File No. MA 013-98

L. Kamerman) Monday, the 1st day
Mining and Lands Commissioner) of March, 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.
AQUAFOR BEECH LIMITED

Respondents
(Amended November 25, 1998)

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, 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 Werner Lake Development 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, Aquafor Beach Limited, 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, Aquafor Beach Limited, in Ontario Court (General Division).

3. **THIS TRIBUNAL FURTHER ORDERS** that costs in the amount of $750.00 shall be payable by Werner Lake Developments Ltd. and Robert W. Hopley to the Respondent, Aquafor Beach Limited.

DATED this 1st day of March, 1999.

Original signed by

Linda Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 013-98

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B E T W E E N:

WERNER LAKE DEVELOPMENTS LTD. AND ROBERT W. HOPLEY
Applicants

- and -

AEC WEST LTD.
AQUAFOR BEECH LIMITED
Respondents
(Amended November 25, 1998)

REASONS

Appearances:

Aquafor Beech Limited	James O'Brien, Counsel

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Werner Lake Ltd. and Robert Hopley	Howard P. Alpert, Counsel
AEC West Ltd.	Richard Coburn, Counsel

Background

On April 22nd, 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.

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The tribunal considered the consent for a declaration with respect to its jurisdiction under subsection 79(2) concerning Aquafor Beech Limited and determined that it could not issue a consent declaratory order as to its jurisdiction without a hearing on the merits as to whether Aquafor Beech Limited, as agent of AEC West Ltd., was captured within the meaning of the clauses of subsection 79(2), and in particular, whether an agent could be considered an owner as contemplated by clause 79(2)(d) of the **Mining Act.**

The tribunal appointed November 26, 1998 for the hearing of all of the various motions. At the convening of the matter, Mr. O'Brien advised the tribunal that he had been unable to obtain instructions from his client, owing to the fact that the tribunal's decision to not issue the declaration on consent was made on November 25, 1998. The hearing of the motions of Aquafor Beech and AEC West was adjourned to January 7, 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.

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1. Does the meaning of "owner" who carries on mining operations as set out in clause 79(2)(d) include an agent for such owner?

2. If the answer to the first issue is "yes", does "mining operations" include mine rehabilitation work?

Submissions

Mr. O'Brien filed the following documents in support of his motion: Notice of Motion, Affidavit of Robert Whyte, who is a Director and Officer of Aquafor Beech, Factum, and Affidavit of Service, all having been marked as Exhibit 12; and a Supplementary Factum and Book of Authorities, having been marked as Exhibit 22.

As was noted by Mr. Coburn, these and other documents noted below, are not properly exhibits in this matter. Rather, this reflects a procedure adopted by the tribunal to mark and tab all individual letters, submissions and bound materials submitted in any matter for ease of access during a hearing, particularly in a matter such as this proceeding, when a considerable volume of material was filed pursuant to the tribunal's Order to File.

Mr. O'Brien commenced by referring to the Affidavit of Mr. Whyte, which essentially parallels the wording of clauses 79(1)(a) through (d) which set out that Aquafor Beech Limited has never done, owned or been in any of the situations described. The question raised by the tribunal is whether the definition of the word, "owner" found in clause 79(2)(d) is expanded so as to include an agent of an owner.

Mr. O'Brien stated that there is no doubt that Aquafor Beech Limited was operating on the subject lands as the agent of AEC West. Aquafor was not working on the lands of their own accord, but were on retainer, their speciality being environmental rehabilitation. They are an engineering company, specializing in the environmental clean up of lands and soils and were retained for that purpose.

The definition of "owner" found in section 1 of the **Act** is specifically expanded for purposes of Parts VII, IX and XI. It states:

> "owner", when used in Parts VII, IX and XI, includes,
>
> (a) every current owner, lesser or occupier of a mining or part of a mine, or a mine hazard or any land located, patented or leased as mining lands,
>
> (b) an agent of the current owner, lessee or occupier, or a person designated by the agent or the current owner, lessee or occupier, as being responsible for the control, management and direction of a mine or part of a mine, or a mine hazard,

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(c) a secured lender with respect to a mine or mining lands who has entered into possession of the mine or mining lands pursuant to their security,

but does not include,

(d) a person receiving only a royalty from a mine or mining lands;

Mr. O'Brien pointed out that subsection 79(2) is not found in any of the enumerated Parts, but rather is found in Part II. He submitted that it is plain and obvious from reading that the definition is not expanded for purposes of subsection 79(2).

