File No. MA 005-12

L. Kamerman)
Mining and Lands Commissioner)
M. Orr)
Deputy Mining and Lands Commissioner)

Friday, the 24th day
of August, 2012.

THE MINING ACT

IN THE MATTER OF

Mining Claims P-4251521, 4251523, 4251524, both inclusive, situate in the BMA 522 862 Area, 4251514 to 4251520, both inclusive, situate in the BMA 523 862 Area, 4250189, 4251434, 4251510 to 4251513, both inclusive, 4254220, situate in the BMA 524 862 Area, 4248373, 4248438, 4248439, 4251502 to 4251509, both inclusive, situate in the BMA 525 862 Area, 4256490, situate in the BMA 526 862 Area, situate in the Porcupine Mining Division, TB-4251534 to 4251542, both inclusive, situate in the BMA 521 863 (TB) Area, 4248592, 4251525, 4251527 to 4251533, both inclusive, situate in the BMA 522 863 (TB) Area, 4251698 to 4251700, both inclusive, 4251881, 4252051 to 4252056, both inclusive, 4252058, situate in the Dusey River Area (TB), 4251543 to 4251546, both inclusive, situate in the Hale Lake Area, 4251687 to 4251697, both inclusive, situate in the Kagiami Falls Area (TB), 4251656 to 4251658, both inclusive, 4251660 to 4251662, both inclusive, situate in the Sherolock Lake Area, 4248432 to 4248434, both inclusive, 4252059 to 4252064, both inclusive, situate in the Tanase Lake Area (TB), 4251547 to 4251550, both inclusive, 4251651 to 4251655, both inclusive, situate in the Tillett Lake Area, 4251663, 4251672 and 4251673, situate in the Venton Lake Area (TB) and 4251664 to 4251667, both inclusive and 4251669 to 4251671, both inclusive, situate in the Wowchuk Lake Area, situate in the Thunder Bay Mining Division, recorded in the name of Canada Chrome Corporation, (hereinafter referred to as the "Mining Claims");

AND IN THE MATTER OF

Mining Claims P-1192735, 1192740, 1192743 and 1192744, situate in the BMA 523 862 Area and 1192755, 1192756, 1192759, 1192769 and 1192772, situate in the BMA 524 862 Area, situate in the Porcupine Mining Division, recorded in the name of Canada Chrome Corporation by transfer, after the above-noted application was filed, on the 11th day of April, 2012, (hereinafter referred to as the "Transferred Mining Claims").

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AND IN THE MATTER OF

A referral by the Minister of Northern Development and Mines to the tribunal pursuant to subsection 51(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, of an application under the **Public Lands Act,** R.S.O. 1990, c P. 43, as amended, (**PLA**) for disposition under the **PLA** of surface rights over portions of the Mining Claims and the Transferred Mining Claims:

B E T W E E N:

2274659 ONTARIO INC.
Applicant
- and -

CANADA CHROME CORPORATION
Respondent
- and -

MINISTER OF NATURAL RESOURCES
Party of the Third Part
- and -

NESKATANGA FIRST NATION
Applicant for Party Status

ORDER ON PARTY STATUS

WHEREAS the Neskatanga First Nation ("Neskatanga") filed an application with this tribunal to be added as a party to this application, on the 28th day of May, 2012;

AND WHEREAS a Preliminary Motion in this matter was heard in the courtroom of this tribunal on the 5th day of July, 2012;

1. IT IS ORDERED that the application for party status of the Neskatanga First Nation be and is hereby dismissed.

2. IT IS FURTHER ORDERED that no costs shall be payable by any party to this matter.

Reasons for this Order are attached.

DATED this 24th day of August, 2012.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by M. Orr
M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

File No. MA 005-12

L. Kamerman	)	
Mining and Lands Commissioner	)	Friday, the 24th day
M. Orr	)	of August, 2012.
Deputy Mining and Lands Commissioner	)	

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B E T W E E N:

2274659 ONTARIO INC.
Applicant
- and -

CANADA CHROME CORPORATION
Respondent
- and -

MINISTER OF NATURAL RESOURCES
Party of the Third Part

- and -

NESKATANGA FIRST NATION
Applicant for Party Status

REASONS

Appearances:

Mr. Chris W. Sanderson, Q.C.	co-counsel for the Applicant
Mr. Toby Kruger	co-counsel for the Applicant
Mr. Neal J. Smitheman	co-counsel for the Respondent
Mr. Richard Butler	co-counsel for the Respondent
Ms. Peggy Thompson	co-counsel for the Party of the Third Part
Mr. Michael Burke	co-counsel for the Party of the Third Part
Mr. F. Matthew Kirchner	co-counsel for the Applicant for Party Status
Mr. Nathan Hume	co-counsel for the Applicant for Party Status

