsection 92(1) stated:

> **91**. - (1) Where the surface rights of land have been granted, sold, leased or located with reservation of mines, minerals or mining rights to the Crown, or where land is occupied by a person who has made improvement thereon that in the opinion of the Minister entitles him to compensation, a licensee who prospects for mineral or stakes out a mining claim or an area of land for a boring permit or carries on mining operations upon such land shall compensate the owner, lessee, locatee or occupant for all injury or damage that is or may be caused to the surface rights by such prospecting, staking out or operating, and in default of agreement the amount and the manner and time of payment of compensation shall be determined by the Commissioner after a hearing, and subject to appeal to the Divisional Court where the amount awarded exceeds $1,000, his order is final.

Perhaps the most significant change is that, while the phrase "carries on mining operations" remains unchanged, it was then limited in its application to the licensee and did not extend to a lessee or owner of the mining lands. It did, however, apply to future damage which could occur should the lands be brought to lease or patent, should actual extractive mining occur. At the time, section 57 provided for the issuance of a certificate of record by the mining recorder upon certain conditions, including some agreement for or securing of payment of surface rights compensation. At the time when a certificate of record was applied for, the matter of surface rights compensation was required to be settled, either between the parties or by application to the tribunal. The certificate of record had the effect of changing the status of the holder of the mining claim from a licensee of the Crown to a tenant at will when it was issued, the most notable effect of which was to preclude the filing of disputes, which could occur in certain circumstances up to the time a lease was applied for. Certificates of record no longer exist and the rules involving disputes are governed by new provisions relating to the performance of assessment work, and several other less common circumstances.

Also changed from the former section 92 is that the quantum of damage arrived at had to include compensation for damage which occurred up to the date of agreement or order plus future damage, estimated pursuant to the words "damage ... may be caused". Under the new provisions in section 79, it is only current damage, with additional powers provided in subsection 79(7) to return to the matter and vary a previous order. The result is that all ongoing damage which actually does occur can be dealt with in compensation.

As to the intent of the legislature in making the changes which now constitute sections 1 and 79, the tribunal has considered the applicable commentary in a document entitled, "Ontario's Mineral and Mineral Policy and Legislation: A Green Paper". This document is recognized as having limited, if any weight in this matter, but nonetheless is recognized as providing an understanding of the background leading up to the changes. As it was a discussion paper, many of the proposals were subsequently changed, reflecting the consultative process. The Green Paper is useful in providing a view of the problems which the legislature sought to address. The following is found at page 17:

Compensation for Surface Rights Owners

> Under Section 92 of the present **Mining Act**, the surface rights owner (when not the prospector or claim staker) is entitled to compensation for any damage inflicted by the prospector, in the past, present or future. According to Section 57, the prospector has to reach agreement with the surface rights owner over any damage or injury sustained (then or in the future) before a certificate of record can be issued. the prospector cannot obtain a lease until the certificate is issued, so this provides a very strong incentive for the prospector to settle damage claims.
>
> As it is difficult to assess "future damage," this requirement has led to a practice of a secondary agreement which allows for additional compensation in the future, if justified. This practice is not satisfactory, in that it demonstrates a failure of the legislation to address a real need.
>
> **Issues**
>
> With the current legislation, problems may arise when the prospector obtains a certificate of record, does more work and produces more damage. The settlement already made for future injury and damage may be insufficient compensation for the latest harm done, and the surface rights owner has no further recourse under the **Mining Act**.

> In other cases, the prospector may, for one reason or another, decide to abandon his claim before it is brought to lease. When that happens, there is no requirement in the **Mining Act** for the settlement of any damage claim. A civil suit can be brought through the regular court system but this can be onerous, time consuming and expensive for the surface rights owner. It may also be unproductive if the prospector does not have enough assets to pay damages.

The foreseen or intended effect of the amendments, therefore, appears to have been to extend the right to bring an application from the licensee of the Crown phase into the future, including the tenant at will phase through to the owner and lessee phase, which corresponds with its extension to the timing of the action or reopening of the action to correspond with future assessment work advanced exploration, extraction through to mine production. This was as opposed to requiring recourse to the courts. The provision allows for ongoing activities to be considered in any reconsideration and evaluation of damage. The commentary in the Green Paper does not appear to address, or to have even considered for that matter, the potential damage which could arise through rehabilitation work.