Expressio unius pest exclusio alterius, meaning to express one thing is to exclude another. According to this principle, the list of things within a stated category is deemed to be exhaustive. Mr. O'Brien submitted that when there is a definition as found in section 1, which lists when the definition is to apply, that list is deemed to be exhaustive. It is not for us to imagine, in that it is clear and unambiguous that it does not. Given that, the ancillary question of the tribunal, of why subsection 79(2) has not been expanded to include an agent, is not a question which need be answered. The only time when such questions need be explored is when faced with ambiguity, which Mr. O'Brien submitted is not the case here.

Using the principle of statutory construction which requires that the **Act** be read as a whole, Mr. O'Brien set out in paragraph 13 of his Supplementary Factum (Ex. 22):

13. The intention of a legislature can be defined by principles of construction and interpretation, more specifically by reviewing:

(a) the Act as whole is to be read in its entire context so as to ascertain the intention of parliament (the law is expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relationship between the individual provisions of the Act).

(b) the words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in light of the intention of the legislature embodied in the act as a whole, the object of the act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law that is the end.

(c) if the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.

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(d) if, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, their is disharmony within the statute, statues in pari materia, or the general law, then an unordinary meaning will produce harmony is to be given to the words, if they are reasonably capable of bearing that meaning.

(e) if obscurity, ambiguity or disharmony cannot be resolved objectively by reference of the intention of the legislature, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected.

Mr. O'Brien submitted that there is a logic in the way in which the legislation is set out. Part I contains the definitions, including "owner". Part II sets out various rules governing obtaining a licence, for the staking of mining claims, prospecting and the performance of assessment work, which Mr. O'Brien suggested is a preliminary step for potential mining rights owners to follow leading up to the acquisition of greater title.

Why is section 79, involving surface rights compensation, found in this Part? Mr. O'Brien submitted that compensation is mandatory from the mining rights owner to the surface rights owner. The section appears to contemplate that agreements are made prior to the commencement of the mining work. Mr. O'Brien likened this to a cost benefit analysis, which includes the cost of compensation to surface rights owners prior to commencing the work, which explains why it is found so early in the legislation and early in the development of a mining property.

Part VII deals generally with the mining operation, the actual digging, smelting and other work, viewing it extensively from an environmental perspective. Specifically, it sets out that closure plans must be in place before, during and after actual mining is carried out.

Part IX deals with disclosure. Part XI is the enforcement provision of the Mining and Lands Commissioner and the Ontario Court (General Division) to ensure adherence to procedures and practices by miners.

What is important about section 79 is that there must be an agreement, as contemplated similarly within the **Industrial and Mining Lands Compensation Act**, providing that agreements must be arrived at prior to any mining going on. The agreement can and should be registered on title. Subsection 79(6) provides that the compensation payable under that section is a special lien, which must be regarded as an extraordinary remedy, one which can be registered on property and most notably, cannot be registered on the property of another.

An agent has no title to the property involved and does not own the land. It is not within the contemplation of the legislature that one could obtain a lien on some distant property to the lands involved, on the property of an agent who acts for an owner. It would be an absurdity. On the principles of statutory interpretation and certainty, it cannot be said that the legislature can extend the lien to be placed on the property of another, in this case an agent.

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The definition of owner, in its ordinary sense, is found in paragraph 16 of the Supplementary Factum, from **Black's Law Dictionary**, West Publishing Company, 4th Edition, St. Paul, Minnesota, 1951, p. 1259:

> owner - the person in whom is vested the ownership, dominion or title over property
>
> - he who has dominion of a thing, real or personal, corporeal, or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right
>
> - the term is however a **nomen generalissimum** and its meaning is to be gathered from the connection in which it is used, and from the subject matter to which it is applied

While these definitions leave the sense that the meaning of owner is difficult to define determinatively, in that an owner may not have title, but one can conclude that at the very least possession or beneficial use is involved. Mr. O'Brien submitted that someone working on the land for two or three days is not an owner and he further submitted that the question of legal title is germane to the bringing of an application under section 79, for purposes of registration on title as well as obtaining the special lien.

Mr. O'Brien submitted that section 79 is the only section in the **Mining Act** which deals with the rights of private parties, where all of the others govern the relationship between the state and private individuals. Therefore, section 79 must be regarded as special and had it been intended to increase the jurisdiction in the section beyond the plain meaning of the words used, it would have been done with clear and unambiguous language.

A second reason is that while the **Act** is primarily for the promotion of mining, it also ensures the health and safety of the public through minimization of impact of mining activities, the rehabilitation of land and the protection of the environment. The environmental concerns set out in Part VII are extensive. Mr. O'Brien submitted that the definition of owner was expanded to ensure that the environment of the province is protected. In the absence of legal title, it is the intent of the legislation that one be able to go against those who stand to gain from their mining activities. In other words, those who benefit from mining should bear the cost. This is reflected in the broadened definition of owner, as well, as it is limited to the agent who has control of the mining operation. They are capturing the agent of the owner, someone who is well versed with the operation of a mine, having the management control of the mine. Such agents should perform operations and have complete control of any activities.