Introduction

This motion for standing stems from a referral under subsection 51(4) of the **Mining Act** (the "Section 51 hearing") involving two mining companies, one being the holder of an extensive chain of mining claims (Canada Chrome Corporation) and the other (2274659 Ontario Inc.) seeking relinquishment of a portion of the surface rights on those claims to build a road from the south to their chromite mine in the James Bay lowlands. The Neskantaga First Nation sought

standing as a full party to the hearing on disposition of surface rights or in the alternative to be recognized as an interested person within the contemplation of subsection 51(5).

Disposition of surface rights is governed by the **Public Lands Act**, administered by the Minister of Natural Resources. The refusal to consent to an application for the disposition of surface rights triggers a referral of the application, via the Minister of Northern Development and Mines, who refers it to the Mining and Lands Commissioner (MLC) for a determination.

The Issues:

1. What is the issue in a hearing held under s. 51 of the **Mining Act**?
2. Should the Neskantaga First Nation be granted party status?

Background

2274659 Ontario Inc., the applicant in the hearing before the tribunal, will be referred to by the name of its parent company Cliffs Chromite Ontario Inc. ("Cliffs") for ease of reference.

Cliffs applied to the Ministry of Natural Resources (the "MNR") in 2011 (May & December) for a disposition of surface rights under the **Public Lands Act**. Cliffs indicated that it was requesting an easement for the purpose of allowing the numbered company to build and maintain a road from a mine site in and around the McFaulds Lake area to a "proposed transload facility to the northwest of Cavell, Ontario."

According to documents filed with the tribunal, the holder of the mining claims, Canada Chrome Corporation ("Canada Chrome") intends to use part or the entire surface of the claims for a railroad to their own mine, in the vicinity of the proposed Cliffs mine. The mining claims in question run a distance of approximately 340 kilometres, north to south.

In January, 2012, the MNR advised Cliffs that it would have to obtain the consent of Canadian Chromite to any disposition "to enable MNR to grant an easement over [the] lands", as holders of the affected unpatented mining claims. Also, the Office of the Provincial Mining Recorder, of the Ministry of Northern Development and Mines (MNDM) was notified concerning the application to "ensure the priority to the surface rights for this application under the **Public Lands Act**, subject to any existing rights (e.g. unpatented mining claims in good standing)."

Section 51 provides a straight-forward process for those cases in which the unpatented claim holder provides consent. However, in this case, Canada Chrome has refused to provide the necessary consent to relinquish surface rights to enable the granting of an easement by the MNR to Cliffs. Where a mining claim holder refuses to consent, section 51 provides for a referral of the application by the Minister of Northern Development and Mines to the Mining and Lands Commissioner. Cliffs counsel was notified of this on February 23, 2012.

In this manner, Cliffs and Canada Chrome became parties to the section 51 hearing before the Mining and Lands Commissioner and its usual procedures were followed to have each

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file their materials. During this filing period, the Neskantaga First Nation (the "Neskantaga" or "First Nation") asked to be made a party. Both Cliffs and the MNR objected to this request and both of these parties made submissions in addition to Neskantaga.

The parameters for what constitutes an "interested person" were not addressed by the objecting parties in any great depth as they maintained that the reasons for objecting to the inclusion of the Neskantaga as a party would be the same as for an "interested person". The tribunal will address this point below.

The Arguments

The Neskantaga Submission

Neskantaga sought to be made a party, or in the alternative, to be recognized as an interested party under subsection 51(5) of the **Mining Act**. (The correct wording under that section is "interested person"). Mr. Matthew Kirchner, Counsel for the First Nation, began by describing the matter before the MLC as being a part of a broader matter (or bigger picture). The Cliffs Chromite Project involves a "massive chromite mine" and would bring "the first all season road into this remote, pristine and fragile environment".

The Cliffs application for an easement would allow it to build a road to service its chromite mining project. The First Nation took the position that this tribunal's decision under s. 51 of the **Mining Act** was a statutory decision that would advance the regulatory process for the proposed road and consequently directly affect the First Nation's rights. A decision granting Cliffs' request would lead to the next step and a determination as to whether an easement should be given under the **Public Lands Act**. "…If the Commissioner does consider the Application, she would be compelled to assume that the Cliffs Chromite Project will be authorized and constructed." It would be a mistake to hive off the matter before this tribunal and treat it separately. In the words of its counsel, "[t]hey are entitled as a matter of law to be consulted about this decision to – in respect of the overall proposal to build this road through their territory and to establish this mine in the Ring of Fire."