However, at the same time, the general definition for "mine" as a verb has purportedly been extended to include rehabilitation work, although the statutory construction and interpretation of this is problematic, as discussed above.

The only way in which rehabilitation may be caught in section 79, for purposes of surface rights compensation, is if it is found to constitute mining operations. It should be stated that, although "mine" when used as a verb may include the rehabilitation stage according to the analysis of the definition in clause (e), in point of fact, the word "mining" as used in clause 79(2)(d) is actually an adjective. As to whether this removes the phrase from having the definition applied, as set out in section 1, to the common usage of the term, being one of the principles of statutory interpretation, is also a possibility.

The tribunal has considered Mr. Alpert's submissions concerning a purposive analysis of the legislation, applied to the purpose of the **Mining Act** as set out in section 2. The purpose of the legislation as set out is primarily a public purpose, namely the development of mineral resources and the minimization of impact on the public through rehabilitation.

However, in Sullivan, R. **Driedger on the Construction of Statutes** (3rd ed.), Toronto: Butterworths, 1994, the purposive analysis is carried further, to consider more than the overall stated purpose of the legislation. At page 47:

> *Analysis of multiple purposes.* Although it is customary to speak of "the purpose" of legislation as if there were only one, most legislation has many purposes. These vary depending on the unit considered and the question asked. Each Act, each Part or Division, each provision, each legislative component has its own reasons for being there. These reasons may relate to the primary goals of the legislation, to secondary policies or principles, or the coherent operation of the legislative scheme. Sophisticated purposive analysis takes these multiple and shifting perspectives into account.

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The tribunal has considered Mr. Alpert's submissions and the forgoing commentary and finds that section 79 is to provide a statutory right to individuals, be they surface rights owners, pursuant to subsection (2), or mineral rights owners in connection with their mineral exploration workings or claim posts as provided in subsection (3). The purpose in this section, the tribunal finds, is to provide the individual who has been injured through mining activity or sees their own mineral claim workings injured by another, have recourse to the relatively quick and simplified procedures of the tribunal, of having damage assessed and compensation ordered. The provisions neither add to nor detract from the common law rights to bring an action for negligence or trespass. Rather, it is a statutory remedy to bring the action before the tribunal rather than the Courts.

The mischief which the changes to section 79 sought to address, aside from the new right of compensation to mineral workings, clearly involved the problem of having to establish compensation prior to the granting of a certificate of record, being early in the exploration process and well before the extraction phase. Recognition was given that the amounts set in advance were inexact and many circumstances could occur which would render the estimated or projected damage inaccurate or wholly incorrect. The changes to subsection 79(2) and (7) provided a mechanism to adjust the quantum of damage to reflect ongoing damage which occurred throughout the process.

As to whether the meaning of "mining operations" prior to the 1989 amendments could have captured rehabilitation was not necessarily considered. The timing of any pre-June 3, 1991 application would have been such that the remoteness of any potential rehabilitation activity to the certificate of record phase was such that, quite frankly, it did not arise in previous cases. Also, the previous Part XI was not so rigorous in its requirements as the current Part VII, amounting more in the nature of securing the shut-down of operations. It is clear, however, that the definition of "mining" prior to the amendments did not include rehabilitation.

It is only through the definition current definition of "mine" and the more rigorous requirements of Part VII that the possibility of rehabilitation work being included comes into play. It stands to reason that no change to the activities sought to qualify under subsection 79(2) was intended by the legislature in making the changes as it did. In other words, prior to the 1989 amendments, there was no way in which "mining operations" could be construed to include rehabilitation work, given the definition of "mine" at the time. As the changes are directed to the elimination of the certificate of record, and the corresponding timing of the application but not the actual activities captured, namely "mining operations", could it have been the intent of the legislature to capture rehabilitation activities?

Turning to principles of statutory interpretation, using the literal meaning rule, as set out in the **Sussex Peerage Case** {1936] All E.R. 151, the tribunal's first impression of the term, "mining operations" encompasses that of mineral extraction and production activities. This coincides with how the term was understood under the auspices of the **Mining Act** until the 1989 changes were made effective and the tribunal would go so far as to say, within the mining community itself both up to and after those changes became effective. Indeed, this is the gist of the issue here, for counsel are arguing the merits of including rehabilitation in the definition of mining, when a miner will distinguish between mining and rehabilitation, just as he or she would distinguish between prospecting and exploration on the one hand and mineral extraction and production on the other.