Concern for the environment is relatively new in such enterprises. To ensure that the environment is well looked after, the legislation is designed to capture those who stand to gain

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from such activities. Otherwise, it could just as easily capture janitors. There is no intention to capture other agents to make them responsible for the surface rights.

It can be seen from the case law submitted that one of the considerations in fixing compensation is that the miner will have the right to virtually destroy the surface rights (see gzuba). To be captured by the section, it must be the owner who stands to gain from the riches extracted. This is to be regarded as an equitable treatment of those having contiguous rights in land. It cannot be expanded to include an agent.

Mr. O'Brien raised one other issue briefly, being of policy concern, which has great implications for professional engineers and insurers. These proceedings have put both on notice as well as the Superintendent of Insurance. The concern is that professional engineers have certain expertise which allows them to rehabilitate mining lands. They are routinely retained to design rehabilitation closure plans. There is nothing within a plain reading of the **Mining Act** to suggest to engineering firms that they are deemed to be an owner by virtue of accepting a retainer. The definition is clear that such engineering companies should not be captured. If the decision should be such that an engineering firm should accept a retainer and be deemed an owner, the absolute liability created by subsection 79(2) making them liable for compensation to the surface rights owner, there has been no opportunity to assess the associated risks and charge for insurance coverage for that risk.

Mr. O'Brien pointed out that the law requires that professional engineers have insurance, otherwise they cannot practice. Their current insurance coverage is for negligent acts, errors and omissions. There is currently insurance compensation for injury or as a result of such errors. To date, the professional engineers do not ask for insurance for deemed ownership when the deeming of ownership occurs at the time they accept a retainer. There is no insurance for this professional association which would cover such absolute liability arising from deemed ownership, particularly when it should be regarded as one of the incidents of ownership from which compensation flows.

This whole matter raises severe policy implications. The professional engineers may be required to hold harmless and indemnify surface rights owners, involving potentially vast amounts of money which may be demanded in compensation.

At present, he suggests, any environmental work which would be performed by a professional engineer would grind to a halt, as they would not be in a position to take on the work, due to the risks associated with deemed ownership.

Mr. O'Brien submitted that the current activities involved took place long after the mining operation had ceased. There has been no opportunity in the environmental rehabilitation to make money. As well, the mining rights owner could well be bankrupt, while the engineer, who is still around, has deep pockets. Mr. O'Brien stated that he did not believe that it was the intention of the legislature to put a chill on a contractual basis between the mining rights owner and professional engineers for purposes of environmental rehabilitation work, but the effect would be to prevent any such environmental work going on.

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As to the matter of absolute liability, this would lead to some discussion of what the engineer did, involving assessment of errors or omissions, which Mr. O'Brien submitted is beyond the jurisdiction of the tribunal.

Mr. Alpert submitted that the intent of subsection 79(2) of the **Mining Act** is to include and encompass the agent together with the owner, making each of them liable for surface rights compensation. The definition of "owner" has been broadened, and the proper interpretation is to give it a broad and remedial interpretation to include both an owner and agent.

It is fundamental, when one considers the purpose of the **Act** set out in section 2, that it is to include staking and the minimization of environmental impacts through the rehabilitation of mining lands, the latter of which highlights the importance of minimizing the impact of mining activities, which must be seen as an essential purpose of the **Mining Act**.

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 which applies to both owners and agents. The reason for this is clear. An agent, in law, has the authority to bind an owner contractually and can create tort liability for the owner.

It has been stated that Aquafor Beech is admittedly the agent for AEC West. In its work permit from MNR, dated June 9, 1994 (Ex. 1, Tab 6), at page 2 setting out the conditions, in paragraph 2 it has covenanted to "indemnify and forever save and keep harmless the Crown " from any claims arising from injury or damage to property. Under paragraph 3, it is set out that the permittee is an occupier under the **Trespass to Property Act** and the **Occupier's Liability Act** and must ensure that persons entering the property are kept reasonably safe. As can be seen from Exhibit 6, which outlines the rehabilitation work done by Aquafor Beech for AEC West, it is evidence that Aquafor Beech was an agent responsible for the control, management and direction of the mine, by having control over the direction of the rehabilitation program for the mine. It controlled, managed and directed the rehabilitation work, which Mr. Alpert submitted, is part of mining operations. In fact, the title of Part VII of the **Act** is "Operation of Mines".