The Neskantaga territory lies in the path of the proposed road and mine. (One has to assume that it also lies in the path of the proposed Canada Chrome railroad. Canada Chrome holds the unpatented mining claims that are the focus of the disposition application and under the **Mining Act** has first right to the use of the surface covering those mining claims. Under the **Mining Act**, Canada Chrome is free to work its claims and to develop the resource that lies beneath the surface in the way described by s. 2 of the **Act**.). The Neskantaga is a party to Treaty 9. Treaty 9 (also known as "The James Bay Treaty") has protected the Neskantaga hunting and fishing rights; they have Aboriginal rights and title apart from Treaty 9 (through section 35 of the **Constitution Act**) and, according to Mr. Kirchner, the Crown has a constitutional obligation to consult in respect of the road and mine.

The Neskantaga Reserve is located on the Attawapiskat Lake and is accessible only by airplane and ice road. The Neskantaga use both the Attawapiskat Lake and River. The Attawapiskat River watershed in its entirety forms the "heart of Neskantaga traditional territory and the sacred and spiritual landscape of the Neskantaga". The lands are used for hunting, fishing, and gathering foodstuffs such as berries. The Neskantaga ancestors are buried there. Sacred and secret

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ceremonies take place on those lands. Amongst other things, Treaty 9 awards them the right to hunt, trap and fish in their territory. This right is qualified by the clause that says "…saving and excepting [for] such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." It is with this clause that the duty to consult is engaged, as the Supreme Court of Canada has said in **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)** [2005] 3 S.C.R. 388), that when the Crown is exercising its right to take up land, it must act honourably and determine what impact the taking up is going to have on First Nation's rights.

Counsel stressed the point that the proposed road and mine have the potential to affect the Neskantaga "lifestyle" and the First Nation is entitled to be consulted. Counsel then took the tribunal through the case law that has grown around the consultation process and requirement. Before delving into the cases, counsel summed up the duty. "Where the Crown takes or proposes to take a course of action that may affect the treaty rights, aboriginal rights or aboriginal title asserted by a First Nation, the Crown has a constitutional duty to consult with that First Nation about the proposed action and, where appropriate, accommodate the First Nation's interests and concerns. This duty of consultation is founded in the historic relationship between the Crown and First Nations and arises from the honour of the Crown."

Counsel's point throughout his argument was that a decision made by this tribunal in favour of Cliffs would "move the ball down the field" and "[give] the project momentum". "…this decision …moves the project further down. [The MLC is] not going to approve the road, but [the MLC is] going to move the project down the road if [the MLC decides] in favour of Cliffs…."

Counsel's reference to case law was made in support of his argument that the consultation requirement was triggered by the making of a statutory decision, Crown conduct and even the potential for adverse effect on the future exercise of a First Nation right. There need not be an immediate impact on that right.

Counsel took the tribunal to the decision in **Rio Tinto Alcan v. Carrier Sekani Tribal Council**, [2010] SCC 43 to make his points. **Rio Tinto** provided a description of what constituted Crown conduct, namely "high-level management decisions or structural changes to the resource's management". In the case of **Rio Tinto** the court was looking at the hydro power resource (the Nechako River in British Columbia) which was located on lands claimed by the First Nations as their ancestral homeland. In both instances, there can be an effect felt at some point in the future. The example given was of the Crown contracting with a private party to transfer power over a resource. The court observed that the Crown would no longer be involved in ensuring that the resource was "developed in a way that respects Aboriginal interests in accordance with the honour of the Crown."

With respect to the argument that the issue before this tribunal is one that involves two private companies and the disposition of surface rights, counsel turned to the Haida case (**Haida Nation v. B.C.**, [2004] SCC 73) which dealt with the transfer of a tree farm licence, permitting the cutting of old growth forest. This case is an example of strategic planning triggering the consultation process.

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The Mikisew (**Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),** [2005] 3 S.C.R. 388, 2005 SCC 69) case involved the Crown's approving a winter road that ran through a First Nation reserve without consulting the affected First Nation. A modified route affected the traplines of approximately 14 First Nation families and the court had to determine if the infringement of the right was justified and in turn, affected the obligation to consult.