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It is only through the recent changes to the **Mining Act** in sections 1 and 79 that the issue arises that this phrase may have some greater meaning. The tribunal considers the words of Sir Wilfred Greene M.R. in **Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.** [1938] Ch. 174, at page 187:

> The results of the various constructions suggested on behalf of the respondents appear to me to be highly illogical and absurd. Nevertheless, this circumstance would not prevent the adoption of one or other of those constructions if upon the true interpretation of the language used it ought to be adopted. But when I find that each of these constructions involves straining and glossing the language of the section in a manner for which I can find no warrant, I am compelled to reject them. In my opinion the section means what it says.

To paraphrase the above, given the definition of "mine" in section, through use of terms exclusively defined for Part VII, and defining "mine" as a noun and verb, when "mining" as used in the expression "mining operation" is an adjective would, in the tribunal's opinion, amount to a straining of the language of the **Mining Act**.

In attempting to interpret the extent of the changes made to section 79, the tribunal has relied extensively on Driedger, E.A., in both the **Construction of Statutes**, 2nd ed., and in Sullivan, R. **Driedger on the Construction of Statutes**, 3rd ed., Markham: Butterworths, 1994, and has considered the following commentary at pages 313 and 314 of the latter:

COMMON LAW EVOLUTION PRECLUDED BY LEGISLATION

> *Courts may change common law*. It is well established that common law courts have a jurisdiction to change the common law in response to changing social conditions. In *R. v. Salituro*, Iacobucci, J. wrote:
>
> > The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.[50]
>
> The scope of this jurisdiction is explored by McLachlin J. in *Watkins v. Olafson*:
>
> > Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents.... While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
> >
> > There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to access the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court before it has a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover,

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[50] [1991] 3 S.C.R. 654, at 678.

> the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through courts and practitioners than by judicial decrees. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.[51]

For these reasons major changes in the common law are left to the legislature...

The common law with respect to injury or damage to surface rights continues to exist parallel to the provisions in the **Mining Act**. What was intended by these provisions, initially and perhaps most importantly, was to provide a relatively simple, quick and effective means of securing surface rights compensation before the status of the mining claim holder changed from licensee of the Crown to tenant at will of the Crown, or to a lessee or patent holder. This remedy proved inadequate, due to ongoing activity on the lands, and so the legislature sought to extend it to allow for ongoing calculation of damage throughout the life of the mine.

As can be seen from the determination in the Aquafor Beech case as well as that of the Ministry of Natural Resources, this statutory remedy is limited. It does not extend to activities on the lands done by third parties, other than the owner or licensee. Similarly, the lines which can readily be drawn in the current situation between extraction/production and rehabilitation could become blurred where rehabilitation occurs throughout the extraction/production process. Had the legislature intended the changes to subsection 79(2) to be a codification of the rights of all involved in such activities, this would be evident from more extensive amendments.

The tribunal finds that the phrase "mining operations" as used in clause 79(2)(d) does not include rehabilitation work. The reasons for inclusion of the terms used in the definition in clause (e) for the definition of "mine" in section 1 are not altogether clear, but the tribunal is persuaded that there was no legislative attempt to modify the pre-existing meaning of the phrase "mining operations" used in clause 79(2)(d). Mining in this phrase is used as an adjective, and therefore the tribunal finds that it is not bound by the definition, for in the

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[51] (1989), 61 D.L.R. (4th) 577, at 583-84 (S.C.C.).

words of Greene, Master of the Rolls, it would be a construction which would strain the meaning of the language used. Nor is there anything in the amendments made to the section which indicates the legislature addressed its mind to this issue.

The tribunal is fully cognizant of the fact that considerable consultations have gone on in the past and continue to occur through the Mining Minister's Advisory Committee. It is also cognizant of the considerable weighing of the potential impacts of new provisions which goes on and in particular with respect to mine rehabilitation. Without clear and unambiguous wording in subsection 79(2), the tribunal finds that it is reluctant to place on clause 79(2)(d) the meaning which the applicant is advancing.

Conclusions

The tribunal finds that it has no jurisdiction to hear the application of Robert W. Hopely and Werner Lake Developments Ltd. under clause 79(2)(d) of the **Mining Act**. The tribunal has found that the meaning of the phrase "mining operation" used in that clause does not extend to rehabilitation measures which may be carried out.

This declaration is made without prejudice to bringing an action in the Courts.