Section 139 defines "progressive rehabilitation" as being "rehabilitation done continually and sequentially, within a reasonable time, during the entire period that the project continues". As can be seen from the Final Report prepared by Aquafor Beech (Ex. 6, Tab 62, page 22, paragraph 4) it is clear that the rehabilitation work is ongoing. Quoting from that paragraph, it states, "It is anticipated that the 1994/1995 Rehabilitation Program should decrease the requirement for on-going and significant maintenance works for the next 10 years or longer, subject to the occurrence of any infrequent and extreme storm events."

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

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

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(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

(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 is 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.

The agent was engaged in this work and did it for the owner. Mr. Alpert submitted that the agent, Aquafor Beech, had the care, control and management of the mine for purposes of the rehabilitation work undertaken for AEC West.

Mr. Alpert submitted that, from the definitions used in the legislation, it is obvious that the mining activity at this mine, in the manner defined, is continuing and ongoing, because the legislation requires ongoing 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.

Section 139 defines "rehabilitate". The measures to be taken are in accordance with prescribed standards and it is obviously intended that the work should be done, through an ongoing duty. In fact, according to section 142, mine production cannot be commenced or

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recommenced without submitting a closure plan, which continues through every phase of the mine, through extraction and to final closure. Mr. Alpert submitted that the duties imposed by Part VII are duties imposed on the owner of the mine as well as any agent of the owner at the time.

The definition in section 1, it is submitted, when dealing with an owner under subsection 79(2), deals with compensation for damage to the surface rights of the application, that there is no direct interpretation of "owner" of the mining lands, and therefore one must look to methods of statutory interpretation.

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**. The ambiguity of the phraseology of the definition of "owner", in Mr. Alpert's submission, requires that the proper interpretation is to give meaning to the phrase "owner" to permit the remedial aspect of the **Act** to be accomplished. The definition of "owner" is specified to apply when used in Parts VII, IX and XI. It includes every person, immediate proprietor, lessee or occupier of a mine. Mr. Alpert submitted that it includes Aquafor Beech, who is AEC West's immediate agent. The definition is to include agents or any person designated by the owner, having management of a mine or part thereof. The definition goes on to state that it does not include someone who receives a royalty. Mr. Alpert submitted that the qualifying language used does not apply to restrict the application of the definition exclusively to those Parts specified. He submitted that the **Act** can be read to include the definition of an owner, which includes an agent, throughout the **Act**.

The reason for such an interpretation is to aid the surface rights owner of the full remedial aspects of subsection 79(2). Otherwise, a narrow interpretation would put handcuffs on the tribunal in its jurisdiction to grant compensation for damage to surface rights. It is clear that the owner/agent must comply with the rehabilitation provisions of the **Act**. To allow the agent to escape this requirement would defeat the remedial provisions. It is submitted that as a direct result of performing that type of rehabilitation work, if damage is caused to the surface rights, the agent should be liable to compensate for that damage.

The **Act** contemplates that a mine should be rehabilitated at the end of its useful life. At this point it is nothing more than a liability, because the obligations involved are more onerous than the asset value. Since the definition of owner is expanded by Part VII, the legislature contemplated that the rehabilitation would be done by the owner or an agent. If this is not the case, then an owner whose only asset is the mining rights, could frustrate the intention of the legislation, retain an agent to do the work, and then through bankruptcy avoid liability, leaving the agent to walk away as well. By giving the tribunal jurisdiction over the actions of all owners, as defined, this situation is designed in the legislation to be avoided.

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Mr. Alpert referred to the meaning of the word "owner" as found in **The Canadian Law Dictionary**, Law and Business Publications (Canada) Inc., Toronto, p. 271, being,

> **owner:** The person who is beneficially entitled to a right. However, the term is frequently used to denote a person who is beneficially entitled to a corporeal thing such as land, chattels, goods, animals, etc.
>
> The term also has the extended meaning of denoting the person who has the dominion or control over a thing, although the title to the same may be in another such as the conditional sales purchaser.

Mr. Alpert submitted that an examination of the history of the legislation reveals the intent of the legislature to expand the scope of the remedial provisions of ss. 79(2) and has granted the tribunal jurisdiction to order compensation of an owner of surface rights of land for damages sustained by the carrying on of any mining operations by either the owner of the mining lands or the owner's agent. Mr. Albert contrasted the provisions of the earlier and current drafting of the definition of "owner" and the predecessor to section 79, with the sections from the 1980 R.S.O. which set out:

> **1.** 21. "owner" when used in Parts IX and XI, includes every person, mining partnership and company being the immediate proprietor or lessee or occupier of a mine or plant, or a part thereof, or of any land located, patented or leased as mining land, but does not include a person or a mining partnership or company receiving merely a royalty, rent or fine from a mine, plant or mining lands, or being merely the proprietor of a mine, plant or mining lands subject to a lease, grant or other authority for the working thereof, or the owner of the surface rights and not of the ore or minerals;
>
> **92.**-(1) Where the surface rights of land have been granted, sold, leased or located to the Crown, or where land is occupied by a person who has made improvements 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 operations, 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.