How early in the process should consultation be undertaken? Counsel turned to the Musqueam Indian Band case (**Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management**) (2005), 37 B.C.L.R. (4th) 309, [2005] BCCA 128) to support his argument that it must be engaged early in the process. The Musqueam case dealt with the Crown's obligation to deal fairly even prior to the determination of any Aboriginal right. The treaty right is accommodated through consultation. The Crown alone is responsible for seeing that consultation is carried out. The Squamish decision (**Squamish Nation v. Minister of Sustainable Resource Management** [2004], 34 B.C.L.R. (4th) (B.C.S.C.) 280, [2004] BCSC 1320) dealt with four government decisions made by the Crown pursuant to an interim agreement dealing with a ski hill (Garibaldi). The agreement was made pursuant to a government policy. The Squamish decision was another case in support of early consultation. Early consultation is a necessity if the honour of the Crown is to be upheld, and that consultation cannot be delayed to some later point in the process. Again, this case was presented in support of the position that this tribunal's decision was but part of a process and stands for the proposition that before matters could go any further, the Mining and Lands Commissioner had to await the outcome of the consultation process. Counsel indicated that the granting of party status to his client would be followed by a motion whereby the Neskantaga would ask for adjournment of the section 51 hearing pending completion of the consultation process.

Counsel noted (referring to the decision in Wahgoshig (**Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario**, [2011] ONSC 7708), that there is a growing and significant body of case law dealing with the conflicts that have arisen between those wishing to develop resources and the First Nations. Counsel argued that all of the cases put forward supported his client's position that consultation had to be initiated at the most early of stages of an approval process. As counsel pointed out, the consultation process had not begun in this matter – the MNR had admitted that consultation was awaiting the determination of the issue by the MLC in the section 51 hearing.

In terms of the test for party status, counsel pointed out that there was nothing in the **Mining Act,** the **Statutory Powers Procedure Act**, or the tribunal's Guidelines that could provide a test for the adding of parties. The Mining and Lands Commissioner had discretion and could refer to the Rules of Civil Procedure for guidance, but was not bound by that test. The Neskantaga were an "interested person" as per subsection 51(4) of the **Mining Act**. The Neskantaga argued that they could meet any test imposed, whether it was under the Rules, or whether the tribunal took into account a list of factors supplied by counsel. These included, the nature of the case, the issues, likelihood of the applicant being able to make a useful contribution and whether any injustice would affect the immediate parties.

Cliffs Submission

Mr. Chris Sanderson, counsel for Cliffs, began by acknowledging that a duty to consult would arise "in the context of Cliffs' chromite project and the Crown assessment of that project and ultimate approvals for it". The company was "committed" to making sure that the Crown's obligations were met. None of that was an issue for this tribunal. The issue for the MLC is "the relevance of that admitted duty on the decision [to be made]" by this tribunal. Mr. Sanderson described the decision to be made by the MLC as being to "establish priority with respect to the acquisition of potential surface rights from the Crown between two private interests".

Counsel took the tribunal to s. 21 of the **Public Lands Act**, saying that Cliffs had brought an application to the MNR for an easement under that **Act**. The application was referred to the Mining and Lands Commissioner for "determination of a specific issue" - Cliffs wants a share of the surface rights covering the mining claims held by another (Canada Chrome). "Should the Minister contemplate granting an easement?" Mr. Sanderson asked whether Cliffs' proposal is compatible with what Canada Chrome has as a mining purpose and further, how can interests be properly balanced?

Counsel took the tribunal to the decision in **Roffey v. Toronto and Region Conservation Authority** MLC File No. CA 003-05 (2007) wherein the Mining and Lands Commissioner stated that the determination of the question of standing is "tied directly to relevancy and jurisdiction".

Mr. Sanderson wanted the tribunal to adjust its focus to be very specific and narrower than that presented by the Neskantaga. He pointed out that his client faced a number of approval hurdles with its project. Some processes (such as the Federal environmental process) were already underway. The order his client sought under the **Mining Act** was "simply an order … establishing priorities with respect to the surface and the mining claims." In response to the tribunal's question as to what meaning should be given to the word "disposition", Mr. Sanderson said it was "a general word", meaning the transfer of an interest. Mr. Sanderson urged the tribunal to stay focused on the decision it would have to make, that the decision was not one that could be said to have an adverse effect (or even the potential for one) on Aboriginal interests. Larger issues (i.e., the mine project) should not be drawn into the very limited matter before this tribunal. The question of whether the tribunal's decision could directly affect the First Nation's interests had to be answered in the negative. There was no momentum building as a result of any potential decision by this tribunal.