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Mr. Alpert submitted that the remedial purpose of ss. 79(2) gives the tribunal jurisdiction to award compensation in situations such as the one involving his client and Aquafor Beech Limited.

Relying on section 10 of the **Interpretation Act**, R.S.O. 1990, c. I 11 and E.A. Driedger, *Construction of Statutes (3rd 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 accordingly receive 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. ...
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> ... Under a purposive approach, the court defers to the legislature not by decoding its language but by ensuring that its plans are carried out.
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> ***Propositions comprising purposive analysis***. The purposive approach to statutory interpretation may be summarized by the following propositions.
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> (1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.
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> (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.
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> (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.
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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*.[1] Although this rule did not originate in Heydon's Case, it was there where it received its most famous and influential formulation:

> 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:-
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> 2nd. What was the mischief and defect for which the common law did not provide.
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> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the common-wealth.
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> 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 privato 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*.[2]

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 ....[3]

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. ...

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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

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1 (1584), 3 Co. Rep. 7a, 76 E.R. 637.

2 *Ibid*., at 638(E.R.).

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

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.*:

> [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]
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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]
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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

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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.).

> 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]

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.
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> 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.

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

[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).

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:

> 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...

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[93] (1987), 46 D.L.R. (4th) 376 (N.B. C.A.).
[94] Ibid, at 379.

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

> 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]
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> 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]

page 327:

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.
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> 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:

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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.

> ... 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]

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):
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> > 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 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.*
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> *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:
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> > 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]

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[60] Id., p. 395. Similarly, Lord Herschell in *Brophy v. A.G. for Manitoba*, [1895] A.C. 202, 216.
[94] (1984), 9 D.L.R. (4th) 161 (S.C.C.).
[95] Ibid., at 176.

> 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.
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> ***Uses of Headings***. The arrangement of headings and subheadings within an enactment helps reveal the overall scheme of an Act. In well drafted 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.
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> ***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.
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> 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.*

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[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.).

> *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.
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> ... 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.:
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> > 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 **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". ...

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> 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 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.

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.

While the facts of the **Sparling** case are quite different from those of the case before the tribunal, an analogy can be drawn. Mr. Alpert submitted that the owner of the lands and their agent(s) are inextricably intertwined, and that is the remedy the legislature sought to provide in subsection 79(2). "Owner", as used in subsection 79(2) should be interpreted to include the agent. The definition is used so that those listed should be liable in the same way as the owner, due to being responsible for the activities. That is what the legislation is looking to, namely the care, control and custody of a mine. 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]

To respond to Mr. O'Brien's arguments, some emphasis was placed upon the provisions of subsection 79(6), providing for a special lien by way of compensation. That lien, in Mr. Alpert's submission, is just one additional type of remedy. It doesn't take away from the ordinary remedies. With an Order for compensation, one can take it to the sheriff and obtain a garnishment. To do so against a party, it need not involve the legal owner of the mining lands. To allow the application to proceed would be more than just a granting of rights, but could allow the applicant to enforce a monetary judgement, through, for example, the seizure of assets. While a lien may be a special remedy, it does not preclude others. See, by way of example, subsection 79(5) of the **Act**, where further work on the mining lands could be prohibited.

Mr. Alpert submitted that the tribunal has a broad range of powers in determining and awarding compensation which are not limited to the granting of a lien. If that can be executed only against one, then the tribunal is not limited to it, as other remedies can be awarded against other parties involved.

That the agent, Aquafor Beech Limited, did not have money at stake in this matter is not entirely correct, as it did not work for free. As to the matter of attempting to gain the tribunal's sympathy for professional engineers who may be insured for negligence, Mr. Alpert submitted that Mr. O'Brien was purporting to offer expert evidence on this by way of argument, asking the tribunal to be concerned about the precedential effect that a decision would have on their liability. Mr. Alpert submitted that they are already negligent and they carry insurance for just such situations. As to the question of adequacy, he submitted that that should not be a problem for the tribunal. Furthermore, the tribunal ought to disregard Mr. O'Brien's policy arguments as being entirely irrelevant.

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[72] Per Lock J., Canadian Fishing co. v. Smith, [1962] S.C.R. 294, 307.

Mr. Alpert concluded by asking the tribunal to consider the legislative intent behind the provision. He submitted that it has been included in the **Act** in contemplation of the possibility of negligence, just as the MNR work permits contemplate the possibility of negligence. Compensation has nothing to do with who is the legal owner, but rather that liability has been extended to include agents who fall within it.

In reply, Mr. O'Brien submitted that subsection 79(2) does not involve a determination of negligence, but rather involves absolute liability. The words involved are "shall compensate". He reiterated the policy concern that an engineer reading the **Act** could not have made such a determination of liability when on a plain reading they could not determine that they might be caught. Rather, the section involves legal liability stemming from ownership, whether legal or deemed. There is no purposive interpretation which could alter this fact.

As to the matter of headings, generally, Mr. O'Brien has no problem with the submissions of Mr. Alpert, stating that headings are a matter of motherhood. However, the headings in question are not those concerned with section 79 and therefore have no applicability to the issues in this case.

As to the purpose of the legislation, Mr. O'Brien submitted that the manner in which Mr. Alpert wishes to see the legislation interpreted amounts to the tail wagging the dog. Section 2 does not say that the purpose of the **Act** is to compensate surface rights owners. Rather, it pushes forward mining while not despoiling the environment. As to the matter of compensation, it is but one tiny section. That it is remedial, to prevent mischief, Mr. O'Brien stated that he had no difficulty with that assertion. However, the remedy is for the public health and safety. Mr. O'Brien wondered how such compensation becomes a matter of public concern.

The purpose is to force upon those gaining from mining operations that they have an obligation to rehabilitate. The purpose is not to run around and compensate. The question of compensation to this owner, does not have the effect of involving the agent. The impact of this purpose is found in Part VII of the **Mining Act**, and not with respect to compensation for surface rights - one section - not found in Part VII.

As to whether this is a new remedy, similar compensation provisions are found in the 1897 statute. Rather, it is the environmental concern which is new, and not that of compensation. In this regard, the emphasis is on the environmental concern and not the creation of a new heading of compensation.

On the matter of agency, the doctrine of agency provides that an agent can bind its principal, and be liable for tort. Subsection 79(2) neither captures the agent, nor does it cover torts. Aquafor Beech was not acting strictly as an agent, acting pursuant to an agreement made with a third party. That is to say, there is no agreement between the Applicants and AEC West, for which Aquafor Beech is the agent of AEC West. Aquafor Beech has no contractual relationship with the Applicants. There are no dealings with the Applicants which give rise to tort. Rather, the Applicants knew that Aquafor Beech was acting for a disclosed principal, which gives rise to the Doctrine of Election. When dealing with a disclosed principal, the injured party must chose from whom compensation will be sought. The problem with the way

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in which Mr. Alpert is seeking to apply on behalf of the Applicants is that the Doctrine of Election requires that once the choice is made as against whom an action is brought, the right to exercise a remedy against the other is lost, whereas Mr. Alpert is seeking to override the common law and bring this Application against both AEC West and Aquafor Beech. There is nothing in the **Mining Act** which specifically overrides the Doctrine of Election, allowing an applicant to seek remedies against numerous parties.

This is tied into the relationship of the tribunal in this matter. Part VII involves the State imposing its powers on those deemed responsible. There is no question of election, but in this case, it is the relationship between private parties which gives rise to the situation created.

On the matter of agency, Mr. O'Brien submitted that he fails to see how the requirement of a work permit from MNR gives rise to any relationship with the owner of the surface rights. Rather, it is a matter of statutory obligation and not one of a relationship with the surface rights owners.

Mr. O'Brien discussed the issues raised in **Royal Trustco**, where the issue was whether the manner in which the action was brought was appropriate. There were no findings of joint and several liability, but only whether the legislation allowed an action against two parties when it was silent about bringing the action against one party. The basis of the Court's decision was that the legislature was capable of listing the powers of the Director on behalf of the shareholders, it being clear that broad powers were granted, and that an application could be brought against both parties.

In conclusion, Mr. O'Brien submitted that it is absolutely clear that Part VII includes an owner and agent, and that this was not done in Part II, so that the converse conclusion must be equally clear - that the legislature did not intend the section to apply to an agent.

Mr. Alpert submitted that Aquafor Beech Limited's Factum did not raise the matter of the insurance situation with professional engineers. There is no material, in his submission, upon which to base the conjectures raised by Mr. O'Brien. He submitted that these submissions were unsubstantiated.