Mr. Sanderson referred to the **Rio Tinto** case and the three-prong test in terms of the Neskantaga argument that the tribunal's decision was part of a larger project or picture. (The Neskantaga had argued that because the MLC decision related to a big project, it was required to determine the adequacy of consultation before making its own decision). The Mining and Lands Commissioner was not making a decision to move anything forward. The Commissioner was "simply being asked to determine priorities between … competing interests." He said that the matter before the tribunal here was similar to that in the **Roffey** case. There, the tribunal had to consider a situation where a private interest wanted to insert itself into a public interest situation. This case was the "mirror" of that and the tribunal, in this instance, was being asked to determine a private dispute.

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The Cliff submissions frequently referred to what was called "priority determination" when describing the function of this tribunal in a section 51 hearing. "The sole function ... is to resolve the relative priorities to surface rights as between the holder of an unpatented mining claim ... and any other user...." The Crown's duty to consult was not engaged by this "priority determination".

Counsel said there was no causal connection between the order being sought by his client and any adverse impact on the First Nation's interests. Furthermore, once the MLC process was completed, the First Nation matters would be addressed. The granting of tenure was separate from the granting of a right to proceed with the project. Even with the granting of an easement, none of the things that the First Nations was worried about (paving etc.) would result. This is different from the **Haida** case for example where granting a tree cutting licence could lead to the actual cutting of trees. He said that those involved in the chromite mine project were working to achieve a "holistic" approach to all things environmental and aboriginal in order to avoid a piecemeal approach. The **Environmental Assessment Act** allows for the granting of an easement before the process is engaged; however, the MNR was (and Cliffs was agreeing) putting the environmental assessment process ahead of the granting of any easement. Mr. Sanderson pointed out that the environmental assessment process involves the provincial and federal governments and in fact, the First Nations are in Federal Court of Canada arguing that the Federal assessment process is unsatisfactory. The Neskantaga are involved in this court case.

The Neskantaga want a "full regional process" that takes into account First Nation's needs regarding infrastructure environmental, social and cultural impacts. He asked "…can this hearing ever be that?" He answered "no" and said that the **Rio Tinto** decision makes its clear that the Crown "can design the process to discharge its obligation to First Nation people as it wishes, provided that it meets the obligation."

Even if the MLC did not have the jurisdiction to consider the adequacy of consultation (Neskantaga argument – Sanderson agreed), the argument that the MLC should therefore do nothing (exercise its authority) pending the completion of the consultation process is not supported by any case law.

Mr. Sanderson took the tribunal to the **Squamish** case and explained how the law had developed since that decision. Going to paragraph 73 of the decision, he questioned the Neskantaga argument that a decision as to whether Cliffs should share in the use of surface rights would move things forward. Paragraph 73 of the decision deals with the potential for impact of third party interest on claimed aboriginal lands and Mr. Sanderson asked "potential impact from what?"

Mr. Sanderson took the tribunal through the test in that decision and explained how the decision to be reached by this tribunal did not match the items listed

The MNR Submission

The MNR position was similar to that taken by Cliffs. The matter before this tribunal would not result in an easement as that was the Minister of Natural Resources' decision under the **Public Lands Act**. The Minister would take the public interest into account, amongst

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other things and decide whether to grant an easement to Cliffs. That was not a decision for this tribunal. Mr. Michael Burke made submissions for the MNR. He took the tribunal to MNR Policy PL 4.02.01 entitled "Application Review and Land Disposition Process" which was issued on July 24, 2008 and described the MNR's policies regarding environmental issues and the Ministry's legal obligations with respect to Aboriginal rights. He also pointed out how the decision to be made by this tribunal in the section 51 hearing would serve to scope the coming consultation process by either reducing the number of parties involved (e.g., were a decision to be made favouring Canada Chrome), or confirming that one more party had to be included (were a decision to be made favouring Cliffs). As he put it, consultation could not take place "in a vacuum". The parties should be known.

Application of the Law and Findings

The Neskantaga First Nation is asking to be made a party to the section 51 hearing or in the alternative, to be recognized as an "interested person". While the request brings forward a number of issues dealing with the law and First Nations, it is first necessary to understand exactly what the issue is and the function of the Mining and Lands Commissioner in a section 51 hearing. What must take place initially is a discussion of the essential elements of the matter that has been referred to the tribunal by the Minister of Northern Development and Mines. Simply put, to understand the issues surrounding the granting of party status is to understand who should be a party to the hearing.