Subsection 79 does not deal with tort. It is implicit in the language used that we are dealing with damages which could occur. Tort is one way in which damage could arise. As to the election principle, there is no substantiation of Mr. O'Brien's position and Mr. Alpert submitted that it should be regarded as a bald faced proposition, and nothing more.

As to the work permit statement on behalf of Aquafor Beech, Mr. Alpert submitted that there has been an admission of the agency relationship. This is a clear admission of Aquafor's role in the rehabilitation of the property. It shows that they fell within the meaning of "owner".

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Costs

Mr. O'Brien pointed out that a consent agreement had been reached prior to the hearing of the motion. The tribunal had been notified of this agreement and of the payment of $750 in costs. Mr. O'Brien stated that he did not believe that Mr. Alpert sought to overturn the consent on the matter of costs. Therefore, Mr. O'Brien stated that he was seeking the payment of those costs of $750.00 plus an additional $750.00. Mr. Alpert's position had been clear, that the parties would have the right to pursue this matter further in the Courts.

Mr. Alpert agreed as to the payment of $750.00 in costs originally agreed to, but stated that the matter of the hearing was due to the fact that the tribunal felt it could not allow the matter to be disposed of on consent, requiring a hearing on the merits. It was the position of the tribunal that the matter was sufficiently novel that argument was required before it could be disposed of.

Findings

The tribunal disposed of this matter at the hearing, without full and complete reasons. These findings are an expansion of its reasoning in finding that the meaning of "owner" in clause 79(2)(d) does not extend to include an agent. This being the case, the matter of whether "mining operations" include mine rehabilitation work is not dealt with in these Reasons, but will be explored fully in the Reasons for the AEC West motion.

The **Mining Act** is unusual in the manner in which it sets up the definition of "owner". The definition, found in section 1 and includes *some agents*, is limited in its applicability to Parts VII, IX and XI. There is no definition which expressedly applies to other Parts of the **Act** where it is found, such as section 79. Yet, the word does appear and some meaning must be given to it.

Parts VII, IX and XI and involve the Mine Rehabilitation provisions, entitled, "Operation of Mines", "Statistical Returns" and Offenses, Penalties and Prosecution" respectively. A perusal of Parts VII and XI reveals that the word "owner" is used sparingly. Subsection 139(1) of Part VII defines "proponent" as including an owner, and others. It is the "proponent" who is required to carry out or refrain from doing the activities set out in the Part. Interestingly, the meaning of the word "proponent" is "one who makes a proposal" [**Webster's Third New International Dictionary** (Springfield, Massachusetts: Merriam-Webster, 1993)]. Part VII involves the filing of and adherence to a closure plan, central to the operation of a mine from the advanced exploration stage through to the final closure stage, so that the use of the word "proponent" is linguistically accurate. Similarly, the part dealing with offenses largely involves persons who contravene any of the various activities, with several exceptions, found in clause 164(1)(f), involving an owner of a mine, and subsection 167(5), involving "every director or officer of a corporation that engages in a project under Part VII". Part IX, involving statistical returns, is the responsibility of the owner of a mine.

The meaning of "owner" in law, was discussed by both Messers. O'Brien and Alpert, selecting different portions. A fuller selection of definitions found in **Black's Law Dictionary** is set out:

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> **Owner**. The person in whom is vested the ownership, dominion, or title of a property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.
>
> The term is, however, a **nomen generalissimum**, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the term also includes one having a possessory right to the land or the person occupying or cultivating it.
>
> The term "owner" is used to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has "title" to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term "title," unlike "ownership," is a colourless word; to say without more that a person has title to a certain property does not indicate whether he holds such property for his own benefit or as trustee.

The definition of "agent" is also reproduced in part from [**Black's Law Dictionary**]:

> **Agent.** A person authorized by another (principal) to act for or in place of him; one intrusted with another's business. ... One who represents and acts for another under the contract or relation of agency (*q.v.*). A business representative whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.

The tribunal finds that it is clear that an agent is not an owner in the legal sense, whatever liabilities and obligations may be set up by statute or common law. An agent does not have either beneficial or legal title to the thing involved. There is no dominion over that thing. There exists between the owner and agent a contractual relationship which ends when the obligations set out in the contract are at an end, barring any further rights which might arise flowing from the completion of that contract. Much of the case law on the meaning of the word relates to construction liens, insurance and sale of goods, therefore turning on whose property may be affected and when the law regarding ownership may be applied, regardless of when title passes.