To begin, a section 51 hearing is an exercise in the application of the "multiple use principle". The concept of "multiple use of Crown lands" can be traced back, at least on paper, to a report made by a committee called the Public Lands Investigation Committee, 1959. The Chair was the Mining Commissioner of the time, J. Forbes McFarland. The Committee's duty was "to enquire into, investigate and make recommendation in respect of the disposal of public lands under the **Mining Act** and the **Public Lands Act**…" (OC-685/59) Intending to address the fact that the mining industry seemed to be lagging behind other sectors of the economy, the Committee noted, "… mining operations seldom use all of the surface of the mining lands owned and leased. If all phases of the economy are to be developed, and inasmuch as the only sound economy is a diversified one, then provision should be made for multiple land use."(Report, page vi)

The 1984 decision of then Mining and Lands Commissioner, Grant Ferguson, in the case of **Kamiskotia Ski Resorts Limited v. Lost Treasure Resources Ltd.** (6 M.C.C. 460) refers to this committee's work. Commissioner Ferguson was asked to decide whether a public company that operated ski facilities should be able to seek a licence of occupation under the **Public Lands Act** without the consent of the holder of certain mining claims. The holder of the claims refused to provide its consent and had instead offered to sell them to the ski resort. The holder failed to appear at the hearing and the Commissioner ruled in favour of the ski resort ordering that the application by the ski resort for the aforementioned licence be dealt with without the consent of the holder of the mining claims. The Commissioner made note of the fact that the section in the **Mining Act** dealing with consent to the use of surface rights had its origins in the recommendations of the Committee. "They set out a method of resolving, if feasible, conflicting uses or the prevention in a proper case of the subsequent acquisition of surface rights through a hearing before the Commissioner."

The current section 51 of the **Mining Act** has this lineage.

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The right of free entry is one of the so-called "pillars" of the **Mining Act**. This is the right to enter and use any lands for mineral purposes, (within the parameters of the **Act** of course). The free entry system means that a prospector does not have to actually own the surface in order to stake or work a mining claim. If the surface rights are privately owned, then staking and working the mining claim may be confined to some degree by the **Act**. On the other hand insofar as Crown lands are concerned, a mining claim holder has a prior right to any subsequent right to the user of the surface rights. Section 51 of the **Act** says:

> *"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, except the right to sand, peat and gravel, for prospecting and the efficient exploration, development and operation of the mines, minerals and mining right."*.

This prior right is the starting point for the application of the law.

The question of the use of surface rights on Crown lands brings the Ministry of Natural Resources and the **Public Lands Act** into the picture. While the **Mining Act** sets the scene for mineral exploration and development, the **Public Lands Act** sets out how the Crown (in the person of the Minister of Natural Resources) takes charge of the management, sale and disposition of public lands and forests. It is evident through a general reading of the **Mining Act**, that the Ministry of Natural Resources and the Ministry of Northern Development and Mines are expected to work in tandem in some instances. Section 51 is but one example; section 30 of the **Mining Act** is another.

The Ministry of Natural Resources controls the disposition of public lands through the **Public Lands Act**. However, where a pre-existing unpatented mining claim is involved, the holder of that mining claim must give his or her consent to the disposition. This is in keeping with the prior right (described by section 51) to develop their holdings.

Where consent is given, the consent is noted on the claim record by the Provincial Mining Recorder. A survey of the surface rights may be required by the MNDM. Presumably this would form part of the mining claim record as well although that is not stipulated in the **Act**. It is the refusal of consent that sets in motion a hearing before this tribunal. Refusal triggers a referral by the MNDM of an application for the disposition of surface rights to the Mining and Lands Commissioner. This is where the question arises, "what is the issue in a section 51 hearing and the MLC's role in determining that issue - and who should be involved?"

If the **Mining Act** were to be read literally, then the wording in subsection 51(4) could mean that the Mining and Lands Commissioner is being referred something more than a dispute regarding a mining claim holder's prior right to surface rights. The Commissioner has the power to grant easements under section 175 of the **Act**. Why should the Commissioner not be expected to have such a power in section 51? If this were the case, then the First Nation argument for party status to the section 51 hearing might carry more weight, as indeed, any decision favouring an applicant would undoubtedly move the process along. However, the section simply does not work that way and for a very simple reason. Section 2 of the **Public Lands Act** clearly states that

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the Minister of Natural Resources has control over the disposition of public lands and no such power has been assigned to the Mining and Lands Commissioner. S**ection 51 can only be dealing with a mining claim holder's priority of right and the effect of that mining claim holder's "consent or refusal to consent" to waive some measure of his or her priority vis-à-vis the surface rights of the mining claim**. This is the logical approach to section 51. A decision as to whether an applicant's request for disposition without that consent should be accepted by the Minister of Natural Resources is within the jurisdiction of this tribunal – indeed, section 105 of the **Mining Act** empowers the Mining and Lands Commissioner to make just such a decision. As an inferior court established under the **Mining Act**, the Commissioner is the judge of disputes, claims and questions concerning rights, privileges and interests conferred by or under the authority of the **Act**. Certain exceptions apply and matters relating to consultation with Aboriginal communities, etc. are listed. Simply put, the Crown did not propel this matter here, the mining claim holder's refusal did.