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It is quite clear from the facts that Aquafor Beech Limited has no interest in the mining lands, other than that of an agent or contractor. It had no dominion over the lands, other than that of a contrac of time, undertaking certain fixed items, as set out in Exhibit 6, being the Aquafor Beech Limited 1994/1995 Rehabilitation Program, set out as at page 5 of the Final Report:

- repair of the Werner Lake Road;
- restoration of natural water levels in Gordon Lake;
- tailings area - ditch and spillway construction;
- tailings area - dam and embankment stabilization;
- rehabilitation of the mine site;
- rehabilitation of the town site;
- rehabilitation of the Shaft No. 1 area;
- rehabilitation of several dump sites; and
- general site restoration.

The tribunal has considered the lengthy and compelling analysis of Mr. Alpert and in particular, the purposive analysis and the use of heading in statutory interpretation. However, it finds that the ordinary meaning of the word "owner" is to be applied for those Parts which the statutory definition does not include. It further finds that there is that there is no ambiguity in the meaning of the word, "owner" as it is used in clause 79(2)(d). The wording states quite clearly that the lessee or owner shall compensate the owner of the surface rights for damages sustained by [mining] operations. Without considering the issue of whether rehabilitation work is included in mining operations, the tribunal finds that the meaning of the word "owner" is apparent from a plain reading of the subsection. There is no ambiguity created by the use of the word "owner", which requires the tribunal to look to rules of statutory interpretation, such as the purposive analysis submitted by Mr. Alpert. "Owner" is found to have its usual meaning and not the expanded statutory meaning imported for purposes of Parts VII, IX and XI. In other words, it is the person in whom legal or beneficial title is vested, the one who has dominion over the thing. While Aquafor may have had certain contractual obligations over the mining lands, this does in no way mean that it had dominion over those lands.

The creation of the relationship between AEC West and Aquafor Beech Limited arose when Aquafor Beech Limited contracted to perform the rehabilitation work. While Part VII may capture some agents, it is noted that prior to the creation of the contract, MNDM could not require Aquafor Beech to file a closure plan, as it would not have fit within the expanded definition of "owner" applicable in Part VII at that time. However, regardless of the timing of creation of the agency, it is quite clear that Aquafor Beech Limited is not captured by clause 79(2)(d).

The use of the word "owner" is also found in subsection 84(1), which is also located in Part II. It involves the situation where a lessee or owner may obtain a lease of surface rights in connection with both mine operations or tailings and waste disposal. Following Mr. Alpert's reasoning that a word used within legislation is to have the same meaning throughout, the tribunal finds that it agrees and examination of this subsection serves to confirm

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that the definition cannot include an agent.. It is beyond comprehension to suggest that the Ministry of Northern Development and Mines would lease surface rights to an agent, to accommodate the mining operations of another. Clearly, the meaning of the word "owner" is its ordinary meaning, apparent from the intent of this subsection, that it is the entity having dominion over the mining rights who would be entitled to a lease of the surface rights under certain conditions pursuant to subsection 84(1).

The tribunal is also persuaded in these findings by the wording of subsection 79(6), which states in part, "*The compensation is a special lien* upon any mining claim or mining lands, as the case may be ...". The definite article "the" is used, so it cannot be taken as selective as to whether compensation ordered *may be a special lien on the property, if the circumstance of the particular owner warrant*. Rather, the meaning is clear - any such compensation as may be awarded by an order will be a special lien. A lien can occur only on the property of the owner limited to the mining lands involved. There can be no other meaning.

Finally, as submitted by Mr. O'Brien, and as noted by the tribunal orally at the hearing, the **Mining Act** sets out a fairly extensive list in subsection 79(2) as to whom the provision applies to. Without at this time dealing with the question of mine rehabilitation, the tribunal agrees that this list is one to which the principle of *expressio unius* applies. The language does not include an agent, and therefore, it is to be concluded where there is an operating mine in which an agent performs certain work on behalf of the owner or lessee, the surface rights owner must seek compensation from that owner or lessee, and after a hearing, should one be required, the compensation would be a special lien on that mining property.

Costs

The tribunal finds that it will award costs in the amount of $750.00 payable by the Applicants to the Respondent, Aquafor Beech Limited. This was the amount agreed upon when the parties sought to have the declaration requested issued on consent. The tribunal agrees with the submissions of Mr. Alpert that the need for a hearing on the merits was at the request of the tribunal and his client should not be made to bear the additional costs requested as a result.

Conclusions

The motion of the Respondent is granted. A declaration will be made that clause 79(2)(d) of the **Mining Act** does not extend liability for compensation to the surface rights owner by an agent of the owner of mining lands carrying on mining operations. This declaration is made without prejudice to bringing an action in the Courts.

Costs in the amount of $750.00 are payable by the Applicants, Werner Lake Developments Ltd. and Robert W. Hopely to the Respondent, Aquafor Beech Limited.