Returning back to the question of the role of the MLC in a section 51 hearing when consent is refused, one must consider the practicalities of the referral process. Unfortunately, one might have to read a lot between the lines in order to understand what administrative processes are in place to engage the work of two ministries. Fortunately, ministry policies (for both ministries) as well as documentation provided by Cliffs and the Ministry of Natural Resources paint an adequate picture of the processes involved. As stated earlier, the actual granting of an easement over Crown lands can only be done by the Minister of Natural Resources. There was no indication that the Minister of Natural Resources in any way shared that power with any other minister of the Crown. What exactly then is being referred to this tribunal? The word "application" on its own is confusing. Subsection 51(4) refers to an "application for disposition under the **Public Lands Act**" and the referring of that "application" to the Commissioner. Generally speaking, the wording for section 51 is clumsy. As mentioned earlier, it could and should make reference to the fact that it is dealing with surface rights on Crown lands. Under subsection 51(4), it could and should indicate that the MNDM is asking the Commissioner for a ruling as to whether an application for the disposition of public lands can proceed in the face of a lack of consent or a refusal to consent by a mining claim holder. This is all that section 51 is about – a mining claim holder has either refused consent or failed to provide it (as in the **Kamiskotia** case) and the Commissioner is being asked to assess that refusal or failure in light of an application for disposition. A hearing is needed to give the mining claim holder the opportunity to explain the reasons for his or her position in the face of the principle of multiple use of public lands. (The tribunal notes that under rigorous questioning by the tribunal on the point of what was being referred, the MNR's counsel, Mr. Burke stood fast and advised that "an application…gets referred for a determination of the issue…whether the refusal to provide consent is reasonable…." He added, "…the Commissioner says what the issue is…, …whether there are multiple uses, and whether the uses can co-exist.") The role of the Mining and Lands Commissioner in a section 51 hearing is to "weigh the interests of the parties in accordance with the principle of multiple use of public lands."[1] This is really "it" in a nutshell.

As Mr. Sanderson pointed out, the Mining and Lands Commissioner would not even be involved were his client and Canada Chrome able to agree as to the use of the surface rights. Indeed, his client has reached agreement with a number of mining claim holders already. In those cases, unless the MNDM required a survey (ss. 51(3)), the only evidence of a connection to the

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[1] Canadian Law of Mining, Barton, B.J., Canadian Institute of Resource Law, 1993, page 199

Mining Act would be a recorder's entry on the record of the claim (ss. 51(2)). In a hypothetical situation where consent to the use of the surface has been provided, then the only parties involved (assuming there are two for this hypothetical) would be the party who held the mining claim and the party seeking that claim holder's consent. Taking this hypothetical one step further, there would be no opportunity for any other person to become involved in the matter *at that stage*. This is another example of how singular the scope of section 51 is.

The Neskantaga say that they should be added as a party because the decision to be made by this tribunal is a part of a larger approval process that, since it involves the Crown, triggers consultation with the First Nations. This tribunal's decision could "move the ball forward" as far as the overall project was concerned. Mr. Kirchner's submission on this point was informative and articulate. He readily admitted that he and his client had come to understand that the matter before this tribunal was not the actual granting of an easement. But he said that in no way took away from his argument that the proceeding and the application were a part of a broader application. He repeatedly made reference to this point. The consultation process was triggered by the fact that the Crown was involved in the project. Mr. Kirchner made repeated references to the proposed chromite mine, to the proposed road and the effect that granting an easement would have on his client's rights. This tribunal's work was but one approval step in the whole process. This is where the tribunal believes that the Neskantaga argument fails and not only for the fact that this tribunal's decision only affects a mining claim holder's right under the **Mining Act**.

The cases presented to the tribunal by Mr. Kirchner all involve some action of the Crown. This is the key. The tribunal is not "the Crown" here, nor is it making a Crown decision. It is an independent inferior court of review and as such it is determining whether a mining claim holder's refusal to consent should stand in the way of an application for disposition. The Mining and Lands Commissioner is acting alone and independently of the Crown. It could not be otherwise.

Mr. Kirchner's logic properly applies to the Minister of Natural Resources' decision to grant an easement and there has been information provided to this tribunal to satisfy it that a consultation process is a necessary component to that decision. This tribunal finds no support for the granting of party status as a result of the Neskantaga "big picture" argument The tribunal's decision as to whether the mining claim holder's right described by section 51 of the **Mining Act** should be affected is actually a necessary precursor to the consultation process. In his affidavit, Chief Moonias described the need for "a full regional process that properly considers the infrastructure needs of northern First Nations…." A decision by this tribunal is needed now in order to make that process fully "regional" and to determine early on who is involved and in what capacity. As the MNR's Mr. Burke put it, the Ministry cannot operate in a vacuum. While the tribunal sympathizes with Neskantaga's argument that processes involving decisions concerning its traditional territory are proceeding without recognition or invocation of its constitutional right to consultation, the tribunal cannot behave like the proverbial tail wagging the dog in sympathy. It is merely making a very discreet determination as to a mining claim holder's rights under the **Mining Act** and is not jurisdictionally empowered to consider wider issues encompassing the broader mining community and the proposed mining projects when making that determination.

Should the Neskantaga be granted the role of "interested person" as an alternative? The tribunal is of the view that the phrase "interested person" as found in subsection 51(4) does not

have a wide meaning. It does not lend itself to opening up a section 51 hearing to the general public. This finding arises out of the earlier finding regarding the singular scope of section 51 and is supported by the narrowness resulting from a statutory interpretation of the actual provision. If all that the section is dealing with is a mining claim holder's refusal/failure to consent, then the parties involved will be the mining claim holder and whoever sought that consent. Occasionally, there will be the need to notify those who can properly be called "interested persons" – for example, in the case of **The Improvement District of Gauthier v. Egg** (7 M.C.C. 282), notice of the hearing was given to a credit union that had filed a certificate of interest against the mining claim and another individual who had filed a lien under the **Construction Lien Act, 1983**. Neither of those individuals appeared at the hearing. These people obviously had a specific interest in the mining claim and could have presented information regarding their interests should they have felt it necessary.

The logical interpretation of the phrase "interested person" should reflect the fact that a section 51 hearing is dealing only with a mining claim holder (or holders) and a person (or persons) who seeks to acquire some right to the surface rights. These are the recipients of a notice of hearing under the section. It may be that information comes forward to indicate a need for other interested persons to be heard (such as the credit union or lien holder in the cases cited earlier). The Neskantaga can make no such assertion regarding the mining claims that are the subject of this hearing. Opening up the hearing to the general public is not contemplated given the narrowness of the issue. The statutory provision specifically provides that it is the tribunal who must determine ahead of time who is an interested person and provide notice of the proceedings to that person (or persons). This is not akin to an environmental assessment process or even a public consultation process found in Part VII of the **Mining Act**. The drafting is clear that it is a very limited and circumspect provision and is not intended to cast a wide net.

Nor can the Neskantaga provide any better information with respect to the plans that the mining claim holder or applicant have for the surface rights. This will come from those two parties themselves. The tribunal will assess and weigh the plans of the mining claim holder and those of the applicant and make a determination as to whether the applicant can proceed to seek a disposition under the **Public Lands Act** without the consent of the claim holder. The tribunal cannot foresee any need for the Neskantaga to play a role in that process.

The tribunal's role will be to take into account the interests and intentions of the mining claim holder in terms of the **Mining Act**, as well as the interests and intentions of the applicant seeking access and decide if the applicant's request for disposition should be processed in the face of a refusal by the mining claims holder to consent. The result will be just what the Neskantaga are seeking – a holistic approach to the assessment of the project vis-à-vis their rights. All the parties will be assembled (whether Cliffs is successful or not) and once the MLC's final decision is made, the Minister of Natural Resources will be in a position to proceed with its consultative work, also from a holistic and comprehensive perspective.

Mr. Kirchner indicated that should party status be granted, he will be arguing that the tribunal hearing be stopped pending completion of the consultation process. This highlights another flaw in his argument. Were the process to be stopped before knowing who should be at the proverbial table, how would that lend itself to a holistic approach? It makes no sense to interpret the decisions he presented to come up with this result. How could the consultation process be carried out without knowing the surface rights status of all interested parties?

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In conclusion, the tribunal finds that it is charged with determining whether an application for disposition under the **Public Lands Act** should be accepted by the Minister of Natural Resources in the face of a refusal of consent from a mining claims holder. This is the "multiple use principle" at work. For the reasons given above, the tribunal cannot agree that the Neskantaga should be granted party status or that the Neskantaga qualify as an "interested person" for the purposes of this section 51 hearing. Due to the important nature of the issues raised by the Neskantaga's application, no costs will be payable by any party.

The tribunal will also Order that no costs shall be awarded to any party as a result of this motion.